TSU Faculty of Law

№1
2019

Journal of Law

Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№1, 2019

უნივერსიტეტის
გამომცემლობა

UDC(უაკ) 34(051.2)
ს-216

Published by the decision of Ivane Javakhishvili Tbilisi State University Publishing Board

ISSN 2233-3746

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Do Companies Enjoy Human Rights - Theoretical Analysis

Development of the protection of human rights caused the issues whether or not the companies enjoy human rights. This idea has supporters but at the same time, there are opponents to it. The Article below reviews the main aspects of both approaches, analyzes the case law of US Supreme Court as well as discusses the relation of regional international human rights treaties to their applicability to the companies. The discussion is summed up by opinion that European Convention on Human Rights is the only international multilateral human rights instrument which allows a space for the protection of the relevant rights of the company.

Key words: *European Convention on Human Rights, Companies, Human Rights, American and African Human Rights Systems, Amendment to US Constitution – Bill of Rights.*

1. Introduction

Whether or not companies enjoy human rights has been subject to sharp discussion over the long period. Despite certain case law or other authorities on this issue, there are opinions based on various theories or international legal instruments that companies should not enjoy such rights. It is very important that commercial legal entities participate in international economic and others relations. In many countries such entities are major employers and contribute to the formation and increase of gross domestic product. Therefore, in this article we shall overview the issue of usage of the same rights by commercial legal entities that by means of international agreements are enjoyed by natural persons. We shall also introduce the reader with the case law of US Supreme Court in relation to the issues above. We shall determine which international convention may be applied by commercial legal entities when seeking to protect their rights through international mechanisms and which international agreements excludes possibility of hearing of their claims.

2. Opinions in Favor of Companies' Enjoyment of Human Rights

Despite the absence of any indication of companies in the first multilateral human rights agreements[1], the practice of usage of conventions made it clear that certain rights could be used by the companies. When corporations are overwhelmed with duties (avoidance of child labor, protection of environment etc.), the suggestion that corporations can also be victims of human rights violations is not so readily appreciated[2]. Of course, there are reasons for that. Number of scholars consider it unacceptable

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1 For example, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, etc.

2 *Addo M. K.,* The Corporation as a Victim of Human Rights Violations, in: *Addo M. K.* (ed.), Human Rights Standards and the Responsibility of Transnational Corporations, Kluwer Law International, The Hague, London, Boston, 1999, 187.

to identify human being and corporation, for one thing corporations are not human but rather artificial entities[3] with no inherent ability to suffer harms associated with human rights violations[4]. Furthermore, the corporations are often associated with the private commercial domain where the guiding principles are determined by the rules of the free market, whereas the human rights are seen as directed to activities in the public domain especially with regard to governmental actions[5]. Thus, the main obstacle for the enjoyment of human rights by companies might be an artificial character of the companies' and their ties with private domain.

However, it was considered that the reasons articulated for denying human rights to corporations represent only part of the wider picture in this field: a picture which is influenced largely by traditional principles of doctrine and an excessive overlay of the historical basis of human rights[6]. Society is a diversified one and our understanding of human rights has changed considerably[7]. The increasingly central role played by corporations has opened them to as much if not more abuse by public and private authorities[8].

It is true that corporations are artificial legal entities but they are organized, operated by[9] and for the benefit of human beings[10]. There is a sense in which policies and activities directed at corporations can actually affect the human being behind the corporation[11]. Human rights would have failed in their primary purpose of protecting against abuse if they were to be limited to the direct effect on individuals[12]. The principle of effective protection as well as the need for human rights to be credible can provide a basis for extending the scope of human rights to entities such as corporations[13].

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3 *Addo M. K.,* The Corporation as a Victim of Human Rights Violations, in: *Addo M. K.* (ed.), Human Rights Standards and the Responsibility of Transnational Corporations, Kluwer Law International, The Hague, London, Boston, 1999, 187, cited: *Teubner G.,* Enterprise Corporatism: New Industrial Policy and the Essence of the Legal Person, Am. J. of Comp. Law, 1988, Vol. 36, 130.

4 *Addo M. K.,* The Corporation as a Victim of Human Rights Violations, in: *Addo M. K.* (ed.), Human Rights Standards and the Responsibility of Transnational Corporations, Kluwer Law International, The Hague, London, Boston 1999, 187.

5 *Addo M. K.,* The Corporation as a Victim of Human Rights Violations, in: *Addo M. K.* (ed.), Human Rights Standards and the Responsibility of Transnational Corporations, Kluwer Law International, The Hague/London/Boston, 1999, 187, cited: *Clapham A.,* Human Rights in the Private Sphere (OUP 1993), 91.

6 Ibid, 188.

7 Ibid.

8 Ibid.

9 Ibid. Normally, corporations are sponsored by their owners (shareholders or similar groups) and managed by professionals such as managers, directors and the rank and file of workers all of whom are human beings, cited: *Addo M.K.,* The Corporation as a Victim of Human Rights Violations, in: *Addo M. K.* (ed.), Human Rights Standards and the Responsibility of Transnational Corporations, Kluwer Law International, The Hague, London, Boston, 1999, 187.

10 Ibid. The most obvious beneficiaries are the consumers, shareholders and to some extent, employees, cited: *Addo M. K.,* The Corporation as a Victim of Human Rights Violations, in: *Addo M. K.* (ed.), Human Rights Standards and the Responsibility of Transnational Corporations, Kluwer Law International, The Hague, London, Boston, 1999, 188.

11 Ibid, 189.

12 Ibid.

13 Ibid.

Some scholars think that the general public humanizes the companies when the society deems companies to be a friend or an enemy which the companies themselves encourage through branding[14]. Humanization has also proved rather advantageous to companies in the legal field, as for example, it has allowed them to use human rights to further their agenda[15]. Most people would accept that companies make invaluable contribution to our societies and thus should be encouraged through a mix of facilitative and restrictive regulation, varying depending on the State's relative priorities[16].

3. Opinions Against of Companies' Enjoyment of Human Rights

It is obvious that the above-mentioned ideas are opposed by many. They think that companies should not enjoy human rights and this stipulation is based on direct interpretation or on conventional bodies' interpretation of the Universal Declaration of Human Rights and of other fundamental international instruments in the field of human rights.

The international human rights regime is built around the Universal Declaration of Human Rights (UDHR) and its two related covenants, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)[17]. It comprises a system of standards and implementation procedures centered on the United Nations – in particular the Human Rights Council - supported by a small group of regional human rights regimes, key among which is the European Convention on Human Rights[18].

Despite this fact, some scholars think that "Transnational Corporations have such a decisive influence on international human rights law and discourse that the entire UDHR paradigm stands imperiled by the development of a new paradigm of "trade related, market-friendly human rights (TRMFHR)" that the UDHR paradigm is "being steadily, but surely, *supplanted* by a paradigm that seeks to demote, even reverse, the notion that universal human rights are designed for the attainment of dignity and well-being of human beings and for enhancing the security and well-being of socially, economically and civilizationally vulnerable peoples and communities[19]. The emergent paradigm insists upon the promotion of the collective human rights of global capital, in ways which "justify" cor-

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14 *Kohl U.,* The Sun, Liverpudlians and "The Truth": A Corporate Right to Human Right? in: *Harding C., Kohl U., Salmon N.,* Human Rights in the Market Place, The Exploration of Rights' Protection by Economic Actors, Routledge, London and New York, 2016, 23.

15 Ibid, 24.

16 Ibid, 25.

17 *Grear A.,* Corporations, Human Rights and the Age of Globalization: Another look at the "Dark Side" in the Twenty-First Century", in: *Wilson H. B., Grear A.* (eds.), Human Rights in the World Community: Issues and Action, Fourth Edition, University of Pennsylvania Press, Philadelphia, 2016, 420.

18 Ibid 421, with further references.

19 *Grear A.,* Corporations, Human Rights and the Age of Globalization: Another look at the "Dark Side" the Twenty-First Century, in: *Wilson H. B., Grear A.* (eds.), Human Rights in the World Community, Issues and Action, Fourth Edition, University of Pennsylvania Press, Philadelphia, 2016, 420, see citation: *Baxi U.,* The Future of Human Rights, Oxford University Press, Oxford, 237.

porate well-being and dignity even when it entails continuing gross and flagrant violation of human rights of actually existing human beings and communities[20]".

It is also noteworthy that UDHR[21] as well as ICCPR[22] and ICESCR[23] do not directly touch upon the applicability of these covenants to the companies and include no such provision in the text. Therefore, some scholars believe that the only beneficiary of these covenants may be human beings. Although in Georgian translation of Article 2 of ICCPR, it is the word "person" that is mentioned as a term, it does not change the meaning of the English word "individual's" meaning which is used to indicate to the human being. Opinions expresses in literature tend to imply that the ICCPR does not recognize rights of corporations[24]. The Human Rights Committee took a restrictive approach in the case of *A Newspaper Publishing Company v. Trinidad and Tobago* where it simply stated that "only individuals may submit a communication…A company incorporated under the laws of a State party to the Optional Protocol as such, has no standing… regardless of whether its allegations appear to raise issues under UN Covenant[25]".

Such a strict explanation does not allow different interpretation of the Covenant and its Optional Protocol but some authors opine that Human Rights Committee indirectly recognized the rights of corporations – "the Human Rights Committee, until 1993 denied that corporate bodies can claim to be victims of violations of any rights under the Covenant for the purpose of founding a right of individual petition under the Optional Protocol[26]. In 1993, it accepted that corporations may have rights under Article 19 of the Covenant which is concerned with freedom of expression[27]". According to other scholars the principle of effective protection as well as the need for human rights to be credible can provide a basis for extending the scope of human rights to entities such as corporations and the Com-

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20 *Grear A.,* Corporations, Human Rights and the Age of Globalization: Another look at the "Dark Side" the Twenty-First Century, in: *Wilson H. B., Grear A.* (eds.), Human Rights in the World Community, Issues and Action, Fourth Edition, University of Pennsylvania Press, Philadelphia, 2016, 420, see citation: *Baxi U.,* The Future of Human Rights, Oxford University Press, Oxford, 237.

21 See Article 2 of UDHR "Everyone is entitled to all the rights and freedoms set forth in this Declaration".

22 See "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" – Article 2.1 of International Covenant on Civil and Political Rights

23 "The state parties to the present covenant recognizing that these rights derive from the inherent dignity of the human person", see Preamble of the International Covenant of Economic, Social and Cultural Rights.

24 *Cassimatis E. A.,* Human Rights Related Trade Measures under International Law: The Legality of Trade Measures Imposed, in Response to Violations Human Rights Obligations under General International Law, Martinus Nijhoff Publishers, Leiden, Boston, 2007, 45.

25 *Harding C., Kohl U., Salmon N.,* Human Rights in the Market Place, The Exploration of the Rights Protection by Economic Actors, Routledge, London and New York, 2016, 25, see citation: *A Newspaper Publishing Company v. Trinidad and Tobago* (360/1989).

26 *Dine J.,* Companies, International Trade and Human Rights, Cambridge University Press, 2005, 205-206, cited: *Feldman D.,* Corporate Rights and the Privilege Against Self-incrimination, in: *Feldman D., Meisel F.* (eds.), Corporate and Commercial Law: Modern Developments, Lloyds of London, 1996, 365; *Novak M.,* UN Covenant on Civil and Political Rights: CCPR Commentary, Engel, Kehl, 1993.

27 *Dine J.,* Companies, International Trade and Human Rights, Cambridge University Press, 2005, 205-206.

mittee endorsed this principle of derivative entitlement[28]. When the respondent State in *Allan Singer v. Canada* objected to the admissibility of the communication which alleged a violation of Article 19 of the Covenant the Human Rights Committee decided that: "The state party has contended that the author is claiming violations of rights of his company, and that a company has no standing under article 1 of the Optional Protocol. The Committee notes that the Covenant rights which are at issue in the present communication, and in particular the rights to freedom of expression, are by their nature inalienably linked to the person. The author has the freedom to impart the information concerning his business in the language of his choice. The Committee therefore considers that the author himself, and not only his company, has been personally affected by the contested provisions of Bills Nos. 101 and 178[29]".

Appropriate Article of the International Covenant on Economic, Social and Cultural Rights is of a very general character and avoids specific mention of its subjects[30].

Some scholars go even further and steadily criticize those scholars who recognized enjoyment of human rights by the companies in their academic works. According to such critics: "The corporation, while representing one manifestation of a human right to association, reflecting the outcome of autonomous human choices, and serving human interests in property an profit, is not reducible, in any straightforward way, to the embodied vulnerability of the human sub-stratum beneath it[31]". The legal personality of an institution grants the institution an existence independent of its members[32]. It can be sued in its own name, it can own property in its own name and that property does not, thereby, become the property of the human being who at any moment make up human sub-stratum[33]. These facts should alert us to the absence of any simple continuity between the corporation and its human sub-stratum for the purposes of attributing the individual human rights of human beings to the corporate form[34].

Although the idea that "transacting business under the forms, methods and procedure pertaining to so-called corporations is simply another mode by which *individuals* or *natural persons* can enjoy their property or engage in business[35]" is partially supported, still it is believed that the main difference

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28 *Addo M. K.,* The Corporation as a Victim of Human Rights Violations, in *Addo M. K.* (ed.), Human Rights Standards and the Responsibility of Transnational Corporations, Kluwer Law International, 1999,189.

29 Ibid.

30 See paragraph 2, Article 2 of the Covenant – "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

31 *Grear A.,* Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights, Hum. Rights Law Rev. Vol. 7, Issue 3, 2007, Oxford University Press, 7.

32 Ibid.

33 Ibid.

34 Ibid.

35 *Grear A.*, Redirecting Human Rights. Facing the Challenge of Corporate Legal Humanity, Palgrave Macmillan, 2010, 33, cited: *Hohfeld W. N.,* Nature of Stockholders Individual Liability for Corporate Debts, (1909) 9 Columbia Law Review 288, with further reference: *Finnis*, The Priority of Persons, in: *Horder J.* (ed.), Oxford Essays in Jurisprudence, Volume IV, (Oxford: Oxford University Press, 2000).

in enjoyment of human rights between the corporation and human being is "embodies vulnerability" pertaining to human beings[36].

4. Bill of Rights and the Case Law of US Supreme Court

From this point of view it is very interesting to observe US Supreme Court's interpretation over the applicability towards companies of the amendments of the US Constitution - Bill of Rights – one of the first documents in the field of human rights.

Human rights and private corporations, traditionally, have not been linked terms[37]. There are at least two explanations for this phenomenon[38]. One explanation is that the discussion of human rights initially took place in the sphere of international law, where, until recently, nation states were the sole actors[39]. The other explanation is that the relative economic significance of private corporations when compared with the nation states escaped our attention until quite recently[40].

In the United States, the recognition of the separate personality of the corporations with existence as a juridical entity, separate from its shareholders, has gone through three stages and is now entering a fourth[41]. The content and scope of the rights and duties of the corporations have developed over the years in response to evolving theoretical understanding of the nature of the corporate persona[42]. One's choice of theory of corporate personality also has significant implications for whether one is likely to consider corporations as having human rights[43].

As early as in 1819, in one of the cases Chief Justice Marshall declared the following:" A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which charter of its creation confers upon it, either expressly or as incidental to its very existence[44]". This approach is called *artificial entity* or *fic-*

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36 *Grear A.,* Redirecting Human Rights. Facing the Challenge of Corporate Legal Humanity, Palgrave Macmillan, 2010, 32.

37 *Wood S. G., Scharff B. G.,* Applicability of Human Rights Standards to Private Corporations: An American Perspective, Am. J. Comp. L., Vol 50, Oxford University Press, 2002, 541, <http:/www.jstor.org/stable/840888?seq=1&cid=pdf-reference#references_tab_contents>, [02.08.2017].

38 Ibid.

39 Ibid.

40 Ibid.

41 *Blumberg Ph.,* The Corporate Personality in American Law: A Summary Review, Faculty Articles and Papers, 197, 1996, 49, <http://digitalcommons.uconn.edu/law_papers/197>, [27.07.2017].

42 *Wood S. G., Scharff B. G.,* Applicability of Human Rights Standards to Private Corporations: An American Perspective, Am. J. Comp. L., Vol. 50, Oxford University Press, 2002, 541, <http:/www.jstor.org/stable/840888?seq=1&cid=pdf-reference#references_tab_contents>, [02.08.2017].

43 Ibid.

44 *Blumberg Ph.,* The Corporate Personality in American Law: A Summary Review, Faculty Articles and Papers, 197, 1996, 49, Cited: Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 *1819); <http://digitalcommons.uconn.edu/law_papers/197>, [27.07.2017].

tion doctrine. When the corporation is viewed as an artificial or fictional entity, it would appear quite unlikely that a corporation would be viewed as a holder of "human rights"[45].

As the Supreme Court commenced determination of the rights of the corporation under the new federal Constitution, a second, more complex theory of the corporate personality emerged reflecting the interests of the incorporators and shareholders of the corporation[46]. The corporation was perceived as an association of individuals contracting with each other in organizing the corporations, with its core attributes as an artificial legal person supplemented by the attribution to it of constitutional rights of its shareholders[47]. As justice Field noted: " Private corporations are, it is true artificial legal persons but… they consist of aggregation of individuals united for some legitimate purpose…The courts will always look beyond the name of the artificial being to the individuals whom it represents[48]". This theory is called *aggregation* or *associational* theory. Because the corporation is not viewed as an entity in its own right, from an aggregationalist perspective one might argue that the corporation does not itself have rights and duties, since the enterprise is comprised of individuals who themselves have disparate interests, rights and duties[49].

According to third approach, referred to as *natural entity* or *real entity* approach, corporation has been perceived as an organic social reality with an existence independent of, and constituting something more than, its changing shareholding[50]. When the corporation is viewed as a natural entity, it is much more likely that the corporation will be seen as having rights and duties that are very similar to those of human beings[51].

Based on all three approaches the US Supreme Court elaborated its case law, under which it empowered legal persons in general, including companies number of rights stipulated by US Constitution, including those rights that according to the text of the norm could have been attributable only to natural person. For example, corporations have been granted such rights as freedom of speech, free-

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45 *Wood S. G., Scharff B. G.,* Applicability of Human Rights Standards to Private Corporations: An American Perspective, Am. J. Comp. L., Vol 50, Oxford University Press, 2002, 542, <http:/www.jstor.org/stable/840888?seq=1&cid=pdf-reference#references_tab_contents>, [02.08.2017].

46 *Blumberg Ph.,* The Corporate Personality in American Law: A Summary Review, Faculty Articles and Papers 197, 1996, 50, <http://digitalcommons.uconn.edu/law_papers/197>, [27.07.2017].

47 Ibid.

48 The Railroad Tax Cases, 13 F. 744 (C.C.D. Cal. 1882), appeal Dismissed as moot sub nom. San Mateo County v. Sothern Pac. R.R., 116 U.S. 138 (1885) in: *Blumberg Ph.,* The Corporate Personality in American Law: A Summary Review, Faculty Articles and Papers 197, 1996, 49, <http://digitalcommons.uconn.-edu/law_papers/197>, [27.07.2017].

49 *Wood S. G., Scharff B. G.,* Applicability of Human Rights Standards to Private Corporations: An American Perspective, Am. J. Comp. L., Vol. 50, Oxford University Press, 2002, 544, <http:/www.jstor.org/stable/840888?seq=1&cid=pdf-reference#references_tab_contents>, [02.08.2017].

50 *Blumberg Ph.,* The Corporate Personality in American Law: A Summary Review, Faculty Articles and Papers 197, 1996, 49, <http://digitalcommons.uconn.edu/law_papers/197>, [27.07.2017].

51 *Wood S. G., Scharff B. G.,* Applicability of Human Rights Standards to Private Corporations: An American Perspective, Am. J. Comp. L., Vol. 50, Oxford University Press, 2002, 544, <http:/www.jstor.org/stable/840888?seq=1&cid=pdf-reference#references_tab_contents>, [02.08.2017].

dom from unreasonable searches and seizures, etc[52]. It is especially interesting to note that in relation to the latter right the 7-th amendment to the US Constitution terminologically refers to "people" as to the subjects of the norm: "The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized[53]". The Supreme Court in *Hale v. Henkel*[54] held that the term "people" protected corporations against the production of corporate records seized under circumstances violating the provision[55]". All the above mentioned indicates that terminological difference have not been a burden for the Supreme Court to attribute appropriate rights to companies.

Since 1960 the Court has stopped theorizing about the nature of corporation and retreated to more pragmatic means of deciding the degree of constitutional rights available to corporations[56]. Rather than determine the extant to which corporations deserved to be treated like natural persons, the Court assessed the degree to which according corporations constitutional protections would benefit natural persons[57].

Taking into consideration that legal person was created by natural persons in order to regulate certain relations of individuals, most probably, the later approach should be the main cornerstone when deciding in practice enjoyment by the corporation of this or that right attributable to the individuals.

5. American and African Human Rights Systems

The situation is slightly different in non-European regional human rights systems. American Convention on Human Rights[58] even in its preamble points to the natural persons as to the beneficiaries of those rights – "recognizing that the essential rights of man are not derived from one's being a national of a certain state" and "reiterating that in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his

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52 For detailed review of constitutional right attributable to companies, please, see:
Wood S. G., Scharff B. G., Applicability of Human Rights Standards to Private Corporations: An American Perspective, Am. J. Comp. L., Vol. 50, Oxford University Press, 2002, 544, <http:/www.jstor.org/stable/840888?seq=1&cid=pdf-reference#references_tab_contents>, [02.08.2017].
Blumberg Ph., The Corporate Personality in American Law: A Summary Review, Faculty Articles and Papers 197, 1996, 49 -69, <http://digitalcommons.uconn.edu/law_papers/197>, [27.07.2017].

53 See, 7-th amendment to the US Constitution.

54 201 U.S. 43 (1906).

55 *Blumberg, Ph.,* The Corporate Personality in American Law: A Summary Review, Faculty Articles and Papers, 197, 1990, 60, <http://digitalcommons.uconn.edu/law_papers/197>, [27.07.2017].

56 *Graver D.,* Personal Bodies: A Corporeal Theory of Corporate Personhood, The University of Chicago Law School Roundtable, 1999, Vol. 6, Iss. 1, Art. 11, 240, <http://chicagounbound.unchicago.edu/roundtable/vol6/iss1/11>, [26.07.2017].

57 Ibid.

58 American Convention on Human Rights, 1969.

civil and political rights[59]". It is significant to underline that the Convention does not confine itself to limit the rights attributed by the Convention only to natural persons and additionally, in paragraph 2 of Article 1 declares that "for the purpose of this Convention, "person" means every human being[60]".

Preamble of the African Charter on Human and Peoples' Rights[61] does not make a special reference on usage of the rights included therein by only natural persons. However, in the text of the Charter, Article 2 absolutely clearly indicates only to natural persons, by applying the terms "individual", which makes it impossible to apply the normative content of Article 2 of the Charter to other persons except of natural persons – "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status[62]".

Eventually, it's hard not to agree with the Dutch scholar Uta Kohl's conclusion made after review of the concepts about applicability of human rights by companies:

"1. There is no general consensus on the corporate right to human rights;

2. Positions at either of the spectrum are taken with the confidence attached to obvious unarguable facts (which can partly be attributed to the wording of the instruments in question);

3. Where, as in Europe, companies have been granted the victim status in respect of some human rights, the basis for that protection appears to have been the status of the company as a legal person[63].

4. The company's most explicit entitlement is to the right to the protection of property, and

5. The artificial nature of the corporate person has even in Europe meant that companies cannot take advantage of all human rights[64]".

6. European Convention on Human Rights

Based on the present research it can be maintained that it is the European Convention on Human Rights which is the only multilateral international agreement in the field of human rights which directly stipulates protection of the rights of the companies. Such a conclusion derives from the Preamble of the Convention as well as from text of number of Articles of the Convention referring to the

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59 See, paragraphs 2 and 4 of the Preamble of the American Convention on Human Rights, 1969.

60 Ibid, paragraph 2, Article 1.

61 African Charter of Human and People's Rights, 1981.

62 See, Article 2 of the African Charter of on Human and Peoples' Rights, 1981.

63 This phenomenon is by no means limited to Europe; see Article: *Ohlin J. D.,* Is the Concept of the Person Necessary for Human Rights? Colum. L. Rev. 105:209, 2005, 226ff: cited *Kohl U.,* The Sun, Liverpudlians and "The Truth": A Corporate Right to Human Right?, in: *Harding C., Kohl U., Salmon N.,* Human Rights in the Market Place. The Exploration of Rights' Protection by Economic Actors, Routledge, 2016, 29.

64 *Kolh U.,* The Sun, Liverpudlians and "The Truth": A Corporate Right to Human Right?, in: *Harding C., Kohl U., Salmon N.,* Human Rights in the Market Place. The Exploration of Rights' Protection by Economic Actors, Routledge, 2016, 29.

companies as to the subjects of appropriate Articles. Attribution of some other norms to companies is determined by the rule on admissibility of the claim and by Case Law of European Court of Human Rights. According to scholars, "Court has never engaged in a technical legal sense with the question of whether the artificiality of the corporation imposes limitations on its ability to be the victim of a rights violation[65]".

Under Article 1 of the European Convention on Human Rights: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention". The term "everyone" might be more applicable to natural persons rather than to the legal entities. However, the content of the Conventional norms as well as practice of their applicability allows not only to deviate from this term but also, based on other norms, to attribute them to legal entities including companies. Therefore, the opinion expressed in the academic environment that Article 1 "incorporates *inter alia* a supervisory responsibility for the states within their domestic jurisdictions which encompasses the potential violations from all and every dimension – private or public[66]" is fully grounded.

If we follow the numbering of the Conventional Articles the first norm which is directly attributed to companies is paragraph 1 of Article 10, according to which "Everyone has the right to freedom of expression. This right shall include to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television and cinema enterprises".

Thus, we face a situation when one of the material Articles of the Convention directly envisaged its applicability to the companies and this fact undoubtedly indicates a link of other articles to the companies. Of course, it would have been illogical to assume that only this very article applies to the companies simply because only it refers to the enterprises. The final confirmation on this debate took place in paragraph 1 of Article 1 of the First Protocol of the Convention defining that "every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interests and subject to the conditions provided for by law and by general principles of international law". This provision fully excluded any assumption about whether or not the companies may enjoy the rights set out in the Convention.

Despite expression in material norms, the ability of legal persons to apply the Convention is also prescribed in Section II of the Convention dealing mostly with procedural principles and stipulates procedures and rules. Article 34 of the Convention underlines "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of

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65 *Kolh U.,* The Sun, Liverpudlians and "The Truth": A Corporate Right to Human Right?, cited: *Dignam A. J., Allen D.,* Company Law and the Human Rights Act 1998, Butterworths, London 2000, 173, in: *Harding C., Kohl U., Salmon N.,* Human Rights in the Market Place, The Exploration of the Rights Protection by Economic Actors, Routledge, 2016, 27.

66 *Addo M. K.,* Applicability Human Rights Act to Private Corporations, in: *Betten L.* (ed.), The Human Rights Act 1998, What It Means. The Incorporation of the European Convention on Human Rights into the Legal Order of the United Kingdom, Martinus Nijhoff Publishers, The Hague, London, Boston, 1999, 197.

violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right". Taking into consideration the fact that material right should also have a procedural guarantee it was correctly stressed out in the doctrine that "given the explicit reference to "legal person" in respect of the right to property seems justified also to interpret "person" in Article 34 broadly, as otherwise companies would have a right but not a remedy (in terms of making a complaint)[67]".

Although there is no indication to legal persons and especially, to companies in this article, but the Court itself through many decisions on admissibility or judgments on merits, underlined that term "non-governmental organization" also implies the companies. This very issue is discussed in the Practical Guide on Admissibility Criteria that emphasizes that "application may be submitted by any non-governmental organization in a general sense of this term e.i. by any organization except of those who exercise governmental powers[68]". Taking into consideration those criteria, it is evident that since companies do not perform any governmental powers (except of cases of delegation, which are very rare), they fully satisfy *ratione personae* status provided that the issue concerns rights attributed to them. Based on these considerations, the scholars consider such an approach of European Court of Human Rights as progressive, which is absolutely correct. "The institutions of the ECHR are not commonly associated with a dogmatic approach to the interpretation of human rights standards. It is not surprising that the case law of the Convention has extended beyond governmental activities in the public law domain. The ECHR has found application within the private sphere including instances which involve private corporation. The legal bases for the progressive use of the Convention is found in the text of the Convention as well as in what is the true and purposive interpretation of the Convention[69]".

7. Conclusion

There is no unanimous approach within human rights scholars, whether or not the enterprises should enjoy the human rights. At the same time, the practice of US Supreme Court allows applicability of certain rules of Bill of Rights to commercial legal entities. As regards the multilateral international legal instruments, the universal agreements do not contain direct norms in relation to companies, while the dispute resolution bodies established by above mentioned multilateral instruments are not ready at this stage to apply conventional rules in relation to commercial legal entities. The regional

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67 *Kolh U.,* The Sun, Liverpudlians and "The Truth": A Corporate Right to Human Right?, in: *Harding C., Kohl U., Salmon N.,* Human Rights in the Market Place. The Exploration of Rights' Protection by Economic Actors, Routledge, 2016, 27.

68 Practical Guide on Admissibility Criteria, Council of Europe/ European Court of Human Rights, 2011, 10, <http://echr.coe.int/Documents/Admissibility_guide_KAT.pdf>, [20.01.2018] (in Georgian).

69 *Addo M. K.,* Applicability Human Rights Act to Private Corporations, in: *Betten L.* (ed.), The Human Rights Act 1998, What It Means. The Incorporation of the European Convention on Human Rights into the Legal Order of the United Kingdom, Martinus Nijhoff Publishers, The Hague, London, Boston, 1999, 197.

agreements also do not recognize the rights of companies except of the European Convention of Human Rights.

Despite theoretical contradictions, companies do have certain space to protect their rights based on the provisions of international human rights treaties. Although at this stage, such space is limited only to European Convention on Human Rights, overall, it is still a huge achievement in the sphere of human rights and enlarges practical applicability of international instruments on human rights.

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Diana Berekashvili*

Recognition of a Person as an Unworthy Heir and Inheritance-Legal Sanctions upon the Mandatory Heir of the Share

The civil code of Georgia imperatively defines the circle of mandatory heirs (beneficiaries), who still have the possibility to receive a certain share of inheritance against the will of the bequeather and irrespective of the contents of the will. The inheritance right constitutes the fundamental and traditional aspect of the right of private property. [1]The right of private property is the possibility to acquire property and not the property itself. [2]However, the danger exists that using this possibility will fail and the condition of the mandatory heir will essentially change contingent upon concrete legal circumstances.

A human is born naturally free and this freedom is restricted with rights and obligations by a human himself, deriving from the principles of mutual respect and mutual responsibility.[3]The negligence of exactly these moral norms, which are based on mutual respect and mutual responsibility, preconditions the withholding of the rights of inheritance.

The heirs whose rights of inheritance have been withheld can be divided into two groups. The first group includes those who cannot be heirs either by will or by law, i.e. unworthy heirs, and the second group includes those who cannot be heirs by law but can be heirs by a will. Such a division can be explained, on the one hand, by the necessity of prioritizing the will of a bequeather, and, on the other hand, by the necessity of considering any possible unlawful infringement of the interests of a bequeather by the heirs during his/her lifetime.[4]The presented work discusses the concept of mandatory share, the legal sanctions of withholding of inheritance and the preconditions of its implementation.

Key words: *Property, inheritance, bequeather, heir, the inheritance amount, mandatory share, unworthy heir, withholding the inheritance, inheritance-legal sanctions, family-legal sanctions*

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1. Introduction to Withholding the Inheritance Right

A number of norms of withholding the inheritance right can be traced in old Georgian law, for instance, article 58 of *Samartbeka* describes the case when a father expels his son from the house and this way deprives him of inheritance. Obviously, this action would not have taken place without a reason and the father's decision would have been the response to the unlawful behavior of the son, although even this deprived inheritance right can be restored, depending on how the son behaves after

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1 The Decision of the European Court of Human Rights on June 13, 1979, on the case Marckx v. Belgium, doc. № 6833/74.

2 *Zoidze B.,* Property Law, Tbilisi, 2003, 86 (in Georgian).

3 *Tchanturia L.,* Property of Immovables, Tbilisi, 2001, 112 (in Georgian).

4 *Gongalo U. B.,* Legal Facts in the Inheritance Law of Russia and France, Comparative-Legal Study, Moscow, 2010, 28 (in Russian).

being expelled: whether he repents his "sins" or commits even more "crimes". That is why, the legislator claims the following: "if a son obeys a father, forgiving him and not keeping grudge, the father can change the mind and no one will stand in the way of bequeathing the land to the son", however, if the son does not improve his behavior and continues unworthy action, he will be deprived of the inheritance right for good – "for if a son leaves the house and keeps grudge against his father, and continues to behave unlawfully, he should never hope to inherit his father's land". [5]By underscoring the family relationships, the mandatory share law should be considered within family context. Considering a family without solidarity ties is sensless. Solidarity does not mean the balance between giving and receiving, but it means tolerating certain imbalance sometimes, and it should prove its right of exitence exactly under these conditions. "Solidarity", in the first instance, means a morally justified relationship between family members. The inheritance law provides the offspring with the possibility of receiving the minimum inheritance in the form of mandatory share. So far, not a single field has united biological and genetical ties between generations so tightly in view of transferring inheritance.[6]

The inheritance right, as the basic constitutional right, is equated to the property right.[7] Property is the expression and precondition of personal freedom.[8]Not only does the withholding of inheritance mean the deprivation of private property, but it also implies the debasement and the exposure of a person in a rebukable activity. The linking of property right to personal freedom, in the first instance, is expressed in property relationships, where the goal of the property is to guarantee the citizens with the wide opportunities in the spheres of entrepreneurship, trade, free administering of the property, inheritance and many others.[9]The behavior of an heir regarding the desire and the means of obtaining the inheritance, the attitude and solidarity towards the bequeather before revealing the heirloom, define the criteria for withholding the inheritance.

The limitation or withholding of inheritance is not contingent upon the bequeather's will, but the legislature imposes upon him/her strict regulations and entrusts the final decision to the court who should take into account and make judgment of both moral norms and legal issues of the case before coming to conclusion. "The basis for withholding inheritance should correspond modern views of morality, the withholding of mandatory share should correspond the challenges of transforming immoral lifestyle".[10] For setting the preconditions of withholding the inheritance, the court must evaluate the honest performance of social responsibilities by an heir (such as taking care of a bequeather). The premeditated crime committed by an heir or any other immoral behavior against the will of a bequether must be carefully considered. The right of acquisition of inheritance cannot be based upon the dishonest behavior of an heir. Neither inheritance nor property rights can be gained by a person

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5 *Zoidze B.,* Old Georgian Inheritance Law, Tbilisi, 2000, 256 (in Georgian).

6 *Weigel S.*, European Perspectives on Heritage Culture, Taylor&Francis LTD, The Cardozo School of Law, 2008, 281.

7 *Leibholz G.*, Jahrbuchs des öffentlichen Rechts der Gegenwart, neue Folge, 1982, 148.

8 *Meier-Hayoz A.*, Vom Wesen des Eigentums, cited in: FG f. Carl Oftiger, Zürich 1969, 171.

9 *Tchanturia L.*, Property of Immovables, Tbilisi, 2001, 109 (in Georgian).

10 *Klingelhöffer H.,* Pflichtteilsrecht, 2. völlig neue bearbeitete Aufl., München 2003, 37.

through violation of law and moral norms. At the same time, the benefit brought to the creditor or the loss inflicted upon the debtor, that would not have happened in the case of honest behavior, should be carefully evaluated in each specific case.[11]In the process of considering all these criteria, the priority of interpreting the legal norm as connected with modernity should be borne in mind at all times, for the interpretation of a norm cannot always retain the views of the time of its inception. The sensible function that a law might carry at the moment of its application should be considered. A norm is in continuous connection with social relationships and with public-political views, which it should influence in its turn. Its contents can and must be amended in accordance with the existent circumstances. This rule is particularly significant when social relationships and legal views have so fundamentally changed between the times of passing the law and its application as it was the case in the 20th century.[12]

The civil law of Georgia has generally imposed inheritance-legal sanctions upon: 1. unworthy heirs; 2.the heirs who viciously avoided the responsibility of supporting and caring for the bequeather; 3. The spouses who terminated the family relations no less than three years before the exposure of the inheritance and 4. The heir who has been deprived of inheritance by the order of bequeather's will.

2. The Preconditions for the Recognition of a Person as an Unworthy Heir

The right of a mandatory share presents a special type of inheritance right, which cannot be regarded as a legal inheritance, since it originates only by the will of inheritance. At the same time, the right of a mandatory share is not solely the inheritance right by will, in as much as the legal dedefinition of an obligatory share of the heirs of the first instance indicates their priorities relative to others, despite the contents of the will. Thus, being a special type of inheritance right, obligatory share right complies with all those norms that are generally defined in relation to inheritance right.[13]Article 1381 of the civil code of Georgia (CCG as mentioned later on) defines the preconditions of withholding the mandatory share and states the general principles of withholding the inheritance right. Articles 1310 and 1311 of CCG stipulate the general reasons for withholding inheritance rights. A distinction should be made between recognizing a person as an unworthy heir and withholding a mandatory share. Although different legal regulations apply to these instances, they still have one commonality, namely, the fact that the normative frameworks of the basic norm, article 1310 of CCG, are ambiguous, for they define those preconditions for recognizing an unworthy heir, which, according to the article 1381-I of CCG, are also applied to the cases of withholding a mandatory share. Therefore, the law does not

11 *Palandt O.,* BGB, 73 Aufl., 2014, §242, Rn.42-45.

12 BVerfGE, Beschluss des Ersten Senats vom 14. Februar 1973, Band 34, 288, <http://www.servat.unibe.ch/dfr/bv034269.html>, [12.08.2019].

13 *Chikvashvili Sh*., Inheritance Law, Tbilisi 2000, 130 (in Georgian).

regulate separately the cases when a lawful heir or an heir by will, acquires the inheritance by means of infringing upon the life of a bequeather or by attemting to do so.[14]

According to the article 1310 of CCG, a person cannot be considered a lawful heir or an heir by will, if he/she purposefully hindered the bequeather in carrying out his last will, and in such a way, facilitated his/her inclusion or the inclusion of his/her close relatives in the will, incentivised the increase of the share of inheritance, or committed a premeditated crime or any other immoral act against the final will of a bequeather. If the court vindicates these circumstances, the person will be recognized as an unworthy heir. The concept of morality is especially interesting in understanding the given norm. While interpreting it, historically changing views should be taken into consideration, the views that were accepted in social relations and went through continuous changes. Thus, a modern and different interpretation of the norm is also possible[15]. The first part of the norm of recognizing a person as an unworthy heir indicates the various actions of an heir that engendered certain inheritance concessions or priorities towards an heir or his/her close relatives. This concerns both types of inheritance. The second part of the norm concerns commiting a premeditated crime or any other immoral action against the will of a bequeather. It could be the case that a person does not act in his favor but hinders the bequeather in carrying out his/her last will. The norm implies that the inheritance right is withheld in relation to the bequether towards whom the heir has committed a crime or has acted indecently.[16]

The following preconditions are necessary for recognizing a person as an unworthy heir: **An action must be premeditated.** Careless or negligent behavior of an heir that has caused the death of a bequether does not hinder the acquisition of inheritance.[17]Those individuals who committed an action that presented a public danger cannot be regarded as unworthy heirs, if the action was committed by them while being *non compos mentis* (mentally insane) and were not able to realize their actions or could not control the events. Likewise, the actions of the persons under the age of 14 and of the individuals receiving support or sustenance (considering limitations) cannot be regarded as the preconditions for withholding the inheritance. This can be explained by the fact that although such persons have committed morally reprehensible actions, they are still not regarded as offenders. [18]

The actions must be unlawful. The inactivity of an individual can also be regarded as a precondition for being declared as an unworthy heir. [19]The accomplishment of an unlawful action does not influence the decision of declaring a person as an unworthy heir. The following statement clarifies the matter: "they supported, incentivized or attempted to facilitate" the act of declaring a person as an unworthy heir. The reasons behind the action make no difference. The unlawful actions must facilitate,

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14 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, Georgian Law Review, № 4, 2003, 516 (in Georgian).

15 BVerfGE, Urteil vom 15. Januar 1958, Band 7, 215, <http://www.servat.unibe.ch/dfr/bv007198.html №208>, [12.03.2019].

16 *Shengelia R., Shengelia E.,* Inheritance Law, Tbilisi, 2011, 24 (in Georgian).

17 *Chikvashvili Sh*., Inheritance Law, Tbilisi 2000, 26 (in Georgian).

18 *Sergeev A. P., Tolstoy U. K.,* Civil Law, Moscow, 2006, 641 (in Russian).

19 Ibid, 640.

i.e. cause the invitation of an unworthy heir or other individuals to receive the inheritance, as well as, trigger the increase of his/her or others' share. [20]

The actions must be directed against the final wish of a bequeather as expressed in his/her will. Here, again, the accomplishment of the action and attainment of the goals are not necessary, it is the direction of the action that matters. A distinction should be made between the actions directed against the final wish of a bequeather as expressed in his/her will and the actions that violate the principle of freedom in the process of drafting the will. The former can be realized only after drafting the will. This can be achieved through such actions as forcing a person to change the will or declining the inheritance share in favor of an unworthy heir. The following ativities violate the freedom of drafting a will: the action that hindered the drafting of a will, [21]the distortion of the will of a bequeather or wrongful formulation of his/her will, the creation of forceful or deceitful conditions for drafting the will.[22]The precondition for being recognized as an unworthy heir can be established when the heir puts the bequeather under such circumstances that the latter will not be able to draft or re-draft the will till the moment of death, or when the heir hides such facts from the bequether that would make the latter decide the issue of inheritance in a different way,[23]or when there exist unlawful actions that are directed against the will of the bequeather. The unlawful actions can also involve hiding the authentic will, forcing the bequether to draft the will or will obligation/responsibility in favor of a specific person, forcing the lawful heir to decline the right to receive inheritance or forcing the person responsible for the will to decline the will obligation.

The aim of the action that implies that the heir facilitates or attempts to facilitate the inclusion of himself or his close relatives in the will or the increase of his inheritance share**.** The motive of the committed action is vividly revealed, deriving from the goals of the norm. The heir commits unlawful actions in order to bring upon the inheritance the fate that is in the interests of the people committing these actions and act in his favor under any circumstances. The murder of a bequeather committed on the grounds of jealousy or out of unworthy intentions is equated to the premeditated murder, hence, necessitates the opening of the inheritance accordingly, and invites the unworthy heir to receive the inheritance.[24]At the same time, a person must be considered as an unworthy heir, irrespective of committing unlawful actions in his own interest or in the interests of another heir. The heir, in whose interests the unworthy heir committed the unlawful action, does not lose the right of receiving the inheritance. There is a hypothesis that: not only the heir, acting unlawfully against the be-

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20 *Sergeev A. P., Tolstoy U. K., Eliseev I. V.,* Article by Article Commentaries to the Civil Code of the Russian Federation, Part 3, Moscow, 2002, 23 (in Russian).

21 The ruling of December 12, 2001 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № 3K/623-01

22 *Sergeev A. P., Tolstoy U. K., Eliseev I. V.,* Article by Article Commentaries to the Civil Code of the Russian Federation, Part 3, Moscow, 2002, 23 (in Russian).

23 The ruling of March 27, 2002 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № 3K/1212-01

24 *Sergeev A. P., Tolstoy U. K., Eliseev I. V.,* Article by Article Commentaries to the Civil Code of the Russian Federation, Part 3, Moscow, 2002, 23 (in Russian).

queather in the interests of a third person, should be deprived of the inheritance right, but also this third person should be deprived of inheritance, in order not to protect those inheritance rights the inception of which is based on any given unlawful activity, despite the fact that the person having claims on these rights was not related to the unlawful action in any way.[25]However, the action of an unworthy heir, which legally benefitted another heir – i.e. brought him the right of acquiring the inheritance, should not be the responsibility of the latter, for he should not be liable for the unlawful actions of another person. The ungrounded expansion of the circumstances under which the inheritance right is withheld can bring about unjust consequences for the honest heir.

The court trial practice considers the direction of the actions of an heir against the final will of a bequeather as a precondition for recognizing him as an unworthy heir. An unworthy heir should realize that the direction of his action will yield certain results. The conflict or verbal abuse between a bequeather and an heir do not create preconditions for withholding the inheritance. [26]In the case,[27]in which there was a dispute over the withholding the right of inheritance, the court explained that the heir who had not had any contacts with the bequeather for years before the latter's death, could not have hindered him in carrying out his final will. Thus, the bequeather freely fulfilled his last wish and drafted the will, by which he bequeathed his inheritance to the defendant heir. Although the fact of the "abusive verbal-mention" of the bequeather and his family by the heir was proved, and the court considered this to be an unacceptable and unworthy behavior, this action could not be considered as the basis for acting against the final will of the bequeather.[28]Furthermore, if the bequeather had not drafted any will at all, the heir could in no way have committed any action against the last will of the bequeather.[29]The conflict between a bequeather and an heir does not precondition the withdrawal of the right of inheritance[30]and pertains to the legal sphere.[31]Theft of the bequeather's inheritance committed by an heir, even though not aimed at the increase of the inheritance share, and not considered as a precondition for recognizing him as an unworthy heir, is still an immoral action towards a bequeather, that has brought the inheritance to the heir during the lifetime of a bequeather.

Articles 726 and 729 of the civil code of France discuss mandatory and optional bases of withholding the inheritance. Article 726 of the civil code of France discusses the withdrawal of the inheritance from the heirs who have been convicted of felony aimed at murdering or at attemting the murder

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25 *Shilokhvost O. U.,* Inheritance by Law in Russian Civil Law, Norm, Moscow, 2006, 333 (in Russian).

26 The ruling of September 15, 2005 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: №AS-201-521-05

27 Ibid.

28 The ruling of June 20, 2011 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № AS-786-840-2011

29 The ruling of June 25, 2012 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № AS-786-739-2012

30 The ruling of December 20, 2010 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № AS-922-869-2010

31 The ruling of the Supreme Court of Georgia of September 20, 2013 on the case: AS-347-330-2013

of a bequether[32]. Likewise, the court may rule to withhold the inheritance from the heir, if the latter is convicted of committing a lesser-degree crime aimed at murdering, or at attempting to murder, or at infringing upon the life or health of a bequeather.[33]

Paragraph 2333 of the Civil Code of Germany provides an exhaustive enumeration of the bases for withholding an obligatory inheritance share and other cases cannot be used as analogies[34]. According to the paragraph 2333 of the Civil Code of Germany: A bequeather can withhold an obligatory inheritance share from the offspring: 1. If the latter infringes upon the life of the bequeather, upon the life of his spouse or upon the life of his child. 2. If an offspring is exposed in the cruel physical treatment of a bequeather or of his spouse (Misshandlung), although, in the case of cruel treatment of the spouse, this only applies only if an offspring is the decendant of a spouse. 3. If an offspring viciously avoids the responsibility of caring for a bequeather. 4. If the offspring commits a premeditated criminal offence towards the bequeather, in which case the former is sentenced to minimum one year of imprisonment, and in which case a bequeather cannot be required to bequeath the inheritance share to the offender.[35]

For a long time, the German doctrine and litigation practice had only ruled the withdrawal of the obligatory share of inheritance from the "unworthy" heir only in those instances when an heir acted offensively. [36] This approach was changed by the 2005 decision of the Federal Constitutional Court.[37]According to the clarification of the constitutional court, the existence of the obligatory share serves the purposes of special protection of a family. The withdrawal of an obligatory share is not contingent upon the culpability of an heir.As discussed in the given case, the person entitled to obligatory share, had been committing a grave felony towards the bequeather for several years (had attacked and had physically abused him) and thus, had hampered the preservation of the unity of the family. Having withheld the obligatory share from the heir, the court indicated that there was no clear basis for the withdrawal of the obligatory share, deriving solely from the offensive activity of the latter.[38]

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32 Code Civil, Version consolidée au 12 juillet 2014, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>, [16.04.2019].

33 Code civil, Version consolidéeau 12 juillet 2014, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>, [16.04.2019].

34 *Palandt O.,* Bürgerliches Gesetzbuch, 73 Aufl., 2014, §2333, Rn.2. comp., BGH NJW 74, 1084.

35 Paragraph 2333 of GCC.

36 Comp. OLG Düsseldorf, NJW 1968, 944, 945; OLG Hamburg, NJW 1988, 977, 978; *Palandt O.,* Edenhofer W., BGB, 64. Aufl., München. 2005, § 2333 Rn. 2.

37 BVerfG, Beschluss vom 19.04.2005 - 1 BvR 1644/00, openJur 2010, 3199. The plot of the case is as follows: The heir and the bequeather lived together with the offspring who suffered from schizophrenic psychosis. Shortly before the death, the psychotic offspring attacked the mother several times and inflicted a physical harm upon her. After one of the serious attacks, the mother drafted a new will of 20.01.1994, in which she withdrew the right of inheritance from her violent offspring. Within one month after the drafting of the will, the psychotic offspring murdered the mother. After the murder, the court sent the offspring to a psychiatric clinic on the basis of an expert's diagnosis, which stated that the murderer, although aware of the unlawfulness of the action, was mentally ill while commiting the murder and was in the condition of spiritual anxiety, that did not enable him/her to act consciously.

38 BVerfG, Beschluss des Ersten Senats vom 19. April 2005 - 1 BvR 1644/00 - Rn. 36 .

The Civil Code of Germany considered the intentional physical abuse of the bequeather or of his spouse a reasonable ground for withholding the obligatory share from the heir.[39]The mentioned norm in the litigation practice clarified that only hardened crime laid grounds for the withdrawal of the obligatory share, i.e. the offence had to be so grave that the relationship between the bequeather and the heir was destroyed and caused the humiliation of the bequeather. The court thereafter overlooked the general concepts that had not been legally considered or accounted for – such as the deterioration of relationship between the bequeather and the heir, disrespectful treatment of the bequeather, and it was explained that only such an action of the heir as inflicting psychological harm on the bequeather, that in its turn led to the physical harm of the latter, could be the basis for withholding the obligatory share. Desperation, anger, distress and grief solely cannot serve as the bases for withdrawal. The court provided further clarification: "Cruel psychological treatment can become the basis for withholding the mandatory share only if it has led (or will lead) to the considerable physical harm of the bequeather".[40]

The Supreme Court of Georgia offers two distinct explanations in the decisions of two different periods regarding the withdrawal of the mandatory share from the heir as a result of committing premeditated murder by the latter. For instance, an heir committed a premeditated offence – a murder of a bequeather – for which he was sentenced to 20 years of imprisonment. The committed crime was followed by the death of the bequeather, the fact that necessitated the invitation of the person as an heir. Such a circumstance presents the basis for the recognition of a person as an unworthy heir.[41] And vice versa, the verdict stated that the heir had committed the murder of the bequeather not for the gain of profit but for the revenge, i.e. while committing offence the goal was not the aqcuisition of the inheritance or the increase of its share, but the revenge. The bequeather had not drafted any will, and obviously, the heir could not have acted in any way against the will of the former. Deriving from this fact, the heir had not commited the crime for the purpose of acquiring inheritance. Accordingly, the court did not find any legal grounds for recognizing him as an unworthy heir.[42]

According to the litigation practice and verbatim clarification of the norm for recognizing a person as an unworthy heir, a person who has murdered a bequeather has the right to make use of the consequent will or inheritance, if the murder committed by him is not connected to the inheritance. When resolving such disputes, a court must justify the decision by analogy (article 5 of CCG), by article 98 – II of CCG, according to which, "if a party has brought about the condition dishonestly, which is profitable for him, the circumstance cannot be considered as valid". This norm, in itself, is the expression of the general principle of good faith, it is formulated in the article 361_II of the CCG and is

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39 Civil Code of Germany, the second part of paragraph 2333, 01.01.2010.

40 BGH*,* Urteil v*om* 25./26.10.1976 – IV ZR 109/74*,* NJW 1977, 339.

41 The ruling of September 15, 2003 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № 3K-1127-02

42 The ruling of May 31, 2010 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № AS-266-251-2010

applicable to the entire civil law[43]. It establishes social-ethical values in civil legal relations [44] and enables us to evaluate any relationship through this prism. At the same time, when using analogies, a judge can either use or not use any norm through analogy, by taking into account specific conditions, and can adjust any relevant decision (of using the norm through analogy) to expediency and justice.[45]Even in the case of impossibility of applying the law through analogy, the article 5 of CCG directly indicates the necessity to act in accordance with general principles of law, justice, good faith and morality. Even in the process of applying the law through analogy, when taking a decision on recognizing a person as an unworthy heir for the premeditated murder of a bequeather, the court sets the rules of behavior in accordance with the principle of good faith, even more so, when this principle in itself essentially entails both, the principles deriving form the legal or constitutional values and from the obligation to act in accordance with justice and "moral requirements".[46]

In search of social justice, the Appeals Court of Tbilisi granted the claim to recognize a person as an unworthy heir and referred to the usage of analogy of the regulatory norm of contractual relations of gifting. As the Court clarified, the systemic analysis of the norms of gift-giving and recognizing a person as an unworthy heir gives grounds to state that the legislation sets high standards of behavior both for gift-recipient and for heir, the inviolable adherence to which enables them to enjoy the legal right established by inheritance law and by gift-giving norms. [47] The Supreme Court had sufficient grounds not to share the reasons expressed in the mentioned conclusions of the Appeals Court and stated further that the established factual circumstances did not provide the legal basis to be regarded as essential preconditions for recognizing a person as an unworthy heir. The actions taken by the heir were as follows: the person secretly obtained and unlawfully appropriated the gold items belonging to the spouse of the bequeather, through which he inflicted a significant loss to the plaintiff. The same verdict proved that the claimant did not disclose the offence committed by him (murder of the bequeather). However, the established factual circumstances, although deserving reprehension, do not justify the implementation of the preconditions for recognizing the person as an unworthy heir. The court clarifies further that even applying the article 529-I is not justifiable, since the latter norm aims at regulating a different matter and pertains to the part of the regulatory statement of gift-giving relations, which belong to special type of relations. And the norms regulating special relations cannot be used as analogies.[48]

The participants of legal relations are required to carry out their rights and obligations in good faith[49]. Although it is true that the majority of norms do not indicate this directly, they still refer to it, since the civil order is based exactly on this principle. Good faith behavior entails considerate and re-

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43 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 516 (in Georgian).

44 *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl., München 2006, §242, Rn. 3.

45 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 95 (in Georgian).

46 Ibid.

47 The decision of the Appeals Court of Tbilisi on May 24, 2017 on the case: №2B/5313-15

48 The decision of the Supreme Court of Georgia of February 15, 2018 on the case: №AS-1101-1021-2017

49 Civil Code of Georgia, Article 8.

spectful attitude of the participants of civil relations towards each other's rights. The basic function of the principle of good faith is the attainment of fair results and the avoidance of injustice, the fact that is directly connected to the stability and reliability of civil relations. [50] The overall analysis of inheritance-legal sanction norms obiges the subjects of private law to act within the framework of good faith. If we turn to the aspiration of a legislator to guarantee the realization of the principles of justice and good faith in inheritance-legal relations by introducing sanctions, then the acquisition of a legal good, i.e. the inheritance, through one's own unlawful action must be construed as impermissible. "The acquisition of direct legal good through one's own unlawful action pertains to the principle of Roman law *Expceptio doli specialis,* which in Anglo-American law is referred to as the contest of *unclean hands*"[51].It is important that an individual must not have any possibilities to influence the attainment of the desired condition through dishonest means, the fact that is considered by the article 98 of CCG as impermissible. [52]

An heir, whose unlawful action caused the death of a be queather , must not be granted the right to acquire the inheritance for the mere reason that the motive of his action was not directly aimed at receiving the inheritance, although he was quite well aware of the fact that his action would lead to the desired result, i.e. to the death of the bequeather and to his acquisition of the inheritance. "Deriving from the methodology of explanation, this result can also be achieved through the so-called "the more so" principle, i.e. *Argumentum a fortiori – (arg a majore ad minus od a minore ad maius –* from the greater to the lesser and from the lesser to the greater), during the application of which the principle of "the more so" operates: if a concrete legal result occurs as a consequence of unlawful action against the will of a bequeather or as a consequence of the violation of the moral norms of caring for him, so that the heir becomes deprived of the right to acquire the inheritance, then this result will occur "even more so" in the case of committing a more serious offence, since the legal aims and procedures will be more clearly applicable in the second case. For instance, this could be the application of the obligation of compensation of damages during expropriation in the cases of unlawful deprivation of the right of private property.[53]

The Georgian litigation practice and the contents of the existent norm reject the possibility of withholding the right of inheritance in the case of infringing upon the life and health of a bequeather. That is why, the rightful regulation of this issue fully depends on the development and formulation of the court law. For the purposes of establishing the rightful litigation practice, the issue regarding the recognition of a person as an unworthy heir as a consequence of unlawful action, should receive special evaluation. Accordingly, if we do not use the law analogy and the explicit explanation of the norm in the above discussed sense, during the verbatim interpretation of the article 1310 of the CCG, that refers to the sanctions of withholding inheritance, we will face a curious legislative error, deriving

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50 The decision of the Supreme Court of Georgia of April 12, 2011 on the case: № AS-1224-1076-2010

51 *Bioling H.,*Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, Georgian Law Review, № 4, 2003, 516-517 (in Georgian).

52 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 397 (in Georgian).

53 *Palandt O.,* BGB, 73 Aufl., München. 2014, Rn. 51.

from the fact of unequal treatment.

"The application of a legal norm through analogy means the generalization of this norm that is achieved by evaluation: the contents of the norm reveal that the difference between the legally regulated and unregulated cases is so insignificant that their different resolutions could not be justified. In other words, the general common features of the legal norm should be sufficient to justify the application of legal result. This fact proves that the application of the legal norm through analogy is one of the reflections of the application of the principle of equality. In law, equal treatment and equal evaluation always mean abstracting the existent inequality under a concrete legal view".[54]

Therefore, the legal result, as defined by law, must be applied to the relationships of greater significance, and the heir, whose premeditated inlawful actions led to the death of a bequeather or to the death of any of his family members, must be recognized as an unworthy heir, irrespective of the motives of the committed offence. "The law must protect not only life but also the right to life"[55]. Life is an untouchable right of a human and is protected by law. [56]It presents not only the taken-for-granted good but also defines other human virtues. There is no freedom, or spiritual, mental and cultural development or human happiness without life. The right to life protects the natural existence of a human and by this creates the precondition for enjoying other human goods.[57]

The unlawful action of an heir for gaining the legal good, i.e. inheritance share, should be considered as impermissible. Deriving from the principles of equality and expediency, the application of the analogy of legal norm, or its teleological definition, may be allowed for recognizing a person as an unworthy heir. A special mention will be made of the legislator's aspiration and zeal to establish the principles of justice and good faith by imposing sanctions. This action, in its turn, can become an important instrument for further development of law.[58]"While elaborating the cases of this category, the judge should set the correction of flaws existent in the law as his goal. On the basis of interpreting the analogy of legal norm, in fact he creates a new norm, which is one of the significant foundations for the development of law. That is why, the modern theories of law interpretation are in reality the theories of the development of law, which are created on the basis of litigation practice".[59] Therefore, the "flaw in the law should not frighten us, as it often happens with the Georgian judges, but on the contrary, should incentivize us to create a new norm. Only, this norm should conform the constitutional foundations and the strife of the given law"[60]. In addition to achieving justice, the goal of a law is to guarantee legal security and the optimal and expedient satisfaction of the interests. The mentioned goal should be taken into account in the process of interpreting and generalizing a law. The function

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54 *Radbruch G.*, Rechtsphilosophie, 3. Auflage, Heidelberg. 1932, §§ 49.
55 *Fawcett J. F.C.*, The Application of the European Convention on Human Rights, Oxford, 1987, 37.
56 The Constitution of Georgia, Article 15.
57 *Gotsiridze E.,* Commentary to the Constitution of Georgia, Tbilisi, 2013, 72 (in Georgian).
58 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 94 (in Georgian).
59 *Staudinger J. von*., Kommentar zum Bürgerlichen Gesetzbuch, Buch 1, 15 Aufl., Berlin, 2015, Rn. 124.
60 *Tchanturia L.,* Introduction to the General Part of the Civil Law of Georgia, Tbilisi, 1997, 121 (in Georgian).

of the law to solve the problems fairly is not carried out solely by interpretation, but also by checking the necessity to extend or generalize the law.[61]Besides, the interpretation of a law should adhere to the principle of "preserving the coherence of a law", namely, it is necessary to redress the fair balance while interpreting separate norms and coming across logical discrepancies and inconsistencies between the different goals of various norms.[62]

3. Withholding the Mandatory Share and Decreasing its Amount by the Order of Will

A bequeather can withhold the inheritance from his offspring during his lifetime by the two types of will order: by the first type, he may not make any mention of the heir in the will, and by the second type, he can withhold the inheritance through the order of will. A person, from whom the inheritance has been withheld through the direct order of the will, cannot be a legal heir to the part of the inheritance, which has not been included in the will, also in the case when the heirs-by-will declined the wish to acquire the inheritance.[63]In both cases, the mandatory heir retains the right to acquire the obligatory share. The explanation of the article 1354 of the CCG is especially interesting in this respect, which discusses whether the first order heir will be considered as an obligatory heir at all, and if yes, what portion of inheritance he can make claims to. The interconnected interpretation of the articles 1354 and 1371 of the CCG gives grounds for drawing such a conclusion. The offspring, parents, and spouse of a bequeather are entitled to an obligatory share, irrespective of the contents of the will, and irrespective of the fact that the bequeather has withheld the right of mandatory share from the first-order heir by the direct order of the will. Therefore, irrespective of the contents of the will, such an heir will still acquire a mandatory share both from the inheritance mentioned in the will and from the property left out of the will. Although, under such a will order, he/she may not be regarded as a lawful heir, but may merely remain as an heir of a mandatory share.

The second part of the article 1381 of the CCG makes an explicit and direct indication of the fact that the heir from whom the inheritance has been withheld by will, still remains as an heir of mandatory share. According to this article, a bequeather can withhold the mandatory share from the heir during his lifetime by appealing to the court. Therefore, a bequeather can withhold the mandatory share from the heir only through the court and not by will order, in the case of proving the existence of the preconditions as set by the article 1381.[64]

A bequeather who decides to forgive an heir, should explicitly state this in the will. This is the case, when a bequeather knows that the heir deserves to be deprived of the inheritance due to his action, but in spite of this, he still considers the latter as his heir.[65]The will may also be drafted in favor of another heir, but it must make an explicit formulation of the bequeather's desire to forgive the un-

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61 The decision of the Supreme Court of Georgia of July 14, 2017 on the case: №AS-178-167-2017.
62 *Zippelius R.,* Teaching of Legal Methods, the 10th Rev. Ed., GIZ, Tbilisi, 2009, 53 (in Georgian).
63 Article 1354 of CCG.
64 The decision of the Supreme Court of Georgia of March 9, 2016 on the case: № AS-1048-988-2015.
65 *Akhvlediani Z.,* Inheritance Law, Tbilisi, 2007, 10 (in Georgian).

worthy heir. Under such circumstances, an unworthy inheritance-deprived heir will be invited to receive his mandatory share. Although the law requires that the bequeather should formulate in the will his desire to forgive the heir, any other written document, which makes an explicit statement about the firm desire of a bequeather to forgive an heir, can be used as a valid proof.

A bequeather may draft a will, and despite the court decision on withholding the mandatory share from the heir, bequeath to the mandatory heir the portion of inheritance that is less than the obligatory share. The right to acquire a mandatory share rises only in the instance when the heir becomes deprived of the entire or portion of the inheritance by the order of will. At the same time, the legislation takes into consideration the commensurability of the mandatory share and the inheritance share as allotted by the will, more specifically: if a person, entitled to the mandatory share of the inheritance, has been bequeathed the property that is half the portion that he/she could have received in the case of being a legal heir, then he/she can claim the portion, by which the share received by the will is less than half the protion that he/she would have received in the case of being a legal heir.[66]Accordingly, a mandatory heir acquires a mandatory share and, at the same time, is the heir by will as well. Deriving from the disposition of the article 1379 of the CCG, the claimant, the mandatory heir, disputed that the inherited share was less than half the share that he/she would have received in the case of being considered as a legal heir.[67]If a bequeather withholds the inheritance from a mandatory heir by court decision, and despite such a decision, still mentions the latter in the will, the deprivation of the entitlement to the mandatory share still does not cause the loss of the inheritance by will, and the withdrawal of the mandatory share still leaves the right to aqcuire the inheritance by will unalterable. In such a case, a bequeather can amend the will and not make any mention of an heir in a new will. Therefore, if an heir is not mentioned in the will any longer, and has been deprived of the mandatory share by the court decision, he/she cannot receive the inheritance.

A distinction should be made between the two different cases in respect to the articles 1379 and 1381 of the CCG: a. If a bequeather in his lifetime and by his will has bequeathed a portion of inheritance to the heir, who has been deprived of the mandatory share, and the bequeathed share is less than mandatory share (and the will does not make a mention of forgiveness), then although the heir has the right to claim the full mandatory share (to fill up the share), he still cannot claim the full share, since there exists a court decision regarding withholding the mandatory share from him. This is the case when a bequeather refuses to withhold a relatively small share of inheritance from the heir, from whom the mandatory share has been already withheld. According to the article 1313 of the CCG, this decision is mandatory for the individuals named in the article 1312 of the CCG.[68]Accordingly, the claim initiated by them to recognize a person as an unworthy heir, will be unsuccessful. Therefore, the heir, who has been bequeathed a share less than the mandatory one and has been deprived of the right

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66 Article 1379 of CCG.

67 The decision of the Supreme Court of Georgia of December 4, 2013 on the case: № AS-531-505-2013

68 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 524 (in Georgian).

to receive the mandatory share by a bequeather, cannot receive the right to fill up the share to the amount of the mandatory one, as defined by the artile 1379 of the CCG, and will only receive the small amount that the bequeather left for him by the will, and that is smaller in amount than the portion of the mandatory share. And another heir, who has been bequeathed a lesser portion than the mandatory share, but has not been deprived of the mandatory share by the court decision during a bequeather's lifetime, may receive the right to fill up the share, as defined by the article 1379, i. e. may receive the entire mandatory share. In this case, an heir-by-the-will can appeal to the court and claim the withdrawal of the mandatoy share from the mandatory heir. If the court decides to withhold the mandatory share from the obligatory heir, he will still not be granted the right to fill up the share to the amount of the mandatory share, and will have to accept only a small portion, as allotted by a bequeather.

4. Withholding Inheritance for Viciously Avoiding Family-Legal Responsibility

The unfulfillment of family-legal responsibilities is the precondition for withholding inheritance. This is revealed in vicious avoidance of the duty of caring for a bequeather. Such an heir retains the possibility of receiving inheritance, if a bequeather names him as an heir by will. He will acquire the inherited share as a result of "generous forgiveness" of a bequeather. In the case of absence of such a document, the heir will be deprived of the right of inheritance by law, since he did not carry out the responsibilities not only in respect to the bequeather, but in respect to the law and society as well. [69]

The withholding of the inheritance from an heir for viciously avoiding the moral and legal responsibility of caring for a bequeather is the utmost expression of the protection of the interests of heir and bequeather from dishonest and unlawful influences in the sphere of legal relations of inheritance. When we talk about moral norms, we do not mean the firmly fixed, unalterable and readily-given principles, but the views of "the people in good faith", that are prevalent in the social relations of a given society. These views are historically changeable. At the same time, their change can happen through legal concepts.[70] In family law, the relations between family members are mainly defined by moral principles. They bear the responsibilities of caring for each other. The law, committing family members to take care of each other, also implies the obligation to offer each other material assistance, should the necessity arise.[71]The inheritance-legal relations are in close connection with family reltions. The inheritance right and the right to receive goods and benefits, together with the law regulating the spousal property relations, make up the family-property law.[72]Inheritance-legal sanction of withholding the inheritance is applied in the case of unfulfillment of family legal responsibilities. The subjects

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69 *Makovski A. L., Sukhanov E. A.,* Commentaries to the Third Part of the Civil Code of the Russian Federation, Moscow, 2005, 78 (in Russian).

70 BVerfGE, Urteil des Ersten Senats vom 15. Januar 1958, Band7, 215, <http://www.servat.unibe.ch/dfr/bv007198.html#208>, [12.08.2019].

71 *Shengelia R., Shengelia E.,* Family Law, Tbilisi, 2009, 244 (in Georgian).

72 *Malaurie Ph., Aynés L.*, Droit Civil, Les successions. Les libéralités. 3e éd. Defrénois, Paris, 2008, 6.

of family-legal responsibilities are parents, offspring, spouses, grandparents, and sister-brother. As a rule, the obligations of care, help and sustenance should be carried out on a voluntary basis, otherwise the court takes decision of imposing support in the best interests of those who need help. "The best interests" imply the concepts, which are influenced by cultural, economic conditions and religious norms,[73]"need help" means the lack of necessities for normal life under modern social-economic conditions.[74]Not fulfilling the legal and civil-moral responsibilities of supporting a bequeather create the preconditions for withholding the inheritance. Therefore, support and viciously avoiding the the responsibility of support should be clearly defined.

The majority of familial disputes in the Georgian legal system stem from the unfulfillment of alimony obligations by parents towards offspring. Both parents have equal and common responsibilities for upbringing and developing the offspring,[75]the best interests of a child should present the primary topic of discussion and deriving from its nature and gravity, may even supercede the interests of a parent.[76]Even in the case when the balance of interests needs to be redressed, the best interests of a child get prioritized and the corresponding decision is taken. [77]

Not every kind of avoidance can be regarded as the violation of familial obligations and can serve as the basis for withholding the inheritance, but only the vicious avoidance of these obligations. Financial condition (low income, unemployment, lack of stable income) or health problems do not diminish the requirements of underage or disabled persons, accordingly, even in such a case, a minimum amount of alimony/sustenance should be preserved. The imposition of alimony or sustenance below the minimum threshold is only permissible under the exceptional conditions, when the financial or physical inability of a parent to make any payments is beyond reasonable doubt and therefore, the imposition of any financial obligations is excluded.[78]In the case of establishing such circumstances, no assumptions should be made that the person in question viciously avoided familial responsibilities.

The familial-legal sanction of withholding the right of parenthood breeds another inheritance-legal sanction as well, namely, withholding the right of custody over offspring. Deprivation of parental rights is possible in respect to one or several offspring. If the offspring has died, over whom the parental right was not deprived, the parent retains the legal right of inheritance, but has no rights over another offspring[79].

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73 *Blair M. D., Weiner M. H., Stark B., Maldonado S.,* Family Law in the World Community: Cases, Materials and Problems in Comparative and International Family Law, Carolina Academic Pres Law Casebook Series, 2nd ed., Durham, North Carolina, 2009, 394.

74 *Sergeev A. P., Tolstoy U. K.*, Civil Law, Moscow, 2006, 564 (in Russian).

75 *Kurdadze I., Korkelia K.,* International Law of Human Rights, according to the Human Rights Convention, Tbilisi, 2004, 183 (in Georgian).

76 The decision of the European Court of Human Rights of February 2, 2016 on the case: 'N.Ts. et al vs. Georgia', statement № 71776/12.

77 The decision of the European Court of Human Rights of July 31, 2000 on the case: – Elsholz v. Germany, statement: № 25735/94, Par. 52.

78 The decision of the Supreme Court of Georgia of October 20, 2015 on the case: №AS-538-511-2015.

79 *Shengelia R., Shengelia E.,* Inheritance Law, Tbilisi, 2011, 24 (in Georgian).

German litigation practice presents an interesting case in regards to withholding the mandatory share for avoiding the legal responsibility of care. Regarding the withholding of the mandatory share for viciously avoiding the legal duty of care for a bequeather, the supreme court of Frankfurt stated that it is impossible to withhold the mandatory share based on the non-fulfillment of physical care for a disabled or ailing person, since the support is carried out only through monetary payments. Besides, merely declining the obligation of care is not sufficient for vicious avoidnce of the responsibility. The non-fulfillment of the obligation should also be based on the reprehensible and immoral attitude of an heir.[80]

The first-order heir of the bequeather, the spouse, is also an obligatory heir. Besides avoiding the familial-legal responsibility of care, a spouse may not be rearded as a legal or mandatory heir, if the spouses terminated their familial relationships three years before the disclosure of the inheritance and lived separarately during this period. Naturally, the employment location of spouses in different cities, long-term business trip, etc. do not constitute the preconditions for the withholding of inheritance. For this purpose, the existence of specific preconditions is necessary, namely, the termination of spousal relationships is of decisive importance. The aim of the legal order is to guarantee that nobody is deprived of rights without due proof, and vice versa, nobody appropriates the goods unlawfully[81]. Already during feudal period, the foundation of inheritance law was laid by inseparable habitation under one roof, the fact that also constituted the frames of legal inheritance.[82]Legal inheritance is based upon familial and relational ties[83], and withholding the inheritance right from a spouse by law is connected with the break-up of exactly these ties. The goal of a legislator in this case is to regulate the legal relations in such a way that the inheritance of a deceased person is transferred to other persons by law and the circle of legal heirs is rightfully established. These procedures are carried out in view of avoidance of illegal transfer of those rights and privileges to the wrongful heir (who was registered as a spouse), that a bequeather enjoyed at the moment of death (the amount of inheritance), and in view of avoidance of unjustifiable violation of the rights of legal heirs.[84]In order to legally withhold the inheritance, and hence, the mandatory share, from the spouse, an expression of will of termination of wedlock by both, or at least one spouse, must be established. This latter fact must be demonstrated through a concrete action, which must,in its turn and by considering certain circumstances, give grounds to drawing unequivocal conclusion that the spousal relation was terminated within three years before the death of one spouse.[85]The term "during divorce", which is mentioned in the preamble of the article 1341 of the CCG, causes certain confusion, although the fact of separate habitation of spouses

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80 Münchener Kommentar zum BGB, Band 9, 6. Aufl. München, 2013, § 2333, Rn. 32.
81 The decision of the Supreme Court of Georgia of July 22, 2015 on the case: №AS-187-174
82 *Zoidze B.,* Old Georgian Inheritance Law, Tbilisi, 2000, 12 (in Georgian).
83 *Shengelia R., Shengelia E.,* Inheritance Law, Tbilisi, 2007, 123 (in Georgian).
84 The decision of the Supreme Court of Georgia of July 22, 2015 on the case: №AS-187-174-2015.
85 The decision of the Supreme Court of Georgia of December 8, 2010 on the case: №AS-611-573-2010.

for more than three years must be established, and the fact that no legal divorce has taken place does not exclude the decision to legally withhold the inheritance from a spouse.[86]

5. Legal Proceedings of Withholding Mandatory Share

The material-legal norm of the recognition of a person as an unworthy heir imperatively defines the circle of persons who can commence legal proceedings. However, two distinct regultions should be singled out: under the first regulation, already during his lifetime, a bequeather, can initiate a legal proceeding for withholding the mandatory share form an heir, and under the second regulation, the heirs who have property-legal interests can instigate the litigation. In accordance with law, during his lifetime, a bequeather cannot raise the issue of legally recognizing a person as an unworthy heir, and the opposite view contradicts the verbatim meaning of the law, also the system, the essence and the aim of the law. Moreover, there is no need to initiate such a legal proceeding.[87]Some judges do not agree with this opinion, since the norm does not make a mention of the condition for recognizing a person as an unworthy heir that this may only happen after the disclosure of the inheritance.[88]However, a verbatim and purposeful interpretation of the inheritance-withdrawal norm excludes such a claim made by a bequeather. The article 1312 of the CCG defines the circle of persons who are legally entitled to making such a claim. The mentioned circle is limited to those persons, whose deprivation of the inheritance right will bring about certain property consequences to an unworthy heir. A bequeather does not belong to this circle, during whose lifetime the recognition of a person as an unworthy heir will not bear any property implications. A bequeather is not restricted in his dispositional freedom and does not depend on or is not limited by the court decision. The recognition of a person as an unworthy heir and the deprivation of the right to acquire a mandatory share are based on different regulations, and deriving from the legal system, must be strictly distinguished.[89]

The withdrawal of mandatory share before the disclosure of inheritance is possible only through a bequeather's appeal to court already during his lifetime. The expansion of the circle of the subjects entitled to making such claims is not permissible, since "the laws, setting special regulations, may not be used through analogies"[90]. Such a prohibition does not mean the limitation of access to legal proceedings, since other subjects can make such claims after the disclosure of the inheritance. An access to legal proceedings can be restricted out of expediency conciderations. The restrictions should not

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86 The decision of the Supreme Court of Georgia of May 13, 2010 on the case: №AS-109-103-10.

87 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 520 (in Georgian).

88 The decision of the Supreme Court of Georgia of July 4, 2001 on the case: №3K/299-01.

89 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, Georgian Law Review, № 4, 2003, 524.

90 *Trubetskoy E. N.,* Encyclopedia of Law, New York, 1982, 34 (in Russian).

impact the essence of the access right[91], also the restriction should serve a specific goal and should be proportionate to this goal.[92]

Accordingly, a legislator only permits the withdrawal of legal inheritance right during the lifetime of a bequeather in accordance with the will of the latter. As regards the withdrawal of mandatory share, only article 1381 considers its possibility. We can conclude that "the legislator purposefully created the norm, distinct from the article 1381 of the CCG, the second and the third parts of which consider granting a bequeather with the right to instigate the legal proceedings. The conscious decision of the legislator excludes the application of the norm through analogy towards the case unregulated by law, since we lack one of the preconditions for using analogy, namely, an overlooked error. The fact that a concrete circumstance "A" and legally regulated case "B" were not regulated purposefully in a similar way, naturally excludes the possibility of applying analogy. Quite on the contrary, the legislator here permits only the possibility of making the so-called counterargument *–argumentatio e contratio* or *argumentum e silentio*. By his silence, the legislator unequivocally declares that a legally unregulated case must not be addressed in a similar way as the legally regulated case.[93]

The analysis of the indicated norm of recognition of a person as an an unworthy heir makes it clear that the recognition of a person as an unworthy heir happens only when an unlawful action of an heir hinders the expression of a real will by a bequeather, and solely those individuals can appeal to the court for whom the withdrawal of inheritance right bears certain property consequences. Therefore, when a claimant is a supposed bequeather, the appeal to recognize the defendants (heirs) as unworthy heirs will bear no property consequences for him, [94]since a bequeather's claim made during his lifetime against the mandatory heirs must derive from the requirements set by the article 1381 of the civil code and must contain the requirements defined by this article.

A bequeather's claim regarding the recognition of a person as an unworthy heir presents a declaratory relief and the precondition for its permissibility of the existence of legal interest. For the establishment of legal interest, the potential improvement of claimant's legal circumstance in the case of granting his declaratory relief requirement must be proved.[95]The declaratory relief of a bequeather regarding the withdrawal of legal inheritance right from the heir does not meet the procedural preconditions for permissibility of making claims, neither the right of making such a claim exists from the material-legal standpoint. To carry out his last will, a bequeather has a much simpler way than a legal proceeding: to withhold the inheritance from all or from one heir by drafting a will, as well as to withhold the inheritance of everything, and of the property remaining outside the will among others, by

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91 The decision of the European Court of Human Rights of October 24, 1979 on the case: Winterwerp v The Netherlands, statement: №6301/73, <http://www.bailii.org/eu/cases/ECHR/>, [13.08.2019].

92 The decision of the European Court of Human Rights of October 30, 1998 on the case: F.a. v. FRA, statement: №38212/97, <http://www.bailii.org/eu/cases/ECHR/>, [13.08.2019].

93 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, Georgian Law Review, № 4, 2003, 520 (in Georgian).

94 The decision of the Supreme Court of Georgia of March 13, 2006 on the case: AS-22-473-06.

95 The ruling of the Great Chamber of the Supreme Court of Georgia on March 17, 2016 on the case: №AS-121-117-2016.

direct will order. A legal proceeding is permissible only based on the claims of those persons who will receive certain property benefit in the case of the recognition of an heir as unworthy. "They have no other way than to make a declaratir relief in the court in order to carry out the bequeather's last will or exclude the unworthy heir from inheritance"[96].

With the aim of withholding a mandatory share, a bequeather, who connects the withdrawal of inheritance right from the family member with his inheritance plans, might have a legal interest to make a declaratory relief claim in order to see whether the institution of mandatory share will operate in the case of disclosure of the inheritance. Only an heir-by-will has a legal interest of withholding the mandatory share and instigating a prorpietary claim, since the withdrawn mandatory share will be transferred solely to the heir-by-will. There might exist several such heirs, though a claim made even by one of them may be regarded as permissible. Considering procedural expediency and real property interests of the parties, it is bettrer for an heir to make proprietary claim regarding the recognition of an unworthy heir as an inheritance heir, even more so, in the case when the issues of inheritance amount and inheritance acquisition are disputable. These steps should be taken to avoid future necessity of instigating further legal proceedings.

In the case of instigating legal proceedings regarding the recognition of a person as an unworthy heir, the claimant must produce a proof of the existence of a will. A bequeather is not required to produce an original or a copy of the will, but only a notary statement regarding the existence of a will drafted by a bequeather will suffice to prove the point. And this will be made possible only if a bequeather has drafted a notary-type will. A claimant is also required to produce trustworthy and relevant proofs regarding the existence of preconditions for withholding the inheritance right. [97]The burden of proof of the existence of grounds for withholding the mandatory share must be borne by the person who makes a claim of withholding the right of inheritance.[98]

According to CCG, the following type of a person will be regarded as unworthy: 1. Who committed a premeditated and unlawful murder of a bequeather, or made an attempt of his murder, or drove him to the condition in which a bequeather was incabale of making or annulling a will order before his death, 2. Who purposefully hindered a bequeather in either making or annulling a will order, 3. Who purposefully misled or unlawfully threatened a bequeather to make or annul a will order, 4. Who has been convicted as a criminal for committing a crime in connection with the will order of a bequeather that pertains to §§ 267, 271-274 of criminal law.[99] In this case, only court verdict can be used as a basis for withholding the inheritance, although "the recognition of a person as an unworthy heir is realized through the contest by a receiver of inheritance. The contest is directed towards the legal relation, through which an unworthy person became an heir (§ 2339). The realization of contest

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96 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 522 (in Georgian).

97 The decision of the Supreme Court of Georgia of September 20, 2013 on the case: AS-347-330-2013.

98 BGH, NJW 1974, 1084,1085.

99 Paragraph 2339 of CCG.

is possible after the transfer of property to an unworthy heir[100], the right of contest is realized within one year after the heirs make a claim. It is sufficient to produce a contest statement before making such a claim by the persons who have inheritance legacy or the right to acquire mandatory share. [101] The contest comes into effect only after the enforcement of court decision.[102] According to German law, there are several types of claim that a person entitled to mandatory share can apply. More specifically, a person entitled to the mandatory share can legally require the information about the amount (volume) of the inheritance (claim regarding the disclosure of information – Auskunftsklage des Pflichtteilsberechtigte). In addition to this, a person entitled to the mandatory share can instigate a legal proceeding for establishing the value of the inheritance – (Klage auf Wertermittlung). A person entitled to the mandatory share can demand to have his right to the mandatory share proved by declaratory relief (declaratory relief – Feststellungsklage). After going through the above-mentioned steps, a person entitled to the mandatory share can instigate a proprietary suit and claim the due share (proprietary claim / suit – Leistungsklage). At the same time, a person entitled to the mandatory share can initiate the suit taking the above-mentioned steps simultaneously. According to the civil legislature of France, in the event of facultative indecency, the withdrawal of inheritance is permissible only after the disclosure of the inheritance on the basis of court decision made regarding the heir's claim.[103] The cassation court of France considers the sanction of withholding the inheritance from an unworthy heir as a civil-legal responsibility of a private nature, because such a civil-legal sanction plays into the hands of a concrete heir, and it is logical that he should decide on his own whether to apply this sanction towards an unworthy heir.

