

The paper is dedicated to one of the founders of modern Georgian civil law and the first leader of development of comparativistics Professor Tedo Ninidze by whose impressive lectures, saturated with maxims of law, a new generation of lawyers is continuously being nourished.

Will and Manifestation of the Will

(Meta-legal and Civil Comprehension)

A human is a rational being, which is expressed in his/her "I". Only a human is able to understand own self, self-consciousness, by which a human is distinguished from other living beings. The substance of the mind is liberty. Antic people lacked the real comprehension of liberty, as they were connecting the existence of liberty with certain social criteria and not with the humanness itself. According to the Christian doctrine an individual himself/herself has infinite values, as a being created by God, who is able to make the creator live in himself/herself. Real liberty does not mean the isolation of the individual from society, as a human is a social being, revealing his/her own self in relation to the others. The human's liberty is manifested in the liberty of his/her will. The will defines the individual's interests, realization of which is carried out by the individual's right. Besides the existence the liberty of the will means demonstration of the will too, a legal instrument of which is transaction among private living relations. An issue concerning which component defines the essence of the transaction: the will, characterizing an individual internally or its expression, becoming perceivable for the addressee, is establishing different theories in civilities. In defining transaction modern private law does not grant the priority to either of them and it is deemed that considering all the circumstances it is possible to provide interests of private autonomy or turnover.

Key Words: *human – free mind, self-consciousness, liberty – substance of the mind, human- a social being, balancing of mine and others' liberties, interrelation between the will, interest and right, transaction – legally suitable manifestation of the will, theories of expressing subjective and objective will, stability of private autonomy and turnover.*

Free mind is a real mind.

Hegel.

Human – Being Here and Free Mind

“Mind, as the truth of nature, can be created”.¹ The first-rate definition of the mind is that it is “I” and each of us is “I”. A human itself is continuous creativeness, which is the only feature of its perfectibility.² Cogitation is the first among those characteristics, by which a human differs from nature. Although a human includes the whole inner essence of nature in its own self, but in mind natural definitions are represented by a different rule compared with the outer nature.³

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¹ *Hegel, Philosophy of Mind, translation by N. Natadze, under the editorship of N. Chavchavadze, T. Buachidze, G. Tsintsadze, Tbilisi, 1984, 46.*

² *Kashia J., Liberty and Federalism (Political culturology), Tbilisi, 2013, 77.*

³ *Hegel, Philosophy of Mind, translation by N. Natadze, under the editorship of N. Chavchavadze, T. Buachidze, G. Tsintsadze, Tbilisi, 1984, 30.*

Philosophy interprets the mind as an inevitable development of an eternal idea and the whole evolution of the mind is its self-rising up to its truth.⁴ An individual is a result of the way, the knowledge of which is impossible and it is cognizable as much as it is given and with it informs something.⁵ Only a human is able to be risen from sensory consciousness to generalization of the thought, knowledge of own self. Each action of the mind is understanding of own self, self consciousness, not only individual's abilities, intentions, character, but perception of the mind, as a being itself in a human.⁶

The substance of the mind is liberty (liberty is the own existence of the mind) or being independently. Liberty has quality of being the first source and not a result, because it is a metaphysical category.⁷ There is no other concept (idea), which would have more distinguished meaning and would influence variously on the mind, than "liberty" (*Montesquieu*). In the mind there is unity of a concept and objectivity, which at the same time stipulates its truth and liberty. They have a quality of originating each other, namely the truth makes the mind free and liberty makes it true.⁸

So a human, as a rational being, is authorized to have liberty, a human comprises free mind in himself.⁹ Antique people did not have a concept of absolute liberty; in their opinion liberty had a feature of naturality, because they connected liberty with human's background, citizenship and education. They failed to cognize a human as a free being, only with his humaneness. The idea of liberty is connected with Christianity, according to which an individual himself has infinite values, as he is a subject of God's love and a human's aim is to have the absolute relation to God as to the mind and make the mind live in himself.¹⁰ To decline the liberty is the same as to decline the own human dignity, human right (A human is as much a human, as much he is a possessor, expressing these rights),¹¹ which is incompatible with human nature¹² and there is nothing to be able to compensate the results of this decline.¹³ This desire of liberty is no longer striving, which must be satisfied, it is already character independent from striving, transformed into existence, reasoning perception.¹⁴

2. Relativity of Liberty – Inevitable Choice of a Self-Conscious Individual

Despite of being-for-itself a human is with "other", i.e. "self" liberty is conditioned or it has a relative nature.¹⁵ A human cannot decline communications, it avoids loneliness and is trying to find society,¹⁶ human's humanity is revealed just in its sociality.¹⁷ An individual is certainly free, when the "other" is also free

⁴ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze*, *T. Buachidze*, *G. Tsintsadze*, Tbilisi, 1984, 20.

