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THE IMPORTANCE OF REDUCTION OF DISCRETIONARY POWER TO ZERO IN THE PREVENTIVE ACTIVITY OF THE POLICE

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“The police must not shoot sparrows with cannons”¹

INTRODUCTION*

According to the definition elaborated in the 19th century, the police represent the “monopoly of the state on the use of force.”² The monopoly on the use of force is a delicate sphere of activity, since it creates the risks of abuse of power and possibilities of non-disclosure of human rights violations.³ For this reason, this activity is limited by general principles characterizing a legal state.⁴

Since the police have discretionary power while exercising police activity, there should be a means to balance its scope. According to Article 7 of the Constitution of Georgia, while exercising authority, the people and the state shall be bound by universally recognized human rights and the existing law. This limits the scope of police activity with human rights, in accordance with the principle of proportionality and sets grounds for the transformation of police authority into an obligation, based on specific circumstances.

This research determines the interrelation between discretionary power in preventive measures of the police and fundamental rights.

This paper discusses the essence of police as a subject exercising public administration and the issue of differentiation of police activities, since this paper is related to preventive activities the police exercise. The main focus is on the importance of discretionary power in police activity and the reduction of its scope to zero. Finally, in conclusion, the specific fundamental rights for which the reduction to zero of discretionary powers will follow, will be discussed.

For these purposes, the following research methods were used: legal teleology – through extension and reduction;

1 F. Fleiner, *Institutionen des deutschen Verwaltungsrecht* (JCB Mohr 1912) , 354.

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2 The concept of Gewalt Monopol des Staates was first used by Max Weber and was then applied by other authors as well (see: Hobbes, Bowden). According to Weber, a state is “a union human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.” The basis for the use of force by the state is envisaged by Article 20 of the Basic Law of Germany, with the objective to guarantee the principle of a legal state. See: M. Weber, *Wirtschaft und Gesellschaft*, S. 29., A. Fisahn, *Legitimation des Gewaltmonopols*, S. 3., *Grundgesetz für die Bundesrepublik Deutschland* vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Artikel 1 des Gesetzes vom 13. Juli 2017 (BGBl. I S. 2347), Art. 20., J. Bodin j, *Les six livres de la République 1576.*, T. Hobs, *Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* 165.

3 *Polizei und Menschenrechte*, Informationsplattform, humanrights.ch.

<https://www.humanrights.ch/de/service/wegweiser/polizei-menschenrechte/> (accessed 24.03.2018)

4 *Ibid.*

Systemic clarification – through analysis of administrative and criminal legislation in the process of differentiation of police activities.

The research is based on the analysis of legislative acts, scientific literature, and case laws. Relevant examples are discussed.

1. THE POLICE AS A SUBJECT EXERCISING PUBLIC ADMINISTRATION

Modern police law classifies the concept of the police according to three different approaches: on material, formal, and institutional bases.⁵

- The material concept of the police acquired a special meaning after World War II⁶ and it was defined as follows: the material concept of the police is state activity that aims at prevention of specific or abstract risks or elimination of already committed violations, when public order and security is under threat.⁷
- The institutional (organizational) concept includes all institutions and administrative organs that fall under the organizational scope of the police.⁸ Therefore, this concept underlines the organizational structure of the police.
- The formal understanding includes the obligations of the police that should be exercised under the institutional conception of the police.⁹ Therefore, it represents a combination of subjective powers.¹⁰

The Law of Georgia on Police¹¹ prioritized the institutional concept,¹² and therefore, its scope covered only the police that is subordinate to the Ministry of Internal Affairs. In addition, it should

5 P. J. Tettinger., W. Erbguth., T. Mann, Besonderes Verwaltungsrecht, Kommunalrecht, Polizei und Ordnungsrecht, Baurecht, 9. neu bearbeitete Auflage, C.F. Mueller Verlag, Heidelberg, 2007, 154.

6 V. Götz, ALLGEMEINES POLIZEI-UND ORDNUNGSRECHT, 9. neuarbeitete Auflage, Göttingen 1988, 19.

7 R. Breuer, T. von Danwitz, P. M. Humber, W. Krebs, P. Kunig, H. Ch. Röhl, E. Schmidt-Aßman, F. Schoch, Besonderes Verwaltungsrecht, (Dr. Friedrich Schoch, Polizei- und Ordnungsrecht) 14. Auflage, De Gruyter Recht, Berlin, 2008, 135. Compare: V. Götz, ALLGEMEINES POLIZEI-UND ORDNUNGSRECHT, 9. neuarbeitete Auflage, Göttingen 1988, 19. The material concept of the police considers it not as a part of an administrative organization, but as a combination of rights and duties oriented at the prevention of threat.

8 P. J. Tettinger., W. Erbguth., T. Mann, Besonderes Verwaltungsrecht, Kommunalrecht, Polizei und Ordnungsrecht, Baurecht, 9. neu bearbeitete Auflage, C.F. Mueller Verlag, Heidelberg, 2007, 154.

