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Problems of Interpretation of the Norm Within the Scope of Judicial Discretion in Administrative Proceeding

The issue of discretion of the administrative body is one of the vaguest and explanatory issues, which in turn is bound by the boundaries set by the law.[1]

According to the General Administrative Code of Georgia, Article №2, paragraph "K": powers granting 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. According Article № 6: If an administrative body is granted discretionary powers to resolve any issue, it shall be obliged to exercise the powers within the scope of the law. An administrative body shall be obliged to exercise discretionary powers solely for the purpose of exercising the powers that they have been granted. Acting in the frame of discretion it must not restrict rights and obligations of society.[2]

The main idea of this research is not to determine how administrative body issues the administrative acts in the frame of discretion, but the court itself, at the stage of exercising discretionary powers and what it might be the definition.

***Keywords**: General Administrative Code of Georgia, court discretion, norm definition.*

1. Introduction

In order to understand the essence of discretion it is necessary to examine the rights and freedoms that exist in human history that have brought us to the present day[3]. The first signs of discretion dates back to ancient times. In 75 BC, one of the king's slaves destroyed another slave's pottery and weapons in the palace of *Alexander Janus*, king of Judea. To resolve the dispute, the king summoned seventy-one judges under the direction of Simon, but none of them had the right to express their opinion on the incident at the king's palace and disagree with the king. On the day of the trial, the king personally summoned both Simon and the other seventy judges, and as a sign of the supremacy of justice, he bowed his head to them, at the same time entrusting the resolution of the case in full. This is one example of the fact that the desire for judicial independence has never been new to mankind. This

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1 *Morstein M.,* Comparative Administrative Law: A note on Review of Discretion, University of Pennsylvania Law Review and American Law Register, Harrisburg, 1999, 973.

2 *Toradze D.*, Responsibility in Exercising Public Powers towards other Persons on the Examples of Georgian and German Administrative Law, Tbilisi, 2019, 53 (in Georgian).

3 *Goodnow F.,* Private Rights and Administrative Discretion, American Bar Association Journal, Vol. 6, 1918, 789.

fundamental right was followed by discretion the right of the court to select the most acceptable and objective decision from several decisions.[4]

The discussion of discretionary powers in the early scientific literature is directly related to the establishment of an independent administrative court in Austria. On December 21, 1867, the basic law of the state on the judiciary was adopted. According to Article 15 of this law, an administrative court was established. The Administrative Court was empowered to review decisions made by administrative bodies, except for decisions made within the framework of "free discretion". According to the discussion of the doctrine of discretion: which still characterizes the doctrine of discretion today. The discussion was driven by the notion that where free discretion of an administrative body begins, judicial control ends.[5]

The variability of time and political regimes has formed seven signs of judicial discretion:

According to the first sign, as a result of scientific and theoretical analysis, it can be said that the purpose of a judge is to act thoughtfully;

Second, the court's decision must be well-founded within its discretion;

Third, the court of all instances is obliged to conduct its own decision, the so-called Fact-Finding test, which determines whether the decision made within the discretion, the requirements and purposes of all elements of law, which are invoked in the decision;

Fourth, attention should be paid if the legal or quasi-legal forces, will be able to deviate from the goals of the Constitution based on this decision and thus carry out their activities;

Fifth, discretion is used when the disputed issue is not regulated by law and the judge has to use explanations and analogy of law;

Sixth, when it comes to following the proper rules. In particular, when a judge has to be guided by established standards rather than written norms, he or she must limit his or her decision to a "flexible limit" on justice;

Seven, discretion is the freedom of the court to allow unwanted stereotypes to be avoided.[6]

2. Discretionary Decision and Georgian Court Practice

The relation of law is carried out like a logical operation, in particular it includes the following stages: 1. Fact-finding; 2. finding the appropriate norm of law; 3. to determine whether the fact complies with the rule of conduct given in the norm; 4. determining the legal result. For its part, the judge, especially in administrative law, has the discretion or right to choose the most optimal of two or more options to resolve the dispute. Decisions based on discretionary powers are considered by the Supreme Court as disputes over the legality of an administrative act.[7] The peculiarity of judicial review due to the specificity of the discretion does not mean that the court is deprived of the

4 *Maurice F.,* Judical Self-Limitation, Harvard Law Review, Vol. 37, 1923-1924, 338.

5 *Khoperia R.,* Control of the Decision Made by Administrative Body within the Discretion, Iv. Javakhishvili Tbilisi State University, Faculty of Law, Dissertation, 13, <http://press.tsu.ge/data/image_db_innova/samartal/revaz_khoferia.pdf> [22.06.2021] (in Georgian).

6 *Isaacs N.,* The Limits of Judical Discretion, The Yale Law Journal, Vol. 32, 1923, 340.

7 Decision of October 10, 2010 case № BS-739-714 (K-10) of the Supreme Court of Georgia.

opportunity to review the decision made on the basis of discretion and determine whether the discretion was exercised with or without mistake. The peculiarity of judicial control of discretionary powers is that the court does not make a final decision and thus does not dig into the discretion of the executive. If the court finds that the discretionary power has been unlawfully exercised, the case shall be returned to the administrative body receiving the act for further investigation of the circumstances and for a final decision. The Court of Cassation noted that discretion rests solely on the freedom to determine the legal outcome: Discretionary power exists only when, once the case has been factually established and the facts are complied with, the administrative body is given the opportunity to make the most appropriate decision. Discretionary power exists only when it is defined by law. However, the purpose of the discretionary power and the scope of its exercise should be determined through the definition.[8] It is important to note that according to the case law of the Supreme Court, the court cannot interfere in the jurisdiction admissible by the administrative body, although it is debatable when assignment of a new act serves only the extension of the relevant term by the administrative body in this case how the judge sees principle of equality and fair process.[9]

2.1. Annulment of Act without Resolving the Case and Related Problems

According Administrative Procedure Code of Georgia Article № 32, Paragraph № 4, If a court considers that an administrative act has been issued without investigating and evaluating essential circumstances of the case, the court shall be authorised to declare the administrative act null and void, without resolving the dispute, and to assign the administrative body to issue a new act after investigating and evaluating the circumstances. According this article court must prove why case cannot be resolved without investigation of circumstances around the case and must also court must prove why this circumstance can be considered as discretion of administrative part.[10] In practice, however, Article № 32, Paragraph № 4 has actually become the cause of inaction by administrative judges. As a result, we get ineffective administrative justice. In case of returning the case, the administrative body only formally "corrects" the act, although it leaves it unchanged in content. The pursuant party has to start a dispute to check the material legality of the act.

The exercise of discretion is not a means of arbitrariness where a public servant tries to avoid his wrong decisions, but it is a kind of public order for him to do his job based on high democratic standards and the rule of law. Discretion is not within any scope of use but, surprisingly, is an essential part of the development of the industry.[11] At the same time, judicial discretion examines regulatory reservations and imposes uniform controls.[12]

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8 *Giorganashvili K.,* Error in Exercising Discretionary Powers, Administrative Law Scientific-Popular Journal, №1, 2013, 31 (in Georgian).

9 *Smith M.,* Decision Making by Public Bodies: How to Avoid Legal Challenge, London, 2008, <https://www.fieldfisher.com/en/insights/decision-making-by-public-bodies-how-to-avoid-legal-challenge> [22.06.2021].

10 Decision of July 22, 2010 case № BS-534-514(K-10) of the Supreme Court of Georgia.

11 *Harvey P.,* Administrative Discretion and the NLRB, Vol. 18, № 2, 1939, 280.

12 *Frank J.,* Kentucky Law Journal, Law Review, 1918, 326.

In court, opinions on the Art. 32, Par.4 are divided into two parts, and the "supporters" of this article indicate the future refinement of the activities of the administrative body. In particular, the Court considers that, on the one hand, the administrative body will take into account and correct the unexamined acts in the future, and on the other hand, the studied circumstances will help the court to make a new decision. With the second opinion this practice might be wrong and administrative bodies could use their legal power in wrong way.

2.2. Completion Deadline of the Decision Issued in the Frames of Discretion

The time limit for completing a defective decision issued by an administrative body within its discretion is not established by procedural law. However, the court is obliged to set a deadline on the motion of the administrative body.[13]

It is noteworthy that the court has a positive obligation to indicate to the administrative body, not to exceed the reasonable time limits for review of the act[14], which should naturally arise from the administrative process[15], although the practice indicates other. According to one example, in labor disputes, when a court invalidates an administrative act, it does not resolve the issue and points to a better investigation by the administrative body into issuing the relevant act. This period of execution is not a fixed term, where the administrative body can issue a similar act months or years later. A person who has been fired has to appeal against a new act and re-enter the path he took several years ago. Given that the efficiency of the court is one of the main concerns for any society[16], such a practice indicates the inefficiency of the court and discourages certain groups of citizens from going to court in the event of a dispute. Accordingly we have a classic example of that, how the court can, on the one hand, vaguely interpret the norm and, on the other hand, completely jeopardize the whole system and its effective operation.

The goal of human existence is always to break down boundaries, and administrative discretion is the boundary that administrative bodies always want to break down.[17] Of course, this can not be assessed positively, but the goal of lawyers is to ensure the maximum explanation of court decision and less incentives for administrative bodies. Contrary to Georgian practice and law, paragraph №113 of the German Administrative Procedure Code is more succinct and clear about what kind of task it gives to a judicial administrative body. Because a particular public servant, in his time, was unable to issue the act under consideration, the court is paving the way for how it should be examined and

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13 Researching the issue and reading the relevant literature, it is established that in a number of European countries (including Germany) the approach of the court to such cases is quite strict. The judge himself sets the deadline for the study of the document and indicates which part of the disputed act is particularly important in order to exclude future meetings of the administrative body as much as possible.

14 *Jeffrey P.,* Principles Governing the Court's Discretion to Extent time, Singapore Academy of Law Journal, Vol. 25, 1999, 1.

15 *Bikle W.,* Administrative Discretion, George Washington Law Review, Vol. 19, 1933, 2.

16 *Lurigio A.,* Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Court, Justice System Journal, Vol. 30, Issue 2, 2009,196.

17 *Arthur S.*, Administrative Discretion in the Award of Federal Contracts, Michigan Law Review, Vol. 53, 1955, 817.

issued. Only 15-20% are the number of cases where the administrative body has re-examined the issue and the new act has a different content. For their part, public officials are reluctant to make new and different decisions, which raises a lot of additional questions.[18]

Misinterpretation of the relevant discretionary norms, and in turn incorrect practice, creates the following defects: 1. the plaintiff receives as a result a dysfunctional court, whose direct duty is to resolve a legal dispute; 2. the administrative body is given additional possibilities to strengthen its decision and justify the previous individual. An act that puts the parties in an unequal position. At the same time, the administrative body tries to extend the deadlines for the study of the issue as much as possible, in order to avoid the responsibilities of specific public officials; 3. Trust in court is declining and disputes have been going on for years.

3. Explanation of the Norm and Its Relation to Discretion

The activities of a judge are directly related to the interpretation of norms. The source of his real power is the goodwill of the people.[19] If not the possibility of a multifaceted interpretation of the norm, the legal discussions would have lost their meaning and the law itself could not have been as it is today.[20] In this way, the primary goal of a judge in interpreting a norm is to evaluate it in terms of philosophy, history and sociology[21] in order to achieve a high standard of objectivity.

The problem of explaining the norm of law in the legal literature is one of the most important and constant. The concept of explanation is pluralistic. In many cases, the rule of law is vaguely conveyed, which consequently manifests itself in its application, in such cases an explanation must be provided in order for the relevant authorities to properly implement this norm in life. The types of explanations are differentiated according to the subjects and the volume. Forms of formal and informal explanations are distinguished according to the subjects, while types of literal, limited and extended explanations are considered according to the volume. Different methods of explaining the norm in the literature are derived from natural law and sociology.[22]

It was the process of explanation that created the joke: two lawyers – three views. The main task of the explanation was and remains a uniform understanding and ensuring the correct understanding of the norms of law in the whole territory of the state, strengthening the unity, its legal field.[23] However, the use of discretion by the judge is explicitly related to how the judge interprets the relevant norm.

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18 Last fall, I had meetings on this issue with several judges of the Tbilisi Court of Appeals who are concerned about the misinterpretation of the relevant discretion by the Court of First Instance. Eventually the case goes to the Court of Appeals and the party who has lost interest in the dispute for years is still losing precious time to get an effective trial.

19 *Bufford S.,* Defining the Rule of Law, Judge's Journal, Vol. 46, Issue 4, 2007, 15.

20 *King A.,* On Court Rates, Law Magazine, or Quarterly Review of Jurisprudence, Issue 2, 1830, 351.

21 *Blach E.,* Interpretation of Law, Marquelle Law Review, Vol. 16, 1932, 107.

22 *Zaiets A.,* Problems of the Definition of Law Topic of the Issue: The Legal System of Ukraine: Topical Issues of Theory and History: Section I: Peculiarities and Developmental Trends of the Legal System of Ukraine, Law of Ukraine, Kyiv, 2013, 23.

23 *Mosulishvili M.,* Explanation of the Rule of Law-Faces, Methods, Acts, Grigol Robakidze University. Academic Herald, Tbilisi, 2015, 56 (in Georgian).

3.1. Logical and Systematic Interpretation of Law

The logical interpretation of the law seeks to determine the meaning and purpose of the law and, based on the interrelationship of the norms of law, to determine the meaning and specificity of a particular norm. This is done by the system method. Systemic exacerbations may indicate that there is a collision of norms. The collision of norms is resolved by observing the following requirements: a) If the collision norms have different legal force, then the hierarchically superior norm obeys the lower norm: *Lex superior derogat legi inferiori*. b) If the collision norms have equal legal force, then the special norm takes precedence over the general norm: *Lex specialis derogat legi generali*. The special norm usually regulates a narrower circle of mutual relations than the general norm. c) If the collision norms are special and at the same time have equal legal force, then the late issue norm is preferred to the earlier issue norm: *Lex posterior derogat legi priori*. The norm of law issued late reflects the will of the legislator more precisely.[24]

3.2. Teleological Definition of the Norm

"Telos" in Greek signifies purpose, result. The teleological definition clarifies the objective purpose of the law and not the initial will of the legislator (insofar as the law terminates its connection with the legislator upon its adoption). Clarifying the purpose of the norm is of great importance in the process of using the norm by the judge. The norm of law is based on a goal – the goal is the creator of all law. If we understand the purpose of law, then we also understand law.[25] A teleological definition means defining the objective purpose of a rule of law. Its purpose is to determine the possibility of implementing the rule of law. The teleological definition refers to the attitude of the rule of law towards the principles of legal certainty, equality and expediency. Given the fact that legal-ethical principles are enshrined in the Constitution, the teleological definition includes a definition corresponding to the constitutional law. In a broad sense, the methods of interpretation include the extension of legal norms in cases that have not been provided for or deliberately regulated by the legislature, as well as cases that have been caused by a change in circumstances. Extensive interpretation of the law is the power of a judge to apply the law by analogy to legally uniform cases or, on the contrary (Argumentum e contrario), to exclude the use of a rule of law in another case, as this case should not be covered by law.[26]

4. Recommendation of the Council of Europe to the Member States about Discretionary

The Committee of Ministers of the Council of Europe adopted a recommendation in 1980 on the exercise of discretionary powers by administrative bodies.[27] The Committee of Ministers of the

[24] Legal dictionary, <https://gil.mylaw.ge/ka/term/879.html> [25.06.2021] (in Georgian).
[25] *Khubua G.,* Theory of Law, Tbilisi, 2004, 156 (in Georgian).
[26] See, ibid, 158.
[27] Council of Europe, Committee of Ministers, Recommendation № R (80), <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804f22ae> [25.06.2021].

Council of Europe considers the increasing involvement of administrative bodies in various spheres of life and the frequent use of discretionary powers by them in decision-making, wishing that the administrative powers of the Member States be exercised on the basis of recognized principles. he purpose of this recommendation is to protect human rights and freedoms, to protect the interests of individuals from the abuse of discretionary powers. The recommendation adopted by the Committee of Ministers of the Council of Europe consists of four parts: 1. Purpose and definitions of concepts; 2. Basic principles; 3. Procedure; 4. Control.[28] The principles set out in the document are used to protect human rights, freedoms and interests when issuing an administrative act by an administrative body within its discretion. An administrative act, as defined by the Committee, means any individual action or decision taken by a public authority or official which directly affects the rights, freedoms and interests of a person. Discretionary power means the authority that gives an administrative body some degree of freedom in making a decision when an administrative body can select one of the most relevant, best decisions from a variety of legal decisions.

5. Conclusion

After the research it's desirable for the court to determine the administrative bodies to investigate the matter and a reasonable time frame for the issuance of a new act, which cannot be assessed as an interference at the discretion of the administrative body, as only this can protect the rights of the other party having the access to effective jurisprudence.

The position of the Court of Appeals that using article must be argumentative, should be shared, criticizing the practice of the first instance and not to violate the principle of economy of process. This issue is directly related to the building of a strong democratic state, which is a prerequisite for the formation of a society with high legal consciousness. Accordingly, the constitutional principles discussed above, such as the existence of the principles of the rule of law, democracy and the welfare state, constitute the most important action provisions in public law, which implies the strict implementation of the above principles by any state body and the existence of a normative basis.

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3. German Administrative Procedure Code, 11/06/1946.
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8. *Frank J.,* Kentucky Law Journal, Law Review, 1918, 326.

[28] *Khoperia R.,* Control of the Decision Made by Administrative Body within the Discretion, Iv. Javakhishvili Tbilisi State University Faculty of Law, Dissertation, Tbilisi, 2019, 33 (in Georgian).

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24. Decision of October 10, 2010, case № BS-739-714 (K-10), Supreme Court of Georgia.
25. Decision of July 22, 2010, case № BS-534-514(K-10), Supreme Court of Georgia.
26. *Council of Europe,* Committee of Ministers, Recommendation №R (80), <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804f22ae> [25.06.2021].
27. Legal dictionary, <https://gil.mylaw.ge/ka/term/879.html> [25.06.2021] (in Georgian).

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Legal Scope of Usage of a Memoji Created by Visuals of Others

With the development of technology, applications offer more innovations to customers. One of the outstanding examples of this is "Memoji". It allows the user to create an individual "Emoji" with his image and spread it with different reactions to a defined or indefinite circle of persons. This action can also be considered in legal terms. For example, signing a "Memoji"upload agreement (consent/acceptance), etc. "Memoji"is not copyrighted, but its improper use may infringe on a person's non-property rights. In particular, the application is not familiar with the mechanism by which it would be possible to verify, whether the person uses their own visual when creating a "Memoji". Consequently, the probability of using someone else's visual and placement of the "Memoji" in a negative (violation of the rights) context is increasing. In turn, non-property rights are protected by Georgian law, which means that a person has a right in case of any violation of it (will it be otherwise or improper use of "Memoji") to request its restoration. In particular, the person must make a request from the general regulatory norms. Accordingly, the person can request the dissemination of the opposite information (data) as well as compensation for non-property damage for placing an improper and infringing "Memoji". The discussion in the paper devotes to these issues and is focused on, what action can a person take to protect their own rights as a result of improper use of "Memoji" by someone else.

Keywords: *"Memoji", Image, non-property right.*

1. Introduction

Various types of software are being developed by gigantic organizations alongside technological progress, which offers additional entertainment opportunities to users. One of such examples is Memoji, which has only a few years history of existence and offers users to create an individual Emoji based on own appearance. Memoji is mostly used by Apple in iOS 13 and iPadOS – in new generation of hardware (iPhone[1] and iPad Pro[2]). In a view of technical patterns, various effects can be applied to Memoji, as in cases of images.

A seemingly positive software may become a prerequisite of breaching human rights in the future: it is not technically controlled under the software to ensure for an individual to only be able to use own appearance. Thus, a risk arises that initially reflects into violation of non-property rights. Hence, it is important to determine the scope of usage of Memoji from the outset and preconditions of legal consequences in case of improper usage thereof.

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[1] Foremost, iPhone X.

[2] Also new generations in most cases, *e.g.* 12, 9.

2. Difference of Memoji from Emoji

The term Memoji represents a merger of two words: "Me" and "Emoji". This can be interpreted as my personal emoji. Thus, unlike emoji, identification is possible in case of Memoji. The essence of Memoji is that it is not a symbol of a general scope, but it rather expresses an individual's standpoint, attitude or view with respect to certain topics. Memoji is not being used in a general manner, in contrast from emoji. An obvious example for this is that not similar Memoji is loaded in everyone's smartphones (regardless of model or production date) or social networks.

3. Non-applicability of Copyrights on Memoji

Rights on Memoji does not include copyrights of a user. With other words, a user does not obtain copyright on a Memoji created with a mobile software. According to the Aricle 6 I a[3] of the law of Georgia "On Copyright and Related Rights", computer program is regarded as a work, which is then specified in paragraph 4: „Protection of computer programs shall apply to all kinds of computer programs (including operational systems), which may be expressed in any language and in any form, including the initial text and objective code". If copyright would be spread on Memoji, the most related term would be the mentioned "any form". Namely, Memoji would be regarded as a form of expression, however here we encounter an important detail: a) Memoji is created on the basis of a pre-established software, and b) it is impossible to dispose Memoji as a work. For example, an individual cannot sell own Memoji as a subject-matter of copyright, but would be able to permit other persons to use the Memoji of his/her appearance (image right).

4. Image Rights and Memoji

A person's right on appearance within Memoji is defined as follows: apart from exclusive cases[4], the need of consent of the person is spread on any usage of appearance.[5] Furthermore, protection of this right requests additional restrictions in modern reality (under internet).[6] Therefore, in case of an improper usage of Memoji it is possible for the scope of liability of a person to occur, may it be a result of an incurred moral damage or interpreting it as a similar action to abuse in public places.

5. Improper Usage of Memoji

An improper usage of Memoji can be considered in two main aspects: a) violation of non-property tights[7] and b) disorderly conduct. In both cases it is implied that a person uses other person's

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3 Legislative Herald of Georgia, 28(35), 08/07/1999.

4 Section 5 of the Article 18 of Civil Code of Georgia, Georgian Parliamentary Gazette, 31, 24/07/1997.

5 See *Jorbenadze S.*, Commentary of the Civil Code of Georgia, Book I, *Chanturia L. (ed.),* Tbilisi, 2017, Art. 18, Mn. 78 (in Georgian).

6 If a minor is involved, a special clause applies.

7 Which can be expressed in defamation.

Memoji without permission. In particular, by using the image of another person available on the internet, he/she creates a Memoji and keeps it in own device (mobile). Subsequently, he/she publishes posts on Facebook by attaching the same Memoji and thereby negatively mentions a specific person, for example: slanders, insults, etc.

Claiming by the unauthorized person spreading Memoji that the image (appearance) was publicly available cannot be regarded as a justification[8]. For example, if everyone would place our pictures on Facebook, this does not necessarily imply for us to expect that a third party would use the pictures without our permission and in a way that would cause damage to us (non-property rights would be violated).

5.1. Non-Property Rights

Section 5 of the Article 18 of the Civil Code of Georgia, the right to honor, dignity and business reputation also encompasses events of an unpermitted usage of images. For example, one publishes a post on Facebook where a Memoji of an individual is included, highlighting that the same individual has commited a crime. In such cases it is possible to identify an individual easily: a person who has access to such individual's account can effortlessly recognize who the post refers to (if certain elements exist, e.g. glasses or mole are visible, etc., identification is much simpler). This can lead to creation of an opinion on this individual (impression may alter, regarded as a criminal, oppressor, etc.).

5.2. Disorderly Conduct

Disorderly conduct is regulated by Administrative Offences Code (Article 166[9]). Pursuant to the provision, such conduct is defined as: "swearing in public places, harassment of citizens or similar actions that disrupt public order and peace of citizens". There is an established practice in Georgia, when disorderly conduct is also applied to posts on Facebook.[10] Considering the practice, disorderly conduct can also be spread on Memoji. Namely, if a person was presented in a post (indicating Memoji) in an immoral way and if such action would be interpreted as swearing, respective liability may follow. In case of Facebook, this should occur in a public space,[11] determination of which will be a subject of consideration[12] (this may happen using a status as well[13]).

6. Scope of a Legal Claim

In practical terms, requesting prohibition of usage of Memoji or reimbursing for moral damages based on Memoji encompasses certain difficulties. Besides formal details (such as, e.g. identification of the defendant, etc.), a lawsuit mainly represents an expression of "the last hope", as it's actually impossible to reach a full restitution of the violated right.

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8 Posting a picture publicly does not necessarily authorize anyone to violate an individual's rights.
9 Departments of the High Council of the Georgian SSR, Annex of 12, 31/12/1984.
10 See Resolution of December 9, 2019, № 4/A-889-19, Tbilisi Court of Appeals.
11 *Jorbenadze S.*, Social Media Law, Tbilisi, 2019, 121-122 (in Georgrian).
12 See Resolution of September 9, 2019, № 4/A-889-19, Tbilisi Court of Appeals.
13 Ruling of January 9, 2014, №AS-1559-1462-2012, Supreme Court of Georgia.

Especially, if spreading is aimed at the active users of Facebook. A distinctive example of this is Georgia. Say, a Memoji was spread that violates a person's right, and the latter decides to appeals to the court. Even if the litigation end up in favor of the plaintiff, he/she will not manage to eliminate an accelerated spread of information (and, therefore, violation of rights, as the information became available to vast masses), on the one hand, and neither will the favorable judgement become a ground for a full restitution of the violated right – even if judicial proceedings would end within a month in favor of the plaintiff,[14] the "primal effect" would still prevail the outcome in terms of awareness or interests, on the other hand.

These circumstances do not disrupt a person to appeal to the court. The scope of request may be determined in two pieces: a) prohibition of usage and b) reimbursement for moral damages. For a better flexibility, securing a claim can also be applied so that the proceedings gain a better effect.

6.1. Defamation

In order for a private person to appeal for defamation[15] to a court,[16] he/she would need to prove three circumstances:[17] a) the post directly referred to him/her;[18] b) the post was grounded on a fundamentally fake fact (i.e. it does not represent an evaluative reasoning, but rather refers to actual circumstances[19]); and c) that this caused damages.[20] Even if the last two conditions are proved, one circumstance remains: how is it possible for the plaintiff to prove defamation based on a Memoji? In practical terms, verification in such cases are difficult. Furthermore, it is possible for a comparison between the Memoji and the appearance of the plaintiff take place in the court to determine the proper plaintiff.

Another problem is enforcement: after such dispute, the defendant may be requested to publish a notice on the judgement in a form determined by the court. What can be the form for it? If the court would order the defendant to create a new Memoji, then the claim should be construed the same way, however, such conditions would be neither practical, nor logical. Publishing the same Memoji would not be in the interests of the plaintiff. Therefore, only one possibility is left: the defendant must publish a post and mention the judgement of the court (the text would be irrelevant). This implies a less "visual effect" for the society, i.e. for the group that had access to the first post that violated the right. Moreover, in modern times, interest to a Facebook post is often attracted due to the visual perception. Unlike a Memoji, typing a typical text would not be captivating for users.

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14 Which is almost inconceivable due to the overload of courts and provisions of the Civil Procedure Code.

15 For example Germany: Unlike Germany, defamation is not regarded as crime in Georgia.

16 Discussion is elaborated in context of a private person. Unlike the provisions regulating a public figure, there is different standard established for private persons.

17 The circumstances considered as excluding of defamation are not discussed intentionally. Specifically, defamation does not cause liability if it: a) is spread within a political debate or in relation to duties fulfilled by a member parliament/council; b) is expressed on a preliminary court hearing or court proceeding, as well as in front of a public defender, a gathering of parliament, council, or committees thereof, within the person's authority; c) is spread by request of an authorized body.

18 Ruling of August 3, 2012, №AS-1739-1720-2011, Supreme Court of Georgia.

19 Ruling of May 7, 2015, №AS-962-920-2013, Supreme Court of Georgia.

20 Article 13 of the Law of Georgia on "Freedom of Speech and Expression", Legislative Herald of Georgia, 19, 15/07/2004.

6.2. Restriction of Use

Taking into account the hardships in enforcement and for the purposes of a proper usage of "visual effect", it is particularly important to execute the right to restriction of use. Namely, an individual may request from the court to restrict the plaintiff to publish the Memoji created from his/her image. The claim shall be construed in a way to cover restrictions not only on existing Memoji, but also a potential Memoji.

6.3. Compensating Moral Damages

Reimbursement for moral damages is possible in case of violation of non-property rights.[21] The plaintiff first needs to substantiate which non-property right was violated.[22] The scope of a claim in case of publishing of a Memoji derives from Sections 2 and 6 of Article 18 of the Civil Code of Georgia. On the other hand, in case of defamation, considering the purpose of a special law, a person would be entitled to request compensation for damages alongside with a request to spread opposing information.[23] In practical terms, the problem in such cases is also to determine the amount of the claim a person would need to submit to the court.

6.4. Hardships in Case of a Story

With respect to the restitution in right, challenges in publishing a story are obvious: considering the meaning of a story, it is published for only 24 hours. Therefore, burden of proof, as well as obligating to an opposing action are complicated. In case of the former, an evidence can be submitted in a form of a screenshot[24] (although this becomes disputable sometimes), but in case of the latter, taking an opposing action often appear derisory. For instance, a person submitted a claim to the court and demanded spreading the opposing information via the same means. Accordingly, he/she would fight for the contents of the judgement (in form of a story) be published for 24 hours.

6.5. Securing a Claim

It needs to pass three instances and takes a long period of time after submitting a lawsuit for the judgement to enter into legal force[25] This considerably complicates to obtain the effective result of

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21 *Jorbenadze S.*, Commentary of the Civil Code of Georgia, Book I, *Chanturia L. (ed.),* Tbilisi, 2017, Art. 18, Mn. 87 and f (in Georgian).

22 Decision of December 21, 2018, №2/22022-18, Tbilisi City Court.

23 Paragraph 3 of Article 17 of the Law of Georgia on "Freedom of Speech and Expression", Legislative Herald of Georgia, 19, 15/07/2004.

24 *Jorbenadze S.*, Social Media Law, Tbilisi, 2019, 277, 283 (in Georgian).

25 There is a difference in procedural legislation if it's about immediate enforcement of the judgement of the court of first instance. However, it's subject to discussion whether it would be comprised within disputes on freedom of expression. If, based on Article 268 I z of the Civil Procedure Code of Georgia (Legislative Herald of Georgia, 47-48, 31/12/1997) the court would consider that delay would cause an important damage for the plaintiff, then such outcome might occur.

protection of right and proportional restitution. Accordingly, endeavors should be aimed at an alternative examination of the subject.

6.5.1. Temporarily Changing the Status of a Public Memoji

With regards to securing the claim, an individual is free to choose the way he/she appeals to the court. In this point of view, we could consider publishing of Memoji in a different status as an alternative. Specifically, changing the Public status into Only Me. This way, it is possible to ensure protection of an individual's rights for the period needed for litigation. For instance, if a dispute is taking one year in all three instances of court, the Memoji is published and each time a new person sees it, the rights of an individual is violated. If this would be avoided, the outcome would remain within reasonable limits.

When securing a claim is used based on the practice, it should comply with several preconditions: a) if measures for securing the claim are not taken, it would complicate to enforce the decision[26] – taking into account the delay in terms causing complications in protection was already discussed above; b) the second precondition is the reasonable assumption of satisfaction of the claim, which must be possible by the lawsuit – this does not implicate that evidences will be examined, for example, but it must rather be grounded on an objective assumption[27]; c) the third prerequisite would be the possibility of compensation, especially when the dispute is about compensation for moral damages. No amount would be sufficient to such violations like defaming one's dignity or business reputation.[28] Each precondition mentioned above are aimed at safeguarding a plaintiff's interests.

6.5.2. Securing on the Number of Friends (Viewers)

If the Memoji was published as a Story and it was viewed by roughly 700 users, it does not necessarily mean that the contents of the favorable judgement to the plaintiff (published as a Story) would be viewed by the same number of friends (viewers). This is based on two circumstances: a) it is possible that the Story on a judgement is not interesting to a Facebook user (and they might not open it), or b) the defendant might reduce the number of friends (say, he/she had 1200 friends and reduced it to 500 after the proceedings). Taking into consideration the above-mentioned, it is possible for the plaintiff to set two requests as measures for securing the claim: a) forbidding deletion of friends from Facebook, and b) forbidding to deactivate (even temporary) the Facebook account.

6.6. Challenges in Identification

The main challenge in practical terms is the issue of identification. Namely, to determine who stands behind a particular account. In case of a so called "fake account", the problem is to expose them, which might lead to an improper defendant. For instance, when a person has an anonymous account (named like Geo Geo) and it's hard to expose him/her.

