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The Application of the European Convention on Human Rights and Judicial Dialogue**

The article is dedicated to the issues of judicial dialogue between the European Court of Human Rights and domestic courts and of its peculiarities.

Key words: *Judicial dialogue between ECHR and domestic courts. The fourth instance doctrine, the absence of Doctrine of precedent, the Convention as a "Living Instrument", the comparative interpretation. Autonomous concepts.*

1. Introduction

Formal recognition of the European Convention on Human Rights (hereinafter referred to as the Convention) as part of the domestic law of the States parties to the Convention does not present particular difficulties. Although the ways of incorporating the Convention into the national legal system are different, all the States determine its status and place within their legal system.[1] Some States, such as Austria, confer to the Convention the status of Constitutional law. This means that in order to protect the rights and freedoms provided for in the Convention, individuals can apply to the Austrian Constitutional Court. In Germany, Italy, Denmark, Norway, Sweden and Finland, the Convention takes the rank of ordinary law.

In other countries, the Convention is recognized after the Constitution as a law that has prior legal force in the hierarchy of ordinary laws, as in France, Greece, Spain, Portugal and Eastern European states.[2]

Nevertheless, the effectiveness of the application of the Convention with regard to individuals largely depends on the judiciary and functioning of domestic courts. Along with the fact that by adopting laws (for example, abolishing the death penalty on the basis of Protocol No. 6) or by implementing various reforms (improving the conditions of detention in penitentiary institutions), the State implements standards and requirements of the Convention, it is extremely important that domestic judges understand and apply the Convention when dealing with concrete cases. The process of applying the Convention involves both judges of the European Court of Human Rights in Strasbourg (hereinafter the Strasbourg Court or the Court) and judges of various judicial instances in the States parties. At the same time, the manner in which these judges apply the Convention varies greatly.

The concept of the Convention is not reduced to the text of this international legal document and its Protocols. It implies first of all the rich case-law of the Strasbourg Court (hereinafter – the case-law), in which the Court interprets specific rights and freedoms enshrined in the Convention. By adopting spe-

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** Note: The foregoing article is dedicated to the 60th Anniversary of Prof. *Nona Todua*.

1 *Grabenwarter Ch., Pabel K.,* Europäische Menschenrechtskonvention, 6. Aufl., München, 2016, § 3 Rn. 2.

2 Ibid, Rn. 2-5.

cific court decisions, the Court establishes standards significance of which go beyond the particular case.[3] Therefore, the application of the Convention by domestic courts, the determination of the scope of specific rights and correct understanding of the main provisions of the Convention are impossible without the case-law and standards established by it.[4]

Although judges of both the Strasbourg Court and domestic courts are charged to apply the Convention, the principles and methods of their work, as well as their jurisdiction, are characterised by certain specificities.

For the judges of the Strasbourg Court, the Convention is the main source of law, since the Court decides whether applications lodged before it meet the requirements of the Convention and its case-law. For judges of domestic courts, the Convention serves an additional source of law when examining criminal, civil, administrative and other types of cases. The Strasbourg Court further relies on the legislation and case-law of the States parties.

The main purpose of the Strasbourg Court is to establish a breach of or compliance with the standards of the Convention by the State party. A judge of a domestic court checks the compliance of the actions by state bodies with the requirements of the Convention. The different legal status of the Convention within the domestic legal system predetermines the differences and peculiarities of the jurisdiction of domestic courts.

Although domestic courts are obliged to apply the Convention and it case-law, in some instances the application of the case-law without amending the national law is rather difficult. This happens when legislation imperatively establishes restrictions that are contrary to the Convention, for example, if the law establishes an unreasonably short limitation periods, which the Strasbourg Court found to be in violation of Article 6 of the Convention.

In the process of practical application of the Convention by domestic courts, an important issue of access to the case-law often arises. Judges in the States parties use the state's official language at work, and they are not required to be fluent in the official languages of the Strasbourg proceedings. To solve the problem of providing courts with relevant case-law in understandable languages remains one of the central issues of the implementation of the Convention.

The effectiveness of the Convention in the States parties depends not only on the execution of specific Court judgments in relation to a particular state. It largely depends on the recognition and acceptance of the case-law by the domestic courts. To a certain extent, there is a dialogue between the judges of the Strasbourg Court and the domestic courts of the States parties. This is primarily reflected in the fact that judges in Strasbourg carefully consider opinions and arguments of domestic courts. In assessing the actual circumstances of the case, the Strasbourg Court relies on the facts established by domestic courts.

In practice, there are also cases when judges of domestic courts do not agree with the interpretation adopted in Strasbourg.[5]

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3 *Ireland v. The United Kingdom* [1978] ECHR (Ser. A.), № 25, 154.

4 Recommendation of the Committee of Ministers of the Council of Europe of December 18, 2002 Rec., 2002, 13, <www.coe.int> [17.12.2019].

5 *Harris D., O'Boyle M., Warbrick C.,* Law of the European Convention on Human Rights, 3rd ed., GB, 2016, 36.

The work of the judges of the Strasbourg Court is based on certain principles, some of which deserve particular attention, such as **the fourth instance doctrine, the absence of Doctrine of precedent, the Convention as a "Living Instrument", the comparative interpretation or autonomous concepts.** The specificities of these principles make obvious the difference between the working methods of the judges of the Strasbourg Court and those of judges in the domestic court.

2. The Fourth Instance Doctrine

Despite the fact that the Strasbourg court can only take a case into consideration after all domestic remedies have been exhausted, it does not constitute an additional court of appeal, a fourth instance in relation to domestic courts applying the laws of the participating States. Its functions do not include the elimination of errors of fact or law allegedly committed by a domestic court, unless they constitute a violation of the rights and freedoms protected by the Convention:[6]

> The Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.

As a rule, the Strasbourg court agrees with the interpretation of the law by the domestic courts, but it may not agree with the interpretation of the law by the courts when this interpretation is "arbitrary or manifestly unfounded:"

> It reiterates that, according to its long-standing and established case-law, it is not for this Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, for instance, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999‑I, and *Perez v. France* [GC], no. 47287/99, § 82, ECHR 2004‑I), for instance where it can, exceptionally, be said that they are constitutive of "unfairness" incompatible with Article 6 of the Convention. While this provision guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to given items of evidence or to findings or assessments in issue before them for consideration are not for the Court to review. The Court should not act as a court of fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be re-

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6 *Garcia Ruiz v. Spain*, [1999-I], 31 EHRR 589, §28.

garded as arbitrary or manifestly unreasonable (see, for instance, *Dulaurans v. France*, no. 34553/97, §§ 33-34 and 38, 21 March 2000; *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007; and *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013).[7]

In *Khamidov v. Russia*[8] the Court gave to the domestic court's decision the following assessment:

"In the Court's view, the unreasonableness of this conclusion is so striking and palpable on the face of it that the decisions of the domestic courts in the 2002 proceedings can be regarded as grossly arbitrary, and by reaching that conclusion in the circumstances of the case the domestic courts in fact set an extreme and unattainable standard of proof for the applicant so that his claim could not, in any event, have had even the slightest prospect of success".

3. The Absence of Doctrine of Precedent

Another feature of the work of the Strasbourg court is the absence of Doctrine of precedent. The Strasbourg court "is not bound by its previous decisions", but "it is usually guided by its own precedents and applies them, and this course is carried out in the interests of legal certainty and orderly development of the case law of the Convention:"

"The Court is not bound by its previous judgments... However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions."[9]

The Grand Chamber of the Strasbourg Court in one case stated that "in the interests of legal certainty, predictability and equality before the law, it should not depart without good reason from the precedents formulated in previous cases:"

"While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases."[10]

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7 *Bochan v. Ukraine* [05.02.2015], ECHR, No. 2, no. 22251/08, § 61.
8 *Khamidov v. Russia* [15.11.2007], ECHR, no. 72118/01, § 174.
9 *Cossey v. UK* [1990] A 184, 13 EHRR 622, § 35, PC.
10 *Goodwin Christine v. UK* [2002-VI], 35 EHRR 447, § 74, GC.

4. The Convention as a "Living Instrument"

One of the features of the work of the Court is the interpretation of the Convention "in the light of modern realities". The decisive factors for the Court are the standards currently adopted in Europe, and not the standards that existed when the Convention was adopted. It prefers a more dynamic approach to the assessment of facts than a historical one.[11]

A clear example of the "vitality" of the Convention is the establishment by the Strasbourg Court throughout the text of the Convention, especially with respect to Art. 3 and 8, positive obligations of the state.[12] On the other hand, the Court takes into account the changes taking place in the legal systems of the participating States and tries to provide for these changes in its decisions.

In *Goodwin Christine v. UK*, despite the sex reassignment surgery, the applicant, from the point of view of the law, remained a man, which accordingly affected her life in those areas where the issue of her gender was of legal importance, primarily on the right of a man and woman to join marriage. Although the first sentence of Article 12 of the Convention specifically indicated the right of a man and woman to marry, the Court was not convinced by the respondent Government that it could still be assumed that these terms were associated with sex only by biological criteria. Since the adoption of the Convention, significant social changes have occurred in the institution of marriage. Significant changes have also taken place in the development of medicine and science in the field of transsexuality. The Court concludes that, in accordance with Article 8 of the Convention, the criterion of the relevant biological factors cannot further be decisive in the event of a denial of legal recognition of a sex change.

5. The Comparative Interpretation

In interpreting the Convention and introducing new standards, the Strasbourg court often applies a comparative legal analysis of the laws and jurisprudence of participating States.[13] As a rule, this comparative legal material becomes part of a judgment.[14]

6. Autonomous Concepts

Although the Strasbourg Court applies the law and jurisprudence of the participating States, the opinions of the domestic courts and the Strasbourg court may differ on certain concepts. In other words, the Court independently determines the content of these concepts, regardless of how much this content corresponds to that adopted in domestic law. Such concepts include "civil rights" or "criminal charges", according to Art. 6 of the Convention, or the concept of "associations" according to Art. 11 of the Con-

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11 *Leach Ph.,* Taking a Case to the European Court of Human Rights, 4th ed., Oxford, 2017, 190.

12 *Harris D., Boyle M. O., Warbrick C.*, Law of the European Convention on Human Rights, 3rd ed., GB, 2016, 11.

13 *Jacobs F. G., White R., Ovey C.*, The European Convention on Human Rights, 6th ed., Oxford, 2014, 78.

14 Advisory Opinion P16-2018-001, ECHR 132 (2019), delivered on April 10, 2019, §§ 22-24.

vention, as well as the concept of "ownership" in accordance with Art. 1 of Protocol No. 1. These concepts are called autonomous concepts.[15]

In the case of *Micallef v. Malta*[16], the Grand Chamber, referring to the judicial law of the Court, reiterated that the Court independently determines the content of these concepts regardless of the content in domestic law:

> "According to the Court's case-law, the concept of "civil rights and obligations" cannot be interpreted solely by reference to the domestic law of the respondent State. The Court has on several occasions affirmed the principle that this concept is "autonomous", within the meaning of Article 6 § 1 of the Convention (see, among other authorities, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, pp. 29-30, §§ 88-89, and *Baraona v. Portugal*, judgment of 8 July 1987, Series A no. 122, pp. 17-18, § 42). The Court confirms this case-law in the instant case. It considers that any other solution is liable to lead to results that are incompatible with the object and purpose of the Convention (see, mutatis mutandis, *König*, cited above, pp. 29-30, § 88, and *Maaouia v. France* [GC], no. 39652/98, § 34, ECHR 2000-X)".[17]

7. Protocol No. 16 and New Forms of Judicial Dialogue

With the entry into force on 1 August 2018 of Protocol No. 16 in relation to 10 States parties (Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine) there appeared a new form and the possibility of a dialogue between the Strasbourg Court and domestic courts. The Supreme and Constitutional Courts are given the opportunity to request an advisory opinion from the Strasbourg Court on the points of interpretation and application of the rights and freedoms enshrined in the Convention and its Protocols. The advisory opinion, which is adopted by the Grand Chamber of the Court, contains the reasons and arguments of the Court, but it is not binding on domestic courts.

The prerequisite for applying to the Strasbourg Court for an advisory opinion is that a request must originate in pending domestic proceedings currently being heard by a highest court or tribunal or Constitutional Court. The first advisory opinion was adopted on 10 April 2019 at the request of the French Court of Cassation *(Cour de cassation)*, and it concerns the issue of recognition a birth certificate issued abroad to a child born abroad as a result of a gestational surrogacy arrangement.

This opinion is noteworthy in that the Grand Chamber for the first time defined the boundaries of advisory opinion requests. It confirmed that the Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in light of Convention law, or to rule on the outcome of the domestic proceedings. Its role is strictly limited to furnishing an opinion regarding the questions submitted with the requirements of the Convention and its case-law.

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15 *Leach Ph.,* Taking a Case to the European Court of Human Rights, 4th ed., Oxford, 2017, 191.
16 *Micallef v. Malta* [15.10.2009], ECHR, no. 17056/06, § 84.
17 *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 24-31, ECHR 2001-VII.

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1. European Court of Human Rights, Council of Europe, Strasbourg, 03/09/1953.
2. Recommendation of the Committee of Ministers of the Council of Europe of December 18, 2002 Rec., 2002, 13, <www.coe.int> [17.12.2019].
3. *Grabenwarter Ch., Pabel K.,* Europäische Menschenrechtskonvention, 6. Aufl., München, 2016, § 3 Rn. 2, 2-5.
4. *Harris D., O'Boyle M., Warbrick C.,* Law of the European Convention on Human Rights, 3rd ed., GB, 2016, 11, 36.
5. *Jacobs F. G., White R., Ovey C.*, The European Convention on Human Rights, 6th ed., Oxford, 2014, 78.
6. *Leach Ph.,* Taking a Case to the European Court of Human Rights, 4th ed., Oxford, 2017, 190-191.
7. Advisory Opinion P16-2018-001, ECHR 132 (2019), delivered on April 10, 2019, §§ 22-24.
8. *Bochan v. Ukraine* [05.02.2015], ECHR, №. 2, no. 22251/08, § 61.
9. *Cossey v. UK* [1990] A 184, 13 EHRR 622, § 35, PC.
10. *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 24-31, ECHR 2001-VII.
11. *Garcia Ruiz v. Spain* [1999-I], 31 EHRR 589, §28.
12. *Goodwin Christine v. UK* [2002-VI], 35 EHRR 447, § 74, GC.
13. *Ireland v. The United Kingdom* [1978] ECHR (Ser. A.), № 25, 154.
14. *Micallef v. Malta* [15.10.2009], ECHR, no. 17056/06, § 84.
15. *Khamidov v. Russia* [15.11.2007], ECHR, no. 72118/01, § 174.

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New Legal Regulation of Intellectual Property Protection and Enforcement

By signing EU-Georgia Association Agreement,[1] *(AA) new stage has started with regard to ensuring protection of intellectual property and harmonization of its implementation mechanisms with European Law.*

One of the most important steps with this regard is the legislative amendments in the Civil Procedure Code of Georgia (GCPC) so that to ensure adequate and effective protection and enforcement of intellectual property rights.

Specifically: Chapter 7 was added to the GCPC "Specificities in proceedings in relation to the breach of exclusive right on the site of intellectual property".

Before the legislative amendments it was possible for the plaintiff to request the use of the measure to secure the claim, although it was included under the category of other measures and it was quite hard to substantiate the reasons for using a different kind of provision. The purpose of above-mentioned legislative amendments is to solve this and other problems, which will be further elaborated on in the following paper.

Key words: *Intellectual property law, protection of intellectual property, hamonization, Association Agreement, directive, civil procedure code, (GCPC), enforcement, provision, to secure the claim, to secure the evidence/evidence provision, articles* 363^{25}*-*363^{29}.

1. Introduction

Defining events on the development of the mankind are connected with inventions, scientific and artistic innovations. Nowadays, it is particularly striking that new technologies have a substantial effect on the agenda of the civilization. Historically, keeping up with the fast pace of creative and innovative progress was supported by the precise reformation of the intellectual property law.[2] Each step towards the development of this field of law is of utmost importance for the overall progress at the present time as well.

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[1] The Association Agreement, agreement between Georgia on the one hand, and on the other hand-EU and Nuclear nergy ssociation of Europe and its Member States, <https://matsne.gov.ge/ka/document/view/249-6959?publication=0> [30.06.2019].

[2] "Intellectual Property" was formed as an internationally recognized term in 1967, after adoption of the Convention for the Establishment of the Intellectual Property Organization, a terminological definition of intellectual property. See, *Sajaia L.,* The Author's personal non-property rights, Thesis, TSU, Tbilisi, 2014, 17 <http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/lika_sajaia.pdf> [23.07.2019] (in Georgian). *Harms. L. T. C.*, A Casebook on the Enforcement of Intellectual Property Rights., 4th ed., WIPO, 2018, 10 <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_791_2018.pdf> [21.07.2019].

The question elaborated on in the following paper is very important, insofar as it concerns the novelty in the *GCPC*, on intellectual property disputes, regarding the definition of claim and evidence provision measures.

The rights are realized only when the legislation has a strong protective lever to ensure the enforcement of norms. ubi jus, ibi remedium,[3] i.e. there is no right in case there is no mechanism to ensure its effective enforcement – this is the leitmotif of this article.

GCPC chapter XXIII[4] regulates the claim provision with regard to civil disputes, and chapter XIV[5] regulates the evidence provision. Thus, the regulating norms to secure the claim and the evidence provision measures covered the disputes with regard to intellectual property, as well as other civil proceeding in relation to material and immaterial property.[6]

Two reasons form the basis of the legislative amendments discussed in the following paper. The first one is practical. Due to the legal nature of the intellectual property, its regulating mechanisms have to be in full accordance with the specificities of the subject of protection. Otherwise, applying the common and overall mechanism hinders the process of legal proceeding, which was the case in the Georgian reality. The second reason is formal and legal. Upon signing the association agreement – Georgia has undertaken an obligation to incorporate European legislation in the Georgian law. Namely, it concerns the implementation of the directive 2004/48/EC of the European Parliament and of the European Council on enforcement of intellectual property rights.

The term used in the civil procedure code "Law making specificities in relation to the breach of exclusive right on the site of intellectual property" may cause certain confusion, which is a pity to have it as a drawback, insofar as, as academician Ivane Javakhishvili believed, the term must denote the scientific concept with utmost accuracy and completeness.[7]

The multilayered legal nature of intellectual property caused multiplicity of the terms denoting the concept of an object and its scientific meaning. Although, a modern western doctrine (in contrast to the Russian doctrine that uses the term – *Интеллектуальные Права*) definitely corresponds the term – intellectual property and intellectual property rights. This is very important, insofar as it clearly describes the immanent features of the legal nature of the object.[8]

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3 "*When the law permits, it at the same time allows it to be protected". Kapanadze N., Kvachadze M.,* Latin-Georgian Legal Dictionary, Tbilisi, 2008, 86 (in Georgian). See, *Nadareishvili G.,* Civil Law of Rome, 3rd ed., Tbilisi, 2009, 165 (in Georgian). See, Law Dictionary, <https://dictionary.thelaw.com/ubi-jus-ibi-remedium/> [23.07.2019]. See. *Thomas T. A.,* Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy, The University of Akron, 2004, <https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1208&context=ua_law_publications> [23.07.2019].

4 Articles:191-199[1], Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 31/12/1997.

5 Ibid, articles: 109-119.

6 *Jorbenadze S.,* Life and work of Ivane Javakhishvili, Tbilisi, 1984, 379 (in Georgian). See, *Taliashvili T.,* Foundations of Legal Protection of Geographic Indication of the Goods, Doctoral Dissertation, TSU, Tbilisi, 2003, 23 <http://dspace.nplg.gov.ge/handle/1234/305872> [03.07.2019] (in Georgian).

7 Prof. *T. Zarandia* points out that "there is no such unified concept as property, instead, there are completely different concepts and definitions famous for the most of continental Europe codifications that depended on historical and political circumstances within which the codification took place". See. *Zarandia T.,* Property Law, 2nd revised ed., Tbilisi, 2019, 206 (in Georgian).

8 *Taliashvili T.,* Foundations of Legal Protection of Geographic Indication of the Goods, Doctoral dissertation, TSU, Tbilisi, 2003, 8, <http://dspace.nplg.gov.ge/handle/1234/305872> [03.07.2019] (in Georgian).

It has to be pointed out that this specific term "Intellectual property" is included in the Constitution of Georgia. Taking into consideration that the legal regulation of intellectual property is not codified, and regulating invention, authorship rights or other objects are reflected in specific laws, application of the unified term for the field – intellectual property – is not common in the field of positive law. It is appropriate that the civil procedure code adopt the term – "Intellectual Property Law: (Constitution of Georgia, article 20 confirms the above: intellectual property rights are protected)[9] recognized by the Constitution of Georgia.

In terms of the structure the article is composed of the Introduction, 2 chapters, Conclusion and bibliography. The article elaborates on the following important questions: Harmonization of intellectual property protection and enforcement mechanisms; New procedural norms of intellectual property protection and enforcement.

2. Harmonization of Intellectual Property Protection and Enforcement Mechanisms

In the domain of intellectual property law, it is extremely important that the intergovernmental positions regarding issues on protection of institutions, are in accordance with each other.[10] National legal levers developed by one state to ensure settling the above-mentioned problem is not sufficient,[11] since the breach of rights of immaterial goods has the specificity that cannot be found in relation to "material objects". Besides, material property, intellectual rights is characterized by the so-called "territorial principle". [12 ; 13 ; 14] The solution can be found in international and intergovernmental agreements.

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9 Constitution of Georgia, Departments of the Parliament of Georgia, №31-33, 24/08/1995.

10 *Taliashvili T.,* Some Aspects of Patent Law, Journal of Law, №5-6, 1998, 37-43 (in Georgian).

11 *Taliashvili, T,.* Foundations of Legal Protection of Geographic Indication of the Goods, Doctoral dissertation, TSU, Tbilisi, 2003, 80-81 <http://dspace.nplg.gov.ge/handle/1234/305872> [03.07.2019] (in Georgian). *Taliashvili T.,* Der Schutz geografischer Bezeichnungen in Georgien am Maßstab des internationalen und europäischen Rechts, GRUR Int 2003, 324. *Taliashvili T.,* Reinvention of the Concept of Intellectual Property to Post-Soviet Society – Georgian Experience, Public Lecture, Conference on "Intellectual Property in Modern Europe", GWZO, Universität Leipzig, 2012. See. *Taliashvili T.,* Internationale Konferenz: Auslegung der Verfassungsnormen in den Postsowjetischen Gesellschaften, Ostrecht, №52, Berlin, 2006.

12 *Lundstedt L.,* Territoriality in Intellectual Property Law, Stockholm University, 2016, 27, <https://su.diva-portal.org/smash/get/diva2:972658/FULLTEXT01.pdf> [30.08.2019]. See. *Hand G., Zekoll J., Zumbansen P. (eds),* Beyond Territoriality: Transnational Legal Authority in an Age of Globalization, Queen Mary Studies in International Law, Brill Academic Publishing, Leiden, Boston, 2012, 189-228.

13 See. *Peukert A.,* Territoriality and Extraterritoriality in Intellectual Property Law, 2010, 4, <http://www.-jura.unifrankfurt.de/ifrvl/peukert/forschung/TerritorialityandExtraterritorialityinIntellectualPropertyLaw.pdf.16> [30.08.2019]. See, *Bradley C. A.,* Territorial Intellectual Property Rights in an Age of Globalism, 37 VA. J. INT'L L., (1997), 505, 514-15, 520, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1982&context=-faculty_scholarship> [30.08.2019].

14 *Taliashvili T.,* Aspects of Protection of Names of Georgian Origin and Geographic Indications Abroad and Protection of Names of Foreign Origin and Geographic Indications in Georgia, Prof. *Z. Akhvlediani* Collection*, Shengelia R. (ed.),* Tbilisi, 2004, 179-187 (in Georgian).

The European Union is committed to getting closer to the member states of Intellectual Law. The issues of implementation of European directives on the local level, along with the territorial limitations of the legislation, represent the key difficulties in the above-mentioned process.[15]

The objective of the European Union is to significantly reduce differences between national legal systems and to effect harmonization with the European Legislation. "Harmonization is the normative statement when the inconsistencies between two different legal systems reduce, although this process can hardly be regarded as simple or smooth".[16]

Upon signing an Association Agreement the issue of harmonisation of regulatory norms of intellectual property with the European law became the part of the agenda. Despite the fact that "the harmonisation is the soft responsibility",[17] the state has undertaken responsibility to implement European standards and directives in Georgian legislation which primarily is based on the decree[18] adopted by the Parliament of Georgia on "Harmonization of Georgian Legislation with the EU law," which explicitly emphasizes that all laws and normative acts passed by the Georgian parliament should be harmonised with the standards and norms established by the European Union.

Historically, "Georgian lawmakers made efforts that its nation had a harmonized law in place, which was not secluded within its own frames but at the same time were not quite absorbed in supranational boundless space,[19;20] insofar as the "harmonization of the law assumes not only the peaceful coexistence with the external world, bat rather a naturally unified legal space within the country".[21] The process of harmonization seeks to unite two or more different elements or effect the close approximation.[22] The key characteristics of harmonisation is the unification of diversity in one sole object .[23] Harmonization does not assume that all laws are identical.[24] Neither does it mean to copy from the European union legislation or introduce it word for word in the legislation of the third world state.

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15 *Hilty R. M., Moscon V.,* Modernization of the EU Copyright Rules, Position Statement of the Max Planck Institute for Innovation and Competition, Research Paper No. 17-12, Munich, 2017, 14, <https://pure.mpg.de/rest/items/item_2470998_12/component/file_2479390/content> [20.06.2019].

16 *Samkharadze I.,* Harmonization of Legal Systems: EU and Georgia., TSU Journal of Law, № 1, Tbilisi, 2015, 315 (in Georgian).

17 *Surmava L.,* Compatibility of Georgian Legislation with EU Legislation with regard to the State Assistance, Doctoral Dissertation, TSU, Tbilisi, 2012, 10, <http://press.tsu.ge/data/image_db_innova/Disertaciebi/lita_surmava.pdf> [26.07.2019] (in Georgian).

18 Decree adopted by the Parliament of Georgia on "Harmonisation of Georgian Legislation with the EU Law", 02/09/1997, <https://matsne.gov.ge/ka/document/view/38704?publication=0> [31.08.2019].

19 *Zoidze B.,* Reception of European Private Law by Georgia, Tbilisi, 2005, 29 (in Georgian).

20 *Loewenheim U.,* Harmonization and Intellectual Property in Europe, Columbia Journal of European Law 2, no. 3, Spring, Summer, 1996, 481-489.

21 *Zoidze B.,* Reception of European Private Law by Georgia, Tbilisi, 2005, 39 (in Georgian).

22 See. *Fox E. M.,* Harmonization on Law and Procedures in a Globalized World: Why, What and How? Vol. 60 Antitrust Law Journal, 1992, 594. See. *Boodman M.,* The Myth of Harmonization of Laws, The American Journal of Comparative Law, Vol. 39, 1991, 699.

23 *Samkharadze I.,* Harmonization of Legal Systems: EU and Georgia., TSU Journal of Law, №1, 2015, 316 (in Georgian).

24 *Loewenheim U.,* Harmonization and Intellectual Property in Europe, Columbia Journal of European Law 2, no. 3, Spring, Summer, 1996, 488.

Harmonization assumes that the key principles of European Union taken into consideration and their enforcement mechanisms are ensured.[25] It is important to develop the legal mechanisms within the harmonization process that will effectively regulate modern civil relationships.[26] Most significantly, the harmonization of the laws remains the task to be fulfilled by EU member states.

Development and establishment of the enforcement mechanisms of regulating norms of intellectual property represent one of the key tasks for the purposes of harmonization. Although, "sanctions and enforcement mechanisms which have always been the part of the law on Intellectual Property" have not typically been regulated[27] on an international level. One of the most important international agreements "Agreement on *Trade*-Related Aspects of Intellectual *Property* Rights" (TRIPS Agreement)[28;29] has been a major step forward in the field of intellectual property law. Although, it turned out to be sufficient for elimination of the above-mentioned misbalance and consequently, the Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights adopted in 2004.[30] (Directive 2004/48/EC)

The above-mentioned directive represents one of the horizontal directives[31] which regulates all subjects of intellectual property and is "focused on the procedure issues[32] emerged during the legal proceeding." It also stipulates preventive measures with regard to the protection of intellectual rights.

Directive 2004/48/EC offers alternative measures of protection of intellectual rights, such as an evocation of counterfeit goods from the trade network, as well as their removal from commercial net-

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25 *Surmava L.,* Compatibility of Georgian Legislation with EU Legislation with regard to the State Assistance, Doctoral Dissertation, TSU, Tbilisi, 2012, 62, <http://press.tsu.ge/data/image_db_innova/Disertaciebi/lita_surmava.pdf> [26.07.2019] (in Georgian).

26 *Kharitonashvili N.,* Third Parties as the Subjects of Civil Justice, TSU Journal of Law №1, 2017, 275 (in Georgian).

27 *Kur A., Dreier T.,* EU Intellectual Property Law*,* Texts, Cases and Materials, *Gugeshashvili G (transl.),* Tbilisi, 2017, 478 (in Georgian).

28 Agreement on *Trade*-Related Aspects of Intellectual *Property* Rights, 14/06/2000, <https://matsne.gov.ge/ka/document/view/2507839?publication=0> [26.07.2019]; <https://www.wto.org/english/docs_e/legal_e/27-trips.pdf> [26.07.2019].

29 Based on agreement aspect and meaning, *Peter K. Y.,* The Objectives and Principles of the TRIPS Agreement, 2009, <https://www.wilmerhale.com/en/insights/publications/new-eu-directive-on-ip-enforcement-september-16-2004> [26.07.2019].

30 Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual Property Rights, 29/04/2004, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R%2801%29> [26.07.2019]; <https://www.wilmerhale.com/en/insights/publications/new-eu-directive-on-ip-enforcement-september-16-2004> [26.07.2019].

31 "Direct effect may be vertical (that is, the EU legislation can be enforced against the state or an emanation of the state, such as a nationalised industry or privatised utility) or horizontal (that is, it may be enforced against another individual)", <https://uk.practicallaw.thomsonreuters.com/6-107-6114?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> [12.09.2019]. See, on the effects of horizontal directives, *Lundstedt L.,* Territoriality in Intellectual Property Law, Stockholm University, 2016, 21, 420, <https://su.diva-portal.org/smash/get/diva2:972658/FULLTEXT01.pdf> [30.08.2019].

32 *Cook T.,* Enforcement Directive and Harmonization of Remedies for Intellectual Property Infringement in the EU, Journal of Intellectual Property Rights, Vol. 20, 2015, 264, <http://nopr.niscair.res.in/bitstream/123456789/31958/1/JIPR%2020%284%29%20264-269.pdf> [26.07.2019].

work, and destroying the product made as a result the infringement of rights. The court might apply one of the measures, such as prohibiting the individual from performing the activity that infringes the special right. In the form of alternative court measure the directive also stipulates imposition of compensation to cover the damages (including unearned income).[33] The directive, besides the above-mentioned aspect, covers important provisions such as ensuring the provision of evidence while protecting the rights of intellectual property, as well as compensation of the damages.[34]

To ensure that the objectives of justice are met, in case the rights under the above directive have been infringed, the states must ensure compliance with the relevant standards so that the unacceptable barriers are not created, at the same time the standards must fully correspond with the fundamental principles of enforcement law, such as the transparency of the enforcement process, which is accessible, effective, predictable,consistent and carried out within the reasonable time frame.[35;36;37]

For the purpose of the following paper the next chapter discusses the changes in the Georgian legislation with regard to the protection and enforcement of intellectual property.

3. New Procedural Norms of Intellectual Property Protection and Enforcement

Upon the association agreement entered into force the process of harmonization of European intellectual law within the Georgian legislation was speeded up. In response to obligations undertaken under the Association Agreement with the package of amendments was developed in the civil procedure law, by means of which procedural norms regarding the protection of intellectual property were regulated in a new way. The $7^{th\,5}$ chapters (articles 363^{25}–363^{29}) were added to the civil procedure code, which defined the lawmaking specificity[38] in relation to intellectual property.

The following measures on the disputes of the above-mentioned category were defined for the first time in the civil procedure code: a) measures to *secure evidence*;[39] b) right to information;[40] c) *measures to secure claims*.[41]

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33 Intellectual Property Rights Enforcement Directive, <https://wiki.openrightsgroup.org/wiki/Intellectual_Property_Rights_Enforcement_Directive#Criticisms> [12.09.2019].

34 *Cook T.,* Enforcement Directive and Harmonization of Remedies for Intellectual Property Infringement in the EU, Journal of Intellectual Property Rights, Vol. 20, 2015, 266-267. <http://nopr.niscair.res.in/bitstream/-123456789/31958/1/JIPR%2020%284%29%20264-269.pdf> [26.07.2019].

35 *Dzlierishvili Z.,* Cross-undertaking as to Damages Resulting from a Provisional Remedy, TSU Journal of Law, №1, 2018, 5 (in Georgian). Original text: Beck'sche Kurz-Kommentare Zivilprozessordnung mit Gerichtsverfassungsgesetz und anderen Nebengesetzen., Begründet von. 75 Aufl., 2016, Vorb. 704, 2046.

36 See the related detailed information: *Kurdadze Sh., Kurdadze G., Khunashvili N., Chkonia Z.,* Comments on the Law of Georgia on Enforcement Proceedings, Part 1 (articles 1-48), SDASU, Tbilisi, 2018, 7 (in Georgian). *Uitdehaag J.*, *Kurtauli S.*, Review of the Georgian within the National and International Context, Enforcement System, Tbilisi, 2013, 101 (in Georgian).

37 Section 16, Conclusion by consultative Council of European Judges, (CCJE) Conclusion № 13 Strasbourg 19/11/2010, <https://rm.coe.int/-ccje-13-2010-/168074824c> [27.08.2019].

38 On amendments in the Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 31/12/1997.

39 Compare GCPC, article 363^{27}; Association Agreement, article 192.

40 Compare GCPC, article 363^{28}; Association Agreement, article 193.

41 Compare GCPC, article 363^{29}. There is no literal meaning of the term – measure to secure the claim in Association Agreement, although temporary provision measures are included in article 194.

For the Georgian procedure code the measure to secure the claim does not represent the institutional novelty. Although, this is relatively new that norms regulating intellectual property have been defined according to the code since 2018, the regulating sphere, right to information and most importantly the procedure to use measures to secure evidence/claim were specified. Through the amendment in the code non-disclosure and confidentiality of obtained information were defined as an obligation to the court,[42] as for the norms of the authority category, the court may:

a) Ensure sequestration of the movable/immovable property (including bank accounts and other assets) owned by the individual, related to which, based on a well-grounded assumption the individual has violated the exclusive right of a commercial scale; Obtained documents/information shall be handed over to the independent expert[43] appointed by the court so that to identify the subject of sequestration;

b) Request the bank-related, financial and/or commercial documents/information [44] from the assumed violator; Only the court is authorized to be familiarized with the above information, i.e. the unauthorized person may not have access to such information;

c) Prohibit the person who, based on the well-grounded assumption has breached the exclusive right by the action that violates the exclusive right; or instead of the above prohibition, request on person who, based on the well-grounded assumption has breached the exclusive right to present the corresponding warranty;

d) Discuss the issue related to using the provision measures in cases defined by the code, without oral hearing. In the above-mentioned cases the person in relation to whom the above provision measures will be carried out, must be informed about it without delay, within no later than 48 hours from the moment of the above measure.[45]

e) define the possible indemnification provision along with the measures to secure the claim;

Considering the requirements of the lawmaker, the court is also authorized to issue a ruling on using the measures to secure the evidence, based on the motion, in order to preserve the evidences, in case there exists the danger that the evidence might be destroyed.[46] Moreover, if it is impossible to secure the evidence through the above-mentioned measures, the sequestration as a necessary measure may be used, in order to avoid the possible fulfillment of the decision due to the difficulties to fulfil it.[47]

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42 Compare GCPC article 1, point "A", 363^{29} and GCPC 363^{28} article 3, paragraph 3; Associaton Agreement, article 192, paragraph 1.

43 Section 25, Conclusion by consultative Council of European Judges, (CCJE) Conclusion № 13 Strasbourg 19/11/2010, <https://rm.coe.int/-ccje-13-2010-/168074824c> [27.08.2019]. It is underlined that "the search and sequestration of defendant's assets has to be carried out effectively. But at the same time relevant provisions regarding human rights, protection of personal data, urgency for court revision".

44 See authors' comment on the same regulation, *Kur A., Dreier T.,* EU Intellectual Property Law*,* Texts, Cases and Materials, *Gugeshashvili G. (transl.),* Tbilisi, 2017, 485. "If the violation represents a "commercial scale", member states may grant the right to the national courts, based on the request by one party and under appropriate circumstances require to present bank, financial or commercial documentation, which is under the control of the opposing party and represents the confidential information."

45 Compare GCPC article 363^{27}, paragraph 5 and GCPC $363^{28;}$ Associaton Agreement article 192, section 3.

46 Civil Porcedure Code of Georgia, article 363^{27} [14/11/1997].

47 Decision №2b/4597-14 of 29 September 2014 of Tbilisi Court of Appeal. <http://library.court.ge/judgements/77202015-01-30.pdf> [05.09.2019].

It has to be underlined that the court has the discretionary authority to carry out the detailed description of documentation (through taking a sample or without it) as well as sequestration,[48] while using the measures to secure the evidence. It is a significant regulation of this norm that the court can use several measures at the same time when the case is related to the breach of exclusive right on the site of intellectual property, it will only depend on the specificities of the case, and what kind of preventive measures are required to be used according to the author of the motion.

For the purpose of this article, the following question arises: if the procedural law stipulated regulating norms [49] of provision measures, why was it necessary to additionally include similar provisions in part 7 of the procedure code? Does it mean that there is an attempt to regulate one and the same question twice?

To respond the above question we share the following position, according to which until 23 December, 2017 "it was possible for the plaintiff to request the use of the measure to secure the claim, which was included under the category of other measures and it was quite hard to substantiate the reasons for using a different kind of provision".[50] The disputes on intellectual property were considerably prolonged in time, which was sustained by the overload of court authorities. The problem was settled by using the provision measure on 1 day basis, hence the protection and enforcement of intellectual property rights has become effective and fast.

In procedural way, the purpose of the measure to secure the claim means "to create the favourable conditions for the plaintiff so that he/she enjoys the material rights".[51;52] The ability to enforce decisions and eliminate negative results are the elements to be used in the future, so that the decisions are enfocred and the negative results are eliminated.[53] The key purpose of the provision measure is to prevent the party from direct damage.

From the point of view of protection of intellectual property rights and its effective enforcement, it is obvious that the procedural law required on the one hand the procedural measure to secure the evidence and on the other hand "the guarantee to effectively enjoy the right to a fair trial."[54] According to the definition of the reviewing court, the above represent two different procedural elements.[55;56] If in the first case, the security for, the evidence in the case is made for the purpose of determining substantive

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48 Article 363^{27}, Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 31/12/1997. Article 192, paragraph 2 of the Association Agreement.

49 GCPC chapter XXIII, article $191\text{-}199^{1}$.

50 Kaikatsishvili and Lawyers, <http://kbarristers.ge/ge/news/index/74> [12.08.2019].

51 *Kurdadze Sh., Khunashvili N.,* Procedure Code of Georgia, 2nd ed., Tbilisi, 2015, 382 (in Georgian).

52 *Nachkebia A.,* Definitions of Civil Legal Norms in the Practice of Supreme Court (2000-2013), Tbilisi, 2014, 466, <http://www.library.court.ge/upload/aleko_nachkhebia_final.pdf> [01.09.2019] (in Georgian).

53 Decision №2-4883-14 of 05 September 2014 of Court of Appeal of Tbilisi. Available in only Court Archive.

54 Decision "Ltd "Georgian Manganese" against the Parliament of Georgia, decision of the Constitutional Court of Georgia of 1 December, 2017 №2/6/746, <https://www.constcourt.ge/ge/legal-acts/judgments/2-6-746-shps-djordjian-manganezi-saqartvelos-parlamentis-winaagmdeg2.page> [03.09.2019].

55 Decision № as-827-1190-06 of May 29, 2007 of the Supreme Court of Georgia. Available in only Court Archive.

56 Note: Evidence provision differs from court tasks in a qualitative way. See. Decision №as-827-1190-06 of 29 May 2007 of the Supreme Court of Georgia.

facts,[57] while the purpose on the last one (security for a claim) is too ensure the enforcement of the court decision.[58;59] Ultimately, both measures are directed at improving the quality of the protection of the subject whose rights have been violated.

The procedural aim of evidence security is to fix the evidence by means of the "rules determined by the law" for further use",[60] during substantial consideration of the civil case, while "the purpose of measures to secure the claim is to defend the plaintiff's lawful interests in the case of the dishonesty of the defendant".[61]

There are cases in the court practice, when either of the parties are unable to present the evidence in support of their request, in such a case, through mediation of the parties, the court can request the evidence from whoever owns it.[62] Precisely this is the common standard for securing the evidence, this is why it is very important to have this institute included in the chapter on intellectual property, insofar as "under certain circumstances, certain significant evidence might get damaged or destroyed if not appropriately secured by the third party, or else it might be required to secure the assets".[63]

So that to confirm the circumstances provided in the claim, it is extremely important for the party to present the evidence to the court, by means of which the party requires to substantiate the lawfulness of the request, in the meantime the evidence should not be endangered in terms of either being damanded or destroyed. Precisely for this reason the lawmaker has defined the procedure to secure the evidence, along with the security for a claim,so that to once again harmonise European directives and obligations under the Association Agreement. Since 23 December, 2017, any dispute related to protecting above objects and enforcement, is regulated by special articles of the civil procedure code, which represents a step forward towards implementation of the association agreement.

Tbilisi city court, with regard to the case of invalidation of the trade registration mark, reviewed the question without oral hearing, concerning the use of measures to secure the evidence; In the substantiation part of the document, the court pointed out that for enforcement purposes, using procedural measures, including measures to secure the evidence has been declared as an obligation of the state according to the European Court of Human Rights. The Strasbourg court on the case JGK *Statyba ltd. and Guselnikovas v. Lithuania*,[64] defined that the order of sequestration, which was temporary and preventive, was directed at ensuring evidence enforcement and eliminating the risks which prevented from satisfying requests of the creditors.[65]

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57 Decision №2/7126-19 of 4 April, 2019 of Tbilisi *City* Court. Available in only Court Archive.

58 *Kazhashvili G.,* Role of the Perpetuation of Evidences and Claim Security in Litigation, TSU Journal of Law, № 1, Tbilisi, 2016, 77 (in Georgian).

59 *Dzlierishvili Z.,* Cross-undertaking as to Damages Resulting from a Provisional Remedy*,* TSU Journal of Law №1, Tbilisi, 2018, 6 (in Georgian).

60 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 266 (in Georgian).

61 Decision №as-538-511-2013 of 3 July, 2003 of the Supreme Court of Georgia.

62 *Gagua I.,* The Burden of Proof in the Civil Procedure Law, Doctoral Dissertation, TSU, 2012, 26, <http://press.tsu.ge/data/image_db_innova/Disertaciebi/ilona_gagua.pdf> [09.08.2019] (in Georgian).

63 *Ostermiller S. M., Swenson D. R., Alternative Dispute* Resolution in Georgia, Tbilisi, 2014, 250, <http://ewmi-prolog.org/images/files/2188ADR_Georgia_GEO.pdf> [13.07.2019] (in Georgian).

64 JGK Statyba LTD and Guselnikovas v. Lithuania, [2013] ECHR, <http://en.efhr.eu/2010/02/11/case-jgk-statyba-ltd-guselnikovas-v-lithuania-application-no-333012-2013/> [09.08.2019].

65 Decision of *2 March, 2018 of the Tbilisi* City *Court.* Available in only Court Archive.

Along with the measures to secure the claim and evidence, guarantee, sequestration, prohibition), civil procedure law took into consideration ensuring possible indemnification provisions.[66] If the court considers that applying the measure to secure the claim might harm the person towards whom there is a well-grounded assumption, that he/she has violated exclusive right, it can use the measure to secure the claim and, at the same time request of the person with the exclusive right, to compensate for the expected damage. The court may as well use the provision warranty based on the claim on the counterpart.[67]

Tbilisi court of appeal, chamber of civil cases considers that there is the need for ensuring indemnification provisions and guarantees for the damaged party in case the court has a substantiated doubt. that the provision measure might not be justified, moreover, the damage due to the provision measure caused to the defendant is evident, or there is the possibility of such damage.[68]

It is important to note that according to the second part of article 199 of GCPC, on 4 April, 2018 one more significant legislative amendment was approved, according to which expected compensation for the damage will be secured within the dates defined by the court which should not exceed 30 days.[69]

Articles 363^{25}–363^{29} of Civil Procedure Law, in relation to the disputes on intellectual property, have a potential to become a precise, practical guideline for the judges so that to achieve effective performance of justice.

For the Georgian legislation, in the process of its "Europianisation", the theoretical and practical meaning of the above-mentioned questions becomes more and more important,[70] insofar as "in a large-scale harmonization process it is important that the GCPC is in compliance with international approaches".[71]

Despite the fact that not a long time has passed since the norms became effective, and there is not quite a big number of disputes related to intellectual property so that to assess the legal index, it is possible to predict that provision measures will be effective. Articles 363^{25}–363^{29} of GCPC will be actively used in practice, since they will secure protection of the parties in equal conditions.

4. Conclusion

The paper presented by us provides the basis for the conclusion that the amendments in the civil procedure law of Georgia in relation to the protection of intellectual property and enforcement

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66 See. GCMP, article 363^{29}, section 4.

67 On amendments in the Civil Procedure Code of Georgia <https://info.parliament.ge/file/1/BillReview-Content/151540?> [31.07.2019].

68 Decision №2b/5617-14 of 29 September 2014 of Tbilisi Court of Appeal, <http://www.tbappeal.court.-ge/appealAllFiles/files/appeal_docs/1415211897__-841888428.pdf> [03.09.2019].

69 On amendments in the Civil Procedure Code of Georgia <https://www.matsne.gov.ge/ka/document/view/-4139203?publication=0#DOCUMENT:1> [26.08.2019]. See. *Dzlierishvili Z.,* Cross-undertaking as to Damages Resulting from a Provisional Remedy, TSU Journal of Law №1, 2018, 16 (in Georgian).

70 *Dzamukashvili D.,* Intelletual Property Law, International Agreements and Conventions, Tbilisi, 2002, 111 (in Georgian).

71 *Kharitonashvili N.,* Third Parties as the Subjects of Civil Justice, TSU Journal of Law №1, 2017, 285 (in Georgian).

mechanisms was the rightful decision. These new legal norms in the field of intellectual property ensure that the process of emerged disputes is more effective, fast and flexible.

Despite the fact that this normative decision was introduced in European countries 15 years earlier, we believe that it is never late to adopt good legal achievements.

This article will support the actors in the civil processes to actively apply and introduce the norms discussed in this paper. It is essential to be able to enjoy the intellectual property rights without any obstacles for the overall progress, insofar as today, intellectual property leads every fundamental economic, social or cultural change.

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Ioseb Gabaraev*

Feasibility of Applying Case Law of *Ad Hoc* International Tribunal for Former Yugoslavia in Cases of Sexual offences committed by Coercion

The effective functioning of mechanism of the national human rights protection implies approximation of national legislation towards international standards and refining the practice of national courts, which should be a continuous process and be aimed at adapting best international judicial practice to national judicial practice. In order to ensure adherence to high standards of universally recognised human rights it is essential and thus decisive significance is assigned to share practice of various countries and international institutions.

In the present article, discussing the stages of the evolutionary development of the definition of rape and distinguishing it from the crime of torture is based on analysis of landmark decision of the ad hoc International Criminal Tribunal for the former Yugoslavia (hereinafter referred as ICTY) the purpose of which is to introduce and apply them in judicial practice and thus to improve the reasoning of the decisions of national courts in similar cases.

Key words: *Definition of rape, sexual violence, consent of a victim, penetration, ICTY, ICC.*

1. Introduction

Unlike the law of European human rights, the scope of international criminal law is universal and includes the countries of all continents that ratified the Statute of the International Criminal Court -the Rome Statute.[1]

International criminal law, as a combination of regulations of international law and criminal law, is an independent branch of law which is still under the process of development that was considered as part of international law until the 1990s.[2]

The basis for formation of the international criminal law as a separate branch was 1) first, establishment of *ad hoc* International Criminal Tribunal for the former Yugoslavia (*ICTY*)[3] under the Resolution 808 of the United Nations Security Council of 25 May 1993[4], and then 2) establishment of *ad hoc* International Criminal Tribunal for Rwanda (ICTR)[5] under the Resolution 995 of the United Nations Security Council; 3) adoption of the Statute of the International Criminal Court in Rome on 7 July 1998 and on its basis, 4 years later, on 1 July 2002, establishment of the first standing International Criminal Court (ICC).

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1 See *Turava, M.,* Basics of International Criminal Law, Tbilisi, 2015, 239 (in Georgian).

2 Ibid, 5.

3 See Statute of the International Criminal Tribunal for the former Yugoslavia, Security Council resolution 827 (1993) of 25 May 1993, document S/RES/827, art. 5 (hereinafter "Statute of the ICTY"), <https://casebook.icrc.org/case-study/un-statute-icty> [12.12.2018].

4 UNSC Resolution 808, 22/02/1993, <http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf> [20.08.2018].

5 See UN Security Council Resolution 955, 08/11/1994.

Since the period of establishment of this two *ad hoc* international tribunals, international tribunals for Former Yugoslavia and Rwanda cases, which were established in response to domestic conflicts in Former Yugoslavia (in 1992) and Rwanda (in 1994), were equally empowered to review[6] cases concerning ***"gender-based"*** crimes committed against women, including criminal cases concerning rape and other forms of sexual violence, which lead to exponential development of jurisprudence for cases of sexual violence.[7]

Although precedents of cases of rapes adopted by both tribunals are historically significant and valuable, they significantly differ from each other regarding the effectiveness of administration of justice. This was conditioned by the fact that the approval of the rape charges was a key element of the strategy of ICTY Prosecutor's Office, which was achieved through conducting gender-sensitive investigative procedures and was reflected on delivering appropriate judgements; the same is not true about cases of rape brought before ICTR where charges in 13 cases could not have been confirmed.[8] Judgements delivered by both tribunals arouse great interest around the subject of the research, although taking into consideration the format determined for submitting the present article, we will only be limited to analysis of several judgements delivered by the *ad hoc* International Tribunal for Former Yugoslavia.

2. Why case law of *ICTY*?

Sexual violence (including rape) is the key element attributing to throughout its entire activity of the *ICTY*.[9] During the domestic conflict within the territory of Former Yugoslavia (1992) a number of facts of rape and sexual violence took place and they were widespread. Rape, due to its social nature, was used as a weapon of ethnic cleansing during the war.[10]

Tribunals in former Yugoslavia, as well as in Rwanda, sought to elaborate and develop a mutually agreed definition of the elements of rape, including key aspects related to the definition of consent and violence. For this very purpose, a number of judgements delivered by both tribunals where in the context of regulations of international criminal law and on the basis of analysis of national criminal laws of various states (a sort of hybridisation),[11] notions of rape and other types of violent sexual assaults and their elements are interpreted and in certain cases rape is considered as a torture.

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6 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (International Tribunal for the Former Yugoslavia), Art. 1, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalTribunalForTheFormerYugoslavia.aspx> [06.08.2018].

7 Comp. *O'Brien M.*, Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes, International Criminal Law Review, 11(4), (Aug. 2011), 803-827, <https://www.researchgate.net/publication/233606169> [10.01.2019].

8 See *Haddad H. N.*, Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals, Journal Human Rights Review, Vol. 12, № 1, 2011, 109.

9 information on ICTY is available in the link below, <http://www.icty.org/en/documents> [24.10.2018].

10 *Ghosh G., Tiwari S.,* The Evolving Jurisprudence of Rape as a War Crime, International Journal of Law and Legal Jurisprudence Studies (IJIIJS), Vol. 1, Issue 6, 2018, 38.

11 Comp. *Schramm E.*, Internationales Strafrecht, 2011, 43. Cit. *Turava, M.,* Basics of International Criminal Law, Tbilisi, 2015, 14 (in Georgian).

It should also be noted that prior to establishment of *ICTY*, *ICTR* and *ICC* and prior to delivering appropriate judgements by these courts, in the international criminal law there were no internationally recognised interpretations of sexual offences committed by coercion, including rape. Judicial practice of these two tribunals with their valuable precedents became the basis for the further judicial practice of both *ICC* and hybrid (mixed) tribunals, the so called "third generation"[12] international courts. When judges were reasoning their judgements by, they often directly cited benchmark decisions of *ICTY* and *ICTR* and progressive implications and opinions were accepted in the original form.[13]

2.1. Should Common Courts of Georgia apply decisions (precedents) issued by *ICTY*?

Prior to considering the content of judgements delivered by the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (*ICTY)* it is important to briefly review the issue regarding the importance of judgements of *ICTY* for the judicial system of Georgia and whether or not precedents of *ICTY* should be applied in reasoning the judgements of the Common Courts of Georgia.

The fact that the main source of *ICC*, as the "permanent court"[14] is the case law of *ICTY* (as well as of Nuremberg,[15] Tokyo and Rwanda) and to some extent the existence of the *ICC* is based on the above judgements, it seems fair to say, that it also provides an reputable interpretation of the offences provided for in the Statute (Rome Statute). The status of "permanent court" of *ICC* further increases[16] and does not deprive value of the mentioned judgements for the purpose of Georgian judicial practice as far as Georgia is a part[17] of the Rome Statute of the International Criminal Court, as part of the international treaty, which is recognised as the integral part of the legislation of Georgia.

By accession to the Rome Statute and other important international treaties of humanitarian law, Georgia has undertaken the commitment to implement their requirements which implied the implementation of provisions of elements of individual offences provided for in the Rome Statute in Criminal Code of Georgia through the relevant legislative amendments. More specifically, Georgia, by the Rome Statute, imple-

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12 See *Turava M.*, Basics of International Criminal Law, Tbilisi, 2015, 46 (in Georgian).

13 See e.g. *Prosecutor v. Brima, Kamara, Kanu*, SCSL Trial Judgement, Case № SCSL-04-16-T, 20.06.2007, § 693-694, <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf> [12.02.2019]; see *also: Prosecutor v. Sesay, Kallon, Gbao,* SCSL Case № SCSL-04-15-T, 02.03.2009, § 143-148, <http://www.-rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf> [12.02.2019].

14 See details *Turava, M.*, Basics of International Criminal Law, Tbilisi, 2015, 239 (in Georgian).

15 Although the Nuremberg Tribunal did not prosecute cases of rape and sexual assault directly, rape was qualified as a crime against humanity pursuant to Article II(1)(c) of the Rule No. 10 of the Control Council Law. Control Council Law № 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace And Against Humanity, <https://www.legal-tools.org/doc/ffda62/pdf/> [12.12.2018].

