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Evolution of Negligence from Classical Theory of Crime to Modern System (Dogmatic-Systemic Analysis)

The article reviews specific features of development of the crime of negligence in the light of dogmatic-systemic analysis, demonstrating the nature of negligence and its place in classical, neoclassical and finalist doctrines. The paper discusses various aspects of negligence from this very view-point, with due consideration of the trends of its development.

Keywords: *Evolution of the Clime of Negligence Classical, Neoclassical and Finalist Doctrines of Crime, Psychological, Psychological-Normative and Purely Normative Theories of Guilt.*

1. Introduction

This paper focuses on the history of development of crime system, specifically, on dogmatic-systemic analysis of negligence within crime system, where worth mentioning are the established judgments about negligence. All the foregoing is based on scholarly justified, although sometimes disputable arguments. It should be said, that *the problems of negligence became grounds for substitution of one crime system with the other and the "Achilles' heel" in the course of development of the uniform crime system.* For this reason the researchers of criminal law have their hearts set on determination the place of crime of negligence within uniform crime system through revealing its nature.

The problems of negligence has quite a complex nature, when it is necessary to make a recourse to various doctrines, *inter alia* to the system of philosophy. In this regard, particular mention should be made of *Kant's* philosophical doctrine of idealism,[1] also of *Hegel's* judgments[2] and neo-Kantian schools.

Insofar as the above theme covers quite a wide range of issues and it is impossible to thoroughly analyse them it in a single article, this time the paper offers the discussion of the peculiarities of the development of the crime of negligence starting from **traditional system** and ending up with **modern systems**.

Criminal negligence went through the following steps of development of the concept of crime: classical, neoclassical, finalist[3] and neo-finalist (modern) systems, where, based on psychological and normative doctrines, criminal negligence is described as a type of guilt, consequently, as a form of guilt and in other systems negligence, as a specific type of punishable action, employs double scope of assessment (dominating opinion)[4].

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[1] See: *Vormbaum T.*, Einführung in die moderne Strafrechtsgeschichte, 3. Auf., 2013, 47. *Amelung* wrote about these influences, that German doctrine and criminal dogmatics are of social-spiritualistic nature. See *Amelung K.*, Rechtsgüterschutz und Schutz der Gesellschaft, 1972, 32.

[2] *Kutalia L-G.,* Guilt in Criminal Law, Genesis of Guilt, Vol. 1, 2000, 222 (in Georgian).

[3] *Jescheck H-H.*, Thomas Weigend, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 199.

[4] *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 114.

2. The Notion of Negligence according to Psychological Theory in Classical[5] Doctrine of Crime

The general system of crime is the core and the basis of criminal dogmas, where the general model of the concept of crime is developed - the so-called wide concepts establishing categories[6], and the process of working out of these concepts has proved to be quite lengthy and the enhancement of these concepts is conditioned by the influence of philosophical thinking. Specifically, the philosophical schools underlay the *development of the doctrines of crime,* ***classical doctrine*** *being the first to mention among them*. *Anselm von Feuerbach is regarded as the founder of classical school,* the origins of whose criminal doctrine are based on Kant's judgments about law[7]. According to Feuerbach the conditions of criminality were: mind - for understanding of law, reasoning ability - for acting in accordance with law, and focus of willpower - on the breach of law. He tried to equally apply these conditions when proving intention, as well as negligence[8]. Using this concept Feuerbach built negligence on the notion of intention and thus created the strange construction of "intentional negligence"[9]. He would link negligence (intention) with the breach of obligation, however he believed that it was impossible to breach prudence obligation negligently[10].

The three-point division of crime is based on the system of *Liszt* and *Beling*, according to which a crime was regarded as an unlawful and culpable action (or tort)[11.] Liszt[12] would equate negligence with guilt and state that unlike intention negligence was itself guilt. In his opinion the only thing that linked guilt with its types was the function punishable under panel law. Liszt presented guilt in subjective-psychological light. He would define guild as perpetrator's subjective link with consequence, which was associated with criminal liability. Liszt would limit the concept of guilt only to intent and negligence. Hence, based on his judgements, Liszt created theory which these days is known as "psychological theory of guilt". As the psychological theory of guilt proved to be insufficient to solve the problem of

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5 The period of classical system is called the epoch of scientific positivism. See *Jescheck H-H*., Strafrecht im Dienste der Gemeinschaft, Ausgewählte Beitragäge, Berlin, 1980, 162; *Jescheck H-H*., *Weigend T*., Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 203.

6 *Leipziger kommentar*, Band I, Auflage 12, 707.

7 However, this idea should not be understood as if Feuerbach was Kant's blind follower - in fact they had different opinions about various aspects. See *Vormbaum T*., Einführung in die moderne Strafrechtsgeschichte, Auflage 3, 2013, 42; *Vacheishvili Al*., Mens rea in Soviet Criminal Law, 1957, 112 (in Georgian).

8 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 105 (in Georgian).

9 Ibid, 108. *Feuerbach* is regarded as the father of German panel law. He reviewed the basic concepts of panel law on the basis of strongly abided by dogmatic method and embodied his concept in the Penal Law Code of the Kingdom of Bavaria (1813).

10 *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 133 (in Georgian).

11 However, the foundations of the contemporary model of crime were laid by Stübel at the beginning of the nineteenth century and later by Luden, See *Jescheck H-H*., Strafrecht im Dienste der Gemeinschaft, Ausgewählte Beitragäge, Berlin, 1980, 163.

12 Binding criticises Liszt because of his action doctrine, as he views an action only from the naturalistic point of view, i.e. is oriented on bodily movements and changes in the outer world. Respectively, he relies on the concept of action, as *genus proximum*, as the basis of his system and links unlawfulness and guilt with it as *diferentia specifica*.

negligence, Lizst tried to link the foreseeability of consequence, as potential mental connection, with a psychological element; however, the mandatory objective feature like prudence failed to fit with the psychological model of guilt, as stated by List himself. Due to these and other circumstances Liszt's guilt theory failed[13].

As regards Beling, he made notional-systemic synthesis of essential-normative elements of the notion of guilt[14][15]. Like other classics, in his first publication Beling would regard guilt as perpetrator's mental dependence on action, and negligence (intent) - as a type of guilt. His criterion for the delimitation between intent and negligence was awareness of misconduct and knowledge about circumstances constituting the elements of action[16]. However, in his scholarly work, published in 1910 - *Guilt and Levels of Guilt* - Beling stressed, that in the case of inclusion of intent and negligence in the concept of guilt, the intent and negligence would have naturally lost the meaning of the forms of guilt or the types of guilt. Thus, Beling regarded intent and negligence as levels of guilt based on the assumption, that as legislator provided for more stringent punishment for an intentional crime than for a negligent one, then they can be linked with the guilt according to levels[17].

Adolf Merkel did not regard negligence (intent) as a type of guilt, but rather took it as a possibility of imputation of tort. He described negligence in a form of intensive particular tort of general will and included it in generic concept of will contradicting obligation. Merkel understood that the breach of prudence standard, as an objective feature, is characteristic only for negligence and is antithetical to intent. Hence the equalisation of these two concepts is logically impossible. Instead of the concept of guilt Merkel speaks about the category of imputation, which he set against the category of action imputation, recognised by post-Hegelian dogmas[18]. Hence, Merkel's judgments are marked with an attempt to prove negligent guilt aloof from psychological moments, unlike intent[19].

