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PRACTICAL ASPECTS OF THE HIERARCHY OF CONSTITUTIONAL RIGHTS

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ABSTRACT*

Historically, the development of the protection of human rights has been never consistent.[1] Despite the fact that states acknowledged the exceptional importance of human rights, they were not enshrined in international law until the end of the Second World War.

Once fundamental rights were granted full legal standing, an individual was enabled to turn to a court for protection of his or her own rights. The main essence and meaning of human was hence clarified – protection of individuals from unjustifiable state interference. Consequently, positive and negative obligations were imposed upon the states.

The preamble of the 1948 Universal Declaration of Human Rights emphasized the universal, equal and non-derogable nature of human rights. Hence, the document excludes any hierarchical arrangement of the rights. However, over the years the conflict between fundamental rights has gained a considerable spotlight. This paper studies the question of granting different weight and importance to various rights and their interrelation to the development of the hierarchy of rights.

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1 The Magna Carta or "Great Charter" was one of the first document containing certain legal rights. After that, Habeas Corpus and Bill of Rights expanded sphere of human rights. Universal nature of human rights was first acknowledged in 1776 by the Virginia Declaration of Rights in the USA, while in Europe they were acknowledged by the Declaration of the Rights of Man and of the Citizen adopted in 1789 in France.

INTRODUCTION

The protection of human rights and freedoms represents the highest value and accomplishment of the modern world. In particular, the existence of rights and freedoms serves as protection for an individual from unjustifiable state interference while also creating a favorable environment and legislation for fundamental rights to be exercised. Consequently, a main idea of a democratic state based on the rule of law is fully founded on a guarantee of exercising human rights effectively and comprehensively.[2]

There is general agreement that each human right and freedom granted to an individual is of equal importance and it is impossible to prioritize one over the rest.[3] However, the expansion of the catalogue of human rights coupled with the broad interpretation of existing legal documents have generated conflicts between the rights.[4]

This paper illustrates constitutional dilemmas related to the hierarchy of rights and the granting of different legal weights to various rights. The paper maintains that despite the widespread opinion that instruments for the protection of human rights give equal importance to fundamental rights and dismiss the idea of a hierarchical arrangement,[5] a certain differentiation still exists.

The first chapter of the paper refers to the classification of rights and its relation to the development of an idea of the hierarchy of human rights. The second chapter suggests that despite the fact that courts do not intend to show any preference for one right over another, through their practice a degree of preference can be observed. The third chapter discusses a mechanism for solving the conflict between rights, while the conclusion summarizes the main points of the conducted case analysis.

2 Eremadze, Balancing Interests in Democratic Society, 2013, p.14 (ერემაძე, ინტერესთა დაბალანსება დემოკრატიულ საზოგადოებაში, 2013, გვ.14).

3 Bernard Williams, Moral Luck: Philosophical Papers 1973 – 1980, Reprinted (Cambridge: Cambridge Univ. Press, 1999), 14. Raymond Plant, "Religion, Identity and Freedom of Expression," Res Publica (13564765) 17, no. 1 (February, 2011): 16-17.

4 Bribosia, Rorive, In search of a balance between the right to equality and other fundamental rights, 2010, p. 14.

5 Bernard Williams, Moral Luck: Philosophical Papers 1973 - 1980, Reprinted (Cambridge: Cambridge Univ. Press, 1999), 14. Raymond Plant, "Religion, Identity and Freedom of Expression," Res Publica (13564765) 17, no. 1 (February, 2011): 16-17.

1. CLASSIFICATION OF FUNDAMENTAL HUMAN RIGHTS

1.1. Functional Division of Rights

Taking into account various principles for classification, basic rights can be also divided according to their functions and importance. Therefore, the subjective and objective position of rights can be differentiated.

The subjective rights regulate relations between an individual and a state.[6] The German legal doctrine distinguishes three classic functions of fundamental rights: defensive, beneficiary and participatory.[7]

Status Negativus (defensive): this function obliges a state not to violate an individual's fundamental rights, as well as, to provide a legal remedy, in case such violation still occurs. These rights include, for example: right to life, right to development, freedom of speech, freedom of assembly, etc. It should be noted that such rights are also grouped with the rights to freedom.

Status Positivus (beneficiary): this function obligates a state to actively implement certain measures, for instance, to ensure access to education for all its citizens. All social rights contain this function.

Status Aktivus (participatory): this function empowers an individual to participate in the decision-making process at a national level.[8] The rights that fall within this function are civil and political rights, such as participation in elections.

As for the objective position, fundamental rights oblige a state to protect legal institutions.[9] For instance, Georgia considers it unacceptable to abolish the institution of private property, and consequently, it must ensure its institutional strengthening.

According to the classification described above, the rights are being differentiated not according to the levels of protection they provide but according to their functions, which allows a better demonstration their essential tasks. Consequently, such a division does not aim at establishing any kind of hierarchy. Therefore, it does not contradict the idea of the equal importance of rights.

6 Dreier, Subjektiv-rechtliche und Objektiv-rechtliche Grundrechtsgehalte, Jura 1994, S. 505 ff.; ders., in: Grundgesetz-Kommentar, Dreier (Hrsg.), 2. Aufl., 2004, S. 91f., 98.

7 Comment of Constitution of Georgia (საქართველოს კონსტიტუციის კომენტარი); 2013, pg. 15. See: http://www.library.court.ge/upload/Constitution_Commentary_Human_Rights.pdf (Last seen on 09/10/2017).

8 BVerfGE 8, 104.

9 BVerfGE 7,198; Böckenförde, Grundrechte als Grundsatznormen, in: ders., Staat, Verfassung, Demokratie, 1991, S. 159 ff.; Jarass, Grundrechte als Wertentscheidunegen bzw. Objektiv-rechtliche Prinzipien in der Rechtssprechung des Budesverfassungsgerichts, in: AoeR 110 (1985), S. 363 ff.

1.2. Differentiating Rights as Absolute Rights and Rights Subject to State Interference

Despite the long established opinion about the equal importance of rights, they can be differentiated and grouped in a) absolute rights and b) those which are subject to interference (relative rights).

Restricting or derogating inviolable or absolute rights is not permissible even during war or state of emergency.[10] Therefore, a state cannot interfere with the prohibition of torture, slavery, inhuman or degrading treatment/punishment. Equally, a state cannot intervene in the right not to be held guilty of any offence which did not constitute a criminal offence at the time when it was committed and the right not to be imposed a heavier penalty (severe punishment) than the one which was applicable at the time the crime was committed.[11]

It should be noted that the Georgian Constitution and the Georgian Constitutional Court's case law, both appear to share the aforementioned approach. According to the established standard, respect for a human dignity is considered to be a main value for a state, which cannot be restricted or deprived.[12] Through its decisions, the Constitutional Court of Georgia has emphasized the absolute nature of the doctrine of prohibiting multiple punishment for the same crime. However, the Court has indicated exceptional cases, such as "when proceedings can be reopened because of new or newly discovered evidences or when serious shortcomings are revealed during the proceedings which could have influenced case proceedings and the outcomes, and which provides the ground for new trial under a clear, foreseeable and priorly adopted legislation. However, apart from the above-mentioned exceptions, the principle of prohibition against someone being tried twice for the same offence *(non bis in idem)* is an absolute and imperative constitutional obligation".[13] Rights which are subject to state interference, however, can be restricted in certain circumstances, either on the ground established by law and/or if such a restriction should be necessary in a democratic society.[14] For example, limitations on the freedom of speech or freedom of expression.

According to the European Court of Human Rights (hereinafter "ECtHR"), taking into account each particular case, interference in fundamental rights is allowed only when it is exercised in accordance with the law and when such restriction is necessary to protect public and/or private in-

10 European Convention of Human Rights, Article 15; ECtHR, application no. 14038/88, *Soering v The United Kingdom*, judgment of 07/07/1989; ECtHR, application no. 12850/87, *Tomasi v France*, judgment of 27/08/1992; ECtHR, application no. 30873/96, *Egmez v Cyprus*, judgment of 21/12/2000; *Albert and Le Compte v Belgium*, application no. №7299/75; 7496/76, judgment of 10/02/1983.

11 European Convention of Human Rights, Articles 3, 4 and 7.

12 №2/2-389 Ruling of the Constitutional Court of Georgia (26 October, 2007) on a case, *Citizen Maia Natadze and others v Parliament of Georgia and President of Georgi*a, II-30.

13 №3/1/608,609 Ruling of the Constitutional Court of Georgia (29 September, 2015) on the case, Constitutional Complaint Filed by the Supreme Court of Georgia on Constitutionality on 4th part of the Article 306 of the Code of Criminal Procedure and Complaint filed by the Supreme Court of Georgia on constitutionality of the paragraph "g" of the Article 297 of the Code of Criminal Procedure of Georgia, II-36.

14 Cherednychenko, Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions, 2007, p. 241.

terests.[15] The European Convention of Human Rights directly specifies under what circumstances public authorities can restrict such rights, it can be: national security, public safety, the economic well-being of the country, prevention of disorder or crime, protection of health or morals, and protection of the rights and freedoms of others.[16]

Standard established by the Constitutional Court of Georgia is also worth noting: "one of the important conditions for the stability of a modern state is to determine priorities among public and private interests accurately and fairly, and to create a reasonably balanced system for a state's and individual's relations. This, in the first place, is expressed in adequate legislative definition of content and scope of each specific right".[17]

It should be noted that, differentiation cannot be excluded even among the rights subject to interference, however, this is not the focus of the present paper.

2. DIFFERENT CONSTITUTIONAL WEIGHTS OF FUNDAMENTAL HUMAN RIGHTS

Despite the classification of rights described above, there is no common concept of the hierarchy of human rights. "All rights are inter-related, indivisible and have equal status. One group of rights is not more important than another and all rights — whether civil, political, economic, social or cultural — must be equally respected."[18]

Although the division of rights according to their functions does not oppose the idea of the equal importance of fundamental rights, when classifying them as absolute rights and those which are subject to state interference, the differential approach is obvious. Because of the essence of a right, in the case of conflict, some rights are granted more importance.

While it is true that no state directly acknowledges a hierarchy of rights, when weighing them against other types of rights, it is apparent from various states' courts practices that more importance is given to absolute rights.

In this respect, the cases concerning right to dignity are significant. According to the German doctrine, human dignity is inviolable and at the same time it is the basis of the right to develop-

15 ECtHR, application no. 21318/93, Ochensberger v. Austria, judgment of 2/09/1994.

16 European Convention of Human Rights, Article 8-11.

17 №1/2/384 ruling of the Constitutional Court of Georgia on a case, *Georgian Citizens, David Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v Parliament of Georgia* II-5(5).

18 Desai, A Rights-Based Preventative Approach for Psychosocial Well-being in Childhood, Children's Well-being: Indicators and Research, 2010, p. 43.

ment.[19] The German standard established by the Constitutional Court of Germany implies that dignity has the highest constitutional value and all other norms should be interpreted in harmony with it. Although this position has caused legal debates, it still remains dominant.[20]

The Constitutional Court of Georgia also emphasizes the importance of the protection of dignity and prohibition of torture. According to the interpretation presented put forward by the court: "Constitutional prohibition of torture, inhumane, cruel and degrading treatment or punishment are individuals' absolute rights which means that the Constitution unconditionally excludes intervention in these rights. It is notable, that this prohibition applies both in war and emergency times. Consequently, there are no legitimate aims and insurmountable interests, no matter how important, whether it is defense of territorial integrity or sovereignty of the state, fight against terrorism or national security and etc., which could have justified interference in these rights."[21]

Thus, interference in absolute rights is unconditionally unjustifiable. However, it should be noted that absolute rights are not exempted from judicial assessment, in case of conflicting rights, it does not automatically ascertain that violation of absolute rights took place.[22] The court should determine and assess the intervention in a protected sphere for each specific case. According to the standard established by the ECtHR, to rule an act as a violation of Article 3 of the Convention, it is necessary to determine the "minimum level of severity,"[23] which means that the content, form, duration and circumstances of the treatment should all be assessed.[24]

On the other hand, it is interesting how the social-political environment of the country has an impact on the assessment of the violation of a right. In some cases, a specific country's courts may assess the protection of public interests differently, depending the level of necessity.

In this respect, so-called "Islamic headscarf cases" deserve attention. While the ECtHR considers it acceptable for a state to impose restrictions on wearing a hijab,[25] the Federal Constitutional Court of Germany[26] and the US Supreme Court believe this approach unjustifiable.[27]

19 Grundgesetz, BGBl. I Art. 1(1) und Art. 2(1)

20 Barroso, Here, There, And Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse, Boston Collage International and Comparative Law Review (Vol. 35:331), p. 338, ftn. 39. See: http://www.luisrobertobarroso.com.br/wp-content/uploads/2017/09/aqui_em_todo_lugar_dignidade_humana_direito_contemporaneo_discurso_transnacional_en.pdf (last seen on 17.10.2017).

21 №1/14/592 Ruling of the Constitutional Court of Georgia (24 October, 2015) on *Citizen Beka Tsikarishvili v Parliament*, I-19.

22 See cases, ECtHR, application no. 54810/00, *Jalloh v Germany*, judgment of 11/07/2006, paras. 77–83; ECtHR, application no. 20166/92, *S.W. v United Kingdom*, judgment of 22/11/1995, paras. 36 and 44; ECtHR, application no. 20190/92, *C.R. v United Kingdom*, judgment of 22/11/1995, paras. 34 and 42.

23 *Raninen v Finland* judgment of 16 December 1997, Reports of Judgments and Decisions 1997-VIII, pp. 2821-22, § 55.

24 See cases, ECtHR, application no. 14038/88, *Soering v The United Kingdom*, judgment of 07/07/1989, para. 108. ECtHR, application no. 54825/00, *Nevmerzhitsky v Ukraine*, judgment of 05/04/2005, paras. 93-99.

25 ECtHR, application no. 27058/05, *Dogru v France*, judgment of 4/12/2008; ECtHR, application no. 44774/98, *Leyla Sahin v Turkey*, judgment of 10/11/2005.

26 BVerfG, Beschluss des Ersten Senats vom 27. January 2015. See: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html;jsessionid=CCFF242F94FFE23D1AA2EDD9BD04281A.2_cid370 (Last seen on: 10/12/2017).

27 See: Supreme Court of the United States, *Equal Employment Opportunity Commission v Abercrombie & Fitch Stores, Inc*., 01/06/2015. See: https://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf (Last seen on: 17/10/2017).

On the other hand, in the ECtHR cases *Dogru v France* and *Kervanci v France*,[28] concerning the students' expulsion from school for wearing headscarves during sports classes, the court noted that the wearing of a headscarf during sports classes did not comply with the health and safety rules and that the penalty imposed was merely motivated by the students' refusal to comply with the internal rules of a school, and not by religious convictions. Furthermore, disciplinary measures taken against the students fully complied with the obligation to strike a balance between different interests and, therefore, was proportionate to the aim pursued.

By contrast, according to a decision passed in 2015, the German Constitutional Court indicated that wearing Islamic headscarf is a religious expression of an individual rather than a religious expression of an individual. Moreover, it observed that such an act does not contradict the education aims of the state, nor its neutrality.[29] The US Supreme Court shares the same approach, to an extent. It observes that refusing to employ an individual who wears a headscarf of religious significance constitutes nothing but discrimination on religious grounds.[30]

There are cases where the level of a right's protection depends on the subject of such protection. In this regard, the case law of the US Supreme Court concerning the death penalty is worth analyzing in light of the VIII Amendment of the US Constitution.[31] In the case *Atkins v Virginia,*[32] the Court based its decision on a 1989 judgment and recognized the death penalty of persons with psychosocial needs as unconstitutional.[33] The Supreme Court emphasized the tendency that a significant number of states supported that death penalty was not a suitable punishment for individuals with psychosocial needs and was morally unjustifiable. Besides, it was also noted that society at large was less keen to denounce offences committed by such individuals.[34]

The US Supreme Court also held that the death penalty for crimes committed by offenders under the age 18 was a cruel and degrading punishment. In the case *Roper v Simmons*, like in the case of *Atkins v Virginia*, the Court emphasized society's more lenient attitude toward crimes committed by juveniles compared to those committed by adults.[35]

28 ECtHR, application no. 31645/04, *Kervanci v France*, judgment of 4 December 2008.

29 BVerfG, Beschluss des Ersten Senats vom 27. Januar 2015. See Begadze, Secularism: Framework of Relations between State and Church, in Constitutional Law Review: http://www.constcourt.ge/ge/publications/journals (Last seen on: 09/10/2017) (ბეგაძე, სეკულარიზმი: სახელმწიფოსა და ეკლესიას შორის ურთიერთობის ჩარჩო, საკონსტიტუციო სასამართლოს მიმოხილვა; გვ. X, 2016; 119-120).

30 Supreme Court of the United States, *Equal Employment Opportunity Commission v Abercrombie & Fitch Stores, Inc.*, 01/06/2015, pp.3-7.

31 According to the 8th Amendment of the Constitution, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

32 Supreme Court of the United States, *Atkins v Virginia*, No. 00-8452, June 20, 2002. See: https://www.law.cornell.edu/supct/html/00-8452.ZO.html (Last seen on: 18/10/2017)

33 Supreme Court of the United States, *Penry v Lynaugh*, No. 87-6177, June 26, 1989. See: https://www.law.cornell.edu/supremecourt/text/492/302 (Last seen on: 18/10/2017). The Supreme Court ruled that execution of individuals with psychosocial needs did not violate the 8th amendment, rather it was a factor which mitigated punishment.

34 Supreme Court of the United States, *Atkins v. Virginia,* 8-12.

35 Supreme Court of the United States, *Roper v Simmons*, No. 03-633, March 1, 2005. See: http://caselaw.findlaw.com/us-supreme-court/543/551.html (Last seen on: 18/10/2017).

Thus, it can be concluded that while competing the rights, if there is unjustifiable interference in the absolute right, the latter unconditionally outweighs.

3. BALANCING INTERESTS AS A MECHANISM FOR SOLVING A CONFLICT

Considering the fact that every state examines each particular case based on its established practice within its cultural, political and social context, agreement on a common hierarchical arrangement is, in fact, impossible. Consequently, one right's priority over the other can be determined through examining and analyzing each specific case.

Some scholars believe that the principle of proportionality is the way to solve the issue, which is used to regulate existing conflict between the rights and which in turn tries to avoid "sacrificing" one right at the expense of another.[36] Others think that the principle of proportionality should be used within a certain framework that enables "affording a priority to the right which is considered to be of a greater value".[37] Although they point out that interests should be balanced, they also note that "balancing raises more questions than it provides answers."[38]

According to the universally agreed opinion, the principle of proportionality is considered as a measuring instrument for assessing the restrictions to a constitutional right. Therefore, a legislative regulation restricting a right should be a necessary and genuinely meet objectives of general interest. At the same time, the intensity of the restriction should be proportionate to such a legitimate (public) aim. Achieving such a goal at the expense of the unreasonable restriction of the right should be unacceptable.[39]

It should be noted that the legitimate aim of a restriction, to some extent, is also determined by the text of the legislation. For instance, the right to assembly and manifestation shall be subject only to such limitations as are prescribed by law and are necessary, in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[40]

36 Van Drooghenbroeck, S., Conflits entre droits fondamentaux, pondération des intérêts: fausses pistes (?) et vrais problèmes, Les droits de la personnalité, op. cit., pp. 299 ff., No 35.

37 De Schutter, Tulkens, The European Court of Human Rights as a Pragmatic Institution (June 6, 2014), in E. Brems (ed.), Conflicts between Fundamental Rights, Intersentia, 2008, p.17. Available at SSRN: https://ssrn.com/abstract=2446909 (Last seen on: 03/02/2019)

38 Ibid, p.21. See: Bribosia, Rorive, supra note 2, pp. 23-24.

39 №3/1/512 Ruling of the Constitutional Court of Georgia (26 June 2012) on a case, *Citizen of Denmark Heike Cronqvist v Parliament of Georgia*; II-60; Charter of Fundamental Rights of the European Union, Art. 52.1; Flores, Proportionality in Constitutional and Human Rights Interpretation, Georgetown University Law Center, 2013, pp. 83-113.

40 European Convention of Human Rights, Article 11; Constitution of Georgia, Article 25.

In this regard, this 2011 ruling of the Constitutional Court of Georgia is interesting. It states that: "when a conflict between rights is inevitable, for instance, when a number of participants of the assembly or manifestation makes it impossible for others to move freely, according to the disputed norms of the Constitution, priority is given to the right protected by the Article 25 of the Constitution, as otherwise freedom of assembly and manifestation would be inaccessible to numerous participants of the assembly, who for the protection of the rights of others would be forced to refuse their right to exercise the right to assembly. Consequently, the right to assembly (manifestation) should be given priority when it is impossible to exercise it without restriction of the others' rights and when a blocking a roadway demonstrates an objective necessity." [41]

The approach used by the Federal Constitutional Court of Germany regarding conflict of rights is also worth mentioning. In the case of Erich Lüth,[42] the applicant urged owners of German cinemas and film distributors, as well as the public, to boycott a film directed by a German film director. The Constitutional Court found that Lüth's call for a boycott, taking into consideration his motives and aims, was protected by freedom of expression and was morally justifiable.

The same approach is shared by the ECtHR. In the case of *Editions Plon v France*[43] the Court banned the distribution of a book containing information related to the private life of an individual. Similar decision was held in the case of *Otto-Preminger Institut v Austria*, where the ECtHR satisfied the plaintiff's demand and banned the showing of the film in order to avoid offending of religious feelings of others under the right to expression.[44]

Therefore, the optimization of values in every case of conflict of rights can only be achieved by assessing the circumstances of the case and balancing of the interests.

CONCLUSION

Based on the information presented above, it can be concluded that although a form of interference in the absolute right is not automatically exempted from a court's assessment and it may turn into a disputable issue,[45] a state's margin of appreciation should not be so broad as to cause the loss

41 №2/482,483,487,502 Ruling of the Constitutional Court of Georgia (18 April, 2011) on a case, *Political Union of Citizens Movement for United Georgia, Political Union of Citizens Conservative Party of Georgia, Citizens of Georgia: Zviad Dzidziguri and Kakha Kukava, Association of Young Lawyers of Georgia, Citizens of Georgia: Dachi Tsaguria and Jaba Jishkariani, Public Defender of Georgia v Parliament of Georgia*, II-38.

42 BVerfGE 7, 198.

43 ECtHR, application no. 58148/00, *Editions Plon v France*, judgment of 18 May 2004.

44 ECtHR, application no. 13470/87, *Otto-Preminger Institut v Austria*, judgment of 20 September 1994, para. 48.

45 See: ECtHR, application no. 54810/00, *Jalloh v Germany*, judgment of 11/07/2006, paras.77–83; ECtHR, application no. 20166/92, *S.W. v United Kingdom*, judgment of 22/11/1995, paras. 36 and 44; ECtHR, application no. 20190/92, *C.R. v United Kingdom*, judgment of 22/11/1995, paras. 34 and 42.

of the absoluteness of a right. Nevertheless, which right should be given priority is a decision to be adopted by the court on the basis of its assessment and inner belief. However, it should be noted that the simultaneous protection of two fundamental rights of equal importance is simply impossible.[46] The presence of one right causes full or/and partial disappearance of another.[47]

On the other hand, granting priority or restriction to a group of rights, is indeed necessary for maintaining a democratic society. A modern state permits the possibility of the limitation of an individual's freedom if the priorities between private and public interests are correctly and justly balanced. Consequently, a balance achieved in these circumstances is not considered to be unfair. Although, it should be taken into account that, while there is an absolute right on the one hand, and a right which is subject to proportionate interference on the other, the former one always outweighs the latter. Hence, when a conflict of rights exists, an absolute right is always granted with a greater value compared to other rights.