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[26] See Ruling of July 3, 2013, № AS-538-511-2013, Supreme Court of Georgia.

[27] See Ruling of June 2, 2014, № 2b/2154-14, Tbilisi Court of Appeals.

[28] *Jorbenadze S.*, Commentary of the Civil Code of Georgia, Book I, *Chanturia L. (ed.),* Tbilisi, 2017, Art. 18, Mn. 110 (in Georgian).

6.7. When Using a Shared Account

Usually, a person creates the Facebook account individually. In this way, he/she verifies personal usage of and independent activity on the social network. However, it is still common when two or more persons jointly use a single account. Such persons are: pairs, spouses, siblings, friends, etc., who think that they don't have anything to hide from each other. If a Memoji that violates one's rights is published by such account, a joint liability shall be imposed to all users of the account, e.g. AnnGeorge has published a post that contained defamation against a particular person – both individuals (Ann and George) shall be responsible for the abuse[29].

Two types can be regarded as exceptions from this rule: a) one of the persons (e.g. in case of Ann – George) confirms that he published the post containing defamation independently from Ann, and b) if it is obvious from the post that the action was conducted by a particular person (e.g. in case of SandroLizi – by Lizi). In such cases the scope of liability is determined individually and a respective legal outcome will be established directly to the subject.

7. Cases Involving a Public Figure

Protection of rights in case of a public figure is drastically different.[30] According to Georgian legislation, a public figure has a greater responsibility of endurance,[31] which encompasses individual consideration of safeguarding the rights: if in case of a private person the determining factors are a fake fact and damage issues for defamation, a new element is added in case of a public figure that accentuates[32] the matter of guilt.[33] Especially, if a Memoji is published within the context of the work of a public figure, protection of rights distinguishes with even more challenges. For instance, if a politician's image is used, such action is equalized to publishing of a caricature, for which a politician has a greater responsibility of endurance[34].



29 See *Jorbenadze S.*, Social Media Law, Tbilisi, 2019, 281 (in Georgian).

30 A public figure can be a state official (politician), an actor, etc. See for example Ruling of April 23, 2014, №AS-1332-1258-2012, Supreme Court of Georgia.

31 It is of no importance what position he/she holds. If he/she is qualified as a public figure, the result is determined accordingly. See *Jorbenadze S., Bakhtadze U., Matcharadze Z.*, Media Law, Tbilisi, 2014, 79 (in Georgian).

32 Article 14 of the Law of Georgia on "Freedom of Speech and Expression", Legislative Herald of Georgia, 19, 15/07/2004.

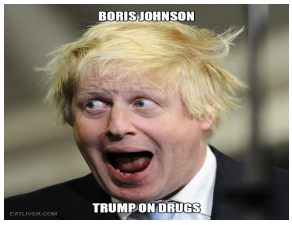
33 Intended, obvious or gross negligence. In this regard, see *Meskhishvili K.*, Actual Issues of Private Law, Book I, Tbilisi, 2020, 253 (in Georgian).

34 If it's about the work, i.e. the Memoji shall be examined from this viewpoint.

The argument mentioned above does not necessarily mean that a public figure has no means to protect own rights. In cases of personal life or non-property rights he/she would be able to make a claim and as the judiciary practice is developed in this direction, a different standard of substantiation applies.[35]

8. Similarities with GIF and Meme

The issue of safeguarding the rights will be similar in cases of GIF or Meme. Say, if the contents of a Meme will be regarded as an immoral conduct (e.g. insult),[36] or if non-property rights will be violated in case of GIF, the matter of protection of right to image comes in the foreground and authorizes the person to safeguard his/her rights, likewise to Memojis.



9. Concluding Agreements Using Memoji

Concluding an agreement using a Memoji shall not be considered as if a party expresses the will to engage in all cases of sending a Memoji. Each instance has an individual nature that requires offer and acceptance.[37] This is widespread in cases of private correspondence, where the contents of correspondence also comprise a reasonable expectation. An example is the correspondence in which the parties agree on the price of the item to be sold. If the counterparty agrees to the final offer using a corresponding expression of a Memoji[38], considering the nature of modern correspondence and technical possibilities, the latter can be regarded as acceptance (acceptance to conclude the agreement). For a better understanding, we can examine a correspondence, exemplary parties of which are George and Ann:

George: Hi, Ann. I read your post published in the social network where you write about selling your bicycle. You noted that the price is 500 EUR. I'm interested in purchasing it.

Ann: Hi, George. Thank you for your interest. Yes, 500 EUR is the price that would be acceptable for me to sell the bicycle. If you have any question or would like to see it, we can agree on details.

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35 See Decision of August 1, 2012, № 2B/1476-12, Tbilisi Court of Appeals.

36 Compare Resolution of December 9, 2019 №4/A-889-19, Tbilisi Court of Appeals.

37 Preconditions of conclusion of an agreement are strictly applied in such cases, as determined by Georgian legislation, e.g. see Articles 329-331 of the Civil Code of Georgia, Georgian Parliamentary Gazette, 31, 24/07/1997.

38 Sending a Memoji with positive visual is implied.

George: I'm rushing to buy it, and therefore won't be able to see it. Please tell me if it has any defects so that I don't discover them later.

Ann: Yes, it has a little defect. One of the brakes does not work properly, however, it's not fully damaged. It needs to be taken to a specialist. Yet, as I said, it's not fully unfunctional. I still ride this bicycle. Still, one would need to get used to it. It does not even need to be fixed, just needs a periodical inspection, a slight work. This service costs around 20 EUR. Thus, I can sell it to you for 480 EUR.

George: It's acceptable. I am well aware of bicycles and the mentioned issue won't prevent me from buying. Let's agree for 450 EUR and I will take it tomorrow.

Ann: Uploads a Memoji on which her appearance is present and a positive reaction is expressed by a combination of fingers (Like).

As it appears from the example, Ann's final action was expressed using a Memoji. She sent a positive sign to George after she received a new offer from George (Section 2 of Article 33 of the Civil Code of Georgia). Thus, this **action shall be qualified as an acceptance**. A reason for this can be several circumstances derived from the discussion:

Ann expresses an intent. From a legal perspective, an action directed at a legal outcome from Ann's side is materially or formally is reserved. Specifically, her abilities are not doubtful (it's not a case of a minor, etc.), on the one hand, and it's not necessary to observe the form of transaction as prescribed by the law (in this case, compliance is determined with Section 1 of Article 186 of the Civil Code of Georgia), on the other hand. Therefore, the intent is valid.

In order to consider Ann's action as an acceptance, it should be considered within the scope of Article 52 of the Civil Code of Georgia: need of interpretation of an intent arises only when it's ambiguous and the parties of an agreement understand it differently.[39] In such cases, the validity of expression of intent shall be determined by a reasonable consideration. What can be a reasonable consideration: a negotiation took place between the parties, which was followed by two offers and Ann's action.

What can Ann's action mean? The offer was so specific and it complied to the correspondence between the parties so well that Ann's action is nothing but an acceptance, namely, she agreed to George's action, approved it, considered it acceptable and expressed an intent. For better understanding, we might describe the actions as follows:

[39] *Chanturia L.*, Commentary of the Civil Code of Georgia, Book I*, Chanturia L. (ed.),* Tbilisi, 2017, Art. 52, Mn. 2 (in Georgian).

Invitation to make offer (Ann) + offer (George) + new offer (Ann) + rejection of offer and new offer (George) + "positive" action of Ann = conclusion of agreement.

9.1. Inadmissibility to Consider an Inappropriate Memoji as an Acceptance

Cases when a Memoji is published without a context or a thoughtless expression of intent is in place, are severely different. This mainly encompasses friendly communications, in which various symbols can be sent without an intent to conclude an agreement. In such events the parties do not have an expectation that they will engage in an agreement with each other. Hence, one of the main postulates of the Article 52 – a reasonable consideration, – is absent.

9.2. Importance of Freedom of Form of the Agreement

Freedom of form of the agreement is one of the restrictive preconditions of the freedom of agreement.[40] Usage of Article 68, 69 and 328 of the Civil Code of Georgia spreads on relations under Memoji. Specifically, in cases of obligation of simple or comprehensive written forms, expression of intent only by a Memoji would not be considered as valid. This relates not only to the restrictions directly envisaged by law, but also to results reached by the agreement between parties. Apart from exclusive events, the parties are entitled to agree on the form of the agreement. In this case, say, a preliminary agreement is concluded in written, then conclusion of the main agreement using the Memoji would not be sufficient to prove the validity of intent[41] (Section 3 of Article 327 and Article 328 of the Civil Code of Georgia).

10. Conclusion

It is not expedient to regulate the scope of usage of Memoji or Emoji by law. However, this does not mean that usage of each of them is outside of rules, but it rather implies that certain legal relations need to be resolved in compliance with general principles. Considering that a user does not obtain the copyright on Memoji, the claim shall be made within the scope of right to image (within the context of a non-property right). Herewith, if it's about defamation, the legal application shall be governed accordingly.

Usage of Memoji in private correspondence is related to expression of certain position. Taking into account the mentioned, using it in a correspondence can be interpreted as an expression of intent. Namely, if an intent was expressed seriously and if the contents of the correspondence and the context of use of the Memoji jointly determine the possibility of reaching the respective outcome.

Indeed, the judiciary practice in this direction is not developed yet, but it's important for the court not to be locked in "legislative framework" in such disputes, but rather observe the issue widely:

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[40] See for example: *Jorbenadze S.*, Freedom of Contract in Civil Law, Tbilisi, 2017, 185 and f (in Georgian).

[41] *Baghishvili E.*, Commentary of the Civil Code of Georgia, Book III, *Chanturia L. (ed.),* Tbilisi, 2019, Art. 327, Mn. 18 (in Georgian).

be it an obligation to remove the Memoji under securing of claim or restriction of use of such Memoji from a particular person.

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4. Law of Georgia on "Copyright and Related Rights", Legislative Herald of Georgia, 28(35), 08/07/1999.
5. Law of Georgia on "Freedom of Speech and Expression", Legislative Herald of Georgia, 19, 15/07/2004.
6. *Meskhishvili K.*, Actual Issues of Private Law, Book I, Tbilisi, 2020, 253 (in Georgian).
7. Commentary of the Civil Code of Georgia, Book I, *Chanturia L. (ed.)*, Tbilisi, 2017, 131, 133, 140-141 (in Georgian).
8. Commentary of the Civil Code of Georgia, Book III, *Chanturia L. (ed.),* Tbilisi, 2019, 94 (in Georgian).
9. *Jorbenadze S., Bakhtadze U., Matcharadze Z.*, Media Law, Tbilisi, 2014, 79 (in Georgian).
10. *Jorbenadze S.*, Social Media Law, Tbilisi, 2019, 121-122, 277, 281, 283 (in Georgian).
11. *Jorbenadze S.*, Freedom of Contract in Civil Law, Tbilisi, 2017, 185 and f (in Georgian).
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14. Ruling of May 7, 2015, №AS-962-920-2013, Supreme Court of Georgia.
15. Ruling of January 9, 2014, №AS-1559-1462-2012, Supreme Court of Georgia.
16. Ruling of April 23, 2014, №AS-1332-1258-2012, Supreme Court of Georgia.
17. Ruling of June 2, 2014, № 2B/2154-14, Tbilisi Court of Appeals.
18. Ruling of July 3, 2013, № AS-538-511-2013, Supreme Court of Georgia.
19. Ruling of August 3, 2012, № AS-1739-1720-2011, Supreme Court of Georgia.
20. Decision of August 1, 2012, № 2B/1476-12, Tbilisi Court of Appeals.

Giorgi Arsoshvili[*]

Restoring Justice as Purpose of Punishment and Its Interrelation with the Resocialization of Criminal

The current article is dedicated to the purpose of punishment – the restoration of justice and its interrelation with the resocialization of criminal.

Studying restoration of justice as a purpose of punishment is important in terms of Criminal Law policy, as well as it is topical from a practical and scientific point of view.

The topicality of the study is caused by the fact that it discusses the purpose of restoring justice in relation to the resocialization of criminal.

The article also studies certain circumstances that must be taken into account during the imposition of punishment, which serves the restoration of justice and at the same time facilitate subsequent resocialization of criminal.

In this article, the essence of justice and the purpose of restoring justice are discussed taking into consideration proportionality of punishment and the principle of individualization of punishment.

The current study represents an analysis of judicial practice in view of the restoration of justice and resocialization of criminal, which in most cases is related to distinctive comprehension and specific difficulties. This study suggests certain recommendations for overcoming these difficulties.

Keywords: *Justice, restoration of justice, resocialization, punishment, the purpose of punishment, criminal law policy, the proportionality of punishment, individualization of punishment, imposing punishment.*

1. Introduction

Research of purposes of punishment is very topical, in view of the criminal law, as well as criminal law principles.

Punishment imposed by the Judge must be just in all particular cases, in order to prevent crime afterwards and resocialize convict.[1] The principle of justice must be considered not only during imposition of punishment, but also during the release from punishment. Therefore, the practice existing nowadays in case of parole is inadmissible and it is particularly important that only court shall discuss the issue of putting on parole.

The topicality of article is related to the huge interest of society towards restoration of justice. Properly chosen punishment by the judge must convince society in the fairness of the decision and must facilitate resocialization of criminal.

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[1] *Vardzelashvili I.*, Purposes of Punishment, Tbilisi, 2016, 6 (in Georgian).

Aristotle assessed justice in the following manner: "Justice is perceived by everyone specifically and they arrive to certain point… Justice must be equality and this is correct."[2]

"Justice is only a concept, but it has unlimited influence on the happiness of person."[3] – write Cesare Beccaria in the legal, philosophic, diplomatic and political book "On crimes and punishments."

In the modern understanding, justice is connected to the notion of state, fair laws and just punishment, and it is put on the same level as equality. In the opinion of some scientists, along with equality, justice is formed by proportionality as well.[4]

Article 4 of the Constitution of Georgia declares the concept of just state and at the same time reinforces principle of social justice (article 5) and equality right (article 11). Constitution is the major law of the country, the value of which is presented by justice and equality.

The fairness of Constitution itself is checked through comparison to what extent the major law complies with general societal values, which are expressed in Human Rights Declaration and particular international acts.[5] According to the practice established by the Constitutional Court of Georgia, the purpose of restoration of justice is defined as follows: "As far as the freedom is equal good for everyone and it implies equal opportunity of each member of the society, chance to development and self-realization, everyone who abuses this freedom, steps over the limit, infringes freedom (any right) of others, the justice requires to restore initial equilibrium and to avoid the danger to everyone's equal right to freedom in future. Therefore, the purpose to restore justice by punishment implies restoration and maintenance of balance in the legal order."[6]

Opinions of law scientists on the importance of restoration of social justice and resocialization are presented in this article.

In the point of view of famous Georgian scientist *Zurab Gotua*, "restoration of social justice, as purpose of punishment is attained by using fair punishment corresponding to various crimes of respective gravity."[7]

Social justice means restoration of interest of person, society or state infringed by the criminal act.[8]

The aim of this study is to summarize opinions existing in legal doctrine and elaborate new recommendations. "While presenting new standards, the Strasbourg Court often uses comparative

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2 *Aristotle*, Politics, Part I, *Kukava T. (transl.),* Tbilisi, 1995, 78 (in Georgian).

3 *Beccaria C.*, On Crimes and Punishments, *Khutsurauli I. (transl.), Lezhava E. (ed.*), Tbilisi, 2003, 35 (in Georgian).

4 *Dvalidze I.*, General part of the Criminal Law, other Criminal Law Outcomes of the Punishment and Crime, Tbilisi, 2013, 21 (in Georgian).

5 *Gamkrelidze O.*, Criminal Law Problems, Vol. III, Tbilisi, 2013, 53 (in Georgian).

6 Decision of October 24, 2015, № 1/4/592, Constitutional Court of Georgia on the case: "Citizen of Georgia Beka Tsikarishvili against Parliament of Georgia", <https://constcourt.ge/ka/judicial-acts?legal=2133> [23.01.2021].

7 *Gotua Z.*, Criminal Law, General Part, Punishment, Course of Lectures, Tbilisi, 2001, 9 (in Georgian).

8 *Lekveishvili M.*, Notion and Aims of Punishment, Group of Authors, General part of the Criminal Law, 4th ed., Tbilisi, 532 (in Georgian).

legal analysis of member states' law and jurisprudence."[9] "As a rule, comparative legal materials become part of the decision."[10] Hence, the article describes approaches envisaged by legislations of foreign countries with regard to the current issue.

2. Restoration of Justice as a Purpose of Punishment

2.1. Essence of Justice

"The law is art of legal order and justice" – these words start the collection of Roman Civil Law – Corpus Juris Civilis. Its essence is that legal problems emerged in the society should have been solved justly.[11]

The statement that unjust law is not law – lex iniusta non est lex, belongs to the follower of natural law Thomas Aquinas.[12] Ancient Greek philosopher Demosthenes considered that laws must be obeyed as they derive from eternal moral code.[13]

Science also was interested in the problem of justice. "Jurisprudence is the science about just and unjust" – was mentioned by Ulpian. Law originates from justice, as from mother; Therefore, law is preceded by justice (digests). Justice is a value scale of the (positive) law."[14]

In relation to justice philosophers talk about three main points:

1) Justice implies equality and morality;
2) Justice is mutuality, which is related to prohibition, not to damage anyone, hence: "wellbeing of everyone and nobody's pain";
3) Justice also requires social fairness.[15]

It is difficult to form, to conceptualize positive notion of justice. It is much easier to determine what is injustice.[16]

In general justice is evaluative category and at the same time is related to the legal state. "As far as the first function of legal state to completely implement and adequately protect human rights and

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9 *Jacobs F. G., White R., Ovey C.*, The European Convention on Human Rights, 6th ed., Oxford, 2014, 78, see citation: *Chanturia L.*, The Application of the European Convention on Human Rights and Judicial Dialogue, Law Journal, № 2, 2019, 9-10.

10 Advisory Opinion P16-2018-001, ECHR 132(2019), delivered on April 10, 2019, 22-24, see citation: *Chanturia L.*, The Application of the European Convention on Human Rights and Judicial Dialogue, Law Journal № 2, 2019, 10.

11 *Zippelius R.,* Doctrine of Legal Methods, *Totladze L. (transl.), Turava M. (ed.),* 10th ed., Tbilisi, 2016, 11 (in Georgian).

12 *Wacks R.*, Philosophy of Law (A very short introduction), *Babukhadia M. (transl.), Kurdovanidze K. (ed.),* 2012, Tbilisi, 5 (in Georgian).

13 *Roscoe P.*, An Introduction to the Philosophy of Law, Revised ed., Chelsea, Michigan, 1982, 7.

14 *Khubua G.,* The Theory of Law, Tbilisi, 2015, 83 (in Georgian).

15 *Monterbruck A.*, Strafrechtsphilosophie (1195-2010), Vergeltung, Strafzeit, Südenbock, Menschenrechts-strafe, Natturrecht, 2, Erweiterte Auflage, 2010, Freie Universität Berlin, 5, see citation: *Vardzelashviuli I.,* Aims of Punishment, Tbilisi, 2016, 55 (in Georgian).

16 *Materni M.,* Criminal Punishment and the Pursuit of Justice, British Journal of American Legal Studies, Vol. 2, Issue 1, 2013, 283.

freedoms, right to fair trial, as certain measure of implementation of legal state principle, implies possibility to protect all those goods that represent rights in their essence."[17]

The main subject of study is the issue whether it is possible to resocialize criminal by the just decision.

In the opinion of Professor *Otar Gamkrelidze*, the main feature of legal state is not the rule of law, but rule of just law.[18]

"Crime provokes not only material, but also moral-political damage. Hence, restoration of justice comes on the agenda as with the material, as well as moral-political aspect."[19]

Justice, at the same time, derives from ethics as well. Justice as an ethical category is characterized by certain correlation in terms of distribution of good between people, characterized by correlation between human rights and obligations, between its action and revenge. The latter (revenge) according to the evaluation of *Giorgi Tkesheliadze*, is private occasion of correlation between crime and punishment. Person who damages other person for his/her own purposes, must understand that his/her such act will not be left unpunished.[20]

While talking about the essence of justice the opinion appears, whether revenge is part of justice or not. In the article 22 of the Criminal Code of Communist-socialist republic: "sentence is not only punishment for committed crime, but it aims at…" therefore, this code considered punishment – revenge as purpose of sentence. According to scientist Duiunov, recognizing purpose of restoration of justice by the Criminal Code represents official declaration of revenge as purpose of punishment by the legislator, moreover this scientist make proposition that term restoration of justice must be altered with term – "satisfying sense of justice of citizens."[21]

Modern approaches exist in relation to this issue. In particular, "members of the society, scientists and practitioners recognize importance of resocialization in comparison with punishment. As well as, they recognize importance of the principle of proportionality. Purposes must be applied in such a manner that they appraise major principles of fairness and proportionality."[22]

Resocialization of criminal becomes possible by the just decision. Here the interrelation between restoration of justice and resocialization of criminal is outlined.

Research of the essence and importance of justice is interesting in terms of the fact that just decision must serve the resocialization of criminal. This is the purpose of legal and social state.

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17 Decision of November 5, 2013, № 3/1/531, Constitutional Court of Georgia on the case: "Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili versus Parliament of Georgia", <https://constcourt.ge/ka/judicial-acts?legal=536> [30.01.2021].

18 *Gamkrelidze O*., Problems of Criminal Law, Vol. III, Tbilisi, 2013, 52 (in Georgian).

19 *Malania T*., Purposes of Punishment, Criminal Law Journal, № 2, 2019, 86 (in Georgian).

20 *Tkesheliadze G*., Concept and Purposes of Punishment, Group of Authors, General part of Criminal Law, Tbilisi, 2007, 354 (in Georgian).

21 *Duyunov V. K.*, Mechanism of Criminal Law Impact Theoretical Grounds and Practice of Realization, Moscow, 2001, 162 (in Russian).

22 Principles and Purposes of Sentencing, Scottish Sentencing Council, 2017, 16, <https://www.advocates.org.uk/media/2601/principles-and-purposes-ofsentencing-consultation.pdf> [04.02.2021].

2.2. Restoration of Justice as One of the Purposes of Punishment

According to the Article 39 of the Criminal Code of Georgia, the purpose of punishment is to restore justice, prevent new crime and resocialize criminal.

In the hierarchy of purposes of punishment, the first place has the restoration of justice. Imposition of fair punishment is the basis for the restoration of justice.

Legislator has given leading place to the restoration of justice in relation to other purposes. By imposing fair punishment, it must be possible to prevent crime and resocialize criminal. Moreover, the purpose of punishment must be implemented with the impact on the convict and other person, in order to inspire them to obey legal order and feel responsible before law (CCG Article 39 paragraph 2).[23]

According to the American doctrine, actually it is impossible to define specifically all purposes of punishment, because they are interconnected and sometimes their differentiation and separate determination is almost impossible.[24] Here the active role of restoration of justice as purpose of punishment is demonstrated. Its effective implementation facilitates effective application of other purposes.

Restoration of justice is not only the purpose of punishment, but it also serves for protection of individual, society and state.

"In the Criminal Law restoration of justice implies going back to equal conditions, restoring balance in legal order. It is proven by the fact that if just punishment serves for restoration of legal order, unjust punishment infringes the legal order."[25] The purpose of the Criminal Code of Georgia is also to prevent crime and defend legal order.

The main essence of the purpose of restoration of justice is that judge renders fair decision.

In the opinion of Professor *Mzia Lekveishvili*, "restoration of justice entails in itself imposition of just punishment to criminal, which corresponds to the moral requirements prevailing in the society."[26]

Restoration of justice is clearly demonstrated while imposing punishment by the judge in particular criminal case. Fairly chosen punishment finally facilitates resocialization of criminal.

According to the paragraph 4 of Article 259 of the Criminal Procedure Code of Georgia, "court decision is just if the imposed punishment corresponds to the personality of convict and to the gravity of committed crime." The judge applies article 53 of the Criminal Code when imposing punishment.

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[23] Despite the fact that there are three purposes of punishment envisaged in the Criminal Code, which ideally must be achieved cumulatively, in the current article two purposes (restoration of justice and resocialization) and their interrelation are discussed.

[24] *Nikiforov B. S., Reshetnikov F. M*., Modern American Criminal Law, Moscow, 1990, 47 (in Russian).

[25] *Dvalidze I*., General Part of the Criminal Law, Other Criminal Law Outcomes of the Punishment and Crime, Tbilisi, 2013, 28 (in Georgian).

[26] *Lekveishvili M*., Purpose of Punishment and Criminal Law and Criminological Aspects of Imposition of a Sanction, "Justice and Law", № 4(43), 2014, 18 (in Georgian).

During sentencing the judge must take into consideration marital status of the person, his/her age, health condition, education, personal relations, his/her income, etc. It is natural that in each particular case personal features are individual.

While rendering fair decision, along with the personal features, the judge must evaluate act committed by the person.

He/she must focus on the type of committed act, method, an at the same time the caused result. All these must be summarized and substantiated by the judge fairly.

"Restoration of justice by imposition of punishment implies choosing such punishment which is adequate, appropriate, proportionate to the dangers caused by the action, considering its gravity."[27] It is very important how fair decision impacts further resocialization of criminal. In order to develop respect and sense of responsibility towards rules established in the society, it is necessary to rehabilitate criminal by involving him/her in various rehabilitation programs.

The purpose of restoring justice is connected with choosing the type and amount of just punishment.

In order to restore disregarded justice, the judge imposes certain type of punishment on the criminal, but **imposition of just fair punishment must not be connected to causing pain**, revenge. The purpose of punishment is not physical suffering of person and humiliation of his/her dignity. (Paragraph 3 of Article 39 of CCG)

"One of the main rules will be following: not to cause pain, and the other not less important rule: cause as less pain as possible. Search for alternatives to punishment and not only alternative punishments."[28]

At last, in the fairness of punishment we must imply legal decision of imposing punishment, maximum benefit for the public and using such rehabilitation measures, which make possible to resocialize criminal.

2.3. Role of the Criminal Law Policy in the Determination of Fair Punishment

Problems of interrelation and correspondence between politics and law, including state policy and criminal law represented subject of scientific research from ancient times.[29]

Criminal Law policy entails such issues as: principles of criminal law, issues of criminalization and decriminalization, types of punishment, purposes of punishment, particularities of juvenile responsibility, crimes against human rights and freedoms.

Criminal Law policy determines main directions of criminal law, but as far as the research topic is restoration of justice and its interrelation with resocialization of criminal, criminal law policy will be discussed only in terms of punishment and its purposes.

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27 Decision of October 24, 2015, № 1/4/592, Constitutional Court of Georgia on the case: "Citizen of Georgia Beka Tsikarishvili against Parliament of Georgia", <https://constcourt.ge/ka/judicial-acts?legal=2133> [23.01.2021].

28 *Christie N.*, Limits to Pain, *Bakhtadze U. (transl.), Shalikashvili M., Giorgadze G. (eds.),* The Role of Punishment in the Penal Policy, Tbilisi, 2017, 20 (in Georgian).

29 *Ivanidze M.,* Essence of the Criminal Law Policy, Journal "Justice", № 2, 2008, 55 (in Georgian).

Modern policy of criminal law is characterized as humane. This is evident in types of punishments envisaged under Criminal Code of Georgia and purposes of punishment. The importance of humane punishment was underlined by Cesare Beccaria as well, who considered that for preventing crime the severity of punishment is less important than its inevitability.[30]

Criminal Law principles is the important issue of Criminal Law policy. Principle of justice is the ground for determining fair punishment.

It is of wide nature and "it must not be limited by the fairness of punishment. The Criminal Code envisages other measures of impact. These are for instance conditional sentence, which must respond to the requirement of justice. In this regard rule and conditions of exempting from responsibility and sentence are not an exception."[31] In terms of Criminal Law policy, amnesty and pardon are also important.

Article 40 of CCG along with other sentences comprises alternative types of punishments as well (community service, fine, house arrest). In the judicial practice of Georgia, in recent period, alternative types of punishment are often applied and their proper selection serves the purpose of restoration of justice. Criminal Law policy is important in terms of resocialization of criminal as well. In this view, Criminal Law policy entails implementation of various rehabilitation programs. It must be mentioned, that the European Court on Human Rights in the case Murray v. Netherlands declared that rehabilitation of convict is the positive obligation of the state.[32] Even though rehabilitation was declared as positive obligation of the state, the substance of rehabilitation differs in EU member states and the country may determine its substance within the free margin of appreciation.

Moreover, part of European countries considers resocialization-rehabilitation as a purpose of punishment. For Instance, according to the Constitution of Spain (paragraph 2 of Article 25), punishments related to imprisonment must be focused on re-education and social rehabilitation of the convict. According to the Constitution of Italy, the purpose of punishment is to transform person before the expiration of sentence term (article 27 of the Constitution of Italy).[33]

It is noteworthy that the Federal Court of Germany in the decision of 1973 declared resocialization as inseparable part of rights guaranteed under constitution. In particular, according to court definition resocialization is based on two grounds – 1. Right to dignity 2. Principle of Social State. Person's reintegration into society is the aim, which must be set by the state while imposing punishment.[34]

Issue of purposes of punishment in juvenile justice is interesting. In Georgia there is not much time passed after adoption of Juvenile Justice Code (12 June 2015). By adoption of juvenile justice

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30 *Beccaria C.,* On Crime and Punishment*, Khutsurauli I. (transl.), Lezhava E. (ed.),* Tbilisi, 2003, 33 (in Georgian).

31 *Nachkebia G*., Criminal Law, General Part, 4th ed., Tbilisi, 2015, 52 (in Georgian).

32 Murray v. The Netherlands [26.04.2016], ECHR, no.10511/10, §104.

33 *Meijer S.,* Rehabilitation as a Positive Obligation, European Journal of Crime, Criminal Law and Justice, Vol. 25, Issue 2, 2017, 152.

34 BVerfGE, 35. Band, 1973, Rn. 85, <BVerfG, Urteil vom 05.06.1973 - 1 BvR 536/72 - openJur> [04.02.2021].

code, our State particularly has noted the necessity to use liberalization policy when determining liability of juveniles being in conflict with the law.

Comparing to article 39 of the Criminal Code of Georgia, Juvenile Justice Code (article 65) does not consider restoration of justice as purpose of punishment. Here the hierarchy (order) of punishment purposes is formed differently.

As a purpose of juvenile punishment, firstly the resocialization-rehabilitation of juvenile and prevention of new crime is envisaged.

Current issue is the part of Criminal Law policy. Deriving from the best interest of juvenile, the main purpose of imposing punishment on juvenile is his/her resocialization-rehabilitation. The process of resocialization for juvenile starts from imposition of sentence and in this way, it becomes possible to prevent new crime. While selecting punishment for juvenile, the judge firstly considers his/her best interest and report of individual evaluation. It is mentioned correctly in the law literature that justice is evaluative notion.[35] Even though the purpose of restoration of justice is not provided by the Juvenile Justice Code, but in each particular case, the judge who has taken special course in children psychology and pedagogy, makes decision by individual approach towards juvenile and imposes sentence proportionate to the committed act. In such case the judge considers personality of juvenile, his/her age, health, education and wellbeing… all those circumstances that are necessary for rendering fair decision.

"The wide policy of Juvenile Justice must contain following major elements: prevention of crime among juveniles, minimal age of criminal law liability and marginal age of juvenile justice; guarantees for fair justice."[36]

The starting point of the issue under study is the liberal criminal law policy. The policy, which has put best interest of juvenile at the first place. Even though purpose of juvenile's punishment is not restoration of justice, the real interest is wider and entails unlimited circle of issues. While talking about importance of restoration of justice as purpose of punishment in juvenile justice, according to Prof. *Mzia Lekveishvili* "it is clear that there is no legal argum.entation on not considering this purpose during imposition of punishment on juvenile."[37]

Therefore, in the view of criminal law policy, in the current sub-chapter the restoration of justice, resocialization of criminal and issue of juvenile justice will be discussed.

3. Restoration of Justice During Imposition of Punishment

3.1. Justice as an Argument for Proportionality

Restoration of justice as purpose of punishment will be implemented when the punishment imposed on criminal will be proportionate to the committed crime. For implementing the purpose of

35 *Khubua G.*, The Theory of Law, 2nd ed., Tbilisi, 2015, 87 (in Georgian).

36 United Nations, General Commentary of the UNICEF № 10 "On the Rights of Children in the System of Juvenile Justice", Geneva, 2007, point 16.

