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**Koba Kalichava***

# Europeanization of Georgian Administrative Law from the European Integration Point of View - Experience of the Past and Future Perspectives

*The process of Europeanization of Georgian administrative law is a phenomenon, emerged in the period of independence of the country. It comprises main phases before and after the Association Agreement. In spite of the fact that the Association Agreement imposes certain obligations of reforms of the legal system on Georgia, Europeanization processes of law considered within its limits must be distinguished from the Europeanization phenomenon of the law systems within the formal borders of the European Union. This difference on its own requires working out a really functional strategy of the reform of the Georgian administrative law (Europeanization), within the limits of which it will be clarified the possibility of the successful reception or transplantation of European law experience in the Georgian legal system, which is a purpose of the present article.*

*Europeanization of administrative law, phases of Europeanization of Georgian administrative law, Association Agreement.*

## 1.''Europeanization'' as a Missionary Goal of the Reform of Georgian Administrative Law and Reception/Transplantation of Foreign Law as a Means of Achievement of this Goal

### 1.1. Why "Europeanization"?

In connection with sharing of foreign experience in the Law field in Georgian legal literature there is often discussed the reception of the European law (mostly in relation to Private Law[1]), harmonization of the Georgian legislation with the European Law (generally in relation to Law[2]) or Europeanization of Georgian Law (from the point of view of sectorial Administrative Law,[3] as well as of Private Law[4]). Though in relation to Administrative Law an argumented discussion about which phenomenon must be accentuated has not been done yet. Observing the dynamics of the development of the modern Administrative Law in Georgia, which will be discussed later, we will conclude that at a missionary level it will be right to talk only about "Europeanization". The point is that

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1 *Zoidze B.,* The Reception of European Private Law in Georgia, Tbilisi, 2005, 5 (In Georgian); *Burduli I., (ed.),* The Development of Modern Georgian Entrepreneurial Law (Main Aspects of the Reform), Tbilisi, 20116, 14 and etc. (In Georgian).

2 *Samkharadze I.,* Harmonization of Legal Systems: The European Union and Georgia, Ivane Javakhishvili Tbilisi State University Press, "Law Journal", # 1, 2015, 314 (In Georgian); *Surmava L.,* Conformity of the Georgian Legislation with the Legislation of the European Union in State Aid, Tbilisi, 2012, 17-60 (In Georgian).

3 *Kalichava K.,* Strategic Aspects of the Legislation Reform of the Georgian Environment Protection, Ivane Javakhishvili Tbilisi State University Press, "Law Journal", # 1, 2012, 118 (In Georgian).

4 *Chanturia L.,* Die Europäisierung des georgischen Rechts – bloßer Wunsch oder große Herausforderung?, in: RabelsZ, Bd. 74, 2010, 154 ff.

the reform of the modern Georgian administrative law from the very start was going in parallel with the European integration processes. According to the facts the first codification of the administrative legislation (1999) was directly connected with the integration of Georgia into European structures. Then the categorical condition of the Council of Europe for the membership of Georgia in the European Union - to adopt administrative legislation appropriate with the principles of the democratic legal state – was in full compliance with the national interests of Georgia and the political will of the country. So the reform was successfully carried out. Since 2014 within the Association Agreement a missionary effect of European integration on the development of the Georgian administrative law has become deeper and more systematic.

### 1.2. Definition of the Role of the Reception/transplantation of European Law

The reception/transplantation of European Law in Georgia (in the sense of supranational as well as of national) is a means of Europeanization. From the point of view of the development of Georgian Administrative Law we must differentiate from each other, on the one hand, Europeanization as an invariable missionary goal of the reform or those values, which Georgia is striving to and, on the other hand, the reception/transplantation of European Public Law as a means of achieving this goal (or Europeanization).[5] As it will be discussed below, the first phase of Europeanization was characterized with both as reception, as well as transplantation features. It is true that these two forms of transfer of the foreign law differ from each other;[6] however I think that a very strict line must not be put between them. Anyway events in the society's legal life in any country might be developed in such a way that a norm created as a result of the reception (which is being established together with the national identity) later might become unacceptable for a concrete political and socio-economic situation, but a norm created as a result of the transplantation (which is being established in detachment from the national identity) later might be turned into an inseparable part of the legal system of the country.

## 2. Europeanization as a Capability of Performing Internal (National) Constitutional Obligations and Admissible Scopes of Europeanization

### 2.1. Europeanization not as a Goal in Itself

Europeanization of the Georgian administrative law is not a goal in itself. In the first place it serves to the performance of the obligations stated by the Constitution of Georgia. If we believe *Fritz Werner's* thesis, that "Administrative Law is the concretized constitutional law",[7] then this link becomes clear in itself. It was already mentioned above, that in a democratic and social-legal state administrative public administration (and its regulating administrative legislation) has functions of providing, regulating, protecting, serving main rights and democratic guarantees. In everyday life realization of these functions (common and private) is done by means of administrative legislation. Sharing of the European legal experience in this field, in the focus of which man is meant as a main value, has only a positive effect on the increase of the protection, control and stability standard. It is obvious that in the conditions of the constitutional identity protection it only favors the realization of those thoughts of a legislator, which are meant in the most common constitutional norms.

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5 It should be noted that a conformist definition of the norm, reception, approaching, within the scope of the European Union, can be explained as a means of getting a goal of Europeanization of legal regulations of the member-states, see *Zuleeg M.,* Deutsches und Europäisches Verwaltungsrecht – wechselseitige Einwirkungen, VVDStRL, 53, 1994, 165 ff.