Neither Stübel recognized negligence as a type of guilt and he believed that only intent was a type of guilt. He tried to find the elements of conscious guilt in unconscious negligence. In his opinion a human being is not accused of causing certain consequence, e.g. death, health injury, etc., but rather of an earlier committed dangerous action, e.g. alcoholic intoxication. However, in criticism of this viewpoint, it is often stated, that instead of discovering conscious in unconscious negligence, this opinion laid foundations for the creation of new elements of crime[20].

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13 *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 40, 41-43.

14 *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 91.

15 Neling's breakthrough is that he viewed crime as an action concurrent with the elements of crime. See *Jescheck H-H*., Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 6.

16 *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 94.

17 *Beling E*., Unschuld, Schuld und Schuldstufen, 1910, 30.

18 *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 45-47.

19 Tinatin Tsereteli regards Merkel as a representative of normative theory of guilt. *Tsereteli T*., Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 31 (in Georgian).

20 See *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 132-133 (in Georgian). It should be mentioned, that such individual independent element already exists in the effective Criminal Code of

Based on metaphysical philosophy of Schopenhauer and Hartman, that recognises the existence of the so-called *unconscious will*, Binding tried to prove the existence of negligence, and specifically of unconscious negligence within the uniform system of guilt. He would state, that subject to act of will may become something, that a human being has not even thought of yet. To prove the foregoing, he refers to experiments, when some professional, say a physicist, wants to find about the outcomes of this research. Respectively, *'unconscious will'* was admissible for Binding, which phenomenon is not associated with imagining and he tried to solve the problem of negligence in this way. This view-point is subject to criticism as psychology, as a science, does not recognise 'unconscious will'[21]. Based on the foregoing Binding, who was a traditionalist and considered negligence (intent) as a type of guilt[22], failed in his endeavours to prove negligence, and specifically of recklessness, through psychological theory.

The judgments about the psychological theory of guilt, developed within classical doctrine, explain the problem of guilt mainly by an act of will and try to incorporate negligence (intent) into the uniform concept of guilt based on this very psychological feature; however, as already mentioned, justification of unconscious negligence by the element of the so-called unconscious will contradicts the fundamentals of psychological theory of guilt as the science of psychology itself is not aware of such a feature[23].

Hence, the problem of psychological concept of guilt was not the intent, but rather negligence, which, according to traditional natural science should have been ranked together with intent upon subjective imputation of consequence. The foregoing problem remained unsolved as there is not will to cause some consequence in the case of negligence and the impression of possible causing such consequence occurs only in the case of conscious negligence, and unconscious negligence remains out of the mix[24].

Radbruch, the follower of the psychological theory tried to rectify the situation through delimiting intent and negligence from mental facts and focused on antisocial consciousness[25] as one of the features, however, he failed to avoid psychological variations[26]. However, Radbruch regarded unconscious negligence as the remnants of objective imputation[27].

Edward Kohlrausch is also believed to be as a supporter of psychological theory. It should be stressed that Kohlrausch viewed guilt as an assessment, but psychological elements were crucial for him

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Germany in terms of Paragraph 316 of the BGB "Driving while under the influence of drink or drugs". Punishability of such action does not depend on occurrence of some consequence.

21 Ibid, 119-120.

22 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 32, 35.

23 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 120-121 (in Georgian).

24 *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 115.

25 *Jakobs G.*, Strafrecht, Allgemeiner Teill, Part 2, 1991, 470, *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 69-70.

26 See *Jakobs G.*, Strafrecht, Allgemeiner Teill, Part 2, 1991, 471.

27 See *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 134 (in Georgian). Objective imputation, mentioned by Radbruch, does not mean the contemporary understanding of the category of objective imputation, which is established at the stage of composition of an action.

in the justification of guilt. Kohlrausch strictly followed traditional conception and regarded negligence (intent) as a type of guilt. However, he always posed the question - whether how and to what extent the traditional punishability of negligence was compatible with the principle of culpable liability. He would state, that unconscious negligence was beyond any guilt as lacks the perception of guilt. The fact that a perpetrator could have and should have foreseen the consequence, would not maintain its culpable nature as the only moment of culpability is general awareness that someone's legal wealth is endangered. This may, at most, justify torts qualified by consequence and not the construction of the form of guilt[28]. In his opinion, if unconscious negligence is regarded as a form (type) of guilt, then the stipulation, that guilt is mental dependence on consequence, should be denied, or the recognition of negligence as a form of guilt should be abandoned and it should be otherwise proved[29]. According to Kohlrausch's explanations unconscious negligence was culpable breach of prohibition of danger, what is embodied in every provision on negligence. If guilt is interpreted in the light of specific mental connection with consequence, then this concerns only the intent[30]. Kohlrausch's view-point was an attempt to free guilt from mental elements, at least, partially. It can be said, that in this respect he made a step forward from purely psychological comprehension of guilt towards its psychological-normative understanding.

In Georgian criminal law the psychological theory of guilt, which is regarded as a left-over of Soviet criminal doctrine[31], maintained its topicality until the end of the twentieth century. This is clearly evidenced by some of the Georgian criminal-law textbooks, published in 1990s, where the guilt is defined as *perpetrator's mental dependence on committed action committed*[32]. Guilt was not an independent feature of crime, but rather constituted *mens rea* together with the motive and purpose[33]. As regards negligence, it was regarded as a form of guilt and presumption and recklessness were presumed to be the types of guilt[34]. To explain recklessness on the basis of psychological theory the supporters of the latter stated, that in the case of recklessness the "peculiar form psychic dependence" would come around, what was manifested in the neglect of the requirements of law[35]. The attempt of the followers of the psychological theory to prove mental dependence in the case of recklessness, failed as criminal law is interested in mental interrelation between an action and consequence and not in any other "peculiar forms". As regards the "neglect of the requirements of law", this problem is an ethical one. "Apart from this, the psychological theory of guilt can never convey the social and political motives of a perpetrator, the system of his/her attitude towards public values"[36].

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28 *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 71-73.

29 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 134 (in Georgian).

30 *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 73.

31 *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, Vol. 1, 2000, 232 (in Georgian).

32 In scholarly works on criminal law, published by the end of the twentieth century in Georgia, the psychological theory of guilt still had its supporter, however ultimately, they would still opt for normative-psychological theory of guilt, See *Surguladze L*., Criminal Law, Crime, 1997, 55; 183 (in Georgian).

33 Ibid, 178.

34 Ibid, 186.

35 Ibid, 200.

36 *Nachkebia G*., Criminal Law, General Part, Tbilisi, 2015, 340 (in Georgian).

Hence, throughout its history, the classical system tried to unite all forms of guilt (direct, indirect, conscious, unconscious) in one logical single whole, otherwise the logical basis of the development of the uniform concept of guilt would have been undermined. Therefore the classical school was engaged in the scrutiny and settlement of these issues for quite a long period[37]. According to classical school solution of the problem of guilt was directly proportional to the settlement of negligence related issues and vice versa, explanation of the phenomenon of negligence was a "golden key" for the elucidation of guilt genesis.

In classical system it was necessary to explain the essence of guilt in such a manner as to find common generic features and basis for intent and negligence. The problem would become particularly pressing when the case concerned recklessness. The above deliberations clarified that classical system failed to cope with this problem with the help of the psychological theory of guilt[38] and thus, criminal science abandoned it[39].

