Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№1, 2018

უნივერსიტეტის
გამომცემლობა

UDC(უაკ) 34(051.2)
ს-216

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ISSN 2233-3746

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Judge-Made Law as a Source of Law (Solving of Legal Issues and Developing the Law)

"Justice, making of law, is such a fundamental need,
so that a country and a nation cannot live without it even for a single day"
Ilia Chavchavadze[1]

Effective system of justice represents a fundamental prerequisite for reinforcing legal system and legal security[2]*. The work with regard to using the law is conducted by the governmental bodies and the courts. At the same time, while detecting legal deficiencies, courts intend to eliminate the problems. Legal issues are being detected in the process of applying the law, in which the judge-made law takes its special place, providing the fact that, real possibilities to detect and eliminate the deficiencies in legal norms by explaining them, is in the hands of the courts*[3]*.*

According to the prevailing opinion in the countries of Roman-German legal system, judge-made law is not considered to be "deserving" of granting the predicate of the "source of law" and it does not have binding force in connection with law[4]*. Despite this consideration, there is a controversy in the legal literature regarding this matter.*

The purpose of present article is to discuss the judge-made law, as a source of law and to demonstrate the role of the court in the process of solving of legal issues and developing the law. While settling these issues this article provides logical analysis, it represents informational-perceptual aspects of the issue and discusses judicial practice.

Keywords: *Judge, Judge-Made Law, Legal Norm, Source of Law, Developing the Law, Solving of Legal Issues, Interpretation of Legal Norms.*

1. Introduction

According to the Article 82 of the Constitution of Georgia, "Judicial Authority shall be exercised through constitutional control, justice and other forms determined by law". Effective protection of human rights is exercised truly by the means of justice.

Under the principle of separation of powers between the authorities having Roman-German legal system, the court is not entitled to exercise legislative activity. However, according to the opinions expressed in judicial literature, in the terms of legislative technique, it is possible to develop legal norms

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1 *Chavchavadze I*., Complete Collection of Compositions (20 Volumes), Vol. 13, Tbilisi, 2007, 62.

2 *Schmidt S., Richter H.,* The Process of Decision-Making in Civil Law, GIZ, 2013, 3.

3 *Kokhreidze L.,* Problems Regarding Interpretation of Particular Norms in Civil Law in the Process of |Hearing Disputes Related to Intestacy, Jour. Justice and Law, №2 (41)'14, Tbilisi, 2014, 13.

4 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 3.

in such way, so that the judge is entitled to fill the open gaps, which have not been yet decided by the legislator. In this case, it needs to be determined, whether within this action the actual normative power needs to be granted to the judge-made law, or whether the judicial activity is powerless in the process of applying the law.[5]

The purpose of this article is to demonstrate the role of the judge in the process of exercising justice, as an interpreter of the norm, applier of the norm and in certain cases as a creator of the norm. Following from the abovementioned, researching this issue and studying the existing practice is an actual matter.

2. Source of Law

2.1. Definition of the Source of Law

Universal definition of the source of law cannot be found in legal literature. The term source of law has different meanings, including, the normative base, which underlies the legislation; the forces resulting in the content of legal norms; historical monuments; documents that enable us to familiarize with the fields of law[6].

According to the prevailing opinion, there are notions of social source of law and legal source of law. Social source of law contains facts of reality, which influence the process of making of law. It does not include conduct requirements that are mandatory. However, it has a certain importance in the decision-making process. Legal source of law involves positive legislation, "law of lawyers", judge-made law. Legal source of law provides conduct requirements that are obligatory[7], but its unit share is differed in formation of the law in a particular country. With regard to narrow interpretation, "the source of law is labelled as ways and forms, used by the state while expressing the legal norms"[8].

The above-mentioned sources of law are included in any legal system or the family of legal systems. At the same time, the families of legal systems differ from each other not only in the fundamental legal institutes, but also in the scope of representing certain legal sources in the entire legal system. For example, common law is characterized by a special role of case law. On the contrary, the role of normative acts dominates in Roman-German legal systems. The role of customs, as a source of law, is considerable in Muslim and less developed legal systems[9].

Traditionally, Georgian law is a part of Roman-German legal system. Accordingly, the main source of Georgian Law consists of normative acts.

Present paper discusses the importance of interpreting the norms by the judges, in particular, the role of judicial practice in Georgian law. Herewith, the paper considers whether the judge-made law creates the foundation for legislation and whether it can become the source of law.

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5 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 8.

6 *Vacheishvili Al.,* General Theory of Law, Tbilisi., 2010, 139.

7 *Khubua G.,* Theory of Law, Tbilisi, 2004, 130.

8 *Fafiashvili S.,* Introduction to Jurisprudence, Tbilisi, 2006, 229.

9 *Kiknavelidze P.,* Problems Regarding Judiciary Practice in Georgia, 2009, 1. <http://www.mkd-ge/geo/sasamart.praqtikis%20problemebi.pdf>, [12.03.2018].

