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Certain Important Aspects of Legal Norms Defining Essence of Disciplinary Misconduct in Public Service

The integration process of Georgia with EU and sustainable democratic development of the country has necessitated the reformation of public service legislation. The Law on Public Service of October 31st, 1997 valid untill July 1st, 2017, left many significant elements of public service beyond the regulatory scope. The result was a very vague and ambiguous practice of enforcement with regards to issues which need a unified approach.[1]

Taking this into account, in the context of public administration reform, the Parliament of Georgia passed a Law of Georgia on "Public Service" on October 27th, 2015, as a far more refined legislative act geared towards a professional public servant.

The new Law introduced numerous novel and innovative institutions for Georgia as well as envisioned norms set to improve the already existing ones. One of such issues was the disciplinary liability of the public servant. Chapter 10, containing provisions regulating disciplinary liability of public servant and stipulating more complete rules of disciplinary liability appeared in the new law, also envisaging disciplinary proceedings. Likewise, disciplinary misconduct was given a new definition, which, in some ways, is different from the previous one.

Thereby, the aim of this article is to discuss and analyze new legal norms defining the essence of disciplinary misconduct in public service and to represent their important aspects as they create certain foundation for the effective functioning of the public service sector.

Key words: *Public service, public servant, disciplinary liability, disciplinary misconduct, minor and serious disciplinary misconducts, breach of norms of ethics and conduct.*

1. Introduction

"Two constitutional values converge into the personality of a public servant simultaneously: the guarantee of protecting individual rights and the element of institutional arrangement crucial for the functioning of the state."[2] Therefore the norms regulating disciplinary liability in the public service should create the basis for the effective functioning of said public service and at the same time ensure proper protection of public servants'[3] interests.

Disciplinary misconduct is the sole basis for disciplinary liability. First and foremost, the fact of actual misconduct transpiring is ascertained and then the issue of applying disciplinary liability measure comes into question.

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1 Explanatory Note to Law of Georgia on Public Service, of October 27th, 2015 (Registration № 07-2/372/8), 1, <http://bit.ly/2t7maWS>, [26.03.2019].

2 *Gatserelia A., Gegenava D., Sommerman K., Kobakhidze I., Rogava Z., Svanishvili S., Turava P., Kalichava K., Khubua G., Khubua G.* (ed.), Handbook of the Legal Bases of Public Administration, Vol. 3, Tbilisi, 2016, 195 (in Georgian).

3 In accordance with Subparagraph "d" of Article 3 of the Law on Public Service, a public servant is a qualified public officer/public officer/officer, a person recruited on the basis of an agreement under public law (administrative agreement) or a person recruited on the basis of an employment agreement (labor contract).

Disciplinary misconduct, at its core, constitutes breach of liabilities and is related to mechanisms for ensuring public service efficiency. During the functioning of a public service, the issues of evaluating conduct of public servants and deciding on the application of a measure of disciplinary liability, provided corresponding legal and factual prerequisites exist, are always relevant.

Thereby, the evaluation of a certain action as a disciplinary misconduct is a crucial process which, at first stage, demands clear understanding and comprehension of the essence of this institution, especially considering that, with promulgation and entering into force of the Law of Georgia of October 27th, 2015, on Public Service (henceforth referred to as "Law"), a new legislative reality has come to light, which envisions numerous issues related to disciplinary misconduct. More precisely, it stipulates the definition of disciplinary misconduct, determines the rules of disciplinary proceedings thus creating the possibility for the proper evaluation of the breach and proportionate protection of interests.

Therefore, in the article presented here, the definition and essence of disciplinary misconduct, its particularities and normative elements determining its essence (content) shall be discussed. For research purposes, also of interest will be those practical and theoretical aspects of the legal definition of disciplinary misconduct, which may have certain significance for ensuring protection of public servants' rights and public interest in general.

The article is based on historical, comparative legal and analytical methods. Due to specifics of issues discussed and objectives of the work, case law was also analyzed in certain terms. The scientific literature and normative materials related to research topic were researched as well.

2. Disciplinary Misconduct as the Basis for Disciplinary Liability and Formulation Determining Its Essence

Public servants, as subject to administative law, play an important role in executing government functions. Their knowledge and work represent the main bedrock for the effective performance of state authorities' tasks at hand.[4]

Therefore, considering the nature of public service and special legal status of the civil servant, he/she has an entire array of obligations, violation of which, naturally, entails disciplinary, administrative, civil or criminal liability. 5 As to which of the aforementioned will be applied depends on legally protected right (object) and the consequence of breach.