⁵ *Mamardashvili M.*, Talks about Philosophy, Tbilisi, 1992, 114.

⁶ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze*, *T. Buachidze*, *G. Tsintsadze*, Tbilisi, 1984, 15. A human cognizes not only the outer world, but his own self, so being as a human in some sense means being as a philosopher. *Buachidze T.*, Opinion is referred: *Nachkepia G.*, Practical Recommendations in a General Part of the Criminal Code of Georgia, Tbilisi, 2015, 66.

⁷ *Kashia J.*, Liberty and Federalism (Political culturology), Tbilisi, 2013, 43.

⁸ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze*, *T. Buachidze*, *G. Tsintsadze*, Tbilisi, 1984, 31.

⁹ *Ibid*, 21.

¹⁰ *Ibid*, 332.

¹¹ *Kashia J.*, Liberty and Federalism (Political culturology), Tbilisi, 2013, 226.

¹² The idea of human's rights comes from the idea of the natural rights, which is historically the inheritance of classical and Christian thinking - *Jean-Jacques Rousseau*. The idea is referred: *Kashia J.*, Liberty and Federalism, Tbilisi, 2013, 217.

¹³ *Jean-Jacques Rousseau*, Social Contract, Translated from French and added notes by *D. Labuchidze-Khoperia*, Tbilisi, 1997, 16.

¹⁴ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze*, *T. Buachidze*, *G. Tsintsadze*, Tbilisi, 1984, 282.

¹⁵ *Ibid*, 45.

¹⁶ *Valdenfels*, Responsive Phenomenology of the Alien, translation from French by *D. Labuchidze*, Tbilisi, 2013, 30.

¹⁷ *Kashia J.*, Liberty and Federalism (Political culturology), Tbilisi, 2013, 54.

and is recognized as such by the individual. A reasoning individual must neither dominate the own naturality nor endure the naturality of the “other”.¹⁸ Only in such a case social liberty can be reached, which means the conformity of “my” liberty with others’ liberty in order to accomplish a general goal – creation of the civilized and free society.¹⁹

A human considers the existence of the divine mind now and here as kind of social institutes existed in this world.²⁰ According to the doctrine about natural law²¹ individuals’ natural state is free and equal, where liberty means absolute liberty of each one, “Here each one is a king equally” (*John Lock*), excluding self-will.²² Contrary to the natural liberty, where a human recognizes a law of nature as the principle of action, but in socium it obeys the authority established by social contract.²³ The state of absolute liberty of a human, when confined only by a natural factor, is really willfulness, which is an antipode to liberty²⁴. So the idea of absolute liberty is abolishing liberty.²⁵

The existence of the state and society does not mean confining of liberty, the existence of the right is only connected with self-definition, which will be excluded in the condition of the natural liberty, where violence and injustice exist. A human is really free only in an organized society, in conditions of the developed law and order, the base of which are legal beginnings by nature to such extent that in realization of them “my” liberty does not encroach liberty and legal interests of the “other”.²⁶ “My” interest does not confront the interest of the “other” and by balancing interests an environment of their peaceful coexistence is created.²⁷ Thus the concurrence of personal liberty with the state life is a way to reach the absolute harmony (*Hegel*).²⁸

3. Will Liberty as Precondition of Human’s Self-Determination

The inner world of a human is a unity of consciousness, reasonableness and will (*blissful Augustine*). In the structure of a human’s consciousness first of all is meant intellect, by which man understands the circumstance, where he is, then comes feeling or an emotional side of consciousness, because apart from the intellectual process in the consciousness structure emotional and volitional processes are also participating.²⁹ Will is an inner endeavour to carry out this or that action, capability – the means of embodiment of inner forces, regulation of own behavior reasonably, it is a means of overcoming of external and internal

¹⁸ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze, T. Buachidze, G. Tsintsadze*, Tbilisi, 1984, 208-209.

¹⁹ *Kashia J.*, Liberty and Federalism (Political culturology), Tbilisi, 2013, 103.

²⁰ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze, T. Buachidze, G. Tsintsadze*, Tbilisi, 1984.

²¹ Natural law means the unity of principles of supreme, universal, eternal law, which exists independently and is an estimation criterion of positive law. *Vacheishvili Al.*, General Theory of Law, Tbilisi, 2010, 32.

²² *Patarai D.*, John Lock – Two Tractates on Administration, dedicated to emeritus *Mzia Lekveishvili*, edited by *M. Ivanidze*, Tbilisi, 2014, 489-490.

