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## **Legal Means for Protection of the Right to Claim Damages**

*The article below reviews legal mechanisms of the Georgian legislation use of which allows an aggrieved person to receive an opportunity to defend the right to compensation of damages caused by administrative bodies or illegal administration of justice.*

*The diversity of activities of an administrative body makes the issue complex, since each of those activities may separately and independently cause damages and the law prescribes various mechanisms to be used by aggrieved persons. If an aggrieved person makes a mistake and choses a wrong mechanism, then he/she will not be able to defend his/her violated right.*

*Selection of right defense mechanisms for claiming damages depends on two aspects: 1. Type of damages, which may be either completed or continuous; and 2. Form of activity of an administrative body. The paper reviews mentioned matters as well as issues of selecting protection mechanisms based on information related to the aspects listed above.*

**Key Words:** *Compensation of damages, state responsibility, protection of the right, forms of activities of an administrative body.*

### **1. Introduction**

“Every person has a right to apply to the court to defend his/her rights”<sup>1</sup>. This represents a procedural right and is considered as one of the key principles of the procedural law; implementation of substantive law depends on exactly that principle<sup>2</sup>. It grants every individual a possibility to address a court if he/she believes that his/her right was or is being violated<sup>3</sup>.

“One of the main guaranties for enjoying the right in full is a possibility of seeking protection in court. If there is not a possibility of avoiding violation of a right or a possibility to restore the violated right, then the legal leverage, enjoyment of the right itself, may be questioned. Therefore, in order to protect rights and freedoms, prohibition of addressing the court or disproportional restriction infringes not only the right to fair trial, but also contains threats of neglecting the right itself, for protection of which addressing a court is prohibited (restricted)”<sup>4</sup>.

The right to appeal to the court applies to the claim of compensation of damages. It’s legal means of protection are characterized to have legal deficiencies. Namely, it should be discussed if temporary mechanisms provided by Administrative Proceedings for Administrative complaints are protecting right of an aggrieved person, when damages are result of an unlawful abstaining from performing a public administrative measures (for instance, damaging by failure to issue a normative administrative-legal act or to perform an realact).

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<sup>1</sup> Article 31, para. 1, Constitution of Georgia, Departments of Parliament, 31-33, 24/08/1995.

<sup>2</sup> *Izoria L., Korkelia K., et al., Commentaries on the Constitution of Georgia, Fundamental Human Rights and Freedoms, Tbilisi, 2005, 363-364 (in Georgian).*

<sup>3</sup> *Kublashvili K., Fundamental Rights, Tbilisi, 2003, 336 (in Georgian).*

<sup>4</sup> Decision № 1/466 of 28 June 2010 of Constitutional Court, Public Defender of Georgia vs. Parliament of Georgia, Part II, paragraph 14, <[www.constcourt.ge/ge/legal-acts/judgments](http://www.constcourt.ge/ge/legal-acts/judgments)> [11.03.2019].

Other than legal deficiencies, what makes difficult to protect the right to compensate for damages is that, the sequence (stages) of applying means for its protection is not defined. Even more, criterions for defining this sequence are not determined.

In the present article, in order to identify the deficiencies in Georgian legislative, the regulations related to the issue that should be studied are reviewed; Also what role should have types of damages, the character of activity inflicting of it and even the legal form of activity for defining the sequence of applying means for protection of the right to compensate for damages are reviewed. Discussion would be about possibility to protect the right by applying to a court with a resumptive claim for acknowledgement instead of directly with the claim for obligation and to use such Private Law institutes as acknowledgment of the existence of a debt and performing the claim of limitation period in Administrative Law.

There is a table/scheme for the purposes of showing explicitly the result of a legal analysis of abovementioned issues, that determines not only which means should be used by aggrieved person for protection of his/her rights in different cases, but also the sequence (stages) of using them. In the article, other than the legal analysis, will also be used comparative-legal analysis method with regard to Germany and the Netherlands, as Civil Code of Georgia (hereinafter – CCG), including key grounds for claims on compensation of damages – Article 1005, is developed on the basis of German legislation<sup>5</sup>, and such legal remedies of protection of rights like the institute of administrative claims, is mainly based on the Dutch model, and the temporary protection remedy - on the German model<sup>6</sup>.

The article has the following structure: at first activities inflicting damages would be classified; then legal forms of activities of administrative body inflicting damages and a claim of a compensation for damages itself as a legal form would be discussed for the purposes to proper selection of means to protect rights; in the next part legal mechanisms to compensate for damages would be reviewed in the following order: administrative application, complaint and claim with according deficiencies and in the end of the article the results of a study would be resumed.

## 2. Activities Inflicting Damages in the Field of Administrative Law

“State authority shall be exercised based on the principle of division of power”<sup>7</sup>. This principle implies the state authority implementation related approach, according to which the state authority shall be exercised by balanced but independent branches of power<sup>8</sup>. The state authority in Georgia is divided into legislative, executive and judicial powers<sup>9</sup>. Legislative power is exercised by the Parliament of Georgia<sup>10</sup>, Executive – by the Government of Georgia<sup>11</sup> and Judicial – by the Constitutional Court of

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<sup>5</sup> Section 839, German Civil Code, 14/07/1986, <[www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.pdf](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf)> [11.03.2019].

<sup>6</sup> *Winter G.*, Administrative Law Development and Legal Consultation to Georgia as a Country in Transition, Journal “Administrative Law”, № 1, 2013, 78 (in Georgian).

<sup>7</sup> August 24 1995, Art. 4.3, Constitution of Georgia, Departments of Parliament, 31-33, 24/08/1995.

<sup>8</sup> *Melkadze O.*, Constitutionalism, Tbilisi, 2008, 78 (in Georgian).

<sup>9</sup> *Demetrashvili A., Kobakhidze I.*, Constitutional Law, Tbilisi, 2011, 193-194 (in Georgian).

<sup>10</sup> Art. 36.1, Constitution of Georgia, Departments of Parliament, №31-33, 24/08/1995.

<sup>11</sup> *Ibid.*, art. 54.1.

Georgia and Common Courts of Georgia<sup>12</sup>, where the Constitutional Court represents a constitutional oversight body<sup>13</sup> and Common Courts administer justice<sup>14</sup>.

In the field of Administrative Law, in general cases, the damage originates due to activities of the body exercising executive authority, and, in special cases – due to activities of the bodies implementing judicial power, which is envisaged, for instance in the part 3 of Article 1005 of CCG.

## **2.1. General Activities Leading to Damages**

In the field of administrative law, activities inflicting damages can be considered activities of administrative bodies<sup>15</sup>, i.e. persons/entities exercising public legal authorities. Implementation of public legal activities would mean governing activities of the state authority, which does not represent justice, legislative work, political decision making and ecclesial activities<sup>16</sup>, and the remaining activities are called public administration in its material sense<sup>17</sup>. Thus, subjects of law discharging legal authorities may be called public administration in a material sense.

Exercise of public legal authorities is the only criterion for granting a status of an administrative body to legal entities<sup>18</sup>. Therefore, damages caused by such activities shall be considered as damages inflicted by general activities in the field of administrative law. Guarantees for exercising the right to claim compensation of damages are provided by Georgian legislation. Namely, “everyone shall be entitled to full compensation, through court, for damages unlawfully inflicted by the bodies of the State, the autonomous republics and local self-governments, or their employees, from the state funds, the funds of autonomous republics or the funds of local self-governments, respectively”<sup>19</sup>. The purpose of this provision is to create material as well as procedural constitutional guarantees. Based on the meaning of the provision, it can be said that legislator retains a narrow area for actions, which is mainly expressed in regulating procedural issues<sup>20</sup>. To name some damages inflicted by general activities of administrative bodies: City Hall of Tbilisi banned traffic on the street for the reason of road reconstruction, because of which access to the stores located on that street was restricted as well and that inflicted damages on the owners of the shops; such damages shall be compensated based on provisions of the General Administrative Code of Georgia (hereinafter — GACG), namely, Article 209.1. In this example, road infrastructure development represents general activities of the state authority and damages caused by such activities

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<sup>12</sup> Art. 59.1, Constitution of Georgia, Departments of Parliament, 31-33, 24/08/1995.