2.2. Judge-Made Law as a Source of Law

"Justice develops the law in such way that it specifies,
extends and corrects the law
(preater legem)".[10]

Judge-made law represents the norms stated in the particular decisions of the higher courts of the country – the case law, which has a binding legal nature in similar cases[11].

The matter of judge-made law, as an independent source of law, has been disputed in legal doctrine. In the countries of Roman-German legal system a judge is not entitled to perform legislative work, following the separation of powers between the state authorities. Each branch of the state authorities shall not breach its competence and shall not be in conflict with the main area of competence associated with other state authority. In addition, each branch shall remain inviolable in the scope of its main, significant area. According to Montesquieu, the decisions of a judge should represent not the exact duplication of the legal text, but the periphrasis of the exact wording of law[12]. Making of legal norms is in the hands of a legislative body. The judge interprets the law and evaluates the facts independently and impartially based on existing legislation.

Judge-made law plays an important practical role in the process of filling "legal gaps". This method is used when an appropriate legal norm cannot be found or the existing norm is incomplete. In this case, the practical meaning of judge-made law is relevant and it is directly connected with teleological interpretation of the norm. [13]

In the process of interpreting the judge-made law, judge-made law is often referred to as superior to the law, which can be considered as the truth, providing the fact that in a particular case judge-made law can be transformed into the norm. Consequently, three types of judge-made law can be found:

1. Judicial Interpretations (Eigentliche Auslegung) – while the judge interprets the norm in the scope of his/her discretion;
2. "Legal gap" filling Interpretations – while the judge provides teleological interpretation of the norm;
3. Gesetz übersteigend (Exceeding the law)– while the judge makes the law[14].

According to the Article 4 of the French Civil Code, a judge shall give judgement even if the legislation is silent or obscure,[15] whereas Article 5 of this code forbids the judges to decide cases by the

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10 Lat. Preater legem – outside of the law, refers to condition that cannot be included, but does not contradict with the scopes of the law and the laws. Such kind of condition does not comply with the laws fundamentally, but at the same time, it does not contradict with the laws. See: Zippelius R., Theory of Legal Methods, 10th revised Edition, Tbilisi, 2009, 99.

11 *Savaneli B.,* General Theory of Law, Tbilisi, 2005, 36.

12 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15.

13 *Kramer E A.,* Juristische Methodenlehre, fünfte auflage, Verlage C,H. Beck München, 2016, 191.

14 *Rüthers B., Fischer Ch., Birk A.,* Rechtstheorie mit juristischer Methodenlehre, 9. Auflage, C.H BESK, 2016, 571-575.

15 Code civil, p. 8, Dernière modification: 01/10/2017, <http://codes.droit.org/CodV3/civil.pdf>, [10.04.2018].

way of general and regulatory provisions[16]. Therefore, a judge is not entitled to create legal norm in case of legal deficiency, instead a reasoning of a judge shall be based on the existing legislation. In case of obscurity, a judge shall apply the analogy of a statute or law. "Judge-made law is an act of legal imposition, not an act of lawmaking".[17] Judicial practice operates in frames, determined by the legislature, whereas the activity of legislative authority is to establish these frames. As stated in the Code of Justinian, legal force is possessed by the laws, not by the particular cases[18].

Kelsen found certain expression for the judge-made law in his doctrine. Kelsen connects the impact of a legal norm to the impact of a superior norm. However, he faces controversy, with regard to founding the impact of the lower norm on its main-norm (base norm).[19] To be certain: *subordinate normative acts are based on the law, on the other hand, the law is based on the constitution. – The question is: where does the constitution originate from?* In order to answer this question, different natural law doctrines were applied. According to Rupert Schreiber, a scientist working on the problematics of the judge-made law, the normative impact of the judge-made law is founded on the written – material law and it is limited to it. However, from the point of view of the legal technique, it is possible to develop legal norms, formulated by the legislative authority, in such way to entitle the appropriate body, including, the judge, to fill up the existing legal regulations with new legal norms.[20]

In contrast to the countries having Roman-German legal system, the American and English legal system is characterized by the Case Law, which focuses on the decisions of higher courts.[21] The influence of the judges on the governmental bodies is immeasurably considerable. The norms of judge-made law influence the process of exercising the laws, deemed adopted by the parliament, from the point of judiciary explanation. Whilst having the mandatory precedents for the courts, in the process of legal imposition, the laws are modified on the impact of the mandatory precedents. This is the reason why the law becomes the part of judicial precedent in practice.[22] The duty of the countries of English legal system is to protect the rules required in the judicial decisions, obliging English judges to follow the decisions of their predecessors. It is noteworthy that only the Supreme Court and the House of Lords are entitled to create mandatory precedents. The decisions adopted by other judicial or quasi-judicial bodies do not make mandatory precedents.

Accordingly, judge-made law includes every legal norm established and developed by the courts in an intra legem way[23]. Herewith, the versatile meaning of the judge-made law does not affect the law

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16 Code civil, p. 8, Dernière modification: 01/10/2017, <http://codes.droit.org/CodV3/civil.pdf>, [10.04.2018].