3. An Attempt to Substantiate Negligence according to Normative and Psychological-Normative[40] Theory in Neoclassical Doctrine[41]

The influence of philosophical positivism, which laid the basis of psychological theory of guilt in criminal law, has gradually subsided and neo-Kantian philosophy gained a foothold instead of it, which is closely linked with Kant's theory of cognition and ethics[42]. Already after the World War I the criminal law scholars tried to substantiate the concepts and categories of criminal law in a new fresh way. Neoclassicism[43], which has substantially changed the classical system, had this very aspiration. The thinking of this period was mainly limited to neo-Kantian theory of cognition (Rickert, Lask), bringing down science to purposes and valued through own humanitarian methods of assessment. The legal science became the science of *culture* and *rule* and respectively, was no more identified with natural sciences - it had quite different tasks[44]. Neo-Kantianism stresses the individuality and independence of humanitarian-scientific methods of cognition and assessment of human relations, as compared with natural science methods of observation and description of empirically identifiable factual circumstances. Liberation of positivism from natural science methods gave way to new methods, which were defined in the context of purpose and developed into ***"Teleological Method"***. The protection of vital interests of the

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37 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 49-50 (in Georgian).

38 *Turava M*., The System of Negligent Crime (for New Interpretation of Certain Elements according to Georgian Criminal Law), Otar Gamkrelidze 80 Anniversary collection of scholarly articles, Tbilisi, 2016, 204 (*in Georgian*).

39 Such conclusion does not mean that the criminal law science has utterly turned a blind eye to provisions, developed by classical school. Contemporary criminal law was developed and transformed on the basis of scholarly thinking of just that period.

40 Some scholars name this theory of guilt as normative-psychological theory, See *Turava M*., General OArt of Criminal Law, 9th edition 2013, 209 (in Georgian).

41 *Jescheck H-H*., Strafrecht im Dienste der Gemeinschaft, Ausgewählte Beitragäge, Berlin, 1980, 162, 169.

42 *Jescheck H-H*., Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 117.

43 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 180 (in Georgian).

44 *Leipziger kommentar*, Band I, Auflage 12, 718.

public and the responsibility of each and every citizen of a state are the basic values, the criminal law serves. The normative concept of guilt is defined from this very crucial viewpoint[45].

According to neoclassical system, there was no purely formal division of objective and subjective features in the concept of guilt anymore and the main focus was made on criminal-law purposes and immanent perceptions of assessment. All the features of crime were essentially changed, including the concept of guilt[46].

The normative theory of guilt was developed as a result of its detachment from the psychological theory of guilt, acknowledges by classical doctrine. As already mentioned, the latter explained guilt only through inner moments[47]. According to normative theory of guilt the guilt by negligence was not understood as a negative fact of perpetrator's non-awareness of consequences, but rather the recklessness of the perpetrator in fulfilment of his standard of prudence[48].

The intellectual-spiritual status of an individual, on the basis of which a person should be imputed a punishable action, consists of various elements, which collectively make only the subject of assessment of guilt. The negative assessment of these circumstances is called "blaming". The questions, that were left open by psychological theory of guilt, were easily solved by this doctrine. The guilt is excluded even when a perpetrator acts wilfully or negligently as intellectual-spiritual status of a mentally ill individual does not allow for negative assessment. In the case of negligence the accusation is focused not on the negative fact of "lack of perception about consequence", but rather on careless attitude towards prudence requirement of the law and social order. The function of material concept of guilt is for the factors, that are importance for perpetrator's liability in a rule-of-law state with regard to society, should be united and be accumulated in evaluative assessment, where the legitimate demands of the society express the will of the perpetrator[49].

Thanks to philosophically educated jurists - Reinhard Frank, Rudolf Stammler, James Goldschmidt, Alexander Graf zu Dohna, Gustav Radbruch and Marx Ernst Mayer - neo-Kantian movement influenced the development of criminal law science[50]. These scholars greatly committed to the enhancement-perfection of the normative teaching of guilt. For example, according to Frank, the concept of guilt requires more than mere mental dependence; hence, when constructing the concept of guilt, the account is taken of the evaluative moment, meaning that guilt is blaming[51]. Frank stressed the moment, that it was impossible to prove the circumstances excluding guilt under psychological concept of guilt, specifically - of (excusable) urgent necessity. Therefore, guilt should not have been limited only to psychological elements, but rather normative elements should have been involved as well[52]. The guilt

45 *Jescheck H-H*., Beiträge zum Strafrecht 1980-1998, Berlin, 1998. 118.
46 *Leipziger kommentar*, Band I, Auflage 12, 718.
47 This issue is discussed in Liszt's guidebook. See *Liszt F.*, Lehrbuch des deutschen Strafrechts, Auflage 22, 1919, 150-152.
48 *Jescheck H-H*., *Weigend T.*, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 207.
49 *Jescheck H-H*., Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 118.
50 Ibid.
51 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 155 (in Georgian).
52 *Baumann J*., Strafrecht, Allgemeiner Teil, 1985, 369.

was no more comprehended as the demonstration of subjective elements of an action, but rather as blaming of will, "blamefulness"[53] - where psychological understanding of intent and negligence was substituted by normative content[54]. Frank considered negligence (intent) as an element of guilt and delimited it from intent by the absence of the will to cause consequence[55].

Hence, Frank saw guilt in blaming a prohibited action. In his opinion negligence is defined as lack of prudence for the prevention of the consequence of a mistake, consciously made by a perpetrator[56]. But how to precisely define the requested lack of prudence, what may exclude criminal liability in certain cases - there is no answer to this question in Frank's works.[57].

Frank is believed to be the founder of *modified classical doctrine*, which accumulated different elements in guilt[58]. Consequently, Frank described guilt not normatively, but rather in a complex manner - through the unity of mental and normative elements[59]. Hence, Frank is not regarded as the founder of pure normative theory although referred to "blaming" element in scholarly debates. However, this was just one step in this great turnover, which already had its roots in criminal law science[60]. The followers of normative doctrine Robert von Hippel and Edmund Mezger are said to be the successors of Frank's teaching[61].

Turning to modern doctrine is notable in Rober von Hippel's work. He qualified negligence as non-accounting for the breach of obligation and provided for **dual scale** for negligence[62], what later plaid the crucial role in the development of the concept of negligence.

Hippel attributed imputability to guilt as the basis thereof, and regarded negligence (intent) as its type, form or step, while the precondition of guilt was objective unlawfulness. As per his statements, negligence (intent) becomes meaningful not only through its connection with the elements of tort, but rather develops the specific feature - an action prohibited by law. In this doctrine Heppel observed the preference of normative vision of guilt over the psychological one (intentional unlawful action and negligent unlawful action)[63].

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53 This term was introduced by Frank and it can be said, that it has become a terminological trend to a certain extent. Acting as a catalyser, it influenced the further development of guilt. See *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 104; *Jescheck H-H*., Strafrecht im Dienste der Gemeinschaft, Ausgewählte Beitragäge, Berlin, 1980, 172.

54 *Jescheck H-H*., Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 9.

55 *Baumann J*., Strafrecht, Allgemeiner Teil, 1985, 368.

56 *Frank R*., Das Strafgesetzbuch für das deutsche Reich, Auflage 18, 1931, 194.

57 *Jescheck H-H*., Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 119.

58 *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 103.