6. Conclusion

The acquisition of a mandatory share is not contingent upon the will of a bequeather. It is a legal right of an heir and can be withheld by the decision of the court only in the case of a grave mistake made by an heir. Owing to the unsound attitude towards an heir, a bequeather sometimes considers the withholding of the inheritance as an important and essential act.There are frequent cases when a bequeather has disagreements with his/her family members, when heirs do not carry out the legal or moral duty of supporting a bequeather and caring for him/her. Under these circumstances, the will of a bequeather to subject heirs to inheritance-legal sanctions can be understood from personal perspective,[104] although this should be the issue of a scrutiny of not only a bequeather, but of the court as well.

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100 Paragraph 1942 of CCG.

101 *Palandt O.,* Bürgerliches Gesetzbuch, 73. Aufl., München, 2014, § 2340, Rn. 1-2.

102 Paragraph 2342 of CCG.

103 *Gongalo U. B.,* Legal facts in Inheritance Laws of Russia and France, Comparative-Legal Study, Moscow, 2010, 28 (in Russian).

104 *Klingelhöffer H.*, Pflichtteilsrecht, 2. völlig neue bearbeitete Aufl., München, 2003, 37.

The precondition for withholding inheritance is not a general but a vicious and subjective avoidance of carrying out of the family-legal responsibilities. Complete inactivity of an heir, expressed in indifferent and careless attitude towards a bequeather, can be rendered as one such instance. The recognition of a person as an unworthy heir should derive from the views of honest people based on moral values and inter-generational solidarity. During the legal proceedings of withdrawing inheritance, the evidence of avoiding the responsibility of caring for a bequeather by the heir must be established in the first instance, which should be included in the burden of proof of the defendant. [105]The defendant should also prove that the avoidance of the responsibility of caring for a bequeather had objective and excusable reasons, and he/she did not consider this fact as a ground for being deprived of inheritance. If a bequeather did not accept assistance from an heir, despite the wish of the latter, [106]and forbade the heir to contact him/her,[107]no inheritance sanctions can be imposed, because no vicious and purposeful avoidance of responsibilities can be established.

If the violation of a moral-legal obligation of caring for a bequeather, as well as the dishonest influence on his/her wish and the violation of the will, lead us to the recognition of a person as an unworthy heir, it should be, even more so, extended to the aggravated instance of an unregulated case, such as infringement upon a bequeather's life or health. In such a case, the concrete aim of the law should be more widely applied. Human life and health are such rights that express a personality, and thus, have not been created by law but have been created by the nature, and have been bestowed to the law. These rights are the expressions of life, of living being and of human being, and acquire their meaning together with the existence of life. Every individual has the right to enjoy these bestowed goods and the right not to have their natural growth and development terminated or hindered by another individual.[108]The above-mentioned actions of similar gravity, which are directed against a bequeather and his/her family, should be qualified likewise. [109] An heir, who has committed a premeditated murder of a bequeather, must be withheld the right of inheritance, and this issue must be addressed on the basis of the free access to the justice and law, since in the instance of stating the positive norm, while choosing the precedent norm and defining the factual normativity, a person's natural rights and freedoms must not be violated, as the criteria of justice.[110]

An attempt of infringement upon the life or health of a bequeather or any of his/her heirs must be considered as the basis for withholding the right of inheritance. The motive of the respective actions should make no difference. If the murder has been committed on the grounds of personal enmity, without the intention of acquiring the inheritance, the offender must be deprived of the right of

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105 The decision of the Supreme Court of Georgia of June 29, 2017 on the case: №AS-1227-1147-2017.

106 The decision of the Supreme Court of Georgia of May 12, 2011 on the case: №AS-265-249-2011.

107 The decision of the Supreme Court of Georgia of December 12, 2001 on the case: №3K/623-01.

108 Comp. Urt. v. 20.12.1952, Az.: II ZR 141/51, <https://www.jurion.de/urteile/bgh/1952-12-20/ii-zr-141_51/>, [11.04.2019].

109 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 518 (in Georgian).

110 *Savaneli B.,* Legal Methods, Tbilisi, 2008, 95 (in Georgian).

inheritance even more so, because by his/her actions he/she facilitated his/her inclusion in the will.[111]The motive of committing these actions can be not only a person's desire to be included in the will or the increase of his/her inheritance share, but also jealousy, revenge, or unworthy cunning behavior.[112]If we consider the strife of the legislator to guarantee the equal treatment of parties in inheritance-legal relationships and the realization of the principles of justice and good faith by imposing sanctions, the modern norm and its interpretation in connection with the recognition of a person as an unworthy heir, can be formulated in the following way: A person cannot be considered a lawful heir or an heir-by-will, if he/she purposefully hindered a bequeather in carrying out his last will, and in such a way, facilitated his/her inclusion or the inclusion of his/her close relatives in the will, incentivised the increase of the share of inheritance, or committed a premeditated crime or any other immoral act against the final will of a bequeather,irrespective of the motives and aims of such actions. If the court vindicates these circumstances, the person will be recognized as an unworthy heir.

The withholding of the mandatory share of the inheritance should be carried out by court decision, on the basis of the appeal of the heir, for whom the withholding of the inheritance will bear proprietary consequences. It is noteworthy that a bequeather can forgive an heir at any time or change a will or include an unworthy heir in it. In such a case, the litigations regarding the recognition of a person as an unworthy heir become devoid of any sense. According to the civil legislature of Germany, "Producing a declaratory relief during the lifetime of a bequeather is not permissible, because he/she can forgive an heir at any time."[113]

Litigation should not be necessary for withdrawing an obligatory share from an unworthy heir, who has been exposed in committing a crime and has been deprived of any rights by parents. In this instance, an interested heir should have the right to deprive an unworthy heir of the obligatory share by means of appealing to notary and producing enacted court decision or verdict. Obviously, it is at the discretion of an heir whether he/she applies this rule towards an unworthy heir. If he/she does not produce such an appeal to notary, then we should assume that she/she has declined the legal right to acquire the inheritance share. Regarding the instance when an heir purposefully hindered a bequeather in carrying out his last will, and in such a way, facilitated his/her inclusion or the inclusion of his/her close relatives in the will, incentivised the increase of the share of inheritance, or committed a premeditated crime or any other immoral act against the final will of a bequeather,and also in the case when an heir viciously avoided the responsibility of caring for a bequeather, such a person should be recognized as an unworthy heir. These circumstances must be proved solely by the court.

In conclusion, through "interpreting a law and drawing analogies, a court enters the so-called "borderline mine-field" between legislative and judiciary bodies. A judge will be able to act success-

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111 *Marisheva N. I., Iaroshenko K. B.,* Article by Article Commentaries to the Third Part of the Civil Code of the Russian Federation, Contract Infra-m, 2004, 29 (in Russian).

112 *Shilokhvost O. U.,* Inheritance by Law in Russian Civil Law, Moscow, Norm, 2006, 330 (in Russian).

113 *Palandt O.,* Bürgerliches Gesetzbuch, 73. Aufl., München, 2014,§ 2340, Rn. 1-2.

fully and smoothly on this territory only if he/she adheres to the interpretation method of the law in good faith and makes the basis of his/her decision more transparent. [114]

If the law grants certain freedom to the judge in the process of making a decision, and the assessments established by law and other indicies do not contain valid and reliable grounds for agreed-upon views on justice, the decision should be made on the basis of the legal perceptions of a judge. Oftentimes, a judge appears in the situation, in which justice is violated owing to the unequivocal definition of the law and to the limitations of unarguable rules and principles of interpretation. In the instance when a judge is granted the freedom of decision-making during law interpretation and deficiency correction, he/she can participate in the development of legal proceedings. This way, the application of the law can become a momentous episode in the development process, which is always accompanied by the existence of the guaranteed justice and legal morale. [115]

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Convention "Against Discrimination in Education" UNESCO, Paris, December 14, 19601 The Implementation of the Convention in the Georgian Legislation

The current article refers to the implementation of the UNESCO Convention "Against Discrimination in Education" (UNESCO, Paris) of December 14, 1960 in the Georgian legislation. It covers the general aspects of the implementation of the mentioned convention in the Georgian legislation. In the article we discuss what the discrimination in education is, what type of discrimination exists and what type of discrimination could take place in educational institutions. It is expedient to discuss the implementation of the convention in the Georgian legislation in the context of access to education, financing of education, inclusive education, the rights of ethnic minorities to education and religious and political discrimination. Hence, the following topics are presented: a) The access to education, where legal acts are discussed, in which the provisions of the convention are represented. In the same part, we discuss the Law of Georgia on the "Elimination of All Forms of Discrimination" of May 2, 2014 (Kutaisi, N 2391-IIS), which on its behalf, regulates the issues related to elimination of discrimination in education and access to education; b) The financing of education. Due to the fact that the state finances the general education in Georgia, whereas the citizens have the right to get funding from the state for vocational and higher education, in the given part we discuss all three types of state funding of education; c) The access to inclusive education. Taking into consideration the citizens' right to education and elimination of all types of discrimination, utmost importance is placed on the inclusive education, thus, in our article we discuss the inclusive education, whereas we cover accessibility to inclusive education in state institutions; d) The ethnic minorities' rights to education, whereas as according to the international standards, Georgia protects the individual and collective rights of ethnic minorities and facilitates their civic integration. This refers to access to education also; e) The religious and political discrimination, whereas we discuss the regulatory norms of the mentioned issue on the national level, which are in accordance with the 5th article of the convention.

The article also draws conclusions on the implementation of the discussed issues in Georgian legislation.

Key words: *Right to education, elimination of discrimination, inclusive education, financing of education, UNESCO convention.*

1. Introduction

Historically, large emphasis has been placed on education in Georgia, its importance is properly acknowledged in terms of the development of the statehood and likewise other democratic countries, Georgia is a party to the international agreements, which acknowledge the right to education and set

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1 See, Convention against Discrimination in Education, 14/12/1960, <www.unesco.org/education/pdf/-DISCRIE.PDF>, [23.11.2018].

high standards. Georgian state conducts the implementation of international standards and principles into the national legislation. Among the international agreements, it is important to discuss the UNESCO "Convention against Discrimination in Education" (UNESCO, Paris, December 14, 1960)[2] (hereinafter referred as convention).

Convention has entered into force for Georgia on November 4, 1993.[3] Georgia by joining the convention undertook the obligation (to eliminate all forms of discrimination in education and implement the opportunities for equal access to education) to implement regulations in the Georgian legislation in the context of access to education, financing of education, inclusive education, the rights of ethnic minorities to education and religious and political discrimination.

What is discrimination in education? In the educational environment, we encounter various methods of discrimination. For example, the educational institutions may refuse to enroll a student of a different race. It is of great importance that the educational institutions could guarantee the access to education for persons with disabilities, whereas access to education should be guaranteed for both sexes, including involvement in sports activities.[4]

In the educational institutions there exist four types of discrimination: direct discrimination, indirect discrimination, harassment and victimization.[5] **Direct discrimination** in schools is when a child is treated less favorably on the grounds of gender, disability, race, sexual orientation, religious belief or age. For example, assuming a child may not be able to reach a certain level of work because they are disabled. In these cases, the act itself is unlawful, not whether or not someone meant it.[6] **Indirect discrimination** is when policies or practices affect a certain group of children more than others for no good reason. The groups protected by the legislation include groups defined by their gender, race, sexual orientation, religion or belief, or age. When it is related to disability, reasonable adjustments should be made so that indirect discrimination does not take place.[7] Harassment can occur when a school engages in unwanted conduct related to a disability which has the purpose or effect of violating a pupil's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the pupil. The pupil concerned may not have a disability but might be associated with someone who has, or is wrongly perceived as having a disability.[8] Victimization occurs when a school does something which is disadvantageous to a pupil because either the pupil or the pupil's parent or sibling takes, or is thought to be about to take, action under disability discrimination law. This extends to pupils who are associated with, or perceived to have, a disability.[9]

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2 "Convention against Discrimination in Education", UNESCO, Paris, 14/12/1960.

3 The National Commission on UNESCO Affairs, <www.unesco.ge/?page_id=534>, [23.11.2018].

4 Find Law, Discrimination in Education, <www.civilrights.findlaw.com/discrimination/discrimination-in-education.html>, [01.05.2019].

5 Stephenson, Discrimination in Schools, <www.stephensons.co.uk/site/individuals/education/discriminationasagroundforappeal/>, [01.05.2019].

6 Ibid.

7 Ibid.

8 Ibid.

9 Ibid.

2. Access to Education

The provisions of the convention are mirrored in the Georgian national legislation, whereas the elimination of discrimination in the educational sphere is guaranteed on the legislation level. As according to the article 27 of the Constitution of Georgia, "Everyone has the right to receive education and the right to choose the form of education they receive."[10] "With the mentioned article, Georgian Constitution establishes the constitutional equality in the educational sphere. Everyone, including foreigners and persons without citizenship, who reside in Georgia, are equal (here the fundamental constitutional principle of the Article 14 of the Constitution of Georgia enters into force) and it is unlawful to conduct any discriminatory activities towards them in their right to receive education and the right to choose the form of education they receive."[11]

In accordance with the convention, the Georgian Law on General Education defines that "Everyone shall enjoy equal rights to acquire a complete general education in order to fully develop his/her personality and acquire knowledge and skills necessary for equal opportunities to be successful in private and social life. Acquisition of aprimary and basic education shall be mandatory." 12 Deriving from the principles of universality of education and access to education "The State shall ensure the right of each pupil (including pupils with special educational needs) to acquire general education in the official, or in his/her native, language, as close to his/her place of residence as possible."[13]

As according to the National Educational Curriculum "It is forbidden for a public school to set barriers regarding the enrollment of students and only enroll the students, who are ready for school and are of academically successful."[14] As according to the Georgian law on Vocational Education:" Everyone has a right without discrimination to exercise the right to vocational education as determined by Georgian legislation. Vocational education students and trainees, as well as vocational education teachers and their unions have the right without discrimination to exercise the rights granted by the Georgian legislation as well as the rights and freedom granted by educational institutions."[15] Abovementioned law does not only declare elimination of discrimination in the vocational education sphere, but creates legal mechanisms for the civic integration of the persons, whose mother tongue is not Georgian and offers preparation program/modules in Georgian language, which aims at learning state language in order for them to study on vocational educational programs.[16]

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10 Article 27 (1), Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995.

11 *Kantaria B.,* The Constitutional Principle of the Right to Education, Commentary to the Constitution of Georgia, Chapter two. Georgian Citizenship. The Fundamental Human rights, Tbilisi, 2013, 426 (in Georgian).

12 Article 9 (1), Georgian Law on "General Education", Parliament of Georgia, LHG, 20, 04/05/2005.

13 Ibid, article 7(1).

14 Decree № 40/N of the Minister of Education and Science of Georgia of May 18, 2016 about the adoption of the National Education Curriculum, Article 1, annex 11 to the article 1.

15 Article 4 (1) and (2), Georgian Law on "Vocational Education", 3442-IS, 20/09/2018.

16 Ibid, Article 3(Z).

Georgian Law on "Higher Education" mentions that the state guarantees the transparency and access to higher education, among them for persons with convictions; Life-long higher education opportunity and elimination of any types of discrimination in education, among them academic, religious, ethnic discrimination, as well as discrimination on the grounds of opinion, sex, social origin and others.[17] It is worth mentioning that on May 2, 2014 the Parliament of Georgia adopted the Georgia Law on "Elimination of all forms of discrimination" (Kutaisi, N 2391-IIS). The aim of the statute is to eliminate all forms of discrimination and guarantee for all natural and legal persons bodies to exercise the right guaranteed by the legislation regardless of race, color, language, sex, age, nationality, origin, place of birth, residence, property or title, religion or faith, national, ethnic or social belonging, profession, marital status, health condition, disability, sexual orientation, gender identity and expression, political or other beliefs or other basis. According to the same law the principle of equal treatment shall be imposed towards the conditions of social and health security, education, delivery of products and services, among them access to education.[18]

The essence of the abovementioned legal norms attest that the requisition of the E clause of the article 3, which guarantees the access to education for foreign residents,[19] has been executed on national level in Georgia and according to the national legislation, the equal access, as a principle, is guaranteed to the foreign residents, which means that the public schools do not have a right to refuse or create any type of barriers to access to education.

3. Funding of Education

As according to the Constitution of Georgia, "Pre-school education shall be guaranteed in accordance with the procedures established by law. Elementary and basic education shall be compulsory. General education shall be fully funded by the State, in accordance with the procedures established by law. Citizens shall have the right to state-funded vocational and higher education, in accordance with the procedures established by law."[20] According to the Georgian Law on "General Education" the state funds each educational institution with a voucher per student. The numbers of standard and increased vouchers are determined according to the maximum work-load set in the National Educational Curriculum, with the preservation of the equality principle in terms of the right to education.[21]

Despite the fact that article 3, clause C of the convention restricts unequal treatment of students in the funding sphere,[22] Law of Georgia on "General Education" (which foresees "shall have the right

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17 Article 3 (2), Georgian Law on "Higher Education", Parliament of Georgia, LHG, 2, 10/01/2005.

18 Articles: 1 and 2(10)(g), Law of Georgia on "Elimination of All Forms of Discrimination", 2391-IIS, 07/05/2014.

19 Convention against Discrimination in Education, 14/12/1960, <www.unesco.org/education/pdf/DISCRI-_E.PDF>, [23.11.2018].

20 Article 27(2), Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995.

21 Article 22 (2)(3), Law of Georgia on "General Education", LHG, 20, 04/05/2005.

22 Convention against Discrimination in Education, 14/12/1960, <www.unesco.org/education/pdf/DISCRI_-E.PDF>, [23.11.2018].

to receive additional funding from the State Budget of Georgia in the form of an increased school voucher and/or within an appropriate target program"[23] and grants right to the Government of Georgia to set "the financial norms per student, standardized and increased vouchers")[24] could not be reviewed as infringement of the convention, due to the fact that the usage of additional funding and increased vouchers are deemed appropriate on special occasions, while preserving the principle of equality. The public schools, which undertake teaching programs for the students with special educational needs, have the calculated funding and accordingly the standardized vouchers according to their needs. The small public schools are also entitled for additional funding, whereas in cases, when the execution of the National Educational Curriculum exceeds the funding per student. [25]

It is worth noting that according to the article 3 of the convention, the obligation of funding the foreign residents and persons without Georgian citizenship is guaranteed in the General Education sphere, as according to the Georgian Law on General Education "The funding determined by this article shall apply to citizens of Georgia, the persons having neutral ID cards, neutral travel documents or temporary ID cards, aliens (including the citizens of foreign countries with the status of compatriot living abroad), stateless persons and persons with refugee or humanitarian status"[26].

Georgian citizens, foreign residents and persons without Georgian citizenship are eligible for "Funding of vocational education, short-cycle educational programs and state language programs is carried out by state authorities, authorized ministries of the Autonomous Republics of Abkhazia and Adjara and municipalities in accordance with Georgian legislation. Financing of vocational education, short-cycle educational programs and state language training programs may also be done by other agencies and organizations in accordance with Georgian legislation".[27]

With the aim of preservation of the equality principle, the funding mechanisms for the Higher Education are set, in particular, citizens of Georgia who are persons with neutral ID cards or neutral travel documents, and aliens with the status of fellow citizens living abroad, who are admitted to the accredited educational programs of higher education institutions that are the members of the Unified Post-graduate Examination Network as provided for by this Law, may obtain state educational scholarship for Master's Programs. Aliens, except for aliens with the status of fellow citizens living abroad, whose higher education is financed in accordance with the procedures established by this Law for financing the higher education of the citizens of Georgia, may be granted state educational scholarship for Master's Programs only within the threshold limit of 2% of the annual amount of state educational scholarships for Master's Programs under the state programme determined by the Ministry of Education, Science, Culture and Sports of Georgia.[28]

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23 Article 22, Law of Georgia on "General Education", LHG, 20, 04/05/2005.
24 Ibid, article 25.
25 Decree № 476 of the Government of Georgia of 14 September, 2015 about the Funding of General Education.
26 Article 22(7), Law of Georgia on "General Education", LHG, 20, 04/05/2005.
27 Article 30 (1), Georgian Law on "Vocational Education", 3442-IS, 20/09/2018.
28 Article 80 and 80^{1}(2), Georgian Law on "Higher Education", LHG, 2, 10/01/2005.

Despite the fact that article 3, clause C of the convention does not allow to have differences in treatment in matters of funding,[29] the law on "Higher Education" articles 80, clause 2 and article 80^1, clause 2 (Aliens, except for aliens with the status of fellow citizens living abroad, whose higher education is financed in accordance with the procedures established by this Law for financing the higher education of the citizens of Georgia, may be granted state educational scholarship for Master's Programs only within the threshold limit of 2% of the annual amount of state educational scholarships for Master's Programs under the state program) which determine the state policy towards the foreign residents and aliens with the status of fellow citizens living abroad, should not be considered as infringement of the obligations set as according to the convention, due to the fact that according to the given regulation, during 2013-2018 the total sum allocated as a state grant was set at 240 000 GEL for the foreign residents, who passed the Unified National Exams, whereas the sum for the Unified Master Exams was set at 45 000 GEL. The mentioned funding could be used to give tuition waiver tuition waiver scholarships to 106 students on bachelor educational programs scholarships to 106 students on bachelor educational programs and 20 tuition waiver scholarships on master educational programs.[30]

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[29] Convention against Discrimination in Education, 14/12/1960, <www.unesco.org/education/pdf/DISCRI_-E.PDF>, [23.11.2018].

[30] See, Decree № 66 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships and Program Funding for the Academic Year of 2013-2014", 28/03/2013; Decree № 248 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships and Program Funding for the Academic Year of 2014-2015", 20/03/2014; Decree № 180 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships and Program Funding for the Academic Year of 2015-2016", 24/04/2015; Decree № 158 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships and Program Funding for the Academic Year of 2016-2017", 01/04/2016; Decree № 359 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships and Program Funding for the Academic Year of 2017-2018", 24/07/2017; Decree № 65 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships for Master Educational Programs, Approval of the Priority Master Educational Programs and Approval of the Sums to be Distributed Among the Priority Master Educational Programs for the Academic Year of 2013-2014", 13/02/2013; Decree № 163 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships for Master Educational Programs, Approval of the Priority Master Educational Programs and Approval of the Sums to be Distributed Among the Priority Master Educational Programs for the Academic Year of 2014-2015", 13/02/2014; Decree № 85 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships for Master Educational Programs, Approval of the Priority Master Educational Programs and Approval of the Sums to be Distributed Among the Priority Master Educational Programs for the Academic Year of 2015-2016", 05/03/2015; Decree № 97 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships for Master Educational Programs, Approval of the Priority Master Educational Programs and Approval of the Sums to be Distributed Among the Priority Master Educational Programs for the Academic Year of 2016-2017", 26/02/2016; Decree № 131 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships for Master Educational Programs, Approval of the Priority Master Educational Programs and Approval of the Sums to be Distributed Among the Priority Master Educational Programs for the Academic Year of 2017-2018", 15/03/2017.

In the framework of the Foreign National Funding program, the number of the foreign nationals who received tuition waiver scholarships during 2013-2018:[31]

Level of Education	2013	2014	2015	2016	2017
Bachelor	39	42	40	25	42
Master	3	3	9	13	11

The above presented numbers exemplify that each year the number of the students is less than the proposed sum of state funding. Therefore, we could explicitly state that is no unequal treatment towards the foreign nationals in terms of funding in the sphere of higher education.

Taking into consideration the above-mentioned statements, we could summarize that the elimination of discrimination is guaranteed in terms of the state funding on national legislation level in Georgia.

4. Inclusive Education

The adoption of the principles of inclusive education in Georgia could be viewed in light of the elimination of discrimination and creation of the equal enjoyment opportunities in the educational sphere.

Georgian Law on "General Education" creates legal basis for the implementation of the inclusive education and for the realization of the equal opportunities for the students with special needs. According to the Georgian Law on "General Education", a sign language and its analogues shall be used in specialized schools for sensory impairments, where children with hearing disorders are educated. The Braille system shall be used in specialized schools for sensory impairments, where children with visual impairments are educated. With the purpose of the implementation of the inclusive education, the ministry of Education, Science, Culture and Sports is entitled to adopt the regulations for the implementation, development and monitoring of the inclusive education, also the identification mechanism for the students with special needs.[32]

The national Educational Curriculum defines the individual learning curriculum according to the individual learning competencies and interests. The objective of the individual learning curriculum is to satisfy the needs of the students with special needs.[33]

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[31] The current information has been received through a correspondence of 27 November 2018, № MES61801523368 sent by *M. Shukhoshvili*, Head of the Higher Education and Science Department of the Ministry of Education, Science, Sports and Culture.

[32] Georgian Law on "General Education", LHG, 20, 04/05/2005.

[33] The annex to the Article 1 of the decree № 40/N dated 18 May 2016, of the minister of Education and Science of Georgia about the "Adoption of the Individual Learning Curriculum".

We could consider the Georgian Law on "Vocational Education" as a mechanism for the elimination of discrimination in the vocational education sphere, as it foresees: the equal enjoyment of the educational process, where all vocational educational students and trainees are ensured with opportunities to get vocational education based on their individual educational needs and abilities. According to the Georgian Law on "Vocational Education", an educational institution should ensure vocational education students and trainees have hearing disabilities; in case of necessity Georgian sign language shall be used. Vocational education students and trainees have visual impairment; in case of necessity Braille system shall be used.[34]

Higher Education Institutions in Georgia provide appropriate learning conditions for students with disabilities and create learning opportunities for students with special needs.[35]

According to the Georgian legislation, an educational institution could not obtain a status, in case of absence adapted environment for the students with disabilities.[36]

5. Rights to Education of Ethnic Minorities

Article 4, clause 3 of the Georgian Law on "General Education" serves the purpose of the elimination of discrimination, as according to it, "the citizens of Georgia, whose native language is not Georgian, shall have the right to acquire a complete general education in their native language in accordance with the National Education Curriculum, as provided for by the legislation. According to the international standards, the Georgian legislation protects the individual and collective rights of ethnic minorities, to practice their native language, preserves and freely express their identity. Apart from this, an individual, who studies at a non-Georgian educational institution or passed the level of individual Educational Curriculum as an extern in Russian, Armenian or Azerbaijani languages is entitled to pass the educational institution's exams in Georgian, Russian, Armenian or Azerbaijani languages.[37] Therefore, we could state that the Georgian legislation creates the guarantees for access to education and access to education in ethnic minorities' languages. The mentioned legal regulation is in accordance with the article 5, clause C of the convention.

As according to the Georgian Law on "Vocational Education" there exists a state Language Training Program, module aimed at teaching state language for tackling the goals of the vocational program / short-cycle educational program / vocational training / retraining program and / or for supporting the civil integration of those for whom Georgian is not a native language.[38]

Apart from this, the Georgian Law on "Higher Education" preserves the interests of minorities by introducing a State Language Educational Program, whereas it is compulsory to teach the program

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34 Georgian Law on "Vocational Education", 3442-IS, 20/09/2018.

35 Article 3(3), sub-clause 3 and article 43(3), Georgian Law on "Higher Education", LHG, 2, 10/01/2005.

36 Decree № 99/N of the minister of Education and Science of Georgia on the "Adoption of the Authorization of Educational Institutions", 01/10/2010.

37 Georgian Law on "General Education", LHG, 20, 04/05/2005.

38 Article 3(Z^2), Georgian Law on "Vocational Education", 3442-IS, 20/09/2018.

during the 1st year to the students, who passed Unified National Examination tests in Azerbaijani, Armenian, Abkhaz and Ossetian languages. Foreign nationals, who wish to continue studies on bachelor programs, bachelor/master integrated educational program of Teacher Education, Veterinary integrated master program, certified medical worker's/dentist's program are entitled to State Language Educational Program.[39]

6. Elimination of Discrimination Based on Religious and Political Features

According to the article 5, clause 1, sub-clause b, the Georgian law on "general Education" guarantees the freedom of public schools from religious and political associations and freedom of private schools from political associations. The legislation does not allow the politicization of the teaching process, also does not allow indoctrination of the educational process, proselytism or forced assimilation.[40] Also, the Georgian law on "Higher Education" prohibits any type of discrimination, among them, academic, ethnic, social or religious affiliation, and/or opinion, sex and other grounds. Establishment of a political or religious organization at higher educational institution. The higher educational institution should guarantee the equal treatment regardless of political or religious beliefs.[41]

In comparison to the Georgian law on "General Education" and the Georgian law on "Higher Education", there Georgian law on "Vocational Education" does not contain legal norms, which directly prohibits discrimination with religious and political features in vocational education; however, it regulates the general norm prohibiting discrimination. According to the Georgian Law on "Vocational Education", a vocational education student, a vocational education teacher and their respective unions, are entitled to the rights guaranteed with the Georgian legislation without discrimination.[42]

7. Conclusion

Taking into consideration all the aboementioned, we could summarize that the convention on the "Elimination of Discrimination in Education" has been succesfully implemented in the Georgian legislation. We should also nerebu note that, one of the forms of discrimination is racial discrimination. Racial discrimination is related to a race, colour of the skin, national decendency. Discrimination could occur anytime, starting from the pre-school period and continueing to the university period, which could be caused by the teacher, institution, any worker of the institution's administration or by the student.[43] In order to eliminate the racial discrimination and avoid non-friendly educational envrionment, the federal government established one of the most important acts,

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39 Georgian Law on "Higher Education", LHG, 2, 10/01/2005.
40 Georgian Law on "General Education", LHG, 20, 04/05/2005.
41 Articles 3 and 16, Georgian Law on "Higher Education" LHG, 2, 10/01/2005.
42 Article 4(2), Georgian Law on "Vocational Education", 3442-IS, 20/09/2018.
43 Free Advice Legal, Racial Discrimination in Education, <www.law.freeadvice.com/government_law/-civil_rights_law_ada/race-discrimination-education.htm>, [01.05.2019].

which declared racial, religios, gender and ethnic discrimination unlawful. Non-equal voting rights and racial segragation at schools had been abolished. President *Lyndon Johnson* had signed the Civic Rights Act at the White House on July 2, 1964.[44]

Often, the discrimination on behalf of the teacher is related to the in-class disciplinary issues, whereas most of these cases contain instances, where teachers show signs of discriminatory actions towards the representatives of minorities. This is custom in cases related to African American/Latin students, especially at high schools, whereas different forms of discrimiantion on behalf of the teachers are exemplified in giving them non-fair grading. Also, there are instances, when the students, who are the victims of discrimination, are not accepted by the peers, whereas on most occasions, the students, who are the discrminators, do not get the necessary reactions from the teachers.[45]

The cases of discrimnation from the educational institution's administration is more common, than acts of discrimination from the teachers. In pre-schools and middle-schools, the administartors are more expected to punish students representing the different minotities. Often, there are cases, when the representatives of the minorotoes are expelled from the educational institutions, representatives of the majority. The above mentioned Civil Rights Act fines schools, when they refuse students to their program and also, in cases, when the schools do not show signs of positive discrimination to students, who had been victims of discrimination in the past.[46]

Most common form of discrimination is the oppression from the students towards the victim. The mentioned Civil Rights Office pubished the cases of the racially motivated incidents, which comprises of acts of physical violence, racial epithet calling outs, writings on the school walls and organized acts of violence, which are directed to certain students. Those, closed up incidents, which are conducted by the students, could be percieved as the cases of non-investigative nature, however, such acts are repreated, the Civil Rights Office would start investigation.[47]

It is important to note the cases that happened at the school in Tbilisi, when there had been a verbal confrontation between a white (race) and African-American (race) students. The court had judged that there was a case of racial discrimination, in particular, it judged that it is of great importance to understand whether the victim perceived that conducted act as an act of violence. The Appellate Court judged that the motive of the dinscrimiantor is not importnat, rather it is important, whether the act itself contained feats of discrimination.

It is noteworthy that Georgia represents as a member country of the European Convention on Human rights, whereas the article 14 of the convention prohibits any type of discrimination. In this case, the case of “Savez crkava “Rijec Zivota” and others v. Croatia" is noteworthy.[48] The court judged that, discrimination could be interpreted widely, in particular, article 1 of the protocol 12 con-

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44 See, Civil Rights Act, 02/07/1964.

45 Free Advice Legal, Racial Discrimination in Education, <www.law.freeadvice.com/government_law/-civil_rights_law_ada/race-discrimination-education.htm>, [01.05.2019].

46 Ibid.

47 Ibid.

48 Savez Crkava (Rijec Zivota) and Others v Croatia, [2010] ECHR, App. № 7798/08.

siders the general prohibition of discrimination and its defense does not limit to "any right approved by the law", as it is indicated in the article 1 of the added protocol. Therefore, the clauses 1 and 6 in article 2 of the Georgian Law on the "Elimination of the Discrimination" serve the purpose of a wider definition.[49]

The right to access to education is constitionally protected. The current legislation proibits discrimination in education and declares equal access to education at pre-schools, public schools and higher educational institutions. The Georgian law on "General Education" protects each student from violence or any type of misconduct from the discriminators. Article 13, of the Law, which is related to the prohibition of discrimination, puts obligation on an educational institution to protect students and to establish mutual respect and tolerance among teachers and parents, despite their social, ethnic, religious, language or political belongings. Article 20 of the Law prohibits any type pf violence againts any student of the educational institution, whereas in cases, where the physical or verbal abuses occur, the school shall immediately rwact based on the regulations set in the Georgian legislation. A student, has a right to be protected from the non-acceptable behavior, carelessness and humiliation.[50]

It is important to note that there could exist different treatment could co-exist with certain rights or to be related with certain merits, as the discrimination itslef, could not be viewed as a separate institute and therefore be a subject of independent protection. Therefore, in cases if discrimination, there should exist a protected spheres/right, which are subject to legal interferences, comparative-analogical or essentially similar person and there should exist a difference netween those persons, which should directly be related to the "protected sphere". In cases of direct discrimination, as well as indirect dicrimination cases, it is of utmost importance to define the comparator, in order for us to define whether the exact critirium, or the influence of the practice is rather negative, than on instances with other persons being in the similar situation.[51]

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[49] Decision of the Tbilisi Appeal Court of 14 June 2018, № 2B/5499-17.
[50] Ibid.
[51] Ibid.

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11. Decree № 163 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships for Master Educational Programs, Approval of the Priority Master Educational Programs and Approval of the Sums to be Distributed Among the Priority Master Educational Programs for the Academic Year of 2014-2015", 13/02/2014.
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13. Decree № 97 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships for Master Educational Programs, Approval of the Priority Master Educational Programs and Approval of the Sums to be Distributed Among the Priority Master Educational Programs for the Academic Year of 2016-2017", 26/02/2016.
14. Decree № 131 of the Government of Georgia on the "Approval of the State Educational Grant Volume and Amount of State Scholarships for Master Educational Programs, Approval of the Priority Master Educational Programs and Approval of the Sums to be Distributed Among the Priority Master Educational Programs for the Academic Year of 2017-2018", 15/03/2017.
15. Decree № 40/N of the Minister of Education and Science of Georgia on the "Adoption of the National Education Curriculum", 18/05/2016.
16. Decree № 99/N of the Minister of Education and Science of Georgia on the "Adoption of the Authorization of Educational Institutions", 01/03/2010.
17. Georgian Law on "General Education", LHG, 20, 04/05/2005.
18. Georgian Law on "Vocational Education", 3442-IS, 20/09/2018.
19. Georgian Law on "Higher Education", LHG, 2, 10/01/2005.
20. Georgian Law on "Elimination of any type of Discrimination", 2391-IIS, 02/05/2014.

21. *Kantaria B.,* The Constitutional Principle of the Right to Education, Commentary to the Constitution of Georgia. Chapter two. Georgian Citizenship, The Fundamental Human Rights, Tbilisi, 2013, 426 (in Georgian).
22. Decision of the Tbilisi Appeal Court of 14 June 2018, № 2B/5499-17.
23. Savez Crkava (Rijec Zivota) and Others v Croatia, [2010] ECHR, App. № 7798/08.
24. Correspondence № MES61801523368 of 17 November, 2018 sent by M. Shukhoshvili, Head of the Higher Education and Science Department of the Ministry of Education, Science, Sports and Culture.
25. <www.unesco.ge/?page_id=534>.
26. <www.civilrights.findlaw.com/discrimination/discrimination-in-education.html>.
27. <www.stephensons.co.uk/site/individuals/education/discriminationasagroundforappea>.
28. <www.law.freeadvice.com/government_law/civil_rights_law_ada/race-discrimination-education.htm>.

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The Impact of the Limitation of Contractual Claim on the Stability of Civil Circulation

The Institute of limitation represents a kind of framework, violation of which is related to a specific legal consequence. It has a positive impact on the protection of the rights of parties and the stability of civil circulation. Therefore, this institution is of great importance.

The analysis of influence of the limitation on stability of civil circulation shows that the main problem is related to the difficulties associated with determining a reasonable time for successful realization of limitation goals. An inadequately short or long limitation period can neglect the interest of stability of civil circulation, as well as the interest of determining a reasonable balance between the parties. Therefore, the deep analysis of the essence and goals of limitation is necessary.

Key words: *Limitation, stability of civil circulation, interest of the debtor, interest of the creditor, public interest, legal security, restriction, reasonable, goal.*

1. Introduction

The law and order of almost every country envisages the institute of limitation. Its existence is conditioned proceeding from the need for equal protection of equality and the interests of the parties of the agreement. Existence of reasonable claim limitation periods is a necessary prerequisite for realization of rights. That is why the importance of this institution in the modern society is great.

In general, time plays a major role in case of protection of violated rights or the rights that became disputed.[1] Some legal relationships between the parties may arise so long ago that it can influence the rights and duties of the parties.[2] Generation of right, as well as its termination is related to a specified time; consequently, the limitation period informs the subject of law about the term of implementation of its violated right through the court.[3] The limitation bears the importance to the extent that some relationship took place so long ago that passing of a long period of time directly affects the rights of persons.[4]

The institution of limitation violates the principle of stability and continuity based on a contractual trust that is characteristic of a private legal relationship;[5] however, the above mentioned has its justification. After some time, the requirement of legal stability is more worthy of protection.[6]

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1 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 133 (in Georgian).

2 *Akhvlediani Z.* in: *Chanturia L.* (ed.), *Akhvlediani Z., Zoidze B., Jorbenadze S., Ninidze T.,* Comment of the Civil Code of Georgia, Book I, Tbilisi, 1999, 316 (in Georgian).

3 *Zoidze B.*, From the History of Creation of the Georgian Civil Code, "Georgian Law Review", №6/2003-1, 2003, 110 (in Georgian).

4 *Akhvlediani Z.* in: Comment of the Civil Code of Georgia, Book I, *Chanturia L.* (ed.), *Akhvlediani Z., Zoidze B., Jorbenadze S., Ninidze T.,* Comment of the Civil Code of Georgia, Tbilisi, 1999, 316 (in Georgian).

5 *Bucher E.,* Schweizerisches Obligationenrecht, Allgemeiner Teil ohne Deliktsrecht, 2. Aufl., Zürich, 1988, 444.

Proceeding from the practical significance of the institute of limitation, it is necessary to define in detail, what is the impact of the limitation of contractual claim on the stability of civil circulation, in addition, does the mentioned institute cause unreasonable restriction of interests of the parties, which, from its part, is incompatible with the principle of contractual liberty.

2. The Concept of Limitation of Action and its Impact on the Stability of Civil Circulation

The institution of limitation is derived from Roman law. The sources of Roman law do not provide the definition of concept of limitation; therefore, the general indication about it is not available. In the Roman law, the word "praescriptio" expressed the certain period of time, during which the specific action had to be implemented or vice versa.[7] In addition, there were different views regarding its legal essence. The lawmakers put the question, whether the limitation opposed the natural law. The answer to this question was negative, as, on the one hand, the limitation was considered as the negligence sanction, and on the other hand, the legal proceedings through the limitation, and, accordingly, the dispute would end, that anyway, corresponded to the doctrine of natural law.[8]

In Middle Ages the limitation, due to its nature, was considered as the sanction for negligent creditor, later it was qualified not as the sanction but as assumption, that the party, by its contracting bargains, denied the right. The mentioned aspect of the will of parties later became the basis for the pandectists.[9]

Tribaut, who fully recognized the abstract concept of limitation, was the most important among the scientists. Proceeding from the natural law he propagated the limitation, in general, to all the rights and required to justify the use of all cases in accordance with the positive law.[10]

In 1841, Savini evaluated the limitation as a very important and so-called "well-wisher" institute, and in 1975 the monograph of Spiro, which considered the limitation as indispensable in the state having developed legal system, was published.[11]

The institute of limitation can be found in the Civil Law Code of SSR. It is also regulated under the current Civil Code of Georgia (hereinafter the CCG), which was adopted on 25 November, 1997. The term - "limitation" is of Georgian origin.[12]

The norms regulating the limitation institute are also found in the German Civil Code (hereinafter referred to as the GCC). The general part of the GCC includes the norms on the limitation that are applied to other legal relationships. The mentioned approach is dictated by Pandect Law.[13]

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6 *Schmidt-Kessel M.,* Ein einheitliches europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommision, München, 2012, 529.

7 *Engelmann J.,* Dissertation, Die Verjährung nach russischem Privatrecht, 1867, 3.

8 *Pichonnaz P.,* Ursprung und Begründung in historischer Sicht, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 2015, 521.

9 Ibid.

10 *Engelmann J.,* Dissertation, Die Verjährung nach russischem Privatrecht, Dorpat, 1867, 3.

11 *Guckelberger A.,* Die Verjährung im Öffentlichen Recht, Tübingen, 2004, 1.

12 *Lomidze V.*, Limitation (term for the issue), the ollection Dedicated to Prof. G. Nadareishvili's Memory: Historical Essays of Law and Political Thinking, Book I, Tbilisi, 2010, 370 (in Georgian).

The regulation on limitation is given in the chapter of law of obligation in the French Civil Code, however, there are different regulations as well; in particular, there are separate acts on limitation in England and Denmark. One of the most noticeable sign of such regulation is a comprehensive regulation.[14]

It should be noted that English law is not familiar with the limitation of the action. This is the right based on the law.[15] There in the Limitation Act of 1980 in England that indicates the number of laws. In addition, the above-mentioned Act keeps the special limitation terms, established by other legal acts, unchanged.[16]

In general, the limitation period implies the period of time during which the person is given a legal opportunity to protect his/her rights and interests.[17] By determining the limitation of action, the person whose rights were violated, has an opportunity to protect the right in a certain period of time, and the expiration of this period causes the limitation of a claim.[18]

2.1. Consider the Interest of the Debtor in the Context of Limitation of Action

When assessing the issue of limitation of action the motives that were the main factor for lawmaker in determining the norms regulating the limitation, are important. The public and private interests should be differentiated from each other. It is not unambiguously decided yet whether the institute of limitation more serves to protection of public or private interests.[19]

One of the objectives of determining the limitation of action is to protect the debtor. [20] The more time passes, the more difficult it is to determine whether the agreed equivalent was available in the relevant period of time, and less likely that the counter party requests fulfillment of claims due to violation of the equivalence.[21] The interest worthy of protection of the debtor and creditor is equally important, and as far as the interest of one party of the contract diminishes, the interest increases with the

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13 *Mann M., Hervier M., Sychold M.,* Gutachten zum Recht der Verjährung in Deutschland, Frankreich, England und Dänemark, Lausanne, 2011, 10.

14 Ibid.

15 Ibid.

16 Limitation Act, see, <https://www.legislation.gov.uk/ukpga/1980/58>, [27.03.2019].

17 Decree No.as-1089-2018 of 24 December, 2018 of the Chamber of Civil Cases of the Supreme Court of Georgia.

18 *Kvantaliani N.*, Comment of the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 128, field number 2 (in Georgian).

19 *Kepplinger J.,* Zur vertraglichen Verlängerung der kurzen Verjährungsfrist von Schadenersatzansprüchen, Juristische Blätter, Heft 3, 2012, 161.

20 *Kvantaliani N.*, Comment of the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 128, field number 3 (in Georgian).

21 *Schmidt-Kessel M.,* Ein einheitliches europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommision, München, 2012, 529.

same proportion for other party of the contract, which had to have the belief after certain period of time that the claim would no longer be submitted to the party.[22]

First of all, the private interest protects the debtor from execution of unexpected, substantially delayed claims for an indefinite period. The debtor shall be well informed in the issue, whether he/she still has to fulfill the obligation or he/she can otherwise use the ordered subject.[23]

The institute of limitation of action also serves the protection of interests of the debtor in terms of obtaining the evidences.[24] In legal relations the elapse of time is constantly associated with complication of burden of evidence. It is possible that the evidences can be lost or destroyed, the memories become vague, material evidences may no longer exist. After a long period of time, the witnesses, who can provide the evidences significant for the case, may no longer be available.[25] Consequently, it can become complicated for the debtor to prove the specific fact, the burden of proof he/she is bearing.

The debtor must be protected from the damage, conditioned by the time elapse in case of protection from unsubstantiated claim. In cases when the debtor has no more proof, keeping of which has been presumable within the specified limits even for him/her, probably he/she cannot protect his/her own interests. The institute of limitation on contractual claims serves the protection of the debtor from the mentioned case.[26]

The above purpose of protection of the debtor's interests is especially important, when the debtor is not familiar with the facts proving the claim or does not expect the exercising of the right to him/her and, therefore, does not have any basis for protection of the proof.[27]

The purpose of the limitation on contractual claims is to protect the interests of the party "from becoming a part of the process, in which the protection of position is difficult or impossible due to the limitation of a claim".[28] The economic relations of the debtor that may be deteriorated after passing of long time are protected by the limitation.[29]

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22 Ibid.

23 *Sebastian B.,* Aktuelle Probleme des Verjährungsrechts, Juristische Ausbildung, 31. Jahrgang, Heft 7/2009, 2009, 481.

24 *Derleder P., Meyer T.,* Die Verjährung zivilrechtlicher Ansprüche – Schuldrechtsmodernisierung zwischen Verbraucherschutz und Turbokapitalismus, Kritische Justiz, Nr. 3, 35 Jahrgang, 2002, 326.

25 *Akhvlediani Z.* in: *Chanturia L.* (ed.)*, Akhvlediani Z., Zoidze B., Jorbenadze S., Ninidze T.,* Comment of the Civil Code of Georgia, Book I, Tbilisi, 1999, 316 (in Georgian); *Guckelberger A.,* Die Verjährung im Öffentlichen Recht, Tübingen, 2004, 74; *Dohse R.*, Die Verjährung, 11. Auflage, München, 2010, 22; *Seidl E.,* Die Verjährung als sozialer Behelf im Rechtsbuch von Hermopolis, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 1974, 361.

26 *Koller A.,* Schweizerisches Obligationenrecht: Handbuch des allgemeinen Schuldrechts ohne Deliktsrecht, 3. Aufl., Bern, 2009, §67, Rn. 6

27 Ibid.

28 Decision No.as-898-860-2014 of 9 October 2015 of the Chamber of Civil Cases of the Supreme Court of Georgia.

29 *Klose M.,* Vindikationsverjährung: Gewogen für verfassungswidrig befunden! Rewiss, Heft 2, 2014, 242.

The limitation on contractual claims protects the debtor in case when the latter knows that the creditor's claim is materially grounded.[30] The good or bad will of a person based on limitation is essentially negligible. The justification of the above-mentioned fact is that the limitation is based on inactivity of an authorized person, due to which the subjective representation of a liable person is less important for this institution.[31]

At the same time, it is noteworthy that the debtor is not obliged to be ready for fulfillment of obligations for a long period of time; if the debtor has constantly ready economic means in order to meet the creditor's claim, this results in inappropriate restricting his/her economic freedom[32] as well as dispositional freedom.[33] Those who are willing to intelligently implement economic activities should organize their own work in a manner not to use own limited means to satisfy the claims, which he/she does not expect to realize any more.[34]

Spiro refers to the purposes of limitation that the debtor does not seriously assume to implement the right against it, after the time elapse. Therefore, it is less likely to raise a claim to him. In addition, the debtor, in any case, shall not feel morally obliged to do more than he/she promised and the law requires it; in particular, fulfill the obligation and sacrifice a life even when an authorized person no longer requires fulfilling the obligation.[35]

The limitation institute protects the debtor not only from the fact that with time elapse possibility of proof may complicate, but also from the damage that could be caused for the debtor by the elapse of long time even when the burden of proof does not exist and the creditor's claim is justified, if the debtor has confidence for the fact that the creditor will no longer fulfill the claims against him/her.[36]

Protection of debtor's interests on the basis of limitation is the priority in some cases even towards the creditor's interests. This is fully reasonable only in case if the creditor has enough time to exercise the right. In other cases, proceeding from the interests of protection of debtor, refusal to satisfy a claim will be inappropriate towards the creditor as well as principle of justice existing in civil circulation.

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30 *Koller A.,* Schweizerisches Obligationenrecht: Handbuch des allgemeinen Schuldrechts ohne Deliktsrecht, 3. Aufl., Bern, 2009, §67, Rn. 6.

31 *Guckelberger A.,* Die Verjährung im Öffentlichen Recht, Tübingen, 2004, 74.

32 *Liebel F.,* Die Verjährung von Schadenersatzansprüchen bei Vorliegen mehrerer Aufklärungspflichtverletzungen, ÖBA, 6/17, 404.

33 *Gukelberger A.,* Die Verjährung im Öffentlichen Recht, Tübingen, 2004, 74.

34 *Bergmann A.,* Der Verfall des Eigentums: Ersitzung und Verjährung der Vindikation am Beispiel von Raubkunst und Entarteter Kunst, Tübingen, 2015, 37.

35 Ibid.

36 *Dohse R.,* Die Verjährung, 11. Aufl., Stuttgart, 2010, 22.

2.2. Consider the Interest of the Creditor in the Context of the Limitation of Action

In addition to the debtor's interests, the institute of limitation of action serves the protection of creditor's interests. For the creditor the limitation causes not only own expectation but the expectation conditioned by the interest of clear legal relationship, to fulfill the claims in reasonable time and not to defer the dispute on request.[37]

The creditor should have sufficient opportunity to fulfill own demands. The existence of the limitation period actually represents the guarantee to exercise the right. By the limitation period the creditor can protect the right proceeding from the topicality of protection of right and real possibility of submitting the relevant evidences.[38]

In general, the institute of limitation does not infringe the creditor's interests. Within the limits of the limitation period, the creditor has the possibility to actually realize the existence of the claim, to examine the authority, to collect the evidences and to initiate execution of claims through the court.[39] However, in a separate case, the creditor does not have the opportunity to ensure the exercising of right before the expiration of the limitation period.[40]

It should be shared the position that if the subject of the right is hindered to fulfil the claim or the subject of the right does not have the basis to exercise the right, the limitation loses its justification.[41] The limitation should be compatible with the creditor's possibility to demand to fulfill the obligation.[42] Accordingly, if the creditor does not have enough ability to fulfill the demand or the knowledge related to violation of rights, this results in inappropriate infringement of his/her rights.

2.3. The Limitation Conditioned by the Public Interest

The monograph of Spiro with regard to the legitimization of limitation, published in 1975, is important; here Spiro indicated that only the interest, worthy of debtor's protection, is not enough for legitimization of institute of limitation of action. It should also be clearly substantiated, why the legal damage, which inflicts the creditor by using a limitation, can be justified.[43]

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37 *Thouvenin F., Purtschert T.,* Schweizer Obligationenrecht 2020, Entwurf für einen neuen allgemeinen Teil, Zürich, 2013, Rn. 1.

38 Decree No.as-868-814-2012 of 19 July, 2012 of the Chamber of Civil Cases of the Supreme Court of Georgia.

39 *Dohse R.,* Die Verjährung, 11. Aufl., Stuttgart, 2010, 21.

40 *Medicus D.,* Allgemeiner Teil des BGB, 10. Aufl., München, 2010, Rn. 105.

41 *Habscheid W.,* Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen, Band I: Die Verjährung der Forderungen, Band II: Andere Befristungen und Rechte by Karl Spiro, Archiv für die civilistische Praxis, 1978, 335.

42 *Pichonnaz P.,* Ursprung und Begründung in historischer Sicht, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 2015, 525.

43 *Dannemann G., Karatzenis F., Thomas G.,* Reform des Verjährungsrechts aus rechtsvergleichender Sicht - Hans Stoll zum 65. Geburtstag, Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law, 55. Jahrgang, Heft 1, 1991, 699.

The fact is undisputed that rights are subject to change not only in certain time, but exactly in terms of time, which may weaken or even stop it.[44] The limitation is based on the fact that the creditors' long-term inactivity causes the groundlessness of claim and this may be perceived as a refusal to satisfy a claim.[45]

Many private-legal norms and institutions that are recognized cannot be justified only by bilateral relationship. In addition, the social position should be taken into consideration.[46]

Proceeding from the relationship of creditor and debtor refutation of the right based on the limitation is unreasonable; more global legal stability and rationality aim should be achieved.[47]

By establishing the period of limitation of action, the purpose of lawmaker is to avoid the risk of unequal use or misuse of the right by the creditor. Establishing of the period of limitation of action also supports: the process of determining and studying of facts by the court, accordingly, making the reasoned decision; stabilization of civil circulation; strengthening of the mutual control of subjects of civil legal relationship and stimulating immediate restoration of the violated rights.[48]

Limitation of action ensures the stability of legal circulation and legal security,[49] protects the potential defendant and ensures avoidance of injustice[50] that may arise if the courts have to settle the past cases based on unreliable or incomplete evidences.[51]

The evidences, changed or destroyed due to elapse of long time, in general, will complicate the determining of reliability of the evidence that became disputable.[52]

The law provides for the institute of limitation of action, first of all, proceeding from the necessity of protection of public interest. In terms of legal stability and legal peace, the legal interest re-

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44 *Frank P.,* Befristung, Verjährung, Verschweigung und Verwirkung, Archiv für die civilistische Praxis, Band 206, Heft 6, 2006, 980.

45 BGE 90 II 428.

46 *Medicus D.,* System und Prinzipien des Privatrechts by Franz Bydlinski, Archiv für die civilistische Praxis, 1997, 317.

47 Ibid.

48 The Recommendations of the Supreme Court of Georgia on the problematic issues of Civil Law court practice, Tbilisi, 2007, 63; Decision No.as-547-515-2012 of 11 June, 2012 of the Chamber of Civil Cases of the Supreme Court of Georgia.

49 *Bucher E.,* Schweizerisches Obligationenrecht, Allgemeiner Teil ohne Deliktsrecht, 2. Aufl., Zürich, 1988, 444.

50 *Habscheid W.,* Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen. Band I: Die Verjährung der Forderungen. Band II: Andere Befristungen und Rechte by Karl Spiro, Archiv für die civilistische Praxis, 1978, 335.

51 Agentur der Europäischen Union für Grundrechte und Europarat, Handbuch zu den europarechtlichen Grundlagen des Zugangs zur Justiz, Luxemburg, 2016, 144.

52 Decree No.as-313-313-2018 of 20 April, 2018 of the Chamber of Civil Cases of the Supreme Court of Georgia.

quires that the claims that have not been fulfilled within the certain limits will not be the subject of realization.[53] Its goal is to arrange the interminable claims into a certain system.[54]

The limitation period represents one of the effective guarantees of proper solution to the case. In particular, the decision is based on the evidences submitted by the parties; therefore, the possibility of truly defining of authenticity for the case of evidences is an essential precondition for making the sound and objective decision. After a long time elapse there is a high probability that memory of witnesses will turn pale, number of unreliable evidences will be increased, consequently, biased assessment of factual situation of the case can take place.[55]

It's true, the limitation should serve the completion of uncertainty of existence and execution of the claim;[56] however, it is important, defining of what terms will be the effective mean for achieving this goal.

The public interest is different in legal security. The short limitation periods may bear the purpose of settling early conflict[57] and may serve prompt occurrence of legal peace,[58] however, it is possible that short limitation period may create the problems to the legal security, in case if injustice, caused as a result of establishing of short limitation period, goes beyond the certain boundaries. At this time the interest of the public can be changed; also, it can be required that individuals, despite elapse of long period of time, can satisfy the claim,[59] although long limitation periods can hinder the settlement of late conflict, based on complicated submission of evidences.[60]

It is noteworthy that in separate cases the term for submission of a claim can be expired due to a defect, when the creditor learns about the defect of the object. In such case, refutation of the creditor's claim based on the limitation will evidently cause unfair result, and the institute of limitation of action will create the acute conflict, instead of a legal security tool. The situation can be improved only in the way that the limitation period should start when the creditor can truly exercise the right. In this case the limitation on contractual claims can be understood not as a result of the expression of a small interest, but as a transition of a risk.[61]

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53 *Boemke B., Ulrici B.,* BGB Allgemeiner Teil, Berlin, Heidelberg 2009, Rn. 16; *Gukelberger A.,* Die Verjährung im Öffentlichen Recht, Tübingen, 2004, 72; *Schmidt-Räntsch J.* in: Erman BGB Kommentar, 11 Auflage, Band I, Hamburg, 2004, §194, Rn. 2.

54 Decision No.as-17-14-2015 of 1 July 2015 of the Chamber of Civil Cases of the Supreme Court of Georgia.

55 Decision No.3/1/531 of 5 November, 2013 of Plenum of the Constitutional Court of Georgia – "Tamaz Janashvili, Nana Janashvili and Irma Janashvili versus the Parliament of Georgia".

56 *Meller-Hannich C.,* Die Einrede der Verjährung, JuristenZeitung, 60. Jahrgang, Heft 13, 2005, 658.

57 *Derleder P., Meyer T.,* Die Verjährung zivilrechtlicher Ansprüche – Schuldrechtsmodernisierung zwischen Verbraucherschutz und Turbokapitalismus, Kritische Justiz, Nr. 3, 35 Jahrgang, 2002, 327.

58 *Greiner S.,* Schuldrecht Besonderer Teil, Vertragliche Schuldverhältnisse, Berlin, Heidelberg, 2011, 130.

59 *Bergmann A.,* Der Verfall des Eigentums: Ersitzung und Verjährung der Vindikation am Beispiel von Raubkunst und Entarteter Kunst, Tübingen, 2015, 36.

60 *Derleder P., Meyer T.,* Die Verjährung zivilrechtlicher Ansprüche – Schuldrechtsmodernisierung zwischen Verbraucherschutz und Turbokapitalismus, Kritische Justiz, Nr. 3, 35 Jahrgang, 2002, 327.

61 *Medicus D.,* Allgemeiner Teil des BGB, 10. Aufl., München, 2010, Rn. 105.

When determining the limitation institute, the public interest towards the effective use of state resources is in place,[62] including the interest of unloading of the court[63] from ungrounded claims.[64] In addition, there is an assumption that short terms of limitation helps to disburden the court through rigid manner.[65]

Determining of small limitation ensures cost saving, in particular, by complication of obtaining of evidences the process may be extended, and even the amount of court costs related to the judicial proceedings can be increased, which may lead to an obvious inconsistency between the expenses incurred by the party for making a decision and the results.[66]

Taking into consideration the indication of applying to the court today, when the workload of common courts is constantly increasing particularly in relation to civil-legal disputes, an indicated interest of limitation of action is noteworthy.

The institute of limitation also serves the strengthening of contractual discipline and helps the participants of legal relationship in effective implementation of their rights and obligations.[67]

The limitation of action places high priority on the power of time, which, in turn, gives the mitigating result. According to a separate opinion the lawmaker, stability of relationship and clarity of legal relationship provided by establishing the period of limitation of action, is considered the most significant than exercising of old right.[68]

Equal protection of interests of participants of circulation, based on limitation grounds, is ensured by the legislative stipulation that the participants of legal relationship are obliged to exercise their rights and obligations in good faith.[69] Proceeding from the above, while establishing the specific legislative regulation the interests of the debtor as well as the creditor have to be taken into consideration. Duration of limitation period shall be obvious and unambiguously approved[70] and it shall ensure defining of reasonable balance between the interests of parties.

In addition, it is noteworthy that despite granting such a great importance to the interest of stability of civil circulation, the separate provisions established by the CCG explicitly neglect the given

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62 *Pichonnaz P.,* Ursprung und Begründung in historischer Sicht, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 2015, 521.

63 *Thouvenin F., Purtschert T.,* Schweizer Obligationenrecht 2020, Entwurf für einen neuen allgemeinen Teil, Zürich, 2013, Rn. 2.

64 *Friehe T., Schulz M., Zimmer D.,* Gutachten zur Revision des Schweizer Verjährungsrechts aus rechtsökonomischer Perspektive - Eine Regulierungsfolgenabschätzung, Bonn, 2013, 19.

65 *Derleder P., Meyer T.,* Die Verjährung zivilrechtlicher Ansprüche – Schuldrechtsmodernisierung zwischen Verbraucherschutz und Turbokapitalismus, Kritische Justiz, Nr. 3, 35 Jahrgang, 2002, 327.

66 *Friehe T., Schulz M., Zimmer D.,* Gutachten zur Revision des Schweizer Verjährungsrechts aus rechtsökonomischer Perspektive - Eine Regulierungsfolgenabschätzung, Bonn, 2013, 18.

67 Decision No.as-266-254-2013 of 25 December, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia.

68 *Guckelberger A.,* Die Verjährung im Öffentlichen Recht, Tübingen, 2004, 73.

69 Decree No.as-609-582-2016 of 13 October, 2016 of the Chamber of Civil Cases of the Supreme Court of Georgia.

70 *Meller-Hannich C.,* Die Einrede der Verjährung, JuristenZeitung, 60. Jahrgang, Heft 13, 2005, 658.

goal of limitation. A similar approach of the lawmaker generates the possibility of assumption that by establishing the limitation the lawmaker made more effort on legal stability to protect the debtor's rather than creditor's interests, however, in some cases, this situation changes in favor of the creditor.

3. The Main Peculiarities of Limiting the Right of Fair Court through Limitation of Action

When discussing the institute of limitation of action, it's necessary to provide the assessment in terms of its compliance with the constitutional-legal principles. There is no doubt that with expiry of limitation period, the creditor is deprived of the opportunity to carry out the forced execution of his/her claim.[71] Since the most important guarantee of full use of this or that right exactly represents the opportunity of its protection in the court, and if there is no possibility to prevent a violation of the right or restore the violated right, enjoying of right can be called into question. Accordingly, prohibition of reference to the court or disproportionate restriction for protection of tight-freedoms is incompatible not only with right of a fair trial but, at the same time, contains the threat of neglecting of right for protection of which the reference to the court is restricted.[72]

It should be noted that the right of fair trial is of instrumental nature; its purpose is to ensure an opportunity of adequate and effective protection of human's rights and legitimate interests through the court. Accordingly, the realization of the right of a fair trial requires the existence of a specific right, the protection of which is related to the possibility of reference to the court.[73] The right of a fair trial has a special importance in a modern democratic and legal state; it is not absolute and it is subject to restriction that will be justified by legitimate public interest".[74]

The European Court of Human Rights indicates the legitimate aim of determining the limitation period, in particular, the court clarifies that the limitation "serves several important aims, namely, legal certainty and finality, protection of potential defenders from old claims, protection from which may become difficult, also, avoiding the injustice that may arise if the courts are forced to settle the cases that have occurred in the distant past and are based on the evidences that may be unreliable or incomplete because of time elapse".[75]

It is indisputable that limitation really serves the realization of the above-mentioned goals, which is determined under the European Court of Human Rights, as well as the practice of the Constitutional

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71 Decree No.as-1267-1398-04 of 4 March, 2005 of the Chamber of Civil Cases of the Supreme Court of Georgia.

72 Decision No.1/466 of 28 June, 2010 of Plenum of the Constitutional Court of Georgia – "the Public Defender (Ombusdman) of Georgia versus the Parliament of Georgia".

73 Decree No.1/2/440 of 4 April, 2008 of the Constitutional Court of Georgia – "the citizen of Georgia Anatoly Kozlovsky versus the Parliament of Georgia".

74 Decision No.1/466 of 28 June, 2010 of Plenum of the Constitutional Court of Georgia – "the Public Defender (Ombusdman) of Georgia versus the Parliament of Georgia".

75 Stubbings and Otherss v. The United Kingdom, [1996], ECHR, 15.

Court of Georgia; however, in order to the limitation periods comply with the Law of European Council, it should bear the legitimate aim and should represent the proportional mean of achieving the goal.[76]

Under the existence of a legitimate goal it is necessary to evaluate the separate norm in accordance with the principle of proportionality. In line with principle of proportionality "the right restricting legal regulation shall represent the useful and necessary mean for achieving of valuable public (legitimate) goal. At the same time, intensity of restriction of right should be proportionate to the public goal to be achieved. It is inadmissible to achieve a legitimate aim at the expense of increased restriction of human rights. "[77]

The control of expediency and compliance of the institute of limitation of action is achieved definitely in terms of compliance with its principle of proportionality.

Generally, the assessment of the constitutionality of the institute of limitation of action should be made proceeding from the objective possibility of the reasonableness of established terms and satisfaction of claim. The term established for execution of a legal action must be reasonable and, usually, should serve the general legal protection or the protection from injustice generated from early demand.[78]

"On the one hand, the legislator shall not establish an unjustifiably long term, following which the possibility that any deal can become disputable and even the conscientious contractor may be unable to protect itself, is created. On the other hand, it should not be unreasonable, obviously small, should not exclude the possibility of protecting the legitimate interests of the interested person". [79]

Proceeding from the mentioned discussion, any term established by the legislator shall be reasonable and bilateral interests of the parties shall be taken into consideration. The term established by the legislation, which is inappropriately short or unjustifiably long, can be considered as incompatible with the Constitution, on the grounds of inconsideration of protection of reasonable balance between the interests of the parties. If unreasonable term is established then the law cannot ensure real protection of a person's right and it will be only fictitious.[80]

Assessment of the issue of reasonableness of limitation periods should be made individually. When establishing the separate terms of limitation, the legislator must take into consideration the real possibility of submission of a claim by the creditor. If the creditor fails to submit the claim because he/she did not have the information due to the basis of claim submission, this should not cause an im-

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[76] Agentur der Europäischen Union für Grundrechte und Europarat, Handbuch zu den europarechtlichen Grundlagen des Zugangs zur Justiz, Luxemburg, 2016, 143.

[77] Decision No.3/1/512 of 26 June, 2012 of the Constitutional Court of Georgia – „Danish citizen Heike Cronqvist versus the Parliament of Georgia".

[78] Agentur der Europäischen Union für Grundrechte und Europarat, Handbuch zu den europarechtlichen Grundlagen des Zugangs zur Justiz, Luxemburg, 2016, 133.

[79] Decision No.1/1/543 of 29 January, 2014 of Constitutional Court of Georgia – "Metalinvest Ltd" versus the Parliament of Georgia".

[80] *Kokhreidze L.*, Problems of the Definition of Some Civil-Legal Norms in Resolution of Disputes Related to the Heritage; Justice and Law, №2(41)'14, 2014, 15.

possibility of satisfaction of the claim, based on the limitation.[81] In order to the person can enjoy a right of granting of annulment of the decision, he/she shall have an opportunity to have information on availability of decision, related to his/her rights and interests. Restriction of the right of reference to the court with the period of limitation of action will be the proportional mean of achieving a legitimate aim if the person has enough time and opportunity to exercise the right.[82]

According to the Constitutional Court the situation changes when the public interest conflicts with the possibility of protection of the right of private individuals, for example, when the violation of the rights of the interested parties is caused by illegal/guilty conduct of the state (state bodies/officials) and/or other persons (witness, expert, party or its representative). The crucial aspect of legal security is to ensure the ability of compensation for damages caused by violation of the law by the state. The legal state recognizes a human not only as the main value, but also provides full and efficient exercising of basic rights, since, in the legal state, the state represents only the possibility of realization of rights. "It is true that by restriction of claim limitation period the legitimate aims are maintained, but these objectives are qualitatively modified towards the state as they are not related to the threat of violation of the rights of specific private individuals. The state, which itself should be a guarantor of legal security, does not have the expectation of satisfaction of this interest (legal security) from another party that distinguishes it from private individuals. " [83]

Since during participation of the state the opposing interests are different, therefore, the approach must be different for evaluation of fair balance between these interests. In this case, the interested persons should have the real opportunity to protect their rights, in addition, to require invalidity of court decision violating their rights and made in favor of the state, when it is a direct and necessary way to restore the right or get the compensation.[84]

The court noted in relation to the state that in these relations, in which the state participates, the level of trust and conscientiousness is very high, in addition, the principle of lawful trust is valid on the part of private law entities towards the actions of the powerful counter-party, the state.[85]

In case of private individuals, the state shall not have the possibility to protect itself using the limitation period, because it itself represents the guarantor of protection of the rights and interests of a person.

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81 Decision No.2/2/656 of 21 July, 2017 of Constitutional Court of Georgia – „JSC "Silk Road Bank" versus the Parliament of Georgia"; *Gabriel U.,* Verjährung der Schadensersatzansprüche gegen den Steuerberater nach altem und neuen Verjährungsrecht, Hamburg, 2014, 26.

82 *Kokhreidze L.*, Problems of the Definition of Some Civil-Legal Norms in Resolution of Disputes Related to the Heritage, "Justice and Law", №2(41)'14, 2014, 15 (in Georgian).

83 Decision No.3/1/531 of 5 November, 2013 of Plenum of the Constitutional Court of Georgia – "Tamaz Janashvili, Nana Janashvili and Irma Janashvili versus the Parliament of Georgia".

84 Ibid.

85 *Svanadze G.*, Comment of the Civil Code, Book I, 2017, Tbilisi, Article 144, field number 4 (in Georgian).

4. Conclusion

The importance of limitation of contractual claim is indispensable, it has a positive influence on the protection of the parties' interests and the stability of civil circulation; however, together with the importance of institute of limitation of action and necessity of its implementation, it is important to mention those difficulties that are generally associated with the institute of limitation.

It's quite difficult to justify the establishing of different limitation periods in relation to separate cases. The goals, by which the existence of institute of limitation of action is justified, can be successfully used in different cases. In general, it is very difficult to substantiate, why the specific claims shall be limited within a shorter period of time, compared with other similar claims. For illustration, different limitation periods applied towards the purchase agreement and contractor's agreement can be cited from the legislation.

The main weakness related to institute of limitation is that, when establishing the limitation period, the interests of only debtor or only creditor are taken into consideration, which, naturally, violates the reasonable balance between the parties. In addition, it may become impossible to satisfy a claim due to expiry of limitation period, even if the creditor did not know and could not have known about violation of the right. Such solution of an issue may itself be incompatible with the stability of civil circulation.

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Peculiarities of Doctor's Professional Insurance – Comparative Legal Analysis

A doctor plays invaluable role in maintaining human life and health. The society has special trust and positive attitude towards the representatives of medical field. However, alongside the above, there are strong requirements for high standards of performance set for doctors. The mistake made by a doctor is acutely perceptible and severely punishable. The damage caused by the doctor's mistake and the amount of compensation for such damage may exceed even the material resources of the doctor. In the modern world, the doctor's professional liability insurance is considered as one of the important tools for protection of doctor and the patient. The paper reviews the modern trends in doctor's professional liability insurance, its advantages and disadvantages, the problems that appear at the occurrence of liability insurance. In parallel with the above assessment, the factual circumstance existing in Georgia, challenges and prospects related to the introduction of a doctor's professional responsibility are displayed.

Key words: *Insurance, insurance company, insured, civil liability insurance, doctor's professional liability insurance, insured risk, damage, compensation, medical malpractice, patient, doctor, medical institution.*

1. Introduction

The expression "who makes no mistakes makes nothing"[1] is common knowledge; even professionals make the mistake. It is good if mistake is not harmful to anyone. However, there are cases when a small mistake can lead to a big loss. The obligation for damage compensation may bring serious financial loss to any organization or private entity; it may force him/her to direct his/her financial resources from the main activity to absolutely different direction, moreover, even lead to bankruptcy.

In modern civilized society, the liability insurance is considered as one of the means for neutralizing the professional risk. The professional liability insurance is a closed type of distributive relationship between its participants, which is based on formation of insurance funds, which are intended to compensate material damage incurred by physical and legal entities. The main feature of professional liability insurance is the insured object. Namely, the tangible interest of an insured physical person is related to his/her liability to compensate the damage to third parties generated during his / her professional activities.

Professional liability risk insurance is the most important element of social infrastructure. Effective functioning and sustainable development of its mechanism is an essential prerequisite for the performance

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1 "It's only those who do nothing that make no mistakes, I suppose.", *Conrad J.,* Outcast of the Islands, NY, 1896, 3.

of professional duties and improved quality.[2] Professional liability insurance bears a great economic significance.[3] In microeconomics term, it relieves the insurer from not a very rare fatal risk. In addition, the liability insurance is of essential importance in general economic terms. A good demonstration of the above statement is the leading country in the field of insurance, Germany. According to statistical data of the insurance economy, in 2018, 49.19 million people owned the private civil liability insurance.[4] And this, naturally, is reflected in the general economic condition of the country as well as the population.

2. The Role of Professional Liability Insurance in the Modern Society

In modern world, the need and importance of professional liability insurance is not any more the subject of discussion. The majority of states regulate the professional liability insurance not only by the general legislative rules, but most of the professions are subject to obligatory insurance, under the separate legislative acts. While the world is moving forward and the majority of states is committed to have the insurance covering most activity fields, in Georgia, the discussion on the importance and need for professional liability insurance, has only started to emerge.

The problem is strained by the fact that Georgian legislation regulates the civil liability insurance issues only under the several articles of the Civil Code of Georgia (hereinafter - CCG) and three legislative acts. Namely, the Articles 839-843 of CCG[5] very briefly defines and regulates the rights and obligations of the insurance company and the insurer at the time of civil liability insurance. In addition to the above, there are separate acts, which regulate the obligatory insurance issues of professional liability for the professions, such as a private executor,[6] notary[7] and the auditor[8].

In recent years, the number of complaints towards the doctors and medical institutions in Georgia has increased. Citizens are demanding the proper compensation for the wrong services. This

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2 *Gaist V. J.,* Professional Liability Insurance, Journal Lawyer's Counselor, № 1, 2010, <http://www.s-yu.ru/articles/2010/1/4809.html>, [15.01.2019].

3 *Littbarski S.,* in: *Langheid Th., Wandt M.*, Münchener Kommentar zum Versicherungsvertragsgesetz, Band 2, 2 Aufl., München, 2014, §100-124, Rn. 147 ff, referenced: *Bruns A*., Privatversicherungsrecht, München, 2015, § 22, Rn. 2.

4 <https://de.statista.com/statistik/daten/studie/266307/umfrage/versicherungen-besitz-einer-privaten-haftpflichtversicherung-in-deutschland/>, [15.01.2019].

5 Articles 839-843, The Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997.

6 The order of the Minister of Justice of Georgia № 118 "on the determining of the amount and conditions of compulsory insurance for the civil liability of the private executor", 29/06/2009.

7 The order of the Minister of Justice of Georgia № 158, "on the determining of the essential terms and minimum insurance amount of the mandatory professional insurance for notaries", 17/03/2010.

8 Decree "on approval of the rules of determination of insurance amount and essential terms of professional liability insurance for auditor/audit firm", № 12, the Head of Accounting, Reporting and Audit Supervision Service, 17/10/2016.

fact itself is not an indicator of low qualification of representatives of this profession.[9] The above statistics indicate that the awareness of patient and client has improved. Compared to previous years, the users have learned how to protect their rights.

All this leads to the increased interest of the society towards discussed type of insurance. However, it is noteworthy that the increase in interest has not radically impacted the amount of premium attracted by the insurance companies in this field.[10] This fact is conditioned by several circumstances. First - an imperfect legal base. In addition to the latter, the lack of experience of an insurance company as well as the insurer leads to their distrust towards the product and, therefore, less motivation to be engaged in similar type of insurance relationship.

One of the ways to eliminate the above factors is to fill the information vacuum. It is important that the potential contracting parties of insurance relationship are provided with the information on the factors that have conditioned civil liability and, accordingly, professional liability insurance to become top insurance products in the developed countries. What is its essence, advantages and disadvantages and the risk that this product may contain for the user? For this purpose, it is expedient to conduct in-depth study of issues such as the significance of civil liability insurance, the essence of the medical malpractice and the extent of the doctor's professional liability, the significance of insurance in the medical practice, the extent of responsibility of insurance company for the damage inflicted to the patient by the doctor. Indeed, the deep legal analysis of the above-mentioned issues is important for each party participating in the professional liability insurance. Increase of interest towards the professional liability insurance can only be possible if all participating entities have a clear understanding of their rights and obligations, fulfillment of a contract and achieving of result that the parties aimed at the initial stage of concluding the agreement, is not vague and suspicious.

3. The Essence of Civil Liability Insurance

Professional liability insurance is a form of civil liability insurance. The purpose of the civil liability insurance is to protect the insured from the property damage that can be originated for insured based on claim for compensation for losses incurred by the third person. Such type of insurance, by its nature, is similar to loss insurance, so-called passive insurance, during which the interest of the insurer is expressed in the exemption of its property from the burden of civil liability.[11]

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9 It is worth to mention the United States, where, according to statistical data, on average from 44,000 to 98,000 patients die per year due to the wrongful medical practice. *Eiff W.,* Risikomanagement, 2 Aufl., Heidelberg, 2014, 12.

10 According to statistical data of 2012 of the National Bank of Georgia, in the same year, only 1966 policies of civil liability insurance were signed in the fourteen insurance companies operating in Georgia. The number of these policies includes all types of agreement, where the person's civil liability is insured and not only the professional liability, <https://www.nbg.gov.ge/index.php?m=489>, [18.01.2019].

11 *Piontek S.,* Haftpflichtversicherung, Grundlagen und Praxis, München, 2016, 1.

The CCG articles, relating to the civil liability insurance, do not provide a definition of the insured accident. The Article 839 of CCG provides only the obligation of the insurance company - to release the insurer from the obligation, which is imposed to the insurer due to the responsibility to the third person during the insurance period.

Similar to the Georgian legislation, the German Law on Insurance does not provide a comprehensive explanation of the insured accident in the case of liability insurance. The explanatory card of paragraph 100 of the German Law on Insurance indicates that, in accordance with the insurance agreement, the parties, according to their will, may determine the insured accident.[12] However, it generally describes the criteria that shall be met. The insured accident should be an event that occurs during the validity of the insurance agreement and generates the liability of the insurance company. For example, in case of insurance of general liability - damage-causing event, in case of insurance of architect's liability - the mistake made during the planning, in case of insurance of attorney and the notary - the legal mistake made by them, in case of doctor's responsibility – medical wrongful practice conducted by a doctor and etc.[13]

In the case of civil liability insurance, the insurance company bears double responsibility.[14] In particular, it is liable to release the insurer from the obligation and, in addition, to protect the insurer. The obligation of release from the responsibility implies release of the insurer from the material-legal obligation to the third parties. And, protection of insurer is expressed in the liability of the insurance company to reject the unreasonable requests of third parties and to undertake the responsibility for related judicial and non-judicial costs.[15] [16]

The specified obligations clearly determine that the insured accident does not necessarily mean the material-legal liability of the insurer in case of civil liability insurance. In order to define the existence of an insured accident, it is sufficient to raise the issue of liability of the insurer by third parties. In terms of determining the existence of an insured accident, it does not matter, whether the request is fair or unfair.[17] The obligation of the insurance company arises from the moment when the need for protection of an insured person is manifested; namely, from the very moment, when the injured party puts in claim towards the insured, inflicting the damage.

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12 RegE, BT-Drucks. 16/3945, S. 85, Betriebseitschrift für Recht und Wirtschaft, 2697, 2007, <http://dip21.bundestag.de/dip21/btd/16/039/1603945.pdf>, [08.10.2019].

13 Gesetzentwurf der Bundesregierung - Entwurf eines Gesetzes zur Reform des Versicherungsvertragsrechts, BT-Drucksache 16/3945, 85, 20/12/2006, <http://dip21.bundestag.de/dip21/btd/16/039/1603945.pdf>, [16.10.2019].

14 *Bruns A*., Privatversicherungsrecht, München, 2015, § 22, Rn. 9.

15 *Schneider W.,* in: *Beckmann R. M., Matusche-Beckmann A.,* Versicherungsrechts-Handbuch, 2 Aufl., München, 2009, §24, Rn. 3.

16 Comp. Article 841, The Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997.

17 *Bruns A*., Privatversicherungsrecht, München, 2015, § 22, Rn. 9.

3.1. Three Parties Involved in the Insurance Eelationship — the Legal Position of the Injured Party

It is unambiguously clear from the above mentioned that the peculiarities of the civil liability insurance are demonstrated in the relationship between the three parties.[18] Essentially, there is a legal relationship between the insurance company and the insurer, such as at the occurrence of insured accident between the insurance company and the third person, but not the insurer and the third person.[19]

There is interesting opinion expressed in German legal doctrine - initially the essence of liability insurance was to protect the insurer's interest. However, together with development of this type of insurance, its purpose changed and the protection of third person's interest came to the fore.[20]

Nowadays, the qualification of the Liability Insurance Agreement, as the agreement concluded in favor of a third party, is unanimously recognized. However, the essence of insurance relationship in general - protection of interest, should not be forgotten. It is not difficult to demonstrate that, in case of liability insurance, rather than insuring the beneficiary – third-party interest, the interest of insured or insurer is insured, which insures the risk of its liability by such type of insurance agreement. As far as the risk - is possible infliction of damage, so the liability risk - is the infliction of possible risk to the insured, in case of imposing the responsibility to him/her.[21] Therefore, in case of liability insurance, the interest of a person, whose liability risk is insured, is protected. For this type of insurance, insurance compensation is being paid not to the person, whose interest is protected, but to the injured person. Of course, the interest of the injured is satisfied, but not because of the service provided, but because the services that shall be provided to the insured according to the insurance agreement, implies the satisfaction of the interest of injured.[22] The beneficiary third person appears only to ensure the interest of insured in such type of insurance relationships.

Proceeding from the above mentioned, while concluding any type of civil liability insurance agreement, the insurer operates based on his/her interests. As far as, in return for paying a small insurance premium, he/she can be confident that if his/her civil liability occurs, he/she is not imposed any financial responsibility and obligation - to independently compensate the damage caused.[23]

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18 *Schneider W.,* in: *Beckmann R. M., Matusche-Beckmann A.,* Versicherungsrechts-Handbuch, 2 Aufl., München, 2009, §24, Rn. 3.

19 BGHZ 7, 244, 245; OLG Düsseldorf VersR 1983, 625.

20 *Beckmann R. M., Matusche-Beckmann A.,* Versicherungsrechts-Handbuch, 2 Aufl., München, 2009, §24, Rn. 12.

21 *Fogelson Y.,* The Insurance Law; Theoretical Foundations and Practice of Application, Moscow, 2012, 421.