Disciplinary liability, as one of forms of liability, is a supervision mechanism in the civil service,[6] triggered as a direct result of the breach of work obligations and rules of conduct. 7 It has three

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4 *Baindurashvili N.,* Specifics of Handling the Disputes Related to Public Office, Legal Problems and Ways to Address Them, Legal Journal "Justice and Law", №3(38), 2013, 116 (in Georgian).

5 *Tofan M., Bercu A. M.,* Disciplinary Liabilities of the European Public Servants, CES Working Papers, I, (1), 2009, 27, <http://bit.ly/2uzx2L8>, [11.03.2019].

6 Disciplinary Liability in Public Service – Legislation, Administrative Practice and Case Law, 2015 Georgian Young Lawyers' Association Report, Tbilisi, 2016, 4, <https://bit.ly/29DhwV>, [11.04.2019].

functions: educational (teaches public servants to respect certain rules), preventive and repressive.[8] The implementation of said functions is important in establishing correct conduct in case of public servants.

Imposing disciplinary liability generally means that a public servant has committed a misconduct.[9] Disciplinary misconduct of a public servant constitutes a concept within administrative, more specifically civil service law, and is connected with disciplinary liability. Thus, "disciplinary misconduct and disciplinary liability are institutions of civil service law and public service".[10]

The Law does not give the definition of the term "disciplinary liability". However it can be frequently seen used in various contexts, namely, in disciplinary liability measures stipulated by the legislation, 11 exemption from disciplinary liability, 12 validity(t of disciplinary liability, etc. 13

The Supreme Court of Georgia remarks on disciplinary liability, that "public servant during his line of work is liable towards state and public and thus, failure to perform obligations set by legislation or defective performance thereof may lead to the imposition of disciplinary lability, which is a form of liability for violations identified in the professional line of public servant business and the aim of which is to ensure the proper observance of duties stipulated by legislation and to improve the work process,[14] which in turn leads to preventing cases of such violation of official duties in future. [15]

From this and based on the analysis of norms regulating the subject matter, disciplinary liability of the public servant may be understood as a legal responsibility following disciplinary misconduct, which is determined by a legislative act issued after disciplinary proceedings. Likewise, one of its properties as a measure of legal liability is the subject, which, in this case is public servant and illegal conduct, which fall under disciplinary misconduct.[16]

Tentatively, legal doctrine recognizes three types of disciplinary liability. These are the liability by labour by-laws (mainly concern support staff and contracted workers), liability by official subordination (as envisaged by the Law on Public Service) and liability as stipulated by special

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7 *Tofan M., Bercu A. M.,* Disciplinarie Liabilities of the European Public Servants, CES Working Papers, I, (1), 2009, 23, <http://bit.ly/2uzx2L8>, [11.03.2019].

8 Ibid*,* 27.

9 *Barbu V.,* Disciplinary Liability of European Officials, Perspectives of Business Law Journal, Vol. 1, Issue 1, 2012, 73.

10 Decision of April 29, 2014 № BS-651-626(K-13) Chamber of Administrative Cases of Supreme Court of Georgia.

11 Article 96, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

12 Paragraph 2 of Article 101, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

13 Article 101, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

14 Decision of July 14, 2016 № BS-184-183(K-16), Chamber of Administrative Cases of Supreme Court of Georgia.

15 Decision of December 10, 2015 № BS-161-158(K-15) Chamber of Administrative Cases of Supreme Court of Georgia.

16 *Malinche D. M.,* The Liability of Public Servants, Perspectives of Law and Public Administration, Societatea de Stiinte Juridice si Administrative (Society of Juridical and Administrative Sciences), Vol. 7(1), 2018, 69.

(extraordinary) statutes. 17 Chapter 10 of the new law applies to officials and extends to persons contracted under labor or administrative contract. 18 Furthermore, issues related to the disciplinary liability of the latter may be additionally covered by the Labour Code, relevant agreements and statutes (various internal regulations). Therefore, the given classification of disciplinary liability is not relevant for Georgia as Chapter 10 of Law, stipulating rules and conditions for imposing disciplinary liability, likewise applies to both the official and persons employed by a labour or administrative contract.

Considering abovementioned, the institution of disciplinary liability is an important mechanism for the proper functioning of the public service. It should be noted, that the institution of disciplinary liability is an important mechanism for proper functioning of public office. The right of public administration to enact certain measures against the offender (*ius puniendi*), strengthens internal discipline, increases accountability and ensures fulfillment of obligations. 19

3. Definition and Essence of Disciplinary Liability

Responsibility is the fundamental element of representative democracy. Public officials are doubly responsible, on one hand, towards citizens, and on the other – towards the government for the administration of public service. [20] Therefore, public official finds himself in a specific legal dimension and various liability forms may be applied to him/her, including disciplinary liability.