²³ *Patarai D.*, John Lock – Two Tractates on Administration, dedicated to emeritus *Mzia Lekveishvili*, edited by *M. Ivanidze*, Tbilisi, 2014, 506-507.

²⁴ *Fatianov A.A.*, Will as a Legal Category, Journal “State and Law”, №4, 2008, 7-8.

²⁵ *Nachkepia G.*, Practical Recommendations in General Part of the Criminal Code of Georgia, Tbilisi, 2015, 74.

²⁶ *Fatianov A.A.*, Will as a Legal Category, Journal “State and Law”, №4, 2008, 7-8.

²⁷ *Zoidze B.*, Attempt of Cognition of Practical Existence of Law (mostly from the point of view of human rights), Assays, Tbilisi, 2013, 116.

²⁸ Consideration is referred: *Baev V.G.*, “Idea of State” according to *Kant* and *Hegel*: Systems of Philosophy and State Practice in Germany of the beginning of the XIX century, Journal “Law and State”, №7, 2005, 16.

²⁹ *Chavchavadze N.*, Esthetics Matters, Vol. I, Tbilisi, 2007, 27; Referred: *Nachkepia G.*, Practical Recommendations in General Part of the Criminal Code of Georgia, Tbilisi, 2015, 2015, 41.

difficulties. In psychology the will is interpreted as a free choice, taking decision in the process of choosing is estimated as a free act, in the process of choosing taking decision is estimated as a free act, a will activity.³⁰

The dependence of the wish capability on the sensation is called tendency and it points out the demand, but the dependence of the randomly definable will on mental principles is interest.³¹ Human's action is conditioned by material and ideal interests, which is at the same time the right creating force (*Weber*). The will is a means of satisfaction of interest, but the purpose of the right is provision of interest.³² The will and the interest belong to the individual psychics, but combination of the interest and the will gives the right.³³ Nothing can be created without interest; the activity for reaching the purpose exists because an individual by virtue of interest is involved even in the most unselfish and unprofitable for him acts.³⁴

Mind, which knows its own self as to be free, is a mental will. The will itself is an independent thinker and free.³⁵ Liberty of the will means self-determination of a person in his/her actions. Autonomy of the will is the right, which must provide each one's liberty and inviolability of others by recognition them as equal members of a free society (*Habermas*).³⁶ Liberty of the will is an absolute, eternal and the oldest right, which turns man into human. At the same time the will is original and independent. It can't be created. "If the whole world teaches, compels man, tries to inspire, there will be no result, the will either is or is not. In Georgian under the word "will" there is meant willpower, as well as liberty and desire. Restraint of the own will liberty by man means taking the moral ground for his/her own action."³⁷

Besides this the will must not be egoistic in spite of the fact that subjectivity is the essential feature of the will.³⁸ Subjective will is a unit; a unit will is self-will. But certain liberty, as morality, exists when the purpose of the will has not an egoistic, but general content, which is only in thinking.³⁹ Only objective certitude-truth corresponds to the certain liberty of the will.⁴⁰

An individual might have a private will, different from the common will and opposing to it,⁴¹ but liberty does not mean doing whatever you like, it means a right to fulfill your duty (liberty is a form expressing the existence of a human being);⁴² if liberty does not recognize a law created in relation to man and does not listen to the voice of conscience, then it is confronting the society.⁴³ The final purpose of the world, a duty of the subject is to foresee kindness, to make it as own intention and carry out it by his actions.⁴⁴ A good will is deemed to be a law of human's life; it has a universal character and is free from egoistic intentions. The absolute purpose of a human's action is conformation of the idea of liberty to the spiritual life, it is

³⁰ *Fatianov A.A.*, Will as a Legal Category, Journal "State and Law", №4, 2008, 6.

³¹ *Kant I.*, Groundwork for the Metaphysics of Morals", translated by *Ramishvili L.*, edited by *Natadze N.*, Tbilisi, 2013, 121.

³² *Kuzmina A.V.*, Typology of Legal Interests, Journal of Russian Law, №3, 2011, 51.

³³ *Vacheishvili Al.*, General Theory of Law, Tbilisi, 2010, 9.

³⁴ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze, T. Buachidze, G. Tsintsadze*, Tbilisi, 1984, 278.

³⁵ *Ibid*, 26.

³⁶ Thought is referred: *Kniper R.*, Law and History, Baden-Baden, Almaty, 2005, 15.

³⁷ *Mamardashvili M.*, Talks about Philosophy, Tbilisi, 1992, 121.

³⁸ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze, T. Buachidze, G. Tsintsadze*, Tbilisi, 1984, 292.

³⁹ *Ibid*, 270.

⁴⁰ *Ibid*, 189.