22 Ibid, 422.

23 Ibid, 421.

4. Medical Practice – Specialty with High Risk of Responsibility

Proceeding from the specifics of the profession, the risk of responsibility is high especially for doctors. The reason for this is that the doctor has a direct contact with such a special goodness as the human life and health. Due to the fact that the human life and health is invaluable in material terms, there is high probability of occurrence of great material damage during medical practice.[24] According to the European practice, patients often demand compensation for material as well as the moral damages. The amount of compensation increases annually. For example, if in the 90s the defendant had to pay 75,000 Euros[25] for compensation of moral damages caused by the brain damage, nowadays, the court can impose as much as 600,000 Euros over the doctor in similar disputes.[26] The cost of treatment of the patient has also increased. In developed countries, in some cases, the amount can even reach as much as five million. The reason for the above - as a result of wrong medical practice, the injured often needs constant supervision from the professionals. In addition to the treatment costs, the court may even impose the doctor to reimburse the non-received income of the patient, which ultimately requires substantial material resources from a doctor.

The fact that the doctors bear greater responsibility when fulfilling their professional activities is quite natural. The function of human body is not so well known and studied to always provide the accurate and effective treatment. Accordingly, the risk of making mistake is an integral part of medical practice. On the other hand, as the human's health and life is exceptional and invaluable, there is a huge loss for patient or its relatives that may follow a wrongful medical practice.

5. Compulsory Insurance of a Doctor's Professional Liability — Better Protection Guarantee for the Society

For decades, developed countries apply to professional liability insurance for mitigation of doctors' material responsibility. In Germany, for example, doctors' professional liability insurance has been effective since 1887. Even during the first stage, when the doctor's liability insurance, in moral terms, was considered as non-insurable risk, in Stuttgart insurance union,[27] there were about 6500 agreements[28] of liability insurance for doctors and pharmaceuticals.

The European states are constantly working to ensure that professional liability insurance can cover as many as possible doctors. Every doctor, no matter, whether he/she owns a private clinic or is

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24 *Terbille M., Höra K.,* Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., München, 2013, § 19, Rn. 64, 65.

25 Comp. BGH NJW 1992, 2962=MedR 1993, 67, referenced: *Laufs A., Katzenmeier Ch., Lipp V.,* Arztrecht, neu bearbeitete Auflage, München, 2015, Rn. 124.

26 Comp. *Schlösser M.,* MedR, 2011, 227, referenced: Ibid.

27 According to 1901 data, comp. *Bergmann K., Wever C., Versicherungsrecht, Bühren H. W.* (Hrsg.), 6 Aufl., Bonn, 2014, § 11, Rn. 6.

28 Comp. *Möhle J.,* Die Haftpflichtversicherung im Heilwesen, Frankfurt-Main, 1992, 9. Referenced: *Bergmann K., Wever C.,* Versicherungsrecht, *Bühren H. W.* (Hrsg.), 6 Aufl., Bonn, 2014, §11, Rn. 6.

employed on the basis of a labor contract, shall consider and envisage that for professional negligence he/she may be imposed to compensate for damages and the amount of compensation may exceed his/her material resources.

It is not obligatory to have professional liability insurance for medical practice in Germany. However, in accordance with paragraph 21 of the General Rules of the Doctor's Professional Code of Conduct, doctors are obliged to provide adequate insurance protection for the responsibility that could arise within their professional practice.[29] Proceeding from Article 70 of the Constitution of Germany, which gives the right of legislative competence,[30] the separate federal land determines itself and establishes the issue of professional liability insurance for doctors.[3132] It must be noted that assignment of decision making power on mandatory nature of professional liability insurance to the specific land legislation or doctor's will has often been criticized. The parallel is drawn to the lawyer's professional liability insurance, which is mandatory throughout Germany and without which a person cannot enter the mentioned profession. The same applies to the obligatory insurance of civil liability of automobile transport owners and it is indicated that in case of damage to the car frame the person is more protected than a patient, who takes his/her most valuable goodness - the health and life into the doctor's confidence. In case of treatment with a doctor having no insurance, in case of damage, the doctor is liable with personal property, but if the doctor is insolvent, then the bearer of 100% of risk is the patient himself/herself.[33] According to one of the authors, when a person with no civil liability insurance cannot become a traffic participant, or cannot enter the lawyer's profession, the state's approach towards the doctor's professional liability insurance is unfair. According to the representative of the patient's rights in the German government, "to protect patients' interests, it is expedient for all the doctors to have the professional liability insurance, in order to fully compensate the damage incurred."[34] Therefore, only the request is not sufficient. It is urgent and necessary to adopt such a law under which the insurance of doctor's professional liability is necessary precondition for implementation of medical practice.[35]

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29 (Muster-)Berufsordnung für die in Deutschland tätigen Ärztinnen und Ärzte – MBO-Ä 1997 –in der Fassung der Beschlüsse des 121. Deutschen Ärztetages 2018 in Erfurt geändert durch Beschluss des Vorstandes der Bundesärztekammer, 14/12/2018.

30 See <http://www.gesetze-im-internet.de/gg/art_70.html>, [23.02.2019].

31 *Terbille M., Höra K.,* Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., München, 2013, § 19, Rn. 5.

32 The lands, where the doctor's professional liability is introduced as mandatory, are: Brandenburg, Baden Württemberg, Bremen, Hamburg, Nordrhein-Westfalen, Sachsen-Anhalt, Schleswig-Holstein, Bayern, Mecklenburg-Vorpommer.

33 *Scholz I.,* Ist ein Arzt nicht versichert, ist der geschädigte Patient der Dumme, August, 2011, <https://ihr-anwalt.com/blog/ist-ein-arzt-nicht-versichert-ist-der-geschadigte-patient-der-dumme/>, [14.03.2019].

34 *Zöller W.,* Grundlagenpapier Patientenrechte in Deutschland, März, 2011, <https://www.hamburg.de/-contentblob/3152236/fcfb94cc57b2d3051baea67e90869239/data/bgv-patientenrechte-grundlagenpapier.pdf;jsessionid=2E0905784E2C6D5F37A1710BC1FA8E09.liveWorker2>, [14.03.2019].

35 *Scholz I.,* Ist ein Arzt nicht versichert, ist der geschädigte Patient der Dumme, August, 2011, <https://ihr-anwalt.com/blog/ist-ein-arzt-nicht-versichert-ist-der-geschadigte-patient-der-dumme/>, [14.03.2019].

In Georgia, as noted above, insurance of the doctor's professional liability is not obligatory. According to Article 97 of the Law of Georgia on Medical Practice, an independent medical practitioner shall have the right of professional liability insurance for proprietary or non-proprietary losses inflicted to a patient as a result of professional errors.[36] As European experience demonstrates, the voluntary nature of this insurance is not sufficient and the state, still proceeding from the interests of its citizens, shall be more rigorous. Experience shows that compensation for the losses imposed to a doctor by the court is reflected in direct proportion in the cost of medical service. The doctor, who pays more than half of his/her income to injured patient, also increases the cost of his/her service. Insurance is a mean of neutralizing the risk and releasing from compensation using the personal property. The statistics in Georgia clearly demonstrate the increased awareness of patients on their own rights. They are increasingly applying to the court and request compensation for losses. In addition to providing financial guarantees, insurance can become sort of measurement tool for the patient. Namely, the insured doctor always represents a guarantee that he/she has the appropriate qualification, as far as, when signing the insurance agreement, he/she is required to meet strict criteria. Of course, the insured doctor does not automatically mean the faultless treatment; however, it means that the doctor has proper qualification, license and the financial guarantee.

6. Legal Basis for Doctor and Patient Relationship

6.1. Medical Services Agreement

The insurance contract concluded between the doctor and the insurance company is essentially based on the legal relationship between the doctor and the patients. Therefore, well-established legal base, regulating the doctor-patient relationship, is the basis for the well-organized insurance relationship.

In Georgia the main legal act, regulating the doctor-patient relationship, is CCG, as well as the Georgian Law on Patient Rights[37] and the Law of Georgia on Medical Practice. Like Georgia, a large part of European states implements the legal regulation of the doctor-patient relationship under the Civil Code.[38] Even Germany has been following this practice for years, however, the gained experience and practice showed that regulation of this relationship with only general norms would generate many problems. On February 26, 2013, the amendment was made to the GCC (hereinafter the German Civil Code). Sections A-Z were added to the paragraph 630 of GCC, which directly relate to the medical practice and the relationship between the doctor and patient.[39] As stated in the doctrine,

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[36] Law of Georgia on Medical Practice, SSM, 18, 08/06/2001.

[37] Article 10, Law of Georgia on Patient Rights, SSM, 19, 05/05/2000.

[38] For the example of Switzerland see: Wichtige Aspekte der Arzthaftung, Haftpflichtversicherung für Ärzte und Spitäler, winterthur, 2011, <https://www.axa.ch/doc/abtc7>, [19.09.2019].

[39] See, <https://www.gesetze-iminternet.de/bgb/BJNR001950896.html#BJNR001950896BJNG026900377>, [10.02.2019].

the doctor's responsibility law has been developing on the basis of judicial law over the past hundred years and the mentioned fact is the first case of its codification.[40]

In the legislative initiative concerning the addition of chapter on the patient's rights to the GCC, it is noted that the lack of special norms on the medical wrongful practice and the doctor's responsibility in the law and assigning it only to the judiciary law, makes it difficult for the parties of medical relationship to clearly understand their rights. Due to the complexity of medicine and diversity of treatment, a legislative framework, which gives a clear understanding of their rights to each party and increases their self-confidence, is required. Effectively introduced and balanced rights will ensure the equality of doctor and patient.[41]

German experience has shown that as a result of discussed changes patients' rights became transparent and balanced. In addition to the above, judges were given an essential impetus to interpret and define the norm.[42] The willingness to regulate doctor-patient relationship at a legislative level is conditioned by strive towards achievement of fair judicial decisions, which, in parallel with the interpretation of the court, is achievable only based on the existing laws and recognized principles of the law.[43]

The only special provision in the CCG, which determines compensation for losses inflicted by the medical institution, is the Article 1007.

It is recommended that the Georgian legislators also share the German experience and make appropriate changes to the CCG; especially on the background of annually increased number of claims against the medical institution and doctor. It is justifiable that the patient and the doctor have a clear understanding of their rights that are not regulated by general norms but are subject to special regulation. One of the problems specified at the beginning of the article, which impedes the development of doctor's professional liability insurance in Georgia, is clearly the ambiguity of the parties' rights. The introduction of this regulation will be a step forward in the development of insurance sector.

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40 On early attempts see: *Francke R., Hart D.,* Charta der Patientenrechte, Rechtsgutachten für die Bundesländer Bremen, Hamburg, Nordrhein-Westfalen, 1999. Referenced: *Rehborn M.,* Das Patientenrechtegesetz, Zeitschrift für Arztrecht, Krankenhausrecht, Apotheken- und Arzneimittelrecht, 12 Jahrgang, Heft 5, 2013, 257, <http://www.gesr.de/gesr_2013_05_aufs.pdf>, [13.03.2019].

41 Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechte von Patientinnen und Patienten, Deutscher Bundestag Drucksache 17/10488, 17 Wahlperiode, 15/08/2012.

42 For detail, see: <https://www.robbers-verlag.de/dokumente_neu/pdf/2014-08-ArzthRGrundl.pdf>, [12.02. 2019].

43 Grundlagen des Arzthaftungsrechts unter Berücksichtigung der neuen gesetzlichen Regelungen des Patientenrechtegesetzes. For details, see: <https://www.robbers-verlag.de/dokumente_neu/pdf/2014-08-ArzthRGrundl.pdf>, [05.02.2019].

6.2. Legal Nature of Medical Service Agreement

The legal basis for relationship between a doctor and a patient is a civil-legal agreement concluded under the rules envisaged by the CCG. Generally, at the initial stage of relationship, the parties reach an agreement not in writing, but verbally and via concluding actions. The agreement between the doctor and the patient is concluded by agreement of visit time with the doctor and, later, by submitting the personal documentation.

It is true that relationship between the medical establishment or the doctor and the patient is a contractual relationship, however, for a long time, the question on which category of agreement included the agreement concluded between a doctor / medical institution and a patient was disputable among the lawyers. The solution of the mentioned issue was important not only in political and legal terms, but, first of all, in practical terms.

Despite the development of modern medicine, due to the complexity and unpredictability of the processes in the human's body, it is impossible to require from a doctor to fulfill a specific "work" and achieve a successful outcome. As a contract party, the doctor undertakes the liability to fulfill the services, conduct the examinations and use the methods of treatment that are relevant to the modern medical achievements. Due to the abovementioned features of the medical service agreement, the agreement concluded between a doctor and a patient belongs to a service agreement. The doctor is responsible for the properly provided treatment and not for the recovery or the outcome of treatment. Therefore, regardless of the doctor's efforts, in case of failure to achieve the relevant outcome, the patient does not gain the right to request free treatment in the future or request to return the amount back.

In 2013, the record was made in GCC, where it was uniquely determined by sub-paragraph "B" of paragraph 630, that applicable rules to the service agreement are applied to the medical agreement. The mentioned classification is important for the precise definition of the rights and obligations of the parties and, accordingly, for determining the boundaries of claims for the contracting party.

The Georgian legislation does not contain the specific instruction on the classification of the agreement concluded between the doctor and the patient. However, the term established in the practice "medical service agreement", indicates to its legal nature. In addition, the Georgian judicial decisions clearly indicate that failure to achieve outcomes in the medical practice does not imply improper fulfillment of the obligation. For example, in one of its decisions, Tbilisi Court of Appeals indicated that unsuccessful treatment or negative outcome of treatment does not necessarily entail the responsibility for medical personnel.[44] In addition, according to the Supreme Court of Georgia, the proper treatment, even if it has a negative outcome, does not entail a doctor's responsibility. [45] Consequently, inadequate outcome does not necessarily mean existence of wrongful medical

[44] Decision of September 3, 2018 № 2b/1843-17 of Tbilisi Court of Appeals.

[45] See the decision of June 27, 2011 № AS-260-244-11 of the Supreme Court of Georgia.

practice;[46] i.e. doctor cannot guarantee the specific outcome. That is why it is different from service agreement, where the parties enter into a legal relationship to achieve specific results.[47]

It must be noted that classification of the agreement concluded with a doctor as service agreement also applies to the denture treatments and cosmetic surgical procedures. Even in this case, the doctor undertakes the responsibility for the patient, in accordance with the medical standard, to fulfill the maximum of his/her capabilities. The doctor cannot guarantee the positive change, beautification and other outcomes.

Although, the agreement between the doctor and the patient is a service agreement, but regulatory norms for contractor's agreement of CCG,[48] as the closest norm, applies to it. However, some special norms can be applied only to the contractor's agreement,[49] due to its exceptional nature.

In addition to the service agreement, proceeding from the specificity of the work, the contractor's or procurement agreement, mixed agreements could be present.[50] For example, when the parties agree to produce and supply the prosthesis of any part of tooth or body. In this case, unlike the service agreement, the patient has the right to request a correction.[51]

In addition to contractual-legal provisions, non-contractual norms apply to the relationship between a doctor and a patient. Namely, there could be a tort-legal relationship or performing others works without receiving an assignment. The latter takes place when the patient is taken to medical institution in unconscious condition or, being under the effect of anesthesia, an urgent need for further medical manipulation arises.[52] Generally, in such case, the agreement is concluded immediately upon the recovery of consciousness.

As for the tort relationship, the right for claim for compensation of losses may arise not only from the agreement as well as from tort.[53] Tort requirements are especially important when the contract is not in place or the patient's request is directed to the employee of the medical institution, which is not the immediate party of the agreement.[54] The doctor's professional liability insurance usually covers the claims made to the doctor for compensation of material as well as moral damages. A patient or its family member makes claim for compensation for damages when the patient is dissatisfied with medical services, namely, with the outcome of the treatment. However, every unsuccessful treatment is not a wrongful medical practice and accordingly, the basis for responsibility

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46 Similarly, in the decision of May 11, 2018 № AS-111-111-2018 of the Supreme Court of Georgia.

47 *Krophollder J.*, German Civil Code, Study Comment, 13th ed., *Darjania T., Tchetchelashvili Z.* (trans.), *Chachanidze E., Darjania T., Totladze L.* (eds.), Tbilisi, 2014, § 631, para. 1 (in Georgian).

48 Chapter 10, Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997.

49 Decision of November 1, 2013 № AS-223-215-2013 of the Supreme Court of Georgia.

50 For details, see, *Pepanashvili N.,* Compensation for Losses Caused by the Medical Institution, Tbilisi, 2016, 112-113 (in Georgian).

51 <http://www.medizinrecht-ratgeber.de/medizinrecht/vertrag/index_02.html>, [19.03.2019].

52 For details, see. *Brennecke P.,* Ärztliche Geschäftsführung ohne Auftrag, Heidelberg, 2010, 62.

53 Article 413, the Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997.

54 *Rehborn M.,* Das Patientenrechtegesetz, Zeitschrift für Arztrecht, Krankenhausrecht, Apotheken- und Arzneimittelrecht, 12 Jahrgang, Heft 5, 2013, 257.

of the doctor and then the insurance company. If the existence of an error in the doctor's action is proved, the patient is given an opportunity of compensation, in the form of compensation for damages. The Georgian legislation clearly provides the right of the patient to apply to the court and claim the compensation for material and moral damages.[55] At the same time, the claim shall be made within the time prescribed by law.

6.3. Beginning and End of the Claim for Compensation for Damages in Connection with Insurance Claim

In accordance with the Section 1, Article 806 of the CCG, insurance enters into force at twenty-four hour on the day of concluding a contract and ends at twenty-four hours of the last day of the term envisaged by the contract. At a first glance, the mentioned rule is clear and it is suitable for all types of communications. However, the issue becomes complicated when the event and the outcome of this event do not coincide in time, more specifically with the validity of contract. The most obvious example is the medical service and the outcome occurred based on this service. Over the last ten years, lawyers have been discussing the timing of specific contracts such as the doctor's professional liability insurance.

It is obvious that there can be a long gap between the wrongful medical practice and cognition of occurrence of damage and, therefore, the patient may claim the compensation. According to CCG a three-year period of limitation is applied to tortious as well as contractual obligations. A similar rule applies to the limitation of a damage inflicted as a result of wrongful medical practice. [56] The Article 130 of CCG specifies beginning of the limitation period and specifies that the limitation begins from the moment at which the claim arises. The claim shall be deemed to have arisen from the moment at which the person detected or ought to have detected the violation of the right. [57] The GCC goes much further and applies thirty years' limitation period on claims for damages based on injury to life, body, health or liberty, notwithstanding the manner in which they arose and notwithstanding knowledge or a grossly negligent lack of knowledge.[58] Accordingly, proceeding from the wrongful medical practice, the claim for compensation for damage may arise even in a few decades after the treatment.[59]

When, in the context of insurance, it refers to the time of occurrence of damage, the question about the existence of obligation of insurance company arises; namely, whether the insurance

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55 Article 10, Law of Georgia on Patient Rights, SSM, 19, 05/05/2000.

56 Articles 1008, 129(1), the Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997. Similar to Germany, see, §195, Bürgerliches Gesetzbuch Deutschlands, 18/08/1896.

57 Similarly, standard limitation period commences at the end of the year in which the claim arose and the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence, §199.1, Bürgerliches Gesetzbuch Deutschlands, 18/08/1896.

58 Ibid, Section 2.

59 *Bergmann K., Wever C.,* in: *Hubert W. van Bühren,* Versicherungsrecht, 6 Aufl. 2014, Bonn, § 11, Rn. 109, 110.

company is obligated to pay losses, which occurred at a time when the insurance agreement is no longer available. For visualization purposes, one example is quite interesting.[60] In 1998 a woman, after an unsuccessful surgical contraception, gave birth to an unwanted but a healthy child in 2001. The woman was claiming compensation for moral and material damage caused by unwanted pregnancy. The doctor had been engaged in the medical activity and enjoyed professional insurance until the end of 1999. The Court satisfied the claim of plaintiff, however, the question on how much the insurance company was obligated to compensate the damage, was raised.[61]

According to the German insurance practice, insurance companies do not envisage any special rule in the contract for determining the timing and indicate the rule of law on the standard conditions of liability insurance.[62] Unlike other insurance agreements, where the death of a person is the basis for termination of the insurance agreement,[63] in case of insuring the doctor's liability, his/her death or termination of his/her professional activity does not automatically cause the exemption of insurance company from the liability. The responsibility of the insurance company is related to occurrence of damage. However, in legal terms it can be problematic to define which moment is considered as the time of occurrence of damage in particular case. In the above example it is interesting, what should be considered as the moment of occurrence of damage, the wrong medical intervention, the pregnancy of a woman or birth of a child.

The German Federal Court develops two theories, the theory of causality and the theory of occurrence of damage. It is interesting that in one of its decisions, the Federal Court of Germany indicated that "the event" is not the only reason of damage, but also directly the occurrence of damage, as an external expression of event, that caused the infliction of damage directly to person or property.[64] If the above case is considered, insurance protection is related to realization of the risk that the doctor has taken i.e. related to the conceiving or birth of a child and not to the medical action of a doctor. Proceeding from the abovementioned, the responsibility of the doctor is obvious, though according to this theory, the insurance company is not obliged to compensate for damage. According to the theory of occurrence of damage, in order to implement insurance protection, it is necessary to cause damage directly during the validity of the contract. Consequently, the insurer doctor is fully responsible for the damage occurred later.

Later, the Federal Court of Germany established the practice entirely different from the above-mentioned approach and pointed to the theory of causality. The court generally discussed the definition of insurance provision in time and, for insurance protection purposes, considered significant

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60 ZfV 1990, 55 (76). *Bergmann K., Wever C.,* in *Hubert W. van Bühren,* Versicherungsrecht, 6. Aufl. 2014, Bonn, § 11, Rn. 109, 111.

61 Ibid, Rn. 111.

62 Ibid, Rn. 112.

63 *Terbille M., Höra K.,* Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., München, 2013, § 19, Rn. 64, 65.

64 BGHZ 25, 34 (34) Referenced: *Bergmann K., Wever C.,* Versicherungsrecht, *Bühren H. W.* (Hrsg.), 6 Aufl., Bonn, 2014, § 11, Rn. 113.

the time when the action or inactivity took place, based on which the legal claim was generated to the third party.[65] The case reviewed by the court concerned the insurance of industrial liability. In particular, the injured, when performing official duties related to care for the plants, used the plant poisoning, following which the damage has occurred. For resolving the issue of responsibility of the insurance company, the court considered significant to determine the time of use of poison and not determine when the substance affected the person. Since the use of poison coincided with the period of validity of the insurance agreement, the insurance company was imposed to compensate for damage. Proceeding from the above mentioned, the German court practice, for classification of insured accident in time, considers important not determining the time of occurrence of the accident, but defining and determining the event, which is the basis for the insured accident, so-called causal connection.[66]

In 2014, the amendment was made to the general rules of liability insurance of the German Law, which states that "within the framework of insured risk the insurance coverage is valid if, due to the insured accident that occurred during the validity of an agreement, the third party makes the claim to the insurer to compensate for personal or property damages. The damage event is an event, as a result of which the damage was incurred by the third party. The time of occurrence of damage, which is caused by a specific event, does not bear the significance.[67] As indicated in the doctrine, this record of the legislator should put an end to heterogeneous practice established by courts over the years.[68]

The Anglo-American approach, so-called principle of claim coverage (claims-made-coverage), used in professional liability insurance, is also quite interesting. In order to define, whether the insurance protection is valid or not, first of all it is identified, whether the occurrence of damage coincides with the insurance contract period or not. As the insurance companies indicate, the advantage of the mentioned rule is that transparency of insured accidents during the year allows the insurance company to calculate the amount of damage and determine the adequate premium of risk for the insurers. The insurer permanently has an insurance amount at hand that can be disposed freely. At the same time, the problem of compensation for damages caused later does not arise further. However, to oppose this system, it must be noted that due to the long-time interval between the action and occurrence of damage, so-called emptiness may arise, and the damage can take place following the expiry of contract term, which creates a problem for both the doctor and the patient.

French legislation is more specific and precisely determines the responsibility of the insurance company in time. In particular, if within five years from the expiry of the term of the contract the person incurs damage as a result of the action carried out during the validity of the contract, the

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65 BGHZ 79, 76 (89).

66 *Terbille M., Höra K.,* Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., 2013, München, § 19, Rn. 58.

67 Allgemeine Versicherungsbedingungen für die Haftpflichtversicherung (AHB), 2016 Ziff. 1.1., <https://service.comfortplan.de/bedingungen/Axa%20Privathaftpflicht%20Bedingungen.pdf>, [15.02.2019].

68 *Bergmann K., Wever C.,* Versicherungsrecht, *Bühren H. W.* (Hrsg.), 6 Aufl., Bonn, 2014, § 11, Rn 121.

insurance company is obliged to compensate for damages, if the insured does not have any other insurance contract with other insurance company.[69]

The American as well as the European experience shows that the insured persons typically need protection after the expiry of the term of insurance agreement. Proceeding from the specifics of medical practice, the question of compensation for damages may be put forward by the patient after few years. Unless there is no united judicial definition about the time of occurrence of damage, in Georgia among them, the parties will permanently remain under uncertainty. In order to avoid generation of "emptiness" (gap) during occurrence of damage following the expiration of the validity of the insurance contract, the practical men advise the insurance participants to conclude further liability insurance agreement, after the expiration of insurance contract validity or after the completion of medical practice. This is the way, by which the security will be provided.[70]

7. Relationship of Doctor and Patient in Constitutional-legal Context

7.1. The Patient's Right of Self-determination

It is difficult to find such field of social relationship, where ethical and legal aspects are so strongly interconnected with each other, as it is in the medical practice. The doctor-patient relationship is much more than a simple contractual relationship, - noted German scientist Eberhard Schmidt in his work.[71]

The key fundament for the doctor and patient relationship is the trust between them.[72] Commercialization, labor division, profit distribution and other factors complicate the possibility to maintain the ideal picture. The relationship between a doctor and a patient is more than a contractual-legal relationship.[73] On the basis of these relationships the patient can share his/her pain to a doctor, which is assessed by a doctor on the basis of his/her knowledge and who makes the conclusion regarding the treatment.

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69 *Lutterbeck A.,* in: *Wenzel F.,* Handbuch des Fachanwalts Medizinrecht, 3 Aufl., München, 2013, Kap. 5, Rn. 90.

70 *Bergmann K., Wever C.,* in: *Bühren H. W.,* Versicherungsrecht, 6 Aufl., Bonn, 2014, § 11, Rn. 126. Also, *Terbille M., Höra K.,* Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., München, 2013, § 19, Rn. 77.

71 *Schmidt E.,* Der Arzt im Strafrecht, in Ponsoldt, Lehrbuch der gerichtlichen Medizin, 2. Aufl., Leipzig, 1957, 2. Referenced: *Bischoff R.,* Festschrift für Karmann Geiss, Hamburg, 2000, 437.

72 *Deutsch E., Spickhoff A.,* Medizinrecht, 6. Aufl., Berlin, Heidelberg, New York, 2008, Rn. 17. Referenced: *Schneider L.,* Neue Behandlungsmethoden im Arzthaftungsrecht Behandlungsfehler – Aufklärungsfehler – Versicherung, Berlin, Heidelberg, 2010, 9.

73 BGH NJW 1956, 811, 813. Referenced: *Schneider L.,* Neue Behandlungsmethoden im Arzthaftungsrecht Behandlungsfehler – Aufklärungsfehler –Versicherung, Berlin, Heidelberg, 2010, 9.

At different times, there were different definitions of a doctor-patient relationship. The oldest is the paternalist definition in which the doctor plaid a role of defending father for his/her patient, and the patient was so called "illiterate child", for whom the doctor was the authority and controlling party.

Proceeding from such an understanding of the relationship, there was a danger that the patient could lose the right for self-determination and there was a threat that the doctor could abuse his/her rights.[74] Therefore, together with the development of the society and the medicine, the doctor-patient relationship transformed from paternalist relationship into partnership relationship, where, in order to achieve a better outcome, joint discussions and mutual cooperation was taken to the forefront. This, first of all, includes the patient's awareness. The relationship between the doctor and the patient primarily considers providing complete information on existing condition to the patient. Familiarity with the comprehensive information gives him/her an opportunity to weigh everything and, based on this, make a decision.[75] Of course, this does not mean transferring of all risks to the patient. On the contrary, the partnership relationship between the doctor and the patient implies incorporating their co-operation within the relevant framework for achieving the best outcomes.[76]

The legal relationship between a doctor and a patient is related not only to contractual law and law of torts, but it is also closely related to constitutional law. Medical treatment relationship is a highly sensitive relationship, the boundaries of which reach the fundamental rights of a human.[77]

If we base our discussion on the European experience, the specialized courts are required at constitutional level to use the basic rights as guiding principles while using the civil law norms.

The right of self-determination of the patient is in the center of the responsibility of doctor and the constitutional justice. Proceeding from this idea, in one of its decisions, the German Supreme Court notes that the right for self-determination, which includes the right to make decision freely and the right of human dignity, unconditionally requires the patient's awareness.[78] Here the court adds that, in general, any interference in the human's body is an injury of a body that requires the patient's consent.[79]

Providing comprehensive information to the patient and the need to obtain patient's consent during the narcosis, surgery, injection, irradiation or other manipulations, is necessary for realization of the right for self-determination. Providing explanation to the patient should ensure patient's full awareness. The doctor has no right to oversimplify and embellish possible risks to the patient. In addition, as the European practice shows, the consent of the patient shall apply to all the doctors involved in the treatment process, whether it is a surgeon or anesthesiologist.[80]

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74 *Bürger C.,* Patientenorientierte Information und Kommunikation im Gesundheitswesen, Wiesbaden, 2003, 19 ff.

75 Ibid, 20 ff.

76 *Schneider L., Neue* Behandlungsmethoden im Arzthaftungsrecht Behandlungsfehler – Aufklärungsfehler – Versicherung, Berlin, Heidelberg, 2010, 10.

77 ZfS 1983, 99/100. Referenced: *Bischoff R.,* Festschrift für Karmann Geiss, München, 2000, 437.

78 BGH AHRS 3150/3. Referenced: Ibid, 438.

79 BGHZ 124, 52. Referenced: *Bischoff R.,* Festschrift für Karmann Geiss, München, 2000, 438.

80 *Geiss K., Greiner H.,* Arzthaftpflichtrecht, 7 Aufl., München, 2014, C, Rn. 6 ff.

Of course, providing information to a patient does not mean a complete and exhaustive familiarity with the approaches existing in the medical science, but it relates to the impact the specific interference can have on the patient. The form and severity of interference should be explained. In addition, it is not necessary to provide explanation with a medical accuracy.

One important aspect shall be also emphasized in this regard - patient's consent for this or that action does not relieve the doctor from the responsibility.[81]

7.2. The Importance of Patient's Further Information Awareness — the Boundary between Providing and Recognition of Information

The issue of providing the information does not lose its significance even after completion of medical treatment or provided service. However, unlike the supply of information based on the right for self-determination, the doctor shall be more prudent while providing the information and explanation following the treatment.

Naturally, the main task of quality management of medical practice is to achieve patients' satisfaction. Dissatisfied patient can spread negative information about the hospital and its medical staff; furthermore, often the patient's dissatisfaction, according to his/her point of view, conditioned by the wrong treatment by a doctor, is manifested in the form of verbal abuse. Therefore, the communication and exchange of information between the doctor and the patient is important at all stages. In some cases, the patient's claims against doctor disappear, when the doctor via the communication with the patient attempts to answer the questions – what were the medical basis for the treatment not having the desired outcome, why does the patient have an opinion that everything could have different outcomes, in some cases, such expectation could be unjustified and etc. Quite often the patient and his/her relatives are looking for answers to the questions themselves. Because of this disappointment, the patient or his/her relatives can make decision to approach the lawyer.

Often, the need for the legal procedure would not become necessary if a doctor, as mentioned above, would give a timely, lengthy and clear explanation to the patient. However, during this type of conversation, it is necessary to be very careful. A doctor shall refrain from the expressions, which indicate that he/she somehow acknowledges a mistake made during the treatment. For example, the German legislator unequivocally indicates that, if a patient claims compensation for damage from a doctor and the doctor recognizes the request in the presence of the patient, then the doctor, on the basis of the mentioned recognition, becomes liable before the patient, and at the same time, the insurance company is liable to the extent, as it would be in case if the doctor did not recognize the fault, based on the circumstances of the case and legal justification.[82] If the doctor, evading the law, in his/her own opinion recognizes the right for claim for compensation of losses by the patient then he/she is respon-

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[81] *Steinmeyer H., Roeder N.,* Medizin-Haftung-Versicherung, Festschrift für Karl Otto Bergmann, zum 70. Geburtstag, *Eiff von W.* (hrsg.), Berlin, Heidelberg, 2015, 171.

[82] *Meichner O., Steinbeck R.,* Das neue Versicherungsvertragsrecht, 2 Aufl., München, 2011, § 3, Rn. 12.

sible against the patient, to the extent, he/she would be responsible in case of absence of insurance.[83] Before talking to the patient, the doctor shall be warned to abstain and limit to the explanation of medical facts only. It is always impractical and loss-making position, when a doctor conducts the written communication with the patient in similar situation, without the consent from the insurance company. Any written opinion presented to the person claiming compensation for damages shall not be made through the doctor allegedly involved in wrongful medical practice, but through the insurance company, which is entitled to conduct such correspondence with the claimant for damages, as well as obliged to do so under the agreement. As mentioned in the German literature, the doctor must remember that in such a situation he is just like a dilettante and unprofessional lawyer, as non-doctor person in medical field.

8. Conclusion

One of the ways to approach the international standards of doctor's professional insurance is well-established legislative base. Even in those countries where the mentioned insurance product is popular and had many consumers for a decade, in order to adapt to modern requirements and standards, the legislation is continuously improving and developing. It is expedient to add the relevant article to the CCG, which will regulate the doctor-patient relationship in detail. The second important step is to fill the informational vacuum and eliminate distrust. On the background of increased judicial disputes, the number of doctors bearing material responsibility increases statistically. Often, the hearing is not only a serious material burden for the doctor, but also cause for the damage to the business reputation. As mentioned at the beginning of the work, even professionals make mistakes; accordingly, wrongful medical practice does not always mean it is conducted by an unprofessional doctor. Insurance protection often protects the doctor from noisy judicial proceedings as well as material damages. All parties must take into consideration that protected doctor implies a protected patient, which would be a success achieved by each member of the society.

[83] *Terbille M., Höra K.,* Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., München, 2013, § 19, Rn. 64-65.

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Tatia Jorbenadze*

Diversified Practice of Lease Item Return

Leasing companies face a variety of objections when returning a lease item, which is also supported by the Court's diverse approach. When the main activity of a company is leasing property, their return is also part of the daily routine. In each case, assuming that the item was in the best condition, the calculation of the state duty would increase the company's expenses and threaten commercial activities. Writing the article was driven by the author's practical experiment, according to which, in spite of the market value of the lease item, a new judicial approach has been established when defining 60 GEL of state duty on its return in all cases and the leasing company has significantly saved finances. The purpose of this paper is to determine the value of the subject of dispute, the court, the state duty when returning the lease item, also facilitate the development of a unified approach on the basis of analyzing the practical difficulties and to inform the reader of the possible obstacles associated with the return of the lease item.

Key words: *Lease item value, determination of state duty by 60 GEL, separation of leasing from other contracts.*

1. Introduction

Leasing relationships are integral part of trade-economic and technological development. In countries like China and the United States, leasing is one of the broader sources of income that is less typical of developing countries[1]. In Georgia, the most demanded leasing products are cars and construction equipment[2]. Leasing financing is favorable for both small and medium-sized and large businesses, contributing to the growth of the economy. It is logical that state support for business development has direct affect[3]. For this reason, tax laws provide leasing companies with certain benefits[4]. For tax purposes, a leasing company is an enterprise whose leasing income during the calendar year is at least 70 percent of its whole income. [5]

The Civil Procedure Code also establishes favorable conditions for the lessor, in particular, the case of returning the lease item in the possession of the lessor is considered in a simplified manner, the state duty is halved, the operative consideration of the case is favorable for the party and for lightening the court's workload as well. [6] Procedural benefits to the lessor are not due to business policy but to

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1 *Qoqrashvili Q.,* International Financial Leasing and the Real Aspects of Its Establishment in Georgia, Journal "Law", № 3, 2001, 35, 38, 39 (in Georgian); *Wang G. J., Yang J.,* Financing without Bank Loans, New Alternatives for Funding SMEs in China, (Alternatives for Funding SMEs in Chinainah), Singapore, 2016, 109.

2 *Barbakadze Kh.,* Leasing - Duty Process Optimization Tool, Tbilisi, 2017, 3, 4 (in Georgian).

3 *Boobyer Ch.,* Leasing and Asset Finance: The Comprehensive Guide for Practitioners, 4th ed., London, 2003, 303.

4 Article 202, Part 3, paragraph 31, Tax Code of Georgia, 17/09/2010.

5 Article 8, Part 39, Ibid.

6 *Tabagari A.,* Promoting Leasing Activities Processually, Journal "Man and Constitution", № 2, 2004, 97 (in Georgian).

the fact, that the cases of this category are not complicated, as the applicant's (lessor) property rights are clear and his/her sole claim is to return of owned property into his/her possession.

At first glance, return of a lease item is the most easy stage to overcome within the leasing relationships, but expectations are quickly dashed as soon as it comes to returning many assets at once. It can be said that the case law on the return of the lease item is diversified: the basis for different decisions on identical content contracts in a court of the same instance could be interpretation of the contract, as well as discussions on the issues of halving or limiting the state duty.

Thus, the purpose of the article is to facilitate development of a uniform judicial approach, as well as to inform the reader of the practical cases in which the lessor might be able to return the lease item into his/her possession at minimal cost. The article consists of two main parts. The first part deals with the basic grounds of interpretation of lease as a loan by Kutaisi Appeal Court, and the second part explains the expediency of setting the state duty at 60 GEL when returning a lease item.

2. Basics of Interpretation of Lease as a Loan

Recognizing the leasing relationship as a separate legal institution is a vacuum of uniform court practice. Frequently, separation of leasing contracts from the contracts such as: loans, tenancy and installment sale is questionable[7]. Leasing is a special kind of contract that incorporates elements similar to other contracts.[8] Interestingly, the same court may have a different opinion on contracts of identical terms and conditions. For example, if Batumi City Court upheld the request to return the lease item[9], on another case of similar content, the same court considered the lease as a loan[10] and refused to satisfy the claim. A different decision of the court may be found on exactly the same case. In satisfying the claim in Zestafoni District Court[11], decision was not affected by the fact that the same case had previously been qualified as a loan in both Zestafoni District Court[12] and Kutaisi Appeal Court.[13]

According to court practice, it turns out that the fortunate luck of a return of a lease item depends on the judge's assessment and decision. If Tbilisi Appeal Court considers the relationship to be a lease and different discussions are due to the duty halving and subject of dispute[14] value determining issues, the contracts of similar content were interpreted as loans at Kutaisi Appeal

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7 Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 18 September 2018, № 2/B-839-2018, paragraphs: 2.8-2.11. *Meshvelishvili S.,* The Essence of Leasing Relations, Historical Review of its Development, Peculiarities and Modern Definition, Journal "Justice and the Law", № 4 (39), 2013, 86-88 (in Georgian).

8 *Ghudushauri A.,* Leasing and its Opportunities, Journal "Law", № 11-12, 1993, 55 (in Georgian). *Lesni L. C.,* The Lease Contract, Contemporary Readings in Law and Social Justice, Vol. 4(2), 2012, 900.

9 Civil Cases Panel of Batumi City Court, Order of 11 September 2018 and Writ of Execution № 2-3724-18 .

10 Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 18 September 2018, № 2/B-839-2018.

11 Zestaponi District Court Order of 19 February 2019 and Writ of Execution № 2/71-2019.

12 Zestaponi District Court Ruling of 2 April 2018, № 2/327-18.

13 Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 19 June 2018, № 2/B-494-2018.

14 Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 21 January 2019, № 2B/5748-18 on leaving the appealed ruling unchanged. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 10 January 2019, № 2/6929-18 on the satisfaction of a private complaint.

Court[15]. Despite this practice of Kutaisi Appeal Court, Kutaisi City Court Panels often satisfy the lessor's request. Based on the analysis of the practice, the main grounds were identified, in case of which the application to return the lease item was not satisfied and the lease contract was considered as a loan by Kutaisi Appeal Court.[16]

2.1. Variety of Lease Contract

Confusion the lease relationship with a loan is also associated with different types of leasing contract denial. In English literature, the term lease refers to a tenancy, rent[17] and lease itself to separate it from the tenancy is referred to as a financial lease[18]. In the Georgian legal language, all three terms are so phonetically distinct that in practice, even in advertising campaigns, financial leasing is used to indicate one of the types of leasing contract and is referred to as a contract where the lessee has the right to purchase the lease if the obligation is fulfilled and where the lessee and the supplier (seller) are not the same person[19]. The Court's understanding of the general leasing relationship of financial leasing is not justified. The leasing contract without the right to purchase is quite different from financial lease and is called operating leasing.[20]

In any leasing agreement, the lessor acquires property selected by the lessee. It is possible for the lessor to enter into a leasing agreement with the same person from whom the item was purchased.[21] Where the supplier (seller) of the property is at the same time the lessee and the lease agreement is provided that, in the event of its execution, the ownership right will be transferred to the lessee, such agreement shall be referred to as inverse-lease[22], in other terms, returnable lease.[23] It is regarded as a

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15 Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraph 4.29.2; Ruling № 2/B-839-2018 of 18 September 2018, paragraphs: 2.8-2.11, 4.13.1, 4.28.1, 4.29.2; Ruling № 2/B-706 of 19 September 2017; Ruling № 2/B-494-18 of 19 June 2018.

16 Ibid. Compare Orders and Writ of Execution of Civil Cases Panel of Kutaisi City Court of 7 March 2019, № 2/448-19; № 2/4-19 of 4 January 2019; № 5/3572-18 of 5 November 2018.

17 *Dzlierishvili Z.,* Legal Regulation of Leasing, Journal "Review of Georgian Law", № 5 (4), 2002, 506 (in Georgian).

18 *Iremashvili Q.,* Online Comment of the Civil Code of Georgia, Article 576, Line 13, 21, 71-72, <www.gccc.ge/წიგნი-მესამე/კერძო-ნაწილი/კარი-i-სახელშეკრულებო-სამ/თავი-iv-ლიზინგი/მუხლი-576/>, [24.03.2019] (in Georgian).

19 Australian Accounting Standards Board, AASB 117, 14, 01/12/2009, <www.aasb.gov.au/admin/file/content105/c9/AASB117_07-04_COMPjun09_01-10.pdf>, [30.03.2019].

20 *Imedashvili G., Kharaishvili S.,* Aircraft Leasing Contract, Journal "Law", № 1-2, 2006, 39 (in Georgian); *Jankhoteli Sh.,* Leasing, Journal "Civil Law", October, 1998, 51-53 (in Georgian).

21 *Vial E. L.,* Georgia's New Law on Leasing - A Critical Analysis, Journal "Review of Georgian Law", № 5 (4), 2002, 530 (in Georgian).

22 *Gepheridze D.,* Aircraft Leasing under International Law, Journal "Law", № 11-12, 2003, 73, <www.intlaw.ge/old/publikaciebi/statia%206.PDF>, [21.03.2019] (in Georgian). *Chandraiah E.,* Evaluation of Lease Financing, New Delhi, 2004, 39.

23 Desk Dictionary of an Official, UNDP, *Gurgenidze V.* (ed.), Tbilisi, 2004, 483 (in Georgian).

branch of financial lease. [24] Its distinctive feature is two kinds of agreements, lease and purchase agreements, concluded with the same person, that is why Kutaisi Appeal Court considers amount paid under purchase agreement as borrowed, lease property transferred under the lease agreement as secure measures and lease payments as loan return. [25]

2.2. Putting on the Same Level of the Lease Item and Registered Mortgage

Leased property should not be considered as a form of request secure measure, [26] as the ownership of the lease item remains with the lessor throughout the leasing relationship. Use of the property owned by the debtor or third party and not the creditor is possible as the form of secure. Kutaisi Appeal Court considered the lease item as a registered mortgage and in relation to the property right stated that, instead of the lessor, the owner is the lessee on the basis of the decision of the Supreme Court of Georgia[27], by which a person may be considered as the owner of the vehicle without being registered with the relevant authority. [28]

Neither the lessee shall be deemed to be the purchaser nor the lease item shall be deemed to be a registered mortgage because of the mentioned decision of the Supreme Court. First of all, the Supreme Court has used explanation of the optional registration issue as one of the arguments to recognize the person as an owner who was registered as such. Second, the said decision concerns the purchase and not the lease, and the parties did not sign any agreement. Thirdly, Supreme Court considered a tripartite relationship in which the original owner requested a third party to request an item that the buyer had transferred to a third person on the basis of a fraudulent power of attorney. The Supreme Court discussed whether the defendant could be considered as a good-faith buyer when he was unaware of the falsity of a notarized power of attorney.

This Supreme Court decision was established into practice[29], but has become the object of criticism in scientific environment[30]. Uniform practice of optional registration of vehicle ownership to

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24 *Cuming C. C. R.,* Model Rules for Lease Financing: A Possible Complement to the UNIDROIT Convention on International Financial Leasing, Unif. L. Rev. n.s., Vol. 3, 1998, 378.

25 Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.29.3-4.29.9; Ruling of 18 September 2018, № 2/B-839-2018, paragraph: 4.29.6.

26 Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.29.3-4.29.9; Ruling of 18 September 2018, № 2/B-839-2018, paragraph: 4.29.6; Ruling of 19 September 2017, № 2/B-706.

27 Decision of 9 September 2002, Civil Cases Chamber of Supreme Court, № 3K-624-02.

28 Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.29.7, 4.29.8, 4.29.10.

29 *Zarandia T.,* Transfer of Ownership on Moving Items. Origin of Ownership of Mechanical Motor Vehicles. Collision of Norms, Foundations of Georgian Civil Law in Georgian Judicial Practice, *Zarandia T.* (ed.), Tbilisi, 2016, 68-70 (in Georgian). Civil Cases Chamber of Supreme Court, Ruling of 25 September 2018, № AS-899-2018, paragraph: 14.3; Decision of 5 December 2014 of the same court, № SD-658-625-2014.

30 *Takashvili S.,* Legal Regulation of the Origin of a Movable Property Right under Georgian Law, Besarion Zoidze 60, Anniversary Edition*, Gegenava D., Jorbenadze S.* (ed.), Tbilisi, 2013, 51-53 (in Georgian).

purchase property rights is the only lever to maintain the stability of the civil movement in a society where the purchase agreement of a vehicle is concluded generally verbally or without registration. Therefore, the practice discussed here regulates car sales cases, and putting on the same level leasing with them is an attempt of excluding leasing relationship from the legal space.

2.3. Redeem, Purchase and Lease Annual Interest Rate

Due to the radical incompatibility[31] of redemption and leasing, the "redemption right" referred to in the leasing regulating Articles of the Civil Code has been replaced by the "right of purchase". It is not justified by the court to put on the same levels the lease agreement and redemption[32].

Considering a lease as loan due to the high lease payments is the subject of a separate discussion. Leasing is one of the sources of income. While agreeing on the lease payment, the focus is made on the existing and possible future condition of the item, the term of the contract. Based on the relevant data, the parties try to analyze which type of leasing contract is appropriate for their economic calculations. The definition of a leasing relationship carries different risks. If a financial lease is made for a significant period of time of the economic viability of the item, the contractual term for an operating lease is usually less[33]. In the case of financial lease, the lessee may incur insurance, tax and other financial expenses[34]. Financial expense is the general concept and is part of the effective annual interest rate. Each term is explained in the order[35] of the President of the National Bank of Georgia, which are to be considered on the level of principles for a non-entrepreneur lessor[36]. Considering a lease as a loan, is not justified due to the absence of legislative annual interest rate, lease price rates, advance fee or penalties[37]. It is the publicly acknowledged fact, that leasing is not less expensive than

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31 *Dzlierishvili Z.,* Legal Regulation of Leasing, Journal "Review of Georgian Law", № 5 (4), 2002, 510 (in Georgian).

32 Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraph: 2.7; Ruling of 18 September 2018, № 2/B-839-2018, paragraph: 2.10; Ruling of 19 September 2017, № 2/B-706.

33 *Vial E. L.,* Georgia's New Law on Leasing — A Critical Analysis, Journal "Review of Georgian Law", № 5 (4), 2002, 532.

34 *Iremashvili Q.,* Online Comment of the Civil Code of Georgia, Article 576, Line 13, 21, 71-72, <www.gccc.ge/წიგნი-მესამე/კერძო-ნაწილი/კარი-i-სახელშეკრულებო-სამ/თავი-iv-ლიზინგი/მუხლი-576/>, [24.03.2019] (in Georgian). *Guzhva V. S., Raghavan S., D'Agostino D. J.*, Aircraft Leasing and Financing: Tools for Success in International Aircraft Acquisition and Management, 2018, 86, <www.efinancemanagement.com/sources-of-finance/difference-between-operating-and-financial-lease>, [24.03.2019].

35 Article 2, Order of the President of the National Bank of Georgia on the "Approval of the Procedure for Calculating the Annual Effective Lease Rate, Fee, Financial Cost, Penalty and/or Any Form of Financial Sanction for the Purpose of Article 576", № 18/04, 05/02/2019.

36 Article 576, section 6, Civil Code of Georgia, 26/06/1997.

37 Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 2.5, 4.5.3, 4.10, 4.27.3, 4.29; Ruling of 18 September 2018, № 2/B-839-2018, paragraphs: 2.9-2.11; Ruling of 19 September 2017, № 2/B-706.

a bank loan. Anyone with a special calculator available on the leasing companies' website can calculate it approximately by the value of the leasing asset and the term of the contract. [38]

2.4. Depreciation Expense

An additional reason why the court does not recognize the agreement as a lease is the fact that the lease expense do not consider the depreciation expenses. The term "depreciation" is deleted in the Civil Code Leasing Regulating norms. In the Ottawa International Convention of 28 May 1988, determination of lease payments considering the depreciation expense[39] is stated at the level of the principle and under Roman Model Law, it depends to the will of the parties[40]. The term "depreciation" is used in the Tax Code and reduces the taxpayer's taxes[41]. Therefore, it is decisive whether the lessee is the sole proprietor, since depreciation is charged to the lessee in the case of financial lease, and in the case of operating lease to the lessor[42]. Calculating depreciation expense requires the professionalism of a financier. In the context of freedom of contract, it is not fair for the court to order the parties to deduct depreciation expense from the lease payments[43]. Prior to the leasing relationship, the lease payment is determined by the current, possible future condition of the item and the term of the contract.

In case of simplified return of the lease item, the subject of dispute is only the return of item into possession due to the non-payment of the amount specified in the schedule. The purpose of the court should not be a comprehensive analysis of the monthly lease payments.

If the defendant considers that the contract was not properly executed due to an unjustifiably high fee or if the lease item was improperly seized, he/she may appeal to the superior court with a private complaint.

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38 <www.turbo.ge/>, [25.03.2019]; <www.agleasing.ge/ge/calculator>, [25.03.2019].

39 Article 1, paragraph 2, sub-paragraph c, Ottawa Convention of 28 May 1988 on "International Leasing", 28/05/1988.

40 Article 2, paragraph c, Model Law of Rome, 13/11/2018.

41 Article 111, 112 and etc., Tax Code of Georgia, 17/09/2010. *Nadaraia L., Rogava Z., Rukhadze K., Bolkvadze B.,* Comment on Tax Code of Georgia, Book I, Tbilisi, 2012, 108, 421 (in Georgian).

42 Order of the Head of the Accounting, Reporting and Audit Supervision Service N-26 on "Introducing International Financial Reporting Standards (IFRS) into Georgian Language", 26/12/2017. International Financial Reporting Standard (IFRS) for SMEs, paragraphs: 20.12 and 20.26, <www.saras.gov.ge/Content/files/Final-IFRS_for_SMEs_2017_%2017-october.pdf>, [28.03.2019]. The concept of financial and operating lease in the international standard is translated as a lease.

43 Different Opinion see, Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.15, 4.15.2; Ruling of 18 September 2018, № 2/B-839-2018, paragraphs: 4.19.; Ruling of 19 September 2017, № 2/B-706.

2.5. Purchase Obligation in Exchange for the Right

Kutaisi Appeal Court does not recognize the lease agreement, by which, after the full payment, the purchase of the item is the obligation of the lessee and not the authority[44]. The Court's reasoning is based on the interpretation of paragraph 3 of Article 1 of the Ottawa Convention, although this Article of the Ottawa Convention generally describes the types of leases and does not prohibit the parties, the right to purchase an item to be defined as the obligation of the lessee.

Civil Cases Chamber of Kutaisi Appeal Court recognizes as loans those leasing contracts entered into force with the purchase obligation, that even Administrative Cases Panel consider as leasing. According to the resolutions of the Administrative Cases Panel, penalties written on behalf of the lessor, as the owner, if the vehicle is owned by the lessee, are canceled due to the failure to underway the technical inspection. The Administrative Cases Panel and Kutaisi Civil Cases Chamber, based on the same source, explain differently the leasing contract entered into force with the purchase obligation. [45]

2.6. Commercial Purpose

A lease contract may be concluded for both entrepreneurial and non-entrepreneurial purposes, and when returning the lease item, the court's emphasis on such a purpose is unnecessary[46]. The importance of the commercial purpose is more important publicly and legally, as the leasing companies are obliged to provide information[47] in an appropriate form[48] to the Financial Monitoring Service of Georgia[49] about the agreement which:

- **are concluded for commercial purposes,** [50] and therefore,
- The deal is **expensive, unlikely or unusual.** [51]

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[44] Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.15, 4.15.1; Ruling of 18 September 2018, № 2/B-839-2018, paragraphs: 4.23.2.; Ruling of 19 September 2017, № 2/B-706.

[45] Administration Cases Panel of Tbilisi City Court, Resolution of 4 December 2018, № 4/8878-18. Administration Cases Panel of Tbilisi City Court, Resolution of 26 November 2018, № 4/8876-18, paragraph: 6.3. Administration Cases Panel of Tbilisi City Court, Resolution of 15 October 2018, № 4/7503-18, paragraph: 6.3.

[46] Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraph: 4.4.2.

[47] Article 2, paragraphs "d" and "z", article 3, paragraph "l", Law of Georgia on Facilitating the Prevention of Illicit Income Legalization, 06/06/2003.

[48] <www.fms.gov.ge/records/data/help/uguide_registration.html>, [22.03.2019].

[49] Article 4, paragraph "b", article 5, Law of Georgia on Facilitating the Prevention of Illicit Income Legalization, 06/06/2003.

[50] Order № 2 of the Head of the Financial Monitoring Service of Georgia on Approval of the Regulation on Receipt, Systematization, Processing and Transmission of Information by Leasing Companies to the Financial Monitoring Service of Georgia, Article 1, Paragraph 1, 05/09/2013.

The deal will be considered expensive if the value of the leased property exceeds 30,000 GEL. In carrying out this obligation, the concept of a leasing company is identical to a concept of a tax code[52]. Leasing company law does not directly oblige to inform the state if the lessee is an entrepreneur, the deal is expensive and the and non-entrepreneur purposes are indicated in the contract, but the idea of unusual and suspicious deals is so vague that informing the government for prevention purposes is advisable. For defense purposes, it is also advisable, when interpretation of the expensive, pay attention to the amounts specified in the lease agreement (the total amount of which is usually greater than the cost of the lease item) and not the market value of the lease item.

In the case of a non-entrepreneur lessee, where the purpose is non-entrepreneurial and the amount of the contract exceeds 30,000 GEL, financial monitoring involvement will be appropriate If it is impossible to use the item for non-commercial purposes due to the characteristics of the lease item (for example leasing, saddle-quad, elevator and other construction machinery units). The lessee might not be an entrepreneur and the item might be used non-commercially, although it may be risky not to notify the state if the amounts agreed under the contract exceed 30,000 GEL.

2.7. Interim Report

A study and analysis of the various practices of the Courts of Appeal on the return of the lease item revealed that the agreements of the same content would have different effects in different parts of the State. Unpredictable decisions can damage the lessor. The refusal to accept the return proceedings of the lease shall be subject to a private appeal, on which the Court of Appeal makes a final ruling and not subject to appeal. In the light of the above-mentioned, after the refusal from Kutaisi Court of Appeal, the only way for the lessor is to file a lawsuit, make a double resources and forcefully recognize the agreement as a loan agreement that the Tbilisi Court of Appeals considers as lease. The problem becomes even more profound if the leasing company is a company, whose core business is leasing hundreds of assets on daily basis and being forced to evaluate its business differently in front of the court. The only way to avoid litigation is for the applicant to seek a renewal of the proceedings under the newly established circumstances, which in practice ended with the Supreme Court ruling[53] of returning the lease item[54].

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[51] Article 2, paragraphs “h” and “i”, article 3, article 5, paragraph 13, sub-paragraph “c”, Ibid. Order of the President of the National Bank of Georgia № 1/04 on Facilitating the Prevention of Illicit Income On the establishment of a list of zones for the purposes of the Law of Georgia, 09/01/2017.

[52] Article 2, paragraph “z”, Law of Georgia on Facilitating the Prevention of Illicit Income Legalization, 06/06/2003.

[53] Civil Cases Chamber of Georgian Supreme Court, Ruling of 4 May 2018, № AS-267-267-2018.

[54] Civil Cases Chamber of Kutaisi Appral Court, Ruling of 15 November 2018, № 2/B-706.

3. Judgment and Halving of the State Duty while Returning a Lease Item

The application for the return of the lease item shall be submitted to the court based on the defendant's place of residence. In this respect, the place of performance of the contract is irrelevant and on applications, being a non-actional claim, don't apply special jurisdiction[55]. If the defendant's factual and legal address differs, the applicant chooses the court to consider the case[56].

The lease item return proceedings being in the possession of the lessor, is dealt with a simplified manner by filing an application, while the simplified proceeding is under the jurisdiction of the Magistrate courts and the state duty is halved. Cases of this kind are usually heard by magistrate judges, no matter how expensive the subject matter of the lease is and whether it costs more than 5,000 GEL[57]. In this regard, judicial practice is being developing[58],, which is actively supported by the Supreme Court of Georgia[59]. The question of halving the duty also applies to lowering its upper and lower limits. In the first instance, when filing an application for the return of the lease item, the amount of the duty shall not exceed 1,500 GEL for individuals and 2,500 GEL for legal entities[60], while the minimum amount shall be 50 GEL instead of 100 GEL. The private appeal duty on the application will also be halved. In calculating the state duty, the issues under questions should not be raised, but there are still precedents when the cost of lease item has become the basis of considering the case as Non-magistrate[61]. Sometimes the court still rejects the order on return of the lease item because the state duty has been halved and indicates to the applicant that in the case of simplified proceeding of the return of lease item, the state duly should be calculated at 3% of the value of the litigation item instead of 1.5%[62].

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55 Civil Cases Panel of Tbilisi City Court, Ruling of 31 January 2019, № 2/1431-19. Different opinion see, Practical Recommendations of the Supreme Court of Georgia to Judges of Common Courts on issues of Civil Procedure Law, Tbilisi, 2010, 105, 106, <www.supremecourt.ge/files/upload-file/pdf/Praqtikulirekomendacebi6-12-2010.pdf>, [09.03.2019] (in Georgian).

56 Civil Cases Panel of Tbilisi City Court, Ruling of 31 January 2019, № 2/1431-19.

57 Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 29 November 2018, № 2B/5741-18. Practical Recommendations of the Supreme Court of Georgia to Judges of Common Courts on issues of Common Procedure Law, Tbilisi, 2010, 27, <www.supremecourt.ge/files/upload-file/pdf/Praqtikulirekomendacebi6-12-2010.pdf>, [01.03.2019] (in Georgian).

58 Civil Cases Panel of Tbilisi City Court, Order of 25 February 2019 and Writ of Execution № 2/3730-19. Civil Cases Panel of Batumi City Court, Order of 22 February 2019, Writ of Execution № 2-439/19. Civil Cases Panel of Tbilisi City Court, Order of 9 January 2019 and Writ of Execution № 2/30-19.

59 Practical Recommendations of the Supreme Court of Georgia on issues of Common Procedure Law for Judges of Common Courts, Tbilisi, 2010, 26, 27, <www.supremecourt.ge/files/upload-file/pdf/Praqtikulirekomendacebi6-12-2010.pdf>, [01.03.2019] (in Georgian).

60 Civil Cases Panel of Tbilisi City Court, Order 11 February 2019 and Writ of Execution № 2/2270-19.

61 Tkibuli Magistrate Court Ruling of 1 February 2018, № 2/5-18. Civil Cases Chamber of Kutaisi Appeal Court Ruling of 12 April 2018, № 2/B-232.

62 Civil Cases Panel of Batumi City Court, Ruling of 28 December 2018, № 2/5351-2018. Civil Cases Panel of Tbilisi City Court, Ruling of 26 July 2018, № 2/22321-18. Civil Cases Panel of Rustavi City Court, Ruling of 28 May 2018, № 2-1582-18.

4. State Duty Standard when Returning a Lease Item an Established Approach

To calculate the State duty, it is important to determine the value of the lease item, the following methods are used: the property is valued at the pre-leasing condition when the item was still owned by the lessor (at that time it may be possible to submit a purchase agreement whereby the item was subsequently leased[63]) or observe the market value of the family property. For example, they apply to a private expert appraiser who assesses the lease item with the assumption of material flawless[64] of the item. With the rare exception[65], the court does not require the assessee to prove his/her competence. [66] Certificate issued by a person accredited by the Unified National Accreditation Body[67] is satisfactory for being considered as a licensed expert. The grounds for refusing to accept the application are hardly become the assessment of the lease item in foreign currency by an expert[68]. It is possible to determine the market value by buying and selling ads[69] on the intermediate web site.

It is clear that the subject of the dispute is hypothetically determined by the idealistic-theoretical assumption that it is in working condition and / or at least has been maintained the conditions prior to transfer to the lessee with respect to natural depreciation.

4.1. Incorrectness of an Established Approach

The value of the leased item depends on its proper use, quality of maintenance. Due to the tremendous treatment of the lessee, the property may have unambiguously lost its functional purpose and value. In this case, the lessor has to pay one or twice of state duty, because under the established theoretical valuation method, he/she has to imagine that its item is in the same condition as the other family properties or is in identical condition before signing the contract. Even so, the lessor requests

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63 Kobuleti Magistrate Court Order of 16 October 2018 and Writ of Execution № 2/691-2018.

64 Civil Cases Panel of Tbilisi City Court, Order of 6 November 2018 and Writ of Execution № 2/32279-18. Khulo Magistrate Court Order of 6 November 2018 and Writ of Execution № 2-96/18. Kutaisi City Court Order of 5 November 2018 and Writ of Execution № 2/3572-18. Batumi City Court Order of 2 November 2018 and Writ of Execution № 2-4520/18. Tianeti Magistrate Court Order of 2 November 2018 and Writ of Execution № 2/103-18. Civil Cases Panel of Rustavi City Court, Order of 31 October 2018 and Writ of Execution № 2-2929-18. Civil Cases Panel of Tbilisi City Court, Order of 25 October 2018 and Writ of Execution № 2/30879-18. Civil Cases Panel of Batumi City Court, Order of 19 October 2018 and Writ of Execution № 2-4304/18. Lagodekhi Magistrate Court Order of 18 October 2018 and Writ of Execution № 2/251-18. Tbilidi City Court Order of 23 October 2018 and Writ of Execution № 2/30413-18.

65 Civil Cases Panel of Tbilisi City Court, Ruling of 5 November 2018, № 2/31985-18; Ruling of 24 December 2018, № 2/36933-18.

66 See, Footnote 64.

67 Civil Cases Panel of Tbilisi City Court Ordner of 25 February 2019 and Writ of Executions, № 2/37561-19 and № 2/1089-19.

68 Marneuli Magistrate Court Ruling of 20 April 2018, № 2/163-18.

69 Supreme Court Ruling of 30 October 2015, № AS-901-851-2015.

with claim the property transferred directly to the contractor, and not the family property similar to it, which is very similar to vindication.

The issue is especially relevant if the usual business of the leasing company is leasing cars. Overpricing payment of state duty on the objective value of the subject matter of the dispute and the lump sum flow of the company in large quantities makes the stability of the enterprise under the question. Returning the leased item into a substantially defective state can be the cause of a lawsuit[70], failure to find a lease item or return of a lease item in the form of scrap[71] might become a prerequisite for starting an investigation the execution stage, which increases the cost. If the application is satisfied, the remuneration shall be borne by the losing party, but a decision that comes into force cannot always guarantee a refund. The objective and fair calculation of the State duty required the introduction of new practices that would not threaten the applicant to pay more.

4.2. Inability to Determine a Real Value of a Subject of Dispute

The lessor regarding the return of lease item into his/her possession shall apply to the Court with the sole request to return the item having the specific characteristics specified in the leasing contract. Under the established approach, the lessor is obliged to determine the value of the item of the dispute so as he/she owns the item directly and know its real value. It is not justified for the lessor to conceive of himself/herself as operating within the area of rights and the failure of it's performance has led to a claim to the court. According to the established practice, the lessor acts from the owner's point of view to determine the price of the item as close as possible with its real value, which is illogical, since the lessor can have no real idea about the item's condition until the object is returned to the owner.

Imaginary reasoning about the value of an item for the lessor is due to the fact that the lessee continuously owns the lease item during the term of the contract. Moreover, the lessee has the right to terminate the contract if he/she is incapable to use the lease item.

Proceedings on the return of the lease item into the leasor's possession are treated not in a actional but in a simplified manner by filing an application[72]. The applicant seeks to return possession on the item transferred directly to the defendant and should not assign importance to the market situation of similar, family property items.

4.2.1. Determination of a Lease Item Value at 4,000 GEL

In the case of return of the leased item, the amount of the dispute shall be estimated at GEL 4,000 (Article 41.1 (j) of the Code of Civil Procedure) for two main reasons:

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70 Civil Cases Panel of Tbilisi City Court, Act of 25 January 2019, № 2/942-19.

71 Criminal Cases Investigation, pre-trial and substantial discussion Panel of Tbilisi City Court Ruling of 13 February 2019, № 11A/2244-19.

72 *Khurtsilava R.,* Simplified Production in the Georgian Civil Process, Tbilisi, 2009, 177 (in Georgian).

A. The value of the leasing item cannot be determined because of limited ownership. Since the lessor transfer the property to the lessee, he/she will not be able to take back the leased item[73], even for the purpose of determining the market value and/or in case of a car, for the purpose of carrying out technical inspections[74], because the legislator grants the lessee with the right to terminate the lease contract if the lessee is "Is not able to perform his/her ownership rights on the lease item"[75]. Both the Ottawa Convention and Rome Model Laws affirm the right of the lessee to use the lease item without delay[76]. In the event of failure to reach an agreement, the lessor might only request the return of lease item into his/her ownership on the basis of an order and an writ of execution or lease certificate.

B. Even if the lessor has the ability to determine value, it should not be given any importance. The purpose of the leasing is to return the item into ownership only and it doesn't argue on the payment of the amount, the recognition of the owner or the change of property with a family property item. When dealing with the return of a leased item, as well as at the time of vindication[77], the party should not be required to determine the actual status of the disputed item. It is in the interest of the lessor to make full use of the property and not to compensate for the damage, to change the property with a family property item or to recognize himself/herself as owner. The applicant requests the return of a particular item transferred to the defendant, having certain characteristics, with an identifiable asset, such as in the case of a vehicle, with unique identification and state number. Just with it, the return of a lease item of an obligatory-legal leasing is similar to property-legal vindication lawsuit[78], but they differ radically through litigation. In order to recover an item from unlawful possession, it is necessary for the item to be belonged to the applicant and the defendant shall not have the ground of owning an item.[79]

In determining the value of a subject of dispute, the Supreme Court states: “When the legal status of ownership of an item is certain, the owner of the item is known and is only prevented from using and disposing of his/her property, and the owner also seeks separation from his/her co-owner, the value of the subject of dispute shall be determined by Article 41 (1) (k) of the Code of Civil Procedure it means, by 4000 GEL. [80]" The amount of subject of dispute should be set at “4,000 GEL If

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73 Article 580^6, Civil Code of Georgia, 26/06/1997.

74 Administration Cases Panel of Tbilisi City Court Resolution of 4 December 2018, № 4/8878-18 and Resolution of 15 October 2018, № 4/7503-18. According to the Resolutions, the court canceled the leasing company's fine imposed by the patrol police for failing to carry out technical inspections on the leasing vehicle. The legal basis for the cancellation is that the lessor is denied the right to ownership during the term of the lease agreement.

75 Article 580^5, section 2, Civil Code of Georgia 26/06/1997.

76 Article 8, paragraph 2, Ottawa Convention (give full name, if applicable), 28/05/1988. Article 16, Model Law of Rome, 13/11/2008.

77 Civil Cases Chamber of Supreme Court, Ruling of 13 December 2018, № AS-1580-2018, paragraphs: 63, 64. Decision of 20 March 2017 of the same Court, № AS-1165-1120-2016, paragraph 2.1.

78 *Qochashvili Q.,* Ownership as a Basis for Presumption of Property (Comparative Jurisprudence Study), Tbilisi, 2012, 140 (in Georgian).

79 *Zoidze B.,* Georgian Property Law, Tbilisi, 2003, 97 (in Georgian).

80 Georgian Supreme Court Ruling of 11 January 2008, № AS-645-1022-06.

it is impossible to determine the value of the subject of dispute in a property-legal dispute (encroachment or other interference, neighborhood dispute, etc.)". [81] There is a property-legal dispute over the return of the lease item[82]. Dispute is property-legal even if the claim applies to the property right or items having a monetary value. The return of the lease item will be brought to court by filing an application, though the simplified proceeding does not amount to undisputed proceeding. [83]

The so called principle of *Numerus Clausus* doesn't effect the 4 000 GEL defining norm. The wording: "... encroachment or other interference, neighborhood disputes, etc." implies an inexhaustible list and includes all property disputes on which the value of the subject-matter of the dispute cannot be objectively determined.

Since the state duty on the return of ownership of the lease item is 1.5% of the value of subject of dispute (of GEL 4,000), 60 GEL should be set as the standard of the state duty.

4.2.2. Adopt a New Standard of State Duty in Judicial Practice

In applying 60 GEL state duty standard, the Court's opinion was divided into two. [84] The practice was established by the Tbilisi Appeal Court, which out of the five cases, in all of them, [85] satisfied the private complainant requests with 4 000 GEL of lease item and and therefore, on determination of state duty by 60 GEL, it canceled the City Court's rulings on rejecting the application and remitted the cases to the same court for re-consideration. Following the first ruling of the Court of Appeal, while defining the duty at 60 GEL, there was a clear positive trend towards satisfying the application[86], which was reinforced by further rulings and established as a new practice.

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81 *Khurtsilava R.*, Simplified Procedure in the Georgian Civil Process, Tbilisi, 2009, 177, 187 (in Georgian).

82 Civil Cases Chamber of Supreme Court Ruling of 14 February 2011, № AS-1323-1166-2010, the part of motivation.

83 Tbilisi Appeal Court Ruling of 26 November 2012, № 2B/3630-12, 5.

84 Civil Cases Panel of Tbilisi City Court, Order of 17 October 2018 and Writ of Execution, № 2/29925-18. Civil Cases Panel of Batumi City Court Order of 11 September 2018 and Writ of Execution, № 2-3724-18. Different Opinion see, Civil Cases Panel of Tbilisi City Court, Ruling of 17 October 2018, № 2/29921-18; Ruling of 15 October 2018 of the same court, № 2/29775-18.

85 Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 10 January 2019, № 2B/6929-18 on satisfaction of a private compliant. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 27 June 2019, № 2B/4296-19 on satisfaction of a private compliant. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 9 August 2019, № 2B/4479-19 on satisfaction of a private compliant. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 9 August 2019, № 2B/4852-19 on satisfaction of a private compliant. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 17 September 2019 on satisfaction of a private compliant, N 2b/5183-19.

86 Civil Cases Panel Orders of Tbilisi City Court and Writ of Executions of 25 March 2019, № 2/5856-19; № 2/5421-19 of 20 March 2019; № 2/5384-19 of 19 March 2019.

4.2.3. The Supreme Court Recommendation on a New Standard

The rule of determining the value of the lease item by GEL 4,000 is also supported by the Supreme Court of Georgia. In 2008 and 2010, the Supreme Court of Georgia issued a recommendation to judges on civil procedural law, according to which a return of a lease item can be judged by a magistrate judge, even if the item could be assessed as overly expensive. According to the same recommendation, the calculation of the state duty depends on the validity of the leasing contract[87]. In particular, the value of the subject of the dispute shall be set at 4,000 GEL only if the return of lease item is required after the expiry of the contract. In case of early termination of the contract, to calculate the duty it is recommended to use Article 41.1 (g) of the Civil Procedure Code, which regulates early termination of the tenancy agreement and sets the cost of subject of dispute to the lessor in the total amount payable for the remaining time (no more than three years).

It should be emphasized that Article 41.1 (g) appliess directly to tenancy and should not be confused with all contracts under which the payment is in accordance with the schedule. The use of Civil Code with its current version is unjustified, as the lease agreement was considered a form of tenancy at the time the recommendation was issued[88]. Since the tenancy rules are no longer applicable in terms of leasing, while in determining the value of the subject of dispute, it is no longer relevant whether the contract has been terminated prematurely and the leased property should in all cases be valued at 4,000 GEL.

5. Conclusion

A different interpretation of the agreements concluded with the same terms in the east and west of Georgia at the same time impedes the development of the lease sector at the outset. A uniform court approach is needed in order for the lessor to be able to conduct a stable business. When returning a lease item, the applicant's sole interest is to return exactly the item that was leased to the lessee. Upon return of the lease item, the lessor's claim might not be a request on change of item with a family property item or refund. The subject of dispute shall not be assessed on the basis of the assumptions that it is materially flawless or at the market value of similar family property items. On the basis of the arguments discussed, Tbilisi Appeal Court out of five attempts, in all cases shared the author's argument on the establishment of a new standard of state duty and while returning a leased property

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87 Practical Recommendations of the Supreme Court of Georgia to Judges of Common Courts on Civil Procedure Law, Tbilisi, 2010, 105, <www.supremecourt.ge/files/upload-file/pdf/Praqtikulirekomendacebi6-12-2010.pdf>, [09.03.2019] (in Georgian). Practical Recommendations of the Supreme Court of Georgia to the Magistrate Judges on Civil Procedure Law, Tbilisi, 2008, 101, <www.supremecourt.ge/files/upload-file/pdf/rek2008.pdf>, [01.04.2019] (in Georgian).

88 *Iremashvili Q.,* Online Comment of the Civil Code of Georgia, Article 576, Line 13, <http://www.gccc.ge/წიგნი-მესამე/კერძო-ნაწილი/კარი-i-სახელშეკრულებო-სამ/თავი-iv-ლიზინგი/მუხლი-576/>, [17.03.2019] (in Georgian). *Dzlierishvili Z.,* Legal Regulation of Leasing, Journal "Review of Georgian Law", № 5 (4), 2002, 508, (in Georgian).

with a simplified manner (by application), the value of the subject of dispute under Article 4 (1) (j) of the Civil Procedure Code is set at 4,000 GEL in all cases, with GEL 60 being the standard for state duty, since the case duty belonging the Magistrate Court is calculated by the halved quantity (1.5%) of the value of subject of dispute.

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Monitoring of Internet Communications in Criminal Proceedings

The present paper reviews the Georgian Legislation and international standards related to secret investigative actions of obtaining internet communications. Due to rapid development of modern technologies, protection of privacy in the field of electronic surveillance has become the significant challenge. Since the Constitutional Court of Georgia, under the judgement of April 14, 2016 recognized as unconstitutional certain provisions regulating secret investigative actions of obtaining communications in real time, this issue has acquired a special importance in Georgia. Taking into consideration the above mentioned, the aim of the present paper is to discuss the legal standards established by the Constitutional Court of Georgia and amendments into the legislation, to analyze certain problematic issues with regard to monitoring of internet communications and to demonstrate the best international practice developed in this field.

Key words: *Monitoring of internet communications, right to privacy, secret surveillance measures, obtaining communications in real time, secret investigative actions.*

1. Introduction

Information technologies, particularly the internet have brought fundamental changes in the life of society.[1] By allowing large amount of information to be transferred rapidly and with less expense all over the world, the internet has transformed the present capabilities of communication.[2] Internet communication, in terms of application, competes with more traditional methods of communication, such as telephone communication. "There is no actual difference in exchange of information on the phone and on the internet in terms of amount, content, characteristics, kind of exchangeable information between individuals. Moreover, by the rate of usage and consequently, by informative value and the volume of data, internet communication nowadays may be much more informative. Accordingly, uncontrolled access to this field may provoke much more serious interference with privacy and may violate the fundamental rights as a result".[3]

Parallel to the modern technological progress, technical capabilities of state in the field of electronic surveillance are gradually increasing. Electronic communications may reveal the most personal and intimate information on individuals, including their past or future actions. Accordingly, communications represent valuable source of evidence.[4]

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1 *Wright J.,* Necessary and Inherent Limits to Internet Surveillance, Internet Policy Review, Vol. 2, Issue 3, 2013, 1.

2 *Clough J.,* Principles of Cybercrime, New York, 2010, 135.

3 Judgment №1/1/625, 640 of April 14th, 2016 of the Constitutional Court of Georgia, 55-56.

4 Report of the Special Rapporteur "On the Promotion and Protection of the Right to Freedom of Opinion and Expression", 17.04.2013, 4, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf>, [02.04.2019].

Obtaining internet communications and its use in criminal proceedings represents particularly serious interference with the right to privacy established under Article 15 of the Constitution of Georgia, Article 8 of the European Convention (hereinafter – Convention) on Human Rights and Fundamental Freedoms, Article 12 of the Universal Declaration of Human Rights and number of other international legal acts. Due to limitless nature of Internet and increasing development of modern technologies, protection of privacy is no longer a challenge for only one state and has already acquired the global importance. It is also of a great significance that only just a few year ago the problem of "illegal wiretapping" was the subject of public scrutiny in Georgia. Since August 2014, when the parliament of Georgia has adopted a new legislative package related to covert investigative activities, the protection of privacy hasn't lost its significance in process of obtaining information from the means of electronic communication. Additionally, the Constitutional Court of Georgia, under the decision of April 14, 2016, acknowledged certain provisions related to monitoring of internet communications[5] (as well as interception of telephone communications) to be in violation with constitutional standards[6]. In order to execute above-mentioned judgment, some amendments have been made into Georgian legislation on March 22 2017. However, the dispute is still pending to this day in the Constitutional Court. In this dispute plaintiffs consider that the amendments made to the legislation fail to meet the requirements established by Constitutional Court under the judgment of April 14, 2016.[7]

Taking into consideration the abovementioned, the present paper will cover fundamental guarantees of right to privacy in the field of secret surveillance, capabilities of obtaining the internet communications, legal standards established by Constitutional Court and amendments made into Georgian legislation, as well as certain problematic issues related to monitoring of internet communications and international practice.

2. Right to Privacy and its Fundamental Guarantees Related to Secret Investigative Actions

As it has been already mentioned, internet offers unprecedented opportunities to exchange information from any place in the world. Internet communication tools include applications or websites based on modern technology and available to everyone, such as Facebook, Messenger, Skype, WhatsApp, Viber, Gmail, etc. These products differed from each other functionally and technologically, however the availability of modern technologies enabled companies to develop products in such

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5 In the Decision №1/1/625, 640 of April 14th, 2016 the Constitutional Court discussed the secret investigative actions provided in sub-paragraph "a" (interception of telephone communications) of the first part of Article 143^1 of Criminal Procedure Code of Georgia and sub-paragraph "b" of the first part of the same article. The measure of obtaining real-time internet communication provided in sub-paragraph "b" of the first part of Article 143^1 is referred to as "monitoring of internet communications".

6 Ibid.

7 Recording Notice №3/4/885-1231 of December 29th, 2017 of the Constitutional Court of Georgia.

a way that these, and many other applications offer almost similar services to users, such as: internet telephony (VoIP), video call, text and voice messages, photo/video data sharing, etc.

Privacy of communication is protected under the Article 15 of the Constitution of Georgia, which determines the communication protection from undesired participation of third parties.[8] Communication set by wired and wireless communication systems is protected by the constitution.[9] Additionally, both content of communication and communication identifying information are under the protection of right to privacy.[10] Content data includes the messages sent and received via e-mail, content of the internet telephony, text, voice and other digital format messages exchanged through the internet applications and social networks, files sent and received, etc. Identification data of Communication – metadata includes information created or processed as a result of a communication's transmission.[11] This information makes it possible to identify the person with whom the subscriber has communicated, also the means of communication as well as time and place. Besides, this data makes it possible to determine how often the user communicated with certain individuals in a specific period of time (Joined Cases Tele2 Sverige AB and Watson).[12] Metadata generated from internet communication includes internet protocol address (IP address) which has a special evidential value for investigation. This data can be used to identify and locate a person and track their online activities.[13] Such data also includes "to-from information on e-mails, login times and locations",[14] etc.

As it has been already mentioned, obtaining information from the means of electronic communication and its application in criminal proceedings is a serious limitation to privacy. At the same time, privacy is not an absolute right and the state can interfere in exceptional cases considering significant public interests. The state must have the ability to use secret surveillance measures to neutralize the threats from terrorism and other serious crimes; However, its application is only permissible in exceptional cases provided that mentioned measure represents proportional and necessary mean to achieve a legitimate aim (to protect national security, prevent crime or disorder) (Klass and others v. Germany).[15]

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8 Comment to the Constitution of Georgia, Chapter Two, Citizenship of Georgia, Human Rights and Freedoms, Tbilisi, 2013, 181. The book refers to Article 20 of the old edition of the Constitution of Georgia (in Georgian).

9 Judgment №1/1/625, 640 of April 14th, 2016 of the Constitutional Court of Georgia, 28.

10 Ibid, 61-62. See also Case NC-293/12 and C-594/12, Digital Rights Ireland Ltd and Seitlinger and Others, [2014], Court of Justice, 34. Joined Cases C-203/15 and C-698/15, Tele2 Sverige AB and Watson, [2016], Court of Justice, 98-100.

11 *Loideain N.,* EU Law and Mass Internet Metadata Surveillance in the Post-Snowden Era, Media and Communication, Vol. 3, No. 2, 2015, 54.

12 Joined Cases C-203/15 and C-698/15, Tele2 Sverige AB and Watson, [2016], Court of Justice, 98.

13 Report of the Special Rapporteur "On the Promotion and Protection of the Right to Freedom of Opinion and Expression", 17.04.2013, 18, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/-Session23/A.HRC.23.40_EN.pdf.>, [02.04.2019].

14 *Kerr O. S.,* The Next Generation Communications Privacy Act, University of Pennsylvania Law Review, Vol. 162, No. 2, 2014, 384.