As noted before, disciplinary misconduct is the basis for disciplinary liability. The definition for the latter exists on legislative level, in particular, Paragraph 1 of Article 85 lays down the definition of disciplinary misconduct, while Paragraph 2 exhaustively lists disciplinary misconducts of one particular type.

In accordance with Paragraph 1 of Article 85 of the Law, following constitutes disciplinary misconduct:

a) failure to perform official duties intentionally or through negligence;

b) damage to the property of the public institution or creation of danger (risk) of such damage intentionally or though negligence;

c) neglect and breach of ethical norms and the general rules of conduct that are intended to discredit an officer or a public institution, irrespective of whether it is committed at or outside work. [21]

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17 *Morgoshia A.,* Particularities of Disciplinary Liability of Public Servant, Journal "Law", № 4-5, 2000, 39 (in Georgian).

18 Paragraph 3 of Article 80 and Paragraph 2 of Article 84, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

19 *Cardona F.,* Liabilities and Discipline of Civil Servants, Support for Improvement in Governance and Management, A joint initiative of the OECD and the European Union, principally financed by the EU, 2003, 2, <http://bit.ly/2t76Nhi>, [11.04.2019].

20 *Boroska P. A., Suwaj R., Staszic S.,* Ethical Responsibility of Officials of the European Union and Type Sanctions Imposed for Unethical Conduct, School of Public Administration, Poland, 2, <http:-/-/bit.ly/2pL1ymL>, [22.04.2019].

21 Paragraph 1 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

The definition of disciplinary misconduct is conveyed differently, in scope and meaning, in legislation of other countries. As an example, the Armenian law on Public Service indicates when disciplinary penalties may be applied. Such cases are: failure to perform official duties or improper performance thereof with no solid grounds, exceeding official powers,[22] internal violations of workplace discipline.[23] This example, just as the definition of disciplinary misconduct in Georgia, is a general one (it does not contain specific list of prohibited actions) and hence it is intriguing to determine its meaning as well as scope (scale) of such meaning.

3.1. Failure to Perform Official Duties Intentionally or Through Negligence

Failure to perform official duties intentionally or through negligence is the most common disciplinary misconduct that can be encountered in most other countries. For example, German legislation considers breach of duties intentionally or through negligence as a disciplinary misconduct.[24] Concerning work duties, they are defined based on legislation as well as internal regulation documents (by-laws) and work (job) descriptions.

It is important that current effective regulations in Georgia do not directly encompass faulty (defective) performance within the terms of disciplinary misconduct, but before that the Subparagraph "a" of Paragraph 1 of Article 78 of the previous corresponding law did envision it. Therefore, a question arises whether systematic and intentional defective performance of imposed duties by person entails disciplinary liability. Concerning this issue, the Commentaries to the Law on Public Service state that insofar as even after defective performance we have an unfinished, unfulfilled duty, the legislator has unified these two cases (defective performance and failure to perform) and considers it logical that the consequence of defective performance is, by itself, a failure to perform.[25] Despite such argumentation, considering the nature of disciplinary misconduct, for the purpose of definitiveness of the term of disciplinary conduct, the term of disciplinary misconduct, as regulated by Subparagraph "a" of Paragraph 1 of Article 85 of the Law, should directly indicate both failure to perform official duties intentionally or through negligence and faulty (defective) performance). Notably, according to Azerbaijani legislation, non-performance of official duties as well as improper (unduly) performance thereof and non-compliance of legislative obligations constitute grounds for initiating disciplinary misconduct.[26]

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22 Exceeding powers (the mandate) in Georgia entails criminal responsibility, if it results in the fundamental breach of the public or state legal interest. See, Article 333, Criminal Code of Georgia, SSM 41(48), 13/08/1999.

23 Article 32, The Law of the Republic of Armenia on Civil Service, 04/12/2001, <http://bit.ly/2ufDbg6>, [18.04.2019].

24 *Maizière T. D.,* The Federal Public Service: An Attractive and Modern Employer, Berlin, 2014, 48, <http://bit.ly/2sD1F0Q>, [18.04.2019].

25 *Turava P., Pirtskhalaishvili A., Dvalishvili M., Tsulaia I., Kardava E., Sanikidze Z., Makalatia G.,* The Law of Georgia on Public Service – Commentaries, *Kardava E.* (ed.), Tbilisi, 2018, 283 (in Georgian).

26 Article 25.1, The Law of the Republic of Azerbaijan on Civil Service, <https://bit.ly/2DqmwfV>, [18.04.2019].

It is important to note, that effective regulations do not state of what level, intensity or duration failures to perform work obligations are to be classified as disciplinary misconduct. Such issues are significant from the standpoint of proportionality principle and protection of rights of public servants. Therefore they should be duly evaluated during disciplinary proceedings on case-by-case basis.