⁴¹ *Jean-Jacques Rousseau*, Social Contract, Translated from French and added notes by *D. Labuchidze-Khoperia*, Tbilisi, 1997, 24.

⁴² *Kashia J.*, Liberty and Federalism (Political culturology), Tbilisi, 2013, 326.

⁴³ *Roman Pontiff Paul II*, the thought is referred: *Gamkrelidze T.*, A Scientist and Public Figure, newspaper "Tbilisi University", the insertion prepared by *N. Kakulia*, 23.04, 2015.

⁴⁴ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze, T. Buachidze, G. Tsintsadze*, Tbilisi, 1984, 294.

necessary for the will of a separate man to acquire the universal significance in social life. The main purpose and the highest leading idea of social life is the existence of the union of peace-desiring humans, by means of which each individual's private purpose defines objectively right purposes of others (*Shtamler*).⁴⁵

When these or those people reach a cultural level of apprehension of liberty, they don't need any more the support by laws. If at the lowest stage of the development of public life there is willfulness, at the middle stage – control and compulsion, at the highest stage there is already the real liberty (*Iering*).⁴⁶ This is just the reasonable liberty, which by the European opinion is called liberty. At this stage man has ability of distinguishing good and bad from each other. Moral and religious determinations are obligatory for him not as outward laws and rules, but they are recognized by a human's heart and striving.⁴⁷

4. Transaction - Manifestation of the Legally Worth Will

4.1. About the Concept

The will is an inner psychical moment, which is unachievable for others; so it is necessary to reveal, manifest it or to express the willpower in certain forms, so that an addressee of the will manifestation will be able to perceive it.⁴⁸ According to Hegel the will demonstrated by an individual is expression of real liberty,⁴⁹ liberty of man's actions is realized in demonstration of the private will (*Medicus*).⁵⁰

According to the contemporary European private law the concept of transaction is connected with the demonstration of the person's or persons' will.⁵¹ In addition to it the quality of the demonstration of the will is crucial; transaction is only created by a volitional act carried out with the purpose of achieving a legal result,⁵² so transaction does not cover all types of manifestation of the will, but it is only such manifestation, which has legal nature, the purpose of reaching a legal result: A transaction is a unilateral, bilateral or multilateral declaration of intent aimed at creating, changing or terminating legal relations (Article 50 of Civil Code of Georgia). Accordingly in juridical language the demonstration of the will aimed only at the factual result is not deemed to be the manifestation of the will.⁵³ Transaction is a free, lawful act of will, resulted from consciousness, by which it is distinguished from other juridical facts, which are creating legal relations, such as accidental circumstance and delict (not conforming to law, lawless action).⁵⁴

⁴⁵ The thought is referred: *Vacheishvili Al.*, General Theory of Law, Tbilisi, 2010, 42.

⁴⁶ The thought is referred: *Kniper R.*, Law and History, Baden-Baden, Almaty, 2005, 72.

⁴⁷ *Hegel*, Philosophy of Mind, translation by *N. Natadze*, under the editorship of *N. Chavchavadze, T. Buachidze, G. Tsintsadze*, Tbilisi, 1984.

⁴⁸ *Surguladze I.*, Administrative Law, Tbilisi, 2003, 100.

⁴⁹ The thought is referred: *Kniper R.*, Law and History, Baden-Baden, Almaty, 2005, 129.

⁵⁰ *Ibid*, 63.

⁵¹ Juridical will is based on a legal model, created from legal rules existed beyond a person, transformation of a person into a legal subject is moving the will toward the juridical model. *Marten R.*, Person and Subject of Law, translated by *Sumbatashvili E.*, edited by *Ninidze T.*, Jubilee Volume Dedicated to the 70th Anniversary of Professor *Roman Shengelia*, "Law Problems", edited by *Chanturia L., Shengelia E.*, 2012, 174.

⁵² *Chanturia L.*, Introduction to General Part of the Georgian Civil Code, Tbilisi, 1997, 331.

⁵³ *Ennektserus L.*, Course of German Civil Law, Vol. I, M., 1949, 109, by such action a legal result is often recognized, but the result only depends on actions and not on the will of the parties. In such case a legal effect is obtained independently from the will of the parties, only by the virtue of law (e.g. warning, setting an additional term, real action). *Kropholler I.*, The German Civil Code, Teaching Commentary, translators: *Darjanian T., Chechelashvili Z.*, edited by *Chahchanidze, Darjanian T. Totladze L.*, Tbilisi, 2013, 29.

⁵⁴ See *Chanturia L.*, General Part of the Georgian Civil Code, Tbilisi, 2011, 296-297; *Zoidze B.*, Commentary of the Georgian Civil Code, Rule 1 (*Jorbenadze S., Akhvlediani Z., Zoidze B., Ninidze T., Chanturia L.*), edited by *Chanturia L.*, Tbilisi, 1999, 168.