9 R. Breuer, T. von Danwitz, P. M. Humber, W. Krebs, P. Kunig, H. Ch. Röhl, E. Schmidt-Aßman, F. Schoch, Besonderes Verwaltungsrecht, (Dr. Friedrich Schoch, Polizei- und Ordnungsrecht) 14. Auflage, De Gruyter Recht, Berlin, 2008, 135.

10 V. Götz, ALLGEMEINES POLIZEI-UND ORDNUNGSRECHT, 9. neuarbeitete Auflage, Göttingen 1988, 19.

11 See the Law of Georgia on Police, October 4, 2013.

12 I. Beraia, N. Gelashvili, K. Giorgishvili, L. Izoria, S. Kiladze, D. Muzashvili, P. Turava, Police Law, Ed: Levan Izoria. Tbilisi, 2015, p.15. (ი. ბერაია, ნ. გელაშვილი, ქ. გიორგიშვილი, ლ. იზორია, ს. კილაძე, დ. მუზაშვილი, პ. ტურავა, საპოლიციო სამართალი, ლევან იზორიას რედაქტორობით, თბილისი 2015, 15)

also be noted that, in essence, police functions can be undertaken by other persons on the basis of delegated authority,¹³ but the above-mentioned law does not include these persons.

The legal definition of public administration has not been elaborated, but, according to one of the existing clarifications, public administration represents the organizational sphere of the state, which is neither a part of the legislative or executive branches of government, nor identical to the government.¹⁴

In order to consider the police as a subject exercising public administration, it should fulfill the characteristics of an administrative body¹⁵ and thus be included in the scope of the Administrative Code and the Law of Georgia on Police. According to the latter, “the police is a system of law enforcement agencies under the Ministry exercising executive power. Within the scope of its authority, under the legislation of Georgia, the police carry out preventive measures and respond to offences to ensure public security and legal order.”¹⁶ Therefore, we can say that the police, in organizational terms, represents an administrative body. As for functional terms, this is related to police measures,¹⁷ since the differentiation is made between preventive and reactive measures.

In certain cases, it is difficult to differentiate between preventive and repressive measures. In this regard, the “Doppelfunktion” defined in German law is especially interesting; this means that the police may have a double function, since in some cases a police officer has the duty to not only prevent the threat, but also to exercise criminal law activities.¹⁸ This is expressed through types of police measures that will be discussed in detail below.

In the case when police activity, in functional terms, implies criminal law actions, the scope of General Administrative Code of Georgia cannot include it, and therefore, it cannot be considered as an administrative body.

13 The basis for this is paragraph 1(a) of Article 2, General Administrative Code of Georgia, when another person functionally exercises public law authority, e.g. the Municipal Supervision Service of the Tbilisi City Hall, which identifies violations of the existing rules for construction work, as well as suspension and/or demolition of constructions with violations, use of fines, etc. See: Regulation #10-5 of January 16, 2018 of the Tbilisi City Council on the Approval of the Provision of the Municipal Supervision Service of the Tbilisi municipality.

14 L. Izoria, *Modern State, Modern Administration*, Tbilisi, 2009, 12. (ლ. იზორია, თანამედროვე სახელმწიფო, თანამედროვე ადმინისტრაცია, თბილისი 2009, 12), See: Thieme, Werner, *Verwaltungslehre*, 4. Aufl., 1984, S. 3.

15 General definition of an administrative body is given in the Article 2, paragraph 2(a) of the General Administrative Code of Georgia. An administrative body is defined as “all state or local self-government bodies or institutions, legal entities under public law (other than political and religious associations), and any other person exercising authority under public law in accordance with the legislation of Georgia.”

16 Law of Georgia on Police, Article 3, October 4, 2013.

17 Since police measure is presented as a mechanism for exercising public law authority.

18 H-P von Stöphasius, *Grundlagen des Eingriffsrechts zur Gefahrenabwehr*, Beiträge aus dem Fachbereich Polizei und Sicherheitsmanagement, Nr. 12/2014, 23.

2. POLICE MEASURES

Police activity can be exercised in two main ways: through prevention and through reaction to an offense. The Law of Georgia on Police does not specifically mention repressive measures, since this term often has negative connotations. However, in essence, reaction to an offense is the same as repression. The function of protecting the law is expressed through adequate reaction to an offense, and so when the law protects the public with the threat of legal sanctions, it serves a repressive function.¹⁹

Prevention is an important function of the law and implies measures oriented at avoidance.²⁰ We can distinguish between general and specific meanings of prevention. The former is reflected by the definition of prevention: avoidance. The latter can be illustrated with police law, in which prevention implies avoidance of a threat. When a police officer reacts to a violation or offense, in essence, this is also prevention (for example, when theft is prevented at the stage of attempt),²¹ but in a general sense.