With regards to definition of disciplinary misconduct in Georgia, it is not laid down on legislative level whether or not importance may be attached to the fact that disciplinary misconduct has been committed justifiably (with just cause). While Subparagraph "e" of Paragraph 2 of Article 97 of the Law establishes determination (identification) of reasons for non-performance of official duties, it bears significance during imposition of disciplinary liability measures as pertaining to selecting proportionate sanctions and not when deeming an action as a disciplinary misconduct.

As for the subjective side (mens rea) of the disciplinary misconduct, Subparagraphs "a" and "b" of Paragraph 1 of Article 85 include intentional or negligent behavior under the term of disciplinary misconduct, which points to the fact that current law prescribes due (guilty) liability in this section. However, Subparagraph "c" of the same Article, which concerns the breach and neglect of norms of ethics and general rules of conduct, does not state any form of liability. Concurrently, for instance, the legislation of Romania stipulates that intentional or negligent breach of official duties by public servants entails disciplinary consequences.[27] According to Slovenian law, intentional or negligent breach of official duties is a disciplinary misconduct.[28] Therefore,for an act to qualify as a disciplinary misconduct, it is important to determine subjective side of the committed act as well, when the case concerns failure to perform official duties. However definitions of intent and negligence and their content with regards to disciplinary misconduct is not regulated from normative standpoint within the framework of current civil service law.

3.2. Damage to the Property of the Public Institution or Creation of Danger of Such Damage Intentionally or Through Negligence

Subparagraph "b" of Paragraph 1 of Article 85 of the Law contains two alternative elements of disciplinary misconduct, namely, damaging property of the public institution or creating the danger of such damage occurring intentionally or through negligence.

The issue of qualifying an action of creating danger (risk) of damage to the public institution as a disciplinary misconduct is worth attention. Despite the fact that public servant's action does not result in any negative outcomes for the public institution, he/she can still be subjected to disciplinary liability. In such cases, it is crucial and also difficult to assess the likely results of the action in question and how real the danger was as to not unjustifiably infringe on the interests of the public servant.

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[27] Article 70.1, Regarding the Regulations of Civil Servants, Law № 188/1999, 28/06/2000, <https://-bit.ly/2VXOZks>, [18.04.2019].

[28] Article 122.3, The Civil Servant Act of the Republic of Slovenia, № 020-05/98-20/8, 11/06/2002, <https://bit.ly/2UO4O0E>, [18.04.2019].

Such attitude from the legislator's point emphasizes the public servant's obligation to protect the property of public institution with particular care. The Supreme Court of Georgia considered it as a gross violation of discipline bases on the Law on Public Service, of October 31st, 1997, when the person allowed and "made peace" with the possibility of severe outcomes, proving inadequacy of his behavior, inattentiveness and irresponsible attitude towards official duties.[29]

According to one viewpoint, material damage can be both collateral and the result of disciplinary misconduct and not an element determining its meaning(content). In this case, when inflicting material damage, a separate form of liability comes up first, such as material liability and in special cases, application of disciplinary liability is not excluded either. [30] However, according to Georgian law, material damage is the element setting disciplinary misconduct into motion as inflicting material damage (its existence) is the basis for qualifying a certain action as a disciplinary misconduct, its necessary element.[31]

What should be noted is that public servant's action may cause damage to the property of public institution itself or a third party. However Law does not state on compensation of such damages by the public servant. In this case, to ensure compensation for property damages, the rules contained in Law of Georgia – Civil Code of Georgia are paramount. For instance, in United States of America, in line with Federal regulations, when a head of institution or person authorized by him/her ascertains, that due to wrongdoing the civil servant has financial liabilities towards the institution, the amount will be deducted from his/her monthly salary.[32]

Likewise, it is important to draw a line between a fine or other disciplinary monetary penalty, as a measure of liability and compensation for damages. [33] The aim of the obligation of public servant to compensate for damages is to rectify already existing outcome and it has legal grounds separate from that of disciplinary liability.

3.3. Neglect or Breach of Ethical Norms and General Rules of Conduct Intended to Discredit Officer or Public Institution

3.3.1. Rules of Ethics and Conduct in Public Service

General rules of ethics and conduct are the central values, which should always form the backdrop for a public institution of any democratic and developed country in its daily, routine line of work.

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29 Decision of March 25, 2009 № BS-1108-1070(K-08), Chamber of Administrative Cases of Supreme Court of Georgia.

30 *Morgoshia A.,* Particularities of Disciplinary Liability of Public Servant, Journal "Law", № 4-5, 2000, 38 (in Georgian).

31 Subparagraph "b" of Paragraph 1 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

32 *Cardona F.,* Liabilities and Discipline of Civil Servants, Support for Improvement in Governance and Management, A joint initiative of the OECD and the European Union, principally financed by the EU, 2003, 4, <http://bit.ly/2t76Nhi>, [11.04.2019].