37 *Lekveishvili M.,* Individualization of Punishment as an Important Principle of Imposing Sentence, Tendencies of Liberalization of Criminal Legislation in Georgia, Tbilisi, 2016, 187 (in Georgian).

punishment and to uphold proportionality of punishment, in each particular case the judge must consider gravity of committed crime, level of culpability of criminal, motive and purpose of crime, person's attitude towards committed crime (confessing, regretting, feeling emotional). Moreover, how the particular crime was committed and what was the result (whether it was terminated on preparation stage or during attempt). While making decision, the past life of criminal is also important (his/her personal characteristics), economic condition, his/her relation to the victim, the will to compensate the damage, reconcile or not with the victim.

Each case is individual, and in each case, there are respective particular circumstances. It is not less important how the judge evaluates each of these circumstances and how he/she substantiates it. The proportionality of punishment implies imposition of such sentence for committing crime, which ensures reaching the purpose of punishment.[38]

The Constitutional Court of Georgia validly points out that justice represents unconditional purpose of lawmaking, as well as application of law.[39]

The principle of proportionality of the punishment is established in the United States of America as well. According to modern Model Penal Code § 1.02, (2) (c)), criminal must be protected from exaggerated, disproportionate and spontaneous punishment. At the same time, according to the practice of the Constitutional Court of US, the 8th amendment of the US Constitution prohibits imposition of harshly disproportionate punishment.[40]

Justice as an argument of proportionality is evident when the imposed sentence corresponds to the person of convict and gravity of the committed crime. Professor *Temur Tskitishvili* deriving from the principle of proportionality of punishments, assesses each particular type of punishment. He also touches upon the alternative sentences in the view of proportionality of punishment, and also discussed specifics of fixed-term imprisonment. "For the proportionality of punishment, it is important that the determined sentence corresponds to the gravity of punishable act."

In this regard, the legislator must take into consideration the value of good to be protected, as well as other circumstances.[41] Let us bring an example from judicial practice.

On 27 October 2016, in the evening hours, in Tbilisi, in the dining room of one of the hotels, based on quarrel, Mirian intentionally and gravely damaged Ilia's health by stabbing him with the own knife.[42] Mirian was convicted for committing crime envisaged under Criminal Code of Georgia Article 117 paragraph one and as a type of punishment imprisonment for 4 (four) years was determined, which according to article 63, 64 of the CCG was considered conditional and he was charged with

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38 *Tskitishvili T.,* Purpose of Punishment, as the Orientation for Sentence, Tendencies of Liberalization of Criminal Law Legislation in Georgia, Tbilisi, 2016, 523 (in Georgian).

39 Decision of October 24, 2015, № 1/4/592, Constitutional Court of Georgia on the case: "Citizen of Georgia Beka Tsikarishvili against Parliament of Georgia", <https://constcourt.ge/ka/judicial-acts?legal=2133> [23.01.2021].

40 *Dressler J.*, Understanding Criminal Law, 7th ed., San Francisco, CA, 2015, 49.

41 *Tskitishvili T.*, Purpose of Punishment, as the Orientation for Sentence, Tendencies of Liberalization of Criminal Law Legislation in Georgia, Tbilisi, 2016, 562 (in Georgian).

42 Decision of March 10, 2017, № 1b/99-17, Criminal Law Chamber of the Tbilisi Court of Appeals, available only in the archive of the court (personal data has been altered).

probationary period of 4 (four) years. The prosecution did not consider this decision as just and asked to change probationary period with imprisonment.

The appellate chamber approved this query based on following circumstances: it considered the fact that drunk Mirian was very aggressive, he disturbed and treated rudely the personnel, that is why the victim gave him a remark and asked to defend order. This was followed by the conflict. Deriving from the purposes of punishment, for criminal to reach proper conclusions, the appellate chamber imposed on Mirian 4 (four) years imprisonment based on paragraph 1 of article 117 of the CCG. The judge while imposing sentence took into account the nature of committed crime and personality of criminal as well.

In the legal framework the judge must impose punishment respective, just and proportionate punishment. Some cases are interesting, when the decision made by judge corresponds to legislative limits, but considering the result it is difficult to assess it as just and proportionate. In this regard it cases qualified by article 116 of the CCG are interesting in this regard. Even though the action in committed with negligence, often it is so grave that it is difficult to assess whether the purpose of restoration of justice was reached and with the imposed punishment whether society had sense of justice.

Let us make an example. The mistake of doctor resulted in birth of big embryo physiologically and with the atonic bleeding caused by asphyxia the embryo died. All these was result of wrong maneuver of the doctor (he started to sew uterus) and for this reason the woman giving birth died as well. In the presented indictment the defendant did not plead guilty. While assessing this action, we may discuss, that this is negligent crime, but all actions of doctor are preceded by certain decisions: a) he assessed condition of embryo with mistake; b) refuse to make Caesarean section; c) instead of cutting out uterus – he started its sewing. For this reason, the cause of death was anemia, which developed by atonic bleeding.[43]

Defendant was declared guilty under paragraph 1 of article 116 of the CCG and as a type and amount of punishment was defined imprisonment for 2 (two) years and 6 (six) months. When we think about result, analyze what happened and assess type and amount of the punishment, the question arises how proportionate is imprisonment from 2 to 4 years in relation to the outcome, such as death.

In the negligent crime while determining individualization of punishment, along with other circumstances a particular attention must be paid to the outcome, which was caused by criminal's assumption and negligence (death of person).

Consideration of person's obligation determines the gravity of guilt – its high or low grade.[44] The amount of punishment is determined by taking into account all mentioned above.

Often the issue is discussed in this manner – Article 116 of CCG is a negligent crime, in terms of legislative construction the amount of punishment presented in the sanctions of article envisages

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[43] Archive of criminal law cases from 2006 of Rustavi City Court. (As far as case materials were provided encrypted, it is impossible to indicate case numbers.)

[44] *Lekveishvili M*., Notion and Aims of Punishment, Group of Authors, General Part of the Criminal Law, 4th ed., Tbilisi, 250 (in Georgian).

imprisonment from 2 to 4 years, however this is the case when the amount of punishment is liberal in relation to the outcome. In such cases the outcome is the heaviest – life of a person.

In cases of crime defined by the article 116 of CCG (crime committed by doctor), the court acts in the framework of law, legally assesses committed crime and therefore, defines punishment to the criminal. The punishment, which is subject to thought and discussion. This issue must be thought through in the view of legislative construction.

If we make a comparison – we have negligent crime also in occasions envisaged under article 276 of the CCG, which involves violation of traffic safety rules or rules for operating transport.

Paragraph 6 of article 276 of the CCG is related to death cause in the transport accident and is punished with the imprisonment from 4 to 7 years, and paragraph 8 of the same article prescribes transport accident which resulted in death of two or more people. This latter is punished by imprisonment from 6 to 10 years.

Articles 116 and 276 of the CCG foresees such outcome as negligently causing death of a person. However, in article 116 of the CCG, in first and in second paragraph, sanction is much lighter than in case of paragraphs 6 and 8 of article 276.[45] This once again proves that sanction of article 116 of the CCG (in terms of proportionality with the outcome) requires deliberation in view of legislative construction.

The issue of justice and proportionality of punishment is extremely important in the process of imposing sentence in various circumstances, in particular for unfinished crime, imposing punishment in case of collaboration or repeated crime, in case of cumulation of offences and verdicts.

The current article will discuss particularity of imposing punishment in case of cumulation of offences and verdicts. As a result of legislative amendment introduced in 2006, it was established that in case of cumulation of crimes the punishment was imposed for each crime and finally the overall punishment constituted sum of the sentences. In 2013 amendments were introduced to the law and the second paragraph of article 59 of the CCG was stipulated as follows: when imposing a final sentence for cumulative crimes, the more severe sentence shall absorb the less severe sentence, while when imposing equal sentences, one sentence shall absorb the other sentence. Paragraph three of the same article foresees case of recidivism and stipulates possibility to add up sentences in full, as well as partially and absorb.

It is interesting to discuss this issue in light of purpose of restoration of justice and proportionality.

Deriving from the individualization of punishment, when we discuss absorption of sentence in case of cumulation of crimes, it is advisable to equalize sentences.[46]

In some cases, it is possible to justify the idea of absorption of less sever sentence with more severe punishment,[47] but a lot of circumstances must be taken into account during imposition of the sentence.

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[45] Decision of June 25, 2018, № 1/549-17, Tbilisi City Court.

[46] *Lekveishvili M.,* Individualization of Punishment as an Important Principle of Imposing Sentence, Tendencies of Liberalization of Criminal Legislation in Georgia, Tbilisi, 2016, 220 (in Georgian).

In case of cumulation of crimes, in terms of proportionality of the punishment the partial adding up rule is interesting. In such occasion the judge must indicate in justification the condition based on which he/she decided to add up part of a certain sentence. At last, the full adding up of sentence is important, the past practice of which got criticism from the society. In such case the judge must particularly justify why he/she has chosen the rule of full add up. Current criminal law legislation gives us wide legislative possibility in this regard (adding up sentences, partial add up and principle of absorption).

Therefore, justice as an argument of proportionality when imposing punishment is revealed in various circumstances and is interesting subject for discussion.

3.2. Restoration of Justice and Individualization of Punishment

Individualization of punishment is a specific activity based on the principles of criminal law, which is expressed by defining particular type and amount of punishment to a particular person.[48]

Achieving purpose of restoration of justice is closely connected to resocialization and rehabilitation of criminal. Experience of foreign countries with regard to this issue is interesting.

In the Criminal Code of France, the general criterion of individualization is established, according to which the court imposes punishment in the framework envisaged under the law, which is based on the circumstances of committed crime and personality of criminal. Instead of the term "individualization" in the Criminal Code of France there is a term "personalization". The reason for this is the fact that in number of criminal codes legal persons are also recognized as subjects.[49]

Individualization of punishment must be made in the framework of law. Within those limits the judge must have enough freedom to evaluate all circumstances. Deriving from the principle of individualization of punishment, it is important that the judge studies personal characteristics of criminal, in particular his/her social type. This is necessary in case of collaboration in crime, when liability of each participant is evaluated individually.

Individualization of punishment is related to the number of issues, but in the current article the issue of parole with regard to the punishment of article 72 of the CCG will be discussed. This issue is connected to the purpose of restoration of justice, as not only during imposition of punishment, but also when releasing person form sentence justice and individualization of punishment must be upheld.

From 1st October 2010 the Imprisonment Code of Georgia was enacted, which radically changed the system of parole existing in the country and partially it was developed similarly to systems applied in Scotland and England.[50] In particular, local councils were created, which were tasked to deliberate cases of convicts and make decisions. Person who is imprisoned for definite

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47 Interesting reasoning is provided on this issue by the Supreme Court of Georgia. See: Decision of July 6, 2018, № 2K-50AP-18, The Grand Chamber of the Supreme Court of Georgia.

48 *Lekveishvili* M., Individualization of Punishment as an Important Principle of Imposing Sentence, Tendencies of Liberalization of Criminal Legislation in Georgia, Tbilisi, 2016, 198 (in Georgian).

49 *Papatheodorou T.*, De Individualisation, des Peines et la Personnalisation de Sanctions, Revue Internationale de Criminologie edde Police technique, № 1, 1993, 109.

50 *Arsoshvili G., Mikanadze G., Shalikashvili M.,* Probation Law, Tbilisi, 2015, 119-120 (in Georgian).

period, except convict placed in the penitentiary institution of special risk, may be released on parole if the state subordinated institution within the system of the Ministry of Justice – Local Council of Special Penitentiary Service considers that for the correction of convict there is no more necessity to serve sentence fully. In such case person may be released fully or partially from serving the imposed sentence. Different rule applies in case when community service, correction work, restriction of military service or house arrest are imposed on person.

In such case convict may be released on parole by the court. In occasions mentioned above the issue is related to release from sentence, however when serving certain type of punishment, the decision maker is the court, while in case of imprisonment – Local Council.

Naturally the question arises – why there is a different approach toward the issue of release on parole. In particular, why different bodies are deliberating on this issue?

When discussing this topic, the starting point is only one. Nowadays in Georgia the Court is the body executing law and implementing justice[51] and that is why is must make a decision on imposing punishment, as well as releasing therefrom.

Existing position in this regard is justified by the condition that decision made by the Local Council represents an individual-administrative act and it may be challenged through administrative procedure. If the issue of putting person on parole goes to the court, would not it be better to have the Court making decision on that issue?

Considering the fact that in case of appealing the decision of Council through administrative procedure, it is vague whether the subject of the Control of Court would be following procedures envisaged under the legislation from the side of Council, or subjective and objective circumstances related to the convict. In particular, whether the Council studied all important grounds while making decision.[52] Right to fair trial entails making decision which is studied comprehensively, justified and fair. The issue of releasing person from sentence must be by all means decided by the Court. In addition, when discussing the issue by the Local Council the right of convict to have access to case materials, which will be evaluated by the Council, is not ensured.

The issue of conducting oral hearings is unclear, there is no effective appealing mechanism.[53] The practice shows that the decision is substantially unjustified in most cases.

The answer to the question, why is the issue of putting person on parole deliberated by different procedure, is following: the ground for such differentiation is unclear and the issue of releasing a person from sentence must be decided by the Court.

4. Interrelation of Restoration of Justice and Resocialization of the Criminal

Within the current article the purpose of restoration of justice is discussed in the view of criminal law policy, as well as in terms of principles of proportionality and individualization and as a

[51] Article 59 paragraph 3, Article 62 paragraph 2, Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995.

[52] *Nikoleishvili K*., Compliance of the activity of the Local Council, Discussing Issue of Putting on Parole, with the Standards of Fair Justice (Analysis of some issues), Law Journal, № 2, 2014, 303-304.

[53] Ibid, 296-300.

result of their evaluation, it is evident that restoration of justice facilitates and provides resocialization of the criminal. Connection and synthesis of these two purposes of punishment is evident and is revealed in various conditions. In is natural that not all conditions may be discussed in this article, but some important issues will be underlined.

The essence of justice is primarily expressed in the fair decision of the judge. The resocialization of convict also starts with the fair decision of the court and continues after the serving of sentence as well. The Supreme Court of Georgia in one of the decisions mentions that despite committing grave crime, the personality of convict and general circumstances must be evaluated individually. Therefore, it is possible to correct and resocialize convict by imposing minimum amount of punishment.[54]

Hence, the purpose of restoring justice is connected to the type of fair punishment and selection of its amount. The issue of resocialization is interesting during the imprisonment. Naturally it is better to start rehabilitation from the day of imprisonment. The convict must have information on rehabilitation programs. In the penitentiary institution educational and labor programs must be implemented with full load. "Resocialization of criminal, i.e. correction implies such transformation of the criminal's personality, when he/she does not violate criminal law and respects the rules of human cohabitation."[55]

The convict with life sentence must take a very hard path for the resocialization process. "Lifetime imprisonment must not be used for convict of any category without possibility to put on parole."[56]

Restoration of justice and resocialization of the criminal is important during the imposition of punishment, as well as while putting person on parole. It is crucial that all convicts that have been put on parole have proper support after leaving the penitentiary institutions, which ensures their behavior.[57] **Restoration of justice and resocialization of the criminal is directly connected to the rehabilitation process.**

"The state has positive obligation to create sufficient programs and initiatives for the correction of the criminal."[58] We may suppose that there is a certain risk of recidivism from the side of convict. By applying rehabilitation method timely and properly, this risk may be decreased to the minimum. Decreasing the level of risk is possible within the framework of prison and out of prison programs, in particular, educational, labor skills development, and using other remedial impact.

In terms of the rehabilitation of the criminal it is important to share experience from foreign countries. "While implementing rehabilitation the punishment must be fitted to the personality of the criminal and not the crime. For achieving rehabilitation, the role of society is huge."[59] "In the US the main purpose of punishment is resocialization of the convict. It entails transformation of the criminal

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54 Decision of February 20, 2018, № 2K-527AP-17, Criminal Law Chamber of the Supreme Court of Georgia.

55 *Arsoshvili G*., Resocialization of the Criminal, Tbilisi, 2009, 6 (in Georgian).

56 *Vardzelashvili I*., Purposes of Punishment, Tbilisi, 2016, 109 (in Georgian).

57 *Nikoleishvili* K., Compliance of the Activity of the Local Council, Discussing Issue of Putting on Parole, with the Standards of Fair Justice (Analysis of some issues), Law Journal, № 2, 2014, 289.

58 *Shalikashvili M*., *Miklanadze* G., *Khasia* M., Penal Law, Tbilisi, 2014, 81 (in Georgian).

59 *Banks* C., Criminal Justice Ethics: Theory and Practice, Thousand Oaks, California, 2004, 116.

into a law obeying member of the society."[60] As a result of punishment the purpose must be achieved – person's legal, social and moral rehabilitation.[61]

In the opinion of English law scientists, the punishment must not be used with full severity. The benefit of resocialization is not in the severity of sentence, but in the application of relatively less severe punishment."[62]

At the end of the article, purposes of restoration of justice and resocialization of the criminal must be assessed in the view of criminal law policy. Because of its particular importance, the purpose of restoration of justice serves and at the same time causes other purposes of the punishment. Its interrelation with resocialization of the criminal is special. Synthesis of these two provides prevention of new crime from the side of criminal.

5. Conclusion

The current article touches upon such important purpose of punishment as restoration of justice and its interrelation with the resocialization of criminal. In this article importance of restoration of justice is discussed in the view of proportionality and individualization of the punishment, which at the end is the ground for resocialization of the criminal. Within the framework of this research, considering the scientific opinions and existing judicial practice the following views are presented.

Restoration of justice in its essence is connected to making fair decision. It can be ensured by correct qualification of the crime and based on it, selecting punishment of proper type and amount. And this is the ground for resocialization of the criminal.

For the restoration of justice, it is important to correctly define type and amount of punishment, which implies, in term of legislation, correctly chosen type and amount of sanction for each crime. (In case of negligent crimes, the grave outcome must be taken into consideration in terms of legislation).

In the view of restoration of justice and resocialization of the criminal, it is important that the judge imposes fair punishment. Moreover, it is important that the issue of putting convict on parole is decided by the court. Generalization of these issues will facilitate restoration of justice and resocialization of the criminal.

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4. Criminal Procedure Code of Georgia, LGH, 31, 09/10/2009.
5. Imprisonment Code, record of the Parliament of Georgia, LHG, 12, 24/03/2010.

60 *Lippman M*., Contemporary Criminal Law, Concepts, Cases, and Controversies, 2nd ed., Thousand Oaks, California, 2010, 56.

61 *Conton R*., Probation and the Philosophy of Punishment, Probation Journal, Vol. 65 (3), 2018, 266.

62 *Krilova N., Sereprenikova A*., Criminal Law of Foreign Countries (England, USA, France, Germany), Moscow, 1977, 144 (in Russian).

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Gvantsa Khasia*

Liability of the Travel Organiser for the Traveller's Ruined Holiday

In parallel with the development of the tourism industry, it is important to take proper care of the rights of those who apply for travel services to a travel organiser, especially in a situation when Georgia has obligation to implement EU regulations in the framework of a number of international agreements. Liability of the travel organiser for failure to perform or improper performance of the travel services is defined by Georgian legislation, however, the lack of scientific literature in the field of tourism law and case law in common courts in Georgia makes it very important to study/share an international experience. The paper focuses on the liability of the travel organiser for holiday leave spent to no avail by the traveller, where the traveller can request compensation for non-material damage for loss of the expected enjoyment of the planned leave. The study focuses on the compliance of Georgian legislation with EU directives, discusses the international experience and court precedents on the example of different countries. One of the most pressing and at the same time problematic issues in the study is the determination of compensation in money for the ruined holiday.

Keywords: *Travel organiser, traveller, failed travel, improperly organised leave, compensation for non-material damage, monetary compensation, loss of enjoyment, ruined holiday.*

1. Introduction

The tourism industry is rapidly developing throughout the world, including Georgia. The development of tourism is an important factor for the development of the economy in Georgia, which was clearly demonstrated in the circumstances of the pandemic. Consequently, in parallel with the development of the tourism industry, focusing on legislation regulating this area is an important factor for the tourism development. It should be noted that Georgia has the obligation to align its tourism regulatory acts with international acts in terms of the European integration within the framework of international agreements. In this process, it is important for the law to regulate the rights and responsibilities of the parties of this legal relationship in such a way as to ensure the normal functioning of the internal market and, most importantly, the rights of the traveller, the weak party, who applies to a travel company to receive the services under the travel contract and has an expectation that the contractor will fulfill its obligations properly.

Georgian legislation regulates the responsibility of the travel organiser in case of failure to perform or improper performance of the obligation and allows the traveller to request a price reduction, termination of the travel contract, compensation for material damages and, also, appropriate monetary compensation for ruined holiday. Georgian legislation distinguishes material and non-

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material damages and determines the preconditions for their compensation. The right to claim non-material damage exists in cases of violation of personal non-property rights or other cases provided by law. There is an opinion in legal doctrine that the imposition of monetary compensation for the ruined holiday is one of the grounds for claiming non-property damage.

This paper focuses on the provision in Part 2 of Article 662 of the Civil Code of Georgia (Hereinafter – GCC), which allows the traveller to claim appropriate monetary compensation for the ruined holiday in case the travel was failed or if it was organised improperly. It should be noted that the disputes arising from the travel contract are quite rare in Georgia, which can be explained by many factors, however, there is no case law regarding the monetary compensation caused by the ruined holiday. The aim of this paper is to determine the content of the request for the above norm, to assess the EU regulations and their compliance with Georgian legislation, as well as the essential factors for determining the amount of monetary compensation and to propose relevant recommendations, which on the one hand ensure the protection of the rights of travellers, the weak party, and on the other hand, the normal functioning of the internal market of Georgia in the field of tourism.

2. General Overview of the Grounds for Compensation in Case of Failed or Improper Performance of the Obligation

According to Part 2 of Article 361 of GCC, the obligation shall be performed duly, in good faith, and at the determined time and place. Failure by the debtor to perform or improper performance of the obligation may result in damage to the creditor. Georgian legislation separates material and non-material damages and, at the same time, determines the preconditions for their compensation. In the present paper, based on the subject of research, we will focus on compensation for non-material damage.

The concept of non-material damage is first found in French law, and a little later in German law, where the concept of damage was expanded to include non-material damage in addition to material damage in the presence of relevant preconditions, which was considerably influenced by the concept of personal rights.[1] Any damage that does not lead to a decrease in a person's property can be considered as the non-material damage.[2] Non-material damage is characterized by the difficulty of determining its exact monetary value, since its assessment depends on subjective factors.[3] Furthermore, the existence of non-material damage implies the existence of intangible circumstances such as loss of pleasure, pain, shock, suffering.[4]

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1 *Sadiku A.,* Immaterial Damage and Some Types of its Compensation, Prizren Social Science Journal, Vol. 4, Issue 1, 2020, 50.

2 *Magnus U.,* Damages for Non-Pecuniary Loss in German Contract and Tort Law, The Chinese Journal of Comparative Law, Vol. 3, № 2, 2015, 290, Seen in: *Jahnke J., Burmann M. and others (eds.*), Straßenverkehrsrecht (23rd ed., Beck 2014) s 253 BGB n 3.

3 *Magnus U.,* Damages for Non-Pecuniary Loss in German Contract and Tort Law, The Chinese Journal of Comparative Law, Vol. 3, № 2, 2015, 291.

4 *CooKe J.,* Law of Tort, 12th ed., United Kingdom, 2015, 552.

In accordance with Article 413 of GCC, monetary compensation for non-material damages may be claimed only in the cases precisely defined by law in the form of a reasonable and fair compensation. According to this norm, there must be two cumulative conditions – the fact of causing moral damage and the relevant legal provision.[5] The purpose of the above article is to regulate the cases precisely defined by law, when a victim within various relationships under private law may suffer moral, spiritual suffering, which creates legal basis to claim compensation for non-material damage. Therefore, such regulation provides for the reduction, limitation of the unreasonable extension of the result provided for in this norm, in order to ensure the stability and order of the civil turnover.[6]

It should be noted that the purpose of compensation for moral damages has a function of moral satisfaction along with the rectification of the result, which is manifested in the replacement of spiritual pain with positive emotions.[7] However, it is debatable whether it is possible to rectify the result, because the restitution of the moral damage is considered to be impossible, as the suffering experienced by a human being leaves an indelible mark on their personality.[8] According to the Georgian legislation, the regulation on non-material damage should also have a preventive role, in particular, the person should be protected from material and non-material damage to the extent possible.[9]

GCC and other legislative acts[10] regulate the grounds for claiming non-material damage, including in cases such as violation of personal non-property rights, bodily injury or damage to health, ruined holiday.

It is notable that the case of Jarvis v Swans Tours LTD was one of the first where the court had to discuss the issue of compensation for non-material damages for the breach of contract. Mr. Jarvis wanted to go to Switzerland for Christmas to spend a two-week vacation. He read information in a brochure prepared by a travel company. The brochure described in detail the environment and conditions in which the traveller would stay. The traveller was left in despair with his trip, as the essential conditions given in the brochure were not accurate, so he appealed to the court for damages. The Court noted that if the contracting party breaks the contract, it was important to compensate for the disappointment, loss of enjoyment and distress caused by the breach. Although it is difficult to assess in terms of money, but this does not preclude the possibility of satisfying the claim as Mr. Jarvis eagerly waited for his vacation and he suffered the damage for the loss of it.[11]

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5 *Chanturia L. (ed.),* Commentary to the Civil Code, Vol. III, Tbilisi, 2019, 745 (in Georgian).

6 Decision of January 20, 2012, № AS-1156-1176-2011, Supreme Court of Georgia.

7 *Chanturia L. (ed.),* Commentary to the Civil Code, Vol. III, Tbilisi, 2019, 749 (in Georgian).

8 *Bichia M.,* Analysis of an Article by Grigol Rtskhiladze "Compensation of Moral Damage", Journal "Law and World", № 8, 2017, 80 seen in: *Rtskhiladze G.,* Compensation of Moral Damage, Journal "Soviet Law", № 4, 1928, 80-81.

9 *Bichia M.,* Analysis of an Article by Grigol Rtskhiladze "Compensation of Moral Damage", Journal "Law and World" № 8, Tbilisi, 2017, 84, seen in: *Ninidze T.*, The Problem of Moral Damage in Law, Journal "Soviet Law" № 2, Tbilisi, 1978, 55.

10 Laws of Georgia on "Freedom of Speech and Expression", "Patient Rights", "Advertising", etc.

11 *Jarvis v Swans Tours LTD*, England and Wales Court of Appeal, 1972.

3. The Essence of Holiday Leaves and its Relation to Article 662 of the Civil Code

Georgian legislation recognizes the right of an employee to enjoy paid and unpaid holiday leave for a period defined by law. Vacation, or free time for rest, is earned by the employee in exchange for the work done by him/her.[12]

Georgian law distinguishes between paid leave and unpaid leave. A period of temporary incapacity for work, leave due to pregnancy, childbirth and childcare, newborn adoption leave and additional parental leave for childcare are not considered as holiday leaves.[13]

Holiday leave is a legally guaranteed right to rest in exchange for the time worked by an employee, the use of which is essential for health and personal development. One of the rulings of the European Court of Justice explained that the purpose of entitlement to paid leave is to enable the worker to rest and to enjoy a period of relaxation and leisure.[14] The importance of leave is also emphasized by the fact that the EU law prohibits the replacement of the period of paid annual leave by an allowance in lieu.[15]

The right to leave is a social right, which, in accordance with the Italian law, is considered in close connection with the rights to health and the security of the person. The purpose of the annual leave is to restore the psychophysical energy spent on the work they do during the year for the employees, as well as to support the family and social relations to ensure the personal development.[16] The purpose of the holiday leave is to have some leisure time and enjoy it. It is also the best opportunity to accumulate new emotions. In some cases, people associate their holiday leave with a public holiday, and the expected vacation may especially intensify the importance of the leave.

It is generally believed that a person obtains a sense of satisfaction from a variety of sources throughout life, one of which is the leisure time that a person spends at home or while traveling. Satisfaction received from traveling refers to the experience that a person acquires in an environment free from control, which implies a space free from work, spontaneous emotions received through traveling, and, one of the essential components, the travel service that the traveller receives.[17]

The importance of the leave is indicated in Part 2 of Article 662 of GCC, which stipulates that if the travel was failed or improperly organised, then the traveller can also claim the appropriate monetary compensation for the ruined holiday. Based on the above, the question logically arises – if the provision in Article 662 of GCC refers to the damage caused by wasting the leave of any kind, or only the paid leave. It should be noted that the legislature does not specify the purpose of paid or unpaid leave. In addition, it is debatable whether the traveller has the right to claim monetary compensation for the failure to perform or improper performance of the obligation by the travel

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12 *Shvelidze Z.,* Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 213 (in Georgian).

13 Articles 31-36, Organic Law of Georgia "Labour Code of Georgia", LHG, 75, 27/12/2010.

14 Case C-78/11 Judgement of the Court (5th Chamber), 21 June 2012.

15 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning Certain Aspects of the Organisation of Working Time, Article 7 (2).

16 *Borroni A. (ed.),* Commentary on the Labour Code of Georgia, Tbilisi, 2016, 197-199 (in Georgian).

17 *Neal D. J., Sirgy J. M., Uysal M*., Measuring the Effect of Tourism Services on Travelers' Quality of Life Further Validation, Social Indicators Research, 12, Vol. 69, 2004, 244.

organiser on the above grounds if the traveller is not involved in labour relations and purchases a travel service from a travel organiser. It would be important for the common courts of Georgia to define "leave" in the light of a particular dispute. In my opinion "leave" should be broadly defined or in the impossibility of explanation changes should be made to the provisions of this norm in order to ensure equal protection of the rights of all customers.

4. The Entity Responsible for Ruined Holiday

According to Part 1 of Article 657 of GCC, the parties to the travel contract are the travel organiser (trader) and the tourist (traveller). The travel organiser is responsible for providing the services in accordance with the terms agreed upon by the parties. At the traveling stage, the interest of the traveller shall be taken into account, who has certain expectations from the planned trip. The traveller has a high interest in the fact that the planned trip will be an opportunity for new emotions, adventures and relaxation.

A traveller is a service recipient, whose right to receive service derives from the free movement of services.[18] The Civil Code does not contain the notion of a traveller, however, as a service recipient the traveller is a customer, therefore is a subject to the standard of protection contained in the Georgian legislation to protect the "weak" party.[19] In turn, any subject that buys any product or service to meet personal needs is a customer.[20]

We find the definition of a tourist (traveller) in the Law of Georgia on Tourism and Resorts, according to which – a tourist is a natural person who voluntarily travels outside the place of his/her permanent residence for leisure, recreation, business or other purposes, for no less than 24 hours and no more than one year, and whose travel is not reimbursed from the financial sources of the place of temporary stay.[21]

A traveller applies to a travel organiser for the service, as he or she may not have enough experience to plan the travel and/or may consider that in case of improper performance of the obligation during the service period, it will be more practical and convenient for the traveller to have the right to complain to the travel organiser rather than individually to all the subjects providing different services.

Accordingly, the traveller buys the service hoping that the trip will be in accordance with the expectations. At this stage, it is the obligation of the travel organiser to ensure the proper performance

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18 *Leeuwen van B.,* European Standardisation of Services and its Impact on Private Law: Paradoxes of Convergence (Modern Studies in European Law), Bloomsbury, 2017, 118.

19 *Tsertsvadze G.,* Commentary to Article 657 of the Civil Code, <http://www.gccc.ge/> [15.01.2021] (in Georgian).

20 *Lakerbaia T., Zaalishvili V., Zoidze T.,* Consumer Law, Tbilisi, 2018, 30 (in Georgian).

21 Article 2, part 2, Law of Georgia on Tourism and Resorts, Departments of the Parliament of Georgia, 13-14 (45-46/13), 12/04/1997. Also, the notion of a tourist (traveller) is regulated under Article 2, subparagraph "a" of the Law of Georgia on "the Regulation of the Registration of Tourists Entering and Leaving Georgia".

of the obligations under the contract and to keep the traveller satisfied, within the scope of its responsibilities.

In accordance with Article 662 of the GCC, the party responsible for performing the conditions defined by the agreement between the parties to the travel is the travel organiser, which is a registered entity defined by Georgian law and which has the authorization to carry out entrepreneurial activities. It should be noted that Georgian legislation does not provide for any special legal preconditions for the registration of a travel company and the commencement of activities. The Order of the Head of the State Department of Tourism and Resorts of Georgia envisages voluntary licensing of touristic and resort activities in Georgia.[22] Absense of a license is not a ground for banning or restricting touristic and resort activities for legal or physical persons.[23] Consequently, there are no strictly defined criteria that such a subject would have to meet, which would have led to a somewhat high degree of expectation that the needs of the traveller would be met.

Therefore, it is important to define a number of criteria by the Georgian legislation, which would have to be met in order to give travel companies the right to operate. This would ensure the protection of the interests of travellers, whose lives and health to some extent depend on the trip planned by the travel organiser and may be endangered. Setting additional criteria for the activities of travel companies may have a negative impact on the country's economy, as their registration will be subject to certain restrictions, but I think human life and health should be given priority in this case and reasonable steps should be taken to protect it.