16 Cit. *Dgebuadze G.*, Model of Individual Imputing a Crime in International Criminal Law and its Development under the Impact of Anglo-American and German Criminal Law Systems, dissertation paper, TSU Publishing, Tbilisi, 2017, 171, footnote 725 (in Georgian).

17 Ratified by the Resolution N 2479-of the Parliament of Georgia of 16 July 2003.

mented[18] international offences[19] of *ICC*, i.e. offences falling within the scope of jurisdiction of "the additional authority of the national judicial system"[20], by which created the opportunity to hear cases of international offences under the Rome Statute committed in the territory of Georgia, to be subject to the criminal jurisdiction of Georgia, in order to avoid the need to refer the cases to the International Criminal Court.[21]

That is, Common Courts have the right to apply the case law of *ad hoc* International Tribunal for Former Yugoslavia (*ICTY*) in the course of exercising the justice in the cases of international offences provided for in the Statute (Rome Statute) and implemented in the national criminal law, that enables proper understanding and reflection of legal definitions lacking the specificity in most cases and further imposition of a sentence. for the reason that the terms referring to the violent offences of sexual nature are worded in very general manner in the appropriate provisions of the Rome Statute and it is difficult to interpret and apply correctly the case law of *ICTY* without reputable interpretation of offences envisaged in the Statute (Rome Statute).

Therefore, case law of *ICTY*, in administration of justice in cases of international crimes implemented in national criminal law by national court, should be perceived as the organic part of the national criminal law, as the direct source of law prevailing the national law, as they interpret and explain the content of the text of the Statute.

In addition, judgements discussed in this article, although they are not delivered specifically in relation to Georgia, Common Courts may apply them for the purpose of interpretation of norms reflecting sexual offences committed by coercion in national criminal legislation, as the inspiration for for remedying the shortcoming existed in criminal law.

Furthermore, the fact that the violation of right to sexual freedom and inviolability, as the part of right to honour and dignity is protected by provision of both, international law of human rights and international humanitarian law and international criminal law, helps courts to address specific issues, substantiate the judgement by combined application of individual areas of criminal law and the case law[22] that is definitely is the higher standard of reasoning judgements.

In the present article, analysis of definition of rape is based only on the case law of the *ad hoc* International Criminal Tribunal for Former Yugoslavia *(ICTY).* Obviously, due to the limitations estab-

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18 It should also be noted that there are gaps in the process of harmonisation of relevant provisions of Criminal Code of Georgia with the Rome Statute and provisions of appropriate national law relevant to those of the Rome Statute are not similar. See det. *Turava M*, Basics of International Criminal Law, Tbilisi, 2015, 89-98 (in Georgian).

19 Under Article 5(1) of the Rome Statute of ICC, the jurisdiction of court shall be applied to the following offences: The crime of genocide; crimes against humanity; war crimes; the crime of aggression.

20 See *Turava M*., Basics of International Criminal Law, Tbilisi, 2015, 81 (in Georgian).

21 See Ibid, 82.

22 European Court of Human Rights ruled that international law of human rights and international humanitarian law may be applied simultaneously, which may be interpreted as the ability of a national court of a member state of a Treaty to refer to both case law and practice of international law of human rights (including human rights of European law) and international humanitarian law. Comp. *Hassan v. the United Kingdom,* European Court of Human Rights (ECHR), Grand Chamber, Application no. 29750/09, Judgment, Strasbourg, 16 September 2014, § 77, <http://hudoc.echr.coe.int/eng?i=001-153400> [19.11.2018].

lished for submission of the article, not all of them could be discussed in it. This, of course, does not reduce the value of these decisions in light of applying standards of international law of human rights. Only those few decisions have been selected that refer to and deal with the in-depth discussion of certain elements of the crime of rape and interpret the definition of this term.

All the above mentioned demonstrates that landmark decisions of the Tribunal delivered on the basis of reviews of crimes against humanity, and along with collective good of community, protects individual interests of individual victims of crime[23] as well, is a good example for analysing the definition of rape may definitely be the valuable material in the course of application of law in judicial practice in cases of rape in reasoning the legal issues of judgements when administering the justice by the Common Courts. And reasoning " Means application of provisions of national law, European law, international law and it should reflect Constitution, national legislation, as well as European and international law. Where applicable, it may reflect national, European and international case law, including recommendations regarding case law adopted by courts of other states."[24]

It is important that Common Courts interpret the issue not only in the vacuum of the national legislation but in harmonisation with the other rules of European and international public law.[25]The Constitution of Georgia does not reject universally recognised human rights and freedoms, recognises primacy of universally recognised norms and principles and declares international treaties of Georgia as the integral part of the legislation of Georgia.[26] Legislation of Georgia, as the applicable source of law, fully complies with universally recognised principles and norms of international law, and the international treaties of Georgia shall prevail over domestic normative acts unless they contradict the Constitution of Georgia or the constitutional agreement.[27]

3. Definition of Rape in *ICTY* Case Law

ICTY played the historic role in investigating cases of sexual offences committed by coercion in former Yugoslavia and in charges against persons committed such crimes. The tribunal convicted 23 people in total, judgements delivered at that time became the basis of other judgements worldwide which were delivered later in cases of similar category.

ICTY was the first criminal tribunal where the court considered the rape as the form of torture and assessed the concept of rape in the context of crime committed against humanity. The court also made reference to interpretations of consequences of rape which, in most cases were harmful and irreparable which that generally characterise / accompany the commission of sexual violence.

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[23] See *Ambos K.,* International Strafrecht, 3. Aufl., München, 2011, 245-246; *Werle G.*, Volkerstrafrecht, 3. Aufl., 2012, 384; cit. *Turava M*., Basics of International Criminal Law, Tbilisi, 2015, 102 (in Georgian).

[24] See Opinion N 11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions, Strasbourg, 18.12.2008, 4b.44, 7 <http://hcoj.gov.ge/files/pdf%20files/aqtebi/strasburgi%2011.pdf> [30.08.2018].

[25] Comp. *Hassan v. the United Kingdom, [2009]* ECHR, § 77.

[26] See Article 6, Law of Georgia on International Treaties of Georgia, Parliamentary Gazette, 44, 11/11/1997; see also: Article 7, Organic Law of Georgia on Common Courts, LHG, 41, 08/12/2009.

[27] Article 4(5), Constitution of Georgia, Departments of the Parliament of Georgia, №31-33, 24/08/1995.

3.1. Case - *Prosecutor v. Zejnil Delali, Zdravko Muci, Hazim Deli* and *Esad Lando*

The first case where *ICTY* interpreted the notion of rape in the context of humanitarian law was the case known as *Celebici case*.[28] In the same case, the court devoted extensive consideration to the issue whether rape, as a sexual assault, could be considered as torture.

The major convicted persons of the case were employees occupying different positions in *Celebici camp* who were sentences within the period of May and December 1992 in the territory of former Yugoslavia, in particular, for serious crimes of international humanitarian law (torture, sexual violence, beating and other cruel and inhuman treatment) committed in *Celebici camp*.

When considering the issue, in the mentioned judgement, the court cited and analysed established judicial practice of both, European Court of Human Rights and the various international judicial authorities related to similar issues and indicated that domestic legislation of certain countries interpreted the rape as the involuntary (non-consensual) sexual relation with its different variations.

The Court accepted definition of rape and sexual violence made by *ICTR* in the case *Prosecutor v. Jean-Paul Akayesu* where rape was interpreted as physical penetration of sexual nature in the body of a person being in forced circumstances. While sexual violence, which includes rape, was considered as any action of sexual nature committed by coercion.[29]

And finally, taking into consideration the context of interpretation, *ICTY* additionally considered in this case that "rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts."[30]

The content of the delivered judgement indicates that one of the objectives of the panel of judges reviewing the case was also the consideration of the issue, whether the rape was torture in accordance with the provisions of Geneva Convention.

Although Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment envisages the definition of torture, but there is no reflection of specific acts defining the torture, it is more focused on the conceptual framework of the state sanctioned violence.

In order to determine in which cases rape may be qualified as torture, the Court, for the purposes of their further application, considered it necessary to examine relevant conclusions made in judgements of various international and quasi-judicial authorities as well as the United Nations certain relevant reports.

In their judgements, Inter-American Commission of Human Rights and European Court of Human Rights responded the key question - whether or not the rape is the crime of torture.

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[28] See, *Prosecutor v. Zejnil Delali, Zdravko Muci, Hazim Deli and Esad Lando*, International Criminal Tribunal for the former Yugoslavia (ICTY), Case № IT-96-21-T,16/11/1998, <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> [06.08.2017].

[29] See *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwand, Case № ICTR–96-4-T, Trial Chamber I, 02/09/1998, 241, <http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf> [06.08.2017].

[30] See, Footnote 29, § 478

In its Judgement[31] of 1996, Inter-American Commission of Human Rights in the case of *Fernando and Raquel Mejia v. Peru* (the case concerned a school teacher rape twice by the soldier of Peruvian military army), established that the rape of Raquel Mejía was the violation of Article 5 of the American Convention.[32] Within the scope of Article 5, the Commission held that in order to qualify a certain act as the torture (crime of torture) it shall contain three necessary elements. ***First***, it must be an intentional act through which physical and mental pain and suffering is inflicted on a person; ***second***, it must be committed with a purpose; ***third***, it must be committed by a public official or by a private person acting at the instigation of the former.[33]

Regarding the mentioned case, the Commission established that the three elements of the definition of torture were presented to qualify the rape of *Raquel Mejia* as torture, in particular, the fact that rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, to reflect on the fact of being made the "subject of abuse"[34] of this nature also causes a serious psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.

The establishment of the fact by the Court that Ms *Mejia* was raped as the alleged member of a revolutionary and sabotage group, this act to some extent was her personal punishment and the rape as the punitive measure that totally met the conditions of the above mentioned second element and finally, the main point is that, the third element was also established, she was raped by the service member of Peruvian Army.

In the referred judgement, regarding the consequences of rape and whether the rape cause pain or suffering when discussing the issue, the Court concluded that it shall be assessed not only by noticeable physical injuries but by psychological and social consequences of rape as well. In determining the gravity of pain and suffering that accompanies rape as the act of violence, consideration should be given to physical and mental feelings of the victim relating to public ostracism[35], as well as how the victim's spouse, children and family members in general respond to the fact; whether their family integrity is at stake, etc.[36]

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31 See *Fernando and Raquel Mejia v. Peru*, Case № 10.970, 01.03.1996, Annual Report of the Inter-American Commission on Human Rights, Report № 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157, 1996, <http://hrlibrary.umn.edu/cases/1996/peru5-96.htm> [22.08.2017].

32 See Inter-American Convention on Human Rights "Pact of San Jose, Costa Rica", 22.11.1969, <https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf> [22.08.2017].

33 See Footnote 29, § 483.

34 *Fernando and Raquel Mejia v. Peru*, Case № 10.970, 01.03.1996, Annual Report of the Inter-American Commission on Human Rights, Report № 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157, 1996, <http://hrlibrary.umn.edu/cases/1996/peru5-96.htm> [22.08.2017].

35 Ostracism (*Ostrakismos*) — exclusion and rejection from a society, repudiation, criticism, sarcasm, Dictionary of foreign words of National Library of the Parliament of Georgia, 1989, <http://www.nplg.gov.ge/gwdict/-index.php?a=term&d=3&t=28951> [10.12.2018].

36 See Footnote 32, § 186, cit *Prosecutor v. Zejnil Delali, Zdravko Muci, Hazim Deli and Esad Lando*, Case № IT-96-21-T, 16.11.1998, ICTY, § 486, 494, <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> [06.08.2017].

The opinion that rape as a form of sexual abuse constitutes torture was also mentioned by the UN Special Rapporteur on Torture in a report submitted pursuant to the Commission on Human Rights in 1992,[37] which emphasised that "since it was clear that rape against women held in detention were a particularly ignominious violation of their inherent dignity and right to physical integrity of the human being, rape, as the method of torture,[38] accordingly constituted an act of torture."[39]

In his first report, the UN Special Rapporteur listed various forms of sexual aggression as the methods of torture, including rape and insertion of objects into the orifices the body.[40]

In the above mentioned second Report of the Special Rapporteur, submitted pursuant to Commission on Human Rights, Commission of Special Experts[41] drafted report regarding harm inflicted to victims of rape. The Report states that "rape and other forms of sexual assault harm not only the body of the victim, the more significant harm is inflicted to honour and dignity of the victim. The more significant harm is the feeling of total loss of control over the most intimate and personal decisions and bodily functions. This loss of control infringes on the victim's human dignity."[42]

In reasoning its judgement, *ICTY* Trial Chamber, when considering the issue of segregation the rape from the act of torture, referred to the Report of UN Special Rapporteur - "Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict"[43] and considered the rape as torture on discriminatory grounds. The Special Rapporteur noted that the The Committee on the Elimination of Discrimination against Women had recognised that violence during armed conflicts directed against a woman solely because of her being a woman, including "acts that inflict physical, mental or sexual harm or suffering", represents a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms.

Finally, in view of the above discussion, the Trial Chamber therefore finds that the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows:

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37 See Summary record of the 21st meeting, held at the Palais des Nations, Geneva, on Tuesday, E/CN.4/-1992/SR.21, 11.02.1992: Economic and Social Council, Commission on Human Rights, 48th session, § 35, <http://hr-travaux.law.virginia.edu/document/cped/ecn41992sr21/nid-2460> [24.08.2017].

38 See *Klip A. H., Sluiter G. K. (Goran)*, Annotated Leading Cases of International Criminal Tribunals, Vol. VIII: The International Criminal Tribunal for the Former Yugoslavia 2001-2002, Intersentia, Antwerp Oxford, 2005, 950, § 181.

39 See, Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur, Mr. *Nigel S. Rodley*, submitted pursuant to Commission on Human Rights resolution 1992/32, E/CN.4/-1995/34, § 16. <http://hrlibrary.umn.edu/commission/thematic51/34.htm> [24.08.2017].

40 Comp. *Report* by the *Special Rapporteur,* Mr. *Kooijmans P.,* appointed pursuant to commission on human rghts resolution 1985/33, § 119, <http://ap.ohchr.org/documents/E/CHR/report/E-CN_4-1986-15.pdf> [24.08.-2017].

41 Special Commission of Experts was established pursuant to the United Nations Resolution 780. The Commission of Experts had to draft the Opinion for submission to the Secretary-General of the United Nations regarding the serious violation of provisions of humanitarian law in the territory of Former Yugoslavia within the period of November 1992 to April 1994.

42 See Footnote 29, § 492.

43 Comp. Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, Final Report submitted by Ms. *McDougall. Gay J.*, Special Rapporteur, E/CN.4/Sub.-2/1998/13, 22.06.1998, § 55, <http://www.awf.or.jp/pdf/h0056.pdf> [10.11.2018].

First, there must be an act or omission that causes severe pain or suffering, whether mental or physical,

Second, act is inflicted intentionally;

Third, and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind;

Fourth, and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity. [44]

The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.[45] Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which such act was committed or entrapped or consented, etc.[46]

3.2. Case of *Prosecutor v. Dragoljub Kunarac, Radomir Kovac* and *Zoran Vukovic*

This case known as *Foca Case*, is also known as the *rape case* in the case law of International Criminal Court where the Court established the facts of rape, as the crime against humanity and it was the first verdict of guilty for the Tribunal where the Court, applying norms of national legislation of various countries, decided on the rape as the type of sexual violence. The importance of the case is also underscored by the fact that the majority of the 23 persons convicted by the tribunal have been tried in this case. Although, in fact three accused (*Kunarac, Kovac, Vukovic*) were detained in this case, eight other Bosnian Serb policemen and service members were tried for similar offences in their absence.[47]

Dragoljub Kunarac[48], *Radomir Kovac* and *Zoran Vukovic* as public officials appeared before *ICTY* within the period of April 1992 to February 1993 for their role in committing crimes against Muslim peaceful residents of Bosnia by the soldiers of the military unit under their control.[4950]

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[44] However, later on, several years later, *ICTY*, in the case of Kunarac, established standard on definition of torture in international criminal law different from the current practice; in particular, it did not consider necessary participation of a public official or any other person having similar powers in the commission of the act to qualify the crime as torture. See det. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Kunarac TC)*, Trial Chamber (TC) II, Case № IT-96-23-T & IT-96-23/1-T, ICTY Judgement, 22.02.2001, § 496-497.

[45] See *Prosecutor v. Zejnil Delali, Zdravko Muci, Hazim Deli and Esad Lando*, Case № IT-96-21-T, 16.11.1998, § 491, <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> [06.08.2017].

[46] See Ibid, § 495.

[47] See *Barkan J*., As Old as War Itself: Rape in Foca, Dissent Magazine Winter, 2002, <http://dissentmagazine.org/article/?article=633> [18.08 2018].

[48] Details concerning the case of Kunarac, see http://www.internationalcrimesdatabase.org/Case/97/Kunarac-et-al/> [24.09.2018].

[49] All three accused were members of a military unit, formerly know as the *"Dragan Nikolic unit",* which was part of a local tactic group and was deployed in the city of Foca in Bosnia and Herzegovina.

The Tribunal held that among other actions they held Muslim women and girls under detention during months who were raped on regular basis and they were not just following orders (if there were such orders), the evidence shows free will on their part.[51]

In the referred case both, Trial Chamber and Appellate Chamber explained definition of rape within the scope of Article 3 of Geneva Convention as the crime committed against honour and dignity and Article 5(c) of the Statute of Tribunal as the crime committed against humanity.[52]

Under the circumstances that the elements of rape were not considered neither in the norms of the Statute or international law, nor in the human rights instruments, the Trial Court reviewed the judgements delivered in *Furundzija case*[53] and *Prosecutor v. Jean-Paul Akayesu*[54] and finally held that it was impossible to establish the elements of crime only based on the norms of customary law and international criminal law or on the basis of analysing the general principles.

The Court held that it was impossible to word the precise definition of rape without applying the national criminal legislation of a number of countries worldwide where the rape as the elements of crime is defined in the most precise manner taking into consideration the specificity of principles of criminal law.

for this reason, it was necessary to review the principles of criminal law inherent to the basic legal systems worldwide and the Court reviewed norms on rape of national legislation of 27 countries[55] and at the initial stage grouped different factors envisaged for qualification of various actions of sexual nature as rape into three categories:

- ***First***, ssexual activity committed using violence or threat of violence against a victim or a third person;
- ***Second***, sexual activity accompanied by various such circumstances the presence of which places the victim in particularly vulnerable / unprotected position or negate her ability to make an informed consent[56] or refusal;
- ***Third***, sexual activity occurs without consent of the victim.[57]

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50 See, det. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Kunarac TC)*, Trial Chamber (TC) II, Case number IT-96-23-T & IT-96-23/1-T, ICTY Judgement, 22.02.2001, <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> [25.08.2018].

51 See *Mertus J*., Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, American Society for International Law, 2001, <https://www.asil.org/insights/volume/6/issue/6/judgment-trial-chamber-ii-kunarac-kovac-and-vukovic-case> [07.09.2018].

52 See Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), UN Security Council, (UNSC Res. 808), 25.05.1993, <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> [24.09.2018].

53 See *Prosecutor v. Furundzija*, Case IT-95-17/1-T, Judgement, ICTY, 10.121998.

54 See det. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR–96-4-T, Trial Chamber I, 02.09.1998, § 597. ICTY also referred to this judgement in the case of *Prosecutor v. Zejnil Delali and Others*, Case IT-96-21-T, Judgement, 16112.1998, § 478-479.

55 The court mainly compared norms of criminal law of the UK, Canada, Belgium, India, South Africa and Australia. See ICTY, Prosecutor v. Dragoljub Kunarac and others, Trial Judgement, § 453-456.

56 Informed consent - is the necessary precondition to provide certain medical care in the medical sector, although in the given case, the term refers to conscious voluntary consent or refusal concerning penetration of sexual nature. Such case may be deemed as absence of the informed consent as: when the consenting person is a child, a person with severe mental disorder or otherwise incapable, when, at the moment of consent, he or she does not fully understand or realise what he or she is consenting to and what are the surrounded circumstances.

The indicated factors violate *sexual autonomy* of the victim and penalise the act of sexual nature. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.[58]

The Court also emphasised the importance to establish the fact of victim's consent as the additional element of rape and broadly reviewed the issue of absence of non-voluntary or non-consensual sexual intercourse on the basis of generalised analysis of national criminal legislation of various countries and explained more widely the importance of the fact of victim's will and consent being in vulnerable state.

The Court explained that in the disposition of rape, solely express reference to and further identification of penetration methods of sexual nature and forms of their commission i.e. force or threat of force against, as it took place in the judgements of the above mentioned cases, do not fully reflect the nature of this crime in international law. "Victim's consent" is the common element for almost all countries' jurisdictions, therefore it considered that definition of rape taking into account all the above mentioned elements, makes the definition of the elements of this crime more complete.[59]

In light of the above considerations, the Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by:

the sexual penetration: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.[60]Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.

The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[61]

Regardless the above mentioned position of the prosecution, Report of the Preparatory Commission for the International Criminal Court on the Elements of Crimes[62] justifies the part of conclusion of the Trial Chamber concerning the establishment of victim's consent as the fact of presence of the mandatory element of rape, the content of which fully complies with the provisions of Articles 6, 7 and 8 of the Rome Statute and in its essence, it is an auxiliary mean to identify certain elements of crimes envisaged in the Statute and properly qualify the act as a crime; where the rape is considered in the context of the

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57 See *Prosecutor v. Dragoljub Kunarac and others*, Trial Judgement (ICTY), § 442.

58 See ibid, § 457.

59 See ibid, § 438-440.

60 Comp. Elements of rape and sexual violence, Report of the Preparatory Commission for the International Criminal Court. Finalised draft text of the elements of crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 06/07/-2000, <https://www.auswaertiges-amt.de/blob/229242/7295447c97512a3ca7cfe5970d729239/dl-elementsofcrime-data.pdf> [24.11.2018].

61 See, *Prosecutor v. Dragoljub Kunarac and others*, Trial Judgement (ICTY), § 460, ob. *Klip A. H., Sluiter G. K. (Goran)*, Annotated Leading Cases of International Criminal Tribunals, Vol. VIII, The International Criminal Tribunal for the Former Yugoslavia 2001-2002, Intersentia, Antwerp Oxford, 2005, 940.

62 See Report of the Preparatory Commission for the International Criminal Court. Finalised draft text of the elements of crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 06/07/2000, <https://www.auswaertiges-amt.de/blob-/229242/7295447c97512a3ca7cfe5970d729239/dl-elementsofcrime-data.pdf> [24.11.2018].

crimes committed against humanity and war crimes and the mandatory element of which is the declared so called "true consent" of the person in whose body the penetration of sexual nature occurs.[63]

The judgement delivered by the Appellate Chamber on the basis of the appeal of defence where appellants challenged the Trial Chamber's definition of rape. With negligible differences in diction, they propose instead definitions requiring, in addition to penetration, a showing of two additional elements: (a) force or threat of force and (b) the victim's "continuous" or "genuine" resistance,[64] in which one of the appellant Kovac contended that the latter requirement provides notice to the perpetrator that the sexual intercourse is unwelcome. He argued that "resistance had to be real throughout the duration of the sexual intercourse because otherwise it may be concluded that the alleged victim consented to the sexual intercourse.[65]

In contrast, the Respondent dismisses the Appellants' resistance requirement and largely accepts the Trial Chamber's definition. In so doing, however, the Respondent emphasises an important principle distilled from the Trial Chamber's survey of international law: "serious violations of sexual autonomy are to be penalised"[66] and that force, threats of force, or coercion nullifies true consent.[67]

The Appeals Chamber concurs with the Trial Chamber's definition of rape based on review of common law legal system and continental law legal system and noted that the Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.[68]

The Trial Chamber considered the definition of rape in the present case to be more progressive compared to the tribunal's earlier definition of a rape[69] and attempted to clarify the relevance and importance of establishing the facts of violence and victim's consent for correct interpretation of the definition of rape. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape.

The Trial Chamber attempted to explain that there are factors [other than force] (e.g. (Violent or coercive circumstances, state) which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. A narrow focus on force or threat of force could permit perpetrators

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63 Ibid. Article 7 (1) (g)-1 Crime against humanity of rape, Article 7 (1) (g)-6 Crime against humanity of sexual violence, Article 8 (2) (b) (xxii)-1 War crime of rape, Article 8 (2) (b) (xxii)-6 War crime of sexual violence.

64 See *Kunarac* AC, §125 (Kunarac Appeal Brief, § 99; Vukovic Appeal Brief, § 169 ço Kovac Appeal Brief, § 105.), < http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.htm> [25.08.2018].

65 See *Kovac* Appeal Brief, § 107, об. *Klip A. H., Sluiter G. K. (Goran)*, Annotated Leading Cases Of International Criminal Tribunals, Vol. VIII: The International Criminal Tribunal for the Former Yugoslavia 2001-2002, Intersentia, Antwerp Oxford, 2005, 939.

66 See Prosecution Consolidated Respondent's Brief, § 4.19, cited: *Prosecutor v. Dragoljub Kunarac and others*, Trial Judgement (ICTY), § 457.

67 See Prosecution Consolidated Respondent's Brief, § 4.19, see det. *Klip A. H., Sluiter G. K. (Goran)*, Annotated Leading Cases Of International Criminal Tribunals, Vol. VIII, The International Criminal Tribunal for the Former Yugoslavia 2001-2002, Intersentia, Antwerp Oxford, 2005, 939; *Prosecutor v. Dragoljub Kunarac and others*, Appeals Chamber (ICTY), § 126.

68 See *Prosecutor v. Dragoljub Kunarac and others*, Appeals Chamber (ICTY), § 127-128.

69 See *Prosecutor v. Anto Furundzija*, Trial Judgement, ICTY, 10.12.1998, § 185, <http://www.icty.org/-x/cases/furundzija/tjug/en/> [29.11.18].

to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.[70]

Given the coercive circumstances and state, in which each victim of the crime had to be, any consent by the victim to sexual intercourse with the appellants was nullified, and the court did not grant the complaint request concerning to the definition of rape.

4. Conclusion

The analysis of landmark cases of *ICTY* demonstrated that international humanitarian law declares the rape as punishable act, which is primarily aimed at preventing offence of sexual penetration. Furthermore, in a number of progressive judgements delivered by the Tribunal "gender neutral"[71] notion of sexual offences committed by coercion is suggested that is the confirmation of the fact that rape may be committed against both women and men using force or threat of force even if the victim did not make a voluntary consent or otherwise involuntarily participated in it.

All the above mentioned, along with the other benefits, at the national level enable the Common Courts, in the course of administering the justice, together with the case law of the European Court of Human Rights may apply case law of International Criminal Court (including *ad hoc* tribunals) in reasoning the judgements as they are adopted on the basis of the norms of humanitarian and international criminal law and fully comply with the universally recognised principles and norms of international law that is considered as the integral part of the Constitution of Georgia and current legislation.

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[70] See *Prosecutor v. Dragoljub Kunarac and others*, Appeals Chamber (ICTY), § 129

[71] Comp. *Weiner P.*, The Evolving Jurisprudence of the Crime of Rape in International Criminal Law, Journal Boston College Law, Vol. 54, Iss. 3, 2013, 1209-1233, <https://lawdigitalcommons.bc.edu/bclr/vol54/iss3/-14/> [10.02.2019].

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Separation of the Agreement Concluded in Favor of Third Party from the Agreement Concluded Through a Representative**

The difference between an agreement concluded in favor of a third party and an agreement concluded through a representative is demonstrated in the article. The mentioned is shown through establishing interrelation between the separate elements of notion of an agreement concluded in favor of a third party, the purpose of declaration of will of the parties, powers of third party or the basics of legal relations of participants of contractual relationship. All of this illustrates the essence of an agreement concluded in favor of a third party and an agreement concluded through a representative, in addition, it makes clear that not all agreements involving three parties should be regarded as concluded in favor of third party.

Key words: *The agreement concluded in favor of the third party; transactional representation; separation, representative, represented person; third party.*

1. Introduction

Along with the agreement concluded in favor of a third party, there are some legal institutions, where the participation of third parties is a prerequisite for the formation or implementation of an obligatory legal relationship. Both in Georgian and foreign legal literature, there is a difference of opinion with regard to whether all agreements involving three parties should be considered as concluded in favor of a third party; this requires their separation.

The purpose of the study is separation of the agreement concluded in favor of third party from the agreement concluded through a representative, as from one of such institutions, by which the separate features of these agreements will be shown. Separation of the agreement concluded in favor of third party from the agreement concluded through a representative clearly demonstrates the essence of these two institutions and, based on the ascertaining the purpose of declaration of will of the parties, defines the scope of declaration of will of third party. This is important to ensure the proper qualification of legal relationship and, consequently, the correct outcome of the agreement.

The work shows interrelationship between the agreement concluded in favor of third party and a transactional representation. The agreement concluded in favor of third party is separated from direct representation. By establishing the interrelationship between the rights and responsibilities of the parties to the agreement and the scope of declaration of their will, the difference between these two institutions is displayed.

The general-scientific (historical) as well as special research methods - normative, dogmatic, systemic and comparative-legal methods – are used as a methodological basis of study of work. Historical development of interrelationship between the agreement concluded in favor of third party and the representa-

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tion has been studied using the historical method. For the purpose of differentiation of the agreement concluded in favor of third party and the agreement concluded through a representative, the approaches existing in doctrine and at legislative level have been distinguished using the dogmatic, normative and systemic methods. The approach existing in German doctrine towards the agreement concluded in favor of third party and transactional representation was predominantly displayed based on the comparative-legal method. Consequently, the compatibility of these approaches to the Georgian law has been shown.

2. Interrelation between the Agreement Concluded in Favor of Third Party and the Agreement Concluded Through a Representative

2.1. Historical Review of Agreement Concluded in Favor of Third party and Institute of Representation

According to one of the considerations existing in German legal literature,[1] the agreement concluded in favor of third party was closest to the agreement concluded through the representative.[2] Therefore, for scientific research purposes, the link between these two institutions needs to be properly evaluated, from the historical standpoint as well as according to applicable law.[3]

The Roman law was neither familiar with the agreement concluded in favor of a third party nor the institution of (direct) representation. However, it is clear that the Roman law was familiar with the cases, when it came directly to the representation; but the doctrine has considered it as an exception.[4] The Roman law recognized only the institution of legal representation, but not the "transactional representation"[5] institution.[6]

Neither Roman law commentator-lawyers[7] nor the next generation knew the difference between the agreement concluded in favor of third party and the representation.[8] The commentator-lawyers of Roman law considered the agreement concluded on behalf of a third party as having no legal force.[9] They considered all the agreements, concluded for third party, as uniform legal institution. In their view, the representation and agreement concluded in favor of third party had common rudiments, and the principle – "no one can agree in favor of a stranger"[10] - recognized in classical Roman law was applied towards both of them. But one of them[11] differentiated whether the fulfillment was implemented for a third party or on behalf of

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1 *Dniestrzanski S.,* Die Aufträge zugunsten Dritter, Leipzig, 1904, 6; Comp. *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 16-17.

2 Ibid.

3 *Dniestrzanski S.,* Die Aufträge zugunsten Dritter, Leipzig, 1904, 9.

4 Ibid. 10.

5 *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 426; *Zoidze B.,* Comments to the Civil Code of Georgia, Book I, Tbilisi, 2002, 277 (in Georgian).

6 *Chanturia L.,* Introduction to the General Section of Civil Law of Georgia, Tbilisi, 2000, 410 (in Georgian).

7 "Glossatoren".

8 *Dniestrzanski S.,* Die Aufträge zugunsten Dritter, Leipzig, 1904, 15.

9 Ibid. 12.

10 "Alteri stipulari nemo potest", *Zweigert K., Kötz H.,* Introduction to the Comparative jurisprudence in the field of Private Law, *Sumbatashvili E. (transl.), Ninidze T. (ed.),* Vol. II, Tbilisi, 2001, 146 (in Georgian); *Bayer W.,* Der Vertrag zugunsten Dritter, Tübingen, 1995, 5 ff; *Dniestrzanski S.,* Die Aufträge zugunsten Dritter, Leipzig, 1904, 10, 15; *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 16.

11 "Accursius - gehörte zur Gruppe der Glossatoren".

third party; this indicates a separation of agreement concluded in favor of third party and representation from each other, but it was only of formal and not material nature.[12]

Later, the modern theories developed in the second half of 19th century differentiated the representation and the agreements concluded in favor of third party from each other.[13] The German lawyer - *Friedrich Savigny*[14] recognized the difference between these two institutions.[15] In the deal made based on the representation, *Savigny* considered only the represented person as party, and the representative participating in conclusion of an agreement, considered as bearer of a will of represented person.[16] Together with *Savigny*, *Heinrich Dernburg*[17] made a principled difference between these two institutions; in the agreement concluded in favor of third party, *Dernburg* treated the creditor – the "promisee"[18] as the counterparty; and in representation – the represented person and not the representative.[19] According to *Windscheid,*[20] the person concluding the agreement in favor of third party acted on his/her own behalf, and the one who concluded the agreement as the representative acted on behalf of others.[21]

At present, the agreement concluded in favor of a third party and an agreement concluded through a representative are regarded as non-interdependent institutions, but certain similarities between them are the subject of doctrinal research.[22]

2.2. Separation of the Agreement Concluded in Favor of Third Party from the Direct Representation

The agreement concluded in favor of third party should be separated not from the institution of representation in general, but from the deal made by the representative. Since the legal representation proceeds from the law[23] and in the present case the rights of a third party arise not based upon a law but an agreement, the subject of comparison is only the "transactional representation".

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12 *Dniestrzanski S.,* Die Aufträge zugunsten Dritter, Leipzig, 1904, 12-13.

13 Ibid. 46-50.

14 *Friedrich Carl von Savigny* (1779-1861.).

15 *Dniestrzanski S.,* Die Aufträge zugunsten Dritter, Leipzig, 1904, 46.

16 *Chanturia L.,* Introduction to the General Section of Civil Law of Georgia, Tbilisi, 2000, 411 (in Georgian); Comp. *Dniestrzanski S.,* Die Aufträge zugunsten Dritter, Leipzig, 1904, 47.

17 *Heinrich Dernburg* (1829-1907).

18 "Versprechensempfänger=Promissar, Stipulant".

19 *Dniestrzanski S.,* Die Aufträge zugunsten Dritter, Leipzig, 1904, 47.

20 *Bernhard Windscheid* (1817-1892).

21 *Dniestrzanski S.,* Die Aufträge zugunsten Dritter, Leipzig, 1904, 48.

22 See *Graffenried C.,* Schadloshaltung des Dritten in zweivertraglichen Dreiparteienverhältnissen, Diss., Bern, 2019, Rn. 219 ff., 98 ff.; *Raab Th.,* Austauschverträge mit Drittbeteiligung, Tübingen, 1999, 37, 38; *Erman W., Westermann H.,* Handkommentar, 14., Aufl., §328, Köln, 2014, Rn. 2, 1485; *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 15-17; *Gottwald P.,* Münchener Kommentar, Schuldrecht AT, München, 8. Aufl., 2019, §328, Rn. 12 ff., 676-677; *Looschelders D.,* Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 408; *Christandl G.,* Der Vertrag zugunsten Dritter im Entwurf für ein neues spanisches Schuldrecht im Spiegel des europäischen Vertragsrechts, ZEuP 2012, 247; *Hirtsiefer W.,* Unterschied zwischen echtem und unechtem Vertrag zugunsten Dritter, Diss., Köln, 1935, 2; *Baigusheva Yu. V.,* Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 117 (in Russian); *Chanturia L.,* Comments to the Civil Code of Georgia, Book III, Tbilisi, 2001, 218- 219 (in Georgian).

23 *Zoidze B.,* Comments to the Civil Code of Georgia, Book I, Tbilisi, 2002, 277 (in Georgian); on legal representation see also, *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 401 and

By carrying out a specific action in "transactional representation",[24] the legal effect arises for others.[25] The same takes place in the agreement concluded in favor of third party. An "outward resemblance"[26] of the agreement concluded in favor of third party and transactional representation is conditioned by that in both cases the legal effect under the agreement arises for the person, who did not participate directly in the conclusion of the agreement.[27] Therefore, in order to separate these two institutions, first of all, it is necessary to identify in each case, who is the person, that is, the "other person"[28] (third party), who derives the benefit and/or to whom the rights and obligations arise from the agreement. Such a person, when transactional representation, is a represented person, and in the agreement concluded in favor of third party, usually, a third party not involved in the conclusion of an agreement.

2.2.1. Participants to the Agreement Concluded in Favor of Third Party and Transactional Representation

At least three persons participate in a "transactional representation" as well as in the agreement concluded in favor of third party.[29] The presented person(s) and his/her (their) representative participate on one side of the agreement concluded through the representative, and on the other side - the person(s) with whom the agreement is concluded.

Three entities of jural relationship participate in the agreement concluded in favor of a third party: the debtor as a "promisor",[30] the creditor as a "promisee"[31], in addition, the participant is a "beneficiary"[32] which is a third party.[33] "A promisee is a person, who receives a promise from a promisor regarding

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following (in Georgian); *Jorbenadze S., Chanturia L., (ed.)*, Comments to the Civil Code of Georgia Book I, Tbilisi, 2017, Article 103, field, 7, 593 (in Georgian).

24 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 400-403 (in Georgian).

25 *Erkvania T,* Protection of Interests of Third Parties in the Representation (in accordance with the Civil Codes of Georgia and Germany), Journal "Justice and Law", №3(34)'12, 29 (in Georgian); see also, *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 422 (in Georgian); *Jorbenadze S., Chanturia L., (ed.)*, Comments to the Civil Code of Georgia Book I, Tbilisi, 2017, Article 104, field, 2, 600 (in Georgian).

26 *Chanturia L.,* Comments to the Civil Code of Georgia, Book III, Tbilisi, 2001, 219 (in Georgian).

27 *Baigusheva Yu. V.,* Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 117 (in Russian).

28 *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 276 (in Georgian); *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 421 (in Georgian).

29 *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 429 (in Georgian).

30 "Versprechender=Promittent", see *Wall F.,* Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall – ein Forderungsvermächtnis, Tübingen, 2010, Rn. 1, 4; *Soergel Th., Pfeiffer Th. (Red.), Hadding W.,* BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 12, 11*; Krauskopf P.,* Der Vertrag zugunsten Dritter, Diss., Freiburg Schweiz, 2000, Rn. 14, 6; *Graffenried C.,* Schadloshaltung des Dritten in zweivertraglichen Dreiparteienverhältnissen, Diss., Bern, 2019, Rn. 199, 91.

31 "Versprechensempfänger=Promissar/Stipulant", see *Wall F.,* Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, Rn. 1, 4; *Soergel Th., Pfeiffer Th. (Red.), Hadding W.,* BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 13, 11*; Krauskopf P.,* Der Vertrag zugunsten Dritter, Diss., Freiburg, Schweiz, 2000, Rn. 15, 6.

32 "Begünstigter, Destinatar", see *Wall F.,* Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, Rn. 1, 4; *Soergel Th., Pfeiffer Th. (Red.), Hadding W.,* BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 14, 12*; Krauskopf P.,* Der Vertrag zugunsten Dritter, Diss., Freiburg Schweiz, 2000, Rn. 16, 6.

the fulfillment".[34] The "promisor" is a person, who gives a promise to a party to the agreement on fulfillment in favor of third party.[35] Of the above, the parties to the agreement concluded in favor of a third party are the promisor and the promisee. The third person is not a party to the agreement.

In the Georgian legal literature the third party to the transactional representation is a person to whom the representative concludes an agreement on behalf of the person represented.[36] Therefore, for the purpose of the present work, it is expedient to explain that the comparison will be made not between so-called "third person" and the rights and obligations of a third party participating in an agreement concluded in favor of a third party, but between the latter and represented person, referred to in the same literature as the "other person"[37], - because an outward resemblance of the agreement concluded in favor of a third party and transactional representation, apart from the similarities in the number of parties involved in both of them, is precisely conditioned by the issue of non-participation of these two persons in conclusion of an agreement.

2.2.2. Interrelation between the Person Presented and Rights and Obligations of a Third Party

2.2.2.1. Impact of Declaration of Will of Person Presented and Third Person over the Agreement

An agreement, where the debtor is obliged to fulfill the obligation to a third party is defined as an agreement concluded in favor of a third party.[38] However, the elements of the notion of an agreement in favor of a third party are not exhaustive, because the aforementioned is a very general definition of an

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33 *Joussen J.,* Schuldrecht I, AT, 3., überarb. Aufl., Stuttgart, 2015, 358; *Brox H., Walker W. -D.,* Allgemeines Schuldrecht, 39., Aufl., München, 2015, §32, Rn. 1, 377; *Soergel Th., Pfeiffer Th. (Red.), Hadding W.,* BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 11, 11*; Chechelashvili Z.,* Contract Law, Tbilisi, 2010, 85 (in Georgian).

34 ("Versprechensempfänger ist die Person, der gegenüber dieses Versprechen abgegeben wird."), for this, see *Wall F.,* Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, Rn. 1, 4; Also, ("Die Person, die sich beim Vertrag zugunsten Dritter die Dritt-Leistung vom Promittenten versprechen lässt, heisst Stipulant, Versprechensempfänger oder Promissar"), *Krauskopf P.,* Der Vertrag zugunsten Dritter, Diss., Freiburg Schweiz, 2000, Rn. 15, 6; *Soergel Th., Pfeiffer Th. (Red.), Hadding W.,* BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 12, 11.

35 "Versprechender=Promittent", see *Wall F.,* Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, 4; *Petersen J.,* Die Drittwirkung von Leistungspflichten, Jura, 2013 (12), 1230; *Kropholler J.,* German Civil Code, Study Comment, *Darjania T., Chechelashvili Z. (transl.), Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, §328, field 4, 233 (in Georgian).

36 *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 288 (in Georgian); *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 429 (in Georgian); see, *Erkvania T,* Protection of Interests of Third Parties in the Representation, Journal "Justice and Law" №3(34)'12, 28-43 (in Georgian); Opposing opinion (regarding expediency of noting the third party as the second party), see *Chanturia L. (ed.),* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 103, field 5, 592 (in Georgian).

37 *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 276 (in Georgian); *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 421 (in Georgian).

38 *Bayer W.,* Der Vertrag zugunsten Dritter, Tübingen, 1995, 129.

agreement concluded in favor of third party. But since the subject of the present article is not a notion of an agreement concluded in favor of third party[39] that is also the subject of independent research, only the section that is necessary for separation from transactional representation will be focused.

The person so-called the "other person" represented is not directly involved in arranging a deal. When arranging a deal the representative declares his/her own but not the represented person's will.[40] But the scope of action of the representative is precisely based upon the will of the person represented that is expressed in granting the representative authority by the latter.[41] The person represented shall determine the scope of this authority for himself/herself.[42] Therefore, the will of the represented person have influence upon the formation[43] of the representative's will and the deal is arranged exactly at the will of represented person, i.e. "the deal is made in representative's identity".[44] The third party, when concluding an agreement in its favor, cannot influence the formation of a will of "promisee". The promisee, independently of the third party, concludes the agreement in favor of the third party at his/her own will. However, apparently, this does not imply that the will of third party is neglected in the agreement concluded in its favor. In certain cases, for conclusion of agreement in favor of a third party, the availability of written consent of third party may be prescribed by the law. For example, a life insurance agreement concluded in favor of a third party.

For differentiation of transactional representation and the agreement concluded in favor of a third party, the influence of declaration of will of third party over the agreement concluded in its favor have to be separated from each other before and after conclusion of agreement. Although a third party has not the legal capacity to have an influence upon how its authority will be formulated in the agreement, but he/she is free to decide whether he/she receives the fulfillment promised in his/her favor at all.[45] For example, if a third party does not participate in the contracting process and mostly does not show the will to do so,[46] it affects an agreement already concluded in its favor in such a way that a third party may waive the right acquired under the Article 351 of the Civil Code of Georgia (hereinafter referred to as CCG).[47] This, in turn, becomes the basis for the change in the addressee of fulfillment of obligation or completely the termination of the contractual relationship between the promisee and the promisor. The will of the person represented may always influence the transaction both before as well as after its conclusion.

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39 On the notion and essential conditions of the agreement concluded in favor of the third person see *Legashvili D.,* Peculiarities of Definition of Essential Conditions for the Agreement Concluded in Favor of the Third Party, based on Independent Request, "Law Journal", №2, 2016, 104-120 (in Georgian).

40 *Erkvania T,* Protection of Interests of Third Parties in the Representation, Journal "Justice and Law" №3(34)'12, 32 (in Georgian); *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 283 (in Georgian); *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 430, 431 (in Georgian); *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 405 (in Georgian).

41 *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 283 (in Georgian).

42 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 402 (in Georgian).

43 *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 283 (in Georgian).

44 *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 422 (in Georgian).

45 *Staudinger J., Löwisch M. (Red.), Jagmann R.,* BGB, Buch 2, Berlin, 2015, §333, Rn. 2, 210.

46 *Chanturia L.,* Comment to the Civil Code of Georgia, Book III, Tbilisi, 2001, 216 (in Georgian).

47 See *Rusiashvili G., Aladashvili A., Chanturia L. (ed.),* Comment to the Civil Code of Georgia, Book III, Tbilisi, 2019, Article 351, field 1, 292 (in Georgian); *Baigusheva Yu. V.,* Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 118 (in Russian).

Therefore, although the person represented is not directly involved in conclusion of an agreement, but his/her will is implemented by a representative. In the agreement concluded in favor of a third party, the promisee does not exercise the will of a third party, but willfully grants the right of claim or only an entitlement for fulfillment to the third party, and declaration of will by the third party is deemed as precondition for raising of right in its favor only in certain cases. Such is, for example, a life insurance agreement concluded in favor of a third party, for the validity of which, pursuant to the Article 844, section two of the CCG, the written consent of that person or his/her legal representative is required.

The attention should also be paid to the consequences of the death of the person represented and the third person. According to Article 109 "d" of the CCG, the death of the grantor (the representative) of the authority is the basis for termination of the representative power. Therefore, in the event of the death of the represented person, if "an assignment agreement is not concluded under the proper condition", the representative power shall be deemed as terminated.[48] The death of a third person in the agreement concluded in favor of a third party will not always result in the termination of this contractual relationship. Unless otherwise stated in the essence of the obligation, the parties may agree under the agreement that in the event of death of a third person, the third person shall be replaced by another.

The consequence of death of the promisee and the representative must also be noted here. Proceeding from "the essence of representation",[49] if the death of a representative is the basis for cancellation of representative power,[50] in the agreement concluded in favor of a third party, exactly the death of the promisee may become the basis for origination of the right to a third party, when fulfillment in favor of a third party shall be provided after the death of a promisee.[51] But the death of an insurer in the insurance agreement concluded in favor of a third party may become the basis for termination of this contractual relationship due to non-payment of the insurance premium. Therefore, whether the death of the promisee is the basis for termination of the contractual relationship in favor of a third party should, in each particular case, be determined proceeding from the essence of obligatory relationship.

2.2.2.2. Addressee of Agreement Outcome

In the direct representation, the outcome of the deal is observed directly towards the person represented,[52] also, in the agreement concluded in favor of a third the outcome also occurred for a third party. But unlike the person presented, the third party does not become a party to the agreement.[53] The person

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48 *Jorbenadze S., Chanturia L. (ed.),* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 109, field 8, 622- 623 (in Georgian).

49 Ibid.

50 Ibid.

51 "Vertrag zugunsten Dritter auf den Todesfall", *Wall F.,* Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, 536 ff.

52 *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 277; *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 427; *Jorbenadze S., Chanturia L. (ed.),* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 104, field 2 and next field, 600 (in Georgian); *Gernhuber,* Das Schuldverhältnis, Tübingen, 1989, §20 I 3-4, 470.

53 *Looschelders D.,* Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 408; *Gernhuber J.,* Das Schuldverhältnis, Tübingen, 1989, §20 I 3-4, 470; *Baigusheva Yu. V.,* Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 117 (in Russian).

presented is a party to the agreement and, consequently, all contractual rights and obligations arise thereon. Accession of third party to an agreement or other type of co-participation is not required for arising of its right under the agreement[54] and its non-participation may not be the basis for the voidance of this Agreement.[55] If a third party accesses to an agreement this may not be an agreement concluded in favor of a third party; in such case, the third party itself shall become a party to the agreement[56] that contradicts the essence of such an agreement.

During representation, the addressee of the outcome of transaction is only the person represented,[57] in particular, in accordance with first section of Article 104 (e) of Civil Code of Georgia, by the deal that the representative makes within his/her authority and on behalf of the person he/she represents, the rights and obligations arise only for person represented; i.e. reasoning from the deal, the rights and obligations are also arisen for person represented.[58] In this regard the content of third section of Article 104 of the same Code should also be taken into account, according to which if the representative does not indicate on his/her representative power when concluding the deal, then the deal generates the outcomes directly for the person represented only if the other party had to make assumption of representation. The same rule applies even when it doesn't matter for other party with whom the deal is arranged.

In the agreement concluded in favor of a third party, the third party has only a separate right and obligation, the rest of the rights and obligations remain with the promisee.[59] For example, proceeding from the content of Article 349 of the CCG, the creditor and the debtor grant the right to request the fulfillment of the contract to the third party. But it is interesting who enjoys the rest of the rights arising from the agreement, since in the case of non-fulfillment of the liability stipulated under the agreement – non-fulfillment of primary requirement –- the issue of a secondary claim is considered.[60]

"In the case of a breach of an obligation by a promisor, the question often arises in legal scientific literature as who is entitled to exercise the secondary rights, the promisee or the third party, or only both

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54 *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 14; *Jauernig O., Stadler A.,* BGB, Kommentar, 15. Aufl, München, 2014, §328, Rn., 8, 475.

55 The Judgment №3k-1492-02 of 19th March, 2003 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia.

56 *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 14; *Jauernig O., Stadler A.,* BGB, Kommentar, 15. Aufl, München, 2014, §328, Rn., 8, 475.

57 The Judgment №3as-329-313-2013 of 30th April, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia; The Judgment №as-127-124-2011 of 5th September, 2011 of the Chamber of Civil Cases of the Supreme Court of Georgia; The Judgment №as-479-806-05 of 27th January, 2006 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia.

58 *Chanturia L. (ed.),* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 219 (in Georgian); see also, *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 406 (in Georgian); *Erkvania T,* Protection of Interests of Third Parties in the Representation, Journal "Justice and Law", №3(34)'12, 29 (in Georgian).

59 *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 16-17.

60 *Boiling H., Lutrinhhause P.,* Systemic Analysis of Basics for Requirements of Civil Code of Georgia, Bremen, Tbilisi, 2009, 30 (in Georgian); *Macharadze M.,* Withdrawal from and termination of Agreement – differences and the legal consequences (in accordance with the Georgian and German Laws) Review of Georgian Law - Special Edition, 2008, 126 (in Georgian).

of them together".[61] Specifically, in German doctrine, before as well as after the reform of law of obligation, it is debatable, in the event of breach of an obligation by the promisor, whether the third party should enjoy the right of claim to withdraw from the agreement, payment of damages, additional fulfillment or reduce the price,[62] (for example: Articles 352, 394, 491, 492, 494, 642, 643, 644; 645 of the CCG; §§ 281, 323, 437, 634 of the GCC), whether a third party should have the "freedom of choice among the requirements",[63] such as: the right to claim damages instead of fulfilling of obligation,[64] the choice between withdrawal from the agreement and reduction of price.[65] German legal literature suggests that the promisee is entitled to claim damages instead of fulfilling the obligation.[66] The promisee also has the right to claim to withdraw from the agreement, terminate the agreement, cancel the agreement,[67] and reduce the purchase price.[68] But by interpretation of an agreement it can be determined that a third party may enjoy full rights under the Agreement.[69] The latter position cannot be shared unconditionally. In case of breach of the obligation, the peculiarity of the agreement concluded in favor of a third party calls forth the need for a different arrangement of implementation of claims and rights arising from it. Since a third party does not become a party to an agreement, it cannot enjoy all the rights deriving from the agreement. For example: the legal nature of the institution of withdrawal from an agreement calls forth that the third party's right to withdraw from the agreement should be rejected. Withdrawal from the agreement can be implemented only by one of the parties; accordingly, a third party cannot withdraw from an agreement to which it is not a party. But if a third party acquires an independent, irrevocable right, the promisee, in consequence of the exercising of secondary rights, may deprive the third party of this right only when the third party agrees to infringe upon its legal position.[70] Whether a third party

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61 *Bayer W.,* Der Vertrag zugunsten Dritter, Tübingen, 1995, 339; *Larenz K.,* Lehrbuch des Schuldrechts, Band I, AT, 14. Aufl., München 1987, 223; *Joussen J.,* Schuldrecht I, AT, 4., überarb. Aufl., Stuttgart, 2017, Rn. 1195 ff., 367.

62 *Staudinger J., Löwisch M. (Red.), Jagmann R.,* BGB, Buch 2, Berlin, 2015, §335, Rn. 10, 233-234; see also, *Soergel Th., Pfeiffer Th. (Red.), Hadding W.,* BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 41, 22; *Joussen J.,* Schuldrecht I, AT, 4., überarb. Aufl., Stuttgart, 2017, Rn. 1195 ff., 367.

63 *Chachava S.,* Online comment to the Civil Code of Georgia, Article, 492, field 7, <www.gccc.ge> [30.03.2016] (in Georgian); on "Alternative Competition of Requirements", see *Chachava S.,* Competition of Requirements and Basics for Requirements in Private Law, Tbilisi, 2010, 32-35 (in Georgian).

64 *Larenz K.,* Lehrbuch des Schuldrechts, Band I, AT, 14. Aufl., München, 1987, 223.

65 *Staudinger J., Löwisch M. (Red.), Jagmann R.,* BGB, Buch 2, Berlin, 2015, §335, Rn. 10, 234; see *Chachava,* Online comment to the Civil Code of Georgia, Article 492, field 3 and following field, <www.gccc.ge>, [30.03.2016] (in Georgian).

66 Comp. *Kropholler J.,* German Civil Code, Study Comment, *Darjania T., Chechelashvili Z. (transl.), Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, §328, field 15, 235 (in Georgian); The Decision №3g-ad-537-k-02 of 16th April, 2003 of Chamber of administrative and other category cases of the Supreme Court of Georgia.

67 "Der Widerruf".

68 *Palandt O., Grüneberg Ch.,* BGB, 78. Aufl, München, 2019, §328, Rn., 6, 565.

69 Comp. *Rusiashvili G., Aladashvili A., Chanturia L. (ed.),* Comment to the Civil Code of Georgia, Book III, Tbilisi, 2019, Article 349, field 28, 277 (in Georgian).

70 *Staudinger J., Löwisch M. (Red.), Jagmann R.,* BGB, Buch 2, Berlin, 2015, §335, Rn. 14, 235-236; *Joussen J.,* Schuldrecht I, AT, 4., überarb. Aufl., Stuttgart, 2017, Rn. 1197, 367.

should enjoy the right to fulfill particular claim, depends on the legal position of a third party in the agreement as well as the content of the right.