6 About the difference between the reception and transplantation in detail see *Bregvadze L.,* The Theory of the Autopoietic Legal Culture: Law Transfers and Legal Self regulation in a Global Society, Tbilisi, 2016, 155-163 (In Georgian).

7 *Werner F.,* Verwaltungsrecht als konkretisiertes Verfassungsrecht, DVBl, 1959, 527-533.

### 2.2. Constitutional Framework of Europeanization

The Europeanization processes of the Georgian legal regulation must not jeopardize the state sovereignty of the country and constitutional identity. In connection with it a constitutional court of Germany has interesting decisions, the standard of which must be used more strictly in relation to Georgia, as to a non-member state of the European Union. The constitutional court of Germany states the acceptable scope of influence of European Law on National Law. The court clarifies that the European Union is a unity of sovereign states and the national legislative authority must be responsible when transferring European legislation into the national legislative space, so that the sovereignty principle will not be humiliated.[8] According to the court "the issue of formation of the country belongs to the management of member-states and people", namely "The European Union, which is a contractual link of the sovereign states, is inadmissible to be carried out in such a way, that member-states will not have enough space for defining their economical, cultural and social politics"[9]. So the constitutional court puts an absolute and untouchable limit to the obligation of maintaining the "constitutional identity".[10] These approaches are shared by the constitutional court decision of 2010, in which the court clarifies that if the "interference" in the EU competence is not seen obviously enough and if the act "interfering" in the competence brings on its own important positive structural changes for the member-state, then the competence disturbance can't be stated.[11]

## 3. Main Motivators of Development of the Modern Georgian Administrative Law

### 3.1. Georgian Administrative Law in the Period of the Soviet Totalitarism and Legal Nihilism

As it is known the Soviet system was characterized with legal nihilism and primacy of politics[12] that was having a negative influence on the sphere of public management and its regulating administrative legislation. The activities of the socialist "state governing apparatus" were defined not by laws, but by politics stated by the dominant class (communist party).[13] As Law was identified with "the will of the dominant class", administrative decisions were also taken by the transmissive rule, namely, the will of the communist party was transferred to the state governing apparatus as a directive to be executed, which was fulfilled by the "staff" promoted by the party nomenclature.[14] According to the communist doctrine the state and law were discussed as an instrument of realization of the "historical mission", socialist ideology.[15] Considering also that capital (as well as social) building, industrial activity, socialist trade and service "were totally discussed as the spheres of public administration",[16] which were completely monopolized by the state, we can logically conclude that in that period in a classical sense there was not left any reasonable space for the development of Administrative Law (accordingly either for its Europeanization). So the Soviet administrative law had only one purpose – it was not "law, regulating legal

8 BVerfGE 123, 267 ff. (Ultra-Vires-Lehre).
9 BVerfGE 123, 267 ff. (Ultra-Vires-Lehre).
10 BVerfGE 123, 267 ff. (Ultra-Vires-Lehre).
11 BVerfGE 126, 286 ff. (Ultra-vires-Kontrolle).
12 About the legal nihilism in the Soviet period, see *Gamkrelidze O.*, Fighting for a legal state, Tbilisi, 1998, 3-28 (In Georgian); About Primacy of politics, see *козлов ю.м.,* Советское административное право, Москва, 1984, 16-17; Старосьцяк Е., правовые формы административной деятельности, М., 1959, 68.
13 *Eremov Gr.,* The Soviet Administrative Law, Tbilisi, 1967, 6 (In Georgian).
14 *König K.,* Moderne öffentliche Verwaltung, Berlin, 2008, 151.
15 *Eremov Gr.,* The Soviet Administrative Law, Tbilisi, 1967, 6 (In Georgian).
16 *Kalichava K.,* Control of Environment Protection Activities basing on the example of immissions protection law (comparing Georgian, German and European laws), Tbilisi, , 2016, 37 (In Georgian).

relations between the state, as a legal entity and individuals and economic units, but was an organizational law“.[17]

### 3.2. Real Opportunity of Development of Administrative law in the Post-Soviet Period

In a classical sense the real opportunity of development of the Georgian administrative law arose only in 1991 after breaking up of the Soviet Union and gaining independence by Georgia. According to Professor G. Winter's estimation “After the great political changes of that time the political will turned out to be stronger, the structures must be established by a completely innovative conception – in kind of a democratic legal state with social market economics.“[18] The Constitution of the 24th of August of 1995 from the very start created a strong normative base for this obliging Georgia to establish such administrative legislation, which in the conditions of the system of the authorities distribution and the market economics would adequately define functions of providing main rights, order, protection, service and democratic guarantees, which results from the constitution of any democratic country.[19] By the European Convention for Protection of Human Rights, ratified by the Parliament in 1999, the above mentioned constitutional obligations were raised to the international obligation rank and this way its importance was made much stronger. Just in “this open normative space” the outer factors of the reform began acting, which were creating (and are still creating) a voluntary base of the reform (Europeanization) of the Georgian administrative law, but within the scope of the Association Agreement - its normative base.

## 4. The First Phase of Europeanization of the Modern Georgian Administrative Law

### 4.1. The Context of the First Phase (about “self-limitation”)

The first phase Europeanization of Georgian administrative law starts from the period of gaining independence by Georgia, when Georgia took active steps for the purpose of integration into the European structures. Events in this direction developed fast. In 1993 the country asked the Council of Europe for a “special guest” status. In 1996 the Partnership and Cooperation Agreement (PCA) was drawn up between the parties, by Article 43 of which was defined a general obligation[20] of legal approximation. In 1997 the Parliament adopted a regulation “About Harmonization of the Legislation of Georgia with the Legislation of the European Union“,[21] according to which all the laws and normative acts subjected to the law must have been in compliance with the standards and norms stated by the European Union. The purpose of this “self-limitation” made by Georgia was raising the political and international prestige but really it was not performed; of course it was impossible for “all the normative acts” to be in compliance with the European standards. Neither Member-States of the EU have a similar obligation. However in that period because of such a political will there were adopted normative acts, which were answering the goals of the above mentioned self-limitation and so they will be remained as good examples in the history of the administrative law reform.

