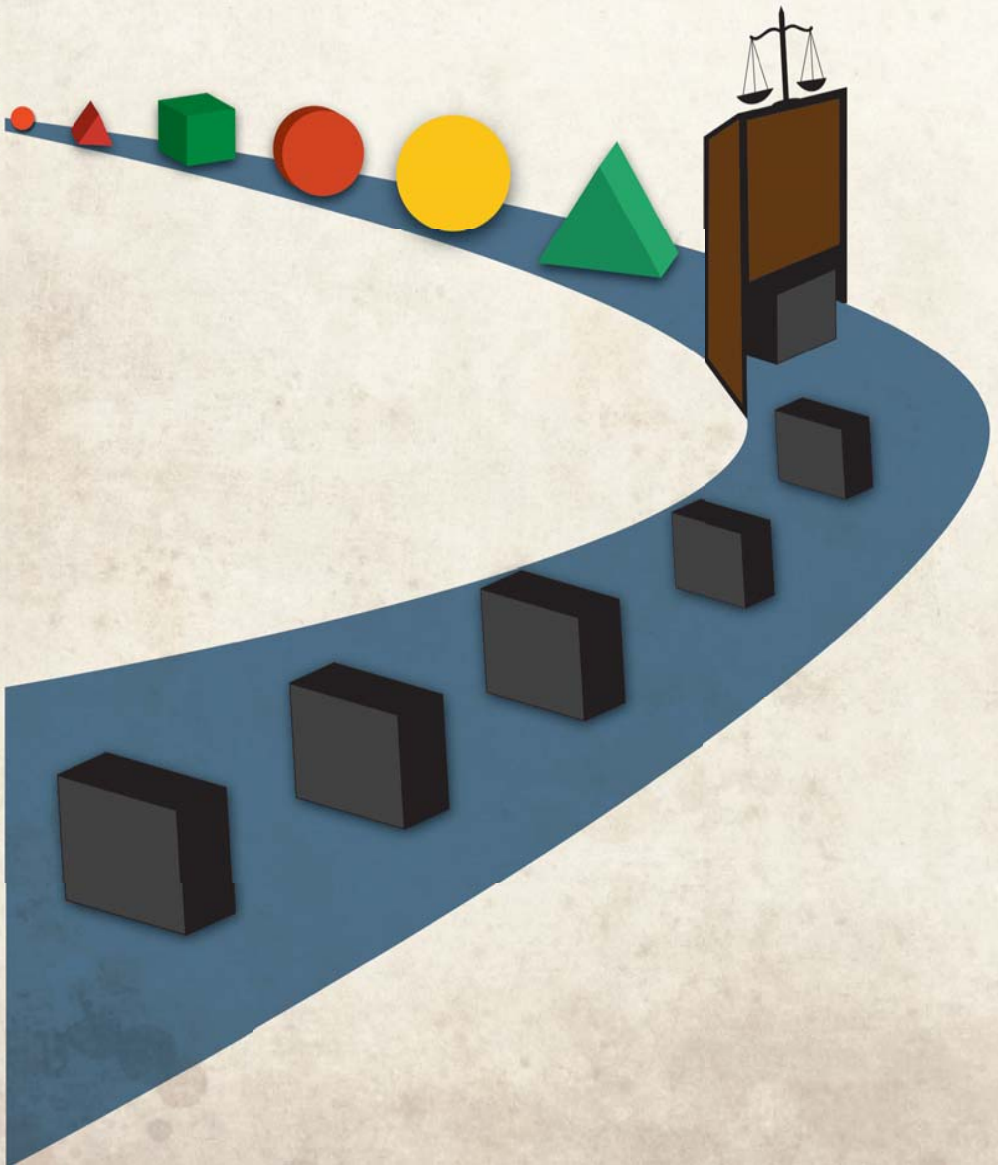
GENDER AND LAW

GENDER ANALYSIS OF GEORGIAN LEGISLATION



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FOREWORD

"A free Georgia is in need of true citizens of both sex, who perceive the needs of the people and their homeland, which can only be understood through a life of civic equity. All Georgian women must be pervaded with this notion and we must, with unanimity, take on the task of restoring our human rights.[1]

Kato Mikeladze (1877-1943)
Feminist publicist and Public Figure

For the Heinrich Boell Foundation South Caucasus Regional Office it was an honor to cooperate with the East West Management Institute (EWMI) by consulting on the program of support for Promoting Rule of Law in Georgia (PROLoG), in order to enrich it with a gendered perspective. From the very beginning we joined with great enthusiasm in the conception and planning stages of the publication before you. This project has in turn created new impulses and vectors within the Gender Democracy program of the HeinrichBoell Foundation.

"Every human being is born free and is equal before the law, regardless of race, denomination, language, sex, religion, political and other views, national, ethnic and social identification, origin, property and titles, place of residence…" The basic notion of this declaration, from Article fourteen of the Georgian constitution, which in turn is based on the universal declaration of human rights, can be found in many modern theories and legal documents. Although, contemporary reality often looks different: the law is often not neutral. Formally, it might apply to everyone, to the same degree, but it can still fail to be a guarantor of equal development and equal access to public goods for people of different social categories – among them women.

Years ago it was relatively simple to recognize sexist legislation, since the language used by the laws, was itself unabashedly discriminatory towards women. Today, the laws of democratic countries shy away from sexist language. Legislators seem to have realized that such an approach to the law is unaccept-

1. *From a speech delivered by K. Mikeladze on March 20 at a women's public meeting in Kutaisi. See Melashvili, Tamta (2013) Kato Mikeladze: Unknown Stories of Georgian Feminism. P. 29.*

able; however, the laws themselves remain a manifestation of man's necessity, man's experience, his knowledge and perspective. In such a reality, the law does not create meaningful, material, conditions for equality and may in fact foster inequality.

The publication *"Gender and Law: Feminist Analysis of Georgian Legislation"* is special in that it initially offers a review of western feminist theories of law and offers the reader a historical retrospective. It contains an evaluation of Georgian normative corpus and an analysis of legal practice. The following study proves that Georgian legislation is mostly gender neutral, which does not necessarily mean that it unconditionally contains a gender sensitive core.

The value of the empirical study is that it clearly demarcates the problem areas within the Georgian legal practice and points to the complexity of the uncovered problems. It brings into the sphere of jurisprudence the dimension of gender, which is still relatively unknown for Georgian lawyers and legislators. The study engages with the norms and practices of civil and criminal law through a feminist prism.

We are convinced that this publication will help an interested reader to perceive more clearly, and subsequently acknowledge, the gender inequality that exists in Georgia, which will widen the circle of those lawyers who are sympathetic to ideas of equality, feminism, and gender democracy.

Virginia Woolf's concept of a 'Room of One's Own,' which has become a kind of metaphor, and which seemed nearly utopian at the beginning of the twentieth century (1929), - the idea that a woman writer needs a room of her own and an income, so that her voice may be clearly heard - is still relevant today. In the twenty-first century, the quality of a woman's autonomy – the material welfare and the solidity of the walls of a *room of her own* - should be determined precisely by gender fair laws and legislation.

We, the publishers of this study, remain hopeful that the recommendations for the overcoming of the challenges that exist in Georgian legal practice will garner the attention of Georgian legislators and lawyers. While for the students of law – regardless of their gender – it should become a new basis for professional diversification and an inspiration for other new scientific studies in the movement towards equality.

Nino Lejava,
The Director of the Heinrich
Boell Foundation's South Caucasus Office

INTRODUCTION

Objectives

The present study is the first comprehensive attempt to analyze Georgian law in terms of Gender. It presents a number of topical and problematic issues of civil, as well as criminal and administrative law. The access to justice theme is dealt separately for LBT, the disabled and ethnic / religious minority women.

The research aims to assess whether legislation and the respective practice give equal treatment to men and women in specific fields; identify the major gaps and circumstances that create barriers to women's equal access to justice and women's rights.

The study refers to both criminal and civil law areas and includes the analysis of appropriate substantive and procedural legislative provisions, as well as judicial practice.

Actuality

While Georgian legislation, for the most part, is gender-neutral, according to the study the results of its application in practice are reflected differently on men and women and usually affect women disproportionately. The present analysis and examples show that in many cases gender-neutral law, especially in a traditional, conservative country, means gender- indifferent law.

On the one hand, the study shows that in the process of administration of legislation and justice, women's experience and gender peculiarities are systematically ignored, while, on the other hand, it is clear that gender bias and stereotypes affect law making and judicial proceedings.

For a new democracy country, such as Georgia, this kind of picture is probably logical.

In Europe and the United States, law scientists and practitioners began to assess legislation and judicial process witha gender perspective only at a later stage of human rights development, which was contributed by the devel-

opment of feminist discourse and the various groups fighting for women's equality in the family and in the public arena as well.

From the viewpoint of women's rights, criminal law has been facing new challenges because of the unprecedented scale of sexual assaults on women during the armed conflicts in former Yugoslavia and Rwanda in the 1990's, which generated the need to review traditional approaches in this field.

These processes of gender revision of legal standards were intense from the mid-20th century, especially in the last two decades. Until recently, Georgia was too distant from these processes. As a result, Georgian laws are incompatible with international standards, and obviously lag behind the progressive international practice. Partly the vague legislation, and partly the legislative vacuum or other circumstances, determine the wrong development of the judicial practice.

Accordingly, it is no wonder that the idea of a gender-sensitive judiciary is still aninnovation for Georgia.

Therefore, the present attempt of gender analysis of the legislation and the practice and promotion of discussion in the aforementioned direction is particularly urgent and important for the development of Georgian law on the given stage.

Although the principle of equality of men and women is recognized by the Constitution of Georgia and laws, the legislation requires a fundamental revision of the material as well as the procedural part in order to ensure equality from a legal and practical standpoint.

Georgian legislation in the direction of criminal and civil law, as well as material and procedural norms, are based on and strengthen the abundance of existing stereotypes presented in the patriarchal society. As a result, instead of legislation and practices to promote the gradual replacement of stereotypes with the idea of freedom and equality, the operating system, in fact, sometimes promotes legalization and encouragement of sexual harassment, gender-based discrimination and inequality.

For example, the research shows that the legislation and practice give inadequate evaluation and do not react to information that a woman is a victim of violence. This applies to both criminal (for example, murder of the oppressor by a woman who is a victim of violence) and civil (child custody determination disputes) issues. A lot of actions that inflict significant harm to a woman's freedom, equality and dignity (for example, stalking) are not punishable under the legislation of Georgia, and in some cases of crimes (e.g., rape) the legislation does not include important aspects of the crime. In particular, according to the Georgian legislation (Article 137) oral or anal penetration involving the offender's genital organs, other bodily parts or objects will not be classified as rape.If these actions contain force or the threat of force, they are punishable by the law, however, they will be evaluated as "sexual intercourse in perverted form" and not as rape (sexual intercourse in perverted form is defined in Article 138). **Given standard contradicts the norms of international law and court practice.**Investigatory practices researching various forms of violence against women study the victims, especially their personal life and past, instead of being directed to the identification of the offender and his characteristics.

Interesting is the fact that in the civil lawsuits, gender-bias victims are both women and men. For example, in child-related disputes the court uses different standards towards the child's father and mother. This approach is determined by stereotypes that are associated with men and women in private and public life. Gender stereotypes determine court decisions about the child's place of residence as well as the parties' requests in such disputes (for example, as a rule fathers do not ask the court to determine their dwelling as the child's place of residence, but they only ask for the right to see their children, etc.).

The results of the research, together with the problems of law and practice, show that the barriers to access to justice for women often is also due to the fact that professionals involved in the system do not take into account the specific character of this field and the differing needs of women.

Finally, unequal attitude, inadequacy and the lack of sensitivity from the legislature and the judicial system forces women to rarely apply to legal ways to protect their rights that means that instead of positive changes, the law and the court system contribute to the maintenance and extension of discrimination against women.

Methodology

The given study represents the analysis of the issues pre-selected in various fields of the legislation of Georgia, which, according to the researchers, are particularly problematic in terms of gender. The study is based on a review of national legislation addressing these issues. This includes both the study and evaluation of the normative content of the relevant articles of law, as well as their comparison with the standards and best practices of international law and feminist approaches. While comparing, the main focus is on the modern feminist theories, which have led to the significant transformation of legal approaches and norms with the aim to establish gender justice.

Significantly, the survey is based on not only the material law, but also the procedural law analysis. However, the complete evaluation of the latter is impossible without monitoring its application in practice, which requires being physically present during the relevant court proceedings.This was not done, because it is beyond the scope of the study; accordingly, the given analysis of procedural rules is not complete and it is important to continue working in this direction.

In addition to a review of the legislation, the study is based on the analysis of dozens of decisions made by the Georgian courts, which were selected randomly. Therefore, the study does not claim to be a comprehensive study and analysis of the practice. Researchers did not preliminarily strictly limit the decision-making period or court instances having made the particular decisions. Several decisions made by the first instance, as well as the Supreme Court are used. Accordingly, the given decisions of the survey carry only illustrative significance.

The study also uses the material from focus group meetings specially organized for the purposes of this publication, and individual interviews conducted with field specialists and participants of the judicial process.

During the study, the research team has encountered certain difficulties. One of the serious obstacles that they encountered was a coding of court decisions (for the protection of personal data), which made it impossible to identify the gender of the persons in the dispute and the parties involved, and therefore complicated the gender analysis of the decisions. The research team applied to the Tbilisi City Court to identify the sex of plaintiffs, defendants and other thirds parties in the analyzed decisions, however, the agency's response made it clear that such data was not processed by the court and could not be provided to the interested parties.[23] Nevertheless, the research team developed a strategy for the given barrier, and in the selected cases the gender was identified by various indicative characteristics (for example, the testimony of the witnesses identified the gender by using the word Mrs./woman; cases of pregnancy and maternity leave, etc.).

The problem of coding the decisions creates particular difficulties when analyzing the judicial practice of gender-based discrimination cases. As there was no single decision in which the court established gender discrimination (on the basis of the Law on Elimination of All Forms of Discrimination) during the research implementation period (July 2016), it took a team of researchers to elaborate an alternative strategy to find decisions on gender discrimination.

Key findings

The study revealed the following key findings:

- According to the Georgian legislation(Article 137) oral or anal penetration involving the offender’s genital organs, other bodily parts or objects will not be classified as rape.If these actions contain force or the threat of force, they are punishable by the law, however, they will be evaluated as “sexual intercourse in perverted form” and not as “rape” (sexual intercourse in perverted form is defined in Article 138). Given standard contradicts the norms of international law and court practice.
- According to the Georgian legislation the action shall not be qualified as rape if violence, threat of violence or abusing the victim’s helpless conditions is not followed by sexual intercourse. According to the UN Handbook for Legislation on Violence against Women, in the case of rape, violence or threat of violence must be defined as

2. Correspondence of the Tbilisi City Court 05.07.2016(2-06173/1418621.

3. The team of researchers appealed to the Public Defender's Office for the non-delivery of information about the gender of persons involved in the court proceedings, which is currently pending.

an aggravating circumstance of the crime and not as a part of rape.

- According to international standards and feminist approaches, the non-existence of victim's consent to have sexual intercourse is enough for the act to be qualified as rape. Despite this, CCG article on rape does not consider the element of victim's consent at all. If violence, the threat of violence or abusing the victim's helpless condition does not take place, only the non-existence of victim's consent to sexual intercourse does not equal rape.
- According to the CCG, declaring pornography a punishable offence serves the protection of public morality and not the protection of rights and interests of persons participating/shown in it that contradicts the feminist and Human Rights Law vision on this issue.
- Georgian criminal law does not comply with Istanbul Convention in certain aspects that significantly reduces the standard of women's rights protection and respect in the practice.
- Sexual harassment is not defined and regulated properly, including the liability of supervisors in terms of prevention of and responsiveness to sexual harassment.
- Similar to women's rights, the Georgian legislation does not provide proper protection of children's rights in many aspects. Legal framework does not allow the judge to determine the residence of both parents as the child's residents to meet the child's best interest. Also the legislation does not explicitly define that the facts of violence must be taken into account during the consideration of family disputes. The law gives narrow definition of the circle of parties who are entitled to receive alimony/support from a former spouse. For this purpose, the experience and principles of other countries should be taken into account. Legal content of alimony is determined by the amount of money, which is a very strict interpretation.

The main recommendations are as follows:

- The definition of rape should be revised and brought in conformity to international law, including a separate mention regarding rape during intimate relationship and marriage.
- The purpose of Georgian legislation with regard to pornography should be changed. The starting point should be the review of pornography in the context of sexual objectification of women and eradication of harmful effects for women participating in pornography. Besides, pornography which shows a woman as a subordinated subject, should be defined as a form of gender-based discrimination according to anti-discrimination legislation;
- Georgian criminal law should comply with the provisions of Istanbul Convention in many aspects and based on relevant definitions given in the Convention:
- Violence against women should be distinguished as a separate offence; also, crime committed against women due to their sex/gender should be defined as discriminative offence against women.
- Gender-based violence should be defined,as a violence that is directed against a woman because she is a woman or that affects women disproportionately;
- Crime committed against a family member should be defined as an aggravating circumstance of the crime;
- Commission of violent acts which were preceded or accompanied by extreme violence should be defined as aggravating circumstance;
- Gender-based crime (notwithstanding whether there is a discriminatory motive), where possible, should be also defined as an aggravating circumstance according to the CCG.
- „Battered woman syndrome'', in every possible case, should be taken into account as a necessary self-defense for qualification. „Battered woman syndrome'' should be reviewed in all cases as a mitigating circumstance.
- Commission of a crime with the motive or context related to gender violence, discrimination against a woman or subordinated role of a women should be formed as a separate article or a circumstance aggravating premeditated murder in the Criminal Code.
- Existence of facts showing domestic violence/gender violence committed prior to premeditated murder/grave damage to health by the

offender should be defined as an aggravating circumstance for the crimes provided by Articles 109 (premeditated murder with aggravating circumstances) and 117 (intentional grave damage to health) of the Criminal Code of Georgia;

- Commission of femicide by a public officer and, particularly, an employee of a law enforcement body should be defined as an aggravating circumstance in articles 109 and 117 of the CCG;
- Commission of femicide/domestic violence/gender violence by means of a service weapon should defined as an aggravating circumstance in Articles 109 and 117 of the CCG;
- Working groups should be set up within judicial system of Georgia to explore and determine gender bias trends, todevelop the strategy of minimization of gender stereotypes and means of protection from gender inequality of judges in the process;
- The term "child's best interest" should be defined at the legislative level and a methodology for its establishing should be developed as recommended by the United Nations Committee on the Rights of the Child;
- Legislative changes should be made for the court to be able to determine both parents' place of residence as child's place of residence, taking into account the child's best interests;
- The legislation should clearly contain provisions about the necessity of taking into account facts of violence in the review of family disputes;
- As a result of the implementation of legislative changes the circle of persons, who should be allowed to claim support from a former spouse should be broadened. For this purpose, the experience and principles of other countries should be taken into account;
- A dialogue in professional circles should be initiated with regard to the change of legal content of alimony, in order to achieve the purpose of alimony through financial as well as non-financial performance of obligations; also, to regulate the unified formula of the calculation of alimony and support through by-laws in order to establish objective criteria for the determination of the amount of alimony;

- A mandatory principle should be developed that will provide objective recording of time and expenses assigned by parents to their children, as a result of which, consequently, alimony will be distributed fairly;
- Legislative changes should be made, based on which a disputing party that is exempted from court expenses will not be obliged to pay the expenses incurred by the opposing party in case of not satisfying their claim or its partial satisfaction. These costs may be paid from the state budget.
- Legislative changes should be made so that legal services will be guaranteed for female victims of violence in all types of civil and administrative disputes.
- The Law of Georgia on the Elimination of All Forms of Discrimination should make changes concerning the specification of the forms of discrimination, the integration of the "sexual harassment" concept, prolonging litigation dates and the period of limitation. Also, the Public Defender's involvement in cases concerning the subjects of private law and physical persons should be defined as a mandatory requirement.
- The concepts of "gender equality" and "sexual harassment" should be revisited in the Law of Georgia on Gender Equality.
- The employers must be obliged to elaborate the policy and guidelines ensuring gender equality under the Labor Code of Georgia.
- Special recommendations considering the specifics of gender discrimination should be elaborated for the judges.
- Special trainings on gender discrimination, referring to the practices of the USA and the EU, should be conducted for the judges and the lawyers.
- The liability of the employer to implement mechanisms for responding to allegations of sexual harassment should be required by legislation, the negligence of which should serve as grounds for holding the employer liable. Effective mechanisms for the victims of sexual harassment should be developed by the employer, which will make administrative and court justice accessible.
- The regulating acts of Labor Inspection should reflect the liability

of supervisors in terms of the prevention of and responsiveness to sexual harassment.

- The following amendments should be made to the Law of Georgia on Prevention of Domestic Violence, Protection of and Assistance to the Victims of Domestic Violence: gender sensitivisation of the law, expansion of the circle of the victims of violence, increase of the proactive role in the law enforcement mechanisms for the supervision of orders and responsiveness, special regulation of particularly complex cases of violence (e.g., an abusive law enforcement official), eradication of barriers to access the judicial system for minority victims of violence, and provision of additional guarantees for the protection and strengthening of the victims
- Special guidelines should be developed for all the institutions participating in the enforcement of the mentioned law, which shall stipulate the gender aspects of responsiveness and execution of violence against women, considering the context of gender inequality in the society and not on the basis of the de-gender approaches.

Summary:

The study provides recommendations addressed to both the legislative bodies and other state agencies. The document refers to the necessity to revise material and procedural law. Some of the items, which are currently left open, should be regulated by legislation; certain concepts and circumstances should be legally defined, some norms should become foreseeable, and so forth.

The group of researchers believes that it is important to continue and expand the gender aspects of justice, to develop it from a theoretical point of view,as well as in the form of monitoring and analysis of judicial practice.We hope this work will become an important source for further research, willhelp to lead to a fact and evidence-based discussion in Georgia, and will promote advocacy of the idea of gender-sensitive justice.

I. THEORIES OF FEMINIST LAW

A. Introduction

Feminist law theories originate from a simple reality that women and men are equally entitled to justice and law.Historically, women's oppression, and inequality in general, was strengthened by laws; laws treated differently the representatives of different sexes, since they were written by only one sex (male) legislators. Feminist lawyers are looking for inequality reasons in the country's legal system and gender discriminatory norms of legislation.

Feminist lawyers differ from lawyers who study gender aspects in legislation predisposing that the systemic oppression against women does not exist. These researchers believe that the law should be neutral towards both sexes, while for feminist lawyers the neutrality of law is an oppressive instrument against women. To feminist lawyers, neutrality means to extend inequality in unequal conditions.

Many lawyers with conservative education still do not believe in gender equity because they often perceive justice as an idealistic conception. For feminist lawyers, justice is achieved by fair methods in daily practice. Fair method is the law that will be available for women when overcoming oppression and violence. Women are backed by feminist lawyers in the struggle for equal opportunities. Women and men are equal in the fight for justice not in an idealistic notion, but rather in its implementation in reality.

The 20th Century is the period of the origin of feminist theories and activation of their influence. Women lawyers based in the United States have played a leading role in the creation and promotion of feminist law theories. They fought for self-determination in the field of justice, as well as to help women victims of sex discrimination.This chapter highlights the achievements of these women, feminist law theories, and important precedents for the realization of women's rights in U.S. courts. The review is not exhaustive in nature since it is the first such initiative in this direction, and following the global nature of the case, it allows to identify only the main trends.

B. The origin of feminist law theories in the USA

The U.S. feminist lawyers' movement began in 1970, when female lawyers made the first organized legal campaign against sex discrimination in courts.[4]At the same time, there was a fight with an intention to integrate women in legal profession.

Ruth Bader Ginsburg, now a justice of the U.S. Supreme Court, had a special role in this battle and was a professor of law and the head of the women's rights project of the American Civil Liberties Union (ACLU). In 1972, Ruth Bader Ginsburg, along with other feminists, founded one of the first scientific journalson women and the law, the Women's Rights Law Reporter,which regularly published articles expressing feminist lawyers' positions.At the same time, the "National Conference of American Women and Law" discussed issues such as sexual harassment of women, rape, "a victim woman's syndrome" and legal notions of necessary defense in terms of women's rights. Women lawyers and their supporters took cases to court concerning social security, maternity leave and pregnancy discrimination issues. One of the first was the case of Reed v. Reed,[5] in which Ruth Ginsburg represented the plaintiff, Sally Reed, and argued for her equal right to statutory inheritance. Lawyer Mira Bradvely fought for the joining the Bar Association. Lawyers demanded to defeat women's inequality on the basis of sex discrimination. The first educational courseon "Women and the Law" was introduced at New York University in 1969.[6]

C. General classification of feminist law theories

Feminist law theories have undergone three basic stages of development:[7]

- Stage of Equality – 1970s;
- Stage of Specificity - 1980s;
- Stage of Diversity - 1990s.

4.Chamallas, M. (1999). Introduction to Feminist Legal Theory. Aspen Law and business.

5.US Supreme Court404 U.S. 71 (1976).

6.Bartlett, T.K. (2012). Feminists Legal Scholarship: a history through the lens of the California Law Review. California Law Review, vol.100. Issue 2.

7.Chamallas, M (1998). Introduction to Feminist Legal Theory, Aspen Law and Business. p. 23.

1. Stage of Equality

The driving idea of the Equality stage is the likeness of a woman to a man. Feminists of this period believed that all restrictions to women and exceptional norms served discrimination against women. According to them, women should have exactly the same access as men to the rights, public spaces and possibilities.

Feminists of the equality stage were often called liberal feminists or pro-assimilation feminists. Their arguments were not intended to change the existing laws and regulations; they tried to obtain the access to rights within the existing legal framework.

Although the theory of equality is somewhat outdated, womenhave repeatedly used it as a means to overcome oppression and discrimination. In March 1971, a group of professional women (Professional Women's Caucus) filed a collective lawsuit against all federal funding of law schools in the U.S. that prevented or restricted women's legal education. As a result of this claim, the number of women law students increased from 8.5% (1970) to 33.5% (1980).In the 1970s, after Wall Street law firms officially refused to hire women lawyers, the discriminatory practice towards women was once again appealed based on the formal equality approach, which ended with the victory of women.At that time the most effective means to overcome barriers was the **formal equality** approach.

2. Stage of distinctiveness

The need to support the theory of distinctiveness came after women lawyers formally entered law firms, however, these people were oppressed with even subtler forms of discrimination. Although employers were employing them, they did not get promoted according to their merits. The "glass ceiling" barriers were used against them, and they were not allowed to occupy even minimum positions in the power hierarchy. Traditionally established roles of women (taking care of children and elderly people) turned out to be incompatible with the corporate culture established in the law firms. On the other hand, the dominant masculine culture in corporations put employed

women in a solid system of oppression and seriously limited their opportunities for self-realization.

Accordingly, the stage of distinctiveness is known by the name of two basic feminist theories, **cultural feminism** and **dominance feminism.**

The development of the concept of "distinctiveness," offered by **cultural feminism,** is largely related to the unique experience of pregnancy and motherhood of women that does not fit the mechanical definition of equality. The U.S. Supreme Court's 1974 decision[8] (*Geduldig v. Aiello*) had an important influenceon the development of this opinion, according to whichit was believed that discrimination on the basis of pregnancy was not a violation of equality under the 14th Amendment of the Constitution. This decision caused an uproar in society, and in response the Pregnancy Discrimination Act was adopted in 1978, which considered the discrimination on the basis of pregnancy as sex discrimination. Carrie Menkel-Meadow[9] used the cultural feminist Carol Gilligan's theory to explain the existence of barriers to women in the law profession.According to this theory, women use different moral criteria, they have a different way of thinking; according to her, all this is called the "ethics of care". In Meadow's view, this different approach causes more discomfort for women when applying adversary, win/lose rules. Consequently, women take into consideration the interests of all parties and spend a lot of resources for mediation between the parties in the implementation of alternative dispute resolution mechanisms. She believed that women prefer to work in a less competitive environment and less fierce competitions, and favor a cooperative approach, providing the establishment of a balance between the private and the public life spheresat the workplace. Meadow's cultural feminism approach, requiring further strengthening, was expanded by Rand Jack and Dana Crowley Jack. The scientists conducted empirical research on 36 lawyers and came to the conclusion that gender is related to a different way of solving an ethical dilemma, in cases where their legal solution was not clear[10]. These researchers believe that female lawyers in fierce

8.US Supreme Court, 417 U.S. 484 (1974).

9.Menkel-Meadow, C. (1985). Porita in a different voice: speculations on a woman's lawyering process. Barkeley Women's L.J.

10.Jack, R & Jack D.C. (1989). Moral vision and professional decisions: the changing values of women and men lawyers.

competition who, at the same time, bear the traditional burden to take care of others, have to make choice between three types of strategies of problem solution: (1) some of them choose the "masculine", law-based rough approach and subordinate their professional life to a hierarchical model, which has been offered by a well-established working environment; (2) other women are"split" by aspirations to implement legal professional work and family care simultaneusly and fully; and (3) there are those who are trying to redeterminethe role of the lawyer and to initiate changes in the authority structure based on their inner beliefs and professional maturity basis.

Feminist Theory of Dominance reflects the negative impact that women experience differently from men as a result of, for example, violence, rape, sexual harassment and pornography. Formal equality theory did not take into account the extent of the damage and the special vulnerability of women, because it could not see thecausing factors within the patriarchal power structures. Consequently, this theory emerged fromunderstandingdomination and privileges of men in legal framework.

The most prominent representative of the Theory of Dominance,Catherine MacKinnon,observed the basis for the difference of women in the control of women's sexuality. In her opinion, men maintained domination over womenthrough controlling their sexuality.[11]MacKinnon believed that women's sexuality was not a biologically given but the product of socialization, which forced them to become the desired object for men. One of the results of the abovementioned was sexual oppression of women at the work places, where they were not able to achieve essential equality with men due to gender neutral and discriminatory laws.

3. Stage of Diversity

Development of the stage of diversity was caused by criticism of early feminist theories, according to which the feminist authors mostly concentrated on white heterosexual women and ignored the problems of women representing different or several groups of minorities.

11.MacKinnon, C. A. (1982). Feminism, Marxism, Method and the State: An Agenda for Theory, 7 signs: Women in Culture & Soc.

Feminist theories of the diversity recognition period are anti-essentialist and postmodernist feminism. These theories require diversification of feminist perspectives that will take into account women of different nationalities, race, religion, gender and sexual orientation, as well as women living in such cultures and societies. A clear example of this approach is the work of Kimberlé Crenshaw[12] and Anjela Harris[13], who criticized the gaps in feminist law theories (for example, evaluating the cases of rape of Afro-American women). In their view, Afro-American women are discriminated against on the grounds of sexas well as race; their situation was qualitatively different from that of white women in terms of severity and intensity. Paulette Caldwell[14] also referred to problems of proper assessment of double gender and racial discrimination within the Act banning discrimination in employment.

The discussed feminist theories, in most cases, were simultaneously or successively used by feminist lawyers to analyze masculine legal norms and practices. Depending on the degree of gender sensitivity and acceptance in the society, it was necessary to work on the situational relevance of a variety of feminist theories. Each approach has played a definite role in the legal battle against inequality and, altogether, created feminist jurisprudence as it is calledby Stang Dahl.

Stang Dahl's[15]work discusses the theoretical and methodological basics of the legislation for women. It is a justification of women-oriented jurisprudence, the center of which is the experience of the oppression of women and women's vision of fairness and justice.Dali believed that the legislation created for women aims to **"describe, explain and clarify the legal status of women, designed to improve the status of women within the judiciary as well as the whole society."**Dahl's methodological approach is based on the empirical experience of oppression and marginalization of women, which is well grounded with sociological research tradition.When women care for other people (children, elderly, disabled persons), they work in the **invisible labor market**, which is invisible for legislation and is unregulated and ignored on a legal level. The author considered legislation as a product created by men that serves their interests and priorities with its material content and structure. It is created based on men's experience, which differs from women's experience, and is in line with men's views of reality.

The main purpose of the gender legislation is to conduct special studies that will reveal the subjectivity, bias, lack of fair approach and oppression that legislation is full of and that these same vices continue to existthrough legislation. The latter separates legal doctrine and general legal science from each other; it also specifies political influence of this sphere. Dahl redefines the concepts of freedom and justice on a policy level, trying to bring women's opinions about equality, dignity, honesty, self-determination and self-realization into them.

Dahl's research highlightsparticularly the difficult economic conditions of women, which is reflected in the specific legal regulations on marriage, salaries and social protection. In heropinion, these three areas of legal regulations are invisibly and radically linked with gender factors. According to her, women, who are unable to find a job because they have dedicated their whole life taking care of other people(which is unpaid andlegally unvalued work), are discriminated against at their retirement. Dahl's work indicates that the legislation is imbued with the spirit of the following message (which is based on the prevailing cultural norms of the society): **"If you want your work to be recognized properly, do not dedicate yourself to your children's upbringing."**

12.Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: a black Feminists critique of antidiscrimination doctrine, feminist theory and antiracist politics. U.Chi. Legal F.

13.Harris, A.P. (1990). Race and Essentialism in Feminist Legal Theory, 42 Stan.L.Rev. 581.

14.Caldwell,P.M. (1991). A hair piece: perspectives on the intersection of race and gender. Duke L.J 365.

15.Dahl, T.S. (1987). Women's Law: An Introduction to Feminist Jurisprudence, Norwegian University Press.

II. Rape and other forms of sexual violence

A. Introduction

This chapter analyzes the following offences against human sexual freedom and inviolability of the Criminal Code of Georgia (CCG): *Article 137: Rape;Article 138: Sexual abuse; Article 139: Sexual Intercourse or Other Action of Sexual Coercion; Article 141: Depraved behavior; Article 19: Attempted crime.*

B. Feminist approaches to rape and other types of sexual violence

Catherine MacKinnon thinks that"the existing laws on rape protect those who commit rape and are written so that most cases of rape remain unpunished."[16]According to her, the reason for this is that rape is overwhelmingly committed by men, and most of legislators are male."Laws on Rape were created when women did not have the right to vote... The creators of laws on rape may have not committed rape themselves, but they belonged to the group [men] that committed rape."[17]

MacKinnon and Susan Estrich believed that in case of rape, instead of studying the intent of the offender the focus is on victims, which is incorrect.[18] Instead of establishing the intention of the criminal, the current approach explores whether the victim consented to the sexual contact and whether there was a possibility that shewould become a victim. If an investigation no longer concentrates on the victim's consent when determining the fact of rape, Judith A. Baer believes this will lead to fundamental change of prevailing attitudes in the given field.[19]

16.MacKinnon, C. A. (2006)*Are Women Human?* Cambridge, Mass.: Harvard University Press.

17.See above.

18.See above.

19.Baer J. A., *Feminist Theory And The Law*, The Oxford Handbook of Political Science**,** Edited by Robert E. Goodin,see the following link: http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-016.

According to the current approach, in case of rape, the guilt (*mens rea*) of the perpetrator should be confirmed by determining the absence of the victim's consent. In order to assess the guilt of the perpetrator, the standard ofa "reasonable person" is used – whether a reasonable person (another objective person in similar circumstances) would have been able to assess whether the victim did not consent to have sexual contact.[20]

As men and women have different perception about sexual contact-related situations in many cases(for example, what is for me just a demonstration for attention and approval can probably be insulting and frightening for women), at the time of administration of justice, influenced by patriarchal attitudes, the standard of a "reasonable person" is mostly defined as the standard of a "reasonableman."[21]For this reason, as MacKinnon points out, in cases of rape and violence against women it is necessary to establish a standard of a "reasonablewoman."[22] An interpretation of a gender-neutral standard - "reasonable person" -systematically ignores the experiences of women in favor of men.

Accordingly, established patriarchal attitudes and stereotypical perception of women's desires and behavior should be eliminated during the investigation and punishment of rape. Justice must be conducted on the basis of the women's experience and taking into account the objective assessment ofcircumstances by the victim.

C. Rape and sexual violence in International Law

Rape is a form of sexual abuse. It is different from other forms of sexual violence in that during rape sexual penetration of the victim takes place.[23] Some common approaches in the law and practice with regard to other crimes of rape and sexual violence prevent the protection of the female victim's rights

20.Whisnant, R. *Feminist Perspectives on Rape*, Stanford Encyclopedia of Philosophy, 13.05.2009, see the following link:http://plato.stanford.edu/entries/feminism-rape/.

21.See above.

22.See above.

23.International Commission of Jurists,*Women's Access to Justice for Gender-based Violence – A Practitioner's Guide*, September, 2013,p.10.See the following link: http://www.icj.org/womens-access-to-justice-for-gender-based-violence-icj-practitioners-guide-n-12-launched/.

and implementation of their equality before law. It is particularly important to review international standards in relation to the **composition of rape** and the **victim's consent to sexual contact.**

1. The composition of rape

"The Council of Europe Conventionon Prevention of Violence against Women and Domestic Violence" (hereinafter referred to as the "Istanbul Convention"), defines the types of sexual violence, including rape, in the following way:

> *"A) establishment of non-consensual[24] vaginal, anal or oral intercourse of a sexual nature with other person's body with any body part or any object;*
>
> *B) establishment of other non-consensual sexual acts with other person'*
>
> *C) compulsion of other personto establish non-consensual sexual act with the third person.[25]*

The "Istanbul Convention" definition is in line with the definition developed by the International Criminal Court on the basis of the practice of former Yugoslavia and Rwanda tribunals. As defined by the International Criminal Court, rape is "even minor penetration of any part of the victim's body… by the offender's penis, an object or any other part of the body."[26]

In addition to the classic interpretation of "rape,"in the definition of rape the state legislation and practice should include all the actions that are equal to "traditional" perception of rape by their nature. For example, female genital partial penetration by the male sex organ; oral penetration; anal penetration with the male sex organ; vaginal or anal penetration with fingers, fists or using other body parts of the offender; vaginal or anal penetration with an object.[27]

The abovementioned standards make it clear that international law recognizes rape as any type of vaginal, anal or oral penetration of a sexual nature into the victim's body, fully or partially, irrespective of how it is implemented – with the offender's sex organ, any other body part or an object.

24.Not consensual – act without the person's consent.

25.The Council of Europe Convention" (hereinafter referred to as the "Istanbul Convention") on prevention of violence against women and domestic violence, Article N36.

26.International Criminal Court, Elements of Crimes (2011), p. 8. See the following link: https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf

27.International Commission of Jurists, p. 204.

2. The victim's consent

There is a discriminatory practice towards women in relation to rape in different systems, according to which if sexual contact is not accompanied by the use of physical force by the man and/or victim's physical resistance by all possible means, it is assumed that the victim consented and the action is not qualified as "rape." In such cases, the defendant (the accused) often appeals that the victim agreed to have sex with him, because she had "let it happen" and did not make any resistance; and her clothing and behavior showed that she wanted to have sexual contact.[28] Nevertheless, sexual acts committed without the use of physical force - **through coercion or threats** –are also considered as rape.[29]

The European Court of Human Rights in the case of *M.C. v. Bulgaria* (2003) noted that due to a variety of psychological factors or because of fear of the offender, victims of sexual violence - especially underage girls - often do not resist the offenders.[30] The Court pointed out that "a tough approach towards sexual assault case and requesting a proof of the victim's physical resistance in all cases will result in impunity of some cases of rape and will endanger the security of individual's sexual autonomy… the state has an obligation to criminalize any non-consensual sexual act and implementthe effective investigation and punishment against it, even if the victim did not make physical resistance."[31]

According to the 3rd party intervention on the same case,presented to the European Court by Interights, the"equality approach aims not to determine whether the woman said 'no', but rather, **whether she said 'yes'".** Women are not in a permanent mode of consent except when they say "no" or show resistance to persons willing to establish sexual relationship with them. Phys-

28.See above, p. 196-197.

29.See above, p. 199.

30.M.C. v. Bulgaria, *Application* N39272/98, The European Court of Human Rights, decision of 4 December, 2003, par. 164.

31.*M.C. v Bulgaria,* par. 166.

ical and sexual autonomy means that they should give affirmative consent to sexual activity."[32]

3. "Coercive circumstances" and "voluntary and genuine consent"

It is established by international legal practice that in the case of coercive circumstances, the existence of violence or a threat of violence is not needed to prove rape. In this case, even the victim's consent to have sexual intercourse should not be taken into consideration.

Based on the practice of the tribunals for the Former Yugoslavia and Rwanda,[33] international criminal law defines that rape occurs when the offender used "force, threat of force or coercion," as well as in case of "taking advantage of a coercive environment." According to the decision of the court, the victim's consent should not be taken into consideration if the circumstances deprived herof "voluntary and genuine consent."A victim's silence or non-resistance does not mean consent.[34] Accordingly, not only the existence of consent, but also whether the consent was voluntary and genuine should be examined.