46 №3/4/550 Ruling of the Constitutional Court of Georgia (17 October, 2017) on a case: *Citizen of Georgia Nodar Dvali v Parliament of Georgia*; Constitutional Court of Georgia ruled in favor of one applicant's public interest against another's legally the same public interest.

47 Kayacan, How to Resolve Conflicts Between Fundamental Constitutional Rights, Saar Blueprints, 2016, p.5

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THE STANDARD OF SUSPENSION OF THE NORMATIVE ACT (ACCORDING TO THE PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA)

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INTRODUCTION

The standard according to which the Constitutional Court of Georgia suspends or does not suspend a normative act has important significance for the issues discussed in this paper. The differences between the standard prescribed under the Article 25 paragraph 5 of the organic law "On Constitutional Court of Georgia", and the normative description that existed before and after June 3 of 2016 is also interesting in this regard. Prior to the change, the suspension of a normative act was possible if "the Constitutional Court of Georgia considered that the normative act may result in irreversible outcomes for one of the parties." After the 2016 reform, the record was changed as follows: "In a case when the Constitutional Court of Georgia considers that the normative act may result in irreversible outcomes for one of the parties, the issue is transferred to the Plenum of the Constitutional Court for discussion, which may suspend the disputed act or respective part thereof until the final decision on the matter will be reached or for a shorter period by the decision of the majority of the composition of the plenum at the distribution session." Based on this clause, it seems that the legislator transformed the standard of irreversible damage to the standard of reassigning the question of the suspension of a normative act to the plenum, and the issue of suspending a normative act by the plenum was left without legislative standard.

In relation to the suspension of a normative act, the practice of the Constitutional Court of Georgia hasusually been todetermine what the question is, whether there is a threat of irreversible damage[1] and in what conditions the right of others (third parties) are being placed.[2] Therefore, we will touch upon the practice of the Constitutional Court of Georgia, regarding what constitutes irreversible damage and what it takes into consideration when determining the interests of third parties. We will also touch upon the issue of the possibility to restitute the right, as far as based on the existence of such condition the Court may refrain from suspending disputed normative act.

1. IRREVERSIBLE DAMAGE

Under irreversible damage, the Constitutional Court of Georgia considers irremediable outcome, the existence of which means the norm may result in the reversible infringement of the right in question; there will not be any possibility to remediate the outcome, even by declaring the norm as unconstitutional;and the person affected may not have a legal possibility to avoid such an outcome.[3] The issue of irreversible damage will be discussed based on the examples of three cases: *Group of Members of Parliament v Parliament of Georgia,*[4] *Citizen of Georgia Levan Gvatua v Parliament of Georgia*[5] and the *Group of the Members of the Parliament and citizens of Georgia Erasti Jakobia and Karina Shakhparoian v Parliament of Georgia*.[6]

In the *Group of Members of Parliament v Parliament of Georgia,"* the Constitutional Court suspended the disputed norms as it considered that it met the standard of irreversible damage in place. In this case, the issue of the merger of the oversight function over the banking sector, which previously fell within the capacity of the National Bank of Georgia, was disputed, according to which the LEPL Financial Oversight Agency of Georgia should have been created. The court at the initial stage has defined the powers that would have been assigned to the Agency according to the Law

1 Protocol of the Constitutional Court of Georgia from 20 May 2008 on the Case №1/452,453 - *Young Georgian Lawyers' Association and Public Defender of Georgia v Parliament of Georgia*, Motivational Part para.2.

2 Protocol of the Constitutional Court of Georgia from 7 November 2012 on the Case №1/3/509 – *Citizen of Georgia SophioEbralidze v Parliament of Georgia*, Motivational Part, para. 9.

3 Protocol of the Constitutional Court of Georgia from 20 May 2008 on the Case №1/452,453 - Young Georgian Lawyers' Association and Public Defender of Georgia v. Parliament of Georgia, Motivational Part para.2.

4 Protocol of the Constitutional Court of Georgia from 12 October 2015 on the Case №3/6/668 – *Group of the Members of the Parliament* (ZurabAbashidze, Giorgi Baramidze, Davit Bakradze and others, in total 39 deputies) *v Parliament of Georgia*.

5 Protocol of the Constitutional Court of Georgia from 25 November 2015 on the Case №1/9/682 – *Citizen of Georgia Levan Gvatua v Parliament of Georgia.*

6 Protocol of the Constitutional Court of Georgia from 17 June 2016 on the Case № 3/4/768,769 – *Group of the Members of the Parliament* (Davit Bakradze, SergoRatiani, Roland Akhalaia, Levan Bezhashvili and others, in total 38 deputies) *and citizens of Georgia Erasti Jakobia and Karina Shakhparoian v Parliament of Georgia*.

on the National Bank of Georgia.[7] Base on the identification and analysis of these functions, the Court defined the negative impact that may be have been caused if the Agency's right to implement these functions had been declared unconstitutional. The negative outcome would have been the equivocal legitimacy of the actions performed by the Agency. The Constitutional Court noted that the main essence of the functional purpose of the Agency representedthe conduct of several controlling and restricting actions (targeted on the financial sector), which could result in a party being unsatisfied with the restrictions. In such a case,the unsatisfied persons/subjects would have the possibility to argue againstthe decisions taken by the Agency,resulting in the existence of the agency beingdeclared unconstitutional, i.e. the Agency would not be entitled to conclude any agreement or give any permission. Such motivation objectively caused a lot of disputes. As a result, the damage would be irremediable indeed, as the legitimacy of the circulationof hundreds of millions of legal currencywould be lost. If the merger went forward, parties would also have the chance to argue for the restoration of damages for the State (Article 42 paragraph 9 of the Constitution of Georgia), which was caused by adecision by anunauthorized person.According to the Court's evaluation, this process could be sodetrimental to the financial system as to destroy it.[8]Hereby it shall be mentioned that current constitutional dispute alsoproceeded under Article 89 paragraph 1 subparagraph "b" of the Constitution of Georgia (Dispute between state institutions of the matter of competence), and according to Article 23 paragraph 2 of the organic law on "Constitutional Court of Georgia," within the named competence, the acceptance of the constitutional claim results in the declaration of the invalidity of the normative act infringing on the competence from the period of its enactment (and not from the time when the decision of the Constitutional Court enters into force).[9]This assessment shows clearly that the source of the irreversible damage identified by the court was real indeed, because anydecision rendered would have full retro action and would result in all respective legal effects.

Citizen of Georgia Levan Gvatua v Parliament of Georgia is the most evident and simple example of irreversible damage. In this case, the plaintiff had beendiagnosedwith "uncertain chronic hepatitis, hepatic cirrhosis, peritoneal dropsy, body care syndrome, portal hypertension," as a result of which he needed a liver transplant. The disputed paragraph 2 of Article 18 of the law "on the transplantation of human organs" narrows the circle of donors to those with afamilial connection, and for the plaintiff none of the persons prescribed by the law was compatible for a liver transplant (it should be noted thatpostmortem donation is not allowed in Georgia). The only chance to save the life of the plaintiff was to find a donor with familial connection or emotionally close relationship. Deriving from the actual health condition of the plaintiff, it was evident that the individual's condition would worsen before the Constitutional Court ruled on the case, and the existing norm could have even resulted in the death of the plaintiff before the final decision of the Court. Consequently, the court did not waste time debating the irreversible damage and suspended the force of the disputed

7 Protocol of the Constitutional Court of Georgia from 20 May 2008 on the Case №1/452,453 - *Young Georgian Lawyers' Association and Public Defender of Georgia v Parliament of Georgia*, Motivational Part para.14.

8 Ibid. Motivational Part , p. 20

9 Ibid. Motivational Part , p. 16

norm "which excludes the donors that have anemotionally close relationshipwith the recipient from the circle of donors from whom the liver may be taken."[10]

In the case *Group of the Members of the Parliament and citizens of Georgia Erasti Jakobia and Karina Shakhparoian v Parliament of Georgia,*the Court did not suspend the force of the disputed norms, but defined that, for the purpose of the paragraph 5 of Article 25 of the law on "The Constitutional Court of Georgia," the existence of irreversible damage means the irreversibility of the outcomes resulting from the suppression of the right after a decision by the Constitutional Court. The court explained that "in case of a different definition there would be a circumstance where receipt for deliberation of any constitutional claim would create the basis for suspension of the norms under question, because of the doubt that the disputed norms suppress the constitutional right (opposes to constitutional statute)."[11]

2. PUBLIC INTEREST

The Constitutional Court always notes that when deliberating on the suspension of a disputed normative act, public interest must be taken into consideration — "the rules of conduct prescribed by the normative act are aimed at regulating the respective spheres of public life and attaining particular legitimate purposes, protection of private and public interests." In certain cases, the suspension of the disputed normative act may constrain private, as well as public interests and damage the value for the protection of which the act was adopted in the first place,"[12] "in each case while deciding on the suspension of disputed norm, the court shall assess the danger of infringement of the rights of others as well."[13] Consequently, the issue of public interest is considered a significant part of the standard for the suspension of a normative act. In the practice of the Constitutional Court, there are frequently cases when the norm is not suspended based on this principle. This issue will be discussed based ontwo important cases heard by the Constitutional Court:"*Citizens of Georgia Mtvarisa Kevlishvili, Nazi Dotiashvili and Marina Gloveli v Parliament of Georgia*[14] and *Citizen of Georgia Levan Gvatua v Parliament of Georgia.*

10 Protocol of the Constitutional Court of Georgia from 25 November 2015 on the Case №1/9/682 – *Citizen of Georgia Levan Gvatua v Parliament of Georgia*, Resolution Part p.2.

11 Protocol of the Constitutional Court of Georgia from 17 June 2016 on the Case № 3/4/768,769 – *Group of the Members of the Parliament* (Davit Bakradze, SergoRatiani, Roland Akhalaia, Levan Bezhashvili and others, in total 38 deputies) *and citizens of Georgia ErastiJakobia and Karina Shakhparoian v Parliament of Georgia*.

12 Decisionof the Constitutional Court of Georgia from December 14, 2014 on the Case № 3/2/577 – *Non-profit (non-commercial) legal entity Human rights Education and Monitoring Center (EMC) and citizen of Georgia VakhushtiMenabde v Parliament of Georgia*."

13 Protocol of the Constitutional Court of Georgia from 7 November 2012 on the Case № 1/3/509 – *Citizen of Georgia Sophio Ebralidze v Parliament of Georgia.*

14 Protocol of the Constitutional Court of Georgia from 1st June 2016 on the Case № 3/2/717 – *Citizens of Georgia Mtvarisa Kevlishvili, Nazi Dotiashvili and Marina Gloveli v Parliament of Georgia*.

In the case of *Citizens of Georgia Mtvarisa Kevlishvili, Nazi Dotiashvili and Marina Gloveli v Parliament of Georgia*, a number of norms within theLaw on Common Courts were disputed, specifically those concerning theappointment of judges by the High Council of Justice of Georgia in city (district) courts and appellate courts (the plaintiffs were participants in a competition for judgeships, and their applicationswere rejected several times). As a result of the suspension of the disputed norms, the procedure of the appointment of judges was practically halted before the final decision of the Constitutional Court. The Constitutional Court considered that the suspension of the disputed norms created thepossibility that important public interest and interests of third persons would be unjustly obstructed, namely "the suspension of the norm may have a great impact not only on the rights of candidates for appointment, but firstly on individuals and parties to exercise their rightsfor legal proceedings. The resulting overload on the courts and the obligation to provide timely justice to the parties shall be taken into consideration. In a situation, where according to the representative of the High Council of Justice, the number of cases has doubled in recent years and each judge has hundreds of cases to deliberate, the suspension of the norm until the decision of the Constitutional Court will worsen the existing situation in terms of the overload within common courts."[15] This factor has been the main argument for not suspending the disputed norms.

Even some of the judges disagreed with the Court's argument: they noted that "the interest to have his/her case heard by the judge, who is appointed according to a constitutional standard, derives from the right of fair trial of each person applying to the court. The appointment of a judge by an infringement of the constitution may significantly contribute to putting the authority and qualification of him/her, and the court system in general, under doubt. This doubt will get stronger in case the constitutional claim is approved and the procedure for appointing judges is ruled as unconstitutional."Accordingly, in this case, considering the unobstructed compilation of the pool of judges in the system of common courts as the factor facilitating the realization of the right to fair trial does not have any objective justification."[16]

According to our opinion,the larger issue of public trust, which in this case is trust in the court system, should take priority. It is understandable that the right to speedy justice is also significant, but it is not as important as public trust in the judicial system. When a legitimate questions arise on the procedure forming the common courts (city/district courts, appellate courts), it is crucial to suspend the respective process. If we truly take into consideration all the implications, the danger of irreversible damage increases in comparison to the results of proclaiming these norms as unconstitutional, and the result is indeed grave — the qualifications of the judges appointed by this procedure,putting their rulings under question. Unfortunately the court has not considered this result because of the simple reason, i.e. that the decision of the Constitutional Court would not have retroactive power and everything would remain as it was (even if current norms would have been proclaimed as unconstitutional). This logic is understandable, but it is only one side of the coin (legal outcome in terms of material, tangible understanding) and on the other side is the issue

15 Ibid. Motivational Part, p.10.

16 Ibid. The distinct opinion of members of the Constitutional Court of Georgia Ketevan Eremadze and Maia Kopaleishvili, p. 8.

of public trust in the judicial system, which definitely will be lost if the Constitutional Court rules that the disputed norms are unconstitutional. In this case, it would result in sitting judges in common courts being appointed through an unconstitutionalprocedure and neither our courts nor our judges deserve such a "label!"

In the case of *Citizen of Georgia Levan Gvatua v Parliament of Georgia,*the object of protection as public interest (legitimate purpose) of the disputed norm was toprevent the illegal selling of organs.[17] National legislation envisages the possibility of a living person donating an organ, and the circle of donors is limited by the disputed norm by a genetic or established social-legal relationship between the donor and recipient.

In that case, the Court fully agreed on the existence of public interest, and the damage that could result if the disputed norm was suspended. The Court defined two conditions —the suspension of the disputed norm does not mean the legalization of the trade of human organs, as the acting legislation envisages several mechanisms for the prevention the trade of human organs; and the plaintiff is not asking for the suspension of entire norm, but rather the suspension of the normative essence of the disputed norm, which restricts donors to those with a familial or emotionally close relationship with the recipient.

The court considered that a significant guarantee for the prevention of trade of human organs, and therefore theprotection of this particular public interest, had been created with the creation of the transplantation council and transplantation information center, established by Articles 28-29 of the Law on the Transplantation of Human Organs,which control the legitimacy of the donation at different stages of the process. Without the agreement of the transplantation council, it is impossible to transplant an organ from a living person. Concerning this particular case, the Court found that the council will still have the power to protect public interest even when the normative essence of the disputed norm is suspended.

In this particular case, the plaintiff was the recipient himself/herself, who needed the liver transplantation, and the Constitutional Court made its final decision taking into consideration that the "life of a human represents the fundamental constitutional value, without which, practically, there are no grounds for any of the constitutional rights. Before the final decision of the Constitutional Court on this case, the disputed norm may cause the irreversible worsening of the health condition of plaintiff, including death. In the framework of the existing legal regulation, the suspension of the disputed norm does not create such danger that would cause an objective observer to reason that the public interest of the disputed norm prevails over the interest of life and health of the plaintiff. As a consequence the arguments detailed above, the Constitutional Court considers that the claim of the plaintiff shall be satisfied and the normative essence of the disputed norm, which excludes

17 According to the article 52 of the law on "the transplantation of the human organs" the transplantation of human organs is prohibited, and according the article 1351 of the criminal code such act represents a crime.

from the circle of donors (from whom the liver may be taken) persons having emotional relationship with the recipient, shall be suspended."[18]

Judges having the coinciding opinion on this case indicated that defining the existence of the emotional relationship between particular persons represents an assessable category. The transplantation council in particular cases is the one approving the existence of individuals prescribed by the disputed norm, and it does not have possibility to study in detail and objectively check the existence of an emotional relationship between non familial persons or the intensity of such relationship,or to identify abuse of the mentioned right. Despite this, for the purpose of the practical and actual implementation of the protection of life for individualsin a similar situation as the plaintiff, the judges with coinciding opinions considered that it is advisable before the final decision of the Constitutional Court to suspend the disputable norm for those recipients for those who would die without a liver transplant anddo not have a donor among the circle of persons as defined by the disputed norm. Hence, according to the judges having coinciding opinion, the part of the disputed norm should have been suspended that prohibits the persons who have close emotional relationship to be donors in cases when the recipient does not have the donor prescribed under the paragraph "b" of the article 18 of the Law on the Transplantation of Human Organs.[19]

3. THE ACTUALITY OF THE DANGER

The Constitutional Court in its practice also determines the actuality of the danger connected to the relevant normative act. For a normative act to be suspended, it is necessary to determine that the disputed act is capable of resulting in damage for the plaintiff before Court makes its final ruling. While the suspension of the act, the Constitutional Court has not deliberated in details the issue of actuality of the damage caused by the disputed normative act, this issue was mentioned by it in the case "on the appointment of judges" – where it noted that "the mentioned danger shall be real, inevitable, concrete and not of abstract/hypothetic nature."[20]

In our view, this part of the standard of suspension of a norm will be considered satisfied from the initial stage if the Constitutional Court decides to accept the constitutional claim for deliberation, because the subparagraph "a" of the paragraph 1 Article 39 of the Lawon the Constitutional Court of Georgia initially excludes *aqtio popularis*— citizens of Georgia, individuals living in Geor-

18 Protocol of the Constitutional Court of Georgia from 25 November 2015 on the Case №1/9/682 – *Citizen of Georgia Levan Gvatua v Parliament of Georgia*, Motivational Part p.14.

19 Ibid. Coinciding opinions of members of the Constitutional Court Lali Phaphiashvili and Otar Sitchinava, p. 10.

20 Protocol of the Constitutional Court of Georgia from 1st June 2016 on the Case № 3/2/717 – *Citizens of Georgia Mtvarisa Kevlishvili, Nazi Dotiashvili and Marina Gloveli v Parliament of Georgia*, Motivational Part p. 5.

gia and legal entities of Georgia, if they consider that the rights and freedoms stipulated under the chapter two of the Constitution of Georgia are infringed or may be infringed.According to the standard developed by the Constitutional Court of Georgia, the existence of inevitable damage shall be defined and then the reality of such damage. When considering the reality of the damage, the probability of the outcome is considered as well as the inevitable outcome.

4. IMPOSSIBILITY OF ERADICATION OF THE IRREMEDIABLE DAMAGE

According to the practice of the Constitutional Court, one factor taken into consideration when weighing the standard of suspension of the disputed normative act is the impossibility of the eradication of the irremediable damage. This criterion implies that even in case of the approval of the constitutional claim, the plaintiff would not have the possibility to restore his/her legal interest.

In the case *Citizens of Georgia Mtvarisa Kevlishvili, Nazi Dotiashvili and Marina Gloveli v Parliament of Georgia,* the Constitutional Court noted that according to existing legislation, the plaintiff shave the right to participate in the competition again — "in case of the approval of the claim by the Constitutional Court, plaintiffs will still have possibility to participate as judge applicants in the competition, in the framework of which the High Council of Justice will be obliged to justify the decision of appointment or rejection and at the same time there will be the possibility to appeal this decision."[21] Consequently, the Constitutional Court considered that the decision on thiscase will have the effect of restitution of theright and plaintiffs' motion on the suspension of the disputed normative act wasunjustified.

In parallel with these arguments, the Constitutional Court took into consideration the constitutional amendment of October 15, 2010, according to which (paragragh 2 of Article86 of the Constitution of Georgia) judges are appointed to positions for life (until the pension age of 65 years). This circumstance in the common courts system (city/district courts, appelatte courts) decreases the possibility of creating vacancies, therefore the Constitutional Court assessed plaintiffs' participation in the competition as candidates. In the motivational part of the decision, this issue is described "at the same time, arranging competition for the appointment of judges relates to the creation of a vacancy, which will exist also in the future in case of the termination of the judge from his or her postbecause of the expiration of term or other reasons. Even before the final decision of the court, these vacancies will be fully occupied, this can not result in inevitable damage for the plaintiff, as the competition of selecting judges, as a rule, takes place twice a year, currently the competition has been announced for 65 vacancies in the system of common courts, and from May 2016 till

21 Ibid. Motivational Part p. 8.

December there will be 29 more vacancies due to the endof the term of sitting judges; in 2017 the number will be 41." Based on these numbers, the Constitutional Court foundthat the plaintiffs, as candidates, could have the possibility to restore their right even in the case thattheir claim was approved by the court.

Judges having distinct opinion on this case did not agree. They argued that before the final decision on the case, there was a possibility that the existing competition (for 65 vacant places) would be finalized, including the unjustified rejection ofthe candidacy of the plaintiffs. It would not be possibe to avoid thisinfringement of rights, even with the final decision on the case, as even in case the plaintiffs'' case was approved by the Court, it would be impossible to review the result of the competition and appointments. Hence, members of the Constitutional Court having a distinct opinion considered that there were grounds to claim the irreversible nature of the infringment of plantiff's right.

Judges having a distinct opinion noted that they do not agree with the argument that vacancies of judges would exist in the future and therefore they would have the chance to participate in the competition again. In their opinion, the rejection to the appointment within the framework of a competition already created irreversible results. If thedisputed norms were declared unconstitutional, the competition would not have started again for the same position (in case when the position would have been filled after competition) and the restoration of legal outcomes of the unjustified rejection would not be possible. The judges having distinct opinion also indicated that the number of vacancieswill be reduced in the future, whichmeans that plaintiffs' opportunities to be hired in adesirable position decrease significantly. In their view "the creation of irremediable outcome does not necesserily mean the full, irreversible disappearance of the right. If the disputable norm may result in the diminishmentof the right and the irreversible decrease of the possibility of its realization, it also creates irremediable outcomes. The fact that the by virtue of the disputable norm plaintiffs do not entirely lose the right prescribed under the Article 29 of the constitution, on its ownequalsinexistence of the irreversible outcome. If the disputable norm diminishs the right, by eithersignificantly or irreversibly decreasing its application, it creates irremediable outcomes as defined by "paragraph 5 of the Article 25 of the organic law on the Constitutional Court of Georgia."[22]

22 Ibid. The distinct opinion of members of the Constitutional Court of Georgia Ketevan Eremadze and Maia Kopaleishvili, p. 6.