If a person's will is not expressed, proving of the existence of transaction is lacking legal grounds,⁵⁵ as a legal act always represents the demonstration of the will.⁵⁶ Concept is an instrument of cognition, by means of which the essence of things and events are ascertained; their conformity with a law is explained. It should be noted that in Roman law there was no equivalent term to transaction; Roman law officials were using the concept "Negotia", which in broad meaning meant any action having factual quality.⁵⁷ The concept of transaction was worked out by German pandects and in original language is called "legal matter". According to the explanation of Flume in human action there is one group, which is called legal actions or legal matters; in this group there is meant permitted human actions, the subject of which is bilateral rights and obligations.⁵⁸ Besides transaction in broad meaning is not the demonstration of the will, in such a case demonstration of the will is one of the components alongside with the other components of transaction (for example, form observance, agreement of an administrative authority).⁵⁹

4.2 Will or Demonstration of the Will: Discussion about a Determining Element of Transaction

A transaction idea is created in the mind of an acting person and is expressed by means of a proper declaration. Before this moment it might experience some change and therefore it has not a juridical significance. There are distinguished two types of the will: transaction will or the will, directed to perform that picture of transaction, which was created in the person's mind and the declared will, by means of which the inner will finds its outer expression,⁶⁰ from a subjective state goes to an objective state⁶¹ and achieves its aim. Only outwardly expressed acts of the will belong to a sphere of law; so the will must be not only existed, but it must be shown. The inner will must be got to the other person by that means, by which it gets to know other persons, or by demonstration of the will. So in order to get a legal meaning it is necessary for the will to take a definite outer expression, without which the person's will can't be perceived and will not be subjected to the estimation from the point of view of legal norms,⁶² it is inadmissible to connect legal results with the unexpressed will, as the will existed in consciousness is not subjected to a field of law.⁶³

So the transaction has a subjective (the will) and an objective (declaration of the will) sides.⁶⁴ According to the common opinion existed in law science in the first half of the XIX century the essential in transaction was the will: where there is no will, there is no transaction, from it "a theory of the will" or "subjective theory" is originated. According to the latter a subject's will is important and not its outer expression, which might not conform to the inner will (*Savin, Tsitelman*).⁶⁵ The inner will is directed to cause

⁵⁵ Schwab/Lohing, *Einführung in das Zivilrecht*, 2010, 187, Rn.408. Referred: *Tsertsvadze G.*, *Contract Law*, authors: *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, edited by *Jugeli G.*, Tbilisi, 2014, 59.

⁵⁶ *Surguladze I.*, *State*, *Journal "Law"*, №9-10, 1991, 24.

⁵⁷ *Dernburg H.*, *Pandects*, Vol. I, translated by *Japaridze K.*, Tbilisi, 2014, 230.

⁵⁸ Referred: *Chanturia L.*, *Introduction to the General Part of the Georgian Civil Law*, Tbilisi, 1997, 308; in old Georgian the term "bargain" did not mean only civil legal fact, but it meant actions of different significance: stating something, taking decision, defining, setting something and others. *Zoidze B.*, *Commentary to the Georgian Civil Code, Rule 1 (Jorbenadze S., Akhvlediani Z., Zoidze B., Nimidze T., Chanturia L.)*, edited by *Chanturia L.*, Tbilisi, 1999, 165.

⁵⁹ *Explanatory Juridical Dictionary*, authors: *Totlade L., Gabrichidze G. Tumanishvili G, Turava P., Chachanidze E.*, edited by *Khubua G., Totlade L.*, Tbilisi, 2014, 109.

⁶⁰ *Dernburg H.*, *Pandects*, Vol. I, translated by *Japaridze K.*, Tbilisi, 2014, 241.

⁶¹ *Shershenevich G. F.*, *Textbook of Russian Civil Law*, the 7th ed., M., 1909, 190.

⁶² *Krasavchikov O.A.*, *Soviet Civil Law*, M., 1973, 176.

⁶³ *Meier D.I.*, *Russian Civil Law*, the 5th ed., M., 1873, 116.

⁶⁴ *Vacheishvili Al.*, *General Theory of Law*, Tbilisi, 2010, 203.