17 *Khubua G.,* Theory of Law, Tbilisi, 2004, 133.

18 „Non exemplis sed legibus judicandum est", David R., Major Legal Systems in the World Today, Editor: *Ninidze T.,* Tbilisi, 2010, 226.

19 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15.

20 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 8.

21 *Khubua G.,* Theory of Law, Tbilisi, 2004, 134.

22 *Savaneli B.,* General Theory of Law, Tbilisi, 2005, 38-39.

23 Lat. intra legem – In the limits of the entitlement granted from the law, see: Explanatory Legal Dictionary <http://gil.mylaw.ge/ka/dictionary/6.html>, [19.03.2018].

consolidated in a contra legem[24] way. With regard to this matter, following is to be said: If a judge is entitled to create the law, he/she has to be entitled to cancel the law made by himself/herself. These two entitlements encumber exercising each other, because each decision of the same court cancels the determinant norm established by this court earlier (Lex posterior derogate legi priori). By using intra legem way judge-made law does not intervene in the main competence of legislature. Legal gaps are often separated from the spheres possessed by the executive authority. From this point of view, it is possible to note that founding a norm only represents "ancillary product" of judiciary activity.[25]

3. Developing the Law by the Judges

3.1. Interpreting the Norms by the Judge

Interpreting legal norms is especially essential in the modern process of forming rule-of-law as it is connected to the rising of society's legal culture and legal awareness. The obtainable and understandable the legal norms are for the population, the more effective it becomes to implement them, including, from the perspective of applying them. S.M. Amosov states, "A judge, having considered his/her civil duty, is required to be not only applying the law, but also to be the creator of its interpretation, because interpreting the law is the same as recreating it. Disputing parties obey the law in such manner, as it is interpreted in the judicial decision, meaning the general rule, which became famous after giving the decision"[26].

Interpreting the law means explaining the obscure norms and determining the meanings of words[27]. The laws express legal imaginings in words. Understanding the law means to make the general imagining content relevant to the words of law, which shall be indicated in these words. If the law gives the judge freedom while giving decision, the decision needs to be given based on the legal perception of the judge. Acting according to the law means giving the judicial decisions only in the limits of the standing law. Interpreting the norms shall be exercised solely on the grounds of legal methodology. In case of detecting legal deficiency, argumentation of a judge shall be provided only according to the immanent principles of the constitution.[28]

The judge obeys not solely the legal norms, but also the law in general. In particular, general legal principles, given in the constitution or other sources of law. The judges are entitled to develop the laws written by this "true law". This can be exercised by the way of interpreting the laws, as well by correcting the deficiencies. Developing the law due to the "judge-made law" exceeds the literal meaning

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24 Lat. Contra cogem – against the law, See: Explanatory Legal Dictionary <http://gil.mylaw.ge/ka/dictionary/6.html>, [19.03.2018].

25 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15.

26 *Kokhreidze L.,* Problems Regarding Interpretation of Particular Norms in Civil Law in the Process of Hearing Disputes Related to Intestacy, Jour. Justice and Law, N2 (41)'14, Tbilisi, 2014, 10-11.

27 *Papuashvili S.,* Legal Tendencies, Developing the Law through the Judge-Made Law and Accessibility of Justice, Journal "Georgian Law Review", 6 №4 2003, 458.

28 *Izoria L.,* Modern State, Modern Administration, Tbilisi, 2009, 191.

of the law and it can be allowed if the supporting arguments are more important than the arguments regarding separation of powers and legal security.[29]

While talking about developing the law due to the judge-made law, it is considerable that the obligatory nature of the judge-made law is fundamentally different from the mandatory character of the legal norms. The judge-made law norm is originated when the judicial decision has taken effective.[30] The judicial decision is not limited to its effective date. Legal force of the final judgement and the consistency of a legal norm differ from each other fundamentally. Legal force of the final judgement makes the decision effective and obligatory. It is significant that a judgement is effective solely for the disputing parties and their successors. However, the prejudication given in the judgement is effective in general: It is effective for everyone and against everyone.[31] At the same time, while deciding similar case, other courts may be guided by existing decisions given in judicial practice. However, it is not obligatory and the courts itself are entitled to decline the norms given by the judge-made law.