59 *Turawa M*., Straftatsysteme in rechtsvergleichender Sicht unter besonderer Berücksichtigung des Schuldbegriffs. Ein Beitrag zur Entwicklung eines rechtsstaatlichen Strafrechts in Georgien, Berlin, 1997, 64; Comp. *Tsereteli T*., Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 31 (in Georgian).

60 See *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 57.

61 See Ibid, 163.

62 *Hippel R*., Deutsches Strafrecht, Band II, 1930, 361.

63 *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 164.

For Edmund Mezger guilt is a *complex* notion. First of all, it means specific "circumstances of guilt". Furthermore, the guilt is the "assessment of the circumstances of guilt". Hence, Mezger united factual circumstances and assessment components in the concept of guilt. Thus he admitted objective moments in the concept of guilt[64]. Furthermore, he placed imputability in guilt on a par with certain mental connection of a perpetrator with his action, which connection is manifested in the intent and negligence, he would refer to as the forms of guilt. With regard to negligence, he would state, that a perpetrator should be aware of breached obligation, what is evident before the occurrence of the consequence[65]. Mezger also focused on dual scale of negligence[66]. He believed that the obligation to be prudent was objective, while individual abilities of a perpetrator - subjective. Hence, the mistakes, lack of knowledge and experience could have resulted in the exclusion of negligence. But, ultimately, the scholar considered negligence as a constituent of the content of guilt[67].

Goldschmidt worked out his own opinion about the perception of normative elements of guilt[68]. His presentation of the construction of guilt was dualistic. He considered, that normative element has its independent place alongside negligence (intent) [69]. In his opinion intent is purely psychological relationship, while the assumption of consequence is a normative feature in the case of intent. For Goldschmidt the construction of tort of conscious negligence was similar to an intent, when he would link the obligation standard with the perception about consequence. It was the mental part of an action that differentiated it from intent; however, Goldschmidt said nothing about the meaning of the foregoing. His perception of unconscious negligence was a complicated construction in essence. And this was conditioned by the fact, that Goldschmidt regarded it as a form of guilt, where direct mental connection with the consequence could not have been proved. He qualified the mandatory perception about consequence as quasi-psychological relationship with the consequence[70]. According to Goldschmidt if violation of mandatory standard in the case of negligence (as well as intent) is manifested in the negation of counter motivation (perception about consequence), in the case of unconscious negligence (potential perception of consequence) it is manifested in the negation of motivation upon self-motivation. Along

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64 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 165-166. Mezger also developed the *functional concept of guilt*. He stated, that criminal liability depends on the essence of punishment. Respectively, it should be defined, whether what purpose is intended to be attained by the legislator through punishment. Hence, in his opinion, the guilt is defined through deduction from the purpose. These days the functional understanding of guilt is developed by Roxine and Jacobs. See *Walter T.*, Der Kern des Strafrechts, Tübingen, 2016, 113.

65 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 168.

66 *Mezger E.*, Strafrecht, Auflage 2, 1932, 359.

67 *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 119, *Jakobs G.*, Strafrecht, Allgemeiner Teill, Part 2, 1991, 473-474.

68 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre,1974, 113.

69 Goldschmidt developed his own legal-theoretical doctrine, the so-called "Theory of obligation standards", according to which along with legal rules, when a person is required to demonstrate externally manifested behaviour, there are the rules which direct the inner behaviour of each individual so that externally manifested behaviour to be compatible with the law and order.

70 *Achenbach H.*, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre,1974, 114-115.

with required sign of violation of self-motivation, unconscious negligence also includes the violation of obligation existing in the requirement on violation of prudence obligation. Hence, the guilt of unconscious negligence twice includes the normative element. Later Goldschmidt presented the new version of the meaning of guilt by negligence. Specifically, in 1930, in his work, dedicated to Frank, be explained the normative feature of guilt as a normative connection with the composition of action in mental meaning[71].

Being influenced by neo-Kantianism Graf zu Dohna developed the ethical concept of guilt in his very first years of academic performance, thus turning back to psychological theory of guilt. He believed, that motive was decisive for punishment[72]. Hence, the will, that generates negative motive, becomes contrary to obligation. Based on the foregoing, the guilt is the volitional action, that is contrary to obligation and the will, contrary to obligation, is not the subjective connection with the consequence. However, Dohna believed, that guilt was not limited only to these normative moments, but rather was determined by two factors: one was psychological and the others were related to ethical basics. In Dohna's opinion every case of breach of general obligation of prudence and care was negligence, if the comprehension of this obligation was clear (possible) for everyone. Dohna was still bound to psychological moments, what is proved by the fact, that he would explain the connection between a perpetrator and an action by mental moments, where Dohna would include negligence (intent). He never denied that negligence was somewhat deficient from psychological point of view. He considered negligence as lack of understanding of unlawfulness and non-awareness of factual circumstances. The main flaw on Dohna's doctrine was that he believed, that normative element of guilt was of ethical nature[73]. Furthermore, he would refer to the lack of unlawfulness in the case of negligence, thus failing to prove factually conscious negligence.

Later, in his textbook "Structure of Crime Doctrine", published in 1936-1950, Dohna portrayed negligence in absolutely new and far more contemporary light, where he divided negligence in objective and subjective aspects[74]. Dohna stopped considering negligence as an element, form or type of guilt, he removed negligence (intent) from guilt, however it is not clear what was its place in the structure of crime, in his opinion. The foregoing cleared the way for the process of destruction of the so-called complex theory of guilt in the future[75].

Neoclassic Zauer identified ethical blaming with guilt. In his opinion the only difference between ethics and guilt was that criminal guilt is complemented with external behaviour, what is not necessary in ethics[76]. Recognition of normative perception of guilt in neoclassical system - specifically, the

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71 *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 116, 120.

72 Dohna gives the following example: when "A" breaks a window-glass when a child is choking from smoke, he may be punished for the damage of a thing on the one hand, if he had a Hooligan motive, however, on the other hand he may be relieved of liability if his behaviour aims at saving life. See *Achenbach H*., Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre, 1974, 85.

73 Ibid, 85-86; 88-90.

74 *Dohna zu G*., Der Aufbau der Verbrechenslehre, (1936-1950).

75 *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000 (in Georgian).

76 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 155 (in Georgian).

introduction of the element of "***blaming***" in the concept of guilt - constituted ethicism in criminal law[77]. Binding was against the foregoing. Mixing of ethical and legal concepts was inadmissible for him. According to his statements, assessment should be of legal nature. Beling also shared his position. According to his statements legal guilt is independent from ethical and religious assessment. Guilt is not excluded even in cases, when a perpetrator acted under the influence of high feelings. Hence, guilt is subject to assessment. The other scholars also supported this position and differentiated between legal and ethical blaming, between which there is a qualitative difference[78]. Bauman stated that moral guilt may be present where criminal guilt is lacking. It is also possible for the behaviour, that is compatible with some standard, to be immoral. Criminal guilt may be present, where no moral guilt is detected. Hence, negligent violation of a rule may not always be immoral. In Bauman's opinion, only in the case of removal of mental elements from guilt and their transposition into the composition (elements) of action the guilt would have become purely normative, what would have become the assessment of an object and not the object of assessment, as the other normativists believed to be the case. However, despite the foregoing Bauman still believed, that guilt should have also included psychological elements along with normative ones. This can be proved by the fact, that he included negligence (together with intent) into guilt and at the same time spoke about negligence (intent) as an element of guilt. Furthermore, he believed, that negligence (intent) was an element of guilt, unlike the proponents of psychological theory, who admitted that negligence was a type of guilt. Hence, in Bauman's opinion the elements of guilt or the steps of guilt (intent - the element of guilt - is at a relatively higher level) are sometimes referred to as forms, what is just a pure terminological problem and in no case means going back to psychological theory. Hence, Bauman tried to differentiate between intent and negligence based on psychological moment and would state, that there is no knowledge and act of will in the case of negligence unlike intent[79].