5. STANDARD OF SUSPENSION OF THE DISPUTED NORMATIVE ACT AS ILLUSTRATED BY THE CITIZEN OF GEORGIA GIORGI GACHECHILADZE V THE PARLIAMENT OF GEORGIA

Citizen of Georgia Giorgi Gachechiladze v the Parliament of Georgia[23] the paragraphs 1 and 3 of the Article 57[10] of Law on Environmental Protection were challenged as unconstitutional based onparagraphs 3 and 4 of the Article 37 of the Constitution.[24] According to the disputed norms, between the Ministry of Energy and interested entity there may be stipulated an agreement based on which within the term defined by the agreement the interested person is exempted from the civil and administrative liability before the state and local selfgovernmental institutions for the actions implemented in the sphere of using natural resources and environmental protection. Within the period defined by the agreement, the person is exempted from paying fines, compensating for damages, fulfilling of any kind of obligation or payment of taxes according to the conditions prescribed by the agreement (paying certain amount of money or fulfilling other obligation).[25] The agreement prescribed by the disputed norms could have been concluded to coverpast, as well as for future, activity. Hence a person was given the legal possibility to inflict incalculable damage tothe environment, which wouldhave otherwise been consider a crime and would have been resulted in catastrophic outcome for the environment. Meanwhile the condition must be taken into consideration that the agreement was concluded not regarding the particular action of the interested person, but with the period of his activity, in relation to the possible enormous amount of offences. The law did not prescribe any obligation for state institutions to check the offences of the interested person within the agreed period before the conclusion of the agreement and to assessthe amount of damage to the environment. Also, according to the paragraph 4 of Article 5710 of the Law on Environmental Protection "it is forbidden to check the action carried out in the sphereof the usage of natural resources and environment protection, during the period envisaged by the agreement." Based on this, the law gave the possibility to conclude an agreement in such a manner that it was not known what would be the exact amount of the prospective offence on behalf of the interested person. Moreover, the action carried outby the person was not checked even after the conclusion of the agreement. Hence, the law envisaged, for the compensation from the state, exclusion from the liability with regard to any amount of offences.

23 Decision of the Constitutional Court of Georgia from 10 April 2013 on the Case № 2/1/524 – *Citizen of Georgia Giorgi Gachechiladze v the Parliament of Georgia*.

24 According to the paragraph 3 of the article 37 of the Constitution of Georgia "everyone has the right to live in the environment safe for health, use natural and cultural resources. Everyone is obliged to care about natural resources and cultural environment." Mentioned constitutional regulation on one hand reaffirms the core right of a person to live in a healthy environment, and on the other hand, prescribes the duty of each member of the society to take care of natural and cultural environment. "The state taking into consideration the interests of the existing and future generations provides protection of the environment and rational usage of natural resources, sustainable development of the country according to the economic and ecological interest of the society for ensuring safe environment for the health of human."

25 This regulation was enacted by the Georgian legislator during the total deregulation policy implementation; this "notion" was a brutal part of this policy.

Such norms were disputed by the plaintiff who claimed the application of Article 25 Law onthe Constitutional Court of Georgia and the Constitutional Court in its motivational part of the protocol refused the suspension of disputed norms: "With regard to the claim of suspending the disputed norms it shall be stated that plaintiff did not present any argument to the court which would gave the Constitutional Court the possibility to conclude that the disputed normatuve act could result in irreversible outcomes for the plaintiff. Therefore, the claim of plaintiff is unjustified."[26] It shall be noted that the Constitutional Court of Georgia by its decision declared these norms as unconstitutional. The unconstitutional norms from the initial hearing (28.12.2012) until the final decision (10.04.2013) remained in force for four months.

In our opinion there was an unconditional ground for the suspension of the disputed norms. The danger of irreversible damage was unequivocal, and the damage in this case influenced the significant merit – the environment, which may be very difficult or impossible to restore (unfortunately there is no data on how many such agreements were concluded within the abovementioned four months). The existing irremediable danger was real — and the reality was shown by the fact that, based on this norm, the agreement could have been concluded at any time and it would have resulted inirreversible, unassessed damage to the environment. Also there was no effective measure for restoring this damage. As for the effect of the suspension of the disputed norm for third parties and public interest: in this case there was no such merit on the other side of the argument, because the environment represents such an interest by itself. In ouropinion, this case is not far from the case on "transplantation of human organs" in terms of sensitivity, where the irreversible damage was related to the life of a person. Also, in this case the sensitive merit was in place, which unfortunately was not thought through by the court. The decision not to suspend disputed norms in this case was wrong and unacceptable, however anegative experience is also worth taking into considerationand we shall outline conclusions based on this, such appropriate conclusion may be the following practice,which was developed in the Constitutional Court after 2013.

It was evident from the begining that the legislator by this disputed norm refused the prevention of environmental offence, it "indulged" the interested person, by which it forgave the already committed offences as well as "sins" to be committed in future. By virtue of a similar mechanism, granting the wide title to influence the environment to an individualwas in conflict with the positive obligation of the state to ensure the protection of the environment in order to preserve a healthy environment for its citizens.

26 Protocol of the Constitutional Court of Georgia from 28 December 2012 on the Case № 2/3/524 – citizen of Georgia Giorgi Gachechiladze v. the Parliament of Georgia, Motivational part p. 2.

CONCLUSION

In conclusion we can state that,according to the practice of the Constitutional Court of Georgia, the standard for thesuspension of a disputed normative act is as follows:

- The danger of irremediable outcome for the plaintiff shall be in place, the eradication of which will not be possible even in the case the claim was approved;
- The real, effective, operational and not illusory measure must not exist for restoration of the right (irremediable damage);
- The existing irreversible danger shall be real, unavoidable and concrete;
- The suspendion of the disputed act shall not cause unjustifiable, unequal limitation of the rights of third parties and/or public interest;

It shall be noted that for the suspention of the disputed normative act all the conditions mentioned above shall be in place cumulatively and not separately.

As we see, there is a very strict, high standard established for the suspension of the disputed normative act, which is one of the reasons why this mechanism is rarelyusedbythe Constitutional Court,[27]is the complexity and high standard of its usage.

The suspension of the disputed norm is used only in case when there is a real danger that the application of the disputed norm will cause irreversible outcomes for the party. Therefore, the institute of the suspension of disputed norm is aimed to prevent the unavoidable and irreversible danger, which may be subsequent to the application of the disputed norm and the redressing of which may not be attained by the declaration as unconstitutional by the Constitutional Court (such irreversible damage shall be evident and there shall not be in place the risk of unjustified limitation of the interests of third parties and public).

27 Decision of the Constitutional Court of Georgia from December 24, 2014 on the Case № 3/2/577 - Non-profit (non-commercial) legal entity Human rights Education and Monitoring Center (EMC) and citizen of Georgia Vakhushti Menabde v Parliament of Georgia", Motivational Part p. 34.

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APPLICATION OF THE LEX PRAEVIA PRINCIPLE TO COURT INTERPRETATION

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ABSTRACT*

A criminal law that criminalizes an act or increases punishment for it shall not have retroactive force. The aim of this paper is to explore to what extent *lex praevia* applies to a judicial interpretation of a provision when it broadens the definition of crime or makes a punishment heavier while the provision itself remains unchanged. Opinions on this issue vary in academic circles and in court practice, which make this issue worth exploring.

Some lawyers believe that *lex praevia* applies to the law alone and not to its interpretation. According to this opinion, any other approach would conflict with the essence of the law, which must be able to evolve along with the development of society in order to meet new challenges. Other lawyers argue, however, that the law is defined by how it is interpreted by a court in real time, when the trust in it is legitimate. According to this view, *lex praevia* should also apply to judicial interpretation when it broadens the boundaries of liability.

This paper takes the position of the latter opinion. Due to the abstract nature of a provision, it is the function of a court to elucidate it and adequately communicate it to the public, and the interpretation of this provision should also as trustworthy and stable as the law itself for the addressee and must not come as a surprise to him/her post factum.

* The work was submitted to CLR at the end of 2017.

Criminal law in a legal state has a guaranteeing function ensured by the following requirements: the prohibition of the application of non-statutory law (*lex scripta*); the prohibition of analogy (*lex stricta*); the prohibition of indeterminate legal provisions (*lex certa*); the prohibition of retroactive application of criminal law (*lex praevia*).[1] These prohibitions follow from one another, and in their entirety, they create legal stability and security.

Since this paper aims to discuss the application of the prohibition of the retroactivity of a law to a judicial interpretation of a provision, it would be suitable to start with a brief overview of the *lex praevia* principle.

The idea of the non-retroactivity of the law, which belongs to renowned German scholar A. Feuerbach,[2] is related to the preventive function of punishment. It also relates to the obligation of advance warning for the provision's addressee in order to avoid any arbitrary use of state authority as well as to the right of an individual to be aware of a prohibited action in advance, which is a guarantee of his/her freedom.[3] In H. Packer's view, the most significant reason why the law must not be used retroactively is not that retroactivity causes **fair surprise** in the addresses but that it dismantles the guarantee of security that a new law will not be used against any of us tomorrow,[4] which would undermine a legal state.[5] The issues of the retroactivity of the law is specified in Paragraph 9 of Article 31 of the Constitution of Georgia, which states that "No one shall be held responsible on account of an action, which did not constitute a criminal offence at the time it was committed. The law that neither mitigates nor abrogates responsibility shall have no retroactive force." This constitutional provision is reflected in Article 2 and 3 of the Criminal Code of Georgia. Pursuant to Article 2 of the Code, "The criminality and punishability of an act shall be determined by the criminal law applicable at the time of its commission," while according to Article 3, "A criminal law that decriminalizes an act or reduces penalty for it shall have retroactive force. A criminal law that criminalizes an act or increases punishment for it shall not have retroactive force."

1 Dana S. 2009. Beyond retroactivity to realizing justice: A theory on the principle of legality in international criminal law. Journal of Criminal Law and Criminology. Vol. 99, N 4. 864-865; Pends D. O. 2010. Retroactive law and proactive justice: Debating crimes against humanity in Germany 1945-1950, Central European History 43, 428-63; Faure M., Goodwin M. and Weber F.2013. The Regulator's Dilemma: Caught between the Need for Flexibility and the Demands of Foreseeability. Reassessing the Lex Certa Principle. Rotterdam Institute of Law and Economics, N 3, 44-46; Schaack B. V. 2008. Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals. The Georgetown law Journal vol. 97. 121-122; Turava M. 2011. Geneal part of criminal law: teaching of crime. Tbilisi, Meridiani. 109; Wessels I. and Beulke V. 2010. General part of criminal law, crime and its composition. Tbilisi, Tbilisi University. 18-22; Dubber M.D. and Hornle T. 2014. Criminal law: A comparative approach. Oxford, Oxford University press. 73.

2 Khubua G. 2004. Theory of law. Tbilisi, Meridiani. 146; Popple J. 1989. The right to protection from retroactive criminal law, Criminal law journal. Vol. 13. 255; Dubber M.D.2010. The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History. 16.

3 Ashworth A. 2009. Principles of Criminal Law. New York, Oxford University Press. 59; Samaha J. 2011. Criminal Law. Belmont, Wadsworth Cengage Learning. 41-42; Adler D. J. T. 1987. Ex post facto limitations of changes in evidentiary law: repeal of accomplice corroboration requirements, Florida law review. 55. N 6. 1196-1197.

4 Packer H. L. 1968. The limits of the criminal sanction. California, Stanford University Press Stanford. 53

5 Determining the time of validity of the law is explained by the Constitutional Court by the importance of protecting legal security and principle of stability.

The prohibition of the retroactivity of the law ensures the stability of legislation, which is a requirement of free society.[6] The guaranteeing function of criminal law is the manifestation of the legal system. To enable an addressee of the provision "to organize action", a criminal law provision must also be sufficiently foreseeable.[7] It is precisely the interaction of these two issues that is important for clarifying the question raised in this paper.

A controversial issue in legal literature is whether the prohibition of retroactivity should apply to judicial interpretation that broadens the definition of an offence or makes the penalty heavier than the earlier interpretation. The debate on this issue was triggered by heterogeneous court practice.

The debate concerns the clarification of the issue of who applies the provision – the "creator" of a new provision or the "discoverer" of the old one.[8] It is believed that a court is not the creator of provision, as this conflicts with the principle of distribution of powers[9] and is an exclusive authority of parliament,[10] but rather it serves as the discoverer of an old provision which has been misinterpreted so far. Therefore, since an old provision was in force at the time an action was committed, the retroactive application of a new understanding of the provision to an old relationship must not be a problem.[11] This opinion was shared by many lawyers but nevertheless it did not solve the issue of the retroactive application of judicial interpretation that broadens the composition of offence as that approach also has many opponents and it is handled differently in the practice of national[12] and international courts[13]. According to widespread opinion, interpretation may be retroactive[14] because the law does not change at this time, it continues to be valid[15] and a person may be released of liability only on the grounds of a pardonable mistake.[16] Some scholars, however, believe that the refusal to subject broad interpretation to the prohibition of retroactivity excessively weakens the guaranteeing function of the law.[17]

For the purposes of this paper, it is also important to briefly overview the *lex certa* requirement, which is yet another element of the guaranteeing function of criminal law and serves the aim of achieving[18] the "maximal foreseeability" of the law.[19] As it is well known, the law must be a "reliable

6 State v. Picotte No. 01-3063-CR. (May 16, 2003). 45.

7 Rawls J. A Theory of Justice. 1999. Cambridge, Massachusetts, Harvard University press. 209.

8 Dworkin R. 1999. 81; Gray J.C. 1921. *The Nature and Sources of the Law.* New York: The Columbia University press.) 93-94.

9 Dworkin R. 1999. 84; Scalia A. 1989. The Rule of Law as a Law of rules. *The University of Chicago Law Review* vol. 56, N 4. 1183.

10 Martina J. and Storey T. 2015. Unlocking Criminal Law. New York, Routledge. 11.

11 Gray J.C. 1921. The Nature and Sources of the Law. New York: The Columbia University press.) 99-100.

12 Rogers v. Tennessee, 532 U.S. 451 (2001); United States v. Shabani, 513 U.S. 10 (1994); compare: Marks v. United States 430 U.S. 188 (1977); James v. United States 366 U.S. 213 (1961). For analysis see: Morrison T. W. 2001. Fair warning and retroactive judicial expansion of federal criminal statutes. South California law review. Vol. 74. 458-460.

13 CR v United Kingdom N 48/1994/495/577 (1996) compare: Rio Prada v. Spain N 42750/09 (2013

14 Gvenetadze N. and Turava M. 2005. Methodology of decision making on criminal cases. Tbilisi, Georgian Judges Association. 21.

15 Turava M. 2011.123.

16 Ibid.

17 Morrison T. W. 2001. 470.

18 Ashworth A. 2009. Principles of Criminal Law. New York, Oxford University Press. 58.

19 For more information on this issues, see: Gegelia T. 2016. Prohibition of uncertainty of the law in modern criminal justice. Review of

source"[20] for citizens and it must not come to them as a surprise post factum.[21] That a provision must explicitly formulate its content follows from the requirement of constitutional importance, according to which addressees of a provision must be aware of the prohibition in advance in order to be able to "plan an action"[22] and establish compliance with the law[23] which, in turn, is a guarantor of their freedom. According to the explanation of both national[24] and international courts[25], a provision must be made clear by a court and therefore, an interpretation of a court has (or must have) a guaranteeing importance similar to that of the provision.

Thus, one should share the opinion of scholars who view such interpretations of courts as being tantamount to a change in the law and apply ex post facto restriction. According to a widespread opinion, the authors of which include J. Gray and H. Hart, a law is defined as it is viewed and interpreted by a court against current challenges and not as adopted decades ago by the parliament to meet the challenges of those times.[26] Consequently, if the understanding of the law changes today, it means that the law itself changes and, therefore, we should apply exactly the same standard towards a new, broader definition of offence, as it happens in the case of legislative amendments. A court must be a reliable source for understanding the law. Attitudes toward this issue differ in the practice of national courts in various countries. For example, US criminal law sets different approaches according to individual states. An interesting case in this regard is the decision of Supreme Court of Tennessee on the case *Roger v. Tennessee* in which a person was punished for a murder although a long period elapsed after the stabbing of the victim with the intention to kill and the death of the victim. According to the established practice, which dates back to the 13th century, medical science was not capable of determining the causality between the action and the outcome of the action beyond a reasonable doubt after a significant amount of time had elapsed following the action. Therefore, it was impermissible to blame the outcome on the person and qualify the action as a murder. According to the Supreme Court of Tennessee, the limitation of a murder by a year and a day rule was not defined by the law, it was a remnant of common law, no longer corresponded to modern achievements and did not deserve to be observed. The court defined the act as murder and punished the person for murder.[27] One of the judges, A. Scalia, disagreed with the court decision and called it a gross violation of the prohibition of retroactivity of the law. To the court's assessment that the application of retroactivity to interpretation would impede the development of case

Constitutional Law. N10.

20 Gvenetadze N. and Turava M. 2005. 33.

21 Jeffries, J. C. Jr. 1985. Legality, Vagueness, and the Construction of Penal Statutes, Virginia Law Review vol. 71. 231.

22 On the importance of ex posto facto prohibition, including in terms of certainty of provision, see: Weaver v. Graham :: 450 U.S. 24 (1981); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966); City of Chicago v. Morales, 527 U.S. 41, 58–59 (1999).

23 The Constitutional Court of Georgia also makes an interpretation similar to the importance of certainty of the law. See, decision N2/2/389 of 26 October 2007.

24 Decision of the Constitutional Court N1/2/552 of 4 March 2-15, para. 16-17.

25 Ashlarba v. Georgia N45554/08 (Strasburg: 15 October 2014); Kokkinakis v. Greece N 14307/88 (Strasburg: 25 May 1993); Steel and others v. The United Kingdom N 67/1997/851/1058, (Strasburg: 23 September 1998); Cantoni v. France N17862/91 (Strasburg: 11 November 1996); Huhtamkai v. Finland,N54468/09 (6 March 2012).

26 Gray J.C. 1921. 94; Hart H.L.A. 1982. *The Concept of Law*. Oxford, Clarendon Press. 137-138.

27 Kadish S.H., Schulhofer S.J. and Steiker C.S. 2007. Criminal law and its process. New York, Aspen, 150.

law, which is the foundation of the common court system, A. Scalia responded that the court was ignoring that such a change must be applied to new relationships alone, otherwise the fundamental principle of *lex praevia* would be violated.[28] Scalia's opinion was shared by the Supreme Court of Wisconsin which, although noting the outdated nature of a year and a day rule and its incompliance with modern technology, did not apply the new interpretation of the provision retroactively to the accused person on the grounds of the prohibition of retroactivity.[29] German criminal law disagrees with the application of the prohibition of retroactivity of the law to a court interpretation. German criminal law prohibited driving while under a degree of influence of alcohol or other toxic substance that deprived the driver of the capacity to drive safely. The absence of "the capacity to drive safely," however, was established by a court, based on several years of practice and expert evaluation, only in cases when at least 0.13% blood alcohol content was detected. Later, a German appeals court changed the standard, lowering the limit of blood alcohol content from 0.13% to 0.11%. In a new case, in which experts detected lower than 13% of alcohol content in the blood of a person, the court still convicted that person. In response to the complainant's argument — that the new approach should not be applied to him because it established a liability for an action which was not punishable at the time when it was committed — the court explained that the new interpretation was to be extended to this case because the law did not change and the letter of the law accommodated such interpretation of the provision, while *lex praevia* applied only to a new law that made the penalty heavier.[30]

Under the influence of German criminal law, it is also not supported in Georgian legal literature or in common court practice, a position that was illustrated by an important interpretation of the Supreme Court of Georgia in 2012.[31] According to the previous position of the Supreme Court,[32] for a fraud committed over a long period of time to be qualified as a significant crime, ill-gotten wealth that exceeded the value of GEL 10 000 in total had to have belonged to one individual. If there were multiple victims, the crime would be judged by the rule of cumulative crimes. The previous approach, in the court's opinion led to an application of unfairly lenient sentences (because of the principle of absorption resulting in concurrent sentence) which would not be fair, therefore in the new case, the action of a group of persons was qualified as large-scale fraud regardless of the fact that the stolen property belonged to several people. Thus, with the new interpretation of the provision, the penalty for a crime against several people became stricter, although no one raised the issue of *lex praevia.* An interesting case in this regard is a case heard by the European Court of Human Rights, Del Rio Prada. The case concerned a court's interpretation of a law, which harmed the defendant. The previous interpretation, which was that two days of work in a prison meant the de-

28 Ibid. 152-153.

29 Ibid. 153.

30 Weigend T., eds. Heller K. J. and Dubber M.D. 2011. The handbook of comparative criminal law. Stanford law books. 256.

31 See 2015. Interpretation of provisions used in decisions of the Grand Chamber of the Supreme Court of Georgia – decision №236ap-12 of 22 November on the qualification of crime against private property – fraud in a large amount. Tbilisi. Supreme Court of Georgia. 141-145. Available at: http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba-d.pdf. Last accessed on 10.30.2017.

32 Decision №1078ap of the Supreme Court of Georgia of 11 February 2008. See, in the collection of works – 2008. Decisions of the Supreme Court of Georgia on criminal cases, private part, №12. 46-49.

duction of one day from the imposed sentence (Parot Doctrine), was abolished by an accumulated sentence rule in relation to the imposed punishment. The original rule was a practice established by the interpretation of the provision by a court and clearly did not follow from the law. The applicant, who would have to serve nine years longer under the new interpretation, argued that the new interpretation violated the principle of the prohibition of retroactivity; the European Court agreed and ruled it as an ex post facto violation.

This judgment by the European Court of Human Rights must be applied in Georgia, as well, for two reasons: it is the interpretation of Article 7 of the Convention on Human Rights and it is the most recent court decision on the issue. The Court's explanation is very important to understand the content of the law, which has been repeatedly emphasized by the European Court of Human Rights[33] and the Constitutional Court of Georgia.[34] Consequently, if a court interprets the definition more broadly than it has in the past, its definition of a provision of the law and retroactively applying that new understanding would be in violation of the provision's addressee's right to advance warning.

33 Cantoni v France N 17862/91 (1996); Ashlarbav. Georgia N 45554/08 (2014).

34 Decision of the Constitutional Court N1/2/552 of 4 March 2-15, para. 16.

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SECRET SURVEILLANCE CONDUCTED WITH CONSENT OF ONE PARTY TO COMMUNICATION AND THE RIGHT TO PRIVACY

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ABSTRACT*

With the development of technology, protection of individuals from arbitrary secret surveillance has become a challenge for the right to privacy. Therefore, the legislator should create a legislative base that strictly defines the scope of interference to the right of an individual to be left alone. In this respect, it should be decided whether a similar standard of constitutional protection applies to both "typical surveillance" (surveillance without informing the participants of the communication by a third party) and surveillance conducted with one-party consent. Namely, it should be assessed whether a person subject to surveillance with the consent of the conversation partner has the right to sue for violation of privacy and then it should be determined whether this form of the secret surveillance needs to comply with the formal criteria established by Article 20 of the Constitution of Georgia.[1]

* The work was submitted to CLR at the end of 2017.

1 Before December 16 of 2018 the right to private life was guaranteed by Article 20 of the Constitution of Georgia. However, after the new constitutional amendments entered into force on the above mentioned day, the right to private life is guaranteed/defined by Article 15 section 2 of the supreme law.

INTRODUCTION

In criminal proceedings, evidence obtained by surreptitious surveillance is an important component in the fight against crime and the administration of justice. However, the principle of proportionality requires restrictions on human rights to be based on a fair balance between private and public interests. The latter can only be achieved under the control of an impartial authorized body, which issues a permit for conducting secret surveillance.