If the court is not bounded by the norms established by itself, the judge-made law, as a sphere having the characteristics of the source of law, will not have a solid binding force for the lower court instances. The courts of instances will have the force to decline the norms established by the higher courts, when the norm contradicts with the norm of higher hierarchy. Consequently, each judge shall check the following: Is the subordinate normative act included in their legislative power, does this norm comply with the constitution. Furthermore, the judge has to check whether the decision of the higher instance court is based on the effective law and whether the prejudicial norm fits in legal definition that will fill up the law. As for the constitutional laws, whether a legal norm contradicts with the constitution, the judge shall deliver this task to the constitutional court. In other cases of conflict of laws, the judge has to decide himself/herself, whether the legal norm contradicts with the higher norm. Providing this fact, the judge-made law is considered as the (pre) constitutional court in connection with the subordinate normative acts. Accordingly, if a prejudicial norm does not fit in the scopes of entitlement, it becomes inactive.[32]

The functional side of this entitlement is to be considered. Well-known obiter dictas[33] do not represent legal norms, providing the fact that the court is entitled to establish legal norms if the legal norm requires that itself, for the purposes of deciding the case. [34]

Undefined legal terms represent certain parts of an "open" legislation. At the same time, they strengthen the power of a judge regarding the entitlement of norm developing. While giving the decisions those terms allow judges to answer the questions asked but not answered by the legislature.[35]

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29 *Zippelius R.,* Theory of Legal Methods, 10th revised Edition, Tbilisi, 2009, 83.

30 *Papuashvili S.,* Legal Tendencies, Developing the Law through the Judge-Made Law and Accessibility of Justice, Journal "Georgian Law Review", 6, №4 2003, 460.

31 *Reimer F.,* Juristiche Methodenlehre, Nomos, 2016, 105.

32 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15-16.

33 obiter dicta – Arguments mentioned additionally in the judgement, See: Explanatory Legal Dictionary, < http://gil.mylaw.ge/ka/search/6/obiter/.html>, [21.03.2018].

34 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 15-16.

35 *Kruse H.W.,* Das Richterrrecht als Rechtsquelle des innerstaatlichen Rechts, Tübingen, 1971, 6.

It is considerable, whether the judge is obliged to fill out the open fragments of legislation and give the judge-made law actual normative power due to this action, or, whether from this point the judge-made law is powerless. The answer to this question given by classical teaching methods is positive. According to the historical school, prejudicial existence of every right is integrated. However, this approach with regard to the integrated nature of norms no longer exists. Despite this, it is often considered that the judicial judgement is a result of solely using the legal text and; from this point, it represents a typical act of recognition and acknowledgement. This reasoning leads to the conclusion that the legislative body has not given any other role to the judge. However, if the judge is obliged to fill out open fragments of legislation, it means that the judge has to fill the gaps given by the legislature. The judge faces this controversy in each case, when he/she meets the individualism distinctive for particular case.[36]

To sum up, finding the law is not a typical process of cognition, which could be defined based on objective criterions. Consequently, in the process of developing the law, interpretations given by the judge plays an important role. Wherever the law cannot exercise its function of solving legal issues fairly, judge has an opportunity of restricted exercising "productive critics" of the law, in order to determine deficiencies and to fill out them.[37] It is noteworthy that while interpreting the norm, the judge is not completely free to decide the case solely on the grounds of personal legal perception. In such case, the judge is obliged to use every possibility of cognition, in order to find the way of eliminating the deficiency, which is most relevant to the particular case or complies with the existing judicial practice. According to the federal constitutional court of Germany: "the person using the law obeys not only the norms, but the law in general". Consequently, interpreting the norm by the judge, while exercising judicial power, represents legitimate foundation for developing the law, originating from the principle of "fair law". [38]

3.2. Role of the Judge-Made Law in Georgian Legal System

Legal regulation of the court, as an authority to make justice, is determined by Georgian Constitution. According to the Article 82, paragraph 1, of the Constitution, "judicial authority shall be exercised through constitutional control, justice, and other forms determined by the law". [39] The organization of justice should apply to the constitutional right of human regarding effective protection of the right. Three-step system of human rights protection serves exercising of effective justice. [40] Administrative justice is exercised by general courts, through trying cases at the first instance, court of appeals and court of cassation. Interpreted norms and decisions adopted by each instance of court plays an important role in the process of developing the law. However, the judgements given by the Supreme Court is important for establishing uniform judicial practice and developing the law. Due to the decision

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36 Ibid, 8-11.

37 *Zippelius R.,* Theory of Legal Methods, 10th revised Edition, Tbilisi, 2006, 105.

38 Ibid, 23, 105-106.

39 Compare: Article 59, Paragraph 3 of the draft Constitution of Georgia, according to which "Justice shall be administered by general courts".

40 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P. (ed.),* Handbook on Administrative Process Law, Tbilisi, 2008, 398.

of the Supreme Court, the judgements of lower instances can be changed completely or partially or can be uphold. However, behind every ruling stands the uniform judicial practice and the meaning of the Supreme Court, as an instance having the function of interpreting the law.[41]