<sup>13</sup> Ibid, art. 59.2.

<sup>14</sup> Ibid, art. 59.3.

<sup>15</sup> Article 2.1.a, General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

<sup>16</sup> *Turava P.*, General Administrative Law, 2<sup>nd</sup> ed., Tbilisi, 2018, 24 (in Georgian).

<sup>17</sup> *Adeishvili Z., Vardiashvili K., Izoria L.* et al., Textbook of General Administrative Law, Tbilisi, 2005, 53-54 (in Georgian).

<sup>18</sup> *Adeishvili Z., Winter G., Kitoshvili D.*, Commentaries on the Georgian Administrative Code of Georgia, Tbilisi, 2002, 32-33 (in Georgian).

<sup>19</sup> Art. 18.4, Constitution of Georgia, Departments of Parliament, №31-33, 24/08/1995.

<sup>20</sup> Decision № 2/3/423 of 7 December 2009 of the Constitutional Court, Public Defender of Georgia vs Parliament of Georgia, Part II, paragraph 2, <[www.constcourt.ge/ge/legal-acts/judgments](http://www.constcourt.ge/ge/legal-acts/judgments)> [11.03.2019].

shall be viewed as damages inflicted upon as a result of general activities of the state agents (entities) in the area of administrative law.

Similarly to the Constitution of Georgia, the guarantees for protection of the right to claim compensation of damages, are created by the basic law of Germany, according to which if a person while exercising public authorities violates public obligations to the third person, the responsibility shall be imposed principally on the state or the employing body<sup>21</sup>.

## 2.2. Special Activities Inflicting Damages

“The person whose freedom has been unlawfully curtailed has the right to receive compensation.”<sup>22</sup> The special highlight on this provision and its distinct separation from the general legal regulation shall be stipulated by such fundamental principles and supreme values of free democratic law and order as people’s freedom.<sup>23</sup> It should also be highlighted that paragraph 7, Article 18 of the Constitution of Georgia is closely linked to Article 42, paragraph 9, thus complementing each other and jointly creating constitutional guarantees (previous edition of the Constitution of Georgia). This fact is first of all reflected in the scope of the legal protection means and the compensation size of illegal detainees or arrested persons.<sup>24</sup>

In the area of Administrative Law, the damages arisen as a result of a special activity from the state authority shall be distinguished from the damages arisen from general activities. In the process of exercising these activities, the subjects carrying out special activities do not have the status of “an administrative body”. The lack of such a status may have an impact on the “proper” use of legal means to protect the right of an aggrieved person to claim damages. In the scope of Administrative Law, we can consider the person's illegal conviction as a result of the damage that arose as a result of a special activity on the part of the state authority. When a person is charged with a crime, the Municipal (District) Court exercises not a legal authority or enjoys the status of “an administrative body”<sup>25</sup> but exercises justice. Hence, the activity carried out by it shall represent not a general activity of the state authority, but a special one.

## 3. The Form of Activity of an Administrative Body and the Types of Claims in Case of Compensation of Damages

The administrative body has public and private legal forms of activity.<sup>26</sup> Since this paper refers to the observance of the right to claim compensation for damages in the area of Administrative Law, we will

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<sup>21</sup> Article 34, Basic Law for the Federal Republic of Germany, <[www.bundestag.de/en/documents/legal](http://www.bundestag.de/en/documents/legal)> [11.03.2019].

<sup>22</sup> Article 13, para. 6, Constitution of Georgia, Departments of Parliament, 31-33, 24/08/1995.

<sup>23</sup> *Izoria L., Korkelia K.*, et al., Commentaries on the Constitution of Georgia, People’s Basic Human Rights and Freedoms, Tbilisi, 2005, 96 (in Georgian).

<sup>24</sup> See, decision № 2/3/423 of 7 December 2009 of the Constitutional Court, Public Defender of Georgia vs Parliament of Georgia, Part 2, paragraph 5, <[www.constcourt.ge/ge/legal-acts/judgments](http://www.constcourt.ge/ge/legal-acts/judgments)> [11.03.2019].

<sup>25</sup> Article 3, para. 2, subpara. “d”, General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

<sup>26</sup> *Turava P.*, General Administrative Law, 2<sup>nd</sup> ed., Tbilisi, 2018, 124 (in Georgian).

not expand on the private legal forms of activity of an administrative body. Moreover that, in private legal relations, administrative bodies act as subjects of Civil Law.”<sup>27</sup> Correspondingly, the compensation arising out of such relations is subject to Civil Law and the legal mechanisms for the protection of the right of its claim is defined by private law, and the discussion of the latter is beyond the scope of the present paper. Therefore, I would like to note that of the public legal forms, the administrative body has four forms:

- Individual administrative-legal act;
- Normative administrative-legal act;
- Administrative agreement;
- Realact.<sup>28</sup>

Any public legal form of the activity of an administrative body: individual administrative-legal act, normative administrative-legal act, administrative agreement, or even a realact may cause direct damages. Therefore, the legal mechanisms that will allow the person to protect the claim of compensation for damages caused by the activities of an administrative agency will be different. Such mechanisms are an administrative complaint and claim, as well as the means to request claim and the right to compensation for damages.

On its part, compensation for damages by an administrative body is one of the forms of activity of an administrative body called a realact.<sup>29</sup> There is no unified legal definition of the latter, but it is widely used in scientific literature and Georgian judicial practice.<sup>30</sup> Realact is such an activity of a subject having public authority that aims not at causing legal consequences but at an actual outcome. For example, cash payment.<sup>31</sup> The fact that compensation for damages is a realact – the object of claim for obligation- is confirmed by the practice of the Supreme Court of Georgia, where in accordance with the definition of the Appeal Court, “T.K. ....filed a claim and concurrently demanded recognition of opening accounts in Samtredia branch ..... of the former Soviet Union Savings Bank, as well as imposition of compensation of the relevant amount on the Ministry of Finance of Georgia. i.e. he arose demands pertinent for both action for acknowledgement and obligatory claim by filing one and the same claim”.<sup>32</sup> The knowledge of this legal condition is important, since the protection of the right of a person is directly connected with the proper determination of the form of the activity of the administrative body. If the person

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<sup>27</sup> Article 65<sup>1</sup>(1), General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

<sup>28</sup> Further see, *Adeishvili Z., Vardiashvili K., Izoria L.*, et al., Textbook of General Administrative Law, Tbilisi, 2005, 102-105 (in Georgian).

<sup>29</sup> In order to return unlawfully received government payable – pension – into the budget (being compensation of damages in terms of legal relations), the administrative agency uses Article 24 of Administrative Procedure Code of Georgia (APCG), i.e. a norm connected with the implementation of the task on realact. Relocation of the parties will not change the nature of their legal relations due to which the compensation of damages by the administrative agency shall occur in terms of Article 24. In details see, *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T.*, Textbook of Administrative Procedure Law, Tbilisi, 2018, 287-289 (in Georgian).

<sup>30</sup> *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T.*, Textbook of Administrative Procedure Law, Tbilisi, 2018, 285-286 (in Georgian).

<sup>31</sup> *Detterbeck S.*, Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht, 12 Aufl., München, 2014, §15, Rn. 885, 331. *Ossenbül F., Cornilis M.*, Staatshaftungsrecht, 6 Aufl., München, 2013, §7, Rn. 280, 126.