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[17] *Winter G.,* Development of Administrative Law and Legal Consultation on the example of Georgia, as a transitional country, Journal “Administrative Law”, #1, 2013, 68.

[18] Ibid.

[19] Functions of Public Management in Democratic Legal State, see *Sommermann K. P.*, Public Management in Social and Democratic Legal State, see *Khubua G., Sommermann K.P. (ed.),* Legal Foundations of Public Management, Tbilisi, 2016, 18-40.

[20] By that time it implied satisfaction of those minimal criteria, which were inevitable for Georgia to become a member-state of the EU. Just after satisfaction of these criteria on the 27th of April, 1999 Georgia became the 41st member of the European Union.

[21] <https://matsne.gov.ge/ka/document/view/38704>.

## 4.2. Reform of General Administrative and Administrative Procedural Legislation ("Rudimentary" Europeanization)

The start of Europeanization of the Georgian administrative Law is connected with the idea of creating general administrative and administrative procedural codes. For its part this idea was coming from the Council of Europe, which in 1997 as a pre-condition for membership of Georgia defined the legislative regulation of public management in accordance with the principles of a democratic legal state.[22] On the performance of this international obligation there was also the internal political will, anyway it seemed so from "outside".[23] The guarantee of carrying out the reform successfully was also preparing the project of administrative and administrative procedural codes, which were based on the experience of different western administrative law order (Germany, Holland, partly the USA), on the basis of which Georgian legal norms were formed (about administrative proceeding, forms of activities of an administrative authority, legal confidence, state responsibility, administrative complaint, protection of the right by the rule of court and etc.).[24] Though, despite lots of changes the necessity of the reform of these codes even after 16 years is of high priority,[25] the main European line, which was defined correctly from the very start, now a talk will be of its perfection. Thus what was begun as transplantation and in that reality seemed strange, today has turned into reception and become an organic part of the Georgian legal system.

## 4.3. Reform of the Sectoral Administrative Legislation (mostly "random" Europeanization)

The process of approximating the sectoral administrative legislation with the western experience was mostly spontaneous. At the beginning of the 90s because of market economics, privatization, entrepreneurship freedom and a new politics of the managing sector Georgia had to create a new legislation regulating different fields.[26] As in that period our country was carrying out reforms almost in all directions,[27] many norms from the western experience were "involuntarily" introduced in haste. The point was that because of the lack of market economic experience our country began to "adopt blindly" most part of foreign legislative acts, which was followed by some part of the western experience brought over recklessly. The example of this was "Best Available Technology-BAT", which appeared in some laws of environment protection, however, since it was a norm carried over by chance, and there were not implemented necessary mechanisms fot starting it up, of course in real life it did not work.[28] The second example is a two-stage system of town planning and accordingly the European conception of banning of building on so called "external territories", which though was avowed in the worked up legislation, by economic and political motivations there were introduced exceptional mechanisms, because of which the

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[22] In detail see *Winter G.,* The Development of Administrative Law and Legal Consultation on the Example of Georgia, as a Transitional country, Journal "Administrative Law", #1, 2013, 69.

[23] Ibid.

[24] Ibid 70 and further.

[25] In 2016 the Ministry of Justice of Georgia and GIZ within the scope of the EU grant started a reform of general administrative and administrative procedural legislation. There was created a workgroup, consisting of Georgian and foreign experts as from an academic, as well as from a practice sphere.

[26] *Winter G.,* Administrative Law Development and Legal Consultation on the Example of Georgia, as a Transitional country, Journal "Administrative Law", #1, 2013, 73 (In Georgian).

[27] Transition from the Soviet system to the post-Soviet system affected almost all the spheres of public life – democratization, development of market structures, development of state structures and others, high quality achievement of which at the same time was impossible, see *Khubua G.,* Modernization of State Management, see Publications of the Institute of Administrative Sciences of TSU, Transformation of Public Management in South Caucasus: experience and perspectives, Tbilisi, 2015, 20

[28] *Kalichava K.,* Control of Permissibility of Environment Protection Activities on the example of the immissions protection law (Comparison of Georgian, German and European Law), Tbilisi, 2016, 136-137 (In Georgian).

existence of a planning conception lost its sense.[29] There were lots of analogous examples in the legislation of that period. Therefore from the very start it needed drastic reform.[30] For this reason the above mentioned process can't be called a really approximating process of the Georgian administrative Law with the western-European experience, it was rather a mechanical process.[31] Though despite this its importance must not be lessened, because these accidentally appeared conceptions and institutes within the scopes of the Association Agreement will give more organicity to the process going on the day of the administrative legislation reform and will simplify the reception process of the European legal experience.