5. Grounds for Claiming Monetary Compensation for Ruined Holiday

The main duty of the travel organiser is to fulfill the obligation in accordance with the terms agreed by the parties, which means to organise the trip in such a way that it does not have any shortcomings that can downgrade or reduce its importance for general or contractual purposes.[24]

Georgian legislation entitles a traveller to request reduction of the price and termination of the contract in the presence of preconditions provided by law, as well as compensation for material damage for failure to perform the obligation, and appropriate monetary compensation for the ruined holiday.[25]

The travel organiser is liable for damages caused by it and the result of which is the failed travel or improper performance of the travel services, which entitles the traveller to claim appropriate compensation for the ruined holiday. The terms "failed travel" and "improper performance of travel services" are ambiguous, as the failed travel may be the result of improper performance of travel services. Whereas, under Article 662, these two grounds constitute two independent grounds for the claim for damages, let us consider that failed travel is the one that did not take place, which can be

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22 See Order № 2 of the Head of the State Department of Tourism and Resorts of Georgia, 28/01/1999.

23 I approached the LEPL National Tourism Administration with the request to provide information about the travel companies in the country that have voluntary licensing. According to the received answer (letter № 3120, 08.10.2020), licensing of travel companies is not carried out in Georgia.

24 Decision of March 14, 2017, №AS-1102-1059-2016, Supreme Court of Georgia.

25 See Articles 660-662, of the Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997.

caused by many reasons (absence of visa, expired travel documents, etc.),[26] and improper performance of travel services – when the traveller took the trip, however the service lacked such a component that significantly deteriorated and reduced the value of the trip, causing the traveller to suffer non-material damage.[27]

It should be noted that according to the Civil Code of Germany (Hereinafter – BGB), if the travel package is made impossible or package conditions significantly impaired, then the traveller may also claim appropriate compensation in money for the ruined holiday. Travel package "made impossible" and "significantly impaired" is a much more terminologically correct wording than is found in Georgian legislation.[28] Regulations on compensation for damages, including provisions on non-material damages, were especially adopted in German legislation at the end of the 20th century. In 1979, the law made it possible to claim non-material damage under a travel service contract.[29] One of the exceptions to the cases of compensation for non-material damage is the damage caused by the loss of the pleasure of the holiday, as the traveller has an interest and expectation that he or she will be able to regain energy and have fun as a result of the holiday. Accordingly, German legislation, in particular paragraph 651f of the Civil Code of Germany (BGB), allows a traveller to claim compensation for damages, in particular for non-material damage, for the disappointment or significant impairment of his or her expectation under a contractual relationship. This should be considered as a means of protecting the contractual interest that the traveller has towards the proper performance of the obligation. It should be noted that the German courts do not recognize the possibility of compensation for loss of leisure or the enjoyment of leave outside the contractual relationship.[30]

Under German legislation, the obligation to pay compensation for the "ruined holiday" is the only case in contract law that ensures the protection of non-material interests, as there is a loss of pleasure.[31] Damage received through a ruined (wasted) holiday time shall, as an exception, be reimbursed as non-material damage and not as material damage.[32] Herewith, the grounds for this claim can be both if the travel package was made "impossible" or "significantly impaired".[33]

In France there is a fairly big practice of imposing compensation for non-material damage due to improper performance of the travel services. In one case instead of the agreed three-star hotel the travellers had to spend a holiday in a low-class hotel, which was inconvenient and served poor quality food. The travellers got their money back and received 500 EUR in non-material damage for

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26 See the decision of February 18, 2015, № 2/16914-15, Collegium of Civil Cases of Tbilisi City Court.

27 See the decision of March 14, 2017, №AS -1102-1059-2016, Chamber of Civil Cases of the Supreme Court of Georgia; Decision of December 4, 2013, №AS-510-484-2013, Chamber of Civil Cases of the Supreme Court of Georgia.

28 Article 651f (2), Civil Code of Germany (BGB), 01/01/1900.

29 *Magnus U.,* Damage for Non-Pecuniary Loss in German Contract and Tort Law, The Chinese Journal of Comparative Law, Vol. 3, № 2, 2015, 297.

30 Ibid, 302.

31 *Markesinis B. S., Unberath H, Johnston A.,* The German Law of Contract, 2nd ed., USA and Canada, 2006, 157-158.

32 *Kropholler J.,* Commentary to the Civil Code, *Darjania T., Tchetchelashvili Z. (transl.), Chachanidze E., Darjania T., Totladze L. (eds.),* Tbilisi, 2014, Introduction to §§ 249-253, VII, 120 (in Georgian).

33 Ibid, § 651a, VI, 492.

disappointment and the trip that left bad memories. The approach of the court was similar in the case when the travellers arrived at a hotel under construction and with an unfinished swimming pool. When imposing compensation for damages, there is usually no explanation of how the amount was calculated.[34]

6. The Scope of Liability of the Travel Organiser under EU Law – Directive 90/314/EEC on "Package Travel, Package Holidays and Package Tours"

In terms of European integration, Georgia has an obligation under international agreements to implement the European standards of consumer rights, in accordance with the Partnership and Cooperation Agreement (PCA)[35] and the EU-Georgia Association Agreement[36]. The EU regulates the selected areas through Directives within its legislative competence, including the types of contracts that are politically important for the effective functioning of the internal market.[37]

Directive 90/314/EEC on "package travel, package holidays and package tours"[38] has been implemented by a number of states and Georgia has such obligation under the Association Agreement. This Directive has become important for the protection of consumers' rights, as it regulates issues such as information to be provided to travellers, payment of service fees, changes in the contract, cancellation of the tour by the organiser, liability of travel organiser and other issues.[39]

It is noteworthy that the question of whether EU law provides for the liability of the travel organiser in the event of travel cancellation to compensate for non-material damage sustained by the traveller for the ruined holiday was answered in one of the cases, namely when the family of Simone Leitner booked a travel package in Turkish Riviera. They spent their entire holiday in a hotel and there they took all their meals. A week after the start of the holiday, Simone Leitner showed symptoms of poisoning from food included in their travel package. Simone felt ill throughout and beyond the end of the holiday, accompanied by a variety of symptoms. Her parents had to look after her until the end of the holiday. Other guests at the same hotel also fell ill with the same illness and presented the same symptoms of illness. Simone's family appealed to the court for damages, the court of first instance awarded the claimant only 13,000 ATS for the physical pain and suffering caused by the food poisoning and dismissed the remainder of the application, which was for compensation for the non-material damage caused by the holiday leave spent to no avail. The court justified this decision by

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34 CA Paris 29 Jan 2010, Numéro JurisData: 2010–001776; CA Bordeaux 4 Nov 2002, Numéro JurisData: 2002–196116. Seen in: *Palmer V. V. (ed.)*, The Recovery of Non-Pecuniary Loss in European Contract Law, United Kingdom, 2015, 359.

35 Ratified by Decree № 347 of the Parliament of Georgia, International Treaty and Agreement of Georgia, 18/05/2000.

36 Ratified by Decree № 2495-RS of the Parliament of Georgia, entered into force on 1 July 2016, International Treaty and Agreement of Georgia, 11/09/2014.

37 *Serrat B., Maria J.,* Selling Tourism Services at a Distance: An Analysis of the EU Consumer Acquis, Spain, 2012, 6.

38 Council Directive 90/314/EEC of 13 June 1990 on package Travel, Package Holidays and Package Tours.

39 *Serrat B., Maria J.,* Selling Tourism Services at a Distance: An Analysis of the EU Consumer Acquis, Spain, 2012, 7.

saying that there is no express provision in any Austrian law for compensation for non-material damage of that kind. The claimant appealed the decision of the first-instance. Although the decision of the first instance court was upheld with reference to Austrian law, the Court considered that application of Article 5 of the Directive could lead to a different outcome, as it was not sufficiently precise and its interpretation could also have in view the compensation for non-material damage. Accordingly, the judge decided to suspend the proceedings and refer to the Court of Justice of the European Union for an explanation of Article 5, namely whether that article was to be interpreted as meaning that compensation is in principle payable in respect of claims for compensation for non-material damage resulting from failure to perform or the improper performance of the oblications inherent in the provision of package travel.

On this issue, the European Court of Justice has clarified that Article 5(2) of the Directive provides that Member States may, in the matter of damage other than personal injury, allow compensation to be limited under the contract. This means that the Directive implicitly recognises the existence of a right to compensation for damage other than personal injury, including non-material damage. Consequently, in addition to material damage, non-material damage is also considered under it.[40] It is generally considered that in the event of doubt the interpretation of the provisions of the Directive should be made in favor of the person whose rights these provisions serve to protect. This can be determined by a systematic analysis of the text and purpose of the Directive. In the given case it is clear that the addressee of the Directive is a consumer who uses travel services.[41]

It should be noted that case law has already refined the concept of damage for the ruined holiday by specifying a serious of indicators for that purpose (distance from the hotel to the sea, quality of the food, noise, lack of balconies and windows, etc.). If years ago there was a lack of clarity on this issue, today there are already regulations in the EU member states that provide for the possibility of compensation for non-material damage due to the ruined holiday (Belgium, Spain, the Netherlands, etc.).[42]

7. Directive 2015/2302 on "Package Travel and Linked Travel Arrangements"

Directive 90/314/EEC on "package travel, package holidays and package tours" has been repealed and replaced by Directive 2015/2302[43] on "package travel and linked travel arrangements", the implementation of which is not legally binding for Georgia under the Association Agreement. However, it would be interesting to review, since it is more in line with the internal market needs of

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40 Case C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG, [12.03.2002] ECJ (Sixth Chamber), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62000CJ0168&from=EN> [07.09.2021].

41 Opinion of Mr Advocate General Tizzano delivered on 20 September 2001, Case C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG, [12.03.2002] ECJ (Sixth Chamber), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62000CC0168&from=EN> [07.09.2021].

42 Ibid.

43 The Directive 2015/2302 has been adopted by the European Parliament and the Council on 25 November 2015.

European countries and took into account the shortcomings that existed in the previous Directive. Moreover, the purpose of this Directive is to ensure the existence of a real customer-oriented internal market in the field of travel services.

In case of improper performance of the travel services, the Directive provides for the possibility of the traveller to have problems resolved and, in certain cases, the traveller should be able to do so himself and request reimbursement of the necessary expenses. Travellers should also be entitled to a price reduction, termination of the package travel contract and/or compensation for damages. Compensation should also cover non-material damage, such as compensation for loss of enjoyment of the trip or holiday caused by substantial problems in the performance of the travel services. Consequently, damage entails the possibility of claiming both material and non-material damage.[44]

Moreover, the Directive 2015/2302 proposes a term "lack of conformity", which is defined as a failure to perform or improper performance of the travel services included in a package.[45] The current Directive stipulats the right of the traveller to receive appropriate compensation from the organiser for any damage which the traveller sustains as a result of any lack of conformity. Moreover, compensation shall be made without undue delay. The traveller's claim for compensation will not be satisfied if the organiser proved that the lack of conformity is attributable to the traveller or to a third party unconnected with the provision of the travel services and is unforeseeable and unavoidable. An obligation to pay compensation for damages does not arise if the damage is due to unavoidable and extraordinary circumstances in which the organiser is not at fault.[46]

8. Difficulty of Determining Compensation Under Part 2 of Article 662 of the Civil Code

The spiritual pain inflicted on the victim has no corresponding monetary equivalent, as due to its legal nature it is impossible to assess individually and to express the amount of non-material damage inflicted on each individual.[47] This is why it is often difficult to assess moral damages in monetary terms, as there is no standard financial assessment tool and it affects the personal feelings of the individual. However, this definition conflicts with the requirements of the European Union, according to which the damage must be assessed in monetary terms and must be compensated.[48]

As mentioned, there is no universal formula for determining the amount of compensation for moral damages; In each case, the court has the authority to take into account its individual characteristics, upon the request of the party, in particular, the degree and nature of the damage, the material state of the parties, etc.[49]

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44 Directive (EU) 2015/2302 of the European Parlianemt and of the Council of 25 November 2015 on Package Travel and Linked Travel Arrangements, Preamble (34).

45 Ibid, Article 2 (13).

46 Ibid, Article 14 (2)(3).

47 *Chanturia L. (ed.),* Commentary to the Civil Code, Vol. III, Tbilisi, 2019, 749 (in Georgian).

48 *Koziol H., Schulze R. (eds.*), Tort Law of the European Community, Tort and Insurance Law, Vol. 23, Germany, 2018, 579.

49 *Bichia M.,* Analysis of an Article by Grigol Rtskhiladze "Compensation of Moral Damage", Journal "Law and World", № 8, 2017, 84.

The practice of determining the amount of compensation for damage is different in European countries, however, when determining the amount due to the loss of the enjoyment of holiday, the severity and intensity of the breach, the degree of fault of the travel organisation, the purpose of the trip, as well as its cost are taken into consideration. There is a practice when the amount is calculated by days and the damage for each day is about 50-60 EUR.[50]

As mentioned, when determining the amount of compensation in money, the importance and purpose of the holiday for the traveller should be taken into account, in particular, the traveller may have been able to enjoy the vacation for the first time in the past two years[51] or the trip coincided with a public holiday. The damage sustained during this period further aggravates the spiritual state of the victim.[52]

The practice of the German courts places a limiting value on the cost of the tour package, in particular, the courts generally consider the total price of the package to be the maximum amount of compensation, hence in this case the determination of the cost of the service becomes essential. It does not matter if the traveller enjoyed an alternative trip during this time, stayed at home or was working.[53]

It should be noted that in international practice we come across the cases where the maximum compensation for damages is determined. In particular, the International Convention on Travel Contracts (CCV)[54] defines the liability of the travel organiser for any loss or damage caused to the traveller as a result of non-performane, in whole or in part, of its obligations to organise as resulting from the contract or the Convention. In addition, for damages that do not represent personal injury or damage to property and represents any other damage, the amount of payable compensation for each traveller is limited to 5,000 francs.

In determining the amount of compensation for non-material damage, it is considered that its imposition on the defendant should be carried out in an amount that does not constitute a heavy property burden for the defendant and, in financial terms, does not endanger further activities.[55] As it was mentioned, currently the activities of travel organisers in Georgia are not subject to any special regulation, therefore, the state does not have complete information about the entities that organise travel activities. Starting and carrying out the activities of such a nature is quite simple in the absence of any special preconditions, therefore it is a source of income for many people. Therefore, when imposing compensation for moral damages on a travel organiser, it is important to consider an amount

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50 *Palmer V. V. (ed.),* The Recovery of Non-Pecuniary Loss in European Contract Law, United Kingdom, 2015, 375.

51 Artcile 35 of the Organic Law of Georgia – Labour Code of Goergia provides for the exceptional cases for the paid leave to be carried over to the next year. Organic Law of Georgia – Labour Code of Goergia, № 4113-RS, LHG, 75, 27/12/2010.

52 AG Montabaur, 15 C 316/05, 05.09.2005, seen in: A Collection of Summaries of Special Decisions made by the German Federal Courts in respect to Non-Material Damages, 80, <http://library.court.ge/index.php ?id=9388> [24.02.2021].

53 BGH NJW 2005, 1047 (1049s), seen in*: Magnus U.,* Damage for Non-Pecuniary Loss in German Contract and Tort Law, The Chinese Journal of Comparative Law, Vol. 3, № 2, 2015, 306.

54 Article 13, International Convention on Travel Contracts (CCV), Brussels, 23/04/1970)**;** *Racine J., Sautonie L. & others*, European Contract Law, Munich, 2008, 255.

55 Decision of July 26, 2017, № AS-1011-972-2016, Supreme Court of Georgia.

that will not jeopardize its subsequent activities and, at the same time, will be of preventive importance for the proper performance of further travel services.

9. Conclusion

GCC allows the traveller to claim appropriate monetary compensation for the ruined holiday due to failure to perform or improper performance of the travel services. The scarcity of research papers and cases heard by the common courts in connection with the travel service contracts in Georgia makes this issue even more crucial, especially in the context of the obligation of Georgia to implement international agreements to ensure the rights of consumers.

Condacting the researach revealed following reality: currently there are no special legal requirements for starting tourism activities in Georgia, the existence of which would allow the state to control the internal market and thus provide greater protection for travellers. It is important that the activities of such entities are subject to mandatory licensing under Georgian law, as these activities are characterized by an increased threat to human life or health, which has been proven as a result of a number of unfortunate facts in Georgia.

In accordance to Part 2 of Article 662 of GCC, there is a possibility of compensation for non-material damage in case of the ruined holiday. However, the case when the traveller is not involved in labour relations and purchases a travel service from a travel organiser stays outside of the regulation of this norm, because the definition of "leave" in this norm causes certain ambiguity.

Moreover, as mentioned above, Georgian legislation distinguishes between paid and unpaid leave, therefore the content of this article may be disputed. It is advisable to consider any leisure time that a traveller uses for travel purposes as a holiday leave, however, it would be appropriate to focus not directly on the ruined holiday, but on compensation for the loss of enjoyment of the trip or holiday, as it is mentioned in the preamble of the Directive 2015/2302 on "package travel and linked travel arrangements". The mentioned solution of the issue ensure the protection of the rights of each traveller who, due to the lack of conformity attributable to the travel organiser, failed to receive the services required within the agreed terms.

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31. Case C-78/11 Judgement of the Court (5th Chamber), 21 June 2012.
32. Decision of January 20, 2012, № AS-1156-1176-2011, Supreme Court of Georgia.

33. Case C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG, [12.03.2002] ECJ (Sixth Chamber), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX: 62000CJ0168& from=EN> [07.09.2021].
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On the Issue of Computer Data Concept, Its Characteristics and Authenticity

This letter addresses a topical issue such as computer data and its use in criminal proceedings. Given, which is completely different from the traditional evidence and due to its specific and technical characteristics has become a significant challenge for the legal community. Comprehending its content, demonstrating the distinction between material and electronic documents, and determining the authenticity of electronic data turned out to be complicated. Accordingly, the paper aims to research the essence of computer data, identify its features and outline the prerequisites for authenticity.

Keywords: *Computer data, Computer system, Digital evidence, Electronic evidence, Authentication of computer data*.

1. Introduction

The rapid growth of technology and its establishment in society often outpaces their inclusion in legal frameworks. Computer data is a clear example.

Although computers have been around for a long time, just 20-30 years ago its use in the interests of the investigation was a notable event. Occasionally, its importance has increased and today it has become an integral part of the investigation.[1] As result words related to computers, such as computer data, electronic and digital evidence, etc. have emerged in different legislations. It is noteworthy that these words attracted the attention of many international organizations and it took quite a long time to determine their exact and comprehensive content. Compared to other countries, computer data and related investigative actions are novel for Georgian procedural legislation. It is currently on the path of development and thus there is a lack of information in the Georgian legal literature. [2] This deficiency creates some legal obstruction both in terms of investigation and case law.

Also, authentication of computer data became a point of contention. The legal basis for discussion was its characteristic features. Some scholars consider that new legislation is required for electronic data,[3] but others think that regardless of the nature of digital data it is possible to apply the rules which have been developed concerning the authentication of traditional evidence.[4] Worthy of

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1 *Kerr S. O.,* Searches and Seizures in a Digital World Harvard Law Review, Vol. 119, 2006, 1.

2 *Meurmishvili B*., Georgian Criminal Procedure Law, Special part, *Papiashvili L. (eds.),* Tbilisi 2017, 534-539. (in Georgian). *See: Toloraia L.,* Commentary on the Criminal Procedure Code of Georgia, *Giorgadze G. (eds.),* Tbilisi, 2015, 422-425 (in Georgian).

3 *Brenner W. S., Frederiksen A. B.,* Computer Searches and Seizures: Some Unresolved Issues, Michigan Telecommunications and Technology Law Review, Vol. 8, Issue 1, 2002, 60-63, 80-82.

4 *Clancy K. T.,* The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and A Primer, Mississippi Law Journal, Vol. 75, 2005, 193.

attention that the extraction of computer data is differently regulated by the Georgian Criminal Procedure law and establishes some procedural restrictions, which is partially caused by the international law and but a mostly superficial understanding of the essence and features of computer data.

According to the urgency of the issue, the purpose of the article is to fill information scarcity to some extent, examine computer data, identify hallmarks of electronic evidence, and given the legal literature and the experience of different countries outline challenging issues related to its authenticity.

2. The Essence of Computer Data

The intensive development of information and communication technologies has led to the introduction of investigative actions related to obtaining electronic evidence. Since without such a procedural tool it would have been virtually impossible to obtain relevant information of the case and its use in the evidentiary process, accordingly with foreseeing of the Convention on Cybercrime, the actions related to computer data had been depicted in XVI chapter of Criminal procedure code of Georgia.[5]

Consequently, new words appeared in criminal procedure law, such as computer system, computer data, service provider, internet traffic, etc. Due to their technical and specific features, an accurate and in-depth understanding of their content was difficult not only for the interested persons but also for the lawyers. Therefore, we will try to make the contents of the computer system and data more intelligible for them.

It is noteworthy that the definition of computer data is given both in the Convention on Cybercrime and in the Criminal Procedure Code of Georgia. The definitions given in both sources are identical and look like this: "Computer data – means the information displayed in any form convenient for processing in a computer system, including software that ensures the operation of the computer system" [6]

To understand the essence of computer data it would be better to discuss it in detail. Firstly, let's explain what the computer system means. The definition is identical in both of the above-mentioned documents and looks as follows: "A computer system is any mechanism or a group of interconnected mechanisms which through the software automatically process data". Like the definition in national legislation, the Convention on Cybercrime focuses on automatic data processing, which indicates that the process is managed through the program.[7] In turn, the definition of computer data contains the term "suitable for processing" which means that the data is put in such a form that it can be directly processed by the computer system. [8]

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5 *Meurmishvili B*., Georgian Criminal Procedure Law, Special part, *Papiashvili L. (eds.),* Tbilisi 2017, 534 (in Georgian).

6 Criminal Procedure Code of Georgia, LHG, 03/11/2009. Convention on Cybercrime (Budapest Convention), 23/11/2001.

7 The Explanatory Report to the Convention on Cybercrime, European Treaty Series – № 185, Budapest, 23/11/2001, 5.

8 Ibid.

A computer system should be considered as a combination of two elements: hardware and software.[9] It consists of a variety of devices, but CPU, data storage, and software are the main components.[10]

CPU – is the functional core constituent of any electronic device, which receives the data, performs logical-arithmetic operations[11] and produces an output that may be displayed on the screen[12], passed to a local storage facility or uplinked via a network connection to another device.[13]

Software – consists of programs that give instructions to the digital device. There are two main categories of software: system software and application software. [14] As the name suggests, the system software is required for the basic operation of a device. It performs the basic function of connecting to devices, folders, and application software. [15] Application software – is "special purpose" software that enables the user to undertake specific kinds of tasks on the computer. These include web browsing, email, social networking, and so on.

Data storage devices – information storage media are mainly hard disk and RAM. Any program that ensures the functioning of the computer runs in RAM. RAM includes the information which is being processed and data will not be saved if the power is disconnected. That's why it is called volatile storage. Therefore, law enforcement attempts to capture data in RAM before disconnecting the power during computer searches. This is commonly known as "Live Data Forensics".[16]

Unlike RAM, a hard drive disk is a permanent memory and if the device is disconnected from the power supply, information on it is not lost. [17] Since it is non-volatile, it is a significant source of computer data (afterward electronic evidence).

Also, computer data may be stored in differpaent storage facilities. For example compact disk, memory sticks da, etc. Besides, data may be stored remotely on "cloud" facilities.[18]

By summarizing, we can conclude that a computer system is a device, which integrates one or several active parts and at least one of them automatically receives, processes, and transmits data through the software.

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9 *Stanfield R. A.,* The Authentication of Electronic Evidence, Queensland University of Technology, Australia, 2016, 61.

10 *Mason S., Weir R. S. G.,* The Sources of Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.),* London, 2017, 1-5. *Otkhozoria V., Tsiramua Z., Svanishvili Sh*., Supporter Specialist of Information Technology*,* Tbilisi, 2015, 8 (in Georgian).

11 Input consists of words, numbers, images, sounds, or a combination of the above. Keyboard, compact disk, mouse, scanner, digital camera, internet, etc. are frequently used for storing data in computers.

12 A common device used to output information is a printer and a voice adapter. Also, floppy disk, storage media, etc. If the computer is connected to the network, it can be considered as an output device.

13 *Mason S., Weir R. S. G.,* The Sources of Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.),* London, 2017, 1.

14 Ibid, 2.

15 *Otkhozoria V., Tsiramua Z.,* Information Technology, Tbilisi, 2015, 226 (in Georgian).

16 *Council of Europe,* Cybercrime Training for Judges, 2010, 35, <https://rm.coe.int/16802fa028> [23.02.2021] (in Georgian).

17 *Mason S., Weir R. S. G.,* The Sources of Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.),* London, 2017, 4.

18 Ibid, 5.

To such an extent, we have talked about computer systems, but the content and essence of computer data are of interest. According to the definition of the Code of Criminal Procedure and the Convention on Cybercrime, computer data means any representation of information or facts in a form suitable for processing in a computer system, including a program to perform its function. [19]

It is important to determine whether computer data can be considered as a document. For criminal proceedings, a document is any source in which information is recorded in the form of words and signs and or photo-, film-, video-, sound or through other technical means. [20] To perceive the connection between these independent terms and to discuss the issue in-depth it would be better to look at the experience of other countries. In this regard, it is interesting how the document is interpreted in different jurisdictions. For example, according to Australian legislation, a document is any source of information where signs, figures, symbols, photos, and drawings are depicted.[21] Also, compact disk, audio files, and more.[22] And this definition of a document is broad enough to include computer data/electronic information.

As for the United States Criminal Procedure law, unlike Civil Procedure, it does not contain a definition of document.[23] However, Federal Rules of Criminal Procedure define the "Property" which includes material objects like documents and records as perceptual and comprehensible information.[24] And the Evidence Code of California considers any representation of information as a document, regardless of where and in what form is stored. For instance, manuscript, photo-audio, and more.[25]

In this regard, Canadian legislation has gone further and separately defines „electronic document". According to Canada Evidence Act, electronic documents are – data that is recorded or stored by the computer system or other similar device and that can be read or perceived by a person or any medium.[26]

In the legislation of England and Wales, 'Data' is defined as information stored in a computer system for further processing, that is processed automatically and that information is part of the system.[27]

An analysis of the legislation of different countries has shown us that the contents of computer/electronic data are resembling. Similar to the legislation of Georgia, in other jurisdictions, the document is widely explained and covers electronic information. However, in foreign legal literature instead of "Computer data or Electronic information," it is used "Digital or Electronic Evidence'. And its definition is offered by lots of international organizations. To cite an example, the definition proposed by the Scientific Working Group on Digital Evidence (SWGDE) defines 'Digital Evidence' as information of probative value that is either stored or transmitted in binary

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19 Criminal Procedure Code of Georgia, LHG, 03/11/2009. Convention on Cybercrime (Budapest Convention), 23/11/2001.
20 Ibid, Article 3(23).
21 Evidence Act, 23/02/1995; Acts Interpretation Act 1901 (Amendment of 14/01/2019).
22 Evidence Act, 23/02 1995.
23 Federal Rules of Civil Procedure, 20/12/1937.
24 Federal Rules of Criminal Procedure, 26/12/44.
25 Evidence Code of California, 18/05/1965.
26 Canada Evidence Act, 1985.
27 Data Protection Act, 16/ 07/1998.

form.[28] Another definition proposed by the International Organization of Computer Evidence (IOCE) is – information stored on transmitted in binary form that may be relied upon in court.[29] When the above-mentioned organizations are interpreting the concept, they focus on the probative value of electronic data not its importance during an investigation.[30] But a broader definition is proposed by the Association of Chief Police Officers (ACPO) and 'Digital Evidence' is information and data of investigative value that are stored on or transmitted by a computer.[31] A similar notion has the National Institute of Justice (NIJ) that 'Digital Evidence' is information and data of value to an investigation that is stored on receive, or transmitted by an electronic device.[32]

Since our goal was to determine the essence of computer data, first of all, it was essential to understand the nature of computer systems in depth. While working on the issue, it was revealed that to consider a device like a computer system, it is mandatory to have it 1. CPU (Central Processing Unit) – an integral device that performs computational operations and processes information; 2. Software – which provides relevant instructions for the operation of an electronic device; 3. Data Storage Facilities – where processed information is stored.

These are the three core components of a computer system. For a computer to be able to create computer data, store, process, or transmit, human resources are required. Human, who is the creator and user of all above-mentioned property. Thus, we can conclude that computer data is any information entered by the user into the computer system, then automatically processed, stored, or transmitted by the electronic device. And electronic/digital evidence is – computer data available in computer systems that are valuable to the investigation or to a party to the proceedings to prove important circumstances in court.

3. Characteristics of Computer Data

It is noteworthy that electronic evidence and computer forensics are relatively recent additions to the means of proof in legal proceedings. Unlike other forensic disciplines, digital evidence has caused controversial discussions among legal professionals.[33] Besides, different legal systems approached in various ways to this new challenge. Some systems have introduced new legislation to specifically address electronic evidence. Others try to establish a 'closest match' to existing legislation and have applied wherever possible existing rules analogously.[34]

The adoption of the new legislation was due to the difference between electronic and traditional forms of evidence. And where analogous approaches are used, the emphasis is on the similarities

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28 Scientific Working Group on Digital Evidence (SWDGE), SWGDE Digital and Multimedia Evidence Glossary, 2016, 7, <https://www.swgde.org/documents/published> [20.02.2021].

29 *Casey O.*, Digital Evidence and Computer Crime, 3rd ed., USA, 2011, 7.

30 Ibid.

31 Ibid.

32 *Goodison E. S., Davis C. R., Jackson A. B.*, Digital Evidence and U.S. Criminal Justice System: Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence, NIJ, USA, 2015, 3.

33 *Schafer B., Mason S.*, The Characteristics of Electronic Evidence, Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.),* London, 2017, 18.

34 Ibid.

between traditional and digital evidence.[35] If we share this notion, separation of the chapter of computer data-related investigative actions in the Criminal Procedure Code of Georgia and applying provisions of secret investigative actions on them should be explained not only by the ratification of the Convention on Cybercrime but also by the fundamental differences between electronic and traditional evidence.

The legal literature focuses on lots of features of electronic evidence. According to scientists, electronic evidence is latent in the same sense as fingerprints or DNA evidence can transcend borders with ease and speed[36], can be easily altered.[37] Therefore, compared to material evidence it requires precautious treatment.[38]

A particularly important form of evidence in all developed legal systems is proof by the document. The same can be said for electronic ones. Herewith, comparing a written document to an electronic document is the best way to illustrate the characteristics of electronic evidence.[39] Especially when electronic documents have the same visual appearance as documents typed on paper. It is possible to turn their pages, put them in folders and discard them in baskets. And this inauthentic familiarity can create the misleading impression that the electronic document maintains its structural integrity even when the file is closed or the computer switched off, in the same way, a paper document continues to exist when we put it into a folder.[40] This does not necessarily mean that an electronic document is inevitably fake or unreliable. However, due to its characteristics confirmation of its authenticity requires accurate and consistent verification.[41]

When talking about the main features of electronic evidence, we should not forget the Sedona Conference Working Group[42], which has made great efforts to determine its characteristics. According to their notion, the fundamental distinction between electronic and written documents can be grouped into the following six categories: Metadata; Volume and duplicability; persistence; dynamic – changeable content; environment dependence and obsolescence; dispersion.[43]

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35 Ibid.

36 *Mukasey B. M., Sedgwick L. J., Hagy W. D*., Electronic Crime Scene Investigation: A Guide for First Responders, National Institute of Justice, USA, 2008, 9.

37 *Gonzales R. A., Schofield B. R., Hagy W. D*., Investigations Involving the Internet and Computer Networks, National Institute of Justice, USA, 2007, 2. See*, Casey E*., Foundations of Digital Forensics, Digital Evidence, and Computer Crime, 3rd ed., USA, 2011, 26.

38 *Goodison E. S., Davis C. R., Jackson A. B*., Digital Evidence and U.S. Criminal Justice System: Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence, NIJ, USA, 2015, 3.

39 *Schafer B., Mason S.*, The Characteristics of Electronic Evidence, Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.),* London, 2017, 20.