<sup>32</sup> Decision № BS-827-793(3-06) of 11 April 2007 of the Supreme Court of Georgia.

fails to properly define the form of an administrative body, he/she will make a mistake in selecting the legal remedy for the protection of the right. The relation between the form of activity of the administrative body and the protection mechanism of right is exactly the same as between a lock and a key. To open the lock, the person must select the key that corresponds to this lock. Similarly, in order to defend one's right, a person should choose the right mechanism enabling the person to protect his/her right; as to the selection criterion, it is the form of the activity of the administrative body, which the administrative body has performed or is requested by the person to be performed.

“Unless otherwise provided by this Code (GACG), the rule prescribed by the Civil Code of Georgia<sup>33</sup> shall be used for reimbursement of damages caused by an administrative body.” In case when damages arise, Georgian legislation envisages indemnification means. Particularly, “the person who is obliged to reimburse the damages shall restore the condition that would have existed unless the obligatory consequences for compensation arose.”<sup>34</sup> And “if restoration of the initial condition is not possible or leads to disproportionately big costs, then the creditor may be given a refund.”<sup>35</sup> The choice of the means of damages compensation depends on the aggrieved person; however, the question of how the offender will compensate for damages is decided by the court, who is obliged first to use the form of in kind restitution, whether it is replacement of the item or its repair. Only in the two cases when in kind restitution is not possible or when the latter is connected with disproportionately large costs, the offender will be allowed to use cash indemnification method to compensate for the damages.<sup>36</sup>

In case of inflicting damages, the restoration of its initial condition is required by the Administrative Law as well. Particularly, if as a result of invalidation of the individual administrative-legal act from the date of its enforcement, the administrative body obtained some welfare, the administrative body is liable to return it.<sup>37</sup>

#### **4. The Application as a Claim for Compensation of Damages and a Right for Realization**

According to Georgian legislation, “an application is a written request submitted, as prescribed by this Code, by the party concerned by the issuance of an individual administrative-legal act on obtaining the right.”<sup>38</sup> The legal definition of the term “application” in the Administrative Law became necessary in order to highlight the right of the person to claim issuance of an individual administrative-legal act from the administrative body and in this way to protect, obtain or confirm his/her own right.<sup>39</sup> It is true

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<sup>33</sup> Article 207, General Administrative Code of Georgia, LHG 32(39), 15/07/1999,

<sup>34</sup> Article 408(1), Civil Code of Georgia, Departments of Parliament, 31, 24/07/1997.

<sup>35</sup> Ibid, article 409.

<sup>36</sup> Further see, *Chanturia L., Zoidze B.*, Commentaries on Civil Code, Book 3, Tbilisi, 2001, 452-453, 455-457 (in Georgian).

<sup>37</sup> *Adeishvili Z., Vardiashvili K., Izoria L.*, at al., Textbook of General Administrative Law, Tbilisi, 2005, 353 (in Georgian).

<sup>38</sup> Article 2(1)(h), General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

<sup>39</sup> *Adeishvili Z., Winter G., Kitoshvili D.*, Commentaries on Georgian Administrative Code of Georgia, Tbilisi, 2002, 40 (in Georgian).

that proceeding from the term itself, application should be related to the issuance of an individual act, but by considering the purpose of its interpretation we can widen the circle of forms of the activities of the administrative body which this term - application implies; we can assume that realact ia also included in these forms, thus ensuring maximum rights to the person.

In general the claim represents a pretention to demand some action or restraint from an action from another person. It is always directed towards a particular person and performing particular action or restraint from performing this action.<sup>40</sup> Hence, in the area of the Administrative Law, the legislation should take into consideration the legal means to claim compensation for damages by an aggrieved person and the application requesting compensation for the damages submitted to the responsible administrative body by an aggrieved person shall be considered as such. Furthermore, if a circumstance arises that impedes to claim compensation for damages, the application could be used as a means for realization the right of compensation for damages.

#### **4.1. Application as a Legal Means for Claiming Compensation for Damages**

The application as a legal means for claiming compensation for damages can be used only if the damages have been completed; i.e. such damages whose amount, despite the time remains unchanged, as the action of the activity form by an administrative body that regulates concrete relations has been completed and as a result we have the final outcome. In such a case the aggrieved person loses interest towards the dispute against the activities of the administrative body that inflicted damages, because due to the activity the legal outcome is obvious and his/her primary concern is to receive compensation for damages.<sup>41</sup> Contrary to this, in case of continuous damages, the aggrieved person should use the legal mechanisms to defend his/her rights, including the means of temporary protection. The damage is continuous when with time the amount of damages changes, since the form of the activity of the administrative body regulating particular relation continues to act and due to which the final outcome has not yet been achieved.

Legal mechanisms for the right to claim compensation for damages are an administrative complaint and claim. It should be noted that the right calls for protection only after it is violated. The right for compensation of damages will be violated if the aggrieved person addresses the administrative body with a claim for compensation of damages, i.e. with an application about performing the action and the latter is not satisfied. After that, the aggrieved person may use legal mechanisms for the right to claim compensation for damages.

Like the administrative body, in case there is a precondition for the obligation to compensate for the damages on the part of a government or a public servant, it should be possible to address the latter with a written request to compensate the damages. However, even if such an address does not exist, the aggrieved

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<sup>40</sup> *Berekashvili D., Todua M., Chachava S., Dzlierishvili Z., Methods for Solving Cases in the Civil Law, Tbilisi, 2015, 20-21 (in Georgian).*

<sup>41</sup> *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T., Textbook of Administrative Procedural Law, Tbilisi, 2018, 320 (in Georgian).*



person will have an opportunity to defend his/her rights on compensation of damages inflicted by the government or public servant by filing an administrative claim to the court.

#### **4.2. Application as a Legal Means to Realize the Right to Compensation for Damages**

The application as a means to claim compensation for damages shall be distinguished from the application as a mechanism for the realization of the right to compensation for damages. The criterion for the difference could be the presence of the condition impeding the claim for compensation of damages. Limitation period of the claim could be such a condition. In compliance with Georgian legislation, “the limitation period of the claim for compensation of damages inflicted by delict is three years from the moment the aggrieved person learnt about the damages or about the person responsible for the damages.”<sup>42</sup> The limitation period shall be considered as a condition impeding the claim for compensation of damages, since it identifies the period of time during which the aggrieved person has an opportunity to claim for indemnification of damages. During this period the person responsible for the compensation of damages is liable to compensate damages. Expiration of the limitation period shall not affect the claim for compensation of damages as presence of a substantive-legal right, since its presence depends on the cumulative presence of actual and legal preconditions of the claim for compensation of damages defined by Article 1005. paragraph 1 of CCG. And they exist despite the limitation period for compensation of damages. Hence, even in case of limitation period of the claim, the request for compensation of damages, as a substantive-legal right, still pertains. The difference lies in the fact the aggrieved person in this case is unable to protect his/her right by enforcement and the person responsible for the compensation of damages has right to reject to perform the action. Despite this right, the person responsible for the compensation of damages could show his/her goodwill to settle the claim and compensate the damages.<sup>43</sup> This is based on the legislation of Georgia, particularly, “after the expiration of the limitation period, the responsible person shall have right to refuse to perform the action.”<sup>44</sup>

While making a decision on the claim of limitation period in regard to compensation of damages, the attention should be paid to the limits of the autonomy of the administrative body. Unlike legal entities of legal and private law who may undertake any action not prohibited by law, the administrative body enjoys rights that have been precisely outlined in the law. The administrative body is limited by the principle of legality and protection of public interests, thus, excluding it from the use of principle of the autonomy of the will; this fact determines introduction of special legal regime for the persons participating in the administrative-legal relation.<sup>45</sup> Unlike the administrative authorities, when the state or public servant is responsible for compensation of damages, he/she shall be allowed to use the principle of autonomy of will defined

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<sup>42</sup> Article 1008, Civil Code of Georgia, Departments of Parliament, 31, 24/07/1997.;

<sup>43</sup> *Akhvlediani Z., Chanturia L., Zoidze B., Ninidze T., Jorbenadze S.*, Commentaries on Civil Code, Book 1, Tbilisi, 1999, 337 (in Georgian).