## 5. The Second Phase of Europeanization of the Modern Georgian Administrative Law

### 5.1. Context of the Second Phase (Limitation within the Scope of the Association)

The second phase of Europeanization of the modern Georgian administrative law began on the 27th of June, 2014, when in Brussels between the European Union and Georgia was signed an Association Agreement (AA), which started coming into operation from the 1st of July, 2016.[32] The Association Agreement substituted "The Agreement about Partnership and Cooperation" (PCA) signed in 1996 and created a new legal frame of cooperation between Georgia and the European Union. The Association Agreement belongs to the so called "new generation" agreement and comprises a component of the Deep and Comprehensive Free Trade Area (DCFTA) too, which foresees concrete mechanisms for approaching the European Union. In the preamble of the Association Agreement there is said that parties "are taking obligations to strengthen the respect to the parties' common values, based on the democratic principles of fundamental freedoms, human rights ....the supremacy of law and good management". These principles are also articulated in other articles of the Agreement. There are also given step-by-step and dynamic approaching mechanism. Concrete regulations and directives, the step-by-step implementation of which must be carried out in the Georgian legal system,[33] are represented in special attachments to the Association Agreement. As for the obligation of dynamic approximation it implies already implemented regulations and to represent current changes in the directives made by the European Parliament, also in the current regime, into the Georgian legislation.[34]

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29 It should be noted that such a reform is needed even today, see *Kalichava K.,* "Influence of Georgian Building Law on business freedom", see Materials of the forum of the Administrative Sciences Institute of TSU, Perspectives of Administrative Sciences, #2, Tbilisi, 2016, 37 (In Georgian).

30 *Winter G., Turava P., Kalichava K.,* Analysis and Appraisal of General Norms of Environment Protection (Permisions System, Environment Impact Assessment, damage prevention and compensation, environment planning and eco-audit), Tbilisi, 2009, 11-132 (In Georgian).

31 Such examples of "... transplantation are in great numbers in countries, which are liberated from the totalitarian regime or are in crisis from the point of view of economical growth, where in the euphoria of democratic changes there are introduced the models of legal acts or institutions from the countries of "the developed, democratic, western" world thoughtlessly, mechanically and chaotically" (see *Bregvadze L.,* The Theory of Autopoetic Legal Culture: Law Transfers and Legal Self-regulation in the Global Society, Tbilisi, 2016, 156)

32 Though from 2014 several obligations were already in force, within the frame of which there were worked up different laws and normative acts.

33 Article 417 of the Associated Agreement.

34 Article 418 of the Associated Agreement

## 5.2. Legal Nature of the Associated Agreement and Comparison it to Europeanization in in European concept

The Associated Agreement is an international legal basis of the association (union) based on bilateral rights and obligations, joint tasks and special procedures. Though, it must be noted here that despite the correlativity and reciprocality of rights-obligations, the obligation of approximation of legislation is unilateral in relation to Georgia, implying that only Georgia is obliged to approximate the national legislation to the European standards.[35] In common tasks there are meant taking joint measures for achieving free trade goals, just because of which the Association Agreement has a legally obligatory character.[36] For implementing of these obligations there is an institutional frame, namely in the country there is functioning as vertical (departments subordinated to Prime Minister and the Parliament), as well as horizontal institutional infrastructures (in kind of corresponding Ministries), but on the international level there is acting the Association Council, Association Committee and ssciation subcommittees.[37]

In the European area the term "Europeanization of Law" is used as generally in law science,[38] as well as especially in administrative law science.[39] The Europeanization phenomenon in the field of administrative law became a subject of scientific interest even from the 80s of the XX century and it is natural, that it was being established in parallel with the formation of European administrative law. It's true that the first signs of creation of science of transnational (European) administrative law appeared in the middle of the XIX century,[40] that was connected with the establishment of the association of the international telegraphic and Universal Postal Union,[41] though in its development a crucial role was played by "the greatest legal creation in the world history"[42] – the modern European administrative law,[43] consolidation of which was simultaneously based on mutual influence factors of European and national legal orders.

In the foreword to the first German book[44] in the European administrative law the author admitted that "apart from demonstrating the existed achievements (of that time) in the development of European Law" the most important issue was to ascertain the influence of main principles of the national administrative Law on the EU's Law and on the contrary, the counter-influence of the newborn European Law on the national administrative legal order".[45] Even today in German, French, Italian or English[46] publications the Europeam administrative Law is analyzed from the both above mentioned perspectives or considering as the influence of European legal

[35] See *Samkharadze I.,* Harmonization of Legal Systems: the European Union and Georgia, Ivane Javakhishvili Tbilisi State University Press, "Law Journal;", #1, 2015, 327 (In Georgian).

[36] Ibid, 325.

[37] Articles 404, 407 and 409 of the Associated Agreement.

[38] *Coing H.,* Europäisierung der Rechtswissenschaft, NJW, 1990, 937 ff.

[39] *Sommermann K.-P.,* Europäisches Verwaltungsrecht oder Europäisierung des Verwaltungsrechts?, DVBI, 1996, 889 ff.

[40] *Sommermann K.-P.,* Ziele und Methoden einer transnationalen Verwaltungsrechtswissenschaft, in: *Sommermann (Hrsg.),* Öffentliche Angelegenheiten – interdisziplinär betrachet, Berlin, 2016, 73 ff.

[41] Ibid, 81.

[42] *Sommermann K.-P.,* Europäisches Verwaltungsrecht als „die großartigste Rechtsbildung der Weltgeschichte"?, DÖV, 2007, 859.

[43] *Sommermann K.-P.,* Ziele und Methoden einer transnationalen Verwaltungsrechtswissenschaft, in: Sommermann (Hrsg.), Öffentliche Angelegenheiten – interdisziplinär betrachet, Berlin, 2016, 73 ff.

[44] *Schwartz J.,* Europäisches Verwaltungsrecht, Bd. I und II, Baden-Baden, 1988. In this two-volume set legal materials, which were chaotically scattered before, are gathered and systemized for the first time (see *Danwitz v. Th.,* Europäisches Verwaltungsrecht, Berlin, Heidelberg, 2008, 1).