According to the decision of **the European Court of Human Rights**, despite the fact that the definition of rape by the tribunals of international criminal law refers to cases of rapes during armed conflicts, the topic of consent is universal and relevant in every context.[35] According to the Court, when the offender intentionally misguided the victim to a depopulated place, those coercive circumstances were created that were enough for crossing sexual autonomy. The court concluded, "any sexual penetration without the victim's consent constitutes rape and that consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances. "[36]

In the case *Karen Tayag Vertido v. the Philippines*, the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) also uses the standards developed by international courts and declares that the state should take out the criteria of violence from the definition of rape and should elaborate the definition of rape, which: **a. Requires the existence of "unequivocal voluntary agreement" of the victim and the proof by the accused of steps taken for making sure of victim's consent to have a sexual intercourse; or b. Considers the act in "coercive circumstances" and defines a broad range of such circumstances.**[37]

The Istanbul Convention also supports that "consent must be given voluntarily as a result of the person's free will assessed in the context of the surrounding circumstances."[38]

According to the UN Handbook for Legislation on Violence against Women, in a number of countries rape and sexual violence are not criminalize if they happen in marriage or intimate relationships,[39] or, despite their criminalization, these crimes are seldom prosecuted and punished in practice. Therefore, the UN Handbook recommends that in the case of rape, force must be defined as an aggravating circumstance of the crime and not as a part of rape. These terms should be taken out from the definition of rape.[40]Respectively, rape should be defined as a sexual act without the consent of the victim, and if the crime is committed by using violence, this constitutes rape in aggravating circumstances.

The UN Handbook also mentions that the legislation should have a separate mention regarding rape during intimate relationship and marriage, so **that marriage or any other type of intimate relationship** is not used as acircum-

32.Interights 3rd party intervention to the European Human Rights Court case *M.C. v Bulgaria*, 12 April 2003., par. 12.

33.For example, in the case of Akayesu, the International Criminal Tribunal for Rwanda defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive" – according to the definition, it is not mandatory whether the offender has used force. Prosecutor v. Akayesu, Case No ICTR-96-4, Trial Judgment, 02.09,1998, paragraph 596-598.

34. International Criminal Court, "Rules of Procedure and Evidence",UN Doc ICC-ASP/1/3 (2002),rule 70 a-c.

35.M.C. v Bulgaria, paragraph 163.

36.M.C. v Bulgaria, paragraph 102-107 and 163.

37.Karen TayagVertido v. The Philippines, CEDAW, communication N18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), paragraph 8.9(b)(ii).URL:http://pcw.gov.ph/sites/default/files/documents/efiles/webmaster/cedaw-op-karen-vertido-case.pdf

38.Istanbul Convention, Article N36.3.

39.Handbook for Legislation on Violence against Women, United Nations Department for Economic and Social Affairs, Division for the Advancement of Women, p. 27.

40.See above, p. 26.

stance precluding wrongfulness.[41]

D. Rape and other crimes against sexual freedom and inviolability in Georgian legislation[42]

1. Rape – Article 137 of the Criminal Code of Georgia

a) Consequence of rape

According to Article 137, paragraph 1 of theCCG (Criminal Code of Georgia), rape is **"a sexual intercourse by use of violence, threat of violence or abusing the victim's helpless condition."** Rape belongs to the crimes against sexual freedom and inviolability, and the purpose of its prohibition is to protect a person's sexual freedom and inviolability.[43] As the article is gender neutral, any person who is 14 years of age or more (male or female) can be the offender (perpetrator) of rape and it can be committed against women and men, as well as children.females and males.

b) Elements of rape; sexual intercourse

According to the comment on the Private Part of the Criminal Code, sexual intercourse during rape implies only the so-called "normal, physiological act" between a man and a woman while including their genital organs.[44] It will not be "rape" if the victim's body was penetrated (through genital organs or other organs) with offender's other bodily parts or other objects. Accordingly, oral or anal penetration involving the offender's genital organs, other bodily parts or objects will not be classified as rape.If these actions contain force or the threat of force, they are punishable by the law (see below), however, they will be evaluated as "sexual intercourse in perverted form"[45] and not as "rape."[46]

Based on the abovementioned, the definition of rape in the Criminal Code of Georgiaconflicts with international standards and feminist approaches, according to which any type of sexual penetration into the victim's body - vaginal, anal or oral, with offender's genital organs, other bodily parts or other objects - is defined as "rape" (see above).

c) Method of committing the crime

According to Article 137, paragraph 1 of the CCG, there are three ways of committing rape -by use of a. violence, b. threat of violence or c. abusing the victim's helpless condition.

If **violence** (for instance, beating, tying up, twisting limbs) was followed by minor or less serious injury, the action is still categorized as rape. However, if this action caused serious health impairment, then it becomes a group of crimes (rape, as well as other type of criminal offense).[47] Violence can be directed against the victim, or against another person whose life is in the interest of the victim, or against a person who was trying to prevent the crime.[48]

Including violence as an element of rape is against international standards (see above), according to which violence is an aggravating circumstance of rape and not a part of it.

According to the commentary on the Criminal Code, **the threat of violence** (murder, impairment of health, threat of raping another person or destroying important property) must be real and well grounded; the threat should be happening at that time and there should be a ground of its immediate execution. It does not matter if the offender was going to execute the threat or not – it is important how realistic it was. Violence can be directed against the victim, as well as against another person, whose life is in the interest of

41.See above.

42.Article 137. Rape;Article 138. Violent act of sexual nature;Article 139. Coercion into sexual intercourse or any other act of sexual nature; Article 140. Sexual intercourse or any other act of sexual nature with a person who has not attained the age of 16 years; Article 141. Lewd acts.

43.Sexual freedom is a person's right to willingly choose a sexual partner; sexual inviolability means that sexual intercourse with a particular person (for instance, underage) is prohibited even in case of their consent (See Lekveishvili, M., Todua N., Gvenetadze N., Mamulashvili G., Private Part of Criminal Law, Book I, 6th Edition, 2016, p. 211).

44. Private Part of Criminal Law, Book I, 6th Edition, 2016, p. 212. .

45.A homophobic term in the Criminal Code referring to any type of non-heteronormative sexual intercourse as a perverted form.

46. This article and article on rape consider same punishments.

47.Private Part of the Criminal Code, Book I, p. 212-213.

48.See above, p. 213.

the victim, or against a person who was trying to prevent the crime.[49]

According to the comment, if the threat is real and well grounded but it is intended for the future, the act may be classified as coercion into sexual intercourse or any other act of sexual nature (Article 139 of CCG) or coercion (Article 150 of CCG).[50]

Accordingly, if there is a threat intended for the future, or if it cannot be perceived as a real threat and sexual intercourse with the victim took placecoercively, according to the comment, it will not be classified as rape, as coercion is not considered as a means for commiting rape. This approach raises the following problems:

1. It opposes the definition of "rape" in International Human Rights Law (see above). In case if the threat is directed to the future and the sexual intercourse is committed against the will of the victim, the act has to be classified as rape;
2. It devalues the crime – instead of the 6 to 8 years of imprisonment that can be imposed onthe offender of rape, the punishment is comparatively weak. Article 139 of CCG (Coercion into sexual intercourse or any other act of sexual nature) considers a fine or imprisonment for up to three years as a punishment, and Article 150 of CCG (coercion) considers a fine or corrective labor for up to one year or imprisonment for the same term.

One of the ways of committing rape is **abusing the victim's helpless condition**. It takes place when the victim does not have an ability to oppose the act due to their physical or mental condition (for example, elderly people, people with disabilities, people in deep sleep or those under the influence of alcohol or other substances).[51]

Rape is **considered to be committed (completed)** when the offender starts sexual intercourse. It does not matter if he/she will be able to complete it – this action is still rape.[52]

If a person has sexual intercourse based on a lie, for example a promise of getting married, it will not be deemed to be rape.[53] Since in Georgia the existing norms and the patriarchal attitudes prevent women to have sexual intercourse (it decreases the chances of getting married in the future), the promise of getting married can often be used by a man as the only means to get a woman's agreement to have sexual intercourse. Despite this,by the legislation and the practice, acts committed under such circumstances are not considered acute enough to be qualified as rape.

d) Victim's consent

According to international law and feminist approaches, the non-existence of victim's consent to have sexual intercourse is enough for the act to be qualified as rape. Despite this, the CCG article on rape does not consider the element of victim's consent at all. If violence, the threat of violence or abusing the victim's helpless condition does not take place, the non-existence of victim's consent to sexual intercourse does not equal rape.

2. Violent act of sexual nature (Article 138 of CCG)

The Criminal Code of Georgia differentiates rape and a violent act of sexual nature (Article 138 of CCG). According to paragraph 1, **"Homosexuality, lesbianism or other sexual intercourse in perverted form committed using violence, threat of violence or the victim's helpless state"**is punishable. This article is different from rape because the rape is only sexual intercourse between a man and a woman and only when including genital organs. If there is sexual intercourse of the same sex (by force, threat of force or abusing the victim's helpless condition) or between a woman and a man, using a man's genital organ and other bodily parts of the woman,[54] the act is qualified as a

49.See above, p. 170.

50.See above, p. 170.

51.See above, p. 171.

52.See above, pp. 171-172.

53.See above, p. 171.Sexual intercourse by deception is considered as rape in some countries' legislation (for example, the Criminal Code of Belgium, Article 375, see the link: http://eige.europa.eu/gender-based-violence/regulatory-and-legal-framework/legal-definitions-in-the-eu/belgium-rape).

54.According to the practice of court, if a man's genital organ is not involved in sexual

violent act of sexual nature and not as rape.[55]

Separation of this article from the article of rapeis in contrary tothe understandingof "rape" in International Human Rights Law, which defines rape as any type of non-consensual sexual penetration (see above). As any non-consensual sexual penetration of the body of the victim constitutes rape, crimes under Article 138 should also be defined as rape.

3. Coercion into sexual intercourse or any other act of sexual nature (Article 139 of CCG)

According to the Article 139 of the Criminal Code of Georgia, coercion into a sexual intercourse or any other act of sexual nature is punishable. According to part 1 of this Article **"Coercion into a sexual intercourse, homosexual or lesbian or any other sexual intercourse by threatening to spread the defamatory information or to damage property, or by using material, official or other kind of dependence"** is punishable.

According to the comment, material dependence takes place when the victim receives the amount necessary for living from the offender (food, clothing, costs related to education or healthcare, etc.). Coercion must be expressed in a threat to worsen material conditions. For example, a family member offers sexual intercourse to another member of the family and indicates that if refused material support will stop, so that he/she received agreement on sexual intercourse; or in a workplace a person in a higher position directly or indirectly makes another person feel that his/her work conditions will worsen if the subordinate employee does not agree to have sexual intercourse with him/her, so that it is followed by an agreement.[56]

Firstly, the difference between the threat (in Article 139) and the threat of violence (in Article 137) are not strongly demarcated. Based on CCG, the latter is a part of rape. According to the comment to Article 139, "the public danger of this crime, compared to rape, is evidentially less, as in this case person's life or health are not under threat. Besides, the person has time to think about offender's offer, evaluate the situation, ask other people for help, etc."

The separation of the crime (coercion into sexual intercourse or any other act of sexual nature) from rape opposes feminist approaches discussed above and the definition of "rape" in International Human Rights Law. The crime is committed based on paralyzing the victim's will and using coercive circumstances, due to which the act should be qualified as rape (see above).

Besides the abovementioned, incompatibility of the act with the international definition of "rape," qualifying the act as coercion into sexual intercourse or any other act of sexual nature (Article 139 of CCG) will cause rather lenient punishment of the offender.Whereas rape has imprisonment from 6 to 8 years as a punishment, the punishment for this crime is a fine or imprisonment for up to 3 years.

If the offender forces the victim into a sexual intercourse on the basis of the future threat, the case may not be even qualified as a sexual crime and the person may be punished according to Article 150 (Coercion) of CCG.[57]Imminence of the threat shall not be decisive for the classification of the crime. It is important that the perpetrator have the intent of sexual act, in the presence of which the act will be defined as a crime falling under Article 139. If the threat is directed to the future, this fact should have an impact on the determination of sanction and not on the classification of the crime.

4. Lewd acts (Article 141 of CCG)

According to Article 141 of the CCG, a lewd act is punishable; it states: "Lewd acts committed without violence and knowingly by the offender with a person who has not attained the age of 16 years."[58] The victim of the crime can only be a person who has not reached the age of 16.

According to the comment, during the lewd act the offender does not have sexual intercourse with the victim if "it is characterized as an external imitation of sexual intercourse," but does an act of a sexual character on the victim's body, or his/her own body in the victim's presence, or shows porno-

intercourse, the crime is not qualified as rape or coercion into sexual intercourse. The crime is qualified as an attempt to rape or as a perverted act (if the victim is underage).

55.See: Private Part of the Criminal Code, Book I, pp. 226-228.

56.Private Part of the Criminal Code, Book I, pp. 230.

57.Private Part of the Criminal Code, Book I, pp. 234.

58.The act is punishable by imprisonment for a term of five to seven years.

graphic material to the victim, or "talks to the victim regarding sexual details that could result in emerging sexual desire in the adolescent."[59]

Despite this definition,in the court practice acts that should qualify as rape are often qualified as lewd acts (see below).

The improper qualification of an act under the current legislation does not provide significantly more lenient punishment – according to the amendment of the CCG in 2013, the punishment is almost the same for rape and lewd act - imprisonment for a term of 5 to 7 years for lewd act and imprisonment for a term of 6 to 8 years for rape.

E. Rape, other type of sexual violence and the court practice of Georgia

Based on the analysis of 12 judgments made between 2012-2016 by the courts of first instance, obtained as public information, the following tendencies are visible:

The necessity to have bodily injury to the victim or the offender and other evidence to identify rape:

Despite the fact that physical injury during rape or during other acts of sexual violence is not a mandatory component of the crime, rape, in the above judgements, is mostly identified only if there is evidence of injury. If there is no such evidence in the case, it should be further examined whether these cases reach the court and whether the Prosecutor's Office choosesnot start criminal prosecution, orto terminatethe case due to insufficient evidence.

Based on the analyzed judgments on cases of rape and of other sexual assaults that were followed by a conviction, the following evidence existed: injuries made to the victim by the offender during rape;[60] injuries made on the body of the victim by the offender – injuries around the hymen;[61] multiple bruises and injured hymen;[62] injuries on the victim's body;[63] injuries on the body, and anal and vaginal smear, that was identical to the genetic profile of the accused;[64] bodily injury made by the victim to the offender during an attempt to rape;[65] injured hymen and bruises on the body;[66] external anal injury and rectal injuries on the underage victim's body;[67] sperm of the accused found on the victim's body.[68]

In some cases, **despite the fact that the victim had bodily injuries and there was other proof of rape, the court could still not see that rape was committed**. For example, in one of the cases of Batumi City Court we see following circumstances: the accused refuses the claim of rape; victim's hymen is not injured, however, there are injuries around the vaginal opening; as the expert mentions, the injury could have been made either by a man's genital organ, or an object; also, the sperm of the accused was found on the victim's underwear; the victim was initially hiding the fact of rape.[69] Despite the fact that: a) in case of rape it does not matter if penetration was partial or complete, and whether it was done with genital organs or an object and b) if the victim initially refuses to provide information on rape, it should not be considered as proof that there was no case of rape, the court used mostly these facts as the basis for the verdict of not guilty.

The failure to properly classify crimes as rape: :

Even though there are cases in which forceful penetration into the victim's body is proved, the act is still not qualified as rape. For example, Batumi City Court confirms that there was the case of penetrating victim's (14 years old girl) vagina with a hand and the offender "tormented the area around the hymen by hand." Despite this, the act was not qualified as rape since there was no penetration with the offender's genital organs. It was qualified as an attempt to rape.[70]

59. See the comment on the Criminal Code, p. 192.

60. Mtskheta District Court, judgment of May 8, 2012.

61. Zestaponi District Court, judgment of September 26, 2012.

62. Bolnisi District Court, judgment of June 21, 2013.

63. Batumi City Court, judgment of July 9, 2014; Samtredia District Court, judgement of October 12, 2015.

64. Batumi City Court, judgment of March 19, 2014; Batumi City Court, judgment of November 25, 2014.

65. Khashuri District Court, judgment of June 9, 2015.

66. Telavi District court, judgment of February 12, 2016.

67. Gori District Court, judgment of October 21, 2013.

68. Batumi City Court, judgment of March 19, 2014; Batumi City Court, judgment of November 25, 2014; Samtredia District Court, judgment of October 12, 2015.

69. Batumi City Court, judgment of March 21, 2016.

70. Zestaponi District Court, judgment of September 26, 2012.

In a case where it was confirmed that the offender "used few fingers to penetrate the genital organs" as erection did not occur, the proceeding was based on the article on rape. However, the court requalified it as an attempt to rape, since the crime was not committed with offender's genital organs. Accordingly, based on the court's decision, it did not represent "a normal physiological act that can only happen between a man and a woman using genital organs."[71]

In a case which included penetration into a child's mouth and rectum with a man's genital organ, the crime was qualified as the violent act of sexual nature and not as rape (since vaginal penetration did not take place).[72]

Stereotypes manifested during the evaluation of evidence, which influence or may influence criminal cases:

Along with giving wrong (contradicting international standards) qualifications to the acts, the facts described in the judgments show the stereotypes connected to rape in criminal proceedings:

- According to the convicted person, he/she had before had sexual intercourse with the victim; therefore, he/she was proving that the existence of rape in this case was impossible;[73]
- The defendant's side claimed that the victim (an underage girl) was lying about the rape, since she was usually lying to her teachers about doing homework (the court evaluated this argument as "very weak");[74]
- The victim mentioned that he/she was refraining himself/herself from notifying the police about rape as he/she was scared of having a bad reputation;[75]
- In the case concerning the rape of a 14 year old girl, the head of the teaching department at the school, a relative of the convicted, called the girl and said that the offender would have married her, so that she would not have reported the case.[76]

71. Bolnisi District Court, judgment of June 21, 2013.
72. Gori District Court, judgment of October 21, 2013.
73. Batumi City Court, judgment of July 19, 2014.
74. Zestaponi District Court, judgment of September 26, 2012.
75. Batumi City Court, judgment of July 19, 2014.

The analyzed judgments do not include cases where sexual intercourse took place without violence or the threat of violence. Accordingly, Rape is presumably considered as a crime that results from violence in all the cases and that injuries on the body of the victim (or the perpetrator) are required to confirm the crime. In case when rape is committed without violence, there is a possibility that the prosecution and the courts might not give a proper assessment to the crime, and not classify the act as rape because of the lack of "sufficient evidence.''

F. Conclusion and recommendations

In Georgian criminal law, the definition of rape and other sexual assaults opposes international standards and feminist approaches. The article on rape does not include any act of **non-consensual** sexual penetration of the victim's body with the offender's genital organs, with any other bodily parts or with an object. Violence is a part of the article on rape and not an aggravating circumstance, and rape based on the future threat of violence is not considered as rape.

The non-existence of the victim's consent to have sexual intercourse is not considered enough to be qualified as rape if it is not accompanied by violence or the threat of violence. The legislation and practice do not consider the definition of "coercive circumstances" in the case of rape or the duty of the offender to prove what steps were taken towards being sure of the victim's consent.

Those sexual assaults that are not classified as rape according to the Georgian legislation often include elements that should be considered in the definition of rape according to international standards. As a result rape is considered as other, minor crime.

The analysis of court judgments also showed that injuries on the body of a victim or an offender, which are the characteristics of forceful sexual intercourses, are of fundamental importance for a conviction. It narrows the definition of rape, puts it in the framework of forceful sexual intercourse, and leaves threat, non-existence of victim's consent and other coercive circumstances without evaluation.

76. Telavi District Court, judgment of February 12, 2016.

The legislation systematically ignores women's experience aboutthe essence of sexual intercourse and the consent to it in relation with rape, and creates every possibility so that the majority of sexual violence cases remain unpunished. The evaluation of rape, according to the standards of men's perception and improper analysis of coercive circumstances violates the sexual autonomy of women victims and supportsor maintains the traditional, sexual subordination of women. The legislation and practice concerning sexual violence against women must be changed fundamentally, so that all forms of violence are visible, attention is paid to respecting a victim's dignity, and women's sexual exploitation and oppression are eliminated.

Recommendations:

- In accordance with the Istanbul Convention, rape should be defined as: *"a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; b) engaging in other non-consensual acts of a sexual nature with a person; c) causing another person to engage in non-consensual acts of a sexual nature with a third person;"*
- Non-consensual sexual act should be defined as any non-consensual sexual act, including the deception of a victim (for example, false promise of marriage);
- "Violence" should be taken out as a part of rape. Forceful rape should be an aggravating circumstance;
- In accordance with the practice of CEDAW, the existence of "unequivocal voluntary agreement" must be proved in order to exclude the crime composition; the accused must prove the steps taken for making sure of victim's consent to have sexual intercourse;
- In accordance with the practice of CEDAW and the European Court, in case of rape and other sexual violence, "coercive circumstances" must be examined and a broad range of such circumstances must be determined;
- The legislation should separately mention rape of a spouse, a partner and a sex worker;
- If a threat was not only temporary but also intended for the future, the act must be qualified as rape based on threat. Coercion must be recognized as a means for committing rape.In every case, sexual intercourse based on the threat of violence must be classified as rape and not as another type of sexual assault;
- In case of violence against women and the existence of respective evidence, investigation should have a vision that possibly there is a case of sexual violence. After excluding the case of sexual violence, the possibility of other type of violence must be examined.

III. PORNOGRAPHY

A. Introduction

This chapter deals with pornography and related criminal offences: *Criminal Code of Georgia, Article 255. Illicit production or sale of pornographic works or other items; Criminal Code of Georgia, Article 255[1]. Engagement of minors in illegal production and sale of pornographic works or other similar items; Criminal Code of Georgia, Article 143[1]. Human trafficking; Criminal Code of Georgia, Article 143[2]. Child trafficking.*

B. Feminist approaches to pornography

According to radical feminists, pornography is a weapon of violence and discrimination of women and a form of their exploitation. Those feminists who are positively disposed towards sex believe that some types of pornography serve strengthening of sexual self-expression of women.

Feminists confronting pornography-Catharine MacKinnon, Andrea Dworkin and Diana Russell – assert that pornography contributes to violence against women and serves women's exploitation. In MacKinnon's opinion, pornography contributes to physical, psychological and/or economic violence against women, even if pornographic works portray women as enjoying the process of participation.[77]

According to MacKinnon and Dworkin, pornography is the demonstration of women's subordination, which causes strengthening of men's misogynistic attitude towards women and perceiving them as sexual objects. Robin Morgan believes that watching pornography leads to rape and other forms of sexual abuse-"Pornography is the theory; rape is the practice".[78]

77. MacKinnon, C. (1983). "Not a moral issue." Yale Law and Policy Review, pp. 321-345. Available in JSTOR.

78. Morgan, R. (1978). "Theory and practice: pornography and rape". In Morgan, Robin. Going too far: the personal chronicle of a feminist. New York: Vintage Books. pp. 163–169.

Feminists who are opponents of pornography also consider that pornography causes distorted perceptions of men and women's bodies and sexual acts, and eroticizes domination over, violence against and, in general, derogation of women. This, in MacKinnon's opinion, leads to increase of sexual abuse through assertion of rape-related myths (e.g., opinion that women want/ask for rape; that their refusal means consent, etc.) and forms a non-sensitive attitude towards the issue of violence against women. As a result, violence against women is used as a means causing sexual excitement.[79]

On the other hand, feminists positively-minded towards sex believe that discourse against pornography contributes to ignoring and trivialization of a woman as a sexual agent. According to Ellen Willis, consideration of pornography as a form of violence against women repeats neo-Victorian opinion that only men take pleasure in sex, while women endure it for duty.[80] From the perspective of feminists positively-minded towards sex, pornography can change the traditional, stereotype perception of a woman's sexuality, according to which women, as a rule, donot like sex, or want it only with their partners and only in modest forms. They think that pornography represents a woman as a dominant and not a subordinated subject, allowing to freely express her sexual identity and desires.

Opponents of pornography and feminists with positive attitude towards sex agree that pornography should not be used as a means for women's subordination, or satisfaction of sexual needs through violence. For feminists opposing pornography, all types of heterosexual pornography is a demonstration of subordination of a woman and a tool of her oppression, while feminists with positive attitude towards sex support sexual self-expression of women and even perceive it as a means of sexual emancipation of women.

C. International Human Rights Law and pornography

Voluntary participation of an adult in a pornographic work is not considered a violation of human rights in International Human Rights Law. An adult man/

79. Jeffries, S. (12.04.2006). "Are women human?" - Interview with Catharine MacKinnon. The Guardian. Follow link: https://www.theguardian.com/world/2006/apr/12/gender.politicsphilosophyandsociety.

80. Willis, E. (18.10.2005). "Lust horizons: the 'voice' and the women's movement", Village Voice. Follow link: http://www.villagevoice.com/news/lust-horizons-6401720.

woman or their sexual autonomy is not an object to be protected from pornography, and the producer of a pornographic work does not commit an offence by adult's voluntary participation. Creation of a pornographic work with child participation or using a child's image and involvement of an adult in pornography against their will is punishable.

The international instruments of women's rights protection, including the Convention on the Elimination of All Forms of Discrimination against Women and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, donot contain provisions about pornography. Therefore, in the International Human Rights Law pornography (if it is not related to other criminal offenses) is not regarded as a form of discrimination against women, exploitation or violence over them. There is also no differentiation between pornography pieces expressing sexual acts between one and the same or opposite sex.

On the other hand, international law protects children from forced, as well as voluntary, participation in pornography. According to the UN Convention on the Rights of the Child, the state shall take all measures to prevent "the exploitative use of children in pornographic performances and materials".[81]The Optional Protocol to the Convention on the Rights of the Child on the sale of children, children prostitution and children pornography requires the State to criminalize the "producing, distributing, disseminating, importing, exporting, offering, selling or possessing pornography for the above purposes"[82], and child pornography is defined as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes".[83]

The Protocol does not require the storage of child pornography to be punishable, if the storage does not aim at disseminating or ensuring its availability in any other form. However, the Committee on the Rights of the Child recommends that States criminalize the keeping of child pornography, regardless of storage purposes.[84] The Protocol does not discuss the issue of the consent of children for the participation in pornography as the basis for legitimacy of the material.

81.UN General Assembly, Convention on the Rights of the Child, 20 November, 1989, Article 34 (c).

82.UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the sale of children, children prostitution and children pornography, March 16, 2001A/RES/54/263.

83.Optional Protocol to the Convention on the Rights of the Child on the sale of children, children prostitution and children pornography, Article 2 (c).

An attempt to integrate feminist approaches in US and Canadian national law and practice

Based on the anti-pornography model ordinance, drawn up in 1983 by American feminists Andrea Dworkin and Catherine MacKinnon, various acts on the protection of women and children's civil rights were initiatedin several American states. The model ordinance defines pornography as follows:

"Pornography" means the graphic, sexually explicit subordination of women through pictures and/or words that also includes one or more of the following:

a) *women are presented dehumanized, as sexual objects, things or commodities;*

b) *women are presented as sexual objects, who enjoy humiliation or pain;*

c) *women are presented as sexual objects, experiencing sexual pleasure in rape, incest, or other sexual assault;*

d) *women are presented as sexual objects, tied up or cut up or mutilated or bruised or physically hurt;*

e) *women are presented in postures or positions of sexual submission, servility, or display;*

f) *women's body parts-including, but not limited to vaginas, breasts, or buttocks-are exhibited so that women are identified with those parts;*

g) *women are presented being penetrated by objects or animals;*

h) *women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.*

2. The use of men, children or transsexuals in the place of women in a-h paragraphs of this definition is also the pornography, for purposes of this law.

84.*See*, UNICEF Innocenti Research Centre, Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, p. 12, follow link: https://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf.

3. A "person" shall also include child or transsexual.[85]

According to the model ordinance, pornography is a form of discrimination on the grounds of sex and is a systematic practice of exploitation and subordination based on sex that differentially harms and disadvantages women.[86] According to the model ordinance, anyone being damaged by pornography may sue for damages.[87] It is noteworthy that the model is mainly based on women's experience, but it also recognizes, that a man, a child or a transsexual may become a victim.

In those states where this model ordinance was enacted in the form of a law, these laws were subsequently abrogated based on the argument that they contradicted the freedom of expression and, consequently, were unconstitutional.[88]

In the case *R. v. Butler* (1992), the Supreme Court of Canada reviewed the approaches of Dworkin and MacKinnon and ruled that Canadian law on obscenity violated the freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms if it is applied with the consideration of arguments that are related to morality and public morals. However, the Court noted that the law on obscenity must still be applied with regard to some types of pornography in order to ensure gender equality,as guaranteed by the Charter.[89]

D. Pornography and related offences in Georgian legislation (Criminal Code of Georgia, Articles 255, 255¹, 143¹,143²)

According to the Criminal Code of Georgia, declaring pornography a punishable offence serves the protection of public morality and not of persons

85.Model Antipornography Civil Rights Ordinance. See link: http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/AppD.htm.

86. Model Antipornography Civil Rights Ordinance. Section N1, parts N1 and N2.

87. Model Antipornography Civil Rights Ordinance. Section N3.

88. Sandler, W. A. (1984). The Minneapolis Anti-Pornography Ordinance: A Valid Assertion of Civil Rights? *Fordham Urban Law Journal*.Follow link: http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1271&context=ulj.

89.R. v. Butler, Case N 22191, Supreme Court of Canada, decision of February 27, 1992. Follow link: http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/844/index.do.

participating/shown in it.[90] The legislation of Georgia regulates such acts differently in case of adults and juveniles.

According to part one of Article 255 of the Criminal Code of Georgia, "illegal making, dissemination or advertisement of pornographic works, printed publications, images or similar items, as well as trade in or storage of theseitemsformarketingordisseminatingpurposes is punishable."

Consequently, the purchasing of pornographic works with the image of an adult, their storing for private use, personal use and attending demonstrations is permissible and not punishable. Once more, the law indicates, that illegal making, dissemination or advertisement and storing for the purpose of selling and dissemination of pornographic works is punishable. As the Article prohibits illegal commitment of such actions, it indicates the possibility of their performance within the framework of the legislation – inother words, in certain circumstances making, dissemination, etc. of pornographic works may be legitimate.

Notwithstanding the foregoing, **there is no normative act in the legislation of Georgia which would distinguish from each other the illegal and legitimate producing or distribution of pornography.** Pursuant to part 4 of Article 56 of the Law of Georgia on Broadcasting, "broadcasting of pornography and programs or advertisements abusing a citizen's and a person's dignity and his/her fundamental rights and that contain obscenity, are prohibited". However, the Law only applies to the broadcasting of pornography on television and it does not determine in what cases the making of pornographic works can be illegal or legal.

According to part 2 of Article 255 of the Criminal Code of Georgia, **not onlypurchasing/storing, but also providing access in any form** of pornographic works, containing images of minors is punishable as an aggravating circumstance: "knowingly purchasing, storing, attending the demonstration of, offering, disseminating, transferring, advertising, providing access to or using pornographic works containing images of minors". Unlike pornographic works containing images of adults, the purchasing, storing, attending the demonstration of, offering, disseminating, transferring, advertising, provid-

90.Criminal Code of Georgia, Chapter XXXII –Crime against Public Health and Public Morals.

ing access to or using pornographic works containing images of minors is punishable. **Storing pornographic works, containing images of minors is punishable even in case if a person does not intend to disseminate them.** These actions, if they are related to materials containing images of minors, are illegal in all cases.

Pursuant to part 3 of Article 255 of the Criminal Code of Georgia "Knowingly **making or selling pornographic works containing images of minors"**, as an aggravating circumstance is punishable. Therefore, if there is no legal or illegal making or selling of pornographic works containing images of minors –such actions are illegal in all cases.

"Engagement of minors in the illegal production and sale of pornographic works or other similar items, as well as in the dissemination, advertising or trading of such materials or acquiring benefit from such acts" (Criminal Code of Georgia, Article 255^1) is also punishable.

The ways of engagement of minors in making of pornographic works and other actions are not specified; this can be done forcedly, by threats, blackmail, persuading, etc.[91]

Note to Article 255 defines the children pornography as follows: *A pornographic work containing images of minors shall mean a visual or audio-visual material produced by any method, also a staged performance which, using various means, depicts the participation of minors or of characters with the appearance of a minor in the actual, simulated or computer-generated sexual scenes or displays genitalia of a minor for the gratification of a consumer's sexual needs.* The Article also indicates what is not considered under the term of child pornography: *a work shall not be considered to be pornograph yifithasmedical,scientific, educational or artistic value.*The definition of pornography of minors **complies with the requirements of the Convention of the Rights of Children and its additional protocols,** although, legislation does not specify occasions when images of minors can be used for "medical, scientific, educational or artistic" purposes.

Pornography can be an integral part of human trafficking if a person is exploited, which is manifested by the engagement of a person into pornography (Criminal Code of Georgia, Article 143^2-human trafficking[92], Criminal Code of Georgia, Article 143^2 –child trafficking[93]. Exploitation is "engagingapersonincriminalactivities,prostitution,pornographicorotheranti-socialactivities for the purpose of gaining material or other benefit".[94] Trafficking, which is committed by the engagement of a person into pornography, is considered to be particularly grave offence in relation to minors, as well as adults.[95] Other mentioned crimes related to pornography are comparatively minor offences.[96]

91. M. Lekveishvili, N. Todua, G. Mamulashvili, Private Part of the Criminal Code (Book 1), 6th edition, p. 730,2016.

E. Pornography and Georgian judicial practice

The judgements made by Tbilisi City Court in 2013-2015[97] (5 judgements)

92. Pursuant to Article 143^1 of the Criminal Code of Georgia, human trafficking is "purchase or sale of human beings, or any unlawful transactions in relation to them, by means of threat, use of force or other forms of coercion, of abduction, blackmail, fraud, deception, by abuse of a position of vulnerability or power or by means of giving or receiving of payment or benefits to achieve the consent of a person having control over another person, as well as recruitment, carriage, concealing, hiring, transporting, providing, harbouring or receiving of a human being for exploitation".

93. Pursuant to Article 143^2 of the Criminal Code of Georgia, child trafficking is „purchase or sale of children, or other unlawful transactions in relation to them, as well as their recruitment, carriage, concealment, hiring, transportation, provision, harbouring or reception for exploitation".

94. Criminal Code of Georgia, Article 143^1(Human trafficking), Note "c".

95. Article 143^1 of the Criminal Code of Georgia (human trafficking) envisages imprisonment for a term of seven to twelve years, with deprivation of the right to hold an official position or to carry out a particular activity for up to three years. Article 143^2 (child trafficking) envisages imprisonment for eight to twelve years, with deprivation of the right to hold an official position or to carry out a particular activity for up to three years.

96.Offence envisaged by Article 255^1 of the Criminal Code of Georgia (illegal production or sale of pornographic works or other similar items) shall be punished by a penalty or correctional activities for a term of two years, and/or imprisonment for the same term. The offence envisaged by part 2 shall be punished by a penalty or correction activities for a term of two years and/or imprisonment for three years. The offence envisaged by part three shall be punished by a penalty or imprisonment for a term from three to five years. The offence envisaged by Article 255^1 of the Criminal Code of Georgia (engagement of minors in illegal production and sale of pornographic works or other similar items) shall be punished by imprisonment for the term from two to five years.

97.The judgements made during the period from 2005 to 2016 were requested. Out of judgments submitted by Tbilisi City Court one was delivered in 2013, and four judgments - in 2015.

based on Article 255 of the Criminal Code of Georgia (illegal making or sale of a pornographic work or other items) showed that when a pornographic work is made with the participation of an adult, the offender shall be charged only for the dissemination (and not making) of that work.[98]During the mentioned period there was not a case when a person was charged for the production of pornographic works with the participation of an adult.

In 2005-2016, Tbilisi City Court delivered one judgement, according to which, a person was charged for making and dissemination of pornographic video material with the participation of a minor girl (12 years old).[99]

Pornographic materials in all the above-mentioned cases were disseminated by means of the internet. In cases for which the court delivered a judgment due to dissemination of pornographic materials, it is unknown whether the mentioned persons themselves were producers of pornographic materials. The court does not distinguish between legal and illegal production and dissemination of pornographic materials. In all cases, when material was placed on the internet, the court considered the action as illegal.

F. Conclusion and recommendations

Criminal law provisions related to pornography of minors fully complies with the reviewed feminist approaches and standards of the International Human Rights Law. The legislation of Georgia includes the highest standards recommended by UN Committee of the Rights of the Child, which state that any action related to child pornography, including storing of pornography is punishable regardless of storage purposes.

As regards the participation of women in pornographic works, the legislation of Georgia does not conflict with the international human rights instruments, but also does not envisage the approaches of feminists about the degrading impact of pornography on women. Making pornographic works and the voluntary participation of women in pornography are not regarded in the legislation and practice of Georgia as a form of discrimination against women, exploitation or any form of human rights violations.

98.Judgment of Tbilisi City Court of August 5, 2014; Judgment of Tbilisi City Court of May 14, 2015; Judgment of Tbilisi City Court of June 5, 2015; Judgment of Tbilisi City Court of December 18, 2015.

99.Judgment of Tbilisi City Court of January 23, 2013.

Coercion of women in pornography, or an occurrence when pornography is related to other form of offence, is criminalized according to international standards. Making pornography available by any illegal way is punishable, which complies with feminist standards, though the legislation admits the possibility of legal production and availability of pornography. The legislation does not distinguish between legal and illegal pornography, and the allowability of legal pornography (content of which is not defined) may fail to agree with the approaches of feminist opponents of pornography. In this regard, there is no separation between pornographic works expressing the same and opposite-sex sexual contact.

In contrast with the standards of feminists opposing pornography, the analysed judgments do not contain cases in which a person was sentenced due to production of pornography with the participation of an adult woman. Under the judgements reviewed in this study, only illegal dissemination of pornographic works through the internet is punished. Prohibition and punishment of acts related to pornography serves the protection of public morality, and not the protection of the rights of women who participate in pornographic works.

With regard to pornography, the starting point of the legislation of Georgia must be the review of pornography in the context of the sexual objectification of women and eradication of harmful effects for women participating in pornography. It is necessary to make fundamental changes in the approach of legislation, in order to prevent violence against women, their perception as sexual objects based on the values of the freedom of expression, and the legislation must serve the eradication of sexist attitudes, domination on women and erotization of her humiliation.

Recommendations

- Pursuant to Article 255 of the Criminal Code of Georgia, in all possible cases and according to the severity of action, producing, disseminating or advertising of such pornographic works, as well as trading or storing of such items, which show a woman as a subordinated, sexual object or in which women undergo physical or psychological pain or suffering should be prohibited. The same ac-

tions in relation to a man or a transgender should be announced punishable according to the same Article;

- The legislation should define the cases of legal production of pornography;
- Pornography which shows a woman as a subordinated subject should be defined as a form of gender-based discrimination (according to anti-discrimination legislation);
- Along with other possible objects, an adult woman/person participating in pornography, including voluntary participation, who is shown by means of pornography as a subordinated object and/or feels pain, should be defined as an object to be protected from pornography offences.

IV. VIOLENCE AGAINST WOMEN AND OTHER GENDER OFFENCES COMMITTED AGAINST WOMEN

A. Introduction

This chapter deals with the following crimes against human health:

Criminal Code of Georgia, Article 117. Intentional infliction of grave injury; Criminal Code of Georgia, Article 118. Intentional less grave bodily injury; Criminal Code of Georgia, Article 120. Intentional light bodily injury; Criminal Code of Georgia, Article 121. Intentional grave or less grave bodily injury caused in a state of sudden emotional excitement; Criminal Code of Georgia, Article 122. Intentional grave or less grave bodily injury by exceeding the limits of self-defence; Criminal Code of Georgia, Article 124. Grave or less grave bodily injury through negligence; Criminal Code of Georgia, Article 125. Battery; Criminal Code of Georgia, Article 126. Violence; Criminal Code of Georgia, Article 126 [1]. Domestic violence.

At the same time, in the context of the above-mentioned articles, the chapter addresses the following articles of the Criminal Code of Georgia: Article 11[1]. Liability for domestic crime; Article 19. Attempted crime; Article 28. Necessary defence; Article 53. General principles of sentencing.