Democratic society agrees that unrestrained and unrestricted secret surveillance is a "dirty business[2]" which invades the privacy of an individual. Consequently, a legislator should not create a normative environment that encourages this type of encroachment upon privacy.

Secret eavesdropping can be carried out not only without informing the participants of the communication by a third party but also with the consent of one party to the communication. There is no consensus between legal doctrine and courts' jurisprudences on whether the standard for constitutional protection against these measures is the same. This paper examines the opposing views on this issue using comparative analysis and provides strong arguments for the author's conclusion. In addition, the paper focuses on the necessity to conduct secret surveillance only after obtaining a court's warrant with consent of one party or when it is shown to be a urgently necessary. The paper also identifies the main threats of unrestrained secret surveillance.

The Georgian legislation, the constitutionality of which is questioned by this paper, establishes only a procedural basis for recording/eavesdropping in criminal cases. It can be authorized by specific individuals (party to criminal proceeding) in order to attain a specific aim (obtain evidence to be used in criminal proceeding). Consequently, recording/eavesdropping by private individuals in the scope of freedom expression, for instance, when one records someone for various reasons in the absence of legitimate expectation of privacy or when doing journalist's work, are beyond the norm's sphere. Hence, this paper will focus only on the wiretapping/eavesdropping carried out in criminal cases.

2 The Public Security and Wire Tapping, Helbert Brownell Jr, Cornell Law Review, 1954, pg.195.

LEGISLATION REGULATING SURVEILLANCE CONDUCTED IN CRIMINAL CASES WITH ONE-PARTY CONSENT

Georgian legislation distinguishes between secret investigative actions[3] and secret eavesdropping conducted by consent of one party to the communication.[4] Consequently, the persons authorized to conduct these actions and criteria are different. Secret video/audio recording conducted by a third party (a state) without informing the parties to the communication, is classified as one type of secret investigative action. This action can be described as a "typical form" of secret surveillance. It limits the right to privacy and for that reason, it can only be conducted when approved by a court ruling on the basis of a prosecutor's motion or, in the case of urgent necessity, with the court's oversight. In addition, grounds for carrying out an investigative action, its length, the persons against whom the actions are to be carried out, the rules for the storage of the information obtained during such actions and the rules for their destruction are all strictly regulated.[5] When surveillance is conducted with the consent of one party to the communication, different norms apply. Namely, according to the 5th sentence of the 1st part of the Article 112 of the Criminal Procedure Code of Georgia, consent of one party is sufficient for carrying out an investigative action without a court's decision.[6] According to the said norm, lawfulness of video/audio recording and/or surveillance in real time is conditioned by a single circumstance, i.e. the consent of one party to the communication. Therefore, in this case, an investigative action does not need ex ante or post factum court control. This rule is found in the chapter introducing investigative actions. In addition, the authority to carry out an investigative action is granted only to a party to the case.[7] Therefore, surveillance with one-party consent may be conducted by a participant of the communication or another third person under directives received from the prosecution and defense. Besides, it is permissible to record/eavesdrop any person, including a defendant, who is in possession of relevant information for either the prosecution or defense. So, the rule established by the 5th sentence of the 1st part of the Article 112 of the CPC of Georgia, gives the party of criminal proceedings the right to obtain evidence by secret surveillance and submit it to a court against the will of the person being surveilled and use it to substantiate his/her legal position.

3 See: Chapter XVI1 of the Code of Criminal Procedure of Georgia (CPC).

4 See: The 5th sentence of the 1st part of the Article 112 of the Code of procedural Code of Georgia.

5 See: 1st and 5th parts of the Article 112 and Articles 143^3, 143^5 and 143^8 of the Criminal Procedure Code of Georgia.]

6 See, 1st and 5th parts of the Article 112 of the Criminal Procedure Code of Georgia.

7 According to the 5th part of the Article 3 of the CPC of Georgia, a party means: a defendant, convicted, acquitted, defense lawyer, investigator and prosecutor.

RIGHT TO PRIVACY OF A PERSON SUBJECT TO SURVEILLANCE IN CRIMINAL CASES

The Constitutional Court of Georgia has repeatedly commented on the value and importance of the right to privacy. In particular, it stated in one of its rulings that the right to private life, being an indivisible part of the concept of freedom, is a precondition for the protection of an individual's autonomy, independent development and his/her honor.[8] This right grants an individual the possibility to determine the scope and form of his relations with the outside world at his/her discretion.

Obtaining evidence through secret recording of communications by various technical means, and/or through eavesdropping in real time is relevant for both the prosecution and defense. The prosecution aims to investigate a case unhindered and prevent criminal actions. The defense, on the other hand, is interested in obtaining evidence so that it can prove its legal position. However, since audio/video recordings reveal unique characters of the individual and divulge the contents of conversations, these interests are opposed by the personal interest of the individual being surveilled to protect his/her right to privacy.

For some time, the courts linked obtaining evidence through surveillance to ethics and did not see the threats to the violation of privacy.[9] However, today the Georgian courts have adopted the general practice of viewing typical surveillance through the lens of the right to privacy. [10] However, case law upholds a different approach to surveillance conducted with the consent of one party to the communication, since it is believed that such recording/eavesdropping is to some extent analogous to the typical form of secret surveillance.

The opposing opinion, i.e. that surveillance with one-party consent should enjoy the same standard of protection as typical surveillance, is based on the right of the participant of the communication to independently determine the range of listeners. One of the aspects of private life is the freedom of communication, which involves freedom to choose the audience and content of the conversation. This right has been acknowledged by many jurisdictions including the Constitutional Court of Georgia. Its interpretation runs as follows: "private life protects individuals' personal sphere (space). Personal space includes a definite territory, place (for example, house, private car or some other property), as well as a circle of people an individual chooses for socializing and finally, it also includes the themes an individual wishes to keep secret or wishes to disclose in a particular group of people. Personal space (sphere) of an individual is his/her own creation and he/she has a reasonable expectation that conversations on the themes chosen by him/her will remain unidenti-

8 See №1/2/458 Ruling of the Constitutional Court (10 June, 2009 on the case, *Citizens of Georgia-David Sartania and Aleksander Macharashvili v Parliament of Georgia and Minister of Justice of Georgia*, II-4.

9 See, *Olmstead v United States*, 277 U.S. 438 (1928), p.468.

10 See: Katz v. United States, 389 U.S. 347, (1967); №1/1/625,640 Ruling of the Constitutional Court of Georgia (14 April, 2016) on a case, *Public Defender of Georgia, Citizens of Georgia: Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, N (N)LPs- Open Society Georgia Foundation, International Transparency-Georgia, Georgia's Young Lawyers Association, International Society for Fair Elections and Democracy and Human Rights Centre v Parliament of Georgia*.

fied and unreachable for all those persons he/she has left outside the personal space."[11] "Freedom to hold opinions and freedom of expression mean for a person not only expressing individual opinions containing particular contents or information by different ways and self-realizing this way, but they also mean exchanging these opinions with particular persons in particular community or society, and that is what the Article 20 ensures."[12]

The freedom to select and specify the listeners is a main criterion for the existing connection between secret recording with one-party consent and the right to private life in the practice of the Federal Constitutional Court of Germany. One of its cases dealt with the inadmissibility of a secret tape recording conducted with the consent of one party in the investigation. A defendant was recorded in secret to reveal tax avoidance. The German Constitutional Court qualified the tape obtained in this way as secret. While interpreting protected sphere, it noted that an individual has a right to talk privately without any threat or doubt that his private conversation will be recorded and be used without his/her will or against such will. There is the right of an individual to the words spoken, which enables him/her to determine who should listen to his words and in whose presence his tape-recorded words should be listened to.[13] The court applied the same standard in a civil case related to the use of the witnesses' testimonies about the taped telephone conversations where witnesses listened with the help of a special listening device and where only one part of the conversation was informed. The Federal Constitutional Court explained that a right to so-called "self-determination" also implies the selection of those individuals who may receive information concerning the content of a conversation. This right is expressed in the individual's power to decide whether his/her voice and words should be recorded with an audio-recording device and whether these recordings should be accessible for third parties. Consequently, the Basic Law of Germany protects an individual from the use of his recorded speech without his/her consent and the use thereof against his/her own will. The Court assessed that an individual is protected even when one participant of the communication brings in a third party secretly from other parties to the conversation as a listener or allows him/her to directly participate in the communication.[14]

The same approach was used by the Supreme Court of Canada in a case related to the use of a surreptitious recording by an undercover police agent without informing the affected individual. As the Court interpreted, the Article 8 of the Canadian Charter of Rights and Freedoms[15] aims at protecting individuals from arbitrary recording when there is a reasonable expectation that the

11 See, A №1/2/519 Ruling of the Constitutional Court of Georgia (24 October, 2012) on the case, *Young Lawyers Association of Georgia and Citizen of Georgia, Tamar Chugoshvili v Parliament of Georgia*, II-3.

12 №1/1/625,640 Ruling of the Constitutional Court of Georgia (14 April, 2016) on the case *Public Defender of Georgia, Citizens of Georgia: Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, N (N)LPs- Open Society Georgia Foundation, International Transparency-Georgia, Georgia's Young Lawyers Association, International Society for Fair Elections and Democracy and Human Rights Centre v Parliament of Georgia.*

13 See, Beschluß des Zweiten Senats vom 31. Januar 1973 - 2 BvR 454/71 -, Rn. 32-33.

14 See, Beschluß des Ersten Senats vom 9. Oktober 2002 -- 1 BvR 1611/96 -- -- 1 BvR 805/98 --, Rn. 29-30.

15 It provides protection against unreasonable search and seizure. According to established practice, this norm protects an individual's privacy.

conversation would be heard only by a party of the communication. This derives from the freedom to specify a group of listeners.[16]

Therefore, recording/eavesdropping with the help of a technical devise by the unintended party ignores such aspect of secrecy for an individual as determining the nature of his opinions' initial flow and boundaries. This aspect is naturally linked to the "adjustment" of his/her words spoken to a partner in the conversation and consequently with the right to foresee the implications of the communication.[17] More specifically, if the target of the eavesdropping had been aware of the recording of the conversation or the transmission of it in real time, the contents and form of his conversation in all probability would have been different or, more than that, the communication would not have occurred at all. It's obvious that a target cannot determine the accessibility of his communication when there is recording/eavesdropping with the consent of one party.

A different standard has been applied in those courts' practices where recording with one party consent is not linked to the right to privacy. It is believed that freedom protected by the right to privacy will be misconstrued if recording conducted with one-party consent and typical eavesdropping were put on the same level and thus, were assessed by the same criteria.[18] In this respect the case law of the US Supreme Court is relevant, where the lack of connection with the 4th Amendment has been substantiated by several arguments.[19]

In the cases *On Lee v United States*[20] and *Lopez v United States*[21] the Court established a standard, according to which if a targeted person willingly permits the party of communication equipped with a recording/transmitting device to enter his/her place of business, then it cannot be considered an act of placing a recording device by means of illegal intrusio. Thus, a recording obtained in this way does not violate the 4th Amendment of the US Constitution. However, this argument cannot be considered valid. In this case, it should be examined whether the consent given by the affected person only relates to entering private premises or also to recording/eavesdropping. In these two cases the Supreme Court did not separate these two questions. As a result, the consent given by the target to enter private premises also covered the eavesdropping. Naturally, the lack of knowledge about the recording device excludes the possibility to express free will about recording the conversation, that is, there is no informed consent from the target.

In one of the cases, where a state informant obtained admission to the office from the owner and then, in the absence of the latter, searched the office, the US Supreme Court ruled that if "admission to one's home or office is obtained by stealth or through social acquaintance or in the guise

16 See, a ruling by the Supreme Court of Canada (25 January, 1990) on R v. Duarte and also R v. Wiggins)]

17 See: Beschluß des Ersten Senats vom 9. Oktober 2002 -- 1 BvR 1611/96 -- -- 1 BvR 805/98 --, Rn. 34.

18 See, Informants and the Fourth Amendment: A Reconsideration; Washington University Law Review, Tracey Maclin, 1996. P.598-599.

19 It establishes a right of an individual to be protected from ungrounded search. Court practice protects privacy of an individual with this norm.

20 *On Lee v United States*, 343 U.S. 747 (1952), p. 751-52.

21 *Lopez v United States*, 373 U.S 427 (1963), p.439.

of a business call," any kind of search, in this case, falls under the protection of the 4th Amendment.[22] We observe an analogous situation when an individual has a reasonable expectation that his conversation will remain private (despite the permission to enter the premises) although, his words are clandestinely "seized" by various methods. Here, we witness the invasion of privacy, which should be subject to court oversight.[23] Consequently, the permission to enter private premises does not necessarily mean that permission is granted for the recording as well. Thus an individual subject to recording is being eavesdropped on against his will; that is, he is being eavesdropped on forcefully. The practice of the European Court of Human Rights also indicates that permission to enter is an irrelevant criteria during secret eavesdropping.[24]

Eavesdropping with one-party consent is outside the scope of the right to privacy, because it relates to a risk of losing trust in the conversation's partner. Right to privacy does not cover partner's trustworthiness. A party to the communication independently decides whether to remember the content of the conversation and make it public afterwards or record it with an appropriate device or transmit it to another person in real time. Any person who reveals information to a party of a conversation assumes the risk that contents of the conversation may be divulged. There are plenty of cases in the practice of the US Supreme Court where the main line of reasoning is based on the risk of disclosure of the conversation. In the case United States v. White, the Court assessed that speaking with an individual and giving testimony to a court based on the contents of the conversation does not require the court's permission and consequently it does not violate the 4th Amendment. The situation is similar when a partner in the conversation records the conversation with an appropriate device or transmits it in real time to another person. With a proper device or without it, a party to the communication does not violate the reasonable expectation of privacy since an individual assumes the risk. Hence, in both situations,[25] whether an informant uses a recording device and transmits the conversation to another party or does not use a device and later unveils the contents of the conversation, the risks are similar. The Court established that a recording is an exact version of a testimony and there is no constitutional right that permits its exclusion.[26] The practice of equating the risks mentioned by the Court is not substantiated. On the one hand, the aim of the right to privacy is not "protecting individuals against ill advice of friends."[27] Thus, losing faith in a partner of the communication and the issue of disclosing the contents of the conversation is beyond the scope of the right to privacy. Social interactions among individuals are accompanied by revealing contents of the conversation by dishonest partners,[28] although that cannot be said about the risk of recording the conversation. In the Lopez case, Judge Brennan developed the "theory of risk" in his dissent and differentiated the risks.

22 *Gouled v United States*, 255 U.S 298 (1921), p.306.

23 See, Informants and the Fourth Amendment: A Reconsideration; Washington University Law Review, Tracey Maclin, 1996. P.601.

24 See, *Bykov v Russia*, 10 March 2009, par.82.

25 See, *United States v White*, 401 U.S. 745 (1971), p. 751.

26 See, *Lopez v United States*, 373 U.S 427 (1963), (Brennan, J., dissenting), p.465

27 See a ruling of the Supreme Court of Canada (25 January, 1990).

28 See, *Hoffa v United States*, 385 U.S 293 (1966), p.302]

For instance, risk that a person may be eavesdropped on or betrayed by an informant or may be misled by a wrong identity is something inherent in human relations. This is a risk, which is always assumed by an individual while talking with others. However, the nature of risk changes when the listening is carried out with the help of an electronic device. There is no guarantee for security or privacy in this situation and no possibility to mitigate the risk.[29] Nowadays, the abundance of listening devices does not necessarily mean that an individual should imagine they will be used. The assumption of the possibility that a conversation could be secretly listened to does not lead to the conclusion that an individual should undoubtedly expect the conversation to be recorded.[30] Otherwise, if assumed differently, the grounds for a reasonable expectation that a conversation will remain private will be lost. The risk theory offered by the US Supreme Court is flawed in that it covers "everybody." The risk of recording/eavesdropping and the burden of proof are read from a perspective of an "innocent" individual rather than a "suspect." If we agree on risk theory, then why should it not also cover those persons, which are subject to classic eavesdropping? What is the difference between the risks of eavesdropping during a conversation and why does only typical eavesdropping fall under the protection of private life? The risk theory does not provide answers for these questions.

Defining the audience of listeners is the right of a party to the communication. This right does not depend on the forms of eavesdropping. In this light, the risk theory is somehow controversial. On the one hand, it does not reject an individual's right to define his/her partners in conversation and on the other hand, through compelling an individual to bear a risk, it takes away from him/her the possibility to decide the scope of the accessibility of the communication. Besides, it is unclear what makes typical eavesdropping and eavesdropping with one-party consent different from each other and why the same protection criteria should not be applied to both of them. The main difference is that one party in the communication is aware of eavesdropping. However, that difference does not exclude the arbitrariness of the eavesdropping carried out with one party consent and does not negate the legitimate interest of a person being eavesdropped, which is to be protected from such eavesdropping. Therefore, the difference between surveillance techniques does not change the results for a person who was subjected to surveillance. Nevertheless, risk theory establishes a de jure waiver of constitutional protection in the circumstances when a person does not know and may not ever know that he was subject to surveillance.[31] Therefore the position that limiting a right to privacy arbitrarily during eavesdropping in whatever form is possible equally, and that the right to be protected from it is equally important, is a consistent and substantiated position.

Clearly, the right to privacy of an individual subject to surveillance in a criminal case is not limitless and it is conditioned by a reasonable expectation of privacy. On the one hand, a legitimate expectation of privacy implies the assumption of the individual that his/her right will be violated by eavesdropping only in cases when a court will issue permission based on an objective assessment.

29 See, *Lopez v United States*, 373 U.S 427 (1963), (Brennan, J., dissenting), p.465

30 Beschluß des Ersten Senats vom 9. Oktober 2002 -- 1 BvR 1611/96 -- -- 1 BvR 805/98 --, Rn.24

31 See, Informants and the Fourth Amendment: A Reconsideration; Washington University Law Review, Tracey Maclin, 1996. P.621.

At the same time, for a legitimate expectation an individual must demonstrate expectation of real (subjective) confidentiality and also the expectation that society is ready to accept it as reasonable.[32] Legitimate expectation that a conversation will remain secret cannot exist in all situations and circumstances. For example, when a person is talking loudly and can be wiretapped/eavesdropped effortlessly, this expectation is groundless.[33] Besides, protection of the right to privacy is not contingent upon the content of the conversation. In particular, in respect with the protection of constitutional right, it is irrelevant what is discussed during conversation, whether incriminating or personal or well-known facts. Mostly it is impossible to foresee what paths a conversation would take; even business related and less private talks can turn into confidential private conversation.[34]

The right of an individual not to be wiretapped or listened to secretly extends to all spheres whether it is public or private. The right to privacy aims at protecting individuals and not places. Therefore, an individual's comment in a public space, or even in a private one, is beyond the scope of the right to privacy. Contrary to that, a confidential talk in public places enjoys constitutional protection.[35]

SIGNIFICANCE OF RESTRICTION OF THE RIGHT TO PRIVACY BY COURT'S DECISION OR URGENT NECESSITY

The right to privacy protected by the Constitution of Georgia is not absolute. It can become subject to proportionate interference. Article 20 of the Constitution determines formal and objective grounds and the scope for its restriction. More specifically, according to the 1st paragraph of the Article 20, the right to privacy can be restricted by a court decision or in the absence of the decision as provided by law when it is urgently necessary. The Constitutional Court of Georgia has repeatedly explained the importance of the constitutional guarantee of interference only by a court decision. Namely, the "constitutional requirement for the necessity of a court's decision permitting the restriction of the Article 20 requires that state intervention into the right be assessed by a neutral person for each particular case […] operative-investigative actions unlike other forms of restriction of human rights, are covert.[36] The public as a rule does not see how most of these measures are being implemented so it cannot monitor their processes. In this context, the executive is more tempted

32 See, *Katz v United States* 389 U.S. 347 (1967), P.361.

33 See, Supreme Court of Illinois, *The People of the State of Illinois v DeForest Clark* (No. 115776), March 20, 2014]

34 See, Beschluß des Ersten Senats vom 9. Oktober 2002 -- 1 BvR 1611/96 -- -- 1 BvR 805/98 --, Rn.30

35 See, *Katz v United States 389 U.S. 347* (1967), pp.351-352.

36 NN2/1/484 Ruling of the Constitutional Court of Georgia (29 February, 2012) on a case, *Association of Young Lawyers of Georgia and Citizen of Georgia, Tamar Khidasheli v Parliament of Georgia*, II-20.

to improperly intervene in human rights and risks are indeed high compared to other instances. Monitoring the actions of the executive by neutral person can reduce risks of arbitrariness from the part of the executive branch".[37]

A second formal ground for restriction of the right under the Constitution is "urgent necessity as prescribed by law." "The Constitution considers determining each circumstance for the restriction of rights on the grounds of urgent necessity to be exclusively a legislator's competence. In the absence of a law, the executive branch does not have discretion to substantiate why the right to private communication should be limited without a court's decision. Even when a situation meets constitutional criteria for urgent necessity, intervention in the rights in the absence of law is still inadmissible.[38] In addition, as the Constitutional Court interpreted, urgent necessity's material content "implies such instances where public interest under the Constitution cannot be satisfied without constraining private interests instantly because of actual objective reasons. Besides, it should be very clear and unambiguous that, protection of public interest within the Constitution's scope is impossible in some other ways. Urgency shows shortage of time, which makes it impossible to promptly obtain a judge's order and thus, requires immediate action without a judge's order."[39] Therefore, a law, which suggests the possibility of interference in human rights without a court decision or the urgent necessity as prescribed by law, is formally incompatible with the supreme law and consequently, it is unconstitutional. It is obvious that with such strict regulations, the Constitution tries to minimize the arbitrariness originating from unrestrained and unrestricted eavesdropping by the state and third parties.

On the one hand, intrusion in the human rights by secret surveillance/eavesdropping is characterized by specific factors. The Constitutional Court interprets that, "Due to its secretive nature, interference in human rights creates a risk of abuse of official power, which can bring about harmful consequences for the entire democratic society. Therefore, in a democratic society an intervention can be justified only in a situation where the legislation is equipped with effective and protecting mechanisms against the abuse of official power. A state, which puts its own citizens at a risk of being secretly surveilled and controlled, should not enjoy unrestrained authority. Otherwise, under pretense of defending democracy, unbalanced legislation may turn democracy itself into something very fragile and uncertain."[40] Therefore, due to the clandestine nature of secret surveillance, both the parties which are subject to surveillance and those which are not but may come under that risk, do not have the possibility to avoid unreasonable and excessive interference into their rights. Besides, secret investigative actions, including secret video/audio recording, are *ultima ratio* measures. Consequently, their use is acceptable only when crucial evidence for a case cannot be obtained by other methods or it requires unjustifiably big efforts. Accordingly, these measures

37 NN2/1/484 Ruling of the Constitutional Court of Georgia (29 February, 2012) on a case, *Association of Young Lawyers of Georgia and Citizen of Georgia, Tamar Khidasheli v Parliament of Georgia*, II-20.)]

38 Ibid, II-22.

39 See, Ruling of the Constitutional Court of Georgia (26 Decembery, 2007) on a case, *Association of Young Lawyers of Georgia and Citizen of Georgia, Ekaterine Lomtatidze v Parliament of Georgia*, II-20.