40 Ibid.

41 Ibid, 21.

42 The Sedona Conference – A non-profit, research, and educational institute that was founded in 1997 by *Richard G. Braman.* The Sedona Conference has several working groups, including "Electronic Document Retention and Production" Working group dedicated to the development of guidelines and standards about electronic information management, discovery, and disclosure, <https://thesedonaconference.org/> [20.02.2021]

43 *Diana J. A., Esteban A. A., Guglielmo P. J., Hiser S. T., Kuckelman D., Mandel P. E., Opstnick M. T., Ragan R. C., Sharp C. D., Tully T. M.,* The Sedona Principles, Best Practices, Recommendations &

3.1. Metadata

Metadata is data about data.[44] This is an additional source of information, which includes the content, category, ownership, format, creation, and methods, location, conditions for its use, etc. It should be noted that this list is not exhaustive, as metadata is generated both by the user of the device and automatically by the software and this kind of information can be diverse.[45] Metadata created automatically by the software is more difficult to alter, manipulate or delete. The reason is its invisible nature. Imagine a user creating an electronic document. The software will add metadata about the time when the document is created, who is the author, and where the document is stored. Since it is invisible to the user, he/she may not only know how to alter or delete it but also about its existence.[46]

The metadata may not be infallible.[47] Its authenticity depends on the proper functioning of the computer system as well as other external factors.[48] For more clarity, imagine a device, which time zone is not accurate. Consequently, the metadata about the time of creation will be false.[49] The same can be said about the author of the document. If the computer system is used by the third-party and the latter uses an account registered by the owner, any actions taken by him and related metadata belong not to the owner of the account, but to a third party who uses the device.

In summary, metadata is an integral part of any electronic document[50] and unlike a written document it only characterizes it. Because it is an automatic, software-generated artifact, the difficulty is both to delete it and to obtain it without damage. Besides, its authenticity significantly depends on the proper functioning of a computer system as on other circumstances.

3.2. Volume and Replication

Despite the existence of physical-geographical boundaries, the development of computer technology and telecommunications has led to the rapid exchange of information. Once computers are networked together, a greater volume of information can be rapidly distributed around the world. Internet communications, social networks, and email provide prominent examples. These not only

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Principles for Addressing Electronic Document Production, 3rd ed., The Sedona Conference Journal, Vol. 19, № 1, 2018, 207.

44 *Riley J.,* Understanding Metadata, National Information Standards Organization, Baltimore, MD, 2017, 1.

45 *Schafer B., Mason S.*, The Characteristics of Electronic Evidence, Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.),* London, 2017, 27.

46 Ibid.

47 *Diana J. A., Esteban A. A., Guglielmo P. J., Hiser S. T., Kuckelman D., Mandel P. E., Opstnick M. T., Ragan R. C., Sharp C. D., Tully T. M.,* The Sedona Principles, Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 3rd ed., The Sedona Conference Journal, Vol. 19, № 1, 2018, 211.

48 *Schafer B., Mason S.*, The Characteristics of Electronic Evidence, Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.),* London, 2017, 28.

49 Ibid.

50 *Stanfield R. A.,* The Authentication of Electronic Evidence, Queensland University of Technology, Australia, 2016, 64.

allow data to be transmitted quickly but multiply it indefinitely. For more clarity, email users frequently send the same email to many recipients. These recipients, in turn often forward the message to others. At this time, numerous copies of the email are created.[51]

By way of example, in *AMP v Persons Unknown*[52], the claimant lost his/her phone, and the number of photographs stored in the phone was sexual in nature. Shortly after the telephone was stolen, images were uploaded on various social media websites and enabled others to download and share the images. As a result, the photographs covered the entire Swedish internet space. Another proof of easy duplication of electronic information is the creation of a data backup by the computer system. The purpose is to restore the original in case of data loss.[53]

Along with duplicating electronic documents the issue of its volume is noteworthy. If previously a certain amount of written material could occupy a large area, now the same or larger volume of stuff can be stored electronically on smaller devices. With the development of technology, storage media is becoming more easily accessible, which means customers are available to keep the desired amount of data for an indefinite time.

A common form of information storage is 'cloud computing' technology, which involves outsourcing electronic documents to third-party servers. Along with the benefits of decentralized storage of information, the cloud leads to legal issues such as jurisdictional and data ownership.[54] In this regard, the user faces the obstacle when deleting or destroying information, because erasing in the electronic environment does not mean expunged.[55] Consequently, the danger of infringement of the right to privacy by improper and illegal handling of digital documents by the service provider still exists.

Thus, we can convincingly say that the volume and replication indicate a significant difference between traditional and electronic documents. And above mentioned provides a basis for the exceptional and cautious treatment of electronic evidence by investigative bodies and the judiciary.

3.3. Persistence

We have talked about several features of computer data and electronic documents, but persistence is another distinguishing quality from written documents. By comparing material and electronic documents, it becomes clear that electronic documents are more difficult to dispose of than

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51 *Diana J. A., Esteban A. A., Guglielmo P. J., Hiser S. T., Kuckelman D., Mandel P. E., Opstnick M. T., Ragan R. C., Sharp C. D., Tully T. M.,* The Sedona Principles, Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 3rd ed., The Sedona Conference Journal, Vol. 19, №1, 2018, 208.

52 *AMP v. Persons Unknown*, [2011] EWHC 3454 (TCC).

53 Back up Data, Nonprofit Technology Collaboration, 2013, 1, <https://www.baylor.edu/content/services/document.php/192120.pdf> [23.02.2021].

54 *Schafer B., Mason S.*, The Characteristics of Electronic Evidence, Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.)*, London, 2017, 26.

55 Ibid, 25.

paper ones. Paper documents can be destroyed by shredding or burning, whereas it is not relevant for electronic documents.[56]

The term 'Deletion' can be misleading in the context of electronic data because it does not equate to the "destruction" of data from storage devices.[57] To better understand the issue, the examination of the electronic data storage principle is a leading option. Whenever a file is stored on a computer system, it keeps an index of the location and when a user retrieves the file, the computer looks up the location of the file in the index and knows from which sector to obtain the file. And when a user "deletes" the file, the computer system only removes the file reference from the index, not expunge data. Therefore, if the old data is not overwritten by a new one, the 'deleted' data is still able to be retrieved by a computer forensics expert.[58] Except for overwriting, the only way to effectively destroy electronic evidence is through applying heat or by magnetic destruction.[59]

Thus, it is obvious that electronic documents are durable and their destruction is related to certain difficulties, which emphasizes the need for peculiar treatment by law enforcement agencies.

3.4. Dynamic and Changeable Content

Dynamic and changeable content is one of the fundamental characteristics of electronic data. Electronic documents, unlike paper ones, have content that is designed to change over time even without human intervention.[60] For example computer systems that automatically update files and transfer data from one location to another. Also, an email that automatically and periodically updates information about notifications and destroys old data.[61]

It is noteworthy that electronically stored information can be modified in numerous ways that are sometimes difficult to detect without computer forensics expertise. To give an example, the act of moving an electronic document from one location to another may change creation or modification dates and it can be found in the metadata.[62]

To sum up, we can conclude that examination of computer data requires special care and computer forensic is inevitable for determining its reliability. Besides, in response to its dynamic and changeable nature, the Convention on Cybercrime provides legal tools like Expedited Preservation of

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56 *Stanfield R. A.,* The Authentication of Electronic Evidence, Queensland University of Technology, Australia, 2016, 65.

57 *Diana J. A., Esteban A. A., Guglielmo P. J., Hiser S. T., Kuckelman D., Mandel P. E., Opstnick M. T., Ragan R. C., Sharp C. D., Tully T. M.,* The Sedona Principles, Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 3rd ed., The Sedona Conference Journal, Vol. 19, № 1, 2018, 209.

58 *Stanfield R. A.,* The Authentication of Electronic Evidence, Queensland University of Technology, Australia, 2016, 65-66.

59 Ibid.

60 *Diana J. A., Esteban A. A., Guglielmo P. J., Hiser S. T., Kuckelman D., Mandel P. E., Opstnick M. T., Ragan R. C., Sharp C. D., Tully T. M.,* The Sedona Principles, Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 3rd ed., The Sedona Conference Journal, Vol. 19, № 1, 2018, 209.

61 Ibid.

62 Ibid.

Stored Computer Data and Expedited Preservation and Partial Disclosure of Traffic Data,[63] which are not yet reflected as independent investigative actions in the Criminal Procedure Code of Georgia.

3.5. Environment-Dependence

If good eyesight and knowledge of the language are sufficient to read material documents, it is not enough in the case of electronic records. This deficiency is due to its dependence on hardware and software. Moreover, a user cannot read or create, with nothing to say about alteration or damage.[64]

To illustrate electronic document obsolescence, sending Microsoft office word documents to a third party is a good option. In most cases, the shared document does not function properly or at all. The diverse software is the main cause for that. The pace of hardware and software development has an impact on the legal process. In particular, it is difficult to follow in the footsteps of development. As noted in the legal literature, a lawyer and expert must receive constant training, which is more important than experience in this field.[65]

We also face challenges in the investigation. For example, due to the rapid change in the development of technology, it is difficult to obtain relevant evidence for an investigation. This can be caused by two reasons: first, the tools have yet to be devised, and second, because such tools can be expensive.[66]

Thus, it is obvious that hardware and software are constantly evolving, and for computer data to become perceptible to humans, it requires the use of a range of technologies. Therefore, it can be said that the existence of electronic data without computer systems and software is excluded.

3.6. Dispersion

Due to the nature of electronic data, it is possible to create lots of copies. Thus, each of them may be located in different places. It could be Ram or a Hard drive and data storage facilities, such as compact disc, memory cards, and network servers.

Despite their locations, they look identical. Therefore, it is difficult to distinguish between the copy and the original. Besides, it may seem incredible to deal with large volumes of information, but automated methods allow you to quickly and accurately search for greater volumes of electronically stored data than any paper documents.[67]

Consequently, due to the dispersion of the electronic document, the only way to identify the original one among the documents with identical content is computer forensics.

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63 Convention on Cybercrime, Budapest, 23.11.2001, Art. 16-17.

64 *Schafer B., Mason S.*, The Characteristics of Electronic Evidence, Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.)*, London, 2017, 21.

65 Ibid, 23.

66 Ibid, 24.

67 *Diana J. A., Esteban A. A., Guglielmo P. J., Hiser S. T., Kuckelman D., Mandel P. E., Opstnick M. T., Ragan R. C., Sharp C. D., Tully T. M.,* The Sedona Principles, Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 3rd ed., The Sedona Conference Journal, Vol. 19, № 1, 2018, 213.

4. Authentication of Computer Data

According to criminal procedure law, the alleging process consists of obtaining evidence, affixing it to the proceedings, examining and evaluating it.[68] The importance of each of them is special, but we will mainly focus on evaluating the process of electronic evidence.

It is noteworthy that the evaluation process of evidence lasts at all stages of proceedings, although ultimately, only the court can determine its true value. [69] To some extent parties, but the court is authorized to cumulatively assess the evidence with relevance, admissibility, and reliability.[70] Evidence is relevant if it has any tendency to prove something material to the case.[71] Based on the principle of negative enumeration, the evidence is admissible if there are no grounds for excluding them.[72] As for the reliability of evidence, it includes trustworthiness and authentication.[73] And the authentication is the capacity to prove that the evidence is what it purports to be.[74]

In the legal literature, the authentication of computer data is compared with material documents. Some scientists believe that rules which have developed concerning the authentication of evidence, particularly documentary evidence are to electronic data,[75] but others consider that due to its features stricter foundation or new rules are essential.[76]

The best way to comprehend the diversity of opinions existing in scientists and challenges facing the authenticity of electronic documents is by comparing national legislation to foreign ones. It should be noted that the legislation on the electronic evidence of the United States of America and Canada is similar. According to the Federal Rules of Evidence and Canada Evidence Act, witness testimony, indirect evidence, and proof that indicates the integrity of the data are the means of establishing authenticity.[77] A party who decides to use electronic evidence in court must provide the court with information about the nature, source, and integrity of the record.[78] The source of electronic documents affects its authenticity as reliability. Data storage facilities, whether it is the hard drive or

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68 *Tumanishvili G.,* Criminal Process – Overview of General Part, Tbilisi, 2014, 225-226 (in Georgian).

69 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 288 (in Georgian).

70 Criminal Procedure Code of Georgia, LHG, 03/11/2009.

71 Federal Rules of Evidence, Article IV, Rule 401, 20/11/1972.

72 Decision of July 31, 2015 № 2/2/579, Constitutional Court of Georgia on the case: "Citizen of Georgia Maia Robakidze against the Parliament of Georgia", 12 (in Georgian).

73 *Mason S.*, *Stanfield A.,* Authenticating Electronic Evidence, Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.),* London, 2017,193.

74 *Gonzales R. A., Schofield B. R., Hagy W. D.,* Digital Evidence in the Courtroom – A Guide for Law Enforcement and Prosecutors, NIJ, USA, 2007, 28.

75 *Mason S.*, *Stanfield A.,* Authenticating Electronic Evidence, Electronic Evidence, 4th ed., Institute of Advanced Legal Studies, *Mason S., Seng D. (eds.),* London, 2017, 193.

76 *Johnson A. M.,* Computer Printouts as Evidence: Stricter Foundation or Presumption of Reliability, Marquette Law Review, Vol. 75, Issue 2, 1992, 445.

77 Federal Rules of Evidence (USA), Rule 901(b) (1, 4, 9), (Amendment 1/12/2019). See also. Canada Evidence Act, 1985, Section 31.1-31.7.

78 *Gregory D. J.,* Authentication Rules, and Electronic Evidence, The Canadian Bar Review, Vol. 81, № 3, 2001, 531.

compact disc, or any other storage media is inherently unstable. Some data may be lost or altered over time with or without human intervention.[79] Therefore, a proponent must convince the court that the evidence is authentic and is obtained from reliable sources.[80] Precisely, the changeable content and other features of computer data are the reasons for some scholars to redefine legislation related to electronic documents.

The form of data creation is crucial for the authentication of digital evidence. Particularly, whether it is generated by a computer system or if it is produced by the user.

To determine the authenticity of electronically stored information, it is essential to identify an author and the integrity of the content. It is a little bit challenging in the case of electronic documents. To illustrate, an email is sent from the account of a specific person, although this does not mean that its author is the owner of the account. Possibly, third parties have access to the account. It is appropriate to examine the metadata, which is an integral part of an electronic record and contains data about creation, location, and methods. And this allows us to determine as the users who have access to this document,[81] as the integrity of the record. Just as great importance has an integration of evidence. Documentation is essential at all stages of handling and processing digital evidence and it should include the followings: what types of digital evidence have been collected, who handled the evidence, which tools or methods were used to collect the evidence, who had access to the digital evidence, was information password protected or not, when was evidence collected, etc.[82] Thorough and accurate documentation of the evidence will help parties to confirm the integrity and reliability of evidence. Consequently, with the documentation, where the investigative actions are described in detail and the testimonies of those involved in the process of obtaining information, it is possible to establish the integrity of electronic evidence.

Proper functioning of a computer is decisive for authentication of electronically stored information, including data recorded automatically by a computer system without human intervention. It is also noteworthy that the proper functioning of devices does not guarantee the authenticity and accuracy of the electronic evidence.[83] Possibly, the computer system does not fully function properly, but such a defect cannot affect the integrity of the document. Therefore, it is essential to provide the court with evidence describing a proper functioning of a computer system or shows that it was not operating properly, but it did not affect the production of the document or the accuracy of its contents.[84]

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79 Ibid, 537.

80 *Capra D.,* Authenticating Digital Evidence, Baylor Law Review, № 1, 2017, 3.

81 *Outerbridge D., Siller E.,* The Admissibility of Electronic Evidence, 2015, 11, < https://www.lawinsider .com/documents/1tYTXnzcs2u> [23.02.2021].

82 *Gonzales R. A., Schofield B. R., Hagy W. D.,* Digital Evidence in the Courtroom – A Guide for Law Enforcement and Prosecutors, NIJ, USA, 2007, 28.

83 *Outerbridge D., Siller E.,* The Admissibility of Electronic Evidence, 2015, 11, <https://www.lawinsider .com/documents/1tYTXnzcs2u> [23.02.2021].

84 *Gonzales R. A., Schofield B. R., Hagy W. D.,* Digital Evidence in the Courtroom – A Guide for Law Enforcement and Prosecutors, NIJ, USA, 2007, 44.

Besides theoretical reasoning, judicial practice is interesting. In the case of *R v. Morgan*, [85] The defendant was accused of violating the terms of the fishing license. The prosecutor presented to the court the copy of an electronic permit as evidence. When establishing the authenticity of the document, the court relied upon the witness testimony, the characteristics of the document, and the lack of objection by the defendant.[86]

Also in the case of *R v. Nichols*, [87] based on Canada Evidence Act, emergency calls made by the citizen are considered as electronic documents, and for challenging its authenticity the court had drawn attention to the proper functioning of the communications and telephone systems. According to the testimony of the operator, the system was technically in order. Besides, the supervisor of the employees was at work and declared that there were no obstacles during the work. That's why the electronic record was considered authentic by the court.

As we can see, in both cases the court relied upon the testimony of the witness instead of experts' conclusions. To some extent, witness testimonies may help us to get information about the proper functioning of computers, but in the same way, it is vital to know how accurate and reliable data was presented before the court. When it comes to information automatically processed by the system itself, where no human is involved, this kind of electronic document as a final result is more accurate than the data entered by the user into the computer system. Despite this fact, we believe that this cannot be correct and in some cases, expert evidence will be required for determining the authenticity of electronic documents. The same can be said for electronically stored information.

As well, the authentication of the printout is significant. Its authentication and uniqueness like other forms of computer data are concerned with the reliability of processing and output functions. Unlike other electronic documents, the printout is presented before the court, not in digital form, but material. Thus, they are unable to examine the document in its original form. We face difficulties when examining the authenticity of unofficial documents because unlike official documents it does not have any requisites. With the help of these requisites determining the authenticity of the document requires less effort, but the printout that does not have the hallmarks and the party submits it to the court an expert evaluation will be essential to supply the court with the information on the source of evidence, the proper functioning of the device and its compliance with the original document.

To some extent, we talked about the legislation of the United States and Canada, but just as important is the approach of criminal procedure legislation of Georgia on the issue of document authentication. Even though Georgian procedural law does not contain rules about authentication, it provides the regulation on the admissibility and probative value of documents. In particular, according to article 78(1) of the Criminal procedure Code, a document has probative value if its origin is known and it is authentic. Besides, it is admissible, if a party may interrogate as a witness a person which has acquired, produced, or which held it before its submission to the court. Also, according to article 248(1) during the main hearing, only the evidence the authenticity of which can be proven shall be considered admissible.

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85 *R. v. Morgan,* (2002), N.J., № 15, (NLPC).

86 Ibid, §22.

87 *R. v. Nichols,* (2004), № 6186, CarswellOnt 8225, (Ont. C.J.).

The origin and source of a document have an impact on its probative value as authentication. It helps us to get information about the time of creation, location, author, alteration, and other important circumstances.[88] Thus, by questioning the owner, who can provide the court and investigation with information about the origin of the document, it is feasible to establish its accuracy and authentication. Besides, the procedural law includes the rules of authentication by the testimonies of the persons who obtain and preserve it. Of course, it should be conditioned with objective circumstances.[89]

Also, its authenticity can be established by direct evidence, expert-witness testimony/report, and plenty of other methods, which are impossible to list exhaustively.[90]

Despite the different legal systems, significant similarities were identified between the means of establishing the authenticity of the document. Under all above-mentioned legislation witness testimony, forensic reports, direct and circumstantial evidence are preferred for document verification.

Besides, the case law has shown us that the rules developed for the authentication of written documents are pertinent to electronic evidence. However, it is necessary to pay attention to the features of computer data that affect its integrity. Particularly, for assessing its authenticity, it is vital to identify the author, the source of record, methods of how it is created and obtained, and also to determine the integrity of the document.

If in the course of the proceedings, the above-mentioned features are properly and thoroughly investigated, it will be possible to apply the existing rules to electronic documents, regardless of their inconstant nature.

5. Conclusion

Given the ubiquity of digital devices and our near total reliance on them, in this modern age, it is hard to imagine a crime that does not have a digital dimension.[91] The digital world, like many other fields of activity, has had an impact on the law, too. Consequently, making aware of specific issues of technology is a great of importance for lawyers.

Regarding that electronic evidence and computer data are relatively recent additions to the means of proof in legal proceedings. Its specific and technical characteristics has become a significant challenge for the legal community. So comprehending its content, demonstrating the distinction between material and electronic documents, and determining the authenticity of electronic data were main issues of the article.

As a result of analyzing foreign legal literature and experience of various countries and its comparative legal studies revealed that the definitions of the computer data and the electronic evidence are numerous but the content is mostly common. In particular, computer data is any information entered by the user into the computer system, then automatically processed, stored, or transmitted by an electronic device. And electronic/digital evidence is – computer data available in computer systems

88 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 276 (in Georgian).
89 Ibid, 275.
90 Ibid, 277.
91 *Casey E*., Foundations of Digital Forensics, Digital Evidence and Computer Crime, 3rd ed., USA, 2011, 3.

that are valuable to the investigation or to a party to the proceedings to prove important circumstances in court.

Herewith, analyzing the characteristics of computer data allowed us to perceive the distinction between material and electronic evidence, which in turn showed us the need for additional procedural tools, like Expedited Preservation of Stored Computer Data to respond the dynamic and changeable content of computer data.

The importance of the characteristics of computer data increases when examining the authenticity of it, but also crucial is the form of data creation. Particularly, whether the evidence is generated by a computer system or if it is produced by the user. The authenticity of Printout is a challenging, too. We face difficulties when examining the authenticity of unofficial documents because unlike official documents it does not have any requisites. With the help of these requisites determining the authenticity of the document requires less effort, but the printout that does not have the hallmarks and the party submits it to the court an expert evaluation will be essential to supply the court with the information on the source of evidence, the proper functioning of the device and its compliance with the original document.

Despite the complexity of the issue, a study of different legislation and case law assured us that the use of rules developed concerning the authentication of written documents are fully justified with electronic evidence.

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Khatuna Loria*

Dismissal of Officer due to Redundancy as a Result of Reorganization in the Public Institution (Legislation and Court Practice)

The Law of Georgia on Public Service of 27th October 2015, effective from 1st July 2017, proposed a public service based on the meritocratic principle, where the stability of the public officer and the continuity in their career development plays a distinct role. The aim of the law, to provide a legal basis for the formation and functioning of the stable public service based on career promotion, merit, integrity, political neutrality, impartiality, and accountability, becomes especially relevant in the reorganization process, especially, if it is followed by the redundancy. The law provides for the dismissal of an officer due to redundancy, which is a rather sensitive issue. The role and responsibilities of a public institution in the reorganization process, the scope of judicial control over the decision made are reviewed in the present paper. The concept of mobility plays an important role, which is the main novelty for the management of the reorganization process painlessly and with less professional loss; it is this notion that guarantees the protection of the officer in this difficult process.

Keywords: *Public service, a qualified public officer, reorganization, redundancy, reinstatement in employment, mobility, equal position, protection of rights, legal dispute.*

1. Introduction

The modern model of public service is based on the concept of a qualified public officer, who is independent of politics. The development of a new draft Law of Georgia on Public Service[1] was conditioned by the necessity to increase the efficiency and proper functioning of the public service.[2]

One of the most important tasks of the public service is to ensure a high quality of public service;[3] the modern state faces a significant challenge to strengthen the public service with qualified public officers, ensure their professional growth, provide high quality services to citizens and, at the same time, to reduce bureaucracy, which is translated into the optimization of personnel. The obligations of public officers in different countries focus on the requirement – "serve the society"[4] reflecting on the main purpose and spirit of the legislation.

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1 Law of Georgia on Public Service, 27.10.2015, Legislative Herald of Georgia (LHG), 11/11/2015.

2 Decision of July 23, 2020, № 38(K-20), Supreme Court of Georgia.

3 *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Handbook of General Administrative Law, Tbilisi, 2005, 69 (in Georgian).

4 Public Services Statistics, organization and regulations, Project with the support of the European Commission, May, 2010, 9.

In the United States, the "Pendleton Act"[5] laid the foundation for a merit-based public service preceded by a patronage system. In the European countries, mainly after the Second World War, a merit-based public service was established. Prior to the establishment of the meritocratic principle, a commonly used phrase – "To the victor belong the spoils of the enemy"[6] – considered the making of personnel decisions based on the principle of patronage by the winner of the elections, which has been replaced by a system based on career promotion, stability and merit. The stability of an officer, ensuring the place in office, "officer – for the life time"[7] plays distinct role in a meritocratic system.

2. The Aim of Reorganization

Reorganization, as well as the liquidation or merger[8] of a public institution with another public institution serves to ensure effective governance of the public service. As established by the Law, the reorganization is the change of the institutional structure of a public institution, resulting in a completely or partially new structure of the public institution. Reshuffling or reduction in the number of posts in a public institution is also considered as reorganization. The change in the subordination or the name of a public institution or its structural unit, and/or the assignment of a new function to a public institution shall not be considered as reorganization.

The main purpose of the reorganization should be based upon the interests of the public service, which may differ considering the specifics of the activities of the public institution. The main purpose of the reorganization should be the strengthening of the principle of "good governance", which implies the arrangement of a public institution that ensures orientation on citizen, high quality of service, reduction of bureaucracy, simplification of decision-making mechanisms, increased level of engagement and management efficiency.[9] The interest of the public service also includes increasing the credibility, respect and authority towards it. To achieve this goal, it is important to ensure systemic and effective governance. In this case, reorganization can be considered as the best solution to achieve the legitimate goal of the service. The Article 102 of the Law on Public Service uses the term "is possible" to this measure, which is related to some extent to discretionary power of a public institution, to use the reorganization as the most convenient and effective means to achieve a specific goal. Effective governance is stated at the outset of the public service concept,[10] according to which the reform aims to establish an effective and efficient public service, which will be based on the

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5 *Milkovich G.T., Wigdor A. K., Broderick R. F., Mavor A. S. (ed.),* National Research Council; Division of Behavioral and Social Sciences and Education; Commission on Behavioral and Social Sciences and Education; Committee on Performance Appraisal for Merit Pay for Performance: Evaluating Performance Appraisal and Merit Pay, 1991, Washington, D.C., 14-15.

6 Ibid.

7 *Oppermann T., Classen K., Nettesheim M.,* European Law, Teaching Manual, *Erkvania T., Japarashvili I. (transl.),* Tbilisi, 2021, 118 (in Georgian).

8 For the purposes of this paper, reference is to the reorganization only.

9 Reorganization of a public institution, guide, <https://bit.ly/3gkwRww> [22.05.2021] (in Georgian).

10 Resolution № 627 of the Government of Georgia on the Approval of the Public Service Reform Concept and some related measures, 19.11.2014, LHG, 20/11/2014.

meritocratic principle and ensure the encouragement, support and appreciation of professionalism. Also, one of the most important principles of public service – economy and efficiency[11] is noteworthy, implying not only the obligation of individual officer in the public service – to use service resources economically and efficiently, but also association of the principle with economic and effective management of organizational and institutional processes applicable for management of public service, and the participation of the officer in achieving economy and efficiency of the process. The principle of unity of public servants and public institutions, which are difficult to imagine without each other, gives the basis for this assumption.

In the process of reorganization, protection of both the legitimate interests of the public service and the public servants' right to work is a significant challenge. Therefore, the role of the public service is especially important in planning and conducting the reorganization process. Given the need for reorganization, the personnel optimization will be carried out at discretion of the administrative body, "the administrative body itself has the exclusive competence to determine, which position is added or removed or unification of which positions contributes to the effective exercise of public administration."[12]

Reorganization is a sort of method of public service management focused on the expediency, efficiency, economy, etc. of functions. The reforms, to be implemented in the public service, including reorganization, which are pre-planned processes, are not always predictable in months or years in advance. The need for such reforms may arise at a certain stage of development, responding to the existing needs and challenges. The above discussed circumstances make questionable important principles such as the stability of staff and the principle of appointment of an officer for an indefinite term. The public service considers the objective of continuous employment throughout the life of the officer.[13] As prescribed by the Constitutional Court, "any measure limiting a person's right must be a necessary, least restrictive means of achieving a legitimate aim."[14] Regulation, established by law, serves the protection of this balance and interests, to ensure that unreasonable, unjustified interference in the rights of the officer does not take place in the process of reorganization.

According to the modern concept, a public officer is considered as a "caring servant"; the society expects a kind of "sacrifice"[15] from him/her. Of course, in the literal sense it does not require human life as a sacrifice, although, in the modern world one of the motivators conditioning a person's choice to serve the country is perceived exactly in this spirit. Research carried out in different countries has revealed several factors that represent the motivator for people to take a post in the public service, such as: willingness to participate in the definition of state policy, serve the society and

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11 See, Article 10 of the Law of Georgia on Public Service, 27.10.2015, LHG, 11/11/2015.

12 Decision of February 13, 2020, № BS-179(2k-19), Supreme Court of Georgia.

13 *Oppermann T., Classen K. Nettesheim M.,* European Law, Teaching Manual, *Erkvania T., Japarashvili I. (transl.),* Tbilisi, 2021, 118 (in Georgian).

14 Decision of Arpril 11, 2014, № 1/2/569, Constitutional Court of Georgia on the case: "Georgian citizens – David Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia".

15 Motivating Public Servants: Information and Conclusions for Practitioners, GCPSE, 2014, 6 (in Russian).

the country,[16] willingness to be loyal to the public interest and the state, self-sacrifice and sympathy[17]. Empathy, compassion and collegiality,[18] among other key requirements, are important requirements towards the public officers, provided for by the legislation of EU countries. The court practice is interesting in this regard; with regard to one of the cases the Supreme Court explains, "the main function of the public service is to serve the lawful interests of the society and each of its members, the unconsciousness and improper fulfilment of obligations directly affects the existence of the legal state. The public service should be considered in the consciousness of every public servant as an honourable mission – to serve, to make a personal contribution to the development of the state.[19]

The selection of staff during the reorganization process is an important challenge. It is true that the legislation does not consider reorganization and redundancy as an indicator for testing the officer's qualifications and skills; however, in this situation the decision-making official actually faces such a fact. Notwithstanding such broad powers, the principles applicable in administrative law oblige the head of the public service or the person authorised to justify a decision made within his/her discretionary powers. Such an approach should exclude bias and resolving the issue based on non-objective criteria. The resolution of Government of Georgia[20] defines the procedure for selection of officers to be dismissed – although remaining within the authority of the decision-making official it defines a standard – what should become a precondition for such a decision. The legislation provides for the possibility of setting up a commission to address this issue. The commission is obliged to take into account the competence of the officer, the results of the evaluation (if any) and other objective circumstances and, if necessary, is authorized to conduct an interview and reflect the substantiated results in the minutes of the meeting. Similar regulations are established by the legislation of different countries. For example, in Estonia, if decision on redundancy is to be made between two officers performing a similar job, then the advantage of retaining the job belongs to the officer with higher level of alignment of education, work experience, knowledge and skills with the requirements set for the performance of the job. If it is not possible to slot an official on the basis of the specified criteria, priority shall be given to the officer with the child under the age of seven, and then the persons to whom there is a higher degree of lawful confidence.[21]

According to the practice of the Supreme Court, "the grounds for dismissal during reorganization shall not be incompetence or lack of qualifications of any officer. The basis for dismissal of an officer as a result of reorganization is the actual absence of the place of employment as a result of termination of a post, which was occupied by the official prior to reorganization. The reorganization process is not based on the principle of selection of the best, unlike, for example, the

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16 *Bauby P., Similie (POPA*) *M. M.*, Mapping of the Public Services, Public Services Statistics, Organisation and Regulations, Project with the support of the European Commission, May, 2010, 9.

17 Motivating Public Servants: Information and Conclusions for Practitioners, GCPSE, Astana, Kazakhstan, 2014, 6 (in Russian).

18 Der Europäische Bürgerbeauftragte, Grundsätze des öffentlichen Dienstes für EU-Beamte, 2012, 5-7.

19 Decision of April 4, 2017, № BS-644-637(K-16), Supreme Court of Georgia.

20 Resolution № 199 of the Government of Georgia on the Rules of Mobility of Professional Public Servants, 20.04.2017, LHG, 21/04/2017.

21 Civil Service Act of Estonia, <https://www.riigiteataja.ee/en/eli/ee/525032019003/consolide> [12.05.2021].

employment of an officer that is carried out observing this principle. The reorganization does not result in the dismissal of employees employed in retained positions, even if these persons were unqualified compared to the officer made redundant as a result of the reorganization, as there are no factual-legal grounds for their dismissal."[22] Therefore, the reorganization, of course, is not considered as a necessary precondition for the dismissal of an officer. With respect to reorganization, retaining of the position is a prior right, unless there is a need to terminate it. In addition, dismissal of an officer on the grounds of reorganization is a discretionary authority of the public service. The law protects the rights of qualified public officers, however, also, ensures that public institution reshuffles or reduces the number of posts without any complicated procedures, just by making changes to the staff list.[23]

The reorganization process should be distanced from politics. It is inadmissible to use political criteria when solving the personal issues. The process itself should be aimed at defining of governance policy in a new way in a particular area. Proper planning and management of the process is especially important. Understand the purpose and task towards which the organization is directed, is priority, following which the future results, that the institution expects to accomplish, shall be assessed correctly.