The Law on Police lists both preventive and reactive measures.²² This differentiation is linked with the concept of public administration, since the police is considered an administrative body only when it exercises prevention. This also follows from paragraphs 4 and 5 of Article 5 of the Law of Georgia on Police, according to which: “The police shall exercise their preventive actions applying legal forms of activities of administrative bodies — administrative-legal acts and administrative real acts — as provided for by the General Administrative Code of Georgia. Procedures set by the General Administrative Code²³ of Georgia shall not apply to the issuance and notification of individual administrative-legal acts on conducting criminal intelligence actions. The Criminal Procedure Code and other relevant normative acts of Georgia shall specify legal forms of police responsive actions to offences committed by the police for detecting, preventing, and investigating a crime.”

Therefore, the differentiation has an essential importance for the exact definition of the legal bases on which a police officer shall rely when taking measures. As mentioned above, Law of Georgia on Police lists police measures and differentiates among them to a certain extent, but in some

19 G. Khubua, *Theory of Law*, Tbilisi, 2003, 45-46. (გ. ხუბუა, *სამართლის თეორია*, თბილისი 2004, 45-46).

20 I. Beraia, N. Gelashvili, K. Giorgishvili, L. Izoria, S. Kiladze, D. Muzashvili, P. Turava, *Police Law*, Ed: Levan Izoria. Tbilisi, 2015, p.19 (ბერაია, ნ. გელაშვილი, ქ. გიორგიშვილი, ლ. იზორია, ს. კილაძე, დ. მუზაშვილი, პ. ტურავა, *საპოლიციო სამართალი*, ლევან იზორიას რედაქტორობით, თბილისი 2015), 19.

21 Paragraph 1, Article 39 of Criminal Code of Georgia envisages prevention of new crimes as the goal of a criminal sentence. Therefore, sentencing implies prevention by definition. See: *Criminal Code of Georgia*, July 2, 1999, Matsne 41(48), 13.08.1999.

22 See: *Law of Georgia on Police*, October 4, 2013.

23 Legal definition of administrative real acts is given in the Law on Police and is defined as public legal action that is “aimed at achieving actual outcomes rather than at originating, changing, or terminating legal relations.” The General Administrative Code does not refine a real act and only mentions an “act” — see Article 177, paragraph 3 of the General Administrative Code.

cases, it might be complicated for a police officer to determine whether to use administrative or criminal law. This is clearly depicted in the double (mixed) function of the police.²⁴

Example: Anarmed bank robber flees. His/her arrest can represent prevention — protection of the society from further crime, like taking hostage — as well as repression, through criminal persecution.²⁵

Regardless of its function, a measure cannot be considered as preventive and repressive at the same time. Otherwise, citizens would not have the possibility to realize procedural law means.²⁶ Therefore, there should be a mechanism to differentiate measures having a double function.

To this end, we can use the so-called *center of gravity theory* (German: *Schwerpunkttheorie*).²⁷ First, we should ask what the main aim of the police is: is it to persecute a criminal or to protect peaceful civilians who constitute potential victims? In this case, the center of gravity will turn towards the latter, and therefore, the measure would be considered preventive.²⁸

Therefore, in measures with double function, the main focal point is the aim of the police, which determines whether the measure in question is oriented at avoiding a threat or exercising criminal law.²⁹

3. DISCRETIONARY POWER IN POLICE ACTIVITY

When public order and safety are under threat, a relevant authority is authorized (and not obligated) to take adequate measures.³⁰ This is considered the principle of opportunity, as opposed to criminal law, in which the officiality principle applies.³¹ Therefore, an administrative body has discretionary powers. This means the possibility of different legal outcomes in the process of legal syllogism and application of fact and norms.

24 Similar to Doppelfunktion in German law.

25 M. Bäuerle, *Polizei und Verwaltungsrecht*, Fachbereich Polizei, Abteilung Gießen, 19.

26 Ibid.

27 There is no problem when a measure was preventive before and then transformed into repression. M. Bäuerle, *Polizei und Verwaltungsrecht*, Fachbereich Polizei, Abteilung Gießen, 19.

28 Michael Bäuerle, *Polizei und Verwaltungsrecht*, Fachbereich Polizei, Abteilung Gießen, 19.

29 Doppelfunktionalität – kein Rechtswegwahlrecht des Bürgers, LAW Aktuell 08/12 ÖR, BayVG, Beschl. vom 5.11.2009, Az. 10 C 09.2122, juris = BayVBl 2010, 220. ob : BVerwGE 47, 255/264f., 655 BayVG, NVwZ 1986, and 540 VG, Baden-Württemberg NwZ-RR 2005. 540; Berner/Köhler, *Polizeiaufgaben-gesetz*, 19. Aufl. 2010, RdNr. 20 der Vorbem. zu Art. 11 ff). <http://www.hemmer-club.de/index.php?hp=40&a=171&rb=2&n=0> (Accessed: 31.03.2018).