Thus, the results of showing the will of promisee in the agreement concluded in favor of a third party refers not only to the third party but, in most cases, the promisee itself is an authorized and obliged person.[71] For example, if a third party under the Article 351 of the CCG renounces the right acquired under the agreement, then the promisee may demand fulfillment of the obligation in his/her favor (if this is possible proceeding from the essence of the obligation).

2.2.2.3. A Person with Right to Rescind

It is controversial whether only the creditor has the right to rescind or a third party too.[72]

In accordance with section three of Article 59 of CCG, an interested person shall enjoy right to rescind. Although, in line with the view existing in Georgian legal literature, such person is considered as "party to the transaction" and the third person, whose interests may be infringed by transaction,[73] but the position that the "declarer of a will or the one, who has shown the voidable will, enjoys right to rescind" shall be shared.[74] Since a third party does not show the will to conclude the agreement, it cannot exercise the right to rescind. By the same logic, when a transaction is voidable by reason of a defect in the declaration of will, the will of representative but not the represented person shall prevail.[75] However, if the circumstances, which may cause invalidity of transaction, are known to the person represented before the conclusion of an agreement, the will of the person represented and not representative shall be taken into account in the event of voidance of transaction.[76]

Thus, in the event of voidance of transaction, the person represented, as well as the third party, cannot enjoy the right to rescind. In the transaction concluded by the representative, the person having the right of rescission is a representative, and in the agreement concluded in favor of a third party – a

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71 *Looschelders D.,* Schuldrecht, AT, 16., neu bearbeit. Aufl., München, 2018, §51, Rn. 26, 423.

72 See *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 360 (in Georgian); *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 196 (in Georgian); *Chanturia L.,* Introduction to the General Section of Civil Law of Georgia, Tbilisi, 2000, 390 (in Georgian).

73 *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 196 (in Georgian); *Chanturia L.,* Introduction to the General Section of Civil Law of Georgia, Tbilisi, 2011, 395 (in Georgian); *Darjania T.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 412, field 8, 412 (in Georgian).

74 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 360 (in Georgian); see also, *Rusiashvili G., Chanturia L. (ed.),* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 85, field 2, 492 („Only the person taking part in arrangement of a deal, has the right of rescission") (in Georgian).

75 *Erkvania T,* Protection of Interests of Third Parties in the Representation, Journal "Justice and Law", №3(34)'12, 33 (in Gorgian); *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 284 (in Georgian); Comp. *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 408 (in Georgian).

76 *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 284 (in Georgian); see the Judgment №as-479-806-05 of 27th January, 2006 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia.

promisee (or promisor). However, unlike a third party, the person represented has the right to rescind, if he/she was aware of the circumstances causing the voidance of transaction.

2.2.3. Interrelationship of Powers of the Promisee and the Representative

The action of the promisee in the agreement concluded in favor of a third party, and the action of the representative in the transactional representation, causes the effect provided for the agreement for another person; i.e. the other person acquires the right to claim execution of the agreement.[77] In the first case - in an agreement concluded in favor of a third party by independent request, such is a third party[78] and in the second case – the represented person. But the difference between them is conditioned by that the relationship arisen between the representative and the person represented is based upon the transaction - the granting of power of attorney[79] as a form of outward expression of representative power.[80] However, the relationship between the promisee and the third party is not based upon the granting of authority to the promisee. Although, there is a legal relationship between the promisee and the third party, which is noted[81] as a "currency relationship",[82] but, in general, authenticity of currency relationship plays no role[83] in conclusion of agreement in favor of third party and its authenticity, also, for acquiring of legal claim by the third party, because the agreement concluded in favor of a third party (proportional relationship) and the currency relationship are independent of each other.[84]

The promisee - on his own behalf and not on behalf of a third party[85] and for the interests of others, and the representative - on behalf of others[86] and for the interests of others makes a deal;[87] i.e. the

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77 *Looschelders D.,* Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 408.

78 *Medicus D., Lorenz S.,* Schuldrecht I, BT, 20., neubearb. Aufl., München, 2012, Rn., 805, 410.

79 *Chanturia L.,* General Section of Civil Law of Georgia, Tbilisi, 2011, 426 (in Georgian); The Judgment №as-127-124-2011 of 5th September, 2011 of the Chamber of Civil Cases of the Supreme Court of Georgia; see, *Baigusheva Yu. V.,* Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 118 (in Russian); *Graffenried C.,* Schadloshaltung des Dritten in zweivertraglichen Dreiparteienverhältnissen, Diss., Bern, 2019, Rn. 220, 99.

80 *Chanturia L.,* General Section of Civil Law of Georgia, Tbilisi, 2011, 434 (in Georgian); The Judgment №as-329-313-2013 of 30th April, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia; The Judgment №as-127-124-2011 of 5th September, 2011 of the Chamber of Civil Cases of the Supreme Court of Georgia.

81 *Looschelders D.,* Schuldrecht, AT, 12. Aufl., München, 2014, Rn. 1137, 404; *Bamberger G., Roth H. Janoschek Ch.,* BGB, 4. Aufl., München, 2019, §328, Rn. 8, 2286; *Medicus D., Lorenz S.,* Schuldrecht I, AT, 21., neubearb. Aufl., München, 2015, Rn. 853, 387.

82 "Valutaverhältnis".

83 *Bayer W.,* Der Vertrag zugunsten Dritter, Tübingen, 1995, 209; *Joussen J.,* Schuldrecht I, AT, 3., überarb. Aufl., Stuttgart, 2015, Rn. 1173, 360.

84 *Gottwald P.,* Münchener Kommentar, 8. Aufl., München, 2019, §328, Rn. 29, 680-681; *Looschelders D.,* Schuldrecht, AT, 14. Aufl., München, 2016, Rn. 1138, 411; *Bamberger G., Roth H. Janoschek Ch.,* BGB, 4. Aufl., München, 2019, §328, Rn. 8, 2286; *Staudinger J., Löwisch M. (Red.), Klumpp S.*, BGB, Buch 2, Berlin, 2015, §328, Rn. 18, 63; Comp., *Krauskopf P.,* Der Vertrag zugunsten Dritter, Diss., Freiburg Schweiz, 2000, Rn. 1632 ff., 402.

85 *Raab Th.,* Austauschverträge mit Drittbeteiligung, Tübingen, 1999, 38; *Graffenried C.,* Schadloshaltung des Dritten in zweivertraglichen Dreiparteienverhältnissen, Diss., Bern, 2019, Rn. 220, 99.

promisee shows his will on his/her own behalf,[88] and the representative acts on behalf of another person.[89] Therefore, it can be said that at first glance the agreement concluded in favor of a third party is in pace, when a person concludes the agreement in his/her own behalf and in favor of another person.[90] The agreement concluded in favor of a third party is in pace, when the deal made by a representative depends on whether the will to act on behalf of another person is clearly expressed or not.[91] It is clear that in case of positive answer, the representative transaction is in place, but when in doubt, it is taken into account that the person acts on his/her own behalf and in favor of a third party.[92]

Since the interpretation of an agreement shall determine whether a third party should acquire the right or not,[93] in the event when a separation between the agreement concluded in favor of a third party and the transactional representation cannot be separated, the preference shall be given to the issue of interpretation of the agreement.

3. Separation of an Agreement Concluded in Favor of a Third Party from Indirect Representation

Indirect representation is characterized with peculiarity that in that case the representative acts on his/her own behalf,[94] but for the benefit of another person.[95] In this way it resembles an agreement concluded in favor of a third party, in which, as noted above, the promisee also acts on his/her own behalf. But in case of indirect representation the outcome of a legal relationship first occurs with the representative and then - with the person represented.[96] The right of claim to the party of an agreement arises for

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86 *Schmidt R.,* GBG AT, Grumndlagen des Zivilrechts Methodik der Fallbearbeitung, 13 Aufl., Hamburg, 2015, 182.

87 *Zoidze B.,* Comments to the Civil Code of Georgia, Book I, Tbilisi, 2002, 276, 278, 279 (in Georgian); The Decision №3k-313-03 of 18th June, 2003 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia.

88 *Erman W., Westermann H.,* Handkommentar, 14., Aufl., §328, Köln, 2014, Rn. 2, 1485; *Baigusheva Yu.V.,* Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 118 (in Russian); *Christandl G.,* Der Vertrag zugunsten Dritter im Entwurf für ein neues spanisches Schuldrecht im Spiegel des europäischen Vertragsrechts, ZEuP 2012, 247.

89 *Kötz H.,* Vertragsrecht, 2., Aufl., Tübingen, 2012, Rn. 400, 170, ("Handeln unter fremdem Namen"); *Looschelders D.,* Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 409; see *Lübe G.,* Vertragsschutz Dritter und allgemeine Haftungsrecht, Dissertation, Düsseldorf, 1964, 154 ff.

90 *Medicus D., Lorenz S.,* Schuldrecht I, BT , 20., neubearb., Aufl., München, 2012, Rn. 805, 410; Bettermann K., Verpflichtungsermächtigung und Vertrag zu Lasten Dritter, JZ, 1951, 321.

91 *Looschelders D.,* Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 409; *Medicus D., Lorenz S.,* Schuldrecht I, BT , 20., neubearb. Aufl., München, 2012, Rn., 805, 410; *Kropholler J.,* German Civil Code, Study Comment, *Darjania T., Chechelashvili Z. (transl.), Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, §164, field 9, 80 (in Georgian).

92 *Looschelders D.,* Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 409; *Medicus D., Lorenz S.,* Schuldrecht I, BT, 20., neubearb. Auf., München, 2012, Rn., 805, 410.

93 *Medicus D., Lorenz S.,* Schuldrecht I, BT., 20., neubearb. Aufl., München, 2012, Rn., 810, 411.

94 *Chanturia L.,* General Section of Civil Law of Georgia, Tbilisi, 2011, 428 (in Georgian).

95 *Kropholler J.,* German Civil Code, Study Comment, *Darjania T., Chechelashvili Z. (transl.), Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, §164, field 4, 80 (in Georgian).

96 *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 278 (in Georgian); see *Kobakhidze A.,* Civil Law, I, General Section, Tbilisi, 2001, 310 (in Georgian).

the person represented through the transfer of rights by a representative.[97] By the independent request in the agreement concluded in favor of a third party, the right of claim of execution of an agreement arises immediately[98] for "the third person"[99] based on this agreement.

Indirect representation differs from the agreement concluded in favor of a third party as well as from the representation provided for in section 1, Article 103 of the CCG.[100] Therefore, the separation between an agreement concluded in favor of a third party and indirect representation is less significant.[101]

The full legal effect of the agreement concluded through a direct representative applies to "other persons". In this case the "other party" itself is a party to the agreement. In case of indirect representation the person represented is not a party to the agreement;[102] the contractual rights are being subsequently transferred. By the independent request in the agreement concluded in favor of a third party, a third party enjoys only separate legal claims. The promisee remains as party authorized for other claims as well as the person responsible for responsive fulfillment.[103]

4. Conclusion

The agreement concluded in favor of a third party differs from an agreement concluded through a representative. In each case, there is an intersection between the powers of the third party to the agreement concluded in favor of the third party and the third party, due to participation of which, the contractual relationship becomes similar to an agreement concluded in favor of the third party. But the main difference between the separate element of the notion of agreement concluded in favor of a third party, the purpose of declaration of will of parties, the powers of the third party, or the basics of relationship between the parties involved is conditioned by the difference between the above elements.

The agreement concluded in favor of a third party must be separated not from the institution of representation in general, but from the transaction concluded by the representative. Although the person represented does not directly participate in the conclusion of agreement, but his/her will is implemented by the representative. In the agreement concluded in favor of a third party, the promisee does not exercise the will

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97 *Looschelders D.,* Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1152, 409; *Erkvania T,* Protection of interests of Third Parties in the Representation (in accordance with the Civil Codes of Georgia and Germany), Journal "Justice and Law" №3(34)'12, 37-38 (in Georgian).

98 *Bayer W.,* Der Vertrag zugunsten Dritter, Tübingen, 1995, 219.

99 "in der Person des Dritten", see *Soergel Th., Pfeiffer Th. (Red.), Hadding W.,* BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 17, 13.

100 *Kropholler J.,* German Civil Code, Study Comment, *Darjania T., Chechelashvili Z. (transl.), Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, §164, field 4, 80; *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 277 (in Georgian); see *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 427-428 (in Georgian); *Erkvania T,* Protection of Interests of Third Parties in the Representation (in accordance with the Civil Codes of Georgia and Germany), Journal "Justice and Law" №3(34)'12, 37 (in Georgian).

101 *Looschelders D.,* Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1152, 409.

102 Ibid.

103 *Gottwald P.,* Münchener Kommentar, Schuldrecht AT, 8., Aufl. München, 2019, §328, Rn. 12, 676-677; OLG Köln, NJW 1978, 896- 897.

of the third party, but willfully grants the legal claim to a third party, and declaration of will by third party shall sometimes only be considered as a precondition for the arising of right in his/her favor.

Based on the agreement concluded through a representative and the agreement concluded in favor of third party, the rights may arise for the person not participating directly in conclusion of an agreement. But the difference between them is that the representative acts on behalf of another person, and the promisee - on his/her own behalf. Unlike an agreement concluded in favor of a third party, the party to the agreement is represented and, therefore, all contractual rights and obligations arise thereon. A third party never becomes a party to the agreement. In case of transactional representation and proceeding from the transaction, the rights and obligations arise for the person represented. In the agreement concluded in favor of a third party, the third party has only the separate rights, the rest of the rights and obligations remain with the promisee or the promisor (debtor).

When a transaction is voidable, the represented person as well as the third party cannot enjoy the right of rescission. The person with the right of rescission is a representative in the transaction made by a representative, and in the agreement concluded in favor of a third person – the promisee; however, unlike a third party, the person represented has the right to rescind if he/she is aware of the circumstances causing the voidance of transaction.

The relationship arose between the representative and the person represented is based upon the issuance of a power of attorney, but the relationship between the promisee and the third party is not based upon the granting of authority to the promisee by a third party.

The death of a representative is the basis for the abolition of representative authority; in the agreement concluded in favor of a third party, the death of the promisee may become the basis for arising the right for a third party.

Indirect representation differs not only from the agreement concluded in favor of a third party but also from the representation provided for in section 1, Article 103 of the CCG. Therefore, the separation between the agreement concluded in favor of a third party and indirect representation is less significant.

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Protection of Person's Dignity from Verbal Abuse in the Old Georgian Law

Infringement of person's dignity can take place via action as well as verbally. Compared to assault and battery, the verbal abuse is a milder form of infringement of person's dignity. The purpose of this article is to study the legal protection of a person's dignity, in particular, the issue of responsibility for verbal abuse under the old Georgian law. In this regard, the norms from Georgian Legal Monuments, court practice and historical sources are discussed. Based on the interpretation of legal terms, the signs of components of delict are characterized; the sanctions indicated by the lawmakers are compared with the penalties used in practice. The casuistic nature of old Georgian law is also revealed in relation to the mentioned delict. Taking under consideration these circumstances, other cases of verbal abuse and abuse upon the master by the clergymen, woman and serf is separately distinguished and characterized in the article. Regardless of the circumstances mentioned, general norms of verbal abuse are also in the legal monuments, which indicate that not only the cases of specific verbal abuse, provided for by the norms, were punishable, but the law generally protected the dignity of a person. The social status of both the insulted as well as the insulting person had to be taken into consideration, when imposing a punishment. Proprietary sanctions were mostly applied in relation to these actions, and the compensation was often paid in favour of the insulted person. Despite the above-mentioned, we cannot say unequivocally that verbal abuse was a private delict in old Georgian law, as even in this case the determining factor was to whom the abuse would take place.

Key words: *Protection of dignity, verbal abuse, swearing, payment in the form of property, price of blood, fine for abuse.*

1. Introduction

The actions against the honour and dignity of a person include the slander and abuse. For its part, the abuse can take place via action as well as verbally. The subject of research is the legal protection of dignity of a person when verbally abused in old Georgian law; searching the norms on the mentioned actions, characterization of the signs of components and the analysis of the punishments imposed for verbal abuse.

In the old Georgian law the swearing is a term expressing the verbal abuse. According to interpretation of *Sulkhan-Saba Orbeliani*, the swearing meant the desecrate rebuke, desecration.[1] As can be seen from interpretation, the meaning of swearing was not limited to only the verbal abuse; it was also an expression of action. Disavowal of paternal faith by *Evstat Mtskheteli* was considered as profanity of faith.[2]

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1 *Sulkhan-Saba Orbeliani*, Georgian dictionary, I, prepared according to Autographic Lists, the study and index for vocabulary of definitions enclosed by *I. Abuladze,* Tbilisi, 1991, 159; *David Chubinashvili* interprets this word in the same way. *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 322 (in Georgian). Swearing - insult, disgrace, berate. *Abuladze I.,* Old Georgian Dictionary (materials), Tbilisi, 1973, 93 (in Georgian).

2 *Bakradze A., Tvaradze R.* (Authors), Georgian Literature, Vol. I, Tbilisi, 1987, 253 (in Georgian).

In accordance with the Article 251 of Armenian Law, the committed "voluptuousness" was discussed as swearing.[3] The same can be said in relation to the Articles 31 and 33 of the Law of Moses, where getting into contact with a virgin and a married woman are discussed.[4] In the law of *David Batonishvili*, the term – swearing - is also used in relation to dissoluteness (Article 193).[5] False denunciation could also be considered as "swearing".[6] Since the notion of swearing also included the action, the legislator, defining the responsibility for verbal abuse, differentiates the swearing and other type of "dishonour" through action. According to the Law of the Catholic Church, those who swear at and have the temerity to dishonour the "Catholicons and Bishop" had to be punished under the Canon Law.[7] The "swearing" and "dishonour" is separately provided in the norm.[8] The dishonour may imply the assault and battery. In any case, it can be unambiguously said that the notion of dishonour did not include the swearing in this case.

Considering the Law of *Beka-Aghbugha*, *N. Khizanishvili* notes with regard to swearing that although swearing was punishable in Atabegate (Principality), but the mentioned have not been used towards the peasantry. Verbal abuse of a socially superior person was punishable. In his opinion, this is confirmed by the imposition of four thousand tetri for swearing at the "army"[9] and "penalizing" of twelve peasants for swearing at woman; in addition, the reference - "noble birth must be honoured."[10]

The norms on verbal abuse, submitted in Law Code of *Bagrat Kurapalat*, can be divided into several groups. The three articles refer to swearing at the clergymen (Articles 106-108 of the Law of *Beka-Agbugha*),[11] one refers to swearing at woman (Article 130 of the Law of *Beka-Agbugha*),[12] one – can be considered as general component of swearing, because it refers to the general principle of imposition of

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3 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 314-315 (in Georgian).

4 Ibid, 118-119.

5 *Purtseladze D. (Text publisher)*, David Batonishvili Law, Tbilisi, 1964, 109 (in Georgian).

6 The Article 140 of Georgian version of Greek Law refers to slander and denunciation of clergyman. At the end of mentioned article it is indicated that by this action the person "swore at the meeting". *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 165-166 (in Georgian).

7 The Canon Law of the Catholic Church, Article 17. *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 396 (in Georgian).

8 Dishonour, disgrace, shamelessness — disgrace the honour, unconscionability. *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 1264 (in Georgian). Unconscionability – disgracing of name. *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 107 (in Georgian).

9 *Khizanishvili N. (Urbneli),* Selected Works, prepared for printing, enclosed with biographical material and notes by *Is. Dolidze,* Tbilisi, 1982, 490 (in Georgian); Law Code of Bagrat Kurapalat (Article 130 of Law of Beka-Aghbugha). *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 467 (in Georgian).

10 *Khizanishvili N. (Urbneli),* Selected Works, prepared for printing, enclosed with biographical material and notes by *Is. Dolidze,* Tbilisi, 1982, 489 (in Georgian); Law Code of Bagrat Kurapalat (Article 130 of Law of Beka-Aghbugha). *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 467 (in Georgian).

11 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Volume I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 465 (in Georgian).

12 Ibid, 467.

punishment for verbal abuse (Article 131 of the Law of *Beka-Agbugha*)[13] and, finally, one norm can be considered as specific component of insult (Article 129 of the Law of *Beka-Agbugha*).[14]

2. General Component of Verbal Abuse

According to number of norms listed, it can be said that the old Georgian law paid great attention to the protection of the person's dignity. The components are formed not only taking into account the factors to whom the swearing took place, or where did it take place, but also the general components of verbal abuse are given. In Article 131 the legislator states that "if unworthy man swear at honourable person then he owes more". As stated above, this norm generally expresses the principle of imposition of punishment for verbal abuse. The term "owing" is interpreted as "be owed (to)",[15] i.e. have a debt.[16] Thus, a person's obligation increases if he abuses a person more honourable than himself. In case of swearing, when imposing the punishment the social status of insulted as well as the swearer was taken into account, this is also mentioned in Article 130: "The noble birth of man and woman must be honoured". But did the swearing at peasant by a peasant consider as a punishable act? According to Law Code of *Bagrat Kurapalat* (Article 129 of Law of Beka-Aghbugha) "if a man swears at a man unfairly before the army, to be imposed by four thousand tetri"[17] "Before the army" means the swearing in the presence of army.[18] Swearing at man by a man indicates that the insulting as well as the insulted persons had one social status. Also, the imposition of a precisely defined sanction at the amount of four thousand tetri shall indicate this. According to Article 131, swearing at "honourable person" by unworthy man had to be severely punished.[19] In Article 129, this principle of punishment of swearing is not applied by the legislator. In case of swearing at unworthy by unworthy man, also, swearing at lower nobleman by unworthy man, the equal payment in the form of property could not be applied. In the fragment of Law Book of *Bagrat Kurapalat* the volume of price of blood is not given. According to *Beka-Aghbugha* Law, the peasant's price of blood was four hundred tetri, and the peasant, whom the "master knew for kindness", was valued at one thousand tetri (Article 11).[20] In Article 121, fixing of four thousand tetri as a

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13 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Volume I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 467 (in Georgian).

14 Ibid.

15 *Sulkhan-Saba Orbeliani*, Georgian dictionary, I, prepared according to Autographic lists, the study and index for vocabulary of definitions enclosed by *I. Abuladze,* Tbilisi, 1991, 439 (in Georgian).

16 *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 671 (in Georgian).

17 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 467 (in Georgian).

18 Army – Big hostile army. *Sulkhan-Saba Orbeliani*, Georgian dictionary, I, prepared according to Autographic lists, the study and index for vocabulary of definitions enclosed by *I. Abuladze*, Tbilisi, 1991, 408 (in Georgian); Army – royal army, troops. *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 645 (in Georgian).

19 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 467 (in Georgian).

20 Ibid, 429.

compensation, essentially exceeds the maximum amount of the peasant's price of blood, that excludes that the mentioned article determines the responsibility for swearing at peasant by peasant. Presumably, Article 129 provided for the punishment for verbal abuse of successful persons, and the minimum amount of determined compensation should be justifiable for swearing at person. Reasoning from the general principles of punishment, it is unlikely that the honour of a "humiliated", landless and cloisterless lower nobleman would have been equally valued. However, the question may arise, could Article 129 impose a fine of four thousand tetri for swearing at a higher nobleman? The compensation stipulated under the norm represents one-tenth of the price of blood of higher nobleman. In Article 108, the honour of a priest is determined at one-third of his price of blood.[21] Article 129 also represents qualified component of verbal abuse and it is unlikely that, in this case, the compensation was one-tenth of the price of blood. The legislator points out that the swearing should be unfair. The guiltiness from the side of insulted person excluded the responsibility of the swearer. The compensation was paid in favour of insulted person that is indicated by use of term "payment of compensation". *Sulkhan-Saba Orbeliani* interpreted the term "payment of compensation" as payment of price of blood.[22]

Despite the circumstance that swearing at "army" does not envisage swearing at peasant by peasant, it does not mean that legal protection of peasant's dignity did not take place in Georgia. According to *G. Nadareishvili*, "in feudal Georgia the honour and dignity of a person was protected on a rank basis, but in some cases, disregarding for the rank status, the attention was paid to the national-religious and family honour and dignity."[23] An example of this is *Alexander Jambakur-Orbeliani's* notice about how the *King Erekle II* punished *Kurdishvili*, who was in the service of King's defence, for verbal abuse of Tatar soldier.[24]

The judgement of 1792 refers to swearing among the peasants and "reproaching" of malicious word.[25] Despite the circumstance that the punishment is not imposed in the judgement, the mentioned circumstance still does not prove that swearing at peasant by peasant was not a punishable action. In this case, there was no impunity for the action in general, but the "reckon"[26], because reciprocal actions were proportionate and individuals had the same social status.

Even in the criminal case judgment of 1809, the court refers to the "reckon" of punishment in case of mutual insult between persons.[27] It is obvious from judgement that compared to verbal abuse, assault

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21 According to Article 149 of Law of David Batonishvili, a person had to pay one-sixth of price of blood for abuse. *Purtseladze D. (Text publisher)*, David Batonishvili Law, Tbilisi, 1964, 109, 84 (in Georgian).

22 *Sulkhan-Saba Orbeliani*, Georgian Dictionary, I, prepared according to Autographic lists, the study and index for vocabulary of definitions enclosed by *I. Abuladze*, Tbilisi, 1991, 204 (in Georgian).

23 *Nadareishvili G.,* Protection of Human Honour and Dignity according to Georgia Feudal Legal Monuments and Judicial Practice Materials, journal "Almanach", 2000, N 14, 62-63 (in Georgian).

24 Ibid, 62.

25 The judgement on case of abuse of wives of Qitesa Lomitashvili and Mishelashvili (1792). *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. V, Court rulings, (XVIII century), Tbilisi, 1974, 586 (in Georgian).

26 Reckon - set-off. *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 138 (in Georgian).

27 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. VI, Court rulings, (XVIII-XIX centuries), Tbilisi, 1977, 399 (in Georgian).

and battery was more complex form and compensation was deducted based on the "reckoning" of punishments. The court assessed "bad swearing" at fifteen tumans (tuman - ten roubles).

The fact that peasant's honour was protected can also be proved by "Bezhana and Onisima Criminal Case Judgement" (1822). If insulting person could not swear he had to pay fine for swearing.[28]

In old monuments of Georgian law we cannot find the norms that impose the responsibility for swearing at secular person having any social status. The Article 226 of Law Book of *Vakhtang Batonishvili* also contains the general component of swearing. The norm refers to injustice of swearing.[29] In contrast to other components of verbal abuse, *Vakhtang Batonishvili* defines beating and scolding. The beating was applied while committing a misdemeanour. *Sulkhan-Saba Orbeliani* interpreted the scolding as an instructive wrath.[30] In the same article the qualified component of swearing is distinguished, when the swearing results in "blood and hostility against man".[31] The status of insulted person was taken into consideration when imposing the punishment that was expressed in the volume of price of blood.

3. Verbal Abuse of a King

The Law Book of *Vakhtang Batonishvili* does not determine the price of blood of King, and the fact that payment in the form of property has not been applied for abusing of a King is also confirmed by the first historian of *King Tamar*. *Iv. Javakhishvili* cites the notice of first historian about abusing of *King Tamar* by the mediator of Sultan of *Rûm Rukn-ad-Din*. On the basis of aforementioned notice, the historian comes to a conclusion that punishment for verbal abuse of a King personally and publicly, considered cutting of tongue at first and then - beheading.[32]

The Georgian version of Greek Law and Armenian Law imposed the punishment for verbal abuse of the King. In Georgian version of Greek Law, two articles refer to the swearing at a King and a lord. In Article 58, the legislator indicates that showing of reverence to the King and lord is prescribed by Scripture. As for the signs of components: the legislator speaks about unfair swearing.[33] For swearing at the King or the government, the priest shall be "disciplined" that meant barring from preaching,[34] while the layman expected the damnation. The use of such punishments become comprehensible with the legisla-

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28 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. VI, Court rulings, (XVIII-XIX centuries), Tbilisi, 1977, 580-581, 586 (in Georgian).

29 Ibid, 540.

30 *Sulkhan-Saba Orbeliani*, Georgian Dictionary, II, prepared according to Autographic lists, the study and index for vocabulary of definitions enclosed by *I. Abuladze*, Tbilisi, 1993, 147 (in Georgian).

31 *Dolidze Is (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 539 (in Georgian).

32 *Javakhishvili Iv.,* Works in Twelve Volumes, Vol. VII, Tbilisi, 1984, 217 (in Georgian).

33 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 147 (in Georgian).

34 Restrain - capture, banishment, subjugate, suspend, hinder, delay, catch, halt, take possession, detention. *Abuladze I.*, The Old Georgian Dictionary (materials), Tbilisi, 1973, 129 (in Georgian). Restrain – is a measure of punishment and means abolition of certain rights, for example, restraining of priests from teaching, etc. *Giunashvili E.* (Text publisher), Minor Canon Law, Tbilisi, 1972, 139 (in Georgian).

tor's words from the Law of Moses, also the quotations of the apostle Peter and the "Great Paul" about the commitment of showing the special reverence towards the King and the lord. The next Article (Article 59) states that if a person "foolishly swore, or did not think it was a king and swore at him, or was unfairly treated from the King and foolishly swore at him", shall be examined before the punishment for swearing at the King.[35] When imposing a punishment, the legislator focuses on three circumstances: imputability, misjudge and unfair treatment from the side of insulted person.

Article 200 of Armenian Law, in addition to swearing at King, defines the responsibility for swearing at the lord. Like Greek Law, the Armenian Law also emphasizes the special respect of a King.[36] In this case too, the swearing must have been unfair. "Face to face" abuse should not represent a necessary sign of responsibility, as the legislator speaks of "berating" of the Ruler and higher nobleman".[37]

4. Punishability for Verbal Abuse of Clergyman

Verbal abuse of clergyman can be categorized as a separate group. As the Church's influence in the state was increasing, also the increase of legal protection of honour and dignity of church servants took place. Varsken's actions towards the presbyter represent an example of expressing of disregard of Ruler towards the clergyman.[38] Different situation is presented in *Grigol Khandzteli's* life. The author of the monument emphasizes the preference of the clergyman and the worship of secular persons towards them.

As stated above, three Articles in the Law Code of *Bagrat Kurapalat* are devoted to swearing at clergymen. Two Articles (Articles 106 and 107 of the Law of *Beka-Aghbugha*)[39] impose the responsibility for swearing at bishop. The difference between them is in social status of insulting person and, accordingly, in the volume of payment in form of property. The first refers to swearing at bishop by higher nobleman, the second – swearing at bishop by lower nobleman. The third article refers to swearing at the priest by the higher nobleman and lower nobleman. In addition, abuse of priest by "most humble" is cited (Article 108 of Law of *Beka-Aghbugha*).[40] The "most humble" shall imply the person below the lower nobleman's status, who is also below the status of priest. In Article 31 of the Law Book of *Vakhtang Batonishvili*, the price of blood of low rank, third lower nobleman's blood and blood of priest is forty eight tumans (tuman - ten roubles).[41] If we take this circumstance into account and theoretically rely on the price of blood determined under the Law of *Beka-Aghbugha*, it turns out that the priest and the "humiliated lower nobleman" were at the same level and the price of blood of lower nobleman could have been twelve thousand tetri. The Law Code of *Bagrat Kurapalat* imposes the payment of one-third

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35 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 147.
36 Ibid, 297.
37 Ibid.
38 *Bakradze A., Tvaradze R.* (Authors), Georgian Literature, Vol. I, Tbilisi, 1987, 232-233 (in Georgian).
39 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 465 (in Georgian).
40 Ibid, 465.
41 Ibid, 489.

of price of blood for swearing at priest, and it turns out that a person could be fined four thousand tetri for swearing at the priest, which seems quite possible according to the compensation imposed for swearing at bishop. Swearing at bishop by the higher nobleman was punished by forty thousand tetri, and swearing at the bishop by the lower nobleman - by twenty thousand tetri. According to the Law of *Beka-Aghbugha*, the highest price of blood is defined for the higher nobleman, which was forty thousand tetri. The bishop and higher nobleman shall be at one level. It can be assumed that swearing at bishop by higher nobleman was punished with payment of full price of blood, and verbal abuse of the bishop by the lower nobleman - with payment of half the price of blood. The price of blood was paid in favour of clergyman, however, payment of compensation had to be made "with great imploring"[42] "Great imploring" must have been a particularly heavy form of apology.[43] The legislator does not refer to the injustice of swearing when verbal abusing of clergyman, on the basis of which it could be said that the mentioned circumstance did not represent the necessary sign of component.

The Article 17 of the Law of Catholicons provides for the responsibility for disrespect and swearing at the Catholicos and the bishop. The swearing and "disrespect" is separately mentioned in the norm.[44] The first shall consider the verbal abuse. As for the second term – "disrespect", it is interpreted in the dictionary as disgracing,[45] which is generally possible both by verbal abuse and by action. As the legislator accentuates swearing in the norm, this gives us the reason to think that in having the temerity to "dishonour", the assault and battery might imply. In this case too, the injustice of the abuse is not discussed.

Bichvinta Yadigar refers to the swearing at clergymen (1525-1550). The Article 7 refers to the "hauling for beating" and swearing at Catholicos by the higher nobleman, or prince, or lower nobleman".[46] Unlike the Law of Catholicos, payment in the form of property is defined for the verbal abuse of the Catholicos: "Impose the payment in the form of fifteen peasants and impose Catholicos payment in the form of two "bloods" (form of proprietary fine for criminal offence) with great imploring."[47] Thus, the person was required to pay the compensation in favour of the church as well as the Catholicos. *Vakhtang Batonishvili* does not determine the price of blood for Catholicos. As he notes, "the case of a King and Catholicos, haughty or other nature, both are equal, because one is the king of flesh and another – of soul, and they have equal consecration and honour from the God and men."[48] The Law Book of *Beka-Aghbugha* does not determine the price of blood of Matskvereli, the highest clergyman in Atabegate

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42 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 465 (in Georgian).

43 *Nadareishvili G.,* Protection of Human Honour and Dignity according to Georgia Feudal Legal Monuments and Judicial Practice Materials, journal "Almanach", 2000, N 14, 55 (in Georgian).

44 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 396 (in Georgian).

45 *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 1264 (in Georgian).

46 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. II, Secular Legal Monuments (X-XIX centuries), Tbilisi, 1965, 180 (in Georgian).

47 Ibid.

48 Ibid, 488.

(Principality), and the price of blood of Catholicos is not given in Bichvinta Yadigar. It is difficult to say how much could have been paid for swearing at Catholicos.

The Article 15 of Bichvinta Yadigar imposes the punishment for abusing (beating, swearing and seizure) of Archbishop.[49] A person had to "pay compensation" to twelve peasants for the actions listed, and three hundred thousand tetri had to be paid to the Archbishop. If the insulting person were a peasant, he had to be handed over to the church with his property.[50]

The Article 8 of Bichvinta Yadigar refers to the face to face insult of "brothers".[51] In this case too, a person had to make payment in the form of property to both the church and the clergyman.[52] The compensation defined for insult of "brothers" of Bichvinta Yadigar far exceeds the sanction imposed by the Law of *Bagrat Kurapalat* for swearing at bishop. If we compare the price of blood defined under the Law Book of *Vakhtang Batonishvili*, for example, the price of blood of "brothers" far exceeds the price of blood of a priest; it is also more than the price of blood of abbot. The scientists have doubt about the authenticity of Bichvinta Yadigari. According to *Iv. Surguladze*, the purpose of the committer of fraud was distortion of some of the donations or even artificial increase of price of blood.[53]

The listed norms define the responsibility for abusing of representatives of ecclesiastical rank from the side of secular persons. Different punishments were used when insulting person was a clergyman. Such person was exiled from the Monastery under the Typicon (liturgical handbook) of Vahan Monastry Complex (1204-1234).[54]

In the Law Books Collection of *Vakhtang Batonishvili*, the Armenian Law also refers to abuse of clergymen. In spite of the fact that swearing at priest is mentioned in Article 155, the question arises on how much the given norm provides for the punishment directly for verbal abuse.[55] Together with swearing, the assault and battery is also discussed in the norm that is expressed in priest's "striking". The use of the conjunction "and" between swearing and "striking" makes us to think that the norm is cumulative, i.e. both verbal abuse and assault and battery had to take place. Presumably, this Article does not impose the sanctions for swearing directly at the priest. This consideration is also supported by the punishment used, expressed in the symbolic talion, in particular, in cutting of arm. The fact that cutting off an arm for assault and battery was defined can be seen from the legislator's words, when noting: "the arm that he strikes with, shall be cut off". A person was given an opportunity to redeem an arm. Submitting of penance from the priest was also taken into account.[56] Probably, the Article 155 of the Armenian Law implies the

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49 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. II, Secular Legal Monuments (X-XIX centuries), Tbilisi, 1965, 181 (in Georgian).

50 Ibid.

51 Ibid, 180.

52 Ibid.

53 *Surguladze Iv.,* Sources of History of Georgian Law, Tbilisi, 2000, 224 (in Georgian).

54 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. III, Ecclesiastical Legal Monuments (XI-XIX centuries), Tbilisi, 1970, 142 (in Georgian).

55 Ibid, 278.

56 Meant the compensation for expiation of a sin. *Sulkhan-Saba Orbeliani*, Georgian Dictionary, II, prepared according to Autographic lists, the study and index for vocabulary of definitions enclosed by *I. Abuladze*, Tbilisi, 1993, 32 (in Georgian).

case, when both the verbal as well as real abuse takes place at the same time and in order to the "striking" is more hard form of abuse, the legislator does not impose the punishment separately and applies the punishment for assault and battery. The fact that swearing at priest was punished is evidenced by Article 187 of Armenian Law.[57] The swearing is distinguished from other "dishonourable" actions that indicate that independent legal assessment of verbal abuse takes place. The legislator considers the actions listed as the crime against the God.[58] There is no specific punishment indicated in the mentioned article, however, the legislator notes that he is being toughening the punishment for abusing of the priest.[59]

The Armenian law is especially harsh to the swearer at God (Article 238; the norm also provides for the swearing at priest). The swearer at God shall deserve the death.[60] Compared to the Georgian Law, the Armenian law imposes more severe punishment on swearer at priest.

5. Responsibility for Verbal Abuse of a Woman

Except for the clergyman, the verbal abuse of a woman can be discussed separately. In the Law Code of *Bagrat Kurapalat*, there is no any indication for injustice when swearing at "woman" (Article 130 of Law Book of *Beka-Aghbugha*)[61] that makes us to think that this circumstance was not taken into consideration when swearing at a woman. The norm does not specify what could be considered as swearing. With respect to the mentioned Article, *N. Urbneli* points out that under the Salic Law, the swearing at woman would have been considered as swearing if she were called the whore. According to him, presumably, even in Atabegate, the swearing at woman meant calling her a whore.[62]

The norm mainly focuses on the principle of imposing a punishment. However, there are questions about this issue. For swearing at "woman" insulting person "should be imposed the compensation in the form of work provided by twelve peasants". And the legislator indicates below that "noble birth of man and woman must be honoured."[63] *D. Chubinashvili* interprets the "honourable" as honest, respected and reliable;[64] on the one hand, absolutely determined sanction and, on the other hand, an indication that the social status of both the insulting and insulted person had to be taken into consideration when imposing a punishment. The punishment imposed for swearing at woman contradicts the principle of imposing of punishment, indicated by the legislator. When the "compensation" for swearing at woman would be "paid in form of work provided by twelve peasants"? "Redeeming of captive" is interpreted as the "price for redeeming of

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57 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 292 (in Georgian).

58 Ibid.

59 Ibid.

60 Ibid, 308.

61 Ibid, 467.

62 *Khizanishvili N. (Urbneli),* Selected Works, prepared for printing, enclosed with biographical material and notes by *Is. Dolidze,* Tbilisi, 1982, 356 (in Georgian).

63 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 467 (in Georgian).

64 *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 1105 (in Georgian).

something."[65] If we rely on the Law book of *Beka-Aghbugha* in relation to the price of blood, then a person had to be fined four thousand eight hundred tetri for swearing at woman (the price of peasant's blood was four hundred tetri). The compensation was paid to the insulted person. According to the compensation imposed, it can be said that in the norm the punishment is imposed for abusing of successful women. Four thousand and eight hundred tetri is slightly higher than one third of price of blood of the humbled lower nobleman. Possibly, even in this case, the legislator defines the minimum amount of compensation for "honourable" woman that could be increased taking into consideration the "honour" of both a man and a woman.

The fact that woman's abuse was punished more severely is confirmed by the judgement of *Simon I* (1592): "If he swears at woman, ten thousand shall be fined for abuse".[66] The defined compensation is twice as much as the fine defined for swearing at man.

Some judgments specify that the insulting person had to pay the fine for abuse, but the amount is not determined. In "Bezhana and Onisima Criminal Case Judgement" of 1822 *Bezhana* brought a complaint against Onisima for swearing at her mother. The court passed a resolution that Onisima had to submit two men and vow. If Onisima would not make a vow, then the fine for swearing had to be paid.[67] In this case the fine for abuse was calculated according to the price of blood.

As for the swearing at wife, *Varsken Pitiakhshi's* treatment of his wife is described in the Martyrdom of the Holy Queen Shushanik.[68] Regarding *Varsken's* actions *Iv. Surguladze* notes that "at that time the wife had to be obedient and adherent to her husband in everything; and in relation to the faith the husband had the right to beat his wife and even torture her."[69] If, in the fifth century the husband had the right to beat and torture his wife, none the less, his verbal abuse would not be punishable.

Article 165 of Armenian Law refers to the swearing at and cruel-treatment of a wife, in particular, former widow. However, the norm does not give an opportunity to make conclusions with regard to the issue of punishment. The norm is prohibitive and, as such, does not impose a sanction: "i. e. he will not dare something unseemly to his wife."[70] In the mentioned Article there are listed some cases, when the wife has broken her arm as a result of husband's "ill-treatment", or the husband breaks her teeth", for which the fine was defined. Not indication of sanction for swearing at wife raises the doubts that only verbal abuse of a wife was not considered as a punishable action.

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65 *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 1161 (in Georgian).

66 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. II, Secular Legal Monuments (X-XIX centuries), Tbilisi, 1965, 206 (in Georgian).

67 Ibid, 580-581.

68 *Bakradze A., Tvaradze R.* (Authors), Georgian Literature, Vol. I, Tbilisi, 1987, 230 (in Georgian).

69 *Surguladze Iv.*, For the State and Law History of Georgia, Tbilisi, 1952, 47 (in Georgian).

70 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 283-284 v.

6. Punishability of Verbal Abuse of Master by the Serf

The abuse of master by serf can be regarded as the qualified component of swearing. According to Article 259 of the Law Book of *Vakhtang Batonishvili*, if the serf "annoyingly face to face swears at the master, be the tongue cut off or be bereft of price of tongue."[71] The necessary sign of the component is "face to face" swearing. Compared to the norms existing in the Georgian Legal Monuments that impose responsibility for swearing, the punishment used in relation to the serf is more severe in the above-mentioned norm, which is expressed in the symbolic talion, particularly in cutting off the tongue, however, even in this case the sanction was alternative and the serf could pay the price of tongue. The fact that the symbolic talion was applied in case of verbal abuse in Georgia is confirmed also by historical sources. *Erekle II* punished a person for abuse of soldier with piercing of tongue.[72] In court practice an example of a lenient punishment for abusing of master by serf can be observed. According to the judgement of 1780, *Ioane Avalishvili* sued his serf for abusing of priest Lazare.[73] For public abuse of master with "disgracing and insulting" words, for insulting behaviour, priest Lazare had to pay to his master "three tumans with great implore and sinking" and "ask for forgiveness and absolve and make a promise not to commit a sin anymore."[74] It is obvious from the judgement that the fine for abuse is valued at three tumans.

Although, the legislator is more demanding to the serf swearing at master and, generally, does not focus on unfair swearing, but establishes the grounds for releasing of serf from the responsibility (Article 259): "if the serf catches the master with wife, or unfairly have two pieces, and if the serf doesn't take liberties with it, the judge imposes the compensation or releases. If the serf for such conduct swears at or beats him with stick or slightly wounds him, the master has to forgive him and doesn't dare to be killed."[75]

It has to be noted that the old Georgian law is less demanding to the serf, compared to the Greek and Armenian Law towards the emancipated serf. According to Georgian version of Article 169 of Greek Law: „If an emancipated serf swears at his prince, not to forgive him, then serve him as a worthless slave."[76] The aforementioned norm of Greek Law is similar to the norm in Roman law, when an emancipated slave was under threat of punishment for disrespect expressed towards the former master and his family.[77]

The norm in Armenian Law is similar to that in Greek Law (Article 19): "Is the one, who emancipates the serf, allowed to capture him again and hinder from emancipation?" Giving a response, if he submits such a witness who confirms the swearing and ill-saying, and with such witness, there is a pos-

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71 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 547.

72 *Nadareishvili G.,* Protection of Human Honour and Dignity according to Georgia Feudal Legal Monuments and Judicial Practice Materials, Journal "Almanach", 2000, N 14, 62 (in Georgian).

73 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. V, Court rulings (XVIII century), Tbilisi, 1974, 107 (in Georgian).

74 Ibid.

75 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 547.

76 Ibid, 171.

77 *Surguladze N.* (Text publisher), The Digest of Justinian, Book One, Tbilisi, 2000, 66 (in Georgian).

sibility to take possession against the judges."[78] As it can be seen from the text of given norms, the Greek and Armenian laws do not focus on injustice of swearing, in addition, the laws do not determine any basis for releasing from the responsibility for verbal abuse of former master by the emancipated one.

7. Separate Components of Verbal Abuse

"Call for threat" can be considered as the verbal abuse. The "call for threat" meant the challenge to a sword (duel).[79] Two articles of Law Code of *Bagrat Kurapalat* refer to "call for threat": the first article refers to calling the higher nobleman for threat by higher nobleman (Article 127 of Law Book of *Beka-Aghbugha*).[80] The term comrade in the norm shall imply that both parties would have been the persons at the same social level, and imposing of precisely determined compensation by the legislator points to this. The compensation was paid in favour of insulted person. Injustice of "calling for the threat" represents the sign of component.

The next article defers from the first one with that in this case the "most humbled" man "calls a comrade for the threat" (Article 128 of Law Book of *Beka-Aghbugha*),[81] because the action was carried out by "most humbled", the legislator defines the half of the compensation.

Simon I Criminal Judgement imposes the punishment on *Maghaladze* family for "calling for threat".[82] The judgment also refers to injustice of "calling for threat". The amount of compensation is more increased in *Simon I* judgment. In all three cases, payment of compensation was made in favour of insulted person.

Article 228 of Law Book of *Vakhtang Batonishvili* refers to the "calling for threat".[83] As can be seen from the norm, the legislator's attitude towards "calling for threat" is changed and no longer imposes the compensation and is only limited to warning.

In addition, the condemnation was considered as verbal abuse; condemnation meant reproaching, and reproaching meant giving the rebuke.[84] The abovementioned action was also treated as abusive under the Customary Law; when "exclaiming the rebuke" conflicting parties were arguing with each other on reproaching, unworthy, immoral and felonious actions committed in the past by the opposing party or his/her relatives.[85]

There are several Articles of condemnation in Georgian Legal Monuments. The Law Book of *Beka-Aghbugha* (Article 50) refers to exclaiming of whoring to another's wife by a woman. If a husband,

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78 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 233 (in Georgian).

79 *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 908 (in Georgian).

80 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 467 (in Georgian).

81 Ibid.

82 Ibid, 206.

83 Ibid, 540.

84 *Chubinashvili D.*, Georgian-Russian Dictionary, 2nd ed., prepared for printing and foreword enclosed by *A. Shanidze*, Tbilisi, 1984, 1492 (in Georgian).

85 *Davitashvili G.*, Types of Crime in the Customary Law of Georgia, Tbilisi, 2017, 526 (in Georgian).

based on this exclamation, divorced his wife, then he would have to pay the price of blood, payment for whoring.[86] The norm of similar content is in Law Book of *Vakhtang Batonishvili* (Article 87).[87] Both the disposition of the norm and the punishment imposed are similar. If Article 87 of Law Book of *Vakhtang Batonishvili* specifically refers to exclamation of whoring, the Article 227 can be considered as general component of condemnation. The first part of Article represents the qualified component of condemnation.[88] Condemning person is responsible for the result, based on which he had to pay half of compensation. In the second part, taking into account the main component of condemnation, the legislator levels the "insult" to whacking of head and determines the punishment as follows: "notwithstanding the status, it shall be considered as whacking of head and must pay that much."[89] All three Articles in old Georgian law apply the payment in the form of property that was paid in favour of insulted person. The Armenian Law (Articles 114, 115, 116) also refers to the reproaching, however, unlike the Georgian Law, focuses on falsification of reproaching and denunciation, on the basis of which the mentioned norms should be largely considered as slander or denunciation rather than verbal abuse.

Qualified form of verbal abuse was swearing at parent. The Article 289 of Georgian version of Greek Law refers to disrespect shown for the parent.[90] According to Roman law the action against the parent was imposing a burden to the responsibility.[91] According to the aforementioned norm, the deprivation of right of succession for a child can be considered as additional sanction that would be imposed along with the main punishment. The Armenian Law (Article 110) also refers to swearing at parent and "ill-treatment". The norm does not specify, in particular, in what way the "indemnification" from the side of judge was expressed."[92]

In the Georgian version of Greek Law, a separate article refers to the swearing at judge (Article 56), "whether it is lawful, or no." The legislator imposes the frustrating punishment. Make the swearer "be put on donkey (publicly shamed) and kicked out".[93]

We need to focus on the norms of abuse in the Law of *David Batonishvili*. The Law Book provides for the main component of abuse (Article 182)[94] and several qualified norms.[95] The casuistic list of dishonouring is no longer met both in main as well as qualified component; consequently, there are no

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86 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 443 (in Georgian).

87 Ibid, 503.

88 Ibid, 540.

89 Ibid.

90 Ibid, 197.

91 *Surguladze N.* (Text publisher), The Institutes of Justinian*,* Tbilisi, 2002, 221 (in Georgian).

92 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 256 (in Georgian).

93 *Dolidze Is. (Text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi, 1963, 146 (in Georgian).

94 *Purtseladze D. (Text publisher)*, Law of David Batonishvil, Tbilisi, 1964, 98-99 (in Georgian).

95 Showing "dishonour" in the King's palace and before the King (Article 103); Insult of judges (Article 116); Writing of separate blameworthy book (Article 149); Abuse of a parent (Article 184); Abuse of King's representative (Article 207). *Purtseladze D. (Text publisher)*, David Batonishvili Law, Tbilisi, 1964, 62-63, 67, 84-85, 99-100, 117 (in Georgian).

norms that impose the responsibility only for swearing. Of course, it does not mean that verbal abuse was not a punitive action according to Law of *David Batonishvili*. The punishments imposed for dishonesty are also different. Payment of compensation in the form of property in favour of insulted person is rarely met; however, even here, the punishments are imposed taking into account the social status of a person. The imprisonment, penalty, demotion could be applied towards the noblemen, and corporeal punishment – towards the peasants and soldiers.

8. Conclusion

Thus, on the basis of the norms discussed, it can be said that in line with the old Georgian law the verbal abuse of a person was considered as punishable action, which is confirmed by the norms in Legal Monuments, court rulings or historical sources. Of course, the status of a person was important in terms of punishability, however, based on the sources it can be said that even the honour of persons with low social status were protected.

The norms of verbal abuse in Georgian Legal Monuments can be provisionally divided into two groups: general and qualified components of swearing. Verbal abuse of clergymen, abuse of a woman, abuse of master by serf, abuse before the army belongs to the qualified components. The swearing also must be included in qualified component, when it has had severe consequences. In some norms, the legislator points out the injustice of verbal abuse. It seems that the court should have paid attention to whether the insulted person was guilty before the swearer, or not. In case of "fair" swearing the person shall not be responsible. There is no reference to "unjust" swearing when it comes to verbal abusing of clergyman and woman. This indicates that the law required special respect towards them and, of course, this was reflected in the imposition of punishment as well.

As for punishments, in the old Georgian law the payment in the form of property is mainly applied in case of verbal abuse, which was depended upon the social status of insulting as well as insulted person. The compensation was paid in favour of insulted person. It was possible to use the payment in the form of property as an alternative punishment together with the symbolic talion. If, in case of imposition of payment in form of property, the preference was given to satisfaction of interests of private individuals in relation to other sanctions, it cannot be said that they represented the personal punishments and, consequently, we cannot therefore say that generally the verbal abuse was a private delict.

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13. *Purtseladze D.* (Text publisher), David Batonishvili Law, Text published and Research added by *D. Purtseladze*, Tbilisi, 1964, 98-100, 109, 62-63, 67, 84-85, 117 (in Georgian).
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18. *Surguladze N.* (Text publisher), The Digest of Justinian, Book One, Tbilisi, 2000, 66 (in Georgian).
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Sandro Shermadini*

Legal Means for Protection of the Right to Claim Damages

The article below reviews legal mechanisms of the Georgian legislation use of which allows an aggrieved person to receive an opportunity to defend the right to compensation of damages caused by administrative bodies or illegal administration of justice.

The diversity of activities of an administrative body makes the issue complex, since each of those activities may separately and independently cause damages and the law prescribes various mechanisms to be used by aggrieved persons. If an aggrieved person makes a mistake and choses a wrong mechanism, then he/she will not be able to defend his/her violated right.

Selection of right defense mechanisms for claiming damages depends on two aspects: 1. Type of damages, which may be either completed or continuous; and 2. Form of activity of an administrative body. The paper reviews mentioned matters as well as issues of selecting protection mechanisms based on information related to the aspects listed above.

Key Words: *Compensation of damages, state responsibility, protection of the right, forms of activities of an administrative body.*

1. Introduction

"Every person has a right to apply to the court to defend his/her rights"[1]. This represents a procedural right and is considered as one of the key principles of the procedural law; implementation of substantive law depends on exactly that principle[2]. It grants every individual a possibility to address a court if he/she believes that his/her right was or is being violated[3].

"One of the main guaranties for enjoying the right in full is a possibility of seeking protection in court. If there is not a possibility of avoiding violation of a right or a possibility to restore the violated right, then the legal leverage, enjoyment of the rightt itself, may be questioned. Therefore, in order to protect rights and freedoms, prohibition of addressing the court or disproportional restriction infringes not only the right to fair trial, but also contains threats of neglecting the right itself, for protection of which addressing a court is prohibited (restricted)"[4].

The right to appeal to the court applies to the claim of compensation of damages. It's legal means of protection are characterized to have legal deficiencies. Namely, it should be discussed if temporary mechanisms provided by Administrative Proceedings for Administrative complaints are protecting right of an aggrieved person, when damages are result of an unlawful abstaining from performing a public administrative measures (for instance, damaging by failure to issue a normative administrative-legal act or to perform an realact).

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1 Article 31, para. 1, Constitution of Georgia, Departments of Parliament, 31-33, 24/08/1995.

2 *Izoria L., Korkelia K.,* et al., Commentaries on the Constitution of Georgia, Fundamental Human Rights and Freedoms, Tbilisi, 2005, 363-364 (in Georgian).