According to the Article 34, paragraph 3, Administrative Code of Georgia a cassation appeal shall be admissible if resolving the case would contribute to the development of law and the establishment of uniform judicial practice.[42] Providing the fact that the court of cassation was created not solely for protecting individual, but also for protecting public interest, establishing uniform judicial practice, as well as developing the law, it serves implementing the public purpose of the court. This is the case, when there is a universal interest for similar understanding of certain norms. A case is important, when it is likely that the decision adopted by the court of cassation will contribute similar understanding of legal norms and further developing of the law. First essential prerequisite is that, this legal issue can be clarified, meaning the case has to concern such legal norm, which can be revised. When the same legal norm (or issue) is understood differently by the different court instances, there is no uniform judicial practice represented.[43] Furthermore, only legal issues, included in the judgement of Court of Appeals and legal issues that had to be decided by the Court of Appeals, can be revised by the way of cassation. Second essential prerequisite for determining importance of legal issue, is that the legal issue needs to be clarified. Legal issue does not need to be clarified if it is undisputed, as the solving of this issue follows from the text of the law.[44] The function of judicial practice, especially the Supreme Court, is not limited to interpreting the law and eliminating deficiencies in particular cases, providing that the principle of equality requires resembling cases to be considered similarly. From this point, judicial decisions exceed particular cases and develop as the judge-made law.[45]

In conclusion, despite the importance of interpretations of the Supreme Court for developing uniform practice, judge-made law, can be considered as a source of law, solely if new legal norm is established by the court, which is not included in the promulgated normative acts. The principle of analogy of law can be recognized as a legal foundation of creation of norms by the courts, when normative acts do not include the regulation of similar or particular public relation. In such case, the court fills out the legal deficiency and at the same time, the court establishes legal norm according to the general principles of justice, as well as the requirements of fairness, good faith and morality (Article 5, paragraph 2 of the Civil Code of Georgia).[46]

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41 <http://www.supremecourt.ge/news/id/486>, [22.03.2018].

42 Similar Regulation is included in the Civil Process Code of Georgia, compare: Article 391, Paragraph 5 of the Civil Process Code of Georgia, Parliament of Georgia, N1106, 14.11.1997, <https://matsne.gov.ge/ka/document/view/29962>, [22.03.2018].

43 *Kokhreidze L.,* Problems Regarding Interpretation of Particular Norms in Civil Law in the Process of Hearing Disputes Related to Intestacy, Jour. Justice and Law, №2 (41)'14, Tbilisi, 2014, 15.

44 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P., (Editor),* Handbook on Administrative Process Law, Tbilisi, 2008, 404.

45 *Wienbracke M.,* Juristische Methodenlehre, C.F. Müller, 2016, 107. Compare: *Zippelius R.,* Theory of Legal Methods, 10th revised Ed., Tbilisi, 2009, 100.

46 *Kiknavelidze P.,* Problems regarding Judiciary Practice in Georgia, 2009, 1-2. <http://www.mkd.ge/geo/sasamart.praqtikis%20problemebi.pdf>, [12.03.2018].

According to the Article 84, paragraph 1 of the Constitution of Georgia, "A judge shall be independent in his/her activity and shall comply with the Constitution and law only". Consequently, we can come to the conclusion that the judge-made law, as a source of law, is forbidden by the Constitution.[47]

Therefore, Georgian judicial practice can be discussed from the respect of its role in the process of interpreting the norms of normative acts.

3.3. Judge of the Administrative Law, as an Imposer of the Norm

According to the Article 7, paragraph 1 of organic law of Georgia on General Courts, "A judge shall be independent in his/her activity". In administrative proceedings court is obliged to exercise its entitlement only "according to the Constitution of Georgia, universally accepted principles and standards of international law, other laws and by his/her inner conviction. A judge may not be requested to report or instructed as to which decision to make on a particular case".[48]

Praetorian law was founded in ancient Rome and it was introduced for protecting public interest, in order to contribute, extend and improve the law.[49]

First question arising while deciding administrative cases is connected to the issue of imposing the burden of proof regarding submitting and proving factual circumstances. According to the principle of officiality[50], the court itself is obliged to examine important issues with regard to the case. "Administrative proceedings are characterized by adversarial and inquisitorial principles, meaning that court examines factual circumstances due to its obligation and is entitled to ex officio decide whether to gather and provide additional information or evidence. It depends on the position of the court whether to obtain particular evidences."[51] By using this principle the judge deciding an administrative case examines factual circumstances completely, which contributes to the process of applying the norm.

Providing the fact that there are frequent disputes in judicial practice, involving the claimant claiming for compensation for damages inflicted by administrative bodies, we can discuss the role of a judge, as an interpreter of the norm, in the process of hearing administrative case, on the example of the disputes regarding compensating for damages.

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47 *Khubua G.,* Theory of Law, Tbilisi, 2004, 132.

48 Organic Law of Georgia on „General Courts", Parliament of Georgia, N2257, 04.12.2009 <https://matsne.gov.ge/ka/document/view/90676>, [12.04.2018]. Compare: Article 6, Paragraph 1, of the Civil Process Code of Georgia, Parliament of Georgia, N1106, 14.11.1997, <https://matsne.-gov.ge/ka/document/view/29962>, [12.04.2018].

49 „Ius praetorium est, quod praetors introduxerunt adiuvandi vel supplendi vel corrigenda iuris civilis gratia propter utilitatem publicam", See: *Zippelius R.,* Theory of Legal Methods, 10th revised Edition, Munich, 2006, 100.