30 R. Breuer, T. von Danwitz, P. M. Humber, W. Krebs, P. Kunig, H. Ch. Röhl, E. Schmidt-Assman, F. Schoch, *Besonderes Verwaltungsrecht*, (Dr. Fr. Schoch. *Polizei- und Ordnungsrecht*) 14. Auflage, De Gruyter Recht, Berlin, 2008, 195.

31 In case when police is exercising repressive function, the principle of officiality applies, instead of principle of opportunity.

The definition of public safety is interesting. Specifically, whether this means only collective safety. A reductive definition can lead to this conclusion, which would be incorrect, since police measures aim at protecting individual rights.

Preventive measures are based on the principle of discretionary power. Hence, adequate exercising of this power is an important part of police activity.³² For example, according to Articles 19-28 of the Law of Georgia on Police, the police have discretionary powers.³³

The principle of opportunity, in turn, includes different types of discretion: decisive and elective.³⁴ In the former case, the police has the possibility to take a measure. In the latter, the police has several options in terms of means to take a measure.³⁵

Article 13 of the Law of Georgia on Police includes the principle of exercising discretionary powers, and its first paragraph reads as follows: "In the cases and within the scope of law, to perform its functions, the police shall act within discretionary powers." As for the second and third paragraphs, they determine the decisive and elective forms of discretion.³⁶

Exercising of discretionary powers is related to the principle of proportionality. Accordingly, a police measure should have a legitimate aim, which is useful, necessary, and proportionate.

Discretionary power does not mean full freedom of choice, and administration is limited to a certain extent by its scope. The limitation of discretionary powers can occur through a legal context, since the primary legal power of the law envisages that a decision made on the basis of discretionary power should abide by legal norms.³⁷

32 I. Beraia, N. Gelashvili, K. Giorgishvili, L. Izoria, S. Kiladze, D. Muzashvili, P. Turava, *Police Law*, Ed: Levan Izoria. Tbilisi, 2015, p.68. (ი. ბერაია, ნ. გელაშვილი, ქ. გიორგიშვილი, ლ. იზორია, ს. კილაძე, დ. მუზაშვილი, პ. ტურავა, საპოლიციო სამართალი, ლევან იზორიას რედაქტორობით, თბილისი 2015,68).

33 Ibid.

34 R. Breuer, T. von Danwitz, P. M. Humber, W. Krebs, P. Kunig, H. Ch. Röhl, E. Schmidt-Aßman, F. Schoch, *Besonderes Verwaltungsrecht*, (Dr. Friedrich Schoch, *Polizei- und Ordnungsrecht*) 14. Auflage, De Gruyter Recht, Berlin, 2008, 196.

35 V. Götz, *ALLGEMEINES POLIZEI-UND ORDNUNGSRECHT*, 9. neuarbeitete Auflage, Göttingen 1988,19.

36 "2. A police officer shall be authorised to decide whether to perform police measures.

3. A police officer shall have the freedom to select the most acceptable one out of several police measures under the legislation of Georgia, according to the principle of proportionality.

37 R. Tsipelius, *Science of Legal Methods*, Tenth Edition, Translation of Levan Totladze, Ed: Merab Turava, 2009, 132.

4. FUNDAMENTAL RIGHTS AS A FIXATOR OF DISCRETIONARY POWER

The international community and the majority of democratic states has recently paid more attention to the protection of human rights in relation to police activity and it was recognized that there is a strong and sensitive link between the two.³⁸ Nevertheless, there is a view that during the exercising of police measures, on practical level there is a certain space between human rights standards and their application.³⁹ According to Professor Ralph Crawshaw, a state faces the duty to protect fundamental rights at the same time as exercising police activity.⁴⁰

In general, the existence of discretion is often subject to discussion, since it gives an administrative body power and freedom, as well as responsibility. This is especially evident in police activity. Legislative government creates police as a state institute that represents one of the effective instruments of protection of human rights.⁴¹ This raises questions as to how the police should achieve its main objective, when it has a wide scope of discretion, as well as the duty to protect human rights. The response is the reduction of discretionary powers to zero.

When a public good is under an essential threat, the scope of discretion of an administrative body can be limited, and it can be obligated to interfere.⁴² Therefore, the scope of discretionary power is reduced to zero and the administrative body does not have decisive discretion (choice in terms of “if”). According to German practice, interference is necessary when health and life is under grave threat, as well as in cases where there is a risk of significant damage to property.⁴³ In the decisions of the Federal Administrative Court, we encounter the criterion of “especially high intensity and risk of a violation.”⁴⁴

There is a view that reduction to zero of discretionary powers combats “unjustifiable passivity,”⁴⁵ which should be absolutely correct. Since the main aim of police activity is to protect public safety and order, this cannot always be achieved through absolute discretion. The necessity of the reduc-

38 M. Amir, S. Einstein, *Policing, Security and Democracy: The Theory and Practice*, Office of International Criminal Justice, Huntsville, 2001; Das & Palmiotto, 2002, p. 216.