<sup>44</sup> Article 144(1), Civil Code of Georgia, Departments of Parliament, №31, 24/07/1997.

<sup>45</sup> *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.*, Textbook of Administrative Procedural Law, Tbilisi, 2008, 33-34 (in Georgian).

by the private law, which is stipulated by the legal circumstance that the government or civil servant does not represent an independent administrative body.

Since the administrative body has right to refuse to satisfy the compensation of damages after the limitation period, we can assume that while making decision on such a request, the administrative body is granted a discretionary right – to perform an action and compensate the damages or to restrain from it. It should be highlighted that the legislation establishes the rule for exercising a discretionary right, whose violation determines approval of not inexpedient, but illegal decision. Since, as mentioned already, a government or public servant does not represent an independent administrative body, he/she cannot exercise his/her discretionary right in the sense given in Article 2 para 1 subparagraph k, GACG, though he/she will be able to apply autonomous principle of will envisaged by private law, which implies limitless discretion.

The judicial practice knows the case, when the aggrieved person has several times addressed the administrative body that inflicted damages on him/her with a claim to indemnify damages, and the administrative body settled the claim twice. The Appeals Court estimated this circumstance in compliance with Article 341 of CCG as the liability of the administrative body<sup>46</sup> to compensate the damages. As to the limitation period, in regard to one case the court decided that the claim for compensation of damages shall not be considered as having the limitation period, despite the fact that claim was filed to the incompetent court, since the subject exercising the state authority incorrectly explained to the aggrieved person the rule for appeal<sup>47</sup>. Due to this fact the court considered it inadmissible to restrict the protection of the right of the person.

## **5. Administrative Complaint, as a Legal Means to Protect Right to Claim Compensation for Damages**

“An administrative complaint is a written request filed by a concerned party with the authorized administrative body prescribed by the rule of this Code to restore infringed right on declaring already issued administrative-legal act invalid, issued by the same or subordinate authority, its replacement or issuance of a new administrative-legal act or on performing an action by an administrative body or refraining from performing such an action that does not imply issuance of an individual administrative-legal act.”<sup>48</sup> The administrative complaint has three functions:

- Protection of complainant’s rights;
- Exercise of self-control by administrative bodies;
- Release of the court from the cases of an administrative category.<sup>49</sup>

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<sup>46</sup> Decision № BS-1116-1067(K-07) of 17 April 2008 of the Supreme Court of Georgia, in: *Nachkebia A.*, Definition of Administrative-Legal Norms in the Practice of Supreme Court, Tbilisi, 2015, 101-102 (in Georgian).

<sup>47</sup> Decision № 3G/AD-329-K-02-2 of 24 March 2003 of the Grand Chamber of the Supreme Court of Georgia, in: *Explanations of the Norms Used in the Decisions of the Grand Chamber of the Supreme Court of Georgia*, Tbilisi, 2015, 54 (in Georgian).

<sup>48</sup> Article 2(1), subpara. 1, General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

<sup>49</sup> *Adeishvili Z., Vardiashvili K., Izoria L.*, et al., *Textbook of General Administrative Law*, Tbilisi, 2005, 299 (in Georgian).

The administrative complaint has an advantage: during the administrative procedure, not only the legality of the activities of the subordinate administrative body is examined but also its expediency.<sup>50</sup>

It should be separately noted that Georgian legislation does not envisage filing an administrative complaint against the government or public servant and imposing the responsibility of compensation of damages on government or public servant by the administrative body administering the complaint. In addition, Georgian legislation does not envisage the possibility of filing administrative complaints on disputes arisen from concluding, fulfillment or termination of an agreement.<sup>51</sup> In this regard an administrative claim shall be utilized as a means for the protection of the right to claim compensation for damages. This issue will be more widely discussed in the following chapter.

“The concerned party has the right to appeal the administrative-legal act<sup>52</sup> issued by the administrative body.” The term – administrative-legal act – implies both individual and normative acts.<sup>53</sup> By the initial edition of GACG the possibility of filing an administrative complaint on normative administrative-legal act was not allowed.<sup>54</sup> Only after the amendments introduced on June 24 2005, when the term administrative act was replaced by the term – individual administrative-legal act, it became clear that it was possible to file a complaint on normative administrative-legal act. In case of a normative administrative-legal act, only the damages directly inflicted by the normative administrative-legal act shall be subject to indemnification. Consequently, we should assume that in such cases a broad interpretation of the responsibility is inadmissible.<sup>55</sup> The Law of the Federal Republic of Germany also allows filing an administrative complaint but there is a difference - in general cases individual administrative-legal acts shall be appealed in the court unless otherwise envisaged by special legislation.<sup>56</sup>

Furthermore, “the action of the administrative body, not connected with the publication of the administrative-legal act, shall be appealed in terms of the regulation prescribed by this chapter”<sup>57</sup>, which means that the object of the administrative complaint could be realact.<sup>58</sup> Despite this, there is an idea that it is possible to address a claim to the court to exercise the realact without one-time appeal: in case of a written refusal from the administrative body, within a month after officially receiving the refusal, and in case of its absence – any time.<sup>59</sup>

The utilization of the means of protection of the right – the administrative complaint – depends on two legal conditions: a) the type of damages inflicted by the activities of an administrative body and b)

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<sup>50</sup> *Turava P.*, General Administrative Law, 2<sup>nd</sup> ed., 2018, 238-239 (in Georgian).

<sup>51</sup> *Ibid.*, 244.

<sup>52</sup> Article 177(1), General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

<sup>53</sup> *Adeishvili Z., Winter G., Kitoshvili D.*, Commentaries on General Administrative Code of Georgia, Tbilisi, 2002, 36 (in Georgian).

<sup>54</sup> *Ibid.*, 223.

<sup>55</sup> *Vachadze M., Todria I., Turava P., Tskepladze N.*, Commentaries on the Administrative Procedure Code, Tbilisi, 2005, 21 (in Georgian).

<sup>56</sup> §79, Administrative Procedure Act, 25/05/1976, <[www.gesetze-im-internet.de/englisch\\_vwgo/englisch\\_vwgo.pdf](http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.pdf)> [11.03.2019].

<sup>57</sup> Article 177(3), General Administrative Code of Georgia, LHG 32(39), 15/07/1999.

<sup>58</sup> *Turava P.*, General Administrative Law, 2<sup>nd</sup> ed., Tbilisi, 2018, 244 (in Georgian).

<sup>59</sup> *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.*, Textbook of the Administrative Procedural Law, Tbilisi, 2008, in: *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T.*, Textbook of the Administrative Procedural Law, Tbilisi, 2018, 41 and 290 (in Georgian).

the form of its activities. As mentioned, two types of damages could arise as a result of the activities of the administrative body: a) completed and b) continuous. In case of completed damages, the amount of the damages is unchangeable, in case of uncompleted – changeable. Let's look into the cases when it is possible to protect the right to claim indemnification of damages by filing an administrative complaint.