40 See, Ibid, II-9.

should be employed on a relevant basis against a limited circle of individuals for a limited categories of crime and for limited periods. In addition, there have to be regulations that ensure that the tapes that were recorded during secret surveillance and which were not used as evidence would be destroyed or kept away from the third parties. Secret surveillance needs to be monitored by an independent and impartial body.[41]

Although, it's obvious that completely unchecked surveillance won't meet the above mentioned criteria in some cases and will remain unreasonable per se. Usually, the grounds for conducting any investigative action is evidential standard, which proves a need for carrying out an investigative action. The need for carrying out these measures in the course of secret surveillance by one-party consent is not, as a rule, determined by an objective body/person. Typically, a person consenting to eavesdropping is an individual authorized by that party on whose orders eavesdropping is conducted. In case of prosecution, these persons are mostly informants, and in case of defense — it may be either a party itself or any other person. Thus, while completely excluding ex ante control by courts, the 5th sentence of the 1st paragraph of the article 112 of the Code of Criminal Procedure of Georgia does not establish any limits for eavesdropping with one-party consent. This creates opportunity for state/private persons (defense), upon agreeing with a particular person, to tape an individual's conversation on any grounds for any period and for any kind of crime. Clearly, in such circumstances, secret eavesdropping with one-party consent may become a part of routine administrative practice, which will significantly reduce the application of court's prior ruling or urgent necessity and turn them into mere formality.

Besides, the "chilling effect" experienced by freedom of expression in the circumstances of this norm should be taken into account, in particular, when individuals are aware that their conversations may become subject to surveillance at any time, without any restraints and only by a consent of one party (whether it is state or private party), they will try to limit exercising their right. As the Constitutional Court of Georgia has interpreted, "[…] communicating with desirable people on chosen themes with a sense that the space and communication is not private at all, with high probability will change the character of communication, its form and content and may even compel a person to reject exercising his rights to expression and communication altogether. This goes fundamentally against and excludes the idea of development by one's own choice and makes private space poor and narrow."[42]

Therefore, interference on the grounds of permission from a court or urgent necessity is an effective mechanism for avoiding ungrounded eavesdropping. However, under the current legislation, secret wiretapping conducted by one-party consent is upon the discretion of those persons/bodies

41 See, Assessment of legislation concerning secret surveillance according to the standards established by the European Convention for Human Rights, International Transparency Georgia, 24 May, 2013.

42 See, №1/1/625,640 (14 April, 2016) Ruling of the Constitutional Court of Georgia on a case, *Public Defender of Georgia, Citizens of Georgia: Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, N (N)LPs- Open Society Georgia Foundation, International Transparency-Georgia, Georgia's Young Lawyers Association, International Society for Fair Elections and Democracy and Human Rights Centre v Parliament of Georgia*; II-27.

which are conducting it. It is obvious that this norm creates legal grounds for the arbitrary intrusion on the right to privacy.

CONCLUSION

An individual subjected to secret eavesdropping with the consent of one party to the communication in criminal cases is empowered to turn to a court within the scope of private life because of his/her right to determine an audience of listeners. The risk theory developed by the US Supreme Court is too broad and, besides, it imposes a burden of risk on an individual affected by the recording/eavesdropping by an electronic devise. It should be noted that the risk of the repetition of a conversation and the risk of its recording are not the same. In the course of monitoring the conversation by an "unintended" party, such aspects of secrecy of an individual as the nature of the initial spread of the conversation and its boundaries are ignored. Besides, imposing a risk of eavesdropping on the individual affected does not leave space for a reasonable expectation of privacy. As a result, a sense of being under endless control brings about a "chilling effect" on the freedom of expression, kills free discussion and spontaneous expression, which makes it incompatible with the idea of a free society. [43]

In addition, it is pointless to talk about differences between typical eavesdropping and recording with the consent of one party in light of the results. In both cases, eavesdropping is of secretive nature for the person who is subjected to the measure. The constitution aims at protecting an individual who is subject to secret eavesdropping from unreasonable intrusion in his/her private life notwithstanding the forms of eavesdropping. Besides, the interest of an individual subject to eavesdropping — to be protected from arbitrary interference in his/her private life — always exists and is not dependent on whether or not a partner knows about surveillance.

If there is a right of an individual being eavesdropped to not be recorded unreasonably, there must be an instrument that will ensure protection from arbitrary eavesdropping. The rule established by the 5th sentence of the 1st paragraph of the Article 112 of the Code of Criminal Procedure of Georgia entrusts protection from unreasonable interference to a person who is an interested party in the process of surveillance. Generally, for the protection of human rights, it is not sufficient to count on the fairness and good faith of a person who is authorized to limit a right. That is why Article 20 of the Constitution of Georgia establishes only two grounds for restricting rights: a court decision and urgent necessity. The norm discussed does not stipulate either of them, therefore, formally it does not conform to supreme law.

43 See, *United States v White*, 401 U.S. 745 (1971), (Mr. Justice Douglas, dissenting), p.762

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EUROPEANIZATION OF CRIMINAL JUSTICE AND LEGAL STATE OF VICTIMS

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ABSTRACT

On 1 October 2010, a new Criminal Procedure Code of Georgia entered into force which fully replaced the inquisitional system of criminal proceedings with an adversarial system. The reform affected the institution of victims too, fundamentally changing its role and largely bringing the rights of a victim, in line with the rights of a witness. The result of this is that due to imperfect legislative regulation, victims do not have the possibility to adequately engage in criminal proceedings. Defining such a passive role for a victim is negatively assessed in international and national literature and sources. Therefore, the issue under discussion is what kind of role a victim should have in the criminal justice system. How comprehensive and sufficient is the lawmakers' position concerning victims? Is there a need to grant additional levers to victims? Could the current system pose a threat to the principle of fair trial?

INTRODUCTION

The entry of a new Criminal Procedure Code into force triggered active debates about the rights of a victim who is no longer a party to the proceeding but rather is delegated to the status of a participant in it. It is proved by international legal acts and recommendations concerning the status of a victim of crime and the rights of a victim that the legal status of a victim remains the topic of

debate in various countries and international community. These include a number of interesting recommendations and directives adopted in the European Union. One should note that the process of Europeanization of the criminal justice has been intensive, which manifested, inter alia, in the enhancement of victims' rights on the EU level in the past few years.[1] Georgia is part of the European Neighborhood Policy and therefore, the processes that are underway in the EU affect the legal processes in Georgia. The partnership between the EU and Georgia is not of a mere declarative nature and not limited to separate narrow spheres.[2] After engaging in the European Neighbourhood Policy, Georgia has been consistently making an effort to approximate its legislation to the EU norms and standards.[3] It is therefore important for Georgia to consider the experience of advanced European countries, including with regard to creating sufficient guarantees for victims of crime, in order to avoid the problems and challenges that necessitated the process of Europeanization of the criminal justice.[4] Society has a reasonable expectation that the state will pursue an effective criminal justice policy and ensure a safe environment for people.[5]

This paper aims at analyzing the legal status of a victim and identifying shortcomings in the legislation. To study separate issues, logical, analytical, grammatical, historical, systemic and comparative-legal research methods are used. Moreover, the rights of a victim are assessed from the standpoint of national legislation as well as European experience and regulations.

1. INTERNATIONAL APPROACHES AND REGULATIONS CONCERNING THE VICTIM'S RIGHTS

General trends in the criminal justice policy show that focus has shifted to the victim. This change has been clearly reflected in criminology which, since its origin, has studied the impact of external factors on the development of crime. However, after World War II, the victim became the subject of interest and research of this field.[6] In contrast to that of an accused person or a prosecutor, European countries do not have any ready-made recipes or common models concerning the status of a victim. The main goal is the satisfaction of victim's interests, which is not limited to material or financial satisfaction but also implies an adequate punishment of an offender. Debates on the rights of a victim remain topical in a number of judgments of the European Court of Human Rights

1 Heger M., Adversarial and inquisitorial Elements in the criminal justice systems of European Countries as a Challenge for the Europeanization of the Criminal Procedure; DEUTSCH-GEORGISCHE STRAFRECHTSZEITSCHRIFT №2, 2016, 3, 9; http://bit.ly/2r1gUzG [7.06.207].

2 Jishkariani B., European Criminal Law (within the EU), Tbilisi, 2013, 29.

3 Tumanishvili G., Criminal Procedure, Review of general Part, Tbilisi, 2014, 6.

4 Jishkariani B., European Criminal Law (within the EU), Tbilisi, 2013, 9.

5 Reddy P., Role of the Victim in the Criminal Justice Process, Student Bar Review, National Law School of India University, 2006, Vol 18 (1), 2; http://bit.ly/2r5LFbS [8.07.2017].

6 Trechsel Sh., Human Rights in Criminal Procedure, Tbilisi, 2009, 60. See reference: Kaizer (1996) §47 N3; Kilias (2002); Kunts (2001) §26 N24; also, see: Tumanishvili G., Criminal Procedure, Review of general Part, Tbilisi, 2014, 166.

as well as EU directives and recommendations. Everyone agrees that depriving a victim of all rights in an ongoing criminal proceeding is unjustified and unsuitable.[7]

1.1. The EU law

Paragraph 2 of Article 82 of the Treaty on the Functioning of the EU speaks about the necessity for the European Parliament and the Council to adopt directives in order to facilitate judicial decisions in criminal matters. This, in turn, will establish minimum rules and guarantees on various procedural issues. The rights of victims of crime were among the issues to be regulated, according to the treaty. At the same time, the treaty states that the adoption of the minimum rules will not prevent Member States from maintaining or introducing relevant regulations for the protection of individuals.[8] Instruments adopted by the EU provide a whole set of recommendations to be considered by Member States for the protection of victims. These recommendations, inter alia, concern the protection of victims from degrading treatment both inside and outside a court as well as access of victims to legal remedies.

It is worth noting that Article 47 of the Charter of Fundamental Rights of the European Union guarantees the right to a fair trial. This article does not differentiate between the right to a fair trial and effective remedy of an accused person and a victim. The article includes the right of a victim to a fair and public hearing within a reasonable time, the right to representation, the right to a legal aid, et cetera.[9]

The 2012 EU Directive establishing minimum standards on the rights, support and protection of crime victims specifies the rights that victims must enjoy in criminal proceedings. According to this document, all victims are guaranteed an equal level of support services. This right also includes access to legal and other aid.[10] For the purposes of the Directive, a victim means a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; also family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.[11] For these persons, the Directive ensures the rights to be recognized and treated in a respectful manner, to receive detailed information[12] and a possibility to participate in criminal proceedings. This means that bodies carrying out criminal proceedings must hear victims and allow them to provide

7 Trechsel Sh., Human Rights in Criminal Procedure, Tbilisi, 2009, 61.

8 Treaty on the Functioning of the EU, Article 82 2 (c), http://bit.ly/2rL87UF [20.09.2017].

9 Victims of crime in the EU: the extent and nature of support for victims, European Union Agency for Fundamental Rights, Luxembourg, 2014, 28.

10 Smith C. Alyna., GUIDE TO THE EU VICTIMS' DIRECTIVE: ADVANCING ACCESS TO PROTECTION, SERVICES AND JUSTICE FOR UNDOCUMENTED MIGRANTS, 2015, 12, http://bit.ly/2tuFcE3 [20.09.2017].

11 DIRECTIVE 2012/29/EU OF THE EUROPIAN PARLIAMENT AND OF THE COUNSIL of 25 October 2012, establishing minimum standards on the right, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 2.

12 Ibid, § 26-33.

evidence.[13] Besides, it is important to ensure that communications with victims are given in simple language and take into account the personal characteristics of the victim including any disability that may affect the ability to understand or to be understood.[14] Even more, according to Article 7 of the Directive, victims who do not speak the language of the criminal proceedings concerned are provided, upon request, with interpretation free of charge.

Along with these important rights, the Directive also provides victims with the possibility, at least in regard to certain types of crime, to review the prosecutor's decision not to initiate a criminal prosecution or a decision of higher bodies to terminate the prosecution. In addition, it specifies that complaint procedures must be clear, transparent and without extra bureaucratic elements so as to ensure that victims apply them without any hindrance. At the same time, limited financial resources should not be an impeding factor for the review of a decision.[15]

The necessity to prevent the repeat victimization of victims is discussed in other recommendations emphasizing medical, psychological, social and material support to victims.[16] The possibility to challenge a decision is also specified in the 6 October 2000 recommendation of the Council of Europe Committee of Ministers, which states that decisions by prosecutors not to prosecute may be challenged at a higher body either by way of judicial review, or by engaging private proceedings.[17]

Yet another noteworthy piece of regulation is the 28 June 1985 Recommendation of Council of Europe Committee of Ministers on The Position of the Victim in the Framework of Criminal Law and Procedure. This recommendation emphasizes the importance of providing information to victims both during investigations and court hearings. A victim should be informed of the date and place for the hearing concerning the offence which caused him/her suffering.[18] Also, according to the Recommendation, when taking a discretionary decision, the prosecutor should take into account interests of the victim; the victim should have the right to appeal to a higher official or a court to review a decision not to prosecute.[19]

Thus, the analysis of above mentioned documents makes clear the obligation of the state to give due consideration to and not to disregard interests of the victim. All the above mentioned regulations contain useful instructions and standards aimed at protecting victims' interests in crimi-

13 Ibid, Article 10.

14 Ibid, Article 3.

15 Ibid, § 43, Article 11.

16 Recommendation №R 87 (21) OF COUNCIL OF EUROPE COMMITTEE OF MINISTERS OF THE COMMITTEE TO MEMBER STATES ON ASSISTANCE TO VICTIMS AND THE PREVENTION OF VICTIMISATION, adopted by the Committee of ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies, § 4; Recommendation №R (83) 7 OF COUNCIL OF EUROPE COMMITTEE OF MINISTERS OF THE COMMITTEE TO MEMBER STATES ON PARTICIPATION OF THE PUBLIC IN CRIME POLICY, adopted by the Committee of ministers on 23 June 1983 at the 361th meeting of the Ministers' Deputies, III § D (27).

17 Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, COUNCIL OF EUROPE COMMITTEE OF MINISTERS, § 34.

18 Recommendation №R 85 (11) OF COUNCIL OFEUROPE COMMITTEE OF MINISTERS OF THE COMMITTEE TO MEMBER STATES ON THE POSITION OF THE VICTIM IN THE FRAMEWORK OF CRIMINAL LAW AND PROCEDURE, adopted by the Committee of ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies, § C (9).

19 Ibid, § B (7).

nal proceedings and ensuring their access to objectively realizable services. Moreover, the above mentioned documents lay down minimal rules while the Member States may extend these rights to provide a higher level of protection.

1.2. Approaches of the European Court of Human Rights

The European Convention on Human Rights is part of Georgian legislation and the text of the Convention must not be read in isolation from the case law. According to the standards established by the European Court of Human Rights, the Convention does not confer any right to victims to private revenge.[20] It does define the fact that victims enjoy certain rights in criminal proceedings, which imply the right to be treated with compassion, including, respect for dignity and involvement in the process of investigation to the extent necessary to safeguard his or her legitimate interests.[21] Victims of a crime also have the right to access information which concerns the terms and procedure of criminal proceedings. In particular, they have the right to be informed of the launch of prosecution or the refusal to prosecute, the opportunity to ask for a review of decisions and, in the case of review, of expected decisions. It is also important for victims to have access to criminal case materials.[22] If regulations set down in national legislation are not adequately applied in practice, these regulations will be merely of a formal nature and fail to ensure that investigations are fully accountable to society.[23]

1.2.1. Guarantees for the protection of victims' right to respect for private life.

Article 8 of the European Convention on Human Rights envisages the prevention of those violations that endanger the fundamental values of an individual's private life. Requirements of Article 8 are fulfilled when a victim is guaranteed effective protection mechanisms.

The European Court of Human Rights discussed guarantees for the protection of victims' interests in one of its decisions on the case *X and Y v. The Netherlands* which involved the infringement of the right to privacy.[24] The case concerned the rape of an underage girl who was placed in an institution for mentally handicapped children. This incident had traumatic consequences for her. Since the girl was mentally handicapped, her father filed a complaint with the police and asked for criminal proceedings to be instituted. However, the prosecutor's office decided not to open proceedings against the offender, provided that he would not commit a similar offence within the next two years. The victim's father appealed this decision to the Court of Appeal, which dismissed the

20 McBride J., Human rights and criminal procedure, The case law of the European Court of Human Rights, Council of Europe, 2011, 276.

21 Hugh Jordan v. the United Kingdom, no. 24746/94, 4 May 2001, § 109.

22 Kelly and Others v. the United Kingdom, no. 30054/96, 4 August, 2001, § 118-136; Gorou v. Greece, no. 12686/03, 20 May, 2009, § 36-42.

23 Ramsahai and others v. The Netherlands, no. 52391/99, 15 May, 2007, § 321.

24 *X and Y v The Netherlands,* no. 8978/90, 26 March, 1985, § 7, 8.

appeal noting that in order to launch an investigation, it was necessary for the appeal to be lodged by the victim herself. The European Court of Human Rights pointed out the importance of the use of criminal law mechanisms for the protection of various aspects of the private life of a victim. According to the Court, effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions. Thus, the Court concluded that the appeal court's decision was in violation of Article 8 of the Convention because the legislature required the filing of a complaint by the victim to open the investigation and did not grant the authority to a legal representative to act on behalf of the victim. Consequently, the legislation did not ensure effective protection of the victim.[25]

The Court found a violation of Article 8 of the Convention in yet another case which concerned the placement of an advertisement on an Internet dating site in the name of an underage girl. In this case too, the Court emphasized the importance of the right to privacy and pointed out that to protect the interests of victims of crimes committed against their physical or psychological well-being the state was required to identify the offender and bring him to justice. However, in this case, no effective measures were undertaken to ensure this.[26]

1.2.2. Scope of the right to a fair trial for victims

Since an addressee of fair trial guarantees within Article 6 of the European Convention on Human Rights is mainly an accused person, complaints on the violation of Article 6 of the Convention lodged by victims were initially considered inadmissible by the European Court of Human Rights. However, later the Court extended the application of Article 6 of the Convention to victims and pointed out the necessity to protect the rights and interests of crime victims in a number of its decisions. In the Court's view, although the Convention grants broad rights to the defense, it does not mean that the Court can ignore the plight of victims and downgrade their rights.[27] Consequently, criminal proceedings must be fair, to not only an accused person but also to witnesses and victims. Although a general approach is that Article 6 of the European Convention on Human Rights does not take victims' interests into consideration, it may sometimes occur that their life, health and safety are at stake. In such cases, the principle of a fair trial requires a balance between the interests of the defense and the victim.[28] Victims' interests may not be limited to the right to receive compensation but should also include the conduct of an effective investigation and the identification of offenders.[29] Thus, when assessing the fairness of criminal proceedings, the European Court of Human Rights takes into consideration the interests of victims to have offences adequately investigated and offenders punished.[30]

25 Ibid, § 27-30.

26 *K.U. v Finland*, no. 2872/02, 2 December, 2008, § 47-50.

27 *Perez v France*, no. 47287/99, 12 December, 2004, § 72.

28 *Doorson v The Netherlands*, no. 20524/92, 26 March, 1996, § 70.

29 *Kaya v Turkey*, no. 158/1996/777/978, 19 February, 1998, § 107.

30 Horncastle and others v. the United Kingdom, no. 4184/10, 16 December, 2014, § 130.

In one case, the Grand Chamber of the European Court of Human Rights took into consideration the 6 October 2000 Recommendation of the Committee of Ministers and expressed the view that victims should be able to challenge decisions by prosecutors not to prosecute.[31]

At the same time, apart from possibilities within Article 6 of the European Convention on Human Rights, Article 13 also requires that the state provides effective remedies for protecting the rights ensured under the Convention. It is important to have legal norms on a national level for the consideration of alleged violations of the Convention and satisfaction of victims.

1.2.3. Victims' rights in cases concerning the right to life and the prohibition of torture

Articles 2 and 3 of the European Convention on Human Rights guarantee the protection of life from unlawful violence and torture. Where allegations are made under the abovementioned articles, the European Court of Human Rights applies a particularly thorough scrutiny whether effective investigations have been conducted. At the same time, European Court does not deem that it is bound by the findings of the national courts. If there are valid, important and persuasive arguments available, it may depart from and set aside those findings.[32] In cases of death, torture and inhumane treatment, a positive obligation of the state is not limited to compensation of damages alone. According to the European Court, in case of violation of the mentioned rights, the reinstatement of victims' rights lies in the effective investigation of the crime and the punishment of offenders.[33]

In the European Court's view, an effective investigation of a violation of Article 2 of the Convention implies the involvement of the relatives of the deceased in the criminal proceedings to the extent necessary to safeguard their legitimate interests.[34]

In its decision against Turkey concerning the death of a person as the result of a special operation carried out by security forces, the European Court of Human Rights found the violation of a procedural aspect of Article 2 of the Convention because relatives of the deceased had no access to the case file and were not otherwise informed of the progress in the investigation.[35] In yet another decision, the Court emphasized that although the second applicant was granted victim status, there was no indication that the issue of granting that status to the first applicant was ever considered, despite the fact that the authorities must have been clearly aware of her kinship with the missing person. Moreover, the applicants had no access to the case file and were not kept properly informed of the progress of the investigation; consequently, they could not effectively challenge the activities of the investigating authorities before a court. The Court held that Article 2 of the Convention was

31 *Perez v France*, no. 47287/99, 12 December, 2004, § 68-72.

32 *Enukidze and Girgvliani v Georgia*, no.25091/07, 26 April 2011, § 286.

33 *McKERR v The United Kingdom*, no. 28883/95, 4 May, 2001, § 113, 115; *Mahmut Kaya v Turkey*, no. 22535/93, 28 March, 2000, § 124.

34 *Carabulea v Moldova*, no. 45661/99, 13 July, 2010, § 131 Enukidze and *Girgvliani v Georgia*, no.25091/07, 26 April 2011, § 243.

35 *Ogur v Turkey*, no. 21594/93, 15 December, 1997, § 92-93.

breached in its procedural aspect.[36] In a case which concerned the death of a person as a result of special operation involving the search of apartment, the Court negatively assessed the results of the investigation. It also declared that the applicant and members of his family were not informed that the proceedings were underway and were not afforded the opportunity to tell the court their very different version of events.[37] The European Court also ruled that Article 2 had been breached in its procedural aspect in another case because the relatives of the deceased were denied the access to the case file and were not informed of the termination of criminal proceedings.[38]

In its rulings against Georgia, the Court also noted that family of a deceased must be informed of progress during the investigation into a death[39] and that for an investigation to be effective, its conclusions must be based on a thorough, objective and impartial analysis of all relevant elements.[40] Yet another interesting case concerning the breach of the right to life is the one in which the government of Georgia. The court ruled that the government breached its obligation under Article 2 of the Convention, as, despite regular complaints by the applicant, the investigation was underway for several years without showing any progress.[41]

Much like violations of the right to life, the involvement of victims in criminal proceedings and a public control are important for investigation into degrading treatment to be effective.[42] In one case, the Court held that Article 3 of the Convention was violated because the applicants had no access to the case file and were not properly informed of the progress in the investigation and therefore, could not effectively challenge activities of the investigating authorities before a court.[43]

2. CONSTITUTIONAL LAW GROUNDS OF VICTIMS' RIGHTS

In a democratic state, the state alone holds the monopoly on identifying offences and punishing offenders. Victims cannot resolve conflicts with their offenders and, therefore, self-justice is impermissible. However, in parallel to the monopoly on the punishment of offenders, the state must pay attention to the rights of victims and safeguard their interests in criminal proceedings in order to

36 *Malika Dzhamayeva and Others v Russia*, no. 26980/06, 21 December, 2010, § 112, 115, 118.