3 *Kublashvili K.,* Fundamental Rights, Tbilisi, 2003, 336 (in Georgian).

4 Decision № 1/466 of 28 June 2010 of Constitutional Court, Public Defender of Georgia vs. Parliament of Georgia, Part II, paragraph 14, <www.constcourt.ge/ge/legal-acts/judgments> [11.03.2019].

Other than legal deficiencies, what makes difficult to protect the right to compensate for damages is that, the sequence (stages) of applying means for it's protection is not defined. Even more, criterions for defining this sequence are not determined.

In the present article, in order to identify the deficiencies in Georgian legislative, the regulations related to the issue that should be studied are reviewed; Also what role should have types of damages, the character of activity inflicting of it and even the legal form of activity for defining the sequence of applying means for protection of the right to compensate for damages are reviewed. Discussion would be about possibility to protect the right by applying to a court with a resumptional claim for acknowledgement instead of directly with the claim for obligation and to use such Private Law institutes as acknowledgment of the existence of a debt and performing the claim of limitation period in Administrative Law.

There is a table/scheme for the purposes of showing explicitly the result of a legal analysis of abovementioned issues, that determines not only which means should be used by aggrieved person for protection of his/her rights in different cases, but also the sequence (stages) of using them. In the article, other than the legal analysis, will also be used comparative-legal analysis method with regard to Germany and the Netherlands, as Civil Code of Georgia (hereinafter – CCG), including key grounds for claims on compensation of damages – Article 1005, is developed on the basis of German legislation[5], and such legal remedies of protection of rights like the institute of administrative claims, is mainly based on the Dutch model, and the temporary protection remedy - on the German model[6].

The article has the following structure: at first activities inflicting damages would be classified; then legal forms of activities of administrative body inflicting damages and a claim of a compensation for damages itself as a legal form would be discussed for the purposes to proper selection of means to protect rights; in the next part legal mechanisms to compensate for damages would be reviewed in the following order: administrative application, complaint and claim with according deficiencies and in the end of the article the results of a study would be resumed.

2. Activities Inflicting Damages in the Field of Administrative Law

"State authority shall be exercised based on the principle of division of power"[7]. This principle implies the state authority implementation related approach, according to which the state authority shall be exercised by balanced but independent branches of power[8]. The state authority in Georgia is divided into legislative, executive and judicial powers[9]. Legislative power is exercised by the Parliament of Georgia[10], Executive – by the Government of Georgia[11] and Judicial – by the Constitutional Court of

5 Section 839, German Civil Code, 14/07/1986, <www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf> [11.03.2019].

6 *Winter G.*, Administrative Law Development and Legal Consultation to Georgia as a Country in Transition, Journal "Administrative Law", № 1, 2013, 78 (in Georgian).

7 August 24 1995, Art. 4.3, Constitution of Georgia, Departments of Parliament, 31-33, 24/08/1995.

8 *Melkadze O.*, Constitutionalism, Tbilisi, 2008, 78 (in Georgian).

9 *Demetrashvili A., Kobakhidze I.*, Constitutional Law, Tbilisi, 2011, 193-194 (in Georgian).

10 Art. 36.1, Constitution of Georgia, Departments of Parliament, №31-33, 24/08/1995.

11 Ibid, art. 54.1.

Georgia and Common Courts of Georgia[12], where the Constitutional Court represents a constitutional oversight body[13] and Common Courts administer justice[14].

In the field of Administrative Law, in general cases, the damage originates due to activities of the body exercising executive authority, and, in special cases – due to activities of the bodies implementing judicial power, which is envisaged, for instance in the part 3 of Article 1005 of CCG.

2.1. General Activities Leading to Damages

In the field of administrative law, activities inflicting damages can be considered activities of administrative bodies[15], i.e. persons/entities exercising public legal authorities. Implementation of public legal activities would mean governing activities of the state authority, which does not represent justice, legislative work, political decision making and ecclesial activities[16], and the remaining activities are called public administration in its material sense[17]. Thus, subjects of law discharging legal authorities may be called public administration in a material sense.

Exercise of public legal authorities is the only criterion for granting a status of an administrative body to legal entities[18]. Therefore, damages caused by such activities shall be considered as damages inflicted by general activities in the field of administrative law. Guarantees for exercising the right to claim compensation of damages are provided by Georgian legislation. Namely, "everyone shall be entitled to full compensation, through court, for damages unlawfully inflicted by the bodies of the State, the autonomous republics and local self-governments, or their employees, from the state funds, the funds of autonomous republics or the funds of local self-governments, respectively"[19]. The purpose of this provision is to create material as well as procedural constitutional guarantees. Based on the meaning of the provision, it can be said that legislator retains a narrow area for actions, which is mainly expressed in regulating procedural issues[20]. To name some damages inflicted by general activities of administrative bodies: City Hall of Tbilisi banned traffic on the street for the reason of road reconstruction, because of which access to the stores located on that street was restricted as well and that inflicted damages on the owners of the shops; such damages shall be compensated based on provisions of the General Administrative Code of Georgia (hereinafter ― GACG), namely, Article 209.1. In this example, road infrastructure development represents general activities of the state authority and damages caused by such activities

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12 Art. 59.1, Constitution of Georgia, Departments of Parliament, 31-33, 24/08/1995.
13 Ibid, art. 59.2.
14 Ibid, art. 59.3.
15 Article 2.1.a, General Administrative Code of Georgia, LHG 32(39), 15/07/1999.
16 *Turava P.*, General Administrative Law, 2nd ed., Tbilisi, 2018, 24 (in Georgian).
17 *Adeishvili Z., Vardiashvili K., Izoria L.* et al., Textbook of General Administrative Law, Tbilisi, 2005, 53-54 (in Georgian).
18 *Adeishvili Z., Winter G., Kitoshvili D.*, Commentaries on the Georgian Administrative Code of Georgia, Tbilisi, 2002, 32-33 (in Georgian).
19 Art. 18.4, Constitution of Georgia, Departments of Parliament, №31-33, 24/08/1995.
20 Decision № 2/3/423 of 7 December 2009 of the Constitutional Court, Public Defender of Georgia vs Parliament of Georgia, Part II, paragraph 2, <www.constcourt.ge/ge/legal-acts/judgments> [11.03.2019].

shall be viewed as damages inflicted upon as a result of general activities of the state agents (entities) in the area of administrative law.

Similarly to the Constitution of Georgia, the guarantees for protection of the right to claim compensation of damages, are created by the basic law of Germany, according to which if a person while exercising public authorities violates public obligations to the third person, the responsibility shall be imposed principally on the state or the employing body[21].

2.2. Special Activities Inflicting Damages

"The person whose freedom has been unlawfully curtailed has the right to receive compensation."[22] The special highlight on this provision and its distinct separation from the general legal regulation shall be stipulated by such fundamental principles and supreme values of free democratic law and order as people's freedom.[23] It should also be highlighted that paragraph 7, Article 18 of the Constitution of Georgia is closely linked to Article 42, paragraph 9, thus complementing each other and jointly creating constitutional guarantees (previous edition of the Constitution of Georgia). This fact is first of all reflected in the scope of the legal protection means and the compensation size of illegal detainees or arrested persons.[24]

In the area of Administrative Law, the damages arisen as a result of a special activity from the state authority shall be distinguished from the damages arisen from general activities. In the process of exercising these activities, the subjects carrying out special activities do not have the status of "an administrative body". The lack of such a status may have an impact on the "proper" use of legal means to protect the right of an aggrieved person to claim damages. In the scope of Administrative Law, we can consider the person's illegal conviction as a result of the damage that arose as a result of a special activity on the part of the state authority. When a person is charged with a crime, the Municipal (District) Court exercises not a legal authority or enjoys the status of "an administrative body"[25] but exercises justice. Hence, the activity carried out by it shall represent not a general activity of the state authority, but a special one.

3. The Form of Activity of an Administrative Body and the Types of Claims in Case of Compensation of Damages

The administrative body has public and private legal forms of activity. [26] Since this paper refers to the observance of the right to claim compensation for damages in the area of Administrative Law, we will

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21 Article 34, Basic Law for the Federal Republic of Germany, <www.bundestag.de/en/documents/legal> [11.03.2019].

22 Article 13, para. 6, Constitution of Georgia, Departments of Parliament, 31-33, 24/08/1995.

23 *Izoria L., Korkelia K.*, et al., Commentaries on the Constitution of Georgia, People's Basic Human Rights and Freedoms, Tbilisi, 2005, 96 (in Georgian).

24 See, decision № 2/3/423 of 7 December 2009 of the Constitutional Court, Public Defender of Georgia vs Parliament of Georgia, Part 2, paragraph 5, <www.constcourt.ge/ge/legal-acts/judgments> [11.03.2019].

25 Article 3, para. 2, subpara. "d", General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

26 *Turava P.,* General Administrative Law, 2nd ed., Tbilisi, 2018, 124 (in Georgian).

not expand on the private legal forms of activity of an administrative body. Moreover that, in private legal relations, administrative bodies act as subjects of Civil Law."[27] Correspondingly, the compensation arising out of such relations is subject to Civil Law and the legal mechanisms for the protection of the right of its claim is defined by private law, and the discussion of the latter is beyond the scope of the present paper. Therefore, I would like to note that of the public legal forms, the administrative body has four forms:

- Individual administrative-legal act;
- Normative administrative-legal act;
- Administrative agreement;
- Realact.[28]

Any public legal form of the activity of an administrative body: individual administrative-legal act, normative administrative-legal act, administrative agreement, or even a realact may cause direct damages. Therefore, the legal mechanisms that will allow the person to protect the claim of compensation for damages caused by the activities of an administrative agency will be different. Such mechanisms are an administrative complaint and claim, as well as the means to request claim and the right to compensation for damages.

On its part, compensation for damages by an administrative body is one of the forms of activity of an administrative body called a realact.[29] There is no unified legal definition of the latter, but it is widely used in scientific literature and Georgian judicial practice. [30] Realact is such an activity of a subject having public authority that aims not at causing legal consequences but at an actual outcome. For example, cash payment. [31] The fact that compensation for damages is a realact – the object of claim for obligation- is confirmed by the practice of the Supreme Court of Georgia, where in accordance with the definition of the Appeal Court, "T.K. ….filed a claim and concurrently demanded recognition of opening accounts in Samtredia branch ….. of the former Soviet Union Savings Bank, as well as imposition of compensation of the relevant amount on the Ministry of Finance of Georgia. i.e. he arose demands pertinent for both action for acknowledgement and obligatory claim by filing one and the same claim".[32] The knowledge of this legal condition is important, since the protection of the right of a person is directly connected with the proper determination of the form of the activity of the administrative body. If the person

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27 Article 65[1](1), General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

28 Further see, *Adeishvili Z., Vardiashvili K., Izoria L.,* et al., Textbook of General Administrative Law, Tbilisi, 2005, 102-105 (in Georgian).

29 In order to return unlawfully received government payable – pension – into the budget (being compensation of damages in terms of legal relations), the administrative agency uses Article 24 of Administrative Procedure Code of Georgia (APCG), i.e. a norm connected with the implementation of the task on realact. Relocation of the parties will not change the nature of their legal relations due to which the compensation of damages by the administrative agency shall occur in terms of Article 24. In details see, *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T*., Textbook of Administrative Procedure Law, Tbilisi, 2018, 287-289 (in Georgian).

30 *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T.,* Textbook of Administrative Procedure Law, Tbilisi, 2018, 285-286 (in Georgian).

31 *Detterbeck S.,* Allgemeines Verwaltungsrecht mit Verwaltungsprozesrecht, 12 Aufl., München, 2014, §15, Rn. 885, 331. *Ossenbül F., Cornilis M.,* Staatshaftungsrecht, 6 Aufl., München, 2013, §7, Rn. 280, 126.

32 Decision № BS-827-793(ვ-06) of 11 April 2007 of the Supreme Court of Georgia.

fails to properly define the form of an administrative body, he/she will make a mistake in selecting the legal remedy for the protection of the right. The relation between the form of activity of the administrative body and the protection mechanism of right is exactly the same as between a lock and a key. To open the lock, the person must select the key that corresponds to this lock. Similarly, in order to defend one's right, a person should choose the right mechanism enabling the person to protect his/her right; as to the selection criterion, it is the form of the activity of the administrative body, which the administrative body has performed or is requested by the person to be performed.

"Unless otherwise provided by this Code (GACG), the rule prescribed by the Civil Code of Georgia[33] shall be used for reimbursement of damages caused by an administrative body." In case when damages arise, Georgian legislation envisages indemnification means. Particularly, "the person who is obliged to reimburse the damages shall restore the condition that would have existed unless the obligatory consequences for compensation arose."[34] And "if restoration of the initial condition is not possible or leads to disproportionally big costs, then the creditor may be given a refund." [35] The choice of the means of damages compensation depends on the agrieved person; however, the question of how the offender will compensate for damages is decided by the court, who is obliged first to use the form of in kind restitution, whether it is replacement of the item or its repair. Only in the two cases when in kind restitution is not possible or when the latter is connected with disproportionally large costs, the offender will be allowed to use cash indemnification method to compensate for the damages.[36]

In case of inflicting damages, the restoration of its initial condition is required by the Administrative Law as well. Particularly, if as a result of invalidation of the individual administrative-legal act from the date of its enforcement, the administrative body obtained some welfare, the administrative body is liable to return it.[37]

4. The Application as a Claim for Compensation of Damages and a Right for Realization

According to Georgian legislation, "an application is a written request submitted, as prescribed by this Code, by the party concerned by the issuance of an individual administrative-legal act on obtaining the right."[38] The legal definition of the term "application" in the Administrative Law became necessary in order to highlight the right of the person to claim issuance of an individual administrative-legal act from the administrative body and in this way to protect, obtain or confirm his/her own right. [39] It is true

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33 Article 207, General Administrative Code of Georgia, LHG 32(39), 15/07/1999,

34 Article 408(1), Civil Code of Georgia, Departments of Parliament, 31, 24/07/1997.

35 Ibid, article 409.

36 Further see, *Chanturia L., Zoidze B*., Commentaries on Civil Code, Book 3, Tbilisi, 2001, 452-453, 455-457 (in Georgian).

37 *Adeishvili Z., Vardiashvili K., Izoria L.,* at al., Textbook of General Administrative Law, Tbilisi, 2005, 353 (in Georgian).

38 Article 2(1)(h), General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

39 *Adeishvili Z., Winter G., Kitoshvili D.*, Commentaries on Georgian Administrative Code of Georgia, Tbilisi, 2002, 40 (in Georgian).

that proceeding from the term itself, application should be related to the issuance of an individual act, but by considering the purpose of its interpretation we can widen the circle of forms of the activities of the administrative body which this term - application implies; we can assume that realact ia also included in these forms, thus ensuring maximum rights to the person.

In general the claim represents a pretention to demand some action or restraint from an action from another person. It is always directed towards a particular person and performing particular action or restraint from performing this action.[40] Hence, in the area of the Administrative Law, the legislation should take into consideration the legal means to claim compensation for damages by an aggrieved person and the application requesting compensation for the damages submitted to the responsible administrative body by an aggrieved person shall be considered as such. Furthermore, if a circumstance arises that impedes to claim compensation for damages, the application could be used as a means for realization the right of compensation for damages.

4.1. Application as a Legal Means for Claiming Compensation for Damages

The application as a legal means for claiming compensation for damages can be used only if the damages have been completed; i.e. such damages whose amount, despite the time remains unchanged, as the action of the activity form by an administrative body that regulates concrete relations has been completed and as a result we have the final outcome. In such a case the aggrieved person loses interest towards the dispute against the activities of the administrative body that inflicted damages, because due to the activity the legal outcome is obvious and his/her primary concern is to receive compensation for damages. [41] Contrary to this, in case of continuous damages, the aggrieved person should use the legal mechanisms to defend his/her rights, including the means of temporary protection. The damage is continuous when with time the amount of damages changes, since the form of the activity of the administrative body regulating particular relation continues to act and due to which the final outcome has not yet been achieved.

Legal mechanisms for the right to claim compensation for damages are an administrative complaint and claim. It should be noted that the right calls for protection only after it is violated. The right for compensation of damages will be violated if the aggrieved person addresses the administrative body with a claim for compensation of damages, i.e. with an application about perfroming the action and the latter is not satisfied. After that, the aggrieved person may use legal mechanisms for the right to claim compensation for damages.

Like the administrative body, in case there is a precondition for the obligation to compensate for the damages on the part of a government or a public servant, it should be possible to address the latter with a written request to compensate the damages. However, even if such an address does not exist, the aggrieved

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40 *Berekashvili D., Todua M., Chachava S., Dzlierishvili Z.,* Methods for Solving Cases in the Civil Law, Tbilisi, 2015, 20-21 (in Georgian).

41 *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T.,* Textbook of Administrative Procedural Law, Tbilisi, 2018, 320 (in Georgian).

person will have an opportunity to defend his/her rights on compensation of damages inflicted by the government or public servant by filing an administrative claim to the court.

4.2. Application as a Legal Means to Realize the Right to Compensation for Damages

The application as a means to claim compensation for damages shall be distinguished from the application as a mechanism for the realization of the right to compensation for damages. The criterion for the difference could be the presence of the condition impeding the claim for compensation of damages. Limitation period of the claim could be such a condition. In compliance with Georgian legislation, "the limitation period of the claim for compensation of damages inflicted by delict is three years from the moment the aggrieved person learnt about the damages or about the person responsible for the damages."[42] The limitation period shall be considered as a condition impeding the claim for compensation of damages, since it identifies the period of time during which the aggrieved person has an opportunity to claim for indemnification of damages. During this period the person responsible for the compensation of damages is liable to compensate damages. Expiration of the limitation period shall not affect the claim for compensation of damages as presence of a substantive-legal right, since its presence depends on the cumulative presence of actual and legal preconditions of the claim for compensation of damages defined by Article 1005. paragraph 1 of CCG. And they exist despite the limitation period for compensation of damages. Hence, even in case of limitation period of the claim, the request for compensation of damages, as a substantive-legal right, still pertains. The difference lies in the fact the aggrieved person in this case is unable to protect his/her right by enforcement and the person responsible for the compensation of damages has right to reject to perform the action. Despite this right, the person responsible for the compensation of damages could show his/her goodwill to settle the claim and compensate the damages.[43] This is based on the legislation of Georgia, particularly, "after the expiration of the limitation period, the responsible person shall have right to refuse to perform the action."[44]

While making a decision on the claim of limitation period in regard to compensation of damages, the attention should be paid to the limits of the autonomy of the administrative body. Unlike legal entities of legal and private law who may undertake any action not prohibited by law, the administrative body enjoys rights that have been precisely outlined in the law. The administrative body is limited by the principle of legality and protection of public interests, thus, excluding it from the use of principle of the autonomy of the will; this fact determines introduction of special legal regime for the persons participating in the administrative-legal relation. [45] Unlike the administrative authorities, when the state or public servant is responsible for compensation of damages, he/she shall be allowed to use the principle of autonomy of will defined

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42 Article 1008, Civil Code of Georgia, Departments of Parliament, 31, 24/07/1997.;

43 *Akhvlediani Z., Chanturia L., Zoidze B., Ninidze T., Jorbenadze S.,* Commentaries on Civil Code, Book 1, Tbilisi, 1999, 337 (in Georgian).

44 Article 144(1), Civil Code of Georgia, Departments of Parliament, №31, 24/07/1997.

45 *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.,* Textbook of Administrative Procedural Law, Tbilisi, 2008, 33-34 (in Georgian).

by the private law, which is stipulated by the legal circumstance that the government or civil servant does not represent an independent administrative body.

Since the administrative body has right to refuse to satisfy the compensation of damages after the limitation period, we can assume that while making decision on such a request, the administrative body is granted a discretional right – to perform an action and compensate the damages or to restrain from it. It should be highlighted that the legislation establishes the rule for exercising a discretional right, whose violation determines approval of not inexpedient, but illegal decision. Since, as mentioned already, a government or public servant does not represent an independent administrative body, he/she cannot exercise his/her discretional right in the sense given in Article 2 para 1 subparagraph k, GACG, though he/she will be able to apply autonomous principle of will envisaged by private law, which implies limitless discretion.

The judicial practice knows the case, when the aggrieved person has several times addressed the administrative body that inflicted damages on him/her with a claim to indemnify damages, and the administrative body settled the claim twice. The Appeals Court estimated this circumstance in compliance with Article 341 of CCG as the liability of the administrative body[46] to compensate the damages. As to the limitation period, in regard to one case the court decided that the claim for compensation of damages shall not be considered as having the limitation period, despite the fact that claim was filed to the incompetent court, since the subject exercising the state authority incorrectly explained to the aggrieved person the rule for appeal[47] . Due to this fact the court considered it inadmissible to restrict the protection of the right of the person.

5. Administrative Complaint, as a Legal Means to Protect Right to Claim Compensation for Damages

"An administrative complaint is a written request filed by a concerned party with the authorized administrative body prescribed by the rule of this Code to restore infringed right on declaring already issued administrative-legal act invalid, issued by the same or subordinate authority, its replacement or issuance of a new administrative-legal act or on performing an action by an administrative body or refraining from performing such an action that does not imply issuance of an individual administrative-legal act."[48] The administrative complaint has three functions:

- Protection of complainant's rights;
- Exercise of self-control by administrative bodies;
- Release of the court from the cases of an administrative category.[49]

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[46] Decision № BS-1116-1067(K-07) of 17 April 2008 of the Supreme Court of Georgia, in: *Nachkebia A*., Definition of Administrative-Legal Norms in the Practice of Supreme Court, Tbilisi, 2015, 101-102 (in Georgian).

[47] Decision № 3G/AD-329-K-02-2 of 24 March 2003 of the Grand Chamber of the Supreme Court of Georgia, in: Explanations of the Norms Used in the Decisions of the Grand Chamber of the Supreme Court of Georgia, Tbilisi, 2015, 54 (in Georgian).

[48] Article 2(1), subpara. 1, General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

[49] *Adeishvili Z., Vardiashvili K., Izoria L,* et al., Textbook of General Administrative Law, Tbilisi, 2005, 299 (in Georgian).

The administrative complaint has an advantage: during the administrative procedure, not only the legality of the activities of the subordinate administrative body is examined but also its expediency.[50]

It should be separately noted that Georgian legislation does not envisage filing an administrative complaint against the government or public servant and imposing the responsibility of compensation of damages on government or public servant by the administrative body administering the complaint. In addition, Georgian legislation does not envisage the possibility of filing administrative complaints on disputes arisen from concluding, fulfillment or termination of an agreement.[51] In this regard an administrative claim shall be utilized as a means for the protection of the right to claim compensation for damages. This issue will be more widely discussed in the following chapter.

"The concerned party has the right to appeal the administrative-legal act[52] issued by the administrative body." The term – administrative-legal act – implies both individual and normative acts.[53] By the initial edition of GACG the possibility of filing an administrative complaint on normative administrative-legal act was not allowed. [54] Only after the amendments introduced on June 24 2005, when the term administrative act was replaced by the term – individual administrative-legal act, it became clear that it was possible to file a complaint on normative administrative-legal act. In case of a normative administrative-legal act, only the damages directly inflicted by the normative administrative-legal act shall be subject to indemnification. Consequently, we should assume that in such cases a broad interpretation of the responsibility is inadmissible.[55] The Law of the Federal Republic of Germany also allows filing an administrative complaint but there is a difference - in general cases individual administrative-legal acts shall be appealed in the court unless otherwise envisaged by special legislation. [56]

Furthermore, "the action of the administrative body, not connected with the publication of the administrative-legal act, shall be appealed in terms of the regulation prescribed by this chapter"[57], which means that the object of the administrative complaint could be realact. [58] Despite this, there is an idea that it is possible to address a claim to the court to exercise the realact without one-time appeal: in case of a written refusal from the administrative body, within a month after officially receiving the refusal, and in case of its absence – any time.[59]

The utilization of the means of protection of the right – the administrative complaint – depends on two legal conditions: a) the type of damages inflicted by the activities of an administrative body and b)

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50 *Turava P.*, General Administrative Law, 2nd ed., 2018, 238-239 (in Georgian).
51 Ibid, 244.
52 Article 177(1), General Administrative Code of Georgia, LHG 32(39), 15/07/1999.
53 *Adeishvili Z., Winter G., Kitoshvili D.*, Comentaries on General Administrative Code of Georgia, Tbilisi, 2002, 36 (in Georgian).
54 Ibid, 223.
55 *Vachadze M., Todria I., Turava P., Tskepladze N.,* Comentaries on the Administrative Procedure Code, Tbilisi, 2005, 21 (in Georgian).
56 §79, Administrative Procedure Act, 25/05/1976, <www.gesetze-im-internet.de/englisch_vwgo/englisch_-vwgo.pdf> [11.03.2019].
57 Article 177(3), General Administrative Code of Georgia, LHG 32(39), 15/07/1999.
58 *Turava P.,* General Administrative Law, 2nd ed., Tbilisi, 2018, 244 (in Georgian).
59 *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava* E., Textbook of the Administrative Procedural Law, Tbilisi, 2008, in: *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T.,* Textbook of the Administrative Procedural Law, Tbilisi, 2018, 41 and 290 (in Georgian).

the form of its activities. As mentioned, two types of damages could arise as a result of the activities of the administrative body: a) completed and b) continuous. In case of completed damages, the amount of the damages is unchangeable, in case of uncompleted – changeable. Let's look into the cases when it is possible to protect the right to claim indemnification of damages by filing an administrative complaint.

5.1. Protection of the Right to Claim Compensation for Continuous Damages

5.1.1. Protection of the Right to Claim Compensation for Damages Inflicted by Administrative-Legal Act

Proceeding from the peculiarities of the continuous damages, since the amount increases, the aggrieved individual has interest to suspend the action of the administrative-legal act so that the damage amount does not increase and initial condition could be restored. Consequently, in order to restore the initial condition, he/she should claim invalidation of the administrative-legal act that inflicted damages and assign the administrative body to compensate the damages inflicted; in order to eliminate the increase in the amount of damages, Georgian legislation envisages a temporary mechanism of the right protection, so called suspensive effect. Particularly, "unless otherwise defined by the law or bylaw issued on the basis of the law, the action of the appealed act shall be suspended as soon as the complaint is registered. And the administrative body shall issue an individual administrative act"[60]. It is true that in order to suspend the action of the appealed administrative-legal act, the Law of Georgia demands issuance of an individual administrative act, but this requirement does not have a mandatory nature and even if it is not issued, the action of the administrative-legal act will be automatically suspended once the complaint is registered. Georgian legislation envisages an exception, when the administrative body that issued the disputable administrative-legal act or administered the complaint shall receive an individual administrative act about the continuation of the action of the appealed administrative act. Adoption of such individual administrative-legal act is mandatory. The interested person including the complainant has the right to appeal the decision on suspension of the action of the administrative-legal act, as well as on its continuation by the regulations prescribed by Georgian legislation in regard to individual administrative-legal act.[61]

The above given mechanism protects the aggrieved person from further increase in damages amount, as to the already generated damages, the aggrieved person shall ask for its compensation. In case of continuous damages, the aggrieved person does not necessarily have an obligation to address the subordinate administrative body with an application and the presence of a negative decision on settlement of the claim by the latter is not necessary either. The main arguments for such an approach are the principles of cost effectiveness of administrative procedure and informal attitude toward the issue to be solved. The latter implies that while making a decision the administrative body shall not have rather formal attitude to the issue to be solved. Informal principle differs from cost effectiveness in the following: while

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60 Article 184 (1), General Administrative Code of Georgia, 32(39), 15/07/1999.

61 *Adeishvili Z., Winter G., Kitoshvili D.,* Commentaries on the General Administrative Code, Tbilisi 2002, 336-337 (in Georgian).

taking the latter into consideration, the subject making a decision on the issue reduces unwanted expenses and the terms for considering the complaint by observing all the requirements of the legislation. Contrary to that the principle of informality achieves the same goal, however, through insignificant violation of the requirements of the law, i.e. the mentioned principle implies that the subject deciding the issue shall not have too formal attitude to the issue.

5.1.2. Protection of the Right to Claim Compensation for Damages Inflicted by Realact

While defending the right to claim compensation for continuous damages inflicted by realact, the aggrieved individual also has interest to stop exercise of realact so that not to allow the damages to increase and to restore the initial condition. Consequently, in order to restore the initial condition, he/she should claim restraint from performing of the action that inflicted he damages and imposition of compensation of the generated damages on the administrative body. In such case, cost effectiveness and informal principles will also apply, i.e. it is not mandatory for the aggrieved individual to address the administrative body with a claim for compensation of damages or the presence of the decision on refusal to settle the claim.

The main problem of an administrative complaint that emerges during protection of the right to claim compensation for continuous damages inflicted by realact is the fact that Georgian legislation does not consider the temporary protection means of the right. Consequently, unlike administrative-legal acts, when the registration of the administrative-legal act would suspend the action of the act, other than an exception, in case of realact, the subordinate administrative body has right to perform the action at least until the final decision in regard to the issue is made and the aggrieved individual will not be able to resist increase in the amount of damages by means of any legal mechanism. Consequently, it might be even more appealing for the aggrieved individual to file the administrative claim in the court, since the administrative proceedings envisage more temporary protective means of the right,[62] than in case of administrative procedures in regard to an administrative complaint. It is compounded by the fact that filing one-time administrative complaint is not a precondition for admissibility of the claim on restraining the administrative body from performing the action.[63]

5.2. Protection of Right to Claim Compensation for Completed Damages

Compared to protection of right to claim compensation for continuous damages, protection of the right to claim compensation for completed damages is simpler, since in case of the latter the aggrieved individual does not have to utilize legal means to avoid increase in the damage amount and his/her only concern is to impose compensation of damages on the administrative body. To achieve this purpose

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62 By means of temporary protection mechanisms of the right envisaged by Article 31 of the Administrative Procedure Code of Georgia, LHG 32(39), 15/07/1999

63 *Loria V. (ed.), Kharshiladze I., Kopaleishvili M., Tskepladze N.,* et al., Commentaries on Administrative Procedure Code, 3rd ed., Tbilisi, 2008, 238 (in Georgian).

he/she can use such a mechanism of protection of the right as is administrative complaint, by means of which the aggrieved individual shall demand from the subject considering the complaint to impose on the administrative body that inflicted damages to perform an action, i.e. to compensate damages. It should be separately noted, that the aggrieved individual can choose other means of protection of right, particularly, to file a claim without filing an administrative complaint.

6. Administrative Claim, as a Legal Means to Protect Right to Claim Compensation for Damages

An administrative claim, as a legal means to protect right to claim compensation for damages is envisaged by the Administrative Procedure Code of Georgia (hereinafter, APCG). Since in the given paper the activities of the government authority inflicting damages were divided into two categories, hence, the means of protection of right to claim compensation for damages shall be also divided into two types: 1. administrative claim on protection of right to claim compensation for damages inflicted by general activities of the government authority and 2. Administrative claim on protection of right to claim compensation for damages inflicted by special activities of the government authority.

6.1. Protection of Right to Claim Compensation for Damages Inflicted by General Activities of the Government Authority

General activity of the government authority is exercise of public legal authority by legal subjects. In this case the administrative body applies public legal forms of activities which acquire procedural-legal significance since they determine proper selection of the means of protection of right to claim compensation for damages.[64] This acquires especial significance when we have to deal with the continuous damages. In this case the interest of the person is directed not only towards the past – to receive compensation for already generated damages, but towards the future – to eliminate increase in the amount of damages. Hence, the aggrieved person has to correctly determine the form of activities of the administrative body that inflicted damages and file a claim against it. In case of completed damages, the interest of the interested person is directed only towards the past – compensation for damages, hence he/she does not need to file a claim against the activity that inflicted damages, since such an action has already completed and maximum damages have already been generated. Let's review the mechanisms of protection of right to claim compensation for damages from each category of damage.

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64 *Vachadze M., Todria I., Turava P., Tskepladze N.*, Commentaries on the Administrative Procedural Code, Tbilisi, 20015, 247 (in Georgian).

6.1.1. Protection of Right to Claim Compensation for Continuous Damages

In case of continuous damages, the means of protection of right to claim has one common character, expressed in protection of the interest directed towards past. In order to protect the latter interest, he/she shall request to impose performance of an action on the body that inflicted damage, i.e. compensation of damages as prescribed by Article 24, part 1 of APCG. And in the part of protection of interest directed towards the future, the mechanisms of protection of right to claim compensation for damages are different; consequently, the claims of the aggrieved person shall also be different. This will be discussed in the following subchapters.

6.1.1.1. Protection of Right to Claim Compensation for Damages Inflicted by Administrative-Legal Act

In compliance with Georgian legislation, to file an administrative claim against administrative-legal act is admissible, and as already mentioned under this term we also imply normative administrative-legal act. Unlike Georgia, the Netherlands bans filing a claim against particular normative decisions,[65] hence, their legislation defines the types of administrative claim objects in more details.

6.1.1.1.1. Damages Inflicted by Administrative-Legal Act

"The subject-matter of an administrative dispute in the court could be consistency of the administrative-legal act with Georgian legislation."[66] Hence, in compliance with Article 22, part 1 of APCG, the aggrieved person is authorized to claim invalidation of the issued administrative-legal act that inflicted damages. Such kind of claim in most cases does not require suspension of the increase in the amount of damages, as the claim on invalidation of administrative-legal act has a suspensive effect towards the disputed individual administrative-legal act. Particularly, without a motion of a party and a court hearing, acceptance of the claim automatically suspends the action of the disputed individual act. Acceptance of the claim means that a court issued ruling about taking proceeding to court and not filing a claim into the court registry.[67] In the exceptional cases[68] envisaged by Georgian legislation, the acceptance of the claim does not have suspensive effect towards the disputed individual act, however, if this is the case, the aggrieved person has an alternative mechanism for temporary protection of right; particularly, by his/her

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65 Article 8:2, Dutch General Administrative Law Act, 05/1994, <www.acm.nl/en/publications/publication/15446/Dutch-General-Administrative-Law-Act> [11.03.2019].

66 Article 2(1), subpara. "a", Administrative Procedure Code of Georgia, LHG 32(39), 15/07/1999.

67 *Loria V. (ed.), Kharshiladze I., Kopaleishvili M., Tskepladze N*., et al., Commentaries on the Administrative Procedure Code, 3rd ed., Tbilisi, 2008, 266-267 (in Georgian); see also, Article 29(1), Administrative Procedure Law, LHG 32(39), 15/07/1999.

68 Ibid, Article 29(2). Also, Articles 23 and 35, Law of Georgia on "Licenses and Permits", LHG, 40, 18/07/-2005.

request, the court can suspend the action of the individual act.[69] In this case, the court decision on temporary protection of right replaces so called suspensive effect.[70]

True, it is possible to address the court with request to announce normative administrative-legal act invalid[71], but in regard to such a disputable act unlike disputable individual administrative-legal act, suspensive effect does not apply, as defined by the heading and wording of Article 29 of Administrative Procedure Code of Georgia. Unlike administrative claim, while filing a complaint on recognition of normative administrative-legal act invalid, we can assume that the suspensive effect applies to the disputed normative administrative-legal act. Article 184 of the General Administrative Code of Georgia that determines suspensive effect caused by filing an administrative claim, uses the term "administrative-legal act" and not "individual administrative-legal act". The former, as mentioned, implies individual as well as normative-legal act. Proceeding from this, it is desirable that the norms regulating administrative claim and complaint about recognition of the normative administrative-legal act invalid are brought into consistency. As Georgian legislation considers it admissible to provide the person with repressive protection (restoration of the infringed right)[72] by filing an administrative claim on recognition of normative administrative-legal act invalid, it would be logical that the procedural legislation envisage the mechanism of temporary protection of right, since without it, it would be impossible to provide efficient justice, because there would be a risk that before the final decision is made on the case, the public authority would make the person face the actual facts.[73]

6.1.1.1.2. Damages Inflicted by Failure to Issue an Administrative-Legal Act

"In the court the subject-matter of the administrative dispute may be the responsibility of an administrative body to issue an administrative-legal act."[74] Proceeding from this, the aggrieved person is authorized, by Article 23, part1 of APCG, to claim the issuance of the administrative-legal act whose non-issuance inflicts damages on him/her. However, such claim cannot suspend the increase in the amount of damages caused by failure to issue the administrative-legal act until the disputed issue is resolved. In such a case, the aggrieved person shall utilize temporary mechanism of protection of right and, in order to perform independent procedural action, apply to the court and demand preliminary regulation

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69 Article 29(3), Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.

70 *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.,* Textbook of Administrative Procedure Law, Tbilisi, 2008, 389 (in Georgian).

71 Ibid, 306.

72 *Vachadze M., Todria I., Turava P., Tskepladze N*., Comments on the Administrative Procedural Code, Tbilisi, 2015, 174 (in Georgian).

73 *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.,* Textbook of Administrative Procedural Law, Tbilisi, 2008, 386 (in Georgian).

74 Article 2(1), subpara. "c", Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.

of disputable legal relations.[75] The purpose of the temporary means of protection of right is to avoid actual risk of infringement of the person's interests by changing the legal situation.[76]

While compensating the damages caused by failure to issue the normative administrative-legal act, there is no temporary means for protection of right, unlike repressive protection mechanism of right. Since the latter exists, there should also exist temporary protection means of right so that to provide the aggrieved person with complete protection of right.

6.1.1.2. Protection of Right to Claim Compensation for Damages Inflicted by Realact

"The subject-matter of the administrative dispute in court could be a responsibility of the administrative body on performing some action".[77] The responsibility on performing an action implies performing an action, as well as restraint from performing an action. In order to suspend the increase in the amount of damages, the aggrieved person shall address the court and claim restoration of the infringed right, as defined by Article 24, part1 of ALCG. In addition, it does not matter for the claim whether the damage is inflicted by performing an action or by failure to perform it, since the aggrieved person's protection of right is exercised by Article 24 of ALCG whether the damage was inflicted by performing or failure to perform the activity. The difference between the claims on imposition of performing an action and restraint from performing an action lies on temporary mechanisms of right protection. Let's discuss them in the subchapters below.

6.1.1.2.1. Damages Inflicted by Failure to Perform an Action

Temporary means of protection of right to claim compensation for damages inflicted by the failure to perform an action is identical to the temporary mechanism of protection of right to claim compensation for damages arisen from failure to issue an administrative-legal act. It follows that in the latter two cases, the administrative body is unlawfully refusing to comply with the obligation under the law - whether it is issuance of an administrative-legal act or performance of an action that damages the person. In such a case, as noted while discussing the temporary mechanism of protection of right to claim damages arising from failure to issue an administrative-legal act, in order to suspend the increase in the amount of damages, the aggrieved person can temporarily defend his/her right on the basis of the provisions of Article 31 part 1 sentence 2 of APCG. This provision ensures protection of the aggrieved person's interests by changing the existing legal situation, through the preliminary settlement of the legal relationship.

One of the interesting issues related to the responsibility to compensate damages due to the failure to perform an action by administrative body, is the case when the Park of Culture and Recreation in Rus-

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75 Ibid, Article 31(1), sentence 2.

76 *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.,* Textbook of Administrative Procedural Law, Tbilisi, 2008, 393 (in Georgian).

77 Article 2(1), subpara. "c", Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.

tavi, a 7-year-old child was attacked and stung by a viper, which resulted in the child being in serious condition. The appellant demanded from The City Hall and the owner of the park to compensate for the damages, but the claim was not settled; as the Court of Cassation explained the defendants were not able to prevent damage; it was an accident that the defendants were not guilty of. The state, which is the owner of wild animals, is not responsible for damages caused by animals in the natural state of liberty.[78]

6.1.1.2.2. Damages Inflicted by Performing an Action

While compensating damages inflicted by an action, to suspend increase in the amount of damages, the interest of the aggrieved person is to retain that legal situation, which existed before the action was performed. Consequently, the mechanism of temporary protection of the right to claim damage compensation, used for changing the legal situation will not satisfy the aggrieved person's interest and contrary to that, the aggrieved person's protection could be maintained only by temporary protection means of the right that provides retention of the legal situation. In compliance with Georgian legislation, "On the basis of an application, a court may render temporary ruling regarding a dispute, prior to initiating proceedings, if there is a risk that changing the existing situation may hinder or significantly complicate the exercise of the applicant's rights."[79]

6.1.1.3. Protection of Right to Claim Compensation for the Damages Inflicted by an Administrative Agreement

"The subject-matter of an administrative dispute in court may be conclusion, fulfillment or termination of an administrative agreement,[80] also the responsibility of the administrative body on compensation of damages."[81] In order to suspend the increase in the amount of damages, the aggrieved person shall address the court and claim restoration of the infringed right, as defined by Article 25^1, part2 of APCG. In regard to the mechanisms of temporary protection of right, Articles 29 and 31, part2 of APCG could not be applied, since they refer to disputes that arose in regard to individual administrative-legal acts and performance of or failure to perform an action and not in regard to the disputes that arose from administrative agreements, which is absolutely clear from the heading of the articles and their wording.

It is true that the mechanisms of temporary protection of right do not apply to disputes that arose due to administrative agreements, however civil procedural means should be applied, as well as the measures that ensure enforcement of claims[82] and decisions[83]. Consequently, temporary protection of appellant's rights on such disputes is relatively better secured than on the disputes connected with those arisen from normative administrative-legal acts.

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78 Decision № BS-205-172-K-04 of 23 September 2004 of the Supreme Court of Georgia, in: *Rusiashvili J.,* Compensation of Damages by Administrative Bodies, Tbilisi, 2013, 150-156 (in Georgian).

79 Article 31(1), sentence 1, Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.

80 Ibid, Article 2(1), subpara. "b".

81 Ibid, Article 2(1), subpara. "c".

82 Article 198, Civil Procedure Code, Departments of Parliament, 47-48, 31/12/1997.

83 Ibid, Article 271.

6.1.2. Protection of Right to Claim Compensation for Completed Damages

6.1.2.1. An Action for Acknowledgement

"The subject-matter of the administrative dispute in the court could be determination of existence or absence of right or legal relations." [84] By the definition of the Supreme Court of Georgia, "an action for acknowledgement can occur only when other claims cannot be applied. From the view of cost effectiveness of the trial, an action for acknowledgement is inadmissible if it is possible to issue a claim on exercising responsibility, i.e. if it is possible to issue liability claim. The appellant cannot be legally interested in launching an action for acknowledgement if he/she has an opportunity to achieve a claim in any other form. Furthermore, an action for acknowledgement shall not become a means to escape the preconditions of other types of claims. An action for acknowledgement does not contain the demand for the defendant to accomplish the claim or to enforce the execution."[85] An action for acknowledgement shall be applied in the cases when the activities that inflicted damages have already been performed and they caused the damages in the maximum amount that it could have caused. In such a case, the aggrieved person has interest not toward the activity of the administrative body, but towards the compensation of damages. In such cases the aggrieved person, on the basis of Article 25, part 1 of APCG an action for acknowledgement shall be addressed to the court and he/she shall demand recognition of the completed activities of the administrative body as unlawful. [86] One of such examples is dismantling of the building by the action, implementation of the realact by the administrative body. According to the explanation of the Supreme Court of Georgia "the dismantling of the building by the administrative body is a one-time completed operation (realact). By such realact the only means to restore the right infringed by exercising the realact is an action for acknowledgement envisaged by the procedure legislation to demand that the action be recognized illegal."[87] In this case the interest of the aggrieved person is to appeal not the completed action, but compensation of the damages already generated by such an action.

It is true that Article 31 of the APCG does not directly specify the possibility of using the temporary protection mechanism of the right envisaged by these articles in regard to an action for acknowledgements. The mentioned means should be applicable in case of filing an action for acknowledgement as well.[88] After illegality of the activities of the administrative body is recognized, the aggrieved person shall apply to the body having inflicted damages, as a legal means claiming compensation for damages.

The cases when there is a condition that impedes the claim for compensation of damages should be separately discussed. Particularly, when the claim is beyond the limitation period. The presence of this legal condition should affect not admissibility of an action for acknowledgement and the possibility of its allowability, but the realization of the right of compensation of damages. This proceeds from the

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84 Article 3(1), subpara. "d", Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.

85 Decision № BS-740-706(K-07) of 5 March 2008 of the Supreme Court of Georgia.

86 *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.,* Textbook of Administrative Procedure Law, Tbilisi, 2008, 375 (in Georgian).

87 Decision № BS-595-573(KS-13) of 2 October 2014 of the Supreme Court of Georgia.

88 *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.,* Textbook of Administrative Procedural Law, Tbilisi, 2008, 392 (in Georgian).

fact that, as already mentioned substantive right – the right of compensation of damages – exists independent of the condition of the limitation period - impeding the claim. Consequently, after recognizing the basis for the limitation period - the illegal activities of the administrative body, the aggrieved person shall apply to the body that had inflicted damages – as a legal means for realization the right for damages compensation. While reviewing this application, the limitation period of the claim for compensation of damages will affect the settlement of the claim, since the administrative body, in terms of Article 144 part 1 of APCG, will have right to reject the settlement of the claim. This means that in case the claim has limitation period, the administrative body has discretional right to the settlement of the claim having limitation period. The rule to exercise discretional right is established by Georgian legislation.

6.1.2.2. Claim on Imposing Performance of an Action

As noted, compensation for damages by an administrative body is performance of an action. Consequently, in case of presence of completed damages, the aggrieved person, for the purpose of repressive protection of the right of claim, in terms of Article 24 part 1 of APCG, shall apply to the court with a claim to impose on the administrative body compensation for damages, i.e. to perform an action.

In cases when the activities of the administrative body that inflicted continuous damages have collateral completed damages, the aggrieved person shall not be obliged to apply to the administrative body that inflicted damages with a claim for compensation of damages, as this will cause artificial division of the claims arisen from one and the same issue, which will be a rather formal approach to this issue. This could lead to a new dispute, which will negatively affect government expenditures. Contrary to this, we can say that when the interest of the aggrieved person is compensation of already generated damages as well as suspension of increase of its amount, the mechanism for the right he/she had applied is unified because it should be simultaneously directed towards the suspension of the increase in the amount of damages, and towards the compensation of damages. In this case, the court shall be guided by the informal principle, which allows, proceeding from the particular relation, the claim on compensation for completed collateral damages resulting from the activity of an administrative body responsible for the continuous damages to be recognized admissible on performing the action – compensation of damages - by the administrative body, even in case of absence of a negative decision.

The case will be completely different, when the activities by the administrative body that inflicted damages have been performed and we see only completed damages. In this case the aggrieved person shall be obliged to demand from the administrative body having inflicted the damages, to perform an action – compensation for damages and once this claim is rejected to be settled, he/she will be able to file a claim against the performance of the action – compensation for damages. This is because the protection mechanism of the right to claim compensation for completed damages is not artificially separated from the protection means of the right to claim compensation for continuous damages. Furthermore, the aggrieved person will not be able to use such means since continuous damage does not exist at all.

6.2. Protection of Right to Claim Compensation for Damages Inflicted by Special Activities of the State Authority

As mentioned a special activity of the state authority shall be considered performance of such an activity by the government authority which is not connected with exercise of public legal authority. True, the list of such activities is fully given in Georgian legislation, such an activities are:

- Conviction of a person;
- Criminal prosecution of a person;
- Use of detention of a person as a preventive measure;
- Imposing an administrative penalty on a person in the form of an administrative imprisonment;
- Imposing an administrative penalty on a person in the form of a correctional labor.[89]

As a result of performing such an illegal activity, damages that the person suffered shall be completely indemnified to the aggrieved person. The fact that the person experienced damages due to illegal activity is confirmed by the presence of a rehabilitating condition of the person, without which damages caused by special activities of the state authority shall not be compensated. Such conditions are: not guilty verdict, termination of a criminal case due to absence of constituent element of offense, etc.[90]

"A legal document" confirming the presence of rehabilitating condition acts exactly in the same way as in case of completed damages, the court decision obtained by presenting an action on acknowledgement on the presence of basis for compensation of damages. Since the latter confirms that the person has substantive rights, as is the case with "a legal document" confirming the presence of rehabilitating condition. After either of them, the person shall claim compensation of damages, by means of an independent legal measure, or else damages will not be indemnified. The measure by which the aggrieved person can claim compensation of damages generated by special illegal activity of the state authority is envisaged by Article 24 part 1 of the Administrative Procedure Code of Georgia. It stems from the fact that though the subject that performs such activities, for example, investigation and prosecution agencies, courts, proceeding from the activities they perform in general do not represent administrative bodies but compensation for damages on their part, as an activity, is very close to such a form of activity of an administrative body as realact.

After defining the circumstances and criterions that affect the proper selection of means protection the right to claim a compensation for damages, it would be reasonable for obviousness to show a table/scheme[91] for use of repressive and preventive mechanisms for protection of the right:

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89 Article 1005(3), Civil Code of Georgia, Departments of Parliament, 31, 24/07/1997.

90 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J. (eds.),* Commentaries on the Civil Code, Book 4, Vol. 2, Tbilisi, 2001, 420 (in Georgian).

91 The symbol „X" represent that in the case of an appropriate activity the according legal mean (administrative application, complaint and claim) is not applicable.

		Legal Means of the Right to Claim Compensation for Damages													
		Continuous damages										**Completed damages**			
		General activity inflicting damages										General activity inflicting damages		Special activity inflicting damages	
		Administrative - legal act		Administrative - legal act – not issued		To perform an action		Failure to perform an action		Administrative agreement					
Stages		Repressive protection	Temporary protection	Repressive protection	Temporary protection	Repressive protection	Temporary protection	Repressive protection	Temporary protection	Repressive protection	Temporary protection	Repressive protection	Temporary protection	Repressive protection	Temporary protection
I	An action for acknowledgement	X	X	X	X	X	X	X	X	X	X	APCG Article 25.1.	APCG Article 31	Presence of rehabilitating condition	X
II	Application	X	X	X	X	X	X	X	X	X	X	GACG Article 2.1.h.	X	X	X
III	Administrative claim	GACG Article 177.1.	GACG Article 184.1.	GACG Article 2.1.i.	Not envisaged	GACG Article 177.3.	Not envisaged	GACG Article 177.3.	Not envisaged	X	X	GACG Article 177.3.	Not envisaged	X	X
IV	other types of claim	APCG Article 22.1.	APCG 29.1. and 3 Articles (except for normative acts)	APCG Article 23.1.	APCG Article 31.1. 2 sentence	APCG Article 24.1.	APCG Article 31.1. 1 sentence	APCG Article 24.1.	APCG Article 31.1. 2 sentence	APCG Article $25^1.2$.	CPCG Articles 198 and 271	APCG Article 24.1.	APCG Article 31.1. 2 sentence	APCG Article 24.1.	X

7. Conclusion

Based on the matters studied in the present article, were identified the criterions to proper selection of the means of protection of right to claim a compensation for damages. These are: The character of an activity that arisies damages, the legal forms of the activity and the type of damage itself. Damages can be inflicted by special or general activities of the state and only in the case of latter it is possible to utilize administrative application, complaint and claim. After determining above mentioned legal circumstance, because of a variety of the legal means for protection of rights, for its proper selection it is necessary to estimate one more criterion – type of damages. There are two types of damages: completed and continuous.

In the event of completed damages inflicted by special activity of the state, aggrieved person, based on a „decision" confirming the presence of a so called rehabilitating condition, requests compensation of damages by applying to a court with claim for obligation. As it was discussed in the present article the utilization of the claim for obligation is justified, since administrative measure – compensation of damages, that should be carried out by a responsible body is a realact in terms of legal form of activity.

During a compensation of completed damages inflicted by general activity of the state, it might be more reasonable for an aggrieved person to apply to a court with a resumptional claim for acknowledgement instead of directly with the claim for obligation and to request acknowledging of illegality of an activity inflicting damages. After determining the abovementioned he/she can demand compensation for damages with filing an application to a responsible administrative body. Here could be drawn a parallel between a resumptional claim for acknowledgement and a „decision" confirming the presence of a rehabilitating condition, since both of them affirm an illegality of an activity inflicting damages. The difference is that the first one is related to a general activity of the state and the second one to - a special.

During a compensation of continuous damages inflicted by general activity of the state, it is necessary for a proper selection of repressive and preventive legal means for protection of rights to estimate the third criterion – a legal form of an activity of an administrative body. There are four types of it: individual and normative administrative-legal acts, administrative agreement and realact. Means for protection of rights should be selected against the legal forms of the activity resulting damages in order to suspend the increase in (continuous) damages.

Abovementioned means for protection of rights are characterized to have legal deficiencies. Namely:

• There are no means for temporary protection of rights, in case of compensation of continuous damages caused by realact, because of what it would be impossible for an aggrieved person to suspend the increase in damages when submitting an administrative complaint, unlike in case of administrative claim;

• Similar problem exists when a claim is filed in regard to normative administrative-legal act, since procedural mechanisms for temporary protection of the right cannot be applied in regard to any such claims;

• The situation is almost the same in case of temporary protection of the right to claim compensation for damages inflicted by an administrative agreement, since temporary protection mechanisms envisaged by Articles 29 and 31 of APCG, we should assume, do not apply to administrative agreements.

Tackling of abovementioned legal deficiencies would ensure the preventive protection of the right to claim compensation for damages, which in turn helps to increase the efficiency of it's repressive protection.

It's not less important to note and should be a novation that in the field of the Administrative Law could be applied such Private Law institutes as acknowledgment of the existence of a debt and performing the claim of limitation period. In case of the latter one an aggrieved could request compensation for damages if a court based on a resumptional claim for acknowledgement determines the right to claim compensation for damages as a substantive right to be present. After making such decision an aggrieved person should apply to a responsible administrative body and request a compensation for damages. In turn the latter would have a right to refuse to perform an action, which indicates an existence of discretion of administrative body. Regulations for exercising a discretion are determined by Georgian legislation. Thus, deciding the issue connected with the limitation period of the compensation for damages is discretionary power of the administrative body and the latter does not have such high autonomy of will as in case of entities of private law.

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Consumers' Right to Education in Georgia and EU States

Today, consumers participate in many markets, where the flow of information, also, a wide range of products and services are available. In general, makers of products and services, as well as suppliers, have market power and informative advantage compared to consumers, who are hardly aware of the important terms and conditions of the proposed services and products. This feature of the markets naturally forces state governments to increase the level of financial education of consumers.[1]

Generally, consumers' education can develop critical thinking, increase customers' awareness and enhance their activity. Today consumers' education covers many areas. In particular, the rights and obligations of the parties, issues of personal financing, the rules of proper use of products, the use of digital technologies, etc. So it comes out, that consumers' education is a difficult process.[2]

Last time, the European Organization for Economic Cooperation and Development surveyed various states and identified the problems in regards to consumer education (customers' scant awareness towards consumer issues; absence of educational strategies and legal mechanism, as well as limitation of relevant resources). Unfortunately, Georgia still faces such challenges, which are caused by flawed legislation, weak cooperation between authorized agencies or organizations and not having links with similar foreign institutions; Also, the passivity of the private sector.