## **5.1. Protection of the Right to Claim Compensation for Continuous Damages**

### **5.1.1. Protection of the Right to Claim Compensation for Damages Inflicted by Administrative-Legal Act**

Proceeding from the peculiarities of the continuous damages, since the amount increases, the aggrieved individual has interest to suspend the action of the administrative-legal act so that the damage amount does not increase and initial condition could be restored. Consequently, in order to restore the initial condition, he/she should claim invalidation of the administrative-legal act that inflicted damages and assign the administrative body to compensate the damages inflicted; in order to eliminate the increase in the amount of damages, Georgian legislation envisages a temporary mechanism of the right protection, so called suspensive effect. Particularly, “unless otherwise defined by the law or bylaw issued on the basis of the law, the action of the appealed act shall be suspended as soon as the complaint is registered. And the administrative body shall issue an individual administrative act”<sup>60</sup>. It is true that in order to suspend the action of the appealed administrative-legal act, the Law of Georgia demands issuance of an individual administrative act, but this requirement does not have a mandatory nature and even if it is not issued, the action of the administrative-legal act will be automatically suspended once the complaint is registered. Georgian legislation envisages an exception, when the administrative body that issued the disputable administrative-legal act or administered the complaint shall receive an individual administrative act about the continuation of the action of the appealed administrative act. Adoption of such individual administrative-legal act is mandatory. The interested person including the complainant has the right to appeal the decision on suspension of the action of the administrative-legal act, as well as on its continuation by the regulations prescribed by Georgian legislation in regard to individual administrative-legal act.<sup>61</sup>

The above given mechanism protects the aggrieved person from further increase in damages amount, as to the already generated damages, the aggrieved person shall ask for its compensation. In case of continuous damages, the aggrieved person does not necessarily have an obligation to address the subordinate administrative body with an application and the presence of a negative decision on settlement of the claim by the latter is not necessary either. The main arguments for such an approach are the principles of cost effectiveness of administrative procedure and informal attitude toward the issue to be solved. The latter implies that while making a decision the administrative body shall not have rather formal attitude to the issue to be solved. Informal principle differs from cost effectiveness in the following: while

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<sup>60</sup> Article 184 (1), General Administrative Code of Georgia, 32(39), 15/07/1999.

<sup>61</sup> *Adeishvili Z., Winter G., Kitoshvili D.*, Commentaries on the General Administrative Code, Tbilisi 2002, 336-337 (in Georgian).

taking the latter into consideration, the subject making a decision on the issue reduces unwanted expenses and the terms for considering the complaint by observing all the requirements of the legislation. Contrary to that the principle of informality achieves the same goal, however, through insignificant violation of the requirements of the law, i.e. the mentioned principle implies that the subject deciding the issue shall not have too formal attitude to the issue.

### **5.1.2. Protection of the Right to Claim Compensation for Damages Inflicted by Realact**

While defending the right to claim compensation for continuous damages inflicted by realact, the aggrieved individual also has interest to stop exercise of realact so that not to allow the damages to increase and to restore the initial condition. Consequently, in order to restore the initial condition, he/she should claim restraint from performing of the action that inflicted he damages and imposition of compensation of the generated damages on the administrative body. In such case, cost effectiveness and informal principles will also apply, i.e. it is not mandatory for the aggrieved individual to address the administrative body with a claim for compensation of damages or the presence of the decision on refusal to settle the claim.

The main problem of an administrative complaint that emerges during protection of the right to claim compensation for continuous damages inflicted by realact is the fact that Georgian legislation does not consider the temporary protection means of the right. Consequently, unlike administrative-legal acts, when the registration of the administrative-legal act would suspend the action of the act, other than an exception, in case of realact, the subordinate administrative body has right to perform the action at least until the final decision in regard to the issue is made and the aggrieved individual will not be able to resist increase in the amount of damages by means of any legal mechanism. Consequently, it might be even more appealing for the aggrieved individual to file the administrative claim in the court, since the administrative proceedings envisage more temporary protective means of the right,<sup>62</sup> than in case of administrative procedures in regard to an administrative complaint. It is compounded by the fact that filing one-time administrative complaint is not a precondition for admissibility of the claim on restraining the administrative body from performing the action.<sup>63</sup>

### **5.2. Protection of Right to Claim Compensation for Completed Damages**

Compared to protection of right to claim compensation for continuous damages, protection of the right to claim compensation for completed damages is simpler, since in case of the latter the aggrieved individual does not have to utilize legal means to avoid increase in the damage amount and his/her only concern is to impose compensation of damages on the administrative body. To achieve this purpose

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<sup>62</sup> By means of temporary protection mechanisms of the right envisaged by Article 31 of the Administrative Procedure Code of Georgia, LHG 32(39), 15/07/1999

<sup>63</sup> *Loria V. (ed.), Kharshiladze I., Kopaleishvili M., Tskepladze N., et al., Commentaries on Administrative Procedure Code, 3<sup>rd</sup> ed., Tbilisi, 2008, 238 (in Georgian).*

he/she can use such a mechanism of protection of the right as is administrative complaint, by means of which the aggrieved individual shall demand from the subject considering the complaint to impose on the administrative body that inflicted damages to perform an action, i.e. to compensate damages. It should be separately noted, that the aggrieved individual can choose other means of protection of right, particularly, to file a claim without filing an administrative complaint.

## **6. Administrative Claim, as a Legal Means to Protect Right to Claim Compensation for Damages**

An administrative claim, as a legal means to protect right to claim compensation for damages is envisaged by the Administrative Procedure Code of Georgia (hereinafter, APCG). Since in the given paper the activities of the government authority inflicting damages were divided into two categories, hence, the means of protection of right to claim compensation for damages shall be also divided into two types: 1. administrative claim on protection of right to claim compensation for damages inflicted by general activities of the government authority and 2. Administrative claim on protection of right to claim compensation for damages inflicted by special activities of the government authority.

### **6.1. Protection of Right to Claim Compensation for Damages Inflicted by General Activities of the Government Authority**

General activity of the government authority is exercise of public legal authority by legal subjects. In this case the administrative body applies public legal forms of activities which acquire procedural-legal significance since they determine proper selection of the means of protection of right to claim compensation for damages.<sup>64</sup> This acquires especial significance when we have to deal with the continuous damages. In this case the interest of the person is directed not only towards the past – to receive compensation for already generated damages, but towards the future – to eliminate increase in the amount of damages. Hence, the aggrieved person has to correctly determine the form of activities of the administrative body that inflicted damages and file a claim against it. In case of completed damages, the interest of the interested person is directed only towards the past – compensation for damages, hence he/she does not need to file a claim against the activity that inflicted damages, since such an action has already completed and maximum damages have already been generated. Let's review the mechanisms of protection of right to claim compensation for damages from each category of damage.

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<sup>64</sup> *Vachadze M., Todria I., Turava P., Tskepladze N.*, Commentaries on the Administrative Procedural Code, Tbilisi, 20015, 247 (in Georgian).

### **6.1.1. Protection of Right to Claim Compensation for Continuous Damages**

In case of continuous damages, the means of protection of right to claim has one common character, expressed in protection of the interest directed towards past. In order to protect the latter interest, he/she shall request to impose performance of an action on the body that inflicted damage, i.e. compensation of damages as prescribed by Article 24, part 1 of APCG. And in the part of protection of interest directed towards the future, the mechanisms of protection of right to claim compensation for damages are different; consequently, the claims of the aggrieved person shall also be different. This will be discussed in the following subchapters.

#### **6.1.1.1. Protection of Right to Claim Compensation for Damages Inflicted by Administrative-Legal Act**

In compliance with Georgian legislation, to file an administrative claim against administrative-legal act is admissible, and as already mentioned under this term we also imply normative administrative-legal act. Unlike Georgia, the Netherlands bans filing a claim against particular normative decisions,<sup>65</sup> hence, their legislation defines the types of administrative claim objects in more details.