15 Klass and others v. Germany, [1978] ECtHR, 1978, (Ser. A.), 49.

The European Court follows the principles of legality, legitimate aim and proportionality in cases related to the rights under Article 8 of the Convention. The principle of legality combines the existence of legal basis in domestic legislation and "quality" requirements of law. The latter includes the criteria for "accessibility" and "foreseeability" of the law. The Court has held on several occasions that the reference to "foreseeability" in the context of secret surveillance of communications is not the same as in many other areas. With regards to this particular issue, "foreseeability of law" does not imply the capability of person to foresee when they may be the subject of surveillance from law enforcement authorities and to alter their actions accordingly. Nevertheless, the risk of arbitrariness is evident due to the secret nature of activities by executive bodies. It is therefore essential to have "clear, detailed rules" on secret surveillance measures, especially as the communication interception technology is constantly being advanced (Malone v. United Kingdom, Leander v. Sweden, Valenzuela Contreras v. Spain, Huvig v. France, Association for European Integration and Human Rights and Ekimdzhiev, Kruslin v. France).[16] "The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures" (Malone v. United Kingdom, Roman Zakharov v. Russia).[17] According to the European Court, since the implementation of these measures in practice is not public to its addressee and the whole society, granting of unrestricted discretion to executive bodies or to a judge would be in contrary to the rule of law. Therefore, the scope of this discretion and the manner of its exercise should be regulated with "sufficient clarity" to ensure adequate guarantees against the arbitrary interference (Roman Zakharov v. Russia).[18] Legislation, allowing the interference with private communications, "must specify in detail the precise circumstances in which such interference may be permitted."[19]

The restriction of the right to privacy under Article 8 of the Convention should also be "necessary in a democratic society" (Kennedy v. United Kingdom).[20] In the context of secret surveillance, the European Court noted in a number of cases that in the process of balancing public and private interests the states are granted certain discretion to choose the measures in order to protect national interests. However, because the secret surveillance measures justified with protection of democracy can itself become the reason for undermining democratic foundations, the law must provide sufficient and effective guarantees against arbitrary interference. From this point of view, during the evaluation all circumstances of the case are taken into consideration, such as "the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise,

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16 Malone v. United Kingdom, [1984], ECtHR (Ser. A.), 67; Leander v. Sweden, [1987], ECtHR, (Ser. A.), 51; Valenzuela Contreras v. Spain, [1998], ECtHR, Reports 1998-V, 46. Huvig v. France, [1990], ECtHR, (Ser. A.), 32. Association for European Integration and Human Rights and Ekimdzhiev, [2007], ECtHR, 75; Kruslin v. France, [1990], ECtHR, (Ser. A.), 33.

17 Malone v. United Kingdom, [1984], ECtHR (Ser. A.), 67. Roman Zakharov v. Russia, [2015] ECtHR, 229.

18 Roman Zakharov v. Russia, [2015] ECtHR, 230.

19 General Comment No. 16 Article 17 (The right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation), Human Rights Committee, 1988.

20 Kennedy v. United Kingdom, [2010] ECtHR, 130, Roman Zakharov v. Russia, [2015] ECtHR, 227.

carry out and supervise them, and the kind of remedy provided by national law" (Klass and others v. Germany, Kennedy v. United Kingdom, Roman Zakharov v. Russia, Weber and Saravia v. Germany).[21] The requirement for "necessary in a democratic society" implies that secret surveillance measures must meet "strict necessity" test, meaning it should be "strictly necessary" on one hand, as a general consideration to ensure the democratic foundations and on the other, to obtain vital information in a specific case (Szabo and Vissy v. Hungary).[22] The principle of proportionality also requires that selected mean of interference should be the least invasive among the means which might achieve the legitimate aim.[23]

It is noteworthy, that Article 15 of the Constitution of Georgia establishes the legal grounds for interfering with the right to privacy of communications. Based on paragraph 2 of this article, restriction of the rights defined in this article is permissible only in accordance with the law in order to ensure national security or public safety, or to protect the rights of others insofar as is necessary in a democratic society, based on a court decision or without a court decision in cases of urgent necessity provided by the law.[24] The procedure for obtaining information from the means of electronic communication for the purpose of investigation is determined by the Criminal Procedure Code of Georgia (hereinafter - the CPCG). Chapter XVI[1] of CPCG defines the standards related to carrying out the secret investigative actions and to the use of information obtained. The measure of real-time collection of internet communication is defined by subparagraph "b" of the first part of Article 143[1] of the CPCG. Namely, according to this provision, one of the types of secret investigative actions include removal and recording of information from a communications channel (by connecting to the communication facilities, computer networks, line communications and station devices), computer system (both directly and remotely) and installation of respective software in the computer system for this purpose.[25]

3. Capabilities of Obtaining Internet Communications

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[21] Klass and others v. Germany, [1978] ECtHR, 1978, (Ser. A.), 49-50; Kennedy v. United Kingdom, [2010] ECtHR, 153; Roman Zakharov v. Russia, [2015] ECtHR, 232. Weber and Saravia v. Germany, [2006], ECtHR, ECHR 2006-XI, 106.

[22] Szabo and Vissy v. Hungary, [2016] ECtHR, 73.

[23] CCPR General Comment No. 27: Article 12 (Freedom of Movement), UN Human Rights Committee, 02.11.1999, 11-16, Indicated: Report of the Office of the United Nations High Commissioner for Human Rights, The Right to Privacy in the Digital Age, 30.06.2014, 9, <https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session27/documents/a-hrc-27-37_en.doc>, [27.03.2019]; Also see: International Principles on the Application of Human Rights to Communications Surveillance, <https://en.necessaryandproportionate.org/text>, [02.04.2019].

[24] Constitution of Georgia, Article 15, Departments of the Parliament of Georgia, 31-33, 24/08/1995.

[25] Criminal Procedure Code of Georgia, sub-paragraph "b" of the first part of article 143[1], <www.matsne.gov.ge>, [02.04.2019]

Due to the nature of covert investigative actions and secrecy of these measures, the detailed information on the means used by the states to intercept the online communications, is often hidden from public. However, the various global sources mention main methods used by law enforcement bodies. For example, in the report of UN Special Rapporteur on April 17, 2013 several technical capabilities of obtaining the private communications are highlighted. According to this report, the States have access to a number of different techniques of communications surveillance, for example "by placing a tap on an internet cable relating to a certain location or person, state authorities can also monitor an individual's online activity and obtaining information related to the websites he or she visits."[26] In parallel with the targeted secret surveillance, some States have the capability of mass/total monitoring of internet and telephone communications; "by placing taps on the fibre-optic cables, States can achieve almost complete control of tele - and online communications."[27]

Additionally, to the above-mentioned, practice of obtaining information by law enforcement using the "hacking" technique is under acute discussion and review at international level and scientific circles. As far as it's known, this measure is used by law enforcement bodies of many countries for the purposes of criminal investigation.[28] "Hacking is difficult to define, given the broad scope of activities it covers."[29] For example, according to one of the leading human rights organizations, hacking enables government to gain a remote access to a computer system and, potentially to all data stored on the system.[30] Hacking also allows the real time monitoring of communications.[31] The Federal Constitutional Court of Germany in its judgment of February 27, 2008 concerning the constitutionality of the measure of secret infiltration to computer system explains that secret access to an information technology system makes it possible to monitor its use or to view the storage media, or to control the target system remotely.[32] Additionally, secret infiltration to the computer system may be done in several ways.[33]

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26 Report of the Special Rapporteur "On the Promotion and Protection of the Right to Freedom of Opinion and Expression", 17.04.2013, 10, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession-/Session23/A.HRC.23.40_EN.pdf>, [02.04.2019].

27 Ibid, 11.

28 *Gutheil M., Liger Q., Heetman A., Eager J.* (*Optimity Advisors*), Legal Frameworks for Hacking by Law Enforcement: Identification, Evaluation and Comparison of Practices (Study for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs), Policy Department for Citizens' Rights and Constitutional Affairs, 2017, 42-43, <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583137/-IPOL_STU(2017)583137_EN.pdf>, [03.04.2019]. See also *Winter L. B.,* Remote Computer Searches under Spanish Law: The Proportionality Principle and the Protection of Privacy, Zeitschrift für die Gesamte Strafrechtswissenschaft, Vol.129, No. 1, 2017, 211-212.

29 Encryption and Anonymity Follow-up report, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 2018, 7, <https://www.ohchr.org/Documents/-Issues/Opinion/EncryptionAnonymityFollowUpReport.pdf>, [02.04.2019].

30 Privacy International, Government Hacking and Surveillance: 10 Necessary Safeguards, Privacy International, 2018, 8, <https://privacyinternational.org/sites/default/files/201808/2018.01.17%20Government%2-0Hacking%20and%20Surveillance.pdf>, [03.04.2019].

31 Ibid.

32 BVerfG, Judgment of the First Senate of 27 February 2008 - 1 BvR 370/07.

Considerable attention has been paid to the practice of using this technical capability in the aforementioned report of UN Special Rapporteur, where it is highlighted that using such invasive methods as so-called "Trojans (spyware or malware)" constitute a serious challenge to traditional notions of secret surveillance of electronic communications, fall outside of existing legal frameworks and from a human rights perspective, the use of such technologies is extremely intrusive.[34]

It is noteworthy, that usage of communication encryption is increasing by time. Encryption has become standard and necessary tool to ensure data security, as well as protection of private communications. Widespread use of encryption on the internet affects abilities to obtain information by the state.[35] Since the communication through mainstream applications and social networks is sent in encrypted form, local internet service providers are not able to read the data.[36] Accordingly, proven method for access to this information is to request it directly from the companies of web-pages or applications (Facebook, Instagram, etc.). Besides, different types of encryption are available, some companies such as Google or Dropbox keep the data stored in encrypted form and have the technical capability to decrypt the data. Such information may be obtained through this service provider.[37] In case of different types of encryption (such as End-to-end encryption), only the communication parties have technical capability to decrypt (encryption "key") the content of communication on their computers or smartphones and accordingly, the service provides are deprived the ability to read the content.[38] Therefore, obtaining information encrypted through this method is quite challenging for law enforcement agencies.[39] It is noteworthy, that as a general rule, encryption protects only the content of communication and not its identification data such as Internet Protocol address (IP address).[40] Information on the visited websites may be also available in unencrypted form.[41]

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33 *Vaciago G., Ramalho D. S.,* Online Searches and Online Surveillance: The Use of Trojans and Other Types of Malware as Means of Obtaining Evidence in Criminal Proceedings by Digital Evidence and Electronic Signature Law Review, Vol.13, 2016, 88-89, <http://journals.sas.ac.uk/deeslr/article/viewFile/2299/2252>, [03.04.2019].

34 Report of the Special Rapporteur On the Promotion and Protection of the Right to Freedom of Opinion and Expression, 17.04.2013, 10, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/-Session23/A.HRC.23.40_EN.pdf>, [02.04.2019].

35 *Swire P.,* From Real-time Intercepts to Stored Records: Why Encryption Drives the Government to Seek Access to the Cloud, International Data Privacy Law, Vol. 2, No. 4, 2012, 203.

36 Ibid, 202.

37 *Corn G. S., Brenner-Beck D.,* "Going Dark": Encryption, Privacy, Liberty, and Security in the "Golden Age of Surveillance", The Cambridge Handbook of Surveillance Law, *Gray D., Henderson S. E.* (eds.), New York, 2017, 334.

38 Ibid, 335.

39 Ibid, 334-335. see *Swire P.,* From Real-time Intercepts to Stored Records: Why Encryption Drives the Government to Seek access to the Cloud, International Data Privacy Law, Vol. 2, No. 4, 2012, 202.

40 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 22.05.2015, 4, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/095/85/PDF/G1509-585.pdf?OpenElement>, [27.03.2019].

41 Encryption and Anonymity Follow-up Report, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 2018, 18, <https://www.ohchr.org/Documents/Issues/-Opinion/EncryptionAnonymityFollowUpReport.pdf>, [02.04.2019].

As it has been already mentioned, private companies hold extensive volume of data. Furthermore, as the flow of electronic information is not restrained by state borders, data may be stored transnationally independent from the territory in which the data was originally collected or in which the data subject is located.[42] Request for information stored with the provider may be made by direct addressing the service provider or through cooperation with state law enforcement bodies under whose jurisdiction falls the service provider.[43] Transnational requests for "voluntary" transfer of information is a standard procedure. This way, the state may avoid formalized procedure of international cooperation.[44] However, request for information directly from service provider may be related to a number of practical difficulties, when the service provider is under the jurisdiction of a foreign state. The requesting state does not have the legal authority to force a company founded within foreign jurisdiction to cooperate and provide information required. Consequently, this cooperation is usually based on a voluntary basis.[45]

Thus, different ways of obtaining internet communication are available for the purpose of investigation. In order to better understand the basic possibilities of obtaining internet communications in criminal proceedings, in parallel with capability of obtaining information in real time, issues related to request information stored with service providers have been also discussed.

4. Standards Established by the Constitutional Court of Georgia and Amendments Made into the Legislation

The Constitutional Court of Georgia, under the judgement of April 14, 2016 recognized as unconstitutional the provision of Georgian law "on electronic communications", under which the State Security Service, the agency responsible for execution of secret investigative actions, had been granted an authority for technical capability to "obtain information in real time from physical lines of communication and their connectors, mail servers, base stations, base station equipment, communication networks and other communication connectors, and for this purpose, to install, where necessary, a lawful interception management system and other appropriate equipment and software free of charge at said communication facilities". The constitutional court acknowledged as unconstitutional not the institute for obtaining real-time communication, but only the authorization of the State Security Service - agency "responsible for the investigation" and "professionally interested" with this power.[46]

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42 *Haase A., Peters E.,* Ubiquitous Computing and Increasing Engagement of Private Companies in Governmental Surveillance, International Data Privacy Law, Vol. 7, No. 2, 2017, 126.

43 Ibid.

44 Ibid, 130.

45 Ibid, 130-131.

46 Judgment №1/1/625, 640 of April 14th, 2016 of the Constitutional Court of Georgia.

One of the arguments of non-constitutionality of provisions in the judgement is the circumstance that the legislation did not envisage the right of personal data protection inspector[47] to carry out "full and comprehensive inspection" of the technical infrastructure of obtaining real time information; therefore, arbitrariness and illegality of the body responsible for data processing is not excluded in this process.[48]

As a result of the proceedings in the Constitutional Court it is confirmed that the state authority had the possibility to have the "so-called permanent connection system with internet service providers". It is also confirmed that "they have this apparatus in large companies". However, as it appeared, this system is ineffective and in practice they use "so-called infecting technique" (secret virus installation). "In particular, according to the witness: Although we have this apparatus in a number of large companies to obtain real-time information, this system is not effective, that's why real time internet surveillance system architecture has not been set up... ."[49]

The Constitutional Court considered that "disputed provisions do not separate from each other which technical means should be used by the authorized body for secret investigative actions, which seemed to imply that for monitoring of internet communications it was applicable to use lawful interception management system, as well as other appropriate apparatus and software tools". At the same time according to explanation of State Security Service representative it was ascertained that only the "other appropriate apparatus and software tools" provided by disputed provisions had been used in relation to the internet. According to the Court, as the "information is kept secret" and "audit of those technical means" used for obtaining internet communications is "impossible even on minimal level", "it is not apparent, which apparatus and software tools are used by the state. Therefore, it is impossible to supervise this process and, consequently there is a risk of violation of the rights itself."[50] According to the Court, the state should not be equipped with "completely uncontrolled space, where nobody will ever know what kind of technical means are being utilized and most importantly, whether constitutional requirements are protected or not."[51] Under such circumstances, the only mechanism for the control provided by the law "on Personal Data Protection"[52] - the possibility of inspection, was deemed ineffective.[53]

In order to enforce this judgement, on March 22, 2017 a number of amendments were made into the law about obtaining information from the means of electronic communications and its use in

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47 As a result of amendments made into the legislation, the position of Personal Data Protection Inspector has been abolished since May 10th 2019 and The State Inspector and the State Inspector Service was deemed to be a successor in title of the Personal Data Protection Inspector. According to the legislation in force at that time, the constitutional court's judgment mentions the position of Personal Data Protection Inspector.

48 Recording Notice №3/4/885-1231 of December 29th, 2017 of the Constitutional Court of Georgia, 59.

49 Judgment №1/1/625, 640 of April 14th, 2016 of the Constitutional Court of Georgia, 54.

50 Ibid, 55.

51 Ibid.

52 As a result of amendments made into the legislation, the right of the State Inspector Service in relation to secret investigative actions is currently established in the law "On the State Inspector Service".

53 Judgment №1/1/625, 640 of April 14th, 2016 of the Constitutional Court of Georgia, 55.

criminal proceedings. From this point of view, one of the innovations is establishment of Operative-Technical Agency – a new body, which was founded as a legal entity of public law under the State Security Service and entitled with the power of technical execution of secret surveillance measures.

As a result of amendments, the following ways of obtaining real-time communication have been defined with regards to secret surveillance measures: stationary, semi-stationary and non-stationary technical capability. At the same time, it was determined that covert investigative actions under the subparagraph "b" of the first part of Article 143^1 of CPCG are carried out with stationary, semi-stationary and non-stationary technical capability of obtaining real-time communication.[54]

As it has already been mentioned, empowering operative-technical agency with direct access to telephone and internet communications, as well as capability of copying and storage of metadata, is still under dispute in the Constitutional Court. Within this dispute, the plaintiffs requested to recognize provisions regarding obtaining information in real time as well as the power of copying and retention of metadata as unconstitutional without hearing on the merits. However, under the recording notice of the constitutional court of December 29, 2017 plaintiffs have been refused to recognize abovementioned provisions, as invalid, without hearing on the merits. The Constitutional Court considered that disputable provisions are not identical to the provisions known as unconstitutional under the judgment of the Constitutional Court on April 14, 2016 and the system has been changed significantly through the amendments made into legislation. Therefore, the constitutionality of legislation concerning to obtaining information in real time, including internet communications (also provisions in relation to copying and retention of metadata) will be reviewed on the merits. [55]

As it has already been mentioned, under the judgement of April 14, 2016 unconstitutionality of provisions related to the monitoring of internet communications was conditioned by absence of sufficient external controls. In this regard, the court emphasized the necessity of regulation in the legislation of the inspector's[56] right to inspect the technical means used for electronic surveillance. In this context, the Constitutional Court in the recording notice of December 29, 2017 made a decision on hearing on the merits of disputed provisions upon the grounds of amendments made on March 22, 2017 to the Law of Georgia on "Personal Data Protection"; particularly, an attention has been focused on paragraph 4^1 of Article 35^1 of this Law[57]. According to amendments of March 22, 2017 it was high-

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54 CPCG, sub-paragraph "b" of part 4 of Article 143^3.

55 Recording Notice №3/4/885-1231 of December 29th, 2017 of the Constitutional Court of Georgia According to this recording notice, judges in the court had split opinions related to internet communications, as well as other issues discussed - three judges expressed different opinions and considered that "legislation with regard to Internet communication had not undergone substantial changes that would necessitate a further discussion of hearing on the merits."

56 According to the legislation being in force at that time, the position of "personal data protection inspector" is mentioned in the constitutional court's judgment.

57 It's worth mentioning that as a result of amendments made into the legislation, article 35^1 of the law "On Personal Data Protection" has been annulled and the rights related to inspection which were established in this article were transferred to paragraph 7 of article 18 of the law "On The State Inspector Service" which entered into the force on May 10th 2019.

lighted that "Inspector is authorized to enter into restricted areas of the agency and monitor execution of activities by competent authorities in real time..., to obtain information about technical infrastructure used for the purpose of covert investigative measures and to inspect this infrastructure."[58] It is noteworthy, that according to the explanation made by the inspector at the court session, inspector had already been granted with this power; however, it was set in their order and not in the law.[59]

According to the public information requested from the Personal Data Protection Inspector's Office[60] within the scope of this research, "in 2017-2018 02 (two) unscheduled inspections of LEPL - Operative-Technical Agency of Georgia were made in order to study lawfulness of data processing as a result of covert investigative measures."[61] In the response from Inspector's office it is noted that, the inspection also covered the examination of the technical infrastructure intended for carrying out covert investigative measure under the sub-paragraph "b" of the first part of Article 143^1 of CPCG. Additionally, in 2016 the technical infrastructure for carrying out covert investigative action under the sub-paragraph "b" of the first part of Article 143^1 was also inspected within the scope of inspection of Operative-Technical Department of State Security Service of Georgia.[62]

Based on the above, it is obvious that the Personal Data Protection Inspector (according to the legislation being in force before May 10, 2019) and the successor in title of the Personal Data Protection Inspector – State Inspector Service has been carrying out inspection of technical infrastructure since 2016. This power was clearly established with the amendments to the Law of Georgia on "Personal Data Protection" on March 2017 (As a result of subsequent amendments made into the legislation, which entered into the force starting from May 10th 2019, the same rights are currently established in paragraph 7 of article 18 of the law "On The State Inspector Service"). However, as the personal data protection inspector[63] confirmed in the Constitutional Court, the inspector had been already empowered with this ability by the order. Under the circumstances, it is doubtful whether the function of inspection has actually undergone substantial changes, upon which the inspector had been granted with the power not available before. Finally, it should be noted that since the Constitutional Court has decided hearing on the merits of provisions related to obtain real-time internet communications, within the scope of existing disputes, it will be decided whether the functions defined by paragraph 7 of article 18 of the law "On The State Inspector Service" are sufficient to meet the requirement for "full and comprehensive inspection of technical infrastructure" mentioned in the judgment of April 14, 2016.

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58 Recording Notice №3/4/885-1231 of December 29th, 2017 of the Constitutional Court of Georgia, 58, 65-66.

59 Recording Notice №3/4/885-1231 of December 29th, 2017 of the Constitutional Court of Georgia, 58-59.

60 According to the legislation being in force when requesting public information, "Personal Data Protection Inspector's Office" was still in force instead of "The State Inspector Service".

61 Response (№ PDP 7 19 00000216) from the Person Responsible for the Public Information of the Personal Data Protection Inspector's Office, January 21th, 2019 (in Georgian).

62 Ibid.

63 During the aforementioned constitutional dispute, the position of personal data protection inspector had been provided into the legislation.

5. Certain Problematic Aspects and International Practice

In the recording notice of Constitutional court of December 29, 2017, it is mentioned that obtaining information through the internet with stationary technical capability is not taking place since this is a costly system and at the same time it is less effective. The inefficacy of the system is due to transmission of information in encrypted form on the internet.[64] Additionally, according to the judgment of April 14, 2016 it has been confirmed that "so-called infecting technique" is used in practice for the purpose of real-time surveillance of internet communications. In legal terms, according to the applicable law, we can presumably consider "so-called infecting technique" under the "non-stationary technical capability" of obtaining real time communication, since according to the Law of Georgia "On Legal Entity of Public Law - Operative Technical Agency of Georgia", non-stationary technical capability is defined as data interception "during communication or after finishing communication without connecting to company's network or/and station infrastructure of electronic communication through special technical or/and software tools."[65] As for the semi-stationary technical capability, information on efficiency and usability in practice of this method is not available.

It is notable, that the Constitutional Court's judgment of April 14, 2016 does not define the meaning behind "so called infecting technique", discussion related to this technical capability is not developed in the judgment. As it has been already mentioned above, hacking (which also includes "so called infecting technique"[66]), as well as its technical capabilities is actively discussed in documents at international level, in human rights organization reports or foreign scientific literature and is under considerable attention, which is due to invasive nature of hacking and unlimited potential for access to broad range of information. As it is known, different types of information may be obtained after secret infiltration of computer system, therefore, different functionalities of hacking are available.[67] Taking into consideration the above mentioned, it is not clear what kind of surveillance measure is meant by judgment of the Constitutional Court in relation with "so-called infecting technique".

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64 Different opinions of *Irina Imerlishvili, Giorgi Kverenchkhiladze and Maia Kopaleishvili* – Members of the Constitutional Court on Recording Notice №3/4/885-1231 of December 29th, 2017 of the Constitutional Court of Georgia, 131.

65 The Law of Georgia on "Legal Entity of Public Law - Operative-Technical Agency of Georgia", subparagraph "G" of Article 2, <www.matsne.gov.ge>, [02.04.2019].

66 BVerfG, Judgment of the First Senate of 27th February 2008 - 1 BvR 370/07.

67 *Gutheil M., Liger Q., Heetman A., Eager J.* (*Optimity Advisors*), Legal Frameworks for Hacking by Law Enforcement: Identification, Evaluation and Comparison of Practices, 2017, 58-59, <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583137/IPOL_STU(2017)583137_EN.pdf>, [03.04.2019]. See also *Sagers G.,* The Role of Security in Wireless Privacy, Compiled: Privacy in the Digital Age, 21st-Century Challenges to the Fourth Amendment, *Lind N.S., Rankin E.* (ed.), Vol. 2, California, 2015, 508. Access Now, A Human Rights Response to Government Hacking, 2016, 11, <https://www.accessnow.org/cms/assets/uploads/2016/09/GovernmentHackingDoc.pdf>, [03.04.2019].

Generally, in regards with hacking, it should be noted that because in modern internet network the communication is mostly encrypted, hacking may be one of the most effective method, and sometimes the only mean for investigation purposes. Meanwhile, its highly intrusive nature should be taken into consideration. Some European states specifically regulate the possibility of its use in the legislation, however as a rule, stricter approach and important guarantees of protection of rights are provided in this case.[68] One of the main objectives of criticism related to "hacking" is its application in the absence of specific legislative regulations.[69] The implementation of this measure may be only allowed if "explicitly prescribed by law", also if strict necessity and adequate guarantees are in place.[70] The requirement for "explicit regulatory framework" also implies that this method shall be regulated by the provisions, taking into account "unique privacy and security implications of hacking".[71] Legal provisions designed for conventional forms of secret surveillance, for example, telephone wiretapping, are not sufficient to provide adequate guarantees for hacking. Similarly, regulatory framework of "hacking", which repeats the rules of other electronic surveillance measures lack appropriate protection guarantees.[72]

As discussed above, secret surveillance measures need to be regulated by clear, transparent legal provisions according to "foreseeability" requirement. Clear and detailed provisions are necessary to ensure legality and proportionality in the context of electronic surveillance.[73] Depending on secret nature and invasiveness of these investigative measures, clarity of law is especially important in this context.

It should be underlined that sub-paragraph "b" of the first part of article 143[1] of CPCG regulating the investigative measures of internet surveillance, is so general that it covers obtaining communication through any means possible. This provision had been defined in the law of Georgia "On operative-investigative activities" prior to defining it in the CPCG as secret investigative action. As a result

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68 BVerfG, Judgment of the First Senate of 27th February 2008 - 1 BvR 370/07; *Vaciago G., Ramalho D. S.,* Online Searches and Online Surveillance: The Use of Trojans and Other Types of Malware as Means of Obtaining Evidence in Criminal Proceedings, Digital Evidence and Electronic Signature Law Review, 13, 2016, 92, 94-95, <http://journals.sas.ac.uk/deeslr/article/viewFile/2299/2252>, [03.04.2019]. See also *Gutheil M., Liger Q., Heetman A., Eager J.* (*Optimity Advisors*), Legal Frameworks for Hacking by Law Enforcement: Identification, Evaluation and Comparison of Practices, 2017, 51-54, 58-61, 79-80, <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583137/IPOL_STU(2017)583137_EN.pdf>, [03.04.2019].

69 *Gutheil M., Liger Q., Heetman A., Eager J.* (*Optimity Advisors*), Legal Frameworks for Hacking by Law Enforcement: Identification, Evaluation and Comparison of Practices, 2017, 67, <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583137/IPOL_STU(2017)583137_EN.pdf>, [03.04.2019].

70 Privacy International, Government Hacking and Surveillance: 10 Necessary Safeguards, Privacy International, 2018, 18, <https://privacyinternational.org/sites/default/files/201808/2018.01.17%20Government%20Hacking%20and%20Surveillance.pdf>, [03.04.2019].

71 Ibid.

72 Ibid.

73 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, 23.09.2014, 14-15, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/545/19/PDF/N1454519.pdf?OpenElement>, [02.04.2019].

of the amendments made in 2014, it was transferred to the Procedural Code unchanged. As the technology is developing rapidly, it is especially important that legislation keeps up with the pace. Because diverse and functionally different opportunities to access information resources are available, it is obvious that mentioned provision does not meet the requirement of legal clarity. According to the judgment of the Constitutional Court of April 14, 2016 sub-paragraph "b" of the first part of article 143^1 of CPCG implies "removal and recording of information from any communications channel, computer network and computer system, which consequently means monitoring of internet communications as well as access to information stored/generated in computer systems."[74] These two capabilities outlined by the court are absolutely different measures in content.

Taking into account international sources and the experience of European countries, clarity of regulations on obtaining internet communication is also underlined in regard with "so-called infecting technique", in particular, in the case when it's necessary to use different functionalities of hacking, it's recommended to separate basic functionalities at legislative level and to be the subject to a separate court authorization,[75] which is due to the fact that the influence on the right to privacy and the nature of the interference differs between various types of hacking, requiring different assessment of compliance with the principle of "proportionality".[76] This is also necessary to prevent overuse of extensive capabilities of hacking tool.[77] Such legislative differentiation of measures of obtaining information from computer systems is provided by, for example, the German Code of Criminal Procedure, where so-called "online search" and "telecommunications surveillance" (i.e. Source-TKÜ) are established in form of independent measures. "Online search" implies the interference with an information technology system with technical means, so data can be collected from the system without the knowledge of the person concerned. Under telecommunications surveillance monitoring and recording of real-time telecommunications may be carried out by intervening in an information system with technical means, without the knowledge of the person concerned.[78] This measure makes it possible to detect communi-

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74 Judgment №1/1/625, 640 of April 14th, 2016 of the Constitutional Court of Georgia, 38.

75 *Gutheil M., Liger Q., Heetman A., Eager J. (Optimity Advisors)*, Legal Frameworks for Hacking by Law Enforcement: Identification, Evaluation and Comparison of Practices, 2017, 51, 89, <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583137/IPOL_STU(2017)583137_EN.pdf>, [03.04.2019].

76 Privacy International, Government Hacking and Surveillance: 10 Necessary Safeguards, Privacy International, 2018, 25, <https://privacyinternational.org/sites/default/files/201808/2018.01.17%20Government%20Hacking%20and%20Surveillance.pdf>, [03.04.2019]. The document discusses the separation of authorization procedure for acquiring the information stored on computer system and real-time surveillance measures.

77 *Gutheil M., Liger Q., Heetman A., Eager J.* (*Optimity Advisors*), Legal Frameworks for Hacking by Law Enforcement: Identification, Evaluation and Comparison of Practices, 2017, 12, 58, <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583137/IPOL_STU(2017)583137_EN.pdf>, [03.04.2019].

78 Strafprozeßordnung (StPO), §100a Abs.1 S.2, §100b, <https://www.gesetze-im-internet.de-/stpo/index.html>, [03.04.2019]. The separation of main functionalities of "hacking" was also required under the judgement of Cassation Court of Italy, on July 1st, 2016. Regarding this Issue, see: *Gutheil M., Liger Q., Heetman A., Eager J.* (*Optimity Advisors*), Legal Frameworks for Hacking by Law Enforcement: Identi-

cation before it is encrypted or after it has been decrypted.[79] In order to conduct these investigative actions in accordance with the legislative requirements, the software intended for the use can be applied only after passing the relevant testing and conforming to the minimum standards established specifically.[80] This mechanism is an important guarantee against excessive, illegal use of technical capabilities related to these investigative measures.

Taking all these into consideration, it is recommended that the types of electronic surveillance under sub-paragraph "b" of the first part of article 143^1 of CPCG be clearly defined in order to differentiate the rights to obtain real-time communications and access to information stored on computer system.

Parallel to providing legal clarity in sub-paragraph "b" of the first part of article 143^1 of CPCG, it is also important that the judge should be informed about the specific technical means intended for requested surveillance measure in every individual case. While evaluating the proportionality of secret investigative action, one of the most significant measurement is the potential of the technical tools used with regards to interfering with the right to privacy. The proportionality of the measure restricting the right to privacy and allowing the possibility of electronic surveillance by using specific technical devices depends on the knowledge of relevant bodies about the scope of the measure and applicable technical tools. This implies that the interference with privacy caused by specific covert investigative measure should be assessed in advance.[81] In this context it should be taken into account that according to CPCG, neither in Prosecutor's motion nor in court ruling on authorizing the secret investigative action, information on technical means is not determined as mandatory requisite, according to which specific measure shall be carried out.[82] Providing the information about the technical means used is only required in the protocol of covert investigative activity, however this document is only drawn up only after the end of executed measure.[83] As for court ruling or prosecutor's motion, data defined as mandatory requisites for these documents by the CPCG is not sufficient for the judge to have a sufficient understanding how the investigative measure is going to be implemented in practice. Consequently, it seems difficult to properly assess if the proposed measure is in fact least intrusive, necessary and proportional mean for privacy interference.

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fication, Evaluation and Comparison of Practices, 2017, 85, <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583137/IPOL_STU(2017)583137_EN.pdf>, [03.04.2019].

79 <https://www.bka.de/DE/UnsereAufgaben/Ermittlungsunterstuetzung/Technologien/QuellentkueOnlinedurchsuchung/quellentkueOnlinedurchsuchung.html>, [03.04.2019].

80 <https://www.bka.de/DE/UnsereAufgaben/Ermittlungsunterstuetzung/Technologien/QuellentkueOnlinedurchsuchung/quellentkueOnlinedurchsuchung.html>, [03.04.2019].

81 *Milaj J.,* Privacy, Surveillance, and the Proportionality Principle: The Need for a Method of Assessing Privacy Implications of Technologies Used for Surveillance, International Review of Law, Computers & Technology, Vol.30, No 3, 2016, 115.

82 See CPCG, part 10 of article 143^3.

83 See CPCG, part 14 of article 143^6.

6. Conclusion

Thus, in the present paper, certain problematic aspects related to monitoring the internet communications have been reviewed. Sub-paragraph "b" of the first part of article 143^1 of CPCG was underlined as unclear and formulated imprecisely, which enables the usage of all available methods for internet surveillance under this provision. In the modern age the methods of obtaining private information through electronic means for investigation purposes are diverse, and respectively, possible impact on the right to privacy and the degree of intrusion in many cases is not the same, which may require different assessment of the proportionality test in a certain case. Accordingly, precise regulatory framework in regard with online surveillance is essential. As an illustration, an example has been provided on the German legislation, where the "online search" of computer system and the "telecommunication surveillance" are established as independent surveillance measures. In addition to the aforementioned, for comprehensive analysis of the aspects related to proportionality requirement in an individual case, it is necessary that prosecutor's motion and court ruling shall clearly define precise information on the ways of conducting secret investigative actions: technical means intended to interfere with the right to privacy.

Considerable attention has also been paid to the judgement of the Constitutional Court of Georgia of 14 April, 2016 in relation to usage "so-called infecting technique" in practice. From this point of view, it is not clear what kind of technical capability is meant by this term. The judgment did not focus on the specific content and invasiveness of this measure. As it has already been mentioned, there are various types of this measure. Some European countries specifically regulate the application of certain functionalities of hacking and relevant guarantees in the legislation. It is considered that provisions related to other surveillance measures, for example telephone wiretapping, are not sufficient in this regard and a stricter approach should be developed due to the intrusiveness of hacking tool. Therefore, if using of "so-called infecting technique" is necessary in practice of Georgian law enforcement agencies, precise legal framework, different, stricter approach and adequate guarantees should be in place.

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31. Joined Cases C-203/15 and C-698/15, Tele2 Sverige AB and Watson, [2016], Court of Justice, 98-100.
32. Szabo and Vissy v. Hungary, [2016] ECtHR, 73.
33. Roman Zakharov v. Russia, [2015] ECtHR, 227, 229, 230, 232.
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41. Kruslin v. France, [1990], ECtHR, (Ser. A.), 33.
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Regulation of Restorative Justice in the European Union and its Importance for Strengthening the Standing of Victims of Crime in Georgia

In the modern world the restorative justice gains its popularity day by day and it becomes a very important mechanism to meet the interests of the victims of crime. According to the victims of crime, they feel recognized, gain back the sense of security and it becomes easier to recover from the impact of crime by means of restorative justice. Because of these positive effects, the restorative justice gained attention on the international level. As a result standards regarding to the restorative justice were laid down in a number of international instruments.

It should be mentioned, that Juvenile Justice Code in Georgia is familiar with the diversion and mediation program, which represents the restorative justice. Regarding to the adult justice system, the Criminal Procedure Code of Georgia is familiar with the diversion institution and one of the conditions of the diversion, particularly, full or partial compensation, at the first glance, may be considered as the restorative justice. But the analyse of international standards and practice give us the reason to conclude that the compensation alone could not be considered as a form of restorative justice. Therefore in Georgia the victims of crime (if the case is not handled by the juvenile justice) do not enjoy access to the restorative justice, which put them in the weak legal standing. Therefore this article aims to clearly demonstrate the standards of the restorative justice, to highlight the characteristics of the diversion, which is laid down in the Criminal Procedure Code of Georgia, to emphasize that the victims of crime do not have access to the restorative justice and in this way to promote its establishment in the adult justice.

Key words: *Restorative Justice, Victim of Crime, Criminal proceeding, Diversion and Mediation.*

1. Introduction

Today, in modern world, the restorative justice is considered as one of the most important mechanisms in terms of satisfaction of interests of the victim of crime. If the victim of crime is left out and does not feel recognized[1] in the traditional criminal proceeding, most of the victims of a crime have a different attitude towards the restorative justice. According to them, restorative justice helps them to overcome the traumas incurred as a result of crime.[2] That is why, in recent years the special attention is paid to the restorative justice at international level. The European Union devoted the separate articles to this issue in the "Council Framwork Decision of 15 March 2001 on the standing of victims in criminal proceedings the Framework Decision of 2001"[3] as well as in the "Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum

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1 *Herman S.*, Parallel Justice for victims of Crime, Washington, DC, 2010, 40.

2 European Forum for Restorative Justice, Practice Guide for Restorative Justice Services, The Victims' Directive Challenges and Opprtunities for Restorative Justice, Belgium, 2016, 6, <http://www.euforumrj.org/wp-content/uploads/2017/03/Practice-guide-with-cover-page-for-website.pdf>, [15.04.2019].

3 Hereinafter – the Framework Decision or the Framework Decision of 2001.

standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA", [4] where it developed the standards of the restorative justice.

Georgia also follows the tendences developed on the international level and in 2010 the restorative justice was intorduced in the juvenile justice system.[5] It works in the form of diversion and mediation program[6] and the responsible body for its implemention is the Centre for Crime Prevention. [7] Accordingly, it is important to determine, to what extent the programs in the juvenile justice system meet the requirements of the European Union.

As regarding the adult criminal justice, the Criminal Procedure Code of Georgia[8] is familiar with the diversion institution, which is an alternative mechanism of criminal prosecution. It is used in case of less grave and grave crime.[9] But in compare to the juvenile justice system, the diversion program in the adult criminal justice system does not include mediation program. But the text of subparagraph "c", section 1 of Article 168[1] of the CPCG seems to be interesting, according to which the diversion may be used in case of full or partial compensation for damage. Therefore, the question arises whether only compensation could be considered as a form of restorative justice.

The aim of the present article is to provide answers for the abovementioned questions. Accordingly, in the article, the history, essence, function and objectives of the restorative justice will be reviewed initially, then, provisions regarding to the restorative justice enshrined in the Framework Decision of 2001 and in the Directive of 2012 will be analyzed. At the end of the article the discussed issues will be summarised and it will be determined, to what extent the restorative justice programs in Georgia meet the requirements of the European Union and whether alone the compensation for damage within the diversion program could be considered as a form of restorative justice.

2. Review of Restorative Justice

Becoming a victim of crime is grave phenomenon and it often radically changes the life of a person. It does not matter whether the "less serious" or "serious" offense is committed, it is still accompanied with trauma. After the crime, the victims of crime feel such emotions as fear, feeling of helplessness, anger against themselves and their relatives, loss of faith and blaming themselves.[10] This situation originates the requirements and needs of victim that should be met by the criminal proceed-

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4 Hereinafter – Directive or Directive of 2012.

5 *Chkeidze I.,* Diversion-Mediation Program for Juveniles, Kutaisi, 2018, 4 (in Georgian).

6 *Tandilashvili K.,* Opferrechte im Strafverfahren nach der europäischen und georgischen Gesetzgebung, Deutsch-Georgische Strafrechtszeitschrift, No.2, 2017, 55-56, <http://www.dgstz.de/storage/documents/m0wMkIuJTKf3nihzQgPFnyshtBiqcw6PcrPFy4TH.pdf>, [03.04.2019].

7 Regarding to the Mediation Program, <http://prevention.gov.ge/page/31/geo>, [16.04.2019].

8 Hereinafter – CPCG, 09/10/2009.

9 *Toloraia L.,* Commentary on the Criminal Procedure Code in Georgia, *Giorgadze G.* (ed.), Tbilisi, 2015, 487-488 (in Georgian).

10 *Zehr H., Stutzman Amstutz L., MacRae A., Pranis K.,* The Big Book of Restorative Justice, NY, 2015, 136.

ings. According to Jeffrey Murphy[11], the key function of the criminal justice system is exactly to restore a victim of crime. In particular, if by perpetration of a crime the perpetrator says that he/she hates a victim of crime, that a victim of crime is less valuable than himself/herself, then the criminal proceedings shall reveal that even the victim of crime is fully-fledged citizen with the same value.[12] However, the fact is that the mentioned function is slightly implemented by the traditional criminal proceeding. This is the system, which is more oriented on accused than on victim of crime, where the needs and requirements of the victim of crime are not properly considered.[13] Some scientists believe that the criminal justice system is so inadequate and fragmented that it even infringes the honour and dignity of victim of crime.[14]

Such treatment of victims of crime has led to the formation of movements supporting the victims of crime in the 70s of 20th century.[15] They demanded to grant the adequate rights to the victims of crime during the criminal proceedings.[16] At the same time, the seeking the alternatives of traditional criminal justice system was initiated and the restorative justice, which was still implemented in ancient times, but has not been functioning for centuries since institutionalization of criminal law, has been refound.[17] The restorative justice was quickly established in such countries of Anglo-Saxon law system as Canada, the United States, Australia, New Zealand and North European countries.[18] Later it was spread in the countries of continental law system, and today the restorative justice represents a key mechanism for protection of interests of crime victims.[19]

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11 *Jeffrey Murphy* is an American scientist working in law and philosophy. His teachings in crime and punishment play major role in the development of criminal law science.

12 *Dearing A*., Justice for Victims of Crime, Human Dignity as the Foundation of Criminal Justice in Europe, Switzerland, 2017, 341.

13 *Buczma S., Kierzynka R.,* Protection of victims of crime in the view of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union and the Directive 2011/99/EU on the European protection order, Judicial Academy of the Slovak Republic, 1, <http://www.ja-sr.sk/files/Kierzynka_Buczma_Protection%20of%20victims.pdf>, [30.03.2019].

14 *Herman S.,* Parallel Justice for victims of Crime, Washington, DC, 2010, VIII- IX.

15 *Beloof D.,* Victims' Rights, A Documentary and Reference Guide, USA, 2012, 20-24.

16 *Vanfraechem I., Bolívar D.,* Restorative Justice and Victims of Crime, Victims and Restorative Justice *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 49-51.

17 *Kasper J., Schlickum G., Weiler E.,* Der Täter-Opfer-Ausgleich, München, 2014, 1- 4; *Zehr H.,* The Little Book of Restorative Justice, NY, 2015, 18.

18 *Deymié B.,* Justice Restaurative: Le Dialogue Avant La Peine, Revue Projet, 2018/5 (N° 366), 79-80, <https://www.cairn.info/revue-projet-2018-5-page-79.htm>, [17.04.2019]; *Cario R*., Justice Restaurative: Principes et Promesses, Les Cahiers Dynamiques, 2014/1 (n° 59), 24, <https://www.cairn.info/revue-les-cahiers-dynamiques-2014-1-page-24.htm >, [17.04.2019]; *Moyersoen J.,* Chronique d'une justice restaurative au-delà des frontières, Les Cahiers Dynamiques, 2014/1 (n° 59), 96, <https://www.cairn.info/revue-les-cahiers-dynamiques-2014-1-page-96.htm>, [17.04.2019]; *Zehr H*., The Little Book of Restorative Justice, NY, 2015, 18-19.

19 *Kilchling M*., Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 64.

In contrast to the traditional criminal law, the restorative justice considers the crime as the violation of relationships, which leads not to conviction but to imposing the responsibility. In addition, if the traditional criminal law is exercised by the state and is directed towards conviction of a person, those who were directly affected by the crime participate in the process of restorative justice, in particular, the victims of crime, the offender and, in some cases, the community members, and they are directed to correct the damages. And finally, the traditional criminal law is focused on the offender to receive punishment deserved; on the other hand the restorative justice is focused on the needs of victim of crime and the responsibility to be undertaken by the offender.[20] Accordingly, the participation (communication),[21] voluntariness,[22] taking the responsibility and reparation[23] represent the fundamental principles of restorative justice.

Modern studies confirm the positive impact of restorative justice upon the victim of crime. After the process the victims of crime feel the fear reduction or even lose the fear, the feeling of safety and security is returned to them, they feel support, self-concept is changed, the feeling of recognition and dignity is returned, they have the feeling of satisfaction and justice. Finally, they are becoming empowered and overcoming of traumas incurred as a result of crime becomes easier.[24]

Today, the restorative justice unites many programs,[25] among them the most common is mediation, restorative conferences and circle processes; as it was already noted, it is implemented in many countries of the world, including most of the EU member states, for example, in Germany, Austria, France, Finland, Denmark, Sweden and Belgium.[26]

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[20] *Zehr H.*, The Little Book of Restorative Justice, NY, 2015, 30.

[21] *Kasper J., Schlickum G., Weiler E.*, Der Täter-Opfer-Ausgleich, München, 2014, 20.

[22] Ibid., 43-44; *Zehr H.*, The Little Book of Restorative Justice, NY, 2015, 57.

[23] *Béal C.,* Justice Restaurative et Justice Pénale, Rue Descartes, 2018/1, (N 93), 60, <https://www.cairn.info/revue-rue-descartes-2018-1-page 58.htm?try_download=1&contenu=article>, [17.04.2019].

[24] *APAV,* IVOR Report, Implementing Victim-Oriented Reform of the Criminal Justice System in the European Union, Portugal, 2016, 55, <https://www.apav.pt/ivor/images/ivor/PDFs/IVOR-Repot-WebVersion.pdf>, [16.04.2019]; *Vanfraechem I., Bolívar D.,* Restorative Justice and Victims of Crime, Victims and Restorative Justice *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 53-54; European Forum for Restorative Justice, Practice Guide for Restorative Justice Services, The Victims' Directive Challenges and Opprtunities for Restorative Justice, Belgium, 2016, 6, <http://www.euforumrj.org/wp-content/uploads/2017/03/Practice-guide-with-cover-page-for-website.pdf>, [15.04.2019]; *Gavrielides T.,* The Victims' Directive and What Victims Want From Restorative Justice, Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice, London, 2015, 8-11, <https://www.researchgate.net/publication/276107075_The_Victims'_Directive_and_What_Victims_Want_From_Restorative_Justice>, [16.04.2019].

[25] *Zehr H.*, The Little Book of Restorative Justice, NY, 2015, 13-20.

[26] Regarding to the restorative justice in Germany, <https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-DE-maximizeMS-en.do?clang=en&idSubpage=1&member=1>, [15.04.2019]; regarding to the restorative justice in Austria, <https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-AT-maximizeMS-en.do?clang=en&idSubpage=5&member=1>, [15.04.2019]*; Bachinger L. M., Pelikan C.*, Victim and Mediation in Austria, Victims and Restorative Justice, *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxford-

3. Regulation of Restorative Justice in the European Union

3.1. Framework Decision of 2001

The popularization of restorative justice has prompted its regulation at the international level. The first text about the restorative justice at international level has already appeared in the United Nations Declaration[27] in 1985. It was followed by number of resolutions or recommendations. The United Nations Resolution of 2002 on the Basic principles of restorative justice programs in criminal matters[28] and the Recommendation of the Council of Europe of 1999 concerning Mediation in penal cases[29] is noteworthy among them. As for the European Union, the first record on restorative justice appeared in the Framework Decision of 2001. It differed from the Acts of United Nations and the Council of Europe by having obligatory for fulfilment rather than recommendatory character. Therefore, its adoption at international and European level is considered to be the most important step.[30]

The Articles 1 and 10 were devoted to the restorative justice in the Framework Decision. The definition of restorative justice was provided in sub-paragraph "e" of Article 1, and in Article 10 the provisions relating to its implementation were strengthened.

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shire, NY, 2015, 91; regarding to the restorative justice in France <https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-FR-maximizeMS-en.do?clang=en&idSubpage=5&member=1>, [15.04.2019]; Regarding to the restorative justice in Finland <https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-FI-maximizeMS-en.do?clang=en&idSubpage=1&member=1#n10;>, [15.04.2019]; *Gade C. B. N.,* "Restorative Justice": History of the Term's International and Danish Use, Nordic Mediation Research, *Nyland A., Ervasti K., Adrian L.* (eds.), Tromsø, Helsinki, Copenhagen, 2018, 32-37, <https://link.springer.com/content/pdf/-10.1007%2F978-3-319-73019-6.pdf>, [15.04.2019]; regarding to the restorative justice in Sweden <https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-SE-maximizeMS-en.do?clang=en&idSubpage=5&member=1>, [15.04.2019]; regarding to the restorative justice in Belgiu <https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-BE-maximizeMS-en.do?clang=en&idSubpage=1&member=1>, [15.04.2019].

27 United Nation, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29/11/1985.

28 ECOSOC Resolution 2002/12 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

29 Recommendation No. R (99) 19 of the Committee of Ministers to member States Concerning Mediation in Penal Matters, 15/11/1999, hereinafter – Recommendation of the Council of Europe of 1999; *Kilchling M.*, Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 65.

30 *Lauwaert K.,* European Criminal Justice Policies on Victims and Restorative Justice, Victims and Restorative Justice *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 245; *Borgers M.,* Implementing Framework Decisions, Common Market Law Review, Vol. 44, 1361–1386, 2007, 1361, <https://pdfs.semanticscholar.org/4c26/394a09f32b1dcba956bec8622c7a131df9cd.pdf>, [13.04.2019].

3.1.1. Definition of the Restorative Justice and Its Challenges

Sub-paragraph "e" of Article 1 of the Framework Decision provided the following explanation for restorative justice: “the mediation in criminal cases shall be understood as the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person”.

Although, the Framework Decision has introduced the definition of the restorative justice, in modern science it is considered that it was characterized by many shortcomings. The first shortcoming was that the Framework Decision was focused on "Mediation in criminal cases". Other forms of restorative justice, for example the conferences, were not considered. The second shortcoming was that mediation could only be used prior to or during criminal proceedings. Accordingly, it did not allow the possibility of implementation of mediation at the stage of execution of punishment. The third shortcoming was that the Framework Decision considered the mediation as the search to reach an agreement through negotiation. It is noteworthy that the approach - "reaching an agreement" - does not properly reflect the diverse content of mediation. A form of mediation, which is limited to communication between the victim of crime and the offender, can be considered as successful mediation; for example, when the offender confesses to participation in crime before the victim of crime, when it answers the questions of victim. Hence, it is not necessary for the mediation process to always envisage the written agreement.[31]

3.1.2. Standards Established by the Framework Decision

The paragraph 1 of Article 10 of the Framework Decision obliged the member states to encourage the mediation to the offences that they considered as appropriate for the use of mentioned measures.

This regulation also caused criticism among scientists and practitioners. For example, *Kilchling* believes that this record was more of general and formal character rather than conveying any content.[32] According to *Lauwaert,* the use of the word "promote" revealed a positive view of the Framework Decision towards the restorative justice, however, limiting to the recommendation to apply the mediation only towards the "promotion" and "appropriate offences”, the States were given a wide area of action. They were given the opportunity to only minimally use the restorative justice, even towards the lesser offences, that could lead to the exclusion of certain crimes at all.[33]

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[31] *Lauwaert K.,* European Criminal Justice Policies on Victims and Restorative Justice, Victims and Restorative Justice *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 248.

[32] *Kilchling M.*, Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 67.

[33] *Lauwaert K.,* European Criminal Justice Policies on Victims and Restorative Justice, Victims and Restorative Justice *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 248-249.

As regards the paragraph 2, Article 10 of the Framework Decision, according to it, the States should ensure taking into account the agreement reached under the mediation between the victim of crime and the offender. This phrase clarified that the serious attitude should have been existed towards the mediation results. It also indicated that member states should give appropriate place to mediation in criminal proceedings.[34]

3.2. Directive of 2012

3.2.1. The Way Prior to Adoption of the Directive

Unfortunately, adequate enforcement of the Framework Decision failed in the European Union. Its enforcement has been prevented by vague provisions, the great discretion given to the states and the lack of coercion mechanism of enforcement.[35] According to the Commission's assessment, the Framework Decision was not sufficient for proper protection of rights of crime victim.[36] Accordingly, the goal of the Framework Decision, to properly protect the rights of the victims of crime in all member states, has not been achieved.[37]

After the failure of the Framework Decision, in 2009 the European Commission adopted the Stockholm Roadmap, by which it was recognized that for improvement of rights of crime victims in the legislation of the EU member states, it was required to develop a coordinated and long-term strategy. In 2011, the European Commission elaborated the strategic plan on the strengthening the rights of victim of crime and on protection of the victim of crime in criminal proceedings. It is known as the Budapest Roadmap. It was noted that the Framework Decision of 2001 was outdated and required to develop new regulations.[38] As a result, in 2010 the directive was adopted.[39]

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34 *Lauwaert K.,* European Criminal Justice Policies on Victims and Restorative Justice, Victims and Restorative Justice *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 248-249.

35 Ibid.

36 *Buczma S., Kierzynka R.,* Protection of Victims of Crime in the View of the Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime in the European Union and the Directive 2011/99/EU on the European Protection Order, Judicial Academy of the Slovak Republic, 2, <http://www.ja-sr.sk/files/Kierzynka_Buczma_Protection%20of%20victims.pdf>, [30.03.2019]; *Gavrielides T.*, The Victims' Directive and What Victims Want From Restorative Justice, Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice, London, 2015, 2, <https://www.researchgate.net/publication/276107075_The_Victims'_Directive_and_What_Victims_Want_From_Restorative_Justice>, [16.04.2019].

37 *Brunilda P., European Forum for Restorative Justice,* Briefing Paper about the Regulation of Restorative Justice in the Directive 2012/29/EU, 2016, 3, <http://www.euforumrj.org/wp-content/uploads/2017/-03/EFRJ-Briefing-Paper-RJ-in-the-Victims-Directive.pdf >, [1.04.2019].

38 Ibid.

39 *Gavrielides T.,* The Victims' Directive and What Victims Want From Restorative Justice, Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice, London, 2015, 2, <https://www.researchgate.net/publication/276107075_The_Victims'_Directive_and_What_Victims_Want_From_Restorative_Justice>, [16.04.2019].

3.2.2. Regulation of Restorative Justice in the Directive

In contrast to the Framework Decision of 2001, high emphasis was placed on the restorative justice in the Directive of 2012. It recognizes the benefits of restorative justice for the victim of crime;[40] moreover, by strengthening of restorative justice in the Directive, a significant focus was made: the restorative justice no longer represents a criminal-oriented instrument, as it was mostly understood in the justice system, but became the useful mechanism for victim of crime.[41] The Directive broadly determines the restorative justice (Article 2), requires keeping informed the victim of crime on the restorative justice services (Article 4), demands from the member states to provide safeguards while using the restorative justice, in order to avoid the secondary victimization of victim (Aticle 12), demands from the member states to facilitate the referral of cases to the restorative justice services (Article 12), requires the training of practitioners implementing the restorative justice (Article 25),[42] and in addition requires the cooperation and coordination between the services of restorative justice (Article 26).[43] It is also important that the Directive considers the restorative justice as an alternative to the criminal justice as well as its complementary part.[44]

But it should be noted that the Directive does not oblige the States to introduce the restorative justice.[45] It does not establish the access right to the restorative justice for the victim of crime, the Directive is only limited to introduction of the right of protection measures.[46] If we take into account the fact that given Article is provided in Chapter 3 of this Directive, in which the rights of the crime victim are provided, which should be guaranteed in criminal proceedings, it's surprising, why the Article 12, which does not establish the right of access to the restorative justice, was included in Chapter 3 of the Directive.[47] The fact that the Directive has not granted the right of access to restorative justice to

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40 Recital 46, Directive 2012/29/EU of the European Parliament and of the Council of 25th October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA.

41 *Kilchling M.*, Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 67.

42 *European Forum for Restorative Justice,* Practice Guide for Restorative Justice Services, The Victims' Directive Challenges and Opprtunities for Restorative Justice, Belgium, 2016, 16, <http://www.eufo-rumrj.org/wp-content/uploads/2017/03/Practice-guide-with-cover-page-for-website.pdf>, [15.04.2019].

43 Ibid, 17.

44 *Blackstock J.,* Protecting Victims: EU Competences and Mechanisms for Safeguards, Symposium "Legal Perspectives on the Victim", 2012, 8, <http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/Protecting-Victims-EU-Competences-and-mechanisms-for-safeguards.pdf>, [16.04.2019].

45 European Commission, DG Justice, Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25th October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, Ref. Ares (2013) 3763804 , 2013, 32-33.

46 *APAV,* IVOR Report, Implementing Victim-Oriented Reform of the Criminal Justice System in the European Union, Portugal, 2016, 56, <https://www.apav.pt/ivor/images/ivor/PDFs/IVOR-Repot-WebVersion.pdf>, [16.04.2019].

47 Ibid.

the victim of crime is often perceived as a failure of the Directive.[48] The European Forum for Restorative Justice considers that Europe really needs the right of access to restorative justice instead of right to safeguards.[49]

Also, the tone of Directive towards the restorative justice is problematic. Article 12 directly begins with an emphasis on the safeguards, thus creating an impression that the victim of crime should be protected from restorative justice programs.[50] The Recital 46 of Directive adds, that restorative justice programs may be very beneficial for the victim of crime, however, it does not go in details and directly speaks about the necessity of safeguards.[51] It can be said that with such tone the Directive expresses its distrustful attitude to the restorative justice.[52]

3.2.2.1. Definition of Restorative Justice

According to paragraph 1.d, Article 2 of the Directive, "restorative justice" means any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party".

As a result of the analysis of this definition, it can be said that the Directive acknowledges different forms of restorative justice and it is not focused only on the mediation. It considers the direct as well as indirect forms of restorative justice, which implies the communication between the victim of crime and offender without a face-to-face meeting, for example, through written or audio-video communication. This record is particularly important in the light of today's practice, since indirect mediation is frequently used, for example, in case of grave offence, where the face-to-face meeting of a victim of crime and offender may not be expedient.[53]

In contrast to the Framework Decision of 2001, the Directive is also not focused on the model of reaching of an agreement. Accordingly, the Directive recognizes such programs that are oriented on communication and does not end with the agreement of the parties.[54]

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48 *Brunilda P., European Forum for Restorative Justice,* Briefing Paper about the Regulation of Restorative Justice in the Directive 2012/29/EU, 2016, 12, <http://www.euforumrj.org/wp-content/uploads/2017/03/-EFRJ-Briefing-Paper-RJ-in-the-Victims-Directive.pdf >, [1.04.2019].

49 Ibid, 16.

50 *Kilchling M.*, Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 71.

51 *Brunilda P.,* European Forum for Restorative Justice, Briefing Paper about the Regulation of Restorative Justice in the Directive 2012/29/EU, 2016, 12-13, <http://www.euforumrj.org/wp-content/uploads/2017/-03/EFRJ-Briefing-Paper-RJ-in-the-Victims-Directive.pdf >, [1.04.2019].

52 *Lauwaert K.,* European Criminal Justice Policies on Victims and Restorative Justice, *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 260.

53 Ibid, 256.

54 Ibid, 255; *European Forum for Restorative Justice*, Practice Guide for Restorative Justice Services, The Victims' Directive Challenges and Opprtunities for Restorative Justice, Belgium, 2016, 8, <http://www.-euforumrj.org/wp-content/uploads/2017/03/Practice-guide-with-cover-page-for-website.pdf>, [15.04.2019].

It is important that the Directive refers only to the victim of crime and the offender in the text, however, this record does not exclude participation of other parties, such as supporters or other members of the community.[55]

Definition of restorative justice, as provided in Article 2 of the Directive, does not establish time limits for the implementation of restorative justice, accordingly, it gives the opportunity to implement the restorative justice at any stage of criminal proceedings, starting from the investigation as well as at the stage of imposing or execution of punishment.[56] It is also indicated in the Guidance document of the European Commission that the restorative justice unites various services that may be attached to the criminal proceedings prior to, with or after it.[57] This differs from the approach of the Directive of 2001, according to which the mediation in criminal cases was applied only prior or during the criminal proceedings.[58] It should be noted that in the European states, such as Great Britain, Germany, Belgium, France, the restorative justice services are already implemented at the stage of execution of punishment.[59]

The Directive allows the use of restorative justice to all crimes.[60] It only mentions the factors that should be taken into account when making decisions on the implementation of restorative justice. These factors include the character and severity of a crime, the severity of the trauma, systematic (repeated) infringement of physical, sexual and psychological integrity of victim of crime, inequality of power, age, maturity or intellectual abilities of the victim of crime.[61] It is important that the victim of crime, regardless of its vulnerability, should have the opportunity to participate in the restorative jus-

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55 *European Forum for Restorative Justice*, Practice Guide for Restorative Justice Sererrvices, The Victims' Directive Challenges and Opprtunities for Restorative Justice, Belgium, 2016, 8, <http://www.euforumrj.org/wp-content/uploads/2017/03/Practice-guide-with-cover-page-for-website.pdf>, [15.04.2019].

56 *Brunilda P., European Forum for Restorative Justice,* Briefing Paper about the Regulation of Restorative Justice in the Directive 2012/29/EU, 2016, 9, <http://www.euforumrj.org/wp-content/uploads/2017/03/-EFRJ-Briefing-Paper-RJ-in-the-Victims-Directive.pdf >, [1.04.2019].

57 European Commission, DG Justice, Guidance Document Related to the Transposition and Implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25th October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, Ref. Ares (2013)3763804, 2013, 32-33.

58 *Lauwaert K.,* European Criminal Justice Policies on Victims and Restorative Justice, *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 256.

59 *Kasper J., Schlickum G., Weiler E.*, Der Täter-Opfer-Ausgleich, München, 2014, 53-54; *Kilchling M.*, Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 77; *Deymié B.,* Justice Restaurative: Le Dialogue Avant la Peine, Revue Projet, 2018/5 (N° 366), 80, <https://www.cairn.info/revue-projet-2018-5-page-79.htm>, [17.04.2019].

60 *APAV,* IVOR Report, Implementing Victim-Oriented Reform of the Criminal Justice System in the European Union, Portugal, 2016, 56, <https://www.apav.pt/ivor/images/ivor/PDFs/IVOR-Repot-WebVersion.pdf>, [16.04.2019].

61 *European Forum for Restorative Justice,* Victims and Restorative Justice, Country Report *Bolívar D., Aersten I., Vanfraechem I.* (eds.), 2015, 142, < http://www.euforumrj.org/wp-content/uploads/2015/05/-report_victimsandRJ-2.pdf >, [30.03.2019].

tice. Studies demonstrate that, for successful implementation of restorative justice, the process itself is important but not the type of crime, the legal qualification of the crime, the category of victims of crime or the gravity of the damage inflicted on the victim of crime.[62]

3.2.2.2. Compatibility of Georgian Provisions with the Definitions Established by the Directive

The Juvenile Justice Code in Georgia provides the definition of restorative justice measures as well as the mediation. According to section 8, Article 3 of Juvenile Justice Code "the restorative justice measures is a measure that allows minors in conflict with the law to accept their responsibility for an act committed, to remedy the consequences of a crime, and to compensate damage to and/or to reconcile with the victim". In accordance with section 9 of the same Article the mediation is "a process of dialogue between a juvenile in conflict with the law and a victim, which is led by a mediator and which aims to reconcile the minor and the victim and settle the conflict between them". Based on these definitions it can be said that not only the mediation can be used in the juvenile justice, but also other forms of restorative justice, which of course is welcomed. It is also welcomed that, in mediation definition, the mediation is demonstrated as a dialogue process between the victim and the juvenile in conflict, which in itself means participation of both parties in the process. Besides, according to the subparagraph "c" of Article 2 – "the procedure for imposing the diversion/diversion and mediation program on the minors and the terms and conditions of an agreement to be concluded between the parties" - approved by the Order No.120 of February 1, 2016 of the Minister of Justice of Georgia, one of the parties of diversion-mediation agreement is a victim. The mentioned record also indicates involvement of the victim of a crime. However, it should be noted that, as a rule, the victim's denial does not hinder the use of diversion, but the victim may at any time be involved in the mediation process.[63]

Besides positive trends, there are number of shortcomings in Georgian legislation. It is regrettable that attention is paid to the dialogue between the victim and the juvenile in conflict only in the definition of mediation; and in definition of restorative justice, only the juvenile in conflict is focused, which does not demonstrate that both parties are equally important in the restorative justice. True, that the requirements provided by the norm meet the interests of victim; however, it would have been desirable to have both sides equally presented in the definition of restorative justice and emphasise the communication between the parties similar to the mediation definition. It is also regrettable that in Georgia as well as in many European states the restorative justice is largely used as a tool of diversion

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62 *Brunilda P.,* European Forum for Restorative Justice, Briefing Paper about the Regulation of Restorative Justice in the Directive 2012/29/EU, 2016, 14, <http://www.euforumrj.org/wp-content/uploads/2017/03/-EFRJ-Briefing-Paper-RJ-in-the-Victims-Directive.pdf>, [1.04.2019]; *Kasper J., Schlickum G., Weiler E.*, Der Täter-Opfer-Ausgleich, München, 2014, 81-82.

63 Diversion in the juvenile justice system in Geogia, <http://prevention.gov.ge/page/28/geo>, [21.04.2019].

from a less grave or grave crime,[64] which, from the perspective of victim of crime, is an unjustified approach. For instance, if the victim of crime is not fortunate and the person, convicted many times in the past, commits a crime against him/her, then the restorative justice can no longer be applied as a mean of diversion; and if the victim of crime is fortunate and the offender was not convicted in the past, then the restorative justice is applied to him/her.[65] Accordingly, a system that excludes a certain group of victims of crime from the restorative justice, cannot meet the needs of the crime victim.[66] It is also regrettable that the restorative justice is not accessible at the stage of execution of a punishment.

3.2.2.3. Right to Information

Article 4 of the Directive provides the mandatory nature list of essential information, the exclusive authority of acceptance of which has a victim of crime, in order to as far as possible realize the rights enhanced by the Directive. The right of receiving of information is also applied to the restorative justice. Accordingly, based on Article 4 of the Directive, the State is obliged to provide the victim of crime with information on services of restorative justice, if any.[67] The essence and purpose of the norm is to ensure the accessibility of restorative justice via providing the victim of crime with information.[68]

3.2.2.4. Standards of the Restorative Justice

Although, the right of access to restorative justice has not been guaranteed for a victim of crime under the Directive, the Directive requires that if the restorative justice is offered to the victim of crime, then it should meet the standards set out in the Directive, which, for its part, provide the minimum guarantees for protection of the victim of crime.[69]

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64 *Kilchling M.*, Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 63-64; *Kasper J., Schlickum G., Weiler E.*, Der Täter-Opfer-Ausgleich, München, 2014, 54-55.

65 *Kilchling M.*, Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 76.

66 Ibid, 78; *Gavrielides T.,* The Victims' Directive and What Victims Want From Restorative Justice, Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice, London, 2015, 13, <https://www.researchgate.net/publication/276107075_The_Victims'_Directive_and_What_Victims_Want_From_Restorative_Justice>, [16.04.2019].

67 *Brunilda P.,* European Forum for Restorative Justice, Briefing Paper about the Regulation of Restorative Justice in the Directive 2012/29/EU, 2016, 10, <http://www.euforumrj.org/wp-content/uploads/2017/03/-EFRJ-Briefing-Paper-RJ-in-the-Victims-Directive.pdf >, [01.04.2019].

68 *Kilchling M.*, Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 72.

69 *European Forum for Restorative Justice,* Practice Guide for Restorative Justice Services, The Victims' Directive Challenges and Opportunities for Restorative Justice, Belgium, 2016, 4, <http://www.eufo-

Article 12 of the Directive obliges the States to take appropriate measures in case of implementation of restorative justice, in order to avoid the secondary and repeated victimization, intimidation and revenge of victim of crime. In addition, the Directive requires that if the victim of crime decides participation in the restorative justice program, it shall have the access to safe and competent services.

The Directive requires that participation of victim of crime to be voluntary; in addition, it distinguishes three directions: first of all, a voluntary decision of the victim of crime on participation in restorative justice shall take place. The given decision shall be based on informed consent, which, in turn, should be preceded by providing the complete and impartial information to victim of crime about the process, in case of existence of alleged results of the process and the agreement, on the supervision procedures of its performance. In addition, the consent on participation in the process can be withdrawn at any time, i.e. the victim of crime should be able to refuse to continue the process at any time. Finally, any agreement reached under the restorative justice must be voluntary.[70]

The Directive also requires keeping of confidentiality in line with the Directive, within the framework of restorative justice; non-public conversations may not be disclosed, except the case if the parties agree on this or if, in accordance with national legislation, there is greater public interest towards disclosure. According to the recital 46 of Directive, if during the process revealing of threat or other forms of violence takes place, then this may be the basis for disclosure. The main purpose of this provision is to protect a victim of crime and prevent the use of process by the offender for the purpose of repeated victimization, intimidation and revenge.[71]

The Directive also requires that the offender acknowledges the basic facts of the case. There are different positions on this issue in the literature and legal and psychological aspects opposing each other. In legal terms, in fact, the presumption of innocence and the right to silence loses the significance, if the accused does not deny that he/she was involved in the offense. In case of acknowledgement, agreement reached through mediation must necessarily result in termination of criminal prosecution. In terms of psychology, only following admission of guilt by the defendant, the participation in restorative justice process shall be reasonable for the victim of crime. The Directive has chosen the intermediate position, reiterating the position of Recommendation of the Council of Europe of 1999, by which the admission of guilt is not required. The minimum requirement is that the offender does

rumrj.org/wp-content/uploads/2017/03/Practice-guide-with-cover-page-for-website.pdf>, [15.04.2019]; *Gavrielides T.,* The Victims' Directive and What Victims Want From Restorative Justice, Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice, London, 2015, 19, <https://www.researchgate.net/publication/276107075_The_Victims'_Directive_and_What_Victims_Want_From_Restorative_Justice>, [16.04.2019].

70 *Lauwaert K.,* European Criminal Justice Policies on Victims and Restorative Justice, *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 257.

71 Ibid, 255; *Brunilda P., European Forum for Restorative Justice,* Briefing Paper about the Regulation of Restorative Justice in the Directive 2012/29/EU, 2016, 15, <http://www.euforumrj.org/wp-content/uploads/2017/03/EFRJ-Briefing-Paper-RJ-in-the-Victims-Directive.pdf >, [1.04.2019].

not fully reject the facts. For starting of communication between the victim of crime and the offender it is enough that the offender fully or partially acknowledges his/her participation in offense.[72]

According to the Directive, the agreement reached within the framework of restorative justice may be taken into account in the criminal proceedings. The main achievement of this provision is that it connects the restorative justice to the criminal proceeding and prevents the development of restorative justice independently of criminal proceedings. It is noteworthy that the initial project of the Directive contained the word "must" instead of word "may". This wording was greatly focused on the outcome of restorative justice; in addition, the parties were deprived of their freedom to decide whether to use the agreement in criminal proceedings.[73] Accordingly, it was rejected in the final project of the Directive.

The security requirement is also included in the Directive. Subparagraph "a" of paragraph 1 of Article 12 requires that restorative justice programs to be applied only if it is in the interest of the victim of crime. In addition, the recital 46 of Directive notes that restorative justice programs should first take into account the interests and needs of the victim of crime. According to the European Forum of Restorative Justice, protection of interests of the victims of crime is goal of the Directive; however, in the process of restorative justice the main principle of justice – neutrality, i.e. a balanced approach between the victim of crime, offender and interests of the community - is violated, appealing only to the needs of victim of crime.[74] *Kilchling* believes that the record is roughly incompatible with the impartiality principle.[75] In *Lauwaert's* opinion it is not surprising that the attention is paid to the victims of crime in the document devoted to the victim of crime, however, she believes that, unfortunately, Article 12 of the Directive lays the foundation to the idea - to consider the restorative justice as the instrument for executing only the interests of victim of crime.[76]

3.2.2.5. Applicability of the Directive's Standards in Georgia

If the restorative justice of Georgia will be compared to the provisions of the Directive, it will be obvious, that Georgia feasibly tries to meet the European requirements. In Article 3 of "the procedure for imposing the diversion/diversion and mediation program on the minors and the terms and conditions of an agreement to be concluded between the parties" - approved by the Order No.120 of

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72 *Lauwaert K.,* European Criminal Justice Policies on Victims and Restorative Justice, *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 257.

73 Ibid.

74 *Brunilda P.,* European Forum for Restorative Justice, Briefing Paper about the Regulation of Restorative Justice in the Directive 2012/29/EU, 2016, 15, <http://www.euforumrj.org/wp-content/uploads/2017/03/-EFRJ-Briefing-Paper-RJ-in-the-Victims-Directive.pdf >, [1.04.2019].

75 *Kilchling M.*, Opferrechte und Restorative Justice, Opferrechte in Europäischer, Rechtsvergleichender und Österreichischer Perspektive, *Sautner L., Jesionek U.* (Hrsg.), Viktimologie und Opferrechte, Schriftreihe der Weisser Ring Forschungsgesellschaft, Band 8, Innsbruck, 2017, 72.

76 *Lauwaert K.,* European Criminal Justice Policies on Victims and Restorative Justice, *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 267.

February 1, 2016 of the Minister of Justice of Georgia, is strengthend the principles of the diversion and mediation program, which include voluntariness and confidentiality. But it worth mentioning that according to the Georgian legislation the juvenile has to plead crime. [77]

After analysis of the standards established by the Directive, it can be determined whether one of the conditions of the diversion functioning in the adult justice system, particuliarly full or partial compensation may be considered as the restorative justice.

According to the provision of the Directive, **voluntariness** and **participation**[78] represent the main principles of restorative justice. Accordingly, it is necessary that the victim of crime and offender participate in restorative justice program based on their own choice.

In Georgia the victim is actually minimally involved in the diversion process, not even for communication and dialogue with the offender, but only for the purpose of counselling with the prosecutor. Therefore, the communication between the victim and the offender is not established. It's difficult to consider the counselling with prosecutor as indirect communication, because indirect communication implies the relationship through communication with a letter, audio recording, telephone or other technical means directly between the victim of crime and the offender, but not between the prosecutor and the victim.[79]

In addition to the lack of communication element, the voluntariness element is also important. The CPCG envisages the counselling only with victim. The word "counselling" demonstrates that if the victim does not agree with the prosecutor's decision, the prosecutor anyway may draw up a diversion. Accordingly, the victim's consent is not required. This indicates that in case of diversion the element of voluntariness can be disregarded, which, from its part, may lead to secondary victimization of the victim. In addition, the Directive requires conducting the process with participation of "third, impartial person". Even the prosecutor cannot be considered as such, since it represents the party in the process and has a specific interest.

The Diversion institution is implemented in many states, including Germany and Austria. In the legislation of both countries, the mediation between victims of crime is found in the list of conditions of diversion that may unite the compensation for damage, thus require the participation of crime victim and offender and the communication between them.[80] Accordingly, it could be said that tha diver-

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77 sub-paragraph "d", Article 40, the Juvenile Justice Code, Legislative Herald of Georgia.

78 *Kasper J., Schlickum G., Weiler E.*, Der Täter-Opfer-Ausgleich, München, 2014, 34; *Lauwaert K.,* European Criminal Justice Policies on Victims and restorative Justice, Victims and Restorative Justice *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 257; *Daimagüler M G.,* Der Verletzte im Strafverfahren, Handbuch für die Praxis, München, 2016, 301.

79 *Lauwaert K.,* European criminal justice policies on victims and restorative Justice, Victims and Restorative Justice *Vanfraechem I., Bolívar D., Aersten I.* (eds.), Oxfordshire, NY, 2015, 256.

80 *Meyer-Großner L., Schmidt B.,* Strafprozessordung mit GVG und Nebengesetzen, Beckliche Kurzkommenare, München, 2018, 815, 853-854; *Satzger H., Schluckebier W., Widmaier G.,* Strafprozessordnung mit GVG und EMRK Kommentar, Heymanns Kommenatare, Köln, 991, 1012-1013; §204, Strafprozessordnung von Österreich, 9/12/1975, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326>, [21.04.2019].

sion program functioning in the Georgian adult justice system, does not contain the elements of the restorative justice. [81]

4. Conclusion

The research clarifies that to the restorative justice is given more and more attention on the level of the European Union. The provisions are becoming clearer, which contributes to the strengthening of the legal standing of the victim of crime. By focusing on the safeguards, the European Union once again recognized the great importance to prevent the secondary victimization of the victim of crime. However, it is regrettable that the Directive does not establish the right of access to restorative justice for the victim of crime and leaves in the State discretion, whether it establishes it or not. In addition, it is regrettable that the directive prevails the interests of the victim of crime, that may cause the danger to the neutrality of the restorative justice.

As it has been shown, the mediation program is functioning in the Georgian juvenile justice system, which is a step forward for Georgia, on its way to the European integration. It should be mentioned, the the mediation program is mostly in conformity with the european standards, but it still needs improvement. As regard to the adult justice system, it is not familiar with the restorative justice, because only compensation for damage cannot meet those principles and standards, established by the Directive and which are recognized by international practice. Therefore, in order to properly meet the needs of victim of crime, it is desirable to introduce the restorative justice programs into the adult justice system.

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[81] In the article "Opferrechte im Strafverfahren nach der europäischen und georgischen Gesetzgebung", published in the "Deutsch-Georgische Strafrechtszeitschrift" (German-Georgian Criminal Law Magazine) in 2017, it was mentioned that the restorative justice is applied even to adults. It was meant full or partial compensation for damage by the defendant within the diversion; however, proceeding from the developed practice, it could be consindered that only compensation cannot be considered as the restorative justice, because it does not meet the important element of restorative justice - communication and voluntariness of the parties, see. *Tandilashvili K.,* Opferrechte im Strafverfahren nach der europäischen und georgischen Gesetzgebung, Deutsch-Georgische Strafrechtszeitschrift, No. 2, 2017, 55-56, <http://www.dgstz.de/-storage/documents/m0wMkIuJTKf3nihzQgPFnyshtBiqcw6PcrPFy4TH.pdf>, [03.04.2019].

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Witness Immunity in Criminal Procedure

The paper focus on a topical issue - witness immunity. The key element of the democratization and humanization of criminal procedure is the introduction of the institute of witness immunity into Georgian legislation. Provision for witness immunity at the legislative level and its further improvement is a guarantee for the provision for the rights of the parties to criminal trial.

The paper is based on the analysis of the doctrine and judicial practice, also on conceptual approaches envisaged by the legislation of Roman-German and common law countries with regard to witness immunity. The paper describes and discussed historical aspects of witness immunity and modern trends in this field. General methodological basis of the research is comprised of historical, logical, comparative and empirical-analytical methods.

The research aims at the analysis of witness immunity-related issues of theoretical and practical importance in legal light, sharing foreign experience and development of recommendations with regard to discussed question.

Key words: *Witness, witness immunity, objective and subjective understanding of witness immunity, types of witness immunity.*

1. Introduction

On the whole, the question of witness immunity is not yet duly examined and studied in Georgian criminal procedure. As defined by Part 20 of Article 3 of the Code of Criminal Procedure of Georgia (hereafter – CCPG), a witness is a person who may know the facts required for the establishment of circumstance in a criminal case. A person should dispose of the necessary for the case fact on the basis of own perception and should be able to convey them. However, only the knowledge of the necessary for the case facts, is not sufficient to participate in criminal trial in the capacity of a witness.[1] As an additional precondition the CCPG prescribes that a person acquires the status of a witness after being warned with respect to criminal liability and after taking an oath.[2]

The research focuses on comprehensive and systemic analysis of the institute of witness immunity and development of the recommendations on the basis of the foregoing for the perfection of legal regulation of this institute in criminal procedure. To this end, the paper will focus on the following aspects: 1. Historical development of the institute of witness immunity; 2. Concept and essence of witness immunity; 3. Classification of the types of immunity, also the mechanism of regulation and perfection of witness immunity-related issues of theoretical and practical importance; 4. Analysis of judicial practice of the European Court of Human Rights (ECHR) with regard to witness immunity.

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2 *Laliashvili T.,* Criminal Procedure of Georgiam General Part, Tbilisi, 2015, 293 (in Georgian).

2. Historical Overview of the Concept of Witness Immunity

Semantically the word "immunity" (*Immunitas* – in Latin) means "exemption from something", "avoiding something", "benefit". "Immunity" as a legal term means exemption of a certain group of persons from the application of general legal rules. International law is aware of state immunity, warship immunity, diplomatic immunity, immunity of state merchant vessels. Constitutional law recognised the immunity of the President, a Member of the Parliament and a judge.[3]

Historically the institute of immunity was formed back in Roman Law.[4] Pursuant to common rule, a witness was obliged to testify,[5] however Digest of Justinian provides for the list of persons, who were entitled to witness immunity.[6] In medieval Europe immunity was associated with certain privileges enjoyed only by a certain part of feudal society.[7] Definition of this term implied the right of a feudal to hold hearings without a special authorization of the central government or to collect taxes. Later immunity was called the right of a foreign national or organization to be free from the jurisdiction of a foreign country when on the territory of the country concerned.[8]

In contemporary law immunity with regard to natural persons is understood as a privilege (security) of citizens (natural persons), who require additional guarantees for the discharge of their official or professional duties.[9] Immunity is also an important institute of international law[10] — applied as a guarantee of personal security of the members of the supreme representative political body — Parliament,[11] except cases, when caught in the act. Furthermore, a member of the Parliament[12] cannot be detained and brought before the court of law[13] without a consent of the Parliament.[14] Immunity is also a privilege of the diplomatic corps, what is manifested in their inviolability.[15] It can be said, that witness immunity is an exemption from the principle of everyone's equality before law, guaranteed by the Constitution.[16]

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15 *Gornig G.,* Immunität von Staatoberhäupten, Festschrift für Dietrich Rausching, Köln, Berlin, Bonn, München, 2001, 457-485.
16 *Kimmnich O.,* Das Staatsoberhaupt im Völlkerrecht, Staatsoberhaupt und Völkerrecht, 26 Band, № 2, 1988, 129-168.

3. Concept and Essence of Witness Immunity

In general, it can be said, that immunity is an exceptional right, enjoyed in a state by a group of persons with special status. Witness immunity, as an institute of criminal procedure, is a set of legal (exceptional) norms, providing for the right of witnesses of certain category to refuse to testify. Such persons are divided into three groups: 1. Persons, who generally cannot be questioned as witnesses in a criminal trial (CCPG, Article 50, Part 2); 2. Persons, who generally can be questioned as witnesses, but have the right to refuse to testify (CCPG, Article 49, Part 1(d)); 3. Persons, who may be exempted from the performance of the duty of a witness by the court of law (CCPG, Article 50, Part 3).