Considering all these factors, Consumers' Right to Education is a substantial legal issue. Accordingly, the purpose of this paper is to analyze national, international regulations and established practices; identify existing legal problems and suggest procedures for their consecutive elimination. To achieve this goal, comparative-legal and analytical research methods will be used.

Key words: *Consumers' Right to Education, The UN Resolution № 39.248, Draft Law "On Consumer Rights Protection".*

1. Introduction

The consumers should be properly informed at any time, to make effective decisions and protect own interests. From this point of view, consumers' education has the utmost importance and it is the process of acquiring and developing skills for informed and useful decision making. Education is one of the basic rights of consumers (which in turn, includes the right to safety, to be informed, to satisfy basic needs, to redress, to be in a healthy environment).[3]

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1 *Neuberger D.*, Financial Inclusion, Regulation and Education in Germany, ADBI Working Paper, №530, Asian Development Bank Institute (ADBI), Tokyo, 2015, 17.

2 OECD, Consumer Education Policy Recommendations of the OECD's Committee on Consumer Policy, Paris, DSTI/CP, 2009, 5/Final, 3.

3 *Harding C., Kohl U., Salmon N.,* Human Rights in the Market Place, The Exploitation of Rights Protection by Economic Actors, Aberystwyth University, UK, 2016, 132.

Consumer education is also important for entrepreneurs who operate in competitive conditions and want to increase sales, get more financial benefits and strengthen market positions. Of course, for comparison of many products or services, consumers need to have full information and the ability to correctly perceive it, which determines their decision — purchase a specific product and service or not. Therefore, entrepreneurs are trying to provide timely and thorough information to the customers, to sell their products and services. Financial education is crucially meaningful as well because it helps individuals to precisely determine their needs. At the same time, consumers who ignore this factor spend considerably more financial resources on services/products and are more dependent on loans.[4] The "Gallup World Poll" survey also illustrates the significance of financial education. It was conducted in 2014, and 150,000 people were interviewed worldwide. Subsequently, the highest rate of financial intelligence in Europe was attested in Denmark, Finland, Germany, Holland, Sweden, Norway, and Great Britain. It has been found that around 65% of adults are well aware of financial issues.[5] So, these countries pay enough attention to the multilateral education of consumers. It should be noted that consumers' education is exceptionally valuable; that it serves the legitimate, economically reasonable interests and needs; also, promotes fair and balanced competition, which is the state's priority goal, as well as the common public benefit. Consequently, consumers' teaching is a crucial element[6] of state politics and one of the bases of public-private sector collaboration.

Therefore, consumers' right to education is reflected in both international and national legislation and recommendations, guidelines or action plans. For instance, consumers' right to education (under Article 169[7] of "The Treaty on the Functioning of the European Union") is tightly connected with the right to be informed and extends it. Articles 165 and 167 [8] of the same agreement have similar functions. Also, consumers' education is one of the main objectives of clients' protection under Article 153 of the so-called "Treaty of Amsterdam" of 1997, stating that the EU must provide consumers' study.[9] Here also should be emphasized that these norms are important (but not the only) protective mechanisms for consumers' education, which will be better seen in the examples of separate states.

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4 *Klapper L., Lussardi A., Oudheusden P. V.,* Financial Literacy Around the World: Insights From The Standard & Poor's Ratings Services Global Financial Literacy Survey, 2015, 4, <https://responsiblefinanceforum.org/wp-content/uploads/2015/12/2015-Finlit_paper_17_F3_SINGLES.pdf> [28.03.2019].

5 Ibid, 7.

6 *Reich N., Micklitz H. -W., Rott P.,Tonner K.*, European Consumer Law, 2nded., Vol. 5, Cambridge, 2014, 26.

7 According to Article 169.1 of "The Treaty On The Functioning Of The European Union", the European Union, together with other measures, facilitates the right to educate consumers for protecting their interests. Article 169, Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, EU, C 326/47, 01/12/2009.

8 According to Article 165, the European Union provides cooperation between the Member States to increase the quality of education. Besides, during the educational process, the Union will consider the cultural and linguistic distinction of states. Under Article 167, the European Union will assist member states in the development of common cultural values and respect their national or regional diversity. Ibid, Articles165, 167.

9 Article 153,Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Final Act, Official Journal of the European Communities, Vol. 40, OJ C 340, 10.11.1997,<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1997:340-:FULL&from=EN> [28.03.2019].

2. Guarantees of the Consumers' Right to Education

To create guarantees for the consumers' right to education, it was necessary to identify the existing challenges in states, divide them into categories and develop appropriate recommendations. That is why the Committee on Consumer Policy (CCP) of the Organization for Economic Co-operation and Development (OECD) conducted a study in 2008 to determine which mechanisms were providing consumers' education in member states. An analytical report was prepared regarding the support of consumer education institutions in different countries, and the NGOs' role in this process; this report touched main trends and challenges, also, assessment mechanisms for education programs. The survey was conducted in twenty-seven EU states and the following six major challenges were identified:

1. Most of the countries did not have consumers' education strategies;
2. Increasing the level of consumers' education was inevitable;
3. Only a small part of the schools' curriculums contained elements of consumers' education;
4. It was necessary to better integrate consumers' education in different learning systems;
5. The lack of motivation for teaching consumers issues has been determined;
6. The resources for consumers' education were limited.[10]

In 2009 the Committee on Consumer Policy (CCP) made recommendations based on this analytical report, and set the main tasks, which in turn, were divided into the following subcategories:

1. **Establish Goals/Strategies to Ensure Consumers' Education, and Evaluate their Results** – a) It ensures the efficiency of consumers' education policy. That is why, when defining such goals and developing strategies, proper coordination of different institutions and state authorities is needed, both at internal and other relevant levels; b) Customers' education should start from an early age and continue throughout life. It should be integrated into long-term educational programs or school curricula (according to the need); c) Materials for consumers' education should be relevant to current requirements.

2. **Selection of Common Approaches to Consumers' Education –** a) Despite the existence of separate educational programs, consumers should be involved in school projects. It is recommended that consumers' education should be taught as an independent subject in schools. At the same time, efforts must be taken to interest teachers and pupils with consumers' tuition issues; b) Different agencies and institutions should cooperate to create easily accessible teaching materials for the teachers; c) The state governments must transform the consumers' teaching into a constant process; d) Consumers' educational programs should vary by addressee groups (considering their demographic and socio-economic factors). Attention must be paid to relatively vulnerable consumers – children, old people, persons with disabilities and others; e) TV channels, internet resources (educational portals, social networks, blogs, news sites, video materials, etc.) should be effectively used to increase consumers' awareness.

3. **Improve Coordination and Co-operation of Actors in Customers' Education Process –** a) Intergovernmental co-operation between relevant institutions (especially, between Ministries of Educa-

[10] OECD, Consumer Education Policy Recommendations of the OECD's Committee on Consumer Policy, Paris, DSTI/CP, 2009, 5/Final, 3.

tion and Consumer Affairs) must be improved; b) Business sector should advise governments on consumers' education issues; They must create methodologies and guidelines to educate customers in respective fields; c) Competent agencies should improve international cooperation to enhance the overall level of consumers' education. Successful experience of different states must be shared; d) Participants in the process must share responsibility in different sectors, create a synergy effect and exclude inefficient expenditure of funds; e) Teachers and other stakeholders should work actively to improve consumers' educational materials.[11]

To overcome the identified challenges and fulfill the presented recommendations, the EU has begun implementing various measures. Namely, in 2003 the European Commission launched the project DOLCETA (Developing On-Line Consumer Education and Training for Adults). EU experts have developed a curriculum for eight years that included issues of legislation on consumers' education, financial tuition, usage and safety of service/production. The project aimed to raise awareness of EU citizens regarding consumer rights. As for the project beneficiaries, they were: general public, lecturers, teachers, and non-profit organizations. However, due to the costliness of the project, it was suspended in 2013, and replaced by the website – "Customer Classroom".[12] This multi-lingual site is designed to provide EU teachers with teaching materials for educating consumers in secondary schools. They are categorized and updated periodically; teachers have full access to them and can upload own study materials to share with others.[13]Additionally, a consumer plan was published in 2012 by which the European Commission creates platforms for sharing best practices, and supplying teaching materials to specialists working with adolescents aged 12-18.[14]

We should represent separate state guarantees to better understand the importance of consumers' right to education and to carry out the comparative-legal analysis. Thus, given article reviews the established practice of Georgia, together with, Eastern, Central and Northern European states (Finland, Germany, Austria, Romania, Italy, Sweden, the Czech Republic, Hungary, Spain, and Norway). It should be noted that these ten states have gradually improved consumers' teaching standards at the national level, strengthened inter-agency cooperation, elaborated action plans and are intensively implementing various activities. Therefore, consumers' education in these countries has become the priority of the state and its importance is increasing.

In Austria, the Ministry of Social Affairs and Consumer Protection[15] provides the school teachers with the necessary information about consumers' education under 2011/83/EU Directive on Consumer

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11 Ibid, 2, 5- 8.

12 Euro Parliament, Parliamentary Questions, 2014, <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+P-2014-004562+0+DOC+XML+V0//EN&language=en> [04.12.2018].

13 The site is available in Norwegian, German, English, French, Italian, Polish, Romanian, Slovak, Swedish, Danish, Estonian, Spanish, Croatian, Latvian, Hungarian, Dutch, Portuguese, Slovak, Finnish, Czech, Belgian and other languages.Consumer Classroom, European Commission, <www.consumerclassroom.eu/en/about> [04.12.2018].

14 Overview of Consumer Education in Europe, 1-2, <www.academia.edu/14258385/Overview_of_consumer_education_in_Europe> [28.03.2019].

15 It is noteworthy that the 3rd department of this Ministry specializes in consumer protection. Basic Information Report Austria, Reporting Year 2012/2013 Institutions, Procedures, Measures, Federal Ministry of Labor, Social Affairs and Consumer Protection, Vienna, 2013, 10.

Rights[16]. The Ministry also participates in conferences and training programs to retrain relevant specialists. Teachers, interested in the field of customers' information and education, receive newsletters and other materials four times a year. Besides, involvement in the program is free and it spreads on the entire territory of Austria. The Ministry of Finance implements various activities for consumers' education as well. In particular, it runs the youth educational website. At the same time, the online portal disseminates educational and informational videos. Additionally, the Austrian Tax and Customs Administration and Austrian school heads cooperate to teach tax and customs issues to pupils.[17]

In Germany, statewide-operating institutions and authorities are financed from the federal budget to promote general education and counseling programs for the consumers. The leading role in this process is played by the Federation of German Consumer Organisations (VZBV), which unites 51 associations. It has been consulting individuals for already 30 years about energy consumption matters. Namely, more than 350 Energy Consultants in the whole country provide information to the customers about energy producers, consumption and conservation issues.[18]

It is noteworthy, that since September 2016 a new study scheme has been presented at secondary schools in the south-east of Germany – Baden-Württemberg; the compulsory syllabus was developed, which introduced nutrition and consumers' education concerns as an interdisciplinary subject in secondary schools.[19] Particular attention is paid to the consumer's financial literacy, for which the financial tuition project operates. It is run by consumers' advisory organizations and other institutions to avoid consumers' over-indebtedness. Customers learn to define their economic needs, and critically assess financial services. The Organization for Economic Cooperation and Development has evaluated this program as one of the most successful programs in the field of consumers' education.[20] It is noteworthy that Germany has the largest retail market for drinks and foodstuff throughout Europe, so German clients are constantly focusing on organic, safe and quality products. Consequently, it is not surprising that they are more aware of product consumption issues.[21]

In Romania, more than 800,000 registered firms operate (mostly, private companies), which try to maintain competitiveness, through the introduction of high-grade management; part of them aim to join an international market. In this process, the state needs national policies and strategies which include

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16 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Text with EEA relevance), Official Journal of the European Union, L 304/64, (12), 22/11/2011.

17 Behavioural Insights Applied to Policy, Austria, Country Overview, 3, <www.ec.europa.eu/jrc/sites/jrcsh/files/jrc-biap2016-austria_en.pdf> [01.04.2019].

18 Federation of German Consumer Organisations – VZBV, The Voice of the Consumer, 1, 3, <www.en.vzbv.de/vzbv_image_brochure.pdf> [01.04.2019].

19 *Angele C.,* Nutrition and Consumer Education as a Constituent Part of Global Education in the Light of the New Education Framework in State Schools in Southern Germany: The Case of Baden-Württemberg, International Journal of Development Education and Global Learning, 9 (2) 2017, 90.

20 *Neuberger D.*, Financial Inclusion, Regulation, and Education in Germany, ADBI Working Paper, № 530, Asian Development Bank Institute (ADBI), Tokyo, 2015, 17-18.

21 *Daly E.,* Origin Green Ambassador, German Market, German Consumers are Educated, Discerning and Future Focused, <www.bordbia.ie/industry/manufacturers/insight/alerts/pages/germanconsumersareeducated,discerningandfuturefocused.aspx> [01.04.2019].

elements of maintaining the quality of production/service, developing competition and educating the consumers.[22]

That is why the National Authority for Consumer Protection has been annually conducting consumers information activities since 2001; it holds press conferences and spreads printed materials. Since 2008 a special campaign is being run, which serves to inform customers and develop textbooks for them. Thus, Romania fulfills the UN Resolution № 39.248 – "The Director Principles for the Consumers' Protection", by which the Member States should establish a Consumers' Education System and provide their effective learning.[23] Of course, in this process, Romania should also pay due attention to the introduction of Customers' Education Elements to Schools (as it is in Germany and Austria).

As for Italy, the United Nations Environment Program has developed a package of recommendations and guidelines titled "Here and Now! Education for Sustainable Consumption". It includes formal and informal learning of young customers by using a variety of interdisciplinary methods. Italy has developed a curriculum in cooperation with "Norway Hedmark University College" to fulfill these guidelines.[24] At the same time, in the city of Rome "Roma Tre University" periodically publishes special editions on important consumers' issues. In Italy, consumers' education activities are also implemented by the *National Consumer Union*, which specializes exclusively in consumers' rights protection.[25] Besides, The Italian Competition Authority (ICA) has put forward several initiatives, under which funds can carry out financial projects to increase clients' awareness and education levels, especially in younger generations.

In Sweden, Customer Agency creates and disseminates consumers' educational materials following the requirements of the Higher Education Act.[26] In schools "Household and Consumer Education" is a separate discipline and is taught in high classes in parallel to major subjects. Consumers' education is mandatory here; pupils receive the necessary information on food and health, customers' rights, family economies, environmental protection, and advertising.[27] It should be noted that consumers' associations can participate in the development of school curriculums, but their role is mostly informal and limited to organizing debates, seminars, or school competitions. However, to provide additional guarantees for consumers, associations will develop educational and pedagogical materials (teachers' manuals, brochures, questionnaires) and provide training for teachers and trainers.

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22 *Drăgulănescu N.-G.,*Years of Quality Management and Consumer Protection in Romania, University Polytechnics of Bucharest, 2013, 13, <www.researchgate.net/publication/307473866_21_years_of_quality_management_and_consumer_protection_in_Romania/download> [01.04.2019].

23 *Condrea E., Popovici V., Bucur Crina R.,* The Consumers' Protection in Romania – Authorities'Permanent Preoccupation, 601, <http://steconomiceuoradea.ro/anale/volume/2008/v2-economy-and-business-administration/106.pdf> [03.12.2018].

24 Here and Now! Education For Sustainable Consumption, Recommendations And Guidelines, United Nations Environment Programme, Paris, 2010, 36,<www.unep.fr/shared/publications/pdf/DTIx1252xPA-Here%20and%20Now%20EN.pdf> [28.03.2019].

25 National Consumer Union of Italy, <www.consumatori.it/welcome/> [03.12.2018].

26 OECD, Promoting Sustainable Consumption – Good Practices in OECD Countries, 2008, 26,<www.oecd.org/greengrowth/40317373.pdf> [03.12.2018].

27 Consumer Education – Draft Report, Directorate for Science, Technology and Industry, Committee on Consumer Policy, Organisation for Economic Co-operation and Development, DSTI/CP, 11/REV4, 2007, 5, 8, 20, <www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2007)11/REV4&docLanguage=En> [03.12.2018].

In general, it is considered that the possibility of choice and information on the product is closely related to the customers' literacy index. Studies have shown that this indicator is particularly important in the emerging market economy. For example, in Hungary**,** under Communist governance, customers had a limited choice, there were no international companies on the market, and local clients involuntarily purchased low-cost goods produced in Central and Eastern Europe. This fact was reflected in the level of consumers' education to some extent. However, in the late 1990s, when new products/brands became available in the country and marketing campaigns were spread, the industry's representatives have observed positive changes in customers' education.[28]

Nowadays consumers' early-stage education is a priority of state policy in Hungary; the relevant agencies cooperate with secondary and higher education institutions to run various activities. A special website for children has been operating since 2012, where they are being acquainted with educational materials in many formats. According to the Act of 2011 – "on National Public Education", since 2016 students have been passing tests, including consumers' issues on the final examination of the secondary education institution.

In Finland**,** consumers' education was not initially taught in schools as an independent subject and was distributed in separate disciplines. However, in 1994, the National Board of Education published a curriculum that expanded the municipalities' and schools' delegated rights. New curriculums were created in schools, and consumers' education became more valuable.[29] At present, the Finnish National Agency for Education implements the consumer's pre-school education programs at the primary and secondary stages, thus facilitating the retraining of teachers in this field. In particular, the agency provides them with the necessary educational resources and training methodology.

Also, the Finnish Competition and Consumer Agency has identified priority directions of customers' tuition and has set goals that are divided according to age groups. These main directions include effective consumption of products; media and technological awareness; teaching management at home and customers' involvement; consumers' rights and liabilities; issues of personal financing; marketing and commercial media.[30] Naturally, these mechanisms will provide additional guarantees for consumers' education, especially in terms of service and product flow.

In the Czech Republic governmental institutions[31] work on consumers' education, which disseminates educational materials through websites, printed press, TV, and radio. NGOs complete teaching projects with state funding; they spread information and print manuals on the internet, consult individuals,

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[28] *Cutler R. A., Price L. L., Feick L., Micu C.,*The Evolution of Consumer Knowledge and Sources of Information: Hungary in Transition, Journal of the Academy of Marketing Science, Vol. 33, № 4, 2005, 608, <www.academia.edu/17831503/The_Evolution_of_Consumer_Knowledge_and_Sources_of_Information_Hungary_in_Transition> [01.04.2019].

[29] *Kärpijoki K.,* The Objectives and Contents of and the Working Methods in Consumer Education for Teacher Training, Copenhagen, 2000, 12.

[30] Consumer Education, Finnish Competition and Consumer Authority,<www.kkv.fi/en/education/> [01.04.2019].

[31] Including, the Ministry of Education, Youth Affairs and Sports, which provides the financial education of consumers in secondary schools, and the Office for the Protection of Competition (UOHS).The World Bank Private and Financial Sector Development Department Europe and Central Asia Region, Czech Republic Technical Note on Consumer Protection in Financial Services, Washington DC, 2007, 13, <www.siteresources.worldbank.org/EXTECAREGTOPPRVSECDEV/Resources/CR_CPFS_12June07.pdf> [02.04.2019].

conduct seminars, lectures, and discussions. The media outlets are also involved in the same process. The Czech Consumer Association (SCS) has an important role, which added consumers' education into syllabuses of primary and secondary schools, and cooperates with pedagogic faculties.[32] It has been publishing a special magazine – Shield of Consumer, brochures, reference books, as well as, CDs since 1993. Association's website – World of Consumer also operates and is available in Czech, English, French and German languages. Comments on the acting legislation and draft laws concerning consumer protection are posted on this site.

In 2004, the book "Guide to the Capital Market" was also published here, which is designed for students of secondary schools and vocational colleges, and focuses on economic issues. In 2004-05 a seven series broadcast – "Investment Advisors" was transmitted in the Czech television and radio. It was also published in DVD format and sent to schools as study materials.[33] Additionally, in 2005, the Czech Consumer Association started a large-scale campaign called "Read Before You Sign!", which advises consumers to carefully review terms before signing important documents (especially, before purchasing financial services).[34]

Consumers' protection is one of the basic principles of the Spanish constitution; according to article 51, the government should also provide consumers' education.[35] Here regulatory norms of customers' protection are based mainly on the Constitution and EU legislation.[36] In 1983, consumers' associations, from eight independent autonomous regions, created Consumer Confederation (CECU), which is a member of the Spanish Consumer Board. This confederation represents a country at the European level – European Association for the Co-ordination of Consumer Representation in Standardisation (ANEC) and the European Consumer Consultative Group (ECCG).

Consumer Confederation has organized six Regional Congresses for Hispanic and Latin American agencies, where eighteen consumer associations have participated. As a result, cooperation agreements have been signed with some of them. Today Confederation is lobbying clients; conducts informational and educational campaigns/projects; cooperates with various agencies, both at national and European levels.[37] Similar to Finland, Germany, Austria, Romania, Italy, Sweden, Czech Republic and Hungary, consumers' education programs are also implemented here. Including, the school program for raising the consumers'

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32 Consumers Defence Association of the Czech Republic (SOS), <www.nepim.eu/cms/index.php?article_-id=13&clang=3> [04.12.2018].

33 The World Bank Private and Financial Sector Development Department Europe and Central Asia Region, Czech Republic Technical Note on Consumer Protection in Financial Services, Washington DC, 2007, 39, <www.siteresources.worldbank.org/EXTECAREGTOPPRVSECDEV/Resources/CR_CPFS_12June07.pdf> [02.04.2019].

34 Ibid, 21.

35 *Gutierrez J., Buigas B.,* Consumer Protection in Spain, Comparative Law Yearbook of International Business, Barcelona, 2014, 2-3.

36 Ibid, 1.

37 Consumers International, <www.consumersinternational.org/members/members/confederation-of-consumers-and-users-cecu/> [02.01.2019].

awareness. Printed resources and sites are also available to better inform customers about foodstuffs and services.[38]

Norway is not a member of the EU but establishes its similar standards and guarantees for customers' literacy. According to the Nordic Council of Ministers,[39] the study showed that children have a significant impact on the families' market decisions and they master the role of consumers from an early age. In parallel with the change of society, media and markets, nowadays consumers' education should start from a young age.[40] According to the Council of Ministers, consumers' education issues should be studied through different subjects in schools (such as Ethics, Home Economics, Foreign Languages, Social or Natural Sciences, Arts, Psychology, Mathematics, Technologies, Media, etc).

Accordingly, clients' education is a priority for the Norwegian government, which includes: teacher retraining on consumers' protection issues, and creating appropriate school programs; providing schools with informational resources; widely distributing necessary materials; sharing the experience of Erasmus Academic Network by the Norwegian University; considering the consumers' education recommendations of Organisation for Economic Co-operation and Development; collaborating with the United Nations in respective projects.

Obviously, Norway is gradually reaching these priority goals. In particular, new manuals for teacher retraining were developed in 2010; "Consumer Protection and Personal Economies" has entered as a separate subject in a national curriculum; later the subject "Food and Health" has been renewed."[41]

In Georgia, Public Defender's Office of Consumer Interests has been working on consumers' education from 2014. It organizes various events to raise clients' awareness and provide information. The office is consulting clients about their rights, conducts informational campaigns, organizes workshops, disseminates brochures and cooperates with media representatives.[42] However, misinforming the customers is still problematic, which negatively affects their level of Consumer Education. In particular, the Public Defender's Office published year's report indicating that, like the previous year, in 2017, the misinforming problem of telecommunications service clients was crucially substantial. Therefore, citizens' respective

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38 European Commission (EC), Consumer Policy Institutions, National Consumer Organizations at Listing, 2017, Finland - 3, 4, 6, 11, 12, 13, Germany - 14, Austria - 17, Romania - 14, Italy - 19, 20, Sweden - 8, Czech Republic - 16, Hungary - 29, Spain - 2, 3, 6, 8, 9, <www.ec.europa.eu/info/strategy/consumers/consumer-protection/our-partners-consumer-issues/national-consumer-organisations_en> [07.11.2018].

39 Economic, Legal and Cultural Cooperation Council of Denmark, Iceland, Norway, Finland, and Sweden. Created in 1952, it has 87 members.Nordic Co-operation, <www.norden.org/en/nordic-council> [02.04.2019].

40 Teaching Consumer Competences – a Strategy for Consumer Education, Proposals of Objectives and Content of Consumer Education, Copenhagen 2009, 20, 26.

41 European Commission (EC), Consumer policy institutions, National Consumer Organizations at Listing, 2017, Finland - 3, 4, 6, 11, 12, 13, Norway - 15,<www.ec.europa.eu/info/strategy/consumers/consumer-protection/our-partners-consumer-issues/national-consumer-organisations_en> [09.11.2018].

42 Public Defender's Office of Consumer Interests periodically participates in thematically related activities of consumer education (e.g. held meeting with "Caucasus Online" Ltd representatives regarding to the Ombudsman's recommendations; organized roundtable discussion "the TV service quality in Georgia"; held a press conference concerning the International Day for the Protection of Consumers' Rights. Public Defender's Office of Consumers Interests (Independently Operating with the Georgian National Communications Commission), Report of the Public Defender's Office of Consumer Interests 2014, Tbilisi, 2014, 9, 18, 25, 32 (in Georgian).

appeals to the office have increased significantly. Most of the received complaints concerned with inaccurate, dubious and erroneous information given to consumers by the service providers.[43]

Truly, the Public Defender's Office is protecting consumers' right to education to some extent, but it does not apply to school education programs; in other words, the Office does not cooperate with the Ministry of Education, Science, Culture, and Sport of Georgia. Consequently, the abovementioned measures are insufficient, and cannot provide significant benefits concerning efficiency, duration, or scale.

The Ministry of Education, Science, Culture, and Sport of Georgia, is also working to secure this right. In particular, the component of the customer's education is partially included in the subject of the III-IV class "Me and the Society" which is already taught in schools. Also, the subject "Citizenship" has been prepared for VII-IX classes, which also envisages educating students in consumers' rights and responsibilities;[44] its teaching is scheduled to start from 2019-2020 academic year.[45] However, it is noteworthy that these subjects are intended only for schoolchildren and do not provide the elderly consumers' education. Whereas in Georgia (as in other states) the middle age consumers are the most active economically, because of having an independent source of income.[46] Accordingly, their education programs must be activated in Georgia to balance the interests of different age customers.

It is also noteworthy that Article 2 of the 2015 Draft Law "On Consumer Rights Protection" (edition of June 14, 2018) defined the state policy in the field of consumers' protection, and determined that the state should provide consumers' education.[47] In essence, this provision was progressive because it obliged the state to create the customers' education mechanisms, and practically activate them. However, later this record was removed and the latest version of the draft law[48] does not consider the obligation of the state to provide consumers' education. Thus, the legislator has, willingly or unwillingly, restricted the means of realizing consumers' right to education in the perspective.

In the final edition of the draft law, another record was made regarding consumers' tuition. In particular, section "D" of Article 38 points out that Non-entrepreneurial (Non-commercial) Legal Entities are entitled to participate in the implementation of consumers' informative campaigns and educational

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43 Public Defender's Office of Consumers Interests (Independently Operating with the Georgian National Communications Commission), Report of the Public Defender's Office of Consumer Interests 2017, Tbilisi, 2017, 10 (in Georgian).

44 Reply of the Ministry of Education and Science of Georgia on requested information on the Consumers' Education № MES 2 18 00328434, 23 March 2018 (in Georgian).

45 Reply of the Ministry of Education and Science of Georgia on requested information on the Consumers' Education № MES 5 18 01575946, 7 December 2018 (in Georgian).

46 According to data from the National Statistics Office of Georgia, in the 2nd quarter of 2018, an economically active population constituted 64 percent of the working-age population, <www.commersant.ge/ge/post/saqartveloshi-umushevroba-mciredit-shemcirda> [13.12.2018] (in Georgian).

47 According to Article 2 of the draft law, the state provides Consumer Awareness Education, including about the means and rules of protection of their rights. Article 2, paragraph "B", Draft Law of Georgia "On Consumer Rights Protection", the Committee on European Integration of the Parliament of Georgia, 14/06/2018.

48 In particular, edition of February 28, 2019.

programs.[49] However, this technical maneuver does not correct the above-mentioned legislative defect, and cannot fully restore customers' guarantees. Moreover, the legislator avoids protecting the consumers' right of education to the state level and imposes this responsibility to Private Legal Entities, which will naturally be less effective in realizing this right. Lack of efficiency can be caused by limited financial and human resources of these legal entities, and/or their resistance to participate in such projects. It is also noteworthy that the draft law has not been approved for the fourth consecutive year, and hence, even these legal entities cannot effectively implement the consumers' education programs (due to the absence of legislative framework).

Moreover, the draft law does not consider mechanisms for sharing successful practice of the European countries (Finland, Germany, Austria, Romania, Italy, Sweden, Czech Republic, or Hungary); whether it be an active participation of state institutions or private associations, agencies or companies in educational projects; conducting consumers' teaching campaigns; creating and disseminating proper television, radio, and internet resources, retraining of teachers and other specialists. The mentioned shortcoming (if it is not corrected or neutralized before the adoption of the law) will, naturally, hinder the fulfillment of obligations taken under Articles 345 and 346[50] of the Association Agreement with the European Union.

3. Conclusion

As it turns out, unlike the EU member states (Finland, Germany, Austria, Romania, Italy, Sweden, the Czech Republic, and Spain), in Georgia consumers' education is relatively on a low level and is not integrated into a unified educational system. Legislative shortcomings should be considered as an important precondition for this fact (first of all, not adopting the Draft Law "On Consumer Rights Protection"), as well as the lesser interest of the state and business sector with this issue. Although some Agencies and Right Defenders work on consumers' education, they cannot properly protect consumers' right to education, because of a small scale of activities.

Therefore, to improve the quality of consumers' education in Georgia, it is necessary to restore the initial edition (of June 14, 2018) of Article 2 of Draft Law "On Consumer Rights Protection", and adopt this law soon. This would provide the basis for effective cooperation between ministries and agencies, educational institutions, entrepreneurs and consumers.

Moreover, Georgia should guide with the best foreign experience while implementing the consumers' right to education in practice; it may even consider an example of Hungary that is not the EU

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[49] Article 38, paragraph "D", Draft Law of Georgia "On Consumer Rights Protection", the Committee on European Integration of the Parliament of Georgia, 28/02/2019.

[50] Under Article 345, the Parties shall cooperate to ensure a high level of consumer protection and to achieve compatibility between their consumer protection systems. Under Article 346 (b), if necessary, the Parties cooperation may include: Promoting the exchange of information about consumer protection systems, which, in turn, involves the consumer education/awareness and strengthening their possibilities. Association Agreement between Georgia and the European Union, 30/08/2014,<www.parliament.ge/ge/gavigot-meti-evrokavshirtan-asocirebis-shetanxmebis-shesaxeb/associationagreement1> [12.12.2018] (in Georgian).

member state, but closely cooperates with it, and implements successful programs of consumers' education.[51]

One of the most important programs for consumers' education is "Teaching and Learning for a Sustainable Future",[52] whose main purpose is to use educational tools for ensuring proper consumption of products. The United Nations Educational, Scientific and Cultural Organization (UNESCO) implements this program and it targets students, teachers and other individuals involved in the consumers' education. The program helps to develop the necessary consumer skills, organize family budgeting, and overcome financial difficulties.

Consequently, Georgia as a member of the United Nations can deepen cooperation with the UN and engage in this educational program. This would help to effectively implement the Law "On Consumer Rights Protection" in regards to the consumers' education, which in turn would protect the interests of clients, business and the state.

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[51] This is the United Nations' "Consumer Informing Program", which operates as a global platform for delivering quality information on products and services. The program helps member states to cooperate; during the implementation of relevant policies, strategies and projects. The program is supported by *the European Commission, the International Trade Center (ITC), the United Nations Environment Agency (UNEP)* and other international organizations.
United Nations Environment Programme, <www.web.unep.org/10yfp/programmes/consumer-information> [21.11.2018].

[52] Teaching and Learning for a Sustainable Future, A Multimedia Teacher Education Programme, <www.unesco.org/education/tlsf/> [24.11.2018]; <www.unesco.org/education/tlsf/mods/theme_b/mod09.html> [27.11.-2018].

7. *Angele C.,* Nutrition and Consumer Education as a Constituent Part of Global Education in the Light of the New Education Framework in State Schools in Southern Germany: The Case of Baden-Württemberg, International Journal of Development Education and Global Learning, 9 (2) 2017, 90.
8. Basic Information Report Austria, Reporting Year 2012/2013 Institutions, Procedures, Measures, Federal Ministry of Labor, Social Affairs and Consumer Protection, Vienna, 2013, 10.
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Ketevan Kvinikadze*

Acquisition based on Real Estate Ownership Deal in Georgian, German and French Law

In a legal system of any country while setting regulations related to the things determinant is found in its economic value. Precisely, economic value of things is a main sign of the rules of the emergence and forfeiture of ownership right. The more the thing is valued, the more interested the person is in its ownership. Various legal system relates ownership emerging on immovable thing to different procedures, respectively, rule of forfeiture varies. From the standpoint of Comparative Law, it seems interesting that analysis of German and French legal systems of purchasing immovable thing differs in connection with Georgian Law not only with a moment of ownership right emerging but also with the protection guaranties of bona fide purchasing immovable thing. The aim of the following paper serves to research the attitudes of these three states referring to immovable thing.

***Key words**: Immovable property, public registry, complaint, agreement, registration, alienation , ownership right, bona fide purchaser.*

1. Introduction

Stability of immovable things market relies on the legal regulations and defense standards that serves to insure the risks related to civil turnover of such kinds of objects. Precisely, the risks shall be insured that may be accompanied by entitling ownership on immovable thing. In the following paper a rule of entitling ownership on immovable things is discussed based on the example of three countries. In the aforementioned ones not only do a rule and moment of ownership entitlement differ, but also the protection guaranties of the bona fide purchaser. Generally, participant of civil turnover shall be in good faith, however, law shall consider possible consequences of a mala-fide participator and suggest norms regulating such kind of relations. The mala-fide participator of civil turnover causes disturbances in legal relations, therefore legal system of any country shall be ready for finding the solution to the problems that are resulted by unwisely developed legal relations. "Law shall be capable of resolving any possible conflict of interests."[1] Accordingly, the purpose of the paper is to raise awareness of the rules of ownership entitlement on immovable thing in Georgian, German and French Law that considerably conditions protection guaranties of bona fide purchase. In Article will be discussed the decision of the Constitutional Court and the question of whether Georgian law is sufficiently equipped with these legal institutions without which the existence of a well-balanced institutional arrangement for the bona fide acquisition of immovable property is impossible. Taking into consideration the theoretical and less practical similarity of some levels of legal regulation, this issue will be discussed from the standpoint of German law. By consideration of limited format legal systems will not be reviewed in depth, focus will be placed on regulating legislation. From this standpoint, as far as I am concerned, analysis of Comparitve Law will be interesting.

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1 *Chachava S.,* Competition of Claims and Grounds of Claims in Private Law, Tbilisi, 2010, 7 (in Georgian).

2. Acquisition based on Real Estate Ownership Deal in Georgian Law

2.1. Deal and Registration as a Basis of Origin the Proprietary Right on an Immovable Thing

Georgian Civil code (hereafter - CC) differs the rules of the ownership rights emergence on the movable and immovable things. Unlike the immovable things, while transfer of the ownership right occurs based on a valid right in order to gain a status of an owner, in case of the immovable thing, ownership right emergence is related to the deal made in writing and its registration in the Public Registry (CC. art:183). In order that a person is authorized to possess ownership right on a thing, the one is needed to be registered as an owner of the right at the Public Registry. By menas of this enactment, Georgian Civil Code strengthens German cadaster.[2] Civil Legislation does not recognize another way of purchasing an immovable property.[3] All the legal systems determining an advantage of registering the data, the ones consider that the parties of the agreement are placed under an obligation to register the rights they take interst in, emergence, change and abrogation of right is subject to registration.[4]

Before the legislative changes underwent in 2006, in order to purchase the immovable thing, notarial attestation of purchase agreement was compulsory that implies notorially attested agreemenet used to be registered at the Public Registry.[5] It's worth stating that compulsory norms of notarial attestation of agreement of purchasing the immovable property is still in force in German Law.[6] The purchase agreement is also subordinated to be notarially attested in French Law.[7] In accordance with Georgian Law the parties are capable of deciding themselves to submit notarially attested document at the Public Registry or not. Parties of the deal are capable of signing the deal attended by an authorized person at the Public Registry and the one is sufficient to consider the deal to be valid (CC, 1st part of aricle 311[1]). Modern Georgian law has rejected the obligation of notarial certification, which has had a negative effect on the credibility of the transaction process.[8] Notarization through the provision of qualified legal advice aims at preventive control so that contracting parties do not make harmful mistakes to them.[9] The registration authority only registers the rights and it is not responsible for checking whether the content of the deal is

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2 *Zoidze B.,* Property Law of Georgia, Tbilisi, 2003, 144 (in Georgian).

3 See: Decision № AS-333-318-2012 of 19th July of 2019 of Supreme Court of Georgia.

4 *Knieper R., Chanturia L., Schramm H. J.*, Das Privatrecht im Kaukasus und in Zentralazien, BWV, Berlin, 2010, 314.

5 Article 321, Amending the Civil Code of Georgia, № 3879 - CCM I, № 48, 22/12/2006.

6 *Prütting H., Wegen G., Weinreich G.*, Bürgerliches Gesetzbuch, Kommentar, 13. Aufl., München, 2018, 577, Rn.10.

7 *Kirner O., Macor K.,* Frankreichimmobilien, 7. Aufl., Freiburg, 2015, 72.

8 *Phalavandishvili K.,* Real Property Acquisation Transformation in Georgian Law, "Journal of Law", № 2, 2012, 233 (in Georgian).

9 *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 38 (in Georgian).

in accordance to the will of any party. Notarial certification protects the party through the way he/she is fully informed about the legal consequences of the deal he/she signs.

2.2. Definition of Emergence Moment of the Ownership Right

In accordance with CC, the moment of the ownership emergence on immovable thing is related to the fact of registering the right at the Public Registry. Public Registry serves not only as registering a right, but also be basis of origin of this right.[10] Precisely, registration provides the right with an absolute character and makes it obvious to everyone. The act of not registering ownership right by the purchaser originates relative right instead of absolute one. It implies that the purchaser under agreement is deprived of being capable of defending himself/herself from a possible action of the third party, he/she is authorized to request bona fide action from the seller. Is the registration of ownership right at the Public Registry obligatory in order to emerge the right over the thing or fact of registration is just a confirmation of sole intention that the right of the person is more protected due to its publicity and she or he is guaranteed to be safe from outrage of the third party? Reffering to determining the moment of the right emergence over the immovable thing, the Appeal Court defined: registration is nothing else but the right of the purchaser to be protected from the third party or seller being in bad faith. By means of registration the person expresses a desire to turn his or her object of ownership into object of civil turnover. Thus, Respectively, the person is considered to be owner if this is confirmed with another evidence, firstly, purchase agreement. The person is capable of registering a right and the aforementioned right is not limited by any stipulation or condition including limitation.[11]

By means of acquired right CC authorizes the purchaser to make his/her right absolute through publicity. Each participator of civil turnover is inclined with respect in relation to the owner of this right. By means of not registering his/her ownership right, owner endangers his/her right, since it is possible that an alianator transfers an alianated asset repeatedly. In such case good faith of the third party in relation to his/her unawareness causes legal status worsening of the new owner against his or her will. Precisely, CC not only advises but also obliges the purchaser to register the right, which is the subject of registration. On the one hand, by means of it, the one ensures the right protection, however, secondly – stability-steadiness of relationship related to the immovable thing.

3. German Rule of the Acquisition of Immovable Property and the Means of Protection

3.1. Deal and Registration

Regulated norms related to ownership enitiltment on immovable things are found in the 873rd, 925th, 311th B paragraphs of the German Civil Code (hereafter - BGB). Paragraph 873rd of (BGB) defines

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10 *Kochashvili K.,* Ownership and Possession – Fact and Right in Civil Law, Tbilisi, 2013, 200 (in Georgian).

11 Decision №2b/453-11 of 31th May of 2011 of Appeal Court of Tbilisi.

the prerequistes related to the acquisition of rights on the land[12] and the rights over these rights.[13] It only acts in case of deal-based purchase and by means of law force or state act its purchase is excluded from the scope of application.[14] In accordance with the paragraph 873rd, in order to transfer ownership right on the land, an agreement between an authorized person and the second party referring to the legal status changes (Einigung) and its registration in the cadaster (Eintragung) are needed unless the law implies another rule. The agreement referred to in § 873 (Einigung) is referred to as the "Auflassung" for the purposes of §925. According to §925, agreement between a transferor and purchaser on the immovable thing (Property Agreement or conveyance of property) (Auflassung) is needed to be registered by joint attendance of both parties at a respective administrative body. In accordance with the second alternative of the first part, any notorious is authorized. If a notary certified legal obligation of Property Agreement does not exist, such obligation is fairly defined for obligatory agreement. Namely, according to the first part alternative of §311B of BGB, agreement undertaking the obligation to transfer the ownership right on land or purchase it, is in need of notary certification. For security reasons, notorious is involved not only in case of obligatory agreement, but also Property Agreement.[15]

§873 implies two means of legal status change related to the immovable thing desired effect may even be produced by a joint implementation.[16] The means are following: deal as a limited abstructive agreement targeted to the changes of the property rights (Einigung)[17] and registration (Eintragung) as an official statement.[18] In case of the immovable things, principle of deal and registration acts (Einigung und Eintragung), however in the event of movable ones, principle of deal and transfer does (Einigung und Übergabe).[19] Legal status change cannot only be made by means of deal, but coincidence of content and time of real deal and registration is needed.[20]

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12 German Law implies the "lands" (Grundstück) in a concept of immovable thing. See: *Artz M., Lorenz A.,* in *Erman W.,* BGB, 15. Aufl., Band II, Köln, 2017, 3828, Rn.1; *Stürner R.,* in *Soergel H. Th*., BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 91, Rn.1; *Kohler* J., in *Müko*, 7.Aufl., München, 2017, 97, Rn. 1; *Brox H., Walker W. D.,* Allgemeiner Teil des BGB, 39. Aufl., München, 2015, 337, Rn.799; *Prütting H., Wegen G., Weinreich G.*, Bürgerliches Gesetzbuch, Kommentar, 13. Aufl., München, 2018, 1886, Rn.4; *Chanturia L.,* Ownership of the Immovable Thing, 2nd ed., Tbilisi, 2001, 163 (in Georgian).

13 *Stürner R.,* in *Soergel H. -Th.,* BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 105, Rn.1.

14 Ibid, Rn.2; *Gursky K. H.,* in *Gursky K. H.,* in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 303, Rn.11.

15 *Wolf M., Welenhoper M.,* Property Law, 29th ed., *Chechelashvili Z. (Transl.),* Tbilisi, 2016, 208, Rn. 1 (in Georgian).

16 *Artz M., Lorenz A.,* in *Erman* W., BGB, 15. Aufl., Band II, Köln, 2017, 3831; *Stürner R.,* in *Soergel H. -Th.,* BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 91, Rn. 6; *Gursky K.H.,* in *Staudinger* Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 286, Rn.6.

17 *Artz M., Lorenz A.,* in Erman BGB, 15. Aufl., Band II, Köln, 2017, 3832, Rn. 12; *Stürner R.,* in *Soergel H. -Th.,* BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 106, Rn.3; *Palandt O.,* Bürgerliches Gesetzbuch, Band 7, 65. Aufl., München, 2006, 1356, Rn.9.

18 *Artz M., Lorenz A.,* in *Erman W.,* BGB, 15. Aufl., Band II, Köln, 2017, 3831.

19 *Gursky K. H.,* in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 300, Rn.4.

20 *Gursky K. H.,* in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 300, Rn.6.

It is in need of being dissociated from a basic agreement, that obliges the person to implement the act of transferring the right.[21] "Therefore property deal is an act that really transfer an ownership right."[22] It is a matter for discussion whether agreement and registration only jointly serves as a property deal or only a deal is already a property agreement and registration is only a prerequisite of legal status validity, it shall not be binding upon essential meaning.[23]

All deal-based changes related to the land are subject to the compulsory registration principle, however, all legal changes shall be exempt of such obligatory registration, but as a rule, such changes shall be under registration.[24] Obligatory registration (Eintragungsbedürftigkeit) shall be dissociated from registrability (Eintragungsfähigkeit).[25] All legal registerable phenomena are not subject to necessary registration.[26] On the basis that statutory change is not subject to compulsory registration, but unreasonable coincidence between legal truth and the records in the Registry is frequently seen.[27] They may coincide by means of correcting the essential records in the cadaster.[28] Obligatory of such corrections is allotted by means of §82 of the Public Registry Law and hereafter paragraphs (Grundbuchberichtungszwang).[29]

3.2. Preliminary Record as an Institute for Guaranteeing the Right

3.2.1. Securing Function of Preliminary Record

Institute of Preliminary Record[30] (§883 Vormerkung) in German Law related to the immovable thing serves as a special mean of provision.[31] Obligatory claims have a binding force only between the parties to this legal relationship and are characterized by the "weakness" that the creditor will no longer be able to enforce his claim if the subject of the agreement is removed from the debtor's property or the debtor loses the right to dispose it.[32] This threat is mainly actual on land rights, as legal changes to land rights are usually made through a public registry, and registration is often carried out after a lengthy procedure.[33] Due to the two-stage rule of land acquisition, simultaneous fulfillment of obligations is usually

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21 *Shotadze T.,* Comparative Property Law, First Edition, Tbilisi, 2015, 42 (in Georgian); *Hirte H.,* BGB Allgemeiner Teil, 2. Aufl., Band 1, Hamburg, 2014, 18.

22 *Shotadze T.,* Comparative Property Law, First Edition, Tbilisi, 2015, 42 (in Georgian).

23 *Stürner R.,* in *Soergel H. -Th.,* BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 106, Rn.3.

24 Ibid, 92, Rn.9.

25 Ibid.

26 Ibid. Unregistable rights are the ones that are not acknowledged as property rights and is action force-free of legal lialibility.

27 *Stürner R.,* in *Soergel H. -Th.,* BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 92, Rn.9.

28 Ibid.

29 Ibid.

30 Prior to 2007 the Institute of Pre-Record had also existed in CC (art: 315).

31 *Kohler J.,* in *Müko*, 7.Aufl., München, 2017, 204, Rn.1.

32 *Ring G., Griziwotz H., Keukenschrijver A.,* BGB Kommentar, Sachenrecht, Band 3, 3. Aufl., Baden-Baden, 2013, 150, Rn.1.

33 Ibid.

impossible.[34] The intermediate phase between legal transaction and registration is a risk for the acquirer.[35] Prior to registration, he/she is in such a legal position that may be impaired if his/her contractual partner transfers a right to another against his/her contractual obligation or charges in favor of another.[36] Although acquirer has a contractual requirement of the transfer of right, this does not preclude the proper disposal of a non-owner or the compulsory disposal of a third party.[37] Until the acquirer is registered as the owner, he has only obligatory claim to the secured position. The essence of the pre-record is for the acquirer to guarantee his/her future property right.

The dispositions made against the prior record are characterized by relational nullity.[38] Relative nullity characterizes it insofar as it does not have legal force only against the authorized person, ie the acquisition of the right will only be null to the person, who had guaranteed his/her right by preliminary record (§883 (2)).[39] However, the disposal is null only to the extent that it will affect the secured claim.[40] The main strength of the pre-record is that the claim is secured against any subsequent and compulsory disposal (the so-called "Elisionkraft").[41]

Preliminary record is an accessorial, that means that for its existence it's essential to exist the request.[42] The preliminary record as well as the complaint is an important tool for the protection of rights and although they are both of a securing nature, they differ in purpose. The preliminary record ensures a future legal change, and the complaint protests against the existing incorrect registration or incorrect removal of the right ("Preliminary Record Predicts, Complaint Protests").[43] The complaint protests the current state of the Public Registry, a preliminary record predicting the future state of the Public Registry.[44]

The attitude between the preliminary record and the complaint is very interesting. Which is more powerful - a pre-record or later registered complaint? For example, a preliminary record in favor of conscientious B was registered. After that the real owner E registered a protest against B. Later B was registered as the owner. Did B became the owner?[45] § 892 I precludes bona fide acquisition in the event of a regis-

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34 *Weirich H. A.,* Grundstücksrecht, 3. Aufl., München, 2006, 259, Rn.869.

35 Ibid, 260, Rn.870.

36 *Stürner R.,* in *Soergel H. -Th.,* BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 160, Rn.1.

37 Ibid.

38 *Weirich H. A.,* Grundstücksrecht, 3. Aufl., München, 2006, 276, Rn.921.

39 *Ring G., Griziwotz H., Keukenschrijver A.,* BGB Kommentar, Sachenrecht, Band 3, 3.Aufl., Baden-Baden, 2013, 164, Rn.57; *Stürner R.,* in *Soergel H. -Th.,* BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 172, Rn.35.

40 *Ring G., Griziwotz H., Keukenschrijver A.,* BGB Kommentar, Sachenrecht, Band 3, 3.Aufl., Baden-Baden, 2013, 164, Rn.58.

41 *Gursky K. H.,* in *Staudinger* Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 97, Rn.135. With the Elision force pre-record invalidates the subsequent dispositions.

42 *Weirich H. A.,* Grundstücksrecht, 3. Aufl., München, 2006, 267, Rn.894. For example, if the parties indicate an incorrect purchase price in a notarized document and register a preliminary record, then the certified document as simulates transaction will be void (§117) and the actual transaction - invalid due to form insecurity (§311 b I 1). Thus the right of the buyer to transfer does not arise and therefore a pre-registered record will be premature. Ibid*,* 264, Rn. 884; *Vieweg K., Werner A.,* Sachenrecht, 5 Aufl., München, 2011, 486, Rn.5; *Kropholler J.,* German Civil Code, Study Commentary*, Darjania T., Chechelashvili Z.* (*Transl.*), *Chachanidze E., Totladze L. (ed.),* Tbilisi, 2014, 675, Rn. 2 (in Georgian).

43 *Weirich H. A.,* Grundstücksrecht, 3. Aufl., München, 2006, 282, Rn.936.

44 *Werner A.,* Sachenrecht, 5 Aufl., München, 2011, 487, Rn.6.

45 *Weirich H. A.,* Grundstücksrecht, 3. Aufl., München, 2006, 288, Rn.957.

tered complaint before the transfer of ownership, and § 883 II precludes any subsequent objection to the acquirer after the pre-registration.[46] There is a difference of opinion as to whether the complaint has a predominant effect on the preliminary record and whether even after the registration of the preliminary record, the registered complaint may have the legal effect. In this case - if we give pre-record the advantage, then acquirer (B) will become the owner and no objection raised after registration of the pre-record will hinder good faith acquisition; And if we take advantage of the protest, then the acquirer (B) will not become the owner even though he has already protected himself from further disposal by prior record and the protest will have the ability retroactively alter the legal effects that should have caused the the pre-record. According to one view, a preliminary record which is obtained from the unauthorized person, protects him only against the further disposal by the unauthorized person, from the risk that the (unauthorized) person may reassign the land to a third party or charge it.[47] The safeguard function of §883 II cannot go so far as to extinguish the existing right (is meant the right of real owner E).[48] The second opinion is based on the assertion that the in good faith acquired pre-record would be of no value to the acquirer if it would be inadmissible to use it against the later registered complaint of the owner.[49] Proponents of this opinion proves that a protest cannot jeopardize the in good faith acquired pre-record, as it would be unjustified for the purposes of the security of civil turnover.[50]

3.2.2. The So-called *Bona Fide* Primary and Secondary (Derivative) Acquisition of Preliminary Record

In terms of the acquisition of preliminary record, we must distinguish between primary and secondary acquisition.[51] The bona fide primary acquisition of the preliminary record is in fact unanimously recognized, and the possibility of bona fide secondary acquisition is a subject of heated debate. Unlike the first acquisition of the preliminary record, at the second acquisition it is necessary grantor to have the authority to dispose the claim and to carry out the preliminary record.[52] If there is no the claim which is ensured by the preliminary record, then because of the accessory a second bona fide acquisition is excluded.[53] I will illustrate one example that helps to understand the Essence of Primary and Secondary Acquisition: V is incorrectly registered in public registry as a landowner. He sells the land to an unconscientious K who knows that V is wrongly registered in the registry. A preliminary record was made in the public register in favor of K. Subsequently, K granted conscientious A a request for a transfer of land pursuant to a sale agreement with V. Did K buy the preliminary record and did A got it? A primary pre-record can be purchased bona fide without any problems, which means that if K were conscientious, it would have purchased a bona fide pre-record. Since the first acquisition was

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46 *Weirich H. A.,* Grundstücksrecht, 3. Aufl., München, 2006, 288, Rn.957.
47 Ibid.
48 Ibid.
49 Ibid.
50 *Weirich H. A.,* Grundstücksrecht, 3. Aufl., München, 2006, 288, Rn.957-958.
51 *Werner A.,* Sachenrecht, 5 Aufl., München, 2011, 488, Rn.7.
52 *Weirich H. A.,* Grundstücksrecht, 3. Aufl., München, 2006, 287, Rn.953.
53 Ibid.

disrupted due to K's conscientious, we resolved the problem of bona fide secondary acquisition by third party (A). A may have obtained a preliminary record from K by assignment under §§ 401 I, 398. The preliminary record is accessorial to the claim, so in fact there is the acquisition of ensured claim and not the pre-record, pre-record follows to the claim under the law (§ 401 I). The preliminary record itself does not transfer, but it automatically transfers by analogy to § 401 as a "lateral right" ("Nebenrecht") when the secured claim is assigned.[54] In the process of assignment disposed is the claim, the preliminary record being followed by the law.[55] Unless there is a secured right, it certainly cannot be transferred.[56] For a functional understanding of this issue, it would be correct to say that there is "a deal acquisition of a combination of a claim and an accessoral preliminary record."[57] K has assigned to A the claim in accordance with the formal requirements of the law, to which followed the preliminary record. Since V was not the real owner and this fact knew K, so due to lack of authority, no valid preliminary record would exist. There is not either the first bona fide purchase, as K was unconschientious. Thus there is no preliminary record in favor of K, which he would have assigned to A. The question is, since A was conscientious, would he purchased the pre-record in good faith?[58] The prevailing opinion rejects the possibility of bona fide secondary acquisition of a preliminary record,[59] thereagainst judicial practice considers it possible.[60]

3.2.3. Complaint as a Means of Defense against *Bona Fide* Acquisition

It may also happen that the public registry were incorrect, that means that the judicial reality of public registry would not be in accordance with the actual legal situation. In this case the Registry's inaccuracy should be corrected, which is provided by §894 - a person whose right is not or is not properly registered requires the consent for the amendment from the person to whom such amendment relates. If the incorrectly registered person does not agree to amend the record, such amendment shall be subject to appeal.[61] Due to the dangers associated with making transactions using inaccurate registry data, the inaccuracy of a public registry allows to file a complaint.[62] There are two ways to register a complaint: first - registration may be done with the consent of the person to whom rights will be changed with such registration, but this is usually uncommon in practice,[63] second - registration may be effected on the basis of a court decision; However, it is not necessary to justify the existence of a threat to the right (§899). This need is obvious in itself for the purposes for which the registration of the complaint is required. Bonda fida acquisition is a risk that does not require excessive justification. The complaint does not say that the public

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54 *Gursky K. H.,* in *Staudinger,* Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 363.
55 Ibid*,* 365.
56 Ibid*,* 363.
57 Ibid, 365.
58 Ibid.
59 *Gursky K. H.,* in *Staudinger* Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, Rn. 58; *Kohler J.*, in *Müko*, Band 7, München, 2017, Rn.73; *Wilhelm J.,* Sachenecht, 6 Aufl., Berlin/Boston, Rn. 2263.
60 *Müller K., Peter Gruber U.P.,* Sachenrecht, München, 2016, 583, Rn.2869.
61 Ibid, 507, Rn.2583.
62 *Kohler* J., in Müko, 8. Aufl., München, 2020, 379, Rn.3.
63 Ibid, 378, Rn.1.

registry record is incorrect; it only serves to the insurance of the case, when it appears incorrect.[64] The complaint does not correct an incorrect record but is intended to correct such record, it protects the real owner's request to correct the record.[65] A registered complaint under § 892 (1) eliminates the presumption and therefore impedes a bona fide acquisition,[66] that means that because of the inaccuracy of public registry with the help of registration of the complaint creates the obstacle to a bona fide acquisition.[67] The complaint, by its legal nature, is neither a charge nor an absolute or relational restriction on disposal, but is a temporary securing mean of improperly registered or unregistered property right in the public register.[68] It does not provoke blocking the public registry.[69] If it is subsequently found that the public registry record is correct, then the complaint will be considered as absurd from the outset.[70] It only affects the existing presumption of illusory legal status.[71]

3.2.4. Reference to the Court Dispute

There is a great deal of diversity of opinion in theory and practice regarding the operation of the institutions, which are not directed regulated by law.[72] This also applies to the Reference to the Court Dispute ("Rechtshängigkeitsvermerk"), which is discussed as inadmissible legal event by some scientists.[73] The possibility of Reference to the Court Dispute is not explicitly defined by law, but its admissibility is almost unanimously recognized.[74] The reference shall be registered in the Register and through the publicity it becomes public, thereby acquiring the capacity to oppose the lawful presumption of the Public Register.[75] In contrast to the complaint, it is not based on the applicant's material legal standing (his claim that he is the owner of the thing) but merely on his procedural position that he has a dispute in court.[76] The reference to a litigation gives rise to the same effects as the complaint and like the complaint it appears also in extraction of public registry.[77] There are different opinions regarding the regulation of this institution. Most scholars believe that Reference to the Court Dispute should not be allowed to be registered only by submitting a dispute document, as the complaint would lose its sense if

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64 *Wilhelm J.,* Sachenrecht, 6. Aufl., Berlin/Boston, 2019, 411, Rn.688.