##### **6.1.1.1.1. Damages Inflicted by Administrative-Legal Act**

“The subject-matter of an administrative dispute in the court could be consistency of the administrative-legal act with Georgian legislation.”<sup>66</sup> Hence, in compliance with Article 22, part 1 of APCG, the aggrieved person is authorized to claim invalidation of the issued administrative-legal act that inflicted damages. Such kind of claim in most cases does not require suspension of the increase in the amount of damages, as the claim on invalidation of administrative-legal act has a suspensive effect towards the disputed individual administrative-legal act. Particularly, without a motion of a party and a court hearing, acceptance of the claim automatically suspends the action of the disputed individual act. Acceptance of the claim means that a court issued ruling about taking proceeding to court and not filing a claim into the court registry.<sup>67</sup> In the exceptional cases<sup>68</sup> envisaged by Georgian legislation, the acceptance of the claim does not have suspensive effect towards the disputed individual act, however, if this is the case, the aggrieved person has an alternative mechanism for temporary protection of right; particularly, by his/her

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<sup>65</sup> Article 8:2, Dutch General Administrative Law Act, 05/1994, <[www.acm.nl/en/publications/publication/15446/Dutch-General-Administrative-Law-Act](http://www.acm.nl/en/publications/publication/15446/Dutch-General-Administrative-Law-Act)> [11.03.2019].

<sup>66</sup> Article 2(1), subpara. “a”, Administrative Procedure Code of Georgia, LHG 32(39), 15/07/1999.

<sup>67</sup> *Loria V. (ed.), Kharshiladze I., Kopaleishvili M., Tskepladze N.*, et al., Commentaries on the Administrative Procedure Code, 3<sup>rd</sup> ed., Tbilisi, 2008, 266-267 (in Georgian); see also, Article 29(1), Administrative Procedure Law, LHG 32(39), 15/07/1999.

<sup>68</sup> *Ibid*, Article 29(2). Also, Articles 23 and 35, Law of Georgia on “Licenses and Permits”, LHG, 40, 18/07/2005.

request, the court can suspend the action of the individual act.<sup>69</sup> In this case, the court decision on temporary protection of right replaces so called suspensive effect.<sup>70</sup>

True, it is possible to address the court with request to announce normative administrative-legal act invalid<sup>71</sup>, but in regard to such a disputable act unlike disputable individual administrative-legal act, suspensive effect does not apply, as defined by the heading and wording of Article 29 of Administrative Procedure Code of Georgia. Unlike administrative claim, while filing a complaint on recognition of normative administrative-legal act invalid, we can assume that the suspensive effect applies to the disputed normative administrative-legal act. Article 184 of the General Administrative Code of Georgia that determines suspensive effect caused by filing an administrative claim, uses the term “administrative-legal act” and not “individual administrative-legal act”. The former, as mentioned, implies individual as well as normative-legal act. Proceeding from this, it is desirable that the norms regulating administrative claim and complaint about recognition of the normative administrative-legal act invalid are brought into consistency. As Georgian legislation considers it admissible to provide the person with repressive protection (restoration of the infringed right)<sup>72</sup> by filing an administrative claim on recognition of normative administrative-legal act invalid, it would be logical that the procedural legislation envisage the mechanism of temporary protection of right, since without it, it would be impossible to provide efficient justice, because there would be a risk that before the final decision is made on the case, the public authority would make the person face the actual facts.<sup>73</sup>

#### **6.1.1.1.2. Damages Inflicted by Failure to Issue an Administrative-Legal Act**

“In the court the subject-matter of the administrative dispute may be the responsibility of an administrative body to issue an administrative-legal act.”<sup>74</sup> Proceeding from this, the aggrieved person is authorized, by Article 23, part1 of APCG, to claim the issuance of the administrative-legal act whose non-issuance inflicts damages on him/her. However, such claim cannot suspend the increase in the amount of damages caused by failure to issue the administrative-legal act until the disputed issue is resolved. In such a case, the aggrieved person shall utilize temporary mechanism of protection of right and, in order to perform independent procedural action, apply to the court and demand preliminary regulation

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<sup>69</sup> Article 29(3), Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.

<sup>70</sup> *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E., Textbook of Administrative Procedure Law, Tbilisi, 2008, 389 (in Georgian).*

<sup>71</sup> *Ibid*, 306.

<sup>72</sup> *Vachadze M., Todria I., Turava P., Tskepladze N., Comments on the Administrative Procedural Code, Tbilisi, 2015, 174 (in Georgian).*

<sup>73</sup> *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E., Textbook of Administrative Procedural Law, Tbilisi, 2008, 386 (in Georgian).*

<sup>74</sup> Article 2(1), subpara. “c”, Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.



of disputable legal relations.<sup>75</sup> The purpose of the temporary means of protection of right is to avoid actual risk of infringement of the person's interests by changing the legal situation.<sup>76</sup>

While compensating the damages caused by failure to issue the normative administrative-legal act, there is no temporary means for protection of right, unlike repressive protection mechanism of right. Since the latter exists, there should also exist temporary protection means of right so that to provide the aggrieved person with complete protection of right.

### **6.1.1.2. Protection of Right to Claim Compensation for Damages Inflicted by Realact**

“The subject-matter of the administrative dispute in court could be a responsibility of the administrative body on performing some action”.<sup>77</sup> The responsibility on performing an action implies performing an action, as well as restraint from performing an action. In order to suspend the increase in the amount of damages, the aggrieved person shall address the court and claim restoration of the infringed right, as defined by Article 24, part 1 of ALCG. In addition, it does not matter for the claim whether the damage is inflicted by performing an action or by failure to perform it, since the aggrieved person's protection of right is exercised by Article 24 of ALCG whether the damage was inflicted by performing or failure to perform the activity. The difference between the claims on imposition of performing an action and restraint from performing an action lies on temporary mechanisms of right protection. Let's discuss them in the subchapters below.

#### **6.1.1.2.1. Damages Inflicted by Failure to Perform an Action**

Temporary means of protection of right to claim compensation for damages inflicted by the failure to perform an action is identical to the temporary mechanism of protection of right to claim compensation for damages arisen from failure to issue an administrative-legal act. It follows that in the latter two cases, the administrative body is unlawfully refusing to comply with the obligation under the law - whether it is issuance of an administrative-legal act or performance of an action that damages the person. In such a case, as noted while discussing the temporary mechanism of protection of right to claim damages arising from failure to issue an administrative-legal act, in order to suspend the increase in the amount of damages, the aggrieved person can temporarily defend his/her right on the basis of the provisions of Article 31 part 1 sentence 2 of APCG. This provision ensures protection of the aggrieved person's interests by changing the existing legal situation, through the preliminary settlement of the legal relationship.

One of the interesting issues related to the responsibility to compensate damages due to the failure to perform an action by administrative body, is the case when the Park of Culture and Recreation in Rus-

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<sup>75</sup> Ibid, Article 31(1), sentence 2.

<sup>76</sup> *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.*, Textbook of Administrative Procedural Law, Tbilisi, 2008, 393 (in Georgian).