Granting immunity to a witness or the right of a citizen not to testify against himself, his spouse or next to kin[17] is nothing else than the aspiration of the State not to allow the disruption of kindred, family ties[18], also to ensure the protection of justice against giving knowingly - to a certain extent - false testimonies.[19] Objective and subjective understanding of witness immunity should be strictly delimited. From objective point of view, witness immunity is a set of legal (exceptional) norms regulating legal relations arising in the course of realization of this institute. From subjective point of view, witness immunity is a set of legal (exceptional) norms exempting specific citizens (natural persons) from the obligation to testify in a criminal trial, also guaranteeing right of the citizens not to testify against themselves or their next to kin. German law provides for two main types of immunity: functional (*Immunität ratione materie*) and personal (*Immunität ratione personae*) immunity. Functional immunity is mainly associated with the activities of state authorities. As regards personal immunity, the persons enjoying it are exempted from testifying in a criminal trial due to their official duties or to keep confidential some trade secrecy.[20]

The essence of witness immunity is the right of a witness to refuse the performance of statutory duty — to testify in a criminal trial, also the obligation of state authorities and officials administering criminal procedure to explain their procedural rights to witnesses and to ensure their practical exercise.

As per Part 11 of Article 31 of the Constitution of Georgia nobody is obliged to testify against himself/herself or his/her relatives, as defined by law. Similar stipulation is contained in Article 49(d) of the CCPG. Specifically, about witness immunity — a witness can refuse to testify if his/her testimony might tend to incriminate him/her or his/her next to kin. A person who is summoned as a witness and refuses to testify, is required to present sound evidences, that he/she is in kindred relationship with an accused in criminal trial.

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17 *Tumanishvili G.,* Commentary on Code of Criminal Procedure of Georgia (co-author), Tbilisi, 2015, 209 (in Georgian).

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Granting immunity to a specific witness affects only the essence of his/her testimony and does not constitute grounds for avoiding the appearance before a law-enforcement authority or the court of law. Consequently, if a person with witness status avoids the performance of the duty to make appearance in a criminal trial, the measures of forced escorting, envisaged by the CCPG, can be undertaken. In their return, relevant officials (investigator, prosecutor, court of law) are required to explain the essence of the right to refuse to testify to a person with witness status.[21] If, despite this explanation, the person refuses to enjoy the immunity, he/she should be warned about the imposition of legal liability for false testimony.

Witness immunity is an exemption from the principle of everybody's equality before the law, prescribed by the Constitution.

4. Types of Witness Immunity

Witness immunity, prescribed by Article 49(d) of the CCPG can be divided into two groups: a) right against self-incrimination; b) right not to testify against next to kin. Generally, the right to refuse to testify is one of the crucial rights of a witness and grants certain privilege (immunity) to him/her.[22] Some scholars believe, that the right to refuse to testify against oneself or next to kin in a criminal trial promotes the establishment of truth, as had the law required to testify in such cases, there would have been the jeopardy for these persons to give false testimonies and obstruct the establishment of truth in the case.[23] However, the other scholars are of the opinion that witness's obligation to make true statements promotes the establishment of truth.[24]

Contemporary law of common law countries is aware of two types of witness immunity: 1. use immunity — enjoyed by persons prescribed by law — next to kin of an accused, or persons aware of certain classified information (lawyers, doctors, clergymen); 2. transactional immunity — granted to a witness by a prosecutor in exchange for a testimony. In the United States of America, the legal basis of the existence of immunity in criminal lawsuit is the US Constitution, according to Fifth Amendment of which no person shall be compelled in any criminal case to be a witness against himself. This requirement was reflected in the decision made by the US Supreme Court in its judgment in the case.[25]

In Continental law countries the extent of witness immunity and the group of persons, enjoying such immunity, is prescribed by criminal law (Criminal Code of Germany, Articles 139, 258; Criminal Code of France, Article 434; Criminal Code of Spain, Articles 454, 466).

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21 *Shengelia I.,* Interrogation of a Witness (Comparative Legal Analysis), "Legal Journal", № 3, 2014, 153 (in Georgian).

22 *Konev V., Gromov N., Nikolaichenko V*., Witness Immunity in Criminal Procedure, Moscow, 1997, 19 (in Russian).

23 *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27 Aufl., München, 2012, Para. 26, Rn. 14. *Kühne H. H.,* Ein Lehrbuch zum Deutschen und europäischen Strafverfahrensrecht, 8 Aufl., Heidelberg, 2010, 496.

24 *Hinterhofer H.,* Zeugenschutz und Zeugnisverweigerungsrechte: im österreichischen Strafprozess, 1 Aufl., Wien, 2004, 182.

25 *Miranda v. Arizona*, 384 U.S. 436 (1966), <www.supreme.justia.com/us/384/436/case.html>, [13.11.2019].

According to right against self-incrimination, witness immunity can be classified as absolute (imperative) and relative (dispositional) immunity.

4.1. Absolute (Imperative) Immunity of a Witness

Absolute (imperative) immunity of a witness is in play, when a witness is entitled by law to refuse to testify. Part 1 of Article 50 of the CCPG lists the persons, who are not obliged to be witnesses. Specifically the following persons are not obliged to be examined or to transfer an item, document, substance or other object containing information essential to the case: a) a defence counsel – with regard to circumstances he/she came to know when acting as a defence counsel in the case concerned; b) a defence counsel providing legal aid to person concerned before the receipt of legal defence – with regard to circumstances that became known to him/her in connection with the provision of legal aid; c) a clergyman – with regard to circumstances that became known to him/her as a result of a confession or other act of confiding; d) next to kin of the accused; e) Public Defender or a person duly authorized thereby – with regard to the fact that was confided to him/her in the capacity of the Public Defender; e^{1}) State Inspector – with regard to the fact, that was disclosed to him/her in the capacity of the State Inspector when controlling the legality of personal data procession and covert investigational activities and activities conducted in the central database of electronic communication identification data; f) a Member of the Parliament of Georgia — with regard to the fact, that was confided thereto in the capacity of a member of the representative body;

g) a judge – with regard to circumstances that constitute the classified part of judicial deliberations;

h) a journalist – with regard to information obtained within the scope of professional activities; i) a victim of human trafficking – during the reflection period; j) a member of the Supreme Council of an Autonomous Republic – with regard to the fact, confided thereto in the capacity of a member of the representative body. A person who, due to his/her physical or mental disability, is not able to duly comprehend, memorise and recollect essential for the case circumstances, and communicate information or give testimony cannot be interviewed or interrogated as a witness (CCPG, Article 50, Part 2).

According to general rule, witness immunity does not apply to persons who deal with classified information, however, under Part 3 of Article 50 of the CCPG the court is authorized to exempt the following persons from the obligation to testify as a witness: a) a healthcare professional, if the latter is obliged to keep confidential medical information owing to his/her profession; b) a notary, civil servant, public official, military man and equalized thereto persons, if they are committed to keeping confidential the source and content of received information; c) a person, who was employed on condition of non-disclosure of commercial or bank secrecy; d) a person participating in counter-terrorism or/and special operation (with regard to his/her professional duties), whose activities are classified and the documents, materials and other data about these activities constitute state secrecy. Part 4 of Article 50 of CCPG also provides for an exceptional right according to which testifying as a witness will not be regarded as a breach of confidentiality obligation when a crime envisaged by Article 137(3)(d) or Article 137(4)(c),

Article 138(3)(d) or Article 138(4)(c), Article 139(2), Articles 140 or 141, Article 171(3), Article 253(2), Articles 255(2) or (3), Articles 2551 or 2552 of CCPG is committed against a minor.

4.2. Relative (Dispositional) Immunity of a Witness

Relative (dispositional) immunity is in play, when a witness has an option to enjoy the right to refuse to testify while case-reviewing authority or official is in the position to question the witness, if the latter is ready to testify. This type of immunity extends to an accused, next to kin of the latter (while Article 49(d) of the CCPG provides for witness immunity, specifically a witness may not give a testimony, which may incriminate him/her or his/her next to kin), also a member of Special Preventive Group subordinated to Public Defender — with regard to the fact, that was disclosed to him/her while discharging duties of national prevention mechanism, if the latter agrees to testify (Part 1 of Article 50 of the EEPG).

Unlimited right of a witness to refuse to testify exempts him/her from the obligation to give out any information in a criminal trial, while limited right of a witness to refuse to testify exempts him/her from the obligation to give out only the information that became known to him/her in the course of discharge of professional duties and is obliged to keep confidential because of his/her official position.[26] No person is obliged to testify against his own self — this is the essence of the immunity, which is also fully compatible with the International Covenant on Civil and Political Rights, under Article 14(3)(g) of which "do not compel anyone to testify against himself or to confess guilt". As regards the right to refuse to testify against next to kin or because of the trade pursed — this right stem from close kindred relationship of an accused with a witness, when the legislator takes account of legal interest of a person not to testify against his/her next to kin.[27] For uniform understanding, it will be desirable for criminal procedure law of Georgia to specify, whether who is next to kin of a witness prescribed by Article 49 (d) of the CCPG and also family members, envisaged by Article 3 (2), (3) and (4) of the CCPG; furthermore it will be reasonable for Georgian criminal procedure law to include the definition of a relative, envisaged by Article 31 (11) of the Constitution of Georgia. Even if an accused (culprit) has an appointed legal representative (guardian) in cases envisaged by Article 1275 of the Civil Code of Georgia, when this person is not next to kin to the person under trusteeship, it is desirable for criminal procedure law to delegate the legal representative as well with the right to refuse to testify (witness immunity) in a criminal case involving the person under trusteeship. Furthermore, it is desirable for criminal procedure law to specify, that witness immunity is also enjoyed by foster parents, prescribed by Article 71 of the Law of Georgia on Adoption and Foster Case, in criminal cases, involving their foster children, as well as by foster children in criminal cases, involving their foster parents. As all the rights and obligations of a witness are also enjoyed by a victim under Article 56(1)(l)(m) of the CCPG, the latter is also entitled to immunity, prescribed by Article 49(d) of the CCPG.

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[26] *Laliashvili T.,* Criminal Procedure of Georgia, General Part, Tbilisi, 2015, 337-338 (in Georgian).
[27] *Tumanishvili G.,* Criminal Procedure, Overview of General Part, Tbilisi, 2014, 158 (in Georgian).

In conclusion it can be said, that witness immunity is a legal privilege, legal security of a witness, guaranteeing the protection of rights of a witness in a criminal case.[28] This guarantee is contained in the Note to Article 371 of the Criminal Code of Georgia. Specifically, a person who refused to testify against himself/herself or against his/her next to kin, and also a victim of human trafficking is exempted from criminal liability – for the term of the reflection period. Witness immunity is an exception from general rule and not a categorical prohibition to testify. Consequently, if a witness, enjoying immunity, still agrees to testify or waivers his immunity, giving knowingly false testimony by the witness concerned will result in the imposition of criminal liability thereon under Article 370 of the Criminal Code of Georgia.[29] "An accused – witness will not be charged for false testimony. Criminal liability can be imposed thereon only for false denunciation"[30].

5. Analysis of ECHR Practice with regard to Witness Immunity; Autonomous Interpretation of the Term "Witness"

As per Article 6(3)(d) of the European Convention on Human Rights (hereafter – Convention): "Everyone charged with a criminal offence has the following minimum rights: d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." The term "witness" has an autonomous meaning within Convention system and it differs from the definition, prescribed by national legislation.[31] In cases, when persons were accused on the basis of sworn oath, it constitutes the evidence of prosecution, that is subject to requirements envisaged by Article 6 §§ 1 and 3(d).[32] The term also includes co-accused (see, e.g. Trofimov v. Russia)[33], victims (Vladimir Romanov v. Russia)[34] and expert witnesses (Doorson v. the Netherlands)[35]. Article 6 § 3(d) may also apply to documentary evidence.[36]

5.1. Right of a Person to Examine or Have Examined Witnesses

Article 6(3)(d) of the Convention provides for the principle, according to which principle all the evidence against an accused, must be produced at a public hearing, in the presence of the accused,

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28 *Tumanishvili G.,* Commentary on Code of Criminal Procedure of Georgia (co-author), Tbilisi, 2015, 209 (in Georgian).

29 *Chomakhashvili K., Osepashvili S.,* Crimes Against Justice, Open Society – Georgia Foundation, Tbilisi, 2017, 12 (in Georgian).

30 *Tumanishvili G.*, Criminal Procedure, Overview of General Part, Tbilisi, 2014, 206-208 (in Georgian).

31 Damir Sibgatullin v. Russia, [2012] ECHR, № 1413/05, § 45; S. N. v. Sweden, № 34209/96, [2002] ECHR, § 45.

32 Kaste and Mathisen v. Norway, [2006] ECHR, № 18885/04 and № 21166/04, § 53; Lucà v. Italy, [2001] ECHR, № 33354/96, § 41.

33 Trofimov v. Russia, [2008] ECHR, № 1111/02, § 37.

34 Vladimir Romanov v. Russia, [2008] ECHR, № 41461/02, §97.

35 Doorson v. the Netherlands, [1996] ECHR, §§ 81-82, Report 1996-II.

36 Mirilashvili v. Russia, [2008] ECHR, № 6293/04, §§ 158-159.

with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence and this, as a general rule, requires that the defendant be given an adequate and proper opportunity to challenge and question a witness against him. either when he makes his statement or at a later stage.[37]

There are two requirements which follow from the above general principle. Firstly: there must be a good reason for the non-attendance of a witness. Secondly: when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule").[38]

Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.[39] Important element of fair trial is provision for the option of the defendant to rebut the examination of a witness and his evidences.[40]

5.2. Obligation to Make Reasonable Effort to Secure Witness's Presence

The requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. When a witness does not attend trial to give live evidence, there is a duty to enquire whether that absence is justified.[41]

Paragraphs 1 and 3 of Article 6, taken together, require the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him.[42] In the event the impossibility to examine the witnesses or have them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence.[43]

When the state cannot be held liable that it has not undertaken sufficient efforts for the defendant to have possibility to examine or have examined the witness, non-attendance of the witness is not sufficient ground for termination proceedings against him.[44]

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37 Hümmer v. Germany, [2012] ECHR, № 26171/07, § 38; Lucà v. Italy, [2001] ECHR, № 33354/96, § 39; Solakov v. the Former Yugoslav Republic of Macedonia, [2001] ECHR, № 47023/99, § 57.

38 Al-Khawaja and Tahery v. the United Kingdom [GC], [2009] ECHR, № 26766/05 and № 22228/06, § 119.

39 Van Mechelen and Others v. the Netherlands, [1997] ECHR, § 58, Report 1997-III.

40 Tarău v. Romania, [2009] ECHR, № 3584/02, § 74; Graviano v. Italy, [2005] ECHR, № 10075/02, § 38.

41 Al-Khawaja and Tahery v. the United Kingdom [GC], [2009] ECHR, № 26766/05 and № 22228/06, § 120; Gabrielyan v. Armenia, [2012] ECHR, № 8088/05, §§ 78, 81-84.

42 Trofimov v. Russia, [2008] ECHR, №1111/02, § 33; Sadak and Others v. Turkey (no. 1), [2001] ECHR, № 29900/96 and 3 others, § 67.

43 Karpenko v. Russia, [2012] ECHR, № 5605/04, § 62; Damir Sibgatullin v. Russia, [2012] ECHR, № 1413/05, § 51. Pello v. Estonia, [2007] ECHR, № 11423/03, § 35; Bonev v. Bulgaria, [2006] ECHR, № 60018/00, § 43.

44 Gossa v. Poland, [2007] ECHR, № 47986/99, § 55; Calabrò v. Italy and Germany (dec.), [2002] ECHR, № 59895/00; Ubach Mortes v. Andorra (dec.), [2000] ECHR, № 46253/99 (excerpts).

5.3. Reasoning of Refusal to Hear a Witness

Although provision of its opinion about relevance of presented evidences is not a duty of the ECHR, refusal to summoning a witness or examination thereof can be presumed as violation of the rights of defence, what is incompatible with the requirement of fair trial (see Popov v. Russia[45]; Bocos-Cuesta v. the Netherlands[46]; Wierzbicki v. Poland[47] and Vidal v. Belgium[48]).

It may prove necessary in certain circumstances to refer to depositions made during the investigative stage[49], e.g. if witness died[50] pleaded his/her right to remain silent [51] or when witness did not appear before the court irrespective of reasonable efforts of the authorities to secure his/her presence.[52] Given the extent to which the absence of a witness adversely affects the rights of the defence, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort.[53] Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care.[54] If a witness did not make appearance at adversarial proceedings for an excusable reason, the national court is entitled to decide whether to take account of depositions made by the witness concerned during pre-trial phase, if these depositions are supported by other evidences as well.[55] Article 6 § 3(d) requires cross-questioning of only those witnesses who have not testified before the court, it their depositions have played decisive or important role in the conviction of the individual (see Kok v. the Netherlands (dec.)[56]; Krasniki v. the Czech Republic[57]).

Where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, it would constitute a very important factor to balance in the scales, and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are

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45 Popov v. Russia, [2006] ECHR, № 26853/04, § 188.
46 Bocos-Cuesta v. the Netherlands, [2005] ECHR, № 54789/00, § 72.
47 Wierzbicki v. Poland, [2002] ECHR, № 24541/94, § 45.
48 Vidal v. Belgium, [1992] ECHR, § 34, Series A no. 235-B.
49 Lucà v. Italy, [2001] ECHR, № 33354/96, § 40.
50 Ferrantelli and Santangelo v. Italy, [1996] ECHR, § 52, Report 1996-III.
51 Vidgen v. the Netherlands, [2012] ECHR, № 29353/06, § 47; Sofri and Others v. Italy (dec.), [2003] ECHR, № 37235/97; Craxi v. Italy (no. 1), [2002] ECHR, № 34896/97, § 86.
52 Mirilashvili v. Russia, [2008] ECHR, № 6293/04, § 217.
53 Al-Khawaja and Tahery v. the United Kingdom [GC]), [2009] ECHR, №26766/05 and №22228/06, §125.
54 S. N. v. Sweden, [2002] ECHR, № 34209/96, § 53; Doorson v. the Netherlands, [1996] ECHR, § 76, Report 1996-II.
55 Mirilashvili v. Russia, [2008] ECHR, № 6293/04, § 217; Calabrò v. Italy and Germany (dec.), [2002] ECHR, № 59895/00; Ferrantelli and Santangelo v. Italy, [1996] ECHR, § 52, Report 1996-III.
56 Kok v. the Netherlands (dec.), [2000] ECHR, № 43149/98.
57 Krasniki v. the Czech Republic, [2006] ECHR, № 51277/99.

sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.[58]

While the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle, since, as was acknowledged by the Supreme Court, each result in a potential disadvantage for the defendant. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him.[59]

The use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention.[60] Although Article 6 (art. 6) does not explicitly require the interests of witnesses to be taken into consideration, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.[61] National authorities should present sufficient and sound reasons for maintaining the anonymity of some witnesses.[62]

However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. In such cases such difficulties should be sufficiently counterbalanced by the procedures followed by the judicial authorities.[63] Specifically, an applicant should not be prevented from testing the anonymous witness's reliability.[64]

Furthermore, when assessing that procedures of questioning an anonymous witness counterbalances difficulty faced by the defence, adequately importance should be the fact, how decisive was this evidence in conviction of the claimant. If such evidence was not of decisive importance, the rights of the defence will be restricted to a much lesser extent.[65]

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58 Al-Khawaja and Tahery v. the United Kingdom [GC], [2009] ECHR, № 26766/05 and № 22228/06, § 147.

59 Ibid, § 127.

60 Doorson v. the Netherlands, [1996] ECHR, § 69, Report 1996-II; Van Mechelen and Others v. the Netherlands, [1997], § 52, Report 1997-III; Krasniki v. the Czech Republic, [2006] ECHR, № 51277/99, §76.

61 Doorson v. the Netherlands, [1996] ECHR, § 70, Report 1996-II; Van Mechelen and Others v. the Netherlands, [1997] ECHR, § 53, Report 1997-III.

62 Doorson v. the Netherlands, [1996] ECHR, § 71, Report 1996-II; Visser v. the Netherlands, [2002] ECHR, № 26668/95, § 47; Dzelili v. Germany (dec.), [2005] ECHR, № 65745/01.

63 Doorson v. the Netherlands, [1996] ECHR, § 71, Report 1996-II; Van Mechelen and Others v. the Netherlands, [1997] ECHR, § 54, Report 1997-III.

64 Birutis and Others v. Lithuania, [2002] ECHR, № 47698/99 and № 48115/99, § 29; Kostovski v. the Netherlands, [1989] ECHR, § 42, Series A no. 166.

65 Kok v. the Netherlands (dec.), [2000] ECHR, № 43149/98; Krasniki v. the Czech Republic, [2006] ECHR, № 51277/99, §76.

5.4. Right to Call a Witness

As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter". (see Perna v. Italy [Great Chamber][66]; Solakov v. the Former Yugoslav Republic of Macedonia).[67]

It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth and protection of the rights of the defence.[68] When the applicant has made a request to hear witnesses which is not vexatious, and which is sufficiently reasoned, relevant to the subject matter of the accusation and could arguably have strengthened position of the defence or even led to the applicant's acquittal, the domestic authorities must provide relevant reasons for dismissing such request.[69]

Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to call and hear a witness (see. e.g. S. N. v. Sweden [70]; Accardi and Others v. Italy (dec.)[71]). There can be exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with the requirements of Article 6 of the Convention.[72]

5.5. Refusal of Witness to Testify (Witness Immunity – "Privilege")

European Court of Human Rights (Grand Chamber) in the Case of Van der Heijden v. the Netherlands held, that domestic courts correctly rejected applicant's testimonial privilege in criminal trial opened against her partner.

It was established, that applicant was summoned as a witness in the criminal investigation, related to fatal shootings, however, she refused to testify before the investigating judge as the main suspect was her partner with whom she had two children. The applicant argued that she should be regarded as entitled to the testimonial privilege (immunity) afforded to suspects' spouses and registered

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66 Perna v. Italy [GC], [2003] ECHR, № 48898/99, § 29.

67 Solakov v. the Former Yugoslav Republic of Macedonia, [2001] ECHR, № 47023/99, § 57.

68 Perna v. Italy [GC], [2003] ECHR, № 48898/99, § 29; Băcanu and SC «R» S. A. v. Romania, [2009] ECHR, № 4411/04, § 75.

69 Topić v. Croatia, [2013] ECHR, № 51355/10, § 42; Polyakov v. Russia, [2009] ECHR, № 77018/01, §§ 34-35.

70 S.N. v. Sweden, [2002] ECHR, № 34209/96, § 44.

71 Accardi and Others v. Italy (dec.), [2005] ECHR, № 30598/02.

72 Dorokhov v. Russia, [2008] ECHR, № 66802/01, § 65; Popov v. Russia, [2006] ECHR, № 26853/04, § 188; Bricmont v. Belgium, [1989] ECHR, § 89, Series A no. 158.

partners under the Code of Criminal Procedure. Later she was detained for thirty day for failure to comply with a judicial order on giving testimony.

The applicant filed an appeal with the Supreme Court. The latter found, that the testimonial privilege (immunity) envisaged by domestic legislation, protected "family life" between spouses, registered partners, however it did not encompass the other partners irrespective of long-terms cohabitation. This difference in treatment was reasonable and objective, as it served the purposes of establishment of truth and legal certainty. The attempt made to compel her to give evidence against her partner was an interference in the right to respect for family life. The interference was "in accordance with the law" and served the legitimate purpose of prevention of crime (Convention, Article 8).

As regards the question – whether the interference was necessary in a democratic society, Convention Member States had different practice, which opted more for granting wider discretion to the state when two public interest were competing: prosecution of grave crime and protection of family life from State interference. The Netherlands was one of the first countries to create legislative regulation and grant privilege (immunity) to certain category of witnesses. As far as non-giving testimony was an exception to civic duty, it could have been subjected to certain conditions and formalities to be defined by law. The law of the Netherlands exempted next to kin, spouses, former spouses and registered partners and former registered partners of the accused from the obligation to testify. This list limited the application of this exception to persons whose ties were objectively certifiable. Member States were authorized to set certain limit for testimonial privilege and delimit between marriage and registered partners.

The ECHR did not uphold the applicant's argument, that she should have been entitled to the testimonial privilege (immunity) afforded to suspects' spouses and registered partners under the Code of Criminal Procedure. Decisive factor was not the length or type of relationship, but rather the responsibility, combined of contractual rights and obligations. The absence of comparable legally binding agreement made partner's relationship with the applicant fundamentally different from that of married couple and registered partners. Had domestic court decided otherwise, it would have become necessary to assess the nature of marital relationships or establish conditions, when informal relationship would have been equalised to formal one on a case-by-case basis. The applicant remained "protected" beyond family relationships, which were subject to "testimonial privilege". In the opinion of the ECHR the appealed intervention was not disproportional and unjustified and was not restricting applicants' interests. Applicant's detention for thirty days was not found disproportional either as domestic legislation provided for sufficient guarantees.[73]

6. Conclusion

Witness immunity, as an institute of criminal procedure, is a set of legal (exceptional) norms, providing for the right of witnesses of certain category to refuse to testify. Such persons are divided into three groups: 1. Persons, who generally cannot be questioned as witnesses in a criminal trial; 2.

[73] The Van der Heijden v. Netherlands, [2012] ECHR, № 42857/05.

Persons, who generally can be questioned as witnesses, but have the right to refuse to testify; 3. Persons, who may be exempted from the performance of the duty of a witness by the court of law. Objective and subjective understanding of witness immunity are delimited. Essentially witness immunity can be divided into two groups: a) the right against self-incrimination; b) right to refuse to testify against next to kin. According to right against self-incrimination, witness immunity can be classified as absolute (imperative) and relative (dispositional) immunity. Absolute immunity of a witness is in play, when a witness is entitled by law to refuse to testify. A person who, due to his/her physical or mental disability, is not able to duly comprehend, memorise and recollect essential to the case circumstances, and give information or testimony cannot be interviewed or interrogated as a witness (CCPG, Article 50, Part 2). Relative (dispositional) immunity is in play, when a witness has an option to enjoy the right to refuse to testify while case-reviewing authority or official is in the position to question the witness, if the latter is ready to testify. This type of immunity extends to an accused, next to kin of an accused (witness immunity envisaged by Article 49(d) of the CCPG, specifically a witness may not give a testimony, which may incriminate him/her or his/her next to kin).

As a general rule, witness immunity does not apply to persons who deal with classified information, however, under Part 3 of Article 50 of the CCPG the court is authorized to exempt persons, listed in Part 3 of Article 50 of the CCPG from the obligation to testify. For uniform understanding, it will be desirable for criminal procedure law of Georgia to specify, whether who is next to kin of a witness prescribed by Article 49 (d) of the CCPG and also family members, envisaged by Article 3 (2), (3) and (4) of the CCPG; furthermore it will be reasonable for Georgian criminal procedure law to include the definition of a relative, envisaged by Article 31 (11) of the Constitution of Georgia.

It is desirable for criminal procedure law to specify, that witness immunity is also enjoyed by foster parents, prescribed by Article 71 of the Law of Georgia on Adoption and Foster Case, in criminal cases, involving their foster children, as well as by foster children in criminal cases, involving their foster parents.

As all the rights and obligations of a witness are also enjoyed by a victim under Article 57(1)(m)(n) of the CCPG, the latter is also entitled to immunity, prescribed by Article 49(d) of the CCPG.

Witness immunity is a legal privilege, legal security of a witness, guaranteeing the protection of rights of a witness in a criminal case.

This guarantee is contained in comment to Article 371 of the Criminal Code of Georgia. Specifically, a person who refused to testify against himself/herself or against his/her next to kin is exempted from criminal liability.

Witness immunity is an exception from general rule and not a categorical prohibition to testify. Consequently, if a witness, enjoying immunity, still agrees to testify or waivers his immunity, giving knowingly false testimony by the witness concerned will result in the imposition of criminal liability thereon under Article 370 of the Criminal Code of Georgia. “An accused — witness will not be charged for false testimony. Criminal liability can be imposed thereon only for false denunciation”.

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41. Doorson v. the Netherlands, [1996] ECHR, §§81-82, Report 1996-II.
42. Dzelili v. Germany (dec), [2005] ECHR, № 65745/01.
43. Ferrantelli and Santangelo v. Italy, [1996] ECHR, § 52, Report 1996-III.
44. Graviano v. Italy, [2005] ECHR, №10075/02, §38.
45. Gabrielyan v. Armenia, [2012] ECHR, № 8088/05, §§78, 81-84.
46. Gossa v. Poland, [2007] ECHR, № 47986/99, §55.
47. Hümmer v. Germany, [2012] ECHR, № 26171/07, § 38.
48. Kaste and Mathisen v. Norway, [2006] ECHR, № 18885/04, №21166/04, § 53.
49. Karpenko v. Russia, [2012] ECHR, № 5605/04, § 62., ECHR 2012.
50. Kok v. the Netherlands (dec.), [2000] ECHR, № 43149/98., ECHR 2000-VI.
51. Krasniki v. the Czech Republic, [2006] ECHR, № 51277/99., ECHR 2006.
52. Kostovski v. the Netherlands, [1989] ECHR, § 42, Series A no. 166.
53. Lucà v. Italy, [2001] ECHR, № 33354/96, § 41.
54. Mirilashvili v. Russia, [2008] ECHR, № 6293/04, §§158-159.
55. Pello v. Estonia, [2007] ECHR, № 11423/03, § 35., ECHR 2007.
56. Popov v. Russia, [2006] ECHR, № 26853/04, § 188., ECHR 2006.
57. Perna v. Italy [GC], [2003] ECHR, № 48898/99, § 29., ECHR 2003-V.
58. Polyakov v. Russia, [2009] ECHR, № 77018/01, §§ 34-35., ECHR 2009.
59. Romanov v. Russia, [2008] ECHR, № 41461/02, §97.
60. S. N. v. Sweden, [2002] ECHR, № 34209/96, § 45.
61. Sibgatullin v. Russia, [2012] ECHR, № 1413/05, § 45.
62. Solakov v. the Former Yugoslav Republic of Macedonia, [2001] ECHR, № 47023/99, §57.
63. Sadak and Others v. Turkey (no. 1), [2001] ECHR, № 29900/96 and 3 others, § 67.
64. Sofri and Others v. Italy (dec.), [2003] ECHR, № 37235/97.
65. Trofimov v. Russia, [2008] ECHR, № 1111/02, § 37.
66. Tarău v. Romania, [2009] ECHR, № 3584/02, § 74.
67. The Van der Heijden v. Netherlands, [2012] ECHR, № 42857/05.

68. Topić v. Croatia, [2013] ECHR, № 51355/10, § 42.
69. Ubach Mortes v. Andora, [2000] ECHR, № 46253/99.
70. Van Mechelen and Others v. the Netherlands, [1997] ECHR, § 58, Report 1997-III.
71. Vidal v. Belgium, [1992] ECHR, § 34, Series A no. 235-B.
72. Vidgen v. the Netherlands, [2012] ECHR, № 29353/06, § 47.
73. Visser v. the Netherlands, [2002] ECHR, № 26668/95, §47.
74. Wierzbicki v. Poland, [2002] ECHR, № 24541/94, § 45.
75. <www.supreme.justia.com/us/384/436/case.html>.

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Privacy Protection of Juvenile in Conflict with the Law at the Trial

The present article refers to the issue of privacy of the juvenile in conflict with the law, in particular the rule of examination of the case in closed court hearings and the issue of restriction of attendees at the trial; What are the international standards in this regard, the practice of foreign countries and legislative regulation in Georgia. There is a separate chapter on the controversy surrounding two competitive rights: the right to a privacy of the juvenile and the right to a public hearing, reviewing case-law of the European Court of Human Rights and the Courts of Foreign Countries.

As the juvenile justice code of Georgia has strictly defined the procedure of considering the juvenile case behind closed doors without any exeption and restricted by the list of attendees, it will be analyzed on the basis of international practice research, whether this provision is always in the best interest of the juvenile and protects the juveniles' rights.

Keywords: *Juvenile justice, juvenile in conflict with the law, right to a privacy, considering the case behind closed doors, right to a public hearing, attendees of juvenile's trial.*

1. Introduction

Children are holders of rights, rather than just objects of protection. They are beneficiaries of all human/fundamental rights and subjects of special regulations, given their specific characteristics.[1] The CRC was created bearing in mind that children, in contrast to adult human beings, are in need of special children's rights. This implies a distinction between the child and the adult, and a different legal position for both. [2]

The most notable aspect of the treatment of youths who offend in Western countries is that every country appears to have laws or policies reflecting the belief that youths should be treated differently from adult offenders.[3] Because of the relative immaturity of juveniles, due process protection of juveniles' "new" rights required special considerations which had not been typical in adult criminal procedures. Ways of assuring due process could not merely be borrowed from criminal court procedure, but must be modified to take into consideration the inherent social, emotional, and psychological characteristics of juveniles.[4]

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1 European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to the rights of the child, Luxembourg, 2015, 17.

2 *Hopman M. J.*, (Why) Should Children Have Rights? A philosophical Perspective, The United Nations Convention on the Rights of the Child (taking stock after 25 years and looking ahead), 2016, 272.

3 *Doob A. N., Tonry M.*, Varieties of Youth Justice, Crime and Justice, Vol. 31, Youth Crime and Youth Justice: Comparative and Cross-National Perspectives, Crime and Justice, The University of Chicago Press Journals, 2004, 3.

4 In re Gault,, Supreme Court of U.S., No. 116, 1 (1967). Ibid, *Grisso T.,* Juveniles' Waiver of Rights, Legal and Psychological Competence, New York, 1981, 2.

Under international standards, children, unlike adults, have a right to have their privacy respected at all stages of the proceedings.[5] "Confidentiality" is an important distinguishing factor between juvenile courts and traditional adjudicatory hearings.[6]

The aforementioned norm-principle is also reflected in Article 13 (1) of the Juvenile Justice Code of Georgia,[7] according to it, the right to a privacy of juvenile is guaranteed at any stage of the proceedings. And Article 26 of the same Code imperatively states that the case of a juvenile who is in conflict with the law shall be heard in closed hearing. The same article restricts the number of persons present at the sitting.

The purpose of this paper is to research the issue of the protection of the right to privacy in juvenile justice. Since the right to privacy of a minor includes many components and protection of the right is mandatory at all stages of the proceedings, from the initial contact with law enforcement up until the announcement of a final decision by the court, the present work concerns only a part of the protection of a juvenile's private life related to the examination of the case of the juvenile in conflict with the law in court.

2. Historical Development of Children's Rights

At the end of the 19th century the first juvenile justice system in the world was set up in Illinois, the United States of America [USA] and thereby the first juvenile court was established. The Illinois Juvenile Court Act (1899) is recognised as the first example of legislation that established a separate justice system for juvenile offenders (Sloth-Nielsen, 2001).[8] When America's first juvenile court was enacted in Chicago, it was open to the public and the press.[9]

Following in the footsteps of the USA many countries established separate legislation for juvenile offenders with separate juvenile courts, sentences and institutions. [10]

In 1908, Frankfurt became the first German city to establish a special court department for juvenile offenders, in 1923 according to the Youth Court Law .... prohibited public juvenile trials.[11] It served as a model for other countries.[12]

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5 *Hamilton C.,* Guidance for Legislative Reform on Juvenile Justice, Tbilisi, 2015, 88 (in Georgian).

6 *Greenebaum S. S.*, Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?, Journal of Urban and Contemporary Law, Vol. 44, 1993, 136.

7 Juvenile Justice Code of Georgia, 12/06/2015.

8 *Rap S.,* The Participation of Juvenile Defendants in the Youth Court A Comparative Study of Juvenile Justice Procedures in Europe, Utrecht, 2013, 37.

9 *American Bar Association (ABA) Division for Public Education*, The History of Juvenile Justice, Dialogue on Youth and Justice, 2007, 2, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/-DYJpart1.authcheckdam.pdf>, [04.11.2019].

10 *Rap S.,* The Participation of Juvenile Defendants in the Youth Court A Comparative Study of Juvenile Justice Procedures in Europe, Utrecht, 2013, 37.

11 *Albrecht H.,* Youth Justice in Germany, Crime and Justice, Vol. 31, Youth Crime and Youth Justice: Comparative and Cross-National Perspectives, The University of Chicago Press Journals, 2004, 445.

At the beginning of the 20th century international law on the rights of the child started to develop. This development occurred in tandem with the development of international human rights law.[13]

For a long time in human history, the legal status of the child was not the focus of attention by the state, government, international organisations and even family itself. The child was not treated as an independent holder of rights but rather as a more or less subordinate object of rights of the parents or guardians. More attention began to be paid to children and their position just after the First World War, when, thanks to the efforts and commitments of two sisters, Eglantyne Jebb and Dorothy Buxton, the fi rst Declaration of the Rights of the Child (1924) was adopted.[14]

Since then, many international acts and treaties on child rights have been adopted. These include the UN International Covenant on Civil and Political Rights (1966), the UN Standard Minimum Rules on the Administration of Juvenile Criminal Justice (the Beijing Rules, 1985), the UN Convention on the Rights of the Child (1989), the UN Rules on the Protection of Juveniles (Havana Rules, 1990), etc.

The promotion and protection of the rights of the child is one of the objectives of the EU on which the Treaty of Lisbon has put further emphasis. Notably, Article 3(3) of the Treaty on European Union today explicitly requires the EU to promote the protection of the rights of the child. The rights of the child are furthermore enshrined in the Charter of Fundamental Rights of the European Union.[15]

In the last 20 years, youth justice systems in Europe have undergone considerable changes, particularly in the former socialist countries of Central and Eastern Europe.[16]

As for Georgia, juvenile justice issues prior to 2015 were governed by the substantive criminal and procedural codes, which contained separate chapters devoted to the specific provisions applied only to juvenile proceedings. With regard to the protection of a privacy, it is noteworthy that the whole or part of a case was still heard in private with the request of a party accordance to the Article 16, paragraph 4 of the old Criminal Procedure Code, in order not to disclose intimate or confidential information of the person involved in the case when it was necessary for security protection of one of the party or his/her family members or close relatives. According to Section 7 of the same Article, the decision was made public in all cases, whether it was the case of a juvenile or an adult.[17] As for the new Criminal Procedure Code, before 2015, according to Article 317 §1, the trial attended by the juvenile defendant was closed.[18] The rule of pronouncing the judgment was adjusted in the same manner.

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12 *Palmer E.,* Germany: Children's Rights: International and National Laws and Practice, Law Library of Congress, 2007, 94, <https://www.loc.gov/law/help/child-rights/pdfs/ChildrensRights-Germany.pdf>, [04.11.2019].

13 *Rap S.,* The Participation of Juvenile Defendants in the Youth Court A Comparative Study of Juvenile Justice Procedures in Europe, Utrecht, 2013, 38.

14 *Jancic O. C.,* The Rights of the Child in a Changing World, 25 years after the UN Convention on the Rights of the Child, International Academy of Comparative Law, 2016, preface.

15 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child, 2011, 3.

16 *Dünkel F.,* Juvenile Justice Systems in Europe – Reform developments between justice, welfare and 'new punitiveness', Kriminologijos Studijos, Vol. 1, 2004, 32.

17 Criminal Procedure Code of Georgia, 20/02/1998 (Annulled 01/10/2010).

18 Criminal Procedure Code of Georgia, 9/10/2009 (consolidated version 12/06/2015).

The issue of separation of juvenile justice has become a pressing issue in the Georgian legislative field since the agenda of the Association Agreement with the EU has been defined to improve the juvenile justice legislation and to bring it into line with international standards. The Act stated that there was a need to reform the juvenile justice system in order to protect the rights of children.[19] On June 12, 2015, the Parliament of Georgia adopted the Juvenile Justice Code and Georgian legislation has mostly approximated international standards in this regard. However, I think a number of issues still need refinement and more in-depth study. Among them, the issue of protection of the juvenile's privacy which is one of the core principle.

3. The Scope of the Privacy Protection in Juvenile Court Proceedings

The protection of the right to privacy of a juvenile at all stages of the proceedings is one of the most important components of the rights of juveniles and one of the minimum guarantees of the right to a fair trial enshrined in Article 40 of the Convention on the Rights of the Child. Adults and minors have many common guarantees of the right to a fair trial, but there are some components that only characterize juvenile justice, including the protection of the right to privacy at all stages of the proceedings. According to the article 13 of the Juvenile Justice Code of Georgia guarantees the protection of the private life of the juvenile at any stage of the juvenile justice process. For the same purpose, the Code specifies the list of persons attending the trial. However, informations on previous conviction of juvenile and previous administrative liability are not public. Disclosure and publication of a minor's personal data shall not be permitted except as provided for by the Law of Georgia on Personal Data Protection. The personal data of minors may not be disclosed or published, except as provided for by the Law of Georgia on Personal Data Protection.

It is interesting to see how imperative are international acts and practices of foreign countries related to closed juvenile hearings and limitation of attendees at the trial, whether there are any exceptions to this rule, and whether Georgia's legislation is in line with international standards.

3.1. International Standards

The right to a public hearing is considered by international human rights treaties as one of the essential elements of the concept of a fair trial. The right to a public hearing means that the hearing should, as a rule, be conducted orally and publicly, and judgments should be made

public. However, the public should be excluded from all stages of the proceedings and the judgment should not be made public if the case is against a juvenile offender.[20]

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[19] Georgia-EU Association Agenda 2014-2016, 2014, 5, <https://eeas.europa.eu/archives/delegations/georgia/-documents/eap_aa/associationagenda_2014_ka.pdf>, [04.11.2019].

[20] *Manco E.,* Protecting the Child's Right to Participate in Criminal Justice Proceedings (Commentary), Amsterdam Law Forum, Vol. 8, Amsterdam, 2016, 67.

As mentioned above, Article 40 (II), (b), (VII) of the Convention on the Rights of the Child, which deals with the right to a fair trial, provides as one of the safeguards for the protection of the right to privacy of a minor at all stages of the proceedings. "All stages of the proceedings" includes from the initial contact with law enforcement (e.g. a request for information and identification) up until the final decision by a competent authority, or release from supervision, custody or deprivation of liberty. In this particular context, it is meant to avoid harm caused by undue publicity or by the process of labelling."[21] The Committee recommends that all States parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law.[22] In order to protect the privacy of the child, most States parties have as a rule – sometimes with the possibility of exceptions - that the court or other hearings of a child accused of an infringement of the penal law should take place behind closed doors. This rule allows for the presence of experts or other professionals with a special permission of the court. Public hearings in juvenile justice should only be possible in well-defined cases and at the written decision of the court. Such a decision should be open for appeal by the child.[23]

Another facet of the right to privacy is highlighted by the Beijing Rules, which recommend in principle that information leading to the identification of a juvenile offender should not be published. Such information would include, but is not limited to, the name. This protects the child's right to privacy and serves to prevent children from being identified or labelled as delinquents as criminological research has shown such labelling has had detrimental effects on children.[24]

As for the European Convention on Human Rights, one of the grounds for excluding public from the hearing is the interests of the juvenile. In particular, pursuant to Article 6, §1, "the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".[25]

In May 2016 the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings (hereinafter Directive on procedural safeguards for children or the Directive) has been adopted by the European parliament and the Council of the European Union. The Directive is legally binding for EU Member States and it should be implemented in national laws and regulations by June 2019, with the exception of the UK, Ireland and Denmark which are not taking part in the adoption of the Directive and are not bound by it or subject to its application.[26] Member

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21 UN Committee on the Rights of the Child (CRC), General comment No. 10: Children's Rights in Juvenile Justice, Geneva, 2007, §64.

22 Ibid, § 66.

23 Ibid, § 65.

24 *Van Bueren G.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 40 Child Criminal Justice, Leiden, Boston, 2006, 22.

25 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 (1), 1950.

26 *International Juvenile Justice Observatory*, White Paper on the EU Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. Key aspects, priorities and challenges for implementation in the EU Member States, 7.

States shall either provide that court hearings involving children are usually held in the absence of the public, or allow courts or judges to decide to hold such hearings in the absence of the public.[27] In relation to the draft of this article, the NGOs have submitted joint opinions, according: "Children should be judged in the absence of the public in order to protect their privacy and to facilitate their reintegration into society. Only in exceptional cases and when it is consistent with the best interests of the child should the court be allowed, to hold a hearing in public." [28]

As it seems, under international law, confidentiality is essential to protect juvenile's right to a privacy in juvenile justice, and the trial should usually be closed, though almost all acts state exeption from this rule, if it is in the best interests of the child. This is clearly reflected in the practice of foreign countries.

3.2. The Practice of Foreign Countries

In Germany the issues of juvenile justice is regulated by Youth Courts Law. Article 48 of the above mentioned law applies to the protection of the privacy of a juvenile at the trial. Specifically, according to section 1, the deliberations before the decision-taking court, including the announcing of its decisions, shall not be open to the public. And according to Section 2 of the same article, besides the participants to the proceedings, the aggrieved person, his parent or guardian and his legal representative, and, where the defendant is subject to the supervision and guidance of a probation officer or the care and supervision of a care assistant or if a social worker has been assigned to him, the probation officer, care assistant and the social worker are permitted to be present. The same shall apply to the head of institution in cases in which the youth receives supervisory assistance in a residential home or comparable institution. The judge may admit other persons for special reasons, id est. for training purposes.[29]

It is noteworthy that in Germany the right to attend juvenile proceedings may be granted to other persons. For instance, according to the section §175 (3) of Courts Constitution Acts of Germany, "Exclusion of the public shall not constitute an obstacle to the presence of the judicial administration officials responsible for supervision of service at the hearings before the adjudicating court."[30] Other persons may also be allowed to attend the trial if there is a reasonable basis, for example if the person is: Law student, referee, social worker, police officer. ... Each person must be personally permitted to attend the trial ... The decision on the admissibility of persons at a hearing shall be decided by the

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27 Procedural safeguards for children who are suspects or accused persons in criminal proceedings, The European Parliament and the Council of the European Union, Directive (EU) 2016/800, Article 14 (2).

28 Joint civil society position on the draft report of Caterina Chinnici on the proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings, 2014, 7.

29 Jugendgerichtsgesetz (JGG), Bundesgesetz, Jugendgerichtsgesetz in der Fassung der Bekanntmachung vom 11. Dezember 1974 (BGBl. I S. 3427), das zuletzt durch Artikel 4 des Gesetzes vom 27. August 2017 (BGBl. I S. 3295) geändert worden ist.

30 Gerichtsverfassungsgesetz, GVG, 9 May 1975, <https://germanlawarchive.iuscomp.org/?p=771#175>, [04.11.2019].

Chairman of the sitting only.[31] However, it should also be noted that the large number of people attending the trial should not frighten the youth, which is one of the grounds for appeal.[32]

At the youth court of Germany, "only part of the proceedings may be closed, as the closure of a trial depends on a particular case, since publicly announcing the decision may not necessarily contradict the latter. When the decision is announced, the process may also be closed."[33]

It seems that the court proceedings in youth courts of Germany are usually closed, but in exceptional cases, the judge has the right not only to allow persons to attend the hearing for educational purposes, but also to the court staff who supervise the administration. However, it may be possible for a judge to close only a part of the proceedings in exceptional cases.

As for the USA, "juvenile courts traditionally have been closed to the public".[34] As a policy matter, it was believed that youthful offenders should not be stigmatized forever because of one mistake. Another justification for secrecy was promoting rehabilitation of the youthful offender. For example, the Vermont Supreme Court upheld a statute closing juvenile proceedings to the public, holding that publication of information about youthful offenders could impair the rehabilitative goals of the juvenile system. [35]

In the United States, many courts believe that publicity is an interference with the rehabilitation of juvenile defendants. An open hearing of the case may create negative publicity and deprive the system of an informal atmosphere. In addition, courts have the responsibility to protect minors and their families from any emotional or physical harm. If a minor commits a serious crime, the publicity may endanger any opportunity for a fair trial.[36]

But high profile crimes involving minors, such as the March 1998 schoolyard shooting tragedy in Jonesboro, Ark., have led to changes in public attitudes about the juvenile justice system and a youthful offender's right to privacy.[37] The rise in juvenile crime rates, coupled with widespread media coverage of violent crimes committed by juveniles, has created a public perception that the nation is under attack. This perception has not only driven many states to prosecute more juveniles as adults, but also open more juvenile proceedings and records to the public and to impose heavier sentences on juveniles. This recent increase in violent crimes committed by juveniles has caused a shift from goals of rehabilitation to those of retribution and deterrence. Many states have opened juvenile proceedings to the public when a minor is charged with a violent crime that incites community outrage.[38]

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31 *Brunner R., Dölling D.,* Jugendgerichtsgesetz, Kommentar, 12. neu bearbeitate Aufl., 2011, 313.

32 Ibid, 310.

33 Ibid, 314.

34 *The Reporters Committee for Freedom of the Press*, Access to Juvenile Courts, A reporters guide to proceedings & documents, 1999, 2.

35 Ibid.

36 *Greenebaum S. S.,* Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution? Journal of Urban and Contemporary Law, Vol. 44, 1993, 143.

37 *The Reporters Committee for Freedom of the Press*, Access to Juvenile Courts, A reporters guide to proceedings & documents, 1999, 2.

38 *The Reporters Committee for Freedom of the Press*, Access to Juvenile Courts, A reporters guide to proceedings & documents, 1999, 2.

There was a discussion in the United States at the end of the 20th century about whether juvenile court hearings should be closed. One of the most interesting work on this issue is Jan Trasen's article, which was first asked in 1995: „Do closed Hearings Protect the Child or the System?"[39] In one case, for example, a juvenile's trial was held for five years, during which time the child was transferred from shelter to shelter, which could have a severe impact on her. Her grandmother argued over the negative side of the confidentiality of the process, that in case of openness „a healthy dose of media attention might have raised some public concern about the plight of her granddaughter during the five-year period in which S.E. was shuffled around the bureaucracy of the child welfare system."[40]

Some scientists in the US believed that "decisions that have profound implications for the lives of children and their families should be open to public discussion."[41] According to the opinion of Geraldine Van Bueren, ''This is a forceful argument which child advocates have to confront. Any exception to the principle of open justice can only be sustained by reliance upon the best interests of the child. With open proceedings, the chances of the child being stigmatized would increase and the informality would decrease. However, there is a danger that in human rights cases, violations may go unnoticed in proceedings not open to the public."[42]

Some juvenile court critics argue that "juvenile offenders are criminally responsible for their misconduct, and that by their actions they thereby waive their rights to privacy and anonymity ... that public access to juvenile courts can only improve a system shrouded in secrecy and plagued by inconsistency, error, and limited resources.[43]

It should be noted that the issue of access to juvenile trials in the United States varies from state to state. "The vast majority of states have statutes within their juvenile codes that grant the juvenile court judge the discretion to admit or exclude the public from juvenile proceedings. These proceedings are typically closed unless a third party can show a "direct" or "proper" interest in the case.109 A crucial element in many states is whether opening the proceedings to the public is in the best interest of the child.llo In these states, if the court finds that publicity may have an adverse effect on the juvenile, the judge may grant a court closure order, although these orders are highly scrutinized.[44] A few states determine access to juvenile proceedings based on the seriousness of the charge, under the theory that a juvenile charged with "adult crimes" such as murder and rape should be subject to any adult treatment the press and public wish to render.[45]

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39 *Trasen J. T.,* Privacy v. Public Access to Juvenile Court Proceedings: Do closed Hearings Protect the Child or the System?", Boston College Third World Law Journal, Vol. 15, Issue 2, 1995., 359.

40 Ibid, 378.

41 *Nijnatten C.,* Behind Closed Door: Juvenile Hearings in the Netherlands, International Journal of Law and the Family, Vol. 3, Issue 2, 1989, 177.

42 *Van Bueren G.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 40 Child Criminal Justice, Leiden, Boston, 2006, 22.

43 *Trasen J. L*, Privacy v. Public Access To Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?, Boston College Third World Law Journal, Vol. 15, Issue 2, 1995, 372.

44 Ibid, 373.

45 Ibid, 374.

In the USA, Among the people and entities who may be given access to juvenile criminal records are: parents and legal guardians, juveniles' attorneys, school officials, law enforcement agencies, federal, state, and city attorneys, research organizations, and child protective agencies.[46]

It seems that in both of the above-mentioned countries, which represent different legal systems, confidentiality of juvenile justice is seen as an essential principle, although they do not exclude the possibility of exceptions. In particular, in Germany if it is in the best interests of the juvenile, and in most states of America, the right to a public hearing outweighs the juvenile's right to a privacy, if the juvenile commits a serious crime.

However, the list of attendees of the trial is not always limited to the participants in the process, and in the case of supervisory and educational purposes, the judge is authorized to allow other persons as well.

3.3. Georgian Legislation

As for the Georgian legislation, as mentioned above, the issue of the protection of the privacy of a juvenile is regulated by Article 13 of the Juvenile Justice Code of Georgia, which provides that "the privacy of juveniles shall be protected at all stages of juvenile justice procedure".

"This article can be conditionally divided into two parts. "I - The state should not allow the dissemination of information on a child in conflict with the law that would lead to its identification;"[47] „II - Television reporting should not be able to identify appearance of adolescents, since integration into and reintegration of a "guilty person" into society will be impeded."[48]

According to Article 29 (1) of the Juvenile Justice Code of Georgia, "cases of juveniles in conflict with the law shall be reviewed in closed court hearings." The right to attend the trial under the same article is granted only to the following persons on various grounds: legal representative of the juvenile, his or her lawyer, psychologist, witness and victim coordinator; Section 6 of Article 3 of the same Code also lists the persons involved in the process: a judge, investigator, prosecutor, police officer, lawyer, social worker, mediator, probation officer, witness and victim coordinator, juvenile rehabilitation staff, and relevant prison staff. The Code does not provide for any other exceptions.

It is true, that when considering the case of a juvenile, the circle of persons present at the hearing must be strictly limited to safeguard the privacy of the juvenile and that is why the above-mentioned norm is imperative which does not allow for the exception; However, the question may also be asked: Is the closed court hearing always compatible with the best interests of the juvenile? Is it

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46 *Michon K.,* Juvenile Court: An Overview, Nolo Network – web library of consumer-friendly legal information, <https://www.nolo.com/legal-encyclopedia/exceptions-confidentiality-juvenile-criminal-records.html>, [04.11.2019].

47 *Shahovich N. W., Doek I. E., Cermaten J.,* Child's rights in International Law, Summary of Children's Rights and Context: All About Children's Rights, Tbilisi, 2015, 166 (in Georgian). See also: *Shalikashvili M., Mikanadze G.,* Juvenile Justice (Handbook), Tbilisi, 2016, 86 (in Georgian).

48 Ibid*,* 87.

necessary for those with some monitoring function to be able to attend the trial in order to identify the challenges in the juvenile justice system and, ultimately, to improve the system through their efforts?

To summarize international standards and international practice, I think, in exceptional cases, the judge should have the right to allow the court to attend even those who periodically evaluate and conduct research in order to improve juvenile justice. This is also emphasized in the "Beijing Rules": „Efforts shall be made to establish a regular evaluative research mechanism built into the system of juvenile justice administration and to collect and analyse relevant data and information for appropriate assessment and future improvement and reform of the administration."[49] It is also explained that „Rule 30 thus establishes standards for integrating research into the process of policy formulation and application in juvenile justice administration. The rule draws particular attention to the need for regular review and evaluation of existing programmes and measures and for planning within the broader context of overall development objectives. A constant appraisal of the needs of juveniles, as well as the trends and problems of delinquency, is a prerequisite for improving the methods of formulating appropriate policies and establishing adequate interventions, at both formal and informal levels."[50]

German legislation also gives researchers and other persons the opportunity to attend the trial of the juvenile on the basis of educational objectives. Another argument of this view is the recommendation to the member states of the Committee on the Rights of the Child that "States parties conduct regular evaluations of their practice of juvenile justice, in particular of the effectiveness of the measures taken, including those concerning discrimination, reintegration and recidivism, preferably carried out by independent academic institutions".[51]

4. Case-law - Right to a Privacy v. Right to a Public Hearing

It is an important question, in what circumstances, can be restricted the right to a public hearing by the right to a privacy of the juvenile and when does the right to a public hearing has a superiority to the right to a privacy of the juvenile? When comparing these two rights in a collision, is the right to the juvenile's privacy always prioritized?

Article 6 §1 of the European Convention on Human Rights clearly indicates the interests of juveniles as one of the grounds for restricting the publicity of judicial proceedings. "However, the interests of juveniles usually include the exception of "protection of the privacy of the parties". In addition, juvenile interests are often comprised into other categories, including, especially in the exception of protection of "morality". Therefore, a clear reference to juveniles can be understood as permitting a lower standard of use than in adult cases. This means that in order to safeguard the interests of juveniles, restricting publicity will be considered easier "strictly necessary".[52]

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[49] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Beijing rules, 1985, Part six, 30.3.

[50] Ibid.

[51] UN Committee on the Rights of the Child (CRC), General comment No. 10: Children's Rights in Juvenile Justice, Geneva, 2007, VII, 99.

[52] *Trechsel S.*, Human Rights in Criminal Proceedings, Tbilisi, 2009, 143 (in Georgian).

It is noteworthy that the guarantee of a public trial consists of two independent aspects. On the one hand, it is set out in Article 6 as the individual right of the accused. The public trial of a defendant may be in the interest of the defendant so that everyone, especially his or her friends and relatives, has the opportunity to monitor the trial and to complain about any inaccuracy by a State representative. However, at the same time, publicity may further aggravate the defendant's psychological situation. On the other hand, it is an institutional guarantee, in particular, the way of ensuring public oversight on the administration of justice and it promotes respect for the law and not only for the accused but also for witnesses, experts and other participants in the proceedings.[53]

"The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 (art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained."[54]

Public scrutiny encourages the courts to take special care to uphold the rules of fairness.[55] In one of the high-profile cases heard by the European Court of Human Rights, these two rights contradicted each other: the right to a privacy of the juvenile and right to public hearing. In the case "T. and V. v. the United Kingdom"[56], where two 10-year-old boys were convicted of killing a two-year-old child, the European Court of Human Rights has raised concerns about the level of publicity related to children. The court also noted "an international tendency in favor of the right to respect for the private life of juvenile offenders". The Court found that allowing media to attend a trial contributes to a violation of Article 6 (right to a fair trial) of the European Convention.[57]

In the USA, the Supreme Court of Ohio made a determination related to this issue, that "a juvenile court may restrict public access to its protective proceedings if, after hearing evidence and argument on the issue, it finds 1) that public access reasonably could be found to harm the child or endanger the fairness of the proceeding, and 2) that the potential for harm outweighs the benefits of public access."[58] It should be noted, however, that there are some useful considerations of open juvenile proceedings in US practice that „Arguments in favor of open dependency proceedings suggest that public access would achieve the following goals: to improve the system's fairness and effectiveness, to reduce judicial abuse and error, and to encourage improvement in the juvenile court system through greater public awareness and involvement.[59]

In some cases in the US, records of crimes committed by juveniles may be made publicly available. As juvenile delinquency has grown and become more violent, policymakers have had to

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53 *Trechsel S.*, Human Rights in Criminal Proceedings, Tbilisi, 2009, 147 (in Georgian).
54 Sutter v. Switzerland, ECHR, 8209/78, 1984, §26.
55 *Trechsel S.*, Human Rights in Criminal Proceedings, Tbilisi, 2009, 145 (in Georgian).
56 T. & V. v. the United Kingdom, ECHR, 24888/94, 24724/94, 2000.
57 *Hamilton C.*, Guidance for Legislative Reform on Juvenile Justice, Tbilisi, 2015, 89 (in Georgian).
58 *Case T. R.,* The Supreme Court of Ohio, 1990, at 449, 451. See also: *Trasen J. L.*, Privacy v. Public Access To Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?, Boston College Third World Law Journal, Vol. 15, Issue 2, 1995, 376.
59 *Trasen J. L.,* Privacy v. Public Access To Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?, Boston College Third World Law Journal, Vol.15, Issue 2, 1995, 377.

balance competing interests: public interests and juvenile privacy. Some courts grant public access to juvenile delinquency records when "the public's right to know and the strong interests of the victims outweigh any concern about stigmatizing L.M. or endangering his chances of rehabilitation" [60]. However, agencies may have to redact sensitive information about minors in such situations, including their names. [61]

In Re JR38,[62] the Court found that the fourteen-year-old child at the heart of the proceedings had no expectation of privacy over the publication by the police of photographs of the child involved in riots, as the public interest in identifying suspects alleged to have been involved in criminal acts outweighed any privacy considerations.[63]

One of the interesting case about this issue that was recently discussed was in Northern Ireland in 2015. According to the circumstances of the case, in 2010 two newspapers published a photo of a juvenile defendant who was only 14 years old at the time. These photos were published by newspapers at the request of the police. The publication of the photos was part of a police campaign aimed at resisting secret conspiracies. Appellant complained that the publication of the photographs was the violation of Article 8. The court did not find a violation of Article 8 and held that there was an interference with the right but the interference had been proportionate and justified.[64]

Legislation restricting access to the juvenile courts is often ambiguous and misleading.21 As previously mentioned, the majority of statutes provide that persons with a direct or proper interest have a right of access to juvenile proceedings. Yet, how does the legislature define "direct" or "proper"? Does the press fall within this inclusion? In each state, juvenile courts have answered these questions differently. The courts' analyses generally focus on three basic criteria: maintaining the structure and confidentiality of the juvenile courts; analyzing the history of First Amendment access to courtrooms; and balancing the interests of the press and the minors involved.[65]

The right to privacy of child offenders may be said to have ramifications which extend beyond their childhood. In Venables v News Group Newspapers, the boys who killed James Bulger were granted lifelong anonymity. This decision reflected their status as children when they were sentenced, although the decision was primarily concerned with the extent of the threat to theirlives if their identities were ever revealed.[66]

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60 U.S. v. L.M., 425 F.Supp.2d 948 (N.D. Iowa 2006).

61 *Michon K.,* Juvenile Court: An Overview, Nolo Network – web library of consumer-friendly legal information, <https://www.nolo.com/legal-encyclopedia/exceptions-confidentiality-juvenile-criminal-records.html>, [04.11.2019].

62 Re JR38 [2016] AC 1131.

63 *Morris B., Davies M. M.*, Can Children's Privacy Rights be Adequately Protected through Press Regulation? What Press Regulation Can Learn from the Courts, Journal of Media Law, Vol. 10, Issue 1, 2018, 101.

64 JR 38, RE Application for Judicial Review, Northern Ireland, 2015, <https://swarb.co.uk/jr38-re-application-for-judicial-review-northern-ireland-sc-1-jul-2015/>, [04.11.2019].

65 *Greenebaum S. S.*, Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?, Journal of Urban and Contemporary Law, 1993, 140.

66 *Van Bueren G.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 40 Child Criminal Justice, Leiden, Boston, 2006, 24.

5. Conclusion

In conclusion, it can be said that the protection of a privacy of juvenile, as a norm-principle, reflected in the juvenile justice code of Georgia, is a significant step forward in bringing Georgia's legislation closer to international standards. However, given the current reality, when the juvenile justice system is newly established in Georgia and the new juvenile justice code made the trial strictly confidential, I think, it is desirable for persons with supervisory functions to administer juvenile justice (this may be the High Council of Justice of Georgia) periodically, attend juvenile court hearings and conduct research in order to identify the challenges facing the juvenile justice system, which will ultimately lead to further improvement of the system.

However, I think the example of the practice of Germany deserves attention, and in exceptional cases, for research purposes, the court should have the opportunity to allow such persons to attend the trials of juvenile conflict with the law. By itself, such cases should be exceptional in order not to disturb the atmosphere in the juvenile court, which is such an essential attribute for juvenile justice. Summarizing international standards and international practice, this view will not be in conflict with any of them, but the recommendation of "Beijing Rules" will be taken into account: „Efforts shall be made to establish a regular evaluative research mechanism built into the system of juvenile justice administration and to collect and analyse relevant data and information for appropriate assessment and future improvement and reform of the administration." "Confidentiality does not mean secrecy. It is important for the public to understand how the juvenile court functions."[67]

I would also like to refer to the imperative rule provided in Article 29.1 of Juvenile Justice Code of Georgia, related to the closed hearings without any exception. If we allow the possibility that in highly exceptional cases, the public hearing may be compatible with the best interests of the juvenile and there is a motion of parties requiring public hearing of one of the part of a trial, should the law give the judge authority in extremely cexceptional cases to open even one part of the session?

If we look through the international acts and the practice of foreign countries once again, no such provision would be in conflict with it, since here too, the guiding principle would be the best interest of the juvenile. In addition, the right to a public hearing is one of the fundamental elements of the right to a fair trial as enshrined in international law and the Constitution of Georgia and may not be regarded Article 29, as a rule which prohibits juvenile to use one of the essential constitutionally guarantees, even when publicity is in his/her best interest.

I would like to reiterate that such a case should be an extremely rare exception, given that ,,every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected.[68]

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[67] *Greenebaum S. S.,* Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?, Journal of Urban and Contemporary Law, 1993, 161.

[68] United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 22 July 2005), III.8.a and I.6.

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Individual Aspects of Regulating Substantive Criminal Law Issues of Juvenile Justice

The following article discusses the following individual aspects of regulating substantive criminal law issues according to the juvenile justice code: the importance of considering the best interests of juveniles in juvenile justice; legislative shortcomings that impede the realization of the best interests of juveniles; aims of juvenile punishment, their interaction and importance at the time of determining the form of sentence. The article also focuses on the importance of the principle of proportionality in juvenile justice, the necessity of considering the personalities of juvenile convicts, juvenile sentencing and legislative regulation of sentencing, and the rules of use and importance of restorative justice (diversion and mediation) in criminal juvenile justice oriented toward their correction and education.

Key words: *Juvenile justice, juvenile sentencing, the aims of juvenile sentencing, the principle of proportionality, the best interests of the juvenile, diversion and mediation.*

1. Introduction

Georgia adopted a new Juvenile Justice Code on June 12, 2015, which regulates the issues related to the implementation of juvenile justice. Before Georgia adopted the Juvenile Justice Code, the related matters were regulated by the Substantive Criminal Code of Georgia, in which a separate chapter was envisaged for the criminal responsibility of juveniles, in particular, for sentencing juveniles, the exemption from criminal responsibility and punishment, and criminal responsibility.

Since Georgia has adopted the Juvenile Justice Code, the code regulates not only substantive criminal issues but also issues related to procedural criminal law and sentence enforcement. However, the article will discuss those substantive criminal aspects of the Juvenile Justice Code, which are of particular interest not only because the study of juvenile justice does not have a long history in Georgia, but also because it can be the subject of a different interpretation.

2. Protection of the Best Interests of Juveniles

Under Article 1 of the Juvenile Justice Code, the purpose of the code is to protect the juvenile's best interests in the resocialization and rehabilitation process of the juvenile in conflict with the law. In addition, the purpose of the code is to protect the rights of juvenile victims and juvenile witnesses, prevent further victimization of juvenile victims and juvenile witnesses, prevent reoffending and preserve the law. The provision of the legislative code aims to protect the best interests of the juvenile, resocialization and rehabilitation of the juvenile in conflict with the law, which indicates the advantage

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of the juvenile's interest over the public interest. This is natural because the criminal sanction applied to a juvenile has an educational and correctional function, in contrast to the criminal sanction applied to an adult person, which aims at general prevention of crime and restoring justice besides resocialization of the convicted.

What are considered as the juvenile's best interests is explained in Article 3 of the Juvenile Justice Code, which implies that the juvenile's safety, well-being, health care, education, development, resocialization-rehabilitation and other interests, which are determined in accordance with international standards, individual characteristics and consideration of the opinion of the juvenile. The best interests of juveniles consider the change of the purpose of traditional justice, i.e., sentencing criminals for rehabilitation and restorative justice.[1] The priority of the best interests of the juvenile is considered to be a viable option for the use of mediation, a measure provided by the Juvenile Justice Code.

When talking about the protection of the best interests of the juvenile, the question arises as to whether there is any shortcoming in the Georgian legislation regarding the implementation of the best interests in justice. According to the opinions expressed in legal literature, the competitive criminal proceedings that the Criminal Code of Georgia provides do not contribute to the true interest of the juvenile since the above-mentioned procedural principle restricts the judge in asking questions on the ground of agreement by the parties and find evidence. The practice of plea bargaining is allowed by the Juvenile Justice Code of Georgia (for example, part 2 of Article 71 is also considered to be incompatible with the best interests of the juvenile).[2]

The application of plea bargaining in juvenile justice is unacceptable. In the criminal juvenile justice law of Germany, unlike the criminal law for adults, the use of plea bargaining is considered inadmissible. The German Juvenile Justice Code does not envisage legislative regulation of plea bargain. If the German criminal law is aware of the institution of plea bargain regarding an adult, this institution is treated as something uncommon in juvenile justice.[3]

3. The Purpose of Sentencing Juvenile Convicts

Article 65 of the Juvenile Justice Code of Georgia implies re-socialization, rehabilitation and prevention of crime as the purposes of sentencing juvenile convicts, while the code does not at all imply the restoration of justice. While sentencing juvenile convicts should predominantly serve an educational function, the question arises as to whether restoration of justice can be a purpose the sentence.

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1 *Hamilton K.,* Notes from the Textbook of Juvenile Justice Legal Reform, Children's Legal Center and United Nations Children's Fund ("UNICEF") (trans.), Tbilisi, 2011, 34 (in Georgian).

2 *Shalikashvili, M., Milanadze G.,* Juvenile Justice (Textbook), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 76-77 (in Georgian); *Shalikashvili M.,* Notes on the Juvenile Justice Code, "Journal of Criminology", № 1, 2016, 79 (in Georgian).

3 *Streng F.*, Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 121-122, §7 VII Rn. 241; *Ostendorf H., Drenkhahn K.,* Jugendstrafrecht, 9 Aufl., Baden-Baden, 2017, 64, II 5, Rn. 57.

Modern criminal law is preventive by nature and oriented toward prevention of crime and resocialization of the convicted, rather than toward the restoration of justice. However, restoration of justice is sometimes considered to be an important goal of sentencing adult convicts. However, the question arises as to whether restoration of justice is one of the goals of sentencing in juvenile criminal justice.

In the history of adult criminal justice, there have been cases where restoration of justice, rather than prevention of crime or resocialization of the convicted, was considered as a basis for legitimizing the sentence. For instance, in Germany, the National Socialists have been convicted a long time after committing criminal offences and reoffending by these individuals was not expected in the future. The conviction of the sentenced convicts here did not involve crime prevention and resocialization of the convicted; restoration of justice was the only legitimate basis for the use of punishment in this context.[4] However, in juvenile justice, it is impossible for restoration of justice to be named as the primary purpose of sentencing.

All the regulations in juvenile criminal law are based on the idea of a sentence having an educational function in order to prevent new offences. Juvenile criminal law is called educational criminal law for this reason, while the latter is referred to as the law of perpetrators, which is contrasted with the law of action.[5] Thus, in reference to adults, the law uses a sentence as punishment, while it is used for educational functions in reference to juveniles.[6]

Young people (adolescents) are at the stage of change of roles between childhood and adulthood. At the same time, being an adolescent is not just a status. The phase of adolescence has acquired the importance of an independent condition in modern times. In the phase of adolescence, people can easily find themselves in a field that makes the socialization process difficult. They must comply with existing social and legal order. These demands both the ability to test their own behavior and the rules that affect the adolescent and determine the action. The phase of adolescence is related to a certain level of status and behavioral instability that increases the potential to deviate from the determined rules of behavior, which is why the process of socialization is complicated and this condition is compulsory to take into consideration during the determination of sentence.[7]

When sentencing a juvenile, the preconditions for sentencing are necessary to be fulfilled. This also concerns responsibility. In other words, the need for correctional skills is essential. The risk of recidivism falls under this need. If there is a risk of recidivism, the use of appropriate sanctions is permitted for the purposes of upbringing. Otherwise, the process may be suspended if the threat is small.[8]

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4 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, 4 Aufl., München, 2006, 88, §3 Rn. 44.
5 *Streng F.*, Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 9, §1, III, Rn. 15.
6 *Shalikashvili M., Mikanadze G.,* Juvenile Justice (Textbook), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 127 (in Georgian).
7 *Laubenthal K., Baier H., Nestler N.*, Jugendstrafrecht, 2 Aufl., Heidelberg, 2010, 2, §1, Rn. 3.
8 *Ostendorf H., Drenkhahn K.,* Jugendstrafrecht, 9 Aufl., Baden-Baden, 2017, 142, V 3, Rn. 175.

In legal literature, there exist arguments and counterarguments regarding the upbringing and educational functions of juvenile criminal justice. Pro-arguments include the existence of juvenile justice code and phrases such as "correction instead of punishment" and "correction through the punishment," used in juvenile criminal law.[9]

When using a punishment for juveniles, whether the sentence is guided by an educational and correctional standpoint depends on the crime committed. Sometimes a juvenile crime may be a result of the problems of juvenile development. In some cases, the main variable is the lack of upbringing.[10] It is therefore important to consider the determinant of the crime committed by the juvenile.

The violation of a norm by a young person is not often the expression of the lack of upbringing. However, correction is considered as the main principle of juvenile criminal law.[11] The educational view is considered to be the foremost purpose of juvenile justice when a juvenile is sentenced only due to the degree of the crime.[12] The Supreme Court of the Federal Republic of Germany pointed out in its decision about "educational primacy" as "the basis of all regulations of juvenile criminal law". In regard to the above mentioned, the upper limit of the sentence applied to the juvenile is also indicated.[13]

Despite the predominant importance of the educational standpoint in juvenile sentencing, it is considered inadmissible to violate the proportionality of punishment with regard to the accusation. This implies that the educational standpoint should be taken into consideration as long as the accusation does not exceed the upper threshold.[14] On the one hand, it is considered inadmissible to reduce the importance of education and correction to mere expediency, and on the other hand, the punishment's size cannot be resolved in educational terms if it is incompatible with the accusation.

Criteria for suitability, necessity and proportionality will be checked in the use of sanctions against the juvenile. According to the principle, which states that the correction is of primary importance, the answer should be given to the question whether the offence of a juvenile is an expression of obstruction in the process of studying the norm or it is a consequence of deviation in his/her normal development. There is a need for reaction with regard to the correction process when the violation in the process of learning is evident. Various educational programs are regarded as such reactions. On the second stage, the suitability of sanctions regarding the achievement of aims is checked.[15]

When it comes to juvenile penal law, the question arises whether juvenile punishment fulfils this function, when the sentence is not alleviated but becomes stricter. As relevant legal literature

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9 *Ostendorf H., Drenkhahn K.,* Jugendstrafrecht, 9 Aufl., Baden-Baden, 2017, 59, II 4, Rn. 51.

10 Ibid, 59, II 4, Rn. 52.

11 *Laubenthal K., Baier H., Nestler N.*, Jugendstrafrecht, 2 Aufl., Heidelberg, 2010, 2, §1, Rn. 4; *Diemer H., Schatz H., Sonnen B. -R.,* Jugendgerichtsgesetz, 7 Aufl., Heidelberg, 2015, 157, §17 Rn. 22; BGH GA, 1982, 554.

12 Strafverteidiger (StV), 1994, 599; Strafverteidiger (StV), 2001, 178.

13 BGHSt. 36, 42; BGH, NStZ 2002, 207.

14 *Eisenberg U*., Jugendgerichtsgesetz, 20 Aufl., München, 2018, 305, §17 Rn. 4.

15 *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 92, §5 Rn. 19-20.

points out, the disciplinary function can be justified even when the sentence becomes stricter.[16] The corrective view does not imply a specific measure of sentencing but the scope of the sentence in which a specific measure of punishment is determined to rejuvenate and rehabilitate the convicts.

Juvenile criminal law is an adequate preventive criminal law for juveniles which stresses on positive individual prevention with regulatory sanctions rather than on negative individual prevention by individual warning/intimidation. The goal of juvenile sentencing is the legal action, and the means to an end should be as effective as possible. In adult criminal law, it is traditionally called resocialization.[17]

Despite the fact that, in juvenile justice, sentencing and punishment bear a corrective function, punishment is still not divested of its repressive effect. Punishment should cause pain to the convicted because of his/her wrongdoings.[18]

In the case of adult or juvenile convicts, giving a sentence is interpreted as causing pain, [19&20] which is derived from the nature of the sentence and it remains unchanged for a convict of any age. The sentence itself is aimed at restricting the right of a convict, which is related to pain. Pain is not a purpose of punishment, but an immediate result.

Juvenile sentencing should first be oriented toward the convict and resocialization of the convict, which does not mean that the crime loses its significance. In juvenile criminal law, as indicated in legal literature, after the convict and his/her re-socialization, the punishment is oriented towards retaliation,[21] which means that retaliation is the second and not the primary purpose of the sentence. It should be said that, when talking about retribution by sentencing, we talk about just retribution that is different from naked revenge. That just retribution cannot be understood as naked revenge in juvenile criminal justice is evident from the fact that retribution is not considered as the primary purpose of a sentence. If retributions to be understood as naked revenge, resocialization of the convicted could not be named as the primary purpose of the sentence. In conditions of naked revenge, resocialization not only could not become the primary purpose of the sentence but also could not even be included in the purposes of the sentence.

It is true that juvenile justice is characterized as corrective criminal law, but it would be incorrect to justify its existence only by the corrective principle.[22] It is true that specialized individuals,

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16 *Ostendorf H., Drenkhahn K.,* Jugendstrafrecht, 9 Aufl., Baden-Baden, 2017, 59, II 4, Rn. 52.

17 Ibid, 60, II 4, Rn. 53.

18 *Schöch H.*, in: *Meier B. D., Rössner D., Schöch H.,* Jugendstrafrecht, 3 Aufl., München 2013, 215, §11 Rn 1.

19 *Albrecht P. -A.*, Spezialprävention angesichts neuer Tätergruppen, ZStW, 1985, 833; *Jescheck H. -H., Weigend Th.*, Lehrbuch des Strafrechts Allgemeiner Teil, 5 Aufl., Berlin, 1969, 65; *Kargl W.*, Friede durch Vergeltung, Über den Zusammenhang von Sache und Zweck im Strafbegriff, GA, 1998, 60-61; *Pawlik M.*, Person, Subjekt, Bürger, Zur Legitimation von Strafe, Berlin, 2004, 15.

20 *Christy N.,* The Limits of Pain, the Role of Punishment in Penitentiary Politics, 1st Georgian ed., Georgian-Norwegian Association of the Rule of Law, Tbilisi, 2017, 13 (in Georgian).

21 *Schöch H.*, in: *Meier B. D., Rössner D., Schöch H.,* Jugendstrafrecht, 3 Aufl., München, 2013, 217, §11 Rn. 5.

22 *Streng F.*, Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 9, §1 III Rn. 16.

such as prosecutors, judges and lawyers, are included in juvenile justice, but they are not educators.[23] In juvenile criminal law, education is understood as proportional prevention for young people.[24] To achieve this goal, it is necessary to select the juvenile's proportional strategy that responds to the needs of individual juvenile socialization.[25]

Juvenile criminal law, as genuine criminal law, plays a very important role in maintaining legal peace through strengthening the values and norms of society.[26]

Sentence for juvenile convicts is correctional, although it is not considered as a sufficient basis for legitimizing the sentence. As some of the authors indicate in relevant literature, the primary purpose of sentencing juvenile convicts is retribution and protection of society from new crimes. However, here it is meant to provide security and not general prevention.[27] If for some of the authors the issue correction is primary, for other authors redemption is primary.

According to the position established in German jurisprudence, correction and redemption are in line with each other, since the character of the convicted and the personality that is expressed in action are not only important for upbringing but also important to assess guilt. The aggravating circumstances of the sentence are not only important to determine the size of the sentence, but also to determine the need for upbringing.[28] According to this view, punishment in terms of upbringing brings the result only when it is proportional to the sentence.[29]

Whether the sentence for a juvenile serves a fair redemption of guilt is considered as controversial. If some authors do not exclude redemption of guilt from the purpose of imprisonment of the juvenile, the second part goes to the contrary conclusion and notes that, unlike in case of adults, the purpose of sentencing a juvenile is not a fair redemption of guilt.[30]

Despite the educational function of juvenile criminal law, guilt still plays an important role in determining the size of the sentence. Not only in adult criminal law but also in juvenile criminal law guilt is considered to be a prerequisite for criminal liability.[31] Guilt is not only the basis for punishment but also an important factor in determining the size of the sentence.[32] Age is taken into consideration, but is not limited in connection with guilt, together with other circumstances such as mental condition.

In assessing the circumstances to be considered while determining a sentence, the personality and behavior of the convicted will be taken into consideration. This indicates that determination of the

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23 *Laubenthal K., Baier H., Nestler N.,* Jugendstrafrecht, 2 Aufl., Heidelberg, 2010, 3, §1 Rn. 4.
24 Ibid, 3, §1 Rn. 5.
25 Ibid, 4, §1 Rn. 5.
26 *Streng F*., Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 9, §1, III, Rn. 16.
27 *Schöch H.*, in*: Meier B. -D., Rössner D., Schöch H.,* Jugendstrafrecht, 3 Aufl., München 2013, 215-216, §11 Rn. 1.
28 Strafverteidiger (StV), 2009, 93.
29 *Streng F*., Der Erziehungsgedanke im Jugendstrafrecht, ZStW 1994, 72.
30 *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 244, §18 Rn. 10.
31 Ibid, 63, §3 Rn. 1.
32 Ibid, 245, §18 Rn. 11.

degree of guilt involves the inner side of the action, for example, the motivation of crime and not the objective, which is an external event.[33]At the time of sentencing, it is also taken into consideration whether the person was in a state of diminished capacity as well as further actions committed after the crime, such as an attempt to correct the outcome. Some authors consider the unlawfulness of an act as much as it expresses the personality of the convicted and the degree of guilt.[34] Furthermore, in order to determine the degree of guilt, whether the convicted acted deliberately or out of negligence will be considered, which indicates the indirect significance of the action against the accused. If the action is of little significance that cannot be qualified as a crime, it will be impossible to justify guilt.[35] In criminal law, guilt means guilt in criminal activity. Guilt does not exist without the unlawfulness of the action. Unlawfulness is the prerequisite of guilt, which indicates the connection between an action and guilt.

According to the position of the German Supreme Court, it is true that the guilt of the convicted takes only the second place after the correctional approach in cases of juvenile sentencing. However, it does not mean that the unlawfulness of the action remains unconsidered. Guilt cannot be measured abstractly. The degree of guilt is determined in connection with the action. With regard to juveniles in reference to the level of their development and their personality type, they should be examined against the lawfulness and unlawfulness of their actions. Thus, a sentence that is proportionate to guilt will not be in contradiction with regards to the correctional approach.[36]

In general, proportionality of guilt with the sentence represents the upper limit of the sentence, which cannot be transgressed. The prohibition of disproportionate sentencing is derived from the constitutional principle of the responsibility of convict. Some authors claim that the above-mentioned requirement is also derived from the corrective standpoint, because a disproportionate sentence is unfair and prevents corrective upbringing, rather than making it possible.[37] The above-mentioned opinion contradicts the standpoint according to which the corrective function in juvenile criminal cases is primary and justifies sentencing of the juvenile on the bases of corrective standpoint. This view is based on the arguments which claim that a juvenile sentence is still a criminal sentence. Therefore, the standpoint of lawful sentencing in case crime cannot be considered unforeseen.[38] It is true that reparation of justice is not comparable with other priorities of juvenile justice, but the goal still retains certain importance in juvenile criminal justice.

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33 BGHSt 15, 226; NStZ 1996, 496; *Schaffstein F., Beulke W., Swoboda S.*, Jugendstrafrecht, Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 170-171, §22 Rn. 455.

34 *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 245-246, §18 Rn. 11.

35 *Schaffstein F., Beulke W., Swoboda S.*, Jugendstrafrecht, Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 171, §22 Rn. 455.