37 *Gül v Turkey*, no. 22676/93, 14 December, 2000, § 93, 95.

38 *Slimani v France*, no.57671/00, 27 July, 2004, § 44, 47-48.

39 *Khaindrava and Dzamashvili v Georgia*, no. 18183/05, 8 June, 2010, § 60.

40 *Tsintsabadze v Georgia*, no. 35403/06, 15 February, 2011, § 75, 85

41 The European Court of Human Rights, fourth section decision, 9 September 2009.

42 *El Masri v The Former Yugoslav Republic of Macedonia*, no. 39630/09, 13 December, 2012, § 142; *Case of Husayn (Aby Zubaydah) v Poland*, no. 7511/13, 24 July, 2014, § 489.

43 *Khadisov and Tchechoyev v Russia*, no. 21519/02, 5 May, 2009, § 122.

spare them from repeated harm.[44] A legal state shall pay a great deal of attention to victims and enable them to enjoy the basic rights in the administration of justice that are guaranteed under the constitution.[45] Although the Constitution of Georgia, as the supreme law of the country, does not explicitly refer to the rights of victims, it provides the means to safeguard victims' interests and rights in a general context of the human rights.

2.1. Ensuring the protection of victims' dignity.

Citizens of Georgia live in a democratic state and, therefore, they expect that the laws of the country will be applied to them fairly and adequately. The law shall equally protect the rights and interests of all persons regardless of their status in criminal proceedings.[46] Besides, a legal system in the state must not give rise to feelings of hopelessness and defenselessness among citizens. People must be confident that their rights and interests will not be violated and if violated, legal remedies will be available to be used effectively.[47]

Article 16 of the Constitution of Georgia guarantees everyone's right to the free development of his/her personality and this guarantee also implies the protection of interests and the inviolability of the dignity of victims.[48] The state is particularly responsible for the protection of human dignity in criminal proceedings, which implies not only the acknowledgment of offender's dignity but also the protection of victim's dignity.[49] Consequently, the state must not allow the infringement of victims' dignity in criminal proceedings; namely, it shall not force victims to publicly speak about details of their personal lives and such circumstances that concern their privacy and private experience.[50]

Article 17 of the Constitution of Georgia enshrines the principle of the inviolability of an individual's honor and dignity. The significance of an individual's dignity is particularly apparent in criminal law, which deems it impermissible for an individual to be an object or an instrument of the activity of state agencies. The state violates its obligation when it considers an individual not as a subject with dignity, an end, but as a means to an end.[51] Also, according to a judgment of the Constitutional Court of Georgia, the restriction of honor or dignity causes fear, pain and sense of inferiority in a victim, therewith degrading the physical or moral condition of the victim.[52]

44 Tumanishvili G., Victims in modern criminal procedure law, Law Journal, №2, Tbilisi, 2009, 64.

45 Tumanishvili G., Criminal Procedure, Review of general Part, Tbilisi, 2014, 165.

46 Gurieli A., Rights of victim in criminal legislation of Georgia, magazine Law and World №4, Tbilisi, 2016, 217.

47 Gotsiridze E., in the book: Comments on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Basic Human Rights and Freedoms; editor: Paata Turava, Tbilisi, 2013, 111-112.

48 Tumanishvili G., Victims in modern criminal procedure law, Law Journal, №2, Tbilisi, 2009, 66.

49 Shalikashvili M., Victimology – science about victims of crime, Tbilisi, 2011, 118.

50 Tumanishvili G., Victims in modern criminal procedure law, Law Journal, №2, Tbilisi, 2009, 67.

51 Kublashvili K., Basic Rights, Tbilisi, 2014, 86-89; also, Decision of the Constitutional Court of Georgia on the case *Citizen of Georgia Maia Natadze and others v Parliament of Georgia and President of Georgia*, №2/2-389, 26 October 2007, II-30.

52 Decision of the Constitutional Court of Georgia on the case *Citizen of Georgia Maia Natadze and others v Parliament of Georgia and President of Georgia*, №2/2-389, 26 October 2007, I-6.

2.2. Victims' right of access to justice

According to Paragraph 1 of Article 42 of the Constitution of Georgia: "Everyone has the right to apply to a court for the protection of his/her rights and freedoms." The right of access to court is one of the fundamental constitutional guarantees to protect an individual's rights, which, at the same time, is a means to provide protection for other rights and interests.[53] Consequently, for this or that right to be fully enjoyed, it is important to ensure the possibility to defend this right in a court. Otherwise, the application of this right will be questioned.[54] This provision envisages the possibility to apply to a court as well as the comprehensive protection of an individual, which implies appealing to a court and a legal review of decisions of all those state agencies that violate human rights.[55] The cited provision reckons that when a person's rights are violated as a result of proceedings, that person is granted a possibility to influence the proceedings and a court decision. No one can be a mere object of a court trial. Consequently, every participant in proceedings shall have the possibility to express their views and positions.[56] According to the Constitutional Court of Georgia, Article 42 of the Constitution obligates the state to ensure access to a court not only in case of a violation of rights but also for the settlement of any issue that directly or indirectly affects the content, scope and restriction of an individual's rights.[57] Thus, a necessary precondition for the use of the right to a fair trial is the availability of that right, that benefit that an individual has to defend in a court.[58]

The right to apply to a court to defend one's interests must also extend to victims whose interests may be materially violated in criminal proceedings.[59] A victim of crime has a legal interest to participate in criminal proceedings against the accused person and it does not matter whether this participation has financial or moral motives.[60] Access to justice for victims encompasses the right to an effective remedy, the right to participate in the judicial process, the right to be treated with respect and dignity, the right to protection, the right to reparation, and the right to assistance and support, including legal assistance and psychological support.[61] Besides, the restriction of the right to apply to a court clearly conflicts with the Constitution of Georgia, principles of international law

53 Decision of the Constitutional Court of Georgia on the case *Citizens Giorgi Kipiani and Avtandil Ungiadze v Parliament of Georgia,* №1/3/421,422, 10 November 2009, II-1.

54 Decision of the Constitutional Court of Georgia on the case *Public Defender of Georgia v Parliament of Georgia,* №1/466, 28 June 2010, II-14.

55 Kublashvili K., Basic rights, Tbilisi, 2014, 339; also see, Kublashvili K., in the book: Comments on the Constitution of Georgia, Basic Human Rights and Freedoms, Tbilisi, 2005, 364.

56 Kublashvili K., Basic rights, Tbilisi, 2014, 339; also see, Kublashvili K., in the book: Comments on the Constitution of Georgia, Basic Human Rights and Freedoms, Tbilisi, 2005, 364.

57 Decision of the Constitutional Court of Georgia on the case *Citizens Giorgi Kipiani and Avtandil Ungiadze v Parliament of Georgia,* №1/3/421,422, 10 November 2009, II-2.

58 Decision of the Constitutional Court of Georgia on the case *Citizens of Georgia Khatuna Shubitidze v Parliament of Georgia,* №1/8/594, 30 September 2016, II-6.

59 Tumanishvili G., Victims in modern criminal procedure law, Law Journal, №2, Tbilisi, 2009, 70; see reference: BVerfGE 19, 32 (36); 25, 40 (43); Dahs H., Das rechtliche Gehor im Strafprozess, Munchen, 1965, 56; Luderssen K., Das Recht des Verletzten auf Einsicht in beschlagnahmte Akten, NStZ, 1987, 250.

60 Trechsel Sh., Human Rights in Criminal Procedure, Tbilisi, 2009, 64.

61 OSCE/ODIHR, Trial Monitoring Report Georgia, Warsaw, 2014, 143, §287.

and the practice of Constitutional Court of Georgia.[62] The criminal legislation envisages numerous crimes which differ from one another by their content and degree of gravity. Each crime violates a number of rights guaranteed under the constitution, such as the rights to life, dignity, freedom, private property, et cetera. Victims appeal separate decisions by prosecutors only when a committed crime is especially grave. However, in addition to especially grave crimes, grave and less grave crimes can also result in a violation of the above mentioned constitutional rights. It is therefore important that victims are provided with a possibility of effective justice in all cases.

3. VICTIMS' RIGHTS ACCORDING TO THE EFFECTIVE CRIMINAL PROCEDURE LEGISLATION

In October 2009, the Parliament of Georgia adopted a new Criminal Procedure Code, which entered into force on 1 October 2010. By adopted the new Code, Georgia was attempting to transition from the inquisitional system to the adversarial system.[63] This law introduced numerous novelties, including different regulation of the institution of victim. The new Criminal Procedure Code regulates the status of a victim and his/her rights in criminal proceedings in a new way. In contrast to the 1998 Criminal Procedure Code, under the new Code, a victim is no longer classified as a party to the proceeding and his/her rights has been actually brought in line with the rights of a witness, albeit with some differences. For example, a victim has the right to be informed of various stages of the criminal proceedings.[64] Reform in the area of victims' rights did not end there and in 2014, the criminal procedure legislation was amended to increase the rights of victims. In particular, victims have been given the possibility to challenge the decision not to prosecute or terminate criminal proceedings taken by the prosecutor within the scope of his/her discretionary power. In addition, a person who believes that he/she sustained damage as a result of criminal offence may apply to a prosecutor for the issuance of a decree recognizing the person as a victim. At the same time, a victim may have access to a criminal case file provided that it will not conflict with the interests of investigation. A victim has also been given the right to attend court hearings or part of court hearings regardless of whether they are closed or open.

62 Meparishvili G., Chkheidze I., Regarding principle of discretion in criminal procedure, Collection of scientific papers, http://bit.ly/2rXAPQT [20.09.2017].

63 Bowman H., Chkheidze G., Advocacy in criminal procedure for Georgian lawyers, Tbilisi, 2014, 2.

64 Bokhashvili I., Issue of temporary procedure of interrogation during investigation, the Advocate magazine, №2, 2009, 80.

3.1. Recognition of an individual as a victim or a successor to the victim

The criminal procedure legislation provides for two ways and possibilities to recognize a person as a victim. First, where relevant grounds exist, a prosecutor issues a decree recognizing a person as a victim. Second, a person who believes that an offence caused physical, material or moral damage to him/her, may apply to the prosecutor for the issuance of a decree recognizing him or her as a victim. In both instances, the prosecutor grants the procedural status of a crime victim to an individual. The same possibility is extended to the next of kin of the victim of a murder. In such a case, a next of kin of the deceased is given the rights and obligations of a victim and the procedural status of a successor to the victim. In addition, in the case of a crime committed against a legal person, all the rights and obligations of victim are granted to the person equipped with the authority of representation. If the state is a victim in the case, the interests of the state in criminal proceedings are defended by a prosecutor as a public prosecutor.[65] However, opinions differ on the latter issue. Namely, since the prosecution is a body for criminal prosecution, and any prosecutor who acts in court as a public prosecutor shall bear the burden of proof for the prosecution, a prosecutor in a criminal case cannot be a person enjoying the status of victim. Therefore, although in a court a prosecutor supports the public prosecution, the legislation does not provide him/her with the possibility to represent the interests of a victim in criminal proceedings or/and to enjoy the rights granted to a victim. Consequently, in cases where state bodies suffered damage from a crime, the prosecution must recognize the state as a victim. Although the Criminal Procedure Code does not separately provide for the participation of the state as a victim in an investigation or court trial, the legislation also does not envisage the possibility for cases that give the rights and obligations of a victim to a prosecutor.[66] Thus, when the state is a victim, it is reasonable to grant the rights of a victim to a representative of that concrete state agency that suffered or allegedly suffered damage, in other words, as in cases of crimes committed against legal persons.

Interestingly, the criminal procedure legislation does not specify material, moral or physical damage. However, the dispositions of crimes provided in the Criminal Code envisage possibilities of causing damage and types of damage and therefore, for identifying damage a prosecutor must pay attention to the object of a crime.[67] For example, in the case of theft or burglary, damage is caused to the assets and or property of individual.

In any case, the recognition of a person as a victim requires certain procedures. A prosecutor issues a decree on his/her own initiative, or upon the filing of the relevant application, on recognizing a person as a victim or as a legal successor of the victim. If a prosecutor does not satisfy the application within 48 hours after it has been filed, the person in question may appeal the decision to a superior prosecutor and, in cases of especially grave crime, appeal the decision of a superior prosecutor to a court. Interestingly, a prosecutor sometimes does not take any decision to either

65 Tumanishvili G., in the book: Comment on the Constitution of Georgia, editor: G. Giorgadze, as of 1 October 2015, Tbilisi, 2015, 219.

66 Report of the Public Defender of Georgia, The Situation in Human Rights and Freedoms in Georgia, 2013, 150.

67 Makharadze A., Concept of damage and problems of recognizing a person as a victim, the Justice magazine, №1, Tbilisi, 2009, 56-57.

satisfy of deny an application, but in practice, such an approach is regarded as the refusal to recognize a person as a victim or a successor of the victim.[68] According to a decision of the Tbilisi City Court, "although the procedural document, which is envisaged by the Criminal Procedure Code and the legality of which must be considered by the court, is not available, the court must consider this complaint in order to prevent the neglect of the rights provided in the criminal procedure legislation for a successor of victim, including the right to appeal a decision of a prosecutor on the refusal to recognize a person as a successor of the victim." As regards the term for the appeal of a decision to a superior prosecutor, Article 95 of Chapter XIII on general rules for the review of motion and appeal provides the possibility for the appeal of a prosecutor's decision and specifies the term of 10 days for filing an appeal after the appellant learns about the decision. Thus, although the legislation does not lay down any special regulations for the appeal to a superior prosecutor, general norms and terms may be applied.

It should be noted that the legislation does not set any standard for the recognition of a person as a victim, but specifies appropriate grounds as a criterion for recognizing a person as a victim. It is of course necessary to set a standard for defining/recognizing a person as a victim. This should be done at the initial stage of an investigation because if a prosecutor decides to stop the investigation or not to institute criminal proceedings, a person without a procedural status of victim will not have the possibility to appeal such a decision. It is also necessary for victims to be properly involved in criminal proceedings from the very start. Therefore, a reasonable interpretation of the provision requiring appropriate grounds for recognizing a person as a victim is important in order to ensure that victims are not prevented from using their minimal rights due to the refusal of a prosecutor to recognize them as victims or successors of victims.[69] The earlier a victim of crime is able to engage in criminal proceedings, the greater the possibility that he/she defends his/her rights.[70] According to an opinion expressed in legal literature, a person becomes a victim the moment the offence is committed against him/her and, therefore, when criminal proceedings are instituted that person must be simultaneously recognized as the victim.[71] According to a commonly held position, for a person to be recognized as the victim, relevant evidence is required which would indicate "with sufficient probability" that the damage was caused as a result of the crime; this, consequently, provides sufficient grounds to assume, when taking a decision on recognizing a person as the victim, that moral, material or physical damage was caused as a result of the crime.[72] If an assumption about recognizing the person as a victim proves wrong, the legislation provides a prosecutor with the possibility to abolish the decree on the recognition of a person as the victim.[73] In a one case concerning a

68 Tbilisi City Court decision №3/8106, 22 April 2015.

69 Report of the Public Defender of Georgia, The Situation in Human Rights and Freedoms in Georgia, 2013, 213-219; also see a special of the Public Defender of Georgia, Practice of Investigation of Alleged Crimes Committed by Law Enforcement Officials, Regulations and International Standards on Effective Investigation, Tbilisi, 2014, 60; Report of the Public Defender of Georgia, The Situation in Human Rights and Freedoms in Georgia, Tbilisi, 2014, 345-349; Report of the Public Defender of Georgia, The Situation in Human Rights and Freedoms in Georgia, Tbilisi, 2015, 552-562.

70 Makharadze A., Concept of damage and problems of recognizing a person as a victim, the Justice magazine, №1, Tbilisi, 2009, 60, 63.

71 Paliashvili A., There is a need for a brand new criminal procedure code, the Justice magazine, №10-11, Tbilisi, 1992, 28.

72 Makharadze A., Concept of damage and problems of recognizing a person as a victim, the Justice magazine, №1, Tbilisi, 2009, 62-63.

73 Article 56 of Chapter VI of the Criminal Procedure Code of Georgia.

premeditated murder, when the sister of the deceased demanded recognition as the successor of the victim, the Tbilisi City Court noted that the absence of an accused person in the case was not a circumstance that could impede the recognition of a person as the victim. It ruled that the prosecutor's refusal to recognize that person as the successor of the victim was unfounded and virtually deprived the person of the possibility to enjoy the rights granted to her under the law.[74]

Thus, the refusal to grant a status of the victim/successor of the victim due to the failure to identify an offender or an offence, also without such substantiation, will be a misinterpretation of effective legislative provisions and a wrong approach to the issue.[75]

3.2. Involvement of a victim in criminal proceedings

After being recognized as a victim, a person acquires certain rights and obligations by which he/she defends his/her legal rights and interests. The interest of a victim is to have the crime against him/her investigated properly, the true offender identified, an offence correctly and adequately evaluated and finally, a correct and fair decision taken.[76] When a crime is committed, it is in the interest of the victim and society that the offender is punished.[77] This facilitates not only the effective and adequate compensation of damage, but also the satisfaction of the victim's sense of justice, an illustration that the state is willing and motivated to defend his/her rights and is not indifferent to his/her problems.[78] Fair criminal justice includes the rights of not only accused persons but victims too. However, Georgia lacks sufficient legal and institutional framework and this creates problems in terms of victims' access to justice.[79]

3.2.1. Reading case materials and making their copies

The 2014 legal amendments enabled victims to read materials related to the criminal case, unless it would contradict the interests of the investigation.[80] The law allows them access to the materials at least 10 days before the preliminary hearing.[81] Being aware of case materials enables a victim to be properly informed about various details of the ongoing proceedings. Interestingly, the refusal to allow victims to read case-related materials on the ground that it contradicts with the

74 Tbilisi City Court decision №3/8106, 22 April 2015.

75 Report of the Public Defender of Georgia, The Situation in Human Rights and Freedoms in Georgia, 2013, 213.

76 Decision of the Constitutional Court of Georgia on the case *Citizens of Georgia Khatuna Shubitidze v Parliament of Georgia,* №1/8/594, 30 September 2016, II-10.

77 Tskitishvili T., For the issue of application of punishment, Collection of works dedicated to 75th anniversary of Guram Nachkebia, Tbilisi, 2016, 132.

78 Decision of the Constitutional Court of Georgia on the case *Citizens of Georgia Khatuna Shubitidze v Parliament of Georgia,* №1/8/594, 30 September 2016, II-10.

79 OSCE/ODIHR, Trial Monitoring Report Georgia, Warsaw, 2014, 12-13, §9; 131-145, §251-287

80 Subparagraph H of Paragraph 1 of Article 57 of the Criminal Procedure Code of Georgia.

81 Subparagraph J of Paragraph 1 of Article 57 of the Criminal Procedure Code of Georgia.

interests of the investigation provides ample room for interpretation and thus there is a risk that an incorrect and deficient practice could be established. Therefore, a refusal by the prosecutor must be specific and based on clear grounds. On the one hand, the position of the investigative authorities must be unambiguous so a victim understands why he/she has been refused access to case materials. On the other hand, such a restriction must be necessary and proportionate to the aim pursued, in order to avoid creating an impression of bias and subjectivity.[82] It is important that apart from reading case materials, victims have the right to make copies of them. Sometimes victims need case materials to defend their rights by other means too. In particular, the absence of case materials is a hindrance in applying to the European Court of Human Rights to challenge a protracted or/and ineffective investigation. Also, victims might want to file a complaint on the compensation of damages with a civil court and to this end they need case materials in order to pre-plan their strategies and evaluate the effectiveness of the action. Although the handover of case materials to victims contains certain risks, for example, the disclosure of personal data, this risk can be reduced by blacking out such data or obligating victims not to disclose information about the investigation, as specified in Article 104 of the Criminal Procedure Code of Georgia.

Thus, on the one hand, it is important for a prosecutor to base his/her refusal to grant a victim access to read case materials on concrete reasons. On the other hand, if a prosecutor thinks that giving the victim access to the case materials does not contradict the interests of the investigation, the victim must be provided with a legal possibility to make copies of these documents.

3.2.2. The right to receive information on criminal proceedings

A victim has the right to be informed of the progress of the investigation and court hearings of the case.[83] In particular, upon the request of a victim, the prosecutor must inform him/her in due time about the place and time of the following procedural actions: the initial appearance of the accused in a court; the preliminary hearing; hearing of the case on the merits; hearing of a plea bargain; the sentencing hearing; and the appellate or cassation hearing. Also, upon request, a victim may obtain information on the measure of restraint applied against the accused, and information concerning the accused/convicted person's release from a penitentiary facility, unless this creates a risk for the accused/convicted person.[84] It is worth noting that after the 2014 legislative amendments, the burden to request information is now on the victims. Before that it was mandatory for a prosecutor to inform victims, even without their request, about hearings.[85] Thus, the legislative amendments worsened the situation in regard to the right of a victim to be informed. Victims often lack the possibility to monitor criminal proceedings and properly understand the sequence and specifics of relevant procedures as they are mainly ignorant of the criminal procedure legislation. Therefore, this legislative wording creates a serious risk that victims will not receive information on

82 Report of the Public Defender of Georgia, The Situation in Human Rights and Freedoms in Georgia, Tbilisi, 2014, 351-352.

83 Article 58 of the Criminal Procedure Code of Georgia

84 Subparagraph I of Paragraph 1 of Article 57 of the Criminal Procedure Code of Georgia.

85 Article 58 of the Criminal Procedure Code of Georgia as of 25 January 2014.

the stages of criminal proceedings. Consequently, informing victims should not be dependent on the initiative of victims; rather it must be specified in the law as an obligation of a prosecutor to notify victims in advance about various procedural actions, as it was defined in the Criminal Procedure Code prior to the 2014 amendments.

Victims must believe and have an expectation that they are not neglected by the state. This may be achieved by providing as much information as practicable on the stages of the investigation or court hearing.[86] Such an approach will be more conducive to opening the crime because if victims feel irrelevant, they may not cooperate with law enforcement agencies and the system, which is dependent on citizen participation, would function less effectively as a result.[87]

3.2.3. The right to appeal

Victims enjoy a restricted right to appeal the individual decisions of a prosecutor. According to Paragraph 5 of Article 56 of the Criminal Procedure Code, if a prosecutor does not satisfy the application of a person to be recognized as a victim within 48 hours after it has been filed, the person in question may apply once to a superior prosecutor to be recognized as a victim or a legal successor of the victim. If, after issuing a decree on the recognition of a person as a victim, it is established that there are no appropriate grounds for such recognition, the prosecutor shall annul that decree and inform the victim about this in writing. A victim may appeal this decision to a superior prosecutor too. With regard to this right, it is important that a victim has the right to appeal a prosecutor's decision to terminate an investigation or/and criminal prosecution. Pursuant to Articles 106 and 168 of the Criminal Procedure Code, in case the decision is taken to terminate an investigation or/and criminal prosecution or not to institute criminal proceedings, the prosecutor shall, within a week after such decision, submit a copy of the decree to the victim. After that a victim may appeal a decree of the prosecutor to terminate an investigation and/or a criminal prosecution or not to initiate criminal proceedings to a superior prosecutor.