B. Feminist approaches to crimes committed against women

Feminist author Diana Russell notes that according to the public perception, women are the weaker sex and gentle creatures, so men treat them in a special way. She believes this opinion, in most cases, is a myth and, instead of special treatment, women are often victims of violence. Women are not victims of violence only when they do not obey the rules of the society. Violence of men against women is the means of preservation and strengthening power and control over them.[100]

100.Diana Russel and Nicole Van de Ven, Crimes Against Women: Proceedings of the International Tribunal, 1976,p. 81. See the link: http://www.dianarussell.com/f/

The cause of domestic violence is the existence of patriarchal family, which serves to institutionalize the dominance of husbands over wives.[101]As men in many cases remain unpunished for violence against women, they have the opportunity to abuse their power and express their frustrationtowards themselves, other persons or their way of life through violence against women.[102]

In connection to domestic violence, the main goal of feminists was to take violence from the personal to public space, showing its systematic character and transforming it into a political issue.[103] Domestic violence, which mostly remains hidden, is a form of women's sexual and economic subordination - in many cases the economic situation, pregnancy and child-related issues do not allow a woman to escape the violence.[104] Domestic violence of men against women is sexualised even when a particular act of violence does not include sexual violence, for example, raping of wife by husband.[105]

Modern feminist authors also recognize that domestic violence is not exclusively a phenomena characteristic of heterosexual relations and, in some cases, violence is a serious problem in lesbian relationships.[106] According to Christine Littleton, violence in lesbian couples does not mean that domestic violence does not depend on sex; this fact indicates that "sexual roles and biological roles are not the same," and physical violence, as well as rape, is an action characteristic of "socially masculine gender", but sometimes it is committed by a biological female.[107]

Consequently, domestic violence and gender-based violence against women is a form of power over women and their control that ignores women's autonomy and tries to bring to "normal" the patriarchal structure's subordination of women by men.

Crimes_Against_Women_Tribunal.pdf.

101.See above, p. 48.

102.See above, p. 81.

103.Chamallas, M. *Introduction to Feminst Legal Theory*.Third edition, 2013. Printed: Wolters Kluwer Law&Business, New York, p. 251.

104.See above,p.251 -252.

105.See above.

106.See above, p. 251.

107.Littleton, C. *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989.

C. Crimes against women in International Human Rights Law

According to Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), "Violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women. Gender-based violence is a structural form of violence against women and one of the crucial social mechanisms by which women are forced into a subordinate position compared with men".[108]

Norms of International Human Rights Law (including the European Court of Human Rights and the Inter-American Court practice) considers violence against women to be one of the forms of discrimination against women.[109] General Recommendation 19 of the UN Committee on the Elimination of Discrimination against Women explains that "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."[110]

Istanbul Convention recognizes that women are often exposed to the following forms of violence: domestic violence, stalking, rape, forced marriage, crimes committed in the name of so-called "honour," and genital mutilation.[111] The Convention considers all these crimes to be forms of violence, gross violation of human rights and a major obstacle on the way toward the achievement of equality between men and women. The Convention also recognizes that both women and men can become victims of domestic violence, but this form of violence affects women disproportionately.[112]

108.Istanbul Convention, Preamble.

109. General Recommendation N19 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1992, paragraph N1; See also:Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Istanbul, 11.05.2011, Article 3(a); Opuz v. Turkey, Complaint N33401/02, the European Court of Human Rights, 09.06.2009, paragraph N200.

110. General Recommendation N19 of the Convention on the Elimination of All Forms of Discrimination Against Women, follow link: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm.

111.Istanbul Convention, Preamble.

112.Istanbul Convention, Preamble.

The United Nations Convention on the Elimination of Discrimination against Women in all its forms does not provide for the definition of criminal offenses committed against women. On the other hand, the Istanbul Convention requires the state to criminalize crimes against life and health of women, including:

- Violence against women – must be understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life (Istanbul Convention, Article N3.a).

Gender-based violence against women, according to Istanbul Convention, is a violence that is directed against a woman because she is a woman or that affects women disproportionately (Istanbul Convention, Article N3.c).

- Domestic violence – means all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim (Istanbul Convention, Article N3.b).

As domestic violence mostly occurs because a woman is a victim, and it is disproportionately reflected on women (women are more often victims of domestic violence than men), it is a form of gender violence against women.

- **Psychological violence** - intentional conduct of seriously impairing a person's psychological integrity through coercion or threats must be criminalized (Istanbul Convention, Article N33).

- **Stalking -** intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, must be criminalized (Istanbul Convention, Article N34).

- Physical violence - intentional conduct of committing acts of physical violence against another person must be criminalized (Istanbul Convention, Article N35).

- **Sexual violence** (See chapter II of this work).

- Forced marriage - intentional conduct of forcing an adult or a child to enter into a marriage must be criminalized.

According to the Istanbul Convention, the following circumstances shall be taken into consideration as aggravating circumstances in relation to the offences committed against women:

a) the offence was committed against a former or current spouse or partner as recognized by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;
b) the offence, or related offences, were committed repeatedly;
c) the offence was committed against a person made vulnerable by particular circumstances;
d) the offence was committed against or in the presence of a child;
e) the offence was committed by two or more people acting together;
f) the offence was preceded or accompanied by extreme levels of violence;
g) the offence was committed with the use or threat of a weapon;
h) the offence resulted in severe physical or psychological harm for the victim;
i) the perpetrator had previously been convicted of offences of a similar nature (Istanbul Convention, Article N46).

The Istanbul Convention and other international human rights instruments do not provide for the definition of **femicide** – murder of women on the grounds of gender.

The definition of crime against womentreats all women as if they are the same. However, the legislation should take into account the experience of women, who due to their race, ethnic affiliation, religion, disability, sexual orientation, gender identity, age, social or economic status or place of residence may disproportionately become victims of gender crimes and intersecting discrimination.[113]

Battered woman syndrome

When women apply violence to protect themselves from a violent husband/partner, their actions are rarely qualified as necessary self-defence. The rea-

113.On intersectionality, see United Nations Convention on the Elimination of All Forms of Discrimination Against Women, General Recommendation N28, paragraph N18.

son for this may be that the physical resistance and use of physical force for self-defence is, as a rule, perceived as an action characteristic of men and not women.[114]

Battered woman syndrome is suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and are unable to take any independent action that would allow them to escape the abuse, including refusing to press charges or to accept offers of support.[115] A person with battered woman syndrome sometimes kills the violator because she has no other way to escape from the violator. As a rule, a woman commits murder when no violence or physical confrontation occurs-for example, when the husband is sleeping.[116]

If a women who is a victim of domestic violence uses deadly force, the question arises as to whether the action of the deceased was so dangerous that it justified the use of force; whether the woman is "the true victim"; whether the threat against a woman was perceived sufficiently and whether a woman should be punished (and to what extent) for her actions.[117] The document adopted by the UN General Assembly, which analyses the best international practice, states that "claims of self-defence by women, who have been victims of violence, particularly in cases of battered woman syndrome, are taken into account in investigations, prosecutions and sentences against them."[118]

D. Legislation of Georgia related to crimes committed against women

The legislation of Georgia does not recognize the offences envisaged by Istanbul Convention as violence against women and gender-based violence/ gender crime. Although, some crimes against women occur because she is a woman, or the crime disproportionately relates to women, the articles of

114. *Women's access to justice in case of gender-based violence* (See above),p. 214,

115.UN General Assembly Resolution 65/228, A/RES/65/228, 31.03.2011, p. 11, f. N23. Follow link: https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_Crime_Prevention_and_Criminal_Justice.pdf.

116. Introduction to the Feminist Law Theory (see above), p. 256.

117. See above, p. 255.

118. *Women's access to justice for gender-based violence* (see above), p.214.

the Criminal Code of Georgia do not provide for gender specificity. Violence committed against women and domestic violence, contrary to the Istanbul Convention and the requirements of the international instruments, are not defined as a form of discrimination against women.

Gender-based offences committed against women's health fall within the scope of gender-neutral articles, when their investigation and the punishment is carried out according to: Criminal Code of Georgia, Article 117. Intentionally infliction of grave injury; Criminal Code of Georgia, Article 118. Intentional less grave bodily injury; Criminal Code of Georgia, Article 120. Intentional light bodily injury; Criminal Code of Georgia, Article 121. Intentional grave or less grave bodily injury caused in a state of sudden emotional excitement; Criminal Code of Georgia, Article 122. Intentional grave or less grave bodily injury by exceeding the limits of self-defence; Criminal Code of Georgia, Article 124. Grave or less grave bodily injury through negligence; Criminal Code of Georgia, Article 125. Battery; Criminal Code of Georgia, Article 126. Violence; Criminal Code of Georgia, Article 126 [1]. Domestic violence.

Gender-based offence is also not defined in the mentioned articles of the Criminal Code of Georgia as an aggravating circumstance.

Although part 3[1] of Article 53 of the Criminal Code of Georgia provides for aggravation of sentence when a crime is committed on the grounds of discrimination (including gender-based discrimination), this article is not applied in practice.[119]Even if this article was used by the court or prosecution authorities, all gender-based crimes still would not be identified, as gender-based discrimination might not be uncovered in all gender-based crimes.. Accordingly, the present legislation and practice do not allow the gathering of gender-based crime statistics.

Domestic violence and other domestic offences:

The Criminal Code of Georgia codifies domestic violence and other domestic offences as follows:

Article 126[1] of the Criminal Code of Georgia declares domestic violence punishable – "Violence, regular insult, blackmail, humiliation by one family member of another family member, which has resulted in physical pain or

119.Public information requested from the General Courts of Georgia, as of January 2016.

anguish and which has not entailed the consequences provided for by Articles 117, 118 or 120 of this Code". The action indicated in Article 126[1], according to the Criminal Code of Georgia, is a light offence and it shall be punished by community service or imprisonment for up to a year.

If other domestic offences against human health are committed, which do not fall within the scope of Article 126[1], then the offence shall be qualified according to the relevant article (e.g. Article 117. Intentionally infliction of grave injury; Article 118. Intentional less grave bodily injury; Article 120. Intentional light bodily injury and with reference to Article 11[1] of the Criminal Code of Georgia (liability for domestic violence). The function of Article 11[1] of the Criminal Code of Georgia is to gather statistical information on domestic violence. Contrary to the requirements of the Istanbul Convention, neither Article 11[1] nor any other article provides for consideration of an offence committed against a family member as an aggravating circumstance.

Article 11[1] recognizes a wide definition of a family member (a person against whom domestic crime can be committed). For the purposes of the article, the following persons shall be considered family members: a spouse, mother, father, grandfather, grandmother, child (stepchild), foster child, adopting parent, adopting parent's spouse, adoptee, foster family (foster mother, foster father), guardian, grandchild, sister, brother,parentsofthespouse, son-in-law, daughter-in-law,formerspouse,alsopersonswhomaintainormaintained acommonhousehold. According to the article, domestic crimes are crimes committed against life, health, sexual freedom and security, human rights and freedoms, family and minors, health and public morality, as well as, offences directed against the execution of judicial acts, which are committed by one family member against another.[120]

Although the legislation separates domestic violence, it does not specify the gender crimes committed against women in the family and does not provide

120.The Criminal Code of Georgia, Article 11[1]. Liability for domestic violence:Crime committed by one family member against another family member under Articles 108, 109, 115, 117, 118, 120, 125, 126, 137, 141, 143, 144-144[3], 149-151, 160, 171, 253, 255, 255[1] , 381[1] and 381[2] shall be considered a domestic crime.
Criminal liability for domestic crime shall be determined by the relevant article of the Criminal Code of Georgia specified in this article, by making reference to this article.

for the formulation of gender specificity when the domestic violation is committed against women. Codification of domestic crime is gender-neutral and their victims can become women, as well as men and children. Law norms are applied to such crimes neutrally.

At the same time, though based on the Istanbul Convention (which the legislation of Georgia does not approve) domestic violence against women is a form of gender-based violence against women, the definition of domestic violence does not include all cases of gender-based violence which are committed against women during their life. Women may be subject to gender-based violence by a person who according to the legislator is not a member of the family; for example, violence against a woman by her admirer, violence against a sex worker by a customer, or violence from a neighbour, who wants to establish an intimate relationship with a woman, etc. This problem particularly crops up when it becomes clear that it is impossible to issue protective orders restraining such gender-based violence (for deterrent and protective orders, see, Chapter VIII of this paper).

In addition, contrary to the requirements of the Istanbul Convention (Article 46, f), the Criminal Code of Georgia does not consider the existence of extreme violence prior to the commission of an offence to be an aggravating circumstance. Each offence is evaluated individually, and acts of violence committed in the past (if the person has not been convicted for them) shall not considered as a circumstance, aggravating a new crime. However, this does not prevent the judge from taking such circumstances into account prior to passing a sentence.

Legislation does not separately provide for **psychological violence**. However, Article 126 (Violence) of the Criminal Code of Georgia envisages regular beating or other violence that has caused the victim physical or mental pains but did not entail the consequence provided for by Articles 117 or 118 of this Code (intentional infliction of grave injury or intentional infliction of less grave bodily injury). "Other violence" is defined as psychological violence.[121]

Stalking is not criminalized – a deliberate, continuous threatening action against another person, which evokes in this person fear for own security.

121.M. Lekveishvili, N. Todua, G. Mamulashvili, Private Part of Criminal Code, Book 1, 6th edition.Publishing house "Meridiani", 2016, p. 162-163.

Forced marriage (Article 150[1] of the Criminal Code of Georgia) is criminalized according to the requirements of the Istanbul Convention.[122] According to the article, forced marriage (including unregistered) is punishable, and commission of an offence against minors is considered to be an aggravating circumstance. For the existence of crime, the occurrence of the marriageagainst a person's will is not compulsory. The offence is committed from the moment of duress, whether or not he/she has fulfilled the action desired by the offender.[123]

Necessary self-defence and battered woman syndrome

Battered woman syndrome, as a condition for necessary self-defence, is not provided for by the Criminal Code of Georgia. According to part one of Article 28 of the Criminal Code of Georgia, necessary self-defence is a circumstance excluding unlawful infringement -"a person shall not be considered to have acted unlawfully if he/she commits an act provided for by this Code in self-defence, i.e. injures the wrongdoerduringtheunlawfulinfringementtoprotect his/her or other person's legally protected interests.

According to the legislation of Georgia, for the action to be qualified as necessary self-defence, among other conditions, the danger to the person must be immediate, real and possible to be implemented within a short period of time.[124] The condition of existence of immediate threat eliminates qualification of the action of a woman victim as a necessary self-defence if she kills her husband in case of absence of immediate threat against her, regardless of the husband systematically performing various forms of violent actions against her, threatening her life and health, having no possibility for her to escape violence. The action shall not be qualified as necessary self-defence in the case of a woman who knows that her husband plans to murder her.

For the violence committed by a person with battered woman syndrome to be qualified as a necessary self-defence, the systematic character and severity of violence against women must be appropriately evaluated and the notion of necessary self-defence in relation to such cases must be broadened. During an accident of necessary self-defence, the subjective and objective sides of threat should be examined taking into account the general context of violence against women. In all other cases, battered woman syndrome should be considered as a liability mitigating circumstance.

122. Relevant amendments to the Criminal Code of Georgia were made by the Law of October 17, 2014.

123. On the issue of coercion,see,Private Part of the Criminal Code of Georgia, Book I (see above), p. 316-318.

124. General Part of the Criminal Code of Georgia, a group of authors, Publishing house "Meridiani", Tbilisi, 2007, p.248.

E. Practice of Georgian courts in relation to violent crimes against women

The judgments passed by General Courts of Georgia in 2014-2016 on violent crimes committed against women (20 judgments)[125] showed that in all reviewed cases the offence was qualified as a domestic offence when it was committed towards family members defined by legislation. The crime is classified by the relevant article of the Criminal Code of Georgia and at the same time, Article[11] of the Criminal Code of Georgia (Liability for domestic crime).

Nonetheless, the court/prosecution authorities do not outline gender-based discrimination signs in gender crimes committed against women, including domestic crimes, and do not apply it as an aggravating circumstance in sentencing. At the same time, other facts of violence, prior to commission of offence charged, are not investigated and they are not used as aggravating circumstances. For example, in a judgment of Tbilisi Court of Appeal of July 10, 2014, the control of wife's behaviour by husband, proprietary attitude towards her and jealousyis outlined, as a result of which the offender inflicted severe injuries to the victim by hitting the victim's head with an axe. Regardless of the circumstances indicating gender-based discriminatory motives, the judgment does not contain discussions in this regard.[126]

Studying the motive of the crime within the framework of the study, there was no gender-based discrimination or subordination stated in any of the analysed judgments as a motive for the commission of the crime or its precipitating factor.

125. Within the framework of the survey 20 judgments, made by the General Courts of Georgia (Court of First Instance and the Court of Appeal) in 2014-2016, requested in the form of the public information, were analyzed. The analysis does not include all judgments for domestic crimes committed within the mentioned period.

126.Tbilisi Court of Appeals, judgment of July 10, 2014, case N1/b-285-14.

In some cases, the court sentences for crimes committed against women in families are unduly lenient. For example, according to a judgment[127] of Tbilisi City Court of December 16, 2014, a person who injured his wife in the area of chest and stomach was convicted of premeditated damage to health (Articles 11-117[1] of the Criminal Code of Georgia). The court sentenced the offender to conditional 3 years imprisonment and assigned a 3-year probationary period. The judge considered confession and repentance as mitigating circumstances and noted that there were no aggravating circumstances in the case.

The judgment[128] of Tbilisi City Court of December 18, 2014 referring to the following case is also unduly lenient: former husband hit his ex-wife with a glass vase in the area of the head inflicting intentional damage to health (Articles 11-117[1] of the Criminal Code of Georgia). He was sentenced to 3 years of imprisonment, conditionally, and assigned a probation period of 3 years and a fine in amount of GEL 7000. The court found pleading guilty to be a mitigating circumstance and considered that there were no aggravating circumstances in the offence.[129]

None of the judgments, studied within the research considered a crime against a woman/domestic crime against a woman/family crime to be a form of discrimination of a woman.

F. Conclusion and recommendations

Criminal lawmakes punishable the violent crimes, but none of the offenses provides gender specificity and disproportionate impact of certain crimes on women (e.g. domestic violence). Some of the crimes, e.g. stalking, violence against women (outside family), gender-based violence, where victims were mostly women and reflected women's experience, are not punishable according to the criminal procedure. Legislation does not declare violence against women and other gender-based crimes to be a form of discrimination. The necessary self-defence standard often prevents its use in battered woman syndrome cases.

Gender oppression against women, according to the legislation, is limited to domestic violence only (which is also gender-neutral). Domestic violence in practice is still perceived as a personal matter between the abuser and the victim, who deserves more leniency than other crimes of the same gravity. Criminal law must have a transformative approach - recognize gender-based offences (committed within the family and outside), as a form of power and control, sexual and economic subordination against women, which is a main social mechanism for preservation of a patriarchal culture and the subordinate role of women.

Recommendation:

- Acts committed against women due to their gender/sex should be defined as discriminative offences against women. Also, offences in which according to particular circumstances discrimination is not revealed but the crime is disproportionally related to women (for example, domestic violence and other domestic crimes) should be defined as discriminative offences;
- In the Criminal Code, based on the definition of Istanbul Convention, violence against women should be distinguished as a separate offence: *all types of gender-based crimes committed on the basis of gender, which result or are likely to result in physical, sexual, psychological or economic harm or suffering; including threats of commission of such acts, coercion or arbitrary deprivation of liberty, committed in the community or personal life;*
- In the Criminal Code, based on the definition of Istanbul Convention, gender-based violence should be defined in the light of *violence against women on the grounds that she is a woman, or which has a disproportionate impact on women;*
- Gender-based violence, based on international standards, should be defined in the Criminal Code as a form of discrimination;
- Commission of a crime against a family member, based on the requirements of Istanbul Convention, should be defined as an aggravating circumstance of a crime;

127.Tbilisi City Court, judgment of December 16, 2014, case N1/6333-14.

128.Tbilisi City Court, judgment of December 18, 2014, case N1/6028-14.

129.As of December 18, 2014; also at the time of commission of the crime, the edition of the first part of Article 117 of the Criminal Code of Georgia envisaged imprisonment from three to five years in the form of punishment.

- Stalking should be criminalized. Under the Istanbul Convention, stalking should be defined as follows: intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, must be criminalized;
- Commission of violent acts which were preceded or accompanied by extreme violence should be defined as aggravating circumstances based on the requirements of Istanbul Convention;
- Gender-based crime (notwithstanding whether there is a discriminatory motive), where possible, should be also defined as an aggravating circumstance according to the Criminal Code of Georgia;
- "Battered woman syndrome", in every possible case, should be taken into account as a necessary self-defence for qualification. "Battered woman syndrome" should be reviewed in all cases as a mitigating circumstance.

V. FEMICIDE AND CRIMES AGAINST LIFE

A. Introduction

This chapter deals with the following crimes committed against women: *Criminal Code of Georgia, article 108. Premeditated murder; Criminal Code of Georgia, Article 109. Premeditated murder under aggravating circumstances; Criminal Code of Georgia, Article 111. Premeditated murder in a state of sudden, strong emotional excitement; Criminal Code of Georgia, Article 115. Incitement to suicide; Criminal Code of Georgia, Article 53. Principles of sentencing.*

B. Feminist approaches to murder of women

The concept of "femicide" – i.e. a gender-based murder of a women – was introduced by Diana Russell during the feminist battle of the 1970s. According to Russell, femicide applies to all forms of sexist killing that is "motivated by a sense of entitlement to or superiority over women, by pleasure or sadistic desires toward them, or by an assumption of ownership of women".[130]

In Latin America, the expression "femicide" has been defined in different ways, such as "the misogynist killing of women by men", "the extreme form of gender-based violence, understood as violence of men against women in their desire to obtain power, domination, and control".[131] Julia Monarrez considers that "femicide includes tolerant attitude of the state towards the progression of violent acts that range from emotional and psychological abuse, battery, verbal abuse, torture, rape, prostitution, sexual assault, child abuse, female infanticide, genital mutilation, domestic violence."[132]

The Mexican researcher, Marcela Lagarde coined the term "feminicide", which is different from the term "femicide". "Feminicide" is an absence of political will of the state to investigateand punish women murder/femicide.

130. Russell, D. E. (2006), p. 77-78, quoted in Latin American Model Protocol, p.13.

131.Latin American Model Protocol, p. 13.

132. Monarrez Fragoso, J. Feminicidio sexual serial en Ciudad Juárez: 1993- 2001. Debate Fem., v.13, n.25, p.279-308, 2002.

The concept refers to the full set of facts in which the response of the authorities is one of omissions, and a failure to act in order to prevent and eradicate these crimes.[133]

For feminists the concept "femicide" has a political objective-revealing the patriarchal system of women oppression, violence against women, discrimination and subordination, to which a high point is a hatred towards women andan extreme form of violence over them, i.e. killing of a woman.

C. Experience of Latin America in regard to femicide

The international instruments of human rights, including the Istanbul Convention, do not contain the definition of femicide.

In Latin America, codification of gender-based murders-femicide or feminicide- started in 2007. They were incorporated into special laws (Bolivia, Columbia, Salvador, Guatemala, Panama, Nicaragua, Venezuela), criminal legislation (Argentine, Chile, Costa-Rica, Dominic Republic, Mexico, Peru) or legislation of Mexican states.[134]

The Latin American Model Protocol defines femicide as follows: "the murder of women because they are women, whether it is committed within the family, a domestic partnership, or any other interpersonal relationship, or by anyone in the community, or whether it is perpetrated or tolerated by the state or its agents".[135]

In Latin America, with the Civil Law system, three legislative approaches to criminal law exist in relation to codification of femicide:

1. Distinguishing femicide as a separate crime;
2. Distinguishing femicide as an aggravating circumstance;
3. Classification of femicide as a domestic crime.

133.Latin American Model Protocol, p. 13

134. Latin American ModelProtocol, p. 157

135. Latin American Model Protocol, p. 14

1. Femicide as a separate crime

In Latin American countries, femicide is a separate crime in the criminal law of Chile, Costa Rica, Nicaragua, Guatemala, Honduras and Panama, and in the legislation of Salvador, Mexico, Bolivia and Peru there is a term feminicide instead of femicide. In the legislation of Salvador and Nicaragua feminicide committed under aggravating circumstances is also defined as a separate crime.[136]

In Latin America the murder of a woman, committed within either an official or unofficial marriage, was considered to be femicide (e.g. in the legislation of Costa Rica). Later femicide/feminicide was more broadly defined in the legislation. According to the definition of femicide, elaborated in 2013, Bolivia declared punishable as femicidethe murder of a woman in the following circumstances (even though without such declaration the crime would have been punishable as an ordinary murder):

- If the offender is a current or former spouse or partner of the victim; is or was related to her by intimate or equal relationship, even they didn't live together;
- On account of refusal by the victim to establish partnership, loving, emotional and intimate relationship;
- Because of pregnancy of the victim;
- If the victim is in a subordinated position or relationship with the offender or depends on the offender, or has friendly, business relationship or cooperation with the offender;
- If the victim is in helpless condition;
- If prior to murder the victim suffered physical, psychological, sexual or economic violence from the same person;
- If the murder was proceeded by a crime directed against personal freedom or sexual freedom;

136.*See* El Salvador - Special Comprehensive Law for a Life Free from Violence for Women.Law No. 779. Nicaragua: Comprehensive Law against Violence toward Women and Reforms to Law No. 641, "Criminal Code", 2012.

- If the murder is related to trafficking or smuggling;
- If the murder is committed as a result of rituals, group traditions or cultural practice.

2. Femicide as an aggravating circumstance of a premeditated murder

In Venezuela, Columbia and Argentina, femicide is not a separately-standing crime-it is defined in the article of premeditated murder as an aggravating circumstance and envisages cases when the offender had an emotional relationship with the victim, was married to the victim and the murder was committed due to the fact that "the victim was a woman", or the murder is related to gender-based violence.[137]

3. Femicide as a domestic crime

In the legislation of Chile and Peru, femicide/feminicide is considered as a form of domestic crime. The crime is qualified as femicide if the victim is a wife or partner of the victim or is otherwise related to him.[138]

Legislation of some countries has incorporatedthose elements in the definition of crime, which qualify the crime as a femicide, if, for example:

- The murder is committed "within unequal power relationship between women and men" (Guatemala and Nicaragua);
- The murder is committed "because a victim is a woman" (Guatemala and Columbia);
- The murder is committed "by the motive of hatred or disrespect towards the victim as a woman" (Salvador and Honduras);
- The murder is committed "for gender-related purposes" (Mexico and Honduras);
- The hatred motive is based "on gender or sexual orientation, gender identity or self-expression"and is defined as an aggravating circumstance of the murder in the punishment part (Argentine).[139]

Femicide is a premeditated crime – i.e. the offender realized the action and wished to kill the woman. Intent to commit murder distinguishes femicide from other crimes committed against women – for example, intentional damage to health.

In Latin America the legislation provides severe punishment for femicide-from 15-year term to life imprisonment.[140] In some countries the law declares inadmissible a reduction of the mentioned punishment or application of alternative measures (e.g. in Guatemala). In Mexico,after committingfemicide the offender loses all rights related to the victim. According to Guatemala legislation, it is prohibited to apply cultural or religious traditions as a circumstance excluding the guilt for punishment or as a mitigating circumstance. In Salvador, mediation is prohibited for such cases.[141]

D. Femicide in the legislation of Georgia

The survey of Georgian Young Lawyers' Association "Judgments in Cases of Femicide - 2014" deals with the approach of the Criminal Code of Georgia to similar offences:

The legislation of Georgia does not recognize femicide as an offence.[142] There is no separate article in the Criminal Code of Georgia, which declares femi-

137.Venezuela - Organic Lawon the Right ofWomen to a LifeFree from Violence(G.O. 38668 of Apr. 23, 2007); Columba - Law 1257 of 2008 "which dictates norms of sensitization, prevention, and punishment of forms of violence and discrimination against women, reforms the criminal code, the criminal procedure code, Law 294 of 1996, and sets out otherpronouncements".

138.Chile - Law 20480. Modifying the Criminal Code and Law No. 20.066 on Interfamilial Violence, establishing "femicide," increasing the sentences applicable to this crime, and reforming the norms on parricide, 2010.

139.Latin American Model Protocol, Appendix N1.

140. From 15 to 20 years of imprisonment in Nikaragua and Peru; from 20 to 40 years of imprisonment in Costa-Rika, Venezuela, Salvador, Honduras and Bolivia; from 30 to 60 years of imprisonment in Mexico, Guatemala and Columbia; life imprisonment in Chile and Argentina-see Latin American Model Protocol, Appendix N1.

141. See above.

142. A draft law has been initiated in the Parliament of Georgia, according to which Article 108[1] should have been added to the Criminal Code of Georgia, which defined femicide as follows: „Femicide – a gender-based premeditated murder of a woman by a spouse, former spouse, partner, former partner or other family-member; shall be punishable by imprisonment from eleven to fourteen years". On June 10, 2016 the Parliament did not vote for this draft law.

cide, i.e. gender-based murder of a woman, to be punishable. Commission of gender-based murder is neither distinguished as a circumstance aggravating premeditated murder.[143] Accordingly, femicide is not distinguished from other types of murders and no statistics is gatheredabout it.

Although femicide does not exist as a separately-standing crime, the investigation and punishment of femicide is conducted/may be conducted based on the following articles of the Criminal Code of Georgia:

Premeditated murder (Criminal Code of Georgia, article 108); Premeditated murder under aggravating circumstances (Criminal Code of Georgia, Article 109); Premeditated murder in a state of sudden, strong emotional excitement (Criminal Code of Georgia, Article 111); Intentional grave damage to health, which led to death (Criminal Code of Georgia, Article 117[2])[144]; Incitement to suicide (Criminal Code of Georgia, Article 115).

Femicide, as well as other crimes, may be qualified according to the above-mentioned articles, which are not related to gender motive. Therefore, in order to determine whether a crime was femicide, each judgment passed on the basis of the above articles, where the victim is a woman, should be studied, and based on the circumstances of the case it should be determined in what case the crime is femicide.

Identification of domestic violence in the committed crimes is simplified by Article 11[1] of the Criminal Code of Georgia. This Article determineswhich actions under particular articles of the Code constitute domestic[145] crime.

143. According to subparagraph "d" of part 2 of Article 109 of the Criminal Code of Georgia, the aggravating circumstance of crime is its commission due to racist, religious, national or ethnical intolerance. Commission of a gender-based crime is not envisaged as an aggravating circumstance.

144. Crimes qualified according to Article 117[2] of the Criminal Code of Georgia shall be considered femicide if the crime is qualified incorrectly; in case of correct qualification of the crime would be a premeditated murder (Criminal Code of Georgia, Article 108), or premeditated murder with aggravating circumstances (Criminal Code of Georgia, Article 109).

145. For the purposes of this Article,the following persons shall be considered family members: a spouse, mother, father, grandfather, grandmother, child (stepchild), foster child, adopting parent, adopting parent's spouse, adoptee, foster family (foster mother, foster father), guardian, grandchild, sister, brother, parents of the spouse, son-in-law, daughter-in-law, former spouse, also persons who maintain or maintained a common household.

Therefore, identification of domestic femicide (gender-based murder of a spouse/wife or former spouse) is possible if the above-mentioned crimes are qualified in conjunction with Article 11[1] of the Criminal Code of Georgia.

***All murders** of women committed in a family, i.e. murder of a woman by a spouse/former spouse (to be qualified according to Article 11[1] of the Criminal Code of Georgia), **do not automatically mean** that femicide was committed. To define femicide it is necessary that a crime was committed on a gender base, i.e. the offender should be acting on the basis of a gender-related motive. At the same time, **femicide is not only a murder of women in a family – but it is a murder of a spouse or a former spouse. Femicide constitutes all types of murder of women (either in a family or outside it), which is related to gender discrimination, control of woman behavior, proprietary attitude towards her, gender violence and/or subordination; also incitement of a woman to suicide (Criminal Code of Georgia, Article 115), in the family or outside it, due to the above reasons.** However, despite this fact, most often when a husband/ex-husband kills a wife/ex-wife (and the crime is qualified according to Article 11[1]), the circumstances of the crime would indicate that femicide has been committed.*

If the crime is incorrectly qualified in case of femicide-a premeditated murder has been committed (Criminal Code of Georgia, Article 108) and the crime is qualified as an intentional grave damage to health which led to death (Criminal Code of Georgia, Article 117[2]), the biggest measure of punishment for the offender may be imprisonment for 7 years, instead of 15 years, which is envisaged by Article 108 of the Criminal Code of Georgia.[146]

146.In case of premeditated murder (Criminal Code of Georgia, Article 108), the minimum term of imprisonment is 7 years and maximum-15 years. If the murder was commited under aggravating circumstances, for example, repeatedly, with particular cruelty against a pregnant woman, etc.(Criminal Code of Georgia, Article 109), the offender can be sentenced from 11 years of imprisonment to life term, taking into account the nature of aggravating circumstances. Incitement to suicide (Criminal Code of Georgia, Article 115) envisages restriction of freedom for the term up to 3 years or imprisonment for the term from 2 to 4 years. Intentional grave damage to health, which led to death (Criminal Code of Georgia, Article 117[2]), envisages imprisonment from 4 to 7 years. If the murder was committed in a state of insanity (sudden, strong emotional excitement, the Criminal Code of Georgia, Article 11 prima), the term of imprisonment would be up to 3 years, or from 1 to 3 years. Article 11[1] of the Criminal Code of Georgia

At the same time, the legislation implicates discrimination motive as an aggravating circumstance of a premeditated murder - a murder that was committed on the basis of racial, religious, national or ethnic intolerance (Article 109[2] of the Criminal Code of Georgia) is more severely punished than murder in the absence of aggravating circumstances. For such murders, punishment is imprisonment for the term from 13 to 17 years (in contrast to Article 108, which provides for imprisonment from 7 to 15 years). However, the mentioned article considers only discrimination committed on the basis of the above-mentioned motives to be an aggravating circumstance and does not provide for discrimination on the basis of sex/gender, which is a part of femicide. Therefore, a gender-based murder, if no other aggravating circumstances exist, cannot be qualified according to Article 109 of the Criminal Code of Georgia.

It is important to note that if the motive of the crime is gender-based discrimination, under part 3[1] of Article 53 of the Criminal Code of Georgia, this circumstance would aggravate the quality of the committed action and it is taken/should be taken into account during the sentencing by the court. According to this article, "commission of a crime on the basis of race, color, language, gender, sexual orientation, gender identity, age, religion, political or other opinion, disability, nationality, national, ethnic or social belonging, origin, property or status, place of residence or intolerance motive on the basis of other discriminatory grounds, is an aggravating circumstance for all applicable crimes envisaged by this Code."

Consequently, according to current Georgian legislation, the most relevant (though insufficient) tool for the qualification and identification of femicide, along with the relevant articles of the Criminal Code of Georgia, is reference to part 3[1] of Article 53. The mentioned article may be used, if the applicable article or part of the article of the Criminal Code of Georgia, under which the crime is classified, does not include discrimination as an aggravating circumstance within this article.[147] However, part 3[1] of Article 53 of the Criminal Code of Georgia has never been applied in the court practice (court judgments) in cases of crimes committed against women or other persons.[148]

has the function of maintenance of statistics of domestic crime and, taken separately, cannot influence on the type and measure of punishment.

147. The Criminal Code of Georgia, part 4 of Article 53.

148.Public information requested from the General Courts of Georgia as of December 2015.

Accordingly, if in case of femicide the penalty is aggravated by reference to part 3[1] of Article 53, it would simplify the recognition of femicide by the court as a crime committed against a woman, as well as the maintenance of crime statistics and punishment applied to the relevant offence.[149]

According to the survey held by the Georgian Young Lawyers' Association, the following definition of crime corresponds to the forms of femicide in Georgia: **Femicide – is a gender-based murder of a woman, i.e. the murder of a woman, the motive or context of whichis related to gender violence, discrimination against a woman or a subordinated role of a woman, which is manifested by the desire to have power over a woman, superior position compared to a woman, proprietary attitude towards a woman, control of her behavior or other gender-based causes, as well as incitement of a woman to suicide for the above-mentioned reasons.**[150]Today, the criminal legislation of Georgia does not recognize women's subordination and patriarchal oppression, which is the root cause of femicide, and limits the application of laws to gender-neutral context of crimes against human life.

E. Georgian judicial practice with respect to femicide

Within the framework of the survey of Georgian Young Lawyers' Association, the judgments (12 judgments in 2014-2015)[151]delivered by the courts of first instances on femicide cases committed in 2014 show that in case of femicide the law enforcement bodies and/or courts are reluctant or unable at the stage of investigation or judicial review to assess women murders as

149. „Judgments in cases of femicide - 2014", Georgian Young Lawyers' Association, author: Tamar Dekanosidze, Tbilisi, 2016. See the link: https://gyla.ge/files/news/2016%20%E1%83%AC%E1%83%9A%E1%83%98%E1%83%A1%20%E1%83%92%E1%83%90%E1%83%9B%E1%83%9D%E1%83%AA%E1%83%94%E1%83%9B%E1%83%90/femicidi_ge.pdf .

150. „Judgments of cases of femicide - 2014", p. 10.

151.Georgian Young Lawyers' Association makes analysis of 12 judgments of the courts of first instances of Georgia on femicide cases. 5 judgments have been passed by Tbilisi City Court, 3 judgments by Telavi Regional Court, 1 judgment by Rustavi City Court and 1 judgment by Kutaisi City Court, 1 judgment by Ozurgeti Regional Court and 1 judgment by Khelvachauri Regional Court. All mentioned crimes have been committed in 2014.

femicide. They do notexamine possible discriminatory motives in murders of women, they do notmake proper assessment of the motive, and there are no discussions in the judgments regarding existence of gender-related motive-it has not been studied whether discriminatory, sexist, proprietary or stereotypical attitudes towards the victim might play a significant role in the commission of the crime.

In the court judgments, domestic violence/gender violence committed against a victim prior to the commission of a murder is not considered to be an aggravating circumstance. In most cases, such facts are not described in the texts of judgments.

Punishments for femicide cases[152]

When determining a punishment for femicide issues, the court in some cases was incompatibly lenientl. The only aggravating circumstance that it took into account was the defendant's record of previous conviction for an intentional crime[153]. In this regard, the only exception is the judgment[154] of Tbilisi City Court of January 2015, when the court considered the commission of a crime against a family member as an aggravating circumstance. As an exception, the same court considered the commission of a crime by the law enforcement officer as a factor, which should be taken into account to aggravate responsibility.[155]

Since discriminatory motive of the commitment of an offence based on sex has not been investigated for any of the cases of femicide, nor has discrimination been considered to be an aggravating circumstance in any of the cases, therefore no reference to part 3^1 of Article 53 of the Criminal Code of Georgiawas made.

152. „Judgments in cases of femicide - 2014", Georgian Young Lawyers' Association, author: Tamar Dekanosidze, Tbilisi, 2016; see link: https://gyla.ge/files/news/2016%20%E1%83%AC%E1%83%9A%E1%83%98%E1%83%A1%20%E1%83%92%E1%83%90%E1%83%9B%E1%83%9D%E1%83%AA%E1%83%94%E1%83%9B%E1%83%90/femicidi_ge.pdf

153. Tbilisi City Court, April 7, 2015; Tbilisi City Court, case N1/6524-14 of May 22, 2015; Tbilisi City Court, August 18, 2015.

154. Tbilisi City Court, case N1/4942-14 of January 23, 2015.

155. Tbilisi City Court, case N1/4942-14 of January 23, 2015.

Pleading guilty[156], cooperation with the investigation[157], and the fact that the offender was positively characterized[158] and didn't have criminal record-[159]were taken into account by the court as mitigating circumstances. We encounter positive characteristics of the defendant even in a case when, prior to the murder, the victim was systematically abused in the family and had never applied to the police [160] (these facts are not described in the judgment).

The punishments imposed for the commission of femicide are fully oriented on the offender, his safe integration in the society and avoidance of a new offence. They do not serve to elimination of gender inequality and hierarchies and changing of historically formed power relationships.

F. Conclusion and recommendations

The legislation and court practice of Georgia do not recognize femicide as a gender-based murder of a woman and a crime distinguished from other murders based on gender. Absence of the definition of femicide, as a separately standing crime or as an aggravating circumstance of premeditated murder, makes it impossible to relevantly qualify similar crimes, outline their motive and take into account the commission of gender-based crimes as an aggravating circumstance. Punishments for femicide, due to this reason, are sometimes unduly lenient.

In cases of family femicide, there is a particular threat for a case to be qualified as a lighter crime – e.g. intentional grave damage to health that led to death, and not a premeditated murder. Incitement to suicide, as a form of femicide, does not consider the violence caused by patriarchal culture and norms that werethe reason for the death of a woman.

156. Rustavi City Court, case N1-252-14 ofMay 7, 2014; Telavi Regional Court, case N200100115702991 of 5 August, 2015; Ozurgeti Regional Court, 26 February 2015; Tbilisi City Court, 7 April 2015.

157. Rustavi City Court, case N1-252-14 of May 7, 2014; Ozurgeti Regional Court, 26 February 2015.

158. Rustavi City Court, case N1-252-14 of May 7, 2014.

159.Ibid.