We have a negative experience in Georgia, when officers were fired on the grounds of reorganization, while the change of name of a public institution and maintaining of the same function took place. This proves that dismissal of an officer under the guise of reorganization took place in the public institutions, presented as a decision within the legal framework under the false pretence. To avoid this vicious practice, the applicable Law on Public Service specifies the essence and purpose of reorganization, which guarantees protection of an officer from dismissal on this basis. As for the discretion of the decision-making official in the reorganization process, it is aimed at reorganization and not at the dismissal of the officer, since unless it is followed by a redundancy there is no legal basis for the dismissal of the officer.

There are numerous decisions related to the reorganization in court practice, where the court finds the dismissal of an officer unlawful. The court practice determines that "changing the title of a position will not be considered as reorganization unless the content, function and authority of this staff unit are changed. In order to define the identity of specific positions, the following should be evaluated: a) their place in the official hierarchy of the administrative body; b) scope of key authorities; in addition, the Court of Cassation emphasizes that formally reducing some of the functions or adding any minor requirements does not change the situation; c) requirements necessary to hold a particular position after reorganization; d) in some cases – remuneration."[24]

Thus, it is important to distinguish whether we are dealing with an organizational process or the reorganization of public service. The organizational process can be carried out without substantial changes and transformation, which is not the basis for dismissal of an officer.

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22 Decision of February 13, 2020, № BS-179(2K-19), Supreme Court of Georgia.

23 *Turava P., Pirtskhalaishvili A., Dvalishvili M., Tsulaia I., Kardava E., Sanikidze Z., Makalatia E.,* Law of Georgia on Public Service, Commentaries, *Kardava E. (ed.)*, Tbilisi, 2018, 332 (in Georgian).

24 Decision of December 8, 2020, № BS-449-442(K15), Supreme Court of Georgia.

3. Legislative Basis

The Law of Georgia on Public Service establishes the grounds and rules for dismissal of a public officer. The grounds for dismissal of a qualified public officer are divided into compulsory (Article 107) and non-compulsory, facultative (Article 108) grounds. Prerequisite for such differentiation are defined as objective criteria, as well as the discretionary power of the official with decision-making power, which may be related to a number of objective circumstances (officer's health status, experience, status, public service interest, etc.). Dismissal of an officer on the grounds of reorganization, if it is followed by the redundancy, represents a non-binding ground provided for by the Article 110 of the Law on Public Service.

Regardless of the fact that the law provides for the possibility of making decisions based on discretionary powers, it must be said that the legitimate interest of equality before the law, the principle of the rule of law, and the exercise of public service should not be jeopardized. There are cases when the professionalism of an individual officer, his/her experience, institutional memory, is significant representation of the public interest for retaining the person in the public service; such case cannot be equated with the subjective interest and the approach in individual cases may be different. It is true that professional activities are carried out during the life, with the aim to achieve institutional strengthening of public administration;[25] however, this circumstance does not exclude the termination of the officer's authority before the time, in accordance with the conditions and procedures provided by the law.

4. Guarantees

Reorganization should not become an unconditional basis for the dismissal of an officer; the public "institution should undertake an obligation to ensure the horizontal reshuffling (if there is such an opportunity) of an officer as far as possible; thus, the redundancy shall be considered as an extreme, last option."[26]

Ensuring the stability of a qualified public officer, the continuity of his/her activities and the protection of his/her rights reflects the main spirit of the law. To ensure the principle of stability, the new law suggested a previously unprecedented opportunity – officer's mobility. The concept of mobility represents a guarantee for the officer not to be left without job in case of reorganization, if the redundancy takes place. The preferential right is related to internal mobility, and if that is not possible, the law also provides for the possibility of external mobility. In case of impossibility for mobility, the last solution is to enrol in reserve. "The reserve of public officers is a legal guarantee that will maintain the continuity of the activities of a qualified public officer in the public service and will enable him/her to continue his/her career in the public service system in the future."[27]

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25 *Izoria L.,* Modern State, Modern Administration, Tbilisi, 2009, 89 (in Georgian).

26 United States Office of Personnel Management,Guide To The Senior Executive Service, Washington, DC, 2017, 23.

27 *Turava P., Pirtskhalaishvili A., Dvalishvili M., Kardava E., Tsulaia I., Sanikidze Z., Makalatia E.,* Law of Georgia on Public Service, Commentaries, *Kardava E. (ed.)*, Tbilisi, 2018, 342-343 (in Georgian).

Prerequisites for the implementation of mobility are: 1. Reorganization, liquidation or merger, followed by the redundancy; 2. Availability of an equivalent vacant position; 3. Consent of an officer; 4. Consent of a public institution. The decision made by a public institution towards a specific officer on the basis of mobility represents an individual administrative-legal act; therefore, "it should be preceded by administrative proceedings. The implementation of the mobility process, the possibility of protection of the rights of the officer participating in this process should be directed towards the purpose of administrative proceedings – to exercise the public legal authority based on the law and within the law,"[28] which is one of the important indicators of good governance. In addition, other requirements prescribed by the General Administrative Code of Georgia[29] must be observed.

Reorganization is usually a pre-planned measure that considers following the procedural rules in accordance with the legislation. Accordingly, the law obligates the public institution to notify the officer in writing at least one month prior to expected dismissal. By signing the prior notice on the dismissal, the officer does not consent, but rather confirms that he/she is aware of such a consequence. This procedure is related to the officer's interest to be able to plan his/her own future and make it predictable. This implies to find another job as well as use the possibility to continue a legal dispute.

In general, dismissal from office means the termination of the status of an officer, as well as the termination of an authority. One circumstance is noteworthy, namely, during the reorganization, in case of impossibility for mobility, the law provides for the enrolment of officers in the reserve; in this case although a person is dismissed from office, he/she retains the status in the period of being in the reserve. The dismissal of an officer on this basis shall not result in the termination of the status of an officer during the period of stay in the reserve.

In case of redundancy, during appointment of an officer to another position, the law provides for the interests of both the officer and the relevant public institution, therefore, the transfer of an officer to the same or another public institution takes place with the consent of the recipient public institution and the officer, obviously, without competition.[30] The Cassation Court interprets that "making a decision to refuse appointment under mobility scheme, does not at the same time mean dismissal of a person from office."[31] The purpose of mobility – re-employment and continuity of official activities of an officer – is outlined here. Accordingly, a person may request from public institution to transfer him/her to another equal position through mobility, obviously, if such a position exists. In case of impossibility of mobility, the extreme measure is enrolment of officers in the reserve.

Female officer may not be dismissed from the office during raising a child of less than three years old or during pregnancy due to reorganization, liquidation or merger of a public institution, also, due to the outcomes of officer evaluation. The above regulation serves the legitimate purpose of protection the interests of the pregnant person and the child. This goal was initially stated in the legislation of foreign countries as well. For example, in Austria, in recent years, owing to the

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28 Decision of July 23, 2020, №BS-38(K-20), Supreme Court of Georgia.

29 General Administrative Code of Georgia, 25.06.1999, LHG, 32(39), 15/07/1999.

30 *Turava P., Pirtskhalaishvili A., Dvalishvili M., Kardava E., Tsulaia I., Sanikidze Z., Makalatia E.,* Law of Georgia on Public Service, Commentaries, *Kardava E. (ed.)*, Tbilisi, 2018, 136 (in Georgian).

31 Decision of July 23, 2020, №BS-38(K-20), Supreme Court of Georgia.

numerous measures for the promotion of women, the share of women in public services is constantly increasing. The share of women in the Federal Public Service is currently at 42.5 percent.[32]

According to the practice of the Constitutional Court, the right to work is associated with and ensures the material well-being of person, however, it is inadmissible to perceive the realization of the right to work only as a source of income.[33] Dismissal of an officer, especially under the conditions where there are expectations for stability, requires the creation of not only legal but also financial guarantees. The law obliges a public institution to issue compensation to an officer. The amount of compensation equals to three months' salary. In addition to compensation, the law allows payment of one-month salary to an officer notified about dismissal less than a month earlier. The law discusses the violation of the term, which can not imply the notification to be issued more than one month earlier. Violation of rule implies the limitation of the established right, if the officer is notified more than one month earlier, obviously, this is not perceived as violation of the officer's right and it is not followed by the obligation to pay additional compensation.

"The right of appointment is nothing without the right of dismissal",[34] this opinion is related to the effectiveness of public institutions and, in general, public administration. There are cases when institutional and structural-organizational changes are inevitable and necessary, therefore, such changes require the reshuffling of officers or, in worst case, their removal from the process.

The opinion that reorganization could be used as a "hidden leverage" to dismiss a person is not ungrounded;[35] however, at the same time, it should be noted that "in countries with a career principles, a public servant does not leave the service due to the liquidation of the institution or the redundancy."[36] Therefore, substantiation of its expediency is especially important. The Court of Cassation explains that "the legal obligation to substantiate an individual administrative-legal act is conditioned by the need to bind the administrative body under the law and ensure its activities are within the framework of self-control".[37] Existence of discretionary power cannot protect the public institution from the obligation to adhere to both the legality and expediency of the decision made. "The constitutional right to work, along with its social character, has the meaning of a classical right, the purpose of which is expressed in giving a person the right to protect himself/herself from unlawful interference by the state."[38]

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32 Bundesministerium Kunst, Kultur, öffentlicher Dienst und Sport, Frauen und Männer, Österreich, <https://www.ioffentlicherdienst.gv.atl> [12.05.2021] (in Georgian).

33 Decision of April 19, 2016, № 2/2/565, Constitutional Court of Georgia on the case: "Georgian citizens – Ilia Lezhava and Levan Rostomashvili against the Parliament of Georgia".

34 *Sajó A.,* Limiting Government, An Introduction to Constitutionalism, *Ninidze T. (ed.), Maisuradze M. (transl.),* Tbilisi, 2003, 281 (in Georgian).

35 *Shvelidze Z., Bodone K., Todria T., Khazhomia T., Gujabidze N., Meskhishvili K.,* Georgian Labour Law and International Labour Standards, a Guide for Judges, Lawyers and Law Teachers, *Bakakuri N., Todria T., Shvelidze Z. (eds.),* Tbilisi, 2017, 228 (in Georgian).

36 *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Handbook of General Administrative Law, Tbilisi, 2005, 77 (in Georgian).

37 Decision of November 19, 2013, № BS-301-292 (2K-13), Supreme Court of Georgia.

38 Ibid.

The participation of the Public Service Bureau in the reorganization process serves the protection of the interests of the officer. Although the legislation does not provide for the consent of the Bureau to carry out the reorganization, however, the obligation for notification ensures, first of all, the protection of the interests of the officers. In this regard the Bureau is authorised to seek information on relevant vacancies in the system of public service through unified electronic system of human resource management in the public service; the Bureau shall ensure the search for an equivalent vacant position; in addition, providing of methodological assistance to the public institution upon such request is a competency of Bureau.

5. Protection of Rights

A professional public officer, who is appointed to a position for life, has a legitimate expectation that he/she will be provided with both the position of a public officer as well as economic well-being for life (before reaching retirement age), since the right to work is associated with the right to a dignified life; when this right is restricted, another right of officer – to protect himself/herself from possible illegal consequences – arises. The right to resist is one of the signs of the legal state.[39] The right to court hearing means that court case can be initiated against any person.[40] The legislation considers the possibility for the interested person (in this case public officer) to make disputable any decision concerning him/her. An officer has the right to apply to a court to protect his/her rights. According to the legislation, an officer has an obligation[41] to use the opportunity to appeal the disputable decision (if any) to a superior authority or to a superior official before filing a lawsuit in court. Such regulation is related to a certain subordinate approach existing in the public service, therefore, the initial appeal of the decision and assessment of the legality of the act under dispute should be made with a high official or a superior body.

According to the Law on Public Service, dismissal of an officer on the basis of reorganization shall be considered legal if the following conditions are met:

1. The decision on dismissal is made by an authorized official;
2. The grounds for dismissal are provided for by the Law on Public Service (imperative requirement);
3. The form of decision-making, established by law is observed;
4. The decision-making procedure established by law is observed.

These requirements must be observed in whole, otherwise, the decision made cannot be considered lawful.[42]

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39 *Khubua G.,* Legal Theory, Tbilisi, 2004, 99 (in Georgian).

40 *Sajó A.,* Limiting Government, An Introduction to Constitutionalism, *Ninidze T. (ed.), Maisuradze M. (transl.),* Tbilisi, 2003, 270 (in Georgian).

41 See, Part 5, Article 2 of the Administrative Procedure Code of Georgia, 23.07.1999, LHG, 39(46), 06/08/1999.

42 The listed conditions are of general nature in assessing the legality of an individual administrative-legal act; for the purpose of this paper, the basis for making the decision is separated and linked to the Law on Public Service; otherwise, of course, the material grounds are determined in accordance current legislation.

The legality of the decision on dismissal of the officer due to the redundancy based on reorganization is influenced by the following conditions: it must be checked whether the newly created staff unit considers the same powers; it must be also checked whether the relevant public institution has offered the mobility to the officer. As for the subject of dispute, as established by the law, the individual administrative-legal act on dismissal of an officer is subject to appeal in this case. The so-called presumption of legality is applicable for the administrative-legal acts, which implies that it is considered as lawful until proven otherwise. According to the administrative procedural law, the burden of proof is placed on the public institution issuing[43] this act under dispute, although, this does not exempt the plaintiff of the obligation to substantiate the claim.[44]

In the case regulated under the Law on Public Service, based on the purpose of protection of the right, the circle of interested person should be understood in narrower sense and he/she (the interested party/plaintiff) is directly represented by the officer in relation to whom a specific disputed decision has been made, in our case, the officer dismissed on the basis of reorganization. Consequently, in the present case, we are not dealing with a broad definition of the person concerned, since the act under dispute does not relate to a third party.

When appealing, the purpose of the interested person/plaintiff is to annul the act under dispute. Such a result is achieved by annulment of the appealed act. As established by the law, an administrative-legal act is void if it contradicts the law or if other requirements for its preparation or publication established by the legislation are substantially violated.[45]

The legality of the act under dispute is checked by examining its formal and material legality criteria.[46] In the event of reorganization, the lawfulness of the dismissal must pass a kind of "test" with the principle of "if-then" (wenn-dann),[47] where "if" defines a redundancy on the basis of reorganization as precondition, and "then" envisages the consequence following such redundancy – the dismissal. There is a cause-effect relation between the reorganization process, the redundancy and the dismissal. According to the explanation provided by the Supreme Court, "the decision to dismiss a person is made by an institution in which it is impossible for an officer to remain due to redundancy".[48] Based on the above, it can be said that the reorganization, as a basis for the dismissal of the officer, is related to the following major circumstances:

1. The reorganization process is followed by the redundancy;
2. Officer's mobility could not be implemented.

Thus, these two preconditions are cumulative and should be discussed simultaneously when assessing the legality of dismissal of an officer on this basis.

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43 *Kopaleishvili M., Kharshiladze E., Turava P., Loria Kh., Gvaramadze T., Ghvamichava T.,* Administrative Procedural Law Manual, Tbilisi, 2018, 214 (in Georgian).

44 Article 17, the Administrative Procedure Code of Georgia, 23.07.1999, LHG, 39(46), 06/08/1999.

45 See, Article-60[1], General Administrative Code of Georgia (GADG), 25.06.1999, LHG, 32(39), 15/07/1999.

46 See, *Turava P.,* General Administrative Law, 3rd ed., Tbilisi, 2020, 172-181 (in Georgian).

47 *Schmidt R.,* Allgemeines Verwaltungsrecht, Hochschule für Angewandte Wissenschaften Hamburg, 20. Aufl., Hamburg, 2017, 93.

48 Decision of July 23, 2020, № BS-38(K-20), Supreme Court of Georgia.

The administrative body or court, reviewing the dispute (depending on whether a complaint or lawsuit is in place), should examine whether the disputed decision complies with both the procedural and contextual requirements established by law. According to the established doctrine, "in order to the decisions made by the administration be considered lawful, it needs to be in full compliance with the established procedural order as well as the material norms."[49] Thus, when assessing the legality, the dispute reviewing body/court checks whether the reorganization process was carried out in accordance with the law and following its spirit, whether there was an equal or lower position offered to the officer by the service based on his/her qualifications. "In resolving a dispute, the court should be guided by the requirements of the legislation and not just consideration of expediency, as the discretionary power is not absolute right and its use is limited by the requirements established by the legislation."[50]

In the event of appealing the decision on dismissal, the officer usually requires the annulment of the appealed decision, as well as reinstatement in service and compensation for the missed pay. Of course, only making a demand is not sufficient. The person must indicate the circumstances that he/she considers to be the legal basis for making this demand. This means that the complaint/claim must be substantiated. Of course, a person's assumption on a possible violation of his/her right is not sufficient basis for considering the violation of that right as proven. Generally, a person, in evaluating the decisions made towards him/her, acts based on personal interests and personal well-being, which does not represent objective criteria for evaluating the issue. The presumption on possible violation of the right originates the interest of appeal and does not take into account the unequivocal illegality of the disputed decision in the literal sense. Clearly, examining the legality of the disputed decision is transferred to the competence of the superior body or the court reviewing the dispute.

The right to appeal must be exercised within the time limit established by law. The expiration of limitation period causes the loss of significance of validity of claim and deprives a person of the opportunity to satisfy a complaint or claim. The right of appeal to be made within the time limit forces a person to obey the lawful order and to exercise this right during the period permitted by law and not when it is desirable for him/her. As a rule, a complaint is made to a superior authority or claim is made to the court within one month from the notification on the decision. Thus, counting of the time is linked to the notification on the decision (act on dismissal of the officer). One of the important procedures related to the realization of the right of appeal is getting familiar with the disputed decision in the manner prescribed by law, as the period for appeal commences from getting familiar with the disputed decision (individual administrative-legal act). As established by the court practice, "the period for appeal can start only from the moment when a person has an objective opportunity to receive information about the content of the act. By getting officially familiar with the act, person becomes aware of what became the basis for the issuance of the act and, consequently, whether his/her appeal has any prospects, as well as what legal means can he/she use to protect his/her rights and

[49] *Badura P., Erichsen H., Martens W., Münch I., Ossenbühl F., Rudolf W., Rüfner W., Salzwedel J.,* Allgemeines Verwaltungsrecht, 4 unveränderte Auflage, Berlin, 1975, 244.

[50] Decision of October 4, 2016, № BS-211-210(K-16), Supreme Court of Georgia.

interests, what arguments he/she should use to defy the decision."[51] The Court of Cassation refers to the explanation of the Supreme Court of Georgia, according to which, "the right to appeal includes the presumption that the person is familiar with the content of the act, the appeal implies knowledge of the motives for issuing the act. In this regard, the substantiation of the act has the burden of ensuring of the right of appeal."[52]

It is important that in the event of completion of dispute in favour of the plaintiff, the decision is executed as soon as possible. As for reinstatement in employment, this becomes possible only if the position in question is vacant. It should be noted that a necessary precondition for reinstatement in employment is a vacant position or existence of an equal position. By making the amendment[53] to the Resolution No.199 of the Government of Georgia on 21st May, 2020 on the Rules of Mobility of Professional Public Servants, the notion of equivalent position has been added to the definition of terms, according to which, the equal position is the position with the same rank and category, the job description/duties-responsibilities and qualification requirements of which are identical or mostly similar. Prior to this change, the burden of definition of equivalent position was shifted to the court. Although, the Law on Public Service provided for the concept of an equal position from the very beginning; however, the normative regulation of its content was not given. If it is impossible to reinstate an unlawfully dismissed officer due to non-existence of an equal vacant position in the system of the same public institution, the public institution is obliged to immediately apply to the Bureau with request to find an equal vacant position in the public service system. According to the Supreme Court, "cases of impossibility of reinstatement in service are the absence of this position, or the holding of this position by another person."[54] This proves that the reinstatement of an unlawfully dismissed officer by the dismissal of another officer appointed to this position is inadmissible. Article 106 of the Law of Georgia on Public Service imperatively stipulates that an officer is dismissed from service only if there are grounds provided for by this law. The applicable law does not provide for the dismissal of an officer due to reinstatement of an unlawfully dismissed officer, which excludes the preferential right of an unlawfully dismissed officer over an officer appointed later to the same position. The Law of Georgia on Public Service of 1997,[55] in particular, Article 97, provided for the dismissal of an officer upon reinstatement of an unlawfully dismissed officer, creating an unstable environment. Under the law of 1997, the advantage of being in office belonged to an unlawfully dismissed officer, that is inadmissible under the current valid law. Consequently, the new regulation categorically excludes the application of the principle – "primo in tempore, potior in iure" (first in time, greater in right).[56] In the current legislation, such regulation of the issue is aimed at ensuring

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51 Decision of October 10, 2013, № BS-854-836(K-12), Supreme Court of Georgia.

52 Decision of October 6, 2016, № BS-770-762(K-15), Supreme Court of Georgia.

53 Resolution № 315 of the Government of Georgia on the amendments to the Resolution № 199 of 20th April, 2017 of the Government of Georgia on the "Rules of Mobility of Professional Public Servants", 21/05/2020.

54 Decision of May 21, 2020, № BS-1162(K-18), Supreme Court of Georgia.

55 Law of Georgia on Public Service of 1997 (repealed, 27/10/2015, № 4346).

56 In this regard, see papers: *Kardava E., Kasradze I.,* Legal Grounds and Factual Preconditions for Reinstatement of an Unlawfully Dismissed Officer, also, *Getsadze Sh.,* Practice of General Courts of

legal trust and legal stability. Otherwise, the system will again face a legal dispute in this case due to dismissal of another officer from the same position. Thus, the primary goal in this particular case is to achieve stability of the officer appointed to the vacant position. If the position is no longer vacant, an unlawfully dismissed officer must be reinstated to the equal position; according to the law, in the absence of such a position – to an equal position in the system of the same public institution.

As for the costs of legal proceedings related to labour disputes in the public service, the common courts are governed by the Administrative Procedure and Civil Procedure Codes of Georgia, as well as the Law on State Duty, and these disputes are exempt from the state duty. As for the expenses of the representative (lawyer), in case of completion of the case in favour of the plaintiff presenting the relevant evidence, the court imposes reimbursement of the costs incurred by the plaintiff's representative on the defendant public institution.

6. Conclusion

As established by the legislation, the reorganization in the public service serves not the purpose of redundancy but ensuring the effective governance. Nevertheless, this process is often accompanied by redundancy. For the above reasons it is important to follow the procedures established by law – the maintenance of human capital becomes a significant challenge for public institutions. In the worst case, when there is no possibility of mobility of the officer, there is no equal or lower position, a public institution, of course, is equipped with the right to make a choice before making a decision on dismissal, which should be guided by objective criteria. An appropriate commission can be set up to resolve this issue, although the latter is not of obligatory nature and this means that the decision on the issue is to be made mainly by the head of the institution.

Thus, although the initiation of the reorganization process itself belongs to the discretionary power of the public institution, the dismissal of officers on this basis should be subject to strict criteria and requires substantiation. The requirements that will have to be envisaged by the decision-maker for the selection of an officer should be specified; the above could include the length of service, experience, professional achievements, potential for further professional development and etc.

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The Rule of Disposal of the Matrimonial Property

Legal norms governing relations between spouses are considered to be the acquisition of civilized states from ancient times. Numerous principles and regimes have been developed in the modern legal systems of the world in order to regulate the property relations of spouses. Accordingly, for Georgian family law, as one of the young systems, it is necessary to study the relevant experience of the states with leading jurisdictions through the use of the comparative legal method. Also, the decisions made in the Georgian court practice in this direction requires critical understanding, identification of problems, and development of ways to solve them. The study aims to present and solve the problematic issues of spouses' co-ownership disposition based on the above-mentioned legal sources.

Keywords: *Disposing transaction, Non-Contractual and Contractual Property Regimes, The Nature of Matrimonial Property, Criterion of Covering Family Needs, Conflict of interest between non-alienating spouse and bona fide purchaser, The Regime of Community of Accrued Gains.*

1. Introduction

Family law, in both academic and practical contexts, belongs to exceptionally rapidly evolving subject of study as it reflects the real lives of human beings and does not set abstract rules for the society – this is a trend that was first identified in Henry James Sumner Maine's classic legal text, called "Ancient Law.[1] This field serves to regulate the legal aspects between the persons who are related to each other by social, political and economic units – households.[2] The idea that was declared in the Age of Enlightenment, according to which each and every person has a dualistic character (he is an individual and at the same time a member of society), also led to the creation of appropriate philosophical foundations for the family law.[3] Despite of the high level of development and rich history, the family law still has the number of problematic issues that are resolved in different ways. For instance, the notion of the family itself, regardless of its fundamental meaning, has often become the subject to various interpretations. As an example, we can provide English law, sources of which, propose different methods and content of the definition of the family concept. 1. Definition of a randomly selected person; 2. Formal definition on which the law must be based; 3. Functional

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1 *Burton F.*, Family Law, London, 2003, 4.

2 *Frier B. W., McGinn T. A. J.,* A Casebook on Roman Family Law, Oxford, 2004, 3.

3 *Muller-Freienfels W.,* Family Law and the Law of Succession in Germany, International and Comparative Law Quarterly, Vol. 16, 1964, 409.

definition; 4. Idealistic definition and 5. Definition on the basis of self-determination.[4] It should be noted that the leading case in the field of definition of the notion of family in English law is *Fitzpatrick vs.Sterling Housing Association Ltd*. In this case, according to the definition of the majority of judges, the notion of a family does not include only the relations between persons who are related to each other by marriage or blood relationship.[5] Also, according to Judge Slinn's legal assessment, family cohabitation between persons generates a high degree of interdependence, devotion, care and support, which is why temporary superficial relationships cannot be considered a family relationship. It is on the basis of this definition that it has become possible to consider a possible long-term actual cohabitation between same-sex persons as a family.[6]

The above-mentioned example of the family notion is a clear illustration how the family legal issues can be interpreted in different perspectives. Another problematic area relates to the property relations between spouses and the regulation of their legal status as co-owners. This area covers a wide range of property rights and obligations of spouses, including the issue of matrimonial property administration/disposal. With regard to the concept of disposal in the Georgian law, first of all, its connection with the principle of causality must be taken into account.[7] The main goal of this thesis is to define the correct definition of the article 1160 of the Civil Code of Georgia on the basis of analysis of national and foreign legal sources, as well as its sphere of activity and importance in family legal relations of spouses.

2. Content of the Article 1160 of the Civil Code of Georgia in the Context of Legislative Amendment

The chapter regulating the property rights and duties of spouses established by law is presented by 14 articles, of which only Article 1160 of the Civil Code of Georgia (herein CCG) has been amended since 1997 (i.e. since the adoption of the Civil Code of Georgia) to the present day. The referred legislative change was approved by the Parliament of Georgia on June 29, 2007, which substantially changed the structural as well as contextual aspects of the Article 1160 of the Civil Code of Georgia. Particularly, before, the article under discussion was presented in two provisions (sentences), but as a result of the legislative change, it was developed into three parts. As for the contextual side of the article 1160, its initial edition defined that the administration of matrimonial

4 For detailed information about the methods and content of the definitions of the family notion, see., *Herring J.,* Family Law, Oxford, 2017, 2-4.

5 *Fitzpatrick vs. Sterling Housing Association Ltd,* United Kingdom House of Lords, 1999, <www.publications.parliament.uk> [11.09.2021].

6 Note: It is noteworthy that use of this definition for the Georgian law in the context of same-sex family relations, first of all, will contradict the content of the first paragraph of the article 30 of the Constitution of Georgia as well as the concept of marriage defined in the article 1106 of the Civil Code of Georgia.

7 *Maisuradze D.,* Condictio of Infringement by Disposal in Georgian and German Law, "Georgian-German Journal of Comparative Law", 8/2020, 12 and the following pages (in Georgian); *Rusiashvili G.,* Principle of Separation in Georgian Law of Property, "Georgian-German Journal of Comparative Law", 1/2019, 20th and the following pages (in Georgian); *Rusiashvili G.,* Cases in the General Part of the Civil Law, Tbilisi, 2015, 257-th and the following pages (in Georgian).

property by spouses shall be provided by mutual agreement of spouses, regardless of the fact, which spouse is administering this property. Besides, any transaction made in relation to the administration of the property by one of the spouses had to be declared null and void at the request of the other spouse only if the property disposing spouse did not have such authority and it could be proved that he knew or should have known he had no such right. First of all, on the basis of the comparative analysis of the initial and current editions, it must be mentioned that the rule of administration of the matrimonial property by mutual agreement of parties has not changed, however, the substantial change applied to the provision related to the possibility of annulment of the claim on disposing transaction by non-disposing spouse concluded without notifying and obtaining the consent of the latter. In particular, according to the initial edition, the subject of legal evaluation was the presence/absence of the authority for the administration of the matrimonial property by the disposing spouse (objective component) and the issues related to knowledge/lack of knowledge (subjective component) of such authority. Respectively, the issue of recognition of the transaction null and void had to be decided from the perspective of the spouse disposing the property. Pursuant to the legislative amendment, these circumstances do not belong to the subject of court evaluation and the attention is moved to the evaluation of the authenticity of the disputable transaction deal from the perspective of the non-disposing spouse. The provision defines the list of only those cases, when the disposing transaction is authentic, regardless of the objection of the non-disposing spouse.[8] However, in this case, the paragraph 2 of the article 1160 of CCG clearly requires additional explanation, because, as of today, unfortunately, Georgian case law is not developed in the right direction in terms of application of this norm. It is also notable that paragraph 3 of the article 1160 of CCG is the additional protective leverage of the non-disposing spouse, who had no such leverage before the legislative change. Respectively, according to the initial edition, if he could request in cases defined by the law, the recognition of the administration transaction null and void and in this way, protect its right as a co-owner to the matrimonial property, with the new legislative change, the interest of the non-disposing spouse in relation to the protection of matrimonial property is foreseen even in case if the recognition of the transaction annulment is inadmissible due to the bona-fide acquirer. This has been achieved by assigning the right to the non-disposing spouse to request the gain received on property administration. The referred edition of the article 1160 of CCG was reflected in the law as a result of the change made on July 29, 2007 and together with this change, paragraphs 3 and 4 of the following content were added to the article 312 identifying the presumption of the veracity and completeness of the Register entries.[9] It is noteworthy that Georgian legal doctrine offers substantially similar interpretations of the article 1160 of CCG, however, these interpretations require further specification and improvement.[10]

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8 *Rusiashvili G.,* Property Relations of Spouses, "Georgian-German Journal of Comparative Law", № 10, 2020, 12 (in Georgian).

9 Decision № 2B/211-12 of 29 March 2012 of Chamber for Civil Cases of Tbilisi Court of Appeal.

10 *Shengelia R., Shengelia E.,* Family Law, Tbilisi, 2011, 158-159 (in Georgian); *Ninua E.,* Some of the Legal Aspects of the Relations of Spouse, "Justice and Law", № 03(34), 2012, 50 (in Georgian); *Bichia M.*, Peculiarities of Identifying Matrimonial Property Regimes in accordance with Georgian Case Law, "Justice and Law", № 01(61), 2019, 90 (in Georgian); *Phkhaladze N.,* Legal Regime of Matrimonial Property, "Justice and World", № 14, 2020, 168 (in Georgian); *Kantaria G., Jgerenaya V.,* Some Problematic

3. Interpretation of the Article 1160 of CCG in the Georgian Case Law and its Critical Understanding

First of all, it is interesting to look at the provisions defining the matrimonial property in the Georgian law. In particular, the first part of the article 1158 of CCG and the 3rd paragraph of the article 1176 both offer the content of regimes regulating the matrimonial property relations: 1. First paragraph of the article 1158 states that any property acquired by the spouses during their marriage shall be treated as their joint property (matrimonial property), unless otherwise determined by the marriage contract. The joint property of spouses belongs to each spouse equally, without the pre-defined share.[11] 2. Third paragraph of the article 1176 states the possibility to agree the regimes different from the legal property regimes on the basis of the marriage contract. These regimes are: regime of the united property (when the individual property of the spouses become a joint property on the basis of agreement), share-based property regime (when the share of each spouse is defined for the property under the joint ownership based on the agreement) and separate ownership regime (when the joint property becomes an individual property of one of the spouses based on the agreement). It is allowed to use the combination of all the above-mentioned regimes foreseen in the law, but it is inadmissible to agree an exclusive regime (different from the above-listed) by the spouses. Such agreement will be declared void. This is based on the "typological rule" construction identified in the German Law, by which it is forbidden to make "fantasy property regime" agreement.[12]

When discussing the interpretation of the article 1160 of CCG in the Georgian case law, first of all, it must be mentioned that the interpretation of the paragraph 2 of this article is particularly actual, in the context of the bona-fide acquirer. In particular, according to the definition of the Court of Appeals, the rule set by the paragraph 2 of the article 1160 of CCG, in the process of acquiring the matrimonial property by spouses, protects only the interests of the bona-fide acquirer from the claims of the spouse not-registered as the co-owner of the property.[13] Respectively, in the context of acquiring the property, the content of the article 1160 of the CCG is always interpreted jointly with the articles 185 and 312 of the CCG.[14] In relation to the scale of evaluation of the acquirer's good faith, in one of its decisions, the Court of Cassation has indicated that administration by the spouse, registered as the owner, of the share of matrimonial property of the other spouse shall be deemed annulled and its authenticity shall depend on the approval of the latter, however, the rule referred to in the second part of this article protects the interest of the acquirer from the claim of the spouse who is not registered as

Characteristics of Administration of Matrimonial Property, "Scientific Journal Young Lawyers", № 8, 2018, 88 (in Georgian).