36 BGH GA, 1982, 554.

37 *Brunner R., Dölling D.*, Jugendgerichtsgesetz, Kommentar, 13 Aufl., Berlin, Boston, 2018, 185-186, §18 Rn. 13.

38 See: *Schaffstein F., Beulke W., Swoboda S.*, Jugendstrafrecht, Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 172, §22 Rn. 458.

With regard to the criminal liability of juvenile convicts, the state, maturity, failure and ability to control the actions of a juvenile will be considered. The juvenile must be held accountable for being adult enough to understand the wrongfulness of the act and act accordingly.[39] Consequently, the responsibility of juveniles requires a certain degree of maturity, which enables them to understand that certain acts are prohibited and act accordingly in relation to such prohibitions.[40]

When a convicted person is deprived of his/her liberty, the harmful consequences of this sentence (restriction of liberty) must have a correctional effect on the convicted person.[41] If the execution of punishment excludes the correctional effect, it violates the dignity of the convicted.[42] The sentence of a juvenile is aimed at correction, but the need for punishment for a juvenile must be determined by the degree of the crime.[43] If punishment is not necessary due to the nature of the crime, despite the crime committed, a sentence should not be used if the perpetrator is a juvenile.

Sentencing juvenile convicts can serve as a preventive goal, but first of all, it is private prevention. The fact that private prevention is a legitimate aim of the sentence of a juvenile convict is indicated in the Juvenile Justice Code, where the punishment is aimed at resocializing the convicted. The resocialization of the convicted is an aspect of private prevention.[44] As for the general warning, it is closely related to the restoration of justice. Restoration of justice is a prerequisite for general prevention. Where juvenile crime retaliation is considered as a secondary goal, it is clear what role general prevention plays in juvenile criminal law.

As it is known, general prevention is divided into negative and positive general prevention. Negative general prevention or deterrence plays no role in determining the size of the sentence for a juvenile and setting a sentence since it does not protect the interests of the juvenile.[45]

The argument states that, according to the followers of the mentioned position, the interpretation of the meaning of guilt, where guilt is defined as a personal condemnation of unlawfulness, does not allow for the consideration of negative general prevention standpoint. The above-mentioned argument is used with regards to the unacceptability of considering the general preventive standpoint in cases of sentencing of juveniles.[46]

By the 1952 German Supreme Court decision, guilt is condemnation. The perpetrator is condemned through the sentence, for he/she did not act lawfully when he/she decided in favor of wrongdoing, even though he/she could act lawfully. The content of the indictment is that the person seeks free, responsible and moral self-determination and, thus, has the ability to act or not act against the law.[47]

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39 *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 64, §3 Rn. 2.

40 Ibid, 2014, 65, §3 Rn. 7.

41 *Schöch H.*, in: *Meier B. -D., Rössner D., Schöch H.,* Jugendstrafrecht, 3 Aufl., München, 2013, 215-216, §11 Rn. 1.

42 Ibid, 217, §11 Rn. 4.

43 Ibid, 217, §11 Rn. 5.

44 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, 4 Aufl., München, 2006, 75, §3 Rn. 13.

45 BGHSt 15, 226; *Eisenberg U.*, Jugendgerichtsgesetz, 20 Aufl., München, 2018, 305, §17 Rn. 5.

46 *Diemer H., Schatz H., Sonnen B. -R.*, Jugendgerichtsgesetz, 7 Aufl., Heidelberg, 2015, 157, §17 Rn. 22.

47 *Streng F.*, Schuld, Vergeltung, Generalprävention, ZStW, 1980, 639.

If the sentence represents personal condemnation, the determination of the degree of guilt and sentencing shall be based on the circumstances underlying the basis for personal condemnation. Such circumstances are associated only with the culprit, and not with the general public.

The concept of guilt and its content represents a controversial issue in criminal law literature. The definition of guilt, which explains guilt as a personal condemnation, is not supported by everyone. Some authors claim that not guilt, but the punishment is the condemnation while guilt is just the ground for condemnation.[48] However, the controversy related to the concept of guilt does not preclude the opinion that the negative general prevention approach shall not represent the circumstance while sentencing a juvenile.

While the consideration of negative general prevention is refused in cases of juvenile sentencing, in the opinion of one group of authors, it is permissible to consider the positive general standpoint. A sentence caused by guilt includes positive general preventive components. The sentence also serves supra-individual purposes. The sentence has a mechanical impact on the stability of the norm. As long as there is a requirement for a juvenile sentence for fair redemption or restoration of justice, punishment will always be automatically connected not only to special preventive criminal improvement but also with a positive general aspect.[49]

According to the positive general preventive standpoint, juvenile sentencing is linked to the consolidation of the public's conscience. In the case of juvenile sentencing, the irrelevancy of negative general prevention is based on the inconsistency with the criminal law especially oriented towards prevention, with the aim of deterring the society.[50]

The second group of authors and the German Federal Court do not consider juvenile sentence only as negative, but also as positive general prevention. It is enough to take into account that the punishment of juveniles has a reflexive influence on the logic of those around them. A juvenile who has violated a legal norm is subject to prosecution.[51]

Although juvenile justice is correctional, sometimes educational standpoint does not play any role. In this context, there are cases where trafficking of juveniles takes place in order to commit a crime that is envisaged in the criminal code. The same applies to cases where crimes were committed during juvenile years and sentencing after several decades have passed can only dissocialize a well-socialized citizen, for instance, border guard cases.[52]

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48 *Gamkrelidze O.,* The Concept of Criminal Punishment, "German-Georgian Criminal Electronic Journal", № 1, 2016, 6-7 (in Georgian).

49 *Schaffstein F., Beulke W., Swoboda S.,* Jugendstrafrecht, Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 173, §22 Rn. 460.

50 *Schöch H.*, in: *Meier B. -D., Rössner D., Schöch H.,* Jugendstrafrecht, 3 Aufl., München, 2013, 221, §11 II, Rn. 13; *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 244, §18 Rn. 9.

51 *Mtchedlishvili-Hädrich K.,* Sanctions in Juvenile Criminal Law According to the German Legislation, in the collection: *Lekveishvili M., Shalikashvili M.* (ed.), The Problems of Compulsory Punishment and Educational Nature of Juvenile Sentence, Tbilisi, 2011, 246 (in Georgian).

52 *Streng F.*, Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 10, §1 III Rn. 16.

The main purpose of a juvenile sentence is the redemption of guilt, but it does not exclude the restoration of justice as a secondary goal. Resocialization of the convict is intended not only for juvenile convicted persons but also for adult convicts. The resocialization of a convicted person is a principle of constitutional significance, which is based on the principle of legal state.

In accordance with the decision of the Constitutional Court of Germany, the constitutional requirement of the re-socialization of the convicted corresponds to the legitimacy of a society in which human dignity is at the center, and to the obligation of the principle of a social state. The prisoner should be given the opportunity to return to the society after serving the sentence. The state is obliged to take all legislative measures that are appropriate and necessary to achieve this goal.[53] The duration of deprivation of liberty as a punishment is important for the resocialization of the convicted. This issue is more important for juvenile convicts. In this regard, it is worth mentioning the decision of the Supreme Court of Germany, which states that it is important to consider before sentencing the impact of the sentence on the convicted from the special preventive standpoint of resocialization. Therefore, the type and size of sentence should be determined so as the achievement of the purpose of resocialization remains possible. When a juvenile convict is sentenced to a very long term of imprisonment, there is a threat that, because of the lack of personal liability in the society, it will be hard for the convict to achieve the goal of returning to the society again. The following concerns juvenile convicted persons who have not had a chance of positive development before. When the expectation of returning to society decreases, the resocialization of the convicted becomes harder to achieve.[54]

4. The Principle of Proportionality in Juvenile Justice

Chapter 2 of Juvenile Justice Code is based on the principles that are provided for juvenile justice. The following are the best interests of juveniles: prohibition of discrimination; harmonious development of a juvenile; proportionality; the priority of the most lightweight and alternate measure; imprisonment as an extreme event; juvenile participation in juvenile justice process; prohibition of delaying juvenile justice process shortly after the conviction of juvenile; the private life of a juvenile; individual approach to juvenile; and free legal aid. One of the principles listed here is the principle of proportionality. Under Article 7 of the code, "The measure applied to a juvenile in conflict with the law shall be proportionate to the action committed and must be consistent with his/her personality, age, educational, social and other needs."

The juvenile's penalty, which is inconsistent with the redemption of the offense, violates the principle of proportionality. But, according to U. Eisenberg, if there is disproportion between the quality of the guilt and the need for correction, the juvenile sentence as a response is not used, for example, theft of a low-value item. The severity of the crime constitutes the basis for justifying the sentence of

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[53] Entscheidungen des Bundesverfassungsgerichts (BVerfGE), 45. Band, 1978, 238-239; *Ostendorf H., Drenkhahn K.,* Jugendstrafrecht, 9 Aufl., Baden-Baden, 2017, 61, II 4, Rn. 54.

[54] StV, 2003, 222.

juvenile convicted persons, but the punishment, which excludes the necessary disciplinary development, is considered inadmissible.[55]

Protection of the principle of proportionality in juvenile justice requires that a penalty is imposed on the individual basis, i.e., individualization principle.[56]

The preventive aim of individual justice of juvenile is that criminal response towards juveniles' actions should be directed only to the person of the defendant/convict, and that is why criminal justice of juveniles is criminal justice of convicts. In general prevention terms, influence on others is negated. Even if the quality of guilt can justify the sentence of juveniles, the punishment measure should be individualized. Since the act determines the scope of punishment in parallel, juvenile criminal justice is called criminal law of "action" and "convicts".[57]

The principle of proportionality cannot be implemented without the principle of individualization, which requires the consideration of severity of the offense, quality of guilt and the needs of juvenile convicts.

Proportional punishment of the convicted person in the first place implies the punishment of the action in proportion to its severity, which guarantees that the convicted will not be punished by a disproportionately severe punishment. In German criminal law, there are some crimes distinguished for which imposition of punishment is considered as unreasonable for juveniles. Small thefts, damaging someone's property without aggravating circumstances, which represents a crime against property, are considered as such crimes. In this case, using punishment against the juvenile is considered as unreasonable.[58] In the case of negligent offenses, considering the quality of the guilt, using the penalty for juvenile convicted persons shall only be considered in exceptional cases.[59]

Under juvenile criminal law, during imposition of punishment on a juvenile, as noted earlier, the severity of the action and the punishment take backseat, and the focus is on the convicted person and his/her resocialization.

Proportionality means compatibility of not only the upper limit of the punishment, but also the lower limit of an action. Therefore, in terms of proportional punishment, unreasonably severe as well as unreasonably light punishment is excluded. But the question arises whether the issue should be solved differently when it comes to juvenile. While the case concerns a juvenile, proportional punishment is important for the exclusion and avoidance of a strict penalty, not in the sense that the use of light penalty must be excluded. If unreasonably strict punishment violates the right of a convict and represents an incompatible violation of the right of a convict, it may not be used in case of use of a too light punishment for the convict.

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55 *Eisenberg U.*, Jugendgerichtsgesetz, 20 Aufl., München, 2018, 318, §17 Rn. 25.

56 *Hamilton K.*, Guidelines for Legislative Reform of Juvenile Justice, Georgian Translation, Children's Legal Center and United Nations Children's Fund (UNICEF), 2011, 101 (in Georgian).

57 *Ostendorf H., Drenkhahn K.,* Jugendstrafrecht, 9 Aufl., Baden-Baden, 2017, 63, II 5, Rn. 56.

58 *Eisenberg U.*, Jugendgerichtsgesetz, 20 Aufl., München, 2018, 319, §17 Rn. 27.

59 *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 239, §17 Rn. 32.

If the primary goal of juvenile sentence is educational, the question arises, what is the basis for proportionality of short-term imprisonment? In what case can the use of short-term imprisonment in an educational viewpoint, and therefore proportionality of the sentence, be justified? A short-term imprisonment is proportionate when it is necessary to influence the convicted and protect the law.[60]

When it comes to proportional punishment, it does not mean a precise, specific measure of the sentence, but that penalty size should be approximate. Proportional sentence represents proportional to the convicted person's guilt, but proportional sentence of guilt does not imply a specific measure of an absolute sentence. Guilt is not a specific unit of sentence, but the lower and upper bound of the penalty, which gives the judge a chance to determine the size of a specific sentence.

The proportionality of a sentence may be determined by the exclusion of non-proportionality. Punishment incompatible with the severity of the crime is not proportionate. According[61] to the Constitutional Court of Georgia and in the views expressed in literature on constitutional law,[62] the non-proportionality of a sentence does not represent a simple inconsistency with the offence, but a rough, obvious discrepancy.

The juvenile's sentence should be fit the crime and necessary to avoid it.[63] Consideration of this requirement is of great importance to the principle of proportionality, because fitness and necessity are the structural elements of the given principle.

5. Determining the Convict-Oriented Sentence Instead of Act-Oriented Sentence

There are different opinions in criminal law literature on the importance of considering the personality of a convict during the imposition of a sentence. According to one theory, known as the proportionate doctrine of criminal action, the personality of the convict should not be considered when imposing a sentence. Because, according to this theory, taking into account the personality of the convict makes the conviction process non-transparent.[64] Therefore, the doctrine is oriented on action (unrighteousness) and its severity. However, under Article 7 of Juvenile Justice Code, it is necessary to consider the personality of the convicted person for the imposition of a penalty, which implies that the sentence should be proportionate not only in view of the severity of the action but also proportionate to the acting person.

It is true that modern criminal law, on the one hand, is a law of action, which means that the criminal is punished for committed actions and not for personal qualities, views and moods. On the other hand, the personality of the convict is also important when determining the sentence. The age of

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60 *Kaiser G., Schöch H., Kinzig J.,* Kriminologie, Jugendstrafrecht, Strafvollzug, 8 Aufl., München, 2015, 160.

61 Decision of 24 October 2015 of the Constitutional Court of Georgia, № 1/4/592, para. 25 and 38.

62 *Gotsiridze E.,* in the book: *Turava P.* (ed.), Commentary of the Constitution of Georgia, Chapter II. Georgian Citizenship. Human Rights and Freedoms, Tbilisi, 2013, 125 (in Georgian).

63 *Streng F.*, Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 210, §12 II Rn. 429.

64 See *Meier B. -D.*, Strafrechtliche Sanktionen, 4 Aufl., Berlin, Heidelberg, 2015, 170.

the convict represents the factor related to the personality of the convict. The personality of the convicted person and especially age are of essential importance when dealing with a juvenile.

In juvenile justice, the sentence is primarily oriented on the convicted and only later on the action.[65] Apart from the criminal energy and severity of the crime, juvenile criminal law also considers the personal development and social condition of the juvenile, for which the chances of stabilization and crime-free future are important.[66] In this case, consideration of social condition of the convict does not mean violation of the principle of equality before the law. It is important to consider the social condition, because it gives us the chance of possible determination of future stable life of the convict. In case the convict is socially vulnerable, and the convict's social condition and economic poverty are related to the criminal action, there is a mitigating circumstance of the guilt. On the other hand, the mentioned circumstances, from the preventive point of view, present the possibility of aggravation of the punishment, as due to the social condition of the convict the chance of repeating the crime exists. All of this demonstrates how important it is to take into consideration the social condition of the juvenile convicted person. Considering the personality of the convicted person is also important in criminal justice of adults,[67] but it is of special importance to juveniles.

Although the determination of juvenile justice is based on the personality of the convict, the severity of the offense is considered dominant in the German judicial practice of juveniles. One of the most noteworthy issues related to the topic of discussion is the issue of stricter punishment in case of repeatedly committing crimes. It is arguable that a stricter punishment is based on previous convictions and thus increasing the degree of guilt.[68] But in this connection, it is important that punishment for repeat offense does not reflect the educational approach, on which juvenile justice is based on.[69]

It is not accidental that, under Article 12 § 1 of the Juvenile Justice Code, the previous conviction of the juvenile is considered as annulled as soon as the sentence is served, which must be justified by the best interests of the juvenile. However, it should be mentioned here that the given preference does not apply if the juvenile still commits a crime.

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65 *Schöch H.*, in: *Meier B. -D., Rössner D., Schöch H.*, Jugendstrafrecht, 3 Aufl., München, 2013, 217, §11 Rn. 5

66 *Streng F.*, Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 223-224, §12 III Rn. 453.

67 Human personality and responsibility are the bases for the inner unity of crime and punishment according to Professor *Guram Natchkebia*. See *Natchkebia G.*, Problem of Inner Unity of Crime and Punishment, in the collection: Mzia Lekveishvili — 85, Anniversary Collection, Tbilisi, 2014, 19 (in Georgian).

68 In criminal law literature there are many different opinions expressed about previously convicted persons. If, according to one view, it increases the level of *mens rea*, in the second view, it increases the degree of guilt. The viewpoint, according to which the previous conviction is to be considered as a condition relating to the past life of the convicted, which does not determine the quality of *mens rea* or guilt, although must be considered at the time of imposition of the sentence, may help to determine the measure of sentence that will be preventive.Therefore, the circumstances that can be considered during the imposition of a sentence may be divided into three groups: the circumstances surrounding the *mens rea*, guilt and personality of the convict. However, some of the circumstances related to the personality of the convict may determine the quality of the guilt as well, for example, the age of the convicted person.

69 *Streng F.*, Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 225, §12 III Rn. 455.

During imposition of the sentence or making decisions against him/her, the necessity to consider the juvenile's personality is derived from the best interests of the juvenile, which represents the fundamental principle of juvenile justice.[70]

6. Deprivation of Liberty as the Last Resort

As it is known, criminal justice is the ultimate way or *ultima ratio* to fight against crime for the state. Consequently, criminal punishments are also considered to be state coercive measures, which are used in extreme cases when it is impossible to achieve a goal other than by imposing a sentence. Although sentencing is generally considered to be a sanction to be used in extreme cases, the requirements for the use of deprivation of liberty are even stricter because it restricts the freedom of the convicted person the most. When the matter concerns a juvenile, in the best interests of the juvenile, the possibility of using the sentence in the form of deprivation of liberty is even more restricted. Therefore, the Juvenile Code of Justice (Article 9) considers the deprivation of liberty as a special event by the legislature, which should be used only in case of extreme events. The only use of deprivation of liberty and short-term imprisonment as ultimate measures is derived from Article 37(paragraph b) of the Convention on the Rights of the Child and Section 2 of the Havana Rules.

In juvenile criminal law, sentence can be considered as the ultimate legal outcome, when the use of another measure is not sufficient or the quality of the crime reaches a level where the use of other measures is ineffective.[71] According to German criminal law, during the imposition of the sentence on a juvenile, the bad habits of the juvenile, which should be characterized not only at the time of committing the offense but also after committing the crime and at the time of hearing the case, must also be considered. What can be considered as bad habits and when it is considered that a person has bad habits is a matter of dispute in literature. Using bad habits as one of the grounds for the determination of a sentence causes a critical assessment that this represents branding of the convicted person and recognizing him as a "defective person".[72]

Priority for less severe punishments is derived from the principle of economic effectiveness of the crime as well. Using a punishment is expensive for the state.[73] Therefore, the savings of the state budget is also ensured by less severe punishments.

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70 *Hamilton K.,* Guidelines for Legislative Reform of Juvenile Justice, Georgian Translation, Children's Legal Center and United Nations Children's Fund (UNICEF), 2011, 35 (in Georgian).

71 *Schaffstein F., Beulke W., Swoboda S.*, Jugendstrafrecht, Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 165, §22 Rn. 440; *Streng F.*, Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 207, §12 II Rn. 424.

72 *Mtchedlishvili-Hädrich K.*, Sanctions in Juvenile Criminal Law According to the German Legislation, in the collection: *Lekveishvili M., Shalikashvili M*. (ed.), Problems of Compensation of Juvenile Punishment and Correctional Coercion, Tbilisi, 2011, 243-244 (in Georgian).

73 *Lekveishvili M.,* Punishment and Specifics of Sentence of Juveniles, in the collection: *Lekveishvili M., Shalikashvili M.* (ed.), Problems of Imprisonment for Torture and Correctional Coercion, Tbilisi, 2011, 35 (in Georgian*); Gamkrelidze O.,* Criminal Problems, III Vol., Tbilisi, 2013, 111-112 (in Georgian).

7. Individual Approach to Juveniles

Under the Juvenile Justice Code, the individual approach is a new practice introduced in the juvenile justice system. It involves making a decision using an individual assessment report, which involves taking into consideration individual characteristics such as age, level of development, conditions of life, upbringing and development, education, health status, family situation and other circumstances. This will enable the assessment of the nature and behavior of a juvenile and the identification of his/her needs. Individual assessment determines the risk of committing a crime or administrative offense by a juvenile and the measures recommended for the adequate development of the juvenile and facilitation of their integration into society. The preparation and consideration of an individual assessment report is required at the following stages of criminal proceedings: a) determination of a diversion measure; b) sentencing; c) individual planning of a custodial sentence; d) execution of a non-custodial sentence; and e) consideration of the issue of release on parole. By a resolution of the prosecutor, an individual assessment report may also be prepared and considered at the stage of deciding on the exercise of other discretionary powers. An individual assessment report shall be prepared by the National Agency of Execution of Non-Custodial Sentences and Probation, a legal entity under public law under the Ministry of Corrections of Georgia. The individual assessment report may be prepared in other cases under a prosecutor's decision at the stage of deciding on using discretionary powers. (Juvenile Justice Code, Article 27).

As mentioned above, age is one of the circumstances that should be taken into consideration during the decision-making process as the law imposes the obligation to treat juvenile convicts differently; the minority status of the convict is a kind of ground for limiting his/her conviction (accusation). For example, the term of deprivation of liberty for juveniles aged 14 to 16 years is reduced by 1/3. And the term of the final sentence shall not exceed 10 years. The term of deprivation of liberty for juveniles aged 16 to 18 years is reduced by 1/4. The term of the final sentence shall not exceed 12 years.

The above-mentioned rule of imprisonment for juveniles is valid regardless of whether there are mitigating or aggravating circumstances.[74] The mentioned rule applies even in the case of sentencing in combination of offenses and judgments.[75]

According to the individual assessment report, a convict's life, upbringing, development conditions, education and family situation is taken into consideration while sentencing. Based on the above circumstances, socialization of a juvenile convict can be correctly evaluated. It is important to take into account the level of socialization of a convict for the purpose of his/her resocialization. The type and size of the penalty shall be determined according to the mentioned circumstances.

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[74] *Todua N.,* Some Disputed Issues of Juvenile Sentence, in the book: *Todua N., Ivanidze M.* (ed.), Analysis of Juvenile Law and Court Practice, Tbilisi, 2017, 121 (in Georgian).

[75] Ibid, 114-117.

8. Punishment of Juvenile Offenders

The Juvenile Justice Code envisages the following types of sentencing: a) fine; b) house arrest; c) the deprivation of a right to carry out an activity; d) community service; e) restriction of liberty; and f) fixed-term imprisonment.[76] Unlike adult convicts, juvenile convicts are not sentenced with the penalties such as community service, deprivation of the right to hold public office and life imprisonment. The fact that the deprivation of the right to hold public office does not apply to juveniles is obvious, as a young person cannot be appointed to public office or local self-government body, which excludes the use of this sentence. Community service is a form of punishment that will be executed at the workplace by deduction of wages and if the person lacks the ability to occupy a position due to his/her age, community service is also excluded. The material criminal code envisaged community service for juvenile convicted persons, but it was later abolished as a form of sentence applied to juveniles. As for the prohibition of life imprisonment of the juveniles, it is derived from the principle of proportionality. Life imprisonment is a strict form of punishment and its usage against juveniles would breach the constitutional principle of resocialization of the convict. Lifetime imprisonment under the material criminal code is provided for particularly severe offenses where a person has full liability. As for the juvenile, he/she is not considered to be a person with full liabilities. A juvenile convict is not held fully liable for a crime and decreasing the upper margin of the deprivation of liberty to 12 years for 16 to 18-year-old convicts and to 10 years for 14 to 18-year-old juveniles derives from this.

Deprivation of liberty used for juveniles is different from sentencing used for adults. Deprivation of liberty towards juvenile convicted persons is aimed at educating them, though it is not a fixed measure. It should also be taken into consideration that the use of sentence is based on *mens rea*. Thus, a full replacement of the law of the action by the law of perpetrator is impossible.[77] Despite the fact that criminal justice of juveniles is primarily criminal law of the acting person, at the same time, it remains criminal law of the action. If the convicted person's fault is an important factor to be considered while sentencing, it means that the action taken by the convicted person is essential for sentencing. There is no *mens rea* without an action. Guilt condemnation means condemnation due to the action taken and not because of the personal characteristics of the convicted person.

Because juvenile criminal justice is based on the educational approach and the correctional characteristics of a penalty for the juvenile, the question of whether the terms of imprisonment, imposed by the Juvenile Justice Code, are justifiable arises. Maximum period of imprisonment that can be imposed on a juvenile for the purpose of education is arguable. In particular, if deprivation of liberty for more than 5 years is appropriate for a juvenile, whether it gives the opportunity to have a correctional influence on the convict is arguable. According to one of the opinions, imposing a term of

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[76] The deprivation of liberty is one of the genuine criminal punishments for juvenile convicts to be considered in the criminal justice of German juveniles. See *Schaffstein F., Beulke W., Swoboda S.*, Jugendstrafrecht, Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 165, §22 Rn. 440.

[77] *Schaffstein F., Beulke W., Swoboda S.*, Jugendstrafrecht, Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 166-167, §22 Rn. 442.

imprisonment for more than 5 years for a juvenile contradicts the correctional approach.[78] It should also be noted here that, in general, deprivation of liberty for a 14-15-year-old juvenile is not considered to be a constructive life-supporting method.[79]

When a juvenile convicted person is to be sentenced to deprivation of liberty and harmful consequences that threaten the upbringing are expected, the lower margin of the sentence for a juvenile convict shall be defined in compliance with the quality of *mens rea*. Charging the penalty, under the lower limit due to the degree of the guilt is considered as unacceptable, as according to the same opinion, otherwise, the purpose of a fair redemption of guilt would remain unreachable.[80] This opinion is controversial as the material criminal code and the Juvenile Justice Code of Georgia allow the possibility of a more lenient sentence than envisaged by the law. As a rule, the legislature determines the upper and lower margins so that *mens rea a*s a measure, together with the unrighteousness of the action, is considered. However, the legislature cannot take into consideration everything in advance. There may be such mitigating circumstances on the side of the convicted person that cannot be anticipated in advance. Thus, granting a judge the right to impose a more lenient sentence is very important. However, this does not mean that the judge should not take into consideration the unrighteousness of the action, nature of *mens rea* and personality of the convicted person. The decision of imposing a lighter sentence than provided by the law shall be made by taking the given circumstances into consideration.

When sentencing a juvenile, the time passed from the moment of committing a crime to the moment of making a decision shall be taken into consideration. The mentioned factor is also important when sentencing an adult, but it is granted a particular importance in case of juveniles, because they are at the stage of development, undergoing significant changes in living conditions in a short time. The requirement for a reasonable time to be processed is derived from Article 6.1 of the European Convention on Human Rights. Delaying the process leads to a violation of the mentioned requirement.[81]

It has been previously possible to apply fine, deprivation of the right to work, community service and imprisonment to juvenile offenders under the Criminal Code. However, the legislative regulation of the use of fine used to be different. The Criminal Code allowed the application of fine even if the juvenile offender was insolvent. In such case, the parents of the juvenile offender were supposed to pay the fine. A constitutional claim was filed in the Constitutional Court of Georgia concerning the constitutionality of this legislative regulation. The applicant considered that the impugned legislative regulation was unconstitutional because of the inconsistency with the principle of culpability. The Constitutional Court of Georgia ruled out the unconstitutionality of the impugned provision. The court opined that there was no violation of the principle of culpability because the juvenile offender was declared guilty, he/she was the one who committed the crime and not his parents; the juvenile was convicted

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78 NStZ 1996, 496.

79 *Schaffstein F., Beulke W., Swoboda S.*, Jugendstrafrecht, Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 167, §22 Rn. 443.

80 *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 249, §18 Rn. 20.

81 Ibid, 250, §18 Rn. 24.

not his/her parent.[82] The above-mentioned judgment of the Constitutional Court of Georgia has led to a number of controversial views in the legal community. One group of lawyers criticized the decision of the Constitutional Court and noted that the Constitutional Court justified the application of unfair sentencing.[83] Despite the judgment of the Constitutional Court, the legislation has been changed since and, under the Juvenile Justice Code, it is only allowed to impose fine on a juvenile when the juvenile offender has an independent income from a legal activity (Article 68). Such a solution of the issue is acceptable and fully compatible with the fundamental principles of criminal law.

The rule of imposing fine on the parents of the juvenile convict is envisaged by the legislation of other countries, which is not positively assessed by experts, since parents' desire to participate in the social reintegration process and active partnership of the minor could disappear. Furthermore, it is considered to be incompatible with the best interest of the juvenile.[84]

Fine as a punishment to be imposed on a juvenile offender can be assessed critically as the law does not define the maximum amount of fine that gives rise to a problem in terms of interpretation of the norm. Interpretation of the norm is an important principle that is based on the principle of the rule of law and essential for ensuring the legal stability of the country. The state's reaction to the offence should be foreseeable for the recipient of the norm, which is a necessary precondition for strengthening the confidence of the population towards justice.[85]

In the legal literature concerning the fine to be imposed on juvenile offenders, doubts are expressed in terms of achieving the goal of reintegration of a convict. The skeptical views expressed are often related to minors' restricted financial means.[86]

As noted above, the Juvenile Justice Code of Georgia permits the application of community service as one of the penalties to be imposed on juvenile offenders. Juveniles may be employed in community service for a period of 40 up to 300 hours. However, according to an opinion expressed in legal doctrine, the imposition of community service of 300 hours is contrary to the constitutional principle of proportionality, since the estimated amount of community service does not leave the juvenile convict free time for studying.[87]

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82 Decision of 11 July 2011 of the Constitutional Court of Georgia, № 3/2/416. Concerning the same issue, also see *Kopaleishvili M.,* Does the Action Provided by Para. 5^1 of the Article 42 of the Criminal Code of Georgia Involve Criminal Responsibility of a Parent, Journal of Law, № 1, 2013, 295-306.

83 *Gamkrelidze O.,* Fair and Unfair Punishment, "Life and Law", № 1, 2016, 3-8 (in Georgian).

84 *Hamilton K.,* Guidelines for Legislative Reform of Juvenile Justice, Georgian translation, Children's Legal Center and United Nations Children's Fund ("UNICEF"), 2011, 109 (in Georgian).

85 *Schwabe I.,* Decisions of the Federal Constitutional Court of Germany, *Chachanidze E.* (trans.), Tbilisi, 373 (in Georgian); *Izoria L.*, Modern State, Modern Administration. Tbilisi, 2009, 200 (in Georgian); *Shalikashvili M.,* Notes on the Juvenile Justice Code, "Journal of Criminology", № 1, 2016, 83-84 (in Georgian).

86 *Hamilton K.,* Guidelines for Legislative Reform of Juvenile Justice, Georgian translation, Children's Legal Center and United Nations Children's Fund ("UNICEF"), 2011, 109 (in Georgian).

87 *Ostendorf H., Drenkhahn K.,* Jugendstrafrecht, 9 Aufl., Baden-Baden, 2017, 143, IV 3, Rn. 178; *Shalikashvili M., Mikanadze G.,* Juvenile Justice (Textbook), 2nd ed, Tbilisi, Freiburg, Strasbourg, 2016, 82 (in Georgian).

In juvenile justice and criminal law, the introduction of home arrest as a sentence is an innovation. The Georgian legislation did not take into account the above-mentioned type of sentence. Home arrest was initially envisaged by the Juvenile Justice Code of Georgia, which was enacted in 2016 and has been applied to adults since January 2018.

Home arrest is distinguished from other forms of sentencing in that it is being executed at home and the convict is obliged to stay at home for a fixed period of time during a day. Home arrest is only applied to the offenders convicted for a less serious crime so that its enforcement does not interfere with paid work or education. Electronic surveillance systems may be used to control the complying with the obligation imposed on a convict during the detention. However, by the decision of the National Probation Agency, it may not be used.

Article 70 of the Juvenile Justice Code envisages deprivation of the right to work as one of the alternative penalties. In general, the employment of a convict helps in the process of the resocialisation of the convict. Deprivation of the right to work however entails the opposite. Therefore, the question arises as to the objective of deprivation of the right to work. The objective of crime prevention could be the answer.

When sentencing a person to deprivation of the right to work, it should be taken into account that its use should not cause the convicted unnecessary financial and social problems for the convicted person.[88]

When sentencing the juvenile, it should be taken into consideration whether a particular sentence reduces the risk of reoffending[89] and preference should be given to that type of sentence, which reduces the risk of recidivism.

9. Principal and Additional Penalties

Penalties envisaged for juvenile offenders are divided into principal and additional penalties. Imprisonment can be appointed only as a principal punishment, while other types of sentence can be classified in both groups, principal and additional penalties. From additional penalties, only community work sentence can be assigned as an additional punishment, even if it is not prescribed by the respective article of the Criminal Code of Georgia. (Article 71, Part 5, the Juvenile Justice Code). Such references are not given concerning additional penalties; this means that imposition of an additional penalty is only possible when it is envisaged under the private part of the article of the Juvenile Justice Code. This is very important for the protection of the principle of proportionality and excludes the threat of a disproportionate sentence for the convict.

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88 *Shalikashvili M., Mikanadze, G.,* Juvenile Justice (Textbook), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 140-141 (in Georgian).

89 *Ivanidze, M.,* Juvenile and His Best Interests, in the book: *Todua N., Ivanidze M.* (ed.), Analysis of Juvenile Legislation and Legal Practice, Tbilisi, 2017, 40 (in Georgian).

10. Penalties for Juvenile Offenders

In cases of juvenile sentencing, the judge must envisage the best interests of the juvenile and the individual assessment report. The Juvenile Justice Code provides the possibility of imposing one or more duties on the convict under Article 45 of the code along with the sentence. However, the judge must take into consideration the mental and physical abilities of the convict in order to be able to perform the obligation imposed on the convict. The electronic supervision mechanism is used in the process of non-custodial sentence, the terms and conditions of which are determined by the order of the Minister of Justice.

The Juvenile Justice Code (Article 76) permits to impose on juvenile offenders a more lenient sentence than envisaged under the law. This is possible if there was no conviction in the past, and there is a combination of mitigating circumstances that make it easier to impose a more lenient sentence than envisaged by the law. In the present legislative provision, it is noteworthy that the Juvenile Justice Code does not require a plea bargain between the parties to impose a more lenient sentence than envisaged by the law, unlike the Criminal Code (Article 55), which imposes a more lenient sentence than envisaged by the law only in cases of plea bargain between the parties. The fact that the Juvenile Justice Code does not require a plea bargain agreement between the parties for imposing of a more lenient sentence than envisaged by the law is welcomed, as the plea-bargaining party is guided by public interests. This does not allow considering the convict's best interests.

However, it is hardly possible to say that Article 76 of the Juvenile Justice Code fully provides the possibility to resolve the issue. As for imposing a more lenient sentence under the provisions of this article, it is a necessary condition that the offender must not be condemned in the conviction and there must necessarily be the unity of mitigating circumstances. Juvenile offenders are not subject to Article 55 of the Criminal Code of Georgia. If we do not take into consideration the plea bargain agreement between the parties, the Criminal Code is more liberally resolved to impose a more lenient sentence than prescribed by the Juvenile Justice Code. It is particularly noteworthy that there is a requirement for juveniles not to have a conviction in the past, in order to be more leniently sentenced than the law provides.

The above-mentioned requirement seems even more incorrect, considering that Article 12 of the Juvenile Justice Code requires the juvenile's conviction to be annulled immediately after serving a sentence. It turns out that record is extinguished when sentence is served, but the crime, of which one was convicted, will still be a hindrance to a more lenient sentence. This legislative regulation takes a more unjust look, given that it only applies to minors. It turns out that, in this case, the legislation treats minors more strictly. Apart from this, we should take into consideration the fact that when the Juvenile Justice Code excludes the possibility of imposing a more lenient sentence for a juvenile convict than it is envisaged by the law, it does not take into account the nature of the past conviction (deliberate or non-deliberate, violent or non-violent).

Article 76 of the Juvenile Justice Code, which states that the judge may impose on a minor a sentence which is less than the minimum provided by law or a more lenient sentence if no judgment of conviction has been delivered against the minor in the past, is considered to be unconstitutional be-

cause of the discrepancy between the norm and the personal development of the convicted, since the above-mentioned norm does not allow the juvenile to develop freely.[90] The discriminatory and outdated criminalization prevents the use of humane legislation against the juvenile, which is inconsistent with the juvenile's true interests.

While sentencing juvenile offenders, the court shall consider the defendant's ability to develop as well as reintegrate into the society,[91] the level of education, health condition, environment and circumstances of the offence, perception of crime by the minor,[92] criminal behavior after committing the crime and the possible impact of the sentence on the convict.[93] The relevant circumstances in case of sentencing are the following: offenders confessing to the crime, effective repentance, and attempt to pay damages and starting a job.[94]

The juvenile's sentence should be determined in a way that the necessary corrective and educational effect is possible. However, the prerequisite priority of correctional perspective on juvenile imprisonment should not be understood in a manner that the correctional and educational effects are the only goals that can be taken into account when applying the sentence. It is also necessary to take into account the fair redemption of guilt and the positive general preventive aspect of sentencing.[95]

Even though the correctional view of juvenile sentencing is crucial and essential, it cannot justify the degree of the sentence that exceeds the upper limit of a juvenile's offence. That is why the juvenile should not be subject to a penalty that goes beyond the upper limit of sentence.[96]

11. The Goal of Sentencing Juvenile Offenders

For the argumentative justification of a sentence, guilt redemption is considered as the scope of measurement of charging the penalty. However, determination of the degree of guilt in case of juvenile offence is based on the correctional aspect and the best interests of the juvenile, which is considered the dominant principle of justifying the sentence.[97]

The perceived theory of sentencing in juvenile justice is considered to be a theory of legal aid, which allows prevention within the scope of repression, which implies the correction and educational measures in the scope of guilt redemption.[98]

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90 *Shalikashvili, M.,* Notes on the Juvenile Justice Code, "Journal of Criminology", N 1, 2016, 86 (in Georgian).

91 *Eisenberg U.,* Jugendgerichtsgesetz, 19 Aufl., München, 2017, 1257, §106 Rn. 6.

92 *Hamilton K.,* Guidelines for Legislative Reform of Juvenile Justice, Georgian translation, Children's Legal Center and United Nations Children's Fund ("UNICEF"), 2011, 102 (in Georgian).

93 *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 248, §18 Rn. 16.

94 Ibid, 248, Rn. 18.

95 *Schaffstein F., Beulke W., Swoboda S.,* Jugendstrafrecht, Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 178, §22 Rn. 472.

96 Ibid, 179, §22 Rn. 474.

97 *Streng F.,* Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 225, §12 IV Rn. 455.

98 Ibid, 222, §12 IV Rn. 450.

It is considered to be a controversial issue in juvenile justice, whether it is justified to increase the penalty from the general preventive standpoint. According to one opinion expressed in Georgian legal literature, the penalty for juvenile offenders should not only affect the convicts but other juveniles who are inclined to commit a crime. The designated sentence contains a deterring effect and therefore serves not only private but also for general prevention.[99]

According to the opinion of the German Supreme Court, which represents the prevailing viewpoint, and also according to a viewpoint shared in the Georgian legal literature, tightening of the sentence is considered to be inadmissible for the purpose of deterring the public.[100] The tightening of the sentence for the purposes of deterring the public is more unacceptable in juvenile law, since the main principle of the juvenile legislation implies the avoidance of punishment that has the effect of dehumanization.[101]

12. The Age of Convict as a Ground for Incomplete Charging of Criminal Offence

The juvenile age of the prisoner represents a mitigating circumstance, in particular, if a convict is less than 21 years of age.[102] However, some authors consider the age to be a mitigating circumstance only in cases of minor offenders that are under the age of 18.[103] Nevertheless, it should be right to consider age as a mitigating circumstance not only for minors but also for young people. This is derived from the Juvenile Justice Code of Georgia, which applies not only to minors but also to young persons under the age of 21 (Article 2 of the Juvenile Justice Code).

The lesser the age of the convict, the lesser one may be held responsible. For example, from the standpoint of mental and moral maturity, a person who has reached the age of 14 is less responsible for his/her action than that of a 17 or 20 years-old.[104] This is related to the limited awareness and limited control over own actions, which does not exclude the possibility of different behavior but reduces its probability. Furthermore, the younger the convict, the greater is the possibility of influence on him/her by other people, since the psychology of the juvenile is not fully formed.

The Supreme Court of Georgia rightly considers the juvenile age of the convicted to be a mitigating circumstance, which is necessary to take into consideration in order to achieve the goal of resocialization.[105]

The Juvenile Justice Code, that allows the young age of the convicted person to be taken into consideration during sentencing, solves the matters relating to juveniles in a much more humane way than the Criminal Code in relation to adults.

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99 *Vardzelashvili S.,* The Goals of Sentence, Tbilisi, 2016, 269-170 (in Georgian).

100 *Streng F.,* Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 222-223, §12 IV Rn. 451; *Shalikashvili M., Mikanadze G.*, Juvenile Justice (Textbook), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 126 (in Georgian).

101 *Streng F.,* Jugendstrafrecht, 4 Aufl., Heidelberg, 2016, 222-223, §12 IV Rn. 451.

102 BGH StV, 1995, 584.

103 *Gotua Z.,* Criminal Law, General Part, Punishment, Tbilisi, 2001, 40 (in Georgian).

104 *Schöch H., in: Meier B. -D., Rössner D., Schöch H.,* Jugendstrafrecht, 3 Aufl., München, 2013, 224, §11 II, Rn. 18.

105 Decisions of the Supreme Court of Georgia, N 4, Tbilisi, 2005, 46 (in Georgian).

Taking into account the young age of the convict during sentencing is derived from the fact that at young age, especially in juvenile years, a person is not fully formed yet. It is easy to psychologically influence a young person and because of the young age the person may not have a full understanding of the consequences of his/her action.[106] The above-mentioned represents the basis for reducing the sentence of juvenile offenders due to age. Age of a convict is directly related to the level of his/her development, which is a significant circumstance to consider when applying a sentence.

13. Exemption from Criminal Responsibility for Juveniles

The Juvenile Justice Code provides the grounds for exempting a person from criminal responsibility. These are due to period of limitation, diminished responsibility, diversion and mediation.

Exemption from responsibility due to the expiry of the limitation period is related to the definite timeframes that are differentiated by the severity of the offence committed. It is noteworthy that the framework within which the limitation period is determined is different for adults and juveniles. For example, if six years is the limitation period for adults in case of a less serious offence, the term for juveniles is set at three years, i.e., half of the term determined for adults. If limitation period from the time of a serious offence committed by an adult is ten years, it is only five for juveniles.

The Criminal Code provides for the expiration of the limitation period not only from criminal responsibility but also for exemption from punishment. If the limitation periods relating to the release of responsibility are calculated from the moment when the crime was committed, the terms of exemption from the penalty shall be counted from the moment of sentencing the convict by a court.

As it was already said, diminished responsibility may present the basis for the exemption of the juvenile from criminal responsibility (Article 37 of Juvenile Justice Code) while the Criminal Code indicates the possibility of only mitigating the sentence on the basis of diminished responsibility for adults (Article 35). The same circumstance in the Juvenile Justice Code represents one of the bases for the exemption of a juvenile from criminal responsibility.

14. Diversion and Mediation in Juvenile Justice

The Juvenile Justice Code envisages the use of restorative justice for juvenile offenders, such as diversion and mediation if it ensures resocialization and rehabilitation of juvenile offenders and serves in preventing reoffending. Diversion occurs when the objective of the penalty is achieved without a sentence. The fact that diversion is used to achieve the same objectives a penalty derives from Article 38 of the Juvenile Justice Code, determining the objectives of diversion.

According to one of the opinions expressed in relevant legal literature, we cannot determine that diversion has the same goal as a sentence. The commentator is attempting to explain it by saying that

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[106] *Gotua Z.,* Criminal Law, General Part, Punishment, Tbilisi, 2001, 40 (in Georgian).

diversion and sentence interfere with different intensities in human rights and freedoms.[107] This view is not well-grounded. The fact that diversion and punishment are connected to the interference of various intensities in human rights and freedoms does not mean that these measures should necessarily serve different objectives. The types of sentencing are also related to the interference of various intensities in human rights, but it does not arise from that they serve different objectives. The idea that diversion and sentencing may serve the same purpose is represented by the following circumstance: diversion is an alternate measure of punishment and can be a sentence as well; the diversion measure is used against the offender.

There exists a possibility of diversion in the case of a less severe and serious offence (Article 38 of Juvenile Justice Code). Diversion is an alternate measure of punishment and makes criminal justice more humane,[108] since it is directed not at the past but at the future. Restorative justice programs are considered as an efficient way to reduce crime and manage its recurrence.[109]

When we talk about using the institution of restorative justice for achieving the purpose of sentencing for juveniles, we mean resocialization and rehabilitation of the convict, prevention rather than restoration of justice. Since the Juvenile Justice Code does not take into account the objective of penalty and diversion, mediation measures are not directed towards the implementation of this goal. Although according to one of the views expressed in legal literature, mediation provides the possibility of restoration of justice, since in this respect restoration of justice does not always entail a compulsory repressive measure;[110] this view should be considered controversial. Restoration of justice is not limited to the resolution of conflict between the parties only. Restoration of justice implies the right to retaliate for the crime committed. This requires the punishment of the perpetrator and excludes the measures of diversion and mediation.

It is only possible to use the measure of diversion when the juvenile has committed a less severe or serious offence. Criminal prosecution does not start, or an ongoing prosecution does not stop, during the period of diversion, that is decided by the prosecutor. Decision about diversion can be taken even after the proceedings in court.

Under the Juvenile Justice Code, When the prosecutor makes a decision to apply diversion, or the court reviews the case on the application of diversion on its own motion or based on a reasoned motion of a party, account shall be taken of the best interests of the minor, the nature and gravity of

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107 *Shalikashvili M., Mikanadze, G.,* Juvenile Justice (Textbook), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 94-95 (in Georgian).

108 *Tumanishvili G.,* Restorative Justice and the Perspective of Its Development in Georgia, in the collection: *Turava M.* (ed.), The Science of Criminal Law in the Process of European Development, the Collection of Scientific Symposium of Criminal Law, Tbilisi, 2013, 258 (in Georgian).

109 *Hamilton K.,* Guidelines for Legislative Reform of Juvenile Justice, Georgian translation, Children's Legal Center and United Nations Children's Fund ("UNICEF"), 2011, 104 (in Georgian); *Shalikashvili M., Mikanadze G.,* Juvenile Justice (Textbook), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 91-92 (in Georgian).

110 *Tumanishvili G.,* Restorative Justice and the Perspective of Its Development in Georgia, in the collection: *Turava M.* (ed.), The Science of Criminal Law in the Process of European Development, the Collection of Scientific Symposium of Criminal Law, Tbilisi, 2013, 263 (in Georgian).

the offence, the age of the minor, the degree of guilt, the expected punishment, any injury or damage caused by the minor, the preventive effect of criminal prosecution, the behavior after the commission of the crime, any previous crimes and the individual assessment report. Considering the circumstances mentioned above, imposing diversion is only possible in cases, when: the minor has no previous convictions; the minor confesses to the crime; there is no public interest in initiating criminal prosecution or continuing an already initiated criminal prosecution; and the minor and his/her legal representative have given an informed written consent to the application of diversion. The public prosecutor shall be responsible for the execution of the criminal prosecution or the decision on rejection of it in accordance with the general part of the Guidelines for Criminal Justice Policy.[111]

A diversion measure may impose on a minor the obligations, such as to start or resume study in an educational institution, start working, participate in medical treatment programs and spend leisure time in a specific manner. Diversion may also impose on a minor the obligation of fulfilling other obligations that will facilitate their resocialization and rehabilitation and prevent them from committing a crime in future.

The Juvenile Justice Code provides more stringent grounds for diversion regarding juveniles than the Criminal Procedure Code of Georgia regarding adults. In particular, the following grounds are necessary for the application of diversion: a) absence of criminal record; b) absence of past application of diversion; and c) confession to the offence. Such requirements do not apply to adult convicts, which puts juveniles in an unequal position in relation to adults.[112]

The grounds for refusing diversion can be the degree of guilt, when the use of the diversion measure regarding the degree of guilt is in contradiction with the perceptions of the society about justice, so that the fact of using a diversion measure becomes unbearable.[113]

In relation with the diversion of the juvenile from the sentence, the injustice of the action should also be taken into consideration. However, it is crucial to consider not the abstract severity of the action, but the injustice of the particular action. One group of authors discusses the gravity of a crime in close contact with the gravity of an action and if the gravity of the action is weak, then the severity of the guilt is excluded. Consequently, the injustice committed in particular cases represents the basis for determination of the degree of culpability.[114] On the other hand, the objective injustice of an action alone is considered insufficient to justify the degree of culpability; the personality of the offender should also be considered.[115]

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111 *Akubardia I.,* On the Development of the Institution of Diversion, in the collection: Guram Natchkebia — 75, anniversary collection, Tbilisi, 2016, 61 (in Georgian).

112 Ibid, 69-70.

113 *Schaffstein F., Beulke W., Swoboda S., Jugendstrafrecht,* Eine systematische Darstellung, 15 Aufl., Stuttgart, 2014, 171, §22 Rn. 457; *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 233, §17 Rn. 22; *Schöch H.,* in: *Meier B. -D., Rössner D., Schöch H.,* Jugendstrafrecht, 3 Aufl., München, 2013, 220-221, §11 II, Rn. 12.

114 *Meier B. -D., Rössner D., Trüg G., Wulf R.* (Hrsg.), Jugendgerichtsgesetz, 2 Aufl., Baden-Baden, 2014, 234, §17 Rn. 24.

115 Ibid, 234, §17 Rn. 25.

Although one group of authors supports the determination of the degree of culpability on the basis of the severity of a crime, the above-mentioned opinion could seem controversial in relation to the prohibition of double assessment principle. Double assessment is divided into prohibited and permitted double assessments, which means that double assessment is not always prohibited and is sometimes permitted. However, if we always assess the degree of culpability on the basis of the severity of a crime, soon we will come to the conclusion that double assessment does not exist. But, it is noteworthy to mention regarding this principle that it is not regarded as a functional principle in juvenile justice law.[116]

Diversion from penalty can be inadmissible, for example, in the cases of murder and intentional criminal offence resulting in a deadly outcome during criminal offences such as rape, robbery and kidnappings. According to a view expressed in German legal literature, apart from considering the degree of objective of justice while imposing a sentence, the court should also take into consideration the degree of personal responsibility. In such a case, the injustice is not evaluated independently, but along with the personal circumstances that indicate the connection of the offender with a criminal action.[117] When rejecting diversion and applying a sentence, legal virtue, against which the offence has been committed, will be also considered.[118] The above-mentioned crimes illustrate exactly the cases in which juvenile offenders will be sentenced.

15. Conclusion

In conclusion, it can be said that by adopting the Juvenile Justice Code, Georgia has taken a step towards a more liberal approach with regard to juveniles. It is primarily meant to give priority to the restoration of justice rather than punishment, which represents humanization of penal law. It is also important that the Juvenile Justice Code should focus on the objective of resocialization and reintegration so that juvenile justice is more corrective and educational than punitive. However, this branch of justice remains to be the domain that does not exclude repression when it is impossible to achieve sentencing objectives by non-punitive measures.

While recent reforms in Georgia concerning juvenile justice can be assessed positively in many areas, there are still gaps in legislation, which require further legislative regulation. For instance, it concerns imposition of more lenient sentences on juveniles which requires the existence of several requirements cumulatively; legislative regulation regarding juvenile diversion, which puts juveniles in a more difficult situation than adults; and the use of plea bargain institution in juvenile justice, which contradicts the juvenile's best interests.

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116 Ibid, 242, §18 Rn. 2.

117 *Schöch H.,* in: *Meier B. -D., Rössner D., Schöch H.,* Jugendstrafrecht, 3 Aufl., München, 2013, 220-221, §11 II, Rn. 12.

118 *Mtchedlishvili-Hädrich K.,* Sanctions in Juvenile Criminal Law According to the German Legislation, in the collection: *Lekveishvili M., Shalikashvili M.* (ed.), The Problems of Compulsory Punishment and Educational Nature of Juvenile Sentence, Tbilisi, 2011, 244 (in Georgian).

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David Tsulaia*

Nature of Sin in Crime and Criminality
(Normative Analysis)

Present article explores nature of sin in crime and criminality from the normative perspective.

Normative aspect is common feature for sin, crime and criminality. After, the issue whether the Orthodox Christianity deems sin a violation of positive law becomes necessary to explore. Respectively, the concept of state and law becomes the subject of our investigation. Analysis of the Old Testament reveals that state and law has divine ontology, which means that violation of the positive legal norm is sin. Though, one circumstance remained self-contradictory, whether the violation of legal norm adopted by the state that acknowledges and serves to the false gods should be regarded as sin. Analysis of the Gospel showed the transcendental nature of the state and law more clearly, and the obedience and disobedience towards unjust norm was explored.

Finally, conclusion is made that, except of unjust norm, violation of legal (positive) norm, adopted by the state, is sin.

Deriving from the study of Orthodox Christianity, Christian should fight against unjust norm according to the teachings of the Gospel and should obey the external trials sent by God, and therefore, Christian should obey law of such state.

Key words: *Sin, crime, criminality, norm, state and law.*

1. Introduction

Criminality, quantatively and qualitatively, exposes itself in new ways every year, which proves the fact that the science of crime, criminology is still inept to solve the core of the problem. The given situation indicates the necessity that science should take into account transcendental knowledge, and in particular, teachings of Orthodox Christianity when dealing with criminological issues.

Christianity deems that the genesis of all negative phenomena (immoral, antisocial and criminal) is sin. For this reason, it is expedient that science should use teachings of the Orthodox Christianity when exploring the issues of criminology. Moreover, in general, the use of Orthodox Christianity knowledge in scientific research is deemed to have no alternative.

In the case of Criminology, to explore such phenomena as crime/criminality, to understand its existential nature, is impossible independently only within the framework of a single science, or with integrated scientific theories, and without of its (crime/criminality) transcendental nature.

The objective the present article is to display the nature of sin in crime and criminality through the analysis of normative aspect of sin.

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2. Normative Nature of Sin

In the Universal Declaration of Human Rights, factually in all international agreements of Human Rights, in all constitutions of all countries,[1] as well as in criminal and international criminal law, there is in force the principle of legality *nullum crimen sine lege*, "there is no crime without law",[2] which has biblical ontology, "*sin is not counted where there is no law*" (Rom. 5, 13) and "*where there is no law there is no transgression*" (Rom. 13, 15).

Therefore, exploring the normative nature of sin, requires to begin research from the God's warning given to Adam, because first sin was committed just by violation of said warning. But, before we start research, we have to clarify from the outset what does term "norm" means itself.

Webster's International Dictionary defines "norm" as: 1. obligatory rule or standard; 2. standard of behavior or ethical value; principle of right behavior; especially imperative statement, which proves or denies that something should be done or that something has value; 3. ideal standard, which is obligatory for group of people and serves to control, or regulate right and acceptable behavior.[3]

According to the founder of normativism, *Hans Kelsen*, "by "norm" we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way."[4] "Norm" is a contents of the act by which a concrete behavior is ordered, defined or allowed.[5]

With regard to legal norm, *H. Kelsen* states that "it means regulation of human behavior and if it regulates human behavior by the coercive measure, as it is sanction".[6]

If we derive from the concept of norm, it means that by the warning of Adam, God established a norm, because statement "*but you must not eat from the tree of the knowledge of good and evil*" (Gen. 2, 17), is an establishment the specific *ought* behavior and statement "*when you eat from it you will certainly die*" (Gen. 2, 17), is a sanction. Therefore, first sin is violation of norm. Apart from this, correlation of God's warning and first sin, includes in itself the principle of legality - "there is no sin without norm".

Even at this point of our research, when we clarify that sin is violation of norm, and if we take into consideration the fact that crime and criminality in itself is violation of norm and norms, we have possibility to make preliminary conclusion that crime and criminality are expressions of sin.

Based on abovementioned, we can conclude that:

1. For the exploration the normative nature of sin, it is prime to define a rule of behavior, as a feature of norm;

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1 *Schabas W.*, Unimaginable Atrocities, Justice, Politics, and Rights at the War Crimes Tribunals, London, 2012, 27.

2 *Kedia B.*, Nullum Crimen Sine Lege in International Criminal Law: Myth or Fact? see: International Journal of International Law, (Volume 1, Issue 2), 2015, 1-2; <www.law.cornell.edu/wex/nullum_crimen_sine_lege>, [01.01.2015].

3 Webster's Third New International Dictionary of the English Language Unabridged, *Philip Babcock Gove Pj.* (ed.), USA, 1981, 1540.

4 *Kelsen H.*, Pure Theory of Law, *Knight M.* (trans.), 2nd ed., UK, LND, 1978, 4.

5 Ibid, 5.

6 *Kelsen H.*, General Theory of Law and State, *Wedberg A.* (trans.), 3rd print, USA, 2009, 123.

2. Normativity is common characteristic feature for sin, crime and criminality;

3. The principle of legality originates from the God's warning and first sin.

It is natural that research cannot end on this note, because we have to clarify, whether it is correct to level sin with crime and criminality only by the normative feature, since a) in science, according to the typology of norms, the God's warning belongs to divine, and not to state made positive, legal norms and what is more important, b) if we say by words of *Thomas Hobbes* "*autocratis, non veritas facit legem*" - "authority and not truth defines law".[7]

And law, - as *H. Kelsen* states, - is a normative order, system of norms,[8] state of which is expressed by personification of state.[9]

Based on abovementioned, in order to define the attitude of Orthodox Christianity towards state and violations of its legal norms, we have to analyze in Bible the concept of state and law in general.

3. Concept of State and Law in Old Testament

3.1. State and Law in First Human Society

God creates first human beings in his image (Gen. 1, 27) and grants them right to rule a whole country (Gen. 1, 28-30). In *St. Ephrem the Syrian*'s explanatory book of Genesis, we read that when human being got an authority over the land and everything, it means the image of God "who possesses heaven and earth."[10] *St. John the Golden Mouth*, explains that in the human beings under image of God is meant image of government that the Holy Letter implies in image, possessive and not contextual meaning.[11] In such situation, animals were scared of human being and they were trembling, as they were in front of the ruler. Authority of Adam was expressed also in fact that God "*brought them to the man to see what he would name them*" (Gen. 2, 19). Adam is calling names to all living creatures, which is a sign of authority,[12] as well as honor of royalty.[13]

The *St. Mark from Egypt* says about Adam: "the Lord established human being as a ruler over this visible country. Fire, water and even animals were unable to harm human".[14] It should be mentioned also that the word "right" is explained as "Governor", "Ruler", "Reign" and "Domination".[15]

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7 Pluralism and Law: State, Nation, Community, Civil society, Vol. 2, *Soetemen A.* (ed.), Proceedings of the 20th World Congress, Amsterdam 2001, 10; 2. *Khubua G*, The Theory of Law, Tbilisi, 2015, 65 (par. 160) (in Georgian).

8 *Kelsen H.*, General Theory of Norms, *Hartney M.* (trans.), Oxford, 1991, 330.

9 Ibid, 298.

10 *Siant. Ephrem the Syrian* Explanation of Genesis, Tbilisi, 2014, 28 (in Georgian).

11 *Saint John the Golden Mouth*, Homilies, II Vol., *Gogochashvili T.* (ed.), Tbilisi, 2015, 300, 303 (in Georgian).

12 Ibid, 304.

13 Ibid, 306.

14 The Teaching Basis of the Orthodox Christian Church, *Shovnadze D., Chachibaia N.* (comp.), Tbilisi, 2013, 40 (in Georgian).

According to the *Saint John of Damascus*, God created human being as „King of Earth, which is subordinated to God".[16] According to Bible schollar, *Ben Dunson*: „Adam is to rule over the whole world as a subordinate king underneath God, the true king over all. In this sense, God reigns over His creation in and through Adam".[17]

According to the terminology, state is entelechy of human being. State is within a human being, as teleological reason, as his internal aspiration, purpose, as a teleology, as a human's driving force and ultimate aim.[18]

Apart from this, when God created human being in his image and granted the right to rule over the world, God also warned human being not to eat the fruit of the knowledge of good and evil (Gen. 2, 16-17) and imprinted in him a law recognizing ability - conscience (*Saint Cassian of Imola, Saint Abba Seren*),[19] which is divine internal law.[20]

Conscience, as *Monk Paisios* of Mount Athos says is "God's first law, which was imprinted in the hearts of first human beings and which is transmitted to all of us from our parents, as a copy."[21]

Thus, we see state and law are established not by human being, but by God and His will is that human being to occupy and rule a whole world.

Events described in Bible show that first human beings do not obey internal law, they violate God's warning and commit sin (Gen. 3, 6). *B Dunson*, states that Adam, not only failed to dominate on the world, but the opposite, he rebelled against Sovereign, almighty God. Though, God, will not leave His intention to dominate on earthly world through human-king.[22] God defines for first human being, already new rules of conducts which is related to them and their generation (Gen. 3, 16-19, 21, 22-23). Again, the generation of Adam will not obey to divine internal law, which causes their total degradation (Gen. 6, 5, 11-12), except the family of Noe.

Since, the Noe was only person in which God found a grace (Gen. 6, 8), God made promise with Noe that He would flood the earth (Gen. 7, 6) and save his family (Gen. 6, 18). But before flooding, God establishes specific rules of conduct, how Noe should behave in order to rescue mankind and living creatures (Gen. 6, 13-22; 7, 1-4; 8, 15-17). After flood, God grants right to Noe increase, multiply and fill the earth, defines rules how to live, establishes prohibitions and punishments for their violations (Gen. 9, 1-7).

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15 *Tsintsadze M*, „The Ladder" of St. John Climacus, Translation and Language of Euthymius the Athonite, Batumi, 1965, 58 (in Georgian).

16 *Saint John of Damascus*, An Exact Exposition of the Orthodox Faith, *Chelidze E.* (ed.), Tbilisi, 2012, 104.

17 *Dr. Dunson B. C.*, *The Kingdom of God in the Old Testament: Kingship and Creation*, 2015, <www.ligonier.org/blog/kingdom-god-old-testament-kingship-and-creation>, [01.02. 2015].

18 *Zubov V. P.,* The Aristotle. Moscow, 1963, 77, see: *Gorgoshidze M.*, mentioned writing, 32 (in Georgian).

19 See: <www.martlmadidebloba.ge/ganmarteba20.html>, [01.02. 2015].

20 Explanation of Ten Commandments, chapter second "About Divine Law and Commandments", see: <www.martlmadidebloba.ge/ganmarteba4_sjuli-da-mcnebebi.html>, [01.02. 2015] (in Georgian)

21 *Monk Paisios of Mount Athos*, Spiritual Counsels, Desk Book of Orthodox Believer, Tbilisi, 2004, 11 (in Georgian).

22 *Dr. Dunson B. C.*, *The Kingdom of God in the Old Testament: Kingship and Creation*, 2015, see: <www.ligonier.org/blog/kingdom-god-old-testament-kingship-and-creation>, [01.02. 2015].

Thus, by creating a human being in the image of God, God granted to first human beings authority right to rule over earth and everything. This authority can be understood as an idea of establishing and managing an "informal state", the law of which should be perceived the collection of those divine norms, which are related to possession and ruling the earth, first warning and internal law. It is natural that like Adam, Noe also is an informal ruler of state and its laws are also above-mentioned divine norms established by God.

From this standpoint, establishment of state and law on earth has divine ontology. It begins from Adam. In the first human society, God is a king, lawmaker and judge for everyone, He reigns through human-king. Adam, likewise Noe, is king of an informal state and its law is unwritten collection of divine norms, violation of which is a sin.

3.2. The Concept of State and Law in Israel

3.2.1. Ancient Israel

In old Israel, before establishing kingdom, there was known only one true theocracy - system of judges. Judges used to be God's distinguished prophets, who would reveal to people, a will of God and in case of necessity they were in charge of carrying judicial, political and military functions. Judge was only presenter of God's will, and it was recognized that real governor of nation was God himself.[23]

According to the history of Old Testament, after the death of Adam, the family was ruled by elder of family, which was also called as Patriarch, meaning leader, and all members of family were subordinated to him; he would solve disputes, punish lawbreakers, protect righteous persons, convey knowledge on God, future Savior and etc. Thus, leader in family was a king, priest and teacher.[24]

In the text of Bible, terms like "judge", "elder", "patriarch", "prophet", "leader" and "king" are used interchangeably, for describing the leaders of Judea. For our research purposes, it is expedient to use term "king", as it encompasses contents of all mentioned terms, it is relatively most frequently used in religious literature[25] and most precisely describes the status of state ruler.[26] Therefore, after Adam and Noe, Abraham and other leaders, elders and etc., of Judea are also considered as informal kings.

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[23] *Kshutashvili A.,* Church and Monarchy: Theological Analysis, published in Journal "Philosophical-Theological Reviewer", Iv. Javakhishvili Tbilisi State University Publishing, Tbilisi, 2011, № 1, 125 (in Georgian).

[24] *Archpriest, Kubaneishvili N.,* History of Old Testament, Tbilisi, 1990, 11 (in Georgian).

[25] For example: *Dr. Dunson B.C.,* in mentioned e-article Adam is called as "human king" see: <www.ligonier.org/blog/kingdom-god-old-testament-kingship-and-creation>, [01.02.2015]; *Archpriest, Kubaneishvili N,* in History of Old Testament, recalls leaders of Jewish branch as a kings, and etc.

[26] By the judgement of Lord, all nations in the mankind history was arranged according to the principle of monarchy, and king was on top of state, see: *Burkadze V.,* Prospect of Monarch Ruling in Apostasic World, citied from "Orthodoxy and Modernity", *Kutateladze Dz.* (comp.), *Burkadze V.* (ed.), Vol. 3, Tbilisi, 2012, 89 (in Georgian).

From the text of Old Testament is becomes clear that generation of Noe did not obey divine law and idolatry spreads in the world.[27] Therefore, God desires to separate one nation from others, in order that true religious be preserved in one nation before coming of the Savior (Ex. 2, 24-25). This distinguished nation is Jews, from the branch of Judea.[28] In appearance, God gives an oath with Abraham about coming of kings in his nation (Gen. 17, 6) and after, with his son, Isaac (Gen. 26, 3). The same oath is repeated in appearance with Jacob (Gen. 26, 3-4; 35, 9-12; Ex. 6, 8). This is the appearance, by which the secret of theocracy is explained.[29] Apart from this, the Jacob, during the prophetic blessing, also talks about kings, who will come from Judea before coming of the "Hope of Nations" (Gen. 49, 10).[30] God establishes commandments, statutes and laws (Gen. 26, 5). Moses predicts kingship in Israel, and therefore, he gives instructions, as a manual, to his nations on election of kings. Moses gives also instructions for future king, how to live and behave (Deut. 17).[31]

The episode describing the bringing up Israelites out of Egypt, also contains materials of normative nature. God sends Moses to pharaoh and defines number of norms (see chapters 4-12 of Exodus). When people of Israel left the Egypt, God issued rule and law (Ex. 15, 25) and different types of norms (Ex. 20-31; 33-40).

Interesting information is kept in the articles, which describe conversation between Moses and father in law, Jethro. Moses tells to his father in law: "*whenever they have a dispute, it is brought to me, and I decide between the parties and inform them of God's decrees and instructions*" (Gen. 18, 16). Jethro replies: "… *You must be the people's representative before God and bring their disputes to him. Teach them his decrees and instructions* …" (Gen. 18, 19-20). From these articles it is obvious that in the Israelites, there is also "people's law" along with divine law, meaning tradition and custom, which is also proved from other articles of Exodus.

For instance, God tells to Moses: "*I have seen this people, and behold, it is a stiff-necked people*" (Gen. 32, 9), "*you are an obstinate people*" (Ex. 33, 3). Plus, in Deuteronomy we read: "*So Moses brought their case before the LORD*" (Numbers 27, 6).

Most noteworthy is the chapter 20 of the Exodus in which unwritten norms the Ten Commandments are presented (Ex. 20, 1-17). After, these Commandments are altered slightly and presented already, already in written norms in chapters 24 and 34 of the Exodus.[32]

In chapter 24 of Exodus, we read, "*Moses then wrote down everything the LORD had said…; Then he took the Book of the Covenant and read it to the people*" (Ex. 24, 4, 7) which is related to the Ten Commandment (written in chapters 20-21 of the Exodus) and its rules. These rules are regulating

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27 Gen. 11, 8-9; 13, 13; 14, 2; 1 Kings 8, 5, 19-20; Joshua 24, 2.

28 *Archpriest, Kubaneishvili N.,* History of Old Testament, Tbilisi, 1990, 15-16 (in Georgian).

29 *Gvasalia G.*, Explanation of Genesis, Vol. I, Tbilisi, 2014, 582 (in Georgian).

30 *Lopukhin A, P.,* Comments of Bible, *Arch*. *Dzindzibadze Z.* (ed.), *Metreveli T.* (trans.), Vol. III, Tbilisi, 2000, 55 (in Georgian).

31 Ibid.

32 Though, the first record of written norm is given in chapter 17 of the Exodus, "*Then the LORD said to Moses, "Write this on a scroll as something to be remembered …*" (Ex. 17, 14).

different domains of social activities,[33] prohibiting all kinds of violence and defining punishments for their violation (Ex. 21, 12-36).[34]

In chapter 24 of the Exodus, it is described also, creation of written legal act. God says to Moses "*…I will give you the tablets of stone with the law and commandments I have written for their instruction*" (Ex. 24, 12). At the mount of Sinai, Moses listens number of rules (chapters 25-30 of Exodus). The chapters 31 and 32 are describing how God gave the Ten Commandments to Moses (Ex. 31, 18, 15-16; 34, 1), - "*the words of the Covenant, ten words*" (Ex. 34, 28), "Ten Commandments", meaning "the Law" [35]

3.2.2. Kingdom of Priests

Just at that point, God makes promise with Moses about creation of Kingdom of Priests in the people of Israel. In the promise we read: "*you will be for me a kingdom of priests and a holy nation*" (Ex. 19, 6). In the comments of the Bible we read that Israelites will be not just a union or council of priests, but "kingdom", because, according to the given right, they will get royal, dominant status among other nations (Deut. 26, 16-19). As a kingdom of priests, Israelites will become a "holy nation" cleaned from the sins of divine laws (Lev. 11, 44-45; Deut. 14, 2).[36]

B. Dunson states that Israel was saved in Exodus in order to become kingdom of priests and holy nation, "*for the earth will be filled with the knowledge of the glory of the LORD…*" (Habakkuk 2, 14). As Isaiah prophet says, Israel is "*light for the nations*" (Isaiah 42, 6; 60, 30) in a sense it is a lighthouse established on the mount of the Lord, to show nations - the path of salvation, way towards Zion "…, " (Mic. 4, 2).[37]

Information about kingdom of priests are given also in the New Testament, particularly in letters of Romans and Paul, as well as in revelation:

1. In letters we read: "*But you are a chosen people, a royal priesthood…*" (1 Peter 2, 9).

2. From Paul's letters, Christ is high priest of all believers, He is future King and true basis of the kingdom of priests: "*Your throne, O God, will last for ever and ever; a scepter of justice will be the scepter of your kingdom… .*" (Hebrews 1, 8); "*You are a priest forever, in the order of Melchizedek*" (Hebrews 5, 6).

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33 Rights and duties of the landlord and servant (Ex. 21, 2-6); Punishments for crimes against person (Ex. 21, 12-17).

34 1. Killing (Ex. 21, 12-14); 2. Kidnapping (Ex. 21, 16); 3. Injury (Ex. 21, 18-19); 4. correction of slave (Ex. 21, 20-21); 5. Infliction of injury to pregnant woman (Ex. 21, 22-23); law of revenge (Ex. 21, 24-25); injuring of servant (21, 26-27); injury inflicted to human being by bull (Ex. 21, 28-32); injury of animals (Ex. 21, 33-34); fight between animals (Ex. 21, 35-36).

35 *Lopukhin A. P.,* Comments of Bible, Vol. II, *Arch. Dzindzibadze Z.* (ed.), *Metreveli T.* (trans.), Tbilisi, 2000, 103 (in Georgian).

36 Ibid, 100.

37 *Dr. Dunson B. C.* , The Kingdom of God in the Old Testament: From Abraham to Israel, 2015, see: <https.ligonier.org/blog/kingdom-god-old-testament-abraham-israel/>, [01.02.2015].

3. In revelation we read: "*and has made us to be a kingdom and priests to serve his God and Father…*" (Rev. 1, 6). John saw many creatures in heaven at the throne of God. They sang a "new song" for the Lamb: "...,*You have made them to be a kingdom and priests to serve our God, and they will reign on the earth*" (Rev. 5 8-10). Later in revelation John says: "… *they will be priests of God and of Christ and will reign with him for a thousand years*" (Rev. 20, 6). Together with Christ, they create kingdom of priests, which brings usefulness to whole mankind.

3.2.3. Israel

Formal phase of King's State Governance of Israelites is described in the book of "1 Samuel". People of Israel wished to have formal king (1 Samuel 8, 5), because sons of Samuel, appointed as judges were not following the way of their father and violated laws (1 Samuel 8, 1-4) and they believed that new king would be sufficient guarantee to eliminate vices of many, secondary rulers.[38] Events of king's appointment are described in the book of "1 Samuel". Israelites rejected God as their king (1 Samuel 8, 7-8) when they requested God to appoint a king. Despite the wrong motives, when they requested appointment of king (1 Samuel 8), God granted them their first king to execute the covenant made with Moses (Deut. 17).[39] God chooses Saul as a king, from the Benjamin tribe and from that point, formal governance of kingship in the people of Israel begins.

According to the words of *Episcope Nokodim Milas*: "When the Lord consecrated first king of Israel in the face of Saul, He consecrated all kinds of state authority, irrespective the forms of governance."[40]

The Saul does not rule the Israel according to the laws of God (1 Sam. 13, 8-15) and finally he was removed from the throne of king (1 Sam. 15). Just at this point, the David is appointed as king of Israel (1 Sam. 16). During his reign, the kingship shows up himself in its perfection (2 Sam. 2) and ends up by the fact that God, through the mouth of prophet Nathan, made oath with David (2 Samuel 7; also see: Psalms 89, 35) that God would preserve the royal line in future from the king David (2 Samuel) and from his line Christ would appears in the world (Matt. 1, 6-17).

In the comments of Bible we read "at that time the form of governance of society had theocratic nature (meaning of divine nature) in fullest meaning of this word. God of heaven and all nations (theocracy in broad term) was also deemed as earthly ruler for his chosen nation."[41]

The promise made with David, that God "will establish the throne of his kingdom forever" (2 Samuel 7:13) becomes especially significant when we get to the prophets. History of Israel is primar-

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38 *Lopukhin A. P.,* Comments of Bible, Vol. IV, *Arch. Dzindzibadze Z.* (ed.), *Metreveli T.* (trans.), Tbilisi, 2000, 159.

39 *Dr. Dunson B. C.*, The Kingdom of God in the Old Testament: From Abraham to Israel, 2015, see: <https.ligonier.org/blog/kingdom-god-old-testament-kingship-and-creation>, [01.02.2015].

40 *Tsypin V. (Archpriest)*, Church Law, see: Theological Scientific Almanac "Peristsvaleba", printing house "Anthimos Iverieli", № 1, Tbilisi, 2010, 123 (in Georgian).

41 *Lopukhin A. P.,* Comments of Bible, Vol. IV, *Arch. Dzindzibadze Z.* (ed.), *Metreveli T.* (trans.), Tbilisi, 2000, 159-160 (in Georgian).

ily a history of a failure of their kings to rule according to God's requirements as laid out in Deuteronomy 17. Israel's kings fail to rule over Israel in righteousness. They certainly fail to make Israel a "holy nation and kingdom of priests" and "a light to the nations." God's promise that Israel would be a blessing to the nations (Gen 12:1-3) does not materialize in the Old Testament. The kingdom of God seems precariously close to disappearing as Israel (4 Kings 17, 6-23; 24, 15, 18-20, 2 Chronicles 36, 10-14), however, God is not finished with Israel, nor with Israel's kings. Here is where the prophets come in.[42]

Prophets make it clear that despite of splitting the kingdom of Israel and exile of kings,[43] God would not, and did not, abandon His intention to rule over His people and His world through a Davidic king. Many important prophetic passages reveal that the only hope for the establishment of an enduring and faithful kingdom in Israel lies in a future work of God's redemption. The human heart is too corrupt for God's purposes for the world to be accomplished through Israel's fallen and sinful kings. Periodic revivals and times of faithfulness (such as Josiah's reforms [2 Kings 23]) are not enough to usher in God's worldwide dominion. Despite Israel's earthly failure God still does not abandon His plan to reign over the whole world through His appointed human king.[44]

B. Dunson puts questions forward: How will this reign manifest itself? What is necessary for God to reverse the failure of Israel to be a light to the nations and extend the kingdom across the earth? First, God will begin about a new exodus. This exodus, however, will not be a mere deliverance from Israel's earthly enemies. Instead, God will come in power to deliver His people as He ushers in the new creation itself and renews His reign over His people (Isa 35, 1-4, 8-10) - answers the *B. Dunson*.[45]

The prophets speak of God's deliverance of His people in this way as the reestablishment of God's kingdom: "… *Behold, the Lord GOD comes with might, and his arm rules for him;...*" (Isa. 40, 9-11).[46]

3.2.4. Law of Israel

Law in the narrowest sense was the basis for the administration of justice which was done by local elders at the city gate, though difficult cases were referred to the Temple authorities at Jerusalem. Although, the king exercised judicial functions and his judgement created precedents which, with his entourage of prophets, led to the consolidation of the several codes in the Pentateuch. The historical narratives record events which contributed to this process: there was Samuel placing a book of royal

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42 *Dr. Dunson B. C.*, The Kingdom of God in the Old Testament: From Abraham to Israel, 2015, see: <https.ligonier.org/blog/kingdom-god-old-testament-abraham-israel/>, [01.02.2015].

43 For details see: <www.patheos.com/blogs/christiancrier/2015/10/10/a-list-of-kings-from-the-bible/>, [01.02.2015].

44 *Dr. Dunson B.C.*, The Kingdom of God in the Old Testament: The Prophetic Hope, 2015, see: <https:ligonier.org/blog/kingdom-god-old-testament-prophetic-hope/>, [01.02.2015].

45 Ibid.

46 Ibid.

privileges in the sanctuary (1 Sam. 8), followed by Jeremiah (Jer. 36), and the discovery of the book of the covenant in the reign of Josiah (2 Kgs. 23), and Ezra's proclamation (Ezra 7: 10).[47]

Two types of law are noted in the Hebrew law codes: (1) casuistic, or case, law, which contains a conditional statement and a type of punishment to be meted out; and (2) apodictic law, *i.e.,* regulations in the form of divine commands (*e.g.,* the Ten Commandments).[48]

The apodictically formulated laws relate to the religious as well as to the secular realm of life. Theologian Albrecht, saw them as uniquely Israelite in origin, in contrast with the - casuistic‖ or case law which was part of a common heritage shared with the Canaanites and other Near Eastern peoples.[49] And, the Ten Commandments articulate general ethical principles, while the case law applies those principles to specific cases.[50]

Old Testament establishes the following three codes: (1) Book of Covenant, i.e. Covenant Code; 2 The Deutonormic Code; 3. The Priestly Code.

The Book of the Covenant, one of the oldest collections of law in the Old Testament, is found in Exodus 20:22–23:33. The Covenant Code is divided into the following sections: (1) a prologue; (2) laws on the worship of Yahweh; (3) laws dealing with persons; (4) property laws; (5) laws concerned with the continuance of the Covenant; and (6) an epilogue, with warnings and promises. In the Covenant Code, the lex talionis and the substitution of financial compensation or a fine for the literal punishment, however, was allowed.[51]

The Deuteronomic Code is divided into the following sections: (1) statutes and ordinances, especially related to dealings with the Canaanites and worship in the Temple in Jerusalem alone, to the exclusion of the high places; (2) laws (known as sabbatical laws) concerned with the year of release from obligations, especially financial; (3) regulations for leaders; (4) various civil, cultic, and ethical laws; and (5) an epilogue of blessings and curses.[52] The Deuteronomic Code (Deut. 12–26) is widely identified with the book found in the Temple in the time of Jeremiah. It takes the form of a speech by Moses to the people of Israel before their entry into the Promised Land.[53]

The Priestly Code, containing a major section known as the Code of Holiness (in Leviticus, chapters 17–26), is found in various parts of Exodus, all of Leviticus, and most of Numbers. Emphasizing ceremonial, institutional, and ritualistic practices, the Priestly Code comes from the post-Exilic

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47 Oxford Dictionary of the Bible, (by *Browning W. R. F.*) Oxford University Press, 2003, 1156.

48 Hebraic Law, Encyclopædia Britannica, Encyclopædia Britannica, inc, July 20, 1998, <https://www.britannica.com/topic/Hebraic-law>, [10.09.2019].

49 The Anchor Bible Dictionary, *Freedman D. N.* (ed.), published by Doubleday, New York, USA, 1992, 5197.

50 Law and the Bible, *Jr. Cochran R. F.*, *Drunen D. V.* (eds.), InterVarsity Press, Dorner Groove, Illinois, USA, 2013, 82.

51 Hebraic Law, Encyclopædia Britannica, Encyclopædia Britannica, inc, July 20, 1998, <https://www.britannica.com/topic/Hebraic-law>, [10.09.2019].

52 Hebraic Law, Encyclopædia Britannica, Encyclopædia Britannica, inc, July 20, 1998, <https://www.britannica.com/topic/Hebraic-law>, [10.09.2019].

53 Oxford Dictionary of the Bible, (by *Browning W. R. F.*), Oxford University Press, 2003, 1156.

period (*i.e.,* after 538 BC). Though most of the laws of the Code of Holiness probably come from the pre-Exilic period (pre-6th century BC), the laws reflect a reinterpretation encouraged by the Exile experiences in Babylon. Purity of worship of Yahweh is emphasized.[54]

After the Exile the law was increasingly restated, elaborated, and brought up to date by various groups in Judaism, as Deut. itself had anticipated (Deut. 18: 15–22). The oral law of the Pharisees which eventually was collected into the Mishnah, about 200 CE, was only one form of supplement. The community at Qumran elaborated a code of purity in separation from Jerusalem and the Temple, which was interpreted by Philo Law by means of allegory. It is mentioned that Jesus did not 'come to destroy the law' but in the Sermon on the Mount gave it a radical reinterpretation. Paul did not so much oppose the Jewish Law as such but did reject the view that its observance was the means of salvation for Christians (Gal. 5: 4).[55]

3.3. Melchizedek - Sovereign of the World

When analyzing the issue of state, in commentaries of Bible and generally in religious literature, special attention is paid to the personality of Melchizedek.[56]

The specialty of Melchizedek, who is a king of Salem and priest of God Most High, resides in fact that He is so superior over an informal king Abraham that Melchizedek blesses Abraham, and the latter gives tenth of his goods (Gen. 14, 18-20). It is toneworthy that in the eyes of God Abraham is one of the distinguished kings, which is proved by two facts, namely:

1. From the beginning Abraham was called Abram, and his wife was called Sarai. Later, God called Abraham to Abram, which means "father of many nations" and as for Sarai, He called Sarah, which means "noble woman" (Gen. 17, 5, 15);

2. Because Abraham was so close to God, he became worth to be called - friend of God (Isaiah 41, 8; Jacob 2, 23) and such a reward cannot be found with other leaders. Despite such a high royal status, the Apostle Paul describes mightiness of Melchizedek in comparison with Abraham in the following way: "*Just think how great he was: Even the patriarch Abraham gave him a tenth of the plunder!*" (Hebrew 7, 4).