160. Rustavi City Court, case N1-252-14 of May 7, 2014.

Legislation and court practice related to murder of women do not recognize femicide as a high point of structural violence against women, do not investigate or properly assess acts of violence or the general context of violence against women, the high point of which is femicide.

It is important for the criminal legislation to fully reflect the experience of women victims in relation to the murder of women and have a transformational potential, which reflect the major reasons of femicide: the extreme form of violence against women, structural inequality, subordination and possibility to transform gender hierarchy.

Recommendations[161]

- Commission of a crime with the motive or context related to gender violence, discrimination against a woman or subordinated role of a woman, which may be manifested by the desire to have power over women, a comparatively superior position over women, a proprietary attitude towards women or other gender-related reasons, should beformed as a separate article or a circumstance aggravating premeditated murder in the Criminal Code through legislative changes.
- Commission of a crime against a family member (crimes envisaged by Article 11^1 of the Criminal Code of Georgia) should be defined as a circumstance aggravating responsibility (according to subparagraph "a" of Article 46 of Istanbul Convention);
- Existence of facts showing domestic violence/gender violence committed prior to premeditated murder/grave damage to health by the offender should be defined as an aggravating circumstance for the crimes provided by Articles 109 (premeditated murder with aggravating circumstances) and 117 (intentional grave damage to health) of the Criminal Code of Georgia (according to subparagraph "f" of Article 46 of Istanbul Convention);
- Commission of femicide by a public officer and, particularly, an employee of a law enforcement body should be defined as an aggravating circumstance;
- Commission of femicide/domestic violence/gender violence by means of a service weapon should defined as an aggravating circumstance in Articles 109 and 117 of the Criminal Code of Georgia (based on subparagraph "g" of Article 46 of Istanbul Convention, according to which "commission of a crime by means of a weapon or coercion by weapon" should be defined as aggravating circumstances");
- In all cases involving murder of a woman, the investigation, prosecution and judicial authorities should act with a view that femicide has been committed. Murders of women must be considered as violence, discrimination and subordination against women taking into account general context of subordination.

161.See "Judgments in cases of femicide - 2014", Georgian Young Lawyers' Association, Tbilisi, 2016.

Ana Abashidze

VI. FAMILY LAW

A. Introduction

The chapter on Family Law discusses the family law issues in a different, non-classical method; in particular, the researchers analyzed some institutions of family law in the light of feminist law theories. Based on the mentioned theory, the discussion of the Family Law of Georgia was some kind of innovative attempt. The authors wanted to bring these issues to the public discussion and thus promote the modernization of the law in view of modern approaches.

This part of the work reviews such important institutions of family law as: child's care and custody, determination of the place of residence of a minor, legal content of alimony and its implementation, reciprocal obligations of maintenance of spouses, principles of international law relating to the family law issues, etc. It also refers to procedural rights, the implementation of which depends on financial resources. This chapter reviews the legislative gaps that restrict the constitutional right of different groups of women of access to court. The free legal aid system under the Georgian legislation and international obligations of the country in this regard is also analyzed.

Recommendations are provided at the end of this chapter, the implementation of which according to the researchers will significantly improve Georgian legal regulations and approaches, also the attitude of legal professionals towards gender equality issues.

B. Feminist law theories related to family disputes[162]

In 1994, a group of women filed a suit in California federal court and objected to gender discrimination against women and mothers in family disputes and

162.**Schafran** L.H. (1994-1995) Gender Bias in Family Court, "Why prejudice permeates the Process". Fam. Adv. 22

child guardianship suits. Women appealed court cases in which the court had not considered acts of violence by ex-husbands against their spouses and children. The court decisions had established a practice according to which the custody of a child was frequently awarded to fathers, which was assessed as inadequate and discriminatory standard against women.[163]

In the same period, in New York a group of men filed a suit in federal court charging the courts with discriminatory approach, due to which the courts resolved the custody cases in favor of mothers considering women as "natural parents."[164]

Both of these groups perceived that courts were being biased on a gender basis, which influenced their rulings. The court decisions well reflected all gender stereotypes, indicating the natural and social roles of both genders.

During that period the family law often relied on gender stereotypes and proposed gender non-neutral regulations to the society. The prejudices of disputing parties were derived from their own experience. Even judges were captive to stereotypes, part of which could not dissociate themselves from personal experience, while a part of judges believed that, in comparison with other institutions and fields of law, the family disputes were, on the whole, insignificant.

1. Documented gender bias

In many successful countries, gender bias is mainly documented by working groups that are set up within judicial systems and explore these issues through analytical documents. This could be a kind of self-reflection by the courts. The idea to form such working groups belongs to the chairmen of courts. They evaluate the nature and range of spreading gender stereotypes in courts systems, based on which they initiate the system reforms.

Working groups within the US court system were set up in 40 states, out of which 22 states developed their own, separate documents that were published and became available to everyone. The reports of working groups proved that

163.*Ibid*,p. 22

164.*Ibid*, p. 22

gender bias cases mainly occur in family disputes and affect both women and men. However, on the whole, women suffer more from the gender bias.

For example, in 1987, by the initiative of Chief Justice of the Minnesota Supreme Court, a working group was set up which consisted of 30 judges, lawyers, public officials and community representatives. The group worked extensively for two years to determine what kind of stereotypes existed in the judicial system and how they influenced on judges during decision making.[165]Justice Rosalie Wahl, after studying the cases, stated that gender stereotypes create "institutional sexism" and equated it with "institutional racism". Thus, she underlined the importance and systematic nature of the problem.[166]The justice reviewed the findings of the working group, due to which gender bias became apparent in case hearings on divorce, property distribution, alimony imposing, fees for attorney, child custody, child care, domestic violence and child sexual abuse.

2. Women failure

The working groups, formed for the detection of gender bias, broadly demonstrated the oppressed status of women in property disputes. The studies showed the growth of property during family activities and unfair allocation of property if disputes arose, which mainly affected women. Judges did not consider household activities as women's contribution to accumulate property, and therefore the results of the property disputes, from economic points of view, were more difficult for women than for men. According to this survey, neither were rich women in better conditions. Women with average and higher income, as a rule, refused to demand alimony from their ex-husbands. In 39% of the cases the income of women in this category decreased after divorce, while the income of ex-husbands in 45% of the cases increased.[167]

165.Minnesota Supreme Court, Task Force for Gender Fairness in the Courts, William Mitchell Law Review: Vol. 15: Iss. 4, Article 1. See the link:http://open.mitchellhamline.edu/wmlr/vol15/iss4/1

166.Minnesota Supreme Court, Justice Rosalie E. Wahl, "The task force on Gender Bias in the Court: Establishing a Framework for Change, "second national Conference on Gender Bias in the Court, Williamsburg, Virginia (March 18-21, 1993), pp.6-7

167.Schafran L.H. (1994-1995) Gender Bias in Family Court, "Why prejudice permeates the Process".pp.24

The Washington State working group studied 700 divorce cases from 11 different countries, according to which it turned out that the alimony (towards women) was ordered for a reasonable period of time in only 10% of the cases, while in 84% of cases the alimony was ordered for a limited period. In these cases, the alimony assigned during the divorce cases served the rehabilitation of women, as it was considered that the economic situation of women and men were not equal, as women mostly had to manage a household;because of lack of experience women did not have working skills;demand for male labor on the market was higher than for women's labor.[168]

3. Guardianship and custody of a child

The reports of the working groups showed inadequate practices regarding the child's care and support were the norm and, therefore, this practice manifested a gender bias in the judicial system. Women had total responsibility for their children's support and education; they bore this burden even when the system of child's assistance and support was weak. "**We believe that the child care system is gender-biased",** said the Massachusetts working group. After divorcing, the minor role of women, from economic standpoint, should be considered along with difficulties that are encountered by women during child care.

Introduction of mandatory federal child support guidelines significantly improved the quality of life of many women and children. However, the working group noted that women still faced challenges to meet the needs of the child adequately. The mentioned guideline was an integral part of the problem, which considered only economic responsibilities for the education of the child. According to the Head of the New York Child Care Commission, Judith Reichel, **"in thefield of child care they have failed only in part of calculation of physical costs – the child care burden still totally rests with women and this is a disproportionate burden".[169]**

The study of the working group showed that in judicial proceedings both women and men are the victims of gender discrimination. Different standards are used towards mother and father, which are conditioned by prejudice and stereotypes regarding private and public lives of women and men.

168.*Ibid*, p. 24

169.*Ibid*, p. 26

The majority of judges, as well as other persons being involved in family disputes resolution, believed that the function of women was to manage a household and to care for children and elderly, while the work of men belonged to salaried activities. They brought the food home but never cooked it.

The working groups found that most men refused to undertake the child's guardianship, as their lawyers advised them to do so on the grounds that because of gender stereotypes there was a minimum chance to win such disputes in the court. Although the stereotype of "natural parent" acted against men, they still made remarkable progress. For example, according to the reports of the Massachusetts working group, in more than 70% of cases fathers got main or joint custody of children.[170]

Different kinds of stereotypes arise with regard to women; for example, facts from the private life of women negatively influenced the case when the issue of guardianship was resolved, while in the case of men little account was made of it. Women did not have the right to work outside the house as it did not correspond to the stereotypical role of a "good mother".

Many women were losing the right to the custody of the child when the child's father got married a second time because his new wife stayed home all the time, while the biological mother worked and spent most of her time at work.[171]

The judges' attitude towards the facts of violence became the subject of strong criticism by working groups, as judges were not paying attention to domestic violence or the facts of violence during home visits. A woman criticized the court that awarded child custody to the abuser father;most judges thought that if a man beats his wife but does not commit violence against child, the violence should not negatively affect the decision of child custody. Such an approach leaves beyond attention the fact that children who live in a house where the mother is being abused become "secondary victims" of the violence; the risk of psychological and physical illnesses are increased; they learn violent behavior from their father, etc.

170.*Ibid*, p. 26

171.*Ibid*, p. 27

The escalation of violence occurs during divorce process. According to the US Department of Justice, 75% of grave crimes with a woman victim are committed during the divorce or after parting with the oppressor.[172]

Lawyers also fail to take into account the fact of violence in judicial practice. There is no justifiable reason for those lawyers, who ignore domestic violence and its consequences during the family disputes. The dispute on child custody or absence of supervision when visiting the child will encourage an abusive parent to commit a crime repeatedly against his former wife or children. It is worth considering the role of lawyers in those tragedies, where many women and children have been raped, beaten or killed during child visits.[173]

C. US and EU Legislation concerningfamily law

1. Legislation and Case Law in the USA

a) Attempt to eliminate offender preferences

Before the 19th century, the Anglo-American Law reflected the English common law system, which provided the father with an absolute right to custody of the child. The only exceptions were cases where the father was accused in violence against, abandoning or neglect of the child.

In the case *United States v. Green*[174]the court, contrary to the existing practice, introduced the mother's role as the natural parent. This case established gender bias in favor of mothers in the American judicial system. It was considered that the child's best interest is to live with the mother. This changed the common law approach, the practice of a patrimonial attitude towards the child, however, gender bias trends have been established.[175]

172.Wallerstein, J. and Blakeslee, S. (1989) *Second Chances:* Men, Women, & Children a Decade After Divorce New York: Ticknor & Fieldsp.8

173.Schafran L.H. (1994-1995) Gender Bias in Family Court, "Why prejudice permeates the Process". Fam. Adv. 22. pp.27-28

174.26 F.Cas.30 (C.C.D. R.I. 1824) (No. 15,256)

175.SimeoneT.J. (1991). Great Expectations: New York's Attempt to Eliminate Gender Preferences Between Parents in Child Custody Dispute. Col. Jour. of Law and Social Problems. 457

In the early 1990's, 32 states in America introduced a mandatory guideline on setting up child guardianship, which proposed the "test of best interests of the child" in family disputes. Later, 49 states adopted the unified law on determining child custody and guardianship. All mandatory rules were prescribed substantively and procedurally, which regulated every issue of child custody. The New York Court practice at an early stage was developed based on the child's best interest test, which prohibited the consideration of gender roles in the decision-making process. However, at the same time the court had wide discretion , which still allowed gender bias. In the case *Louise E.S. v. W. Stephen S.*the decision of the New York Court of Appeals showed that even in conditions of wide discretion, the parties were prohibited from appealing the court decisions. New York's vision of justice on family disputes was summed up by New York Court of Appeals in the case *Friederwitzer v. Friederwitzer*,[176]which introduced a new test. According to it, the child custody cases were to be decided jointly – by the "party assessment" and using the "child's best interest test".

New York courts have developed a model set of circumstances which should be considered by the judge when deciding child custody. These circumstances became certain criteria for the assessment of disputing parties and the establishment of the best interest of the child that will become the base of the court decision.

These criteria can be grouped according to the following factors:

1. The lifestyle of each parent and its impact on the child;
2. Psychological relationship between child and parents – this criteria require the evaluation of each parent, whether they are capable to meet the child's emotional and intellectual needs;
3. Assessment of financial and material resources of both parents by the judge;
4. The last criterion (which is rarely used and therefore, it has the least importance) was the child's wishes, which parent would he/she prefer to live with.

176.New York Court of Appeals. File # 55 N.Y. 2d 89, 432 N.E.2d 765, 447 N.Y.S. 2d 893 (1982)

Below each factor used in the New York courts is discussed separately.

b) Lifestyle

New York courts put great emphasis on the parents' lifestyle (for example,a different sexual orientation and gender identity)and its characteristics. For the evaluation of this factor they used the Nexus[177] Test (*Guinan v. Guinan*).[178]According to the test, the lifestyle of parents (e.g. relationship with sexual partner) shall have an impact on the decision of child custody only if it has harmful effects on the child's well-being. This was exactly the imperfection of the Nexus test, because the judge could subjectively evaluate the lifestyle and give an advantage to any parent.

Judge Shapiro pointed to the double standard risk in the case *Feldman v. Feldman,* heard by the Supreme Court of the State of New York[179]; the father, asking for the child custody, stated in the court that during his visit to his former wife's house he saw a magazine on the table in the bedroom; by his assessment, the magazine contained immoral themes; more likely, the intimate letters were nearby. The father claimed that his ex-wife was known for her indecent behavior, and therefore he did not want her to be the custodial parent. The court granted the father's application and awarded him child custody; however, the court of appeals changed the trial court decision.[180] According to Judge Shapiro's assessment, the decision of the first instance court stated the discriminatory standards to the detriment of women. It turned out that the evaluation of lifestyle and manner was definitely a discriminatory approach that harmed mothers.

In the case of*Blank v. Blank*,[181]the court awarded custody to the father as it relied on mother's lifestyle factor. In particular, the court assessed the moth-

177.Nexus - relationship, bond, impact.

178.Supreme Court of the State of New York.102 A.D.2d 963, (1984) - the father accused his ex-wife that she was a homosexual, and therefore, she was not capable to care for their 3 years old child. The Court did not share this opinion and the child's mother was appointed the custodial parent.

179.Supreme Court of the State of New York. 45 A.D.2d. 320, 358 N.Y.S. 2d 407 (1974).

180.*Ibid.*

181.Supreme Court of the State of New York.124 A.D.2d 1010, 509 N.Y.S.2d 217 (1986).

er's extra-marital relations as immoral conduct; it also emphasized her social relationships outside the family.[182]The New York SupremeCourt altered the decision on the grounds that there was no evidence that would prove that mother's character degraded her parental skills. Finally, the court considered that parent's assessment with the abovementioned standard was a mistake.

Based on these cases it was evident that the court was discriminative and used too strict standards for the assessment of women as mothers, which was caused by the evaluation test of lifestyle factors. These cases demonstrated that it was necessary to limit the court's discretion.

c) Psychological Contact with the Child

During examining the mentioned factor the court evaluated two interests: the need for a strong male role model and the tendency that a mother's custody was more acceptable.[183]When assessing the given indicator the court considered the mother's and father's psychological, emotional contact with the children and their parental compliance. Application of this standard was still a risk that the court would be biased in its evaluation of the mother's and father's role model towards the child.

In the New York court decision of *State ex rel. Watts v. Watts,*[184]it was found for the first time that gender bias violates the principle of a fair trial, as guaranteed by the 14th amendment to the United States Constitution. Therefore, it became necessary to release the court from preferences. In disputes of this type the courts had to consider the differences between the roles of mother and father, though this would not be regarded as acknowledgment of the privilege of any parent.

The court cases have shown that psychological contact indicator is more damaging to fathers, who, according to the practice or tradition, are considered less suitable persons. Therefore, this factor was also regarded as gender biased.

182.*Ibid.*

183. Simeone T.J. (1991). Great Expectations: New York's Attempt to Eliminate Gender Preferences between Parents in Child Custody Dispute. Col. Jour. of Law and Social Problems. Pp. 471.

184.Family court of New York,40 A.D.2d 997, 338 N.Y.S.2d 736 (1972).

d) Financial and material resources

The New York Court used two standards that examined the parents' financial possibilities and other material resources. When both parents had more or less equal possibilities, the leading factor was the child's true interest; but if one of the parents owned significantly less resources, the custody privilege was given to the economically stable parent.

Historically women earned much less than men; therefore, using the mentioned standard in case hearing, most likely, would have bent the scales of justice towards fathers.[185]

However, in the case of *Roberts v. Roberts,* the court did not take into account the financial circumstances[186] where it was possible to givea privilege to the parent with less financial means if the psychological and emotional contact with the child would be evaluated positively. In such case, the last factor will have more importance than the economic side.

Another issue related to finances – each parent's available time to spend with the child. In the case of *Jacobs v. Jacobs,*[187]thefather told the court that his busy work schedule would not hinder him to take care of his child. During his absence the child's grandmother (father's mother), who lived there, would look after the child. At the same time, the work schedule and financial conditions did not allow the mother to spend much time with the child. The court awarded custody to the mother and stated that upbringing and care of the child is the responsibility of parents, and the priority could not be given to that parent who can get some assistance from the third person.

e) The child's wishes

Supreme Court of New York was guided by the standard of the child's wishes in the case of *Salk v. Salk*,[188]when it noted that the age, mental capacity and

185.Teitlebaum,L. (2006). Family History and family Law. Utah L. rew.197.

186.Supreme Court of the State of New York. 122 A.D. 2d 405, 505 N.Y.S. 2d 215 (1986).

187.Supreme Court of the State of New York.117 A.D.2d 709, 498 N.Y.S.2d 852 (1986).

188.Supreme Court of the State of New York. 89 MiBc. 2d 883, 393 N.Y.S.2d 841 (N.Y. Sup. Ct. 1975).

circumstances of determining the child's wishes are of equal importance while assessing the preferences of the child. In the Court's opinion, when assessing the wishes of the child the judge must be convinced that the child did not act recklessly, spontaneously or was influenced by other person.

The Court developed a different position in the case *People ex rel, Repetti v. Repetti*,[189]where 3 children, 13, 14 and 16 years old respectively, were involved. The Court noted that the older children were quite mature and expressed their true wishes, and the ignorance of these wishes would cause serious damage to their emotional and mental health. However, the Court did not hold a similar discussion in connection with the 7 years old child, who expressed a desire to live with his mother. The Court awarded custody to the father. Judge Cooper with a dissenting opinion noted that, in general, the wish of an underage child will not be decisive;[190]however, in this case the 7-year-old girl had a significantly developed intellectual capacity;therefore, her opinion should have been considered.[191]The mentioned decision proved that there was no uniform approach of the judges.

f) Sole Custody[192]

To award sole custody, the court relies on the objective and specific preconditions, which are driven by the best interest of the child. Awarding sole custody does not exclude the right of the other parent to receive all the necessary information about the child, to have a relationship with the child, except in such cases when, according to the court decision, the other parent is not allowed to do so.[193]

189.Supreme Court of the State of New York.60 A.D.2d 913, 377 N.Y.S.2d 571 (1975).

190.*Ibid.*

191.*Ibid.*

192. Sole custody means, when one of the parents is identified by the court as a custodian, i.e. is responsible and authorized to make decisions about child's healthcare, education, religion, etc.

193.Family law guideline, Shawnee County, p. 24. 2006 Edition. The guideline was prepared by the family law committee of the Topeka Bar Association. These guideline are intended to be used by Attorneys and parties in domestic relations cases in the Third Judicial District.

g) Joint Custody[194]

In joint custody neither parent has an exclusive right to the child. When fulfilling such shared and equal obligations, parents shall come to the best solution through mutual consultations and consensus;however, the mentioned rule does not apply to urgent circumstances, when the decision shall be made immediately.

h) Determining residence place of a child

When determining the residence place of the child, two types of approaches are used:

1. To determine the residence of the child with each parent;
2. To determine the residence of the child with both parents.[195]

When the residence of the child is determined with one parent, the child spends more time with him/her, and that parent basically cares for the child. In this case, the child care is not distributed equally between parents. That parent, with whom the child lives is obliged to spend more time on the education of the child, to cover the child's daily expenses, which may also include rent, utility bills, medical services, etc. In such cases, the court will impose certain costs on the other parent with whom the child does not live. This is called alimony – child support costs.

Joint residence refers to the situation when both parents have almost equal rights and obligations both, regarding time and expenses. When determining the joint residence, as a rule, a coherent care plan shall be prepared that will include a detailed, fair distribution of all expenses. These expenses could be rent, utility and other taxes, food, transportation, etc. However, determining joint residence requires excellent cooperation and communication between parents to meet the demands of the child's best interests.[196]

194.Joint custody institution creates equal rights and responsibilities for both parents, to care and take joint decisions on every important issue related to the child.

195.To determine joint (shared) residence, it is not mandatory that both parents lived in one house, though such occasions are also considered.

196.Family law guideline, Shawnee County, page 24. 2006 Edition. The guideline was prepared by the family law committee of the Topeka Bar Association. These guideline

Determining joint residence is particularly advantageous for the child, as he/she has the opportunity to have a relationship with both parents without any restrictions. For the parents, joint residence is closely linked with the implementation of the constitutional principle of gender equality, especially in a society in which gender roles are normally distributed in a manner that more burden of the child care and custody lies on women (both, in terms of finances and time). The use of joint housing in the best way regulates the roles and responsibilities of both parents with respect to their children.

Determining the child's residence with both parents is also useful for the court, as the judge no longer has to make a decision to choose a better parent and determine the child's residence with one parent only (which is linked to problems). All of that also reduces the time spent in legal proceedings and other costs;it settles a dispute between conflicting parties which, for the most part, arises at the time of determining the child's residence and child support. Despite the positive aspects, awarding the joint custody is problematic in certain circumstances, and therefore the judge may not apply this method. These circumstances are:

1. Parents' residencies are significantly separated from each other;
2. Parents have serious conflicting relationship;
3. One parent is a victim of violence from the other parent;
4. When one of the parents has harmful effect on the child;
5. When other objective reasons exist.[197]

2. EU and Council of Europe regulations on child custody issues

In this chapter the EU and Council of Europe regulations on the family law issues will be reviewed. The applicable law and major legal principles will be represented, which are applied by the court on family disputes.

In the light of the case-law, particular conditions and communication rules

are intended to be used by Attorneys and parties in domestic relations cases in the Third Judicial District.

197.Becker M. (1992)"Maternal Feelings Myth, Taboo, and Child Custody"; S. Cal. Rev. L. & Women's Stud. 133p.184-187.

with a child will be discussed, including child custody, guardianship and residence determination issues.

a) European Union Law regarding family disputes

According to the EU law, it is recognized that both parents have equal rights with respect to their child/children; at the same time, the preferential right of a child is acknowledged, to have equal relationship with both parents. Separation of the child from the parent is an exception to the principle of equality, which can be justified only by the best interests of the child.

The EU Charter of Fundamental Rights[198]clearly defines the right of a child to have regular contact with both parents; also, without any restrictions to establish communication with each of them. The mentioned right is derived from the spirit of the Convention of the Rights of the Child.[199]

For the regulation of family disputes, mainly two EU law instruments are applied. These are the Council Regulation (EC) 2201/2003[200] and Directive 2008/52/EC (Mediation Directive) of the European Parliament and the Council.[201]In terms of human rights, the Brussels II bis Regulation is especially important. It can be applied in every decision related to the parents' responsibility towards their children, and also in disputes between parents. The rules, which are connected with the jurisdiction, declare the child's best interest the key principle; there is a special note in the document about considering the child's opinion.[202]

According to the standards of the European Court of Justice of the European

198. EU Charter of Fundamental Rights, Article 24(3).

199.UN Convention on the Rights of the Child was adopted by the General Assembly on November 20, 1989; The Parliament of Georgia ratified the Convention in 1994.

200.Council of European Union (2003), Council regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgment in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003L 338 (Brussels II bis).

201.European Parliament, Council of European Union (2008), Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ 2008 L 136/3 (Mediation Directive).

202.See, for example, Council Regulation (EC) No. 2201/2003, Preamble (paras. 5, 12, 13 and 19) and Articles 8, 41 (2) (c) and 42 (2) (a).

Union, there is a single argument why a parent's rights towards the child, and therefore the rights of the child to have regular relationship with both parents, may be limited: again and again, it is the child's best interest. In such cases, the child's interest will outweigh the fundamental rights of all individuals (*Jasna Deticek v. Mauzirio Sgueglia*).[203]This vision is linked to the children's rights and is guaranteed by Article 20 of the Brussels II bis Regulation. Court decisions are based on the principle of balance of interests of disputing parties, when the issue of restricting parental rights shall be resolved only with the consideration of reasonable and objective criteria in the child's best interest.[204]

Often a dispute between the parents arises regarding the determination of the child's place of residence, when one parent leaves the country and moves to another one. In such disputes, the Brussels II bis Regulation, together with Hague Convention, are applicable, as they determine jurisdiction, applicable law, enforcement and cooperation in respect of parental responsibilities.[205]In such cases, the main principle followed by the Court of Justice of the European Union is the issue of determining the child's natural, usual residence.

For example, thecase *Mercredi v. Chaffe*[206]was sent by the Court of Appeals of England and Wales to the Court of Justice of the European Union. It referred the issue of taking a 2-year-old child by the mother from the United Kingdom to live in France. The Court ruled that for the purposes of Articles 8 and 10 of the Brussels II bis Regulation, the habitual residence of a child was interpreted as meaning that it corresponds to the place that reflects some degree of integration by the child in a social and family environment. The Court took into consideration the following factors:

1. duration of stay;
2. regularity;

203.Court of Justice of the European Union (prior to December 2009, European Court of Justice, ECJ) CJEU, C-403/09 PPU 23 December 2009, para. 59.

204.*Ibid.*§ 60.

205.The World Organization for Cross-border Cooperation in Civil and Commercial Matters (1996), Hague Conference on private international Law, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996.

206.Court of Justice of the European Union(CJEU), C-497/10 PPU, 22.12, 2010.

3. conditions;
4. reasons for changing the place;
5. child's age;
6. mother's personal and family origin;
7. family and social relationships of the child and mother.

It can be concluded that the European Union law determines the child's best interest as the key principle, and all parties to dispute shall comply with this principle. At the same time, it becomes clear that the rights of all other parties may be restricted if it is conditioned by the child's best interest. All other objective and subjective circumstances that may exist between the disputing parties will be referred to only as additional circumstances to determine the child's best interest.

b) Council of Europe regulations regarding family disputes

According to the standards of the Council of Europe, the rights regarding family relationships are guaranteed by Article 8 of the European Convention on Human Rights[207]. The case-law of the European Court of Human Rights (ECtHR) clarifies the scopes of Article 8 of the Convention and establishes a unified approach regarding family disputes.

According to the Court, the mutual enjoyment by parents and children of each other's company constitutes a fundamental element of family life(*K. and T. v. Finland*);[208]however, the court adds that this right may be limited since the best interests of the child must be taken into account. These principles are the basic criteria when the Court makes decisions on issues such as child custody and parents' communication with the child.

For example, in the case *Schneider v. Germany*[209]the applicant had a relationship with a married woman and claimed that he was the biological father of the child, though legally the mother's husband was recognized as the father of the child. The applicant objected to the decision of the national court,

207.Article 8 of the European Convention on Human Rights. Right to a Private and Family Life.

208.European Court of Human Right. ECTHR, No. 25702/94, 12 July, 2001, par. 151.

209.European Court of Human Rights. ECTHR, No. 17080/07, 15 September, 2011.

according to which he was not allowed to have contact with this child and receive full information about his development that violated his right to respect family life. The European Court of Human Rights found a violation of Article 8[210], as the German Government could not prove what objective and reasonable circumstances existed against the biological father that could stipulate the necessity of restriction of contact between the child and the father. The Court also noted that the refusal to give the father all required information about the development of the child was not conditioned by the child's best interest, and therefore, the interference in the applicant's right was recognized unjustified.

The Court set a particularly interesting standard in child custody cases if two or more minors are involved in the dispute. For example, in the case of *Mustafa and Armagan Akin v. Turkey,*[211] the applicants, the father and son, appealed the national court decision which had defined the conditions of child custody.The Turkish court separated the two siblings. The custody of the son was awarded to the father, and the daughter's custody to the mother. According to the applicants, that violated their right to respect for their family life. The European Court of Human Rights determined that the Turkish Government violated Article 8 of the Convention by separating the two siblings; on the one hand, it separated the children and on the other hand it prevented the father to enjoy the company of both his children at the same time. In the cases which refer to the issues of child custody and a parent's relationship with the child, the Strasburg Court strictly checks whether there has been a violation of Article 14 of the Convention, which prohibits all forms of discrimination in the application of human rights, which are guaranteed by the Convention.

Based on the principle of the child's best interest, the Court found legitimate the restriction of a parent's right, especially when any form of violence towards the child takes place. For example, in the case of *Levin v. Sweden*[212]the mother of three children objected taking her children into public care after her contact with the children was restricted. The Court examined the pre-

210.Article 8 of the European Convention on Human Rights. Right to respect for a Private and Family Life.

211.ECtHR,*Mustafa and Armagan Akin v. Turkey*, No. 4694/03, 6 April, 2010.

212.ECtHR,*Levin v. Sweden*, No. 35141/06, 15 March, §. 57; 69; ECtHR, *K. and T. v. Finland* No. 25702/94, 12 July 2001, § 151.

conditions for the restriction of the right, as was the child's best interest. Based on evidence, it was confirmed that during their lives with their mother the children were the victims of neglect, and therefore they did not wish to have a relationship with her. The Court rejected the applicant's claim and held that Sweden had not violated Article 8 of the Convention, as the restriction of parental rights was based on the legitimate purpose (child's best interest) and it was proportionate and justified.

D. Family law issues in Georgian legislation and judicial practice

This chapter discusses substantive and procedural regulations of family law provided for by the legislation of Georgia; also, recommendations are presented in this section to be discussed for further reforms.
According to the Civil Code of Georgia[213], both parents have equal rights and duties with respect to their children, to take care of their education and physical, material and intellectual development. As regards custody, the parents have equal rights and obligations, which means there should be joint legal custody, except for cases when, according to the court's decision, any parent is limited or deprived of one, several or all parental rights.[214]

Article 1201 of the Civil Code of Georgia regulates the rule for determining the place of residence of children in the case of parents' divorce.

1. *If the parents live separate and apart because of divorce or some other reason, then the custody of a minor child shall be determined by their agreement.*

2. *In the event of disagreement between the parents, a court shall resolve the dispute taking into account the interests of the child.*

The law imperatively establishes that only one parent's place of residence shall be determined as the place of residence of the child. This regulation does not exclude right of the other (with whom the child does not live) to have a relationship with the child and to exercise joint custody of the child together with the former spouse; also, to be equally responsible to take care

213.Civil Code of Georgia, Articles 1197; 1198.

214.Civil Code of Georgia, Articles 1205; 1206.

of child's upbringing and development.[215]

Such a legal regulation does not allow the court to determine the residence of both parents as the child's residence and thereby to meet the child's best interest to relate equally with both parents. In addition, determining the place of residence of one of the parent as the child's residence often becomes a basis for gender discrimination and a gender-biased decision, which is also proved by the judicial practice.

It is important to start discussions on amendment of the legislative regulations so that, in the child's best interest, the court could involve both parents in the daily care of the child, which for the most part could be achieved by sharing the place of residence between the parents.

1. Custody and guardianship of the child

a) Determining the place of residence of the child by court

For the study purposes, 200 decisions made by the first, second and third instance courts related to family disputes have been analyzed. The review of the decisions has revealed a problem related to the lack of unified standards or criteria for determining the child's residence. It was also observed that unified and, at the same time, objective assessment criteria of skills, conscientiousness and custodial ability of disputing parents have not been developed, which increases the risk of gender-biased decision-making practices.

However, through analysis of the court decisions we shall outline the main issues discussed at court proceedings, and those criteria on which the reasoning of the court decisions are based.

In the majority of court decisions, the court defined the mother's place of residence as the child's residence. However, it should be noted that fathers rarely demand to determine their living places as the child's residence place. They mainly make a request regarding the child visiting days, which may also include the right to leave the child in the father's house at nighttime.

In cases where the court equally divides the days for visits to and relationship with the child (which means the parent's house where the child stays at night) between the parents (in rare cases and if the child wishes so), it establishes in practice the institution of determining the joint residence, which is a good way to balance equally the parties' interests.

When courts establish only the mother's living place as the child's residence, it significantly damages primarily women in Georgia; they are, in fact, the only parentswho, as a result of stereotypical division of gender roles, bring up their children alone and thus undertake an incredibly large burden on themselves. This burden is determined by disproportionate time and material costs spent for the education of the child and other types of services. Such an unfair distribution of responsibilities releases men from fulfilling their duties related to their children. On the other hand, this approach is discriminatory towards those male parents who, despite their wishes, objective possibilities and conditions, could not obtain the right to participate in the child's upbringing or were refused by court to determine their dwelling as the child's residence place or to have a joint residence.

The court practice has established some criteria by which the parent's assessment shall be conductedin such disputes. These criteria are:

1. Material conditions;
2. Moral environment;
3. Degree of attachment of the child to his/her parent.

To determine/to study material conditions, the court gives specific importance to the parent's income and financial conditions of the parent's family. However, to meet the mentioned criterion while determining the child's place of residence is not a main factor considered by the court. For example, Tbilisi Court of Appeals[216]has noted: ***"Having better living conditions cannot always be decisive in determining the child's residence place. In this case, moral environment should also be considered that the parents can give to the child with the consideration of their financial situation, age, moral image, intellectual level and quality of participation in child's education".***

To assess the moral environment, court discussions are never standardized, and it is hard to find a clearly defined standard on the assessment of mor-

215.Civil Code of Georgia, Articles 1197; 1198.

216.Tbilisi Court of Appeals, case #2ბ/3720-10, dates by 13 December, 2011

al environment. At the same time, it should be considered how the judge would be bound by the legal definition of moral. The arguments of ex-husbands against their wives are mainly focused on the moral side and physical/mental possibilities, thus discrediting women as a parent. For example, if a woman has any kind of disability, the spouse claims she would not be able to bring up a child; if a woman's private life is connected to another person (man), the spouse points to her immorality and so forth. However, it should be noted that in those cases where men had indicated such causes, the court did not share their position and the claims were not a basis for its decisions. In this regard, the decisions and approaches on family disputes made by the judges of Batumi City Court should be characterized especially positively. For example, Batumi City Court stated in a case[217]: ***"The Court cannot accept the respondent's (former husband) opinion with regard to the mother, who had left the house without telling the husband a reason; she had not told that she was pregnant and the respondent learnt about it only after bringing a suit against her, leaving no doubt that he was not a father of the third child and the mother had certain relationship with another person".*** The court underlined that the private life of a person is inviolable and in the given dispute mentioned circumstances regarding woman's private life could not be considered by court. Despite more or less fair practice of the assessment of moral criterion, the lack of clear and unified criterion of parents' assessment still encourages the creation of an incoherent overall picture.

To assess the quality of a child's attachment to the parent the court is under obvious influence of gender stereotypes, which is reflected in its final decisions.

As a rule, the court accepts and relies on the assessment of persons invited in case hearings as experts or specialists, which is related to the establishment of the concept of mothers as the "natural parent"[218] and the preferential meaning of the mother and child's relationship. For example, in a case[219] in Gurjaani Regional Court, the court fully accepted the psychologist's recommendation and interpreted that "***in general, the child's biological connection with the mother is more close than with the father, though, along with the biological connection, deciding the issue of assigning one of the parents the right to raise the child, a priority shall be given to the mother in case if she can better fulfill the parental duties and bring up the child, as a person of worth, than the child's father; from this point of view, mother and father have somewhat equal possibilities… with the consideration of the child's age, to avoid emotional stress for the mother's absence it would be better to leave the child with an object of his/her primary attachment – i.e. the mother".***

How would the judge act if the conditions of both parents are fully in line with the child's interest and a minor can live with either of them? If such a complicated question arises, particular meaning would be given to the fact that court avoided a biased discussion, which due to firmly existing gender stereotypes in the public, has been established in every professional area or institution. Such stereotypical concepts include that a woman is a "natural parent" and a mother is "the object of primary attachment."[220]In that case, it must be said that the victims of gender-bias are those fathers whose conditions objectively enable them to obtain a right to the child's custody equally to the mothers. This represents the child's best interest as well, to have relationship with both parents equally. Therefore, it is time to release the court from these harmful stereotypes.

b) Role of the third persons (grandmother, grandfather, others) in child's custody

It is interesting to note the court's consideration of the role of the third persons in disputes when determining the child's residence place with one of the parents. What happens when in raising children the mother or father are assisted by the third persons, e.g., a grandmother or grandfather? Should it be interpreted as either of the parents' privilege and, therefore, the decision shall be made against that parent who does not have family members to care for children? The court practice is clearly biased in such cases.

217.Batumi City Court, case #2/1437-2014, 24 June, 2015.

218.Main purpose of this concept is to underline a privileged, preferential role of a woman in the child's life that could justify the restrictions of the rights of men in relation to their children.

219.Gurjaani Regional Court, case #340210015731676, 27 October, 2015.

220.Primary attachment as a general term, excludes the parents' equality with respect to the child; it also limits the possibility to make individual assessment of men and women, recognizing that under all circumstances the child is attached to his/her mother and, accordingly, the woman should have an advantage.

Analyzing the decisions, cases have been identified when one parent lives abroad and the child lives with his/her grandparents. In such cases, the court's approach is discriminatory – it does not satisfy fathers' request to determine their living place as the child's residence, but mothers' appeals containing similar request are usually granted.

In one case,[221]Telavi Regional Court dismissed a suit to determine the father's living place as the child's residence place. There was a clearly proven fact that the mother lived abroad, while the child grew up with his/her mother's parents in Tbilisi. A social worker positively assessed the father's, and also the mother's parents, living conditions, but the court did not satisfy the father's request and determined the mother's parents' residence as the child's residence place.

Ozurgeti Regional Court made a substantially different reasoning in one of the cases,[222]where it stated: ***"A fact should be considered that if the child remains in his/her father's family, in fact, the grandmother and grandfather (father's parents) would become the child's custodians, as the father from time to time works abroad, during the day he cannot stay with the child, he is out for work and leaves the child with the grandmother. In given case the court does not diminish the role of grandparents in the child's raising, but this cannot change the need for mother's relationship with the children".*** The court determined the mother's dwelling as the child's residence place.

The above analysis of the two cases is not enough to generalize gender preferences in this regard, though there is a sufficient basis to start thinking about changing the similar gender-biased practice in professional circles.

c) Considering acts of violence in determining custody

To determine any parent's living place as the child's residence place, it is essential that the court paid particular attention to the parent's possible violent behavior. As international practice showed, major achievements of modern society are actions directed against violence, and the courts stand as key defenders and guarantors of these achievements. As mentioned during the discussion of feminist theories, special attention should be given to the domestic violence when considering family disputes, including resolving the cases on the relationship with the child.

According to recent statistics, in Georgia most perpetrators of domestic violence are men, and the victims are women. For example, in 2015, 93% of violators were men, while 87% of women were victims;[223]in 2014, most of victims were also women. Accordingly, violence against family members is mainly a challenge faced by women, and logically its consideration in disputes resolution will be evaluated as a means of women's protection.

Acts of violence have harmful impact of minors, irrespective against whom such acts are performed – the spouse, former spouse or child. Therefore, the judge should take into account the violence against women when determining the child's residence place or relationship terms with the child, in order to meet the child's best interest requirement.

However, Georgian legislation does not precisely indicate the standard which should be used if there are violent acts and that would influence the decisions of judges. As the result of imperfect legislation, we have court decisions in which parties openly speak about violence; often such violence is documented by the competent authorities (e.g. order issued by police, criminal prosecution and so forth), though these circumstances do not affect the content of the decision.

Below some decisionsare presented. The Tbilisi Court of Appeals in one case-[224]allowed the father, who used violence against his wife and children, to have relationship with childrenwithout additional guarantees and obligations. In that case, the City Court found the fact confirmed that the man had a serious disagreement with his former wife. The seriousness of the conflict between former spouses was also confirmed by the school director, who stated that ***"A.Ph.'s (father) appearance at school makes his children tremble with fear, they are scared***. [225]

Batumi City Court considered the fact confirmed in a case[226] where the complainant (father) acted violently against his wife, which was also confirmed

221.Telavi Regional Court, #2/441-14, 20 July, 2015.