65 *Quiz T.,* Decision Analysis of Constitutional Court of Georgia - „Nodar Dvali against the Parliament of Georgia" – from a perspective of German Law, "Comparative Law Journal", №1/2019, 3 (in Georgian).

66 Ibid.

67 *Wilhelm J.,* Sachenrecht, 6. Aufl., 2019, 364, Rn.599.

68 *Bauer F., Stürner R.,* Sachenrecht, 18.Aufl., München, 2009, 225, Rn.12.

69 *Müller K., Gruber U. P.,* Sachenrecht, München, 2016, 509, Rn. 2592.

70 *Bauer F., Stürner R.,* Sachenrecht, 18. Aufl., München, 2009, 225, Rn.11.

71 *Sirdadze L.,* Complaint Against Public Registry Record, "Journal of Comparative Law", №1/2020, 8 (in Georgian).

72 *Zeising J.,* Der grundbuchliche Rechtshängigkeitsvermerk - ungeregelt und entbehrlich?, ZJS 1/2010, 1.

73 Ibid.

74 Ibid, 2.

75 *Rusiashvili G., Sirdadze L., Egnatashvili D.,* Property Law, The Cases, Tbilisi, 2019, 317 (in Georgian).

76 Ibid.

77 Ibid.

it would be sufficient for its registration only evidence of the dispute. In such a case, the applicant will always prefer the latter over a difficult-to-register complaint.

4. Acquisition based on Real Estate Ownership Deal in French Law

Various legal systems consider various actions to be sufficient to transfer the ownership right, a part of them – only entering into contract and respectively the ones consider the emergece of the rights,[78] part of them link further actions to right emerging. France belongs to a number of the countries considering that signing the agreement is sufficient in order that right emerges and further activities are not needed to be done. From the standpoint of ownership right emerging, registration is optional. Other coutries possessing the code of France and Napoleon (Belgium, Italy, Luxembourg, Portugal and Spain) in order to purchase the immovable thing preliminary agreement is formed (compromis de vente or promesse de vent, in German: Vorvertrag) and as a rule initial payment is made within the scope from 5% to 10%.[79] Since then purchaser seeks sufficient finances, purchase agreement is formed in accordance with the notary act.[80] It's worth mentioning that preliminary agreements serves as a twisting effect for the parties.[81] As a rule full payment shall be made for the moment the contract transfers the right to the purchaser.[82] On the day of certifying purchase agreement, purchase amount shall be deposited on the account of notorious.[83] After this registration occurs, however, it carries declaratory nature.[84] Purchase amount shall be deposited on the account of the seller since then the change is reflected at the Public Registry.[85] Unlike German Law, ownership right is transferred by not registration but by a purchase agreement from the moment of signing it purchaser is considered to be owner.[86] Registration makes a fact of legal status change for the third individuals obvious ,[87] it is only needed to transfer the effect of legal status to the third individuals.[88]

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78 *Danelia E.,* Demarcation Principles based on the Example of a Gift Agreement: Review of Georgian Law – Special Edition 2008, Tbilisi, 32 (in Georgian).

79 *Schmid C. U., Hertel C., Wicke H.,* Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 48.

80 Ibid.

81 *Kirner O., Macor K.,* Frankreichimmobilien, 7. Aufl., 2015, 61.

82 *Schmid C. U., Hertel C., Wicke H.,* Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 48.

83 *Kirner O., Macor K.,* Frankreichimmobilien, 7. Aufl., 2015, 72, It is the responsibility of notaries to draw up real estate contracts in France, as in most European countries, See: Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 50.

84 *Schmid C. U., Hertel C., Wicke H.,* Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 48.

85 *Kirner O., Macor K.,* Frankreichimmobilien, 7. Aufl., Freiburg, 2015, 72.

86 Ibid.; *Schmid C. U., Hertel C., Wicke H.,* Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 52.

87 *Chaduneli G.,* Action of Defective Record of Public Registy on the deals of Immovable Thing (Comparative-legal analysis), Journal "Junior Lawyers", N 2, 2014, 7 (in Georgian).

88 Ibid.

Registration may be carrying constitutional or declaratory content.[89] Constitutional principle of registration links ending of the process of transferring the rights over the land to the fact of registration.[90] In order that right emerges, declaratory principle of the registration does not consider the registration to be compulsory and deems it as means of demonstrating the real legal status for the third person over the immovable thing. In France registration does not carry declaratory nature, which implies that ownership right emergence over the immovable thing directly shall not connect to the fact of registration. Ownership right is transferred by means of the purchase agreement formed among the parties, however, until it is not registered, such ownership right shall not be valid for the third person. At the same time, in case the agreement shall be void, it prevents the real right from transferring.[91] Changes of legal status shall be valid for the third individuals only after the registration. However, it's worth mentioning that in case the registration does not occur, with an aim of prevention financial penalties are laid.[92] Countries possessing the Civilian Code system of Napoleon main aim of registration agency (the Cadaster) shall be ownership payment (Fiscal Cadaster) that has no legal cadaster function serving as a protector of ownership right.[93]

5. *Bona Fide* Purchasing of Immovable Thing at Georgian, German and French Law

Protection of bona Fide purchaser of the immovable thing is influenced by the rule of ownership entitlement. This rule differs in the three countries. Georgian and German Laws protect the bona fide purchaser, but the French one - original owner. If accruing a right is linked to registration, in such case, as a rule bona fide purchaser is protected (Georgia, Germany) (Greece is excluded), however, if the right is transferred by not registration, but agreement, as a rule, bona fide purchaser is not protected (France), (Denmark, Finland, Poland, Portugal, Spain, Sweden are excluded).[94] The Laws of Georgia and Germany defend stable functionality of civilian circulation behind the purchaser by protecting bona fide purchaser, content of the French Law dwells in legal status and suggests that only real owner shall be able to transfer the right.

Institute of Bona Fide Purchase of Immovable Thing became a matter for discussion of Constitutional Court of Georgia.[95] Normative content of 185th article of CC was recognized uncon-

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89 *Schmid C. U., Hertel C., Wicke H.,* Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 33.

90 Ibid.

91 *Schutte P.,* The Characteristics of an Abstract System for the Transfer of Property in South African Law as distinguished from a Causal System, PER/PELJ 2012(15)3, 139.

92 *Krimphove D.,* Das Europaeische Sachenrecht, Band 1, 1. Aufl., 2006, 157.

93 *Lapachi E.,* Public Registry – Registration Agency of Rights on Immovable Things and Implemented Reforms in this Sphere, "Journal of Law", №2, 2011, 95 (in Georgian).

94 *Schmid C. U., Hertel C., Wicke H.,* Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 34.

95 See. Decision № 3/4550 of 17th October, 2017, of Constitutional Court on the case: A Civilian of Georgia, Nodar Dvali opposes the Parliament of Georgia, <https://www.constcourt.ge/ge/legal-acts/judgments/3-4-550-saqartvelos-moqalaqe-nodar-dvali-saqartvelos-parlamentis-winaagmdeg.page> [25.03.2020].

stitutionally by Constitutional Court implying that "Transferor is considered to be an owner when the record in the Registery has been appealed and purchaser is aware of this fact."

As a result of the Constitutional Court's decision, 185 and 312 Articles of the CC have become even more intertwined because of the fact that now both articles have in common "Complaint", but how do they manage to coexist peacefully is a different issue. Prior to the Constitutional Court's decision Article 185 of the CC provided only one condition to exlude a bona fide acquisition, and that was the acquirer's unconscientious, that is, when he knew that the seller was not the owner. Article 312 of the CC adds one more condition to the exclusion of bona fide acquisition, and that is a complaint against the correctness of the public registry. Generally, article 312 (2)[nd] of CC implies complaint that accords with the sense of the German complaint (Widerspruch, BGB §899) and means the protest against the Public Registry, which is fixed in a respective column and provides the party with information referring to the disputable rights.[96] The purpose of the complaint is to protect the real owner of an unregistered or incorrectly registered right from the bona fide acquisition in accordance with §892.[97] §312 (2) of CC as well as §899 of BGB refer to the existence of the complaint as being sufficient in itself in order to exclude further acquisition, whilst the new content[98] of of article 185[th] of CC referrs to the awareness of the complaint. Both articles link the complaint to different outcomes - Article 185 requires knowledge (the complaint is filed and the fact is known to the acquirer), and Article 312 applies abstractly, regardless of knowledge (complaint filed). Understanding the complaint under article 185 contradicts to the abstract nature of the protest (complaint). The protest operates irrespective of whether the acquirer knows of its existence. Such contradictory but collaborative action of the norms creates a collision for the common courts and also uncertainty for any potential acquirer. As long as the complaint is not registered (impossible due to lack of procedural rules[99]), Article 185 thus provides that when the acquirer receives information on the existence of a dispute in any way and from any source, he will lose the opportunity to ac-

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96 *Eberhard V., Sirdadze L.,* Vain Attempt of Bringing to Life of Fey Comparative Law Journal, №1/2019, 12.

97 *Kohler J.,* in *Müko*, 8.Aufl., München, 2020, 378, Rn.1.

98 The Constitutional Court's understanding of the complaint See: *Sirdadze L.,* Ownership Entitlement on the Immovable Thing by Authorised and Unauthorised Person, Comparitive Law Journal, №2/2019, 44 and the following pages (in Georgian); *Eberhard V., Sirdadze L.,* Vain Attempt of Bringing to Life of Fey Comparative Law Journal, №1/2019, №1/2019, 12 and the following pages (in Georgian); *Quiz T.,* Decision Analysis of Constitutional Court of Georgia - „Nodar Dvali against the Parliament of Georgia" – from a perspective of German Law, Comparative Law Journal, №1/2019, 1 and the following pages; *Tavadze Z.,* Ownership Entitlement on the Immovable Property – Consitutional Balance between the Interests of Original Owner and Bona Fide Purchaser (Decision Analysis of 17[th] December of 2017 of the Consitutional Court) "Law and World", №8/2017, 22 and the following pages (in Georgian); *Chachava S.,* Decision Assessment of 17[th] October, 2017 of the Constitutional Court regarding the Presumption of the Public Registry, 13 <https://idfi.ge/public/upload/IDFI_Photos_2017/rule_of_law/decision_of_constitutional_court_of_georgia_analyses.pdf> [25.03.2020] (in Georgian).

99 The witness invited to the case also indicated this. See: Decision № 3/4550 of 17th October, 2017, of Constitutional Court on the case: A Civilian of Georgia, Nodar Dvali opposes the Parliament of Georgia, I 24; *Sirdadze L.,* Ownership Entitlement on the Immovable Thing by Authorised and Unauthorised Person, Comparitive Law Journal, №2/2019, 56.

quire the thing in good faith.[100] If we tolerate the fact that it's permitted the acquirer to be informed in any way, there is a risk that someone will misuse this right, which will eventually block the institution of good faith.[101] Under the organized legislative regulation complaint appears in a public registry extraction, so it is always known to the acquirer, as the extract is usually inspected prior to purchase, and if the acquirer does not inspect it, he becomes a risk-taker. The protest remains registered and whether the acquirer checks such registration before purchasing the item is under his/her free will his/her "right to risk". In the German model, the complaint is registered in the same column where the right is registered,[102] so upon examination of the extract the legal defect becomes apparent to the acquirer. Under the right and organized registrational process this is the best way for the acquirer to obtain complete information on the legal status of the item, and if he/she is not aware of such a claim, it appears that he/she is not familiar with the record about the property and in this case he/she should take the risk related to disputed property.[103] It's worth indicating a legal practice of Georgian Courts with respect to broad interpretation of the extent of carefulness, that are not mentioned in neither 185 nor 312 articles.[104]

Generally, regulation of *bona fide* purchaser's institute is one of the exempt cases whereas one party stays injured and it occurs in any legal system. "In order to maintain legal security, single justification has to be rejected. Roughly speaking, the phenomena and sacrifice for justification are alike. It can't be fair for the injured",[105] however, "Law acts so in the name of justification."[106] In order for such "sacrifice" to be justified, it is necessary to give the "injured" a real opportunity for self-defense, which is unfortunately not fully provided by Georgian law.

6. Conclusion

Law of each country regulates the matters related to the immovable things in a different way and respectively, the problems caused by such matters are resolved in a different manner. The means of finding solutions depends on the legal system selected by a particular state, whereas it is worth considering that "Rights of the parties are not closed space of legal relations, but they are encumbered by legal valid interests of the third party."[107] Generally, the more difficult it is to accrue a right, the more the one is protected, however, complication of obtaining a right is not a recourse, because in any case it is impossible to create an ideal system and by desire of creating such system a lawgiver shall not delay civil turnover of the immovable things by putting up factitious barriers. The fact that rights emergence and its forfeiture

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100 *Rusiashvili G., Sirdadze L., Egnatashvili D.,* Property Law, The Cases, Tbilisi, 2019, 321 (in Georgian).

101 Ibid.

102 *Eberhard V., Sirdadze L.,* Vain Attempt of Bringing to Life of Fey, "Comparative Law Journal", №1/2019, №1/2019, 1 (in Georgian).

103 Ibid, 2.

104 *Zarandia T.,* Property Law, Second Edition, Tbilisi, 2019, 297-304 (in Georgian); *Zarandia T.,* Bona Fide Purchasing of Immovable Things by unaccredited exprotriator in Georgian Court Practice 64-67, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566289>, [25.03.2020] (in Georgian).

105 *Zoidze B.,* Practical Existential Cogniotion Attempt of Law, Tbilisi, 2013, 217-218 (in Georgian).

106 *Zoidze B.,* Practical Existential Cogniotion Attempt of Law, Tbilisi, 2013, 218 (in Georgian).

107 *Zoidze B.*, European Private Law Reception in Georgia, Tbilisi, 2005, 210 (in Georgian).

over the immovable thing are differently regulated does not imply that any of them consider the ownership right to be undervalued. Laws of Germany and Georgia link emergency of the right over the ownership right to registration, but the French one – signing the agreement, however, it does not imply that French lawgiver underestimate the risks related to ownership right over the immovable thing. Forfeiture of right over the thing always exists including the immovable things. In such case, German and Georgian lawgivers support the bona fide purchaser with an argument of stability-steadiness of civil turnover, French one protects the original owner proving that real right can be accrued by means of real alienation.

As for the practical points and recommendations related to the purchase of immovable property, it is necessary to reinstate the mandatory notarial certification, which is abolished with the aim to simplify the registration of rights and minimize costs, but as a result we got numerous litigation and the threat of encroachment of proprietary right.[108] In German law the mandatory notarial assertion ensures the safe transfer of rights in a transaction executed in accordance with the real will of the parties. Due to the importance of ownership right on land the person shall be protected from careless alienation without consultation.[109] France has a similar approach, where notary is involved in the process of buying real estate.[110] As for the institution of good faith acquisition of immovable property, in light of the court's decision, deficiencies of the system of acquisition of immovable property and the necessity for its refinement became even more apparent. The court's decision showed that the institution of good faith acquisition of property is only superficially regulated and in fact there are no practical safeguards. Despite the being at the legislative level, there is no practical possibility of registering a complaint that would guarantee the owner protection from bona fide purchasing. Filing a complaint against the public registry should become a real opportunity for which legislative changes need to be made. Appropriate procedural preconditions for this institution to be "revitalized" must be established. Due to its immense function and importance of this institute it should not be left out of action.The complaint must be registered in the same way as a German protest, but it may also be registered with the consent of the person to whom rights with this registration will be changed (§ 894).[111] Without the action of a claim institution, it is impossible to speak of a balance between the interests of the bona fide acquirer and the real owner, because the latter has no practical possibility to protect his property against the disposal without his/her will. The institutions repealed by Articles 313 and 315 of the CC,[112] which are still operating in German law and which play a major role in the safe acquisition and protection of property, need to be reviewed and evaluated the feasibility of their cancellation.

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108 *Palavandishvili K.,* Real Property Acquisation Transformation in Georgian Law, "Journal of Law", № 2, 2012, 232 (in Georgian).

109 *Wolf M., Welenhoper M.,* Property Law, 29th ed., *Chechelashvili Z. (Transl.),* Tbilisi, 2016, 208, Rn.1 (in Georgian).

110 *Schmid C. U., Hertel C., Wicke H.,* Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 48.

111 Prior to 2007 there was an article in CC about the requirement to amend the record as well (Article 133).

112 Article 313 - "Request for consent to correct inaccurate record", Article 315 - "Preliminary record in public register".

Simplicity of purchasing immovable thing and its affordability are really a legitimate purpose, however, it shall be achieved by retable and proportional means. Undoubtedly, nowadays purchasing immovable thing is simplified, that is convenient for development of the immovable thing market, however, safety of civialian circulation shall not sacrifice to its affordability. Existing rule of registration over purchasing the immovable thing is significantly in need of being reviewed and in order to protect the original owner further certain procedural requirements shall be detemined, at least, the Publc Registry shall inform her or him compulsorily before legal status changes by law,[113] without preventing the purchaser from unjustifiable protraction within the process of accruing the right that encourages him or her to lose patience and desire of purchasing the property. As stated by Sturner: "No one will desist to build a durable and solid home just because it can't be registered in a day or two."[114]

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[113] See: *Eberhard V., Sirdadze L.,* Vain Attempt of Bringing to Life of Fey, "Comparative Law Journal", №1/2019, 19 (in Georgian).

[114] *Quiz T.,* Decision analysis by the Constitutional Court of Georgia – "The citizen of Georgia, Nodar Dvali against the Parliament of Georgia" – analysis from a perspective of German Law, "Comparative Law Journal", №1/2019, 11 (in Georgian).

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Escorting Prisoners with Physical Disabilities

The present article analyses the challenges and discusses possible solutions connected with transportation (escorting) of prisoners with disabilities. It is noteworthy that, in general, very few materials are available regarding the procedure of escorting prisoners. The standards regulating the transportation of persons with disabilities (PWDs) is especially scarce. Therefore, the existing research papers do not offer any efficient solutions to the issue. The article studies those risks and problems that might be related to transferring prisoners with disabilities and specificities of their transportation; the article also discusses specific approaches set by international standards; it also analyses the practice of the European Court of Human Rights (ECtHR), according to which the violations[1] *made during the transportation of prisoners were determined to be in violation of Article 3 of the European Convention on Human Rights (ECHR).*[2]

The purpose of the article is to show the gaps in the Georgian reality and to offer specific recommendations to the penitentiary system of Georgia, which would allow the elimination of these gaps.

Key words: *Legislation, International Standards, Prisoner's Rights, Protection, Escorting, Escorted Persons, Persons with Disabilities, Searches.*

1. Introduction

Working with persons with disabilities (hereinafter PDWs) is a challenge for any closed system in which these people may be placed. It is clear that PWDs placed in penitentiary establishments represent a particularly vulnerable group for many different reasons. The arguments determining the vulnerability of persons with disabilities in prisons may be derived from both subjective and objective factors. Objective factors include the unadapted prison buildings and other auxiliary buildings; lack of relevant rehabilitation and educational programs or inconsistency with the needs of persons with disabilities; lack of work opportunities; lack of medical services tailored to the needs of persons with disabilities; absence of the caregiver institute, etc. Subjective factors include the attitude of the staff and their low level of professional training. However, if we take into consideration the view of the ECtHR regarding the vulnerability of prisoners, the report of the Parliamentary Assembly of the Council of Europe (PACE) explains that prisoners are among those most vulnerable to violations of their fundamental rights. According to the same report, the ECtHR has stressed that authorities have a "duty to protect" any person in custody at all times.[3]

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1 See the foregoing artilce, 10, 12, 14.

2 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Article 3.

3 *Mr. Mallia E.*, Report, Committee on Legal Affairs and Human Rights Protecting human rights during transfers of prisoners, Parliamentary Assembly, CoE, Malta, 2019, 3, <http://website-pace.net/documents/19838/5636250/20190122-PrisonerTransferRights-EN.pdf/470d737d-1234-4484-b9a4-5000c75f79b7> [17.03.2020].

In regards to placement and living conditions of PWDs in prisons, there are number of international standards and guidelines, which regulate or are directly or indirectly related to treatment of persons with disabilities in penitentiary establishments, however, similar standards that set the procedures and general rules on prisoners' transportation are difficult to find. Such documents are scarce not only in regards to escorting and transportation of special categories[4] of prisoners, but prisoners, in general.

The Code of Imprisonment of Georgia does not discuss the standards of escorting prisoners and thus we do not find any provisions with regard to persons with disabilities either. In this case, it is hard to look for the solution in any other law, as the issue should be regulated by the Code of Imprisonment insofar as it is the law that should regulate all procedures and conditions of detention in the country. The law should set the restrictions, which shall prevent any unlawful acts towards detainees, protect their rights and legitimate interests.

Accordingly, the Georgian legislation should be amended to fully regulate the procedures of escorting the prisoners, including the procedures for transferring prisoners with disabilities, in order to allow for the protection of escorted prisoners from cruel, inhuman or degrading treatment. The Parliamentary Assembly of the Council of Europe calls on the member States of the Council of Europe: to bring their national legal frameworks and practices into line with existing international standards on transfers.[5]

2. Procedures of Escorting Prisoners Regulated by National Legislation

Escorting procedures of prisoners are not regulated by legislation but through bylaws (Order "Approving the Rule of Removal/Transfer of Accused/Convicted Persons"),[6] so it clearly represents a legal act of less importance, while the violation of prisoners' rights, including violence, torture and inhuman and degrading treatment towards them, often occurs during their transportation, as explained in the experts' evaluations,[7] namely, when the escorted individual is in the vehicle under the surveillance of some of the staff members, without control,[8] and does not have any opportunity to complain, call a doctor or ask for any kind of help.

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4 Special categories of prisoners include: women; juveniles; prisoners with disabilities; older prisoners; prisoners with terminal illness; foreign national prisoners; ethnic and racial minorities; lesbian, gay, bisexual, and transgender (LGBT) prisoners. These categories are discussed in the Handbook on Prisoners with Special Needs, United Nations Office on Drugs and crime, 2009, 9, 43, 57, 79, 103, 123, 143.

5 *Mr Mallia E*., Report, Committee on Legal Affairs and Human Rights. Protecting human rights during transfers of prisoners, Parliamentary Assembly, CoE, Malta, 2019, 3, <http://website-pace.net/documents/19-838/5636250/20190122-PrisonerTransferRights-EN.pdf/470d737d-1234-4484-b9a4-5000c75f79b7> [last accessed 17.03.2020].

6 Order N149 of 19 October 2015 of the Minister of Corrections of Georgia on "Approving the Rule of Removal/Transfer of Accused/Convicted Persons", Tbilisi.

7 "Unacceptable conditions during transfers of prisoners may amount to inhuman or degrading treatment or punishment, contrary to Article 3 of the European Convention on Human Rights" in Mr Mallia E., Report, Committee on Legal Affairs and Human Rights Protecting human rights during transfers of prisoners, Parliamentary Assembly, CoE, Malta, 2019, 3, <http://website-pace.net/documents/19838/5636250/20190122-PrisonerTransferRights-EN.pdf/470d737d-1234-4484-b9a4-5000c75f79b7> [17.03.2020].

8 In this case, "control" implies access to supervision of the authorities or independent control (monitoring) institutions.

The Order of the Minister of Corrections of Georgia on "the Rules of Procedure for Providing Escort" defines the general grounds for the transfer of prisoners from one place to another. The grounds are as follows: transfer of accused/convicted persons to participate in court proceedings or pleadings; transfer of accused/convicted persons to participate in investigative or other procedural activities; extradition of accused/convicted persons; temporary leave by convicted persons from prison in cases provided for in Article 26 of the Code of Imprisonment on special, personal grounds; temporary leave by accused persons from the facility in cases provided for in Article 78 of the Code of Imprisonment on special, personal grounds; in cases provided for in Article 121(2) of the Code of Imprisonment, such as: transfer of the accused/convicted persons to or between civil hospitals; transfer of accused/convicted persons from the penitentiary establishment to the Prison General Hospital, the Tuberculosis Treatment and Rehabilitation Center or forensic facility for forensic psychiatric assessment; transfer of the accused/convicted persons from one penitentiary establishment to another; removal and transfer of accused/convicted persons to conduct independent medical examination; removal/transfer of convicted persons to participate in an oral hearing of the Local Council of the Ministry; removal/transfer of the accused/convicted persons for work and other cases established by law.[9]

It should also be noted that in all these cases the person being transferred may be a person with a disability, especially when considering the transfers made to medical, rehabilitation and forensic examinations. Although the scope of these rules is to transport and escort other persons as well as persons with disabilities (being escorted to one or more of the above-mentioned facilities), these rules refer to the specificity of the transportation of persons with disabilities only once, among other special categories, which explains that when escorting women (including pregnant women and/or women with children under 3 years of age), juveniles, older prisoners and prisoners with disabilities, particular attention shall be paid to their necessities and physical, social and psychological needs.[10] This provision does not clarify what is meant by attention, even though the four categories mentioned in it shall and do have drastically different social and physical needs in practice. For example, if it is the child's best interests and psychological state in case of the transportation of a minor, the main problem in the case of a person with disability may be the adaptation of the vehicle, etc.

Article 7 of the Rules briefly specifies the forms of providing for these special needs, such as the selection of the vehicle type, the control methods and the use of handcuffs, which are more in the interests of the escorting service and the prison system than in the interests of the escorted/transferred persons with disabilities or other special needs, since this Article is about security measures and not about the interests and needs of any given category of person.

Although the provision in Article 7 of the Rules, regarding the selection of the type of the vehicle, should be considered as a positive indicator, at the same time it is flawed since the selection of special vehicles intends to consider its technical conditions[11] only and does not include the provision regarding

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9 Order N149 of 19 October 2015 of the Minister of Corrections of Georgia on "Approving the Rule of Removal/Transfer of Accused/Convicted Persons", Article 4.

10 Ibid, Article 7.

11 Ibid, Article 19.

adaptation of transportation vehicles to the needs of PWDs. The opponents may dispute this gap and refer to Article 4 of the Rules regarding the selection of the vehicle type, however, this cannot be considered as a comprehensive opportunity for persons with disabilities either, because they might not and, in most cases, do not require any kind of specially selected vehicles, but only the adaptation of the existing ones, so that they are not transported in isolation but together with other persons in an integrated manner.

The provision in the Order of the Minister of Corrections on the "Use of Special Means"[12] should be welcomed as it states that "special means shall be used as an extreme security measure in the event when another measure is ineffective. The use of the special means shall be proportionate to the danger and do less harm to the addressee of the measure in order to achieve a legitimate aim".[13]

The document, which regulates the rules of transportation of prisoners shall include details related to transportation. As the Prison Incident Management Handbook[14] defines, it shall represent an act with enough power not to be subject to changes in spite of the security risks that could be derived from prisoners. This document should cover issues such as: the number of employees involved in escorting, the reason and direction of the transfer, the actions of the staff at the destination (hospital, court, etc.), the need for checks (searches), the use of restrictions and periodic checks, the frequency of communication and reporting, the timetable of escorting and transportation, type of the vehicle and transportation route, need for escorted persons to be accompanied with the required documents and photos, staff and prisoners' clothing criteria, criteria for terminating the confidentiality of information regarding escorting. Such an approach will minimize the risk of violence against escorted persons and will increase the degree of security and flexibility during escorting.

3. Searching of Prisoners for Removal/Transfer

The "Rules of Procedure for Providing Escort" explains the full and partial searches of persons to be escorted. Particular attention shall be given to full searches, in which case the body, clothing, shoes and prosthesis (if any) of the accused/convicted persons are checked.[15] However, it does not regulate what the checking procedures should be and how to inform the person about the check. It is indicated in the Rules that the searches of the plasters, gypsum and other bandages shall be performed jointly with the medical practitioner. However, the participation of a specially trained person in checking the persons with disabilities is not specified.

Another issue related to checking the person to be escorted is the requirement that the accused/convicted person is obliged to completely remove the clothes or strip the relevant parts of the body

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12 Order N145 dated 12 September 2014 of the Minister of Corrections on "the types of special means possessed by bodies responsible for enforcement of pretrial detention and imprisonment as well as rules and conditions of storing, carrying and using such means; rules of determining persons authorized to use the special means".

13 Ibid, Article 2.

14 See, Prison Incident Management Handbook, UN, 2013, 27.

15 Order N149 of 19 October 2015 of the Minister of Corrections of Georgia on "Approving the Rule of Removal/Transfer of Accused/Convicted Persons", Article 29.

following the instructions of the authorized person.[16] In case if a person is physically unable to independently undress, there is no mention of who can assist and whether the honour and dignity of the person is protected. It is not specified whether the escorting staff member knows how to perform the checking procedures. Also, it should be determined how a person is informed about the actions about to be taken towards them when they have hearing or visual loss or impairments. Also, how fully informed is the person with disabilities, who is being asked to strip, about what is happening in the room (if it takes place in a room) where they should strip, in particular, who is in the room and to what extent is the place isolated from other people's eyesight, etc. The above-mentioned issues have a significant importance as they serve to protect a person from fear and other unjustified stress that may accompany such a person's searches and checks only because there are no clearly defined procedures. Obligation of the escorting staff to inform any escorted persons and especially persons with disabilities about each detail connected to their removal and transfer to the place of destination should be provided by law in order to avoid additional fear caused by uncertainty for persons with disabilities, who are already under psychological stress due to their condition, lack of appropriate information and lack of access to various facilities and services. The General Assembly of the Council of Europe has called on member states to ensure that information on the persons to be transferred is provided to the third party, which is the receiving party, if necessary, and also, to ensure that "all prisoners, subject to transfer, are informed in advance in a language they understand."[17]

The importance of information for escorting personnel is also high when transporting a person with a disability, because the prisoner's disability may not always be immediately obvious to staff and therefore staff may not be aware of the needs the escorted individual has. As the British Prison Service Order[18] explains, it is important that information regarding disability is entered on to the Person Escort Record (PER) under the "health risk" heading and the escort staff are aware of such issues in order that prisoners' needs are met. The Order explains that this information will have a direct impact of the use and provision of specialist resources both during the escort and at the final destination.

A report published by Her Majesty's Inspectorate of Prisons indicates that prisoners with disabilities were less likely to say that they were searched in a respectful way on arrival. The report emphasised the need for national (internal) instructions about searching arrangements to guide staff dealing with prisoners with disabilities.[19]

The same need exists in the Georgian reality as both prison and escort staff conducting searches and checks of any persons, including persons with disabilities, should be provided with guidance on the

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16 Order N149 of 19 October 2015 of the Minister of Corrections of Georgia on "Approving the Rule of Removal/Transfer of Accused/Convicted Persons", Article 29.

17 Disabled prisoners: A short thematic review on the care and support of prisoners with a disability, Thematic report by HM Inspectorate of Prisons, London 2009, 4, <https://www.justiceinspectorates.gov.uk/-hmiprisons/wpcontent/uploads/sites/4/2014/07/Disability-thematic-2008.pdf> [17.03.2020].

18 Communicating Information About Risks on Escort or Transfer, The Person Escort Record (PER)**,** Prison Service Order, 2009, 15.

19 Disabled prisoners: A short thematic review on the care and support of prisoners with a disability, Thematic report by HM Inspectorate of Prisons, London, 2009, 29, <https://www.justiceinspectorates.gov.uk-/hmiprisons/wpcontent/uploads/sites/4/2014/07/Disability-thematic-2008.pdf> [17.03.2020].

implementation of these procedures. There should also be special training programs for these persons to improve their professional qualifications, both upon recruitment and with a reasonable frequency during the employment.

The importance of providing information about the escorting and transferring procedures to persons with disabilities in an understandable and exhaustive manner is also apparent considering the articles of the "Rules of Procedure for Providing Escort", which define what is implied under "escape" during escort and "crossing" of such defence lines, which do not represent any pre-defined standards and, in some cases, are discretionary lines set by the head of the escort group. Thus, the assertion that the boundaries of the defence line are known in advance to the accused/convicted persons is questionable, since these boundaries can be determined at any point in accordance with the existing risk.[20] Prior provision of information should be given special attention in relation to persons with disabilities; the procedures for informing persons with hearing, visual or cognitive disabilities should be clearly defined.

4. Analysis of National Law and Practice in Comparison with International Standards and Practice

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter CPT) has issued a factsheet[21] following the observations during its visits, covering several key issues of escorting persons, such as: material conditions of the vehicle; safety and security measures and health issues.

Unlike the "Rules of Procedure on Providing Escort" established by Georgian legislation, which only describes the general standards, in this document CPT provides a framework for the types of transport and dimensions of compartments or cubicles intended to transport detainees. The standards set the compartment dimensions for individual cubicles and cubicles intended to transport more than one individual. According to these standards individual cubicles measuring less than 0.6 m^2 should not be used for transporting a person, no matter how short the distance or duration, and cubicles used for longer journeys/distances should be much larger. As for compartments or cubicles intended to transport more than one detainee for short journeys/distances should be no less than 0.4 m^2 of space per person and at least 0.6 m^2 per person for long distances. Regarding the height of the vehicle, the CPT explains that compartments or cubicles used for transporting detainees should be of reasonable height.[22] It should be noted that the European Court of Human Rights has discussed the violations in the process of transporting of prisoners, and established violation of Article 3 of ECHR, for example, in Kavalerov and others v. Russia,[23] when the applicant was subjected to repeated transportation in individual cubicle with an area of

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[20] Order N149 of 19 October 2015 of the Minister of Corrections of Georgia on "Approving the Rule of Removal/Transfer of Accused/Convicted Persons", Article 52.

[21] Factsheet, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Council of Europe, 2018, <https://rm.coe.int/16808b631d> [17.03.2020].

[22] Factsheet, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Council of Europe, 2018, 2 <https://rm.coe.int/16808b631d> [17.03.2020].

[23] Kavalerov and others v. Russia: References: 55477/10, ECHR 2017.

0.3 m^2. The court also found a violation of Article 3 of ECHR in the case of Idalov v. Russia,[24] where the applicant was transported by a vehicle with an area of 11.28 m^2 carrying 36 persons, and on a different occasion by a vehicle with an area of 8.93 m^2 carrying 25 persons.

Although the specifics of the cubicles to transport a person with a disability is not indicated it should be noted that the size of the cubicles used to transport PWDs is of an utmost importance given that the person in question shall be able to sit in a fit manner. This argument is supported by CPT's explanation that transport vehicles should be equipped with suitable means of rest, such as appropriate benches or seats. CPT also explains that medicines for sick prisoners should be provided uninterruptedly during transportation, and that sanitary means should be provided as needed. It is noteworthy that this section addresses the needs of persons with disabilities, with a focus on equipping the vehicle in line with the interests of persons with disabilities, in particular that vehicles should be adapted for wheelchair users and, if necessary, with beds.[25]

Other issues that CPT covers in its factsheet and is of utmost importance for PWDs are:

a. Relationship with the escort staff, the issue, which is not considered by Georgian regulations. CPT explains that the transport vehicles, which transfer the detainees, should be equipped with means to enable detainees to communicate with escort staff.[26] This shall be given special consideration in case of PWDs as, compared to other persons, they might have a need for more frequent communication with escort staff due to their physical and physiological necessities.

b. The second issue is related to the technical equipment of transport vehicles. The doors of the cubicles/compartments should be equipped with a device that automatically and/or rapidly unlocks the doors in the event of an emergency,[27] which is important in case of any person, however, when it comes to a person with disabilities who may not be able to open the doors or to open them timely, this gains additional importance.

Transfer procedures of PWDs is related not only to the transportation process but also to the safety and security of the person with disabilities at the facility where he/she is transferred to (prison, medical facility, etc.), as the escort staff member is a person who has information on a person's physical, mental and/or sensory disability, or the learning disability or difficulty, which should be passed to the receiving prison,[28] as, according to the same report, prisoners with disabilities, about whom the prison administration was informed in advance, were seen by a member of the health service staff or had access to health service staff within 24 hours in the admission unit. Overall, they reported a worse experience in reception and within the first few days.[29] Thus, failure to inform the penitentiary establishment can cause irreparable harm to the person with disabilities.

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24 Idalov v. Russia (App no 5826/03) ECHR 22 May 2012.

25 Factsheet, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Council of Europe, 2018, 12.

26 Ibid, 3.

27 Ibid.

28 Disabled prisoners: A short thematic review on the care and support of prisoners with a disability, Thematic report by HM Inspectorate of Prisons, London 2009, 10, <https://www.justiceinspectorates.gov.uk/-hmiprisons/wpcontent/uploads/sites/4/2014/07/Disability-thematic-2008.pdf> [17.03.2020].

29 Ibid, 29.

5. Access to Primary Services During Transportation

In addition to the standards for transport vehicles and general transportation procedures, it is also important to consider the services and transportation conditions, because the transportation is carried out at different times and for different durations, and often the services, which can be considered insignificant in the short distance transportation, may be vital during long-distance transportation. These services include access to fresh air, lighting, heating and air conditioning, as well as periodicity of food delivery relevant by distance and time of transfer, as well as person's state of health. According to CPT standards, transport vehicles should be sufficiently lit and ventilated, and heated appropriately and equipped with safety devices. Necessary arrangements should be made to provide detainees with drinking water and food as required and at appropriate intervals, where the special needs of persons with disabilities should also be taken into account. In the case of Kavalerov and others v. Russia[30] the ECtHR found the violation of Article 3 of the Convention as the transport vehicle had no windows, the escorted persons did not have appropriate access to fresh air, natural light or ventilation; the sleeping areas were inadequate, lacked linen, and the air was heavy due to tobacco smoke. The European Prison Rules states that "the transport of prisoners in conveyances with inadequate ventilation or light, or which would subject them in any way to unnecessary physical hardship or indignity, shall be prohibited."[31]

Special attention should be paid to the availability of toilets, as persons with disabilities may have more frequent need to have access to toilets or have difficulty accessing them independently, etc. At the same time the conditions shall offer sufficient privacy and the protection of honour and dignity.

It is also important to determine whether a person with a disability is in need of assistance. Legislative regulations should set the conditions on how to determine and provide it. It is also worth noting that for long distance transportations detainees should be able to sleep, which should take into account the special needs of persons with disabilities.[32]

Hence, legal regulations should determine, in detail, such important issues as provision of food and drinking water to escorted persons, especially persons with disabilities, indicating its periodicity and content. The law should also provide for access to fresh air, access to toilets and access to assistance, when needed, as well as appropriate rest conditions for persons with disabilities when being transported at a long distance, while fully respecting their honour and dignity.

6. Use of Special Means and Firearms

In addition to significant aspects of escort of prisoners mentioned above, it is particularly important to pay attention to procedures for the use of force and special means during escort. The use of such

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30 Kavalerov and others v. Russia: References: 55477/10, ECHR 2017.

31 Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member states on the European Prison Rules, 2006, Rule 32.2.

32 Factsheet, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Council of Europe, 2018, 17, <https://rm.coe.int/16808b631d> [17.03.2020].

measures requires great caution when transporting any prisoner, but special attention should be paid to vulnerable groups, including persons with disabilities who may not be a threat themselves, but may be affected by the use of force in the event of an emergency, if the special means are also used against them as they are in the same vehicle with other persons. First of all, it is important to determine whether people with disabilities understand and respond to the situation at the moment, or whether they can respond both physically and psychologically considering the type and degree of their disability, etc. It is also of great importance to discuss the extent to which the escort staff is aware how to deal with persons with disabilities.

The Order on the "Rules of Procedure to Provide Escort" specifies that prior to the escort, the head of the escort organizes the receipt of weapons, ammunition, and special means and uses it in an attack or attempted attack, escape or attempted escape as provided by law.[33] As for the Code of Imprisonment, it determines the list of persons who are entitled to use such a measure, but there is no further discussion in the law.

During the removal/transfer of detainees the law establishes certain restrictions on the use of special means that cause serious harm to the health of the accused/convicted persons, represents an unjustified risk or is prohibited by international treaties and international acts of Georgia. However, there is no mention of special categories and their specificities.

CPT explains that any restrictions to be applied during transportation of prisoners must be strictly last resort, proportionate and lawful to the purposes for which such a measure was used. CPT also recommends that the use of means of restraint and force should be limited in time and should only be resorted to when the risk assessment in an individual case clearly warrants it.[34] In the case of Mouisel v. France[35] the transfer of a person with handcuffs to a hospital for treatment with chemotherapy while in a weakened state did not constitute a proportionate measure to the security risk, thus the court determined the violation of Article 3. This means that any special measures and force to be used must be in line with the risk posed by the person being transferred and, first of all, that risk assessment must focus on the person's health and physical capabilities. The Order, which sets what parameters to take into consideration when using force and special means, states that "when using special means, a person's health condition and clearly expressed physical disability should be considered to the extent possible."[36] However, it is uncertain what it means to take into account the clearly expressed physical disabilities and what does this regulation mean under the notion of "clearly expressed".

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[33] Order N149 of 19 October 2015 of the Minister of Corrections of Georgia on "Approving the Rule of Removal/Transfer of Accused/Convicted Persons", 2015, Articles 25, 47.

[34] Factsheet, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Council of Europe, 2018, 4.

[35] Mouisel v. France, Application No. 67263/01, 2002.

[36] See, Order N145 dated 12 September 2014 of the Minister of Corrections on "the types of special means possessed by bodies responsible for enforcement of pretrial detention and imprisonment as well as rules and conditions of storing, carrying and using such means; rules of determining persons authorized to use the special means", Article 4.

The lawfulness, proportionality and other elements of the use of force depend on the knowledge and professional training of the escort staff, which should be of a continuous and systematic nature. As the UN Standard Minimum Rules indicates, the staff shall be provided with the training "before entering on duty" and later shall include training on "security and safety, including the concept of dynamic security, the use of force and instruments of restraint".[37]

Firstly, the penitentiary system should develop risk and needs assessment practices when transporting prisoners, enabling the escort staff to properly plan and use special means towards all prisoners, but introduction of these standards is of particular importance when transferring sick prisoners and prisoners with disabilities.

A plan of working with persons with disabilities in emergency situations and special standards for the use of force and special means shall be elaborated to minimize the risk of physical and psychological harm to persons with disabilities and the violation of their legitimate interests.

7. Conclusion

The research on the transportation process of PWDs and related shortcomings, identified the existing difficulties and obstacles which are the basis of violations of the rights of persons with disabilities. The shortcomings concern the legislation, technical issues and personnel. Based on the findings of this research, the author will present recommendations to relevant authorities or structures that will enable them to plan appropriate actions and take steps to make the escorting process relevant to the needs of persons with disabilities.

The basic standards for the transportation of prisoners should be developed and implemented at the legislative level. The standards shall comprehensively determine the procedures for the transportation of persons with disabilities from one place to another, regardless if the destination is a medical or other type facility. Basic standards should include issues such as the number of seats and the area available per person, which shall be accessible for any person, however, for a person with a disability, who is unable to stand or unable to stand for long periods, and needs more space than other prisoners (e.g., wheelchair users) shall be provided with such means.

Establishing comprehensive procedures within the Georgian legislation shall ensure that all prisoners are protected from any cruel, inhuman or degrading treatment during their transfer. The document that regulates the rules for the transportation of prisoners must include all the details related to transportation. This document should establish procedures such as: the number of employees involved in escorting, the reason and direction of transfer, the actions of the staff at the destination (hospital, court, etc.), the need for checks (searches), the use of restrictions and periodic checks, the frequency of communication and reporting, the timetable of escorting and transportation, the type of transport vehicle and transportation route, need for escorted persons to be accompanied with the required documents and photos, staff and prisoners' clothing criteria, criteria for terminating the confidentiality of information regarding

[37] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 2015, Rules 75-76.

escorting. Such an approach will minimize the risk of violence against escorted persons and will increase the degree of security and flexibility during escorting.

Obligation of the escorting staff to inform any escorted persons and especially persons with disabilities, in a manner and language they understand, about each detail connected to their removal and transfer to the place of destination should be provided by law. In addition to informing persons with disabilities, it should be compulsory to inform the escort staff on the transport of persons with disabilities, this approach is especially of high importance when the disabilities are not clearly expressed, so that the escort team can provide for the needs of such persons.

The escort staff conducting searches and checks of any persons, including persons with disabilities, should be provided with guidance on the implementation of these procedures. There should also be special training programs for these persons to improve their professional qualifications, both upon recruitment and with a reasonable frequency during the employment.

Legal regulations should determine, in detail, such important issues as provision of food and drinking water to escorted persons, especially persons with disabilities, indicating its periodicity and content. The law should also provide for access to fresh air, access to toilets and access to assistance, when needed, as well as appropriate rest conditions for persons with disabilities when being transported at a long distance, while fully respecting their honour and dignity.

The penitentiary system should develop risk and needs assessment system when transporting prisoners, enabling the escort staff to properly plan and use special means towards all prisoners, but especially prisoners with disabilities. A plan of working with persons with disabilities in emergency situations and special standards for the use of force and special means shall be elaborated to minimize the risk of physical and psychological harm to persons with disabilities and the violation of their legitimate interests.

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David Tsulaia*

At the Outset of Georgian Criminology
Briefly about Giorgi Mikheil Shengelaia
(November 1897 - March 1950)

Nowadays, in Georgia, the criminologists and lawyers are almost unaware about the personality of Giorgi Shengelaia. This should not be surprising, since there is nothing mentioned about him and his professional achievements in Georgian legal and criminological literature. Whereas, G. Shengelaia had been lecturing for years at the Law faculty of Tbilisi State University, as well as delivering lectures for lawyers, police officers, prosecutors and judges. Besides the pedagogical activities, G. Shengelaia was also keenly involved in scientific research activities. He had also been researching issues related to criminology and criminal law.

Due to this fact, we decided to briefly present Mr. Shengelaia's personality and his works before the the Georgian public. In the course of research, we have obtained just few information regarding his biography and professional activities that we would like to review and discuss about Mr. G. Shengelaia. We hope that in the near future we will find more and more interesting materials that we be definitely introduced before public.

Key words: *criminology, psychiatry, criminal, evildoer, crime, evildoing.*

1. The Docent G Shangelaia[1]

Giorgi Shengelaia graduated with honors from Medical Faculty of Tbilisi State University in 1924 and began his scientific work during his academic studies. From 1920 to 1922 he was considered to be a temporary assistant at the Department of Physiology and studied extensively the physiology of the central nervous system. Since 1922 he was an employee of the Department of Psychiatry and worked fruitfully in the field of psychiatry.

Upon graduation from the university G. Shengelaia was appointed as a resident of the Institute of Psychiatric Neuroscience and, since 1927, as a resident of the State University Psychiatry Clinic.

From 1930 to 1945 G. Shengelaia had been working, initially, as a deputy Director of the Department of Psychiatric Neurology of the City Health Department, and after, as a Director of the Institute of Functional and Neural Diseases. He had done a great deal of work in the organization and opening of the said institution.

From 1931 to 1938 G. Shengelaia was an assistant of Psychiatry Department at the Tbilisi State Medical Institute, and since 1934, he led the forensic psychiatry course at the Tbilisi State University Law Faculty. From 1934 until his death, he had been regularly delivering lectures at that faculty.

In 1935, the Scientific Council of the Public Health Commission of Georgia awarded him the title of Senior Scientist.

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1 *Gobronidze E.,* The Docent G. Shengelaia (Ministry of Health of the Georgian SSR, M. Asatiani Scientific Research Institute of Psychiatry, Volume XVIII, ed., academician A. Zurabashvili), Tbilisi, 1958, 157-160 (in Georgia).

In 1937, G. Shengelaia defended his dissertation to obtain a scientific degree of candidate of medical sciences. In the same year, he was elected on a position of a Docent.

Since 1927, G. Shengelaia worked for the Institute of Forensic Psychiatry in the field of forensic psychiatry. With his direct involvement, the institute established a special Division of Forensic Psychiatric Expertise, which he was chairing until his death.

From 1938 to 1950, he had been working for Georgian SSR Member of the Sanitary Department of the Ministry of Internal Affairs, as a psycho-neurologist and as a member of the Medical Expert Commission.

In 1946, G. Shengelaia was awarded the honorary title of Honored Doctor of the Republic.

Docent, Giorgi Shengelaia was considered to be the leading psychiatrist in the Republic, who did much in the organization and development of forensic psychiatric expertise. He would train lawyers and doctors for years. G. Shengelaia delivered lectures for employees of investigation agencies and prosecutor's offices, militia, judges and advocates.

G. Shengelaia produced 30 scientific papers, which can be divided into the following groups: 1. works mainly on mental illness and therapy; 2. physiological and pathophysiological works; 3. organizational work; and 4. work primarily on forensic psychiatric issues.

From the organizational topic, the following works are interesting: "For the History of the Department of Psychiatry in Georgia", "Forensic Psychiatric Expertise in Georgia", "Key Issues of Modern Forensic Psychiatry".

Among the forensic psychiatric works, it is worth to mention the following: Forensic Psychiatric Expertise; Characteristics of Forensic Psychiatric Expertise During the period of World War II; Basic Issues of Forensic Psychiatry; Issue of Mental Capability during Mental Illness; Crime and Criminals; For the issue of Classification of Self-Incrimination; About the one form of Alcoholism; The issue of Simulation of Mental Illness. The latter work is a fundamental work in the form of an extensive monograph. This thesis was intended as a doctoral dissertation, which was almost done, but the serious illness did not allow him to complete it.

Giorgi Shengalaia belongs to the first set of disciples of the Prof. M. Asatiani, who was founder of Georgian Psychiatry. He was a distinguished disciple of his precious teacher. He was considered to be the best clinician and deeply educated physician. G. Shengelaia was Georgia's honorary doctor, docent, best teacher, true scientist and citizen.

2. G. Shengelaia as a Specialist of Forensic Psychiatry[2]

In 1927, by the initiative of Prof. M. Asatiani, the Special Forensic Psychiatric Examination Unit was opened at the Psychiatric and Neurological Institute of the USSR Health Commissariat and the Docent, Giorgi Shangelaia was appointed as a head of this Unit.

[2] *Jimsheleishvili V.*, G. Shengelaia as a Specialist of Forensic Psychiatry (Ministry of Health of the Georgian SSR, M. Asatiani Scientific Research Institute of Psychiatry, volume XVIII, ed., academician A. Zurabashvili), Tbilisi, 1958, 551-553 (in Georgia).

From that day onwards, practical and scientific works on various issues of forensic psychiatry started in that Unit. On the one hand, the Unit provided some assistance with high-quality findings to Soviet forensic investigators on a mental capability of persons in question, and on the other hand, studying and specifying those clinical forms of psychosis that carried a specific implication.

Scientific works of G. Shengelaia on forensic psychiatry can be divided into two parts. The works written in the first years of his work, which carries the nature of revision of literature in general and is dealing with the issue offender's mental capability and release from criminal liability, or represent material of forensic psychiatric unit, with appropriate analysis and comparative literature sources. These works belong to 1927-1930. After this period, his works bear the pure clinical-psychopathological nature for ten-twelve years. Only since 1943, G. Shengelaia returned to the core issues of forensic psychiatry. These include: The issue of Self-Incrimination Classification; One form of Alcoholism; Sleep-wake states of Consciousness, their Diagnosis and Psychiatric Evaluation and his doctoral dissertation on Mental Illness Simulation.

In the work on "the Issue of Self-Incrimination Classification" literature review of this issue and 5 cases of self-incrimination with a proper analysis is provided. In the author's opinion, it would be more expedient to have the following classification instead of the existed one:

1. The notion of true self-incrimination, as well as the notion of true simulation, must imply such self-incriminations that are of a targeted nature and which, according to content, can be dealt under the Criminal Code, as a crime.

2. False, i.e. pseudo-allegations must be known to those cases, where self-incrimination derives from and relates to a specified psychopathological condition.

In the work of "Sleep-wake States of Consciousness", there are cases where persons in question, has committed a crime in condition of sleep-wake consciousness. Such conditions, in the author's view are close to the visual disorder of consciousness and should be attributed to special situations. Such a situation is very rarely encountered and is only episodic in human life. Their characteristic is that the acts committed are not complex in nature and are completely unknown for the criminal.

To the origin of these conditions, the author argues, that effective and easily intoxicated moments are important. The person should not be held liable for the crime committed in such a situation.

The work of "Simulation of Mental Illness" is a monograph, which, among other issues, analyzes the assessment and critique of various current trends in criminal law. The said work of G. Shengelaia is remained unfinished.