⁶⁵ Referred: *Pepanashvili N.*, *Commentary to the Georgian Civil Law, Rule 1*, Tbilisi, 2014, 307.

a definite juridical result, which is obtained just because it was desired, the inner will was directed to it.⁶⁶ The main governing regulation of the theory of the will is the following: the declaration without the will has the same meaning as the will without the declaration. Transaction is not given, if demonstration of the will does not correspond to the inner will and when the will is cognizable and it is possible to state its real content, meaning, then the priority must be given just to the will.⁶⁷ The opinion, that only a real and freely expressed will has a restraining force, is based on the autonomy principle of the will, according to which on a person cannot be imposed the obligation, to arising of which his will was not directed.⁶⁸

On the contrary the theory of “expressing the will” (“reliance theory”) is oriented on the external manifestation of the will; it is deemed that transaction does not exist without it. Important for transaction is not the inner state of the will, but its outer expression (*Koller*).⁶⁹ The will, as an invisible phenomenon, the inner side of transaction, needs manifestation; the inner, outwardly unexpressed state cannot give a legal result. The will gets a legal meaning only as a result of external action.⁷⁰ From the demand of the stability of civil turnover for law and order the existence of the inner will (the inner manifestation of the will) might be essential, if it is within the scope of usual legal meaning, which is given by a reasonable man to the manifestation of his will.⁷¹

So manifestation of the will is a main part of transaction, it is an act of the outwardly perceivable will, directed to a legal result sanctioned by law and order.⁷² Here decisive is not an inner will, being a base of transaction, but a form of expressing the will, which is understandable for an average participant of civil turnover.⁷³ If an individual says that he/she wants, it is supposed that he/she really wants, unless something opposite comes from the objectively perceivable circumstance (*Windshide*).⁷⁴ In such a case confidence is accentuated: if the will is manifested, a person’s proving about non-existence of such will is not taken into consideration, if the outwardly expressed will causes conscientious assurance of the other party of getting rights.⁷⁵ The theory of expressing the will provides protection of contractor’s interests, because everybody must trust to the demonstrated will, perceive it as a serious and real will; a person carries a risk of demonstration, if the will demonstrated by him/her differs from the true will.⁷⁶

4.3. Importance of the Constitutional Element of Transaction in Explanation of the Will Demonstration

Giving priority to the will or expressing the will acquires importance in explaining the demonstration of the will. In order to achieve a result the declared will must conform to the imagination of the declaring person, word and action must overlap each other.

⁶⁶ *Dornberger G., Kleine G., Klinger G.*, Civil Law of the German Democratic Republic, M., 1957, 315.

⁶⁷ *Pokrovski I.A.*, Main Problems of Civil Law, M., 1998, 246.

⁶⁸ *Kotz/Flessner*, Europaisches vertragsrecht, 164, Band I, 1996. Referred: *Vashakidze G.* Theoretical Aspects of the Explanatory of Contracts and the Importance of Objective Interpretation in Stating the Parties’ Will, Journal “Justice and Law”, №1, 2007, 30.

⁶⁹ Referred: *Pepanashvili N.*, Commentary to the Georgian Civil Code, Rule I, Tbiisi, 2014, 297.

⁷⁰ *Shershenevich G.F.*, Text-book of Russian Civil Code, the 7th ed., M., 1909, 100.

⁷¹ *Tsvaigert K., Kotts H.*, Introduction of Comparative Jurisprudence to the Sphere of Private Law, Vol. 2, scientific editor *T. Ninidze*, translated by *E. Sumbatashvili*, Tbilisi, 2001, 87.

⁷² *Kropholler J.*, The German Civil Code, Teaching Commentary, translators: *Darjania T., Chechelashvili Z.*, edited by *Chahchanidze, Darjania T. Totladze L.*, Tbilisi, 2013, 37.

⁷³ *Kotz/Flessner*, Europaisches vertragsrecht, 167, Band I, 1996. Referred: *Vashakidze G.*, Theoretical Aspects of the Explanatory of Contracts and the Importance of Objective Interpretation in Stating the Parties’ Will, Journal “Justice and Law”, №1, 2007, 30.

⁷⁴ Referred: *Kereselidze D.*, The Most General Systemic Concepts of the Private Law, Tbilisi, 2009, 238.

⁷⁵ *Kereselidze D.*, The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 238.

⁷⁶ *Ibid*, 240.

According to the subjective theory of explanation the most important thing is to state that intention of the person, which he/she had in demonstrating the will. In French civil law the subjective theory is advantageous; according to it in explaining the transaction a judge must comprehend profoundly the case, dry generalization of legislative rules will cause mistakes. First of all the intention of participants of the transaction and not only the word-to-word content of the transaction must be ascertained.⁷⁷ The judge in this process must respect the person's or persons' obvious or meant intention, even when it is expressed obscurely and ambiguously,⁷⁸ he is obliged to state the presumable will of the parties or to study the intention considered to be the manifestation of the persons' reasonable will, taking into account subjective and objective circumstances.⁷⁹ So in France the theory of the will is priority, in case of the wrong declaration of the will, the inner will maintains power and the declaration is deemed to be quashed, because it does not imply the inner will (*Larentz*).⁸⁰