33 Ibid.

[34] These rules represent a list of principles and standards, [35] which concern the proper behaviour of civil servants[36] and support adherence to high moral standards. [37]

The ethics of public service originate from several different sources. These sources begin with the individual ethical character of the public servant, continue with the internal culture/regulations and statutes of the institution and end with international conventions and written standards of conduct. [38]

In most states, the norms of ethics and conduct are mainly enshrined in ethics codes and codes of conduct. They, as a rule, reflect three different values: personal moral principles (honesty, loyalty, etc.), professional public service values (neutrality, equal treatment, etc.) and legal regulations (avoiding conflict of interests, etc.). [39] Currently, rules of ethics and conduct are valid in different forms in majority of countries. They may be regulated by legislative or sublegislative act as well as international regulatory documents. [40] For instance, Estonia was the first country among Baltic States that adopted Public Service Code of Ethics. It was integrated in the Law on Public Service. [41] In Azerbaijan as well, the Code of Ethics and Conduct are regulated on legislative level. [42] The existence of

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[34] *Aghapishvili I., Beselia G., Tsukhishvili N.,* Commentaries on the Decree of the Government of Georgiaon Determining General Rules of Ethics and Conduct in Civil Service, *Kardava E.* (ed.), Tbilisi, 2018, 6 (in Georgian).

[35] *Beselia G.,* Which Role Can Ethics Management Play in the Improvement of the Performance of Public Administration? What is the Relationship between Ethics and Law in this Respect?, "Journal of Law", № 1, Tbilisi, 2012, 253 (in Georgian).

[36] *Kernaghan K.,* Promoting Public Service Ethics: The Codification Option, Ethics in Public Service, *Chapman R. A.* (ed.), Edinburgh, 1993, 18, cited in: *Beselia G.,* Which Role Can Ethics Management Play in the Improvement of the Performance of Public Administration? What is the Relationship between Ethics and Law in this Respect?, "Journal of Law", № 1, Tbilisi, 2012, 253 (in Georgian).

[37] *Huddleston M. W., Sands J. C.,* Enforcing Administrative Ethics, The Ethics Edge, *Berman E. M., West J. P., Bonezek S. J.* (eds.), 1998,147, cited in: *Beselia G.,* Which Role Can Ethics Management Play in the Improvement of the Performance of Public Administration? What is the Relationship between Ethics and Law in this Respect?, "Journal of Law", №1, Tbilisi, 2012, 253 (in Georgian).

[38] *Amundsen I., Pinto de Andrade V.* (eds.), Public Sector Ethics, Luanda, Bergen, 2009, 13, <http://bit.ly/-2tBHlB0>, [18.04.2019].

[39] *Palidauskaite J.,* Codes of Conduct for Public Servants in Eastern and Central European Countries: Comparative Perspective, 7, <http://bit.ly/2sgG1jC>, [18.04.2019].

[40] Even today there are unresolved debates, whether the ethics codes approved by the Act of the Government are more effective or internal regulations adopted by a specific institution. The obvious advantage of the governmental act is, that it is more consistent and understandable. But before 1992 a model Code was in effect in the United States of America, allowing administrative institutions to modify it as they saw fit to their own requirements. Later it was revealed, that as a result they were different approaches from agency to agency. For example, at some places even drinking coffee could have entailed liability, while a gift up to 220 dollars was allowed at other administrative bodies. After 1992, with the recommendation of the Presidential Commission on Federal Ethics Law Reform, a unified standard was developed and civil servants were now aware, what actions were permitted at the administrative body they were moving to. On this issue see: *Gilman S. C.,* Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons, Washington, 2005, 49-50.

[41] *Palidauskaite J.,* Codes of Conduct for Public Servants in Eastern and Central European Countries: Comparative Perspective, 2-3, <http://bit.ly/2sgG1jC>, [18.04.2019].

[42] The Law of the Republic of Azerbaijan on Rules of Ethics Conduct of Civil Servants, № 352-IIQD 31/05/2007, <http://bit.ly/2tC6oUq>, [18.04.2019].

rules on ethics and conduct for public servants may be considered as a Western approach in EEC countries.[43]

Until April 20th, 2017, there were no rules of ethics and conduct in form of a single, unified document. The Law on Public Service of October 31st, 1997, contained general rules of conduct for public servants, while considering an improper behavior directed against general ethical norms a disciplinary misconduct. Nowadays, in the wake of new legislative rules, ethical obligations are prescribed in the Decree № 200 of the Government of Georgia, of April 20th, 2017, on Determining General Rules of Ethics and Conduct in Civil Service. The Decree presents quite detailed list of rules of ethics and conduct, elaborates on each principle and and not merely declares them. The scope includes public servants employed at public institutions and sets out common general rules for them. Current legislation also envisages existence of special ethical rules and rules of conduct. [44]