It should be mentioned, that delimitation of intent and negligence on the basis of only the psychological moment is Bauman's unsuccessful endeavour as it is a known fact, that it is the psychological moment that unites conscious negligence and indirect intent.

It can be said, that the complex concept of guilt in neoclassical system is criticised by the finalists, as the concept of guilt accumulates absolutely different, mutually incompatible moments, where the object of assessment itself includes assessment[80].

The fault of neoclassical system with regard to negligence is the fact, that after the recognition of guilt by negligence, it became necessary to define negligence by the independent content of impropriety. Hence the obligation to make necessary amendments to the system of guilt were assumed by the finalist system.[81]

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77 It is a known fact, that Kant delimited between law and morals. In his opinion, this difference does not mean that they are situated on different fields, but rather the fact, that ethical rules make the obligation to act, as such, as an instigator (motive), whilst legal rules are defines by any instigator. See *Vormbaum T.*, Einführung in die moderne Strafrechtsgeschichte, 3rd ed., 2013, 36.

78 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 157-158 (in Georgian).

79 *Baumann J.*, Strafrecht, Allgemeiner Teil, 1985, 364, 370, 373.

80 *Turawa M.*, Straftatsysteme in rechtsvergleichender Sicht unter besonderer Berücksichtigung des Schuldbegriffs. Ein Beitrag zur Entwicklung eines rechtsstaatlichen Strafrechts in Georgien, Berlin, 1997, 67.

81 *Jescheck H-H., Weigend T.*, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 208.

Georgian criminal law science paid particular attention to psychic moments, recognised on the basis of psychological theory of guilt, that originated within classical doctrine, however, the moment assessment was not neglected either[82]. In academic works, published during this period the scholars supported the concept of guilt, developed within criminal law, according to which the concept the guilt was comprehended as the synthesis of factual and assessment elements[83]. This understanding of guilt can be traced back to 1950s. Since then some Georgian scholars would define guilt in their works not only from mental point of view, but assessment as well, specifically from social and ethical view-point, no matter what is concerned - criminal law or moral guilt[84]. Hence, in Georgian criminal law science the guilt was defined as mental connection of an individual with dangerous for the society action, committed by him intentionally or by negligence, where the account was also taken of moral-political elements in terms of assessments, blaming[85]. According to Georgian criminal law scholars of those times the subject of assessment was the state and the society, whilst the moment of assessment was regarded as a link between the concept of guilt and punishment[86]. Hence, the Georgian criminal law science was were interested in assessment moment more for the justification of transfer to punishment, than in the light of development of uniform concept of guilt.

Upholding this concept proves, that pure psychological theory of guilt was not dominating in Georgian law, but rather guilt was viewed from psychological-normative viewpoint under the influence of German criminal law dogmas, proving that Georgian criminal law science, accounting for certain exceptions, stood on the lines of neoclassical system. E.g. T.Tsereteli acknowledged psychological theory of guilt when explained guilt by mental connection with the action and consequence, but she also introduced the element of moral (moral-political) blaming, thus actually denying pure psychological explanation of guilt[87]. However, despite apparent proximity of neoclassical system and Tsereteli's perception, there still is an essential difference between them with regard to various aspects. E.g. she would characterise guilt as a negative assessment, when, together with the moment of assessment she relied not on normative, but rather psychological concept of guilt, where she gave preference to "public hazard" as an assessment predicate[88]. And this means that Tsereteli opted more for psychological theory[89].

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82 *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 9 (in Georgian).

83 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 192 (in Georgian); *Tsereteli T.*, *Tkesheliadze G.*, Crime Doctrine, Tbilisi, 1969, 60 (in Georgian).

84 *Makashvili V. G.,* Guilt and consciousness of wrongfulness, 1948 (in Russian).

85 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 19; 196; 251 (*in Georgian*); *Ugrekhelidze M.*, Guilt in danger torts, 1982, 7-8 (in Georgian).

86 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 252-253 (in Georgian).

87 See *Tsereteli T.*, Challenges of Criminal Law, vol. I, Tbilisi., 2007, 46 (in Georgian); *Tsereteli T.V.*, *Makashvili V.G.*, Concept of Guilt in Criminal Law, journal "Matsne" ("Herald"), Law and Economics series, 1986, №2, 79 (*in Russian*); *Tsereteli T.V.*, About the Concept of Guilt, "Vestnik" ("Herald"), 1960 №1, 129 (in Russian); *Shavgulidze T.*, Third Form of Guilt in Criminal Law, Legal Surveys, Collection of scholarly articles dedicated to 70th anniversary of Tinatin Tsereteli, 1977, 79-80 (in Georgian).

88 See *Turawa M.*, Straftatsysteme in rechtsvergleichender Sicht unter besonderer Berücksichtigung des Schuldbegriffs. Ein Beitrag zur Entwicklung eines rechtsstaatlichen Strafrechts in Georgien, Berlin, 1997, 214.

89 See *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, Vol. 1, 2000, 676 (in Georgian).

Like Tsereteli, Makashchili also identified two moments in guilt: the moment of mental connection with the action and consequence and the moment of guilt assessment, which was closely linked with the first moment. Hence, according to Makashvili, to understand guilt, moral assessment should have been taken into account, what would have made it easier to prove guilt by negligence. Insofar as Makashvili was fully aware of difficulties, associated with the substantiation of individual's mental connection with consequence in the case of negligence, and specifically, recklessness,[90] he would refer to mental connection with an action in the case of negligence, what requires negative moral-legal assessment. Furthermore, Makashvili regarded guilt as a type of guilt and tried to save it. This is evident from where he tried to prove the existence of "potential mental connection" in the case of negligence[91]. Hence, there is an impression that Makashvili brought psychological moments to assessment, what, naturally is not mutually compatible.

M. Ugrekhelidze offers his explanation of complex-psychological theory of guilt. He tries to substantiate guilt by negligence on the basis of psychological theory in the light of unconscious psychics, while making recourse to Uznadze's *theory of attitude* and wants to present unconscious negligent action as a manifestation of impulse attitude and thus prove the existence of mental elements in negligence. With this theory Ugrekelidze wants to prove that failure to demonstrate care in the case of negligence does not mean that human psychics is empty, but rather that he has specific psychics of unconscious form. However, it should be stressed, that Uznadze has never analysed his theory specifically for the cases of negligence[92]. Except for psychological explanation Ugrekhelidze would describe guilt as a social-ethical category, where negligence is regarded as a type of guilt. In his opinion the basis of social-ethical assessment is the possibility to comprehend a standard and respectively, the possibility to act otherwise, where an individual acts under the conditions of freedom of willpower. If an individual is not behaving according to moral rules, it is quite possible to speak about moral guilt in the behaviour of the individual concerned[93]. However, moral blaming in the case of negligence does not mean the assessment of the individual concerned in general, but rather of his/her mental condition upon commitment of a negligent act. An individual is blamed not because of his carelessness, but rather because he acted recklessly in a specific situation. Hence, the behaviour of an individual, who has not employed his inner potential to maximum practicable extent and has not taken account of potential danger, can be assessed negatively[94].