50 Principle of Officiality, same as Principle of Inquisitorial System, is a processual principle, under which the court is entitled to examine factual circumstances.

51 *Vachadze M., Todria I., Turava P., Tskepladze N.,* Commentary on Georgian Administrative Process Code, Tbilisi, 2005, 29.

Compensation for damages inflicted by administrative bodies – according to the Article 42, paragraph 9, "Any person, who has illegally sustained damage inflicted by the State, Autonomous Republics, or self-government bodies and officials, shall be guaranteed by the court to receive full compensation accordingly from the funds of the State, Autonomous Republic, and local self-government". According to the interpretation of the Constitutional Court of Georgia, present norm entitles everyone, to claim and receive compensation from the funds of the State and the scope of compensation represents full compensation for the damage.[52] Present right can be exercised due to Article 207 and 209 of General Administrative Code of Georgia (Hereinafter referred to as "GACG") and Article 1005 of Civil Code of Georgia.[53] In addition, the wording of this norm needs to be considered, as a case can be heard through administrative proceeding, if a claimant claims for compensation from the administrative body, providing that "only the damage inflicted by an administrative body can be compensated through administrative proceedings".[54] The damage needs to be compensated when there are required conditions for imposing liability for compensating damage. In particular, damage is required to be caused a) in a line of a duty, b) intentionally and c) through the breach of the duty.[55]

According to the argumentation of the Tbilisi Court of Appeals "Restitution of the violated right is connected to the legitimate possibility of claiming compensation inflicted by the State, which is based on trustworthy verification of ineligible, unlawful acts performed on the duty (in the process of exercising public duty) by the State officials or public officers. While imposing liability on the State, Chamber considers having the consequences of the damage verified. Furthermore, Chamber discusses legal term of the damage and reasons that while compensating material damage the following circumstances need to be proved: Evidences of the consequences of damage, the fault of the tortfeasor, connection between consequences and the activity, and the possibilities of the injured party with regard to avoid the damage. Consequently, liability for compensating damages can be imposed if there are verified conditions for the compensation of damages and other required normative criterions as well".[56]

In case there are legal norms regulating particular obligations for administrative bodies, there is an obligation to understand, interpret and apply these norms properly. Legal norms are not created for purpose of provoking a dispute from every legal issue and for purpose of making this issue the object of

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52 Judgement of December 7, 2009 of the Constitutional Court of Georgia N2/3/423, „Public Defender v. Parliament of Georgia", II. Paragraph 2.

53 *Turava P., Tskepladze N.,* Handbook on General Administrative Code, Tbilisi, 2013, 232.

54 *Giorgadze G., Kopaleishvili M., Loria A., Loria V., Salkhinashvili M., Tskepladze M., Chkareuli Ts., Kharshiladze I.,* Commentary on Administrative Process Code of Georgia, Edited by *V. Loria,* Publisher "Bona Causa", Tbilisi, 2008, 17.

55 *Turava P., Tskepladze N.,* Handbook on General Administrative Code, Tbilisi, 2013, 235. See: Judgement of March 27, 2014 of the Supreme Court of Georgia Nbs-551-532(k-13), According to the interpretation of the Court of Cassation "standing legislation requires an obligation of compensating damage from the state, which is inflicted by the action or the decision of an official. For imposing the liability of compensating the damage following requirements need to be fulfilled: Action, which inflicted the obligation for compensating the damage, shall be connected with exercising public duty; the breach shall be intended to violate the rights of the other; the tortfeasor shall act with fault; the relationship between unlawful action and result shall be causal".

56 Judgement of June 15, 2014 of the Administrative Chamber of Tbilisi Court of Appeals, №3b/1474-15.

discussion in the court. Particular norms of administrative law entitle administrative bodies to administrate and solve certain issues, meaning that administrative body shall exercise this entitlement with good faith and in accordance with the laws. Whenever administrative body does not fulfill its obligations, it is assumed that the official of administrative body acts through his fault – intentionally or negligently, otherwise administrative body shall prove that it acted without fault and that its official has not acted with fault – intentionally or negligently. Whether the action is intentional or negligent is not important, providing that damage needs to be compensated in full.[57]

As the Supreme Court of Georgia has stated in one of its judgements regarding compensation of damages inflicted by the administrative body: "According to the Article 208 of General Administrative Code of Georgia, the compensation of damages through administrative proceedings requires to be discussed only if one of the disputed parties is represented by the administrative body. If a claimant claims for compensation of damages from the State and the official jointly, based on the Article 1005 of Civil Code of Georgia and Article 208, paragraph 1 of General Administrative Code of Georgia, the Court of Appeals shall clarify which particular administrative body is named as defendant. The court of cassation explains that the court is entitled to hear the case through administrative proceedings solely after the abovementioned proceedings are exercised.[58]

The chamber of administrative cases of Supreme Court and the Court of Appeals have played an important role in developing judicial practice regarding the above-stated issue.