On the contrary, according to the objective theory of declaration, which dominates in common law, transaction is not a state of mind; it is an action and in this form it is a result of a certain behavior. Responsibilities must be imposed on the parties not according to their intention, but what they have said, written or acted. In this system a judge does not state elements connected with the mind, but provides achievement of the expected reasonable results defined by the participants.⁸¹

None of these theories is perfect independently. On the one hand, it does not correspond to the contract nature in obliging the person, who declares the will, to do what he did not want to (a result of the objective theory) and on the other hand, it is necessary to protect contractors' interests, which is based on the declaration of the will (which is denied by the subjective theory).

There is an opinion, that it is inadmissible to separate the will and the will declaration. They are two sides of one phenomenon.⁸² According to Diu mulen in explaining transaction everything must be taken into consideration: as the parties' behavior, as well as a presumable intention (hypothetic will).⁸³ In one of its decisions the Georgian Supreme Court points out, that in explaining transaction the main condition is to state the will according to the principle of conscience and considering peculiarities of legal turnover. In explaining transaction it is inadmissible to give its content the meaning, which was supposed by the person declaring the will or the addressee of the will. In this case the essential must be the meaning, which might have been given to the declaration of the will by an imaginary reasonable man, if he had been connected with the case in the state of the addressee considering all the important circumstances.⁸⁴ This approach corresponds to the position represented in the unified acts of modern private legal law, namely if in defining of the will declaration the Vienna Convention on "Contracts for the International Sale of Goods" or UNI-

⁷⁷ *Dumbadze M.*, Lease Agreement, as a Means of Avoiding Entering into a Labor Contract, Labor Law, Articles, Vol. 3, edited by *Chachava S., Zaalishvili V.*, Coordinator *Amiranashvili G.*, Tbilisi, 2014, 326.

⁷⁸ *Lando O., Beale H.*, Principles of European Contract Law, Parts 1-2, Kluwer Law International, London/Boston, 2000, 288. Referred: *Bachaiashvili V.*, Explanation of Contract According to the Principles of European Contractual Law and the Reasonability of its Implementation in Georgian Legislation, Journal "Justice", №1, 2013, 8.

⁷⁹ *Tsvaigert K., Kotts H.*, Introduction of Comparative Jurisprudence to the Sphere of Private Law, Vol. 2, scientific editor *T. Ninidze*, translated by *E. Sumbatashvili*, Tbilisi, 2001, 88.

⁸⁰ Referred: *Dumbadze M.*, Lease Agreement, as a Means of Avoiding Entering into a Labor Contract, Labor Law, Articles, Vol. 3, edited by *Chachava S., Zaalishvili V.*, Coordinator *Amiranashvili G.*, Tbilisi, 2014, 328

⁸¹ *Zweigert K., Kötr H.*, An Introduction to Comparative Law, The Inshtuhons of Private Law, Volume 2, scientific editor *T. Ninidze*, translated by *E. Sumbatashvili*, Tbilisi, 2001, 92.

⁸² *Grimm*, Referred: *Ioffe O.S.*, Civil Law, Selected Works, M., 2000, 106.

⁸³ *Ioseliani A.*, Contract Law of Conflicts, Tbilisi, 2011, 6.

⁸⁴ *Dzlierishvili Z.*, Contract Law, authors: *Dzlierishvili Z., Tsertsvadze G., Robakdze I., Svanadze G., Tsertsvadze L., Janashia L.*, editor *Jugeli G.*, Tbilisi, 2014, 60.

DROIT Principles (International Commercial Contracts) is governing according to the parties' interests, the manifestation of the will (declaration) must be defined in the meaning, which a reasonable man would have had, if he had acted in situations analogous to the participants' situation.⁸⁵

5. Transaction in Private Autonomy Sphere

Transaction is a volitional juridical action, a volitional act, the fulfillment of which means the existence of a subject's cognitive level, that a person considers own action and governs it. Demonstration of the will must be legally appropriate or must satisfy indisputable material (person's mental capabilities) and formal-legal (legal form-circumstances, when declaration of the will restrains the parties with a juridical result) conditions of the authenticity of expressing the will.⁸⁶ Who is capable to make a transaction or who is able to declare the will causing a legal result?