The psychological-normative theory of guilt is beyond criticism as such understanding of guilt is the mechanic linking of mental and normative, what is devoid of serious scholarly grounds as psychology is not aware of evaluative concept. Hence, these phenomena are from different realities and they cannot be

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90 See *Makashvili V.G.*, Criminal Liability for Negligence, Moscow, 1957, 10-13 (*in Russian*). In Lakashvili's opinion legal and moral standards cannot contradict each other by their nature and purpose.

91 *Makashvili V.G.*, Criminal Liability for Negligence, Moscow, 1957, 90-92 (in Russian).

92 *Ugrekhelidze M.G.,* About psychological nature of negligence, journal "Matsne" ("Herald"), philosophy, psychology, economics and law series, 1972, №4, 171, 175, 177, 180 (in Russian); *Ugrekhelidze M.,* Problem of guilt by negligence in criminal law, 1976, 37-38, 40 (in Russian).

93 *Ugrekhelidze M.G.,* Social-ethical nature of guilt by negligence, journal "Matsne" ("Herald"), philosophy, psychology, economics and law series, 1973 №1, 140 (in Russian); *Ugrekhelidze M.,* On proving moral guilt in the case of negligence, journal "Soviet Law" 1975 №1, 8, 12 (in Georgian).

94 *Ugrekhelidze M.,* Problem of Guilt by Negligence in Criminal Law, 1976, 37-38, 40 (in Russian).

united in a single concept[95]. Furthermore, if intentional guilt can be explained by psychological moments and negligence (recklessness) can be brought down to moral guilt, the authors of this idea will contradict their own conception - to unite intent and negligence in guilt under single generic concept.

Al.Vacheishvili regarded guilt as "lack of public sense or its weakness". He applied this stipulation for proving all types of guilt, specifically, of intent and negligence. In the case of negligence public sense is not that strong to become crime countervailing force, motive[96]. Vacheishvili's conception on inclusion of negligence in single concept of guilt is as unsuccessful as the attempt of the other scholars to bring together negligence and arrogance or intent from psychological point of view.

G.Nachkebia does not describe the concept of guilt from psychological point of view as he believes, that guilt has normative preconditions. Furthermore, in scholar's opinion, it is impossible to explain guilt aloof from mental dependence when he believes that there also is a room for normative aspect in guilt. However, this does not mean, that Nachkebia presented guilt as a psychological-normative theory (in a complex manner)[97], as it was the case with Tsereteli[98]. In his opinion guilt is not purely psychological phenomenon as there is no concept of guilt in psychology and hence, it is impossible to explain guilt through psychological moments, however it is not purely normative either as "Normativism, which is not aware of the concept of legal relation, cannot provide for the concept of guilt." The guilt, along with intent and negligence, is a philosophical category. Guilt is understood as a form of the unity of positive and negative liability[99] and it is the synonym of irresponsibility. Nachkebia believes, that is it impossible to prove negligence from purely psychological standpoint as he regards it as an irresponsible attitude towards prudence standard[100].

Hence the development of Neoclassical doctrine has not started from a clean sheet, but rather its prerequisite and basis was the classical theory of guilt. Quite a number of issues, including guilt by negligence, were revised on the basis of the latter. Unlike classical doctrine, where according to psychological theory of guilt, the guilt consists of only mental elements, in neoclassical system the content of guilt is brought down to psychological-normative viewpoint (normative and psychological-normative theory of guilt).

4. Dogmatic-Systemic Analysis of Negligence according to Finalist System of Crime

It was the doctrine of guilt, worked out by Velzel in early 1930s, that managed to reorganise the teleological system of crime[101]. The finalists regarded an action as purposeful behaviour of an individual

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95 For criticism see *Nachkebia G.*, Criminal Law, General Part, Tbilisi, 2015, 330-331 (in Georgian); *Gamkrelidze O.*, Problem of imputation in criminal law and attempt to prove normative concept of guilt, journal: "Individual and Constitution", 2002, №4, 83 (*in Georgian*).

96 *Vacheishvili Al., Mens rea* in Soviet Criminal Law, 1957, 257-260 (in Georgian).

97 *Nachkebia G.*, Guilt as a Category of Social Philosophy, Tbilisi, 2001, 201-202, 255 (in Georgian).

98 Comp. *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 319 (in Georgian).

99 *Nachkebia G.*, Guilt as a Category of Social Philosophy, Tbilisi, 2001, 305, 307, 310 (in Georgian).

100 Ibid, 213, 299.

101 See *Jescheck H-H.*, Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 11. "The way for Velzel's judgements from criminal law viewpoint was cleared by Graf zu Dohna's work "Construction of Guilt Doctrine" and

and they separated intent from guilt and assigned it to action[102]. Unlike psychological and normative-psychological concept of guilt, the finalist doctrine, as already mentioned, acknowledges purely normative concept of guilt, where guilt is of purely normative, purely evaluative nature. The finalism transposed psychological elements from guilt to action[103].

The merit of this doctrine is that is offered the new vision of the concept of negligence. The case is that, this doctrine differentiated between *intentional and negligent torts according to the elements of unlawfulness*. The finalists also considered the concept of single executor inadmissible for the elements of intentional and negligent crime[104]. They introduced negligence not only into unlawfulness, but also in guilt as a different from intent punishable action. As a result negligence acquired equivocal meaning in the system of crime: 1. Negligence, as a part of the composition of unlawfulness, is manifested in the breach of objectively compulsory prudence when it is possible to objectively predict the consequence, pertinent to the composition of the action, and 2. Negligence, as a component of guilt, is revealed in personal liability of a perpetrator, in blaming for non-predicting and not taking account of pertinent to the action consequences[105]. Hence the finalists described the fundamental difference between intent and negligence not only through the forms of guilt but also managed to delimit between them already at the stage of unlawfulness. However, it should necessarily be stressed, that the finalists were not the first to determine unlawfulness of not only consequence, but also of negligence through the breach of standard of objective prudence. This problem is notable already in the monographs of the followers of classical school Exner and Engisch[106].

In his earlier conception on negligence Velzel stated that negligent acts cause consequences, first of all, causally. However they stem only from causal-naturalistic processes, which are oriented on the avoidance of a consequence. The fact, that the consequence was not avoided is conditioned by insufficient prudence on the part of the one, who committed the act. Prudence implies full awareness of obligation and capability, i.e. of guilt. Only as a result of the foregoing a culpable (punishable) perpetrator may commit negligent acts[107].

When discussing Velzel's judgments, it is highlighted, that preventability, as a feature of perpetrator's connection with the action, "may provide for final foreseeability, which is related to the capacity of an individual. Velzel's model of negligence is marked with individual preventability, as clear grounds for legal assessment[108]. Negligence, and specifically, unconscious negligence definitely was noy

from philosophical point of view - N.Hartmann's ontology". See *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 695 *(in Georgian)*; *Gamkrelidze O*., Problem of imputation in criminal law and attempt to prove normative concept of guilt, journal: "Individual and Constitution", 2002, №4, 79 (*in Georgian*).

102 *Jescheck H-H*., Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 12.

103 *Baumann J*., Strafrecht, Allgemeiner Teil, 1985, 371.

104 *Jescheck H-H*., Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 12.