11 *Shengelia R., Shengelia E.,* Family Law, Tbilisi, 2011, 162 (in Georgian).

12 *Rusiashvili G.,* Property Relations of Spouses, "Georgian-German Journal of Comparative Law", № 10, 2020, 12, 18 (in Georgian).

13 Decision № 2B/211-12 of 29 March 2012 of Chamber for Civil Cases of Tbilisi Court of Appeal.

14 Decision № 2B/211-12 of 29 March 2012 of the Chamber for Civil Cases of Tbilisi Court of Appeal. Decision № B/1403-12 of 9 October, 2012 of the Chamber for Civil Cases of Tbilisi Court of Appeal. Decision № 2B/3387-16 of 24 November 2016 of the Chamber for Civil Cases of Tbilisi Court of Appeal.

a property owner in the public registry but who had this right under the ground of acquiring property within the registered marriage. Such legislative regulation proves that the right of the spouse not registered as the owner on the property acquired during the marriage is not absolute and when the matrimonial property (including the share of the other spouse) is disposed by the person registered as the property owner, the realization of the authority of the other spouse depends on certain circumstances, namely, the identification of the fact that the acquirer lacks good faith. During the administration (disposal) of the matrimonial property, dispute of the spouse not registered as the owner of the disputed property, may lead to the annulment of the property sale only in case if it is identified the property acquirer not only knew about the existences of the other owner on the subject of sale but he was also aware of the fact that the spouse not registered as a property owner was against selling this property. In any other case, it is presumed that the registered owner, acts in agreement with his spouse and the property acquirer has a good faith with regard to the purchasing transaction.[15] In the context of application of the article 1160 of CCG, the principle of protection of the bona-fide acquirer also applies to the bona-fide mortgagee. In particular, in one of the cases, it is stated that since the fact of concluding a loan and mortgage agreement between the third party and one of the spouses has been established, and the real estate owned by the same spouse registered in the public registry has been encumbered with a mortgage to secure the loan repayment, annulment of the mortgage on the 2/3 share of the second spouse that was registered in the public registry, will cause a violation of the stability of civil circulation, because pursuant to the article 312 of CCG, the Public Registry is the guarantee of bona-fide civil circulation and serves to the provision and protection of the interests of the circulation parties.

This principle protects the right of the creditor too (mortgagee). Therefore, the rights of the mortgagee are protected in the same way as the property acquirer and they receive an authority to satisfy their claim against the main debtor from the property encumbered by the mortgage, respectively, the non-disposing spouse, in compliance with the paragraph 2 of the article 1160 of CCG, has right to demand from the other spouse, the benefit received from the property secured by mortgage.[16] This definition complies with the concept of disposal of the property established in the Georgian doctrine.[17]

In the context of application of the second paragraph of the article 1160 of CCG, the Court of Cassation also defines that with regard to the disposal of the matrimonial property, from the

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15 Decision № AS-1432-2019 of 22 January 2020 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-397-397-2018 of 19 April 2019 of the Chamber for Civil Cases of Supreme Court of Georgia; There is a strictly defined, homogeneous case law regarding this issue: № AS-756-707-2017; № AS-87-83-2017; № AS-571-879-2009; № AS-506-480-2015; № AS-7-7-2016; № AS-1563-1466-2012; № AS-1015-951-2012; № AS-1367-1289-2012; № AS-794-747-2012; to see case about sham transaction concluded between one of the spouses and the third person and its evaluation, See: Decision № AS-8-2020 of 2 July, 2020 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-789-2019 of 26 July 2019 of the Chamber for Civil Cases of Supreme Court of Georgia.

16 Decision of № AS-565-536-2014 of 22 July 2015 of the Chamber for Civil Cases of Supreme Court of Georgia.

17 *Rusiashvili G., Egnatashvili D.,* Cases of Non-Contractual Obligations*,* Tbilisi, 2016, 39 (in Georgian).

transaction concluded by one spouse without the consent of the other spouse, the latter cannot have an independent claim.[18] In case the disposing transaction remains in force, in accordance with the principle of civil procedure law (Article 248 of the Civil Procedure Code of Georgia), for exercising the right to claim the benefit assigned to the non-disposing spouses under the paragraph 3 of the article 1160 of CCG, its formation as a separate claim in the suit shall be considered. Otherwise, the Court may discuss the case within the action of declaration (to recognize the transaction null and void), but, in the event, the claim is rejected, if the party has not claimed reimbursement (pecuniary claim) of the gain acquired from sale of property, the court will not be authorized to initiate the discussion of the lawfulness of the right of this claim.[19] Particularly, even in cases where the plaintiff requests not the gain but the compensation of damage incurred as a result of property sale, in the conditions of its compensation claim, the damage is the reduction of the asset and increase of the liability.

If we mean the money received from the property disposal, then it is not the damage but the gain. If we mean such disposal of the property co-owned by the spouse, where the gain is lower than the actual value of the property, then it can be the damage, but even in this case, the following facts shall be subject to investigation: value of the property at the moment of sale; circumstances leading to the reduced value, etc.[20]. Moreover, it is interesting to review the explanation of the Court of Cassation for one of the cases, according to which, in order for giving rise to the matrimonial right of the spouses, the moment of official termination of their marriage cannot be deemed as important, when the case materials prove that before official termination of the marriage, the plaintiff and the defendant had not lived as one family since 1998.[21] According to the explanation of the Court of Cassation, only the marriage registration cannot be the determinant to apply to the property the matrimonial property regime of the spouse being in registered marriage, in the cases when it has been proven that the spouses did not manage the joint household whilst buying the disputable objects and the marriage, regardless of its registration, had factually been terminated. The claim was based on the norms determining the legal regime of the property acquired during the cohabitation of spouses and the plaintiff believed that he had to be recognized as the owner of all immovable property acquired before 2016, before the registration of the divorce and one half of the value of sold immovable property had to be compensated from the side of the other party. However, the Court of Appeals as well as Cassation Courts used the termination of actual cohabitation and not the divorce registration as the ground to separate common and individual property. Hence, the paragraphs 2 and 3 of the article 1160 of CCG were not applied to any of the properties only acquired by one of the spouses or acquired and then disposed in the period following the termination of actual cohabitation of spouses.

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18 Decision № AS-951-989-2011 of 10 November 2011 of the Chamber for Civil Cases of Supreme Court of Georgia.

19 Decision № AS-123-118-2012 of 17 April 2012 of the Chamber for Civil Cases of Supreme Court of Georgia.

20 Decision № AS-1136-1067-2012 of 11 February 2013 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-881-843-2014 of 2 July 2015 of the Chamber for Civil Cases of Supreme Court of Georgia.

21 Decision № AS-1226-2020 of 25 March 2021 of the Chamber for Civil Cases of Supreme Court of Georgia.

From the point of view of a critical understanding of Georgian case law, it is first of all noteworthy that Georgian case law often misinterprets the notion of matrimonial property, when the complainant spouse is automatically considered to be the co-owner of ½ of unlawfully disposed property. The above-mentioned clearly contradicts the legal nature of the matrimonial property right, because, in this case, the share of none of the spouses is defined in advance (before separating the matrimonial property). Respectively, until the matrimonial property is separated and the shares of spouses and individual ownership of the properties assigned to these shares are identified, the property right of each spouse applies to the whole matrimonial property and not to some part or ½ of it. In this respect, Georgian case law is generally wrong.[22] Respectively, where the preconditions foreseen in the law exist, the transaction shall be fully annulled, because when the property is disposed without informing/approval of the other spouse and at the same time, with mala fide purchaser, the co-ownership of non-disposing spouse shall be fully applied to such property.

Paragraph 2 of the article 1160 of Civil Code of Georgia protects the bona-fide acquirer and the paragraph 2 – the co-owner, a non-disposing spouse. However, it interesting how the notion "administration" can be interpreted and understood in the context of the article 1160 of the Civil Code of Georgia. Namely, administration is a transaction that aims to satisfy the family needs.[23] Respectively, if the disposing spouse uses the matrimonial property to fulfill his personal obligations, in this case, claim of the other spouse to annul such transaction is admissible on the ground that he was unaware of and/or did not agree to such transaction, however, even in such cases, if the bona-fide acquirer is concerned, he won't be able to claim the annulment of the transaction, but he can demand the transfer of the gain received from this transaction. Good faith shall be assessed in case of the unlawfulness of the disposing spouse and the latter is unlawful if he violates the rule stipulated in the article 1159 and first part of 1160 of CCG. In such cases, leaving/not leaving the transaction in force shall be decided in consideration of the following circumstance: the main aim of matrimonial property administration in each particular case. Where the aim corresponds to the family interests, then the disposing spouse is lawful in any case and there is no need to evaluate the good faith of the acquirer; however, if the administration of matrimonial property serves to the personal interests of the disposing spouse, he shall inform the other spouse and obtain his approval. And where such does not exist, in order for the transaction to be valid, it is important to identify the good faith of the acquirer, which in case of immovable property co-ownership is defined by paragraphs 3 and 4 of the article 312 of the Civil Code of Georgia. Georgian case law does not use the above-mentioned criterion of "covering family needs" at all and reviews the disposing transaction referred to in the context of the article 1160 only from the perspective of the good faith of the acquirer, which in view of the content of this article is not justified. Therefore, it is necessary for the Georgian

[22] For instance, Decision № AS-621-588-2015 of 3 June 2016 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-7-7-2016 of 16 March 2016 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-1426-1346-2017 of 2 March 2018 of the Chamber for Civil Cases of Supreme Court of Georgia.

[23] For details about this issues: *Rusiashvili G.,* Property Relations of Spouses, "Georgian-German Journal of Comparative Law", № 10, 2020, 12-13 (in Georgian).

case law to adopt the above-referred criterion, limit the area of activity of this norm and require the approval of non-disposing spouse as mandatory only in cases where the disposing spouse uses the matrimonial property solely for personal goals.

4. Rule of Administration of Matrimonial Property in the Laws of Foreign Countries

4.1. German Family Property Law

Chapter 6 of the Book 4 of German Civil Code is divided into three sub-sections, regulating the legal and contractual property regimes as well as the issues related to keeping register of the common property. It is interesting that the legislative basis regulating the contractual regime is divided into four chapters, namely: 1. General Provisions. 2. Property Separation Regulatory Norms; 3. Common Property Regime Regulatory Norms; 4. Norms for Regulating the Optional Regime of the Community of Accrued Gains[24]. Pursuant to the section 1363 of the Civil Code of Germany, the spouses live under the property regime of community of accrued gains if they do not by marriage contract agree otherwise.[25] Respectively, in Germany, there is a principle of freedom with respect to choosing the property regime, however, in the absence of the marriage contract, the property separation is a matrimonial property regime defined by the spouses, under the condition to participate in the community of accrued gains by spouses, which is known as the regime of community of accrued gains or "compensation for the community of accrued gains".[26] Therefore, one the one hand, the property of the husband and the property of the wife do not turn into the common property of the spouses (matrimonial property); the same applies to property that one spouse acquires after marriage, i.e. it is also subject to the property separation rule. On the other hand, the accrued gain that the spouses acquire in the marriage, however, shall be compensated if the community of accrued gains ends. Respectively, according to this legal regime, each spouse manages his own property independently; however, the rule of property management, in accordance with the section 1364 of Civil Code of Germany and the following paragraphs, requires the consent of the other spouse for selling the property or his mandatory approval of already concluded transactions.[27] The section 1414 of the Civil Code of Germany shall also be mentioned. Pursuant to this section, If the spouses exclude the statutory property regime or terminate it, separation of property takes effect, unless the marriage contract leads to a different conclusion.[28]

Sections 1415 and 1518 of the Civil Code of Germany regulate the common property regime. In compliance with the section 1415 of the Civil Code of Germany, the spouses may agree on this

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24 *Izquierdo A. O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 347-348.

25 German Civil Code, 1363 Article, <www.gesetze-im-internet.de> [06.09.2021].

26 *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 348.

27 German Civil Code, 1364 and following articles, <www.gesetze-im-internet.de> [06.09.2021].

28 *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 348.

regime, which is characterized by three types of properties that are different from each other: (1) The matrimonial property – the property that the spouses acquire during the period of this regime is subject to joint management and administration rule by both spouses; (2) The individual property – the property owned by each spouse separately; (3) Separated property – the property that is excluded from the matrimonial property of spouses and assigned to one of them, based on the agreement.[29] In the last two cases, the spouse who is or who will become the owner of the relevant property has the authority to manage the property. On the basis of all the above-mentioned, pursuant to the German Law, the rule of the community of accrued gain belongs to the secondary legal property regime and the agreement by the spouses about the matrimonial property regime is allowed by the section 1415 and the following sections of the Civil Code of Germany.

4.2. French Family Property Law

Article 1387 of the Civil Code of France states that the law regulates property relations between the spouses only in the absence of a specific agreement, which the spouses can conclude on the condition that the latter will not contradict the ethical norms and rules established by the relevant law. Therefore, it can be said that French law recognizes the principle of free choice of the property regime of spouses.[30]

In case the marriage contract does not exist, pursuant to the article 1393 of the Civil Code of France, the primary legal property regime of spouses is the limited common property system, which is characterized by three property types that are different from each other: 1. Individual property – mostly formed by the property acquired before the marriage, also, received as an inheritance during the marriage, property received by subrogation or as a gift. 2. Co-ownership of spouses – all acquisitions of the spouses during the marriage which are not deemed as an individual property in compliance with the article 1401 of the Civil Code of France.[31] It follows from the above dichotomy that the authority to manage and dispose of individual property rests with the respective individual owner spouse, while co-ownership can be managed only jointly, with the consent of the other spouse.

It is noteworthy that the optional system or so called secondary legal regime in this case is a property separation rule, according to which, the spouses have only separated ownership of the property as well as of liabilities during the whole period of marriage.[32] This naturally conditions the possibility to dispose the property independently from each other. Besides, the article 1497 of the Civil Code of France assigns the right to the spouses to limit the use of the common property regime but solely with respect to revenues, change the common property management system or define the

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29 Ibid, 349.

30 *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 333-334.

31 The Civil Code of France, 1393, 1401 Articles, <www.legifrance.gouv.fr> [06.09.2021].

32 *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 334.

amount of each spouse's share[33]. Pursuant to the article 1526 of the Civil Code of France, such agreement may also contain the agreement about universal property regime, by which all liabilities and properties, whether current or future, shall be subject to common property regime, excluding the property exclusively agreed by the spouses and the gift specially made to one of the spouses by the grantor.[34] Also, it is interesting to look at the article 1569 of the Civil Code of France, which, by its essence complied with the community of accrued gain defined in the section 1363 of the Civil Code of Germany. In the event, the spouses agree on this regime: 1. Where the community of accrued gains of both spouses exist, the spouse whose gain exceeds the gain of the other spouse, shall give compensation to the latter in the amount of ½ of the difference between the both gains. 2. Where only one of the spouses has a gain, he shall pay compensation to the other spouse in the amount of ½ of the gain value. 3. Where none of the spouses has accrued any gain during the marriage, the compensation rule shall not be applied.[35]

4.3. English Family Property Law

First of all, it must be admitted that UK does not have a specific regulation that would regulate the property rights and obligations of spouses.[36]

As for the English Law itself, from the day Married Women's Property Act 1882 was adopted to date, the latter do not know the property rights regime of spouses.[37] Respectively, in England, the marriage does not have a legal effect on the property of spouses. Nevertheless, this circumstance can be equated with the regime of property separation, although when the marriage ends, the courts may guide with Domicile and Matrimonial Proceedings Act 1973.[38] According to Article 22 of this Act, the court has the right to distribute property acquired in any way during the marriage between the spouses, except for property received as gifts and inheritance.[39] In making such a distribution, the court must take into account the circumstances surrounding the spouses and, if necessary, the agreement between the spouses before and after marriage, so called marriage contract. Such agreements may be supported or rejected by the court fully or partially, however, in any case, the interests of marriage and children shall be taken into account, as it is stipulated in the article 24 of Domicile and Matrimonial Proceedings Act 1973.[40] In consideration of all the above-mentioned, it can be concluded that in England (as well as in Wales), the actual property regime is the property separation rule with potential legal separation. This regime shall be interpreted as a system where the matrimonial property remains

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33 The Civil Code of France, 1497 Article, <www.legifrance.gouv.fr> [06.09.2021].

34 Ibid, 1526 Article, <www.legifrance.gouv.fr> [06.09.2021].

35 *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 336-337.

36 Ibid, 915.

37 Ibid*,* 916; Married Woman's Property Act of 1882, <www.legislation.gov.uk> [06.09.2021].

38 Ibid, 918.

39 Matrimonial Causes Act, 22 Article, <www.legislation.gov.uk> [06.09.2021].

40 Matrimonial Causes Act of 1973, 24 Article, <www.legislation.gov.uk> [06.09.2021].

separated during the marriage, in terms of rights as well as obligations of spouses, for which the spouses remain the authority on property ownership, management and free disposal independently from each other.[41] This fact is confirmed by the section 37 of the Law of Property Act 1925, which stipulates that "A husband and wife shall, for all purposes of acquisition of any interest in property, shall be treated as two persons".[42] Respectively, this rule excludes any legal effect of the marriage against the property of spouses throughout the whole period when the marriage is valid.

4.4. Italian Family Property Law

Pursuant to the article 159 of the Civil Code of Italy, in the absence of the marriage contract, the property rights and obligations of spouses shall be regulated under the matrimonial property regime stipulated in the law.[43] Thus, the spouses have a possibility to choose the property regime freely, however, if they do not use such possibility, then the primary regime defined in the law is the matrimonial property regime, which is regulated by the article 177 of the Civil Code of Italy.[44] This regime shall be interpreted as the rule of limited common property which foresees different properties: 1. Individual property – each spouse owns individual property separately from each other, which consists of the property of strictly personal nature, e.g. property received as a gift, inherited subrogation and acquired via compensation of personal damage before the marriage or during the marriage. 2. Common property – this consists of all other properties acquired during the marriage (or could be acquired in future) and cannot be deemed as the ownership of only one of the spouses in compliance with the article 177 of the Civil Code of Italy.[45]

With regard to the rule of matrimonial property management and administration – article 180 of the Italian Civil Code stipulates that each spouse can exercise the management and disposal rights independently from each other, however, if this goes beyond the scopes of a daily activities, in this case, the above-referred rights shall be jointly exercised by both spouses or by the court decision in accordance with the article 181 of the Italian Civil Code.[46] Therefore, the authority of individual property management and disposal lies with each spouse independently from each other and the authority of matrimonial property management and disposal may be granted by the court only to one spouse, when the other spouse hinders and frustrates the implementation of these authorities.[47]

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41 *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 916.

42 Law of Property Act of 1925, 37 Article, <www.legislation.gov.uk> [06.09.2021].

43 The Civil Code of Italy, 159 Article, <www.jus.unitn.it> [06.09.2021].

44 *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 432.

45 Ibid*,* 433.

46 The Civil Code of Italy, 180-181, Articles, <www.jus.unitn.it> [06.09.2021].

47 *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 432.

Additionally, it is also possible that one of the spouses may claim separation of the common property, if the other spouse treats the property negligently or weakly.[48]

Article 215 of the Italian Civil Code also recognizes the property separation regime as the secondary rule defined by the law for termination of actual cohabitation of spouses. Besides, this rule is one of the optional property regimes.[49] Pursuant to the article 210 of the Italian Civil Code, the spouses have a right to agree about the property regime that will allow them make changes to the rule established in the law, however, in any case, this regime shall be subject to the restrictions stipulated under the article 210 of the Italian Civil Code.[50] This article forbids annulment of the management rules defined in the law and also recognition of the common property strictly as a personal property.[51] Any spouse can create a fund of property which will include immovable and movable properties for covering the family needs. Such fund may be subject to the special regime defined in the law, by which, the disposal of the fund property can be carried out only by mutual agreement/approval of spouses or by the court decision in cases where the interests of underage children are concerned.[52]

5. Conclusion

For the purposes of rightful application of the article 1160 of the Civil Code of Georgia, first of all, the court shall correctly understand the concept of the matrimonial property regime, which means assigning of the indefinitely equal right to both spouses regardless of their share in the properties under the common ownership. However, apart from the above-mentioned, on the basis of German Law, it is necessary to introduce the criterion of "covering the family needs" into the Georgian case law and on its basis, interpretation of the administration transaction referred to in the article 1160 of the Civil Code of Georgia in each particular case, for the purposes of identifying the will of the disposing spouse. Respectively, when the administration of property under the matrimonial property by the disposing spouse complies with the goal of "covering family needs", the transaction shall remain in force and therefore, this case, with its result, should be equated with the administration of the common property by mutual agreement of the spouses. It is of critical importance for the Georgian family law to identify what type of property regimes are defined by the legal systems of other countries. Interestingly, the property regimes defined in the article 1158 and paragraph 3 of the article 1176 are also familiar to the legal systems of Germany, France, UK and Italy, provided herein. These systems shall be studied in more detail. However, the rule of community of accrued gain defined by the primary legal regime in the German law is completely a new and unknown legal category for the Georgian family law; it shall become the subject of scientific research in academic circles along with the property regimes that Georgian lawyers are already acquainted with.

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48 Ibid.

49 The Civil Code of Italy, 215 Article, <www.jus.unitn.it> [06.09.2021].

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51 *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 433.

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Protecting a Minor's Privacy from Media Coverage of the Crime

The article addresses the issue of protecting the privacy of a minor in the coverage of crime by the media. In particular, it discusses the guarantees of protection of the privacy of minor in conflict with the law, minor witness and minor victim in the context of freedom of expression of the media.

Protecting the privacy of a minor is an essential element of juvenile justice. All International or European instruments prohibit the disclosure of the identity of a minor, including the media. Similarly, the Juvenile Justice Code of Georgia considers the protection of the privacy of minor involved in the juvenile justice process to be the main principle, which is crucial for achieving the goals of juvenile justice.

Whereas freedom of expression in the media comes into conflict with the right to privacy of a minor, the article discusses the balancing process of these competing rights. The case-law of the European Court of Human Rights, the courts of the United Kingdom, and the United States is discussed in this regard. Based on the comparative analysis, both international and national standards for media coverage of juvenile issues are presented; In addition, the article analyzes the decisions made by the Council of the Georgian Charter of Journalistic Ethics on the facts of violation of privacy of a minor by media representatives.

Keywords: *Juvenile justice, protection of juvenile privacy, freedom of expression of the media, competing rights, coverage of crime, minor in conflict with the law, minor witness, minor victim.*

1. Introduction

With the adoption of the Juvenile Justice Code of Georgia (hereinafter – the JJCG) in 2015, an important guarantee was created in terms of the right of the privacy of juveniles. One of the main principles is to protect the privacy of minors at all stages of the proceedings. Article 13 (2) of the JJCG prohibits the disclosure and publication of a minor's personal data,[1] which implies not only the obligation of the state not to allow the dissemination of a minor's identity, but also the responsibility of the media not to violate the privacy of a minor during reporting.[2]

In today's reality, the subject of the media's increasing interest is the crimes in which children are involved.[3] Given the urgency of the issue, the purpose of this paper is to address the very aspects

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1 Law of Georgia "Juvenile Justice Code", Parliament of Georgia, № 3708-IIS, 12/06/2015.

2 *Shalikashvili M., Mikanadze G.,* Juvenile Justice (textbook), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 86 (in Georgian).

3 *Jorbenadze S., Bakhtadze U., Macharadze Z.,* Media Law, *Jorbenadze S. (ed.)*, Tbilisi, 2014, 195-196 (in Georgian).

of the protection of a minor's privacy that are related to the coverage of juvenile delinquency by the media; In particular, to what extent does the existing legislation comply with international and European standards; How to prepare television reports on minors in such a way as to protect, on the one hand, the minor's right to privacy and, on the other hand, freedom of expression; and what mechanisms are in place for a journalist to respond to violations of child coverage standards?

2. The Role of the Media in Juvenile Justice

Freedom of the media is a necessary condition for the existence of a democratic state.[4] "The media is one of the main source of free access to information by society and the most effective forum for disseminating information, exchanging ideas and sharing."[5] The public mostly exercises control over the government through the press.[6] However, public confidence in the state is determined by the evaluation of the administration of justice. The role of the media acquires the main purpose of having the "power" to provide the public with adequate information on the administration of justice.[7]

Media involvement is crucial in the process of child protection, that is why comprehensive reform of juvenile justice requires not only the adoption of relevant regulations and laws, but also ensuring of other interrelated components and compliance with the international legal framework.[8] The UN "Riyadh Guidelines" view the media as a key player in the prevention of juvenile delinquency. The mass media should be aware of its extensive social role and responsibility.[9] Following the adoption of the Convention on the Rights of the Child[10], the Committee on the Rights of the Child stressed the positive role of the media in juvenile justice, while also highlighting the need for respect for the privacy of minors in media coverage.[11] The "legal culture" of journalists is as important in covering information about trials as judicial staff is required to be competent and accountable in the law field. Media representatives need to draw the line between "inanimate entertainment" and "true information,"[12] especially when it comes to juvenile involvement in criminal proceedings.

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4 *Jorbenadze S.,* Social Media Law, *Dzlierishvili Z. (ed.),* Tbilisi, 2019, 102 (in Georgian).

5 Decision № 1/5 /675,681 of 30 September 2016 of the Constitutional Court of Georgia in the case: "Rustavi 2 Broadcasting Company Ltd and Georgia TV Ltd v. Parliament of Georgia", II-71.

6 *Kublashvili K.,* Fundamental Human Rights and Freedoms, 4th ed., Tbilisi, 2017, 249 (in Georgian).

7 *Schwartz H.,* How the Free Press Can Help Justice, Almanac Magazine, № 16, Georgian Young Lawyers Association, Tbilisi, 2001, 25 (in Georgian). See: *Jorbenadze S., Bakhtadze U., Macharadze Z.,* Media Law, *Jorbenadze S. (ed.),* Tbilisi, 2014, 58 (in Georgian).

8 United Nations Office on Drugs and Crime, Justice in Matters Involving Children in Conflict with the Law, Model Law on Juvenile Justice and Related Commentary, New York, 2013, VIII.

9 United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), UN General Assembly, A/RES/45/112, 4 December 1990, §44.

10 Convention on the Rights of the Child, UN General Assembly, Resolution 44/25, 1989.

11 *Sahovic N. V., Doek I. E., Zermatten J.,* Child Rights in International Law, Child Rights in Brief and Context: All About Children's Rights, *Tugushi R., Aleksidze T. (transl.), Aleksidze L., Khutsishvili St. (eds.),* Tbilisi, 2015, 151 (in Georgian).

12 *Alvart H.,* The Principle of Publicity According to the German Criminal Procedure, in: The Impact of European and International Law on Georgian Criminal Procedure Law, *Tumanishvili G., Jishkariani B., Schramm E. (eds.),* Tbilisi, 2019, 437-438 (in Georgian).

3. Freedom of Expression and the Media

Freedom of expression enshrined in the Constitution of Georgia and a number of international acts, is manifested in several aspects. Article 17 of the Constitution of Georgia protects the rights to freedom of thought, information, mass media and the Internet. Freedom of expression is protected by Article 10 of the European Convention on Human Rights, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[13] Article 3 of the Act of Georgia on Freedom of Speech and Expression provides for the right to seek, receive, create, store, process and disseminate any form of information and ideas.[14] Freedom of expression can be understood, on the one hand, as an individual right when the media has the right to disseminate information and ideas, [15] and on the other hand, as a common public right – to receive this information, otherwise the press will not function as a "public watchdog".[16] Freedom of expression directly related to journalistic activities can be considered in the context of freedom of media, which implies protection not only of the press, but also of electronic media.[17] Freedom of the press protects the process of founding and operating all kinds of news agencies, publishing offices and other similar institutions that process and disseminate information.[18] As for electronic media, it is considered to create and spread all kinds of images and audio products by means of electromagnetic waves.[19]

4. The Right to Privacy of a Minor v. Freedom of Media

Media representatives do not have unrestricted rights to cover issues of public interest, they also have "responsibilities", which means the journalist's good faith to provide the public with accurate and reliable information in accordance with journalistic ethics.[20] According to the European Court, despite the essential role of the press in a democratic society, it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the proper administration of justice, its duty is

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13 Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1950, Art. 10(1).

14 Law of Georgia on Freedom of Speech and Expression, Parliament of Georgia, 24/06/2004.

15 *Gotsiridze E.,* Freedom of Expression in the Context of Fair Balancing of Conflict Values, University Press, Tbilisi, 2007, 7 (in Georgian).

16 Von Hannover v. Germany, [07.02.2012] ECHR, App. no. 40660/08 and 60641/08; 41. Bladet Tromsø and Stensaas v. Norway, [1999] ECHR, App. no. 21980/93; 51. Petrenco v. Moldova, [30.03.2010], ECHR, App. no. 20928/05, §55.

17 *Jorbenadze S., Bakhtadze U., Macharadze Z.,* Media Law, *Jorbenadze S. (ed.)*, Tbilisi, 2014, 84 (in Georgian); *Kublashvili K.,* Fundamental Human Rights and Freedoms, 4th ed., Tbilisi, 2017, 248 (in Georgian).

18 *Kublashvili K.,* Fundamental Human Rights and Freedoms, 4th ed., Tbilisi, 2017, 250-251 (in Georgian).

19 Ibid, 257.

20 Office of the Personal Data Protection Inspector, Guidelines for the Protection of Privacy in the Media, Council of Europe/EU Joint Project — Partnership for Good Governance, 7, <https://rm.coe.int/guidelines-safeguarding-privacy-in-media-coverage-georgian/1680760838> [12.07.2021].

nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest.[21]

Freedom of expression in the media often comes into conflict with other interests. Achieving a fair balance among these competing interests is a problematic issue.[22] One of the grounds for the restriction of freedom of expression can be considered the right to privacy of a minor. Maintaining a legal balance between these conflicting interests is doubly important since the case concerns a minor.[23] On the one hand, the public has a right to know about the crime, the investigation and the ongoing trial, [24] and on the other hand, it is of valuable interest to protect the juvenile's right to privacy. In the case of Handyside v. The United Kingdom,[25] the European Court found that the restriction of freedom of expression to protect the interests of minors was justified.[26]

Under both Article 8 and Article 10 of the European Convention, Member States shall have the discretion to determine whether interference with the rights protected by these Articles is necessary and within what limits. However, this scope of free assessment is considered under the supervision of the European Court, which includes both the legislation and the decisions taken for its implementation, including the decisions made by the courts.[27]

In the case of Egeland and Hanseid v. Norway,[28] alleging a breach of the ban on taking photographs without the convict's consent after the rendering a judgement, the European Court clarified that as there is no consensus in Europe on the prohibition of photographing convicts, the competent authorities of the respondent State should be given a wide margin of appreciation in balancing conflicting interests,[29] and the European Court reviews national court decisions in terms of reasonableness and arbitrariness.

It is noteworthy that the Committee of Ministers of Council of Europe adopted reccomendation on the Provision of Information through the Media in Relation to Criminal Proceedings which considers the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the

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21 Jersild v. Denmark, [23.09.1999] ECHR, App. no. 15890/89, § 31; Bladet Tromsø and Stensaas v. Norway, [1999] ECHR, App. no. 21980/93, § 59; Flinkkilä and Others v. Finland, [06.04.2010], ECHR, App. no. 25576/04, §73; Krone Verlag GmbH and Krone Multimedia GmbH v. Austria, [17.02.2012], ECHR, App. no. 33497/07, §48.

22 *Bichia M.,* Protection of Private Life under Georgian Civil Law, University Press, Tbilisi, 2012, 122 (in Georgian).