[45] *Schwartz J.,* Europäisches Verwaltungsrecht, Bd. I, Baden-Baden, 1988, I.

[46] *Auby J.-B., Rochére J. D. (dir.),* Droit administratif européen, 2. ed., Brussel, 2014; *Chitti M. P., Greco G. (dir.),* trattato di diritto amministrativo europeo, 2. ed., Milano, 2007; Craig P., Eu Administrative Paw, Oxford, 2006 (cited *Sommermann K.-P.,* Ziele und Methoden einer transnationalen Verwaltungsrechtswissenschaft, in: Sommermann (Hrsg.), Öffentliche Angelegenheiten – interdisziplinär betrachet, Berlin, 2016 , 76 f.).

norms on the national legislation, as well as from the perspective of the counter-influence of different legal cultures of the Member-States on supranational law.

Thus in the European interpretation Europeanization of Law in the point of view of Eurointegration is a dynamic process of approximation of national and supranational legal systems, which is not a voluntary (political) act, but is more of compulsory (legal) character. Therein, there are distinguished from each other vertical and horizontal influences/interrelations. Vertical Europeanization implies "transformation of national administrative legal order on the basis of the European concept and approaches having a compulsory force and formation process in a new manner",[47] or inevitably conditioned by legal order of the European Union"...process of newly interpretation, substantial changes and replacement of the national administrative Law".[48]

Horizontal Europeanization emphasizes that the influence of the EU Law on Member-States Law is not unilateral, but is basing on bilateral connections.[49] European administrative law was mostly established as a result of dogmatic conceptions and institutions originated in the bosom of the national legal order, which in a unified form are returning to Member-States.[50] At the same time for efficiency of European law a proper support must be appeared in national law that in dynamics is based on such systematic elements of overcoming conflicts between legal orders, as: direct action of European law, reception, approximation, a conformist explanation of a norm by a judge and etc.[51]

## 6. Reform (Europeanization) Strategy of Georgian Administrative Law

### 6.1. Practical Purpose of Comparative law in the Process of Reform and Europeanization of Law Science

Within the frame of the Association Agreement Georgia has taken obligations for implementing such norms, in connection with which it did not have proper experience. In the European integration process the national law reform implicates either origination of new conceptions and institutes or thorough perfection of the existed ones. Therefore unknown norms cannot be implemented successfully without strengthening of the role of comparative law. This method, sprung in the bosom of private law,[52] because of its multifunctional purpose (communication and dialogue between legal cultures, deep comprehension of own legal values, transferring of national law in foreign legal order, harmonization of law[53]), besides its scientific perception from the point of view of the legislative system reform, has a great practical purpose.[54] It is a source of deep changes and creating new legal orders as on national, as well as on supranational level: 1) On the national level a legislator or a judge, which is interpreting a law for the purpose of implementing the right legal practice, foresees the foreign law experience,[55] that is done basing on the own will, with which it differs from the processes of legal transfers caused by the

47 *Schmidt-Aßmann E.,* Die allgemeine Verwaltungsrecht als Ordnungsidee, 2. Aufl., Heidelberg, 2004, 31.

48 *Sommermann K.-P.,* Europäisches Verwaltungsrecht oder Europäisierung des Verwaltungsrechts?, DVBI, 1996, 191.

49 *Danwitz v. Th.,* Europäisches Verwaltungsrecht, Berlin, Heidelberg 2008, 4-7; *Siegel Th.,* Europäisierung des Öffentlichen Rechts (Rahmenbedingungen und Schnittstellen zwischen dem Europarecht und dem nationalem (Verwaltungs-) Recht, Tübingen, 2012, Rn. 69.

50 *Rengeling H.-W.,* Deutsches und Europäisches Verwaltungsrecht – wechselseitige Einwirkungen, VVDStRL, 53, 1994, 217 ff.

51 *Zuleeg M.,* Deutsches und Europäisches Verwaltungsrecht– wechselseitige Einwirkungen, VVDStRL, 53, 1994, 165 ff.

52 In private law the meaning of the comparative method in the early period was conditioned by transnationalization of personal and commercial relations, which only later became relevant in the field of public management, (see *Schwartz J.,* Europäisches Verwaltungsrecht, 2. Aufl., Baden-Baden, 2005, 74).

53 *Kischel U.,* Rechtsvergleichung, München, 2015, 49 ff.; 56 ff.; 63 ff.; 68 ff.

54 *Sommermann S.-K.,* Die Bedeutung der Rechtsvergleichung für dieFortentwicklung des Staats- und Verwaltungsrechts in Eurioa, DÖV, 1999, 1019 ff.

55 *Schwartz J.,* Europäisches Verwaltungsrecht, 2. Aufl., Baden-Baden, 2005, 76.

influence of the colonial regime.[56] As opposed to it the process of voluntary transfer of the foreign law is due to the development of the country, the growth of its international reputation or the will of execution of international obligations;[57] 2) In case of supranational law an inevitable precondition of juristic act is also comparative law, which is conditioned by two circumstances. The first circumstance - by means of comparative law to define what kind of values and principles will be positive within the concrete inter-ethnic unity.[58] The second circumstance – lots of legal institutes of supranational legislation are based on such fundamental principles, which are common for Member-States.[59]

The success of comparative law is connected with internationalization of law science. As modern administrative law "....is mostly a result of breaking of a legal system locked in national-state borders",[60] for reflecting international perspectives it requires Europeanization/internationalization of proper (law) science.[61] In this way proper intellectual resources must be mobilized. For its part it requires creation of a proper infrastructure and a united research area,[62] in which the main role must be played by foreign connections of universities and close international networks of law scientists. It is certain that Europeanization of Georgian administrative law needs "an intellectual law specialist thinking in European manner",[63] which will not be confined in the shell of the national legal culture and provincial legal order and in the process of searching for united transnational legal values is leaving particular legal thinking limits.