105 *Leipziger Kommentar*, Band I, Auflage 12, 2007, 719.

106 *Jescheck H-H., Weigend T*., Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 212.

107 *Kawaguchi H*., „Damit waren die weichen von vornherein falsch gestellt-Anmerkungen zu Welzels Fahrlässigkeitslehre“. Lebendiges und Totes in der Verbrechenslehre Hans Welzels, 2015, 112.

108 *Jakobs G*., Sdudien zum fahrlässigen Erfolgsdelikt, 1972, 70.

proved in Velzel's finalism as foreseeability and preventability were associated with the awareness of an individual. Velzel was perfectly aware of the foregoing himself and later he, himself denounced his model of negligence as he believed, that part of negligent act, that was crucial in the light of criminal law, was vested in the consequence and it is not caused as a finale, but was rather conditioned by some blind causality. Hence Velzel believed, that it was necessary to introduce "*potential finalism*"[109] along with existing finalism, meaning that potential finality is oriented on the prevention of a consequence. Hence an individual is able and obliged to prevent criminal consequences[110].

Despite everything, the negligence acts have not easily found their place in final concept of an action, meaning: the moment of action is conditioned not by actual, but rather potential final connections, what generates apparent difficulties as "possibility" creates an act only mentally, through normative requirements and it does not belong to essential structure of a final act[111]. Hence, although the final act is committed imprudently in the case of negligence, as often stated by finalists, the imprudence has no finality element in the course of commitment of the act itself. For criminal-law assessment only relevant breaches of prudence can be placed beside the finality of an action to a certain extent. The committed error will be assessed only for the prevention of a consequence, which, in the case of negligent acts, is no way connected with the final one. In most cases the lack of prudence in the case of negligence does not mean that a perpetrator acted imprudently, but rather that actually, they have ever occurred. In this case it is difficult to assert, that as a general rule, an action would have been committed imprudently. E.g. a nurse, who gives wrong injection to patients by mistake, acts imprudently. But if it happens vice versa, when a patient does not need any injection because of his health status, then it should not be said, that a nurse, who, despite giving injection to the patient, is acting imprudently. Actually, the mistake is that the nurse acted at all[112].

The finalist doctrine of action was partially reflected in German criminal law (Maurach, Hirsch, Stratenvert). The finalist doctrine had its impact on judicial practice as well[113]. Despite the foregoing it had many opponents. E.g. the finalist theory was criticized by Roxin[114]. He opposed ontological justification of the concept of action as socially important elements underpin the manifestations of law, which elements should not be understood as the drivers of the causality factors. Ultimately, Roxin arrived to the conclusion, that as finalist theory of action is mixed with finalist theory of the elements of

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Tsereteli T., Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 32 (*in Georgian*); *Kawaguchi H.*, „Damit waren die weichen von vornherein falsch gestellt- Anmerkungen zu Welzels Fahrlässigkeitslehre“. Lebendiges und Totes in der Verbrechenslehre Hans Welzels, 2015, 113.

110 *Tsereteli T.*, Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 32 (*in Georgian*); *Hsu H.*, Zurechnungsgrundlage und Strafbarkeitsgrenze der Fahrlässigkeitsdelikte in der modernen Industriegesellschaft, 2009, 110.

111 *Jescheck H-H.,* Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 12.

112 *Jescheck H-H., Weigend T.*, Lehrbuch des Srafrechts, Allgemeiner Teil, 1996, 221-222.

113 E.g. In one of its cases the Senate of German Federal Court recognised the consciousness of wrongfulness as a constituent element of crime and resolved the question of a mistake made in prohibition according to this very moment, See BGHSt 2, 194, 196-197. Also in a civil case the Grand Senate found wrongfulness of an action in the case of negligent tort on the basis of breach of prudence provision. See BGHZ 24, 21.

114 *Roxin C.*, Zur Kritik der finalen Handlungslehre, ZStW 1962, 515.

an action, the ontological finalist concept should be substituted by the *concept of legal-social finalism*[115]. The other scholars are also of the same opinion and maintain that the content of obligation of prudence in negligence torts, presented by finalists, was not logical. Correct would have been the route, which would have made it opt for social-normative direction. A perpetrator is found guilty of commitment of unlawful action, only when he would have avoided it with due diligence. The foregoing is equally applicable to both intent and negligence. Hence, avoidability is regarded as generic concept of intent and negligence[116].

The finalist system was also criticised by the proponent of psychological-normative theory of guilt Baumann. He believes that although guilt is of evaluative nature, perpetrator's guilt cannot be understood bereft of psychological moments. The assessment of guilt is heteronomic, whilst guilt itself is autonomous[117]. Furthermore, he also states that finalists focus on dishonesty of an action even when there is a consequence which is beyond guilt and unlawfulness, whilst finalism is not oriented on the consequence and guilt concerns only an action (and not consequence). However causalists, who regard consequence as an inevitable element of unlawfulness, delimit between unlawfulness and guilt as accidental consequence has nothing to do with guilt. Based on the above opinion Baumann arrives to the conclusion, that consequence is a constituent element of unlawfulness of tort of consequential negligence. Hence, it is not just a condition for punishability and only a reason for criminal law intervention. Torts of negligence demonstrate that idea of dishonesty of an action, offered by finalists is not right, or is, at least, unilateral[118].

Some scholars do not rightfully agree to Baumann's criticism of focusing on dishonesty of an action, made by finalists system and believe, that in consequential torts an individual is called to account for the consequence, caused by the action, what does not refute the importance of consequence, but rather stresses the subordination of the importance of consequence on the importance of the action[119].

Idiosyncratic criticism is offered by Schmidhäuser, when he develops his idea about negligence. He judged by the concept of unlawfulness and not the concept of action. Later he totally refuted the concept of action[120]. According to his statements the elements of unlawfulness of torts by act may not be final, as admitted by Velzel, but rather essentially understood will[121].

Schmidhäuser regarded negligence as a feature of guilt, when a perpetrator does not take account of the breach of legal wealth, when he unconsciously encroaches upon it (negative part of negligence), but at the same time in some specific situation he could have become aware of the encroachment (positive part of negligence). Negligence proves subjective imputation of unlawfulness in guilt as an element of crime. According to its category simple concept of negligence is equal to intentional torts.

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115 *Roxin C.*, Zur Kritik der finalen Handlungslehre, ZStW 1962, 525, 549.

116 *Kawaguchi H.*, „Damit waren die weichen von vornherein falsch gestellt-Anmerkungen zu Welzels Fahrlässigkeitslehre“. Lebendiges und Totes in der Verbrechenslehre Hans Welzels, 2015, 113-114.

117 *Baumann J.*, Strafrecht, Allgemeiner Teil, 1985, 372.

118 Ibid, 429.

119 *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 505-506 (in Georgian).

120 *Schmidhäuser E.*, Strafrecht, Allgemeiner Teil, Auflage 2, 1975, 177.

121 *Schmidhäuser E.*, Willkürlichkeit und Finalität als Unrechtsmerkmal im Strafrechtssystem, ZStW, 1954, 39.