39 S. Pastor, *Time for Change in Police Culture: Putting Human Rights at the Centre of Policing*, Postgraduate HRC 2015 Working Paper No. 9, Belfast, 2015, p. 7.

40 R. Crawshaw, *Human Rights and the Theory and the Practice of Policing*, *The International Journal of Human Rights*, Vol. 1, Issue 1, 1997, p.2.

41 P. Turava, *Compliance of norms regulating the activity of the police of Georgia with European standards of human rights*, *Human Rights and Legal Reform in Georgia*, Compilation of Articles, K, Korkelia (ed.), Tbilisi, 2014, 120. (პ. ტურავა, საქართველოს პოლიციის საქმიანობის მარეგულირებელი ნორმების შესაბამისობა ადამიანის უფლებათა ევროპულ სტანდარტებთან, ადამიანის უფლებათა დაცვა და სამართლებრივი რეფორმა საქართველოში, სტატიათა კრებული, კ. კორკელია (რედ.), თბილისი 2014, 120).

42 V. Götz, *ALLGEMEINES POLIZEI-UND ORDNUNGSRECHT*, 9. neuarbeitete Auflage, Göttingen 1988, 134.

43 Ibid.

44 BVerwGE 11,95,97.

45 Wilke, FS Scupin, S.831, 840 ff .

tion of authority arises, first and foremost, when there is a significant risk of a violation of human rights.

Example: There is a football match during which supporters engage in a physical confrontation. Considering reduction to zero, it is the duty, and not the authority, of the police to interfere already at the onset, so as to avoid further escalation. The inaction of the police on grounds of having discretionary power and the choice to avoid applying it cannot be justified, since the health and life of persons are at stake.

4.1 The Right to Life

One of the elements of the right to life is the positive obligation of the police to protect life. The duty to protect life envisages an absolute obligation of the state to avoid any loss of life. This obligation is oriented at fulfillment, not at outcome.⁴⁶ In *Osman v the United Kingdom*, the European Court of Human Rights noted that the police shall take effective operative measures within its authority in order to prevent real and inevitable threat to life, on which it has or should have had information.⁴⁷

Taking this into consideration, it is clear that the standard of precaution applied to the police is high, since the ECHR mentions not only awareness, but also “potential awareness,” meaning that the police had an objective possibility to know that the taken measure would result in the loss of life. Therefore, on one hand, there should be a real and inevitable danger that the police have or should have had information on, and, on the other hand, there should be a possibility to take effective steps to prevent it.

In this regard, the use of firearms, or the use of force, in relation to the right to life is interesting.

Example: The police receive information that an armed robber has broken into a bank. In several minutes, patrol police mobilize near the bank to prevent the crime and neutralize the situation. Armed robbers try to escape, and displayed their firearms. The police warn the attackers regarding the possible use of firearms, but they do not react, and so the police use firearms with the aim of arresting them. Specifically, there a shot is fired in the direction of the legs of one of the attackers. But it appears that the bullet hit the main artery of the leg and the attacker dies before the ambulance arrives.

If we discuss the given plot in terms of the reasonable use of firearms, the decision of the ECHR on the case *Nachova and Others v Bulgaria* is especially interesting. In this case, the court discussed whether the use of firearms was lawful or not and ruled that “there can be no necessity to use a po-

46 J. Murdoch, R. Roche, *The European Convention on Human Rights and Policing, A Handbook for Police Officers and Other Law Enforcement Officials*, Council of Europe Publishing, 2013, p. 39.

47 *Osman v The United Kingdom*, October 28, 1998, Article 2. See: <http://swarb.co.uk/osman-v-the-united-kingdom-echr-28-oct-1998>, (Accessed: 04.04.2018).

tentially lethal force where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence. This principle applies even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.⁴⁸ The only legitimate aim of the use of lethal or potentially lethal force that justifies it is absolute necessity to protect life. Article 2 of the European Convention on Human Rights contains a limited exception for the cases of lawful executions and sets out strictly controlled circumstances in which the deprivation of life may be justified: a) in defense of any person from unlawful violence; 2) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; 3) in action lawfully taken for the purpose of quelling a riot or insurrection. It is clear from the European standards the police has the right to use firearms/force only in the case of “absolute necessity.” Since the main aim of the police is to protect public order and safety, it is clear that in this case, the rights of the attackers and the rights of third persons/society face each other. In the example above, armed robbers broke into a bank and, by demonstrating firearms, tried to escape from the area. It is certain that the persons in the area faced an objective, immediate and real threat. The fact that in this case the police was exercising preventive activity should also be mentioned. Therefore, the police acted as a subject exercising public administration, i.e. an administrative body. Even though the attackers committed an action covered by the criminal law and the police were called to react to the mentioned violation, the activity of the police was mainly directed at prevention of unlawful activity in order to avoid threats to public safety. Therefore, police activity in these terms should be included within the scope of administrative law. It is also important to note that the police shot in the direction of one of the attacker’s legs, which means that the police did not have a premeditated intention to threaten health or life, rather, the police officer was aiming at preventing further actions of the attackers and arrest them. At the same time, the measure was oriented at ensuring a bigger public good— public safety, which, according to European standards and national legislations, creates a basis for proportional interference. However, this is not sufficient to consider the actions of the police as legitimate. It is also necessary to discuss the issue of the adequate application of discretionary power by the police.