222.Ozurgeti Regional Court, #2/476-14, 30 January, 2015.

223. Parliamentary Report of the Public Defender of Georgia of 2015, p. 1013.

224.Tbilisi City Court, case #2ბ/64-07, 21 September, 2007.

225.*Ibid*, p. 2

226.Batumi City Court, case #2/1214, 21 October, 2015.

by the restraining order issued by police. However, the court disregarded the abusive character of the father when determining the issue of the father's relationship with his children and satisfied the father's requirements. Moreover, the court interpreted: "***the party has not presented any evidence to the court that would prove the fact that father's relationship with his children contradicts the children's interest and causes damage to them, or prevents the normal upbringing of children and would have negative impact on them".***[227]

Similarly, the act of violence against the child appeared essentially not a considerable circumstance for the court. For example, in a case[228] in Tbilisi Court of Appeals, the court improperly interpreted some of the standards of the Convention on the Right of the Child and the child's best interest. Two facts of physical abuse against minor child were clearly stated, and such acts were regarded as criminal offences. The father confessed to having committed violent acts, based on which the prosecution used its discretionary power and terminated the criminal prosecution against the father.At the request of the social worker, the child was taken into public care, in particular in the program of foster care. But the Tbilisi Court of Appeals satisfied the father's request to return the child into his/her biological family; he made a promise that he would not act violently against the child. The court did not take into consideration the social worker's opinion about possible risks of returning the child to his/her family.

The above mentioned cases showed the need to improve legislation so that the court makes an adequate evaluation and fair assessment of violent crimes during family disputes resolution. The current practice clearly reflects the problem of gender bias in the courts that has an adverse impact on women as victims of violence.

By ignoring violence, courts encourage the oppressor men to commit such actsrepeatedly; it strengthens the opinion that an act of violence committed against a woman is not objectionable behavior at all, particularly, in the court. Therefore, we consider that it is time that the court and the legislature change their position and diverge from the stereotypical vision that a person might be a criminal offender and violent husband, and at the same time a good father.

227.*Ibid*, par. 6.1(4).

228.Tbilisi Court of Appeals, case #2ბ/3978-12, 4 December, 2012.

2. Alimony and the obligation of spousal support in the legislation of Georgia

a) The legislation of Georgia with respect to alimony payable in favor of a child

The Civil Code of Georgia regulates several types of alimony institutions, which are recognized by law as a legitimate right of persons with the right to claim. The Code also regulates the rule of claim, determination and payment of alimony.[229]

The circle of parties who have the right to claim alimony/support is quite broad. Though the present document deals with two cases only: a) alimony obligations of parents towards children and b) spousal support obligations.

The purpose of alimony allocated for a child is the education and development of persons who have the right to claim, ensuring their good living conditions, health care, satisfaction of daily needs, etc.

According to the Civil Code of Georgia, alimony is a legislative obligation, release from which is possible only on the basis of a court decision. The following criteria should be taken into account while allocating alimony:

- reasonableness
- justice
- the goal of normal support and upbringing
- the actual financial status of the person paying alimony[230].

Sometimes a parent paying alimony has to bear additional costs which may be caused by extraordinary circumstances (child's illness, mutilation, etc.).

According to the legal content of the alimony institution, alimony is the amount of money that goes to the protection of the best interests of a child and can be expressed only in the material form. Such regulation of the issue constitutes a challenge. When one of the parties or both parties do not have an opportunity to perform their legal obligations in monetary form, what can a court do? In case of absence of objective standard, the court releases the disputing party from the obligation to perform any material obligation,[231]

229.The Civil Code of Georgia, chapters 3, 4 and 5.

230. The Civil Code of Georgia, Article 1214.

231. The Civil Code of Georgia, Article 1237.

as there is no legislative regulation for the court to ensure performance of the non-financial obligation of a parent related to support and upbringing of a child. Therefore, in case of lack of finances, one party will be unjustly released from their obligation, which means that all obligations towards the child will fall on the other party. In most cases, women are such party.

It should be noted that this issue is not well regulated in other legal systems either. Some countries try to regulate the issue by repressive methods, which are manifested in imprisonment of persons who fail to perform financial obligations towards a child. Such attitude is not directed at the satisfaction of child's best interests; it is not a useful event to achieve equal distribution of the parents' obligations.

Taking this into account, we bring up for discussion a completely new approach to alimony as a legal concept regarding the definition of alimony. In the legal system of Georgia this approach constitutes an innovation. Its essence lies in the fact that the legal definition of alimony in the legislation must be broadened; in particular, when it is established that a party has no objective opportunity to perform its financial obligations, the court must be authorized to define the non-financial performance of obligations instead of financial obligations, with the objective of support and upbringing of a child, involvement into the child's everyday life of the parent who was required by the court to pay alimony. A relevant state body will be assigned to perform the monitoring of enforcement of the decision. As to the calculation of monetary alimony, the current legislation introduces several subjective and general concepts - it is a reasonable and fair assessment of the financial capacities of the parties. Due to such general definitions, the court practice is ambiguous and does not develop a uniform standard with the objective of calculating the amount of alimony; in developed countries a mandatory and accessible formula has been elaborated, by means of which the amount of alimony is calculated objectively in case of a particular person. The court practice of Georgia, however, does not define the minimum amount of alimony. Consequently, it is difficult to demand an objective amount of alimony, as well as ensure its legal satisfaction. Such non-standardized approaches inflict damage to the parties participating in a dispute and also children.

b) The rule of defining the amount of alimony for the minor child - the judicial practice

In family disputes the main motivator of parties is the interest of determining alimony and place of residence; in such cases the claimants are mainly mothers.

Study of decisions made on claims of alimony showed that when determining the amount of alimony the plaintiff's claim is rarely (almost never) based on objective criteria. The amount of alimony is based on the financial capacities of the defendant (mainly, father). For example, in one case[232], the applicant requested that the father be obligated to pay monthly USD 1500-1500 (3000) in favor of two children. The reason for demanding such a large amount of support was the substantial income of the father, which amounted to USD 9000. Such reasoning of the court on similar requests is based on the opinion that the amount of alimony should not depend on the volume of income of the person on whom the support rests; a reasonable amount should be determined, which is necessary for support and upbringing of a child. However, the demand of an unreasonable amount by the plaintiffs may be caused by the absence of an objective formula for the calculation of the alimony in the legislation of Georgia.

The courts' approaches to impose fair alimony are very important. Batumi City Court in one case[233], where the plaintiff (mother) demanded from the respondent (father) alimony in the amount of GEL 200-200 (400) for two minor children, explained that ***"In making a decision on the issue of alimony, the court must take into account the economic status of parents as well as the reasonable amount for the support of the child. The economic problems do not exclude the obligation of the respondent to participate in the upbringing of the children equally with the second parent, the plaintiff... If the situation of both parents are equal and similar in respect to children, then the father should participate in the support and upbringing of the children notwithstanding his income. The court considers that the respondent should be imposed payment of GEL 200 (GEL 100 per child). The court explains that for normal support and upbringing of two children large amounts are re-***

232. Batumi City Court, case #2/4191-2015, 29 February 2016.

233. Judgment of Batumi City Court, case #0102100145437462-1427/14, 21 October 2014.

quired and for the support of two children GEL 200 is not enough, but the amount of alimony should be defined within the framework of correlation of the financial capacity of parents and mandatory expenses for the support of the child, and not according to the amounts required for upbringing of the child and the income of the respondent. In such case, determination of the alimony in the amount of GEL 100 is quite reasonable. It is not only the minimum amount for the support and upbringing of the child, it is also taken in view of the limits of the financial capacity of the respondent".

The mentioned decision clearly expresses the attitude of the judge to the obligations of the parents towards the child, which should be determined notwithstanding financial problems, though as a result of logical reasoning it was followed by allocation of a reduced amount of the alimony that satisfies only the "minimum" needs of the child, and the demand of the legislation that alimony should satisfy not "minimum" but "normal" standards of upbringing was not achieved; neither were the requested financial obligations replaced by imposing other non-financial obligations. And the reason was the financial content of the alimony.

We face a significant challenge during the practical implementation of the reasonableness standard of the child support decision. In exceptional cases, the courts take into account the fact that the parent with whom the child lives spends much more time and resources than the parent on whom the court imposes financial support for the child. Based on the principle of equality, it is logical that such costs – financial, as well as non-financial – should be distributed fairly between both parents. Typically, the parent with whom the child does not live is loaded only by financial obligations when imposing alimony, in contrast to the parent with whom the children live. Therefore, at the time of determining the amount of alimony the court must take into account the situation and be guided by it in determination of the amount of child support, thus, essentially, to the disadvantage of individuals in unequal conditions and will avoid discrimination, which affects only women by its results.

In a case[234] where the mother requested imposing on the children's father GEL 300 monthly in the form of alimony, the judge of Akhalkalaki Regional Court noted that *"For the determination of the living wage for Georgia in view of the required food basket, the court considers appropriate that for the support and upbringing of a child (the mother) needs GEL200 per month as a minimum, half of which must be imposed on the respondent as a parent with whom the child does not live".* This decision clearly shows that the judge did not take into account the amount of expenses of the mother and put the woman into a discriminatory position by dividing the alimony into two equal parts. For the prevention of unequal treatment, it is necessary to clearly formulate the principle or draw up a rule as to how and in what circumstances the amount of alimony should be defined. This will facilitate the formation of a uniform and fair practice in the system of justice.

234.Akhalkalaki Regional Court, case #2/119-14; 15 August 2014.

c) The obligation of spousal support

Pursuant to Article 1129 of the Civil Code of Georgia, *"At the request of the spouse entitled to maintenance from the other spouse, the court shall, when making a decision on a divorce case, determine the amount of the funds to be paid by the other spouse".* Chapter 5 of the Code is fully dedicated to the issues of spousal support.

The subject receiving support from the spouse (including the former spouse) shall be:

1. A disabled spouse, who requires financial support;
2. The wife during pregnancy and 3 years after childbirth.

To receive support under the first test, the legislation requires two cumulative conditions (disability and the need for financial support); as to the second test (pregnancy and/or childcare up to the age of 3), in this case the woman's disability or the need for financial assistance are of no importance.

The disabled spouse has the right to claim support during marriage, or after the divorce if the disability arouse prior to the divorce or within 1 year after the divorce.

We will focus on the subjects who have the right to demand alimony, as well as the rule and existing practice determining the alimony.

In modern legal systems the obligation of mutual support of the spouses is a recognized sphere requiring legal settlement and, as a rule, there are minimum

prerequisites for the former spouses to use the right to demand alimony (support);

For example, according to the German Civil Code, spouses shall support each other after divorce under certain conditions and within certain terms. Basically, such are the cases, when the spouse:

1. Is upbringing the child;
2. Is old;
3. Is ill;
4. Has no adequate work.[235]

The support may also be demanded with the objective of funding trainings or other study courses. The duration shall be defined based on the needs, it also depends on how long the former spouses have been married, and the support will be terminated if any party died, got married, found employment or due to other reasons, when there is no need for the payment of alimony.[236]

Besides the German legal system, American legislation also recognizes the legal institution of payment of spousal support by former spouses to each other. Unlike the legislation of Georgia, in the context of terms, temporal and main support institutions are established. Temporal support is calculated according to the formula is allocated to the spouse who is in the divorce process, and later, by the final decision of the court, the main support is allocated, which would be approximately 17% of the income of the paying party.[237]

Proceeding from the above, Georgia's connection of the obligation of the spousal support to spouses with disability, pregnancy and/or caring for a child under 3 years of age limits the mentioned right, which is contrary to the approaches of the developed legal systems and therefore, should be reviewed.

235.German Civil Code BGB, Sections 1569; 1570-1575.

236.Ibid, Section 1579.

237.Douglas County, Family Law guidelines. The edition of 2012, prepared by the family law guidelines committee of the Douglas County Bar Association. Section 3.00-3.04 p. 8-10.

d) The court practice for the demand of support by a spouse

As mentioned above, in Georgia a spouse can claim support only if he/she has financial difficulties and, at the same time, is disabled; or is pregnant; or has a child under 3 years of age. If in the first case mentioned both requirements are not met, and in the second case if either of the requirements does not exist, a spouse cannot exercise the right to demand the support.

Let's consider the concept of disability. The Law of Georgia on Medical and Social Expertise defines degrees of disability (Article 22)[238], which are directly related to the deterioration of health conditions.

The legislation connects the obligations of spousal support with cases of dysfunction of the organism to a certain degree and pecuniary burdens. Such obligation should be arised due to particular objective reasons, which may be health challenges, as well as, for example, cases when a spouse has been a victim of economic difficulties and other violence for years; was prohibited to work; also, based on gender stereotypes, was forced to get involved into family matters only, etc. This approach does not coincide, as a rule, with the purpose of spousal support.

In the cases (up to 200 judgments) reviewed during preparation of this document, none dealt with the requirement of support between spouses or former spouses, which may indicate that parties do not try to exercise the mentioned right through the courts. This could be the result of the existence of narrow legislative regulation. Also, it should be noted that the basis for

238. Article 22 „1. If the victim has an obvious problem with function of the organism, which hinders or makes impossible performance of any work, including, in specially designed conditions, 100 (one hundred) percent of loss of earning capacity is defined. 2. If the victim can perform work only in specially created conditions, loss of earning capacity by not less than 70 (seventy) percent is defined. 3. If the victim as a result of labor trauma can perform their professional activities, but to a lesser extent or with capacity reduction and reduction of salary, or he/she lost the qualification, but is able to perform a relatively low-skilled and low paid jobs in other professions, the degree of losing professional ability is determined from 25 (twenty-five) to 60 (sixty) percent, according to the volume of work, reduction of payment and reduction of qualification. 4. If the victim can continue working by his/her profession, which is accompanied by the reduction of payment, or his/her profession, but with more tension than before, degree of loss of earning capacity is defined by up to 25 (twenty-five) percent".

the demand of support from the spouse mainly arise among women, and only they suffer when it is impossible to receive it. The support institution is gender-defined because, in most cases, the need which gives rise to the right to receive support is dictated in a particular society by social roles designated for women. For example, the restriction to work is the result of the role of child-rearing of women only, etc.

It is important to broaden the circle of those individuals to whom the legislation will give an opportunity, in objective cases, to request support for a reasonable term and this demand to be enforceable. The main reason for allocating support is financial hardship, and it should not cumulatively be related to disability. However, this approach should not preclude the appointment of support for a reasonable term based on disability.

3. Procedural costs in the legislation of Georgia

a) Court and out-of-court charges

According to Article 37 of the Criminal Procedure Code of Georgia, two types of procedural expenses are envisaged:

1. Court charges;
2. Out-of-court charges.

The court expenses include the levy that must be paid by the plaintiff prior to filing of a complaint; also, other expenses related to the review of the case, the rule of calculation and amount of which is regulated by the decision of the Supreme Council of Justice. According to Article 44 of the Civil Code, the expenses related to hearing of the case are:

1. Witnesses, specialists and experts costs;
2. The cost of an interpreter;
3. The expenses of local examination;
4. The expenses incurred for the statement of facts as a result of the court inspection;
5. Expenses related to the search of the defendant;
6. Expenses related to the enforcement of court judgments;
7. Funds paid to the lawyer from the state cash register;
8. Expenses of forensic examination conducted in a special expert institution.

Out-of-court expenses are expenses incurred for a lawyer, lost wages (lost time), expenses incurred for provision of evidence, as well as other necessary expenses of the parties.

In connection with the court expenses it should be noted that the procedural legislation allows the parties to get legal recourse (exemptions) if they are in difficult financial position. Most family disputes (child care, alimony) are exempt from state duties; the court can delay, disjoint, or completely release a party from other court duties. However, barriers arises when the party cannot incur *out-of-court expenses* (lawyer costs, lost time, expenses incurred for the provision of evidence, etc.). In themselves such expenses can be quite heavy. For example, when the subject of the litigation is the division of property acquired within marriage (which is quite expensive), all expenses, as a rule, are calculated according to the price of the claim. For cases reviewed in superior courts, additional costs arise.

The study showed that judges recognize the problems faced by women in relation to the payment of costs, especially for ethnic minorities and disabled women. Often they refuse to submit a claim to the court after they become aware of the costs to be incurred. Or, perhaps a woman can apply to the court and fail to protect her positions during the dispute because a lawyer does not protect her interests in the court.[239]

In such cases, a way out for women is free legal service (including lawyer services) for family disputes, particularly for those involving ethnic minorities or disabled.[240] Women will receive free and qualified services, whereby justice will become available for women who are representatives of various ethnic minorities or vulnerable groups (women with disabilities, ethnic/religious/national other minority women, women-victims of violence).

239.See chapter IX of this work – qualitative research, 1.5.

240.See information about barriers existing before the representatives of particular groups, in sections1.2., 1.3., 1.5.

Making free legal aid services available for women-victims of violence is an internationally recognized obligation of Georgia, which comes from the EC Convention "On Preventing and Combating Violence against Women and Domestic Violence."[241] According to Article 57 of the Convention *"Participating parties establish free legal consultation and assistance services for women according to domestic legislation* ".

As for the legislation of Georgia, the Law of Georgia on legal aid defines the circle of persons who may benefit from free legal aid. The law gives the opportunity to exercise such rights mainly to insolvent individuals, as well as to persons who, at the same time, based on particular complexity of the case, need the assistance of a lawyer. As for the women from vulnerable groups indicated in this chapter, including women-victims of violence, in case of civil and administrative disputes, free legal aid guarantees do not apply if they are, at the same time, insolvent (which is defined as persons registered in the unified database of socially vulnerable families) and, in addition, their dispute in the court system is not particularly complicated.

The legislation should be gender-sensitive in a manner that women who are underpaid workers, and/or due to gender stereotypes their main activity is taking care of the family (which is not paid work), enjoy the minimum standards of protection during the court proceedings.

b) Distribution of court expenses between the parties

Although the procedure law of Georgia enables the plaintiff who cannot pay expenses to use various grounds of exemption from court expenses, the same legislation contains a reservation under which the above-mentioned possibility completely loses its sense in relation to women who have financial problems.

According to Article 53 of the Civil Procedure Code of Georgia, ***"The costs incurred by the party in whose favor a decision is made shall be paid by the other party, even if this party is exempted from court costs payable to the State Budget. If a claim has been satisfied in part, then the plaintiff shall pay the amount specified in this article in proportion to the portion of the claim satisfied by the court, and the defendant shall pay the amount in proportion to the portion of the claim that was not satisfied by the court. The court shall impose costs for the assistance of the representative of that party in whose favor the decision was made, on the other party within reasonable limits, but not exceeding 4% of the value of the subject matter of dispute and during non-property disputes, taking into consideration the importance and complex nature of the case, up to the amount of GEL 2 000".***

The goal of submitting a claim to the court is the restoration of a particular violated right, which of course does not guarantee the correctness of the position of the plaintiff, but includes submission of a claim with the desire to restore rights in the independent, impartial and free space where dispute can be satisfied or fail. This means that submission of a claim to the court is characterized by the probability of winning an action, which is manifested in partial or full satisfaction of the claim, or denying the claim. Accordingly, the legislation should not put a potential plaintiff before choice. The latter can submit a claim and be exempted from any court expenses at the stage of submission, but in case of losing the action be held liable for all the costs incurred by the respondent. Lawyers are obliged to warn customers about the risk of costs, while the opposite side, which due to financial hardship cannot pay the court duty, would probably refuse to protect their own rights and rights of the child through the court.

For example, let's imagine a woman who for years has been suffering violence from her husband, she was prohibited to work and to stay in a social environment, so she does not have work experience and practical skills; consequently, she has no income. Finally, this woman escaped from the violent environment and wants to apply to the court regarding the division of property acquired while living with her husband and other issues envisaged by family law. However, if the court does not satisfy the claim of the woman about the property or satisfies it partially, according to the legislation, she will have to cover all costs incurred by the other party. At that time, these expenses increase together with the volume of the market value of the disputable property. As a result, this woman will fall into such an unfavorable situation due to the application to the court that the initial guarantees of ac-

241. Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 2011.

cess to the court (at the time the claim is filed in court to be exempted from expenses) may lose sense for her.

E. Conclusions, findings and Recommendations

In conclusion, it can be said that the legislative framework does not meet modern challenges, both in terms of financial regulation and due to the ambiguous interpretation of provisions in practice. The court experience indicates recent trends show a progressive approach of individual judges but as an exception, and it is impossible to generalize. Part of the problems discovered in the process are related to legislation, lack of relevant application of norms in practice, as well as an inappropriate level and sensitivity of awareness of the professional circles about the constitutional principle of gender equality. To accomplish this, the findings can be summarized as follows:

- A significant part of child custody and guardianship, which is related to determining of the child's place of residence, is not consistent with the purpose of meeting the child's best interests. This is reflected in the limited legislative regulation, according to which during the court dispute the court has to determine only one parent's place of residence as the child's place of residence;
- As a result of practical analysis of cases, it was found that the judicial system is not based on single, unified standards in resolution of child custody and guardianship issues; consequently, the system is not protected from a biased approach, which often becomes a reason of gender bias;
- The court practice shows that the parent who has the support of family members enjoys certain privileges in the review of family disputes, compared with the parent who does not have such strong support of family members. In addition, the court decisions revealed gender bias in favor of mothers, even if they are not physically with their children and are defined by the court as the child's physical custodians at the background of leveling the interests of fathers;
- The courts develop an outdated vision when they do not take into account past violence from family membersduring review of family disputes, which damages the interests of women victims of violence and children's best interest;
- The monetary nature of alimony creates practical risks with regard to achievement of the purpose of the alimony; in particular, persons who are unable to fulfill the obligations in monetary form are totally exempted from all obligations;
- As a practical matter, spouses do not demand performance of the obligation of spousal support. One reason is a narrow regulation of the issue, based on which only disabled, pregnant spouses and/or those who have children under 3 years of age may exercise this right. There is no support obligation towards other persons;
- It is clear that in allocation of child alimony, as well as spousal support, there are no objective criteria for calculations, which supports creation of inconsistent and unfair practices;
- Research has shown that in determination of alimony for children the court decisions are of discriminative content; in particular, the alimony is equally distributed and the parent with whom the child lives is more loaded with parental obligations, than the parent whose obligations are limited to the payment of the child support. The court does not take into account such circumstances in determination of the amount of alimony;
- The current legislation cannot ensure a high standard of access to the court for women from vulnerable groups, who do not have the financial ability to apply to the court with an aim to protect their rights and freedoms;
- Free legal aid service is not guaranteed for the victims of violence, which is contrary to the country's international commitments.

Recommendations

- Working groups should be created in the judicial system of Georgia to study and determine the gender bias trends; they will develop recommendations that will minimize the risks of gender bias in the judicial system;
- Permanent character should be assigned to professional trainings of judges, lawyers and other representatives of the legal profession with the objective of implementation of modern standards of gender equality and children's rights;
- At the legislative level, to define "child's best interests" and develop a methodology for its establishing, which is recommended by the United Nations Committee on the Rights of the Child;
- Legislative changes should be made for the court to be able to determine both parents' place of residence as child's place of residence, taking into account the child's best interests;
- The strategy of minimization of gender stereotypes in the judiciary system and means of prevention of gender inequality of judges in the process should be developed;
- Objective criteria for parents' evaluation should be developed in the form of legislative or auxiliary guidelines, which will be based on the international experience and gender-equitable principles of modern legislation;
- The legislation should clearly contain provisions about the necessity of taking into account facts of violence in the review of family disputes;
- To initiate a dialogue in professional circles with regard to the change of legal content of alimony, in order to achieve the purpose of alimony through financial as well as non-financial performance of obligations;
- As a result of the implementation of legislative changes, broaden the circle of persons who should be allowed to claim support from a former spouse. For this purpose, the experience and principles of other countries should be taken into account;
- The unified formula of the calculation of alimony and support should be regulated through by-laws in order to establish objective criteria for the determination of the amount of alimony;
- A mandatory principle should be developed that will provide objective recording of time and expenses assigned by parents to their children, as a result of which, consequently, alimony will be distributed fairly;
- Considering the practice of other countries, a guideline on family law issues should be worked out that will be efficiently applied by judges and lawyers;
- Legislative changes should be made, based on which a disputing party (women and other valnorable groups) that is exempted from court expenses will not be obliged to pay the expenses incurred by the opposing party in case of not satisfying their claim or its partial satisfaction. These costs may be paid from the state budget;
- Legislative changes should be made so that legal services will be guaranteed for female victims of violencein all types of administrative and civil disputes.

Anna Arganashvili

VII. PROHIBITION OF DISCRIMINATION

A. Introduction

This chapter analyzes the elimination of discrimination against women. It includes international and national legislations seen through feminist legal theory. More precisely, the section below discusses the history of adopting, as well as the existing norms, of anti-discrimination law in the USA and the EU. We also present the gender analysis of the following legislative acts: the Law of Georgia "On the Elimination of All Forms of Discrimination," the Law of Georgia on "Gender Equality" and the Labor Code of Georgia. The practices of the Public Defender of Georgia regarding anti-discrimination mechanisms and the decisions of national courts have alsobeen studied regarding the topic.

B. Feminist approaches to the prohibition of discrimination and theirintegration in the U.S. case law

Both, historically and in today's reality, the main demand of the feminist movement is the prohibition of discrimination in every sphere. However, anti-discrimination legislation had the special feminist impact on prohibiting discrimination in the employment sphere. Discrimination against women is the most visible, as well as measurable in monetary units, within the employment and labor rights spheres. At the same time, employed and active women manage the best to protect their rights in courts.

1. Tokenism and gender stereotypes

In the 1970s in the USA, when the main principle in women's rights sphere was "a formal approach to equality," activist women demanded the integration of women in the labor market and believed that the employment of women would have naturally increased the equality level. However, they soon realized that this type of mechanical integration did not provide equality in terms of payment and social status. A question emerged - if women were already participating in the labor market, meaning that formally they were not the victims of discrimination, why was their "discriminated" and subordinated status in the workplace, and generally in the society, still present?

Feminist lawyers faced the situation where they had to fundamentally analyze and revisit the definition of "discrimination." Based on the social aspect of oppression against women, when discussing cases with discrimination in the court, they decided to integrate results of sociological research into legislative strategies. More precisely, sociologist Rosabeth Moss Kanter studied the sociological theory[242] of tokenism,[243] which represents the situation of women being an obvious minority within a corporation. According to Kanter, when women, as representatives of a vulnerable group, are [artificially] involved in an organization where men are in majority, this does not increase the equality level of women. Special drastic forms of oppression are used against them. These women are particularly criticized for what they wear, how they look, for their bodies and behaviors. This criticism is directed towards proving that women cannot fulfill the jobs effectively. Sexist and stereotype-based criticism like this significantly worsens women's conditions in corporations. As Kanter argues, the masculine culture of corporations cannot be changed until women's involvement reaches an interval between 15% and 35%. As the theory emphasizes, the main source of discrimination is the organizational structure, the corporate culture and not the motivation of a discriminating individual. Kanter refers to this situation as a form of "structural" discrimination. For "structural" theorists, discrimination in the workplace is less likely to come from conscious decision and action of an individual being disadvantageous for women, such a behavior is conditioned by an existing gender imbalance within an organization.

2. "Price Waterhouse v. Hopkins" case[244]

Kanter's theory had a direct impact on the change of the U.S. legal practice regarding the appeal of discrimination against women in their workplace. In the case*Price Waterhouse v. Hopkins*, Ann Hopkins, who worked in a large

242. Rosabeth Moss Kanter (1977). Men and Women of the Corporation. Basic Books,p. 206-42.

243 Token – sign; symbol; note-reminder; indication; memorable gift; badge; coupon.

244. US Supreme Court, 490 U.S. 228 (1989).

accounting firm, sued partners of the corporation, as despite her distinct skills and abilities she was not promoted to partnership within the corporation. The defendants claimed that the shortcoming of Ann Hopkins was her rough communication style with subordinate employees. Ann Hopkins, who represented a noticeable example of tokenism within a corporation, was the only woman among 88 candidates for partnership. "Price Waterhouse" had 662 acting partners, among whom there were only 7 women. Within the law enforcement strategy, Ann Hopkins invited psychologist Susan Fiske as an expert witness. In her testimony,Fiske recalled the tokenism theory and talked about the damaging influence of stereotypes against women within a male-dominated corporation. According to Fiske, in a similar environment women are judged according to established criteria of "femininity" and not according to their actual skills. Hence, it was due to this environment that the partners refused Ann Hopkins's promotion to partnership.

According to the defendants' evidence (which was discussed in the court), refusing Ann Hopkins's promotion to partnership, among other reasons, was due to the fact that she used rough and uncensored words in communication. They believed that a woman should not betalking this way and recommended the plaintiff to attend special etiquette courses for women. According to them, Hopkins had to "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[245]

Ann Hopkins won the case. The court's decision regarding her promotion to partnership was unusual at that time. This case influenced legal doctrine in terms of transferring the burden of proof to the defendant for seeing the discriminatory motive against the plaintiff. Also, feminist lawyers made more important conclusions from this decision and from the tokenism theory: in anti-discrimination doctrine they criticized the causal relation between the result and facts that are hard to prove. In cases of discrimination against women, they considered it wrong to mention discriminatory intentions and comparators. According to feminist lawyers, women, who are the victims of discrimination in the workplace, should always point out that there was an imbalance of female representation that made it impossible to receive an evaluation free from stereotypes even when employed women fulfilled objective standards of qualification. In order to avoid possible discrimination, employers must ensure not "tokenism" but fair and equal representation of women in the decision-making body. Despite the fact that the feminist approach did not result in making a full change in legal doctrine, the involvement of expert witnesses (and hearing their testimonies) in lawsuits became more frequent. They were convincing the court of the negative influence of organizations' discriminatory environment.

245. Player M.A. (2013). Federal Law of Employment Discrimination in a Nutshell, Seventh Edition. WEST

C. Anti-discrimination law in the USA and the EU

1. The U.S. Anti-Discrimination federal law and gender discrimination

In 1964, the U.S. Congress adopted the Civil Rights Act. Title VII generally prohibited discrimination in the workplace.

Initially, Title VII contained a prohibition of racial discrimination and gender discrimination was not considered. However, a few hours before passing the Act, Senator Howard Smith proposed to include "sex" in the Act as a possible reason of discrimination. When researching the history of the topic, it is an interesting fact that according to legal researchers,[246] Senator Howard himself was against passing the Act and proposed this in order to make the opposition stronger. Some researchers mention that the proposal of Senator Smith was actually a joke, however the Congress successfully integrated this point in Title VII of the Act.[247][248] Including sex as abasis of discrimination in the Civil Rights Act had been supported for many years by the National Women's Party, which was established in 1916 during the suffragette movement (they also supported the Nineteenth Amendment to the United States Constitution; in 1920 this amendment gave women the right to vote). It is noteworthy, that the adoption of this Act did not change the court practice right away.

In the USA, discrimination in the workplace is an intersection of the Labor Code and the civil rights acts. On one hand, it deals with labor relations and on

246. Drobac, A.J. (2004). Sexual Harassment Law, History, Cases and Theory, Carolina Academic Press, Durham, North Carolina.

247.Baer, J.A. (2002). Women in American Law, 77.

248. Greenberg, J.G.et al. (1998). Mary Joe Frug's Women and the Law .

the other – with person's civil right to be protected from all forms of discrimination. Nowadays, the U.S. Equal Employment Opportunity Commission,[249] which is the main mechanism for studying labor discrimination, uses three main legal acts: (1) The Civil Rights Act of 1964 (Title VII bans discrimination based on age, sex, race, national origin and religion), (2) The Age Discrimination in Employment Act,[250] and (3) the Americans with Disabilities Act.[251] The abovementioned federal acts set minimal limits that are mandatory to protect a person's labor relations. However, this does not limit any state to establish higher standards of protecting a person from discrimination based on the above-mentioned or differently.

Title VII of the Civil Rights Act, which mentions "sex" as one of the reasons of discrimination, does not provide a definition of "sex." However, the 1978 Pregnancy Discrimination Act,[252] which made amendments to Title VII of the Civil Rights Act, defines the characteristic of sex as "pregnancy, childbirth, or related medical conditions." In their decisions, the U.S. courts defined "sex" as a "physical and biological difference between men and women." In the cases of discrimination based on sex, courts use "sex" and "gender" synonymously.

2. The prohibition of gender discrimination according to European Union law

Article 119 of the treaty establishing the European Economic Community in 1957 pointed out that the prohibition of gender discrimination is mandatory in relation to equal work and equal payment. However, in 1976,based on the decision of the European Court of Justice, the mentioned definition went beyond economic relations and took on a social aim. According to the court's definition, this article supports social progress, and improvement of working and living conditions.[253] Later, the same court defined that the economic aim is secondary to the social aim, as the principle of equal payment is the execution of a fundamental human right.[254]

249.Equal Employment Opportunity Commission (EEOC).

250. The Age Discrimination in Employment Act (ADEA).

251. The Americans with Disabilities Act (ADA).

252.1978 Pregnancy Discrimination Act.

253. Case C-43/75 Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena [1976] ECR 455 (Defrenne II), at paras 10-12.

254. Case C-50/96 Deutsche Telekom AG, formerly Deutsche Bundespost Telekom v. Lilli Schröder [2000] ECR I-743 (Schröder), at para. 57.

In 1999, the legislative base for prohibiting gender discrimination was reinforced by the Treaty of Amsterdam, as the achievement of gender equality in every sphere became the declared an aim for the Union. The gender mainstreaming principle was introduced. In 2007, the Treaty of Lisbon recognized the protection from discrimination and gender equality as fundamental principles of the EU. The abovementioned decisions were also reflected in those EU directives, which concern equality and protection from discrimination. In 2000, the EU got two directives concerning equal treatment during employment and racial equality. The Charter of Fundamental Rights of the EU bans discrimination, including based on gender (Article 21). It requires the protection from gender discrimination not only in labor relations, but also in the spheres of family and personal life.

Directive 2006/54, bans direct and indirect discrimination in public and private spheres concerning the following:

(1) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(2) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(3) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

From the abovementioned, an exception is the existence of a genuine occupational requirement when part of the job has specific, gender-related characteristics due to which treating a representative of a particular gender differently based on the context cannot be deemed to be discrimination. However, the EU directives treat this matter with special caution so that the growth of exceptions is not groundless. According to the position of the European Court of Justice, similar exceptional cases must be defined very strictly. There is a risk that those professions and jobs that women were discriminatively pro-

hibited to undertake for centuries can be counted as such exceptions. The EU directives oblige the member states to reevaluate and revise mandatory requirements of jobs every 8 years, as due to technological progress and social development those jobs that were connected to a particular gender before may not contain same requirements. It is especially important to mention that it is impermissible to forbid women to undertake any job on a motive of their protection (for example, military).

Another exception that will not be deemed to be discrimination is the positive action in the framework of which "With a view of ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages." These measures imply giving specific advantages which will overcome the historical oppression that the representatives of oppressed gender were experiencing in the spheres of employment or vocational education.

Special entry was made regarding the protection of women, especially relating to topics of pregnancy and maternity.[255] In 1992, the member states received another directive 92/85 concerning the protection of employed pregnant women.

In 1976, the member states could not reach an agreement concerning equal treatment of women and men in the sphere of social security; However, in 1978 they received directive 79/7, the so-called **third directive of equality**, concerning equality among women and men in the sphere of social security. This directive organizes topics related to illness, disability, age, industrial and occupational accident and unemployment.

The third directive also includes exceptions regarding the retirement age of women and positive acts, which are connected to the fact that if a person was busy with childcare she might have had to stop professional activity.

In directive 2010/18, a parent's leave of absence is also discussed. It helps a person to balance professional and private life.

Directive 2004/113 broadens the gender equality spectrum even more and points out that it should be protected in the spheres of service and supply.

255.Directive 76/207, Article 2(3).

D. Review of the national legislation about the prohibition of discrimination

For understanding the prohibition of discrimination against women, we should discuss three important legislative acts of Georgia's national legislation. These acts are directly connected to regulating the prohibition of discrimination against women: the Law of Georgia on "Gender Equality,"the Labor Code of Georgia and the Law of Georgia "On the Elimination of All Forms of Discrimination."

1. The Law of Georgia on "Gender Equality"

The Law of Georgia on "Gender Equality" was adopted in 2010. If not for its declarative character, it would have been one of the most important documents concerning the prohibition of discrimination against women. Until today, it is criticized exactly for this reason – it almost does not contain mechanisms for execution of the law; no other legislative act provides sanctions for violating the norms provided in the law on gender equality. The law also has shortcomings about formulating injunctions defining women equality. This topic will be discussed here.

Paragraph 1 of Article 3 of the Law, which includes the definitions of main terms, defines **gender equalityas "a part of rights."**[256] This definition is not relevant to the essence and philosophy of gender equality, as there is no particular group of rights wherein gender equality should not be present. Gender equality is a principle that encompasses a wide specter of human rights and freedom, and not some part of it. At the same time, Article 14 of the Constitution of Georgia, which ensures equality (including gender equality), does not refer to a group of rights but to all of them.

The Law on Gender Equality does not have an entry about changing public stereotypes and sentiments connected to the inequality against women. Given the circumstances that the courts consider stereotypical attitudes and sexist expressions as evidence of discrimination against women, not having the abovementioned entry can be considered as a shortcoming of the law.

256. "gender equality - a part of human rights which implies equal rights and duties, responsibilities and equal participation of men and women in all spheres of personal and public lives;"

The Law on Gender Equalityalso does not consider the intersectional approach to discrimination, which means the discrimination against women according to multiple aspects; accordingly, an entry about the mandatory elimination of the systematic oppression of women belonging to ethnic and religious minorities and those with disabilities, as well as those with different sexual orientation and gender identity, also those living in villages and of other marginalized groups, is missing.

The law's provision which allows inequality against women when performing particular jobs is also problematic. We should consider the formulation of the problematic article. According to Article 6, paragraph 3:

"During recruitment and in the course of employment persons may be put in unequal conditions and/or given priority over others on the basis of sex due to the substance and specificity of work or due to specific conditions required for its performance, and also if it serves a legitimate purpose and is appropriate and necessary for achieving that purpose"

Firstly, it should be mentioned that in the law, the case of **"genuine occupational requirements"** is provided as a general, acceptable practice and not as an exception. This formulation is problematic from the beginning and creates the risk of widely expanding this article. In the article, genuine occupational requirements are referred as "the substance of work." With its essence, "work" is wider than any particular occupation. Every kind of work (for example that of a soldier) may contain several occupations. Therefore, the requirements should derive not from "work," but from "occupation." The article also does not refer to a context, which makes the limitation wider. According to a context, a particular occupation may pose different requirements for a person realizing it. The "terms" provided in the article are formulated so that they are seen as characteristic of work; while "a context" refers more to the characteristics of an environment. Unlike respective directives of the EU, the article also does not provide an obligation to reconsider "genuine occupational requirements" from time to time. Based on the above, we believe that the formulation of the article is blank and contains the risk of gender discrimination, which is exactly influenced by public stereotypes.

The law also does not discuss the topic of **"parent's leave of absence,"** which could support equal parenting for women and men. In the Labor Code of Georgia, "maternity leave" is still considered as women's right and changing the term to "parental leave" would have been an advance for solving this problem.

The article about the prohibition of women's harassment in the workplace should be mentioned. However, there is a shortcoming in that the term **"sexual harassment"** is not used, which is definitely a problem. Additionally, the same law does not prohibit sexual harassment in another environment, for example, in an educational institution, which is equally challenging.

Based on the analysis, we can evaluate and state that in reality the Law on Gender Equality does not respond to its aim, does not consider the elimination of historical context concerning the oppression of women, and does not ensure the prohibition of gender discrimination in different spheres of life.

2. The Labor Code of Georgia

The Labor Code of Georgia prohibits discrimination in pre-contractual and labor relations and during the termination of labor agreements. Together with the list of spheres guaranteed by law which contains indications on "gender," the Labor Code also defines the essence of direct and indirect discrimination and exceptions. Declaring harassment as a form of discrimination is particularly important. However, we should consider articles with shortcomings and with neutral content which place women in a disadvantageous situation.