In the blessing of Melchizedek the contents of blessing (divine grace, which was granted to Abraham and for this reason praise made to the God, Gen. 14, 18-29) is important. In particular, the blessing of the Melchizedek, is proof of materialization of divine will and law on the Abraham's con-

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54 Hebraic Law, Encyclopædia Britannica, Encyclopædia Britannica, inc, July 20, 1998, <https://www.britannica.com/topic/Hebraic-law>, [10.09.2019].

55 Oxford Dictionary of the Bible, (by *Browning W. R. F.*) Oxford University Press, 2003, 1156.

56 For example: 1. *Christian S.*, Types and Shadows: Prophetic Pictures to Wholeness in Christ, USA, 2006; 2. *Jones M. K.*, Toward a Christology of Christ the High Priest, Italy, 2006; 3. *Horton F. L.*, The Melchizedek Tradition: A Critical Examination of the Sources to the fifth Century A.D. and in the Epistle to the Hebrews, UK, 1976; 4. *Nattan S. V.*, Kings of The Bible: What They Teach Us, Chapter - Other Heathen Kings, Blessed Quitness Journal, see: <www.blessedquietness.com/journal/housechu/kings.htm>, [20.05.2016].

duct (destruction of kings, the captivity of the nephew and the seizure of the captured plunder). This point is supported by the note made in comments of Bible, when Abraham with small army wins against Kedorlaomer who held enormous army (Gen. 14, 9-17), clearly proves the fact that God power is beside Abraham (Psalms 32, 16-18).[57]

Undisclosed service of Melchizedek, His special status and priesthood filled with royal greatness is described by the Apostle Paul (Hebrew 7) to fullest extent and clearly, in parallels made between the Melchizedek and the Christ.[58]

Parallels between the Melchizedek and Christ are mainly based on the following proofs:

1. Their kingship and priesthood are caused by the God's call;

2. They are from the non-priestly tribe, they did not have similar predecessor bishop and beginning and end.[59]

3. Bringing of bread and wine by the Melchizedek implies the secret of Eucharist.[60]

4. Etymological research of terms proves that "identity of Salem and Jerusalem is undisputed fact". Jerusalem is mentioned as "Jeru-Salem" meaning - "City of Salem".[61] King of Salem means king of peace. Word "shalom" in Hebrew means - peace. As for the word "Salem", is based on "shalom", which means integrity and righteousness towards peace.[62] According to the Apostle Paul, name of Melchizedek is explained as "King of Righteousness" (Hebrew 7, 2). Thus, Salem and Israel are identical and describe the same city, whose king in Old Testament is Melchizedek and in New Testament is Christ.

5. According to teachings of the holy fathers, Melchizedek foreboded Christ. The word Melkesidek means "King of Righteousness", Jesus Christ is also the King of Truth (Psalms 9, 9); the honor of Melchizedek of Salem, that is the King of peace foreboded Christ - Chief of Peace (Isaiah 9, 6). In Genesis nothing is mentioned about parents of Melchizedek, as well as His birth and death; according to the explanation of the Apostle Paul, this is because Christ is presented in the face of Melchizedek, who does not belong to any nation due to His divine nature; apart from this, by merging honors of kingship and priesthood in face of Melchizedek foreboded the Jesus Christ - eternal King, whose reign has no end, and also eternal high priest, who sacrificed Himself (Hebrew 7, 27) and is everlasting mediator for us before God.[63]

According to the commentaries of Bible, the king of Salem, Melchizedek is completely exceptional person. The fact that Moses does not provide any information about Him, and the author of

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57 *Lopukhin A. P.,* Comments of Bible, Vol. I, *Arch. Dzindzibadze Z.* (ed.), *Metreveli T.* (trans.), Tbilisi, 2000, 173 (in Georgian).

58 Ibid*,* 174-175.

59 Psalms 109 (110), 4; Hebrew 5, 10; 6, 20; 7, 3; 14-17.

60 *Lopukhin A., P.,* Comments of Bible, Vol. I, *Arch. Dzindzibadze Z.* (ed.), *Metreveli T.* (trans.), Tbilisi, 2000, 176 (in Georgian).

61 1. *Christian S.*, see mentioned work, 84-85; 2. *Lopukhin A. P.,* Comments of Bible, Vol. I, *Arch. Dzindzibadze Z.* (ed.), *Metreveli T.* (trans.), Tbilisi, 2000, 175-176 (in Georgian).

62 *Christian S.*, see mentioned work, 84.

63 Manual for Learning Old and New Testament, *Lopukhin A. P.* (comp.), Kutaisi, 1909, 50-51 (in Georgian).

Psalms and Apostle Paul indicate His secret connection to the Jesus Christ (Psalms 76, 2, 4; Hebrew. 6, 20; 7, 1-3, 11, 19), arose different opinion about personality of Melchizedek and His service.[64] Regardless of contradictory arguments, opinion that Melchizedek is first face of Christ in Old Testament is considered credible, who unites personality of "King and Priest".[65]

Just because of this circumstance, we analyzed personality of Melchizedek as separate topic, while analyzing the issue of state and law, since Melchizedek is superior not only over first informal king, Adam, after Noe and other kings of first human beings, but he is considered to be a Christ in Old Testament, as first image of Christ, meaning the King of heaven and earth (Psalms 76, 2, 4; Hebrew. 6, 20; 7, 1-3, 11, 19).

3.4. The Concept of State and Law in the Pagan Society

The history of Old Testament, provides information on pagan kings and kingdoms from the period of building the Tower of Babel, when the families of the Noe's son, will scatter according to their genealogies, by their nations in different lands of the world (Gen. 10, 32), forget true God, religion and false religion will be spread among them.[66]

First Biblical information about the beginning of political and state life is encountered in Genesis, which is connected to the kingdom of Nimrod (Gen. 10, 10). In the opinion of majority of authoritative scholars, Bible speaks about "first confederation of Chaldea", i.e. union of cities of Chaldea, united under the authority of famous Kush Nimrod, which in old-Chaldean inscriptions is recalled as "Arba-Lizuni" title, i.e. a king of four languages.[67]

According to famous English orientalist *Georg Smith*, the Akkad was king of Sargon's capital and was located on the coast of Euphrates, near the Sifvart, on the north from Babylon. With these four cities, first union was created, i.e. ancient Chaldean-Babylonian kingdom.[68]

From the explanations of the articles 11 and 12 of tenth chapter of Genesis, it is clear that the Semites, who were dissatisfied with despotic ruling of Nimrod and Kushite, chose to abandon and move to north and create their kingdom. It is mentioned that Ashuri builds his kingdom, new center in north - city Nineveh, which later became strongest Assyrian capital city (Jonah 3,3; 4, 11).[69]

In Bible, we encounters many passages about pagan kings. For instance, in chapter 14 of Genesis, we read about kings of Shinar, Ellaser, Elam, Goiim, Sodom, Admah, Zeboiim, Bela (Gen. 14, 1-3).

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64 *Lopukhin A. P.,* Comments of Bible, Vol. I, *Arch. Dzindzibadze Z.* (ed.), *Metreveli T.* (trans.), Tbilisi, 2000, 174-175 (in Georgian).

65 Ibid, 177 (in Georgian).

66 1. *Archpriest, Kubaneishvili N.,* History of Old Testament, Tbilisi, 1990, 40 (in Georgian); 2. About Pagan religions see: *Adeishvili G.*, God: Mind of Universe, Tbilisi, 2008, 15-19 (in Georgian); 3. *Gogebashvili I.*, History of Religion, Tbilisi, 2016, 19-20 (in Georgian).

67 *Lopukhin A. P.,* Comments of Bible, Vol. I, *Arch. Dzindzibadze Z.* (ed.), *Metreveli T.* (trans.), Tbilisi, 2000, 139 (in Georgian).

68 Ibid, 140.

69 Ibid, 141.

In chapter 36 of Genesis, there are kings who reign on the land of Edom before any king reigned over the sons of Israel (Gen. 36, 31-43). In Genesis and Exodus we read about pharaohs. There are 14 pharaohs in total in Old Testament, out of which only three encompasses enough information for their analysis. In particular, information related to relations between Abraham, Joseph and Moses with pharaohs.[70]

In addition, there are many passages in Old Testament about such pagan kingdoms and empires such as Babylon,[71] Egypt,[72] Syria,[73] Persia-Media,[74] Greece[75] and Rome.[76] Analysis of the sources reveal that 59 pagan countries[77] and more than 35 kings are mentioned in the Old Testament.[78]

With respect to law of abovementioned pagan countries, it should be mentioned that at that time both unwritten and written law was in practice.

For example, from Bible we learn that king Abimelech of Philistines issues decree not to touch Isaac and his wife (Gen. 26, 11). The king of Egypt, issues decree, to kill new born babies (Exodus 1, 16). In the book of Daniel (Dan. 6, 8-9) there is information about injunction, decree and law.

Interesting information is preserved in the request of Israelites when they demanding to appoint formal king: "… *Now appoint a king for us to judge us like all nations. We also may be like all the nations, that our king may judge us* …" (1 Sam. 8, 5, 19-20).

Straightforward statement about written legal acts are given in Esther, for instance:

"… *let it be written in the laws of Persian and Media*, …" (Esth. 1, 19); "… *being written in the name of King Ahasuerus and sealed with the king's signet ring*" (Esth. 3, 12); "… *text of edict*…" (Esth. 4, 8); "*A copy of the edict to be issued as law* …, " (Esth. 8, 13); "*the Jews established and made a custom for themselves, …according to their regulation*" (Esth. 9, 27).

But, far more interesting facts are provided in scientific materials, connected to laws of those pagan state, which are described in the Old Testament.

Most interesting is the research, which is related to the law of the Babylonian Empire. Namely, law code engraved on stone stele and belonging to Hammurabi, the king of Babylon. It is evident that the king Hammurabi was king Amraphel mentioned in Old Testament (Gen. 14, 1).[79]

It is true that most important legal act is law code of Hammurabi, but it is not the most ancient one. In 1947 there came to light a law code promulgated by King Lipit-Ishtar,[80] who preceded Ham-

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70 In detail see: *Nattan S. V.*, Kings of The Bible: What They Teach Us, Chapter - Other Heathen Kings, Blessed Quitness Journal, <www.blessedquietness.com/journal/housechu/kings.htm>, [20.05.2016].

71 Ex.: Gen. 10, 8-10; 11, 8, 9; Acts 7, 2.

72 Ex.: Gen. 10, 6, 13-14; 12, 14-15; 40, 1-2; 41, 1-3.

73 Ex.: Gen. 10, 8-10; Is. 7, 20.

74 Ex.: Gen. 10, 22; Esth. 1, 1, 3.

75 Dan., chapters 2, 8, 10-11.

76 Dan. 2, 33, 40-43; 7, 7-8, 19-25.

77 See: <www.bible-history.com/old-testament/nations.html>, [01.04.2016].

78 See: <www.idahobaptist.com/biblical-kings-and-queens-i-timothy-117/>, [01.04.2016].

79 The International Standard Bible Encyclopedia, *James Orr., M. A., D. D.* (ed.), Vol. 1, USA, 1915, 126.

80 *Kramer S. N.*, The Sumerians: Their History Culture, and Character, USA, 1963, 336-340.

murabi by more than one hundred and fifty years. The Lipit-Ishtar code, as it is now generally called, is inscribed not on a stele but on a sun-baked clay tablet. It is written in the cuneiform script, but in the non-Semitic Sumerian language and contains a prologue, epilogue, and an unknown number of laws, of which thirty-seven are preserved wholly or in part. But Lipit-Ishtar's claim to fame as the world's first lawgiver was short-lived. In 1948, the researcher Taha Baqir discovered two tablets inscribed with an older law code. Like the Hammurabi code, these tablets were written in the Semitic Babylonian language and contains the brief prologue that precedes the laws (there is no epilogue), a king by the name of Bilalama is mentioned. He may have lived some seventy years before LipitIshtar.[81]

And in 1952, law code of Sumerian king named UrNammu was discovered.[82] This ruler, who founded the now well-known Third Dynasty of Ur,[83] began his reign, even according to lowest chronological estimates, about 2050 B.C., some three hundred years before the Babylonian King Hammurabi. The UrNammu tablet is one of the hundreds of Sumerian literary tablets in the collection of the Museum of the Ancient Orient in Istanbul.[84]

But the first written Law was formulated in 2420 B.C. and is related to Urukagina of Lagash. Private documents of law - contracts, deeds, wills, promissory notes, receipts - are recovered by archeologists. The supervision of the courts was in the hands of the city governor (*ensi*) or his representative (*mashkim*). Cases were heard by a panel of three or four judges (*di-kud*) who weighed evidence in the form of statements from witnesses and written documents. Conflicts in testimony were resolved by oath-taking. The decision of the judges was legally binding, but appeals could be made on the basis of new evidence.[85]

Referring to these scientific researches, prove only one fact that in pagan states of Old Testament, laws, both unwritten and written, were widely applied in practice.

3.5. Resume

In the first society, state and law has transcendental nature to everyone. There is, sort of informal state with unwritten divine laws, set of norms. But in reality, God is lawmaker, executor and judge for all. From the time of the Tower of Babel, the common transcendental nature of state and law is

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81 *Kramer S. N.*, History Begins at Sumer, USA, 1956, 51-52.

82 Many scholars indicate that Sumer is meant in Shinar (Gen. 10, 10; 11, 2), see: 1. Bible Questions Answered, Who were the Sumerians?, <www.gotquestions.org/Sumerians.html>; 2. <www.biblegateway.-com/resources/encyclopedia-of-the-bible/Sumer>, [01.04.2016].

83 Ur was the land of Haran's nativity, (Gen. 11, 28) the place from which Terah and Abraham started "to go into the land of Canaan." (Gen. 11, 31) It is called in Genesis "Ur of the Chaldeans," while in the Acts St. Stephen places it, by implication, in Mesopotamia. (Acts 7, 2-4), see: <www.biblehub.com/topical/-u/ur.htm>, [01.04.2016].

84 *Kramer S. N.*, History Begins at Sumer, USA, 1956, 53.

85 Encyclopedia of The Bible - Sumer, 4, c. Law, <www.biblegateway.com/resources/encyclopedia-of-the-bible/Sumer>, [01.04.2016].

changing. From the emergence of idolatry, ruling of formal state starts shaping, which acknowledges and serves to false Gods.

Therefore, we cannot share the opinion that "state is result of progress of society" [86]. Just the opposite, "difficulty of social ties led to creation of state" (*V. Tsypin*) and the regression, which is called a spiritual falling and idol worship. In the words of *St. John the Golden Mouth* "establishment of state is a result of perversion." [87]

Thus, state and law, still remain on theocratic basis, but the difference is that Israelites acknowledge and serve only one, true God, whereas pagan people acknowledge and serve to false Gods.

The concept of state and law, conditionally can be characterized from informal and formal viewpoint.

1. Informal state implies:

a. A human being, created in image of God, i.e. first informal king, who was given right to rule over the world;

b. Informal kings (judges, leaders and etc.) who are called to execute the will, covenant and commandments of true God;

c. Kingdom of priest in Israelites, who are tasked to get kingship status among other nations, and to become "holy nation", cleaned from divine sins in order to fill whole world with divine knowledge;

d. The Melchizedek, who is considered to be in Old Testament, image of Christ, King of heaven and earth.

2. Formal state implies:

a. Pagan nations, - which starts from the building the Tower of Babel and is related to kingdoms and empires of Chaldea-Babylon, Syria, Egypt, Greece, Persia-Media and Rome.

b. State of Israel, - begins from consecration of King Saul, when God makes a promise that Christ will come from the line of David, the King of Israel.

3. In all forms of informal states and in state of Israel, divine law is applied, the source of which is true God. In the states of pagan nations, sources of divine laws are false Gods. In addition, in both forms of state, unwritten "peoples" law is also in applied.

We have to note that, in jurisprudence, among theories of origins of state and law, theological theory is oldest one, which arose from religious-mythological viewpoints and since God created the world, from this standpoint, state and law is of divine origin.[88] In this formula, it is expedient to draw attention on the fact that birth of state and law is connected to the true God and not to false Gods, because:

1. God is a sovereign of heaven and earthly nations, since He created heaven and earth (Gen. 1, 1), He possesses whole world (Ex. 19, 5), His throne is forever and ever (Ps. 44 (45), 6), He is Great

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86 Law, *Metreveli V.* (ed.), Tbilisi, 2003, 25 (in Georgian).

87 *Saint John the Golden Mouth*, Homilies, II Vol., *Gogochashvili T.* (ed.), Tbilisi, 2015, 309 (in Georgian).

88 Basis of Georgian Law, *Shengelia R.* (ed.), *Tsulaia Z.* (rev.), Tbilisi, 2000, 23 (in Georgian).

God, and great king above all gods (Ps. 94 (95), 3), kings reign, rulers decree justice, princes rule and nobles and judges made justice by Him (Prov. 8, 15-16), Wisdom and power belongs to Him, and it is He who changes the times and the epochs, He removes kings and establishes kings (Dan. 2, 20-21).

2. When God establishes formal kingdom in Israelites, God blesses all types of state authority, regardless of forms of state (*N. Milas*).

Finally, based on the divine ontology of state and law, we have possibility to answer our questions that violation of legal norm established by state, is sin.

Though, such formulation looks self-contradictory. Violation of legal norm established by state of Israel and pagan states, meaning nations who acknowledge and serve to true God and false Gods, are sins.

Since the New Testament clarifies better the attitude of the teachings of Orthodox Christianity on the nature of sin with regard to violation of legal norms adopted by states of pagan nations, we will examine the issue in details in the following paragraph.

4. Concept of State and Law in New Testament

4.1. Roman Empire and Orthodox Christian Attitude towards Violations of Roman Law

All the actions of the New Testament take place in the lands of Roman Empire. The birth of King of heaven and earth, Jesus Christ, his merits, crucifixion, the resurrection, as well as, spread of Christianity in world is happening in the boundaries of Roman Empire.

An absolute ruler of that times Roman Empire was the emperor. Kings were the highest local rulers of territories in the Roman Empire, elected by senate and subject to the central authority of the emperor at Rome.[89] Governors (procurators) were rulers of designated territories, appointed by the emperor and directly responsible to him. Apart from work of finances, such as taxes, they also had right to judge a person, as it had fifth pagan procurator Pilates of Judea Province, part of Roman Empire. The Procurator who ruled over Judea and Samaria had an official judicial residence in Caesarea. Members of the Sanhedrin accused Jesus of claiming to be King. If true, this would have mace Jesus a potential threat to the emperor's authority.[90]

Just in given setting, the Gospels of Mathew and John, letters of the Apostle Paul give best answer to our question. Let's examine each of them:

According to *V. Tsypin*, Jesus Christ, the Ruler of heaven and earth, subjected himself to earthly order, He obeyed to officials of the state. He replied to the Pilate "*You would have no power over me if*

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89 1. *Jensen I. L.*, Jensen's Survey of New Testament, USA, 1981, 56-59; 2. Political Setting of The New Testament, Lecture 3, N. Washington Dallas, Texas, see: <www.ministryserver.com/dsmtext/nttext03.htm>, [01.08.2014].

90 Ibid, 59.

it were not given to you from above" (John 19, 11). By this, *V. Tsypin* underlined that by these words God noted that all kinds of state has divine source.[91]

When asked by Pharisees to the test question on the payment for Caesar, Jesus answers: "*render to Caesar the things that are Caesar's; and to God the things that are God's*" (Matt. 22, 21).[92] According to the comments of Mathew: 1. Christ teaches that they should obey king in daily relations and external activities, but in internal and spiritual matters they should obey God; 2. Since we are composed of flesh and spirit, therefore, we have to provide food and clothes to flesh similarly like to Caesar, but to spirit, which is divine part and is inside us, we have to provides - respective share to it.[93]

When *V. Tsypin*, expands Christ's teachings on attitude to state authority, he recalls letters of Apostles of Peter and Paul. From the letters it is clear that God established all kinds of state authority (Rom. 13, 1) and for this reason, man must obey all human authority for God's sake, "… *for such is a will of God*" (1 Pet. 2, 13-15).[94]

Apostles would teach Christians to obey authority despite what kind of attitude they had towards the Church.[95]

When the Apostle Paul wrote a letter to Romans, at that time the emperor of Rome was Nero, probably most vicious among Roman emperors. Regardless of this, the Paul acknowledged obedience towards the laws of Roman government.[96]

Based on the letter (Rom. 13, 16) sent to Romans, *St. Justin* explains that "hierarchy of values and hierarchy of order is Godly, therefore, we have to obey government as earthly God-given regulator and guardian".[97]

Based on abovementioned, God does not exempt us from the obligation to obey to earthly authority. The example for this is the behavior of Christ himself, who obediently subjected himself to state law.[98]

But, such attitude, does not *a priori* mean that state law always reflects the will of God and that we have to obey such laws blindly.

St. Justin explains that "when authority becomes persecutor of divine virtue, an absolute kindness - Jesus Christ and His Church, then neither obedience nor listening of such authority is allowed. Christian should fight against such authority, - by Holy, Gospel's teachings."[99]

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91 *Tsypin V. (Archpriest)*, Church Law, see: Theological Scientific Almanac "Peristsvaleba", printing house "Anthimos Iverieli", № 1, Tbilisi, 2010, 123-124 (in Georgian).

92 Ibid*,* 124.

93 *Saint Theophylact Bulgarian*, Explanation of Mathew's Gospel, Tbilisi, 2012, 295 (in Georgian).

94 *Archpriest Vladislav Tsypin*, Church Law, see: Theological Scientific Almanac "Peristsvaleba", printing house "Anthimos Iverieli", № 1, Tbilisi, 2010, 124 (in Georgian).

95 Ibid*,* 124.

96 See: Do Christians have to obey the laws of the land? Second Paragraph, <www.gotquestions.org/laws-land.html>, [01.06.2014].

97 *Saint Justin (Popovich)*, Collection of Works, *Sidorov A. I.* (ed.), *Fonov S.* (trans.), Vol. 1, Moscow, 2004, 68 (in Russian).

98 Articles of New Testament: Mathew 22, 21; John 19, 11; 1. Peter 2, 13-16; Romans 13, 1-7; Colossians 1, 16; 1 Timothy 2, 2.

Expert in legal and religious matters, *Harold Berman* notes that laws that conflict with Christian faith are not binding in conscience.[100] This had had its counterpart in Jewish history as well - for example, in resistance to the worship of Baal, the story of Daniel's disobedience to King Darius, and refusals to replace statues of the Roman emperors in the synagogues.[101]

According to the Church teachings, when the Church and its members are encountering laws conflicting with the will of God, where religious and moral laws are violated, where spirit is in danger, in such situations, all are required to obey God: "*we must obey God rather than man*" (Acts 5, 29).[102]

Despite of it, in Council the reply of Apostle Peter "*we must obey God rather than man*" unambiguously truly means that, if state's law is not conflicting divine law, Christians are obliged to obey law of land and *vice-versa*, if state's law is conflicting divine laws, Christian is not obeying laws of land, but even in this case, Christian, to some extent, is still "obeying" authority. This is proved by the fact that *St. Peter* and *St John* not only objected their flogging, but the opposite, they rejoiced this as obedience of God (Acts 5, 40-42).[103]

From the life of *Saint Basil the Great* we learn that Emperor Valen would persecute and sending into exile Orthodox Bishops and spread Arian heresy. For the same reason, he went to Cappadocia and sent his the prefect Modestus to Saint Basil, who began to threaten the saint with the confiscation of his property, banishment, beatings, and even death.

But Saint Basil replied:

"*… Death would be a kindness to me, for it will bring me all the sooner to God, for Whom I live and labor, and to Whom I hasten. In all else we are meek, the most humble of all. But when it concerns God, and people rise up against Him, then we, counting everything else as naught, look to Him alone. Then fire, sword, wild beasts and iron rods that rend the body, serve to fill us with joy, rather than fear.*"[104]

In general, persecution has always been a natural condition for Christian. As *Apostle Paul* says:

"*… That is why, for Christ's sake, I delight in weaknesses, in insults, in hardships, in persecutions, in difficulties. For when I am weak, then I am strong*" (2 Cor. 12, 10).[105]

St. Gregory the Theologian notes that often righteous men are given in hands to evil persons not to glorify them, but that righteous men are tested.[106]

According to the teachings of *St. John the Golden Mouth* "a human should strive with rejoice to be tested, which makes him in becoming a citizen of heaven. And this test is attest from outward,

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99 *Saint Justin (Popovich)*, Collection of Works, *Sidorov A. I.* (ed.), *Fonov S.* (trans.), Vol. 1, Moscow, 2004, 68-69 (in Russian).

100 *Berman H. J.*, The Interaction of Law and Religion, New York, 1974, 52.

101 Ibid.

102 *Jincharadze K. (Archpriest)*, True Freedom, Tbilisi, 2014, 103 (in Georgian).

103 „Do Christians have to obey the laws of the land?", <www.gotquestions.org/laws-land.html>, [01.06.2014].

104 *Machitadze Z. (Archbishop)*, Saints' Life, Book One, Tbilisi, 2003, 10-11 (in Georgian).

105 *Jincharadze K. (Archpriest)*, True Freedom, Tbilisi, 2014, 115 (in Georgian).

106 Spiritual Meadow, *Tarashvili N.*, *Rakviashvili Kh.*, *Asatiani T.* (comp.), *Gogochashvili T.* (ed.), Tbilisi, 2014, 660 (in Georgian).

about which the Apostle Jacob states: "*Consider it pure joy, my brothers and sisters, whenever you face trials of many kinds*" (James 1, 2), since test is cleaner of spirit. Cleaning of spirit is continuing endlessly in life Cristian; therefore a human should endure test not once, but throughout a life course, because the Apostle states "whoever endure, one will be saved".[107]

As for obedience towards state authority, *St. John the Golden Mouth* explains that first sin gave a birth to three types of slavery, out of which the most difficult is obedience towards Rulers and Authorities. When God saw our negligence, He handed over our nature to rulers as teachers and leaders, in order them to correct our negligence, which means that establishment of Authority is a result of our perversion. We need leaders like medicine for ill persons, as punishment for crime. But such a leader is not need to them who are embraced with virtues and points to the words of the *Apostle Paul*: "*Do you want to be free from fear of the one in authority? Then do what is right and you will be commended*." Law is above rulers, but who lives righteously, they do not need law because "*the law is made not for the righteous*" (1 Tim. 1, 9) and adds that "if law cannot obstruct him, moreover neither - ruler".[108]

4.2. Christ - Ruler of Heaven and Earth

Sulkhan-Saba Orbeliani, describes Georgian term "meuphe" based on the Gospel of Mathew in the following way: "Meuphe - great king, superior over all kings…". And, according to the Georgian Otkhtavi Symphony Dictionary the term "meuphe" is described as king, and mainly it means the Savior.[109]

Creator and King of heaven and earth - son of God, is an eternal king by divinity and is king by Godman nature too. Christ was considered as king before His coming (Matt. 2, 2), He was a King when was on earth, before crucifixion (Matt. 27, 11, 37, 42) and remained after resurrection (Matt. 28, 18).[110]

Prophets would call Christ a king. In Isaiah we read: "*For to us a child is born, to us a son is given, and the government will be on his shoulders. And he will be called Wonderful Counselor, Mighty God, Everlasting Father, Prince of Peace. Of the greatness of his government and peace there will be no end. He will reign on David's throne and over his kingdom, establishing and upholding it with justice and righteousness from that time on and forever...*" (Is. 9, 6-7).[111]

In Psalms we read "*I have installed my king on Zion, my holy mountain*" (Ps. 2, 6). In the mount Zion, the whole Judea is implied. I.e. Christ says that He is established on the mount Zion, meaning in Jerusalem, as King in order to inform commandments of Gospel to people. But the article ten says

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107 *Nazarashvili T.*, Trial, Public Religious Internet Journal "Amboni", 2012, see: <www.ambioni.ge/gansacdeli>, [17.05.2015] (in Georgian),

108 *Saint John the Golden Mouth*, Homilies, *Gogochashvili T.* (ed.), Vol. II, Tbilisi, 2015, 309-310 (in Georgian).

109 *Gabuldani N.*, Some General Trends of Christian Terms in Georgian and Other Kartvelian Languages, Tbilisi, 2002, 30 (in Georgian).

110 *Pomazansky M. (Protopresbyter)*, Dogmatic Theology, 3rd Revised and Completed ed., Tbilisi, 2012, 143 (in Georgian).

111 Ibid.

"*Now then, you kings, act wisely! Be warned, you rulers of the earth!*" (Ps. 2, 10). The "now" includes meaning of conclusive part. As if it is said: let it be, kings of Romans and of other nations, and you, judges of earth, what a misfortune they came across who foolishly rejecter Christ, and because God had chosen you as heritage. All of you will be taught and be separated from initial foolishness, you will be educated in virtues, as you will be guided by experiencing the Holy Letter.[112]

In the John's Gospel we read that by the words "*My kingdom is not of this world*" (John 18, 36): 1. God calls Himself a King;[113] 2. Earthly kingdom is weak and His power is expressed in service, and heavenly kingdom is strong in itself and needs nobody's assistance.[114] The same is proved by the Matthew's Gospel: "*The kingdom of heaven is like a king …*" (Matt. 22, 2); 3. God is absolutely governs kingdom of heaven and earth, which is proved by the pray "Our Father" (Matt. 6, 9-18), in which Christ tells his disciples to refer in order that kingdom of heaven be lodged on earth, as it is in heaven. Apart from this, Christ indicated to Pilate, when He says that His kingdom is not of this world (John 18, 36).[115]

After resurrection, Christ came to His disciples with glory and said: "*All authority in heaven and on earth has been given to me*" (Matt. 28, 18). Metropolitan Philaret explains that Christ's "… kingdom is not limited only with heaven, but it covers whole world too, especially in order to take believers from earthly, imperfect, mortal life into heavenly life, in perfect, immortal, bliss of heaven. Like God, Christ has eternal, unlimited right on everything, which is created by Him; and now, by His revival, He got this right with his human nature too, as Savior of this world."[116]

According to *Saint Theophilact*, Christ, as God and creator, every time and on everything has always authority, but He has not had obedience voluntarily from the part of human beings. And after resurrection, Christ gets voluntary obedience too and everyone will obey, as He by crossing had overcome already existed power of death.[117]

Service of the Savior as King was revealed: a) in miracles executed by Him and governing the nature; b) in the domination over evil's forces; c) in domination over death. But after resurrection, Christ is Chief of heaven, earth and residents of hell. Christ's complete power of King was revealed,

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112 *Galdava M. (Priest)*, Second Psalm, Psalm of David, see: <www.orthodoxy.ge/tserili/fsalm/fsalm2.htm>, [17.05.2015].

113 *Pomazansky M. (Protopresbyter)*, Dogmatic Theology, 3rd Revised and Completed ed., Tbilisi, 2012, 144 (in Georgian).

114 *Holy Theophilact Bulgarian*, Expolanation of Gospel of John, Tbilisi, 2012, 357 (in Georgian).

115 See: „How many kingdoms are there in the Bible?", <www.neverthirsty.org/bible-qa/qa-archives/question/how-many-kingdoms-are-there-in-the-bible>, [20.05.2016].

116 Appearence of God on Galilea Mount (Matt. 28, 16-20), (in Georgian), see: Explanation of Gospel of Matthew according to the teachings of Saint Fathers (Tsilkani, Bishop Zosime (Shioshvili) – compilor of materials and translator), <www.orthodoxy.ge/tserili/zosime/28_16-20.htm>, [21.05.2016].

117 *Holy Theophilact Bulgarian*, Expolanation of Gospel of John, Tbilisi, 2012, 394-395 (in Georgian).

when he went down to hell, destroyed its chains, revived from death and won over death, and finally ascended and opened Kingdom of heaven for everybody, who believes in Him.[118]

In revelation, Christ coming with the clouds is called as ruler of earthly kings (Rev. 1, 5), Lord of lords and King of kings (Rev. 17, 14), His glory and the domination is forever and ever, who is and who was and who is to come, Almighty (Rev. 1, 6-8).

To better understand our topic, it is also expedient to analyze aspect of relationship between the Church and State.

V. Burkadze notes:

"Merger of divine and human nature defines righteous norm of interaction of priesthood and state. State is a fruit of human's rational and purposeful activity and there is not sphere of life, in which a human being is free from God."[119]

V. Burkadze adds that:

"Kingdom of God - Kingdom of Heaven - should be an objective, and human kingship, kingdom – should be a mean: they should be merged as spirit and flesh is merged in human. The law of Orthodox Christianity expresses interaction of the Church and State in such way: priesthood and kingship are virtues granted by Gospel for human beings; the first one is in charge to carrying divine activities and the second, leads human activities, but both, deriving from one source, are making human beings perfect. In order to execute both services, hierarchy of the Church and Kingdom are established, and both are - arranged like hierarchy of heaven".[120]

V. Tsypin, separates the Church from state and explains that:

"The Church is established by God, Jesus Christ, and establishment of state authority is a result of historical process, which is executed by the will of creator and ruler of God; the objective of the Church is to save human being eternally and the objective of state is expressed in earthly well-being".[121]

In the opinion of *V. Tsypin*, Orthodox Church remains unchanged on the promise, according to which each government should be in service of Christianity, because: "*For in him all things were created: things in heaven and on earth, visible and invisible, whether thrones or powers or rulers or authorities; all things have been created through him and for him*" (Col. 1, 16).[122]

According to *V. Tsypin*, the Church not only defines to his sons obedience to state authority, regardless of the opinion of their representatives and faith, but the Church is praying also for them, "*for*

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118 *Pomazansky M. (Protopresbyter)*, Dogmatic Theology, 3rd Revised and Completed ed., Tbilisi, 2012, 144 (in Georgian).

119 *Burkadze V.,* Prospect of Monarch Ruling in Apostasic World, citied from "Orthodoxy and Modernity", *Kutateladze Dz*. (comp.), *Burkadze V*. (ed.), Vol. III, Tbilisi, 2012, 86 (in Georgian).

120 Ibid, 87.

121 *Archpriest Vladislav Tsypin*, Church Law, see: Theological Scientific Almanac "Peristsvaleba", printing house "Anthimos Iverieli", № 1, Tbilisi, 2010, 123-131 (in Georgian).

122 Ibid, 124.

kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness" (1 Tim. 2, 2).[123]

Now let's examine the rules, commandments, i.e. the issue of law of Christ.

It is true that Christ established commandments,[124] but He came for mankind not to abolish the old Law, but to fulfil them (Matt. 5, 17), meaning to assist, in order that this law to be utilized in life fully (Matt. 5, 21-48) and by doing so, He made the Law perfect. How is it expressed? In order to make it clear, let's recall most well-known commandments of Moses - you shall not murder, steal, commit adultery. Moses establishes capital punishment for murder, stealing or adultery. According to the commandments of Christ, murder, stealing and adultery is considered not only deprivation of life of other person, misappropriation property of other person and perverted intercourse of man or woman, but murder is hatred buried in heart towards other person, stealing is also to hide your own property, in order to avoid payment of taxes, and finally, adultery is when a person even thinks in heart perverted thoughts and will glance at other with lust.[125]

According to the *St. John the Golden Mouth* the commandments of Christ do not abolish the old Law, but they advance and fulfil it. For instance, the commandment *you shall not murder* is not abolished by the commandment *you shall not get angry*, just the opposite, the latter fulfils and strengthens the first one and the same can be said to all other commandments too.[126]

In the Gospel of John we read: "*the law was given through Moses; grace and truth came through Jesus Christ*" (John 1, 17). In Old Testament, when God gave the Ten Commandments to Moses, God was invisible, only His voice could have been heard. But in New Testament we are given a commandment of "grace" at the mount of Galilea, God was visible, as a man - Godman, as only teacher and legislator. Christ-Savior gave perfect commandments of Gospel, which are known as "Sermon on the Mount". This preaching is called as code of Christian commandments. By this preaching, the Law of Moses was fulfilled and faultless laws of Gospel was revealed.[127]

Thus, in the Old Testament, human beings were established in faith by force by the Law of Moses, through observing- executing God's commandments. And, in the New Testament, establishing in God's faith is voluntary act by the Laws of Christ. Just because of this, the *Apostle Paul* says that:

"*… a person is not justified by the works of the law, but by faith in Jesus Christ. So we, too, have put our faith in Christ Jesus that we may be justified by faith in Christ and not by the works of the law, because by the works of the law no one will be justified*" (Gal. 2, 16).[128]

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123 Ibid.

124 Examples: Matthew. 5, 22-24, 27-48; 6, 1-4, 6-8, 16-25; 31-34; 7, 1-24; 16, 24; 18, 8-10, 15-17, 21-22; 19, 16-19; 20, 25-28; 22, 34-40; 22, 25.

125 *Burkadze V.,* Crime and Punishment according to Chriatian Teaching, see: Sanugesho, *Tevdorashvili G.* (ed.), Tbilisi, 2016, 68 (in Georgian).

126 *Saint John the Golden Mouth*, Homilies, *Gogochashvili T.* (ed.), Vol. V, Tbilisi, 2016, 193 (in Georgian).

127 *Berdzenishvili L.*, Way of Christ, Liturgy and Catechism, Book 4, Tbilisi, 2011, 224 (in Georgian).

128 *Burkadze V.,* Crime and Punishment according to Chriatian Teaching, see: Sanugesho, *Tevdorashvili G.* (ed.), Tbilisi, 2016, 69 (in Georgian).

Finally, "*Christ is the culmination of the law so that there may be righteousness for everyone who believes*" (Rom. 10, 4), and the Gospel of Christ is designated to all nations and whole world (Matt. 28, 18-20; Mark 16, 15-16). Christ was striving to establish the Kingdom of God on earth and its passing is necessary in order to enter in Kingdom of Heaven. The Kingdom of God is a society of people and its internal world is managed by the will of God, as eternal and unalterable law. This is a last objective, towards which a mankind should strive.[129]

5. Conclusion

By taking into account that everyone should be subject to the governing authorities, for there is no authority except that which God has established (Rom. 13, 1), because thrones or powers or rulers or authorities were created in Him (Col 1, 16), that everything comes from God (1 Cor. 11, 12) and that Heavenly King does not exempt us from obligation towards earthly king, even when such authority issues unjust norms, because He himself recognizes them and He himself obliges us to execute them,[130] we can conclude that:

According to the Orthodox Christian teachings, except of unjust norm, violation of State's (positive) legal norm is sin and conceptually it is irrelevant, which category the norm belongs to, whether it is divine or not, unwritten or written and who defines it, human, society or authority.

With respect to unjust norm, "disobedience" is required from Christian and "obedience" towards the law of such state, which is based on the following:

1. Christian, should fight against unjust norm of state according to the teachings of Gospel (*St. Justin*), which is derived from divine commandment. Consequently, disobedience to unjust law cannot be counted as sin and obedience, in contrary, will be counted as sin.

2. Christian should obey the law of such state, as an "external trial" sent by God (*St. John the Golden Mouth*), because often righteous man are handed over in hands to evil persons not to glorify them, but that righteous man are tested (*St. Gregory the Theologian*). And disobedience to the external trial is a sin, which is proved by the words of Christ to Pilate: "*You would have no power over me if it were not given to you from above*" (John 19, 11).

We have to note also that theory and practice of positive law, to some extent shares the position of Orthodox Christian teachings, when we have into consideration:

a. Legal maxim *Lex iniusta non est lex* that "unjust law is not a law at all";

b. Teaching of legal philosophy, according to which, „there *can* be laws that are so unjust and so socially harmful that validity, indeed legal character itself, must be denied them. There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is

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[129] Explanation of Gospel, *Gladkov B. E.* (comp.), *Keburia R., Keburia I., Janiashvili K.* (trans.), Book II, Tbilisi, 2016, 23 (in Georgian).

[130] Matthew 22, 21; John 19, 11; 1 Peter 2, 13-16; Romans 13, 1-7; Colossians 1, 16; 1 Timothy 2, 2.

devoid of validity. These principles are known as natural law or the law of reason" (*Gustav Radbrukh*).[131]

c. Declaration of Independence of the US, which is based on natural law, stipulates that people are entitled to alter or abolish any form of Government, which violates rights of people endowed by their Creator.[132]

d. Number of scientific researches and court practices, by which the supremacy of natural law over positive law is proved. For instance, with regard to "*The Grudge Informer Case*", the founder of positive law *Herbert Hart* acknowledges that the reasoning was followed in many cases, and these were "hailed as a triumph of the doctrines of natural law and as signaling the overthrow of legal positivism".[133]

e. According to the Georgian legislation, unconstitutional norm can be appealed and annulled in constitutional court[134] and etc.

Here we will say also that the system of law in general is just, but not in all cases.[135] Norm adopted by state, through the all formal procedures, can be unjust. History knows many "legally unjust" cases.[136]

To illustrate this, apart from abovementioned cases, we will recall one fact, which happened in recent past of Georgia.

Holy Father St. Gabriel, the Confessor and Fool for Christ, filled with love towards the God and neighbor (Matt. 22, 37-39), like Christ, in order to save humanity, decided to sacrifice himself, when during the Communist Party parade, on 1 of May 1965, set fire to a banner of depicting Vladimir Lenin, by which he executed with absolute precision the commandment of Gospel:

"*To this you were called, because Christ suffered for you, leaving you an example that you should follow in his steps*" (1 Pet. 2, 21).

In order to assess this fact, we refer to the conclusion, made by well-known criminologist *Emile Durkheim* on the judgment of Socrates:

"*According to Athenian law, Socrates was a criminal and his condemnation was entirely just. However, his crime - his independence of thought - was useful not only for humanity but for his country. It served to prepare a way for a new morality and a new faith, … .*"[137]

It is true that merits of Socrates and *St. Father Gabriel* are different, but conceptually are similar. Since "sinner human being cannot be ideal to his/her like and moreover anti-Christ - for Chris-

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131 *Radbruch G.*, Five Minutes of Legal Philosophy, *Paulson B. L.*, *Paulson S. L.* (trans.), Oxford Journal of Legal Studies, Vol. 26, No. 1, 2006, 14.

132 See: the preamble of the Declaration of Independence of the US, 1, <www.americainclass.org/sources/-makingrevolution/rebellion/text8/decindep.pdf>, [01.02.2015].

133 *Dyzenhaus D.*, The Grudge Informer Revisited, 83 N.Y.U. L. REV. 1000, 2008, 1003-04.

134 Legal grounds to appeal an unconstitutional norm are: article 31 and 60 of the Constitution of Georgia; article 19, 31 and 39 of the Organic Law on Constitutional Court of Georgia.

135 *Khubua G.*, The Theory of Law, Tbilisi, 2015, 83, (par. 211) (in Georgian).

136 Ibid, 66, (par. 181).

137 *Durkheim E.*, The Rules of Sociological Method, *Halls W. D.* (trans.), UK, LDN, 1982, 102.

tian",[138] illegal behavior of the Saint would lead to reappearance of God's faith in people and by doing so, would lead to saving spirits of peoples, which was beneficial not only for one country, but in general, for the whole world.[139]

It is paradox, but it is fact, - from the axiological viewpoint, most virtue behavior (saving human beings), by law created by sinful humans is qualified as crime, which indicates about the existence of lacuna in positive law and indicates that it should be corrected.

Consequently, in order not to repeat, qualifying acts as a crime, which are beneficial for the whole humankind, even if they outwardly are ignoring all norms (e.g. acts of Fool for Christ) of social relations and not to repeat punishing saint people, it is necessary: 1. to examine scientifically the facts of persecution of holy people throughout the humankind's history and holes of positive law, and 2. improve the values of law and criminal policy.

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Importance of Hearsay in Accordance with the Practice of the European Court of Human Rights

It is obvious, that Article 6 of the European Convention on Human Rights enshrined the principle that before the accused could be convicted all the evidence against him had to be produced in his presence at a public hearing with a view to adversarial argument. In addition the use of statements obtained at the pre-trial stage is not always in itself inconsistent with fair trial right if the defendant has been given an adequate and proper opportunities to challenge depositions at an investigation stage.[1] Perhaps the accused has never had a chance to question witness but it did not automatically result in a breach of fair trial right if there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of limiting witness examination right. Because the defendant faces such kind of handicaps which criminal process law does not include it is necessary to be sufficient counterbalancing factors while using hearsay evidence.Thus, in the present work we will analyze as national courts as European Court of Human Right's approach to hearsay which enables us to define the purpose of hearsay evidence for criminal process law and master in depth about international court's experience in the use of hearsay evidence.

Key words: *Confrontation right, hearsay, adversary principle, counterbalancing factors.*

1. Introduction

Evidence is the basis of persuasion. Whenever we try to sway others we cite evidence because humans do not respond to abstract, theoretical arguments.[2]

Certainly this is true in the courtroom. Moreover, parties use evidence in a court to prove or refuse certain facts and make their legal evaluation and court uses them to establish if there exists a fact or action why criminal proceeding is conducted.[3] Therefore, we can convincingly say that evidence determines the existence or nonexistence of the proceedings and the witness testimony particularly hearsay holds a tangible place in this process.

The fact that hearsay is derived evidence[4] and it should complete high standards of reliability besides the defendant is significantly restricted to confrontation right granted under article 6(3d) of the European Convention on Human Rights. That's why admissibility of hearsay evidence must be complied with the procedural safeguards. It can be said that the absence of an adequate procedural guarantees for using hearsay became the reason for the decision of the Constitutional Court of Georgia ac-

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1 Windischv. Austria, 1993, ECHR, §26.

2 *Meritt J. D., Simmons R*., Learning Evidence from the Federal Rules to the Courtroom, American Casebook Series, 2009, 1.

3 Criminal Procedure Code of Georgia, Article 3(23).

4 *Maglakelidze L., Tumanishvili G*., Importance of Indirect Evidence in Accordance with the Georgian and International Criminal Procedure, Justice and Law Journal, №1 (53), 2017, 32 (in Georgian).

cording to which accusation and conviction on the basis of hearsay evidence is unconstitutional. Despite that decision, Constitutional court does not exclude the use of hearsay in particular cases.

Exceptions may be justified for objective reasons when it is impossible to interrogate eyewitness and it is essential for the interests of justice.[5] In particular, when witness or victim are intimidated or there is a need for their security. The unlawful act of accused – intimidation of the witness should not hinder the execution of justice. That's why in exceptional cases under adequate procedural guarantees, the court is authorized to discuss about admissibility of hearsay evidence.[6]

It is noteworthy, that abovementioned decision significantly influenced on Common Court's approach to hearsay evidence. In most cases judges discuss about probative value of hearsay if the information provided in it is confirmed by direct evidence. Doubtlessly, such approaches have increased proof standard but significantly reduced the importance of indirect evidence in criminal procedure.

It is clear that the assessing probative value of hearsay evidence is problematic. Thus, in that work we will determine the probative value of hearsay evidence and its importance in criminal procedure on the basis of legal scientific literature, legislation and both national and international judicial practices. Herewith, through the examination of the experience of International Court the procedural safeguards which should be taken into consideration while using hearsay will be determined not to infringe fair trial right.

2. An Analysis of Constitutional Court Decision Regarding the Use of Hearsay Evidence

It is an interesting fact that Constitutional Court had to evaluate the constitutionality of hearsay evidence regulatory norms.

It must be said that in 22 January, 2015 Constitutional Court of Georgia according to its decision N1/1/548 declared that the normative content of the second section of article 13 of the Criminal Procedure Code of Georgia was unconstitutional. The normative content enabled the possibility for delivery of judgement of conviction based on hearsay and the normative content of the first section of article 169 of the Criminal Procedure Code of Georgia also enabled a possibility for declaring a person to be accused based on hearsay evidence.

According to paragraph of article of the Constitution of Georgia[7], "A decision to bring criminal charge against the accused, bill of indictment and judgement of conviction will be based only on incontrovertible evidence. Thus, within the present dispute the Constitutional Court assessed whether the possibility of using hearsay as an evidence involved risks of violation of constitutional rights and if the criminal procedure legislation contained sufficient guarantees to secure accused in the process of administering justice.[8]

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5 *Maglakelidze L., Tumanishvili G.*, Importance of Indirect Evidence in Accordance with the Georgian and International Criminal Procedure, Justice and Law Journal, №1 (53), 2017, 36 (in Georgian).

6 Decision of Constitutional Court of Georgia, Dated January 22th, 2015, №1/1/548, II-36-37.

7 The consolidated version of the Constitution of Georgia, article 31(7), 23/03/2018.

8 Decision of Constitutional Court of Georgia, Dated January 22th, 2015, №1/1/548, II-4.

The court announced that the admission of testimony which is based on the statement of other person or information disseminated by him/her, involves multiple risks. For instance, it is hard to assess reliability of such information because court has a lack of opportunity to check attitude of source towards the events related to the criminal cases. Besides, it is hard to foresee what kind of testimony person would give, if he/she had been presented before the court. Doubtless, criminal law legislation contains responsibility for providing false information by the witness but this legal mechanism which is for ensuring reliability of witness testimony, in case of hearsay, loses its function because person giving hearsay cannot confirm how incontrovertible the information disseminated by other person is. Despite that attitude, court declared hearsay admissible in existing clearly formulated provisions and adequate procedural guarantees. Moreover, in every occasion the court should evaluate the circumstances which is indicated by the agency responsible for criminal prosecution of justifying the use of hearsay.[9]

Certainly, the lack of legal mechanisms for ensuring the reliability of hearsay were ground of court's explanation that automatic admissibility and use of hearsay is intolerable notwithstanding the conditions and means through which the information was acquired by witness giving it.[10] Despite that fact, in exceptional cases the Constitutional Court consider possibility for admission of hearsay as evidence. When there are objective reasons and it is necessary for the interests of justice use of hearsay is allowed. For example, when witness or victim is frightened or there is a need for their security. The unlawful action of the accused - witness intimidation should not cause distortion to administration of the justice. Therefore, in exceptional cases the court should be authorized to assess necessity of admission and use of hearsay but it must be realized under adequate procedural guarantees.[11]

In conclusion, it is true that disputed provisions were declared unconstitutional by the Constitutional Court of Georgia but it did not deny the use of hearsay as an evidence. It discussed about the conditions in which it is available to consider it credible.

3. Common Courts Practice about Using Hearsay Evidence

It is impossible to master the importance of hearsay in depth without assessing the practice of the Common Courts about hearsay evidence. It is noteworthy that the Common Courts judges often take the discussion into consideration to use hearsay developed into the decision N1/1/548 made by Constitutional Court of Georgia in 22 January, 2015. For example, according to the Supreme Court decision G.kh and G.L who were accused for extortion which means demanding another person to hand over property by more than one person that was accompanied by a threat of spreading the information that may damage victim's rights. In that case, Supreme Court judge agreed with the Court of Appeal's decision on the part of the prosecution's witnesses. Their testimonies were based on informa-

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9 Decision of Constitutional Court of Georgia, Dated January 22th, 2015, №1/1/548. II-37.
10 Ibid, II-29, 31, 34.
11 Ibid, II–36, 37.

tion provided by victim and according to article 76(1) of the Code of Criminal Procedure these were hearsay which were not enough to bring a conviction.[12]

The Supreme Court had the same approach when it shared the Court of Appeal's attitude according to which hearsay evidence does not satisfy with the constitutional standard of incontrovertibility and thus conviction based on such kind of evidence is inadmissible.Because the crime was committed by the defendant could not be proved beyond the reasonable doubt with the pieces of evidence, including hearsay, the court found verdict of not guilty.[13]

Similar decision made by Supreme Court when one of the witnesses' testimony considered as a hearsay and the conviction of the lower instance court was replaced with acquittal judgment.[14]

According to the case materials, the conviction was based decisively on the hearsay and the defendant not at investigation stage nor at trial had never had the opportunity to examine witness. Besides, witness statement was based on the information released by the defendant and the latter denied providing such information to him. Consequently, on the base of Constitutional Court N1/1/548 decision, dated 22 January, 2015 Supreme Court clarified that hearsay does not satisfy with the constitutional standard of incontrovertibility and in addition with no other direct evidence confirmed A.B's guiltiness the court had to made acquittal judgment.[15]

Approximately similar content was developed by Supreme Court of Georgia on 26 June, 2018.[16]According to the case materials several hearsay evidence was based on the information released by the victim and the accused was victim's spouse. And the victim took advantage of the right granted by the Code of Criminal Procedure and refused to give testimony against close relative. Because the hearsay could not confirm by other pieces of evidence which were not hearsay, the court on the base of article 76(3) of the Criminal Code of Georgia and on 22 January, 2015 N1/1/548 decision of Constitutional Court of Georgia, explained that only hearsay evidence could not be legal ground for conviction.[17]

Also the witness testimonies were based on the information released by the defendant on hunting for the Red List animal.[18] According to the court the evidence presented in the case did not prove the investigation version that the bear was killed by the defendant with its own gun because there was not any direct evidence proving that fact. Particularly, there has not been eyewitness and the hunters have not seen it directly but their statements were based on defendant's story that he killed bear with its own gun that was later denied by the defendant. Because the defendant's guiltiness was not confirmed by direct evidence both the first instance and the Court of Appeal, hearsay and another evidence presented to the case considered inadequate for conviction. That's why it determined acquittal judgment.

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12 Decision of Supreme Court of Georgia, Dated March 20th, 2018, №541 ap-17.
13 Ibid, №502 ap-17.
14 Decision of Supreme Court of Georgia, Dated June 30th, 2015, №14 ap-15.
15 Ibid.
16 Decision of Supreme Court of Georgia, Dated June 26th, 2018, №73 ap-18.
17 Ibid.
18 Decision of Supreme Court of Georgia, Dated April 27th, 2018, №646 ap-17.

We should pay attention to the Supreme Court №218ap-14 decision of 18 December, 2014 because it represents the example of Common Court's existed practice about hearsay before Constitutional Court's decision, dated 22 January, 2015.

According to that case, K.Q was charged for theft, i.e secretly taking another person's movable property for its unlawful appropriation by illegal entry into a dwelling place and which has caused considerable damage. At the trial stage, the fact that K.Q secretly took personal computer was only proved with police hearsay which had been known for him from undercover agent.[19] In view of that information was operative and it was impossible to verify. The court relied on article 76(2) of the Code of Criminal Procedure according to which hearsay is admissible if the person indicates the source of information which can be identified and verified. Thus, the court did not share hearsay as evidence.[20]

In conclusion, the approach of Common Courts about admissibility of hearsay evidence is in framework. And the decision of the Constitutional Court had a special effect on it. It is noteworthy that the courts are discussing about probative value of hearsay and sharing it or not in the process of final judgment.However, as the study of the practice of the national courts showed us judges evaluate the probative value of hearsay if there is any corroborative direct evidence in the case. Such approach increased the standard of proof but in the legal sense it is acceptable to admit hearsay as evidence when there is any corroborative indirect evidence because circumstantial evidence is as probative as direct evidence and they face similar challenges of reliability and accuracy.[21]

For more clarity, imagine the case when there are several circumstantial evidences. It is not necessary that each piece of evidence separately convince you of the defendant's guiltiness beyond a reasonable doubt but all the pieces of circumstantial evidence when considered together must reasonably and naturally lead to that conclusion. But if you can draw two or more reasonable conclusions from the circumstantial evidence the court should not rely on these ones.[22] Thus, if the indirect evidence which is presented in the case satisfies the authenticity standard and also confirms the information provided in hearsay it is possible to have discussion about probative value of hearsay and with other evidences proof the defendant's guilt beyond a reasonable doubt.

4. Practice of the European Court of Human Rights on Hearsay Evidence

When we are discussing about admissibility of hearsay, we should focus on the right of confrontation provided for in article 6(3d) of the European Convention on Human Rights because it serves to examine the credibility of witness and its testimony.[23] In case of hearsay the party has no possibility to

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19 Decision of Supreme Court of Georgia, Dated December 18th, 2014, №218 ap-14.

20 Ibid, 4.1.1.2.

21 *Heeter E. M.,* Chance of Rain: Rethinking Circumstantial Evidence Jury Instructions, Hastings Law Journal, February 2013, 533.

22 Judicial Council of California Advisory Committee on Criminal Jury Instructions, 2018, 52.

23 See also: *Meritt Jones D., Simmons R*., Learning Evidence From the Federal Rules To The Courtroom, American Casebook Series, 2009, 720.

check its real content and credibility by questioning the witness because author of that statement cannot confirm the truth of spreading information.

In legal literature it is considered that testimony by a witness against a criminal defendant will be more reliable if it is given in open court and in the presence of the accused, enabling the defendant to cross-examine the witness face to face.[24] A question which arises is whether it is right to examine witness testimony at trial or is it enough for the defendant to be given an opportunity to question witness at investigative or pre-trial stage?

In this regard, ECHR approach is interesting. The best is to question a witness at trial although it will not be a violation of the right to a defendant to use as evidence such statements obtained at the pre-trial stage and an accused had an opportunity to challenge and question a witness against him when the witness was making his statement or later stage of the proceedings.[25] For more clarity, subparagraphs "a" of article 114 of the Criminal Procedure Code of Georgia gives opportunity to both party, as a prosecution and defense to interrogate witness before a magistrate judge. That process is taking place with the participation of the parties and the absence of the non-initiator party will not interfere in the examination (Paragraph 9 of article 114 of the Criminal Procedure Code of Georgia).

We should also pay attention to the fact that the European Convention on Human Rights does not contain any record that denies the use of hearsay in criminal proceedings. Moreover, according to ECHR practice the admissibility of evidence is primarily a matter for regulation by national law.[26] Although it is important to assess such kind of testimony carefully because hearsay has less weight than first-hand testimony.[27] Besides, a conviction should not be solely based on hearsay evidence.

It can be said that the European Court of Human Rights in the case of Al-Khawaja and Tahery against The United Kingdom[28] has developed a standard (Three-part test "Al-Khawaja test") which should be satisfied during the use of hearsay evidence in order not to infringe the fair trial right. Namely, 1. There must be a good reason for the non-attendance of the witness; 2. Hearsay evidence must not be the sole or decisive basis for the conviction; 3. There must be sufficient counterbalancing factors to compensate for the handicaps which were caused by admission of the absent witness testimony.[29] Interestingly to know what the court implies in each of them.

A good reason for the non-attendance will be provided by the death of the witness, fear of death, health damage, sense of material harm and so on. In order for fear to be acceptable as a good reason the court must determine whether or not there are objective grounds for that fear and whether those objective grounds are supported by evidence. In addition, European court assesses if national courts having made all reasonable efforts to secure the attendance of a witness. Not surprisingly, the

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[24] *Hurley J. B.,* Confrontation and the Unavailable Witness: Searching for a Standard, Valparo University Law Review, 1983, 193.

[25] Kostowski v. The Netherlands, 1989, ECHR, §41.

[26] Garcia Ruiz v. Spain, 1999, ECHR, §28.

[27] Pichugin v. Russia, 2012, ECHR, §198.

[28] Al-Kwavaja and Tahery v. The United Kingdom, 2011, ECHR.

[29] Ibid, §119-125.

European Court of Human Rights in its recent decision interpreted that the privilege for refusing to give evidence against relatives may be considered as a good reason for non-attendance of a witness.[30] This approach is absolutely different from the past practice of European Court. For instance, in case of Unterpertinger v. Austria[31] an applicant had been convicted of assaulting family members. And the witnesses who gave testimony to the police at the investigation stage were victims of the crime. But later at the trial, both had refused to testify against him as they were permitted to do under national law. The ECHR concluded that the conviction was a violation of applicant's right because the defendant had not been able to cross-examine declarant about the statements at any stage of process which were ground for the conviction.[32]

As for the sole or decisive basis for the conviction, the testimony of the absent witness which is the sole evidence against an accused cannot be a basis for conviction. Besides, hearsay cannot be determinative of the outcome of the case.[33] Where the untested evidence of a witness is supported by other corroborative evidence the assessment of whether it is decisive will depend on the strength of the supportive evidence. The stronger the corroborative evidence is the less influential hearsay is at the process of decision.

The counterbalancing factors for ECHR at a minimum this means that the hearsay must be approached with caution. The courts must show that they are aware that it carries less weight in the process of conviction and detailed reasoning is required to consider it reliable. Also there should be another strong accusatory evidence in the case[34] and the defendants should be given opportunity to submit their own version of the events to the court and in case of knowing the identity of the absent witness cast doubt on their credibility.[35]As for the additional safeguards which are part of the counterbalancing factors the court implies an opportunity to record video of witness questioning at the investigation stage in order to allow the prosecution and defence to observe the witness demeanour.[36] Also when an interrogation of witness is not possible at trial the possibility of the defense to put its own questions to the witness indirectly for example, in writing it is considered as an important procedural safeguard.[37]And the defense counsel's opportunity to question witness during the investigation also remote interrogation of witness is possible by using video-audio inputs.

For legal point the case of Schatschashvili v. Germany is very important.[38] In assessing the fairness of entire trial the court relied on "Al-khawaja Test". However, the court had to evaluate whether there was a breach of fair trial right if the good reason for non-attendance of witness would not be satisfied. The court noted that the absence of the good reason for the non-attendance of a witness cannot

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30 N.K. v. Germany, 2018, ECHR.
31 Unterpertinger v. Austria, 1986, ECHR.
32 Ibid, §33.
33 Ibid, §131.
34 Paic v. Croatia, 2016, ECHR, §43.
35 Ibid, §45
36 Chmura v. Poland, 2012, ECHR, §50.
37 Scholer v. Germany, 2015, ECHR, §60.
38 Schatschashvili v. Germany, 2015, ECHR.

itself be conclusive of the unfairness of a trial.[39] As for sufficient counterbalancing factors it is crucial in assessing the fairness of the entire process. The existence of sufficient counterbalancing factors must be reviewed not only in cases in which the evidence given by an absent witness was the sole or decisive basis for the applicant's conviction, but also in those cases whether such kind of evidence carried significant weight and that its admission handicapped the defense. Namely, the more important that evidence is the more counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair.[40] Thus, the Strasbourg Court with that case ruled that despite the absence of a good reason for non-attendance of a witness it is possible to use the "Al-Khawaja test" in assessing the fairness of entire trial.

The ECHR in one more case namely in Seton v. The United Kingdom[41] shared the approach developed in Schatschashvili's case and noted that the absence of a good reason for witness non-attendance could not be a decisive of entire process fairness.[42]

The above-mentioned principles are shared by Strasbourg court in a recent case Batek and Others v. The Czech Republic.[43] According to the factual circumstances of the case the applicants worked as a custom officers at the border of Slovakia and their convictions were for bribery. There was a testimony of an anonymous policeman who had been working in custom-house for two month in order to reveal the crime and also testimonies of twenty truck drivers of different nationalities. The truck drivers were questioned before a judge but the applicants and their counsels did not attend the proceedings because they were not charged for crime. As for the anonymous witness she gave her testimony outside the courtroom using an audio streaming device. During the trial only one applicant put a question to the anonymous witness but other applicants who did not attend the court were represented by defenses, they did not enjoy the right to confront anonymous witnesses.

The applicants complained that there had not been sufficient counterbalancing factors for the failure to summon the absent witnesses to testify. Moreover, the courts had not taken any positive steps to allow the defense to cross-examine the truck drivers. And they also debated that their conviction had been based on a decisive extent on testimonies of absent witnesses.

The European Court of Human Rights discussed whether there was a good reason for witness non-attendance and interpreted that the fact that the truck drivers were not citizens of the Czech Republic and travelled frequently could not be considered as "a good reason" for failure of their attendance. But it was added that this fact cannot determine unfairness/fairness of entire process.[44]

As for the anonymity of police agent from the court's perspective there was an important reason and legal basis in preserving the anonymity of an undercover agent. And whether the testimonies were sole or decisive for the defendant's conviction the court noted that the conviction was strengthened by many other inculpatory evidence and the testimonies of witnesses could not have been considered as the only basis for conviction.

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39 Schatschashvili v. Germany, 2015, ECHR. §113.
40 Ibid, §116.
41 Seton v. The United Kingdom, 2016, ECHR.
42 Ibid, §59.
43 Batek and Others v. The Czech Republic, 2017, ECHR.
44 Ibid, §44.

Besides, the court observed if there were any sufficient counterbalancing factors and noted that there had not been any indication that national courts approached statements given by absent witnesses with any specific caution, but the applicants had the opportunity to present their own version of events. In addition, the identities of the witnesses were known to the defense which was able to contest the witnesses' credibility.

It should be noted that the court considered that all negative factors caused by the restriction of the right were balanced and declared that there had been no violation of the fair trial right.

Thus, we can convincingly say that the main premises that must be satisfied in order to consider the trial fair are assembled in the case law of European Court of Human Rights. As for the hearsay, it is clear that it is not excluded from the proceedings and it is admissible. However, when assessing its credibility peculiar caution is required and the more weight will be given to it the more counterbalancing factors will have to carry during the process.

5. Conclusion

During working on this issue, the probative value of hearsay in decision-making process has been confirmed. Furthermore, none of the provisions of the European Convention on Human Rights indicate restrictions on its use but it should be said that high standard of reliability must be satisfied while using hearsay and its probative value is significantly depended on corroborative evidence. Proving evidence can be both direct and indirect. However, as the case law of national courts has shown, judges focus on direct one. Such approach increased the standard of proof but in the legal sense it decreased the value of indirect evidence. Despite the different types of evidence, both of them must be authentic. Thus, we consider that it is possible to discuss about probative value of hearsay even it is proved with indirect one.

Because, the admission of hearsay restricts the defendant's confrontation right guaranteed by the European Convention on Human Rights[45] the court during its practice developed a number of prerequisites to balance these negative factors in order not to be infringed fair trial right. It must be mentioned that in the case of Al-Khawaja and Tahery v. The United Kingdom, the following three basic principles were developed: a) a good reason for witness non-attendance; b) if hearsay was the sole or decisive basis for the conviction and c) sufficient counterbalancing factors to compensate for the handicaps which were caused by admission of the absent witness testimony. This test was the guideline for both the European Court of Human Rights and the national courts of member states. It is noteworthy that the decision of the Constitutional Court of Georgia on admissibility of hearsay was based on above-mentioned principles. But the ECHR in case of Schatschashvili v. Germany introduced a change of assessing violation of fair trial right that was significant. In the court's view, except for counterbalancing factors which have crucial impact when assessing fairness of the whole proceed-

[45] If confrontation was absolute, it would require that all evidence be given by live witnesses in open court. See: *Hurley J. B.,* Confrontation and the Unavailable Witness: Searching for a Standard, Valparo University Law Review, 1983, 193.

ings, it is possible to perform complete Al-Khawaja test always even in cases where there is no good reason for witness non-attendance.

Consequently, there may be no good reason for witness non-attendance, but if the handicaps caused by admission of hearsay and restriction of defendant's confrontation right, will be balanced and besides, hearsay will not be sole or decisive basis for conviction, trial will be fair.

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16. Batek and Others v. The Czech Republic, 2017, ECHR.
17. Paic v. Croatia, 2016, ECHR.
18. Seton v. The United Kingdom, 2016, ECHR.
19. Schatschashvili v. Germany, 2015, ECHR.
20. Scholer v. Germany, 2015, ECHR.
21. Chmura v. Poland, 2012, ECHR.
22. Pichugin v. Russia, 2012, ECHR.
23. Al-Kwavaja and Tahery v. The United Kingdom, 2011, ECHR.
24. Garcia Ruiz v. Spain, 1999, ECHR.
25. Windisch v. Austria, 1993, ECHR.
26. Kostowski v The Netherlands, 1989, ECHR.
27. Unterpertinger v Austria, 1986, ECHR.

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Certain Important Aspects of Legal Norms Defining Essence of Disciplinary Misconduct in Public Service

The integration process of Georgia with EU and sustainable democratic development of the country has necessitated the reformation of public service legislation. The Law on Public Service of October 31st, 1997 valid untill July 1st, 2017, left many significant elements of public service beyond the regulatory scope. The result was a very vague and ambiguous practice of enforcement with regards to issues which need a unified approach.[1]

Taking this into account, in the context of public administration reform, the Parliament of Georgia passed a Law of Georgia on "Public Service" on October 27th, 2015, as a far more refined legislative act geared towards a professional public servant.

The new Law introduced numerous novel and innovative institutions for Georgia as well as envisioned norms set to improve the already existing ones. One of such issues was the disciplinary liability of the public servant. Chapter 10, containing provisions regulating disciplinary liability of public servant and stipulating more complete rules of disciplinary liability appeared in the new law, also envisaging disciplinary proceedings. Likewise, disciplinary misconduct was given a new definition, which, in some ways, is different from the previous one.

Thereby, the aim of this article is to discuss and analyze new legal norms defining the essence of disciplinary misconduct in public service and to represent their important aspects as they create certain foundation for the effective functioning of the public service sector.

Key words: *Public service, public servant, disciplinary liability, disciplinary misconduct, minor and serious disciplinary misconducts, breach of norms of ethics and conduct.*

1. Introduction

"Two constitutional values converge into the personality of a public servant simultaneously: the guarantee of protecting individual rights and the element of institutional arrangement crucial for the functioning of the state."[2] Therefore the norms regulating disciplinary liability in the public service should create the basis for the effective functioning of said public service and at the same time ensure proper protection of public servants'[3] interests.

Disciplinary misconduct is the sole basis for disciplinary liability. First and foremost, the fact of actual misconduct transpiring is ascertained and then the issue of applying disciplinary liability measure comes into question.

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1 Explanatory Note to Law of Georgia on Public Service, of October 27th, 2015 (Registration № 07-2/372/8), 1, <http://bit.ly/2t7maWS>, [26.03.2019].

2 *Gatserelia A., Gegenava D., Sommerman K., Kobakhidze I., Rogava Z., Svanishvili S., Turava P., Kalichava K., Khubua G., Khubua G.* (ed.), Handbook of the Legal Bases of Public Administration, Vol. 3, Tbilisi, 2016, 195 (in Georgian).

3 In accordance with Subparagraph "d" of Article 3 of the Law on Public Service, a public servant is a qualified public officer/public officer/officer, a person recruited on the basis of an agreement under public law (administrative agreement) or a person recruited on the basis of an employment agreement (labor contract).

Disciplinary misconduct, at its core, constitutes breach of liabilities and is related to mechanisms for ensuring public service efficiency. During the functioning of a public service, the issues of evaluating conduct of public servants and deciding on the application of a measure of disciplinary liability, provided corresponding legal and factual prerequisites exist, are always relevant.

Thereby, the evaluation of a certain action as a disciplinary misconduct is a crucial process which, at first stage, demands clear understanding and comprehension of the essence of this institution, especially considering that, with promulgation and entering into force of the Law of Georgia of October 27th, 2015, on Public Service (henceforth referred to as "Law"), a new legislative reality has come to light, which envisions numerous issues related to disciplinary misconduct. More precisely, it stipulates the definition of disciplinary misconduct, determines the rules of disciplinary proceedings thus creating the possibility for the proper evaluation of the breach and proportionate protection of interests.

Therefore, in the article presented here, the definition and essence of disciplinary misconduct, its particularities and normative elements determining its essence (content) shall be discussed. For research purposes, also of interest will be those practical and theoretical aspects of the legal definition of disciplinary misconduct, which may have certain significance for ensuring protection of public servants' rights and public interest in general.

The article is based on historical, comparative legal and analytical methods. Due to specifics of issues discussed and objectives of the work, case law was also analyzed in certain terms. The scientific literature and normative materials related to research topic were researched as well.

2. Disciplinary Misconduct as the Basis for Disciplinary Liability and Formulation Determining Its Essence

Public servants, as subject to administative law, play an important role in executing government functions. Their knowledge and work represent the main bedrock for the effective performance of state authorities' tasks at hand.[4]

Therefore, considering the nature of public service and special legal status of the civil servant, he/she has an entire array of obligations, violation of which, naturally, entails disciplinary, administrative, civil or criminal liability. 5 As to which of the aforementioned will be applied depends on legally protected right (object) and the consequence of breach.

Disciplinary liability, as one of forms of liability, is a supervision mechanism in the civil service,[6] triggered as a direct result of the breach of work obligations and rules of conduct. 7 It has three

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4 *Baindurashvili N.,* Specifics of Handling the Disputes Related to Public Office, Legal Problems and Ways to Address Them, Legal Journal "Justice and Law", №3(38), 2013, 116 (in Georgian).

5 *Tofan M., Bercu A. M.,* Disciplinary Liabilities of the European Public Servants, CES Working Papers, I, (1), 2009, 27, <http://bit.ly/2uzx2L8>, [11.03.2019].

6 Disciplinary Liability in Public Service – Legislation, Administrative Practice and Case Law, 2015 Georgian Young Lawyers' Association Report, Tbilisi, 2016, 4, <https://bit.ly/29DhwV>, [11.04.2019].

functions: educational (teaches public servants to respect certain rules), preventive and repressive.[8] The implementation of said functions is important in establishing correct conduct in case of public servants.

Imposing disciplinary liability generally means that a public servant has committed a misconduct.[9] Disciplinary misconduct of a public servant constitutes a concept within administrative, more specifically civil service law, and is connected with disciplinary liability. Thus, "disciplinary misconduct and disciplinary liability are institutions of civil service law and public service".[10]

The Law does not give the definition of the term "disciplinary liability". However it can be frequently seen used in various contexts, namely, in disciplinary liability measures stipulated by the legislation, 11 exemption from disciplinary liability, 12 validity(t of disciplinary liability, etc. 13

The Supreme Court of Georgia remarks on disciplinary liability, that "public servant during his line of work is liable towards state and public and thus, failure to perform obligations set by legislation or defective performance thereof may lead to the imposition of disciplinary lability, which is a form of liability for violations identified in the professional line of public servant business and the aim of which is to ensure the proper observance of duties stipulated by legislation and to improve the work process,[14] which in turn leads to preventing cases of such violation of official duties in future. [15]

From this and based on the analysis of norms regulating the subject matter, disciplinary liability of the public servant may be understood as a legal responsibility following disciplinary misconduct, which is determined by a legislative act issued after disciplinary proceedings. Likewise, one of its properties as a measure of legal liability is the subject, which, in this case is public servant and illegal conduct, which fall under disciplinary misconduct.[16]

Tentatively, legal doctrine recognizes three types of disciplinary liability. These are the liability by labour by-laws (mainly concern support staff and contracted workers), liability by official subordination (as envisaged by the Law on Public Service) and liability as stipulated by special

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7 *Tofan M., Bercu A. M.,* Disciplinarie Liabilities of the European Public Servants, CES Working Papers, I, (1), 2009, 23, <http://bit.ly/2uzx2L8>, [11.03.2019].

8 Ibid*,* 27.

9 *Barbu V.,* Disciplinary Liability of European Officials, Perspectives of Business Law Journal, Vol. 1, Issue 1, 2012, 73.

10 Decision of April 29, 2014 № BS-651-626(K-13) Chamber of Administrative Cases of Supreme Court of Georgia.

11 Article 96, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

12 Paragraph 2 of Article 101, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

13 Article 101, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

14 Decision of July 14, 2016 № BS-184-183(K-16), Chamber of Administrative Cases of Supreme Court of Georgia.

15 Decision of December 10, 2015 № BS-161-158(K-15) Chamber of Administrative Cases of Supreme Court of Georgia.

16 *Malinche D. M.,* The Liability of Public Servants, Perspectives of Law and Public Administration, Societatea de Stiinte Juridice si Administrative (Society of Juridical and Administrative Sciences), Vol. 7(1), 2018, 69.

(extraordinary) statutes. 17 Chapter 10 of the new law applies to officials and extends to persons contracted under labor or administrative contract. 18 Furthermore, issues related to the disciplinary liability of the latter may be additionally covered by the Labour Code, relevant agreements and statutes (various internal regulations). Therefore, the given classification of disciplinary liability is not relevant for Georgia as Chapter 10 of Law, stipulating rules and conditions for imposing disciplinary liability, likewise applies to both the official and persons employed by a labour or administrative contract.

Considering abovementioned, the institution of disciplinary liability is an important mechanism for the proper functioning of the public service. It should be noted, that the institution of disciplinary liability is an important mechanism for proper functioning of public office. The right of public administration to enact certain measures against the offender (*ius puniendi*), strengthens internal discipline, increases accountability and ensures fulfillment of obligations. 19

3. Definition and Essence of Disciplinary Liability

Responsibility is the fundamental element of representative democracy. Public officials are doubly responsible, on one hand, towards citizens, and on the other – towards the government for the administration of public service. [20] Therefore, public official finds himself in a specific legal dimension and various liability forms may be applied to him/her, including disciplinary liability.

As noted before, disciplinary misconduct is the basis for disciplinary liability. The definition for the latter exists on legislative level, in particular, Paragraph 1 of Article 85 lays down the definition of disciplinary misconduct, while Paragraph 2 exhaustively lists disciplinary misconducts of one particular type.

In accordance with Paragraph 1 of Article 85 of the Law, following constitutes disciplinary misconduct:

a) failure to perform official duties intentionally or through negligence;

b) damage to the property of the public institution or creation of danger (risk) of such damage intentionally or though negligence;

c) neglect and breach of ethical norms and the general rules of conduct that are intended to discredit an officer or a public institution, irrespective of whether it is committed at or outside work. [21]

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17 *Morgoshia A.,* Particularities of Disciplinary Liability of Public Servant, Journal "Law", № 4-5, 2000, 39 (in Georgian).

18 Paragraph 3 of Article 80 and Paragraph 2 of Article 84, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

19 *Cardona F.,* Liabilities and Discipline of Civil Servants, Support for Improvement in Governance and Management, A joint initiative of the OECD and the European Union, principally financed by the EU, 2003, 2, <http://bit.ly/2t76Nhi>, [11.04.2019].

20 *Boroska P. A., Suwaj R., Staszic S.,* Ethical Responsibility of Officials of the European Union and Type Sanctions Imposed for Unethical Conduct, School of Public Administration, Poland, 2, <http:-/-/bit.ly/2pL1ymL>, [22.04.2019].

21 Paragraph 1 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

The definition of disciplinary misconduct is conveyed differently, in scope and meaning, in legislation of other countries. As an example, the Armenian law on Public Service indicates when disciplinary penalties may be applied. Such cases are: failure to perform official duties or improper performance thereof with no solid grounds, exceeding official powers,[22] internal violations of workplace discipline.[23] This example, just as the definition of disciplinary misconduct in Georgia, is a general one (it does not contain specific list of prohibited actions) and hence it is intriguing to determine its meaning as well as scope (scale) of such meaning.

3.1. Failure to Perform Official Duties Intentionally or Through Negligence

Failure to perform official duties intentionally or through negligence is the most common disciplinary misconduct that can be encountered in most other countries. For example, German legislation considers breach of duties intentionally or through negligence as a disciplinary misconduct.[24] Concerning work duties, they are defined based on legislation as well as internal regulation documents (by-laws) and work (job) descriptions.

It is important that current effective regulations in Georgia do not directly encompass faulty (defective) performance within the terms of disciplinary misconduct, but before that the Subparagraph "a" of Paragraph 1 of Article 78 of the previous corresponding law did envision it. Therefore, a question arises whether systematic and intentional defective performance of imposed duties by person entails disciplinary liability. Concerning this issue, the Commentaries to the Law on Public Service state that insofar as even after defective performance we have an unfinished, unfulfilled duty, the legislator has unified these two cases (defective performance and failure to perform) and considers it logical that the consequence of defective performance is, by itself, a failure to perform.[25] Despite such argumentation, considering the nature of disciplinary misconduct, for the purpose of definitiveness of the term of disciplinary conduct, the term of disciplinary misconduct, as regulated by Subparagraph "a" of Paragraph 1 of Article 85 of the Law, should directly indicate both failure to perform official duties intentionally or through negligence and faulty (defective) performance). Notably, according to Azerbaijani legislation, non-performance of official duties as well as improper (unduly) performance thereof and non-compliance of legislative obligations constitute grounds for initiating disciplinary misconduct.[26]

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22 Exceeding powers (the mandate) in Georgia entails criminal responsibility, if it results in the fundamental breach of the public or state legal interest. See, Article 333, Criminal Code of Georgia, SSM 41(48), 13/08/1999.

23 Article 32, The Law of the Republic of Armenia on Civil Service, 04/12/2001, <http://bit.ly/2ufDbg6>, [18.04.2019].

24 *Maizière T. D.,* The Federal Public Service: An Attractive and Modern Employer, Berlin, 2014, 48, <http://bit.ly/2sD1F0Q>, [18.04.2019].

25 *Turava P., Pirtskhalaishvili A., Dvalishvili M., Tsulaia I., Kardava E., Sanikidze Z., Makalatia G.,* The Law of Georgia on Public Service – Commentaries, *Kardava E.* (ed.), Tbilisi, 2018, 283 (in Georgian).

26 Article 25.1, The Law of the Republic of Azerbaijan on Civil Service, <https://bit.ly/2DqmwfV>, [18.04.2019].

It is important to note, that effective regulations do not state of what level, intensity or duration failures to perform work obligations are to be classified as disciplinary misconduct. Such issues are significant from the standpoint of proportionality principle and protection of rights of public servants. Therefore they should be duly evaluated during disciplinary proceedings on case-by-case basis.

With regards to definition of disciplinary misconduct in Georgia, it is not laid down on legislative level whether or not importance may be attached to the fact that disciplinary misconduct has been committed justifiably (with just cause). While Subparagraph "e" of Paragraph 2 of Article 97 of the Law establishes determination (identification) of reasons for non-performance of official duties, it bears significance during imposition of disciplinary liability measures as pertaining to selecting proportionate sanctions and not when deeming an action as a disciplinary misconduct.

As for the subjective side (mens rea) of the disciplinary misconduct, Subparagraphs "a" and "b" of Paragraph 1 of Article 85 include intentional or negligent behavior under the term of disciplinary misconduct, which points to the fact that current law prescribes due (guilty) liability in this section. However, Subparagraph "c" of the same Article, which concerns the breach and neglect of norms of ethics and general rules of conduct, does not state any form of liability. Concurrently, for instance, the legislation of Romania stipulates that intentional or negligent breach of official duties by public servants entails disciplinary consequences.[27] According to Slovenian law, intentional or negligent breach of official duties is a disciplinary misconduct.[28] Therefore,for an act to qualify as a disciplinary misconduct, it is important to determine subjective side of the committed act as well, when the case concerns failure to perform official duties. However definitions of intent and negligence and their content with regards to disciplinary misconduct is not regulated from normative standpoint within the framework of current civil service law.

3.2. Damage to the Property of the Public Institution or Creation of Danger of Such Damage Intentionally or Through Negligence

Subparagraph "b" of Paragraph 1 of Article 85 of the Law contains two alternative elements of disciplinary misconduct, namely, damaging property of the public institution or creating the danger of such damage occurring intentionally or through negligence.

The issue of qualifying an action of creating danger (risk) of damage to the public institution as a disciplinary misconduct is worth attention. Despite the fact that public servant's action does not result in any negative outcomes for the public institution, he/she can still be subjected to disciplinary liability. In such cases, it is crucial and also difficult to assess the likely results of the action in question and how real the danger was as to not unjustifiably infringe on the interests of the public servant.