<sup>77</sup> Article 2(1), subpara. “c”, Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.

tavi, a 7-year-old child was attacked and stung by a viper, which resulted in the child being in serious condition. The appellant demanded from The City Hall and the owner of the park to compensate for the damages, but the claim was not settled; as the Court of Cassation explained the defendants were not able to prevent damage; it was an accident that the defendants were not guilty of. The state, which is the owner of wild animals, is not responsible for damages caused by animals in the natural state of liberty.<sup>78</sup>

#### **6.1.1.2.2. Damages Inflicted by Performing an Action**

While compensating damages inflicted by an action, to suspend increase in the amount of damages, the interest of the aggrieved person is to retain that legal situation, which existed before the action was performed. Consequently, the mechanism of temporary protection of the right to claim damage compensation, used for changing the legal situation will not satisfy the aggrieved person's interest and contrary to that, the aggrieved person's protection could be maintained only by temporary protection means of the right that provides retention of the legal situation. In compliance with Georgian legislation, "On the basis of an application, a court may render temporary ruling regarding a dispute, prior to initiating proceedings, if there is a risk that changing the existing situation may hinder or significantly complicate the exercise of the applicant's rights."<sup>79</sup>

#### **6.1.1.3. Protection of Right to Claim Compensation for the Damages Inflicted by an Administrative Agreement**

"The subject-matter of an administrative dispute in court may be conclusion, fulfillment or termination of an administrative agreement,<sup>80</sup> also the responsibility of the administrative body on compensation of damages."<sup>81</sup> In order to suspend the increase in the amount of damages, the aggrieved person shall address the court and claim restoration of the infringed right, as defined by Article 25<sup>1</sup>, part2 of APCG. In regard to the mechanisms of temporary protection of right, Articles 29 and 31, part2 of APCG could not be applied, since they refer to disputes that arose in regard to individual administrative-legal acts and performance of or failure to perform an action and not in regard to the disputes that arose from administrative agreements, which is absolutely clear from the heading of the articles and their wording.

It is true that the mechanisms of temporary protection of right do not apply to disputes that arose due to administrative agreements, however civil procedural means should be applied, as well as the measures that ensure enforcement of claims<sup>82</sup> and decisions<sup>83</sup>. Consequently, temporary protection of appellant's rights on such disputes is relatively better secured than on the disputes connected with those arisen from normative administrative-legal acts.

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<sup>78</sup> Decision № BS-205-172-K-04 of 23 September 2004 of the Supreme Court of Georgia, in: *Rusiashvili J., Compensation of Damages by Administrative Bodies*, Tbilisi, 2013, 150-156 (in Georgian).

<sup>79</sup> Article 31(1), sentence 1, Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.

<sup>80</sup> Ibid, Article 2(1), subpara. "b".

<sup>81</sup> Ibid, Article 2(1), subpara. "c".

<sup>82</sup> Article 198, Civil Procedure Code, Departments of Parliament, 47-48, 31/12/1997.

<sup>83</sup> Ibid, Article 271.

## **6.1.2. Protection of Right to Claim Compensation for Completed Damages**

### **6.1.2.1. An Action for Acknowledgement**

“The subject-matter of the administrative dispute in the court could be determination of existence or absence of right or legal relations.”<sup>84</sup> By the definition of the Supreme Court of Georgia, “an action for acknowledgement can occur only when other claims cannot be applied. From the view of cost effectiveness of the trial, an action for acknowledgement is inadmissible if it is possible to issue a claim on exercising responsibility, i.e. if it is possible to issue liability claim. The appellant cannot be legally interested in launching an action for acknowledgement if he/she has an opportunity to achieve a claim in any other form. Furthermore, an action for acknowledgement shall not become a means to escape the preconditions of other types of claims. An action for acknowledgement does not contain the demand for the defendant to accomplish the claim or to enforce the execution.”<sup>85</sup> An action for acknowledgement shall be applied in the cases when the activities that inflicted damages have already been performed and they caused the damages in the maximum amount that it could have caused. In such a case, the aggrieved person has interest not toward the activity of the administrative body, but towards the compensation of damages. In such cases the aggrieved person, on the basis of Article 25, part 1 of APCG an action for acknowledgement shall be addressed to the court and he/she shall demand recognition of the completed activities of the administrative body as unlawful.<sup>86</sup> One of such examples is dismantling of the building by the action, implementation of the realact by the administrative body. According to the explanation of the Supreme Court of Georgia “the dismantling of the building by the administrative body is a one-time completed operation (realact). By such realact the only means to restore the right infringed by exercising the realact is an action for acknowledgement envisaged by the procedure legislation to demand that the action be recognized illegal.”<sup>87</sup> In this case the interest of the aggrieved person is to appeal not the completed action, but compensation of the damages already generated by such an action.

It is true that Article 31 of the APCG does not directly specify the possibility of using the temporary protection mechanism of the right envisaged by these articles in regard to an action for acknowledgements. The mentioned means should be applicable in case of filing an action for acknowledgement as well.<sup>88</sup> After illegality of the activities of the administrative body is recognized, the aggrieved person shall apply to the body having inflicted damages, as a legal means claiming compensation for damages.

The cases when there is a condition that impedes the claim for compensation of damages should be separately discussed. Particularly, when the claim is beyond the limitation period. The presence of this legal condition should affect not admissibility of an action for acknowledgement and the possibility of its allowability, but the realization of the right of compensation of damages. This proceeds from the

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<sup>84</sup> Article 3(1), subpara. “d”, Administrative Procedure Code of Georgia, LHG 39(46), 06/08/1999.

<sup>85</sup> Decision № BS-740-706(K-07) of 5 March 2008 of the Supreme Court of Georgia.

<sup>86</sup> *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.*, Textbook of Administrative Procedure Law, Tbilisi, 2008, 375 (in Georgian).

<sup>87</sup> Decision № BS-595-573(KS-13) of 2 October 2014 of the Supreme Court of Georgia.

<sup>88</sup> *Turava P. (ed.), Kopaleishvili M., Skhirtladze N., Kardava E.*, Textbook of Administrative Procedural Law, Tbilisi, 2008, 392 (in Georgian).

fact that, as already mentioned substantive right – the right of compensation of damages – exists independent of the condition of the limitation period - impeding the claim. Consequently, after recognizing the basis for the limitation period - the illegal activities of the administrative body, the aggrieved person shall apply to the body that had inflicted damages – as a legal means for realization the right for damages compensation. While reviewing this application, the limitation period of the claim for compensation of damages will affect the settlement of the claim, since the administrative body, in terms of Article 144 part 1 of APCG, will have right to reject the settlement of the claim. This means that in case the claim has limitation period, the administrative body has discretionary right to the settlement of the claim having limitation period. The rule to exercise discretionary right is established by Georgian legislation.

### **6.1.2.2. Claim on Imposing Performance of an Action**

As noted, compensation for damages by an administrative body is performance of an action. Consequently, in case of presence of completed damages, the aggrieved person, for the purpose of repressive protection of the right of claim, in terms of Article 24 part 1 of APCG, shall apply to the court with a claim to impose on the administrative body compensation for damages, i.e. to perform an action.

In cases when the activities of the administrative body that inflicted continuous damages have collateral completed damages, the aggrieved person shall not be obliged to apply to the administrative body that inflicted damages with a claim for compensation of damages, as this will cause artificial division of the claims arisen from one and the same issue, which will be a rather formal approach to this issue. This could lead to a new dispute, which will negatively affect government expenditures. Contrary to this, we can say that when the interest of the aggrieved person is compensation of already generated damages as well as suspension of increase of its amount, the mechanism for the right he/she had applied is unified because it should be simultaneously directed towards the suspension of the increase in the amount of damages, and towards the compensation of damages. In this case, the court shall be guided by the informal principle, which allows, proceeding from the particular relation, the claim on compensation for completed collateral damages resulting from the activity of an administrative body responsible for the continuous damages to be recognized admissible on performing the action – compensation of damages - by the administrative body, even in case of absence of a negative decision.

The case will be completely different, when the activities by the administrative body that inflicted damages have been performed and we see only completed damages. In this case the aggrieved person shall be obliged to demand from the administrative body having inflicted the damages, to perform an action – compensation for damages and once this claim is rejected to be settled, he/she will be able to file a claim against the performance of the action – compensation for damages. This is because the protection mechanism of the right to claim compensation for completed damages is not artificially separated from the protection means of the right to claim compensation for continuous damages. Furthermore, the aggrieved person will not be able to use such means since continuous damage does not exist at all.