3.3.2. Breach of Rules of Ethics and Conduct as Grounds for Disciplinary Liability

Ethics and corruption may be considered as two sides of the same coin. Following ethical norms is necessary for proper functioning of public services. Taking this into account, obligation to adhere to ethical norms are prescribed normatively in majority of countries, but the size and scope of ethics codes may be different. In certain countries it is comprised of only general principles and values and does not include procedures for their implementation (e.g. Estonia). However codes of many countries do contain both the responsibilities as well as sanctions resulting from violation of said responsibilities, such as in Latvia. [45] As for Bulgaria, there is a provision in Code of Conduct of State Administration Employees that when violating the obligations defined in the Code, the employees are to bear disciplinary liability under the Civil Servants Act and the Labour Code. [46] Breaching public servant codes of conduct entails disciplinary liability in Romania[47] and Croatia[48] as well.

In Decree № 200 of the Government of Georgia, of April 20th, 2017, on Determining General Rules of Ethics and Conduct in Civil Service only ethical obligations and norms of conduct are laid down. It does not include mechanisms for their implementation and does not specify legal repercussions for their breach.

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43 See Recommendation № R(2000)10 of the Committee of Ministers to Member States on Codes of Conduct for Public Officials, the Council of Europe, 11/05/2000.

44 Article 2 of Decree № 200 of the Government of Georgia, on Determining General Rules of Ethics and Conduct in Civil Service, 20/04/2017.

45 *Palidauskaite J.,* Codes of Conduct for Public Servants in Eastern and Central European Countries: Comparative Perspective, 7-8, <http://bit.ly/2sgG1jC>, [18.04.2019].

46 Article 22, Code of Conduct of State Administration Employees, Adopted with CoM Decree №126/11.06.2004, promulgated, SG №53/22.06.2004, <http://bit.ly/2sgVjoB>, [18.04.2019].

47 *Puran A. N., Olah L.,* Disciplinary Sanctions Applicable to Romanian Civil Servants, AGORA International Journal of Juridical Sciences, № 4, 2013, 185.

48 Part 10, Section 1, Article 96, The Civil Servant Act of the Republic of Croatia, 15/07/2005, <http://bit.ly/2tg3Xom>, [18.04.2019].

However, according to Subparagraph "c" of Paragraph 1 of Article 85 of the Law, neglect and breach of ethical norms and general rules of conduct, intended to discredit an officer or the public institution represents disciplinary misconduct, irrespective of whether or not it was committed at our outside of work. The similar norm in the old law envisaged alternative configurations for disciplinary misconduct and very general evaluative terms. [49] The new Law, on the other hand, has somewhat specified the previously existent provision and counted neglect and breach of ethical norms and general rules of conduct, intended to discredit an officer or the public institution, both at work and outside it, as a disciplinary misconduct.

Current rules of ethics and norms, along with other concrete provisions, include in themselves wide, complex principles, based on which the ethical evaluation of behavior encounters certain difficulties. Concurrently, there are no unequivocal definitions for unethical conduct. A specific behavior may be ethical for certain groups of people, while the same action may be unacceptable to others. All this creates the problem of qualifying an action as a disciplinary misconduct due to breach of norms of ethics or conduct. To solve this issue, an emphasis may be made on the outcome that follows the action. Likewise, it is possible that unethical conduct may not have immediate negative consequences, but after some time it may adversely affect public's trust towards the public institution. For this reason, instantaneous result of the action can not be the defining factor in ascertaining disciplinary misconduct.

It is interesting, that the aforementioned legal norm differentiates between the breach and neglect of ethical rules, although it is hard to ascertain what exactly is meant by either of them. As there is no mention of liability and its types in this part of the provision, it is possible that neglect means an act committed through negligence, while breach is the same, only with intent. Still it raises questions as public official may intentionally disregard an ethical norm and not respect it. Likewise neglect of rules by a public official may mean their breach as well. Sulkhan-Saba Orbeliani defines "neglect" as "slipping from the mind".[50] It may include neglect, ignoring, not taking into consideration, denial, while "breach" means deviation, not adhering to the rule. [51] Despite the abovementioned, it is still difficult to speculate what exactly the legislator meant under these two terms and what practical purpose their separate presence in the law serves.