## 6.2. Universalistical and Culturalistical Contexts of the Reform

### (Especially Considering Membership Criteria for OECD (Organization for Economic Cooperation and Development))

Europeanization Georgian administrative Law, as a missionary goal, demands reception or transplantation of European legal experience (in which are meant as supranational, as well as national legal systems). Achievement of this goal, or more correctly, capability of achieving the goal for its part is connected with culturalistical and universalistical contexts. According to *the culturalistical context* law is discussed as a part of historical, economical and cultural unity of a concrete state, in the conditions of which successful transfer of the unknown legal order is possible only in the conditions of fundamental reforms of the proper state, which means as political, as well as administrative and legal culture.[64] Authors, who are sharing these approaches of the sociological school of jurisprudence, doubt about a success of law transfer, unless there is the suitable cultural readiness for it. *According to Lawrence Friedman*, "It is impossible for a legal system to play the same role and cause the same results in the life of any other country, as it happened in the original country".[65] Radically skeptical is the following declaration:"The existence of law is possible without a state, but impossible without culture".[66] This last assessment is exaggerated. The point is that there are cases when law has a function of transformation, including creation of new cultural values. If it had not been so, lots of paragraphs of the Association Agreement

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56 *Kischel J.,* Rechtsvergleichung, München, 2015, 49, 67.

57 Ibid.

58 *Schwartz J.,* Europäisches Verwaltungsrecht, 2. Aufl., Baden-Baden, 2005, 77.

59 *Kischel K.,* Rechtsvergleichung, München, 2015, 89 ff.

60 *Wissenschaftsrat (WR),* Perspektiven der Rechtswissenschaft in Deutschlang (Situation, Analysen, Empfehlungen), Hamburg, 2012, 29.

61 Ibid.

62 *Duve Th.,* Internationalisierung und Transnationalisierung der Rechtswissenschaft – aus deutscher Perspektive, Frankfurt a.M., 2013, 7 ff.

63 About conception see *Coing K.,* Europäisierung der Rechtswissenschaft, NJW, 1990, 937 ff.

64 *Sommermann K.-P.,* Erkenntnisinteressen der Rechtsvergleichung, in: Gamper/Verschraegen (Hrsg.), Rechtsvergleichung als juristische Auslegungsmethode, Wien, 2013, 205.

65 *Friedman L.M.,* The Legal System, New York, 1975, 195.

66 *Bregvadze L.,* Autopoetic Law Culture Theory: Law Transfers and Legal Self-regulation in the Global Society, Tbilisi, 2016, 246.

would have been fictional. If there is a political will about reform (transformation), then it is quite possible to accomplish it. The continuance of this judgment is a *universalistical context* of the reform, which is based on argumentation, that any political unity has legal and organizational issues, which enables legal transfer to be carried out without any problem, especially from the point of view of generally acknowledged legal principles (for examples fundamental rights).[67] In practice we have examples of both of them and therefore the truth is somewhere in the middle.[68] Of course transfer of foreign law is successful, when there is readiness, in an individual legal tradition,[69] in such a case the transplanted law goes through refining, perfecting and is transformed into a receptive law, "though there are certain universal values, which are inevitable, if there a political will in any society to create and establish market economics and legal state".[70] A private property guarantee, limitation of public administration based on law and etc. are those universal values, without which the above mentioned goals cannot be reached and once again I will say the same: the key point is a political will.[71] At the same time there are such extreme cases, when there is absolute non-acceptance of a new norm, though it does not mean, that the norm would not work, but it means that in a democratic state public non-acceptance of the norm will be turned into a source of formation/correction of the political will.[72] Even a state of the totalitarian political regime avoids accepting a norm, implementation of which will be connected with great efforts, violence and etc. The more particularistic (not universalistic) the issue is, the harder the obstacles are. So a legislator drawing a right line between these two values gets success.

Thus we must talk about individualistic approaches of law reception, as an exchange process of legal institutions and procedures means not an acculturation process, but a reform of legal institutes in parallel with a transcultural process.[73] Especially must be foreseen persistent (developing) public administrations, which in most cases fall short of expectations, articulated in active legislations. For awarding legal state qualification to the public administration system the acceptation of legislative regulations is not enough, such as for example, modern general administrative code..., It is necessary to add good public administration culture oriented on principles and values".[74] Just in connection with this, within the limits of so called Copenhagen criteria, in OECD report of 2012 („Rethinking Europe's, Rule of Law and Enlargement Agenda: The Fundamental Dilemma") there was emphasized unambiguously by the experts that within the frame of the joining procedure on assessing of a candidate state more importance must be given to the analysis of the socio-economic reality of the state

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67 *Sommermann K.-P.,* Erkenntnisinteressen der Rechtsvergleichung, in: Gamper/Verschraegen (Hrsg.), Rechtsvergleichung als juristische Auslegungsmethode, Wien, 2013, 206.

68 *Winter G.,* Administrative Law Development and Legal Consultation on the Example of Georgia, as a Transitional country, Journal "Administrative Law", #1, 2013, 83 (In Georgian).

69 *Sommermann K.-P.,* Erkenntnisinteressen der Rechtsvergleichung, in: Gamper/Verschraegen (Hrsg.), Rechtsvergleichung als juristische Auslegungsmethode, Wien, 2013, 207.

70 *Winter G.,* Administrative Law Development and Legal Consultation on the Example of Georgia, as a Transitional country, Journal "Administrative Law", #1, 2013, 83-84 (In Georgian).