According to research conducted in 2014,[257] the Labor Code of Georgia does not regulate the content of job announcements on a pre-contractual level, which creates discriminatory results against women. According to the same research, the problem is that during the interview employer has unlimited rights to obtain information about a candidate. This is regulated by the first part of Article 5 of the Code. As the article does not define precisely what information can be considered as discriminatory, or what information a candidate can refuse to provide, we can again consider this article as providing unequal and discriminatory results against women. For example, in the context of Georgia, if the employer has information about the pregnancy of a woman, it often becomes a reason for refusing the job to her. The means of obtaining

257."Article 42 of the Constitution" (2014). 'Gender Discrimination in Labor Relations'.

information by employers is also not defined in the Labor Code of Georgia. This leaves important aspects of labor relations unregulated and increases the risk of interfering in employees' personal life.[258]

Non-unified legislation is yet another problem. More precisely, it refers to the interrelation of anti-discrimination norms of the Labor Code and anti-discrimination entries made according to the Law of Georgia on the Elimination of All Forms of Discrimination. Since in case of discrimination the Labor Code does not define legal consequences for the discriminator, as well as other topics connected to discrimination, the plaintiff has to rely on the provisions of the Law of Georgia on the Elimination of All Forms of Discrimination. However, this becomes complicated in limiting the governing sphere of the law defined in Article 3, where we read that: "The requirements laid down in this Law shall apply to the actions of public institutions, organisations, and to the actions of natural and legal persons in all spheres, only if the actions are not regulated by other legal acts." The situation is also complicated due to different time frames for litigation that are provided by these two documents. For the person in a labor lawsuit, this implicitly poses harder conditions (shorter time for litigation) than for the victims of discrimination in other spheres. The mentioned vagueness and the unification problem may have a negative impact on the execution of anti-discrimination legislation.

The Labor Code of Georgia does not have clear entries regarding equal pay for equal work.[259] It unifies this principle under the general prohibition of discrimination, which does not imply direct obligation of the employer to support equal payment. In Georgia, especially in the private sector, the topic of payment is often considered as discrediting the employer in relation with employees. Confidentiality of information regarding the payment is also problematic, since it is believed that official salary (except in the public sector) is the confidential information of a person; gathering evidence is complicated for the victim of discrimination, and requesting information from the court is only possible on the level of a lawsuit. Of course this does not create equal opportunities for forming a complaint and for adversarial disputes in the system of justice.

258. T. Kereselidze, (2014). The Analysis of the Labor Legislation of Georgia – Gender Discrimination in the Workplace and its Legal Outcomes. Georgian Young Lawyers' Association.

259.Ibid, p. 56.

The Labor Code entry about employing pregnant women is of particular interest. It develops a different approach from that of the Law on Gender Equality.

Article 4, part 5 of the Labor Code prohibits making a labor contract with a pregnant woman ifit implies fulfilling a job in hard, harmful or hazardous conditions. At the same time, Article 6, paragraph 4 of the Law on Gender Equality mentions that **convenient conditions must be ensured for pregnant women, so that their work in hard, harmful or hazardous conditions is excluded.** This entry is much more sensitive to the needs of women, as the prohibitive imperative norm of the Labor Code allows the employer to ask a question regarding pregnancy. At the same time, the Labor Code contains a blanket prohibition on making a contract from the beginning and does not oblige the employer to ensure convenient working conditions, as it is provided in the Law on Gender Equality.

It is noteworthy, that the Labor Code also contains the entry about **"genuine occupational requirements",** however, unlike the Law on Gender Equality, it uses the phrase "shall not be deemed discrimination" (instead of a word such as "permissible"). We believe that this is a better formulation, however, same problems concerning the definition of "work" and omitting "context" remain in the article; also those concerns about revising occupations every 8 years.

As for "maternity leave," in the legislation of Georgia we find two shortcomings: **"Compensation of maternity, child care, and newborn adoption leaves of absence"** provided in the Labor Code of Georgia opposes the decree #231/N as of 2006 of the Minister of Labor, Health, and Social Affairs of Georgia. Despite the fact that the entry in the Labor Code does not directly mention gender (therefore, the subjects of the provision are both employed women and men), according to paragraph 6 of Article 10in the Minister's decree, the leave and the respective compensation of maternity and child care **will not be provided** for the family members of a pregnant woman. Only if the mother passes away will the father or the guardian receive compensation. This entry excludes the concept of **"parental leave,"** which would have allowed both parents to take the leave. Therefore, it is not in accordance with the EU standard and in its essence is gender discriminatory, since excluding the father from childcare puts him in a disadvantageous situation and at the same time strengthens the subordinated and unequal situation

of women. The Labor Code also does not oblige employers to have a special supporting policy ensuring parental leave for men and women.

The Labor Code of Georgia does not have the concept of positive actions.[260] Accordingly, historical context of women's oppression and inequality are not acknowledged and considered in any sphere of employment.

The Labor Code of Georgia also does not consider a possibility of satisfying special needs connected to the reproductive functions of women or, in case of refusing it, deeming it to be the discrimination, as is established in the U.S. legislation and practice.

Due to changes to the Labor Code of Georgia in 2013, there is an entry about transferring the burden of proof of discrimination to the defendant. According to paragraph 3 of Article 40^2 ofof the Labor Code, if the plaintiff points out circumstances that create a supposition of discrimination, then the burden of proof is transferred to the employer. This change is important in relation to protecting employees' rights. However, it is problematic that this entry does not apply to pre-contractual relations, which is a significant shortcoming of the law.

The abovementioned points out that the Labor Code of Georgia is still unfair from a gender perspective and does not consider equal rights of women in the sphere of employment. In reality, it remains on an automatic equality level and depends on the paradigms that were rejected in the USA and the EU decades ago, implying that the mechanical integration of women in the labor market ensures equality. Similar to the formalist approach to the law of the realization of women's labor rights, this paradigm is outdated and useless.

3. The Law of Georgia on the Elimination of All Forms of Discrimination

The law adopted in May 2014 is an advance for the elimination of discrimination based on different aspects, including gender. However, its execution during the past two years revealedthe shortcomings of its general character, as well as the problems about ensuring gender equality.

260.T.Kereselidze, T. (2014). The Analysis of the Labor Legislation of Georgia – Gender Discrimination in the Workplace and its Legal Outcomes. Georgian Young Lawyers' Association.

The Public Defender of Georgia, who was given the function to eliminate discrimination according the law and monitor it, discussed the shortcomings of the law in his special report in 2015.[261] Based on this, in 2016 the Public Defender presented recommendations to the Parliament regarding legislative changes. We will discuss these shortcomings in the aspect of gender equality:

One of the procedural shortcomings is a short period of limitation (3 months) for the litigation of discrimination cases. Also, Article 9, paragraph 1 of the law suspends proceedings when the dispute is in the court (if the Equality Department of the Public Defender has already started to study the case). Those citizens who decide to litigate discrimination in relation to labor rights are limited to the one-month period provided in the Labor Code.[262] This limitation is of particular importance in relation with women, who are the victims of discrimination and for whom a limited timeframe should be considered a barrier to justice, given their gender role and occupation.

The Law of Georgia on the Elimination of All Forms of Discrimination does not allow the Public Defender to make a mandatory request of information from legal entities or persons of private law or from physical persons; this right only exists in relation to legal entities of public law. This hinders the Public Defender from receiving information without difficulties, which is necessary for ascertaining discrimination. If we look at the cases of gender discrimination in 2015 provided by the Public Defender, in most cases the defendant was a subject of private law (for example, JSC "Bank of Georgia," LTD "Jobs.ge", LTD "Credo"). Accordingly, the mentioned procedural shortcoming, which does not oblige defendants to provide information, has a particularly negative impact on establishing equality for women.

There is an important procedural violation in that, according to the entry, if the Public Defender confirms a fact of discrimination, subjects of private law and physical persons do not have the obligation to respond. As mentioned

261.Special report of the Public Defender of Georgia On Combating against Discrimination, Its Prevention and State of Equality. (2015). URL: http://ombudsman.ge/ge/reports/specialuri-angarishebi/qveyanashi-diskriminaciis-winaagmdeg-brdzolis-misi-tavidan-acilebisa-da-tanasworobis-mdgomareobis-shesaxeb.page

262. According to Article 38, paragraph 6 of the Labor Code of Georgia and Article 127, paragraph 1 of the Law of Georgiaon Public Service,an employee can appeal the order of the employer within a month.

in the special report of the Public Defender, he does not have any means to ensure executing recommendation and monitoring with the private sector. From the time of adopting the Law on the Elimination of All Forms of Discrimination until July 2016, every case of gender discrimination or unequal treatment against women was by private companies. Out of all those cases, only one private company considered the recommendation of the Public Defender and canceled the order containing discrimination, as well as provided indemnification. In all the other cases, the private sector showed indifference towards the recommendations of the Public Defender. This once again shows particularly damaging effect of the mentioned shortcoming on women.

During a court proceeding in lawsuits connected to discrimination, the Public Defender is able to present legal conclusions as an "amicus curiae." However, non-governmental organizations which are not parties in the lawsuit or do not have a status of a third party do not have such right[263]. The Public Defender believes that by changes in the Civil Procedure Code of Georgia, every individual who has a specific knowledge and competence regarding the topic should be allowed to use thisremedy. This aspect is particularly important for women's organizations, as their involvement in court proceedings could increase the sensitivity of justice towards women's rights and equality.

The most significant material shortcoming of the Law on the Elimination of All Forms of Discrimination is the fact that it does not define **"sexual harassment"** as a separate form of discrimination. Accordingly, the legal provision about sexual harassment not needing a comparator and reasonable justification, present in the law of the USA and the EU, is not normatively supported here. In addition, with sexual harassment the burden of proof is not transferred to the defendant (as it is in other lawsuits concerning discrimination), but is equally distributed to both sides.

The analysis of the law shows that its material and procedural shortcoming have a particularly hard impact on women's accessibility to justice. Weak executing, sanctioning and compensating mechanisms, also the barriers to using the means of procedure, makes women's trust in the justice system even weaker. All of the above requires urgent material and procedural changes to the anti-discrimination law, as well as increasing their accessibility from the gender perspective.

263. This statement relates to the Civil Law Cases.

E. Cases of gender discrimination discussed by the Public Defender

Based on the special report of the Public Defender of Georgia in 2015[264] and the information provided on their web page, during 2014-2016 (based on the information as of June 2016) the big majority of the cases of gender equality relate to discriminative practice against women by the private sector. Accordingly, in each case the shortcomings of legislation were manifested from the side of the private sector. More precisely, in most cases, during the investigation process organizations did not provide proper evidence to the Public Defender; after the investigation, except for one organization, none executed the recommendations of the Public Defender regarding the suspension of discrimination and the elimination of outcomes (you can find the cases of gender discrimination discussed by the Public Defender in the Attachment #1). This once again shows that the changes to the legislation are urgently needed.

F. National court decisions regarding gender discrimination

Georgia's court practice has been analyzed within the research. The decisions of three instances were collected through the electronic system; also, decisions were requested from court and non-governmental organizations.

As of when the research wasconducted (July 2016) there was no court decision regarding the identification of gender discrimination based on the Law on the Elimination of All Forms of Discrimination, so the group of researchers created an alternative strategy of obtaining decisions about discrimination. More precisely, 593 court decisions (made by all three instances of the court) concerning labor lawsuits were studied, wherein the plaintiff was arguing that their labor right was violated due to discrimination. It included decisions that were about labor lawsuits, rehiring and remuneration for idle time through the fault of an employer. As in the majority of cases there was no request for identifying discrimination, in order to find discussions about discriminatory facts the researchers analyzed full texts of the decisions. In the

264. Special report of the Public Defender of Georgia on Combating against Discrimination, Its Prevention and State of Equality (2015). URL: http://ombudsman.ge/ge/reports/specialuri-angarishebi/qveyanashi-diskriminaciis-winaagmdeg-brdzolis-misi-tavidan-acilebisa-da-tanasworobis-mdgomareobis-shesaxeb.page

end, 20 decisions were selected, which presented the topic of discrimination or gender stereotypes relatively broadly. The following shortcomings were identified in the decisions:

1. Identifying discriminatory treatment

The analysis of court decisions showed that often plaintiff women (and probably their lawyers) cannot interpret discrimination and are not able to have a discussion around it. This is the case even when there are evident signs of gender discrimination. Plaintiff women often mention discriminatory facts while collecting and presenting evidence, however they find it hard to adequately integrate this new legal term in their request. Accordingly, while discussing these cases the court ignores possible discriminatory actions of defendants and does not consider it.

In a case discussed by Batumi City Court,[265] which was about dismissing a pregnant employee, the plaintiff's claim substantiation says:

"On May 1, 2013, the plaintiff started contract-based work at LTD "L.K.R" as an office manager. The contract was made for 12 months. The salary was 1000 GEL. From August 8, 2013, she registered as pregnant at Batumi Maternity House. ... [managers] **explained to her that they did not want pregnant people and those with children at work.** Based on this, they were looking for groundless reasons for dismissing her."

The problematic character of the above is the failure to check information-about discriminatory attitudes is proven by a decision made in 2014 by the Chamber of Civil Cases of Tbilisi Court of Appeals. The Supreme Court shared the position of the Chamber by agreeing to its decision.[266]Specifically, in labor lawsuits the court must first check for the existence of discriminatory treatment, as its primary aim is to ensure lawful execution of civil rights. The non-existence of discrimination is a mandatory condition for this: **"... while exercising the rights given to the employer by the Labor Code, it should be excluded to violate constitutional principles, such as any type of prohibition of discrimination in labor relations based on race, skin color, language, ethnic and social belonging, nationality, origin, property and rank status, place of residence, age, gender, sexual orientation, disability, belonging to religious or any other union, family status, political or other views. Accordingly, when dismissing the employee, it is mandatory to check, if the reason for this was not any of the [factors] deemed to be discriminatory under Article 2 of the Labor Code."**

In the case discussed here, where the plaintiff was evidentially pointing out discriminatory treatment, it is important that national courts spread the standard supported by the Court of Appeals and the Supreme Court of Georgia and check the lawful execution of the right by means of excluding discrimination. A similar approach is mandatory in the initial stage of executing the anti-discrimination law for ensuring its effective execution.

2. Discrimination without legal grounds and comparators

In the vast majority of the labor lawsuits with discussions about discrimination, protected ground is not specified, there is no discussion about comparator; the judge does not evaluate direct or indirect discrimination (does not use the rational and strict assessment tests of discrimination). The term "discrimination" is often used synonymously to "illegal conduct," which belittles the idea of the mechanism of equality.

In this regard, the Kutaisi City Court's decision is seen positively, as it identified direct discrimination based on sexual orientation.[267] In this decision the court discusses the basis (referring to European Court of Human Rights cases for argumentation),[268] as well as the selected comparator for evaluating different treatment (relying on the practice of the Constitutional Court of Georgia).[269] The court also discusses transferring the burden of proof to the defendant, also the mandatory conditions of satisfying supposition standardsby the plaintiff, identifying discrimination,etc. It should be mentioned that this decision is the best example of the standard of identifying discrimination, execution of which is preferable in other courts.

265.Batumi City Court, case #1749/13, December 11, 2013.

266. Tbilisi Court of Appeals, case #AS-792-757-2014, October 6, 2014

267. Kutaisi City Court, case #2/1242-16, June 29, 2016.

268. ECHR, S.L. v. Austria, 2003.

269. The Constituional Court of Georgia, case #1/1/493, December 27, 2010. "Citizen's political unions "New Rights Party" and "the Conservative Party of Georgia" against the Parliament of Georgia."

3. The burden of proof of discrimination

Although the June 2013 amendment to the Labor Code provides that in cases involving the dismissal of an employee on the basis of discrimination the burden of proof is transferred to the defendant, in discussed lawsuits we still see the opposite approach being taken by the courts. In caseswhere discrimination is alleged, the burden of proof is the plaintiff's obligation:

Excerpt from the decision of Zestaponi District Court in 2014:[270]

"According to Article 102, part 1 of the Civil Procedure Code of Georgia, each party should prove circumstances on which they base their request and counterclaim. **As the burden of proof was imposed on the party pointing out the fact of discrimination, parties had to prove it plausibly. However, they were not able to provide the realization of the burden of proof concerning the unlawful actions of the employer and accordingly, the fact of discrimination against them."**

We see similar discussion regarding the burden of proof in another decision of Zestaponi District Court.[271]

Such an approach makes it impossible for the plaintiff to prove possible facts of discrimination, as they have limited access to the evidence that could prove the fact of discrimination. This is why it is necessary to enforce the legal provision about reversing the burden of proof and to provide guidelines for judges.

4. Gender stereotypes

From the decisions studied, there were no casesin which the court discussed gender stereotypes and their role supporting discrimination. Instead, in some cases court decisions reinforce gender stereotypes. This strengthens inequality. While the Federal Court and the courts of different states of the U.S. pay special attention to gender stereotypes, totally ignoring the phenomenon of gender stereotypes in the courts of Georgia speaks of the need for gaining more knowledge in this direction.

270. Zestaponi District Court, case#2/283, Janury 06, 2014.

271. Zestaponi District Court, case#2/285, December 26, 2013.

In its 2013 decision[272] concerning rehiring the plaintiff woman and reimbursement of non-attendance, Batumi City Court noted:

"The court does not question that the plaintiff is a good housewife, however, this does not mean that she would have performed well at her job."

In this case the plaintiff appealed the order of dismissal. The respondent referred to the plaintiff's improper work in the position of a cook. It implied not meeting hygiene and not keeping the kitchen in order. Despite the fact that plaintiff had witnesses to prove that she was a "good housewife," who said that generally she "is a good housewife and follows hygiene," the court did not distinguish plaintiff's practical and professional skills and referred to the gender role. The female gender role - "a good housewife" - does not connect with fulfilling professional duties by a woman, and referring to it may devalue a woman's abilities. In this case, it is important that the court differentiates between a gender role and stereotypes connected to it, even in those cases where the plaintiff is referring to these stereotypes.

Another example of being influenced by gender stereotypes is an unequal mention that we found in the 2014 decision of Tbilisi City Court.[273] The polite form "Mister" is only used in relation with a man, while no other person is referred with the polite form in this case. In particular, the court decision states: "the Court should assess the legality of deregistration of Mister S.S." As the lawsuit concerned the action against the official (S.S.), the court discusses the action as follows:

"In this case the person in a public position was a subject of being removed from the register. According to the evidence, he was an official – the Minister; respective colleagues of S.S. were informed to proceed with the removal from the register. Also, it is indisputable that the law does not consider any difference regarding the procedures of removing officials from the register." Despite this, the court itself shows a different approach and uses the form "Mister" in relation to the official, while this form is not used in relation with other people involved in the case, including women (Ms.).

In the researchers' opinion, discovering gender stereotypes and evaluating them by the court has decisive importance in cases involving gender dis-

272. Batumi City Court, case #2-1465, December 20, 2013.

273. Tbilisi City Court, case #2/14279-14, December 10, 2014.

crimination. As the abovementioned U.S. case law mentions, in most cases exactly gender stereotypes became the proof of women's unequal conditions and it helped the U.S. courts to make gender-sensitive decisions. It is important that the national courts share this practice.

5. Gender biased evaluation criteria

The court decisions in labor lawsuits do not pay much attention to the so-called neutral evaluation criteria, which usually are not perceived and used as neutral due to the public stereotypes and the context. A 2015 decision[274] of Tbilisi City Court is of particular interest in this regard. There was no discussion about gender discrimination in this case, however, the respondent claimed that one of the reasons for dismissing the plaintiff was "the lack of self-confidence and unceremoniousness;" More precisely, the court decision says:

"The plaintiff A.M. worked in a position of an advisor of physical persons for 10 months (from July 26, 2013 until the end of April, 2014) and did not fulfill the job well. This was based on the fact that as soon the plaintiff faced new challenges, due to her skills and qualification she could not fulfill new tasks respective of increased requirements: the analysis of A.M.'s work on the last position showed that the results were not satisfactory in relation with credits, as well as with bringing in new clientele, deposits or making the quarterly presentation. The plaintiff was not able to fulfill the working plan established by the respondent B. … she lacked self-confidence and competence while communicating with clients; at the same time, she was overly unceremonious in relation with them."

It is worth mentioning that the terms "self-confidence" and "unceremonious," as well as the means of their evaluation and gender aspect are not examined in the decision of the City Court. Also, nothing is said about "tokenism" – what was the gender balance among people making the decision and what influence did it have on evaluating female employee.

Later, the Court of Appeals reversed the decision[275] and mentioned in its decision that incompetence and non-fulfillment of the job by the plaintiff was not proven by the respondent; at the same time, the court discussed the precise case of "unceremoniousness" and mentioned that **based on the standards and forms of relation in Georgian society, the saying "God bless you" cannot be evaluated as an unceremonious approach."** However, they did not use the analogous standard for discussing established standards of "self-confidence" in the context of Georgia and the possibility of the gender-biased use of this criterion.

It is particularly important to analyze gender-neutral evaluations of the court, since often they become the basis of decisions concerning women. But for revealing gender unbiased decisions, it is important to see the equality of arguments that they were based on. For evaluating the gender-neutral level of some terms, the court must discuss not only their current use and connotation, but also their historical meaning, which becomes established as stereotypes.

6. Concealing discrimination

There was an important case concerning concealing discrimination based on the motive of the reorganization of an enterprise. Tbilisi Court of Appeals[276] discussed this case as follows:

"In this case, there is no evidence of the fact concerning the reduction of staff or the lack of plaintiffs' competence; additionally, the Chamber defines that only the reorganization should not be a reason of dismissing an employee, since in this case during the so-called "reorganization" discriminatory motives of dismissal may be concealed… The Chamber would like to specifically mention that reorganization is an internal change of an enterprise/institution/organization, which can become the reason of dismissing an employee only in the case when the dismissal was due to the results of the reorganization and not of the process itself."

While discussing one of the decisions of the court of first instance, Tbilisi Court of Appeals mentions that:[277]

"In its decision the court mentions that there was no discrimination against the plaintiff. However, the plaintiff's dismissal was exactly due to the dis-

274.Tbilisi City Court, July 26, 2015.

275. Tbilisi Court of Appeals, case #330210014496446. #2B/3878-15, December, 2015.

276.Tbilisi Court of Appeals, case#330210014527929, #2B/3712-15, January 1, 2016.

277.Tbilisi Court of Appeals, #№2B/4238-13, July 21, 2013.

criminatory act based on the "reorganization." The plaintiff was scrupulously fulfilling the job."

In the case concerning the dismissal of a kindergarten manager L.K., Tbilisi Court of Appeals[278] mentioned that there was a possibility of concealing discrimination by changing the form of the labor contract.

"The Chamber explains that in the context of lawfully exercising the right, it is impermissible to change a permanent employment to a temporary contract only for creating a lawful basis for employee's dismissal; especially in the case when such change is against the law from the beginning, as making contracts for less than a year is only permissible in cases prescribed by law, which is not present here.Additionally, the Chamber mentions that changing a permanent employment to a temporary contract for dismissing the employee after the terms end is against the law, as well as is dangerous based on the motives of employee's equal treatment. In such cases the discriminatory motives behind dismissing due to the so-called "end of terms" may be concealed."

It is noteworthy, that using the facts of reorganization in order to conceal discrimination appears very often in decisions involving enterprises and organizations with a majority of women employees, such as schools, medical establishments, etc. One of the negative effects of women's gender segregation in the labor market is the action of indirectly discriminating against women in the name of reorganization. It is important that judges evaluate the wider social meaning of this act and that defenders of women's rights show the statistics of its gender tendency.

7. Considering the responsibility of care

The responsibility of care for underage and other family members is a gender important aspect. It often becomes an underestimated burden and is not considered while analyzing woman's labor. It is noteworthy that in the court's decisions we still do not see the discussion about this factor as a gender specific burden on women. However, there is also a positive practice in this regard, which should be supported and encouraged by court decisions. An example of such practice is the decisions[279] of Tbilisi City Court, which

278. Tbilisi Court of Appeals, case #2B/1100-15, July 16, 2015.

279.Tbilisi City Court, case #2/17644-14, December 12, 2014.

mentions that when canceling labor relation with the employee, the following circumstances should be considered:

"The case materials prove that the underage child of Z. (the plaintiff), whose legal representative is the parent, was in LTD Tbilisi's Children Infectious Clinical Hospital during August 7-8, 2014. It is also proven that on August 8, 2014 Z. was working on duty for 24 hours. The employee's work is hard – besides the physical load, which implies providing service for 24 hours, the psychological load should also be considered. In such circumstances, it is not fair to establish strict rules for her on the shift following 24 hours of work, given that the plaintiff's work was registered at 9:12 of the previous day. It should also be considered that the employee's underage child was ill and she had the responsibility of care."

The evaluation and consideration of the responsibility of care is an important instrument to overcome historically established discrimination against women. National courts should pay special attention to this aspect, as it highlights historically determined inequality against women and represents a step towards its neutralization. The next step will involve the equal distribution of the responsibility of care on both genders, which should follow the abovementioned discussion with an evident indication of the gender aspect.

G. Conclusion and recommendations

The above discussion shows that the legislation of Georgia still contains the writs that interrupt gender equality, which require harmonization with EU law and the integration of feminist approaches. To fully protect women from discrimination, it is needed to execute following actions:

Recommendations:

- The Law of Georgia on the Elimination of All Forms of Discrimination should make changes concerning the specification of the forms of discrimination, the integration of the "sexual harassment" concept, prolonging litigation dates and the period of limitation. Also, the Public Defender's involvement in cases concerning the subjects of private law and physical persons should be de-

fined as a mandatory requirement;

- The concepts of "gender equality" and "sexual harassment" should be revisited in the Law of Georgia on Gender Equality; also, the essence of intersectional discrimination and its elimination, as well as the mechanisms of opposing established gender stereotypes, should be determined. The norms of executing equality mechanisms provided in this law should be included in this and other acts;
- Parental leave, equal pay for equal work and mandatory requirements of job should be defined in the Labor Code of Georgia, and effective mechanisms of its execution should be established. Based on this law, employers must be obliged to elaborate the policy and guidelines ensuring gender equality;
- National courts must create a document of uniform practice on the topic of gender discrimination, which will consider naming discrimination, transferring the burden of proof, using the test of discrimination and other relevant topics. Also, special recommendations concerning the specifics of gender discrimination should be elaborated for the judges;
- Special trainings on gender discrimination, referring to the practices of the USA and the EU, should be conducted for the judges and the lawyers.

VIII. SEXUAL HARASSMENT

A. Introduction

This chapter discusses the phenomenon of sexual harassment, feminist lawyers' considerations of the topic, and the mechanisms of protection from sexual harassment in the framework of the USA and the EU law. The decisions of national courts concerning sexual harassment are also analyzed here.

B. Feminist approaches to sexual harassment

The feminist theory concerning sexual harassment is mostly based on the ideas of radical feminists, who believe that harassment is a specific manifestation of violence against women and patriarchal control.[280] Feminists also shared the idea of leftists concerning capitalism's exploitation of labor relations, which harms employed women. The analysis of sexual harassment as a social phenomenon seems to be influenced by feminist theories about rape, which claim that the main motivation during rape is to gain and preserve power, and not sexual impulse. As Mary Bularzik mentions, sexual harassment is men's "license" to control women. They think that women at work have abandoned their "natural position" and, accordingly, lost "decency." This circumstance gives men the authority to control women.[281]

The first group of feminists believed that those men who committed rape, sexual harassment or domestic violence do not have psychological problems at all. They were logically responding to cultural traditions, which pushed them into violence. In the process of socialization, men were taught to dominate women by the use of force and threat.[282]

280. Baker, C.N. (2008). The women's movement against sexual harassment, Cambridge University Press.

281. Bularzik, M., (1978), Sexual Harassment at theWorkplace, Radical America. July-August.

282.Alliance against Sexual Harassment (AASH), (1981). Sexual Harassment a form of violence against women. FAAR and NCN Newsletter, July/August 28-29.

The second group of feminist theorists discussed sexual harassment in the intersectional framework of discrimination, and mentioned that it is also connected to the class factor. According to them, the difficult conditions for employed women under capitalism make them vulnerable to gender-based violence. In accordance with the intersectional theory of discrimination, Freada Klein believed that racism is also connected to sexual harassment; hence, black women in hard working conditions experience this type of harassment very often. According to Klein, patriarchy and capitalism strengthen each other under such conditions and racism is one of the leading factors.[283]

C. Sexual harassment law in the USA and the EU

1. Sexual harassment in the U.S. legislation and case caw

a) Sexual harassment as a form of discrimination

According to Title VII of the U.S. Civil Rights Act,[284] discrimination based on race, skin color, religion, sex and national origin during employment, dismissal, compensation and determination of working conditions is prohibited. Sexual harassment, as the form of oppression based on sex, implies following forms of discrimination: "quid pro quo" and "creating a hostile work environment." Based on the most recent decision of the U.S. Supreme Court on the topic,[285] sexual harassment can also take place when the oppressor and the oppressed are of the same sex (*Oncale v. Sundowner Offshore Services, Inc.*). The Civil Rights Act protects a person from discrimination by co-workers, supervisors and even by users.[286]

"Quid pro quo" – this form of discrimination may appear when employment decisions about the employee are made according to the extent he/she agrees to/receives unwanted sexual conduct from the oppressor. To qualify this action as sexual harassment, a possible victim needs to prove two circumstances: (1) the possible oppressor must be acting in a way that is considered sexual harassment; (2) the possible oppressor must have an authority to make a decision that can have a real influence on possible victim's condition in the workplace.

"Creating a hostile work environment,"like sexual harassment, can be expressed in the cumulative existence of following conditions: (1) unwanted action/harassment is made against the person; (2) the basis of the action is the person's sex; (3) the action of the oppressor is so evident and severe that it causes a change of working conditions/environment and creates a violent atmosphere (defined by both subjective and objective evaluation standards); (4) the employer is aware of, or should be aware of, the fact of harassment. According to this definition, isolated or one-time cases will not be considered harassment. To ascertain the fact of "creating a hostile work environment,"courts use the criteria established by the U.S. Equal Employment Opportunity Commission: the action expressing sexual harassment must be acute or pervasive, and due to this the environment must be perceived "objectively and subjectively" as violent or hostile. In the*Harris v. Forklift Systems, Inc.* case,[287] the U.S. Supreme Court stated that the employer's conduct must be evaluated by **"the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating...and whether it unreasonably interferes with an employee's work performance."** According to these criteria, insulting touch, vulgar remarks and humiliating talk about women, as well as the employer playing a song with humiliating content were defined as sexual harassment; it also included supervisors ignoring the victim of sexual harassment whenshe informed them about the fact that one of the employees was physically harassing her.

To avoid supervisor's liability (when they are not committing the harassment themselves), it is necessary that: (1) the organization has a policy of prohibiting sexual harassment; (2) the policy must be noticeable/accessible for employees; (3) employees must have a possibility to appeal and there should be a body discussing it; (4) the appeal person must be able to remain anonymous; (5) the supervisor must take actions to eliminate the harassment.

283. Freada Klein (1978) Book Review of Sexual Shakedown: the sexual harassment of women on the job by Lin Farley. Aegis, November/December. 34.

284. U.S. Equality Employment Opportunity Commission: Title VII of the Civil Rights Act in 1964. URL: https://www.eeoc.gov/laws/statutes/titlevii.cfm

285. U.S. Supreme Court. 3/4/98.

286.Slauter, J.M., (2000) legal analysis: Sexual Harassment in the Workplace: Examining Title VII and the Elliott-Larsen Civil Rights Act. URL: https://msu.edu/~wlfgr/slaughter_j.pdf.

287. U.S. Supreme Court. N510 U.S. 17, 23 (1993).

b) The influence of women's narratives on court decisions

The law on sexual harassment has been created by judges (judicial law). Since women started to tell their stories about sexual harassment in the workplace, judges tried to adjust existing laws to this newly discovered phenomenon. Initially, the judges of Washington, D.C. defined sexual harassment as a form of sexual discrimination. If committed, the employer may face civil liability.

Based on women's stories of sexual harassment, the District of Columbia judges established a prohibition of sexual harassment. These judges became supporters of the movement for liberating women from oppression. After a careful analysis and hearing of victim women's testimonies, they created the doctrine of gender equality. By this they replaced the interest of the dominant side with the victim's interest.

Diana Williams (*Williams v. Bell*),[288] employed at the U.S. Department of Justice, claimed that she was experiencing sexual harassment and humiliation from her supervisor, and in the end she was dismissed due to "bad fulfillment" of her job because she refused his sexual offer. According to the 1976 decision, Judge Charles Richey established that this practice was conditioned by the victim's gender and the supervisor's conduct was within the legal grounds provided in Title VII of the Civil Rights Act. According to the decision of the judge: **"This practice is an artificial barrier to employment … which is faced by one gender and not the other, despite the fact that both genders were similarly situated."** Both of them have sexuality and a job. However, in this situation the hampering factor of employment was the sexuality of only the representatives of one sex, Williams and her female colleagues.

A second important case of sexual harassment was the 1977 case of *Barnes v. Costle*,[289] which was appealed to the court of appeals. This case is special, as at that time the decisions of other district courts did not consider sexual harassment according to violation gender equality. In those other decisions, the judges said that sexuality did not represent a sign of gender, as according to them both sexes could equally have been the victims of sexual harassment. These decisions did not include discussions concerning the fact that sexuality is a socially constructed term and the demand of unwanted sex usually appears towards employed women; the employer, who makes this demand, is mostly a man. In such circumstances, the discussion by Judge Robinson was especially important: **"Barnes' supervisor terminated her job because she had refused sexual advances, not because she was a woman. We rejected those arguments as disingenuous in the extreme. The supervisor in that case made demands of Barnes that he would not have made of male employees."**The U. S. Supreme Court's later decision in *Harris v. Forklift Systems*[290]expressed a similar point, stating that in cases concerning sexual harassment it is of decisive importance to acknowledge that people of one sex (women) are more subjected to sexual harassment than people of another sex (men).

The cases of *Barnes* and *Williams*were both examples of "quid pro quo" type of sexual harassment (sexual relations in exchange of economic benefit and keeping the job). There were different facts in the case of *Bundy v. Jackson* (1981)[291], where the "quid pro quo" nature of the request for sexual intercourse from the supervisor was not explicitly expressed and the court had to discuss to what extent the actions reached the level of sexual harassment. In such a situation, which is considered the creation of the hostile work environment, damage is made not to the job and to keeping it, but to the victim herself/himself, to her/his other rights and equality. In the *Bundy*case, the judges stated that creating a hostile work environment that is accompanied by the request for sexual intercourse and the atmosphere of extortion is sufficient to include this violation in the sphere of protection from discrimination under the Civil Rights Act. **"The sexually stereotyped insults and demeaning propositions … illegally poisoned that environment."**By this decision, the D.C. Court of Appeals defined for the first time that woman's sexual objectification itself contains damage and is discrimination based on gender. After these decisions, when the case of sexual harassment (*Meritor Savings Bank v. Vinson*) reached the Supreme Court,[292] Justice Rehnquist wrote in the decision that: "**when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex."**Accordingly, women won the battle and this decision became a precedent.

288.Court of Appeal, Washington dc. 587 F2d 1240 (D.C. Cir. 1978).

289.Court of Appeal, Washington dc.561 F.2d 983 (D.C. Cir 1977).

290.US Supreme Court.510 U.S. 17, 23 (1993).

291.US Court of Appeal. 7-th dc. 641 F.2d 934, (D.C. Cir. 1981).

292. US Supreme Court.477 U.S.57 (1986).

c) Cancelation of requesting comparator, intention and motive

The following development of the law on sexual harassment is connected to discussing intention and motive in this context; more precisely, discussions concerning sexual harassment showed the necessity that the intention of harassment should not be discussed when considering this form of discrimination. Despite the oppressor's lack of intent to discriminate against a woman, or to have a sexual intercourse with her in the workplace, the damage experienced by a woman due to violating equality may still be evidentially manifest.

Nadine Taub criticized the existing concept of discrimination and analyzed the practical difficulty due to which courts often do not consider sexual discrimination as a form of discrimination based on gender.[293] According to Taub, despite the fact that sexual harassment is a form of gender discrimination, it is important to revise how the concept of "discrimination" and the criteria of its establishment are adjusted to the context of sexual harassment: initially, when discussing the cases of discrimination, courts looked for a discriminatory motive, which required plaintiff to show that the defendant had a negative attitude and aversion to a specific group. Accordingly, during the evaluation of a fact of discrimination, there was a necessity to find a "comparator" for ascertaining unequal treatment of a representative of particular group. As Nadine Taub considered, this was a wrong approach, as those people who committed sexual harassment usually expressedthe established stereotypes and performed the gender roles given to them by society. Often they may not even be aware of the regrettable results of their conduct. Since sexual harassment is a form of discrimination mostly against women, we cannot refer to male comparators. It is also impossible to compare two women's subjective evaluations of sexual harassment, as they may be absolutely different due to their different level of awareness and personal experience.

In 1971, the U.S. Supreme Court discussed the above mentioned in the case *Griggs v. Duke Power*.[294] It defined that using motive and a comparator is not needed when evaluating sexual harassment; it is enough that the plaintiff establishes a claim that the action non-proportionally affects the group to which they belong.

d) Sexual harassment without sexual content

In the next level of development, the doctrine of sexual harassment also defined that despite thelack of sexual content of sexual harassment, it could still be considered sexual harassment. For example, sexist remarks are a form of sexual harassment. It is quite difficult to evaluate if a sexual remark contains sexual nuances. Fortunately, after the decision of the Washington, D.C court in *McKinney v. Dole*, there is no need for such evaluation[295] - **according to the court's decision, harassment based on gender was defined as a form of gender discrimination, regardless of the extent to which it contains evident sexual content.** The decision of the U.S. Supreme Court in *Harris v. Forklift Systems* strengthened this approach.[296] According to it, comments such as: **"you're a woman, what do you know," "we need a man as the rental manager" and the evaluation "a dumb ass woman"** belong to the sphere of sexual harassment. By this, the court established that the desire of sexual content is not a necessary component of sexual harassment. **"To establish discrimination based on gender, it is not necessary that harassment is motivated by a sexual desire."**

The abovementioned discussion and decisions reveal that the concept of sexual harassment made the general paradigm of equality broader. If earlier cases of sexual harassment depended on formal equality, similarities between a man and a woman and the argument concerning biological sex, the decision of the judge in *McKinney* regarding sexual harassment concerned sex as a social construct and acknowledged status hierarchy as the basis of sexual discrimination.

Despite the fact that the Civil Rights Act does not contain a full list of sexual harassment conduct, the examples of such actions are seen in different court decisions. Sexual harassment includes: vulgar remarks (*Henson v.*

293.Keeping women in their place: stereotyping per se as a form of employment discrimination, 21 B.C.L. Rev. 345.

294. US Supreme Court, 401 U.S. 424 (1971).

295. US Court of Appeal,McKinney v. Dole, 765 F 2d 1129 (D.C. Cir. 1985).

296. US Supreme Court, Harris v. Forklift Systems, 510 U.S. 17 (1993).

City of Dundee),[297] sexual aggression (*Faragher v. City of Boca Raton*),[298]and discriminatory conversation about a person's gender/sex.[299]

e) Employer as a liable person for sexual harassment

Two decisions of the U.S. Supreme Court[300] specify the mechanisms of protecting the employer from liability when they are not committing sexual harassment themselves: (1) if the employer had a reasonable and introduced sexual harassment prevention mechanism/policy; (2) if the victim of sexual harassment did not utilize the mechanism of preventing sexual harassment (*Burlington Industries, Inc v. Ellerth*).[301]

2. Regulating sexual harassment in the EU Countries

a) Treatment violating the dignity or the form of discrimination

The prohibition of harassment is a relatively new concept in the EU law on the prohibition of discrimination. According to the EU directives on the prohibition of discrimination, harassment is a specific type of discrimination. Before it was seen as a form of direct discrimination. However, later it was singled out as a separate form in the directives, as to independently discuss it as a particularly damaging form of discrimination.[302] According to the directives on prohibiting discrimination, harassment is a discrimination when:

- Unwanted conduct is seen in relation to the protected group;
- It is made with the purpose of humiliation;

297.US Court of Appeal (11thdc). 682 F. 2d 897 (1982).

298. US Supreme Court. 524 U.S. 775 (1998).

299.Ibid.

300. Slauter, J.M., (2000) legal analysis: Sexual Harassment in the Workplace: Examining Title VII and the Elliott-Larsen Civil Rights Act. Available at (20.06.2016): https://msu.edu/~wlfgr/slaughter_j.pdf.

301.US Supreme Court.524 U.S. 742 (1998).

302. EU Agency for Fundamental Rights, Council of Europe (2010).Handbook on European Non-discrimination Law. URL: http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf.

- It is made to create a derogatory, hostile, degrading, humiliating or offensive environment.[303]

According to this definition, it is not necessary to find a comparator in order to prove harassment.[304]

In the EU countries, the basis of the legislation prohibiting harassment is EU Directive 2002/73/EC, to which changes were made in 2002. The EU countries were asked to make changes respective of the directive to national legislations by October 2005. Later, like the previous one, the new Directive 2006/54/EC defined two concepts – harassment and sexual harassment.

- Harassment– means unwanted conduct related to the sex of a person, with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile and offensive environment (Article 2(1) c).
- Sexual harassment – means any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (Article 2 (1) d).