## **6.2. Protection of Right to Claim Compensation for Damages Inflicted by Special Activities of the State Authority**

As mentioned a special activity of the state authority shall be considered performance of such an activity by the government authority which is not connected with exercise of public legal authority. True, the list of such activities is fully given in Georgian legislation, such an activities are:

- Conviction of a person;
- Criminal prosecution of a person;
- Use of detention of a person as a preventive measure;
- Imposing an administrative penalty on a person in the form of an administrative imprisonment;
- Imposing an administrative penalty on a person in the form of a correctional labor.<sup>89</sup>

As a result of performing such an illegal activity, damages that the person suffered shall be completely indemnified to the aggrieved person. The fact that the person experienced damages due to illegal activity is confirmed by the presence of a rehabilitating condition of the person, without which damages caused by special activities of the state authority shall not be compensated. Such conditions are: not guilty verdict, termination of a criminal case due to absence of constituent element of offense, etc.<sup>90</sup>

“A legal document” confirming the presence of rehabilitating condition acts exactly in the same way as in case of completed damages, the court decision obtained by presenting an action on acknowledgement on the presence of basis for compensation of damages. Since the latter confirms that the person has substantive rights, as is the case with “a legal document” confirming the presence of rehabilitating condition. After either of them, the person shall claim compensation of damages, by means of an independent legal measure, or else damages will not be indemnified. The measure by which the aggrieved person can claim compensation of damages generated by special illegal activity of the state authority is envisaged by Article 24 part 1 of the Administrative Procedure Code of Georgia. It stems from the fact that though the subject that performs such activities, for example, investigation and prosecution agencies, courts, proceeding from the activities they perform in general do not represent administrative bodies but compensation for damages on their part, as an activity, is very close to such a form of activity of an administrative body as realact.

After defining the circumstances and criterions that affect the proper selection of means protection the right to claim a compensation for damages, it would be reasonable for obviousness to show a table/scheme<sup>91</sup> for use of repressive and preventive mechanisms for protection of the right:

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<sup>89</sup> Article 1005(3), Civil Code of Georgia, Departments of Parliament, 31, 24/07/1997.

<sup>90</sup> *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J. (eds.)*, Commentaries on the Civil Code, Book 4, Vol. 2, Tbilisi, 2001, 420 (in Georgian).

<sup>91</sup> The symbol „X“ represent that in the case of an appropriate activity the according legal mean (administrative application, complaint and claim) is not applicable.

		Legal Means of the Right to Claim Compensation for Damages																		
		Continuous damages										Completed damages								
		General activity inflicting damages										General activity inflicting damages	Special activity inflicting damages							
		Administrative - legal act	Administrative - legal act – not issued	To perform an action	Failure to perform an action	Administrative agreement	Repressive protection	Temporary protection	Repressive protection	Temporary protection	Repressive protection			Temporary protection						
IV	other types of claim	III	Administrative claim	II	Application	I	An action for acknowledgement	Stages	Repressive protection	Temporary protection	Repressive protection	Temporary protection	Repressive protection	Temporary protection	Repressive protection	Temporary protection	Repressive protection	Temporary protection		
	APCG Article 22.1.		GACG Article 177.1.		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	APCG 29.1. and 3 Articles (except for normative acts)		GACG Article 184.1.		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	APCG Article 23.1.		GACG Article 2.1.i.		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	APCG Article 31.1. 2 sentence		Not envisaged		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	APCG Article 24.1.		GACG Article 177.3.		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	APCG Article 31.1. 1 sentence		Not envisaged		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	APCG Article 24.1.		GACG Article 177.3.		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	APCG Article 31.1. 2 sentence		Not envisaged		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	APCG Article 25 <sup>1</sup> .2.		X		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	CPCG Articles 198 and 271		X		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection
	APCG Article 24.1.		GACG Article 177.3.		GACG Article 2.1.h.		APCG Article 25.1.		Repressive protection	Temporary protection		APCG Article 25.1.		Repressive protection	Temporary protection		APCG Article 25.1.		Repressive protection	Temporary protection
	APCG Article 31.1. 2 sentence		Not envisaged		X		APCG Article 31		Repressive protection	Temporary protection		APCG Article 31		Repressive protection	Temporary protection		APCG Article 31		Repressive protection	Temporary protection
	APCG Article 24.1.		X		X		Presence of rehabilitating condition		Repressive protection	Temporary protection		Presence of rehabilitating condition		Repressive protection	Temporary protection		Presence of rehabilitating condition		Repressive protection	Temporary protection
	X		X		X		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection		X		Repressive protection	Temporary protection

## **7. Conclusion**

Based on the matters studied in the present article, were identified the criterions to proper selection of the means of protection of right to claim a compensation for damages. These are: The character of an activity that arises damages, the legal forms of the activity and the type of damage itself. Damages can be inflicted by special or general activities of the state and only in the case of latter it is possible to utilize administrative application, complaint and claim. After determining above mentioned legal circumstance, because of a variety of the legal means for protection of rights, for its proper selection it is necessary to estimate one more criterion – type of damages. There are two types of damages: completed and continuous.

In the event of completed damages inflicted by special activity of the state, aggrieved person, based on a „decision“ confirming the presence of a so called rehabilitating condition, requests compensation of damages by applying to a court with claim for obligation. As it was discussed in the present article the utilization of the claim for obligation is justified, since administrative measure – compensation of damages, that should be carried out by a responsible body is a realact in terms of legal form of activity.

During a compensation of completed damages inflicted by general activity of the state, it might be more reasonable for an aggrieved person to apply to a court with a resumptional claim for acknowledgement instead of directly with the claim for obligation and to request acknowledging of illegality of an activity inflicting damages. After determining the abovementioned he/she can demand compensation for damages with filing an application to a responsible administrative body. Here could be drawn a parallel between a resumptional claim for acknowledgement and a „decision“ confirming the presence of a rehabilitating condition, since both of them affirm an illegality of an activity inflicting damages. The difference is that the first one is related to a general activity of the state and the second one to - a special.

During a compensation of continuous damages inflicted by general activity of the state, it is necessary for a proper selection of repressive and preventive legal means for protection of rights to estimate the third criterion – a legal form of an activity of an administrative body. There are four types of it: individual and normative administrative-legal acts, administrative agreement and realact. Means for protection of rights should be selected against the legal forms of the activity resulting damages in order to suspend the increase in (continuous) damages.

Abovementioned means for protection of rights are characterized to have legal deficiencies. Namely:

- There are no means for temporary protection of rights, in case of compensation of continuous damages caused by realact, because of what it would be impossible for an aggrieved person to suspend the increase in damages when submitting an administrative complaint, unlike in case of administrative claim;

- Similar problem exists when a claim is filed in regard to normative administrative-legal act, since procedural mechanisms for temporary protection of the right cannot be applied in regard to any such claims;

• The situation is almost the same in case of temporary protection of the right to claim compensation for damages inflicted by an administrative agreement, since temporary protection mechanisms envisaged by Articles 29 and 31 of APCG, we should assume, do not apply to administrative agreements.

Tackling of abovementioned legal deficiencies would ensure the preventive protection of the right to claim compensation for damages, which in turn helps to increase the efficiency of its repressive protection.

It's not less important to note and should be a novation that in the field of the Administrative Law could be applied such Private Law institutes as acknowledgment of the existence of a debt and performing the claim of limitation period. In case of the latter one an aggrieved could request compensation for damages if a court based on a resumptual claim for acknowledgement determines the right to claim compensation for damages as a substantive right to be present. After making such decision an aggrieved person should apply to a responsible administrative body and request a compensation for damages. In turn the latter would have a right to refuse to perform an action, which indicates an existence of discretion of administrative body. Regulations for exercising a discretion are determined by Georgian legislation. Thus, deciding the issue connected with the limitation period of the compensation for damages is discretionary power of the administrative body and the latter does not have such high autonomy of will as in case of entities of private law.

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