71 Professor *Khubua G.* fairly mentions that "... A politically neutral law does not exist, no matter how distant from the politics sphere are the relations it is regulating, the fact of acceptance (or non-acceptance) of this law is already a certain politics, as cases represented in a legislative agency, as a result of consensus or confrontation of certain political forces" (see *Tsnobiladze P., Khubua G., Khmaladze V., Metreveli N., Kapanadze O.*, How is law created, Tbilisi, 2000, 43 (In Georgian). About General Interrelations of a Law and Politics, see ibid, 39-46.

72 An example of it is a draft law about hunting of the latest period, on public discussions of which the society society expressed a complete non-acceptance of banning lead-containing bullets (as the weapons acquired by them were not fitted to iron-containing bullets) and banning hunting beyond the hunting territory (because hunters did not want to spend time organizing hunting). The reaction was so cute that the authority had to retreat temporarily and the prepared draft law was put on the shelf.

73 *Sommermann K.-P.,* Erkenntnisinteressen der Rechtsvergleichung, in: Gamper/Verschraegen (Hrsg.), Rechtsvergleichung als juristische Auslegungsmethode, Wien, 2013, 208.

74 *Sommermann K.-P.,* Public Administration in a Social and Democratic Legal Stat*e, see Khubua G., Sommermann K.-P. (ed.),* Legal Grounds of Public Administration, Tbilisi, 2016, 23 (In Georgian).

compared with the legal one,[75] which is a basis of defining legitimacy of public administration. Therefore within the association in the frame of Europeanization of Georgian administrative law there must be created such norms, which will work really and meet the above mentioned criteria.

### 6.3. Reform in the Point of View of the International Legal Cooperation

In connection with the issue of legal transfer is very important international legal cooperation formats. From this point of view G. Winter in structures and processes distinguishes missionary, bureaucratic and Socratic aspects.[76] In connection with missionary issues we can simply say that obligations taken within the scope of the Association Agreement is the frame, beyond which must not be acting donor organizations and foreign experts, involved in the limits of the international legal cooperation. As for the course of cooperation, the process must be inevitably going on the basis of Socrates method, when lawmaking is carried out by intensive cooperation of foreign and local experts. Just by this way we can reach that ideal format when universalistical and culturalistical contexts are successfully merging, the importance of which was already mentioned above. Historically so was done in Georgian Law. Any case of transferring of foreign law into the national space legislation was connected with real activities. It implied that on the basis of foreign experience there was created a norm suitable for Georgian national identity and national security of the country.[77] It's true that in this process many dead norms were emerging[78] that is inevitable but in the course of time is corrected, though in main issues there was compatibility and clearness.

## 7. Conclusion

The Europeanization process of Georgian administrative law is a phenomenon appeared in the period of independence. In the post-Soviet period Georgia reached a great success in this direction, this was completed with the Association Agreement. Within the association the post-Soviet period for Georgian administrative law was over and began a period of completely new perspectives of the reform, touching especially private parts of administrative law. In the first place by signing the Association Agreement there was defined a missionary issue or the choice, what Georgia has done from the point of view of approximation of national law with the European standards. Practically how must the reform of Georgian administration law (Europeanization) be done? In the present article there is an attempt to clarify principal and formal aspects of the reform. As to the principal aspect, Georgia will be able to reach success in this process, if it manages to merge universalistical and culturalistical contexts of the reform. For transformations and reforms a crucial point is a political will, which will enable universal legal values (which will be in compliance with the national constitutional identity) to become an organic (cultural) part of the country's legal system. Such a political will has been already revealed in Georgia and there are lots of successful historical examples of such a reform. As for formal aspects, for the purpose of the reform to be more based on the national cultural soil, it is inevitable to have more local experts involved in the international legal cooperation. At the same time Georgian legal science and generally juristical education must be internationalized/Europeanized more effectively.

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[75] Ibid, 24.
[76] *Winter G.,* Administrative Law Development and Legal Consultation on the Example of Georgia, as a Transitional country, Journal "Administrative Law", #1, 2013, 82-83 (In Georgian).
[77] *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 5-9 (In Georgian).
[78] Ibid, 19-20.