3.4. The Judge of Administrative Court, as an Body Exercising Control over the Administrative Body (Exemplified in the Decisions Adopted through the Discretionary Power)

Activities of an administrative body has always been handled as an object of exceptional attention, as the State exercises its public duties through the administrative bodies.

Determining the scopes of court control over the decisions adopted by the administrative bodies in administrative law represents an important issue. There are three legal processual possibilities: 1) Control over the norm through administrative court; 2) Control over the norm through Constitutional Court; 3) "Instance Control", meaning that each court is entitled to give an independent decision regarding the necessity of determining provision as valid or void and as a result this provision can be avoided.[59]

The issue of possibility of revision "admissible judgements" has a practical importance. Revising decisions of the administrative body leads to intervention in the competence of other body,[60] originating from the purpose of administrative proceedings – to exercise objective control over the activity of the administrative body. In case the judgement given by the administrative body based on the principle of

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57 Judgement of June 19, 2014 of the Administrative Chamber of Tbilisi Court of Appeals N3b/762-14.

58 Judgement of April 8, 2010 of the Supreme Court of Georgia Nbs-233-224(g-10).

59 *Kilasonia N.,* Formal and Nonformal Procedures of Participation of People in the Process of Creating Norms and Court Control over these norms, PhD Thesis, Tbilisi, 2016, 101-102.

60 *Zippelius R.,* Theory of Legal Methods, 10th revised ed., Tbilisi, 2009, 128.

disposition contradicts with public interests, the court is entitled to continue decision-making process against the will of administrative body and to decide the case.[61]

According to the judgement of the Supreme Court of Georgia, complete investigation of factual circumstances due to the principle of officiality represents an unconditional necessity in order to decide disputes lawfully and to exercise proper control over the activity of the administrative bodies[62].

As for the possibility of exercising court control over the decisions adopted through the discretionary entitlement of the administrative body, we can discuss the following:

According to the Article 2, paragraph (k), discretionary powers grant freedom to an administrative body or official to choose the most acceptable decision out of possible decisions under the legislation, to protect public or private interests.[63]

The law empowering discretionary powers has a double meaning: On the one side, it determines the grade of freedom for the administrative body, and on the other side, it determines the scope of control of the decisions adopted through the discretionary powers. The idea of the court control does not empower the court to give the decision instead of an administrative body and to correct or annul individual administrative act as a result of this discussion. The court control leads to reviewing the mistakes made while exercising discretionary powers. The scope of court control has to originate from the legal base of the discretionary powers. The court control implies verifying the decision that has already been adopted. The scope of the court control depends on the content of the norm, which includes the discretionary power.[64]

The court investigates whether the administrative body had the discretionary power at first and then checks whether the act adopted by the administrative body is lawful.[65] It is noteworthy that the peculiarity of discretionary powers is indicated solely in the regulation of the General Administrative Code. Administrative Process Code of Georgia does not include the regulation regarding court control over discretionary judgements. Therefore, the role of the court and interpretations related to reviewing decisions adopted through the discretionary power are essential.

The court of cassation explains that the court is empowered with processual competence to review legitimacy of the act adopted by the administrative body. Referring solely to the discretionary power while exercising the court control does not represent sufficient ground for verifying the legitimacy of the

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61 *Turava P.,* Administrative Proceedings and Administrative Legal Proceedings, Handbook on Foundations of Public Governance, Editors: *G. Khubua and K.-P. Zomermann*, Publishings of TSU Institute for Administrative Sciences, Volume 3, Tbilisi, 2016, 160.

62 Judgement of May 20, 2014 of the Supreme Court of Georgia №bs-534-515 (k-13).

63 See Article 2, Paragraph K of the General Administrative Code of Georgia, Parliament of Georgia, N2181, 25.06.1999. <https://matsne.gov.ge/ka/document/view/16270>, [22.03.2018].

64 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 13. *Kopp F., Ramsauer U.,* Verwaltungsverfahrensgesetz, Kommentar, 11. Auflage, München 2010, 767-768. See: *Khoperia R.,* Control over the decisions given by the administrative body through the discretionary power, PhD Thesis, Tbilisi, 2017, 31-32.

65 *Khoperia R.,* Control over the decisions given by the administrative body through the discretionary power, PhD Thesis, Tbilisi, 2017, 94-95.

administrative act, as the court has to evaluate the legitimacy of the act adopted by the administrative body and review whether there is an error in the discretionary power.[66]

The administrative body shall reason and indicate the circumstances as the base of the given decision. The discretionary power of the administrative body does not imply the possibility of disregarding the principles of proportionality and legality. Exercising discretionary power is especially noteworthy in order to avoid procedural breaches and exceeding the scopes of the law, which may result in violation of the property, legality and the rights of the person. The measures mentioned in the administrative act adopted through the discretionary power shall not result in unreasonable restriction of the rights and interests of the person. The obligation of giving reasonable arguments originates from the purpose of exercising control over the activities of the administrative body. The court shall base its decision on the requirements of the law and not only on the opinions of advisability, as the discretionary power is not an absolute entitlement and exercising this power is restricted under the requirements of the law.[67]