One more issue related to the current existing normative formulation of disciplinary misconduct is how appropriate it is to qualify an act committed by a person outside of his work as a disciplinary misconduct or to what degree this act may discredit the institution or the official. One opinion is that "acts committed during non-work hours should not be subject to discussion on disciplinary liability in case of any officials at all, for this provision gives quite broad powers to the public institution."[52] However, it is possible that an act committed by any employ outside of his work hours may reflect

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[49] See Subpararaph "c" of Paragraph 1 of Article 78 of Law of Georgia on Public Service, Parliament Parliamentary Gazette, 45, 21/11/1997.

[50] *Orbeliani S.,* Sitkvis Kona Georgian Dictionary, *Iordanishvili S.* (ed.), Tbilisi, 1949, 342 (in Georgian).

[51] Electronic Version of Explanatory Dictionary, Joint Project of *Arnold Chikobava* Institute of Linguistics and Language Modeling Association, <https://bit.ly/2Qo1hUv>, [18.04.2019].

[52] Disciplinary Liability in Public Service – Legislation, Administrative Practice and Case Law, Georgian Young Lawyers' Association Report of 2015, Tbilisi, 2016, 9, <https://bit.ly/29DhwVu>, [11.04.2019] (in Georgian).

upon overall work process. According to the Judgement of Federal Court of Australia, calls by an employee to another female employee outside of work hours, in non-working environment, were considered as sexual harassment as this type of behavior could have had long-term effects on the work environment.[53]

Therefore, legal status obligates public servant to act in compliance with ethical rules and rules of conduct outside of work and during non-work hours as well, so his/her behavior does not damage the reputation of the public institution and negatively affect the work process.

4. Types of Disciplinary Misconduct and Circumstances Determining Their Classification

Certain countries do not recognize the division of disciplinary misconducts by types (e.g. Romania). [54] However, in most we can still find such classification.

The Law on Public Service of October 31st, 1997 did not distinguish between types of disciplinary misconduct. In Article 78 of the Law, a general definition of disciplinary misconduct was given, while Article 99 contained a provision, according to which an official could have been dismissed from work even without disciplinary liability, if he/she would grossly violate official duties. Regulation of the issue in such a way has coined the term "gross disciplinary misconduct", constituting basis for dismissing an official from public service. However, exactly what was to be meant under this term, was within the discretionary evaluation of the head of public institution.

In accordance with most wide-spread classification, we encounter minor and serious (severe) disciplinary misconducts. Current Georgian law too provides exactly these types of disciplinary misconduct.

Serious disciplinary misconducts have been stipulated exhaustively in line with *numerus clausus* principle as they can lead to far more severe legal repercussions for the public servant (including dismissal). [55] As for minor disciplinary misconducts, law does not define them in full. In this case a principle applies – minor disciplinary misconduct is a misconduct that is not a serious disciplinary misconduct. Hence, unlike criminal offences, the current valid legislation does not include exhaustive list of specific types of disciplinary misconduct. Taking into consideration the danger of prohibited act and strict nature of the following punishment, such approach would have been unacceptable in criminal law, but for administrative law such method of exclusion is not new. Already on the interpretation stage, its definition, formulated by Otto Mayer, was founded on this subtraction method.[56]

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53 *McManus v Scott-Charlton*, (1996) Federal Court of Australia, 70 FCR 16, (1996).

54 Article 70.1, Regarding the Regulations of Civil Servants, Law № 188/1999, 28/06/2000, <https://bit.ly/2VXOZks>, [18.04.2019]

55 Paragraph 3 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

56 *Bogdandy A. V., Mhuber P., Cassese S.,* The Max Planck Handbooks in European Public Law: The Administrative State, Vol. 1, 2017, 153.

In a democratic state the norms regulating disciplinary liability are based on principles effective in administrative law. Similarly, in this case, it is important to create a foundation for the implementation of the principle of predefinition of punishable behavior and relevant sanctions, following which is necessary to manage discipline at the public service. This, however, does not mean that all possible actions and consequences entailed should always be prescribed in detail. In such circumstances, in accordance with *lex certa* principle, public servants should be able to foresee the consequences of their actions.[57] In Georgian reality, despite idiosyncracies of regulation, the civil servant should foresee legal consequences of his actions pertaining to a concrete type of disciplinary miscounduct.

The legislation unambiguously states with regard to gross disciplinary violations, that a disciplinary misconduct is considered as such if:

- it causes the reputation of the person committing misconduct to be tarnished (discredited), which essentially excludes proper performance of official duties from this person in future;
- The reputation of public institution was damaged as a result of disciplinary misconduct;
- It causes significant material damage to the property of the public institution as a result;
- Other public servants, third party or public interest was damaged/infringed as a result of disciplinary misconduct;
- Officer refuses to undergo the evaluation as provided by the law;
- Person bearing disciplinary liability has committed a new disciplinary misconduct.[58]

This list includes only two concrete formulations for serious disciplinary misconducts: 1. Refusal of official to evaluate as provided by the law; 2. Repeated acts of disciplinary misconduct by the person under disciplinary liability. Other meanings (configurations) are general and include evaluative stipulations. [59] For example, the fact of damages or the danger (risk) thereof occurring undoubtedly represents grounds for qualifying an action as a disciplinary misconduct[60] and infliction of severe damage as a serious disciplinary misconduct. In the given context, it is not defined what exactly is meant under "significant damage" and it should be determined on case-by-case basis. Therefore, it turns out that the issue of qualifying an action as a serious disciplinary misconduct again falls under the assessment of the public institution.