Legally valuable will can be demonstrated by subjects of law, who have a private right and obligation (physical and juridical persons; under a physical person is meant a person, who has legal personality (*B. Zoidze*). The existence of transaction implies formation of three types of will: the will of action, the will of manifestation and the will of establishing a legal result. The will of action represents an obligatory component of formation and manifestation of the will; it does not exist, if a person cannot control his/her action; the will of demonstration is a desire of a legally essential will and expressing it consciously, consciousness of manifestation,⁸⁷ the third element is the will directed to a certain transaction, which does not exist, if a person does not want to participate in this transaction.⁸⁸

So an essential element for formation of a transaction is manifestation of the will within the scope of the person's capacity to act (without this capacity person's self-determination does not exist) and in the composition of a concrete legal institution.⁸⁹ In each subject of law from the very start there is given an idea of capability to act, as an action coordinated with a legal norm. Only being as a human or as an anthropological-biological being is not enough in order to become a legal subject, it is necessary to arise to personality, so that there will be created the possibility of carrying out valuable-ethic and legal acts, which itself means pure will-power, pure cogitation – "I".⁹⁰

The possibility given to the subjects of private law by law and order to regulate relations between each other by means of transactions is called private autonomy and is the single most important principle of private law (it is no other than realization of the individuals' liberty of will – Lassali)⁹¹ (In Latin "principium" means initial, basis and in jurisprudence it is deemed as a motive power, as a guiding statute, which by legislative strengthening has a common obligatory character).⁹² So a private autonomy means to state the

⁸⁶ *Zweigert K., Kötr H.*, Introduction of Comparative Law, The Institutions of Private Law, Vol. 2, scientific editor *T. Ninidze*, translated by *E. Sumbatashvili*, Tbilisi, 2001, 94-95; *Bagishvili E.*, Asking for the Will Manifestation in Unified Private Law, Journal "Review of Georgian Law", Special Edition, 2007, 106.

⁸⁷ *Chanturia L.*, Introduction to General Part of Civil Law, M., 2006, 231.

⁸⁸ *Kereselidze D.*, The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 239-240.

⁸⁹ *Vashakidze G.*, Theoretical Aspects of the Explanatory of Contracts and the Importance of Objective Interpretation in Stating the Parties' Will, Journal "Justice and Law", №1, 2007, 30.

⁹⁰ *Diuvernia N.*, Reading in Civil Law, Sankt-Peterburg, 1909, 640.

⁹¹ *Naneishvili G.*, Authenticity of Law and Attempts of Substantiations of Normative Acts, Tbilisi, 1992, 164.

⁹² *Kniper P.*, Law and History, Baden-Baden, Almaty, 2005, 33.

⁹² *Shchennikov L.V.*, About Some Problems of Civil Rights, Krasnodar, 2010, 13; Universal invariable principles of Law are giving a format, which allows law to perform its function; *Skurko E.V.*, Principles of Law in Modern Normative Concept of law, M., 2008, <www.lawlibrary.ru/izdanie2065619.html>.

content of living relations between individuals easily and willfully.⁹³ By this point of view admissible is an action, which is compatible with the will autonomy, but an action, which disagrees with this fundamental principle, is inadmissible. In the concept of a private autonomy first of all is meant the will autonomy, as an action oriented on a legal result in the scope of the concrete right-obligation, each is able to express own will and by this will to reach a desirable result.⁹⁴

It is deemed that these two themes define human's existence – creation of conditions for personal liberty and social welfare.⁹⁵

Efforts for broadening boundaries of freedom is genetic for a human, he/she creates it in any sphere with the purpose of maintaining freedom and then achieving more freedom. Legal liberty considers in itself free legal thinking, legal choice and legal action.⁹⁶ The more the opportunity of liberty, as the possibility of development and realization of own talent and good characteristics, is strengthening, the more understandable it becomes and as comprehension, as well as appraisal of liberty and granting a high value to it, is the basic challenge of modernity.⁹⁷

⁹³ There is also an opposite opinion, that individualism, as liberty, cannot be expressed by a certain principle or norm, because by opposing a norm and a subject to each other the norm by the normative meaning of its valuable moment will overcome the mentioned liberty. So a norm and individualism are denying each other. Each norm denies the sovereignty of private willpower from the very start. *Naneishvili G.*, *Authenticity of Law and Attempts of Substantiation of Normative Facts*, Tbilisi, 1992, 107 .

⁹⁴ *Jorbenadze S.*, *Mistake in Transaction, Parallel with other Legal Institutions*, "Journal of Law", №2, 2011, 192.

⁹⁵ *Kashia J.*, *Liberty and Federalism (political culturology)*, Tbilisi, 2013, 3.

⁹⁶ *Maisuradze N.*, *Essence and Forms of Declaration of Legal Liberty*, Journal "Human and Constitution", № 1, 2006, 54.

⁹⁷ *Hegel*, *Philosophy of Mind*, translation by *N. Natadze*, under the editorship of *N. Chavchavadze, T. Buachidze, G. Tsintsadze*, Tbilisi, 1984, 311.