23 *Khidesheli S.,* Protection of Children's Rights in the Media – an Important Aspect of the Formation of a Democratic State, Protection of Human Rights and Democratic Transformation of the State, in Collection of Articles: *Korkelia K. (ed.),* Tbilisi, 2020, 304 (in Georgian).

24 Office of the Personal Data Protection Inspector, Guidelines for the Protection of Privacy in the Media, Council of Europe/EU Joint Project – Partnership for Good Governance, 20, <https://rm.coe.int/guidelines-safeguarding-privacy-in-media-coverage-georgian/1680760838> [12.07.2021].

25 Handyside v. The United Kingdom, [07.12.1976], ECHR, App. no. 5493/72.

26 *Gotsiridze E.,* Freedom of Expression in the Context of Fair Balancing of Conflict Values, University Press, Tbilisi, 2007, 84 (in Georgian).

27 Von Hannover v. Germany, [07.02.2012] ECHR, App. no. 40660/08 and 60641/08, §104-105.

28 Egeland and Hanseid v. Norway, [16.04.2009], ECHR, App. no. 34438/04, § 61 and §63.

29 Ibid, §54-55.

supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention. Principle 9 of the Recommendation obliges the media to protect the right to privacy of minors during criminal proceedings. In all cases, special attention should be paid to the harmful effects that the disclosure of information may have on him.[30]

Where the right to freedom of expression is being balanced against the right to respect for private life, the following criterias are relevant: a) the contribution made by photos or articles in the press to a debate of general interest;[31] b) How well known is the person concerned and what is the subject of the report? – whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures;[32] c) Prior conduct of the person concerned – in reviewing this criterion, the conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into account.[33] Though European Court does not equate the situation of a convict with the situation of a person who voluntarily exposes himself or herself by virtue of his or her role as a politician,[34] or as a public figure[35] or as a participant in a public debate on a matter of public interest.[36] Accordingly, the fact that convict had cooperated with the press on previous occasions could not serve as an argument for depriving her of privacy protection;[37]d) Content, form and consequences of the publication – The way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report may also be factors to be taken into consideration;[38] e) Circumstances in which the photos were taken – In that connection regard must be had to whether the person photographed gave their consent to the taking of the photos and whether there was a severe result.[39]

In the case of Krone Verlag GmbH and Krone Multimedia GmbH v. Austria, [40] concerning a 10-year-old girl victim of a sexual abuse whose identity and photo were published by two publishers with the consent of her biological mother, the European Court explained: That the applicant companies could inform the public in detail so as not to reveal the identity of the affected juvenile, as this did not

30 Recommendation Rec(2003)13 of the Committee of Ministers to Member States on the Provision of Information through the Media in Relation to Criminal Proceedings, 10/08/2003.

31 Leempoel and S.A. ED. Cine Revue v. Belgium, [09.11.2006], ECHR, App. no. 64772/01, §68; Standard Verlgas Gmbh v. Austria (No. 2), [2007], ECHR, App. no. 21277/05, §46.

32 Petrenco v. Moldova, [30.03.2010], ECHR, App. no. 20928/05, §55; Von Hannover v. Germany, [07.02.2012] ECHR, App. no. 40660/08 and 60641/08, §110.

33 Handyside v. The United Kingdom, [07.12.1976], ECHR, App. no. 5493/72, §52-53; Sapan v. Turkey, [08.07.2010], ECHR, App. no. 44102/04, §34; Von Hannover v. Germany, [07.02.2012] ECHR, App. no. 40660/08 and 60641/08, §111.

34 Lingens v. Austria, [08.07.1986], ECHR, App. no. 9815/82, § 42; News Verlags GmbH & Co.KG v. Austria, [11.01.2000], ECHR, App. no. 31457/96, § 56.

35 Fressoz and Roire v. France [GC], [21.01.1999], ECHR, App. no. 29183/95, § 50; Tønsbergs Blad A.S. and Haukom v. Norway, ECHR, no. 510/04, 1 March 2007, §87.

36 Nilsen and Johnsen v. Norway, [25.11.1999], ECHR, App. no. 23118/93, §52.

37 Egeland and Hanseid v. Norway, [16.04.2009], ECHR, App. no. 34438/04, § 61 and §63.

38 Von Hannover v. Germany, [07.02.2012] ECHR, App. no. 40660/08 and 60641/08, §112.

39 Ibid, §113.

40 Krone Verlag GmbH and Krone Multimedia GmbH v. Austria, [17.01.2012], ECHR, App. no. 33497/07.

serve any specific purpose, such as warning and protecting the public. However, in the present case, the minor victim was not a public figure, nor does the Court consider that she has entered the public scene by becoming the victim of a criminal offence which attracted considerable public attention. Accordingly, the disclosure of her identity was not essential to understanding the circumstances of the case.[41] It should be noted, however, that the European Court emphasized the age of the victim and pointed to the need to protect her right to privacy to a particularly high standard, for which the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which obliges the Contracting States "to take the necessary measures to protect the rights of privacy of the minor victim, by preventing the public dissemination of any information that could lead to her identification.[42]

US courts use a variety of tests to balance media freedom and the juvenile's privacy, in particular, in cases where the court decides whether the media should be allowed to attend a trial involving a minor or whether the media should have access to juvenile records.

1) Experience and Logic Test – In Kentucky Press Association v. Commonwealth of Kentucky[43], the Kentucky Press Association claimed that various provisions of the Kentucky's Uniform Juvenile Code violated the First Amendment of the United States Constitution and the Kentucky Constitution's right of access. The Code excludes the general public from juvenile court proceedings unless the judge finds that the party seeking access has "a direct interest in the case or in the work of the court". The District Court for the Eastern District of Kentucky explained that the U.S. Supreme Court adopted the experience and logic test in recognizing the First Amendment right of access for criminal trials.[44] The first part of the test examines whether the particular proceeding has been historically open to the press and general public, and the second art of the test analysis whether public access would play a "'significant positive role in the functioning of the particular process in question". Based on that test, the Kentucky District Court clarified that even if the first prong of the test could be met, it is doubtful whether the second prong could be satisfied since public access would not play a "significant positive role" in the functioning of juvenile proceedings but instead "frustrate the purpose of juvenile court" by "depriving the juvenile of a fair trial" and diminishing the "prospect of rehabilitation."[45]

2) Balancing test under common law – In Stone v. University of Maryland Medical System Corporation,[46] the District Court for the District of Maryland considered several factors when deciding

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41 Ibid, §56-57.

42 Ibid, §58.

43 Kentucky Press Association v. Commonwealth of Kentucky, 355 F. Supp. 2d 853, 2005.

44 This test was taken and first used in the case of Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, U.S. Supreme Court, 1980, <https://supreme.justia.com/cases/federal/us/448/555/> [12.07.2021].

45 Kentucky Press Association v. Commonwealth of Kentucky, 2005, 864. In: *Nolasco C., Vaughn M. S., Spaic A.,* Media Access to Juvenile Proceedings: Balancing the Tightrope Between Privacy Rights and Freedom of the Press, International Journal of Law Crime and Justice, Vol. 43(4), 2015, 12, <https://www.researchgate.net/publication/273889953_Media_access_to_juvenile_proceedings_Balancing_the_tightrope_between_privacy_rights_and_freedom_of_the_press> [12.07.2021].

46 Stone v. University, Md. Medical System Corp, 855 F.2d 178, 4th Cir., 1988.

whether to grant media access to court records pending the delinquency proceedings. Factors considered by the court include whether the records are "sought for improper purposes," such as "promoting public scandals" or "unfairly gaining a business advantage," whether release would "enhance the public's understanding" of an "important historical event," and whether the public has previous access to the information contained in the records. The District Court noted that open proceedings may "encourage an offender to commit further acts of delinquency, lose employment opportunities, or otherwise suffer unnecessarily for youthful transgressions". In addition, confidentiality promotes rehabilitative goals. The court conceded that the publisher's request for access does not involve an "improper purpose", such as to promote public scandal or gain an unfair business advantage. The court in this case, allowed the publisher access to a redacted copy of the complaint that removes all identifying information of the plaintiffs and substitutes their initials.[47]

3) Strict scrutiny test under the Constitution – the juvenile court may restrict public access if, after hearing evidence and argument on the issue, the court finds that there exists a "reasonable and substantial basis" to believe that public access could "harm the child" or "endanger the fairness of the adjudication," the "potential for harm outweighs the benefits of public access," and there are "no reasonable alternatives to closure".[48]

4) Clear and present danger rule – The case of Arkansas Democrat-Gazette v. Zimmerman[49] involved a 12-year-old juvenile who was charged with attempted capital murder of a police officer in juvenile court. Prior to the hearings, the media published identifying information and details of the case. At the first open hearing in juvenile court, the judge orally issued a gag order that prohibited the press from publishing or disseminating identifying information and pictures of the victim and his family, and the juvenile defendant and his family. Several media publishers in Arkansas petitioned the Supreme Court of Arkansas for a writ of mandamus,[50] directing the respondent juvenile judge to revoke her gag order on the press. The complaint was upheld by the Supreme Court and clarified that the gag order constituted a prior restraint of the media in violation of the First Amendment to the United States Constitution and the Arkansas Constitution. The court pointed out existing jurisprudence declaring unconstitutional any prior restraint on the press unless "accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech. Thus, any prior restraint on the freedom of the press is "subject to the closest scrutiny" and will be upheld only upon a

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47 *Nolasco C., Vaughn M. S., Spaic A.,* Media Access to Juvenile Proceedings: Balancing the Tightrope Between Privacy Rights and Freedom of the Press, International Journal of Law Crime and Justice, Vol. 43(4), 2015, 13, <https://www.researchgate.net/publication/273889953_Media_access_to_juvenile_proceedings_Balancing_the_tightrope_between_privacy_rights_and_freedom_of_the_press> [12.07.2021].

48 State Ex Rel. Plain Dealer Publishing Company v. Floyd, 2006; State Ex Rel. Plain Dealer Publishing Co. v. Geauga Cty. Court of Common Pleas, Juvenile Div., 2000. In*: Nolasco C., Vaughn M. S., Spaic A.,* Media Access to Juvenile Proceedings: Balancing the Tightrope between Privacy Rights and Freedom of the Press, International Journal of Law Crime and Justice, Vol. 43(4), 2015, 16.

49 Arkansas Democrat-Gazette v. Zimmerman, Supreme Court of Arkansas, 341 Ark. 525, 19 S.W.3d 1, 2000.

50 Lat. "mandamus" ― a judicial writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty.

"clear showing that an exercise of this right presents a clear and imminent threat to the fair administration of justice". Since the trial was initially public, the Supreme Court held that there was no state interest in adjudicating the restriction.[51]

Thus, a judge in the United States has the discretion to strike a balance between the right to privacy of a minor and the freedom of the media in each case, in accordance with the case law of the United States Supreme Court. This is considered in accordance with the practice of the US Supreme Court.

5. Standards for Media Coverage of Juvenile Issues

Media representatives should be especially careful when covering information about minors, as they should be protected from age-related vulnerabilities.[52] According to international standards, national law should prohibit the media from disseminating or broadcasting any information that could identify a minor. This includes banning the publishing of photos or other images of the child or his or her parents, naming the child and the parents, the school in which the child studies, and the neighborhood in which the child lives. Accordingly, it is essential that national law on juvenile information be kept confidential and accessible only to persons directly involved in the investigative and judicial proceedings.[53]

A number of international and European instruments set the standard for media coverage of information about juveniles, juvenile witnesses and victims in conflict with the law. "Beijing Rules" emphasizes the protection of minors from the publication of information in the media.[54] Guidelines on child-friendly justice[55] outline possible measures to ensure that the media protects the privacy of minors. Other possible ways to protect the privacy in the media are, inter alia, granting anonymity or a pseudonym, using screens or disguising voices, deletion of names and other elements that can lead to the identification of a child from all documents, prohibiting any form of recording (photo, audio, video), etc. However, the guidelines provide for an exception to this rule, when the child may benefit if the case is revealed or even publicised widely, for example, where a child has been abducted.[56] According to the Guidelines and Principles for Reporting on Issues Involving Children adopted by the International Federation of Journalists, media representatives are required to protect children from

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51 *Nolasco C., Vaughn M. S., Spaic A.,* Media access to juvenile proceedings: Balancing the tightrope between privacy rights and freedom of the press, International Journal of Law Crime and Justice, Vol. 43(4), 2015, 17-18.

52 Guidelines for the Protection of Privacy in the Media, Council of Europe/EU Joint Project ― Partnership for Good Governance, 20.

53 *Hamilton C.,* Guidance for Legislative Reform on Juvenile Justice, UNICEF, Tbilisi, 2015, 89 (in Georgian).

54 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), General Assembly, Resolution 40/33, 29 November 1985, art. 8, commentary.

55 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 2010.

56 Ibid, IV, 59-60.

visual identification when reporting.[57] A similar approach is taken by the ethical reporting guidelines adopted by UNICEF under this document, which require the media to change the name of a juvenile in conflict with the law and to cover up its visuals in any case.[58]

These standards have been adequately reflected in Georgian legislation. Numerous legislative or sub-legislative normative acts protect the privacy of a minor when the media covers information. The "Code of Conduct for Broadcasters" adopted by the resolution of the Georgian National Communications Commission obliges the broadcaster to protect the private life of a minor. The minor does not lose the right to privacy due to parental or school events. In addition, the Code imperatively sets out the obligation of the broadcaster not to disclose the identities of juvenile suspects, accused persons, defendants, convicts, witnesses and victims.[59] It should be noted that the Code of Ethics for Broadcasters, unlike for adults, sets a high standard of privacy when covering information about a minor in conflict with the law and does not allow the disclosure of their identity in any case. While an adult commits a crime, the broadcaster has the right to identify him / her when his / her name is known to the public or the case is in the public interest.[60]

In addition to state regulations, the issue of media self-regulation is crucial to protect a minor's right to privacy, as codes of conduct play a key role in promoting a balanced and ethical practice in journalism.[61] An important tool in this regard is the principles of the Georgian Charter of Journalistic Ethics. The 8th principle strengthens the journalist's obligation to "protect the rights of the child; to give priority to the interests of the child in their professional activities, do not prepare and do not publish articles or reports about children that will be harmful to them. A journalist should not be interviewed or photographed under the age of 16 without the consent of a parent or guardian on matters relating to his or her or any other adolescent's well-being."[62] With regard to this article, the Charter clarifies that although this is the most controversial article, an agreement has been reached according to which the identification of a child under the age of 18 is not allowed regardless of whether the child is a perpetrator, victim or witness. [63] Principle 10 of the same Charter obliges a journalist to respect a person's private life and not to invade his or her private life unless there is a special public interest.[64]

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57 International Federation of Journalists: Guidelines and Principles for Reporting on Issues Involving Children, Seoul, June 11-15, 2001, <https://accountablejournalism.org/ethics-codes/guidelines-and-principles-for-reporting-on-issues-involving-children> [12.07.2021].

58 UNICEF, Ethical reporting guidelines, Key principles for responsible reporting on children and young people, Principle III, <https://www.unicef.org/media/reporting-guidelines> [12.07.2021].

59 Resolution of the Georgian National Communications Commission № 2 on the Approval of the Code of Conduct for Broadcasters, March 12, 2009, Art. 44, part. 3.

60 Ibid, Art. 49, part. 3.

61 Guidelines for the Protection of Privacy in the Media, Council of Europe/EU Joint Project ― Partnership for Good Governance, 35 (in Georgian).

62 Principles of the Charter of Journalistic Ethics, <https://www.qartia.ge/ka/mthavari-gverdis-aikonebi/article/30513-preambula> [12.07.2021] (in Georgian).

63 Definitions of Principles of the Charter of Journalistic Ethics, <https://www.qartia.ge/ka/mthavari-gverdis-aikonebi/article/30508-qartiis-principebis-ganmartebebi> [12.07.2021] (in Georgian).

64 Principles of the Charter of Journalistic Ethics, <https://www.qartia.ge/ka/mthavari-gverdis-aikonebi/article/30513-preambula> [12.07.2021] (in Georgian).

In addition to the above general principles, the Georgian Charter of Journalistic Ethics has approved guidelines for the coverage of child issues.[65] The introductory part of this document emphasizes the responsibility of the media to protect the interests of the child, not to promote the violation of their rights, stigmatize and reinforce stereotypes. The protection of a minor's privacy is guaranteed by the obligation of the journalist to cover it while covering the information.

The protection of a minor's privacy is guaranteed by the obligation of the journalist to cover it while reporting. However, the guidelines state that covering a child's face is not enough to prevent him or her from being identified, it can often be identified by a description of the environment, or by identifying other respondents. Accordingly, when preparing a report, the journalist is obliged to take this into account and not to make both direct and indirect identification. Direct identification refers to when a child is seen visuall, and indirect identification – when the child can be identified by other details (showing parents, neighborhood, address).[66]

To what extent state regulations interfere with media freedom are interesting approaches in this regard in England and Wales. During the court hearing, the juvenile is protected from disclosing his / her identity. The media is prohibited from publishing:

Consider the extent to which state regulations interfere with media freedom. England and Wales have interesting approaches in this regard. During the trial, the juvenile is protected from disclosing his / her identity. The media is prohibited from publishing: a) any report that reveals the child's name, address or school or contains any details that could lead to the identification of any child or young person in the proceedings; b) a picture of any child involved in the proceedings.[67] The court may lift the ban on publishing or broadcasting the name or picture of a child under a limited number of circumstances which include: 1. Publishing the identity of the child is necessary to avoid injustice to the child him or herself; 2. The child is unlawfully at large and publishing his or her identity is necessary for the purpose of apprehending the child; 3. The child is charged or convicted of a violent or sexual offence, or an offence punishable in the case of an adult with imprisonment for 14 years or more.[68] A widely-known case in this regard is the case heard by the Supreme Court of the United Kingdom in 2015. According to factual circumstances, in 2010 two newspapers published a photo of a 14-year-old minor suspected of rioting. The majority of the trial judges found no violation of the juvenile's right to privacy, as there was no reasonable expectation of privacy and the publication of a juvenile photo was intended only to prevent and detect crime, thus balancing the interests of the juvenile and the public.[69]

Another high-profile case in the UK is the murder of 2-year-old James Bulger by 10-year-olds, which was unprecedented in that they were tried in an adult court instead of a juvenile court. The

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65 The Council of Georgian Charter of Journalistic Ethics, Coverage of Children's Issues (Guidelines), Tbilisi, 2016, <https://www.qartia.ge/media/1000907/2017/07/24/17a99f0b5c1f748aabc321d3d023bf1e.pdf> [12.07.2021] (in Georgian).

66 Ibid, 5-6.

67 Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 Member States of the European Union, European Union, Luxemburg, 2014, 40.

68 Ibid.

69 In Re JR38 [2015], UKSC 42, AC 1131.

media did everything to portray the children as "evil monsters". And after the court handed down a guilty verdict, an article appeared in the Daily Star with the headline: "How do you feel now, little idiots?"[70] The convicts later filed a lawsuit in court and asked for permanent anonymity, which was upheld.[71] In the judgement, the court expressed concern about the danger posed to the convicts by disclosing their identities. The Court clarified that 1) the plaintiffs were uniquely known and posed a serious risk of physical harm; 2) the rights of the applicants were protected under Article 2 of the Convention; 3) *Contra mundum*[72] injunction restricted the publication of the identity of the plaintiffs and their location.[73] This judgement gives the grounds to say that the protection of the right to privacy of a minor in conflict with the law has branches that also extend beyond their childhood age.[74]

There are no clear standards and policies for the elimination of children's personal data in the juvenile justice system in the United States. Information about children in the juvenile justice system is published in some US states. In Colombia, law enforcement agencies regularly publish photos of detained children in the media, thus violating their right to privacy and the presumption of innocence. The Inter-American Commission on Human Rights has expressed concern over the stigmatization of children and adolescents by the media in Mexico, where journalists have publicly accused juveniles of committing various crimes for which they have never been convicted. This violates the principle of the presumption of innocence.[75]

6. Facts of Violation of the Right to Privacy of a Minor by the Media

Guidelines on child-friendly justice adopted by the Committee of Ministers of the Council of Europe in 2010 reiterates that monitoring on either legally binding or professional codes of conduct for the press is essential, given the fact that any damage made after publication of names and/or photos is often irreparable.[76] General comment No.10 is more strict related to this issue. According to the comment, journalists who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and when necessary (e.g. in case of recidivism) with penal law sanctions.[77]

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70 *Jorbenadze S., Bakhtadze U., Macharadze Z.,* Media Law, *Jorbenadze S. (ed.),* Tbilisi, 2014, 222 (in Georgian).

71 Venables & Thompson v. News Group Newspapers Ltd and others, High Court of UK, Family Division, EWHC 32, 2001.

72 "*Contra Mundum*" (Latin) — A *contra mundum* injunction is a type of injunction that is "enforceable worldwide".

73 Venables & Thompson v. News Group Newspapers Ltd and others, High Court of UK, Family Division, EWHC 32, 2001, <https://www.ucpi.org.uk/wp-content/uploads/2017/11/Venables-v-News-Group-Newspapers-2001-Fam-430.pdf> [12.07.2021].

74 *Van Bueren G.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 40th Child Criminal Justice, Leiden, Boston, 2006, 24.

75 Inter-American Commission on Human Rights, Juvenile Justice and Human Rights in the Americas, 2011, 46.

76 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 2010, IV.

77 General comment No. 10: Children's Rights in Juvenile Justice, UN Committee on the Rights of the Child (CRC), 2007, §64.

The Georgian Charter of Journalistic Ethics has been functioning in Georgia since 2009. One of the main missions of the Charter is to discuss the facts of violation of professional standards by journalists.[78] In 2017, the Georgian Charter of Journalistic Ethics conducted media monitoring on coverage of children's issues.[79] The main purpose of the monitoring was to study the materials published on children's issues in electronic, online and print media, to analyze compliance with children's rights, ethical norms and in-depth coverage of professional standards. The report says that compared to previous years, the number of cases of identifying juveniles accused of committing crimes has drastically decreased and only a few cases have been revealed. An additional threat to the identification of delinquents is the user's access to the online media comment field, the editors have to spend more resources to control these comments or have no control over it at all.[80]

As a result of media monitoring, a case of identification of a minor was revealed. In particular, in the case of the murder that took place on Khorava Street on December 1, one of the accused juveniles was identified by several media broadcasters. At the same time, the footage was spread on the social network in the form of a photo and caused a great deal of aggression by the society, they demanded in the comments that he be burned alive and tried in a lynching manner.[81] Nika Gurin addressed the Council of the Charter of Journalistic Ethics of Georgia on the fact of the mentioned violation. He considered that on December 4, 2017, the Adjara Public Broadcaster's news program "Mtavari" reported on the detention of a juvenile wanted for the murder on Khorava Street and in which the accused juvenile was identified, violating the 9th principle of Journalistic Charter. According to this principle, when covering a crime, the journalist should be guided by the best interests of the juvenile and avoid identifying the juvenile accused of the crime. A mediation agreement was signed between the parties in this case. Adjara TV apologized and said that "the identifying footage did not appear purposefully in the report, and the mistake was caused by negligence ... The Facebook live of the programme has been removed from the Internet. The video posted on the broadcaster's website has been deleted. The journalist violated the principle of protection of minors."[82]

It should be noted that the report emphasizes the obligation of media representatives not to allow the identification of a minor unless there is a public interest. "Covering a minor is necessary only when the identification may harm his best interests. It is the journalist's responsibility to understand whether the the child's appearance will cause him any problems."[83]

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78 Georgian Charter of Journalistic Ethics, <https://www.qartia.ge/ka/qartia> [12.07.2021] (in Georgian).

79 The Georgian Charter of Journalistic Ethics, Media Monitoring Report on Children's Coverage, April 1 – December 1, 2017, <https://www.qartia.ge/media/1000907/2017/12/26/9fdd88608fdf1dcc781c434605dfa9e4.pdf> [12.07.2021] (in Georgian).

80 Ibid, 6.

81 Ibid, 12.

82 Mediation Case between Nika Gurin and Adjara Television, Minutes of the Meeting of the Georgian Charter of Journalistic Ethics N2017-6, 06.12.2017, <https://www.qartia.ge/ka/gadatsyvetilebebis-dzebna/article/41019-nika-gurinsa-da-atcaris-televizias-shoris-mediacia-shedga> [12.07.2021] (in Georgian).

83 The Georgian Charter of Journalistic Ethics, Media Monitoring Report on Children's Coverage, April 1 – December 1, 2017, 12, <https://www.qartia.ge/media/1000907/2017/12/26/9fdd88608fdf1dcc781c434605dfa9e4.pdf> [12.07.2021] (in Georgian).

No media monitoring report on child rights protection has been posted on the web-page of the Journalistic Charter since 2017. However, the cases reviewed by the Charter Council show that the right to privacy of a minor is still violated while covering the information. A clear example of this is the case reviewed by the Council of Journalistic Charter in 2019, which concerned the violation of the right to privacy of a 16-year-old girl in conflict with the law by the media. The applicant organization "Partnership for Human Rights" disputed the story aired on Maestro TV on May 22, 2019, titled "A 16-year-old mother strangled her 7-month-old sleeping baby and ran away from home with another man." The story was about the murder of a 7-month-old baby by the juvenile mother, who was arrested on murder charge. The applicant considered that the first, 7th, 8th and 10th principles of the Charter had been violated. In this case, the Council found a violation of the Charter in relation to Principles I, 8 and 10 and the issue of protection of the right to privacy of a minor in conflict with the law. The Council explained that "since the story concerned a juvenile and the invasion of her privacy was unjustified and information about the juvenile's alleged sexual relations was made public, there was a violation of Article 8 of the Charter: "Journalists are liable to protect children's rights; in his/her professional activity, given the highest priority to children's interests, neither can journalists prepare nor publish articles or reports regarding children that may be harmful to them. Journalist must not interview, as well as photograph, a youth under the age of 16 on issues related to the welfare of the given or any other youth without the consent of the parents or the guardian."[84]

The Council of Journalistic Charter has reviewed a number of applications related to this case. In the case of PHR v. Resonancedaily and kvira +, the Board found a violation of Principles 8 and 10 of the Journalistic Charter, as the name of the juvenile in conflict with the law was disclosed in the disputed materials. The council explains: "The journalist has a special responsibility to spread the facts about the juvenile. The media should ensure that materials on the juvenile are prepared in a way that does not create the likelihood that the juvenile will develop a negative emotional state. Also, according to the Charter Council's Guidelines for the Coverage of Children, "In the event of any form of violence, it is not permissible to identify an adult, either directly or indirectly, whether the child is a perpetrator, victim or witness." As for the criminal coverage, iIt is inadmissible to identify juveniles involved in criminal histories, victims, accused and convicted and /or eyewitnesses."[85]

It should be noted that the identification of a juvenile in conflict with the law is excluded by the decisions of the Council of Journalistic Charter, although when it comes to juvenile witnesses, in this case it discusses whether the juvenile's interests outweigh the public interest. In the case of the

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84 Decision of the Council of the Georgian Charter of Journalistic Ethics on Case № 288 – Partnership for Human Rights against Giorgi Khukhia, May 29, 2019, <https://www.qartia.ge/ka/gadatsyvetilebebis-dzebna/article/75707-gadatsyvetileba-saqmeze-phr-i-giorgi-khukhias-tsinaaghmdeg> [12.07.2021].

85 Decision of the Council of the Georgian Charter of Journalistic Ethics on Case № 287 – Partnership for Human Rights vs. unidentified journalists of Resonancedaily and Kvira +, 29 May 2019. <https://www.qartia.ge/ka/gadatsyvetilebebis-dzebna/article/75767-gadatsyvetileba-saqmeze-phr-i-resonancedaily-is-da-kvira-istsinaaghmdeg> [12.07.2021]. See also: Decision of the the Council of the Georgian Charter of Journalistic Ethics on Case № 286 – Partnership for Human Rights against an unidentified journalist of Primetime and Malkhaz Mikeladze, May 29, 2019, <https://www.qartia.ge/ka/gadatsyvetilebebis-dzebna/article/75705-gadatsyvetileba-saqmeze-phr-i-primetime-is-zhurnalistebis-tsinaaghmdeg> [12.07.2021].

Partnership for Human Rights v. Mariam Gaprindashvili, the Council noted that, in general, there was an objective public interest in the fact [of the murder]. Such interest might have been in the person testifying as well, but on the other hand there are minors [who have testified as witnesses] and their interests. Accordingly, the council assessed what was more important, the public knew who the witness was, or not to reveal the identities of the juvenile witnesses in order to protect their interests." In the case, the Council considered that "the protection of minors was a greater value than the public interest knowing the identity of the witness. The journalist could have provided information to the public about the details of the murder but not indicating that he relied on the testimony of minor witnesses."[86]

As for the case of identifying a juvenile victim, in one such case the Council of the Charter of Journalistic Ethics explained that "the basis for the preparation of the story was a gross violation of the interests of minors [restriction of freedom and access to education, etc.]. Moreover, the investigation was initiated on the basis of alleged coercion against minors. Therefore, the Council considers that the coverage of the story was necessary to protect the interests of the juveniles and this value outweighed the possible harm caused by their indirect identification." Accordingly, the Council did not find a violation of the Charter by a journalist in this case.[87] Violation of Article 8 of the Charter for indirect identification of a juvenile victim was found in another case where a journalist failed to ensure full protection of the child's privacy, after which he was identified and became a victim of bullying.[88]

7. Conclusion

In conclusion, it can be said that in today's reality there is a high public interest in the crimes in which children are involved. It is true that the media has an important role to play in providing information to the public, however, it also has a great responsibility to cover the information in such a way that both direct and indirect identification of the juvenile does not occur. An analysis of the case law of the European Court of Human Rights shows that in the event of a conflict between freedom of expression (Article 10) and the right to a privacy of a minor (Article 8), the Court relies on International and European instruments on the rights of the child to balance conflicting interests in favor of the right to privacy of a minor.

All international or regional instruments seek to balance media freedom of expression and the privacy of minors. To this end, on the one hand, it obliges state bodies to cooperate with the media in

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86 Decision of the Council of the Georgian Charter of Journalistic Ethics on Case № 233 – Partnership for Human Rights v. Mariam Gaprindashvili, November 17, 2018, <https://www.qartia.ge/ka/gadatsyvetilebebis-dzebna/article/64428-gadatsyvetileba-saqmeze-phr-i-mariam-gafrindashvilis-tsinaaghmdeg> [12.07.2021].

87 Decision of the Council of the Georgian Charter of Journalistic Ethics on the case № 198-199 – Tsotne Museliani against Eka Gagua and Misha Sesiashvili, September 26, 2018, <https://www.qartia.ge/ka gadatsyvetilebebis-dzebna/article/66974-gadatsyvetileba-saqmeze-cotne-museliani-eka-gaguas-da-misha-sesiashvilis-tsinaaghmdeg> [12.07.2021].

88 Decision of the Council of the Georgian Charter of Journalistic Ethics on Case № 209 – Partnership for Human Rights v. Mariam Gaprindashvili, April 14, 2018, <https://www.qartia.ge/ka/gadatsyvetilebebis-dzebna/article/51216-gadatsyvetileba-saqmeze-phr-i-mariam-gafindashvilis-tsinaaghmdeg> [12.07.2021].

terms of providing information, on the other hand, it obliges media representatives to protect the privacy of minors. This can be achieved by using initials, cover or altered sound and various technical means. The journalist is obliged to take all measures to prevent the disclosure of the identity of a minor. However, a number of foreign countries and international acts, as an exception, allow the media to identify a minor when it may be in his best interest. The latter case may be considered in relation to a juvenile victim, and the disclosure of the identity of a juvenile in conflict with the law may not be in his best interest in either case. However, a number of countries (UK, US) allow the disclosure of the identity of a juvenile in conflict with the law when the public safety interest outweighs the juvenile privacy interest.

Under the Georgian legislation, the identification of a juvenile in conflict with the law is explicitly excluded by the media, and in the case of a juvenile witness and victim, it is assessed on a case-by-case basis whether the disclosure of identity is in the best interests of the juvenile. Although Georgian law provides sufficient guarantees for the protection of the juvenile's right to privacy, an analysis of cases reviewed by the Charter of Journalistic Ethics reveals the repeated violations of juvenile privacy by journalists. I think this is due to the lack of training of journalists and the lack of an effective mechanism for responding to violations, as the Charter Council is limited to making recommendations; While European instruments in the field of child protection call for stricter measures against journalists who grossly violate the right to privacy of minors. Thus, it is advisable to raise the qualification of media representatives in terms of coverage of children's issues, in order to exclude the risks of making a mistake by a journalist due to their unqualification, as well as to establish an effective mechanism for responding to such violations.

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