In this case, discretionary power should be discussed by focusing on two aspects: 1) decisive authority and 2) elective authority. Decisive authority is related to the discretion of the police “whether” or not to make a decision to act. Elective authority, in turn, relates to the types of actions, i.e. “how” the police shall achieve its aim. Accordingly, if the police make a decision to act, it also determines the specific type of action to be taken. In the case above, discretionary authority should be discussed in terms of 1) the decision of the police to arrest the attackers; and 2) the decision of the police to use firearms to this end, as a *coercive measure*. The first issue, the arrest of the attackers, is a necessary measure, since discretionary power is reduced to zero. In this case, the police has no discretion in terms of “if” or “whether,” since the life and wellbeing of people in the bank, which has faced a specific threat, has to be protected. Hence, the next step towards the aim, i.e. discretion, in relation to the selection of a measure (discretion in terms of “how”) has to be determined. In this case, the adequate application of discretionary power should be determined in relation to the

48 *Nachova and Others v Bulgaria*, February 26, 2004 Article 2. See: <http://www.errc.org/article/nachova-and-others-v-bulgaria/3582>, (Accessed 04.04.2018).

proportionality principle. The plot of the case helps us conclude that there is a legitimate aim — protection of public safety, as well as the wellbeing and life of people inside and near the bank. At the same time, the use of firearms can be considered as a useful means to achieve the aim. Since the robbers tried to escape by displaying firearms, the police made a decision to hinder their movement by shooting in the direction that avoided threat to life or health of the robbers. It is interesting whether this action was necessary. According to paragraph 4 of Article 12 of the Law of Georgia on Police, a necessary police measure carried out by a police officer shall be deemed proportional if the damage inflicted to achieve the good protected by law does not exceed the good itself, for the protection of which the police measure is carried out. In this case, paragraph 3 of Article 31 and paragraphs 3, 4, 6 and 9 of Article 34 should also be noted. Paragraph 3 of Article 31 envisages that before using physical force, special means and firearms, a police officer shall warn a person and give a reasonable period of time to carry out the lawful order except if the delay may cause a threat to life and the health of a person and/or of a police officer, or other severe consequences, or if such warning is unjustifiable or impossible in a given situation. As for paragraphs 3 and 4 of Article 34, they are related to passive and active use of firearms. Passive use implies demonstration of a firearm towards a legitimate aim, whereas active use refers to an intentional shot from a firearm. In the given case, the latter was used. The police shot intentionally to hinder the movement of the attackers. Paragraph 6 of the same Article envisages that the active use of a firearm against a person shall be preceded by the following verbal warning: ‘Police! Freeze or I will shoot!’ followed by a warning shot. Interestingly, paragraph 9 also envisages that a police officer may in no case use a firearm in situations where there is a possibility of injuring other people, as well as near inflammable and combustible material, except when necessary for self-defense and/or in an emergency. According to the case above, there were people in and near the bank, but it is also important that the attackers pointed their firearms at people and tried to escape by displaying their firearms. They created a real and immediate threat. Therefore, regardless of the prohibition of paragraph 9, the police had no other alternative, they had to use firearms in order to protect the well being and life of people in and near the bank. Therefore, the actions of the police should be considered legitimate.

4.2 The Right to Property

Article 21 of the Constitution of Georgia guarantees the right to property, which is considered a natural human right.⁴⁹ In one of its rulings, the Constitutional Court of Georgia mentioned that “based on the Constitution of Georgia and universally recognized principles and norms of international law, the right to property is an inalienable and supreme human value, a universally recognized

49 B. Zoidze, *Georgian Property Law*, Second Edition, Publishing House “Science”, Tbilisi 2003, 89. (ბ. ზოიძე, ქართული საწიგნო სამართალი, მეორე გადამუშავებული და სრულყოფილი გამოცემა, გამომცემლობა «მეცნიერება», თბილისი 2003,89), See: Decision #1/2/384 of July 2, 2007 of the Constitutional Court of Georgia: «The right to property is a natural right, without which a democratic society cannot exist. The right to property is not only the basic foundation of the existence of a person, but is also a guarantor of freedom, adequate realization of skills and capabilities, and responsibility over life decisions. This determines private incentives in the economic sphere, thus contributing to economic relations, free trade, development of market economy and normal, stable societal turnover.»

fundamental right, as well as the centerpiece of a democratic society and a social and legal state. Property is the essential foundation of human essence.”⁵⁰

The principle of a legal and social state requires freedom of private property and its limitation for public purposes.⁵¹ The right to property is not an absolute right and it gives the owner of the property certain obligations.⁵² “Exercising the right to property shall not violate the rights and freedoms of others, and use of property shall also serve common good,”⁵³ otherwise, the interference of the state in the right to property will be justified.⁵⁴

Therefore, the interference of a police officer into a protected sphere may be justified in some cases.