In all the above cases, the decision of the superior prosecutor shall be final and it may not be appealed. However, as a result of the 2015 legislative amendments, a victim may appeal the decision of the superior prosecutor, who has not satisfied the victim's request, to a court when the investigation concerns a particularly serious offence. A court shall then deliver a judgement on the appeal of the person/victim within 15 days, with or without an oral hearing, and this decision cannot be appealed.

The Constitutional Court of Georgia indicates that victims must have a possibility to control and monitor state bodies. In some instances, the prosecution may act arbitrarily, show incapability or negligence and therefore, fail to effectively defend the victim. Sometimes the prosecutor is not properly motivated to fully investigate all circumstances related to a crime. This may be caused by

86 Reddy P., Role of the Victim in the Criminal Justice Process, Student Bar Review, National Law School of India University, 2006, Vol 18 (1), 6; http://bit.ly/2r5LFbS [20.09.2017].

87 Welling S., Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision, Arizona Law Review, 1988, Vol 30, 92-93; http://bit.ly/2rEXnZo [20.09.2017].

a workload or lack of understanding. Bearing these factors in mind, the risks of mistakes in criminal proceedings, which may harm the interests of victims, always exists.[88]

It is ambiguous what a victim should do when, for example, he/she believes that the termination of the criminal prosecution by the prosecutor was totally unlawful and unsubstantiated and that there are clear signs of offense in the action of this person.[89] In separate cases, the absence of a control lever on decisions of the prosecutor is a provocation by itself, encouraging negligence and improper approach to the case. The system must be effective, enabling the review of the soundness of decisions on opening or not opening criminal prosecution as well as other decisions taken during the process. In this regard, the review of the lawfulness of investigation acts by means of appealing to a court, in order to exclude or minimize instances of negligence or mistakes on the part of prosecutor, particularly important.[90] Although a victim is not the subject of criminal prosecution him/herself, by using this right he/she tries to defend his/her rights.[91] To control the administration of justice, a victim must be given the legal possibility to appeal decisions taken by the prosecutor on the refusal to prosecute or terminate a criminal prosecution.[92] Court oversight is the strongest and most effective way to force the prosecutor to use his/her discretionary power in an objective and impartial way.[93] This will be an additional lever for victims to prevent unlawful acts by the prosecutor.[94]

Will granting the right of appeal to victims on all crime categories lead to overwhelming the courts? In one case, the Constitutional Court indicated that the development of alternative or additional procedures may lead to some costs and an additional load on court resources, but according to the standards established by the Constitutional Court, any difficulty of general administrative nature which may arise in case of an appeal cannot become the grounds for the restriction of the right to appeal to a court.[95] The threat of overburdening the courts may arise in the courts of appeal, as there are only two such courts in the country—in Tbilisi and in Kutaisi. However, given that such cases will be resolved in lower courts and no longer be appealed to higher courts, there is no danger of overburdening the courts of appeal. The law provides for the possibility to consider, in lower courts, a complaint of a victim without an oral hearing,[96] therewith sparing it from the threat

88 Decision of the Constitutional Court of Georgia on the case *Citizens of Georgia Khatuna Shubitidze v Parliament of Georgia,* №1/8/594, 30 September 2016, II-41.

89 Benidze V., Criminal procedure legislation eneds further improvement, Issues of Law, Collection of works dedicated to the 70th anniversary of Roman Shengelia, Tbilisi, 2012, 533.

90 Decision of the Constitutional Court of Georgia on the case *Citizens of Georgia Khatuna Shubitidze v Parliament of Georgia,* №1/8/594, 30 September 2016, II-50.

91 Meurmishvili B., Institution and implementation of criminal prosecution in criminal proceedings (on the investigation stage), Tbilisi, 2015, 280.

92 Tumanishvili G., Victims in modern criminal procedure law, Law Journal, №2, Tbilisi, 2009, 84.

93 Decision of the Constitutional Court of Georgia on the case *Citizens of Georgia Khatuna Shubitidze v Parliament of Georgia,* №1/8/594, 30 September 2016, II-50.

94 Chkheidze I., Victim's right in criminal proceedings, the Justice and Law magazine №2 (37), Tbilisi, 2013, 123-124.

95 Decision of the Constitutional Court of Georgia on the case *Citizens of Georgia Ilia Chanturaia v Parliament of Georgia,* №2/2/558, 27 February 2014, II-46.

96 A judge delivers a judgement on the appeal of the victim with or without an oral hearing, Criminal Procedure Code as of May 2017, Paragraph 7 of Article 56, Paragraph 1^1 of Article 106, Paragraph 2 of Article 168.

of overburdening. Although the granting of the right of appeal to victims limits public interests — the prevention of overburdening the courts —the restriction of the public interests is not of such a scale that it may paralyze courts. Given that a complaint of a victim will not go beyond the activity of lower courts, the balance between public and private interests will be maintained.

CONCLUSION

Thus, a number of shortcomings that hinder victims from effective and full engagement in criminal proceedings have been identified. On the path towards the Europeanization of Georgia's legislation and practice, it is important to maximally adjust the country's criminal procedure to meet EU standards. Despite the significant amendments to the criminal procedure legislation made in 2014, which have improved the protection of victims' interests, deficient and ambiguous norms remain. These make it difficult for the victims of crime to fully and effectively defend their rights. Besides, granting certain privileges to victims must not imply the reinstatement of the status of a party to proceedings. Thus, the rights of victims must be extended, but not through limiting the rights of the defense and strengthening their subjective influence on criminal proceedings. It is important to allow victims to engage in criminal proceedings from the very initial stage of investigation and grant them the procedural status of a victim/successor of a victim. If a person, having applied to the prosecution to open an investigation into damages suffered by him/her, were to be granted a status of victim at this stage, he/she would be guaranteed the possibility to implement his/her procedural rights.[97] Recognizing a person as a victim is linked to the use of the rights guaranteed by the constitution. In particular, a victim has the right to obtain information about the investigation and court hearings, including about the measure of restraint applied against the accused, and the accused/convicted person's release from a penitentiary facility. All this serves the aim of protecting his/her interests, life and health. However, the receipt of this information is the right of a victim and a person cannot use it unless he/she is granted the status of a victim/successor of a victim. One of significant shortcomings resulting from the 2014 legislative amendments is the change of the wording of the provision, which made the receipt of information about criminal proceedings dependent on the victim's initiative. This attitude needs to be changed so that information about court hearings is provided not upon the request of the victims, but as an obligation of the prosecutor to notify victims about the place and time of court hearings in due time, as it was before the 2014 amendments. Failure to properly inform victims may affect their ability to fully use their rights. Uninformed victims may fail to use important rights such as the right to be informed of the place and time of court hearings, to provide information about sustained damage to the court during court hearing, et cetera.

97 Makharadze A., Concept of damage and problems of recognizing a person as a victim, the Justice magazine, №1, Tbilisi, 2009, 62.

It is also important that victims fully use their right to appeal to a court and have the right to appeal the prosecutor's decisions on all categories of crime. The fact that victims do not have the right to appeal in cases of less grave or grave crimes runs counter to Paragraph 1 of Article 42 of the Constitution and deprives individuals of the possibility to apply to a court for the protection of their rights and freedoms.

The elimination of all these shortcomings will notably improve the situation with the protection of the rights and interests of victims. Moreover, granting these rights to victims will not restrict the interests of the defense of the accused; will not impede the establishment of the truth; and will not undermine the effectiveness of the existing model of criminal proceedings.

Tamar Shavgulidze, Mariam Kutaladze

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 19thcentury, 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.

* The work was submitted to CLR Summer 2018.
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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 evisaged 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 II[6] 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 Police[11] 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. Götzt, 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. Götzt, 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, Besoonderes 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. Götzt, 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 body[15] 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, თანამდეროვე 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 Code[23] of Georgiashall 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 acriminal 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 officially 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 Poliziei, Abteilung Gießen, 19.

26 Ibid.

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

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

29 Doppelfunktionalität – kein Rechtswegwahlrecht des Bürgers, LAW Aktuell 08/12 ÖR,BayVGH, Beschl. vom 5.11.2009, Az. 10 C 09.2122, juris = BayVBl 2010, 220. ob :BVerwGE 47, 255/264f., 655 BayVGH NVwZ 1986, and 540 VGH Baden-Württemberg NvwZ-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. Götzt, 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 tothe principle of proportionality.

37 R. Tsipelius, Science of Legal Methods, Tenth Edition, Translation of Levan Totladze, Ed: MerabTurava, 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 thereduction 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: 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. Götzt, 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 wellbeingof 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 caseabove, 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 peoplein 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 სანივთო 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 shots 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 probability[56] 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 (ბ. 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 riskfor 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 withlow 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. ფუტკარაძე, 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 Gogichaishvili 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. ტუღუში, 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 opposingrallies wereorganized 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 thestate 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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ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: OBJECTIVE NECESSITY OR ATTEMPT TO RECONCILE THE INCOMPATIBLE?

THE OPINION 2/13 OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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ABSTRACT

The enactment of the Lisbon Treathas enabled the European Union to start negotiations on accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms as a collective member. The agreed draft agreement was submitted to the Court of Justice of the European Union, which was to address the issue of the draft's compliance with the founding treaties of the European Union. Contrary to expectations, the Court of Justice issued a negative opinion on December 18, 2014, in fact blocking the process of EU accession to the Convention. This article examines the reasons why the EU has sought to accede to the Convention and provides a detailed analysis of the arguments put forward by the EU Court in support of its position.

Key words: *Human rights, Court of Justice of the European Union, Opinion 2/13, European Convention for the Protection of Human Rights and Fundamental Freedoms, Draft Agreement on Accession, European Court of Human Rights.*

On 18 December 2014, the Court of Justice of the European Union (hereinafter the Court of Justice, CJEU) delivered an opinion 2/13 on the compatibility of the draft accession agreement (hereinafter, Draft Agreement, DAA) concerning the accession of the European Union to the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention, Convention) with the Founding Treaties of the European Union (hereinafter, Treaties). The Court of Justice found that the Draft Agreement did not comply with the primary law of the Union.[1]

It's hard to say that the negative opinion of the Court of Justice was not predictable. Notwithstanding the fact that the Court of Justice and the European Court of Human Rights (hereinafter, European Court, ECtHR) have treated each other respectfully and almost made it a rule to rely on each other's decisions in recent years, the ambition of the supreme judicial body of the EU to maintain independence from the Strasbourg Court is obvious. Opinion 2/3has become one ofthe mosthigh-profilerulings of the CJEUpartly because of the importance that Member States attach to the EU's accession to the Convention and partlydue to the difficult negotiations, which lasted more than two years.[2]However, the actual reason should be sought in the arguments put forward by the CJEU and in the nature of its criticism. As Strasbourg University and European College (Bruges) Professor Jean-Paul Jacquèobserves, the Court of Justice, in fact, went up against all 48 member states of the EU, which unanimously supported the Draft Accession Agreement.[3]

This present paper consists of two parts. The first part provides background and describes those basic objectives, which should have been accomplished by the accession of the EU to the Convention. It also provides a brief description of the Draft Agreement. The second part deals with the Opinion 2/13itself. The author assumes that his readers are well aware of the main phases of EU development, the legal basis of its functioning and main issues of EU law.

1 Basically, it combines the norms of the Treaties, general principles of the EU law. Unofficial translation of Founding documents of the EU (Treaty on European Union-TEU, Treaty on the Functioning of the European Union (TFEU) and also Charter of Fundamental Rights of the European Union, which is legally equal to the Treaties) into Georgian language can be found in: Legal Basis of the Functioning of the European Union: Fundamental Acts and Comments, Irakli Papava (Tbilisi, 2017):170-287; ირაკლი პაპავა, ევროპის კავშირის ფუნქციონირების სამართლებრივი საფუძვლები: საბაზისო აქტები და კომენტარები (თბილისი, 2017): 170-287.

2 The first round of negotiations was held in July 2010. Version of the draft agreement to be submitted to the Court of Justice was approved on 5 April 2013.

3 See, Jean Paul Jacquè, „Non la Convention des droits de l›homme? ", Droit de l›Unioneuropéenne. http://www.droit-union-europeenne.be/412337458 (30/06/2018).

I. ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Discussions among law experts and politicians on the idea of the EU accession to the Convention actively started in the late 1970s. Although, it should be noted that, as early as 1951, after creation of the European Coal and Steel Community, the first attempts were made to bring this successful project of economic integration closer to another European project being implemented within the Council of Europe at that time. Today, few people know that the documents developed in the beginning of the 1950s to create the European Political Union contained comprehensive norms on the protection of human rights and freedoms. The authors of the initiative did not need great inventors' minds: without further "coquetry", theysimply insertedthetext of the European Convention of Human Rights and Freedoms in the founding documents of the European Political Union despite the fact that one of the leaders of the European integration, France, did not consider ratifying it until 1974.[4] As for accession of the EU (then European Community) to the Convention,the European Commission first announced the goal in the late 1970s, after France, which was actually the last among the EU states to ratify the Convention and acknowledge the binding jurisdiction of the European Court of Human Rights.

In 1979, the Commission of the European Communities adopted the memorandum "On the Accession of the European Communities to the European Convention for Protection of Human Rights and Fundamental Freedoms," by which the Commission officially proposed a council to accede to the Convention.[5] The memorandum acknowledged the Convention as a founding act, which "had power for strengthening authority and structure of the European Communities".

In 1994, the Council of the EUdecided to turn to the Court of Justice (then the Court of European Communities) tohear its opinion. In its opinion2/94, adopted on 28 March 1996,[6] the CJEU heldthat the Community had no competence to accede to the Convention undertheprovisions ofTreaties that were in effect at that time. In its opinion, relevant changes needed to be made to the Treaties in order to make accession possible. As a result, member states opted for developing their own charters (hereinafter Charter) of human rights. Although the Charter adopted on 7 December 2000 did not have clear legal status or a full legal effect, it was nevertheless used actively first by advocates general[7] and later, when a treaty establishing European Constitution failed, by the Court of European Communities.

4 See: Búrca G. de, „The Road Not Taken: The EU as a Global Human Rights Actor", American Journal of international law, Vol.105. N4 (2011):649–693.

5 See: Memorandum betreffend den Beitritt der EuropäischenGemeinschaftenzurKonventionüber den Schutz der Menschenrechte und Grundfreiheiten, Bulletin der EuropäischenGemeinschaften, Beilage 2/79, vom 4. April 1979.http://aei.pitt.edu/6356/4/6356.pdf (14/06/2018).

6 See Gutachten 2/94 des Gerichtshofs, vom 28. März 1996, ECR I-1763.¬https://eur-lex.europa.eu/resource.html?uri=cellar:3645916a-61ba-4ad5-84e1-57767433f326.0003.02/DOC_2&format=PDF(18/07/2018).

7 Advocates general are independent official persons in the Court of Justice. Their status in some cases are equal to those of the judges.

As a result of the enforcement of the 2007 Lisbon Treaty, the Charter became legally binding for European institutions as well as MemberStates, in which fell under the Charter in the process of implementation of EU law. In contrast to the Convention, the Charter contains a longer lists of rights (for example, rights to integrity, to asylum and to the freedom of the arts and sciences) including those rights which have been granted by establishing the citizenship of the Union. The Article 52 (pa.3) of the Charter states that the rights of the Charter that correspond to the rights guaranteed by the Convention should have the same meaning and scope as those laid down in the Convention.

However, the Member States were well aware that in the context of the increasing activity of the CJEU in the sphere of human rights, this provision would have fewer opportunities to avoid inconsistencies between practices of two courts, that of Luxemburg and Strasbourg. Which is why a provision on the EU accession to the Convention as a collective body was included in Lisbon Treaty simultaneously with granting the Charter a legal force. The Article 6 (pa.3) of the Lisbon version of the agreement (Treaty on the European Union) stipulates: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Accession to the Convention could have increased possible legal protection for individuals from the actions of the EUinstitutions by means of external review.[8] At present, control is exercised indirectly: although individuals cannot bring action against EU acts, they can charge the states that implement the acts. For example, in the case *Matthews v the United Kingdom*[9] the ECtHR found that Great Britain had breached its obligations under the Article 3 of the Convention (right to free elections) by not ensuring the holding of elections to the European Parliament on the territory ofGibraltar. But we also should take into consideration that in another case, *Bosporus Airways v Ireland*,[10] the ECtHR found that EU law offered protection of human rights at a level equivalent to that of the Convention. Consequently, member states implementing the EU law would be found in breach of their obligations within the limits ofthe jurisdiction of the ECtHR only if protection guaranteed by the Convention was manifestly deficient (inappropriate.)[11] The logic of this approach might be explained by the fact that the Council of Europe, from the very beginning, sought closer relationships with the EU as an organization with which it had commonvalues. Furthermore, the potential difficulties,whichmight be encountered by the EU Member States if they have to choose between violations of their obligations occurred within the limits of the EU or Council of Europe, were also taken into account. We may assume, if the EU accedes to the Convention it will not enjoyan advantageous position and its actions will be subjected to strict review, as are other states' actions. On

After the Court's hearings, where they participate, they submit their objective, impartial and grounded opinions to the Court. However, advocates general do not participate in the process of consideration and adopting the Court's decisions (the author's note).

8 See a detailed rationale and relevant arguments (practical benefit) for the EU accession to the Convention, in Irakli Papava, "The EU and Human Rights" („ევროკავშირიდაადამიანისუფლებები"), Georgian Journal of European Studies, №1 (2015): 147-150; Irakli Papava, Legal Basis of the Functioning of the European Union: Fundamental Acts and Comments, Irakli Papava (Tbilisi, 2017):170-287; ირაკლი პაპავა, ევროპის კავშირის ფუნქციონირების სამართლებრივი საფუძვლები: საბაზისო აქტები და კომენტარები (თბილისი, 2017): 170-287.

9 See, Appl. N24833/94, Matthews v. the United Kingdom, Judgment of 18 February 1999, ECTHR 1999-I.

10 See, Appl. N45036/98, Bosphorus Hava Yollari Turizmve Ticaret Anonim (Bosphorus Airways) v. Ireland, Judgment of 30 June 2005, ECTHR 2005-VI.

11 See, par.156 of the judgment.

the other hand,accession will enhance the protection of individuals' rights, as it will become easier for individuals to make a complaint against potential violations of the EU.

There is no denying that while consideringEU accession to the Convention, the states took into consideration international politics. Having in mind how often the EU uses political conditionality[12]in the international arena, accession to the Convention would have enhanced the legitimacy of the EU in deliberations on the protection of human rights along with other states; furthermore, it would have enabled the EU to become an actual "legal union "further strengthening its democratic nature.[13]

Further explanations of the conditions for the accession of the EU are laid down in the 8th Protocol to the Treaties.[14] To be exact, the 8th Protocol specifies a requirement for the preservation of EU law and its specific characteristics, which should be expressed, on the one hand, in granting the EU special conditions for participation in the control bodies of the European Convention and, on the other hand, in creating necessary mechanisms to ensure that the proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate. The Accession Agreement should not affect the competences of the Union and the powers of its institutions,as well as thespecific situation of Member States in relation to the Convention, its protocols, the measures taken by Member Statesderogating from the Convention in accordance with Article 15 of the Convention. The Accession Agreement should also not affect reservations to the Convention made by Member States in accordance with Article 57 of the Convention.

As for the Convention, after the enforcement of the Protocol14 (1 June 2010), a new paragraph 2 was added to the article 59 (on the grounds of the 1st paragraph of Article 17) stating that, "the European Union may accede to this Convention." Initially Article 59 covered the issue of the states' participation and signatures. The said paragraph of Article 59 prepared normative groundwork for the EU's accession. Negotiations onthe AccessionAgreement started in July 2010.

The Court of Justice, aware of its responsibility, delivered a document[15] on the very first phase of developing aDAA, where it summed up its own views and opinions concerning accession. The Court emphasized that the EU should accede to the Convention with different conditions rather than those required from individual Member States. It particularly indicated the importance of the preservation of the autonomy of the EU law and its specific characteristics as laid down in the 8th Protocol. In this respect, while assessing its interactions with the ECtHR, the Court of Justice under-

12 When the EU requires certain criteria to be met by a country for accession, respect democratic values. Often the requirements are laid down in the agreement text; level of cooperation depends on assuming political responsibilities by partners.

13 See: Problems of Accession of the EU to the Convention of Protection of Human Rights and Fundamental Freedoms; Voskresenskaia (ВоскресенскаяЛ. А., „ПроблемыприсоединенияЕвропейскогоСоюзакЕвропейскойконвенциипозащитеправчеловекаиосновныхсвобод", Международноепубличноеичастноеправо, N3 (60) (2011): 4)

14 Official title: Protocol (No 8); Releating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of human Rights and Fundamental Freedoms.

15 See Reflexionspapier des Gerichtshofs der Europäischen Union zubestimmtenAspekten des Beitritts der Europäischen Union zurEuropäischenKonventionzumSchutz der Menschenrechte und Grundfreiheiten. Luxemburg, den 5. Mai 2010. https://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_de_2010-05-21_08-58-25_999.pdf (19/03/2018).

lined that "the Union must make sure that external control over EU actions is preceded by effective internal review by the domestic courts of the member states and/or of the Union." Besides, the CJEU maintained its absolute jurisdiction over deciding the invalidity of the Union's legal act: "That prerogative is an integral part of the competence of the Court of Justice, and… must not be affected by accession (to the Convention)." With the aim of preserving the system of judicial protection, the Court of Justice indicated thepossibility to allow the ECtHR to decide on the conformity of the Union's legal actswith the Convention should be ruled out without the court's prior decision on that point (paragraph 9). In its opinion, a mechanism should be created that which would make it possible to examine effectively the validity of the Union act/actions at the CJEU before the ECtHR rules on compatibility of the said act with the Convention (paragraph 12).

Actually, this unusualand delicate situation encouraged both courts to make unprecedented steps. On 21 January 2011 they delivered a joint communication,[16] which emphasized the importance of the EU accession to the Convention for the development of human rights and fundamental freedoms.

It seemed the parties hadreached the end of the road. But while drafting the agreement, the EU Member States found themselves in serious disagreement with each other regarding some of its provisions and the UK also voiced important remarks. For a while, the process came to a haltat the EU level. Later, after some amendments were inserted in the draft, the process resumed. In June 2013 the draft agreement was ready. The final version of the project[17] specifies that the EU should have its own judge in the European Court[18] and its representative in the executive body, the Committee of Ministers. According to the draft agreement, the main characteristic of the status of the EU is its very limited responsibility: the EU will be responsible only for the acts of its institutions, bodies, offices (agencies), for example, in competition law for a decision made by Directorate-General for Competition of the European Commission.[19] Besides, if the action has been committed by a Member State, even when implementing EU law, responsibility for the action rests with the Member State and not with the EU.[20] This provision aimed at ensuring theautonomy of EU law and avoiding the potential expansion of EU competence to the detriment of Member States.[21]

In order to compensate for potential inequality, the draft agreement allows the EU to become a co-respondent, if it deems it appropriate, together with a Member State. Thus, EU instituions are guaranteed that their views on problems related to EU law will be heard by the European Court. However, there is a risk of finding the EU in violation of the Convention. Nevertheless, Member

16 See, Joint communication from Presidents Costa and Skouris, January 24, 2011.https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf (18/07/2018).