Both concepts go hand in hand in guilt. Intentional and negligent crimes differ in guilt only according to concept and structure. Negligent torts lack the moment of awareness of unlawfulness. Actually, it is conditioned by the absence of awareness of the act itself. Schmidhäuser categorised negligent guilt according to degree, namely into light, average and exceptionally gross negligence.[122]

Schmidhäuser tried to synthesise traditional doctrine and finalist action doctrine. He would explain unlawfulness as a wilful act and described guilt as intellectual behaviour damaging legal wealth. He made distinction between intentional and negligent act not only in the elements of unlawfulness, but only in guilt. He delimited between the elements of unlawfulness and circumstances excluding unlawfulness according to conflict of wealth and obligations. Schmidhäuser would include the circumstances excluding unlawfulness into social adequacy. The result of transposition of the concept of intent in the theory of guilt was that indirect intent included conscious negligence as well as it was guided only by the moment of envisaging[123], what naturally resulted in intermixture of intent and negligence.

It can be said that initially finalism did not find its place in Georgia. Georgian scholars were against finalism[124]. Like German scholars they also stated, that finalist system failed to explain and prove negligence from finalist point of view[125]. Thus, anyone, who tries to prove criminal negligence will oppose Hatman's ontology as the element of purpose can never been separated from the concept of action[126]. Finalism is even called "legal cubism" where nothing can be understood. The criticism of the opponents of finalism is also caused by the fact, that guilt is viewed only from the point of view on blaming, what will give wider discretion to judiciary - judge will be above the law and there will be no limit to his subjectivism[127].

O.Gamkrelidze as Tsereteli's disciple, partially upholds her judgements[128]. The case is that Gemprelidze was of positive opinion of the approach of finalist doctrine on transposition of intent from the concept of guilt into the composition of an action, however the position, that places negligence beside intent in the composition of an action, was unacceptable for him as they are the phenomena from different realities. He stated, that unlike intent, negligence is already an assessment and thus, it should

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122 *Schmidhäuser E*., Strafrecht, Allgemeiner Teil, Auflage2, 1984, 224-225.

123 *Jescheck H-H.,* Beiträge zum Strafrecht 1980-1998, Berlin, 1998, 16.

124 E.g. *Gamkrelidze* would stress that irrespective of certain aspects of finalist theory, it had no supporters in Georgia. See *Gamkrelidze O*., Fight for rule-of-law state 1998, 252 (in Georgian). For criticism of finalist theory see *Tsereteli T*., Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 25 (in Georgian).

125 *Tsereteli T*., Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (journal) 1966, №2, 32 (*in Georgian*); *Nachkebia G*., Criminal Law, General Part, Tbilisi, 2015, 254 (in Georgian).

126 *Kutalia, L-G.,* Guilt in Criminal Law, Genesis of Guilt, vol. 1, 2000, 699 (in Georgian).

127 See *Tsereteli T.V*., *Makashvili V.G.*, Concept of Guilt in Criminal Law, journal "Matsne" ("Herald"), Law and Economics series, 1986, №2, 84-85 (in Russian); *Tsereteli T*., Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (Journal) 1966, №2, 34 (in Georgian).

128 In Tsereteli's judgement the concept of "public jeopardy" prevailed over "unlawfulness", while with Gamkrelidze "unlawfulness" dominated over the concept of "public jeopardy". See *Gamkrelidze O.*, The problem of criminal unlawfulness and grounds for punishment of complicity, Tbilisi, 1989, 124 (in Georgian).

remain at the stage of guilt[129]. Gamkrelidze shared purely normative viewpoint of guilt, admitted by finalist doctrine as he explains guilt as personal blameworthiness, where negligence is presented as a type (form) of guilt[130]. He believes, that negligence is the manifestation of guilt. Unlike intent, which is the object of assessment, negligence is already a negative assessment, blaming[131]. Gamkrelidze assigns negligence to limited capacity and, at the same time, considers negligence as a variety of a mistake, when he relies on Ugrekhelidze's position[132]. Gamkrelidze's justification is as follows: when an individual is called to account for negligence in the case of inexcusable mistake, this means that the individual concerned is of limited capacity. In this case the individual will be called to account only partially[133].

Gamlrelidze's judgment, that negligence, unlike intent, is already blaming and, consequently, guilt, dates back to Liszt's theories[134]. No doubt, such presentation of negligence was somewhat new for Georgian criminal law science of those time[135], however this approach was not further developed to reveal its benefits and deficiencies. In its turn, the foregoing excites desire for Gamkrelidze's judgments about the nature of negligence and determination of its place within the system of crime not to be neglected in future works.

By the end of the twentieth and at the beginning of the twenty-first century the cohort of new generation criminal law scholars supported the finalist system to a certain extent, what was conditioned by the steps made by this doctrine for the determination of the place of negligence within the system of crime. In this regard, the mention can be made of Professor Merab Turava in Georgian criminal law science, who is the proponent of the development of contemporary synthesis of **neoclassical** and **finalist doctrines** (**neofinalism**) and develops the new system, where the element of crime like negligence (intent) has dual function, specifically as objective negligence at the stage of the composition of an action and as individual negligence at the stage of guilt. Furthermore, the absolute subjective composition of an action is admitted in the case of conscious negligence and in the case of unconscious negligence only objective composition of an action is proved[136].

Insofar as according to new system dogmatic-systemic analysis of negligence is beyond the scope of this paper, the detailed analysis of this system will be offered in the papers to follow.

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129 *Gamkrelidze O.*, Problem of Imputation in Criminal Law and Attempt to Prove Normative Concept of Guilt, Journal: "Individual and Constitution", 2002, №4, 84 (in Georgian).

130 *Turawa M.*, Straftatsysteme in rechtsvergleichender Sicht unter besonderer Berücksichtigung des Schuldbegriffs. Ein Beitrag zur Entwicklung eines rechtsstaatlichen Strafrechts in Georgien, Berlin, 1997, 215.

131 *Gamkrelidze O.*, Problem of imputation in criminal law and attempt to prove normative concept of guilt, journal: "Individual and Constitution", 2002, №4, 88 (in Georgian).

132 *Ugrekhelidze M.*, Problem of Negligent Guilt in Criminal Law, 1976, 126-129 (in Russian).

133 *Gamkrelidze O.*, Problem of imputation in criminal law and attempt to prove normative concept of guilt, journal: "Individual and Constitution", 2002, №3, 76 (in Georgian).

134 See footnote №13.

135 Tinatin Tsereteli also judged negligent guilt likewise. See *Tsereteli T.*, Finalist Theory in Bourgeois Criminal Law and Its Criticism, The Soviet Law (Journal) 1966, №2, 36 (in Georgian).

136 *Turava M.*, Criminal Law, General Part, Doctrine of Crime, Tbilisi, 2011, 6-7, 10 (in Georgian).

5. Conclusion

Historical scrutiny of the development of negligent crime demonstrated, that negligence is viewed differently in classical, neoclassical and finalist systems from dogmatic and systemic points of view. The foregoing is conditioned by specific nature of negligence, what makes it different from intent. Hence, criminal law scholars tried to develop such flexible system, where it would have been possible to develop a single concept of guilt both for intent and negligence. However, this attempt failed with psychological and normative-psychological theories, that originated within classical and neoclassical systems, what made scholars to liberate guilt from psychological moments. For this very reason the finalist system was based on purely normative meaning. This was a huge step forward from traditional to contemporary understanding of guilt, where negligence is no more considered as a form (type) of guilt, but rather it found its place in the composition of an action. This, in its turn, gave way to the development of the new system where negligence was delegated with dual function at the stages of composition of an action and guilt. The foregoing necessitated the creation of an independent system of negligent crime, separate and different from intentional one.

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