The Directive additionally statesthat "harassment and sexual harassment, as well as any less favorable treatment based on a person's rejection of or submission to such conduct," also represents gender-based discrimination and is prohibited by the law."[305] The Directive of 2006 broadens the notions of gender-based harassment and sexual harassment, and states:**"Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational**

303.Directive on Racial Equality, Article 2 (3);Directive on Equal Treatment in Employment, Article 2 (3); Directive on Goods and Services, Article 2 (c); Directive on Gender Equality (updated), Article (10 (c)).

304.Ibid.

305.EU (2012). Harassment related to sex and sexual harassment law in 33 Europan countries, Discrimination versus Dignity. URL:http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement_en.pdf.

training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties."

Similar prohibitions are also considered in other Directives, which secure the access to and supply of goods and services. Directive 2004/113/EC provides:**"Discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life."**

Unlike the American approach, which in relation with sexual harassment depends on the philosophy of "discriminatory approach," EU law often discusses sexual harassment in the context of the philosophical approach of "the treatment violating the dignity of a person". However, based on the tendency developed in recent years, nowadays the EU countries often share the "binomial approach." When discussing sexual harassment and harassment based on sex, it includes a discussion about violating the dignity as well as about discrimination. However, it is worth mentioning that various EU countries prefer different paradigms (of discrimination or of violating the dignity) and, accordingly, consider the norms prohibiting sexual harassment either in the Labor Code, or in legislation prohibiting discrimination.

Some experts discuss the advantage of discussing sexual harassment in the context of "anti-discrimination" law. They think that it is much harder to prove employer's general obligations of creating labor conditions than to ascertain discrimination from their side.

As of 2012, the majority of the countries share the formulation of the Directive and in the definition of sexual harassment they have **"with the purpose or effect of"** (Belgium, Croatia, Cyprus, Greece, Malta, UK). However, some countries make a different definition and do not use the phrase **"with the purpose of"** as experts in these countries think that to prohibit this conduct, even when there is no evident purpose of sexual harassment, is important. The notion of "unwanted" is yet another important aspect in the legislation. It is not considered in the definitions of national legislations of some countries (France, Hungary, Luxembourg, the Netherlands, Slovakia, Spain and Sweden). As the authors of the reports of Spain and the Netherlands mention, "it is not necessary to ascertain that it was unwanted for the victim."

However, it should be mentioned that according to the legislations of these countries, "the creation of humiliating and violent environment" includes that the conduct be unwanted to some extent.

b) Response and liability for sexual harassment

In the majority of European countries there are three main ways to respond to sexu9t standards of responding to the appeals against sexual harassment and of protecting women's rights (see Appendix #2 – *Cudak v. Lithuania*).

D. Legislation in Georgia for the regulation of sexual harassment

The research[306] conducted in 2015 by a non-governmental organization showed significant shortcomings of Georgia's national legislation with regard to the regulation of sexual harassment. More specifically, in the opinion of the researchers, the shortcomings of paramount importance are in Part 4 of Article 2 of the Labor Code, which regulates harassment in general and does not make a specific reference to the concept of "sexual harassment." The mentioned Article also requires a compulsory "comparator," which, as it was mentioned earlier, does not comply with the international standard of the definition of sexual harassment.

The researchers also discussed the Law of Georgia on Gender Equality, subparagraphs a) and b) of paragraph 1 of Article 6, which prohibit sexual harassment in a declared manner. However, as the report points out, the term "sexual harassment" is not used by the Law and the mentioned Law does not have a real mechanism of enforcement.

Articles of the Criminal Code proclaim as a crime the following actions relat-

306.L. Jalaghania, T. Nadareishvili (2014). Gender discrimination in work environment. Please see the link:http://article42.ge/wp-content/uploads/2016/03/%E1%83%A1%E1%83%90%E1%83%9B%E1%83%90%E1%83%A0%E1%83%97%E1%83%9A%E1%83%94%E1%83%91%E1%83%A0%E1%83%98%E1%83%95%E1%83%98_%E1%83%90%E1%83%9C%E1%83%90%E1%83%9A%E1%83%98%E1%83%96%E1%83%98_-_%E1%83%99%E1%83%9D%E1%83%9C%E1%83%A1%E1%83%A2%E1%83%98%E1%83%A2%E1%83%A3%E1%83%AA%E1%83%98%E1%83%98%E1%83%A1_42-%E1%83%94_%E1%83%9B%E1%83%A3%E1%83%AE%E1%83%9A%E1%83%9820141215-30646-1d2u1ft.pdf

ed to the sexual harassment: rape committed using a work status[307], forceful action of sexual type[308] , forceful actions to have a sexual act or another action of sexual type using work conditions,but these are considered to be ineffective.[309] According to the researchers, the mentioned actions rather belong to the expertise of the norms regulating criminal offence, whereas because many acts of sexual harassment do not reach the level of criminal offence, they in fact remain unpunished.

With regard to the administrative mechanism for the elimination of sexual harassment, the amount of sanctions for the officials of a company, institution or organization (despite its ownership and organizational and legal form) in the case of violating the labor legislation and labor regulations is stipulated by Article 42 of the Administrative Offences Code. In accordance with Article 215 of the same Code, labor state inspectors will review the cases on administrative offence as provided for by Article 42 of the Code and will impose appropriate sanctions on them.The concept of sexual harassment is not considered in the 2015 Ordinance of the Minister of Health, Labor and Social Affairs, on the basis of which the Statute of the Department of Inspection of Work Conditions was approved[310].

The concept of sexual harassment is also not included as one of the forms of discrimination in the Law on Elimination of All Forms of Discrimination. (For further details see Chapter on Discrimination of this report.)

All of the above indicates that no fully complete provisions can be found in the present legislation in terms of sexual harassment; the existing text includes shortcomings and is of a declaration type; therefore, it is of an utmost importance that in the nearest future both civil and administrative legislation include this type of provision.

E. Court decisions on sexual harassment on a national level

The court decisions issued on a national level with regard to sexual harassment are only a handful; among which the *Case of M.M*[311] is peculiar, since it went through three instances and identified significant shortcomings in the court proceedings.

1. Leaving the circumstances of sexual harassment uninvestigated

According to the plaintiff M.M., she had been working in one of the administrative institutions in the position of the Head of Management Division since 2010. In January 3, 2014,the Head of this Management Office, A.K., committed violence against another (female) employee, and sexual violence against the plaintiff. It became known to the other employees as well. This information was also brought to the attention of the Director of the Management Department. On January 5, 2014, A.K. found himself liable for the commission of violence against M.M. He expressed his regret and apologized to M.M. Moreover, he announced that he would apologize publicly and then he would leave the position. Despite the above, M.M. was dismissed from work in a few months due to the fact that the Inspection Office drew up a report according to which neither an attempt nor actual sexual violence against M.M. took place. Instead, the report claimed M.M. committed a disrespectful act directed towards the discretization of the institution and the official, which was manifested in spreading of information about the fact of sexual harassment in the social network. It also indicated that M.M. was unreasonably creating tension in the relations, in particular she protested against some of the tasks assigned by the Head. The case then went through three instances of the court.

The Court of Appeals refused to reinstate M.M. in her job, finding she lost her job on the basis of a reorganization. The Court of Cassation did not uphold the decision, and decided that M.M. was subject to "unconditional reinstating in the job." The Court of Cassation also assigned to the administrative department to compensate M.M. for the amount of forced absence from work, from the day of dismissal to the day of reinstating.

Despite this decision, none of the courts discussed the essence of the sexual harassment in relation to the case of M.M., and none of them studied the discrimination committed against an employed woman as a form of sexual

307.Criminal Code of Georgia, Article 137, Part 2, paragraph "a".

308.Criminal Code of Georgia, Article 138, Part 2, paragraph "a".

309.Criminal Code of Georgia, Article 139, Part 1.

310.Ordinance #01-10/N of April 21, 2015 of Minister of Health, Labour and Social Affairs of Georgia, Statute of Inspection of Labour Conditions.

311.Batumi City Court, #010310114507378 3-157/14, March 13, 2015.

harassment. In addition, the court did not evaluate the liability of the line manager of M.M., who possessed full information about the mentioned fact. The court also did not discuss the inexistence of a defense policy and official mechanisms for responding to the sexual harassment of employed women in a public institution, which represents a significantly distant practice from the international standard defined for the above case.

2. Problem of identifying the fact of harassment

Information describing the execution of alleged harassment against an employed person is statedin number of court decisions; however, because the plaintiffis usually not familiar with legal terminology and therefore does not call the incident "harassment," the court does not discuss the issue. It can be seen that in the majority of the cases, female plaintiffs are unable to prove sexual harassment because they are unaware how to collect evidence on harassment both at the time of its commission and while addressing the court:

In a decision[312] of the Akhaltsikhe District Court on October 30, 2015, when documenting the plaintiff's statement of claim the following is described:

"Since the beginning of 2015, the Director of the school was systematically executing the violation of not only his/her rights, but also the rights of other employees, which was manifested in constant pressure, inhumane and humiliating treatment. He/she was yelling without any reason or explanation, cursing at the same time; due to the fact that she (plaintiff) was the only employed person in her family, she was putting up with such behavior of the Director."

However, the court stated that the plaintiff did not submit any type of evidence except for her explanatory note.

3. Standard of proof

The vagueness of sexual harassment, as one of the forms of discrimination, in relation to the standard of proof is noticeable in court decisions. It is not indicated in decisions why the evidence presented by the plaintiff for the establishment of sexual harassment did not reach the relevant standard of proof; we do not read either discussions regarding the criteria of subjective and objective harassment, or possible factors hindering the work environment and activities.

The several court decisions reviewed here make general conclusions difficult. However, it was clearly found that the alleged victims of sexual harassment do not possess information on their material and procedural rights, and are unaware how to respond to sexual harassment so that it is not considered as "maneuvering". Addressing different instances for help by the victims of sexual harassment is still viewed as an argument against themselves in the society, and it is not opposed by the court. The victims do not manage to collect evidence; consequently their claims remain undocumented, and as a result of this additional discreditation of reputation, loss of job and societal alienation is caused.

F. Conclusion and recommendations

As the conducted analysis showed, the existing regulation of sexual harassment, as a form of discrimination, does not meet the international legislative standard. Nowadays, the victims of sexual harassment do not manage to address administrative and judicial bodies for an appropriate response to the violation of human rights against them. The existing situation needs changes both on the legislative and practical level. Thus:

- The concept of "sexual harassment" and the circumstances of its establishment, both in civil and administrative legislation should be clarified on a legislative level;
- The liability of the employer to implement mechanisms for responding to allegations of sexual harassment should be required by legislation, the negligence of which should serve as grounds for holding the employer liable.
- Effective mechanisms for the victims of sexual harassment should be developed by the employer, which will make administrative and court justice accessible.

312.Akhaltsikhe District Court, Case #1060757-2/336-16, October 30, 2015.

- The regulating acts of Labor Inspection should reflect the liability of supervisors in terms of the prevention of and responsiveness to sexual harassment.
- The level of awareness of sexual harassment, as a form of discrimination, and quality of education of individuals employed in the judicial system should be raised.

IX. CIVIL AND ADMINISTRATIVE LEGAL MECHANISMS FOR THE PREVENTION OF DOMESTIC VIOLENCE

A. Introduction

This chapter discusses feminist approaches to domestic violence and gender violence, as well as the legal framework of the United States and European Union regarding this topic. The Law of Georgia on Prevention of Domestic Violence, Protection of and Assistance to the Victims of Domestic Violence, in the perspective of gender analysis and administrative mechanisms used by national courts to protect the victims of domestic violence,is also discussed here.

B. Feminist movement for the protection of victims of domestic violence

The realization of the phenomenon of the domestic violence has changed from year to year depending on the status and role of women in the society. One of the moving forces of this realization was women's organizations, which opened shelters for women and crisis centers, both in the USA and different countries in Europe, for the first time in the 1970s.

The first shelter of this kind was opened in 1971 in London, the United Kingdom. Erin Pizzey was the founder of the shelter together with others; she wrote one of the first books on this topic, called "Scream Quietly or the neighbors will hear."[313] In 1980, England alone had around 150 shelters for female victims of violence. In the USA, the first shelter was opened in 1973[314] (in the state of Arizona). In 1972, female lawyers founded the first hot line, which gave consultations to female victims in a state of crisis. In 1977-80s, feminist organizations held numerous conferences in different states on the topic of violence against women. The movement was initiated by the union of interested women on the community level, but often different religious

313. Pizzey, E. (1974). Scream Quietly or the neighbours will hear, Pelican.

314.TierneyK.J. (1982). The battered women movement and the creation of wife beating problem. Social problems, vol.29.no3, February.

groups, organizations providing services, and federal agencies joined to support them.

Feminist lawyers and the "Movement of Women Victims of Violence" view violence against women in the wide context of subordination and gender oppression. The violence against women is directly related to a subordinate position of a woman in the family, discrimination at the workplace, inequality in remuneration, limitation of educational opportunities, lack of social support for motherhood, etc.

It is worth mentioning that the feminist movement does not relate the problem of domestic violence with some kind of pathology of the oppressor or the necessity of treatment. Feminist researchers also do not share the approach that views violence against women from the perspective of "family system" and, therefore, holds each family member liable in a certain way for the processes running in the system.

Feminist lawyers often find the term "violence in the family" itself as a problematic one, since in their opinion, relating violence associatively with "family" makes the concept of violence disappear from the agenda of civil rights. Isabel Marcus[315] stated that gender violence should be considered as a world problem and therefore it should be discussed by the international society.

Legal mechanisms for the prevention of domestic violence often do not consider the forms and dynamics of gender violence identified by the feminists. For example, Martha Mahoney describes in her article[316] the so called "separation violence" as a specific form of violence, which will certainly threaten a woman if she decides to leave the oppressor, but these factors are often overlooked by the justice system. The reason for that, in the opinion of Mahoney, is that the legal system is focused on responding to incidents, on numbers and quantities This approach helps lawyers to view the crime of domestic violence as other crimes, but the downside of this approach is that at this time the accent is changed – we have to count and describe how many times the law enforcement system confirmed that a woman had been a victim of violence, instead of figuring out how many times and how the man was oppressing her.

315.Marcus, I (1994). Reframing "Domestic Violence": terrorism in the home, in Martha Fineman & Roxanne Mykitijuk, The Public Nature of Private Violence: the Discovery of Domestic Abuse 11, 27.

316.Mahoney, M. (1991). Legal Images of battered women: redefining the issue of separation, 90 Mich. L. Rev. 1, 28.

Feminists agreed that the concepts "personal" and "personal relations" often create obstacles for identifying cases of domestic violence. Elizabeth Shneider[317] indicated that this is viewed as "personal violence," emphasizing that viewing the oppression of women in this dimension was a derogation of political dimension of violence.

C. Defence mechanisms against domestic violence in the USA and countries of the European Union

1. Defence mechanisms against domestic violence in the United States of America

a) Civil protective order

Legislation regulating detention orders and civil protective orders in relation to the cases of domestic violence was established in the USA in 1970. Until then, women victims of violence were obliged to initiate legal procedures for divorce to request a protective order. The adoption of a special legal document "Pennsylvania Protection from Abuse Act"[318] in 1976 had a crucial influence on widely spreading this type of orders. In 1980, the system of civil orders was implemented in 45 states and the District of Columbia.

Another important change in the area of violence against women took place in the USA in 1994, when Congress adopted the "Violence Against Women Act"[319]. The fundamental changes brought by this document had the following meaning:

(1) The protective order issued in another state is also valid in the state where the oppressor and/or the victim are located.

(2) The violation of the order committed by moving from one state into another (for example, if an oppressor kidnaps a victim and moves her to another state) is considered a federal crime and the sanction is relatively high.

317.Shneider E. (1991). The Violence of Privacy, 23 Conn. L.

318.Pennsylvania Protection from Abuse.

319.Violence Against Women Act (VAWA).

The Violent Crime Control and Law Enforcement Act of 1994 prohibits keeping and carrying weaponsby those individuals against whom a detention order has been issued. The violation of this Act is punishable by the imprisonment of 10 years.

An act of Washington State determines that domestic violence includes (but is not limited to) assault of the first, the second, the third and the fourth degree, reckless endangerment, coercion, burglary, malicious mischief, unlawful imprisonment. The majority of the states also consider persecution and harassment as grounds for the issuance of the order.

However, the National Institute of Justice emphasizes the problems that exist during the practical implementation of the system of orders:[320] Some judges avoid approving the order if there were only threats and no physical abuse has taken place. At that time they evaluate the frequency of the threats and the ability of the oppressor to execute it.

The legislation in the majority of the states does not require that the victim make a request for an orderwithin a limited period of time; however, the above is regulated by the judicial practice and some judges require that the request for an order be executed, for example, within 48 hours. Other judges find that a victim needs some time after the incident to be informed about the possibility of issuance of a protective order and to receive support from friends to make such a courageous step. Consequently, these judges set a period of one month for a request for issuance of an order.

b) Measures considered by a protective order

According to the legislation of the state of New Jersey, the following measures may be taken in favor of the victim by issuing a civil order:

- Plaintiff (victim) shall be protected from the future abuse of the defendant (oppressor).
- The living premises (where she lives) shall be transferred into the exclusive possession of the victim, despite the fact that it was a shared possession of the parties or was jointly rented.
- Defendant shall pay the plaintiff a monetary compensation for injuries that he has caused and which are the result of abuse. This may include lost profits, cost of treatment of injuries, repair/replacement of damaged property, consulting services, travel sums, attorney's fees, court costs, compensation for the caused pain and trauma, etc.
- Defendant shall berequired to receive a compulsory consultation from a specialist (for example a psychologist or a worker of another area). The consultant may be chosen by the court. The parties may be asked to provide a document confirming the completion of the consultation with appropriate recordings for the sessions attended. The defendant may be liable to pay the fee of the consultant.
- The defendant may be restricted from going to certain places, including the living premises, school, workplaces of the plaintiff or other family members.
- The defendant may be restricted from communications that will cause disturbance of the plaintiff or her family members, including personal, written, telephone communication, also relations with the colleagues of the plaintiff or those persons, communication with who will influence or cause disturbance of the plaintiff.
- The defendant may be assigned to cover rent or a loan for the living premises where the victim or another family member is placed if the defendant has the obligation to support them, if the mentioned issue is not disputable or it is not under the proceedings of another court.
- The plaintiff and other persons to be supported shall receive emergency monetary relief.
- Temporary custody over a child shall be given to the non-violent party considering the best interests of the child.
- A police officer shall be assigned to be present at the living premises of one of the parties and monitor the process of collection of the personal belongings and their transfer.
- In the case of a clear consent and request of the plaintiff, cohabitation of the plaintiff and the defendant in the same living premises shall be determined as well as the terms of use of the living prem-

320. Finn, P. & Colson, S., (1990). National Institute of Justice, Civil Protective Orders: Legislation, Current Court Practice, and Enforcement. Chapter of the publication: Domestic Violence and the Law, theory and practice, 2008, by Schneider, E.M., Hanna, C., Greenberg, J.G., Dalton, C., (2008). Foundation Press.

ises for the defendant.

- The plaintiff shall be assigned other type of adequate support which may not be included into this list.
- The defendant shall be accountable to the court monitoring unit in terms of the fulfillment of the terms of the order.
- The defendant shall be restricted from keeping and carrying firearms and other types of weapons.

When allowing the defendant to visit children, the court determines the degree of safety and stipulates the appropriate terms, including, if necessary, the presence of the third party (for example, a social worker). The plaintiff may also request a relevant institution to assess the possible risks and threats before granting a defendant the right to visit the children. If the court finds out about the endangerment of the children in the period of visits, it is possible to schedule an additional court hearing and cancel the mentioned allowance.

The issue of enforcement of civil protective orders is one of the most significant problems in terms of fighting the phenomenon of domestic violence. Without the appropriate mechanism of enforcement, the issuance of an order may worsen the situation and place the victim under increased threat. The oppressors may permanently violate the order, if they believe that they will remain unpunished. For the enforcement of protective orders, the courts, law enforcement officials and prosecutors must act with a special coordination.

The violation by the oppressor of the terms stipulated by the order represents a violation, whether the mentioned action causes a repeat of abuse or not.

The terms of the order stipulated by the court may be annulled only by a decision of the court. Even if the victim decides that the risk of the threat has passed, contacts the defendant herself and makes up, the mentioned contact shall still remain as a violation of the terms of the order.

c) Impact of domestic violence on children victims from the angle of harmful decisions for women

In 50% of the cases of domestic violence, the oppressor abuses not only his wife but children as well. In those cases where a child is not a direct victim of the abuse, being a witness of the physical abuse of his/her mother turns him/her into a victim of severe psychological and emotional abuse; the child experiences post-traumatic stress syndrome and as a result suffers severe behavioral disorders. A certain group of children, trying to protect their mothers from the physical abuse, get hurt themselves.[321]

Consequently, it is crucial that the law enforcement officials focus on the violence against children while assessing the cases of violence and ensure that the oppressor is held liable in an appropriate manner.

The children that are particularly vulnerable to the occurrence of domestic violence often leave their homes with the help of the social workers and relocate to alternative families for a temporary accommodation. However, because women victims of violence are sometimes not able to protect their children from severe forms of violence, the law enforcement systemmay view them as participants or facilitators of the violence.

d) Case of Sara P. Schechter[322]

In the case of Sara Schechter, the court in New Yorkreviewed the criminal liability of both parents in a case of sexual abuse against their children. Specifically, the father was held liable for touching the genitals of the children. The mother, who was the witness of this offence, was unable to protect her children from their father and inform the law enforcement system about it, so she was held liable as well.

The mentioned case was noticed by the law enforcement system after the mother addressed the police in April 1991 due to abuse executed against her. A specialist from the protection agency of victims was included into the case, who announced that when he visited their house, Sarah was pale, trembling, in tears and could not talk because of the trauma she went through. In an hour she calmed down a little, and asked the agency worker how normal it was that her husband danced with their naked children and took photographs. After Sara was transferred to a shelter, the children went through a medical examination. On the basis of the evidence, the court established

321.Greenberg, J.G (2005). Domestic violence and the danger of joint custody presumptions, Ill.L.Rev. 403.

322.Family Court, Kings County, New York, 1992 587 N.Y.S. 2d 464, in the book of Domestic Violence and the Law, theory and practice, 2008, by Schneider, E.M., Hanna, C., Greenberg, J.G., Dalton, C., 2008. Foundation Press.

that the children were indeed the subjects of sexual abuse by their father, whereas their mother was unable to take any measures. She was trying to defend herself, due to the fact that she was a victim of the violence as well. Sara's defense invited two expertwitnesses, who talked about Battered Woman Syndrome and clarified that in this condition a woman loses a sense of belief in herself, as a result of which she does not realize that she is not acting in an objective and correct way.

The court discussed that Sara, who was suffering from Battered Woman Syndrome, had impaired will and thinking; therefore, she was not supposed to be considered as an oppressor, moreover, she was helpless and unable to protect her children from the violence. Based on the definition of the law, the mother could not be considered as a facilitator of the offence. Thus, Sara was not convicted, although negligence towards her children from her side was determined.

Negligence towards children is, in fact, always confirmed in cases if a woman victim of violence is unable to protect the children from the violence which is executed against her, and the children become the witnesses of these circumstances. Often women, who think that they can tolerate the violence executed against them do not realize that this is directly affecting their children, for whom they are considered to be highly responsible. Keeping children in circumstances of violence represents the violation of their rights, on the basis of which the negligence of the victim of violence is determined; the children are set apart from both parents and they are transferred to an alternative accommodation.It is necessary that a woman victim of violence is fully informed about the protection of children from violence, which will facilitate the conduct of relevant measures.

Lawyer Dorothy Roberts thinks[323] that this approach of the law enforcement system might be hurtful for the woman victim, since the law enforcement system punishes them due totheir inability to fight the oppressor. The mentioned approach does not acknowledge that a woman may have a balanced and different interest from the role of "a mother," herindividual "self." She is viewed as a subordinate to the interests of the child. Substantially, the law enforcement system unconditionally considers that a woman shall acknowledge all of her actions in the specter of the child's interest.

323.Roberts, D.E. (1999). Mothers who fail to protect their children, from Mothers Troubles, by Julia E. Hanigsberg and Sara Ruddick, eds. 1999.

In the opinion of Dorothy Roberts, the law and judges need to investigate thoroughly the reasons why the woman failed to protect her children from the violence executed by her husband. The court needs to study the circumstance that often the oppressors abuse children to punish their wives. When a woman decides to act against violence, the oppressors punish them by oppressing the most vulnerable objects – in this case, minors. Beating up the children may be a part of the oppressor's strategy, in order to morally break the main victim of the violence – a woman. This reasoning, obviously, does not imply the justification of the negligence of violence towards children by the woman victim of violence; it tries to make clear the necessity of naming this occurrence not "carelessness" and "negligence" by the victim, but acknowledging it as a specific form of violence.

The courts nowadays are more concentrated on applying a standard based on the stereotypical reasoning of "a selfish mother" to a woman, and are not trying to thoroughly investigate the circumstances of violence against a child. For example, a traditional stereotype existing with regard to the black women, that they are careless mothers, often results in a conclusion that they "allowed the violence due to this carelessness" against their children. Oppression and inequality of women, in terms of a political context, causes the spreading of stereotypical viewpoints about them as mothers. The justice system should be able to stay away from them and show a sensitive attitude, from a gender standpoint, in relation to this issue.

2. Civil and administrative mechanisms protecting from domestic violence in the countries of European Union

In 2016, a European network of legal experts for the protection of discrimination and gender equality, with the support of the European Commission, conducted a research of legislation of the European countries with regard to the legal regulation of violence against women.[324] The goal of the research was to assess the compliance of the legislation of European countries with the "Convention on Preventing and Combating Violence against Women and Domestic Violence" (Istanbul Convention) of the Council of Europe. The ad-

324.Nousiainen, K., Chinkin, C. (2016). European Commission, Directorate-General for Justice and Consumers: legal implications of EU accession to the Istanbul Convention. See the link: http://ec.europa.eu/justice/gender-equality/files/your_rights/istanbul_convention_report_final.pdf

opted document is of crucial importance for international law in terms of fighting domestic violence.

Along with other issues, the research discusses specific articles of the Convention related to the civil and administrative mechanisms protecting against domestic violence; among them are: accessibility to shelters for the victims of violence, rehabilitation services and professional consultations (Article 20), orders of detention and protection as well as orders acting in times of emergency (Article 52, 53), civil claims (Article 29), and compensation (Article 30). The mentioned issues in the European Union are regulated both by European Union law and acts determined by the national legislation.

In the opinion of the authors of the mentioned research, the European Union law is still in need of development in terms of the regulation of the norms regulating crisis assistance for the victims, since the Directive 2012/29/EU[325] on "establishing minimum standards on the rights, support and protection of victims of crime" is of a relatively narrow scale; it is focused on the direction of criminal process and does not imply all of the services meant by the Convention for the victim of gender equality. The development of the services as such constitutes a responsibility of the member countries and as it is mentioned in the report, it is executed in a more or less successful way. A direct responsibility of the member countries is also represented by the implementation of mechanisms ensured by the civil law, and the regulation of such issues related to the gender violence as custody and care about a child. According to the authors, the improvement of justice in the European Union is possible as well with the help of implementing specific directives, which will focus more on the development of a policy regarding the mentioned issues.

D. Gender Analysis of Law of Georgia on Prevention of Domestic Violence, Protection of and Assistance to Victims of Domestic Violence

On June 29, 2014, Georgia signed the Convention on Prevention and Elimination of Domestic Violence and Violence against Women adopted by the Council of Europe in 2011. After that, the Ministry of Justice of Georgia initiated amendments to many laws of Georgia with the purpose of fulfilling the obligations of the Convention.[326] Despite that, the legislative amendments have not been adopted by the Parliament up until now, just like the Istanbul Convention has not been ratified. Consequently, the shortcomings remain the same in the acts regulating gender violence.

Since some of the actions committed in the context of domestic violence belong the area of the criminal law (see Chapter on Violence against Women of the present research), this Chapter includes mainlya gender analysis of the approaches and administrative mechanisms of the Law on the Prevention of Domestic Violence.

In 2014, a gender analysis of the mentioned Law was executed by an initiative by a group of researchers.[327] In the opinion of the researchers, the problem of domestic violence should be reviewed by the state in a "de-gender framework." The authors explain that **"[the de-gender framework] looks for a problem not in the structure of the society, but on an individual level. Neither a victim nor an oppressor have a gender. The oppressor has the power, whereas the victim is subordinate and may be anybody who has a subordinate status (a child, an elderly person, a disabled person). The problem is presented in the neutral terms of gender and it is a universal problem, which is seen at any level."** According to the same research, it is not mentioned anywhere in the Law that the victim of domestic violence is mainly a woman and that she faces special challenges with regard to this.

It is worth mentioning that Georgia's Law on Domestic Violence does not focus on special measures for the support and assistance to victims of the sexual violence, which shall be taken urgently in a limited period of time.

One of the important shortcomings of the Law is that violence against women is determined only within the circle of "domestic violence" and not in

325.2012/29/EU, DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. See link: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF

326. Law of Georgia on Weapons, Organic Law of Georgia Local Self-governance Code, Law of Georgia on Legal Assistance, Law of Georgia on the Rights of a Patient, Imprisonment Code, Law of Georgia on Police, Law of Georgia on the Activity of Doctors, Law of Georgia on Public Work, Organic Law of Georgia Labor Code of Georgia, Law of Georgia on the Legal Status of Foreign Citizens and Stateless Persons, Law of Georgia on the Higher Education, Law of Georgia on General Education, Criminal Code of Georgia, Law of Georgia on Prevention of Domestic Violence, Protection of and Assistance to Victims of Domestic Violence, Administrative Procedure Code of Georgia, Law of Georgia on Lawyers.

327. N. Chabukiani, G. Jibladze, N. Ubilava (2014). Analysis of Politics against Domestic Violence in Georgia.

general within the gender violence against women. Consequently, the law considers protective mechanisms for the members of the family and the former partner. This means that a woman, against whom gender violence is executed by a person outside the family, will not be able to request the issuance of an order of detention or protection.

The acting edition of the Law does not consider the special case, when the victim of domestic violence notifies the law enforcement system about what occurred, and later under the influence of the external factors (fear of the oppressor), the victim rejects the notification and denies the fact of the violence. Consequently, the law enforcement agency doesn't give special consideration to this fact.

The Law also does not consider those especially complicated cases when an oppressor is part of the law enforcement system, and due to this a conflict of interests arises during the response of law enforcement bodies; therefore the Law does not ensure the elimination of violence.

In accordance with paragraph 6 of Article 16 of the Law, the police are responsible for the supervision of the orders of detention and protection approved by the court, although the Law does not determine the method and frequency of the supervision. Consequently, the enforcement of this norm depends on the notification and activity of the victim, which serves as a vivid message for the oppressor that the victim can rely only on herself and that repeated violence against her may go unpunished. The mentioned regulation, in fact, indicates that the state still considers domestic violence to be a problem of a personal nature and not an issue of order and safety of the society, since to ensure the latter the law enforcement system would execute a proactive control.

The Law also does not determine the accessibility of justice for the especially vulnerable category of the victims of domestic violence, which significantly hinders the activation of protection mechanisms guaranteed for this group by the Law. The victims who at the same time represents any kind of minority and thus experiences discrimination in terms of the accessibility to justice belonging to such groups; for example, women victims of violence who have a disability which eliminates the sending of a notification without the help of an assistant, etc.

It should be noted that the transitional provisions of the Law provide that compensation for a victim of domestic violence and the rules of delivery of

compensation should be determinedby May 1, 2015; however this has not been enforced until now, and thus the victims are limited in their right to request the compensation granted by this Law.

The above analysis indicated that administrative and civil legal mechanisms of protection are not fully ensured by the legislation for the victims of domestic violence; the victims that are expected by the society and the state to send notifications about the violence, or they are not able to receive minimum guarantees of safety. Therefore, it is logical that the notifications about the violence are not made;

E. Analysis of existing court decisions on prevention and elimination of domestic violence

For the purposes of the research, 134 court decisions on the issued and approved orders within the framework of the Law on the Prevention of Domestic Violence, Protection of and Assistance to the Victims of Domestic Violence adopted by the Administrative Board of District and City Courts of Georgia, as well as decisions from the Tbilisi and Kutaisi Courts of Appeal from 2012 to 2016, were studied.

A significant trend in the issued and approved orders according should be noted. In 2012, a review of the orders shows that the cases before the court primarily involved a heavy form of violence against women – physical violence, beatings, and injuries. In the orders from 2016, cases of violence are found which involve limiting the freedom of a woman and her right to independently make a decision, violation of the confidentiality of personal correspondence (control of text messages), restriction of the right to work, restriction of giving birth to a child, etc. This is already a positive trend, in that the women consider such actions as a violation and violence; previously, due to the existing stereotype in the society, such acts were not perceived as violence. This indicates an increase in the level of awareness of the society regarding the human rights and the women's rights.

1. The problem of an incomplete coding of the decisions

Despite the fact that in the majority of the decisions the names of the oppressor and the victim are coded, still decisions are found where a resi-

dential address, personal number and other type of personal information of the participating individuals (including the victims') is fully identified. This may be related to a technical omission (coding methodology), although it should be noted that important personal information about those individuals becomes known to the society[328], which may seriously endanger the victim's safety and the protection of right to privacy.

2. Problem of collecting and presenting evidence by the victim of violence

According to subparagraph "e" of Part 3 of Article 21 (Prime 13) of the Administrative Procedure Code of Georgia, an application for the issuance of a protective order, along with other elements, shall include a list of the evidence, which will be addressed to the court by an authorized person with regard to the issuance of a protective order. As found from the reviewed decisions of the court, it is especially hard for the victims of violence to collect the mentioned evidence, which often results in the refusal to issue a protective order by the court. Two significant factors serve as the basis for the above:

The reasoning on what kind of evidence shall be presented by the victim and what form it shall take is vague in the decisions of court. In some cases the court considers credible only the allegations of violence by the victim and her representative[329] (it is not clearly reflected in the decision that witnesses have been questioned, or some other evidence has been investigated), in other cases this does not occur.

As shown from the review of decisions, in order to shape the inner belief of the judge it is important to present evidence such as photographs proving the physical injuries and a reference issued by a medical institution about the injuries; although such evidence is presented in a small number of cases, as often the woman victim of violence does not possess information on the importance and necessity of collecting it. The judges do not investigate if a woman had an opportunity to collect this evidence (for example if she had the financial means to undergo an examination at a medical institution or to document the injuries).

A detention order issued by patrol police in a previous period also represents

328.Rustavi City Court, Case #3-183-15. October 5, 2015.

329.Tbilisi City Court, Case #3/4410-16. June 21, 2016.

important evidence, even though we encounter cases as well when, after calling the patrol police, the victim changes her mind and refuses the issuance of the detention order:[330]

"On April 20, 2016 due to the violence executed by M.D., the claimant was forced to address the patrol police, although with the reason of fear, expressed a refusal for the offered detention order."A woman's action of this kind should be thoroughly evaluated by the courts and it should not be considered that a woman was not willing to notify; it should also not be considered that the violence did not take place.

The approaches in terms of evaluating the evidence are not similar to one another in the decisions. In some cases the court does not find the testimony presented by the victim and the witnesses regarding the threats against the victim sufficient:

In a case reviewed by Kutaisi Court of Appeals,[331] the claimant addressed Kutaisi City Court at first and then Kutaisi Court of Appeals with the request to issue a protective order due to the existence of alleged violence by her husband. As it is indicated in the decision, prior to the incident of violence, the victim addressed the police not once due to relocation of the children to another city by the father without the permission of the mother. During the court hearing, the victim and three witnesses confirmed the threats of the alleged oppressor to commit a murder, but the court did not agree with the mentioned:

"The Chamber of Appeals indicates the individuals questioned as witnesses at the court hearing of the first instance - T.Sh. (the mother of the claimant), M. Sh. and N.Sh. (the uncle and aunt of the claimant), who explained that B.T. declared in his conversation that he would kill his former spouse, although [in the opinion of the court] such fact of psychological violence is not confirmed by other evidence presented in the case."

Based on the above it is clear that the material and procedural norms of issuance and proof of orders do not consider the regulation of the standard of evaluation of the evidence, which leads to the fact that the court evaluates the evidence by the highest standard of objectivity and authenticity, by means of the procedure stipulated by the Criminal Process. It is worth con-

330.Tbilisi City Court, Case #3/4168-16. June 16, 2016.

331.Kutaisi Court of Appeals, Case #3/B-483-15, 080310915001105679. October 23, 2015.

sidering here that the detention and protective orders do not aim at punishment but atthe prevention, whereas the actions restricted by the order itself is of a light character; for example, the prohibition of approaching, prohibition of communication, etc., which obviously should not require the standard of criminal evaluation of evidence.

3. Difficulty of defining "violence"

As it is stated in the analyzed decisions, the courts still havenot developed a unified standard for identifying and defining the occurrence as violence.

In the above mentioned case reviewed by Kutaisi Court of Appeals, the court did not consider the random taking of the victim's property by the oppressor as the fact of economic violence just because the taking was not accompanied by violence/threats and/or a verbal disrespect.

According to the testimony of the claimant, **"there was an occasion when B.T went to her workplace and forcibly took away work objects; he also went to her residing address and the claimant was forced to call the police."** However, the court grounded the refusal for the issuance of the protective order the following way:**"Whereas according to the testimony of witness G. K., clearly contradicting circumstances are confirmed in relation to the facts, that serve as the basis for the request of L.Sh. for the issuance of the protective order, in particular: at the court hearing of first instance the witness explained that no kind of violence, threats and/or verbal disrespect took place from the side of B.T. neither during the visit to the workplace (a beauty salon) of L.Sh., nor the visit to the residing address of L. Sh. They [B.T and persons accompanying him] took away without any threats or violence from the beauty salon the objects purchased by B.T. for L. Sh."** According to the explanation of the court, if while taking the property of the victim the former husband did not execute violence and did not threaten her, this cannot be considered as economic violence.In the same case, the court did not investigate circumstances which were related to the violence by the father against the elder child, which was mentioned in the request for the issuance of the order by the alleged victim.

4. Unclarified terms of the protective and restraining orders

Sometimes the measures to be taken against the oppressor are not clarified in the decisions of courts with regard to the issuance of the protective and restraining orders:

The oppressor is prohibited to approach the house, workplace and other places of the victim, however the radius of the distance is not indicated, upon the crossing of which the terms of the order will be considered as violated.[332] Thus, it is not clearwhen the behavior of the violator will be considered a violation of the order, how a victim should evaluate this violation, and in what way the information about the behavior of the oppressor should be delivered to law enforcement bodies. These formulations of court decisions increase the uncertainty for the victim, intensify the perception of the danger, and decrease the feeling of the safety.

5. The impact of the diagnosis of victim's mental health on the proceedings of the case

It is disturbing to take advantage of the health of the victim of violence with the purpose of her inhibition by the oppressor. As the decisions of the courts show, the courts are unable to prevent this. With regard to this, a case reviewed by Rustavi City Court is important.[333]

The alleged victim of violence addressed the court with the request to issue a protective order. The claimant indicated that the alleged oppressor (spouse),because of alcohol abuse, was systematically abusing both his wife and two minors in a psychological and physical way. B.L. also threatened the victim to kick her out of the apartment and demanded that she leave. On February 25, the police drew up a restraining order in relation to this, which was approved by the Rustavi Court the same day. Upon the expiry of the restraining order, the violence continued in the presence of the children. The claimant stated that the actions of the alleged oppressor particularly negatively affected one of the children due to his/her health conditions.

332.Ibid.

333.Rustavi City Court, Case # 2....6, 21.A.2016 (data is hatched by the court).

At the court hearing the representative of the children addressed the court with a motion to schedule a psychiatric examination with the purpose of determining the state of health of the alleged victim. The mentioned motion was granted by the court and the examination was scheduled.

On April 14, 2014 a conclusion was presented from Levan Samkharauli National Forensics Bureau to Rustavi City Court. According to the conclusion, the state of the alleged victim shall be evaluated as a **clinically complex forensic case, the resolution of which is impossible in the format of outpatient forensic psychiatric and psychological examination as well as to answer the questions of the verdict in the mentioned format, which is why it is necessary for the person to undergo an inpatientforensic psychiatric and psychological examination in the psychiatric forensic bureau**. The alleged victim withdrew the claim after the court hearing and terminated the dispute.

The court discussed the advisability of the approval of the request of the claimant and came to the conclusion that the request of the victim for the issuance of the protective order shall be dismissed due to being groundless.

"On the basis of the analysis of the presented materials, the court finds that in the given case... except for the fact that E. refused to continue the dispute, a specific fact of violence has not been confirmed and found in the given case. Considering the above, there is no potential threat for the elimination of which a protective order needs to be issued."