While hearing several cases, the Supreme Court of Georgia has explained that the court shall exercise the entitlement, granted from the Article 32, Paragraph 4[68] of the Administrative Process Code of Georgia, if the factual circumstances cannot be identified or established. Accordingly, the court shall exercise this power if it is impossible to evaluate legality of the disputed administrative act. This processual possibility contributes to effective justice and complete court control over the legality of the administrative governance. If administrative body has not established and evaluated factual circumstances, it is often impossible to examine these facts in administrative proceedings. Furthermore, the reference of the court regarding necessity of examining particular circumstances has mandatory power. The Supreme Court states that the court control involves reviewing legality and substantiation of the act and it does not include exercising control over the content of the act. The court is obliged to determine whether the act is adopted in accordance with the Article 96[69] of the General Administrative Code of Georgia, as a result of examination and evaluation of every relevant circumstance.[70]

On 20 May 2014, the Supreme Court of Georgia established an important interpretation regarding exercising court control while reviewing the legality of the decision adopted through the discretionary powers. The court of cassation considered this interpretation as a directive for the existing administrative bodies and their practice. Furthermore, the court of cassation deemed this interpretation to contribute to the establishment of the uniform judiciary practice.[71]

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66 Judgement of June 9, 2011 of the Supreme Court of Georgia №bs-348-345 (k-11).

67 Judgement of October 4, 2016 of the Supreme Court of Georgia №bs-211-210 (k-16).

68 Article 32, Paragraph 4 of the Administrative Process Code of Georgia, Parliament of Georgia, №2352, 23.07.1999, <https://matsne.gov.ge/ka/document/view/16492>, [12.04.2018].

69 Article 96 of the General Administrative Code of Georgia, Parliament of Georgia, 25.06.1999 <https://matsne.gov.ge/ka/document/view/16270>, [12.04.2018].

70 Judgement of October 4, 2016 of the Supreme Court of Georgia №bs-68-67 (k-16), Judgement of January 14, 2009 of the Supreme Court of Georgia Nbs-896-863 (k-08), See: Judgement of February 04, 2016 of the Administrative Chamber of Tbilisi Court of Appeals №3b/1952-15.

71 See: Judgements of May 20, 2014 of the Supreme Court of Georgia №bs-389-378 (k-13) and Nbs-534-515 (k-13).

According to the above-mentioned judgement, the court of cassation explains that while discussing the legality of exercising discretionary powers national courts shall examine to what extent the decision is reasoned, which shall be based on the objective examination-establishing-evaluation of the factual circumstances. The court examines not the advisability, but the legality and substantiation of the decision and administrative body shall prove that the adopted decision was the most appropriate, optimal from the existing options. The court shall not determine which measures needed to be taken from the side of administrative body. The court examines not the advisability, but the legality and substantiation of the adopted decision. Therefore, the court control over the decisions adopted by the administrative body through the discretionary power applies on such a scale to give the court the opportunity to evaluate whether the administrative body used the most appropriate way of deciding the dispute comparatively to other alternatives. The court of cassation considers that this kind of "dictation" from the courts represents the intervention in the process of exercising discretionary powers and it will provoke the selection of governance measures or in other words – administration. Also, it will provoke exceeding the scopes of its constitutional function - court control over the activities of administrative bodies, as examining the complete court control represents direct obligation of the court organs with the help of reviewing compliance between the decisions of governmental bodies and the standing legislation. This function represents constitutional function of the judicative power and it contributes to the most important constitutional principle – separation of powers and implementation of the principle of checks and balances.[72]

As a result of the above-mentioned discussion it can be clearly assumed that the judge-made law plays an important role in the process of solving legal issues and developing the law.

4. Conclusion

The present paper discusses the judge-made law as the source of law (solving of legal issues and developing the law).

In conclusion, judge-made law is playing an important role in every legal system. These legal systems differ from each other in the levels of representing the judge-made law, they differ from each other in the unit share of the judge-made law while forming the law of the country as well.

Providing the fact that Georgian Law is a part of Roman-German Law, the Constitution of Georgia forbids judge-made law as a source of law, consequently, the main source of law in Georgia is represented by the normative acts.[73] Despite this, judge-made law (mainly the judgements adopted by the Supreme Court of Georgia) has a significant meaning in the process of solving legal issues, developing the law and establishing uniform judiciary practice. Therefore, the judgements should be well reasoned, and different legal issues should be given wide interpretations, which will contribute to establishing uniform judiciary practice and uplift the quality of solving the dispute and increase the trust of the civil society towards the court.

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[72] Judgement of May 2014 of the Supreme Court of Georgia №bs-534-515 (k-13).

[73] See: the Law of Georgia on „Normative Acts", Parliament of Georgia, N1876, 22.10.2009, <https://matsne.gov.ge/ka/document/view/90052>, [12.04.2018].

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