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[27] Article 70.1, Regarding the Regulations of Civil Servants, Law № 188/1999, 28/06/2000, <https://-bit.ly/2VXOZks>, [18.04.2019].

[28] Article 122.3, The Civil Servant Act of the Republic of Slovenia, № 020-05/98-20/8, 11/06/2002, <https://bit.ly/2UO4O0E>, [18.04.2019].

Such attitude from the legislator's point emphasizes the public servant's obligation to protect the property of public institution with particular care. The Supreme Court of Georgia considered it as a gross violation of discipline bases on the Law on Public Service, of October 31st, 1997, when the person allowed and "made peace" with the possibility of severe outcomes, proving inadequacy of his behavior, inattentiveness and irresponsible attitude towards official duties.[29]

According to one viewpoint, material damage can be both collateral and the result of disciplinary misconduct and not an element determining its meaning(content). In this case, when inflicting material damage, a separate form of liability comes up first, such as material liability and in special cases, application of disciplinary liability is not excluded either. [30] However, according to Georgian law, material damage is the element setting disciplinary misconduct into motion as inflicting material damage (its existence) is the basis for qualifying a certain action as a disciplinary misconduct, its necessary element.[31]

What should be noted is that public servant's action may cause damage to the property of public institution itself or a third party. However Law does not state on compensation of such damages by the public servant. In this case, to ensure compensation for property damages, the rules contained in Law of Georgia – Civil Code of Georgia are paramount. For instance, in United States of America, in line with Federal regulations, when a head of institution or person authorized by him/her ascertains, that due to wrongdoing the civil servant has financial liabilities towards the institution, the amount will be deducted from his/her monthly salary.[32]

Likewise, it is important to draw a line between a fine or other disciplinary monetary penalty, as a measure of liability and compensation for damages. [33] The aim of the obligation of public servant to compensate for damages is to rectify already existing outcome and it has legal grounds separate from that of disciplinary liability.

3.3. Neglect or Breach of Ethical Norms and General Rules of Conduct Intended to Discredit Officer or Public Institution

3.3.1. Rules of Ethics and Conduct in Public Service

General rules of ethics and conduct are the central values, which should always form the backdrop for a public institution of any democratic and developed country in its daily, routine line of work.

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29 Decision of March 25, 2009 № BS-1108-1070(K-08), Chamber of Administrative Cases of Supreme Court of Georgia.

30 *Morgoshia A.,* Particularities of Disciplinary Liability of Public Servant, Journal "Law", № 4-5, 2000, 38 (in Georgian).

31 Subparagraph "b" of Paragraph 1 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

32 *Cardona F.,* Liabilities and Discipline of Civil Servants, Support for Improvement in Governance and Management, A joint initiative of the OECD and the European Union, principally financed by the EU, 2003, 4, <http://bit.ly/2t76Nhi>, [11.04.2019].

33 Ibid.

[34] These rules represent a list of principles and standards, [35] which concern the proper behaviour of civil servants[36] and support adherence to high moral standards. [37]

The ethics of public service originate from several different sources. These sources begin with the individual ethical character of the public servant, continue with the internal culture/regulations and statutes of the institution and end with international conventions and written standards of conduct. [38]

In most states, the norms of ethics and conduct are mainly enshrined in ethics codes and codes of conduct. They, as a rule, reflect three different values: personal moral principles (honesty, loyalty, etc.), professional public service values (neutrality, equal treatment, etc.) and legal regulations (avoiding conflict of interests, etc.). [39] Currently, rules of ethics and conduct are valid in different forms in majority of countries. They may be regulated by legislative or sublegislative act as well as international regulatory documents. [40] For instance, Estonia was the first country among Baltic States that adopted Public Service Code of Ethics. It was integrated in the Law on Public Service. [41] In Azerbaijan as well, the Code of Ethics and Conduct are regulated on legislative level. [42] The existence of

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[34] *Aghapishvili I., Beselia G., Tsukhishvili N.,* Commentaries on the Decree of the Government of Georgiaon Determining General Rules of Ethics and Conduct in Civil Service, *Kardava E.* (ed.), Tbilisi, 2018, 6 (in Georgian).

[35] *Beselia G.,* Which Role Can Ethics Management Play in the Improvement of the Performance of Public Administration? What is the Relationship between Ethics and Law in this Respect?, "Journal of Law", № 1, Tbilisi, 2012, 253 (in Georgian).

[36] *Kernaghan K.,* Promoting Public Service Ethics: The Codification Option, Ethics in Public Service, *Chapman R. A.* (ed.), Edinburgh, 1993, 18, cited in: *Beselia G.,* Which Role Can Ethics Management Play in the Improvement of the Performance of Public Administration? What is the Relationship between Ethics and Law in this Respect?, "Journal of Law", № 1, Tbilisi, 2012, 253 (in Georgian).

[37] *Huddleston M. W., Sands J. C.,* Enforcing Administrative Ethics, The Ethics Edge, *Berman E. M., West J. P., Bonezek S. J.* (eds.), 1998,147, cited in: *Beselia G.,* Which Role Can Ethics Management Play in the Improvement of the Performance of Public Administration? What is the Relationship between Ethics and Law in this Respect?, "Journal of Law", №1, Tbilisi, 2012, 253 (in Georgian).

[38] *Amundsen I., Pinto de Andrade V.* (eds.), Public Sector Ethics, Luanda, Bergen, 2009, 13, <http://bit.ly/-2tBHlB0>, [18.04.2019].

[39] *Palidauskaite J.,* Codes of Conduct for Public Servants in Eastern and Central European Countries: Comparative Perspective, 7, <http://bit.ly/2sgG1jC>, [18.04.2019].

[40] Even today there are unresolved debates, whether the ethics codes approved by the Act of the Government are more effective or internal regulations adopted by a specific institution. The obvious advantage of the governmental act is, that it is more consistent and understandable. But before 1992 a model Code was in effect in the United States of America, allowing administrative institutions to modify it as they saw fit to their own requirements. Later it was revealed, that as a result they were different approaches from agency to agency. For example, at some places even drinking coffee could have entailed liability, while a gift up to 220 dollars was allowed at other administrative bodies. After 1992, with the recommendation of the Presidential Commission on Federal Ethics Law Reform, a unified standard was developed and civil servants were now aware, what actions were permitted at the administrative body they were moving to. On this issue see: *Gilman S. C.,* Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons, Washington, 2005, 49-50.

[41] *Palidauskaite J.,* Codes of Conduct for Public Servants in Eastern and Central European Countries: Comparative Perspective, 2-3, <http://bit.ly/2sgG1jC>, [18.04.2019].

[42] The Law of the Republic of Azerbaijan on Rules of Ethics Conduct of Civil Servants, № 352-IIQD 31/05/2007, <http://bit.ly/2tC6oUq>, [18.04.2019].

rules on ethics and conduct for public servants may be considered as a Western approach in EEC countries.[43]

Until April 20th, 2017, there were no rules of ethics and conduct in form of a single, unified document. The Law on Public Service of October 31st, 1997, contained general rules of conduct for public servants, while considering an improper behavior directed against general ethical norms a disciplinary misconduct. Nowadays, in the wake of new legislative rules, ethical obligations are prescribed in the Decree № 200 of the Government of Georgia, of April 20th, 2017, on Determining General Rules of Ethics and Conduct in Civil Service. The Decree presents quite detailed list of rules of ethics and conduct, elaborates on each principle and and not merely declares them. The scope includes public servants employed at public institutions and sets out common general rules for them. Current legislation also envisages existence of special ethical rules and rules of conduct. [44]

3.3.2. Breach of Rules of Ethics and Conduct as Grounds for Disciplinary Liability

Ethics and corruption may be considered as two sides of the same coin. Following ethical norms is necessary for proper functioning of public services. Taking this into account, obligation to adhere to ethical norms are prescribed normatively in majority of countries, but the size and scope of ethics codes may be different. In certain countries it is comprised of only general principles and values and does not include procedures for their implementation (e.g. Estonia). However codes of many countries do contain both the responsibilities as well as sanctions resulting from violation of said responsibilities, such as in Latvia. [45] As for Bulgaria, there is a provision in Code of Conduct of State Administration Employees that when violating the obligations defined in the Code, the employees are to bear disciplinary liability under the Civil Servants Act and the Labour Code. [46] Breaching public servant codes of conduct entails disciplinary liability in Romania[47] and Croatia[48] as well.

In Decree № 200 of the Government of Georgia, of April 20th, 2017, on Determining General Rules of Ethics and Conduct in Civil Service only ethical obligations and norms of conduct are laid down. It does not include mechanisms for their implementation and does not specify legal repercussions for their breach.

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43 See Recommendation № R(2000)10 of the Committee of Ministers to Member States on Codes of Conduct for Public Officials, the Council of Europe, 11/05/2000.

44 Article 2 of Decree № 200 of the Government of Georgia, on Determining General Rules of Ethics and Conduct in Civil Service, 20/04/2017.

45 *Palidauskaite J.,* Codes of Conduct for Public Servants in Eastern and Central European Countries: Comparative Perspective, 7-8, <http://bit.ly/2sgG1jC>, [18.04.2019].

46 Article 22, Code of Conduct of State Administration Employees, Adopted with CoM Decree №126/11.06.2004, promulgated, SG №53/22.06.2004, <http://bit.ly/2sgVjoB>, [18.04.2019].

47 *Puran A. N., Olah L.,* Disciplinary Sanctions Applicable to Romanian Civil Servants, AGORA International Journal of Juridical Sciences, № 4, 2013, 185.

48 Part 10, Section 1, Article 96, The Civil Servant Act of the Republic of Croatia, 15/07/2005, <http://bit.ly/2tg3Xom>, [18.04.2019].

However, according to Subparagraph "c" of Paragraph 1 of Article 85 of the Law, neglect and breach of ethical norms and general rules of conduct, intended to discredit an officer or the public institution represents disciplinary misconduct, irrespective of whether or not it was committed at our outside of work. The similar norm in the old law envisaged alternative configurations for disciplinary misconduct and very general evaluative terms. [49] The new Law, on the other hand, has somewhat specified the previously existent provision and counted neglect and breach of ethical norms and general rules of conduct, intended to discredit an officer or the public institution, both at work and outside it, as a disciplinary misconduct.

Current rules of ethics and norms, along with other concrete provisions, include in themselves wide, complex principles, based on which the ethical evaluation of behavior encounters certain difficulties. Concurrently, there are no unequivocal definitions for unethical conduct. A specific behavior may be ethical for certain groups of people, while the same action may be unacceptable to others. All this creates the problem of qualifying an action as a disciplinary misconduct due to breach of norms of ethics or conduct. To solve this issue, an emphasis may be made on the outcome that follows the action. Likewise, it is possible that unethical conduct may not have immediate negative consequences, but after some time it may adversely affect public's trust towards the public institution. For this reason, instantaneous result of the action can not be the defining factor in ascertaining disciplinary misconduct.

It is interesting, that the aforementioned legal norm differentiates between the breach and neglect of ethical rules, although it is hard to ascertain what exactly is meant by either of them. As there is no mention of liability and its types in this part of the provision, it is possible that neglect means an act committed through negligence, while breach is the same, only with intent. Still it raises questions as public official may intentionally disregard an ethical norm and not respect it. Likewise neglect of rules by a public official may mean their breach as well. Sulkhan-Saba Orbeliani defines "neglect" as "slipping from the mind".[50] It may include neglect, ignoring, not taking into consideration, denial, while "breach" means deviation, not adhering to the rule. [51] Despite the abovementioned, it is still difficult to speculate what exactly the legislator meant under these two terms and what practical purpose their separate presence in the law serves.

One more issue related to the current existing normative formulation of disciplinary misconduct is how appropriate it is to qualify an act committed by a person outside of his work as a disciplinary misconduct or to what degree this act may discredit the institution or the official. One opinion is that "acts committed during non-work hours should not be subject to discussion on disciplinary liability in case of any officials at all, for this provision gives quite broad powers to the public institution."[52] However, it is possible that an act committed by any employ outside of his work hours may reflect

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[49] See Subpararaph "c" of Paragraph 1 of Article 78 of Law of Georgia on Public Service, Parliament Parliamentary Gazette, 45, 21/11/1997.

[50] *Orbeliani S.,* Sitkvis Kona Georgian Dictionary, *Iordanishvili S.* (ed.), Tbilisi, 1949, 342 (in Georgian).

[51] Electronic Version of Explanatory Dictionary, Joint Project of *Arnold Chikobava* Institute of Linguistics and Language Modeling Association, <https://bit.ly/2Qo1hUv>, [18.04.2019].

[52] Disciplinary Liability in Public Service – Legislation, Administrative Practice and Case Law, Georgian Young Lawyers' Association Report of 2015, Tbilisi, 2016, 9, <https://bit.ly/29DhwVu>, [11.04.2019] (in Georgian).

upon overall work process. According to the Judgement of Federal Court of Australia, calls by an employee to another female employee outside of work hours, in non-working environment, were considered as sexual harassment as this type of behavior could have had long-term effects on the work environment.[53]

Therefore, legal status obligates public servant to act in compliance with ethical rules and rules of conduct outside of work and during non-work hours as well, so his/her behavior does not damage the reputation of the public institution and negatively affect the work process.

4. Types of Disciplinary Misconduct and Circumstances Determining Their Classification

Certain countries do not recognize the division of disciplinary misconducts by types (e.g. Romania). [54] However, in most we can still find such classification.

The Law on Public Service of October 31st, 1997 did not distinguish between types of disciplinary misconduct. In Article 78 of the Law, a general definition of disciplinary misconduct was given, while Article 99 contained a provision, according to which an official could have been dismissed from work even without disciplinary liability, if he/she would grossly violate official duties. Regulation of the issue in such a way has coined the term "gross disciplinary misconduct", constituting basis for dismissing an official from public service. However, exactly what was to be meant under this term, was within the discretionary evaluation of the head of public institution.

In accordance with most wide-spread classification, we encounter minor and serious (severe) disciplinary misconducts. Current Georgian law too provides exactly these types of disciplinary misconduct.

Serious disciplinary misconducts have been stipulated exhaustively in line with *numerus clausus* principle as they can lead to far more severe legal repercussions for the public servant (including dismissal). [55] As for minor disciplinary misconducts, law does not define them in full. In this case a principle applies – minor disciplinary misconduct is a misconduct that is not a serious disciplinary misconduct. Hence, unlike criminal offences, the current valid legislation does not include exhaustive list of specific types of disciplinary misconduct. Taking into consideration the danger of prohibited act and strict nature of the following punishment, such approach would have been unacceptable in criminal law, but for administrative law such method of exclusion is not new. Already on the interpretation stage, its definition, formulated by Otto Mayer, was founded on this subtraction method.[56]

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53 *McManus v Scott-Charlton*, (1996) Federal Court of Australia, 70 FCR 16, (1996).

54 Article 70.1, Regarding the Regulations of Civil Servants, Law № 188/1999, 28/06/2000, <https://bit.ly/2VXOZks>, [18.04.2019]

55 Paragraph 3 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

56 *Bogdandy A. V., Mhuber P., Cassese S.,* The Max Planck Handbooks in European Public Law: The Administrative State, Vol. 1, 2017, 153.

In a democratic state the norms regulating disciplinary liability are based on principles effective in administrative law. Similarly, in this case, it is important to create a foundation for the implementation of the principle of predefinition of punishable behavior and relevant sanctions, following which is necessary to manage discipline at the public service. This, however, does not mean that all possible actions and consequences entailed should always be prescribed in detail. In such circumstances, in accordance with *lex certa* principle, public servants should be able to foresee the consequences of their actions.[57] In Georgian reality, despite idiosyncracies of regulation, the civil servant should foresee legal consequences of his actions pertaining to a concrete type of disciplinary miscounduct.

The legislation unambiguously states with regard to gross disciplinary violations, that a disciplinary misconduct is considered as such if:

- it causes the reputation of the person committing misconduct to be tarnished (discredited), which essentially excludes proper performance of official duties from this person in future;
- The reputation of public institution was damaged as a result of disciplinary misconduct;
- It causes significant material damage to the property of the public institution as a result;
- Other public servants, third party or public interest was damaged/infringed as a result of disciplinary misconduct;
- Officer refuses to undergo the evaluation as provided by the law;
- Person bearing disciplinary liability has committed a new disciplinary misconduct.[58]

This list includes only two concrete formulations for serious disciplinary misconducts: 1. Refusal of official to evaluate as provided by the law; 2. Repeated acts of disciplinary misconduct by the person under disciplinary liability. Other meanings (configurations) are general and include evaluative stipulations. [59] For example, the fact of damages or the danger (risk) thereof occurring undoubtedly represents grounds for qualifying an action as a disciplinary misconduct[60] and infliction of severe damage as a serious disciplinary misconduct. In the given context, it is not defined what exactly is meant under "significant damage" and it should be determined on case-by-case basis. Therefore, it turns out that the issue of qualifying an action as a serious disciplinary misconduct again falls under the assessment of the public institution.

Considering the multifaceted nature of disciplinary misconducts and their consequences, the existence of general provisions and evaluative terms in legislative acts should be considered justifiable. However some countries do regulate disciplinary misconducts in more detail in order to implement (realize) the principle of predefinition of punishable behavior and relevant sanction. Each solution has

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57 *Cardona F.,* Liabilities and Discipline of Civil Servants, Support for Improvement in Governance and Management, A joint initiative of the OECD and the European Union, principally financed by the EU, 2003, 6, <http://bit.ly/2t76Nhi>, [11.04.2019].

58 Paragraph 3 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

59 Disciplinary Liability in Public Service – Legislation, Administrative Practice and Case Law, Georgian Young Lawyers' Association Report of 2015, Tbilisi, 2016, 12, <https://bit.ly/29DhwVu>, [11.04.2019] (in Georgian).

60 Subparagraph "b" of Paragraph 1 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015

its advantages and drawbacks. If general terms give wide discretionary powers to public entities, the list of specific actions may not be exhaustive accounting for the scale of civil service and multitudinous functions and duties of the public servants.

For instance, Slovenian law provides a comparably precise list of minor and severe disciplinary breaches. However there are evaluative provisions as well. Following counts as minor infractions: violation of obligations stipulated in regulations, collective labor agreements, labor contracts, individual and normative acts of the body (authority), improper behavior with colleagues and clients during the performance of official duties, conduct contradicting the code of ethics for public servants.[61]

Concerning serious disciplinary violations, following are deemed as such in Slovenia: illegal acts at work, misuse of public funds, exceeding the mandate (powers), violation of the principle of political neutrality and impartiality, violation of civil cervants' rights, violation of the duty to protect secret information, breach of restrictions regarding the acceptance of gifts, improper, violent or offensive conduct with work colleagues and citizens, repeated acts of minor disciplinary misconduct, violation of obligations prescribed in regulations, collective labor agreements, labor contracts, individual and normative acts of the administrative body, which induced severe consequences for the client or the body(authority) rendering services, breach of rules regulating conflict of interests; [62]

As for Croatian law, it also distinguishes between minor and serious (severe) offences and sets boundaries between them on the basis of even more specific norms.[63] If being late at work or leaving the workplace early constitutes a minor misconduct, the non-performance of official duties or unscrupulous, inopportune and negligent performance is a severe disciplinary misconduct. Absence from work for one day without due cause counts as a minor misconduct, while absence from 2 to 4 days is a severe one. The abuse of official powers or exceeding them, refusal to perform the task without sound reasons, disclosure of secret work information, an action damaging the reputation of the public institution, committing minor violation thrice and other severe wrongdoings of official duties stipulated by legislation are also severe misconducts. [64]

It is evident from examples discussed, that the distinguishing trait and/or consequence boundaries (scope) that characterizes this or that particular type of wrongdoing and/or accompanies it, may constitute the basis for classifying disciplinary misconducts into types. The nature of wrongdoing, which is often related to failure to perform specific obligations, is also important.

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61 Article 123.1, The Civil Servant Act of the Republic of Slovenia, № 020-05/98-20/8, 11/06/2002, <http://bit.ly/2uzGpdx>, [18.04.2019].

62 Ibid, Article 123.2.

63 Part 10, Section 1, Article 97, The Civil Servant Act of the Republic of Croatia, 15/07/2005, <http://bit.ly/2tg3Xom>, [18.04.2019].

64 Ibid, Part 10, Section 1, Article 99.

5. Conclusion

The public service system and institutions greatly determine the existence of just and democratic state. Among these institutions, application of disciplinary liability is crucial, which should be predicated on certain democratic requirements. [65]

As noted previously, disciplinary misconduct is the basis for disciplinary liability and determining its essence (content). Based on analysis of regulatory norms, it became clear, that in its current state, the Law establishes a more complete definition of disciplinary misconduct. This article discussed its legal aspects connected with the elements of failure to perform official duties, violation of ethical norms and general rules of conduct as grounds for disciplinary misconduct as well as details of the location where such misconduct has been committed.

Aside from this, taking into account the definition of disciplinary misconduct, proper evaluation should be given to damage to property and creation of the risk of such damage, during which the severity of inflicted damage in former and certainty of danger in latter should be analyzed.

Also current classification of types of disciplinary misconducts should be considered as a positive development. While it does not contain a list of concrete actions, it still nevertheless provides an important framework for qualifying an action as a specific type (minor or serious) of disciplinary misconduct.

Concerning the principal challenge of implementing existing regulations, it is the existence of evaluatory categories/definitions, regarding the content (essence) of the disciplinary misconduct and types thereof.

Therefore, thanks to the legislative changes in the public service sphere norms regulating disciplinary misconduct have been laid down, which correspond to the requirements of modern civil service and provide the possibility for a proper assessment of civil servants' behavior. In such case the core legal aspects of valid regulations must be taken into account.

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The Ways of Solving the Legislative and Practical Problems of Construction Permit in the Light of New Construction Code

The article deals with the problematic issues construction permit legislation and practice, as well as analysis in the Light of New Construction Code. As for today, architectural and construction activities are undergoing rapid changes, and therefore there is a need to improve regulatory legislation. Improvement in construction legislation is inconceivable without the relationships associated with construction permit.

Nowadays the most important issues that need further study and research are the specifics of the construction permit, the peculiarities of the administrative proceedings and the involvement of all interested persons or authorities in the corresponding administrative proceedings, depending on the complexity of the decision.

The article addresses such issues as: construction permit as a Law Institute of Construction order, Construction Eligibility Control, Construction Activities subject to construction permit, Legislative Regulation of developmental approval and General procedures for Issuing a construction permit, Administrative Proceedings for permit, a list of permissive documentation and the persons responsible for submitting the application, as well as the participation of other administrative bodies and role of experts.

The article uses a comparative legal approach and aims to identify the abovementioned problems, to find solutions for them, through a detailed analysis of existing legislation and practice, in the prism of new regulations. This analysis will hopefully contribute to the research and development of construction law.

Key words: *Construction permit, Construction order, Administrative proceeding, Construction code, Expertise, Permit Documentation List, Control of permission, Exceptional permit.*

1. Introduction

Separate institutes of construction law should be studied with special approaches. This area has become even more important because construction business has been among the leading industries well developed within the last decade. Accordingly, the process of updating and amending the laws regulating this industry and its analysis is relevant.

Many discussions and working meetings were held on the topic of construction legislation both in the system of government bodies and civil society.[1] There were invited foreign experts who shared their views and experience, and several plans aimed at improvement and Europeanization of construc-

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1 It is noteworthy that the Institute of Administrative Sciences of Tbilisi State University (hereinafter TSU) held forums where the issue of construction legislation reforms were discussed. See: *Kalichava K., Gigineishvili D., Knorr A.,* Materials of the Institute of Administrative Sciences of TSU, Perspectives of Administrative Sciences, Book 2, Tbilisi, 2016 (in Georgian); *Gegenava A., Giorgadze D., Kalichava D., Stelkens U.*, Book 3, 2017 (in Georgian); *Joxadze V., Stelkens U.,* Book 4, 2018 (in Georgian).

tion legislation were drafted. The above discussions and hard work of local government, state executive bodies and experts led to good results and were reflected in the new Construction Code[2] which is a new document in Georgian legislative environment and its adoption is a big step forward. Despite this and some other positive changes amending and developing construction legislation still remains an essential challenge.

Some of the most important issues, which currently need more detailed research, are the specific characteristics of construction permit and the administrative proceedings of issuing it, also, considering the complexity of the decision to be made, ensuring participation of all interested parties and authorized bodies in the administrative procedures. Besides, the goal to be achieved by issuing a construction permit should be clearly defined. The main essence of construction legislation reform is that construction permit, as the most important element of construction law has to ensure construction order. That is why the following issues are on the agenda: necessity of detailed research of construction permit as the main instrument of construction law and order; solving the problems in practice; actual implementation of existing legal tools; creation of legal institutes for making lawful decisions and appropriate use of existing instruments. The goal of the present article is to outline the above problems and search for the solutions based on the detailed analysis of the current legislation and practice, through the prism of the new legislative regulations.

2. Construction Permit as a Legal Institute of Construction System

Construction law comprises both public and private construction laws.[3] The public construction law itself shall be divided into the law of construction planning and the law of construction order. Construction planning implies planning territory and regulates using and organizing it. Construction order is related with the construction object and determines the legal requirements for the premises to be built.[4] The relationships connected with issuing construction permit are part of the construction order law.

Construction permit is one of the most important instruments of construction order law and it serves as a main tool for the authorized bodies issuing permits to implement all the means provided by administrative law to check permissibility of construction object and its compliance with current factual urban planning environment. When issuing a permit the main goal of an administrative body shall be not only ensuring the formal lawfulness of the permit but also protection of the constitutional rights of ownership, life, health, safe environment and cultural heritage. Also the construction permit has to ensure observance of construction law and order and create basis for the right future construction development.

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2 Law of Georgia "Code of Georgian Space Planning, Architectural and Construction Activities", 20.07.2018, 3213 RS, will enter into force on June 3, 2019.

3 *Turava P.,* Basic Concepts and Institutions of Construction Law, Journal of Law, №2, 2009, 121 (in Georgian).

4 Ibid, 121-123.

3. Controlling Permissibility of Construction and Construction Activities which are Subject to Permission

Whenever construction order is mentioned in literature or researches, of course, it does not imply only to the permit issuing regulations or state supervision of construction; construction order is also related with the general issue of construction permissibility. The concept of construction permissibility itself includes three modeling configurations:[5]

- Preventive prohibition with the disclaimer of issuing a permit;
- Repressive prohibition with the possibility of cancelling the prohibition; and
- The obligation of notification.

All these three configurations have the same goal: restricting construction until the state will is expressed.[6] Restricting construction before expression of appropriate will is a kind of an instrument which forces the legislator to fulfill its obligation to create appropriate legal basis for conducting such works. At the same time the above configurations are determined for protecting public interest. Along with the collective favor public interest should include the aspect of basic rights too, because the act of permission in parallel with considering public interest implies statement of overcoming others' rights.[7] Selection of appropriate permit control models shall be based on respective criteria, which include public interest and the needs arising from the constitutional law and order.[8]

As it was already mentioned above, considering some specific characteristics and for ensuring order in the construction industry, permission is required for a number of construction works. That is why Georgian legislation determines the list of works for which construction permit is required. Naturally, it is aimed at establishing construction order and obligates the person conducting construction works to get a permit, which serves as preventive prohibition with the possibility of issuing a permit while the prohibition is replaced by the permit issued.[9]

Legislation of Georgia determines the list of the works for which construction permit is required. Permit shall be issued for a new construction (including but not limited to installation); reconstruction of an existing building; demolition of a building; changes in a construction document for which a new permit is needed.[10] However, there is an exception in the legislation. There are some works for which notification of the permit issuing administrative organ about conducting such works is enough and the permit seeker expects only respective approval as a response.

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5 *Brenner M.,* Offentliches Baurecht, Heidelberg, 2010, 190.

6 See *Kalichava K*., *Kopaleishvili M.,* Control of Admissibility of Construction Activities in Georgia (Reforms Need and Prospectives) Administrative Law, Scientific Journal, Vol. 2, Tbilisi, 2016, 94 (in Georgian).

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10 Resolution №57 of the Government of Georgia on the Rule of Issuing Construction Permit and Permit Conditions of 27.03.2009, article 36, lhg 38 (in Georgian).

4. Construction Permit – Constitutional Right or a Controlling Mechanism

Receiving a construction permit means that one may conduct construction works and enables the owner of the piece of land to use his/her property respectively. Along with many other benefits, a piece of land enables its owner to develop its living environment according to his/her needs and also gain some profit from entrepreneurship. Accordingly, a piece of land which can be used as a construction site is one of the guarantees of the owner's freedom of conducting construction, but there may arise some issues which must not contradict the legislation requirements. The right of using a piece of land for construction purposes may be limited by law.[11]

The ownership right should not be understood narrowly. On the one hand, it is an institute and on the other hand, it includes a person's right to freedom of construction[12]. Despite the fact that an owner of piece of land has the freedom of conducting construction under the current legislation of Georgia, this freedom extends only to the point where others' legitimate rights and interests arise and where the threat of violating others' rights occurs. It should be taken in consideration that the measures of protecting the property rights guaranteed by the Constitution and its principles are valid only when the construction owner acts in accordance with the principle of using his/her property lawfully and proportionally.[13] Accordingly, the importance of balancing the benefits to be gained with a construction permit and the rights protected under the legislation, particularly by the Constitution of Georgia, is obvious. Which is more important in this case – realization of construction right or the good to be protected by preventive prohibition of construction?

Preventive prohibition of construction right is aimed to protect the following principles:

- Life and health safety;
- Ensuring safe environment;
- Protection and maintenance of cultural heritage;
- Protection and realization of property rights.[14]

Protection of human rights is naturally considered to be the fundamental issue and goal of rule of law. However, in case of construction permit it is difficult to determine unanimously whether it is more important to protect the rights of the owner of land or the rights of the persons who may suffer irreparable damages resulted by the construction. Accordingly, it is very important to use construction permit, the main instrument of construction order correctly. Construction permit shall ensure regula-

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11 *Brenner M.,* Offentliches Baurecht, Heidelberg, 2010, 13.

12 *Turava P.,* Basic Concepts and Institutions of Construction Law, "Journal of Law", № 2, 2009, 2009, 123 (in Georgian).

13 Comp: *Churghulia D.,* Problematic Issues of Protection of the Rights of Owners of Neighboring Property in Issuing Construction Permits and Construction Planning, "Journal of Law", № 2, 2017, 315-329 (in Georgian).

14 *Turava P.,* Basic Concepts and Institutions of Construction Law, "Journal of Law", № 2, 2009, 2009, 127 (in Georgian).

tion of the activities subject to permission in a way that other person's rights are not violated. That is why it is necessary to add more clarity to the legislation regulating issuing construction permits by providing detailed definitions of the activities which are subject to permission, appropriate documentation, role of expertise and analyzing the construction site environment. Thus, we can avoid the threats which make the citizens think that realization of construction rights is more important than protection of the fundamental rights.

It may be concluded that in case of amending the legislation and clearly determining the comprehensive pre-conditions of issuing construction permit, without any "exceptions", and if construction permit is not some "unexpectedness" for interested parties, we may achieve the declared goals and establish construction order.

5. Legislative Regulation of Construction Permit

According to the current legislation of Georgia the rules and conditions of issuing construction permit are provided in the law of Georgia on "Licenses and Permits"[15] and the Code of Georgian Space Planning and Architectural and Construction Activities which was adopted on June 20, 2018 and entered into force on June 3, 2019. This is a big step forward because the scattered legislative acts regulating construction law relationships and lack of codification remained a significant problem during the last decade.[16]

Construction permit is a permit of specific hierarchy and it is issued through respective stages. Before enactment of the new construction code there were three stages in the procedure of construction permit issuing: the 1st stage – determining the urban construction conditions (approving the conditions of using a piece of land for the construction); 2nd stage – agreeing the architectural- construction project; and the 3rd stage – issuing a construction permit.[17] Similar regulations on the stages of issuing construction permit are also included in the new Construction Code but the stage of approving the architectural projects is described and outlined more accurately, because it is the most important stage of issuing a permit.

On each of the above stages independent administrative proceedings are conducted. The administrative legal acts issued at each stage have to comply with Chapter IV of the General Administrative Code of Georgia (GACG) which sets forth the requirements for administrative acts. Construction per-

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15 According to the amendments of 20.07.2018 the definitions and procedures related to issuing construction permit were excluded from the Law on Licenses and Permits. This amendment entered into force on June 3, 2019.

16 About the structure and innovations of Georgian Space Planning and Architectural and Construction Activities Code, before enforcement of the code, see TSU Administrative Scientific Institute materials, Perspectives of Administrative Sciences, Book 2, Tbilisi, 2016, 29-61 (in Georgian).

17 Resolution №57 of the Government of Georgia on the Rule of Issuing Construction permit and permit Conditions" of 27.03.2009, article 19, lhg 38.

mit is issued in accordance with the simple administrative procedure under Chapter VI of GACG and the rules set forth in the regulations referring to issuing construction permit and permit conditions.

6. General Procedures and Characteristics of Issuing Construction Permit

In order to understand the legal relationships within the procedures of issuing construction permit, we should shortly review these procedures and underline the problematic issues.

Each stage of construction permit issuing procedures has specific characteristics. The first stage is approval of the conditions of using a piece of land for construction. It should be mentioned herein that the permit seeker is entitled get the conditions of using a piece of land for construction only if appropriate piece of land is provided. Determining validity of a piece of land for construction means that construction works are allowed on it. Different construction conditions are determined for each type of sub-zone based on the characteristics of the piece of land and type of construction allowed in the certain zone. Therefore, the construction-law status of a piece of land is main condition for future construction development.[18] In addition, the new construction code provides for more accurate and improved regulation of construction-law status of a piece of land and clearly defines that the conditions of using a piece of land for construction may be issued only on a piece of land included in a developed urban construction system. If there is no urban construction regulation plan approved for the territory to be used for a construction determining conditions for a piece of land separately or/and making changes to them is not allowed.[19]

In the conditions of using a piece of land the construction coefficient is determined, as well as the construction intensity coefficient; greening coefficient; the rule of placing communication networks on the piece of land; functions of the building, number of floors, etc. It is obvious that at the first stage of issuing construction permit some of most accurate and important conditions are determined and they should be fully observed in order to go through the following stages successfully.

According to the new Construction Code the importance of the stage of approving the conditions of using a piece of land for construction is relatively decreased, unlike the previous regulations. The pre-condition of using a piece of land for construction is inclusion of the piece of land in the developed system of urban construction. Accordingly, the conditions of using a piece of land shall be determined only on the basis of approved construction development plans.

The older regulations set 5 years validity term for the approved conditions while the new Code decreased the term to 3 years. It is a good change because the above conditions refer to very important issues (conditions of placing the building and coefficients, etc.) and considering the growth of construction in the country long validity term for those conditions would not be appropriate. By decreasing the term the permit issuing authorities get more mechanisms of control which is a positive trend.

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[18] *Giorgadze L.,* Construction-legal Status of the Land, "Journal of Law", № 1, 2016, 358 (in Georgian).

[19] Law of Georgia, the Code of Georgian Space Planning and Architectural and Construction Activities, 3213, 66-69, 20/07/2018.

The next stage after approving the conditions of using a piece of land is approving the architectural-construction project. For the purpose of having an architectural-construction project approved the permit seeker shall present architectural project and/or respectively, a construction scheme and/or technological scheme. The second stage is optional for a customer. The goal of this stage is to ensure safety and stability of investments. Essentially, it is close to the institute of administrative promise when a party has legal trust in regard with administrative act. The act of approval issued at this stage is a sound guarantee of receiving a construction permit in short terms. Therefore there is always a higher investment interest on the piece of land on which an architectural-construction project is approved.[20]

The procedure and the stage of approving architectural project under the new construction Code does not differ from the older regulations but there is one important innovation: presenting a conclusion of an accredited inspectorate or a certified expert is mandatory together with submitting detailed architectural project and technological scheme. It will significantly improve the quality of drafting documents and have positive impact on the construction process in whole. Another important innovation in the new law is that in case of submitting architectural project for approval detailed architectural project; results of prior project research and engineering geological research report have to be submitted too. Thus the stage of project approval gains more importance.[21]

Issuing a construction permit is a final stage of permit issuing administrative proceedings when an individual legal act providing legal basis of starting construction works, is issued.

According to the new construction code construction issuing procedure comprises to stages: (1) determining the conditions of using a piece of land for construction and (2) issuing the construction permit except for the case when approving architectural project is needed.

However, there is an exceptional rule for the stages of issuing construction permit. Three stages are not required if there is an urban construction regulation plan directed at the construction object, which itself defines the urban construction conditions. In such case either the administrative proceedings for the second and third stages are carried out, or both stages are combined in the third stage according to the customer's request. Also, after approving the urban construction conditions the customer may request to include the second stage in the third stage.[22] The above procedure envisaged by the new construction code does not differ from the procedure provided in the older regulation but the second stage – approval of architectural project is more emphasized in the new code. Thus the legislator focuses on the importance of this stage.

The specific characteristic of the administrative proceedings of issuing construction permit is that different administrative procedures are carried out at each stage. Formal administrative proceed-

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20 *Kalichava K.,* Construction Law, *Khubua G., Sommermann K. P.* (eds.), Legal Grounds for Public Governance, TSU Administrative Sciences Publication, Vol. 3, Tbilisi, 2016, 291 (in Georgian).

21 Law of Georgia, the Code of Georgian Space Planning and Architectural and Construction Activities, 3213, 106, 20/07/2018.

22 *Kalichava K.,* Construction Law, *Khubua G., Sommermann K. P.* (ed.), Legal Grounds for Public Governance, TSU Administrative Sciences Publication, Vol. 3, Tbilisi, 2016, 290 (in Georgian).

ings are used at the first stage while the second and the third stages are conducted according to simple administrative procedure rules.

7. Permit Documentation List and the Persons Responsible on Submitting Application

The legislation regulating construction activities determines the list of documents required for issuing a permit (including approval) on different buildings. This list is some tool for construction permit issuer because it has a "directing" function and enables the administrative organ to monitor observance of construction legislation requirements.[23]

In connection with the list of documents, it is important to define who can be authorized to draft such documents. Current legislation of Georgia does not provide for any definition of certified specialist in construction industry.[24] The permit issuer body is obligated to get an expertise statement in exceptional cases. Unfortunately, the only criteria for evaluating expert's knowledge are the experience and an education certificate which the expert himself/herself presents while there are no legislative mechanisms for checking this information. The role of expert evaluation implemented in Georgia is not quite clear because there are no rules and conditions determined for recognizing such experts.

In this direction the new Construction Code introduces an important innovation. The Code provides for mandatory certification of architects and engineers. It also introduces an accredited inspectorate body and an institute of certified expert, that will significantly increase construction safety and ensure accuracy and competence of the expertise statements. There is a promising clause included in the transitional provisions of the new Code, which states that appropriate normative acts about the rule of certifying architects and construction engineers and inspecting construction objects by accredited inspectorate body and certified expert and insuring their responsibility, shall be adopted in the nearest future. Hopefully, such regulation will result significant changes in construction industry.

Unlike the legislation of Georgia, in European countries (e.g. Germany) only certified architects and engineers are authorized to draft and sign the application on issuing a construction permit.[25]

Similar regulations are in force in the United States of America. Certified architects with special knowledge participate in project planning and document drafting process. Moreover, at different stages of projecting (e.g. organizing communication networks, making constructive part, etc.) specialists with respective licenses have to be involved. Their participation and communication with the permit issuing administrative authority, including but not limited to preliminary consulting, is mandatory.[26]

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[23] *Kalichava K.*, Control of Admissibility of Construction Activities in Georgia (Reforms Need and Prospectives) Administrative Law, Scientific Journal, *Kopaleishvili M.* (ed.), Vol. 2, Tbilisi, 2016, 95 (in Georgian).

[24] Ibid, 95.

[25] *Kalichava K.,* Construction Law, *Khubua G., Sommermann K. P.* (ed.), Legal Grounds for Public Governance, TSU Administrative Sciences Publication, Vol. 3, Tbilisi, 2016, 289 (in Georgian).

[26] *Ravi S.,* The Development Permit Process, Building Department Administration, 3rd ed., ICC, Ch. 7., USA, 170-171.

Legislation of Russian Federation is also interesting because the project documentation there is prepared and submitted for issuing permit by an architect or an engineer, either private person or an employee of the company conducting the projecting works. However, an important exception in the legislation of Russian Federation, which is a bureaucratic element, should be mentioned: the projector presents the documents to the permit issuing agency or a so called multifunctional center which is also authorized to present the documentation to an authorized organ.[27]

8. The Construction Permit Issuing Authorities

Legislation of Georgia determines the list of administrative bodies authorized to issue construction permit but is seems that their authorities are not consistent and are scattered in different agencies. Before enactment of the new construction code, the powers of issuing construction permit was granted to state executive organ as well as to a local government body. Besides, the legislation determined the agencies responsible on issuing construction permits in the autonomous republics of Abkhazia and Adjara. At the local government level construction permit regulations were implemented by respective representative and executive bodies of a self-governing area, in accordance with the code of local self-government. And the Ministry of Georgia of Culture and Sports was obligated to participate as another administrative body, in the administrative proceedings on issuing permits in cultural heritage protection zones (except immovable monuments of cultural heritage).

The new regulations still maintain and even strengthen the role of local government in the process of issuing construction permit. However, the legislative norms regulating issuing construction permits for the capital of Georgia greatly differ from the powers of other towns. It is also evidenced by the fact that the Ministry of Economics and Sustainable Development of Georgia participates in the administrative proceedings on issuing a construction permit for IV class building, as another administrative organ, when the construction permit is issued within the administrative borders of Tbilisi. In other towns/regions the Ministry of Economics and Sustainable Development is an important participant of administrative proceedings on issuing permit. It shows independence rate of local self-government bodies. There are some other problematic issues related with the competence of local self-government authorities too.

Another question on the powers of issuing construction permit is related to the permits for the V class buildings because it is also included in the competence of the Ministry of Economics and Sustainable Development.

As refers to Tbilisi, the capital of Georgia, the construction permit-issuing powers there are granted to the structural entity of the municipal executive body.

The Code provides only for general regulations on the above issues. More details should be expected in the normative acts to be adopted in accordance with the Code.

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[27] Construction Code of Russia, Article 51, 22/12/2004.

8.1. Participation of Other Administrative Bodies

The Applicable legislation of Georgia provides for the possibility of other administrative bodies' participation in the construction permit issuing procedures. In some cases, it is related with construction of buildings in special areas, which are subject to special regulation (e.g. border and coastlines, protected territories, gas pipelines, etc.). However, other administrative organs are also actively involved in the proceedings of issuing construction permits on living and industry buildings in settled areas.

Participation of another administrative body in a permit issuing proceeding is usually caused by formal and material aspects. For example, involvement of cultural heritage, monument protection or environmental institutions in permit issuing proceedings ensures consideration of respective legislation and progressive knowledge. Moreover, such involvement contributes to legitimacy of permit issuing procedures.[28]

If a construction permit is issued on the territory included in historical-cultural heritage protection zone the Ministry of Georgia of Culture and Sports shall be involved. However, there is a different regulation for Tbilisi where there are many cultural heritage monuments on which construction permits are issued with the help of a committee composed of representatives of municipal government of Tbilisi and the Ministry of Culture and Sports. The goal of such regulation is to protect cultural heritage and value of the immovable monuments.

According to the changes recently made to the construction permit issuing procedures, if a new construction starts within the administrative borders of Tbilisi the Municipality City Hall shall conduct the permit issuing proceedings with the help of a structural unit responsible for environment protection policy (except the case when a II class individual living house is built on an area free from green plants), and an unit responsible for transport policy. Based on the amendments the construction permit seeker shall obtain and present a greening project of the project territory if it is considered necessary. The project has to be drafted and signed by appropriate specialist while the rules of looking after the plants already existing or to be planted have to be observed. According to the best practice established recently the project shall be sent to the municipal unit responsible on environment protection policy, which shall provide its opinion. It is obviously a step forward from the point of view of decreasing the impact of construction on the environment but it must not cause expansion of bureaucratic procedures and prolongation of administrative proceedings.

There should be mentioned another innovation, which also relates to the administrative proceedings of issuing construction permit and introduces the obligation of presenting a traffic organization scheme, in certain cases, on the territory of Tbilisi. The scheme has to include the transportation/road infrastructure of the projected territory and show its connection with the territory under research (except the II class buildings). Also, there has to be submitted a statement on evaluating the impact of the project solutions on the existing transportation/road infrastructure under research (except for the build-

[28] *Kalichava K., Kopaleishvili M.* (ed.), Control of admissibility of construction activities in Georgia (Reforms Need and Prospectives) Administrative Law, Scientific Journal, Vol. 2, Tbilisi, 2016, 96 (in Georgian).

ings with less than 6000 square meters space or/and nightclubs, warehouses, industrial and entrepreneur units, museums, libraries and religious buildings). The goal of the above changes is to prevent transportation overloads caused by construction and increasing settlements in the capital of Georgia and ensure preliminary study and improvement of transport flow. Naturally, such amendments are part of the reform of construction legislation but the latter has to be implemented in parallel with amending the adjoining sector legislation in order to ensure appropriate fulfillment of these goals and tasks.

With regard to participation of another administrative body in the construction permit-issuing proceedings the issue of the buildings subject to ecological expertise has to be underlined, that is directly related to decreasing negative impact on the environment. The current legislation defines the buildings for which construction permits require ecological expertise[29]. There are some very interesting opinions about ecological expertise provided in the legal literature: "the statement of ecological expertise has some negative votum meaning in Georgian Law. Namely, a positive statement of ecological expertise is a mandatory pre-condition of issuing construction permit; otherwise, permit will not be issued. Considering that, the legislator does not define the conditioned (anticipatory) prerequisites, drafting an ecological expertise statement respectively is a result of wide discretion because of which the construction permit automatically gains repressive character".[30] Accordingly, there is a view that the role of ecological expertise, as it is in developed European countries (e.g. Germany), primarily has to be of procedural character and related to evaluation of the aspects affecting environment rather than having a negative votum function.[31]

Although both of the above mentioned innovations greatly contribute to decreasing the negative impact caused by transport and ecological issues, it is also important to have the above procedures conducted on the basis of comprehensive studies by the permit issuing authority and checking and evaluation of the submitted documents by respective experts, in order to ensure that they are not formally implemented.

Another issue related to involvement of other administrative bodies is fire safety. A permit issuing agency shall consult Emergency Management Service, the legal person of public law under the management of the Ministry of Internal Affairs of Georgia, which has to provide its opinion about fire safety of a planned construction in order to ensure observance of the fire safety requirements in the premises under state fire safety supervision. It is a significant advancement of construction legislation. The practice showed that failure to observe the fire safety rules threatens not only those premises where fire may start but also but it can become a source of increased threat for the lives and health of neighboring property owners. However, there are some procedural problems. As a result of legislative amendments, the Emergency Management Service was excluded from municipal structure and now it

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29 The list of the buildings which are subject to the ecological expertise and the rules of carrying out the expertise are regulated by the Code of Environmental Evaluation of Georgia.

30 *Kalichava K., Kopaleishvili M.* (ed.), Control of Admissibility of Construction Activities in Georgia (Reforms Need and Prospectives) Administrative Law, Scientific Journal, Vol. 2, Tbilisi, 2016, 96 (in Georgian).

31 Ibid, 96.

is a unit of state executive body that may cause some communication obstacles as there is no united electronic record keeping system. Though, this issue can easily be solved.

The new rules of Construction Code focus such important aspects of the above issue that their observance and implementation shall have vital importance. The Code clearly states that one of the main reasons of regulating neighboring border zone is protection of fire safety. Thus, the new Code emphasizes both the importance of neighboring border and additional guarantees for fire safety. Hopefully it will be appropriately reflected in respective legal act on regulating use and planning of territories which has to be adopted in accordance with the Code. Nowadays the existing distances between neighboring border zones and buildings are beyond any criticism and cannot definitely ensure protection of fire and construction safety.

Thus, it is obvious that in the construction permit-issuing administrative proceedings there are quite versatile procedures which differ from ordinary proceedings. Multiple participants ensure that all important circumstances for issuing an act are researched within the administrative proceedings and therefore, make it very interesting.

8.2. Participation of Interested Parties in the Administrative Proceedings

The General Administrative Code of Georgia defines the interested party as any physical or legal person or administrative organ to which the administrative act refers and whose legitimate interest is directly and immediately affected by administrative-legal act or an administrative body's action.[32] Undoubtedly, the direct and immediate impact in construction law has to be determined with high standards of proof. Besides, the most important issue of human rights has to be considered. The interested parties must have the opportunity to express their opinion before the real threat of violating their rights occurs. Therefore, participation of an interested party in permit-issuing proceedings is an important factor for increasing legitimacy of the proceedings. The construction permit issuing administrative unit is usually in a difficult situation when it has to ensure protection of the rights of all parties involved. The need of reforming construction legislation in this direction is proven by problematic practical issues and a big number of court disputes.

Before reviewing the characteristics of participation of interested parties we should mention one issue which is most difficult to solve. How can a person who may suffer damages get information about a planned construction? The current legislation offers only the information banner. However, the information banner which is mandatory for the permit seeker to place at the first stage of permit-issuing proceedings[33] includes notification only about the fact that construction is planned on the piece of land and the permit-issuing administrative proceedings are conducted. At the first sight the information provided on the banner is enough but the legislation does not set forth any limitations for correct-

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

[33] Law of Georgia, the Code of Georgian Space Planning and Architectural and Construction Activities, 3213 rs, 110, 20/07/2018.

ing the construction, changing its function, volume and exterior by the owner before or after starting the construction works while the interested party cannot get any information about that. Accordingly, some interested parties may not be involved in the permission-issuing proceedings at all. What happens with the interests of these persons? While some measures are taken against the construction seeker the third party whose legitimate interests may be affected by certain activities, is still even in worse condition because of the silence.[34] In this case it is very difficult to determine who is the interested party from the construction law point of view and how his/her "legal condition can be worsened".[35] How can balance be maintained in compliance with law and order? Construction legislation should provide detailed provisions about the guarantees of protecting the public-law interests of neighbors during the whole proceedings. Information banner cannot serve as an alternative solution. It is an essential defect of legislation which needs reform.[36] Starting a law suit in civil court is not a solution for an interested party either.

In this regard, unfortunately, the new Code does not provide for any actual measures. According to the Code, for the purpose of providing the interested party with information about starting each stage of construction permit-issuing proceedings, the information banner has to be placed 3 calendar days prior to starting the administrative proceedings on the side of public border zone of the construction site. And the interested party whose legitimate interests are directly and immediately affected by the planned construction shall be included in the administrative proceedings in accordance with Article 95 of the General Administrative Code of Georgia.[37] Again this provision is too general and placing an information banner only cannot solve the problem. The new Construction Code does not require strict observance of the information included in the banner. Moreover, the Code does not provide for any limitations for the constructor and customer in regard to prohibition of changing the information provided on the banner after the first stage. Placing the banner makes no sense in such case because if the interested party learns from the banner that it is planned to build an individual house in his/her neighborhood and has no complaints but finally, after the construction works are finished it turns out to be a high-rise apartment building or a multifunctional enterprise it means that the designation of the banner is fully ignored and the interested party is deprived of the possibility of using the instruments of protecting his/her right. Thus, it is another big legislative defect which threatens the success of reform in this direction.

Another example of inappropriate communication with the interested parties during permit-issuing proceedings is issuing construction permit based on a principle that "silence implies consent" i.e. if the decision on issuing a construction permit is not made within the due dates the permit shall

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34 *Tsiklauri I., Giorgadze L.* (ed.), Issues of Administrative Proceedings for Issuing Construction Permit, Davit Batonishvili Institute of Law, Tbilisi, 2013, 122-123 (in Georgian).

35 *Kalichava K., Kopaleishvili M.* (ed.), Control of admissibility of construction activities in Georgia (Reforms Need and Prospectives) Administrative Law, Scientific Journal, Vol. 2, Tbilisi, 2016, 97 (in Georgian).

36 Ibid, 97.

37 Law of Georgia on Space Planning of Georgia, Architectural and Construction Activities Code, 3213 rs, 110, 20/07/2018.

be considered to be issued. In such case the permit seeker has the right to demand the permit certificate after expiration of set time and the permit issuer is obligated to issue it immediately. The above principle is used to ensure issuing respective written acts by administrative bodies within due dates and to protect legitimate interest of the persons who have right to receive a permit. Thus, if the permit seeker requests construction permit and submits the photo of the information banner together with other required documents, but the administrative body does not or cannot make a decision, the latter is obligated to issue a permit certificate. In such case neither the interested parties are invited nor their opinions are heard nor are the important circumstances researched. Accordingly, the right of the interested party to have access to any and each stage of the administrative proceedings is completely ignored. On the one hand using the principle – "silence implies consent", is a guarantee of protecting construction law rights of a permit seeker from administrative body's unlawful actions but on the other hand it puts the interested parties in complete "silence".

9. The Role of Expertise

Expertise is very important for construction activities because some construction and installation works are characterized with high risk factors.

When reviewing the role of expertise at the stage of administrative proceedings of issuing construction permit it should be mentioned that according to the applicable legislation presenting an expertise statement is mandatory for the III class constructions, which itself has to provide only the assessment of compliance of the architectural parts of construction project documents with "Technical Regulation on Approving the Construction Safety Rules" approved by the Government Resolution №41 of January 28, 2016. As refers to IV class buildings, expertise is required for the following parts of construction project documents: engineering geological research; base, foundation and other basic constructions; and architectural parts in regards to compliance with "Technical Regulation on Approving the Construction Safety Rules" approved by the Government Resolution №41 of January 28, 2016. In case of V class buildings there is a wide range of project parts subject to expertise which is common for high risk constructions. In case of IV class constructions mandatory expertise of the impact on neighboring buildings is not required. The permit issuer is obligated to require such expertise only in case of necessity. Thus, the legislator leaves this issue within the administrative body's discretion. It should be considered as an evident defect of legislation which must be improved.

It should be mentioned that expertise is especially important for defining whether the construction affects neighboring buildings.

For generalizing the issue of affecting neighboring buildings studying court practice is most relevant because it can play important role in finding the ways of solving the problem. Usually the court is unambiguously demanding in regard with the expertise. In some cases even if the expertise has been conducted the court considers that additional expertise is needed for the purpose of solving the dispute. Considering the specific characteristics of affecting neighboring buildings and increasing the risk of damage, the court clarifies that if there is a building in poor condition it is necessary to

study the possibility of affecting a living house with construction works accurately and despite the fact that an expert statement is submitted to the court it might not be enough for solving the dispute. The court rules that important circumstances have to be determined and alternative accurate expertise has to be conducted in order to resolve the case appropriately.[38]

Resolution №41 which is a new act in construction legislation is also noteworthy because it provides for strengthened safety requirements before issuing construction permit. However, the range and competence of experts drafting respective statements is not clearly determined therein. Just a specialist (architecture) with a diploma and 10-year experience cannot ensure fulfillment of the goals of the Resolution.

Accordingly, the above argument is proven - the role of the expertise established in Georgia is quite unclear because there is no appropriate rule and conditions of recognizing such experts. However, the prospects of increasing the role of expertise are outlined because this issue has already been reflected in the new construction code that hopefully will strengthen the role of expertise in the process of issuing permit. According to the Code of Georgia of Georgian Space planning, Architectural and Construction Activities, expertise of construction documents shall be conducted by an accredited inspectorate and/or certified expert in the cases and according to the rules determined by legislation of Georgia. An accredited inspectorate and a certified expert shall be a person who shall have appropriate insurance and whose competence shall be approved by respective authorized body. Accredited experts' inspectorate and/or certified expert shall issue appropriate expertise statement and a recommendation (if necessary) which are needed to reduce to the minimum the risks related with construction works/projecting activities. The accredited inspectorate and certified experts shall be granted appropriate authorities in accordance with the legislation of Georgia.[39]

Another favorable regulation and important definition related with the role of expertise is also included in the new Construction Code of Georgia: if any reasonable doubts arise in regard to the expertise statement at the stage of issuing permit the permit issuing administrative body shall have the right to demand explanations from respective expertise agency/person and also have a second expertise conducted. If another expertise statement is positive again its costs shall be paid by the administrative body but if the statement is negative the costs shall be paid by the permit seeker if the latter does not dispute the results of the second expertise. If the permit seeker does not agree with the results of the second expertise he/she may demand the third expertise which shall be decisive. If the third expertise statement is positive the costs shall be paid by permit issuing administrative body. In case of making incorrect expertise statement the expert shall be held responsible in accordance with respective agreement and Georgian legislation.[40] Such detailed regulation is a positive innovation and will contribute to strengthening the role of expertise and evaluation of the experts' work.

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[38] See the decision of July 18 2012, №bs-1015-1007 (k-11) of the Supreme Court of Georgia.

[39] Law of Georgia - the Code of Georgia of "Georgian Space planning, Architectural and Construction Activities", LHG, 3213, 99, 20/07/2018.

[40] Ibid, 106.

We may conclude that before the legislative norms about expertise enter into force and are fully developed the experts should fulfill their obligations appropriately and in good faith, within the scopes of current regulations in order to avoid further problems.

10. Simplified and Exceptional Permits

Current legislation of Georgia includes a list of constructions for which no construction permit is needed. Also, there are exceptional permits envisaged.

According to the Construction Code buildings are divided into 5 classes. The first-class buildings need no permit. Class of a construction is determined in accordance with the parameters of the building to be built or demolished. Accordingly, a list and characteristics of the construction works for which permit is not required is also determined. The list is quite long and includes façade works, also, construction of separately placed temporary and non-temporary buildings and communication network.

While the first-class premises need no permit, the constructor is still obligated to comply with the legislation requirements including but not limited to the construction regulation documents. The constructor/customer of the first-class building has to notify the permit issuing body of intended construction works.

At the first sight it may seem that the legislation allows conducting construction without any permit but actually, the freedom of construction is strongly limited by the same legislation which completely ignores the concept - "without permit". The person who intends to start construction has to notify the permit issuing authority in order to agree its works. The written approval from the side of administrative body is and instrument characterized with the features of administrative legal act.[41] The written approval has all requisites of individual legal act and its contents also cause no doubts regarding its legal character.

The new Construction Code also regulates this issue. The Code states that for the first-class constructions simple notification is required unless otherwise determined by this Code. It should be noted that within the administrative borders of a municipality or a part of it, the municipality Council has the right to replace the obligation of receiving construction permit for II class buildings with the obligation of providing detailed notification. If the detailed notification does not require the actions, procedures and documents similar to permit issuing proceedings it will be an important advancement.

Despite the fact that the procedures have been simplified the necessity of amending legislation, determining detailed procedures and simplifying them still remains an important issue. An interested party should have a right to conduct certain type of construction without going through construction permit issuing, notification or other procedures. It would be reasonable to determine and clarify the types of the constructions which can be conducted without permit/approval, in accordance with con-

[41] *Tsiklauri I., Giorgadze L.* (ed.), Issues of Administrative Proceedings for Issuing Construction Permit, Davit Batonishvili Institute of Law, Tbilisi, 2013, 125 (in Georgian).

struction planning regulation, on some territories which are not included in historical, cultural or other specific areas. It will contribute to establishing construction freedom. Therefore, for the purpose of monitoring compliance of constructions with respective regulations state supervision of construction has to be strengthened at legislative level.

As refers to releasing from construction-law requirements within the scopes of free discretion, there is an "ugly" institute of special zone agreement still operating in Georgia. It implies changing functional zones, increasing/changing basic parameters (coefficients) on which permit decisions are based. The above institute is allowed by the legislation as an alternative type of construction planning. However, such changes should to be implemented only for social or city construction reasons.

Recently, in the capital of Georgia, especially, the number of construction permits issued on the basis of special (zone) agreement has significantly increased which consequently were materialized in the disproportionate and chaotic city constructions. Therefore, proportionally increased the complaints of the citizens with regard to researching lawfulness of such permits and they have to apply to the court for protecting their rights. The court practice on the cases involving permits issued on the basis of special (zone) agreements determined that it is reasonable to use the special zone agreement only for particular social need.

In this direction the court practice unambiguously supports high standard of proving the necessity of exceeding the coefficients and appropriate compensation. The court ruled that exceeding the maximum coefficients shall be allowed only provided that appropriate conditions exist and they are clearly determined in the legislative/subordinated acts regulating the specific institute or generally construction activities. Thus, when discussing the issue of exceeding the coefficients, an administrative body shall research whether such changes are needed for spatial-territorial planning of a certain district or its architectural development or other particular reasons related with the territorial development; the administrative body should also consider if the changes could be compensated and balanced with any other measures which could be taken to ensure prevention of affecting healthy living and working conditions and environment, compliance with the requirements of transportation and engineering infrastructure; and if such increase of coefficients are opposed by other public interests.[42]

It should also be mentioned that the Georgian model of special (zone) agreement implies monetary compensation.[43] Naturally it cannot counterbalance the architectural, construction and planning compensation which consequently causes imperfect, unequal living and working conditions.

The new construction Code has to play decisive role in solving the issue of special zone agreement. According to the Code, the maximum construction coefficient and/or the maximum construction intensity coefficient determined by the fundamental provisions may be exceeded on the basis of detailed construction plan if it can be compensated by other measures and is conditioned by special city

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42 See the decision of April 20 2017, №bs 930-922 (2k-16) of the Supreme Court of Georgia.

43 *Kalichava K., Kopaleishvili M.* (ed.), Control of Admissibility of Construction Activities in Georgia (Reforms Need and Prospectives) Administrative Law, Scientific Journal, Vol. 2, Tbilisi, 2016, 101 (In Georgian).

construction development needs (e.g. protecting and developing urban values); it will not contradict public interests and will not worsen hygiene and sanitary conditions in living and working environment.[44] This provision should be considered as one of the most important gains of the new Code. Many of the above issues should be regulated in accordance with the court practice, which will greatly contribute to putting the construction process in strict legal framework.

We may conclude that despite the incomplete current legislation and inappropriate practice the new construction code provides for important positive regulations but still more legislative clarifications are needed. The special (zone) agreement institute should be abolished and the parameters for existing construction zones should be determined in a way that ensures maintaining coordinated city planning and construction policy.

11. Conclusion

The article reviewed the important issues of current legislation and practice related with construction permit as the fundamental element of construction activities and main institute of construction law and order. The current legislation and practice was compared to the new construction code which is a main document of construction legislation reform. The article showed that current legislation and the respective practice cannot respond the existing challenges in this sphere and important innovations and clarifications are needed. It is noteworthy that on the light of the new Construction Code the fundamental problems of current legislation are even more noticeable.

Nevertheless, by adopting the new Construction Code some important issues were solved: exact regulation of border zone in the process of issuing construction permit has been provided; the list of construction works on which detailed notification has to be submitted for getting a permit has increased; evaluation of the expertise criteria in the process of issuing construction permit has become mandatory and the expert certification requirements have been determined; exceeding the parameters which serve as basis for issuing permit, has been limited; there has been defined the list of subordinated normative acts which have to be adopted and include detailed regulations needed for appropriate implementation of the Code.

There was also underlined in the article that despite many positive changes offered by the new Code it still does not cover number of important issues: strengthening the function of information banner which is the main guarantee of providing information to interested parties; participation of interested parties and administrative bodies in the permission issuing proceedings; clear and unambiguous regulation of construction and construction intensity coefficients; clarification of the works to be conducted without construction permit, etc.

Comparative law method and detailed analysis of new legislation were used to show that despite adopting modern normative documents many key issues still have be developed and more clearly

[44] Law of Georgia on Space Planning of Georgia, Architectural and Construction Activities Code, 3213 rs, 41, 20/07/2018.

regulated. However, the prospect of adopting number of subordinate normative acts in accordance with the Code lets us be optimistic and look forward to creating better legislation.

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Rafał Kania*

Religion in the Legal System of the Kingdom of Poland (1815-1830)

During centuries a relationship between a State and Churches was an object of special interesting by state authority. This relation was one of the main factor that stabilizing a social situation. It was not the one reason that religion was regulated by law. A special situation in Poland was pertained to the Catholic Church which had a strong position in society. For this reason the government wanted to control religion in order to achieve stronger influent on citizens at the beginning of 19th century. The purpose of this article is a presentation of situation of religions that was created by the legal system during 1815-1830 in the Kingdom of Poland.

Key words: *The Kingdom of Poland, religion, history of law, Christianity.*

1. Introduction

The fall of *Napoleon* made European rulers embark on talks aiming at the establishment of new order in Europe. The changes caused by the French revolution and the period of *Napoleonic* wars had gone too far to restore the status quo from before those events. With a view to reaching the acceptable compromise there were diplomatic activities begun in which the main players were: Russia, Great Britain, Austria and Prussia. With time the group was also joined by France which declared to be willing to return to the situation from the period of Ancient regime. Besides the superpowers the attempts to gain profits from the new geopolitical situation were made by a serious of minor political players. The culminations of talks to place during the Congress of Vienna of 1814-1815.

One of the key issues which influenced the system of forces in Europe were the fates of the Polish Republic, the one-time superpower which in 1795 stopped existing as a result of the partitions executed by her neighbours: Russia, Prussia and Austria. The Poles, however, did not quit dreaming of independence. In the early 19th century it was Napoleon who raised the hopes by establishing in 1807 the Warsaw Duchy dependent on France. The emperor's plan to conquer Europe included the creation of new dependent state organisms. The solution, however, did not meet the Polish aspirations whose objective was to regain sovereignty. So "the Polish case", vital to the system of forces in Europe had to return following *Napoleon's* fall as on the main subjects of diplomatic talks during the Congress of Vienna[1].

On the strength of the treaties signed in Vienna in 1815 the majority of lands of the Polish Republic still remained within the borders of Russia, Prussia and Austria[2]. At the same time the territory of the Duchy of Warsaw gave rise to the Kingdom of Poland, with the Great Duchy of Posen incorporated into Prussia. The latter was insignificant state numbering 128500 (square kilometres) km^2 and

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1 *Shilder N. K.,* Imperor Alexander I. His Life and Reign, S. Petersburg, Vol. 1, 1897, 271 (in Russian).

2 *Zamoyski A.*, 1815, upadek Napoleona i kongres wiedeński (Rites od Peace. The Fall of Napoleon and the Congress of Vienna), Kraków, 2010, 304-313, 352-353.

inhabited by 3.2 million of people. It was a constitutional monarchy bound by personal union with Russia. Despite the nominal separateness, the Kingdom of Poland it was closely politically, militarily and economically linked with the Russian Empire. Those situations generated a serious of practical difficulties, taking into account their separate political system and the tradition of the execution of political power[3]. One of key problem was regulating the question of religious cult. It should be remembered that the impact of the Catholic Church suffered during the antireligious crusade of *Napoleon*, aimed in consequence to rebuilt its position. In Russia the prevailed religion was the Orthodox Church while in the Kingdom of Poland the dominating faith was the Roman-Catholicism. Considering a powerful influence of that faith on social life, a serious of issues needed the legal regulation in the new political situation.

2. The Position of Religion at the Moment of Establishing the Kingdom of Poland

At the moment of establishing the Kingdom of Poland the situation of religious faiths and the attitude of the State was complicated and unclear. It was caused by a number of factors. In the past the Polish Republic had been the multi-religious country with a far-reaching religious tolerance. It had been the result of the Polish territory being inhabited by plenty of different nationalities with a variety of cultures. Beside the Catholic of the Roman order, the Polish Republic was densely populated by the believers of Greco-Catholic, Orthodox, Protestant (Lutherans and Calvinists), Jews as well as Muslims. The religious mosaic was completed by the representatives of minor religious communities. Irrespective of the tolerance mentioned before, the dominating position was occupied by Roman Catholicism.

The outstanding position of the Catholic Church in the Polish Republic was confirmed by the content of the government Act of the 3rd May 1791, the first European constitution and the second in the world after that of the United States of America (1787). In accordance with art. I the Roman Catholic religion had the status of the state one. Then change of Catholic faith into another was considered to be the crime of apostasy. Simultaneously, referring to the Christian love of other people and the tolerance, it stipulated the freedom of other cults, being protected by the State[4]. In practise the legal solutions accepted were not realised since in 1795 the Polish Republic disappeared of map of Europe following the partitions executed by the neighbouring superpowers.

Establishing the Warsaw Duchy, *Napoleon* adjusted its social-political system to his vision of the modern state. To a marginal degree he accounted for the needs, aspirations and the traditions of the Polish people. In consequence there were a serious of solutions introduced being in evident contradiction with the Polish culture. One of those was the attempt to subordinate the religion to the state. Such solutions had to meet with the opposition of the Poles attached to tradition, particularly the Catholic Church

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3 *Phalkovich S. M.* (ed.), Poland and Russia in the First Third of XIX Century. From the History of the Autonomous Kingdom of Poland 1815-1830, Mosow, 2010, 11, 109 (in Russian).

4 Art. I ustawy rządowej z dnia 3 maja 1791 r., in: Konstytucje polskie 1791-1921, *Handelsman M.* (ed.), Warszawa, 1926, 38.

losing its impact. While, according to *Napoleon's* Constitutional Act of the Warsaw Duchy[5] passed on the 22nd July 1807 the status of the Catholic religion as the state one was formally maintained and the freedom of other cults was guaranteed, the conception of the relationship between the Church and the State stemming from *Napoleon's* politics and the legal acts of lower degree caused the practice in the field to be complicated. Much controversy was raised by the introduction of French Code Civil[6] (*Kodex Napoleona*) in 1808, the modern codification inconsistent with the level of Polish legal culture. On its basis a series of issues reserved to the Catholic Church became secular. The highest opposition was aroused by extracting the matrimonial issues out of religious jurisdiction and introducing secular divorces, as well as imposing on priest the duty to do administrative proceedings connected with the civil state[7]. There appeared the problem of accommodating the widely acceptable religious dogmas with the new secular legislation. The most difficult situations concerned the Catholic clergymen employed in the administration of the Warsaw Duchy[8]. It should be added that those especially discriminated against were the believers of Judaism, who were deprived of full civil rights and became marginalised in the social life[9].

The circumstances indicated influenced the shape of the public debate devoted to the position of particular religions in the Kingdom of Poland. There appeared the circumstances enabling the introduction of changes to the legal system in the Kingdom of Poland. During the Congress of Vienna, the Polish aristocrat and a close collaborator of tsar *Alexander* I, prince *Adam J. Czartoryski* prepared at the tsar's request "The Constitutional Principles of the Kingdom of Poland" on the 25th May 1815. The author of the project referred the home tradition and suggested to the tsar including a note on religion of the text similar to regulations in The Constitution of the 3rd May 1791. The difference consisted in making the believers of all Christian faiths equal in public life (art. 2). It was understandable considering the Orthodox Church as the state religion in the Russian Empire. It also specified the rules remunerating the Roman Catholic and Greco-Unitarian clergy (art. 31) as well as declared assigning by the State some financial resources to the clergy of the Reformed and Augsburg Churches (art. 32)[10]. "The Constitutionals Principles" referring to the Polish traditions were not however introduced in the shape suggested by prince *Czartoryski*.

3. Religion in the Light of the Constitution of 1815

5 Ustawa konstytucyjna Księstwa Warszawskiego z 22 lipca 1807 r., Dziennik Praw Księstwa Warszawskiego, Vol. I., I-XLVII.

6 Code civil des Français, 21/03/1804.

7 Sześćioletnia korrespondencyja władz duchownych z rządem świeckim Xięstwa Warszawskiego. Służąca do Historyi Kościoła Polskiego, Poznań, 1816, 7,79, 239, 241, 285, 467, 472.

8 *Szaniawski F. K.,* Jak przepisy Kodexu Napoleona o rozwodach roumianemi być mają, Warszawa, 1811.

9 *Bardach J., Senkowska-Gluck M.* (ed.), Historia państwa i prawa Polski, Tom III, od rozbiorów do uwłaszczenia, Warszawa, 1981, 279-287.

10 Zasady konstytucyjne Królestwa Polskiego z dn. 25 maja 1815 r., in: Konstytucje polskie 1791-1921, *Handelsman M.* (ed.), Warszawa, 1926, 76, 80-81.

Tsar *Alexander* I, being also the king of Poland, while establishing a new state organism had primarily in mind the interest of the Russian Empire and the ruling family. On the 27th November 1815 he issued "The Constitutional Act of the Kingdom of Poland"[11]. The Constitution contained a series of modern solutions which made it one of the most liberal constitutions in Europe. As it turned out it was too modern for the absolute monarch. In consequence, the following years saw its infringement and the gradual limitation of its freedoms. From the point of view of factual considerations, the most interesting was the issue of the constitutional regulation of status of religion vs. Churches.

In accordance with the constitution the Roman Catholic religion, in view of its highest number of believers, found itself under especial protection of the State. The privileged legal position of the Catholics did not mean limiting the freedom of other religious cults. *Alexander* I ensured the liberty of public celebration of all faiths. Moreover, he equalled the rights of all Christian faiths (art. 11). It meant that other religions for example Judaism and Islam were in this respect impaired.

The clergy of all faiths found themselves under the care of the State and within the law valid in the Kingdom of Poland (art. 12). The privileged position of some religious denominations was connected with their representatives becoming members of the Senate which was to be seated by a number of Roman Catholic bishops corresponding to the number of voivodships. That provided the clergy with eight senatorial seats. Accordingly, the Catholic church was able to influence the compatibility of legal acts with religious dogmas. The Senate also made place for one bishop of Greco-Uniate Church (art. 14).

The Constitution confirmed the hitherto wealth of the Roman Catholic and the Greco-Uniate Churches. It also declared successive bestowals increasing their financial remunerations. It yet stipulated that the extra financial ingredients were to constitute the possession of the whole Church, not that of particular parishes or clergymen (art. 13). The issues of the financial support of the Evangelic-Reformed and Evangelic-Augsburg Churches were treated differently. They were to utilize the yearly provision made and paid by the State out of public means.

4. The Criminal Law Protection of Religion in the Kingdom of Poland

One of the key issues requiring immediate organisation after the establishment of the Kingdom of Poland was the legal system. From the point of view of security and internal order it was the criminal regulations which gained importance. Therefore, during the first Parliament summoned by *Alexander* I in 1818, the State Council, fulfilling the role of the Government, came up with the project of the Criminal Code to be discussed during the Parliamentary sessions. Following a heated discussion, the Parliament lower chamber and then the Senate both approved of the codification which later gained the royal sanction. The regulation entitled "The Law of the Criminal Code for the Kingdom of Poland" came into being after its publication in the Legal Journal of the Kingdom of Poland dated 20th July 1818[12].

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[11] Ustawa konstytucyjna Królestwa Polskiego z dn. 27 listopada 1815 r., Dziennik Praw Królestwa Polskiego, Vol. I., 1.

[12] Dziennik Praw Królestwa Polskiego, Vol. V, 1818, 1 (hereafter, K.k.K.P.).

In the criminal codification there was a series of regulations concerning the protection of religion. Misconduct against religion were divided into two groups: crimes and offenses. Chapter VIII of the Code included felonies against religion. A misconduct was termed the felony against religion if it caused common scandal or serious dangers (art. 77, KkKP). The legislator acknowledged two cases where such a situation took place. The former referred to public blasphemy against God. The latter was initiating intensive actions aiming at preventing or hindering the ceremonies of religious cults as well as profaning sacred artefacts and places connected with religious cult. The activity of the perpetrator could have been conducted in verbal, oral, written or active forms. The legislator extended the analogical legal protection from crimes of religious offences to all faiths. (art. 78, KkKP). The basic sanction assumed by the Code was the punishment of heavy jail sentence from 3 to 6 years. In case of an action regarded as particularly malicious or causing significant danger, the punishment could have been increased to 10 years (art. 79, KkKP).

Crimes against religion of lighter weight found themselves in Book II "On vices". The first vice was leading a Christian to changing their faith. It is worth emphasizing that the cases penalized were only those connected with conversions to other beliefs, while conversions to Catholicism were approved of by the legislator. Another kind of vices was the establishment of new religious sects. What was penalized was not only their effective organisation but also attempts at their establishment. (art. 257, KkKP). For those vices the legislator foresaw the punishment of public custody from 1 year to 3 years. A gentler sanction was predicted for trying to establish a sect, as the punishment here ranged from 3 months to 1 year of detainment (art. 258, KkKP).

5. The Influence of Religion on the Civil Law of the Kingdom of Poland

As has already been signalled, the establishment of the Kingdom of Poland was followed by circumstances favourable to changing the "French Code Civil", raising huge controversies on account of contradictions of its stipulations with the dogmas of Catholicism. The particularly opposed institutions were the regulations of Book I, Title V "On Marriage" (art. 144-228) and Title VI "On Divorce" (art. 229-311)[13]. The regulations permitted secular weddings and divorces. The laity of the institutions of family law crucial to the social order, so far reserved to religious jurisdiction instigated a violent opposition of the Catholic Church as well as the reactionary and conservative communities. The opponents demonstrated a far-reaching determination to change the legal regulation valid from the 1st May 1808. First occasion came during the Sejm (Polish Parliament) in 1818.

The Constitution of the Kingdom of Poland gave the monarch liberty as to the decision which Chamber should first be presented with the project of the legal act (art. 97). *Alexander* I decided to present it to the Senate, the plausible reason of which may have been the moods of the parliamentarians. The Senate as the upper chamber consisted mainly of conservative – aristocratic social elites of the Kingdom nominated by the tsar. Furthermore, its significant home tradition and social order dem-

[13] Kodex Napoleona, *Szaniawski F. K.* (trans.), Warszawa, 1808.

onstrated essential disparities in the assessment of the project. There was then a danger of the project being rejected while still proceeded in the first chamber. The changes suggested may have transformed its original text. Presenting the project to the Senate first entailed the benefit of the fact that according to the Constitution (art. 103) the project accepted by the 1st Chamber could not be changed by the 2nd one, but rather wholly accepted or rejected. The solution increased then the chance to effectively pass the legal act on the controversial issue without concessions and the necessity to introduce important modifications.

The discussion on the amendment of the Code of *Napoleon* commenced on the 2nd April 1818. The axis of the Senate discussion centred around the assessment of the compatibility of the project and the dogmas of Roman Catholicism as well as the contradictions encountered between the Code of *Napoleon*, local traditions and social order. What was exposed the collision between the secular and canonical law with respect to matrimonial relationships. Judging the valid legal institutions from the perspective of the Church hierarches, the representatives of the government indicated the negative influence of *Code civile* on the customs in the country and loosening family ties. The authors hence stressed that there was a necessity to introduce the legal regulation compatible with Polish mentality, their customs and traditions. The changes would have allowed the compromise between the content of the secular and canonical law. In the end, the project was passed. Out of 33 senators, 24 voted for while 9 against it[14]. The project was then moved on to the lower Chamber.

The proceedings in the lower chamber began on the 6th April 1818. During debates there were three main viewpoints and argumentations distinguished. On one hand there were loyalists supporting the project, on the other, there were its opponents focusing around two opposite stands. The former, traditionally-reactionary focused on the Catholic interpretation of the marital institution and divorce, the latter, liberally-progressive, accentuated the restrictiveness of the project and called for the necessity to maintain the regulations of the French *Code civile* resulting in the marriage being encompassed by the secular law. Paradoxically, the representatives of the two extremely contradictory attitudes, criticising the moderate project from different perspectives became *ad hoc* supporters together opposing the governmental project.

The completion of the discussion was followed by voting. Only 36 voted for the project, 82 Parliamentarians and deputies were against it[15]. In that way, combining the votes of the representatives of two extremely opposite visions of social order, clerically-radical on one hand and liberally-progressive on the other, led to the rejection of the moderate governmental project. In consequence, the regulations contradictory to the Catholic religion and concerning marital relationships were still in force for another 7 years.

In the end the Parliament nullified the regulations on secular marriages and divorces following the introduction of "Civil Code of the Kingdom of Poland"[16] in 1825.That was according to the orders

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14 *Gluecksberg N.* (ed.), Diariusz Sejmu Królestwa Polskiego 1818, Warszawa, Vol. I., 108.

15 Ibid, 156.

16 Kodex cywilny Królestwa Polskiego, Dziennik Praw Królestwa Polskiego, Vol. X, 1-290 (hereafter: KcKP).

of *Alexander* I issued in 1818 specifying that marital law should not contain regulations infringing on the dogmas of Roman Catholicism. As a result of the changes made, the religious character of matrimony was highlighted. It was to be conducted in accordance with the ritual of the newlyweds' faiths (art. 143, 164-165 KcKP). Despite the pressure of the Catholic Church aiming at transferring the matrimonial cases to religious courts the secular jurisdiction was kept. Still, the cases of marriage annulment, separation and divorce were considered according to the religious law of the couple. It was obligatory for the clergyman to appear in matrimonial cases as *defensor matrimonii* (art. 249 KcKP). There was introduced, analogically to the norms of canonical law, a ban on marriages between Christians and non-Christians (art. 163 KcKP).

6. Religion in the Light of Legal-Administrative Regulations

A significant part of cases regarding the church organisations functioning in the Kingdom of Poland was regulated on the grounds of administrative law. There were questions solved in the field connected with the material substance of the churches, in particular the places of worship and financial means. In the course, the students of religious seminars were exempted from military duty. In the issues resolved on the grounds of administrative law it was the interest of the Catholic Church that was taken care of. Other faiths were largely disregarded.

There was also a gradual progress of the Catholic Church domination in the activity of administration apparatus. The transformation of *Alexander* I's world view causing his abandoning the principles of liberalism towards mysticism, as well as clearly articulated conservatives outlooks of his successor *Nikolas* I[17], gave rise to conditions convenient for the reconstruction of the meaning of Catholic clergy in the life of the Kingdom of Poland. The Catholic Church controlled the Commission of Religions and Public Enlightenment, and through it influenced education and upbringing connected with Warsaw University. It also decided about the range of censorship conducted in the interest of the tsardom and its own. Thus, the clergy determined the content of the public debate and the way of thinking of the society majority. Limiting access to information constituted an effective toll of exerting pressure on those presenting views divergent from Catholic ones and fixed the privileged position facilitating the realisations of one's own interests.

7. Conclusion

Considerations regarding the legal position of religion in the Kingdom of Poland in the years 1815-1830 constitute just an outline of very complex subject matter. On the basis of the facts quoted a few conclusions can be drawn. They allow reconstructing the position of religion in the social life. Above all, despite declared freedom of worship, the distinctly dominating position of Roman Catholic religion becomes more evident. It referred to both material law and that of political system. In the

[17] *Askenazy Sz.*, Rosya-Polska 1815-1830, Lwów, 1907, 90, 107.

former case it is worth indicating the criminal law protection of religion and the influence of Catholic dogmas on the content of civil law regulations. In the latter it is enough to point the number of bishops in the Senate. One should add numerous material privileges and financial benefits made by the State for the Catholic Church. What is also worth mentioning is the fact that practice went farther in realising the interest of Catholic clergy than it would from the legislation in force.

Other Christian denominations found themselves in less favourable situation. Non-Roman Catholic Christian beliefs were tolerated, while a much worse position was experienced by the congregations of Non-Christians. The believers of Judaism were those most discriminated against. Besides plentiful limitations sanctioning their legal handicap, they were the object of a lot of intolerant behaviours. In sum, it should be stated that the Catholic Church, thanks to collaboration with the tsar, managed to, not only reconstruct, but also strengthened its own position in the period of the Kingdom of Poland.

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Responsible editor on style: Marine Terrettaz

Cover Designer Mariam Ebralidze

Compositor Lela Tsiklauri

Printed in Ivane Javakhishvili Tbilisi State University Press

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