17 See, final draft accession agreement, full version; https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf (14/06/2018).

18 It should be noted that a concept of national judge operates in ECTHR. This ensures participation of that country's judge in proceedings, against which application is lodged. However, they remain independent in hearings on substance.

19 See, Draft Agreement, art 1(par.3)

20 See, Draft Agreement, art 1(par.4)

21 This could have happened if the ECTHR had demanded from the EU to carry out certain measures in situation where the EU institutions were not equipped with relevant competences.

States also can participate as co-respondents in hearings of complaints against the EU.Finally, in the course of complaining against the EU, in order to protect therule of exhaustion of domestic remedies, DAA requires the exhaustion of EU legal procedures (complaint on validity, which is filed with the Court of Justice or complaint against EU law indirectly through national courts).In cases where the EU is a co-respondent, proceedings can be stopped to enable the Court of Justice to assess the lawfulness of the EU act/measures and deliver its opinion (at present this procedure does not exist in EU law.)[22]

It was obvious from the very start thatthe Draft Agreement would face considerable challenges on its path to approval. First, all 47 states of the Council of Europe had to ratify it. Second, under Article 218 of the Treaty on the Functioning of European Union (TFEU), the Committee of Ministers is authorized to take such/similar decisions unanimously and only after European Parliament's approval. Besides, considering the strict wording of the 8th Protocol, appealing to the CJEU for its opinion on the compatibility of the Draft Agreement with the Convention, had become obligatory (if not decisive) for the accession agreement to enter into legal force.

Consequently, immediately after the draft agreement was completed, the European Commission officially asked the CJEU to deliver its opinion on the compatibility of the DAA with the provisions of the 8thprotocol. In May 2014, the CJEU held a two-day public hearing where EU Council and European Parliament supported the Draft while theMember States also provided a level of support. Influential Advocate General of the CJEU Juliane Kokot also backed the draft. In June 2014, she submitted her comprehensive view to the CJEU.[23]

II. OPINION 2/13 OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Under Article 218 of the TFEU, the Court of Justice is authorized to assess the compatibility of an international agreement with the norms of primary EU law upon request from the EU, its institutions or any of its Member States. In its Opinion 2/13, the CJEU tried to determine[24] whether the draft agreement jeopardized the basic characteristics of EU law and whether it complied with the mandatory conditionsset out by the EU for accession (by the 8th Protocol). The CJEU did not start with examining each paragraph individually. Instead, after a brief description of the Draft Agree-

22 See, Draft Agreement, art 3(par.6)

23 See, Stellungnahme der General anwält in Juliane Kokott, Gutachtenverfahren 2/13. vom 13. Juni 2014, ECLI:EU:C:2014:2475. http://curia.europa.eu/juris/document/document.jsf?docid=160929&doclang=DE(19/03/2018).

24 See, Gutachten 2/13 des Gerichtshofs (Plenum),vom 18. Dezember 2014, ECLI:EU:C:2014:2454.http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=DE(18/07/2018).

ment, it analyzed seven main topics, which may become serious problems after it has been signed. Let us examine the CJEU's arguments.

1. Primacy of EU Law

In the beginning of its opinion, the CJEU states that conferring powers of supervision per se over the acts of the EU on the external judicial body (ECtHR), the decisions of which would be binding for the Union, is not incompatible with EU law. It is logical that interpretations of the Convention by the ECtHR will be binding for the CJEU. Besides, the ECtHR should not be empowered to question the conclusions made by the CJEU regarding the scope of EU law, particularly if it is related to whether a Member State is required to protect fundamental rights and freedoms of the EU.

This is because Article 53 of the Convention allows contracting parties of the Council of Europe to establish higher standards of protection of fundamental rights than those guaranteed by the Convention. At the same time, according to the judgment of the CJEU in "Meloni" case,[25] a state cannot avoid the implementation of EU law on the pretext that its domestic legislation offers higher level of protection than that guaranteed by the Charter of Fundamental Rights. Consequently, the CJEU concludes that there are no appropriate (binding) provisions in the DAA that would determine the scope of the application for Article 53. In fact, the CJEU fears that Member States of the EU would be able to apply Article 53 of the Convention to circumvent their obligations under EU law that in turn may put at risk its specific characteristics, namely primacy and effectiveness.

However, even a small number of supporters of the Opinion 2/13 agree that fear of the CJEU in this paragraph is grounded on a wrong (incorrect) interpretation of Article 53 of the Convention. Although, Article 53 allows contracting parties to establish higher standards of protection than those guaranteed by the Convention, no one forces them to do so. Consequently, the EU faces no obstacles in establishing higher standards of protection through the Charter of Fundamental Rights. In this situation, it is important to ensure that minimum standards established by the Convention are met. For this purpose, the Charter has a special provision[26] stating that the rights guaranteed under the Charter, which correspond to analogous rights guaranteed under the Convention,should be interpreted according to ECtHR case law. Hence, Article 53 of the Convention in no way can serve as a pretext for Member States to violateEU law, particularly when there is a CJEU clear case law concerning this issue.

25 See, a judgement in *Stefano Melloni v. Ministerio Fiscal*, Case C-399/11, Judgment of 26 February 2013.

26 See, Charter of Fundamental Rights of the EU (Article 52 (3).

2. Principles of Sincere Cooperation and Autonomy of the EU Law

Concerning the area of freedom, security and justice, the CJEU states that under the principle of sincere cooperation applied in the EU, a Member State does not have the right to mandate another state it ensure protection of human rights at a higher level than demanded and recognized by the EU law. Besides, there is a presumption of equivalent protection of human rights throughout the EU. Consequently, if there are no exceptional circumstances, the states may not check whether other Member States have observed the standards of protection under EU law. Otherwise, the principle of sincere cooperation is destined to be violated. In the opinion of the CJEU, the Draft Agreement insufficiently provides for the autonomy of EU law, which requires from the states to observe certain "rules of the game." The EU is ready to accede to the Convention provided that the autonomy of EU law is respected in accordance with 8th Protocol to the Treaties.

Unlike the preceding paragraph, here the CJEU points to an actual problem. Despite the fact that the CJEU does not explicitly refer to ECtHR case law, it apparently in mind the judgment of the Grand Chamber of the ECtHR in the case *Tarakhel v Switzerland*.[27] The ECtHR found Switzerland in violation of Article 3 of the Convention for expelling Afghan refugees to Italy without carrying out mandatory inspection whether living conditions in Italian refugee reception centers werecompatible with the standards set out in the Convention. However, as a prominent expert in jurisdictions of Strasbourg and Luxemburg courts,S. Douglas-Scottobserves, it is an attempt on the part of the CJEU to strengthenthe principle of autonomy at the expense of human rights.[28] Indeed, Article 67 (first-par.) of TFEU states, "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights…" Hence, notwithstanding the great importance of mutual trust, it should not jeopardize fundamental human rights, particularly in such a sensitive area as freedom, security and justice, and should not in any way replace the fundamental values of the EU.In this respect, the Opinion of CJEU appears somewhat one-sided. In theory, there is room for political compromise between the EU and its Member States. If the EU demands respect for mutual trust from a state, the latter can be assured that the EU will participate as a co-correspondent in proceedings against the EU and will assume responsibility in cases of possible violations on its part. At the same time, this will enable the EU to carry out more comprehensive control over fulfillment of obligations by its Member States. Italy and Greece showed justhow unprepared they were to handle biggest influx of refugees through the Mediterranean.

27 See, Application N29217/12, Tarakhel v. Switzerland, Judgment of 4 November 2014.

28 See, SionaidhDouglas-Scott, „Opinion 2/13 and the "Elephant in the Room": A Response to Daniel Halberstam", Verfassungsblog ON MATTERS CONSTITUTIONAL, entry posted March 13, 2015, http://www.verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam/ (18/07/2018).

3. Protocol No. 16to the ECHR

In its Opinion, the CJEU reveals potential problems related to the enforcement of Protocol 16 of the Convention, which will enable supreme courts and tribunals of High Contracting Parties to turn to the ECtHR foran advisory opinion on the interpretation and application of the Convention and its Protocols in the context of cases pending before them at national level.

The CJEU fears the supreme courts of the Member States might prefer this instrument to preliminary ruling procedure under EU law. When interpreting the EU law or deciding on the lawfulness of EU acts, the supreme courts of the Member States can turn to the CJEU in order to obtain, and in some instances they are required to obtain, its preliminary ruling (the main difference between these two instruments is that a ruling by the CJEU is binding for national courts). In this case, under provisions of the DAA,the ECtHR would have been required to suspend the hearing and allow the CJEU to express its own opinion. Although, as the CJEU notes in paragraph 198 of its Opinion, Member States' courts will still have the possibility to circumvent a preliminary ruling procedure, which is a keystone of EU law.

As Advocate General Juliane Kokot justly observes in her view on the DAA, this problem has a quite clear solution,stipulated in paragraph 3 of Article 267 (3) of the TFEU. The paragraph requires that the supreme courts of the Member States turn to the CJEU for a preliminary ruling when they come across the interpretation issue of EU law. Since the provisions of the Treaties take precedence over national law and international agreements ratified by the Member States (including the Convention), any attempt by the courts to circumvent Article 267 would be a violation of the Treaties.[29]It would likely have been sufficient if the CJEU had clearly commented on this aspect without asking for additional amendments to the DAA. Finally, it should be noted, that the enactment of Protocol 16 (1 June 2010) will in any case rise this issue regardless of whether the EU joined the Convention or not.

4. EU monopoly over Dispute Settlement

One important characteristic of EU law is the monopoly of the CJEU over inter-state disputes as well as disputes related to the interpretation of EU law. According to Article 344 of the TFEU, Member States are required to decide disputes concerning the interpretation or application of the Treaties using only those means that are provided for in the Treaties. The Court of European Communities confirmed this monopoly in a judgment in MOX case,[30] where it found Ireland in breach of the sincere cooperation principle. The CJEU notes that inasmuch as Article 33 of the Convention allows High Contracting Parties to bring inheritance disputes to the ECtHR, accession to the Conven-

29 See, Advocate General JulianeKokot's View, paragraph 141, ECLI:EU:C:2014:2475.

30 See, a judgment in C-459/03, Commission v. Ireland, Judgment of 30 May 2006.

tion of the EU would enable the EU Member Stateto avoid requirements of Article 344 of the TFEU and bring a case to the ECtHR against another Member State or the EU itself.

As was the case with Protocol 16, the CJEU is addressing a hypothetical problem, asthe DAA does not principally forbidbringing inheritance disputes to other international courts, and it does not disapprove of the application of Article 344 of the TFEU. As the Advocate General points out in her opinion, in the case of a breach of sincere cooperation and an infringement of Article 344 of the TFEU, the European Commission is equipped with all the necessary means/methods (complaint onnon-fulfilment of obligation and preliminary ruling procedure) to stop infringement proceedings and bring the state before the court. Consequently, in her view, there is no need to make additional amendments to the text.[31]

5. Co-respondent mechanismfor the EU or Member State.

The EU Accession to the Convention must havebrought an end to thesituation where only Member States may be charged with violations of the Convention while implementing EU law. Under the Agreement, where an application is directed against a state, the EU may become a co-respondent to the proceedings. Similarly, when an application is directed against the EU, Member States may become co-respondents to the proceedings. The main problem revealed by the CJEU is that such involvement in the proceedings is not automatic under the Agreement, since it is subjected to a preliminary review by the ECtHRin respect to rationale and expediency. In fact, it will produce a situation where the ECtHR examines the distribution of competences between Member States and institutions, which is an exclusive prerogative of the CJEU.

In this respect, the CJEU's arguments look consistent and credible, as there is a risk that decision made by the ECtHR would affect the division of competences within the EU. We believe an optimal solution to the problem would be the addition of relevant amendments to the text of the Agreement as well as the addition of automaticity to the participation of the co-respondents in the proceedings. Abuse of this procedure is less risky: unlike the third parties in the proceedings, the co-respondents are charged not only expenses; they also face thepossible risk of paying a considerable amount to a victim against their will. Another solution might be if the ECtHR demanded from the CJEU to submit its opinion on the participation of the co-respondents in the proceedings. This procedure would have been an expression of the subsidiarity principle and, apart from that, it would have enhanced mutual trust between the ECtHR and CJEU.[32]

31 See, Advocate General JulianeKokot's View, paragraph 118, ECLI:EU:C:2014:2475.

32 See, КириллЭнтин, „ПрисоединениеЕвропейскогоСоюзакЕвропейскойКонвенциизащитеправчеловекаиосновныхсвобод: анализЗаключенияСудаЕС 2/13", СравнительноеконституционноеобозрениеN3 (106) (2015): 88.

6. Mechanism for Prior Involvement of the Court of Justice

As the CJEU states, the (procedure) mechanism for prior involvement[33] enables the proceedings before the ECtHR be suspended, giving the CJEU thepossibility to express its opinion on the authenticity/validity of an EU legal act. However, this possibility is not envisaged for instances, when the Strasbourg Court decides onan interpretation (not authenticity) of a legal act. This claim is hard to discuss particularly when the drafters of the Agreement provide official comment explaining this paragraph.

As Professor Jacque puts in, it isa purely technical element, which can easily be corrected in the text of the Agreement[34] or, as Peter Jan Kuijper suggests, the EU and Council of Europe can make a common statement on the interpretation of the said paragraph.[35] In any case, the CJEU did not need this "vagueness" to add to its arguments in favorof theincompatibility of the Agreement with EU law.

7. The Common Foreign and Security Policy(CFSP)

The CJEU decided to leave one of the mainproblems to address in thefinal stage of its Opinion. Its key claim to the DAA was that theCommon Foreign and Security Policy area (CFSP) was not removed from the ECtHR jurisdiction.Even though the Lisbon Treaty abolishedformal division in three "pillars," theCFSP has maintained a range of specific characteristics until now. In the first place, the role of supranational institutions (Commission, Parliament and CJEU) was reduced to minimum levels, while interstate institutions weremoved forward. Mechanisms for making decisions are also different: all decisions are made based on the unanimity rule.Like many characteristics of EU law, a principle of direct effect is not applied to this area.

The CFSP, in fact, is beyond the control of the CJEU albeit with two exceptions. First, the CJEU is empowered to examine whether a legal act to be adopted really belongs to the CFSP area. Second, the CJEU is authorized to checkthe legality of sanctions against individuals adopted by the EU. The logic of the CJEU is simple: its own jurisdiction in the CFSP area is limited. Consequently, the external judicial body (the ECtHR) will be authorized to consider a range of legal acts to be adopted by the EU without giving the CJEU the possibility to check the legality of these acts in advance. In the opinion of the CJEU,this situation creates a threat for the specific characteristics of the CFSP area.[36] How-

33 In German: Das Verfahren der Vorabbefassung; In English: The procedure for the prior involvement.

34 See, Jean Paul Jacqué, „Non la Convention des droits de l'homme?", Droit de l'Unioneuropéenne. http://www.droit-union-europeenne.be/412337458 (30/06/2018). See, Jean Paul Jacqué, „Non la Convention des droits de l'homme? ", Droit de l'Unioneuropéenne. http://www.droit-union-europeenne.be/412337458 (30/06/2018).

35 Kuijper P.J., „Reaction to Leonard Besselink's ACELG Blog", The BlogactivBlog, entry posted January 6, 2015, http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks%E2%80%99s-acelg-blog/ (21/07/2018).

36 In addition, it should be noted, that all acts of the EU related to European arrest warrant, asylum policy, illegal migration, which have been widely critisised by the ECtHR currently belong to the CFSP area.

ever, Advocate General Kokot directly indicates in her view that the fact that CJEU is not empowered with oversight over the EU in the CFSP area is not an obstacle because it is compensated by national courts with relevant competences[37].

Definitely, the limited jurisdiction of the CJEU in the CFSP area is an internal problem for the EU. It is not a relationship problem between the EU and ECtHR. In fact, the ECtHR does not have any difficulties in thejudicial review of decisions made in this area. The ruling adopted in the case Bosporus Airways v. Ireland[38] confirms that. Irishauthorities impounded anaircraft leased by a Turkish company toa Yugoslavian company under the community regulation in CFSP, which concerned the implementation of the UN Security Council resolution against Yugoslavia. The ECtHR found that transferring sovereign powers to supranational level does not absolve the states from their responsibility under the Convention.

Consequently, the ECtHR has the possibility to review fullythe acts adopted by the EU in this area even without the Accession Agreement. Furthermore, responsibility will be imposed on thestates, whichwillplace them in a disadvantageous position: they will have to violate either EU law or Convention. In this regard, a text of the Accession Agreement does not worsen the EU position. Onthe contrary, it enables anEU representative to defend the position of EU institutions before the ECtHR. It will therefore increase the likelihood of favorable results for the EU. Thus, the CJEU's reasoning in relation to this paragraph contains elements of political "blackmail." It requires the extension of its jurisdiction as a necessary condition for accession. The other option, namely consent of the Council of Europe on the removal of the CFSP area from its jurisdiction, looks unrealistic. During negotiations, representatives of the European Commission raised this issue but they met flat refusal from the Council of Europe.

III. CONCLUSION

The Opinion, delivered on 18 December 2014,became anunpleasant surprise for the coming year for the ECtHR and European Commission as well as those 24 states which supported the DAA during hearings at the CJEU.

Opinion 2/13 of the CJEU definitely makes a bad impression. With its structure and assertive tone,it resembles a guilty verdict more than a court's decision.It is surprising how harshly the CJEU analyzes thecompatibility of the DAA with the Convention; paragraph after paragraph it reveals all

37 See, Advocate General JulianeKokot's View, 96-103 paragraphs, ECLI:EU:C:2014:2475.

38 (38. See, Application N45036/98, BosphorusHavaYollariTurizmveTicaretAnonim (Bosphorus Airways) v. Ireland, Judgment of 30 June 2005, ECtHR 2005-VI).

potential problems. The CJEU decided to ignore the possibility of solving many of the difficulties by applyingthe mechanismsthat already exist in EU law, preferring instead to modify the DAA text.

Thus, the CJEU turns a blind eye on themain unique feature of the Agreement: accession to the Convention is not the wish of the EU, rather it is a legal requirement that is stated in Article 2 of the Lisbon Treaty on the European Union and consequently, it is a provision of EU primary law. Furthermore, the Opinion makes it obvious that the EU institutions have different approaches concerning this article. For the European Commission, the obligation of accession to the Convention is most important element in this Article, while the CJEU believes accession is not a goal in itself and the protection of specific characteristics of EU law should be of the utmost importance. Consequently, if the specific characteristics cannot be preserved, accession should be taken off from the agenda.

Without question, accession to the Convention should not endanger specific characteristics of EU law. That is whyProtocol8 to the Treaties stipulates special reservation. However, as Thomas Streinz[39] justly observes, the aim of this constitutional court is to find a legal solution in a situation when it deals with competing constitutional norms (in this case, mandatory accession and the preservation of the unique characteristics of the EU and EU law) so that both provisions are effectively protected. In this regard, Opinion 2/13 looks strangely one-sided. The CJEU interprets specific characteristics of EU lawtoo broadly, such as, autonomy, and does it to the detriment of the accession obligation, without any effort to find a compromise.

Advocate GeneralJuliane Kokot interprets provisions of the Agreement as maximally compatible with the Treaties. She takes into consideration not only the "word for word" meaning of provisions but also the intent of the drafters. In result, although she too finds some problems in relation to compatibility, she believes they are not fundamental and can be easily removed. These findings led her to conclude that the Agreement, although with some reservations, is compatible with EU law.

It can be said that two significant aspects (or circumstances) influenced the negative opinion of the CJEU:

First, the CJEU fears that the EU's accessionto the Convention puts its independence at risk. This assumption is based on the fact that after accession, the EU will be equally positioned on one level with other Contracting Parties and, once all domestic remedies (within the EU final internal court instance is the CJEU) are exhausted, its legal acts will fall under ECtHR jurisdiction. In this situation, relations between the two courts will shift from coordination to marked subordination. Although, the Convention has never protected economic and social rights throughout its entire existence (that is, the rights which are central for the functioning of the Union and which will be more likely violated by the EU), only a small number of cases pending before the CJEU will moveto the ECtHR (cases concerning protection of human rights and freedoms) if the EU joins the Convention, one fact is more than obvious: the CJEU was not ready (consequently, it did not have any desire) to subject

39 See, Thomas Streinz,The Autonomy Paradox, Verfassungsblog ON MATTERS CONSTITUTIONAL, entry posted March 15, 2015, https://verfassungsblog.de/the-autonomy-paradox/(21/07/2018).

itself to anothercourt's (ECtHR) jurisdiction and external review.To some extent, this willcause the "externalization of internal problems."[40] This position is in line with a frequently cited viewpoint of a former Advocate General at the CJEU, A. Toth. In his words, there is no theoretical or practical substantiation tojustifymovingthe CJEU to the jurisdiction of another court,which may (and should) be regarded only as equal and not superior, and which at the same time represents a gradually diminishing number of non EU-states."[41]

Second, in the context of the CJEU's present roles of protection and judicial review, and taking into account the significance of human rights for the EU, any defeat in the ECtHR will be very painful for the EU since defeat may compromise its image in this sphere. Consequently, the CJEU will found itself under seriouspressure and it will be forced to change its approaches in numerous spheres.[42]As a rule, the opinion of the CJEU is binding for EU institutions. Thus, before longthe European Commission will have to return to negotiations with a package of proposals envisaging the wishes of the CJEU. In this respect, stances taken by other Contracting Parties will be interesting. One thing is obvious: if adding specifications to the preliminary participation mechanism and conceding to the EU participation as a co-respondent in the proceedings are not against the interests of other Contracting Parties, concessions in relation to any other paragraph will place the EU in an advantageous position (particularly it can be said about the idea of theremoval of acts adopted in the CFSP area by EU institutions from the control of the ECtHR). It should be taken into account that it is the EU that is interested in accession to the Convention and not the Council of Europe. In this respect, a realistic solution to the problems identified by the CJEU would be to review the texts of the Treaties (includingaddition of clarifications in relation to extension of the CJEU jurisdiction and Protocol N8 to the Treaties) and not addition of exceptions to the text of DAA. However, since a review of the Treaties is notplannedin thenear future,EU accession to the Convention appears to be postponed for an indefinite period.

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40 See Florian A. Zeitner, „Die Zukunft der Menschenrechte in der Europäischen Union – EMRK-Beitritt der EU (vorerst) gescheitert!?", Der Bevollmächtigte des Rates - BüroBrüssel, Europa-Informationen N148,https://www.ekd.de/bevollmaechtigter/bruessel/newsletter/99139.htm (19/07/2018).

41 TothA.G.,„The European Union and Human Rights: the Way Forward", Common Market Law Review, Vol.34, N3 (1997): 491–529.

42 Энтин К.В.,„Присоединении Евросоюза к ЕКПЧ", Московский журнал международного права, N3 (87) (2012 июль-сентябрь): 115.

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