Example: While patrolling, a police officer notices that a Caucasian guard dog (without a muzzle) is chasing a person. The person is a passer-by, not the owner, and is running to prevent the dog from attacking. There is a very short distance between the dog and the citizen, and when the police officer notices this, he decides to take action and shoots the dog in the leg. Can the dog owner, not present at the scene at the moment, request damage compensation (treatment costs)?

First, it is necessary to establish the type of action taken by the police. In this case, we have a specific danger,⁵⁵ and, at the same time, the high probability⁵⁶ of a violation of a public good— human life. Hence, the police officer takes a preventive measure, which is undoubtedly necessary. But could the police officer prevent the threat with another, more effective and less limiting means? To answer this question, we can use the element of the necessity of proportionality. Since the distance between the dog and the human is very short and since the dog owner, who could somehow stop the animal, is not present, it would be ineffective for the police officer to address relevant agencies that could stop the dog by, for example, using tranquilizers, considering the time limit. Therefore, there were no alternatives for the preventive measure. As for damage compensation, since the police measure was legitimate, it cannot be subject to compensation.

Let us discuss another *example*:⁵⁷ While patrolling on a hot August day, a police officer notices a car parked in a shadow with a child in it. The officer also notices signs of a heat stroke. The driver’s location is unknown, and the child is left without supervision. Hence the question: what should a police officer do in such case? The threat is specific, since it is limited in time and space, and driver

50 Decision #1/51 of July 21, 1997 of the Constitutional Court of Georgia.

51 Decision #1/2/384 of July 2, 2007 of the Constitutional Court of Georgia.

52 This leads to the opinion on property as an obligation, to which the German Constitution directly points. იხ: B. Zoidze, Georgian-Property Law, Second Edition, Publishing House “Science”, Tbilisi 2003, 89 (ზ. ზოიძე, ქართული სანივთო სამართალი, მეორე გადამუშავებული და სრულყოფილი გამოცემა, გამომცემლობა «მეცნიერება», თბილისი 2003, 89).

53 Decision #1/51 of July 21, 1997 of the Constitutional Court of Georgia.

54 K. Kublashvili, Basic Rights, Tbilisi 2008, 173-174. (კ. კუბლაშვილი, ძირითადი უფლებები, თბილისი 2008, 173-174).

55 The Law of Georgia on Police defines threat as: “a condition indicating reasonable grounds to believe that in case of an unobstructed course of expected developments there is a highprobability that the good protected by the police would be damaged.”

56 Article 2 of the Law of Georgia on Police also defines reasonable grounds as “a fact and/or information that would be sufficient for an impartial observer to draw conclusions considering given circumstances”

57 C. Hufen, Ermessen und unbestimmter Rechtsbegriff, Zeitschrift für das Juristische Studium 5/2010, S. 605.

is nowhere in sight. While the police officer may look for the driver, the child's health and life may be jeopardized, since during hot weather in August, the probability of heat stroke is high.

Therefore, the discretionary power in terms of whether or not to interfere lowers to zero and the police officer is obligated to act. In this case, there is a legitimate public aim to save the child, and this is possible by breaking into the car and calling an ambulance. Certainly, the police officer thus interferes in the right to property, but this is justified, since the right was justified at the expense of protecting a more valuable public good.

4.3 The Right to Physical Integrity

The scope of paragraph 2, Article 17 of the Constitution of Georgia covers: human torture, inhumane, cruel treatment and punishment or treatment and punishment infringing upon honor and dignity. A similar provision is included in Article 3 of the European Convention on Human Rights, according to which: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁵⁸ The negative obligation of the state is expressed in the prohibition of such actions, whereas the positive obligation is expressed by the protection persons within its jurisdiction from such treatment by individuals.⁵⁹

This issue is especially relevant in terms of police activity, which implies a substantial risk for the violation of human rights. The Law of Georgia on Police mentions the right to physical integrity, which includes the scope of paragraph 2 of Article 17 but is wider and also includes the right to health in general.⁶⁰

In the case of *Gogichaisvili v the Parliament of Georgia*, the Constitutional Court of Georgia ruled that the norms protecting dignity and honor do not envisage any provisions of limitation of such rights. These two public goods are not limited in situations of war or state of emergency.⁶¹ Therefore, paragraph 2 of Article 17 can also be considered as an absolute right.⁶² However, in certain cases, the interference in the right to physical integrity can be justified, if it is executed with low intensity.⁶³