3. The Right of Criminal Law, Criminality and the Question of Studying the Criminals[3]

In present article G. Shengelaia analyzes a collection of laws of Justinian and finds that Justinian's Corpus Juris was guided not only by the external signs and amount of damage caused by criminal, but also he found new component in crime - the criminal himself - his personality, his civil value.

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[3] *Shengelaia G.*, Examining the Issues of Right of Criminal Law, Criminality and Criminals, Contemporary Medicine, №9, Tbilisi, 1927, 451-456 (in Georgia).

G. Shengelaia thinks that criminology had been fallen into the hands of scholars, canonists and Jesuit lawyers, leaving it to be in arbitrary situation and only the movement of enlighteners of 17th-18th-centuries shattered medieval doctrines and shed light on the criminal law of the day.

According to G. Shengelaya, Beccaria, Montesquieu, Voltaire, Kant, Herbert and Hegel have transformed criminology completely. The classical school of criminal law, founded by Anselm Feuerbach, views criminality as a peculiar attitude that emerges between criminals and state. G. Shengelaia also discusses the shortcomings of the classical school, adding that *Nullum Crimen, Nulla Poena Sine Lege* is characterized to this School.

As regards to the Positive Criminology, G. Shengelaia focuses on Italian physician Cesare Lombroso and his theory. The criminal is a hereditary, atavistic, primitive type who lost the ability to tolerate, the institute of public life. G. Shengelaia also cites Garofalo and Dorado's assertions that crime is not a threat to society, but a criminal that carries all its negative qualities. That is why, in their own understandings, it is necessary to study criminal and not the act committed by him.

G. Shengelaia, despite criticizing Lombroso's theory, does not forget his merits before mankind, which are: Lombroso introduced the notion of determinism into the right of criminal law; he questioned the need to study criminals; a new, vital, sociological school of criminology was caught up in the controversy against it.

With respect to the sociological direction of criminology, G. Shengelaia looks at statistical method of Quetelet and analyzes its key aspects.

The proposal of Liszt, in 1884, supported by Liszt, Prins, Van Gemert is discussed, to set up an International Union for criminology whose scientific program would include a causal study of crime and ways to fight against it. It is said that, according to the Socialists, as long as there is a ruler and a subordinate, master and servant, rich and poor, e. i. there is conflict between the classes, the fight against crime will be futile. Thus, socialist-criminologists consider evil action dialectically, in terms of a material understanding of history (Marx, Engels, Kautsky, Ferri, Gernet, etc.).

After analyzing criminological schools, G. Shengelaia concludes that for a proper understanding of crime, scientific study of the components of crime is necessary and only then can each case be properly evaluated.

After criminological schools, G. Shengelaia speaks about the "Criminological Institute" opened in prison of Buenos Aires in Argentina and the "Penitentiary Anthropology" laboratory set up in Brussels, Belgium in 1907; four types of laboratories in the US; the Criminology Institute opened in Portugal in 1919, and the first Criminological Institute established in Russia, founded by the Council of Moscow in 1923, which was called the "Cabinet for the Study of Criminals and Crimes."

As it turns out, the Moscow-based criminological institute was promptly responded by other Soviet republics and cities, notably by Leningrad, Kiev, Odessa, Irkutsk and Yerevan.

On October 10, 1925, in Tbilisi, the Department of "Psychiatric Examinations and the Scientific Study of the Criminals" was opened at the Psycho-Neurological Institute, with ten beds.

G. Shengelaia also describes what kind of positive work this department has done and what is still needed for having a truly criminological institution in Georgia.

4. Conclusion

Mr. Giorgi Shengelaia's scholarly legacy is a clear proof of his profound knowledge and practical experience, as well as how Georgian criminology had been developing in general in the first half of the twentieth century.

We think that examining the job done by G. Shengelaia is important, not only in terms of the study of the history of Georgian criminology, but we are sure that analyzing each piece of G. Shengelaia's work, his conceptual views and factual materials accumulated through his research, will contribute to a proper understanding of contemporary criminological issues and the development of the field of Georgian criminology.

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George Mirianashvili[*]

The Doctrine of Equivalent Protection - Accessory Conventional Standard for Failure to comply with the European Arrest Warrant

This article reviews the doctrine of equivalent protection, process of its origin and development, sphere of effect and extradition quasi-effects of the spread over the European system. The doctrine of Equal Protection regardless of granting privileges to the European Union and its member states in the European Convention System, it is also conventional mechanism for non-compliance with the European arrest warrant. This, as an instrument enables extradition quasi-European Court of Human Rights shall consider a case in concreto for violation of the European Convention by fulfilling the obligations under the European system, on the one hand and shall impose a responsibility on the Member State of the Union, and the national court shall not enforce the European arrest warrant in accordance with the Convention's standards, on the other hand. Authorial test of non-compliance with the European arrest warrant is proposed in the article based under the doctrine of Equal protection.

Key words: *Extradition, the Doctrine of Equivalent Protection, European Union, European arrest warrant.*

1. Introduction

The modern doctrine of equivalent protection is a concept developed by the European Court of Human Rights in relation to EU law aimed at establishing a constructive relationship between the European Court of Justice and the European Court of Human Rights by granting immunity to EU law.[1] *O'Meara* considers the doctrine as a privilege of the European Union within the framework of the European Convention system.[2] *Hert and Korenica* review the doctrine as a compromise of the European Court of Human Rights, which was achieved at the expense of reducing the effectiveness of the protection of fundamental rights however for the purpose of maintaining own reputation.[3] They deem it as a rational solution to the problems between the Union, its member states and the legal systems of the Council of Europe.[4] In their view, doctrine is not an instrument of elimination of the confrontation between these two international courts.[5] According to *Chronowski,* the doctrine of equivalent protection the relationship between the European Court of Justice and the European Court of Human Rights has

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1 *Pirtskhalashvili A., Mirianashvili, G.,* Human Rights Policy in European Union Law, Tbilisi, 2018, 106 (in Georgian).

2 *O' Meara N.*, More Secure Europe of Rights - The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR, German Legal Journal, Vol. 12, 2011, 1817.

3 *Hert P., Korenica F.,* Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 875.

4 Ibid, 894.

5 Ibid.

transferred to renewed stage of cooperation,[6] that has been expressed by granting confidence in a broad and not absolute mandate in the field of protection of fundamental rights. However, abstract and unclear content of the doctrine do not always allow defining the scope of such a mandate which has positive impact on the autonomy of the EU legal system, however negatively affects the effectiveness of the European Convention.[7] According to *Christou,* the doctrine of equivalent protection promotes the passive, indifferent attitude of the European Court of Human Rights in point of the Union law.[8]

An idea is developed in the article that the doctrine of equivalent protection regardless of giving privilieges to the EU and its member states in the system of the European convention, is also conventional mecganism for non-compliance with the European Order. This, as an instrument enables extradition quasi-European Court of Human Rights shall consider a case *in concreto* for violation of the European Convention by fulfilling the obligations under the European system, on the one hand and shall impose a responsibility on the Member State of the Union, and the national court shall not enforce the European arrest warrant in accordance with the Convention's standards, on the other hand. The below given is a test of non-compliance with the European Arrest Warrant under the doctrine of equivalent protection.

To represent these opinions dynamically, discussion of the origin of the doctrine of equivalent protection is being carried out to establish in a modern way and to introduce the concept of one of its key elements- "manifestly deficient" protection of fundamental right and to formulate extradition quasi of this concept - conventional standard for non-compliance with the European Arrest Warrant.

2. Origin of the Doctrine of Equivalent Protection

The doctrine of equivalent protection was developed by the Federal Constitutional Court for the *Solange II case* - in 1986.[9] According to the Constitutional Court, the European Court of Justice generally ensures effective protection of human rights; correspondingly acts of secondary EU law should be considered substantially similar system to the human rights protection model as provided by the Basic Law for the Federal Republic of Germany.[10] Therefore, the court refused to exercise of jurisdiction. In addition, the Constitutional Court stated that in the future it would not consider submissions, lawsuits of European Union secondary law sources on compliance with human rights standards set by the Basic Law for the Federal Republic of Germany and would recognize them inadmissible.[11] Thus, the Federal Constitutional Court has showed its favour with regard to the integration law and has acknowledged the

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6 *Chronowski N.,* Integration of European Human Rights Standards - Accession of EU to the ECHR, Law of Ukraine Legal Journal, 2013, 269.

7 *Pirtskhalashvili, A., Mirianashvili, G.,* Human Rights Policy in European Union Law, Tbilisi, 2018, 106-107 (in Georgian).

8 *Christou T. A., Weis K.,* The European Arrest Warrant and Fundamental Rights: An Opportunity for Clarity, New Journal of European Criminal Law, 2010, 41.

9 See: Judgement by the Federal Constitutional Court on the case: BVerfGE 73, 339 2 BvR 197/83 Solange II-decision, №197/83, 1986.

10 Ibid, II, paragraph 3.

11 Ibid, "f" subparagraph of first paragraph.

supremacy of the acts of secondary EU law in relation to the supreme law of Germany on the one hand and its sphere of effect on the other hand. However, the court has retained the sovereign right to discuss this issue. In the event if they considered that the model of human rights protection is not the system substiantially similar to the Basic Law for the Federal Republic of Germany at the association level, the court would give preference to the basic law.[12]

The concept developed by the Federal Constitutional Court was shared by the European Commission on Human Rights on the *case M. & Co*. It pointed out that "the transfer of competencies by states to international organizations does not mean violation of the European Convention, if the human rights protection within such an organization is equivalent to that of the European Convention".[13] According to estimates of *Hert* and *Korenica,* by this approach the European Commission on Human Rights has granted the immunity to the Union law with regards to the European Commission of Human Rights and Jurisdiction of the Court.[14] In this decision, discussion about the doctrine of equivalent protection has been presented in two directions. The commission considers that at the European community level convention rights were effectively protected in institutional and statutory terms. With regards to the statutory framework, the European Commission does not imply the existence of normative catalog of fundamental rights within the European communities, however attaches prime importance to the declaration adopted by Commission, Council and European Parliament on April 5, 1977,[15] through which they set out the aim of protecting the rights guaranteed by the constitutions of the Member States and the European Convention of Human Rights at the level of integration.[16] The institutional instrument of human rights included the European Court of Justice, which provided oversight over the implementation of human rights protection within the Union.[17] The European Court of Human Rights has made a decision based on the doctrine of equivalent protection on the cases of Waite & Kennedy[18] and Beer & Regan, [19] however, didn't change the approach towards its content.[20] The European Court of Human Rights has developed a modern concept of the doctrine of equivalent protection on the *case of Bosporus* discussed below.

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12 *Hert P., Korenica F.,* Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 879.

13 See: Judgement by the European Commission of Human Rights on 09 February 1990 on the case: M. & Co. v. Federal Republic of Germany, №13258/87, 1990.

14 *Hert P., Korenica F.,* Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 880.

15 See web-page: <http://www.europarl.europa.eu/charter/docs/pdf/jointdecl_04_77_en_en.pdf> [11.02.2020].

16 See: Judgement by the European Court of Human Rights on 09 February 1990 on the case: M. & Co. v. Federal Republic of Germany, №13258/87, 1990.

17 Ibid.

18 Judgement by the European Court of Human Rights on 18 February 1999 on the case: Waite & Kennedy v. Germany, №26083/94, 1999.

19 See: Judgement by the European Court of Human Rights on 18 February 1999 on the case: Beer & Regan v. Germany, №28934/95, 1999.

20 *Pirtskhalashvili A., Mirianashvili G.,* Human Rights Policy in European Union Law, Tbilisi, 2018, 108 (in Georgian).

According to *Hert* and *Korenica,* by integrating the doctrine of equivalent protection into the system of the European Convention the European Court of Human Rights has conceded jurisdiction in favor of the Union law,[21] however, they disagree with the considerations that the doctrine of equivalent protection has been introduced into the Convention system in view of the decision of the European Court of Justice on the case of Hauer.[22] In this case, the European Court of Justice has expressly pointed out that the alleged violation of human rights by the institutions of the European Communities should be reviewed only in accordance with the law of the European Union,[23] and it has attempted to exclude the jurisdiction of the European Court of Human Rights in this regard.

3. The Principle of the Doctrine of Equivalent Protection under the *Case of Bosporus*

The modern doctrine of equivalent protection has been established *one the case of Bosporus*. This case is important in terms of the transformation of the doctrine. Before discussing this case, the European Court of Human Rights had considered the Union law equivalent to the Convention in the field of human rights protection, however recognized the complaint admissible for the first time.[24] In this case, an applicant was a Turkish charter airline leased two Boeing aircrafts from Yugoslav Airlines.[25] The UN has imposed a number of sanctions on Yugoslavia because of the horrific events and mass human rights violation in the former Republic of Yugoslav, implementation of which was carried out by the European Union.[26] On 17 April 1993, by a UN Security Council resolution[27] all states were required to impound all aircrafts in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia. That resolution was implemented by regulations of the communities within the framework of integration,[28] on the basis of which Ireland impounded an aircraft to the applicantin Dublin.[29] Turkish airline lodged an appeal twice in the Supreme Court of Ireland

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21 *Hert P., Korenica F.,* Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 880.

22 Ibid.

23 Judgement by the European Court of Human Rights on 13 December 1979 on the case: Hauer v. Land Rheinland-Pfalz, Case №44/79, 1963, paragraph 14.

24 *Pirtskhalashvili, A., Mirianashvili, G.,* Human Rights Policy in European Union Law, Tbilisi, 2018, 109 (in Georgian).

25 Judgement by the European Court of Human Rights on 30 June 2005 on the case: Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, №45036/98, 2005, paragraph 14.

26 *Pirtskhalashvili, A., Mirianashvili*, *G.,* Human Rights Policy in European Union Law, Tbilisi, 2018, 109 (in Georgian).

27 See: UN Security Council Resolution 820, 1993.

28 See: European Community Regulations: 1432/92, 3534/92, 990/93, 2472/94, 2815/95, 462/96, 2382/96.

29 Judgment by the European Court of Human Rights on 30 June 2005 on the case: Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, №45036/98, 2005, paragraph 19.

against the judgement. In addition, the case was referred to the European Court of Justice for a preliminary ruling which established that impounding of an aircraft was under that regulation.[30]

The applicant in the complaint lodged with the European Commission on Human Rights considered that by implementing regulation of European Community Ireland has violated the first article of the European Convention and right to property guaranteed by Article 1 of Protocol No. 1.[31] The Court had to consider the issue whether the acts of secondary EU law is in conformity with the European Convention. Although the appeal was declared admissible, the court considered the case abstractively.[32] It has pointed out once again that transfer of sovereign competences to an international organization by a Contracting Party in certain areas does not contravene the Convention, however, the absence of the competence of the contracting entity in such areas does not relieve it from its obligations under the Convention.[33] In these cases, exemption from the obligation is directly contrary to the purpose and object of the Convention.[34] In addition, in the Court's view in the European Communities there is an equivalent model of the system provided by Convention for the Protection of Human Rights.[35] By the concept of "equivalent model" the Court means "comparable" of human rights protection and not identical system.[36] In its view, for the purpose of identical model formation indetical to the regime established by the European Convention on Human Rights, any requirement to the European communities could counter to the interest of international cooperation pursued.[37] The court directly stated that impounding of aircrafts from Turkish company was related to the fulfillment of the obligations arising from membership in the community and Ireland did not have discretionary powers in the process of fulfilling its obligations on the one hand and the European community protects human rights equivalently the Convention on the other hand, presumption arises that Ireland did not depart from the requirements of the Convention.[38]

According to the European Court, in each case it would assess the conformity of institutional and legal system of human rights protection of the community with the model of the European Convention which is fundamentally different from the general approach of the Federal Constitutional Court.[39]

Resolution on the *case of Bosphorus* is interesting from that point of view that the European Court had found the complaint admissible presented with regards to the acts of secondary EU law and indi-

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30 Judgment by the Court of Justice of the European Union 30 July 1996 on the case: Bosphorus Hava Yollari Turizm ve Ticaret AS and Minister for Transport, Energy and Communications, Ireland and the Attorney General, Case №84/95, 1996, paragraph 27.

31 Judgment by the European Court of Human Rights on 30 June 2005 on the case: Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, №45036/98, 2005, paragraph 107.

32 *Pirtskhalashvili, A., Mirianashvili, G.,* Human Rights Policy in European Union Law, Tbilisi, 2018, 110 (in Georgian).

33 Judgment by the European Court of Human Rights on on 30 June 2005 on the case: Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, №45036/98, 2005, paragraph 154.

34 Ibid.

35 Ibid, paragraph 155.

36 Ibid.

37 Ibid.

38 Ibid, paragraph 156.

39 See: *Flaherty J. P., Lally-Green E.,* Fundamental Rights in the European Union, Duquesne Law Review, Vol. 36, 1998, 313.

rectly discussed its compliance with the European Convention.[40] In addition, sphere of effect of the doctrine of equivalent protection has been specified, namely not only the Union has immunity related the Convention, but also a Member State of the Union in the event where it has no discretion in the process of implementation of the secondary legislation of the Union.[41] The European Court has spread the doctrine only over the acts of secondary EU law and those spheres referred to in the first column of so-called "the structure of the temple", e.i supranational dimension.[42]

The European court has discussed the compliance with the primary EU law convention on the of Matthews [43] and found violation of the European Convention. In this case, the applicant was a citizen of Gibraltar who didn't have an active right to vote in the European Parliament under the Treaty on European Union on membership into the European Community of the United Kingdom. She lodged complaint against the treaty on membership into the European Community of the United Kingdom taken alone or in conjunction with Article 14 of the Convention and Article 3 of the First Additional Protocol to the European Convention. The applicant was of the view that because the European Parliament was legislature for the purposes of active suffrage under the European Convention and Founding Treaties of European Integration, acts of secondary EU law was extended to the territory of Gibraltar, absolute prohibition of vote in the European Parliament elections for the citiezen of Gibraltar violated the suffrage under the First Additional Protocol to the European Convention and depending on the place of residence put her unequal position with respect to the citizen of Gibraltar who lived in the United Kingdom.[44] The European Court of Human Rights has shared these arguments. It did not spread the doctrine over the primary legislation of the Union because the Member States were freely entered into Founding Treaties of the Union on the one hand [45] and the European Court of Justice does not have competence to abolish Founding Treaties and acts with identical legal norms, on the other hand.[46] The court reiterated that the transfer of the part of their sovereignty to international organisations, do not exempt them from their rights under the Convention.[47] It should be noted that this resolution of the European Court of Human Rights has not been enforced for 7 years.

Based on the cases discussed above, it should be mentioned that the legal system of the Union is considered equivalent to the Convention, because there are effective legal and institutional mechanisms

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40 *Pirtskhalashvili A., Mirianashvili G.,* Human Rights Policy in European Union Law, Tbilisi, 2018, 111 (in Georgian).

41 Ibid.

42 *Hert P., Korenica F.,* Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 883.

43 Judgment by the European Court of Human Rights on 18 February June 1999 on the case: Matthews v. The United Kingdom, №24833/94, 1999, paragraph 33, see also: Judgment by The Court of Justice of the European Union on 12 September 2006 on the case: Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland, Case №145/04, 2006.

44 See: Judgment by the European Court of Human Rights on 18 February 1999 on the case: Matthews v. The United Kingdom, №24833/94, 1999, paragraphs 27and 46.

45 Ibid, paragraph 33.

46 Ibid.

47 Ibid, paragraph 32.

for human rights protection within the Union ensuring development and protection of the standards similar to the Convention on Human Rights.[48] The court considers common constitutional traditions of the Member States of the Union and the laws of the Union in a legal instrument and the Court of Justice of the Union as an institutional mechanism, which reviews the cases of alleged human rights violation including within the framework of Preliminary decision procedures.[49]

From the theoretical point of view, the European Court of Human Rights is entitled to declare on particular case that there is no model under the European Convention on Human Rights in separate spheres of Union law or to establish violation of the Convention in the process of fulfilling the obligation arising from the membership of the Union, however, the practical mechanism for such a resolution by the European Court is not clear.[50] According to the court, the doctrine of equivalent protection will be rebutted, if it considers that the protection of rights under Convention will be "manifestly deficient" within the union.[51] In this case, the interest of international cooperation would be outweighed by the Convention's role and objectives as a "constitutional instrument of European public order" in the field of human rights.[52]

Consideration of the European system of fundamental rights protection as an equivalent model to the European Convention does not not conform to the practice of the European Court of Human Rights over the years. In the *Bosphorus* case the concept "equivalent" implies "relatively similar", not identical, system of human rights protection. If the Union law does not protect human rights identically the Convention, It should set higher standards than the European Convention. In the opposite case, EU law should be considered incompatible with the Convention, as the European Convention is the minimum level of protection of rights. Despite that the content of the doctrine of equivalent protection differs significantly from the essence of the European Convention and European Court of Human Rights from the case law, the European Court has made a pragmatic decision. It couldn't pointed out that EU regime for the protection of fundamental rights is identical to the Conventional standards because the acts of secondary EU law as well as the prospect of considering compliance with the Convention on the Conduct of Obligations from Membership of the Union would be excluded. Granting absolute immunity to EU law in the field of human rights would violate balance between the Council of Europe and the European Union.

4. The Extradition Quasi of the Doctrine of Equivalent Protection-Spread Across the European System to Reduce the Effect of the Principle of Mutual Trust

The European Court of Human Rights has spread the doctrine of equivalent protection over the extradition quasi-European system, e.i. criminal case in the field of Justice Cooperation. In this case, the applicant impugned his extradion to Italy under a European arrest warrant issued by the Belgian court in

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48 *Pirtskhalashvili A., Mirianashvili G.,* Human Rights Policy in European Union Law, Tbilisi, 2018, 112 (in Georgian).

49 Ibid.

50 Ibid, 112-113.

51 See: Judgment by the European Court of Human Rights on 30 June 2005 on the case: Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, №45036/98, 2005, paragraph 156.

52 Ibid.

enforcement of the judgment *in absentia*. In 1998, the Brescia District Court found Mr. Pirozzi guilty of drug trafficking and sentenced him to 18 years' imprisonment and a fine of up to 250,000 euros.[53] In 2002, the Brescia Court of Appeal reduced the 18-years' imprisonment to three years and ordered him to pay a fine of 80,000 euros.[54] Pirozzi had been unable to take part in appellate proceedings for medical reasons, however was presented by the lawyer.[55] Later, 15-years' imprisonment was reduced by one year.[56] In 2010, the Naples Public Prosecutor's Office issued an European arrest warrant with a view to enforcing the sentence imposed as a result of *in absentia* proceedings and Belgian authorities had surrendered him to the Italian authorities.[57] Before surrender, Pirozzi declared before the Belgian courts that the law of Italy does not give him an effective and clear opportunity to re-hearing of the case and by execution of European arrest warrant, the Article 6 of the Convention – Right to a fair trial would be violated.[58]

The European Court of Human Rights has also considered the case in the abstract, applied the doctrine of equivalent protection with rheards to the right to a fair hearing and found no violation of the Convention. This case is precedent in view of the fact that the European Court of Human Rights has introduced a Convention mechanism for non-fulfillment of the European Arrest Warrant, in which rebutting element of the doctrine of equivalent protection - a "manifestly deficient" standard of protection of fundamental rights has been used.

The European Court used so-called *Soering test* as an instrument for assessing the alleged violation of the right to a fair hearing under Enforcement of European arrest warrant, according to which the article 6 of the European Convention in the process of Deportation or Extradition of a Person is then violated when there is a serious threat to have rough rebuttment of the right to a fair trial to another State.[59] This circumstance indicates that the European Court of Human Rights considers Extradition Quasi-European System variety of extradition. However, the court did not apply this test practically. It didn't discuss the standard of the right to re-hearing of the case in the legal system of Italy. *Pirozzi* case is more important in the context of the introduction of the Conventional instrument for non-compliance with European arrest warrant.

Within the framework of mutual trust of the cooperation in the field of justice, freedom and security the specific expression of which is the European arrest warrant mechanism, the Court itself does not consider incompatible with the European Convention.[60] However, it deems that any instrument for such a space shall not be contrary to conventional right of extraditible person.[61] According to the European Court, the doctrine of equivalent protection applies even when a Member State's court enforces European arrest warrant by virtue of the principle of mutual trust – e.i. implements Union law without

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53 Judgment by the European Court of Human Rights on 17 April 2018 on the case: Pirozzi v. Belgium, №21055/11, 2018, paragraph 7.
54 Ibid, paragraph 8.
55 Ibid.
56 Ibid, paragraph 11.
57 Ibid, paragraph 12.
58 Ibid, paragraph 21.
59 Ibid, paragraph 57.
60 Ibid, paragraph 60.
61 Ibid, paragraph 61.

discretionary power because there is a presumption that fundamental rights are sufficiently protected in the State issuing European arrest warrant.[62] Absoluteness and permanence of such presumption is unacceptable to the European Court of Human Rights. It therefore offers a mechanism for the national courts which must be applied before making a decision on Enforcement of European Arrest Warrant under the obligations of the principle of mutual trust. According to the European Court of Human Rights, the national court should have a favorable attitude towards the principle of mutual trust, however it should not automatically use the presumption of sufficient protection of fundamental rights in another Member State to the detriment of fundamental rights.[63] According to the European Court, based on the mutual trust the national courts may only enforce European arrest warrant when the rights protected under the Convention are not protected "manifestly deficient" in the issuing State.[64] If the national court finds that there is a substantial and serious violation of fundamental rights in the State issuing European arrest warrant, it will be equal to insufficient protection of the rights under the Convention and it should comply with the standards set by the European Convention.[65]

When executing European arrest warrant the European Court of Human Rights could not have considered the convention test to be used by the national court and to discuss the case only abstractly, *as in the case of the Bosporus*. However it emphasized extradition quasi – necessity of compatibility check with the system of the European Convention at the national level and reduced the sphere of effect of the principle of mutual trust under the European Convention. *Pirozzi's* case is constructive opposition to the European Court of Human Rights, institutional reaction expressed in the case of Mellon and in response to the positions presented by the European Court of Justice on the accession to the European Convention on Human Rights.

Introduction of Convention mechanism for the non-fulfillment of the European Arrest Warrant was necessary to maintain the function and role of the European Convention. However, because, from now on, there are two conflict approaches of non-compliance with European Arrest Warrant, Conventional and EU instruments are meant, the national courts found themselves in an even more difficult situation with great legal misunderstanding.

As noted above, the European Court of Justice calls upon the national courts that failure to respect the European Arrest Warrant at the request of the principle of mutual trust is admissible only by decision frame in the cases of lack of any grounds directly established or in exceptional cases for the protection of fundamental rights, but the European Court of Justice determines such cases and the instruments of protection of rights.

According to the European Court of Human Rights, the presumption developed under the principle of mutual trust that other member state of the Union protects the fundamental rights under the convention is not of absolute nature, therefore enforcement of European arrest warrant should not be carried out

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62 Judgment by the European Court of Human Rights on 17 April 2018 on the case: Pirozzi v. Belgium, №21055/11, 2018, paragraph 62.

63 Ibid.

64 Ibid, paragraph 63.

65 Ibid, paragraph 64.

automatically and the degree of protection of fundamental rights needs to be verified in other member states of the Union. It calls upon the national courts to apply the European Convention standard if it appears that the fundamental rights in the State issuing the European arrest warrant are "manifestly deficient" protected and there is no proper mechanism at EU level to restore this right.

It is unambiguous that the national courts considering enforcement of European arrest warrant should rely on two different instruments. If they use convention instrument, the extradition quasi- effectiveness of the European system may be gradually undermined and will resemble the European system of extradition. If the courts, considering the issue of enforcement of European arrest warrants are guided by EU standards, the process of reducing the Conventional standards of fundamental rights protection will be continued.

5. What is Meant by the "Manifestly Deficient" Protection of the Fundamental Rights for the Purposes of the Extradition Quasi-European System?

The case law of the European Court of Human Rights does not explain the concept of "manifestly deficient" protection of the fundamental rights. Abstractiveness of this concept is convenient given that the European Court has the opportunity to customize its content to each case.

Different opinions related to the results of the *Bosporus case* are expressed in the legal literature. Some scientists doubt the effectiveness of the concept of "manifestly deficient" protection of the fundamental rights, and the other part views it as an effective mechanism for declaring the acts of secondary EU law, or considering an effective mechanism for declaring an action incompatible with the Convention for the fulfillment of its obligations under membership of the Union.

Hoffmeister deems that by developing this concept the European Court of Human Rights has acquired the power of intervention in Union law that will use as the ultimate instrument for exercising own powers.[66] *Kuhnert* disagree with this view, in his opinion, the resolution made on the Bosporus case does not indicate that the European Court of Human Rights has a "final word" with regards to EU human rights law and mechanisms.[67] *According to Hert and Korenica, the concept of 'manifestly deficient'* is more superficial, ambiguous isntrument for reviewing the Union legal act than a practical mechanism.[68] In their view, if it is found that Human rights protection is not equivalent to the Convention within the EU and institutional-legal mechanisms of integration are considered "*manifestly deficient'*, it is unclear whether the Union or the Member State will be liable for breach of the Convention.[69] It should be mentioned contrary to this position that If the European Court of Human Rights finds violation of the

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66 *Hoffmeister F.,* Bosphorus Hava Yollari Turizm v. Ireland, App. №45036/98, American Journal of International Law, Vol. 100, 2006, 447.

67 *Kuhnert K.,* Bosphorus - Double Standards in European Human Rights Protection?, Utrecht Legal Review, Vol. 2, 2006, 188.

68 *Hert P., Korenica F.,* Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 886.

69 Ibid, 886-887.

Convention, Contracting Party to the Convention -Member State of the Union shall be liable only, because the European Court has no personal jurisdiction over the European Union. However, enforcement of the European Court's ruling may encounter a problem. If violation of the European Convention is caused by the action taken by a Member State to implement a directive, regulation or framework decision and it didn't have discretion in this process, only the efforts of the member states will not be enough, because only EU authorities have the power to adopt or amend such acts. Correspondingly, the perspective of the enforcement of the judgment of the European Court of Human Rights will also be depended on the will of the Union authorities.

Judges of the European Court of Human Rights also speak about the ambiguity of the criterion of "manifestly deificient" protection of fundamental rights and, in some respects, their incompatibility with the Convention system. In their judgment on the Bosporus case, Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky Botoucharova and Garlicki stated in joint concurring opinion that based on the concept of "manifestly deficient" protection of the fundamental right, the prospect of reviewing the case related to the secondary legislation of EU *in concreto* had been maintained.[70] Despite its unclear essence, by introducing a criterion of "manifestly deficient" protection of fundamental rights, much lower threshold was established for the purpose of examination of violation of a Convention right contradicting the supervision mechanisms of the European Convention of Human Rights.[71] Since the European Convention sets a minimum level of protection, any equivalence between the Convention and European Union standards of fundamental rights may be expressed in means of protection, not in the effects.[72]

Although the decision on the Bosphorus case does not include the content of "manifestly deficient" protection of the fundamental right, Judge Ress of the European Court of Human Rights attempeted to develop his concept in concurring opinion. Opinions of the Judge deserve to be shared. It is somewhat useful to the national courts when considering the non-compliance with the European Arrest Warrant under the Convention standard.

According *to Judge Ress,* "manifestly deficient' protection of fundamental rights will happen in the event if: 1. The European Court of Justice have limited competence over the acts of secondary EU law; 2. The European Court of Justice restrict access to EU justice mechanisms more than sufficiently by explaining the Union law; 3. Non-use of conventional guarantees or inappropriate interpretation are really apparent by the European Court of Justice;[73] or 4. The European Court of Justice deviates from the standards of application or interpretation of the European Convention or its protocols set by the case law of the European Court of Human Rights.[74] He validly disagree with the opinions of other judges that the equivalence between Convention and EU standards of fundamental rights protection should only be expressed in means of protection. It is crucal for Ress that the result of the protection of convention rights

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70 Joint Concuring Opionion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky Botoucharova and Garlicki, paragraph 4.

71 Ibid.

72 Ibid.

73 Concurring Opinion of Judge Ress, paragraph 3.

74 Ibid.

in the EU legal order should be equivalent to that of the Convention system.[75] At the procedural level of the European Convention e.i. institutional protection to be measure of equivalence is not enough. The European Convention exists as a constitutional instrument of European public order because its rights are real, practicable and not illusory.

Based on the opinion of Ress and joint analysis of the Conventional Mechanism for failure to comply with the European Arrest Warrant in the case of Pirozzi it is possible to form such a judicial instrument of the concept of "manifestly deficient" protection of fundamental rights which will be used by the national court considering the enforcement of European arrest warrant. Since the European Convention on Human Rights sets a minimum level of the protection of fundamental rights, the national court considering the enforcement of European arrest warrant:

- Shall evaluate the status of fundamental rights protection in the Member State issuing European arrest warrant *in abstractio* and shall rely on the findings and conclusions of authoritative organizations, including the case law of the European Court of Human Rights;
- Shall evaluate *in concreto* the quality of protection of the Convention rights in the Member State issuing the European arrest warrant, alleged breach of which exdratibile person appeals. At this stage, the ultimate practice of the European Court of Human Rights shall be taken into account with regard to the relevant article of the Convention with respect to the Member State of the Union;
- Shall evaluate extradition quasi- European system, whether the national law defines the standard lower than the European Convention;
- Shall analyze extradition quasi –the practice of the European Court of justice with respect to the European system in the context of (for example: the right to dignity or the right to a fair hearing) unusability or misinterpretation of Convention guarantees (*The first criterion of "manifestly deficient" protection of the fundamental rights*);
- Shall judge whether the European Court of Justice in the context of extradition quasi- the European system deviated from the standards of the use or interpretation of the Convention right set by the case law of the European Court of Human Rights (the second criterion of *"manifestly deficient" protection of* fundamental rights).

If the national court, after completion of the above stages, is convinced that extradition is in breach of the European Convention of Human Rights, shall make a decision on non-compliance with the European arrest warrant. This mechanism is applicable with regards to all Convention rights that protects a person from extradition against the convention. In its turn, this instrument is also useful for the European Court of Human Rights. By enforcing the European Arrest Warrant, the Court may evaluate, in the event of violation of the European Convention, to what extent and how the this mechanism was used by the national court.

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[75] Ibid.

6. Conclusion

The doctrine of equivalent protection is the concept developed by the European Court of Human Rights related to secondary EU law, which facilitates the coexistence of EU law and European Convention, informal constructive cooperation between the European Court of Justice and the European Court of Human Rights by granting immunity to EU law.

The doctrine of equivalent protection considers the EU model of protection of fundamental rights as equivalent, relatively similar system to the European Convention from an institutional-legal point of view. It applies to the secondary legal sources of the Union and the actions of the Member States of the Union when they don't have discretion in the implementation of secondary legislation of the Union.[76] The doctrine is not used in assessing compliance of founding or equivalent acts of the European Union with the European Convention.

The European Court of Human Rights rejects the doctrine of equivalent protection if it considers that the protection of Convention rights under the Union would be "manifestly deficient". In this case, roles and objectives of the European Convention will outweigh the interest of international cooperation.

The European Court of Human Rights the doctrine of equivalent protection spread over the extradition quasi-european system and created convention mechanism for non-compliance with the European arrest warrant in the framework of mutual trust, which can be used in reviewing of complaints concerning the European arrest warrant and by the national courts in the enforcement of the European arrest warrant. If based on this mechanism the national court finds that there is a substantial and serious violation of the fundamental rights in the State issuing the European Arrest Order, it will be deemed to be manifestly deficient protection of the rights under the convention and the national court shall be obligated to comply with the standards set by the European Convention and to refuse to comply with the European arrest warrant.

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The Proceeding of Case of Administrative Offences in Connection with the Appeal

This article is devoted to the peculiarities of the proceeding of case of administrative offences in connection with the appeal. It is not a novelty that the current Administrative Offences Code of Georgia, which was adopted in 1984, fails to meet modern standards in the field of human rights protection, which is also reflected in a number of shortcomings in the rules of proceeding related to the appeal. The rules and conditions for appealing the acts issued by administrative bodies should be properly formulated in the national legislation. This will contribute to the realization of transparency, listening to the parties, expressing one's own views and other fundamental human rights. For this purpose, taking into account the peculiarities of the field of administrative offences, this article discusses the requirements of the legislation in force to appeal the decisions on administrative offences. New mechanisms have been proposed to improve the existing process. The explanations of Constitutional Court of Georgia regarding the problematic issues are listed, with approaches the German legislation, which represents one of the leading countries in this field.

Key words: *administrative offence, Administrative Offences Code, proceeding in connection with the appeal, the appeal of the resolution adopted on the case of administrative offence, examination of administrative appeal, grounds for cancellation of the resolution.*

1. Introduction

The legal system of the modern state must establish the proper procedure for appealing administrative decisions on cases of administrative offence (including during examination at the scene of the offence). Proper determination of the right to appeal acts issued by an administrative body plays a very important role in the legal system of a democratic state and it should be considered as one of the key means of restoring of human right that was violated. The existence of a justified mechanism for appealing the decision imposing an administrative penalty is not only one of the safeguards for the protection of basic human rights, but it also represents a means of control of the superior body, and finally, the ability to control the person who is authorized by the state to impose an administrative penalty, in order not to exceed his duties and / or misuse his official powers. An appropriate opportunity to appeal a decision is a guarantee of lawful conduct of the proceeding of case of administrative offences, because in the event of an appeal, the superior administrative body shall verify its formal and material lawfulness, and If it is found that the proceeding of the case was conducted in violation of the requirements of the legislation, there may be grounds for imposing disciplinary sanctions on the person concerned.

In order to properly determine the mechanism for appealing a decision on an administrative offence case, it is important that the Administrative Offences Code be properly worded as to who has the right to appeal the decision, what types of decisions are subject to appeal, the timeframe for filing an appeal, and the timeframes for its review, the grounds for revocation of the decision and other important matters relating to the proceedings discussed in this paper.

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2. Persons Authorized to Appeal

According to Article 271 of the Administrative Offences Code of Georgia, the order issued in administrative proceedings, also the decision made after hearing an administrative case at the scene according to the procedure laid down by Article 234[1] of this Code[1], may be appealed by the person against whom the order is issued, or by the victim or the preparer of the administrative offence report.

Considering that the applicable Administrative Offences Code does not specify the notion of the interested party and therefore neither his rights, It is advisable to consider such a concept in the new Code. Whereas the administrative resolution may, in addition to the persons referred to in Article 271 of the Code, also affect other persons, it is desirable that the interested party have the power to appeal a resolution on the basis of relevant amendments, which also includes the persons referred to in the above-mentioned Article.

It is noteworthy that there is a similar approach in Germany, where pursuant to Article 67 of The Administrative Offences Act, an interested party may appeal against a resolution on an administrative offence case.

3. The Appeal of the Resolution Adopted on the Case of Administrative Offence

Usually, the purpose of filing an administrative appeal is to protect a person's rights and exercise self-control, and not the supervision of the legality of publication of the act, or repeated verification of the legality of all stages of the act's publication. [2]

According to Article 272 of the Administrative Offences Code of Georgia, In the case of an administrative offence:

a) The order of an agency (official), also the decision imposing an administrative fine and issued after hearing an administrative case at the scene according to the procedure defined by Article 2341 of this Code, may be appealed to a superior body (superior official) or to the district (city) court, the decision of which shall be final; the decision imposing other types of administrative penalty may be appealed to the superior body (superior official), after which an appeal may be filed with the district (city) court, the decision of which shall be final; the order concurrently imposing the main administrative penalty and an additional administrative penalty may be appealed, if the appellant desires, according to the procedure for appealing main or additional penalties;

b) An order of a body (official) of internal affairs imposing an administrative penalty in the form of a warning, and which is registered without preparing a report at the scene of the administrative offence may be appealed to a superior body (superior official);

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1 Administrative Offences Code of Georgia, article 234[1], https://matsne.gov.ge/ka/document/view/28216?-publication=445, 15/12/1984, [03.11.2019].

2 *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* General Administrative Law Handbook, Tbilisi, 2005, 299 (in Georgia).

c) An order of an agency (official) of internal affairs replacing an administrative penalty with another administrative penalty may be appealed to the superior body (superior official) or to the district (city) court, the decision of which shall be final;

d) An order of an agency (official) of internal affairs on the imposition of a surcharge may be appealed to a superior body (superior official) or to the district (city) court, the decision of which shall be final;

e) An order of an official of a Military Traffic Inspectorate imposing an administrative penalty in the form of a warning, and which is registered without preparing a report at the scene of the administrative offence may be appealed to a superior body (superior official).

It is noteworthy that according to Article 31 of the Constitution of Georgia, every person has the right to apply to a court to defend his/her rights. Based on the analysis of Article 272 of the Administrative Offences Code, it is clear that it contains deficiencies in the protection of a person's procedural rights, since it limits the ability to appeal to a higher authority when appealing a decision and sets out only a list of the types of decisions which may be appealed.

In this regard the decision №2 / 7/779 of 19 October 2018 of the Constitutional Court of Georgia should be taken into account. Relevant norms of the Constitution of Georgia make it clear that the right to a fair trial encompasses the possibility of protection of one's right through institutional guarantees of justice recognized by the Constitution of Georgia and through the common court system. This also implies appealing the decisions of the administrative body in the common court system and appealing the decisions of the court in the higher instance of that very system. Therefore, it is clear that the impugned words of Article 272 of the Administrative Offences Code of Georgia, which declare the decision of the first instance as the ultimate one, at the same time limit the person's procedural right protected by the Constitution of Georgia.

By the same decision of the Constitutional Court of Georgia, the following sections have been invalidated: The words of the first sentence of subparagraph (a) of paragraph 1 of the above-mentioned Article – "Whose decision is final"; The words of the second sentence - "Whose decision is final"; The words of the subparagraph (c) of the same paragraph - "Whose decision is final"; And the words of subparagraph (d) - "Whose decision is final".

Therefore, it is necessary to make such fundamental changes to the Administrative Offences Code, that primarily preclude the one-time appeal of the resolutions adopted on case of administrative offences and that clearly establish the possibility of appealing in subsequent instances for the purpose of properly protecting a person's procedural rights, and completely eliminating the risks of error or of resolving the case incorrectly. At the same time, the same amendments should make it possible to appeal against all decisions / resolutions made in cases of administrative offences and not just against some of them, as stated in the current edition.

4. Preconditions for the Examination of Administrative Appeal, Admissibility of Appeal

According to the second part of Article 272 of the Administrative Offences Code of Georgia, an appeal shall be filed with the agency (official) that issued the order in the administrative case, unless otherwise provided for by the legislation of Georgia. Within three days, the appeal, along with the case files, shall be sent to the body (official) that is addressed in the appeal and that is authorized under this article to hear the appeal.

It is advisable to refine this procedure and to take the experience of Germany into account when making appropriate changes. Namely, according to the Administrative Offences Act, an appeal is made to the administrative body issuing the resolution, irrespective of whether the issuance of the act was within the jurisdiction of that administrative body. If the appeal was filed with another administrative body, it shall become effective only after it has been transmitted to the body authorized for its consideration, that is mainly the responsibility of the state agencies. However, it should be borne in mind that the risk of extending the time limit for filing an appeal increases, if that appeal is filed with administrative body that does not have the appropriate jurisdiction over that appeal. If the time limit for filing an appeal expires even at the time when it is submitted to the competent authority, it must be considered that the statute of limitation for that appeal has expired. In this case, the defect can be eliminated by granting a procedural date recovery status, which is only allowed when an appeal is lodged with an unauthorized body without the person's fault.[3]

In order to quickly prosecute the cases of administrative offences and protect the interests of citizens, it is appropriate to establish that an administrative appeal is lodged with that administrative authority, which issued a resolution on the offence. When submitting an appeal to an unauthorized body, it should be obliged by the Code that on its own initiative within three days an appeal is sent to the competent authority for a review of the case.

For the admissibility of the appeal the name of the request specified in the document is not essential and it is not obligatory to refer to it as an appeal – in practice it is often referred as rescission. It is sufficient to establish the applicant's will that he wishes to file an appeal against the resolution and by that he wants to get it revised and / or cancelled. An appeal is better to be substantiated, however, its complete legal justification is not required either. [4]

Appeal of the resolution restores the proceeding of case of administrative offences to the initial stage before the issuance of resolution. At that time, the competent authority should also check whether the form and timeframe for filing an appeal is respected. [5] If it is found that the form and time limit for filing an appeal have been violated, the proceedings should not commence, since an appeal does not meet the admissibility requirements. In such case the ruling imposing an administrative penalty shall not

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3 *Bohnert J., Bülte J.,* Ordnungswidrigkeitenrecht. 5. Auflage, München, 2016, 116.

4 Ibid, 117.

5 Administrative Offences Act of Germany, 19/02/1987, article 69, <https://www.gesetze-im-internet.de/englisch_owig/> [03/11/2019].

be canceled and shall remain in force. [6] However it should be noted that in such case the interested party has the opportunity to appeal the decision to the court.[7]

5. Grounds for the Initiation of Proceedings Related to an Administrative Appeal

There are certain peculiarities in the commencement of proceedings related to an administrative appeal, as it is obligatory to refer to the request recorded in the appeal developed by the party in compliance with the appropriate form, with respect to a particular resolution. Proceedings related to the appeal are initiated by the interested party, on the basis of the proper filing of an administrative appeal.

5. 1.The Form of an Appeal

Given that the applicable Administrative Offences Code does not establish the form and details of an appeal, it is advisable to share the standard set by the General Administrative Code of Georgia and its proper form should be prescribed by reference to certain mandatory requirements. Accordingly, the content of the administrative appeal under Article 181 of the same Code should be taken into account, in accordance with the peculiarities of the proceeding of case of administrative offences. According to that article, an administrative complaint must include:

- The name of the administrative body to which the administrative complaint is filed;
- The identity and address of the person filing the administrative complaint;
- The name of the administrative body whose administrative act or action is appealed;
- The name of the appealed administrative act;
- The claim;
- The circumstances on which the claim is based;
- A list of documents attached to the administrative complaint, if any.

With regards to compiling an written administrative appeal it is noteworthy that over time new technical tools are constantly evolving and certain documents can be compiled in various forms. Earlier appeals were allowed via telegram and fax, however nowadays, when electronic case proceeding systems are introduced, appeal may also be filed electronically. If a person wishes to appeal the resolution by telephone, naturally, written form cannot be maintained, but the notification received by telephone may be made in writing by the state authority and it may thus respond to the obligatory written form for filing a complaint. [8]

Therefore, it is advisable for the new Administrative Offences Code to consider the possibility of filing an appeal both in material and in a properly protected electronic forms.

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6 Administrative Offences Act of Germany, article 69; <https://www.gesetze-im-internet.de/englisch_owig/>, 19/02/1987, [03/11/2019].

7 Ibid, article 62

8 *Bohnert J., Bülte J.,* Ordnungswidrigkeitenrecht. 5. Auflage. 2016, 117.

5.2.Term for Submitting an Appeal

The Georgian legislation is not consistent in defining the time limits for appealing acts issued by the state. According to the General Administrative Code of Georgia, an administrative complaint must be filed within one month after publication or becoming officially familiar with the administrative act, unless otherwise provided for by law. [9] The Administrative Offences Code of Georgia sets a 10-day term for appealing the decision. This reservation is likely to derive from the peculiarities of expedited review of administrative offences cases, but the limitation of these terms should be aimed at safeguarding the best interests of citizens by administrative authorities and not limiting their rights.

It is noteworthy that in its decision №1 / 3/1263 from 18 April 2019 the Constitutional Court of Georgia ruled as unconstitutional the normative content of article 273 of the Administrative Offences Code, according to which the court's ruling on an administrative offence case can be appealed within 10 days of its issuance. This unconstitutional norm has been invalidated since July 1, 2019.

The Constitutional Court has ruled the impugned norm unconstitutional on the ground that, since the term of appeal is counted from the date of the resolution, in case of failure to deliver the reasoned resolution on time, person's ability to file a reasoned appeal is disproportionately limited. Herewith if the impugned norm is immediately invalidated, there will be no time limit for appealing a court resolution. Therefore the party will have the opportunity to appeal the court's resolution at any time.[10]

The timeframe for appealing a court decision on administrative offences is of great importance, because this very expiration is often associated with important issues such as: the entry into force of a court resolution, its legal consequences and so on. If the disputed norm is immediately invalidated, a significant legitimate interest may be damaged. [11]

As a result of the issues discussed in this chapter, it is clear that it is necessary for the Administrative Offences Code to extend the term for appealing the decision on the case. If in the process of reviewing the new term for appealing administrative-legal resolutions, standard set by the General Administrative Code – the opportunity to appeal an administrative act within one month, consequent from the purposes of Administrative Offences Code,

Will be considered as an extended period, then it is possible to consider the German experience as discussed below.

In particular, under German law an appeal against a resolution on an administrative offence can be filed within two weeks, its counting commences on the day of delivery of the resolution to the offender or his representative. [12] This means that the expiry date shall commence from the moment of ending of the day when the resolution was delivered and ends after two weeks by the end of the day of delivery. For example, if a resolution is delivered to the person on Wednesday, its term of appeal expires in two weeks,

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9 General Administrative Code of Georgia, 25/06/1999, article 180. <https://matsne.gov.ge/ka/document/view/16270?publication=33> [03/11/2019].

10 The decision of the Constitutional Court on the case Irakli Khvedelidze v. Parliament of Georgia, <https://matsne.gov.ge/ka/document/view/4544474?publication=0#DOCUMENT:1;> [03/11/2019].

11 Ibid.

12 Administrative Offences Act of Germany, article 50.

with the end of Wednesday. If Wednesday is an official holiday, the deadline expires the following day – Thursday. A similar rule applies on Saturdays and Sundays.[13]

5.3. The Force of an Appeal Against the Legal Effects of a Resolution

When appealing a resolution, the Administrative Offences Code sets a different procedure for its enforcement, given the nature of the resolution and the administrative penalty imposed. According to the article 272 of the Code, if an order issued in an administrative case is appealed to a court, the order issued by the court shall be enforced upon its issuance. Appealing the order shall not suspend its enforcement unless otherwise determined by this Code and other legislative acts of Georgia.

Regarding the operation of the resolution, different approaches are used when different administrative penalties are applied. Namely, according to article 275 of the Code, if an appeal is filed within the defined time limit, it shall suspend the enforcement of orders that impose an administrative penalty, or that replace an administrative penalty with another administrative penalty, or that impose a surcharge, or orders that are issued after hearing the case of an administrative offence at the scene according to the procedure defined by Article 2341 of this Code, except for the orders that impose the penalties provided for in Articles 26 and 32 of this Code, or except for the cases described in paragraph 11 of this article, or except for cases where a fine is imposed and collected from a person at the scene of an administrative offence.

However, it should be borne in mind that appealing the orders issued in the administrative cases provided for in Articles 208 (Administrative cases falling within the jurisdiction of a district (city) court) and 208^2 (Hearing cases of administrative offences provided for by the Organic Law of Georgia on Political Associations of Citizens) of this Code shall not suspend the enforcement of orders that impose an administrative penalty, that replace an administrative penalty with another administrative penalty or that impose a surcharge. If the order is appealed and the appeal is granted, the amount of money paid by the person in the form of the fine and surcharge, also the compensation paid by him/her under this Code for material damages, shall be refunded to the person.

Consequently, it is clear that the current Code provides for a rather vague and complex mechanism for the enforcement of resolutions on administrative offences. Whereas the above-mentioned articles only refer to resolutions of elucidated content, the Code does not consider it admissible to suspend their validity when appealing against all kinds of resolutions.

The Administrative Offences Act of Germany provides us with a different regulation in this regard. It does not mention only a few types of resolutions whose appeal suspends their validity. According to the article 67 of this Act, an appeal suspends the legal force and prevents the entry into force of the resolution on penalties. Accordingly, if the final decision on an administrative offence case is appealed, Its action will stop regardless of its kind or content.

It is also desirable to change the results of appealing the resolution in the Administrative Offences Code of Georgia. In addition, the suspensory effect of the appeal must be taken into account and its ac-

[13] *Bohnert J., Bülte J.,* Ordnungswidrigkeitenrecht. 5. Auflage, München, 2016, 117.

tion should preferably be suspended by appealing the resolution. However, in view of the peculiarities of the resolution on case of administrative offences, it is desirable to define such exceptional cases, the existence of which will not stop its operation. For example, when an offender is imposed an administrative penalty that involves the suspension or deprivation of a special right granted to a person, the fine imposed may not be suspended.

5.4. Withdrawal of Appeal

According to article 67 of Administrative Offences Act of Germany the author of the complaint is entitled to reject the recorded claim and to withdraw the appeal after appealing the resolution. According to the second paragraph of the same article, partial withdrawal is also possible. At this time, a person has a right to request that some of the claims made in his appeal be dismissed without examination. The withdrawal of an appeal requires the same form as an appeal itself, it is not subject to cancellation and it is admissible until a final decision is made on the case.

Withdrawal of appeal may be preferable for the person during the main session, in order to avoid aggravating the decision made by the administrative body (Reformatio in peius).[14]

Reformatio in peius means change for the worse[15] - that is the actual deterioration of the claimant's situation. [16] Reformatio in peius is permitted in Georgia unless permitted by special law. In other cases, the superior administrative authority shall consider an administrative appeal only within the scope of the request.[17]

The existence of such possibility is necessary not only for the initiation of an administrative appeal, but also for the commencement of a simple administrative proceedings, at the later stage of submitting the application. The Administrative Offences Code of Georgia does not envisage these opportunities, but no practice it is often the case that the applicant no longer wishes to pursue proceedings on his request and to impose administrative penalty on a person, and with regard to the fact stated In the original statement (on the basis of which the proceeding commenced) authorized body reviewing the case is forced to investigate and examine all the facts of the case and to impose administrative responsibility on the offender in case of unlawful action contrary to the wishes of the initiator.

5.5. The Term of Proceeding

In accordance with the applicable Administrative Offences Code of Georgia, an appeal on the resolution on the case of administrative offence shall be heard by the authorized body (official) or a district (city) court within 30 days after its filing. [18]

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14 *Bohnert J., Bülte J.,* Ordnungswidrigkeitenrecht. 5. Auflage, München, 2016, 118.
15 *Jaroschek M.,* Die reformatio in peius im Widerspruchsverfahren, JA, 1997, 668.
16 *Kingreen T.,* Zur Zulässigkeit der reformatio in peius im Prüfungsrecht, DÖV, 2003, 2.
17 *Khoperia R.,* Admissibility of REFORMATIO IN PEIUS principle in German and Georgian Exam Laws, 2013/1, 66 (in Georgia).
18 First part of Article 276, Administrative Offences Code of Georgia.

Given that when examining an appeal, the superior administrative authority / court only examines the lawfulness of the decision taken by the person authorized to conduct simple cases of administrative offence, on the basis of the evidence already obtained by this person, it should be possible to reduce the 30-day time limit set for the examination of an appeal, and it must be possible to establish its exceptional nature for its full use. In particular, it is desirable that the relevant norm of the Code instruct the competent authority to consider an appeal on the case of administrative offence within 20 (twenty) calendar days. Where necessary, for a thorough examination of the circumstances of the case, extensions may be allowed for a single period of time, for an additional 10 (ten) calendar days, based on the reasoned decision of the authority examining the case.