The mentioned decision indicates that the mental health of the alleged victim became the main reason for the termination of the court proceedings. Had there not been the results of the psychiatric forensics of the victim, it would have been interesting to see how persuasive the testimony of the victim would be considered. In fact, in all of the cases studied by the researchers, the restraining order issued and approved in the previous period is considered to be an important evidence of the execution of violence from the side of the oppressor, which was neglected in this particular case. It is even more disturbing that the court did not review independently the alleged facts of the violence against the minor and did not include into the dispute (is not seen in the decision)the state bodies for custody and guardianship as a third party, which indicated the court's negligence towards the interests of the children.

The difficulty of a disabled person to collect evidence proving the alleged violence is also an important issue, as well as the court's ignorance of the possibility to invite a relevant expert; the latter would inform the court about the specifics of different types of violence (violence against the disabled victim).

It is stated in a 2016 decision[334] of Tbilisi City Court that T. I. is a disabled person with complications. An alleged citizen is forcing T. I. to agree to sell the apartment. During one of the incidents, L. M. physically assaulted T. I. and the latter's shoulder was broken. As the court stated, "**despite the offer of the court, the claimant did not present relevant evidence proving the fact that the violence was being executed at the period of addressing the court with an application for the issuance of an order."** That is why the court finds that the application is groundless and shall not be granted.The court did not take into consideration that violence against a disabled person represents a more hurtful circumstance, since the mechanisms of justice and defense for a disabled person are less accessible. The fact of not presenting the evidence by the disabled person may be also related to the health conditions of the person. These risks and challenges are not reviewed in the decision.

6. Leaving the facts of violence against children unaddressed

In the majority of the court decisions related to the issuance of the protective orders, it is indicated by the claimant that the victims of violence were also minors – they were direct or indirect victims, being the witnesses of the violence against their mother. Despite that, the courts often leave such occurrences unaddressed. In the event of receiving information regarding violence against a minor, very often the investigation of the circumstances of the case is not executed by the initiative of the court, as it is provided for by the Part 3 of Article 4 of the Administrative Procedure Code of Georgia – in accordance with the principle of officiality. The representative authority of the alleged oppressor parent is also not suspended in accordance with the terms provided for by the legislation.[335]

334.Tbilisi City Court. Case # 3/37-16, January 13, 2016.

335.Special protection measures for minors as provided for by Chapter 4 of the Law of Georgia on Prevention of Domestic Violence, Protection of and Assistance to the Victims of Domestic Violence.

7. A negative impact of time factor on the measures protecting the victim

As the review of decisions has shown, in some cases the court grounded its refusal for the issuance of the protective order by the existence of an effective detention order. For example, in a decision[336] of December 2015, the Administrative Chamber of Tbilisi City Court states: **"The Court finds that in the conditions, when the period of validity of restraining order approved by the decision of November 21, 2015 has not been expired, there is no legal ground for the issuance of a protective order with regard to the application of Z. A."**

First of all, it has to be emphasized that the existence of such formal reason may be verified at the stage of eligibility of the application; at this particular stage, with the purpose of economy of the process, the application of the claimant should be denied and it will not be necessary to issue a decision on the refusal of the issuance of the protective order.

It is also remarkable that there exists no acting regulation on a legislative level restricting the issuance of a protective order in the existence of the terms of a restraining order. While establishing such judicial practice, the fact of how this refusal serves the interests of the alleged victim has to be evaluated, when the latter has extremely limited resources to access the court. In the above-mentioned case, the period of validity of the detention order was expiring in 5 days from the approval of the protective order by the court. This means that in the time of real existence of threat, the victim would be forced to address the court repeatedly or would endanger her health and life, had the court not granted her application.

F. Recommendations

- The following amendments should be made to the Law of Georgia on Prevention of Domestic Violence, Protection of and Assistance to the Victims of Domestic Violence: gender sensitivisation of the law, expansion of the circle of the victims of violence, increase of the proactive role in the law enforcement mechanisms for the supervision of orders and responsiveness, special regulation of particularly complex cases of violence (e.g., an abusive law enforcement official), eradication of barriers to access the judicial system for minority victims of violence, and provision of additional guarantees for the protection and strengthening of the victims;
- Special guidelines should be developed for all the institutions participating in the enforcement of the mentioned law, which shall stipulate the gender aspects of responsiveness and execution of violence against women, considering the context of gender inequality in the society and not on the basis of the de-gender approaches;
- Awareness raising campaign should be conducted for women in terms of collecting evidence and opportunities to address the law enforcement system in cases of gender violence.

336.Tbilisi City Court, Case #3/9431-15, December 15, 2015.

X. QUALITATIVE RESEARCH INTRODUCTION

This section describes obstacles in terms of access to justice for women, including the LBT, disabled women and representatives of ethnic/religious minorities. The issues are analysed in the context of civil, administrative and criminal law.

The aim of the study is to assess the extent of gender aspects in investigation and prosecution of the crimes relevant to particular articles of the Criminal Code and the effectiveness of the justice system with respect to the needs of these groups of women.

The qualitative, practical aim of the study was defined as a methodology which was selected taking into account the aim and object of the study. The study units are: LBT, disabled women and women representatives of ethnic/religious minorities, and specialists involved in the justice system - police, prosecutors, judges, and legal aid lawyers. In total, six focusgroups were held:four with women representatives of ethnic/religious minorities in Akhalkalaki, Lagodekhi, Gardabani, Bolnisi municipalities, and two with disabled women in Tbilisi and Kutaisi. Since LBT groups of women had not expressed their interest in this issue, they were not interviewed in the survey and the results of the study are based only on the results of individual interviews with lawyers working on LBT issues. Within the framework of the survey, 33 individual interviews were conducted: 18 with prosecutors in Tbilisi, Kutaisi, Bolnisi, Akhalkalaki and Ninotsminda; 5with judges in Akhalkalaki, Tbilisi and Rustavi; 5 with lawyers of legal aid in Tbilisi, Rustavi, Kutaisi and Akhaltsikhe; 1 with a police officer and 1with an employee of the Ministry of Internal Affairs; 1 with a lawyer working on LBT issues and 2 with women with disabilities.

I. Civil Law

The purpose of the present chapter is to analyse the gender aspects existing in civil disputes, and identify barriers and problems in the court practice which may represent obstacles for women in terms of access to justice.

1.1. Alimony obligations

With reference to alimony, the practice of the Georgian court system was assessed with respect to alimony obligations of parents and approaches applied in determination of the amount of alimony, as well as the right of a spouse to demand support/alimony.

The survey results revealed that in most alimony disputes in Georgia the plaintiff is a woman, which in turn, is due to the fact that children tend to remain with their mother after the divorce of spouses and the mother's place of residence is determined as the child's place of residence.

Judges participating in the survey noted that they do not have a unified system for the calculation of alimony, but still three main factors that the court considers in determining the amount of alimony can be identified (they have been formed in result of the practice). These include: the financial resources of the parties, marital status and the child's interests:

"We don't have common approaches and recommendations, but we have practice which derives from the material legal norms. The Court determines the amount of the child support proceeding from the financial resources of the parties, marital status and interests of the child, i.e. what are the child's expenses" (Civil Law judge).

Legal aid lawyers participating in the study expressed dissenting opinions. According to them, all judges have an individual approach to the calculation of the alimony. Special problems in this regard arise, when the motion of the plaintiff to receive information from the work place of the respondent party is not satisfied:

"They approach the issue very unemotionally. The court dismisses the motions, when a party states that it failed to obtain evidence from the work place of the respondent about the income and asks the court to request the information. These motions are rarely satisfied. Basically, the court evaluates the evidence obtained by the party. If you have a lawyer, that's fine, but in the alimony disputes the lawyers are rarely appointed for free; only for drawing up a complaint. That's why it directly affects the calculation of the amount of alimony. The second problem is that, when there is no income,

how the alimony could be calculated. The particular judge does it in one way, another in the other way" (lawyer of the Legal Aid Service working on civil cases).

Judges participating in the study believe that in the calculation of alimony, equal participation of both parents in the child's upbringing and their financial support is taken into account. After the expenses necessary for the child are determined, based on the financial situation of the parents these expenses are approximately equally distributed between the parents. Such an approach completely eliminates the obligations, which are imposed on the parent with whom the place of residence of the child is determined. According to the respondents participating in the survey, the parent with whom the children live in most cases is a woman:

"We take into account the fact that a child is not brought up only at the expense of the payer of the alimony, mother should also do something. It is clear that she does not work, but it does not mean that father should pay for everything. If we are talking about equality, let's not understand it as if the father should bear all expenses, the mother should also participate in it. Therefore, when mother says that she cannot bring up a child for GEL60-80, we should tell her, why GEL80, you will receive GEL80 from father and add another GEL80 yourself. She should know that if we are speaking about equality, she is bears responsibility" (Civil Law judge).

Respondents noted that in the process of calculation of alimony particular problems arise when the defendant, against whom the alimony obligation is being discussed, has no financial income. In such cases the court takes into account the minimum wage established in the country and, subsequently, the amount to be requested is established. However, most of these decisions remain unenforced. According to the employees of the Legal Aid Service, the fact that only one executive body in Tbilisi works on alimony disputes is also problematic and it further complicates the issue of the enforcement of the court judgments. However, in cases where a parent has financial income, none of the respondents can indicate based on which criteria the particular amount for the needs of a child shall be calculated; How (in what percentage) can the parent's financial status, which is one of the main factors of alimony calculation, be used in assigning of the alimony

According to the respondents participating in the study, attention is paid to the fact that if a parent upon whom alimony will be imposed has an income, he/she should be imposed such amount of money which will be necessary for the maintenance of the existing lifestyle of the child; one of the main factors is exactly the child's interest.

All respondents participating in the study noted that alimony obligations have only a financial nature, which eliminates imposing on a parent other non-financial obligations, even in a case when a parent does not have financial income and his/her participation in the upbringing of a child is out of question. As they say, such issue has never arisen in the form of a claim and even in the case of review of the mentioned issue, its practical enforcement would be impossible:

"I havenot had an experience of receiving such a proposal. The alimony is an amount of money and it cannot be expressed in any other forms. If we impose the duty of care of a child within particular period of time in lieu of the alimony, it will not be enforceable; and the court's decision shall be, in general, enforceable and someone mustcontrol it" (Judge reviewing Civil cases).

According to the survey of the spousal support obligation, the spouses, in fact, donot apply to the court with the mentioned claim. Legal aid lawyers say that women often come to get advice, but the case never reaches a court hearing because they think that it will not work. Therefore, the analysis of the practice and problems arising during the mentioned disputes becomes impossible.

1.2. Determination of the place of residence of the child

As for the determination of the residence of the child, it became clear that judges and lawyers making a decision on this issue pay particular attention to the protection of the child's best interests. However, they also note that most of the decisions are made in favour of the mother.

The decisions made in favour of the mother are often motivated by the understanding of traditional roles of father and mother (mother can take better care of a child):

"Father claimed his place of residence to be defined as the child's place of

residence. The child had health problems and, if he would go to live with his father, the child's health conditions might worsen and he could even die" (Lawyer of the Legal Aid Service).

The attitude towards the child's involvement in the process is ambiguous. Only one judge participating in the study stated that he always involves the child in the process with the objective of studying his interests. However, the judge added that not all judges approach this issue in the same way, which is due to the vagueness of the content of the article:

"I involve the child in all cases based on Article 81 of the Procedure Code. However, it is unclear what the "involvement" means, in which case the child may be involved. The dispute could be hereditary, it may be a liability dispute - there is no answer to the question whether the child can participate" (Civil Law judge).

According to one of the judges participating in the study, the problem is the demand of the Civil Procedure Law that if a counterclaim is not submitted, a judgment by default shall be made where the evidence submitted in the claim is deemed to be proved. Such an approach eliminates the child's involvement in the process.

Lawyers have a different position with regard to this issue, they think that if parents reach an agreement the participation of the child in the process is not required any longer.

According to survey results, it was confirmed that the practice and legislation of Georgia are familiar with only one form of the custody – sole custody. According to the position of a civil law judge participating in the study, two places of residence cannot be determined for the child, although weekends may be equally distributed between both parents.

With regard to determination of the mother's place of residence as the child's place of residence, it became clear that former spouses often stress mother's mental health problems.

According to disabled women participating in the study, despite the fact that children usually stay with their mothers (this is a general trend), in cases of women with psycho-social needs, it is more likely that they will lose their children.

The mentioned position of disabled women is confirmed by the judges participating in the study. The decision of one of the judges should be evaluated as a positive practice; the judge did not agree with the spouse's statement that his wife had mental health problems, due to which reason his (father's) place of residence should have been determined as the child's place of residence, and demanded the opinion of the relevant expert, if this was an obstacle in the relationship of the child with the mother.

1.3. Division of jointly acquired property

With regard to division of property acquired together, the judges and lawyers of Legal Aid Service stated that the court mainly relies on the evidence submitted by the parties and in this regard there is no gender-based priority. However, proceeding from the difficulties during the evidence collection, based on their own practice they also pointed out that women often suffer more when property owned together is divided. According to them, as a rule, property acquired together is registered in the name of the man, which he can alienate in this or that form, he can sell or donate it. At that time, the other spouse cannot claim the division of the mentioned property.

As legal aid lawyers said, due to the above-mentioned problems women are often left homeless together with children. This is especially due to the following circumstances: even if the spouse owned an apartment, if the property was not acquired together, one cannot demand in any form to provide dwelling for the spouse and children:

"When spouses divorce, women remain vulnerable, with children, without a home. There is no effective means for the man to take responsibility for renting a home for children. The amount of the support may be so small that it would not be enough for rent" (Lawyer of Legal Aid Service).

1.4. The issue of violence during the review of civil disputes

One of the survey issues was the study of the practice of using violence against a woman as evidence in a civil dispute by the legal aid lawyers and

judges. In this regard, the following general trend was determined: if a party submits the relevant evidence, such as restraining or protective order, status of the victim of violence, the court will consider them. However, according to the results, the judge does not seem to be asking questions on this matter without the indication of the party, and is not interested whether in family disputes the violence was committed against a woman.

According to a Legal Aid Service lawyer, more often such evidence is submitted in children-related disputes; in other types of family disputes, such as imposing of alimony obligation, this issue does not come forward as it is a common desire for the process to be completed in a timely manner and amicably.

It was also observed that violence against women is used as evidence only if there is a relevant document proving violence; a statement of a witness or the woman that she was a victim of violence, is not enough.

1.5. Duty and court expenses

According to judges participating in the survey, the state duty is not an obstacle for women to apply to the court because if a woman can afford hiring a lawyer, she will be able to pay the duty as well. They reason like this: a woman cannot be exempted from the payment of a state duty only because she is a woman. The basis for the exemption, besides being registered in the unified database of socially vulnerable families, can be submission of evidence to the court proving that a person cannot afford payment of the duty.

Legal aid lawyers participating in the survey expressed a position different from the judges. It is well known that judges often do not satisfy these requirements; in addition, women sometimes are reluctant to participate in the dispute due to the lack of financial resources and most of them, at the time when dispute starts, might not be registered in the unified database of socially vulnerable families:

"Women who have recently divorced, donot have their own apartment, donot have income, most often dispute about division of property acquired within marriage and determination of the child's place of residence; this problem is particularly acute in regions, where there are very few wealthy women. Most of them find it difficult to pay the duty" (Lawyer of Legal Aid Service).

In the sphere of civil disputes, in contrast to administrative disputes, a problem was distinguished that a party may be exempted from the payment of the state duty, but in case of losing the suit they would not be exempted from reimbursement of costs in favour of the succeeding party, which may be one more obstacle in terms of application to the court.

II. Criminal Law

This chapter presents the results of individual interviews conducted with persons employed in the justice system of Georgia and focus-groups of disabled women and women representing ethnic/religious minorities. The main issue of survey was the approach applied during investigation of gender-based crimes, criminal prosecution and review of cases in the court.

2.1. Rape

Respondents participating in the survey noted that in case of rape criminal prosecution starts very rarely, which in their opinion, can be explained by the following fact - as a rule, **to ensure that women are not accusedby the public of provoking the crime,** such stories are concealed.

It was also observed that there is no common vision toqualify the crime as rape:

"The law enforcement agencies are debating whether sexual intercourse established against the will is rape; i.e. rape is still considered to be anact which was accompanied by a physical resistance" (Legal aid lawyer).

A woman declaring that she had been raped if there are no serious physical injuries and relevant biological materials, according to the existing practice,will not be enough for the act to be qualified as rape:

"These are two extremes. A woman may not really want to have sexual intercourse, but could not say anything due to shock. Therefore, she may have

neither scratches nor be beaten; there is a second option - it is possible, that a woman may inflict physical injuries to herself in order to say that a man forced her to establish sexual intercourse" (policeman).

In case of rape, the basic evidence that the law enforcement agencies rely on is physical damage, existence of biological material on the body of a woman, and testimony of witnesses which would confirm that the victim was locked in the room,was shouting and asking for help.

2.2. Femicide

All criminal law judges participating in the survey stated that gender should be added to the crimes against life, as an aggravating circumstance:

"We have crimes committed on racial, ethnic or other grounds, but we do not have a crime committed, for example, against a former spouse; there must be a separate paragraph on this in the substantive part of the Criminal Code " (Criminal law judge).

"There is Article 109 of the Code, which provides for the premeditated murder under aggravating circumstances. In my view, the situation has changed in such a way that gender should be added to the rating. Legislation should be somehow relevant to reality" (Criminal law judge).

2.3. Criminal prosecution of gender-based crimes

As prosecutors stated, most often, in practicethey come across the following gender-based crimes: beating, domestic violence, crimes against health, including crimes against health of sexual minorities.

Almost all prosecutors pointed out that in the case of gender-based crimes they donot apply for discretionary prosecution. Only one of them pointed out the use of the right of discretionary prosecution, but does not mention the instances.

All prosecutors participating in the survey believed that gender-based crime is a subject of particular public interest and their criminal prosecution has never been stopped.

Prosecutors noted that they have different approaches towards gender-based crimes (compared to other types of crimes) – in such offenses they show more firmness, in fact do not applythe plea agreement, and underlined the recommendationdeveloped in 2016 with respect to application of Article 53^3 of the Criminal Code.

To the question whether they emphasized the gender motive of the crime duringa case hearing, the prosecutors responded that they do so only in case if the mentioned motive is obvious and there isrelevant evidence.

Someof prosecutors participating in the survey noted that they cease investigation in case of reconciliation of the victim of gender-based violence and the defendant when the victim consents to the fact that there is no public interest of prosecution. Only two of them said that they remember cases when the testimony of the defendant had more credibility for the judge than that of the victim.

Most prosecutors noted that they did not conclude a plea agreement for gender-based crimes. However, there were different approaches to the issue:

"The plea agreement is concluded only in the event, if the conflict was one-time, the victim and the offender reconciled and the victim was not damaged to a great extent; also there are circumstances affecting the mentioned decision-making".

2.4. Participation of a victim in the process

Different approaches have been identified with regard to the participation of victims in the process.

Most of the employees of the Prosecutor's Office said that they always took the victim to the trial. However, some of them had a different position and noted that if evidence obtained by the victim was indisputable, or if there was a danger that the victim will again have a psychological trauma, he/she

would not be brought to the trial.

According to alawyer of theLegal Aid Service, he had a case when a woman under his protection did not participate in the process as the accused did not disputethe testimony of the victim.

2.5. Barriers arising in the process of investigation and criminal prosecution of crimes committed against LBT women

According to survey results, the most serious problems against LBT women are domestic violence, threats, and stalking from anyone, be it a family member, a neighbour or ex-partner:

"However, they rarely apply to the police and go to a lawyer for assistance, when they are in a very difficult situation and everything went wrong. The reason for this is the fear that the victim can meet an acquaintance, a neighbourin the police. They donot fear police as much as meeting neighbours there" (Lawyer working on LBT women's issues).

At the stage of investigation of crimes committed against LBT persons, the main obstacle is the assertion of motive that this crime was in fact committed on the grounds of homophobia and transphobia. Therefore, alawyer working on LBT issues thinks that fewerproblems exist during court hearings; the main difficulty is that at the initial stage of investigation, the crime is not properly qualified:

"If they declare that they are the LBT community members, I can take a police officer to the place of accident myself. It is a bit difficult to record this fact as a motive, but you should assure them to dare. When a man calls you "gay" and beats you, this is already the ground of prosecution. No matter whether you are, or you are not gay. "He has beaten me because he thinks I am gay", says the victim. Millions of men came up and down, he did not beat them. This must be indicated as a motive. In order to realize this need they need to be trained" (Lawyer working on the issues of LBT persons).

III. Administrative law

Based on the results of focus-groups of the disabled and ethnic/religious minority women and individual interviews conducted with judges, police officers and legal aid lawyers, this chapter analyzes the main characteristics and challenges of administrative disputes with the participation of women.

In consideration of information provided by the judges and legal aid lawyers, we can conclude that women mainly file a lawsuit in court related to domestic violence and social issues. We studied labor disputes as well, but none of the interviewers mentioned gender discrimination practice in review of this type of cases.

Women with disabilities participating in the study mentioned that they applied to the Public Defender on the issue of discrimination arising during labor disputes, but they also noted a long period of consideration of the case by the Ombudsman's office (for example, one particular case lasted 9 months).

3.1. Labor relations

Employed women with disabilities pointed out that they suffer discrimination in their work place on genderand disability grounds. However, they are reluctant to defend their rights through the courts as it is believed that their employers rendered them a great assistance by hiring them:

"It turned out that during seven months I received less salary compared to disabled men" (disabled woman living in Tbilisi).

"Sometimes they treat me in the way that as a disabled person I will not be able to do some job, they have less expectations that I can do anything, they feel pity for me. I find it discriminatory when a person has a desire and ability to do something but he/she is not allowed to do so" (disabled woman living in Tbilisi).

Discrimination on the ground of disability, according to survey, most frequently occur during the pre-contractual relations; as soon as employers

learn that, for example, a person is blind, even if he/she can fulfill all duties required for that particular position they immediately refuse the applicant to take part in the competition.

3.2. Issuing restraining and protective orders

With regard to approving restraining and protective orders, the study showed that in most cases the police took into account the victim's refusal to issue the order or the statement of a family member on reconciliation and did not issue the appropriate order.

Some ethnic minority women stated that notifications to police about violence from witnesses and neighbors had stopped since it became mandatory to give testimony on the fact, because the notifier's family often faced threats from the offender. They think that it is necessary to make changes in this regard.

In this context, the attitude of ethnic minority women towards violence is problematic. Some of them finds common the fact of violence conducted by the husband, or avoids making notification about violence because nothing will be changed and women have nowhere to go. Their opinion was confirmed by the fact that often the police are insufficiently responsive to violence in ethnic minority regions:

"A woman addressed the police on the fact of violence; today her husband is in jail. She has been enduring violence for long time and now her husband is arrested because of her (ethnic minority woman living in Bolnisi).

"My neighbor's husband beats her every day. This woman calls the police, they arrive on place but do nothing; there are also minor children in the family (ethnic minority woman living in Akhalkalaki).

IV. Access to justice for minority women

Considering the meetings with focusgroups and individual interviews, the given chapter analyzes the issue of access to justice for LBT, the disabled and ethnic/religious minority women.

4.1. Adapted transport

When asked what are the barriers faced by disabled women to make the system of justice available, women with disabilities involved in the given study first of all emphasized the transport adaptation issue, which is a particular obstacle in regions:

"The main problem is that there is no adapted transport in Kutaisi. In Tbilisi, for example, there are adapted taxes. The company may not exist but it would be good if there are even private cars to call" (disabled woman living in Kutaisi).

4.2. Experience of legal action and encountered barriers

During meetings with the disabled and ethnic/religious minority women, only one case was revealed when a person applied to the court but due to the physical environment barriers she could not attend the hearing of her own case. Generally, as a rule, the disabled people try to avoid an appeal due to the obstacles inherent in court proceedings:

"I wanted to sue a doctor but I could not. First, I could not walk independently, I needed an attendant and nobody had time for me. You know, a disabled person would not be able to win the state. I wanted to file an appeal to Tbilisi court but I did not have enough money to go to the city. Hiring a car to take you to Tbilisi costs GEL150" (disabled woman living in Kutaisi).

"In the case of a disabled woman having hearing problem the court passed a decision so that the deaf interpreter had not been invited. She did not even know what she was accused for" (disabled woman living in Tbilisi).

4.3. Access to physical environment

Persons with disabilities participating in the survey stated that they often refuse to apply to the court to protect their rights because non-adapted physical environment represents an insurmountable barriers to them:

"My matters often went wrong and I have not gone to the court. I knew that I had to walk 16 steps in the building what I could not do. I was thinking about it and not my case" (disabled woman living in Tbilisi).

Unlike disabled persons, for judges,only ramps for people in wheelchairs are perceived as necessary for access to court buildings. Some judges could not even recall whether or not the court building they worked in had the ramps. Providing access to the physical environment and adapted toilets has not been considered anywhere, nor have the needs of blind persons and those having greatly reduced vision. They think that if a court official physically helps the disabled person at the entrance of the court building, this can be considered access to justice.

The following situation represents the existing practice in the judicial system: the court hearing is appointed on the first floor if the court administration receives notification from a disabled person about participation in the case to make it easier to enter the area independently. The only exception in this regard may be the building of Kutaisi City Court, where according to the lawyers of Legal Aid Service, it is impossible even to get into the first floor and receive the service from court registry:

"To enter the building of Kutaisi City Court for the disabled persons represents a serious challenge. To get even into the first floor, to file papersto the court registry, a person has to go upstairs. This problem is not resolved in any of the court buildings, where I use to work (including Kutaisi City Court, Samtredia and Tsageri District Courts and Khoni Magistrate Court). To leave the issue of adapted environment aside, there is no transport means to take this people to the building. Luckily, the court-marshals can help disabled persons, or maybe, some kind people show up at that moment…" (Legal aid lawyer).

Besides the court buildings, the problem of access to physical environment also exists with regard to the legal aid lawyers and police offices. However, their officials stated that they can solve the problem by providing in-home service:

"Conditions do not exist but I do not think that it would prevent the disabled person to go upstairs if he/she asks anyone for help. Or, in special occasions, we can visit a person at home – to provide consultations on place is also included in our duties" (Legal aid lawyer).

4.4. Appeal mechanisms in closed institutions

As a disabled women involved in the study stated, one of the biggest problem the disabled face is that in the closed institutions they are completely restricted from access to appeal mechanisms and to get the services of a lawyer:

"People with psycho-social needs, particularly those, who are placed in psychiatric facilities, or undergo involuntary treatment, do not have access to the appeal mechanisms. If you say that you want to file an appeal, you would not be allowed to do so; neither lawyer's assistance is available in these facilities as physically no one visits them to talk to. If you openly express such a desire, no one will help you to write a complaint and submit to appropriate body. Complaints box is installed outside but in fact, you cannot use it" (disabled woman living in Tbilisi).

4.5. Qualification of lawyers

Women with disabilities pointed out that lawyers usually are not aware of the needs of disabled people, and therefore it is very difficult to find a qualified lawyer. Their attitudes towards persons with mental health problems are particularly problematic. It can be said that the relationship between the client (disabled person) and the lawyer in fact cannot be established:

"Due to paternalistic position, "we know better about the needs of these people". They may even want to protect me but they do not know how to do it. They can neither speak to us. Someone stranger is sitting there and you

cannot understand what he says. This is their relationshipwith us(disabled women living in Tbilisi).

"This is a systemic problem. Prior to the trial the lawyer and the client do not talk about mental health problems. A persons does not even know who is his/her lawyer. The lawyer should talk to his client beforehand, he must have necessary skills to relate with and listen to them and have no fear of such relations; the lawyer should possess relevant information and conversation technique" (disabled woman living in Tbilisi).

The legal aid lawyers involved in the study also noted that it is very difficult to establish communication with disable people, and that it ultimately affects the quality of services provided by them:

"I am trying to communicate with this person and learn whether she needs my support except studying her documents, but I cannot. Once I got very angry with myself. We started talking, I was asking about her education but she was not responding. I face these barriers. I would never be able to communicate with persons having hearing problems" (legal aid lawyer).

4.6. Economic barriers

Problems of persons with disabilities related to their education and employment are conditioned by economic barriers that finally create major obstacles in terms of access to justice. Such economic barriers are: renting a car to get to the appropriate facility, hiring a lawyer, the amount required for attending court hearings:

"Economic opportunities also determine a lot of circumstances. You cannot say anything when you are depressed and dependent on others. And disability is added to all these problems" (disabled woman living in Kutaisi).

"It is very hard to find a lawyer for free. In most cases having no money becomes the main reason of every problem. Lack of financial resources prevents you to hire a paid lawyer. You can neither prepare the application" (disabled woman living in Tbilisi).

Ethnic minority women also talked about economic barriers in terms of access to justice. Because of this they often refrain from taking legal action; in most cases, they cannot afford to hire a lawyer, which represents an obstacle to the administrative and civil disputes resolution processes:

"Most of women do not apply to the court because these procedures are related to certain costs" (ethnic minority woman from Akhalkalaki).

"I know the history, when the couple divorced, the husband took children and did not allow his wife to see them. The wife decided to return the children, but could not apply to the court as she did not have enough money" (ethnic minority woman living in Akhalkalaki).

Based on information provided by a lawyer for LBT women who participated in the survey, economic problems often become obstacles to LBT women applying to court. This is caused by the fact that most of them do not have jobs. This problem is particularly serious in the case of transgender women:

"Our organization can cover litigation fees. But if thousand people applies, we would not be able to pay for everyone. We can cover the costs of about 20 people. Most of them do not have even 100 GEL and therefore, do not address the court (lawyer working on LBT women issues).

4.7. Access to legislative acts

According to women with visual problems participating in the study, they have no access to legislative acts, which excludes the possibility of receiving without help any information related to the right of persons with disabilities and the mechanisms for appeal:

"Basically, the most reliable and up to date information is published on the website of "Legislative Herald", which is absolutely inaccessible. You can visit the website and find some information, but then you have to read the law from the beginning to the end; you cannot move to another page, as the sound program does not work in the format, in which the law is published. Sometimes, the text may consist of 100 pages. When you read it to the end, you forget what was written above" (disabled woman living in Tbilisi).

Legal instruments are inaccessible for ethnic minority women we well, because they receive basic information mainly in their native (Armenian or

Azerbaijan) languages; Most of the legislative acts, with minor exceptions, are only in Georgian.

It is a positive practice that, upon request,court decisions are sent to ethnic minority representatives in their native language. However, without assistance of a lawyer or Georgian language speaking helper, they cannot familiarize themselves with case materials.

4.8. Language barrier

All parties participating in the survey confirmed that translation services are provided for people at every stage of legal proceedings, as well as in communications with the police and Legal Aid Service lawyers. The problem arises at civil lawsuits, because the legal aid lawyer can only prepare the suit and not represent a person in court. The problem is the low qualification of interpreters, which was noticed by ethnic minority representatives and alsojudges.

Due to the language barrier, as the respondents stated, women representatives of ethnic minorities often refrain from applying to the court in order to protect their rights:

"However, in particular women cannot fully benefit from judicial services. The only reason is the problem of language proficiency. For this reason they may refrain from bringing a lawsuit or other action to the court. But if someone addresses us with proper request, their needs will be satisfied because the court provides access to full jurisprudence for everyone" (Judge).

SUMMARY

According to survey results, the following barriers for disabled women in terms of access to justice were identified: ignoring their interests in transport and street infrastructure, non-adapted police and court buildings, lack of information about their rights and complaint mechanisms, insufficient means for covering court costs, inaccessibility to legislative instruments, and lack of mechanisms of appeal for women with mental illnesses in closed facilities.

The lack of information about their rights, language and economic barriers were identified in relation to ethnic/religious minority women as impeding the access to justice of these people.

LBT women named the basic problem occurring during the investigation of crimes motivated by homophobia and transphobia to be the crime qualification issue.

Among obstacles existing in civil proceedings, it should be distinguished that there is no unified approach with respect to determination of alimony and a child's residence place, which often becomes a reason for a non-uniform practice. Since the division of joint property is performed based on only the evaluation of presented evidence (which, as a rule, is related to big challenges), women and their children are often left without living places.

Following the examination of materials regarding gender-based crimes, the main problem can be stated as follows: there is no specific article in the Code that makes gender-based motives as an aggravating circumstance in crimes committed against life. There is also no uniform attitude towards the practice of qualifying the crime of "rape", which completely neglects the feminist approaches and principles of international standards referred to in the given research.

The administrative law survey showed that in the case of disabled women, their discrimination was clearly detected in labor relations, in particular, at the pre-contractual stage. It was also a problem that police often inappropriately responded to the facts of violence.

Conclusion

According to the survey results, barriers in the field of access to justice for women is mostly due to the fact that the specific circumstances of women are frequently ignored by the specialists involved in the system.

The system does not provide for special approaches and guidelines to more effectively conduct the investigation and criminal prosecution of gender-based crimes. In this regards, the lack of special legislative regulation often represents an impediment. The recommendation of the Prosecutor's Office of Georgia regarding the investigation of gender-based crimes should be evaluated positively.

In practice, the Georgian justice system fully excludes the consideration of women's economic conditions in disputes resolution; at the same time, lawyers and women indicate this particular issue as one of the main obstacles in terms of applying to the court.

Judges involved in the study consider that the main problem in civil disputes resolution is the ambiguity and vagueness of substantive and procedural norms, which in turn causes difficulty in disputes related to determining the amount of alimony and child's place of residence, as well as the absence of a consistent practice.

All judges and Legal Aid Service lawyers participating in the study verified a particular need to provide additional qualifications on issues related to women and persons with disabilities.

APPENDICES

Appendix #1 - Description of gender discrimination cases discussed by the Public Defender

Case #1. General proposal addressed to the JSC „Bank of Georgia"[1]

The Public Defender was addressed by the head of non-government organization "Safari" regarding the commercial advertisement of the Bank of Georgia, containing gender stereotypes that was published on the Facebook official page of the Bank. The Public Defender had not established the fact of discrimination on this case, but considered that sexist nature of the advert could have a negative impact on gender equality and support dissemination of wrongful stereotypes. Based on the given complaint the Public Defender issued a general proposal and called on the Bank to avoid creation and dissemination of advertisements of discriminatory content in the future. The general proposal issued on December 9, 2014 was sent to JSC Bank of Georgia, however the company has not informed the Public Defender of the measures taken in accordance with the proposal, has ignored two written appeals and has not deleted the sexist image from its official page on Facebook.

Case #2. General proposal addressed to "Jobs.ge"[2]

On December 9, 2014 the Public Defender was addressed by an Executive Director of non-governmental organization "The article 42 of the Constitution". The applicant alleged that Ltd "**Jobs.ge**" used in its search system gender-based discriminatory terms and phrases. The Public Defender considered that since the mentioned site did not make filtering of vacancy announcements that contain discriminatory wording, thus it encouraged employers to disseminate human rights abusing text and in this way, to conduct discrimination on the initial stage of employment. The Public Defender addressed Ltd **"Jobs.ge"** with the general proposal to elaborate such regulations that would

1. General proposal, see link: http://ombudsman.ge/uploads/other/2/2164.pdf
2. General proposal, see link: http://ombudsman.ge/uploads/other/2/2501.pdf

eradicate the practice of publication of discriminatory vacancy announcements on the webpage. The Public Defender expressed its readiness to assist **"Jobs.ge**" in the development of relevant document. However, in response to the general proposal the Ltd has not notified the Public Defender of measures taken by the company, while the publication of similar announcements on the webpage still continues.

Case #3. 1004//15

On December 26, 2014 the vacancy announcement of a private bank was published on the internet website **www.jobs.ge**, where based on job specifics, the priority was given to male applicants. The Public Defender on his own initiative started the case study and requested information from the bank. The latter explained that the given wording of the vacancy announcement was a technical problem and they changed the wording after they had received the third party opinion. After studying the circumstances of the case the Public Defender came to the conclusion that the respondent bank in the given job announcement eliminated details of the alleged discrimination and therefore closed a case.

Case #4. Discrimination in labor relationship in private company[3]

On May 18, 2016 the Public Defender addressed the Ltd microfinance organization "Credo" with a recommendation to eliminate discrimination on grounds of pregnancy in labor relations.

On June 20, 2016 the Public Defender received an answer in writing from the Ltd microfinance organization "Credo" that based on the recommendation of the Public Defender the applicant was reinstated in her job and open-end labor contract was signed with her on the position of the loan officer. Applicant A.A. will start performance of her obligations after maternity leave. Besides, the applicant will be fully reimbursed medical treatment costs and idle working ti

3. Recommendation, see link: http://ombudsman.ge/uploads/other/3/3680.pdf

me. In addition, following the order of the Director of Ltd "Credo", the applicant's warning in writing was revoked.

Case #5. Fact of discrimination on the grounds of gender, age and family status committed by Ltd "Elite-service"[4]

On August 3, 2015 an Executive Director of non-governmental organization "The Article 42 of the Constitution" addressed the Public Defender regarding vacancy announcement of Ltd "Elite-service" published on the website "Jobs.ge". The announcement included the words: "single" girl, "absolutely free of complexes (uninhibited), between 16 to 25 years of age".

As a founder of Ltd "Elite-service" explained, the main activity of the company is repair of computers and therefore, he could not imagine a man as a secretary. As to the age related requirements, he interpreted that "the candidate will be properly trained in her job specifics for half a year that would be also useful for the young people in the future. For elderly people, on one hand, it is difficult to perceive what they are taught and on the other hand, they cannot use their knowledge in the future. As regards the family status, due to the respondent, "once they took a married women into service, but she was unable to perform the required work as her family members often called her and she could not concentrate on her work. In addition, employees often have to stay in the office until late. The married girl would not be able to stay because her husband would not allow her to do so. Employees also often have to go to Batumi on a business trip, but that would be a problem for the married woman and her husband would not allow her to go to Batumi together with her chief".

The Public Defender established the fact of direct discrimination on the case and addressed Ltd "Elite-service" with a recommendation, but there was no information received from the private company by July 2016.

4. Recommendation, see link: http://ombudsman.ge/uploads/other/3/3433.pdf

Appendix #2

European Court of Human Rights, case Cudak v. Lithuania[5]

Judgment of the Grand Chamber of the European Court of Human Rights concerns the sexual harassment case of Lithuanian applicant. She worked as an assistant and operator at the Polish Embassy in Vilnius. In 1999 she complained to the Ombudsperson of Lithuania of sexual harassment by a male colleague, who had diplomat's status of the Embassy. Although the ombudsperson established the fact of sexual harassment towards the applicant and deemed Cudak a victim, the Embassy dismissed her from office. As the applicant claimed she had been subjected to harassment and pressure because of which she felt ill and took the medical treatment sheet from the hospital for the period of September 29 to October 1, 1999. When Cudak came to the Embassy on October 29, she was not allowed to enter the building. Her attempts to return to her job failed the next two days. On November 29, 1999 she wrote a letter to the Ambassador and informed about the incident. On December 2, 1999 the applicant was notified that she was dismissed from the office on the grounds of unauthorized absence from work in the period of 22-29 November. Cudak filed a civil lawsuit to the court requesting compensation for unlawful dismissal. She did not require reinstating in the job. According to the **note verbale** of the Foreign Minister of Poland, the Embassy employer enjoyed State immunity from the jurisdiction of the Lithuanian courts. On August 2, 2000 Vilnius Regional Court dismissed the case based on declining jurisprudence to try an action. On April 14, 2000 the Court of Appeal upheld the decision about termination of proceedings; on June 25, 2001 the Supreme Court took a final decision and upheld the same ruling. The Supreme Court examined **inter alia** that the Agreement of 1993 concluded between Lithuania and Poland on mutual aid did not regulate the issue of immunity, while Lithuania had not passed the law regulating immunity issue at the moment of considering the case. The national law regarding mentioned issue was being developed. Accordingly, the Supreme Court considered the appeal pursuant to the general principles of International Law, in compliance with the European Convention on State Immunity of 1972. In particular, the Supreme Court argued that state immunity should apply to the public law and not the private law relations. As the applicant had exercised a public service functions during her employment at the Embassy, the Court justified the application of the state immunity rule.

In Government's opinion, the applicant could (both theoretically and practically) file a case to the Polish courts and complain about illegal termination of her contract. However, the European Court of Human Rights interpreted that the possibility to file a case to the Polish courts by the applicant was not real and Cudak was restricted the right of access to court. Accordingly, the Government's position regarding the applicant having a remedy to apply to the Polish courts, given the circumstances, should not be considered an effective legal remedy.

The Grand Chamber of the European Court of Human Rights has found that in the given case there was a violation of Article 6 (1) of the European Convention of Human Rights, which means that Cudak was restricted her right to access to court. Lithuania was imposed EUR 10,000 to pay the applicant.

5. ECtHR, #15869/03, 23.03. 2010.