58 Convention on Human Rights and Fundamental Freedoms, Rome, November 4, 1950.

59 I. Burduli, E. Gotsiridze, T. Erkvania, B. Zoidze, L. Izoria, I. Kobakhidze, A. Loria, Z. Matcharadze, M. Turava, A. Pirtskhalaishvili, I. Putkaradze, B. Kantaria, D. Tsereteli, S. Jorbenadze, Commentary on Georgian Constitution, Chapter Two, Citizenship of Georgia, Basic Human Rights and Freedoms, 2013, 117. (ი. ბურდული, ე. გოცირიძე, თ. ერქვანია, ბ. ზოიძე, ლ. იზორია, ი. კობახიძე, ა. ლორია, ზ. მაჭარაძე, მ. ტურავა, ა. ფირცხალაშვილი, ი. ფუტყარაძე, ბ. ქანთარია, დ. წერეთელი, ს. ჯორბენაძე, საქართველოს კონსტიტუციის კომენტარი, თავი მეორე, საქართველოს მოქალაქეობა. ადამიანის ძირითადი უფლებანი და თავისუფლებანი, 2013, 117).

60 K. Kublashvili, Basic Rights, Tbilisi, 2008, 130. (კ. კუბლაშვილი, ძირითადი უფლებები, თბილისი 2008, 130).

61 Decision #2/1/241 of March 11, 2004 of the Constitutional Court of Georgia on the case Akaki Gogichaisvili v the Parliament of Georgia, p.1.

62 T. Tughushi, G. Burjanadze, G. Mshvenieradze, G. Gotsiridze, V. Menabde, Human Rights and Georgian Constitutional Court Case Law, Tbilisi, 2013, p.95. (თ. ტულუში, გ. ბურჯანაძე, გ. მშვენიერაძე, გ. გოცირიძე, ვ. მენაბდე, ადამიანის უფლებები და საქართველოს საკონსტიტუციო სასამართლოს სამართალწარმოების პრაქტიკა, თბილისი 2013, 95).

63 Intervention should take place in accordance with the law and the proportionality principle.

Example: Two opposing rallies were organized in front of the Parliament. The demonstrators engaged in a verbal fight, and verbal insults followed. In order to avoid escalation and mass violation of public order, the police used a water cannon.⁶⁴ Such means is envisaged in paragraph 3(g) of Article 33 of the Law of Georgia on Police.⁶⁵ In this case, interference was lawful, as well as low intensity, and the principle of proportionality was not violated. The police officer's discretionary power on interference transformed into an obligation, since there was a high probability of physical violence and deplorable consequences. However, the mere fact of interference is not sufficient to assess the legitimacy of the measure. The case does not point to the violation of proportionality, so it is clear that the measure was taken in accordance with this principle. In what case would interference be unlawful? Let us discuss a modified example: if the demonstration had been organized during a period of below-zero temperature and the police had used a large amount of water. In this case, the probability of inflicting damage to people's health, perhaps leading to pneumonia, is high. But, on the other hand, it is also important to consider whether there were any other means to prevent danger. If there was no alternative to the use of water cannons and the temperature was significantly below zero, the amount of water should have been determined rationally, otherwise, the measure would have been disproportionate.

CONCLUSION

The activity of the police, as an administrative body, is related to prevention. Prevention is based on the principle of discretionary power. In this process, fundamental human rights acquire a special importance.

Considering the arguments detailed in this paper and based on the circumstances of the case, as well as the threat in question, the discretionary power of the police can be limited to zero, which means that there is no available sphere of authority for the police officer, since the goods under threat are so valuable that the police officer has no alternative other than acting. The reduction of discretionary power to zero arises from the principle of human rights protection and implies protection of certain rights at the expense of limiting other rights.

Human rights become a guideline for a police officer in order to correctly exercise discretionary power. It can be said that this is a catalyzer to a certain extent, since it fixates authority and, at

64 See: I.Beraia, N. Gelashvili, K. Giorgishvili, L. Izoria, S.Kiladze, D.Muzashvili, P. Turava, Police Law, Ed: Levan Izoria. Tbilisi, 2015, 19 (ი. ბერაია, ნ. გელაშვილი, ქ. გიორგიშვილი, ლ. იზორია, ს. კილაძე, დ. მუზაშვილი, პ. ტურავა, საპოლიციო სამართალი, ლევან იზორიას რედაქტორობით, თბილისი 2015, 19).

65 "Water-cannons, armoured car and other special transportation means are used to suppress mass violations of legal order, to repel a group attack on the state and/or public facilities, to stop a vehicle by force if the driver does not obey a police officer's demand to stop; to detain an armed criminal;"

the same time, grants the police officer freedom only in terms the latitude to decide on a certain measure.⁶⁶

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⁶⁶ However, in some cases, it is possible to reduce not only decisive, but also elective discretion. Therefore, sometimes, "reduction to zero" is referred to as "reduction to one".

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