5.6. The Peculiarity of the Results of the Examination of Administrative Appeal

Examination of an appeal regarding an administrative offence gives several possibilities to the competent body handling the case: First, to verify the decision made on its behalf it may conduct additional inquiry into unlawful conduct. If the examining authority shares the position stated in the resolution, it will it in force, but if upon examination of the matter it concludes that the resolution was adopted in breach of the requirements of the law, the resolution can be declared void.

In case of annulment of the resolution imposing administrative penalty, the body examining the appeal returns the process of proceeding to the pre-resolution stage, although it is necessary to take into account the time limit for imposing administrative responsibility. [19]After the revocation of the resolution the authorized body may re-impose administrative fine on the person with the new resolution with original content, or terminate the case for lack of prosecution perquisites and due to the absence of grounds for imposition of a fine. In case of re-imposition of a fine under the new resolution the offender can defend himself by re-filing an appeal.[20]

6. The Decision with Regard to Examination of an Appeal

According to Administrative Offences Code of Georgia, the proceeding of case of administrative offences related to the appeal is completed by the competent authority making a decision on the case. Unlike the simple proceeding of case of administrative offence, one of the following decisions with differing consequences is made in relation to the proceeding related to an appeal:

a) To leave the resolution unchanged and to dismiss an appeal or a protest;
b) To revoke the resolution and resend the case for renewed examination;
c) To annul the resolution and terminate the case;
d) To revoke the resolution adopted during examination at the scene of the offence and exemption of a person from administrative penalty, according to the rule established by article 234[1] of Administrative Offences Code.

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[19] Oberlandersgericht Stuttgart, Monatsschrift Für Deutsches Recht, 1985, 521.
[20] *Bohnert J., Bülte J.,* Ordnungswidrigkeitenrecht. 5. Auflage, München, 2016, 117.

e) To change the size of the penalty for an administrative offence within the limits provided by the Georgian legislation.

6.1. Grounds for Cancellation of the Resolution

The current Administrative Offences Code of Georgia does not specify the preconditions for cancellation of the resolution, except as provided in second part of article 278, according to which If it is established that the order was issued by an agency (official) that was not authorized to decide the case, then the order shall be reversed and the case shall be referred to the authorized body (official) for rehearing. In view of the above, it is appropriate to discuss the grounds for the cancellation of the resolution.

A resolution may be cancelled if it is defective:

1) In procedural terms; 2) With regard to the form of publication; 3) In content.[21]

6.1.1. Procedural Defect

A resolution is illegal if there is a procedural defect on which the resolution about the administrative penalty is based, and which would not have been published had the error not been made in the course of the proceedings. Procedural defect mainly exists when the resolution was made on the basis of the evidence obtained by breaching the law or it was adopted on the basis of inadmissible evidence. Prior to the issuance of a resolution and handing it over to the offender, the competent authority examining the case can correct a procedural defect during proceedings. It may replace illegal evidence with relevant legal evidence and issue an appropriate resolution. If the procedural defect cannot be eliminated, it is inadmissible to issue a resolution establishing illegal consequences.

It should be borne in mind that the basis for improving the procedural defect does not lie in filing an appeal with such demand by the interested party. This shall be carried out on the initiative of the competent authority itself.

If the examining authority does not remove the procedural defect and the interested party appeals the resolution, the competent authority shall invalidate it by indicating an error, or without such indication, since a fundamental error was made in the course of the proceedings, which influenced the final decision on the administrative offence case.

6.1.2. The Defect with Regard to the Form of Publication

There is a defect with the regard form of publication, when a resolution is issued in violation of a written form and / or it is impossible to identify its publishing authority. Error correction is only allowed when there is a writing error but it must not be fundamental. Given that the current Administrative Offences Code does not provide for the possibility for the issuing authority to correct technical and ac-

[21] *Bohnert J., Bülte J.,* Ordnungswidrigkeitenrecht. 5. Auflage, München, 2016, 111.

counting errors, the relevant provision in the new Code needs to be taken into account. This kind of inaccuracy in German law is called the substantive defect.

6.1.3. Defect in Content

Unlike a procedural defect, a defect content is not a ground for invalidating a resolution, as it does not impede the determination of the legal outcome. It is widely believed that some inaccuracies in the text of the document and / or incorrect reference to other less important data related to the person do not cause a great harm, since the specific wrongdoing and the identity of the perpetrator are unambiguously identifiable. [22] A similar rule applies to an inaccurate formulation of procedural action, when, in spite of error, it is obvious and allows for correct interpretation.[23]

Unlike minor inaccuracies, the grounds for invalidating the resolution are the fundamental errors made during the issuance of the legal act, which are evident in the reasonable assessment of all existing factual circumstances.[24]

Given that in some respects use of the preconditions for the invalidity of an administrative legal act, specified for the purposes of general administrative law is also permissible in law of administrative offences, for finding the resolutions illegal it is advisable[25] for the new Administrative Offences Code to envisage the following grounds for revocation of the resolution: Provisions defining the invalidity of an administrative legal act and provisions defining the invalidity of invalid administrative acts, that are given in articles 60 and 60^1 of the General Administrative Code of Georgia.

Illegal and inappropriate decisions must be separated from one another, as they are in General Administrative Code. It should be noted that by proceeding of an appeal the administrative body checks only the appropriateness and the court only checks the legality of the act.[26]

7. The Peculiarity of the Proceeding of Case of Administrative Offences in the Court with Regard to an Appeal

When a person disagrees with the decision of the relevant authority on administrative offences case, he is entitled to use several remedies for protection of his rights. Under current Georgian law, a person may file a lawsuit in court and demand that action be taken or refrained from acting. He is also entitled to lodge an appeal with both the administrative authority and the court, which in this case examines the appeal in the manner prescribed by the Administrative Offences Code.

While examining an appeal, the court does not verify whether it was permissible to issue the resolution on penalty in the particular case and makes an independent decision on the case. It defines a particular procedural action and it identifies the offender responsible. Moreover, the court does not provide

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22 *Kurz*, Karlsruher Kommentar zum OWiG, 2006, § 6, 49.
23 *Rebmann K., Roth W., Herrmann S.*, Gesetz über Ordnungswidrigkeiten, 2014, § 6, 25.
24 Maurer Allgemeines Verwaltungsrecht, 18. Aufl., 2011 § 10, 21.
25 *Göhler*, OWiG, Kommentar, 16. Aufl., 2012§ 66, 57.
26 *Turava P., Tskepladze N.,* General Administrative Law Handbook, Tbilisi, 2010, 132 (in Georgia).

a legal assessment of the action, which was implemented within the framework of a decision adopted by an administrative body imposing administrative penalties. The court makes a decision based on internal convictions, even If it reaches the same decision that was made at the initial hearing by the relevant authority. [27]

It is noteworthy that when dealing with cases of administrative offences, the Chamber of Administrative Cases of the Supreme Court of Georgia made an important statement on December 22, 2015, about the internal conviction of the court. As the court stated in the case #BS-497-490 (K-15), the court evaluates the evidence in its internal conviction, which must be based on a thorough, complete and objective examination of the evidence. It then draws a conclusion on the existence or absence of circumstances relevant to the case. The decision should reflect the considerations that underlie the court's internal conviction.[28]

During the proceeding of case of administrative offences the court checks whether the resolution has been issued in accordance with the requirements of the law. Therefore the court dealing with administrative cases verifies the decision of the administrative body at the time of issuance of the resolution that was based on factual and legal situation. At the same time, it is also checked how the offender's action can be assessed within the court proceedings. It should be noted that the court makes an independent decision imposing an administrative penalty. If the court reaches the same decision as the administrative body, it will not approve the resolution nor will it refuse to grant the complaint. The court decides on the imposition of a fine without referring to the appealed decision. [29]

In order to relieve the courts, along with ensuring proper protection of human rights, appropriate mechanisms for appealing the resolution should clearly be stated in the Administrative Offences Code of Georgia. As noted in this chapter, it is also necessary the Code to also state the right to appeal to a higher authority for a decision on an offence, and the right to appeal later to the court.

8. Conclusion

The study revealed procedural shortcomings in appealing a resolution on administrative offence provided by applicable law. First of all, attention has been paid to the fact that the current Administrative Offences Code of Georgia does not define nor notion of the interested person and hence nor his rights. Having said that, it was proposed to incorporate the notion of an interested person in the new Code. Also the validity of an appeal and the ambiguous issues related to the enforcement of the resolution are discussed. Ways to correct them are given on the example of Germany. In order to fully realize the rights of citizens, the study also identified the need for new terms and a necessity for the applicant to introduce a appeal withdrawal mechanism, that are essential for the examination of the appeal and for appealing the administrative resolution. The article discusses the basics of cancellation of a resolution in a new way

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27 *Bohnert J., Bülte J.,* Ordnungswidrigkeitenrecht, 5. Auflage, München, 2016, 114.

28 Uniform practice of the Supreme Court of Georgia on administrative cases, second half of year 2014 - 2015, 83.

29 *Bohnert J., Bülte J.,* Ordnungswidrigkeitenrecht, 5. Auflage, München, 2016, 115.

and in detail. In particular, the procedural defect and the defect with regard to the form of publication are discussed. The study also suggests that provisions defining the invalidity of an administrative legal act and provisions defining the invalidity of invalid administrative acts, that are given is articles 60 and 60^1 of the General Administrative Code of Georgia, should also be reflected in the new Administrative Offences Code of Georgia.

It is proposed to radically change the approach in the Administrative Offences Code in relation to the appeal procedure, since all decisions / resolutions in administrative law cases should be subjected to appeal and not just some of them, as it is envisaged by the current Code.

Taking into consideration the ways of correcting the existing shortcomings suggested by the research and the relevant suggestions in the Administrative Offences Code, the proceeding of administrative offences with regard to an appeal will be significantly improved. This is both an appropriate guarantee of the protection of human rights and freedoms and an additional mechanism of control of administrative authorities by the state. In case of appeal against the resolution adopted by the authorized person in the case of administrative offence, the superior administrative authority and the court verify the legality of the decision at the stage of examination of an appeal. In this process all the measures taken by body examining the case are checked, including the extent to which the terms of the case have been complied with, whether all the evidence in the case has properly been examined, whether the rights of the person under administrative liability were protected, etc. It should be noted that the development of mechanisms proposed by the article will substantially reduce the risk of unlawful decision-making by an authorized body (official) dealing with an administrative offence case, as he will be aware of a number of special powers and measures specified in the Administrative Offences Code. For example, if the legislation takes into account the criteria for deficiencies of the resolution, set out in this work (procedural defect, defect with the regard form of publication, defect in content), a higher standard of resolution on administrative offence cases will be established.

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Rethinking Paradigms in the Techno-ecological Transition

Through this article we aim to discuss the techno-ecological transition that we are living today from a critical perspective. Analyzing the erosion suffered by the hegemonic ideological paradigms, such us humanism, and the challenges that represents for a system that is beginning to yield in front of the difficulty of managing the ever higher internal contradictions. We proposed an approach based on the technological determinism and post-humanist theories, in order to rethink green anarchism as a key tool in order to imagine alternative scenarios to the ecological and philosophical crises that we are facing front. Trying to develop the basis of a though structure for the understanding of green anarchism in a post-human context, and its importance in the developing of a new awareness in the opportunity window that offer the current transformations of paradigms.

***Key Words**: Green Anarchism, technological determinism, post-humanism.*

1. Introduction

Humanism, understood as one of the pillars of the Western hegemonic thought's structure of the last centuries, has begun to show serious signs of exhaustion, which are reprising its ability to restore self-supporting structures that allow it to continue articulating the current systems and subsystems. Thus, the notion of normality[1] seems to fall apart at an exponential rate since 09/11 and the subsequent invasions of Afghanistan and Iraq and the more than known consequences, creating a strange present, where everything looks the same, but where nothing is quite the same in a universe of mirrors as has been described by *Baudrillard*[2]. A present where the collective imagination has begun to draw a dystopian future which has nothing to do with that sweet end of history that *Fukuyama* predicted[3]. A reality in which Neoliberalism has not been the solution, while being completely honest, certainly has not meant the very essence of the problem. One problem, from our perspective, that is gestated in the notion of power, hegemony, reason and truth, all of them deep-seated in the humanist theory, a fundamental thought structure of western civilization.

We could say therefore that we are facing a battle of philosophical nature that seems unable to overcome his own Gordian knot, which today passes without any kind of doubt through the dissolution of humanism because, among other reasons, to its manifest inability to deal with the two fundamental problems of our time; the technological disruption caused by the massive incorporation of new technologies in our daily live and global ecological crisis, a direct consequence of our industrial and cultural sys-

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1 *Funtowicz S., Ravetz R.,* The Good, the True and the Post-modern, Futures, 24(10), 1992, 963–976. *Sardar Z.,* Postmodernism and The Other: New Imperialism of Western Culture, Madrid: Pluto Press, 1998. *Sardar Z.,* Welcome to Postnormal Times, Futures, 42(5), 2010, 435–444. <http://doi.org/10.1016/j.futures.2009.11.028> [02.04.2020].

2 *Baudrillard J.*, Simulacra and simulation, 1st ed., Detroit: University of Michigan Press, 1994.

3 *Hage J., Hollingsworth R., Fukuyama F.,* The End of History and the Last Man. Contemporary Sociology, Vol. 22, Simon and Schuster, 2006, <http://doi.org/10.2307/2075746> [02.04.2020].

tem. Two interdependent challenges that constitute a new frontier, a new land on which will define the post-human, because it has lead us to a point of no return, a new scenario where new rules must be define. And this new scenario, built in a no man's land between normality's[4], should be considered the main battlefield to recover a lost liberty, after an unnecessary intellectual hegemony, a nonexistent truth, a coerced reason and power that as always, has been asphyxiating. In other words, redefine our future in the window of time we've got before the crystallization of the new normality.

So the overcoming of humanism, vital to solve the major contradictions of our time, will be radical, or not will it. Since the challenges we face cannot be solved from the mental and material hegemonic structures of the current time, a set of structures which are in the process of exhaustion has been illustrated by so many authors[5]. In a context that is mainly driven from the technological field[6].

If we take as an example the global ecological crisis, in its current development, where new weakness, as pandemics, can alter not just the normal life, but the whole economical, and political cicle, we note that this is a crisis that has far exceeded the reference frames of the north-south dynamics or the notion of biopolitics defined by *Foucault*[7], even the capitalist formula, seems to be exhausted by the overwhelming evolution of its own system[8], leading to some implicit contextual changes affecting the human condition as conceived by *Hannah Arendt*[9]. A renewed idea of fighting against the elements, that is providing the deepest crisis of our time. While, the development agendas sponsored by humanistic theories continue to promote an extreme exploitation of natural resources to serve a human development, unprece-

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4 *Gidley J. M.,* Postformal priorities for postnormal times: A rejoinder to Ziauddin Sardar, Futures, 42(6), 2010, 625–632, <http://doi.org/10.1016/j.futures.2010.04.022> [02.04.2020]. *Sardar Z. (n.d.),* Transmodern Journeys: Future studies and Higher Education, <http://ziauddinsardar.com/2013/07/transmodern-journeys-future-studies-and-higher-education/> [05.05.2014].

5 *Bauman Z.*, La posmodernidad y sus descontentos, Ediciones Akal, 2001. *Bauman Z.*, Tiempos líquidos: vivir en una época de incertidumbre, 2007. *Beck U.,* La sociedad del riesgo: hacia una nueva modernidad, 1998, <http://atlas.umss.edu.bo:8080/xmlui/handle/123456789/337> [01.05.2020]. *Beck U.*, Risk Society: Towards a New Modernity, Nation, *Ritter M. (Ed.)*, Vol. 2, Sage, 1992, <http://doi.org/10.2307/2579937> [date of last visit]. *Beck U., Giddens A., Lash S.,* Reflexive modernization: Politics, tradition and aesthetics in the modern social order, London: Stanford University Blackwell Publishers, 1994. *Funtowicz S. O., Ravetz J. R.,* Science for the Post-normal Age, Futures, 25(7), 1993, 739–755. *Funtowicz S., Ravetz R.,* The Good, the True and the Post-modern, Futures, 24(10), 1992, 963–976. *Jameson F.*, Postmodernism, Or, the Cultural Logic of Late Capitalisme, 1st ed., London: Verso, 1991. *Zizek S.,* Democracy versus the people. New Statesman, 137, 2008, 46–48, <http://doi.org/Book Review> [02.04.2020].

6 *Collingridge D.,* The Social Control of Technology, London: Pinter, 1980. *Ellul J., Wilkinson J., Merton R.*, The Technological Society, Nueva York: Random House, 1964. *Marx L.,* The Idea of "Technology" and Postmodern Pessimism, Technology, Pessimism, and Postmodernism, 17, 1994, 11–28. *Postman N.,* Technopoly: The Surrender of Culture to Technology, Nueva York: Vintage Books, 2011. *Sarewitz D.*, Frontiers of Illusion: Science, Technology, and the Politics of Progress, 1st ed., Temple: Temple Unviersity Press, 2010. *Smith M., Marx L.,* Does Technology Drive History?: The Dilemma of Technological Determinism, 1st ed., Boston: Mit Pr; Edición, 1994.

7 *Foucault M., Varela J.,* Microfísica del poder, 1st ed., Madrid: Endymion Ediciones, 1978.

8 *Jameson F.*, Postmodernism, Or, the Cultural Logic of Late Capitalisme, 1st ed., London: Verso, 1991. *Klein N.,* The shock doctrine: The rise of disaster capitalism, 2007, <http://scholar.google.es/scholar?hl=es&q=-Naomi+klein+shock&btnG=&lr=#1> [28.03.2020].

9 *Arendt H.*, La condición humana, 8th ed., Barcelona: Paidós, 2015.

dented in terms of demographically extension, structuring themselves today as part of the problem, not the solution. It is therefore necessary to advance our theoretical frameworks so that the image of the Vitruvian Man, the center of our cognitive universe is relegated to the history of Western thought, because today, anthropocentrism is a fundamental part of the problem. And our legal systems, as a reflections of our mental cosmogony seeks unable to reflect the new notions of responsibility related with the rise of IA. And while our cultural systems refuse to accept this reality, the planet as a whole, continue to walk towards the abyss. An abyss determined by overcoming the resilience of ecosystems. Which, are unable to regenerate in front of the growing pressure of industry, they to become extinct without remission, placing the sword of Damocles over our development agenda and more importantly, over our future.

This article aims to address the issue of the global crisis from a post-human perspective, understanding this conceptualization as heir to the anti-humanists, feminists, anti-colonialist[10] and ultimately anarchist movements instance. Thus, our approach advocates a redefinition of "green anarchism" as a comprehensive and decisive conceptual framework able to resolve the tensions and contradictions of the current, a deciduous system, trying to establishing an intellectual alternative to the new normality that we just started building. Looking ahead to articulate a change of consciousness that can help solve the major challenges of the specie, now shared by the rest of the planet, in a context that is known to all; unprecedented erosion of arable land on the planet, pollution of water resources, deforestation, desertification, alteration of ecosystems and extinctions of species, not to mention at any time, pressure from the technological system, which is crucial to the not only in building alternatives, but the very understanding of our history.

Thus, this article will be structured through an analysis of the conceptual frameworks and systems that have brought us to the brink of where we are today, exploring the human condition in the age of technology, with particular emphasis on the notion of responsibility, and violence. To then give way to an analysis of the post-human condition. Before advancing in the structuring of green anarchism in the post-human age.

2. The Human Condition in the Age of Technology

The human condition, as is described by *Hannah Arendt*[11], arises as a result of the context where the life of the subjects are inscribed, a context that is cultural, technological, anthropological and philosophical, but also ecological. We are who we are because we inhabit the planet we inhabit, the valley, the river, although that planet, valley, river is in a transition process of change towards an unknown scenario, which is far from which it has accompanied us for thousands of years in our development. And it is absurd to think that this change will not accompanied by changes in our own nature, in the way we understand ourselves and others.

Today, lofty in the domain of the medium, many have come to imagine futures where mankind emerges fully out of its natural context and develops lifestyles disconnected from the ecological medium, without understanding the philosophical and anthropological scope of that transformation. The develop-

[10] *Braidoti R.,* Lo Posthumano, 1st ed., Barcelona: Gedisa, 2015.
[11] *Arendt H.*, La condición humana, 8th ed., Barcelona: Paidós, 2015.

ment achieved in Western countries in recent decades, driven by sectors such as biotechnology and nanotechnology have created a new imagery that has spread rapidly thanks to new communication technologies.[12] Which collaborate to accentuate the jump, from sensitive and real world, towards a new reality; oversensitive and hyperreal, placing ourselves in the last instance before the worst fears of *Baudrillard*[13] in a self-fulfilling prophecy that should begin to be deconstructed in order to generate alternatives. And to start this deconstruction is necessary to begin by the origin of the story, humanism and Christianity this latter understood as the conceptual framework that originated humanism.

Thus, the belief in the existence of a god, creator of *Adam* and *Eve*, who in the beginning of time made available to us a wide natural medium with the goal that grow and multiply, has collaborated to build the supremacist vision of our species, similar to that made by many of the major religions, whose belief system is not exempt from responsibility in the creation of the current ecological crisis.

This supremacist vision of our species has understood the environment, like a playroom in which the men could do and undo at will without fear of any consequences, because it was the gift of a god who had created us in his image and likeness. This founding myth of the species, surpassed by the theory of the evolution of species over 200 years ago, has not yet been completely reduced to what it is, a myth. And carries many implications in the understanding of our relationship with the environment.

Humanism, meanwhile, as a mechanism for regeneration of a part of Christian values[14], sought to correct some of its most unnatural postulates, raising an intellectual evolution of the first one. So earthly life would no longer be considered only as a vale of tears, before a hypothetical supersensible paradise after a whole live of renunciation and submissions, or as claimed by *Nietzsche*[15], denying the material real world towards an extra sensitive hypothesis. Humanism understand live as a place to be and as a place to enjoy. And this new approach begins to build a new idea, which contains the basis of the creation of the concept of human rights and civil rights. Although it hardly paid any attention to our relationship with the environment and with the other species that make up our ecosystems. And the reason why is not difficult to guess, since the old biblical promise has not yet been deconstructed, and the goal is not exactly leave a sustainable planet for the day of Armageddon.

Thus, humanism reinforces the old perception of the species, reduced to heterosexual white man, subject of rights[16], which reinforce the structures of pre-existing patriarchy while showing a wide cognitive elasticity with respect to material reality, implementing improved consideration of the members of the community (the white ones) and the conditions of earthly life.

This humanism that reformulates Christian values and not get rid of its mythological heritage is therefore insufficient when they emancipate the human being on his own ghosts, generating a restricted freedom while feeding new social forms which are much more aggressive in regards to the exploitation

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12 *Postman N.,* Technopoly: The Surrender of Culture to Technology, Nueva York: Vintage Books, 2011

13 *Baudrillard J., Foss P., Patton P., Beitchman P.,* Simulations (Semiotext), New York City: Columbia University Press, 1983, <http://www.emilylutzker.com/enlightenment/art_media/Baudrillard_sim.pdf> [02.04.2020].

14 *Braidoti R.,* Lo Posthumano, 1st ed., Barcelona: Gedisa, 2015.

15 *Nietzsche F.,* El crepúsculo de los ídolos, Barcelona: Alianza editorial, 2004.

16 *Beauvoir S. De*., El segundo sexo (1949), Siglo XX, Buenos Aires, 1st ed., Madrid: Cátedra Estudios de la Mujer, 1981. *Braidoti R.,* Lo Posthumano, 1st ed., Barcelona: Gedisa, 2015. *Mbembe A.,* Necropolitics. In Foucault in an Age of Terror, London: Palgrave Macmillan, 2008, 152-182.

of the environment the use of power[17] and limitation of freedom[18]. Since in its conceptual structure it provides the basis for a demographic growth above assumable limits of the ecosystems and social systems, generating global exploitation networks that evolve so that it refers to our species; to the biopolitics *Foucault*[19] at first, and secondly, they acquire the dimension of necropolitics described by *Mbembe*[20]. New forms of slavery, where human bodies themselves acquire the consideration of consumer goods, either through networks of labor exploitation, sexual exploitation, etc., to more extreme cases such as networks dedicated to illegal organ trafficking. Therefore, Christianity and humanism fail to eradicate slavery because are those slaves ideologies, developed by slaves who cannot imagine a world without slaves[21]. Therefore, an overcoming of these thought systems is necessary if the aim is to achieve greater levels of freedom and sustainability.

Assuming that we can never achieve what we cannot imagine, we have to accept that in our technological context, Technopoly, as it has been described by *Neil Postman*[22], our willing is not the main source of change, because technology has now this power, and this fact doesn't guarantee the survival of our system rather the opposite, mainly because any system of understanding has an expiration date registered on their resilience to progress as we can observe in our economic system emerged in the nineteenth century, our political system structured in the eighteen century, and this elasticity is arriving to an end in a technological context of XXI century.

Therefore, we can understand that the current forms of exploitation are simply the result of silting of ideas, social formulations, which ultimately has managed to generate such an advanced technological system that has surpassed our own understanding of it[23] and that works directly and indirectly to maintain and strengthen networks of exploitation, nullifying the ability of individuals to think for themselves, which in the words of *Heidegger* would be the last form of alienation.[24]

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17 *Bakunin M.,* God And The State, 1970, <https://books.google.es/books?hl=es&lr=&id=7ZujAQAAQBAJ&oi=fnd&pg=PR4&dq=God+and+the+state&ots=_388qndNJm&sig=Kesfq9qWx2ZYTGY12Xdh7KmrWB8> [02.04.2020].

18 *Arendt H.*, La condición humana, 8th ed., Barcelona: Paidós, 2015. *Foucault M.,* Vigilar y castigar: nacimiento de la prisión, Siglo XXI, 1990. *Foucault M., Varela J.,* Microfísica del poder, 1st ed., Madrid: Endymion Ediciones, 1978.

19 *Foucault M.,* Genealogía del racismo, 1976, <http://atlas.umss.edu.bo:8080/jspui/handle/123456789/423> [02.04.2020]. *Foucault M., Varela J.,* Microfísica del poder, 1st ed., Madrid: Endymion Ediciones, 1978.

20 *Mbembe A.,* Necropolitics. In Foucault in an Age of Terror, London: Palgrave Macmillan, 2008, 152-182.

21 *Nietzsche F.,* On the Genealogy of Morals and Ecce Homo, *Kaufman W. (Ed.),* College English, Vol. 51, Vintage Books, 1989, <http://doi.org/10.2307/377906> [02.04.2020].
Nietzsche F., The Antichrist, 1st ed., Arcadia ebook, 2016, <https://books.google.es/books?hl=es&lr=&id=-58TlCwAAQBAJ&oi=fnd&pg=PT4&dq=antichrist&ots=Jlndrl2Ipc&sig=pAPHY657RMdw2K8VdAwbtSdcz7A> [02.04.2020].

22 *Postman N.,* Technopoly: The Surrender of Culture to Technology, Nueva York: Vintage Books, 2011.

23 *Bimber B.,* Three Faces of Technological Determinism. In Does Technolgy drives history?, Cambridge, Massachusetts: Merrit Smith; Leo Marx, 1994, 79-100. *Marx L.,* The Idea of "Technology" and Postmodern Pessimism, Technology, Pessimism, and Postmodernism, 17, 1994, 11–28.

24 *Heidegger M.,* The question concerning technology. In Technology and values: Essential readings, 1954, 99–113, <https://books.google.es/books?hl=es&lr=&id=BgYc9_ldWFYC&oi=fnd&pg=PA99&dq=%22The+Question+Concerning+Technology%22+Heidegger&ots=wvPsL2UEA-&sig=X0OMGmyD57DWrZi7sZcVvXUxEU4> [02.04.2020].

We have to admit in this regard, that the operation of existing structures, following the *Gramscian* formulation[25], no longer respond to the will of specific individuals, pressure groups or social elites, but the gear machinery can be imposed on themselves, in a subtle way and amazing efficiency. This revolution of the structures, has been almost imperceptible because the power structures have not changed aesthetically, as the technological fact recreates mental spaces with amazing ease, becoming relevant, not the nature of power, but its simulacrum.[26] That is stoking the fiction of a resident power in democratically elected government bodies.

This hegemonic fiction of our time, has allowed not only to gestate a power outside the public control but to maintain the citizens unaware of its own existence and nature. Making us become insensitive to the fact that at some point in the game, we lost control, and this reflection is key when proposing a posthuman reformulation of our context and condition. Since the technology has become a total phenomenon, as claimed by *Jaques Ellul* in the 60s of the last century.[27] A phenomenon that should be treated as a deterministic factor in shaping the world today and one of the pillars on which the new human condition stands, still less free than in the previous system.[28] The problem is not therefore in the ignorance of the average citizen about the functioning of the system, but in their ignorance of their own ignorance. Thus precluding crystallization of alternatives, since we cannot transform what we cannot even imagine.

So we can say that the last great claudication of individual freedoms, has not been imposed on behalf of any king, god or president, but has been implemented by the system itself as an indispensable requirement for continuous operation. Not being able to overlook that technology has always structured power, based on limits of access to knowledge[29], determining that only those in possession of the art of the occult, could hold power, so from the magician and the sorcerer to priest and scientific, everyone has seen fit to create veils of complexity around the machinery of the system regardless if it was made from sacred texts, magic formulations, or production techniques.

Holders of technology – the technological class described by *Veblen*[30] has always use complexity as a tool of protection of the status quo, knowing that this can only be maintained through censorship.[31]. That is, each new technological system, entails a redistribution of power, perfectly identifiable throughout history. So the magic created wizards, the writing the scribes, the priests came with the religion, the stirrup bring us the knights and feudalism[32], the industrial revolution brought the big capitalists, and the digital revolution the technologists, a new social elite that has crystallized his rise to Olympus of power

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25 *Bates T.*, Gramsci and the Theory of Hegemony, Journal of the History of Ideas, 32(2), 1975, 351–356. *Femia J.,* Gramsci's Political Thought: Hegemony, Consciousness, and the Revolutionary Process, 4th ed., London: Claredon Press, 1987. *Gramsci A.,* Further Selections from the Prison Notebooks, 1st ed., Saint Paul: Univ of Minnesota Pr., 1995.

26 *Baudrillard J.*, The precession of simulacra, in: *Hlynka D. (Ed.),* Paradigms Regained, 1st ed., New York 1983, 448–468.

27 *Ellul J., Wilkinson J., Merton R.*, The Technological Society, Nueva York: Random House, 1964.

28 *Freud B. S.,* Civilization and its discontent, London, 1930.

29 *Ellul J., Wilkinson J., Merton R.*, The Technological Society, Nueva York: Random House, 1964.

30 *Veblen T.,* The Theory of the Leisure Class. A Penn State Electronic Classics Series Publication. Oxford University Press, 2009, <http://doi.org/10.1086/250610> [02.04.2020].

31 *Rodríguez J.,* La civilización ausente: Tecnología y sociedad en la era de la incertidumbre, 1st ed., Oviedo: Trea, 2016.

32 *White L.,* Tecnología medieval y cambio social, Barcelona: Paidós, 1973.

thanks to large corporations like: *Microsoft, Samsung, Apple, Facebook, Amazon* etc., current holders of the sacred knowledge. Or as *Marx* said: "The windmill gives you society with the feudal lord: the steam-mill, society with the industrial capitalist".[33] Holders of power that normally act beyond the legal frameworks, making it compulsory just for those who doesn't hold power.

It is for this reason that elites have always been conservative, mainly in terms of technological disruption, censoring access to information and technology dissemination, fearing black swans, which as *Guttenberg*, could shake the foundations of the hegemonic thought of the moment. Perhaps the old *Archimedes*, who destroyed their machines even after their demonstrations for fear of changes that could lead to the Greek Paideia[34], can be understood as the paradigm of the attitudes of elites, which no longer need to prohibit, when simply can patenting under a pernicious legislation, which slows technological disruption.[35]

This is how we arrived at the time when the "Big data" stands as the new "promise" of the technological system for a utopian future, more efficient, more intelligent, as they did the nuclear and GM industry before, although the "Big data" has an interesting peculiarity, and this is that its very nature lies in the renunciation by individuals of their fundamental rights as it could be their privacy. So we have a new example of a system that rises at the expense of voluntary resignations to private, in a trend that has been announced since the passage of the Patriot Act in the United States. Preparing citizens for a voluntary surrender of their freedoms in pursuit of values such as effectiveness and efficiency so typical of the machines and so alien to humans.[36]

That is how the technological factor would be structured as the third act of a story that draws a dystopian present, disconnected from the environment, and walking towards an abyss of unpredictable consequences. A technology that is related to two fundamental concepts such as the generation of new aesthetics and ethics through the growing dominance of hyper reality on our cognitive systems, and the creation of a system defined by the lack of responsibility and new forms of violence, in a reorganization of the banality of evil phenomenon[37] as intrinsic to our social reality. Two phenomena which forms a hyperreal-ego, which is built likewise through the "Big data". Putting aspiration above reality, and influencing a growing conspicuous consumption that goes beyond the border of the material, penetrating heavily in digital universe. This new set of technologies allows us to be who we want in the digital world, but keeps us from watching who lives under our own mask in the real one, as *Schopenhauer*

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33 *Marx K.,* The Poverty of Philosophy, New York: Cosimo Classics, 2008, <https://books.google.es/books?-hl=es&lr=&id=p7JcSq-vR8oC&oi=fnd&pg=PA9&dq=Poverty+of+Philosophy&ots=2qKC1c39WO&sig=-XRWVQa_ajO3lyleQXDpO7T8eT0k> [01.04.2020].

34 *Ellul J., Wilkinson J., Merton R.*, The Technological Society, Nueva York: Random House, 1964.

35 *Hettinger N.,* Patenting life: Biotechnology, Intellectual Property, and Environmental Ethics, Environmental Affairs, (22), 1994, 267–284. *Ruttan V. W.,* Induced Innovation, Evolutionary Theory and Path Dependence: Sources of Technical Change. The Economic Journal, 107(444), 1997, 520–1529, <http://doi.org/10.1111/-1468-0297.00238> [01.04.2020]. *Specter M.,* Can We Patent Life? - The New Yorker, 2013, <http://www.-newyorker.com/tech/elements/can-we-patent-life> [01.02.2015].

36 *Postman N.,* Technopoly: The Surrender of Culture to Technology, Nueva York: Vintage Books, 2011.

37 *Arendt H.,* Eichmann en Jerusalén, 1st ed., Madrid: DeBolsillo, 2013.

would argue.[38] And the creation of this hyperreal-ego has been possible through a constant cession of privacy structured by the technological system. A system that needs you to publish where you are going, what you are eating, needs to be informed about your networks, your job, family, and friends and then you just have to put filters to look like what you want to be. An easy process, with so many detrimental effects, psychological, anthropological, philosophical… And in its new phase, through childish games like *Pokemon Go*, tries to see whatever you see.

So we should comprehend that at this point that, technology in its current state of development, blurs reality and makes us lose awareness of such important factors as; the processes of personal construction or production processes themselves. We don't know who we are, or what we consume, but it doesn't matter, because juts we feel comfortable in our new Digital Disneyland[39], in our new alienated slavery. And this is how western society are provided with products whose origin, manufacturing process and inherent operating systems are imperceptible to the citizens, who constantly demands more, losing any awareness of the fact of living on a planet with limited resources, which besides must be shared by a population in exponential growth. Thus configuring the makings of a story, which at present is doomed to not have a happy ending, not for most, but for anyone.

A future determined by a technology that plays a crucial role in the crystallization of the present consciousness, as McLuhan said, today the medium is the message.[40] And the message is a new form of digital theology totally off in relation with the cycles of production, exploitation, and more importantly, with reality itself. We cannot ignore the theory of *Eli Pariser*[41] about the knowledge bubbles that emerged thanks to the extension of the algorithms of customization that make that two people with the same IP on different computers, writing the same words in a search engine, they could find diametrically opposite results, creating a bubble of knowledge, reminiscent of the Socratic lesson Thamus and Theuth,[42] when the old king warned us that writing is not the elixir against oblivion, but the false recollection that makes us wise our own knowledge rather than wise. An ancient history aimed at showing the intrinsic dark side to all technology, which should be evaluated not only from economic prisms, but also from social, anthropological and philosophical sinuses, making us aware about the importance of the importance of resubmitting the technological system.

We live under the pressure of a technological system that directs our gaze, that distracted our minds, not as the result of a conspiracy by the vigilant elites dedicated to protect the "status quo" but from the unbearable lightness of algorithms. Hybridization of human and artificial intelligences that

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38 *Schopenhauer,* The World as Will and Representation. Philosophy and Phenomenological Research, Vol. 20, Courier Coorporation, 1959, <http://doi.org/10.2307/2104368> [01.04.2020].

39 *Baudrillard J*., Simulacra and simulation, 1st ed., Detroit: University of Michigan Press, 1994.

40 *McLuhan M.,* Understanding Media: The Extensions of Man, 1st ed., Cambridge, Massachusetts: Mit Press, 1994.

41 *Pariser E.,* The Filter Bubble: What The Internet Is Hiding From You (Google eBook), London: Penguin, 2011.

42 *Platón,* Fedón, Banquete, Fedro, trad. Carlos García Gual y otros, Madrid, Gredos, 1st ed., Madrid: Gredos, 1992.

transports us to the ghosts of *Huxley*[43], where control or lack of privacy are not the problem. But the problem lies in the very willingness of individuals to transfer it, to voluntarily give it to the power, in an exercise of self-alienation which represents a new stage in the evolution of the *civilization and its discontents* as *Freud* observed it.[44] Where pleasure it's frill from sorcery, using the terminology of *Baudrillard*, in the moment we live in a time that technological imposition, makes us forget what matter, and bring us under a new age of conformism, which is no longer confined to cooperate reluctantly with totalitarianism, but impels us to having fun[45] in its new Disneyland riddled with *Pokemons*, a new *Eden*, with new angels and demons, with a new God who sees and knows everything about us. And even knows more about us than ourselves. Because "Big Data" knows, and knows how to use that knowledge to seduce, submit, alienate, to retain us in a comfort zone thus we so cannot feel anymore the weight of the chains that oppress us. And the very big difference, from the previous system, is that in the new one, God is real, he is a technological reality.

And as often happens in history, every belief system gives way to a more sophisticated one, magic gave to religion, religion that now shows clear signs of erosion, bow to techno-science, and this will plunge us into another era of control, of alienation in another step forward in our race toward extinction. Because even, large sections of contemporary environmentalist movement have been victims of technological seduction, abduction that impels them to deposit their hopes in a techno-science, which constantly promises clean energy, responsible food industries to feed the world, environmental sustainability, as we are drive like lemmings toward the ecological collapse. And this is not to say that technology cannot be part of the solution, but the current technological system is undoubtedly a part of the problem and therefore must be radically transformed.

It is for this reason that, in order of recovering a balance with the ecosystem, it is necessary to advance in two parallel and equally important lines. One of them, could be describe as purely philosophical, that would overcome the current and past human condition, and walk towards the construction of the Posthuman, as antithetical to the concept of humanism. And, secondly, redirect the technological flows and dynamics towards the recovery of relations with other species. These two options, both of which can be Major traumas, since they involve a total and complete reformulation of current agendas, especially those embodied in the so-called Millennium Development Goals, covered by eroded humanism, desperately seeking to save humanity sacrificing the environment while condemns man to slavery within the system.

So we could say that the aim is not to increase the arable land of the planet giving the equilibrium of ecosystems in which they operate, it is not genetic modification of species to protect us from certain cycles of disease transmission, as well not to increase GM crops at the expense of small farmers or food sovereignty, destroying entire communities, or inoculating with bovine growth hormone to increase the supply of meat at the expense of the health of the planet. The solution is a radical transformation of our conceptual frameworks, which should allow visualize the whole and not the unique problems of human-

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43 *Huxley A.,* Brave New World*,* 1931, <http://doi.org/10.1177/0956474806064761> [01.04.2020].

44 *Freud B. S.,* Civilization and its discontent, London, 1930.

45 *Postman N.,* Amusing Ourselves to Death: Public Discourse in the Age of Show Business, 20th ed., London: Penguin, 2006.

ity. Anthropocentrism, humanism, must be overcome after the creation of alternative futures of those that are drawn before our eyes.

3. Redefining Green Anarchism in the Current Transition of Normalities

As discussed above, we understand that we should overcome the current human condition, through the recognition of a post-human reality[46], a reality that has been taking place through the last decades, with the irruption of technologies that have dramatically change our approach to the context. A good example is the new warfare industry, with the massive use of drones and other technologies, that make easier to kill, like half century before did the *Zyclon B.* But now, you just have to press one bottom from thousands of kilometers away. New weapons that show us the face of the new understanding of the otherness conducted by technology, that has the ability to cut the traditional recognitions process[47], allowing us to learn through an information bubble that gives a new form to our mind.

This recognitions of the post-human condition are also a consequence of the urgent need to readdress the actual situation results, from; an ecological, technological, and philosophical approach. Anthropocentrism and androcentricity, two values own by humanism and religious systems -this seconds ones in a subtler way, must be overcome through a new awareness that vindicate the non-human, emphasizing a new justice, in the philosophical sense of the term, between genres and species, putting diversity and its protection as a central axis of the system without forgetting the importance of the technological field. That is, actively fighting against all harmonization and standardization process, and last but no less globalization process itself. Because the standards are vital to the proper functioning of technological society, and it is precisely this, which must be overcome. The system needs us to use the same operative systems, they need us to consume the same products, same clothes, same food. The system needs easily identifiable subjects as archetypes, as consumer niches that serve as a means to continue building a hyperreality of comfort where everyone can be happy in this brave new world that is being designed in front of our eyes. And where liberties, are just as the rest, just an illusion.

Thus, in the same way that the Earth ceased to be the center of the universe with the recognitions of heliocentrism, thanks to all these brave people that were able to look upon the limits of their cognitive systems, is the time that humans and especially the "man" no longer be the center of the planet. Bowing to the evidence of being just a part of this gigantic puzzle, where every piece has a function needed to ensure the survival and evolution of the whole. And even in the case that future science fiction scenarios that imagine our species colonizing new worlds come true, we have to admit that those humans will no longer be like us, their condition will have been transformed, perhaps for the best or perhaps for the worse. The real important thing is that even in this hypothetic case, we will condemn the process of human evolution itself if we admit our conversion into parasites, unable to sustain our way of life from the pre-existent ecosystems, generating a productive/creative non extractive/destructive systems.

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46 *Braidoti R.,* Lo Posthumano, 1st ed., Barcelona: Gedisa, 2015.

47 *Beauvoir S. De*., El segundo sexo (1949), Siglo XX, Buenos Aires, 1st ed., Madrid: Cátedra Estudios de la Mujer, 1981.

We should understand that the generation of the notion of the post-human opens a wide range of possibilities oriented overall to the regeneration of the system, which must be accompanied by a transformation of the social and productive systems, so that progress can be oriented in an opposite direction to the current one. So from the extractive and exploitive Orwellian society, we should begin to structure step towards; greater independence, freedom, sustainability and respect for difference.

A social model based on two central pillars responsibility and nonviolence. Understanding violence in a very deeper way, reflecting the abnormalities and contradictions that maintain big layers of population alienated, as the new slaves of the late-capitalist system[48], providing comfort for the world elite, while trying to survive from all the kinds of discriminations that the system has created. Discriminations that could be understand as forms of violence, a violence that is inherent and necessary to the actual configuration of the system and is present in all countries, and not just in the poorer ones. In this sense we can underline the situation of the black community in the U.S.A, as a good example of this forms of modern violence, that manifest itself not only when an Afro-American citizen is killed, but every single time that they are discriminated, in the supermarket, in a job interview, in the healthcare system, etc. As well as women, gay people, immigrants, and everyone that is not a member of the masculine white heterosexual community. That's why we understand nonviolence, as an antithetical concept to the direction of current development, making the lack of accountability and violence gravitational centers of the system.

So in the case of responsibility, if we make an analysis of the social and anthropological parameters of current Western societies, we observe that there is a growing sense of respect for nature. Many companies move through the tortuous path of "greenwash"[49], while consumers begin to demand fair trade products. If we ask any citizen of western countries, especially in Western Europe, in the vast majority of cases, it will never support the existence of child labor exploitation, or production systems that use slave or semi-slave labor but instead they consume products created through these technics, without any kind of concern. And this is possible because the system has been able to dilute the responsibility, masking the reality through democratic fictions where citizens have the sense to be protected by the governmental structure, by a government that is going to take care of all those unfair practices, so we can relay in the oasis of our malls, thinking that all has been produced taking into account ethical standards, but among all the standards existing nowadays, the ethical ones are the less common of all, precisely, because the system is bother by them.

So we freely decided not to be informed about things so basics as the origin of the products we consume, their cycles of production, its environmental externalities, tying to believe that the government

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48 *Jameson F.*, Postmodernism, Or, the Cultural Logic of Late Capitalisme, 1st ed., London: Verso, 1991.

49 *Chen Y., Chang C.,* Greenwash and Green Trust: The Mediation Effects of Green Consumer Confusion and Green Perceived Risk, Journal of Business Ethics, 114(3), 2013, 489–500, <http://doi.org/http://-dx.doi.org/10.1007/s10551-012-1360-0> [01.04.2020]. *Gupta A.*, When global is local: Negotiating safe use of biotechnology, In: *Jasanoff S. (Ed.),* Earthly politics: Local and global in environmental Governance, 1st ed., Cambridge, Massachusetts: Mit Press, 2004, 127-148. *Zaman A. U., Miliutenko S., Nagapetan V.*, Green Marketing or Green Wash ? A Comparative Study of Consumers' Behavior on Selected Eco and Fair Trade Labeling in Sweden, Journal of Ecology and the Natural Environmen, 2(June), 2010, 104–111, <http://-www.diva-portal.org/smash/record.jsf?pid=diva2:463670> [01.04.2020].

is taking care of all of that, so we don't have to face reality. We perfectly know, that if we don't want to be deceived, we don't have to know the true, because it makes us guilty, and this is a kind of feeling that western civilization and humanism is specialized in annihilating, because in the end; who was able to imagine that the 5-Euro T-shirt, produced in Bangladesh, transported by sea could have anything unethical related? So we moved our responsibility to the government, knowing that a government will never be different from the common medium of its citizens. Knowing that irresponsible citizens beget irresponsible politicians and that's how the irresponsible governments arise.

But this lack of responsibility, it's not only common in the average citizen, but instead is present in all levels of our society. It is present at a shareholders meeting that just wanted to know the fate of their funds while they continue to produce profits without showing any kind of interest about the origin of those profits, it is also present in the CEOs of companies that despite knowing of the nature of their investments he found himself justified by the pressure exerted by the shareholders. It is present in the politician that justify his actions in the willing of his voters while his voters even don't know the nature of the policies he is applying. We are just facing front to a system that could be defined as a loop of global irresponsibility that leads to disaster of a magnitude that is even complicated to imagine. But the system, especially the technological system, needs irresponsibility, mainly because, responsible citizens, don't need to be governed, or to be controlled. Because responsible citizens read the disclaimer before signing them, and they don't give their rights, their privacy just for hunting *Pokémon's*.

The transformation of the system, passes therefore by a resurgence of individual responsibility, an anarchist responsibility, because we just cannot trust any form of power, because those are forms of power, any of them, which are allowing the ecological, the social and the human crisis to growth by the use of violence – in all of their forms, and because they take advantage of the inherent responsibility of the system. So the antagonistic, understood as the maximum level of individual responsibility is a method for collective liberation, in a context where the only real power of the citizen, the only real vote it emits, is when you buy, when you eat, when you decide whether to support a multinational that uses child labor and contaminates above any European standards at a plant in Bangladesh, or when you choose the local producer, a sustainable producer, the producer that pays fair wages and respects the environment and the other. So the transformation requires great levels of information, and it is our duty to demand it, to look for it out of the research engines and the algorithms that distract us. And we should concentrate ourselves is those small battles that can represent a change of awareness like claiming for clear labeling systems with direct references to the production cycles, the use of fair labor, and the environmental externalities of the product itself. And even if this is not possible, we must know that responsibility remains ours, without any kind of excuses. And the assumption of this responsibility is the revolutionary event that can transform our communities, our societies.

Green anarchism should be understood as primarily individual responsibility, as a tool for correcting power relations. A responsibility exercised through common sense. We need to regain the ability to be scandalized while observing that local production products can reach five times the price of the imported ones, with the consequent costs of: transportation, fuel, infrastructure and labor necessary that they entail. We must implement new consumption circles, new networks of collaborative economies, which should particularly affect the cycles of technological consumption.

Secondly, in green anarchism one should understand non-violence as a rejection of all forms of discrimination and exploitation, without taking into account if its ecological, labor, social, gender etc. Since the generation of alternatives begins with the destruction of the social scaffolding that protects our system. A system that uses all forms of violence imaginable for maintenance, reaching the extreme form of Necropolitics described by Mbembe.[50]. Non-violence must be intrinsic to the emergence of the post-human, observing that violence has been an inherent fact to humanity throughout history, and has been manifested through concentration camps or subtle discrimination to racial or sexual minorities. Patriarchy is violence, and post-humanism must represent the breaking point.

Thus, these two pillars should compose a new cognitive framework in the creation of the post-human from the perspective of green anarchism as a stand point of radical break with precedent. Gestating an alternative to the prevailing model, which passes through a conscientious objection in everyday life, and a firm regarding the structural disobedience, basing our relationship with the environment in sustainability criteria, responsible and peaceful, respecting own ecosystem flows. A new model that respects the production cycles of nature and not flood markets products generated artificially. A new relationship against the power, not based on its use, but its rejection understanding that power in its extreme forms degenerates into violence, whether physical, systemic, or structural.

We must therefore gestate an alternative to structure a post-system scenario that respects the regeneration of fishing grounds, the seasonality of agricultural production, that livestock growth cycles and the technological flows. Which should guide ourselves not to promote capitalist extraction but anarchist sustainability. A transformation that should take place by imagining a new awareness in a long-term vision that allows us to begin to rebuilding balances, and position ourselves as a fully conscious species that cannot survive alone, and in the case it were possible, it would be unethical. We must work for the consolidation of a categorical post-human principle, which should underline that nature is not anymore a playground like the one described by the biblical tale of *Adam* and *Eve*, but instead, it's an end in itself. And we are a part of it.

Besides, the alternative we propose, the new understanding of green anarchism, should be mentally located in a techno-ecological transition time, focusing on the greater challenges that we face front in the design of the post-system scenario. That means, that it's not an option to negate technology, it's not possible to advocate for a return to nature, to a simpler life, thinking that technology, is just an option, forgetting that is something that has accompanied us, through all our timeline, from the creation lithic industries, and the mastery of fire, to the human genome project.[51] We are a creative species a *Homo Faber*, and it is precisely this ability, which made us survive in the mists of time, that today condemns us to an ecological abyss. But the solution is not to amputate, because for centuries, is what the system has done with inherent parts of our nature, it has amputee freedoms, awareness. In the post-human era we should be complete, because if not, we will be making the same mistakes as the previous systems. The posthuman, from a green anarchist perspective, should be aware, free, responsible, non-violent and technological.

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50 *Mbembe A.,* Necropolitics. In Foucault in an Age of Terror, London: Palgrave Macmillan, 2008, 152-182.

51 *Ellul J., Wilkinson J., Merton R.*, The Technological Society, Nueva York: Random House, 1964. *Rodríguez J.,* La civilización ausente: Tecnología y sociedad en la era de la incertidumbre, 1st ed., Oviedo: Trea, 2016.

And for that reason we should have a strong technological agenda, facing front to threaten as the patent system and the existing corsets to free inquiry, we must underline the importance of the local technological production above the global, the generation of free software applications that are not based in a constant transfer of privacy and freedoms. And especially, we should be aware of all the standards that concentrate the whole industry in a few hands. The algorithms, the new language of technology should be open source, as our language should also be. No more forbidden words, no more forbidden concepts. In the post-human scenario, we don't need more sorceress, priests, or any kind of guardians of any forbidden knowledge.

4. Conclusions

The system has started to show clear signs of exhaustion. The intersystem contradictions are trying to be resolved, once again, through violence. And the philosophical ideas that have supported the old reality are overpassed by the triumph of hyper reality, a new way of understanding the context that is beginning to generate a new human condition, defining a whole new scenario, where technology has become a total phenomenon. Furthermore, our societies are fractured, divided, afraid and as a result, new conflicts are arising over the scarce resources that the system is able to provide to broad population layers in different parts of the planet.

Our population growth, sponsored by humanist theories added to the inherent irresponsibility of the system are amplifying the rapid erosion of the ecosystem through increasing; energy consumption, exploitation of water resources, food needs, social control, behavioral engineering. And in this context, the artificial divisions created by religions and cultural corpus once again are threaten the survival of diversity. While westerns, and high technological societies are experiencing one of the deepest changes in history consequence of the massive incorporations of new technologies in our daily live. So we can say that we are entering in an unknown zone, as we had described above.

Is in this moment of transition when come up an urgent need to offer both cultural and philosophical alternatives that can respond adequately to the needs of the moment. A moment that can be define as a transition between normality's. When is needed to rethink not only our theories, but also our whole epistemological tradition.

Through this article, we have tried to rethink green anarchism, in a posthuman context, understating that its force, relays precisely, in the configuration of an intellectual alternative to the dystopian future that we've got ahead. Comprehending that we cannot build what we cannot imagine, and the transition times, are always susceptible for new ideas to come, because is when the ideological hegemonic system is weaker.

So we have deployed an approach based on the concepts of responsibility and nonviolence, without renouncing to technology, but to the techno-scientific system. Responsibility and lack of violence understood as a revolutionary tool to generate a new awareness, as a wakeup call in front of the big challenges that we are facing front. And as a way to undermine not only the system but also the relations and concept of power itself. In order to promote new agendas with the aim of renewing the commitment to

sustainability, social, ecological, cultural and philosophical in a new cognitive framework that can represent a real alternative to the outdated model that defines today.

We understand that green anarchism can be structured, linked with post humanism, a new balance with the environment, and unprecedented freedom with regard to our cognitive and intellectual development, and even more, a new conceptualization of the human, outside of the borders defined by tradition, mainly built around the notions of humanism and anthropocentrism. Offering a renewed approach to an unknown future that we are begging to build.

In addition, like any theory of anarchist nature, it should not aspire to be hegemonic, standardize, or harmonize, some of the worst risk related with technology, that always take advantage those kind of process in order to take control of the systems evolution. But to offer alternative imaginary futures of different realities, even antagonistic realities that could help us advance in the liberation of the individual through the liberation of the ecosystem.

The window opened by the post-humanism, and the battle it represents in the field of improvement or even the total overcoming of the human, must be exploited, not under conservative cognitive frameworks related with technological disruption, but under the acceptance of the premise of a gradual conversion of our species, because the hybridization with technological elements neither can nor should be eliminated, but redirected. We are entering in an unknown territory, and our mind should be ready, and our tool prepared, for imagining another future.

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