## Bibliography

1. *Bregvadze L.,* The Theory of Autopoetic Legal Culture: Law Transfers and Legal Self regulation in the Global Society, Tbilisi, 2016, 156-163, <http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/lasha_bregvadze.pdf> (In Georgian).
2. *Burduli I., (ed.)* Development of Modern Georgian Entrepreneurial Law (Main aspects of the reform), Tbilisi, 2016, 14 (In Georgian).
3. *Gamkrelidze O.,* Fighting for a Legal State, Tbilisi, 1998, 3-28 (In Georgian).
4. *Eremov Gr.,* The Soviet Administrative Law, Tbilisi, 1967, 6 (In Georgian).
5. *Winter G.,* Administrative Law Development and Legal Consultation on the Example of Georgia, as a Transitional country, Journal "Administrative Law", #1, 2013, 67-85 (In Georgian).
6. *Winter G., Turava P., Kalichava K.,* Analysis and Appraisal of General Norms of Environment Protection (Permissions System, Environment Impact Assessment, damage prevention and compensation, environment planning and eco-audit), Tbilisi, 2009, 11-132 (In Georgian).
7. *Zoidze B.,* Reception of the European Private Law in Georgia, Tbilisi, 2005, 5-20 (In Georgian).
8. *Sommermann K.-P.,* Public Administration in a Social and Democratic Legal State, see Khubua G., Sommermann K.P. (ed.), Legal Grounds of Public Administration, Tbilisi, 2016, 18-40 (In Georgian).
9. *Mishberger M.,* Public Acquisitions Law of Germany, see Issues of the Institute of Admiistrative Sciences of TSU. Perspectives of Administrative Sciences, #2, Tbilisi, 2016, 80-90.
10. *Samkharadze I.,* Harmonization of Legal Systems: the EU and Georgia, Ivane Javakhishvili Tbilisi State University Press, "LAW Journal", #1, 2015, 314 (In Georgian).
11. *Surmava L.,* The Issue of Compliance of Georgian Legislation with the EU Legislation in the Field of State Support, Tbilisi, 2012, 17-60, <http://press.tsu.ge/data/image_db_innova/Disertaciebi/lita_surmava.pdf> (In Georgian).
12. *Kalichava K.,* Control of Permissibility of Environment Protection Activities on the example of the immissions protection law (Comparison of Georgian, German and European Law), Tbilisi 2016, 37; 136-137; 361-368 (In Georgian).
13. *Kalichava K.,* Strategic Aspects of the Reform of Georgian Environment Protection Legislation, Ivane Javakhishvili Tbilisi State University Press, "Law Journal", #1, 2012, 118 (In Georgian).
14. *Kalichava K.,* The Influence of the Georgian Building Law Reform on Freedom of Business, see Materials of the forum of the Institute of Administrative Sciences of TSU, Perspectives of Administrative Science, #2, Tbilisi, 2016, 34-42 (In Georgian).
15. *Khubua G.,* Modernization of State Administration, see Issues of the Institute of Administrative Sciences of TSU, Tbilsi, Transformation of Public Administration in South Caucasia: Experience and Perspectives, Tbilisi, 2015, 20-29 (In Georgian).
16. *Tsnobiladze P., Khubua G., Khmaladze V., Metreveli N., Kapanadze O.,* How is a law created, Tbilisi, 2000, 39-46 (In Georgian).
17. *Coing H.,* Europäisierung der Rechtswissenschaft, NJW, 1990, 937-941.
18. *Danwitz v.Th.,* Europäisches Verwaltungsrecht, Berlin, Heidelberg 2008, 4-7; 144-157.
19. *Duve Th.,* Internationalisierung und Transnationalisierung der Rechtswissenschaft – aus deutscher Perspektive, Frankfurt a.M., 2013, 7 ff.
20. *Friedman L. M.,* The Legal System, New York, 1975, 195.
21. *Kischel U.,* Rechtsvergleichung, München, 2015, 49 ff., 56 ff., 63 ff., 68 ff.
22. *König K.,* Moderne öffentliche Verwaltung, Berlin, 2008, 151.
23. *Rengeling H.-W.,* Deutsches und Europäisches Verwaltungsrecht – wechselseitige Einwirkungen, VVDStRL, Heft 53, 1994, 204-234.

24. *Schmidt-Aßmann E.,* Der Europaische Verwaltungsverbund und die Rolle des Europaischen Verwaltungs-rechts, in: Schmidt-Aßmann E., Schondorf-Haubold B. (Hrsg.), Der Europaische Verwaltungsverbund, 2005, 1 ff.
25. *Schmidt-Aßmann E.,* Die allgemeine Verwaltungsrecht als Ordnungsidee, 2. Aufl., Heidelberg, 2004, 31.
26. *Schwartz J.,* Europäisches Verwaltungsrecht, 2. Aufl., Baden-Baden, 2005, 74);
27. *Schwartz J.,* Europäisches Verwaltungsrecht, Bd. I, Baden-Baden, 1988, I.
28. *Siegel Th.,* Europäisierung als Rechtsbegriff, JöR, Bd. 61, 2013, 177-194.
29. *Siegel Th.,* Europäisierung des Öffentlichen Rechts (Rahmenbedingungen und Schnittstellen zwischen dem Europarecht und dem nationalem (Verwaltungs-)Recht, Tübingen, 2012, Rn. 69.
30. *Sommermann K.-P.,* Europäisches Verwaltungsrecht oder Europäisierung des Verwaltungsrechts, DVBI, 1996, 889-898.
31. *Sommermann K.-P.,* Erkenntnisinteressen der Rechtsvergleichung, in: Gamper/Verschraegen (Hrsg.), Rechtsvergleichung als juristische Auslegungsmethode, Wien, 2013, 205.
32. *Sommermann K.-P.,* Europäisches Verwaltungsrecht als „die großartigste Rechtsbildung der Weltgeschichte“?, DÖV, 2007, 859-867.
33. *Sommermann K.-P.,* Ziele und Methoden einer transnationalen Verwaltungsrechtswissenschaft, in: Sommer-mann (Hrsg.), Öffentliche Angelegenheiten – interdisziplinär betrachet, Berlin, 2016, 71-87.
34. *Sommermann S.-K.,* Die Bedeutung der Rechtsvergleichung für dieFortentwicklung des Staats- und Verwal-tungsrechts in Eurioa, DÖV, 1999, 1019 ff.
35. *Wissenschaftsrat (WR),* Perspetiven der Rechtswissenschaft in Deutschlang (Situation, Analysen, Empfehlun-gen), Hamburg, 2012, 29.
36. *Werner F.,* Verwaltungsrecht als konkretisiertes Verfassungsrecht, DVBl, 1959, 527-533;
37. *Zuleeg M.,* Deutsches und Europäisches Verwaltungsrecht, VVDStRL, 53, 1994, 165 ff.
38. BVerfGE 123, 267 - Ultra-Vires-Lehre.
39. BVerfGE 126, 286 ff - Ultra-vires-Kontrolle.