Considering the multifaceted nature of disciplinary misconducts and their consequences, the existence of general provisions and evaluative terms in legislative acts should be considered justifiable. However some countries do regulate disciplinary misconducts in more detail in order to implement (realize) the principle of predefinition of punishable behavior and relevant sanction. Each solution has

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57 *Cardona F.,* Liabilities and Discipline of Civil Servants, Support for Improvement in Governance and Management, A joint initiative of the OECD and the European Union, principally financed by the EU, 2003, 6, <http://bit.ly/2t76Nhi>, [11.04.2019].

58 Paragraph 3 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015.

59 Disciplinary Liability in Public Service – Legislation, Administrative Practice and Case Law, Georgian Young Lawyers' Association Report of 2015, Tbilisi, 2016, 12, <https://bit.ly/29DhwVu>, [11.04.2019] (in Georgian).

60 Subparagraph "b" of Paragraph 1 of Article 85, Law of Georgia on Public Service, 4346-IS, 11/11/2015

its advantages and drawbacks. If general terms give wide discretionary powers to public entities, the list of specific actions may not be exhaustive accounting for the scale of civil service and multitudinous functions and duties of the public servants.

For instance, Slovenian law provides a comparably precise list of minor and severe disciplinary breaches. However there are evaluative provisions as well. Following counts as minor infractions: violation of obligations stipulated in regulations, collective labor agreements, labor contracts, individual and normative acts of the body (authority), improper behavior with colleagues and clients during the performance of official duties, conduct contradicting the code of ethics for public servants.[61]

Concerning serious disciplinary violations, following are deemed as such in Slovenia: illegal acts at work, misuse of public funds, exceeding the mandate (powers), violation of the principle of political neutrality and impartiality, violation of civil cervants' rights, violation of the duty to protect secret information, breach of restrictions regarding the acceptance of gifts, improper, violent or offensive conduct with work colleagues and citizens, repeated acts of minor disciplinary misconduct, violation of obligations prescribed in regulations, collective labor agreements, labor contracts, individual and normative acts of the administrative body, which induced severe consequences for the client or the body(authority) rendering services, breach of rules regulating conflict of interests; [62]

As for Croatian law, it also distinguishes between minor and serious (severe) offences and sets boundaries between them on the basis of even more specific norms.[63] If being late at work or leaving the workplace early constitutes a minor misconduct, the non-performance of official duties or unscrupulous, inopportune and negligent performance is a severe disciplinary misconduct. Absence from work for one day without due cause counts as a minor misconduct, while absence from 2 to 4 days is a severe one. The abuse of official powers or exceeding them, refusal to perform the task without sound reasons, disclosure of secret work information, an action damaging the reputation of the public institution, committing minor violation thrice and other severe wrongdoings of official duties stipulated by legislation are also severe misconducts. [64]

It is evident from examples discussed, that the distinguishing trait and/or consequence boundaries (scope) that characterizes this or that particular type of wrongdoing and/or accompanies it, may constitute the basis for classifying disciplinary misconducts into types. The nature of wrongdoing, which is often related to failure to perform specific obligations, is also important.

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61 Article 123.1, The Civil Servant Act of the Republic of Slovenia, № 020-05/98-20/8, 11/06/2002, <http://bit.ly/2uzGpdx>, [18.04.2019].

62 Ibid, Article 123.2.

63 Part 10, Section 1, Article 97, The Civil Servant Act of the Republic of Croatia, 15/07/2005, <http://bit.ly/2tg3Xom>, [18.04.2019].

64 Ibid, Part 10, Section 1, Article 99.

5. Conclusion

The public service system and institutions greatly determine the existence of just and democratic state. Among these institutions, application of disciplinary liability is crucial, which should be predicated on certain democratic requirements. [65]

As noted previously, disciplinary misconduct is the basis for disciplinary liability and determining its essence (content). Based on analysis of regulatory norms, it became clear, that in its current state, the Law establishes a more complete definition of disciplinary misconduct. This article discussed its legal aspects connected with the elements of failure to perform official duties, violation of ethical norms and general rules of conduct as grounds for disciplinary misconduct as well as details of the location where such misconduct has been committed.

Aside from this, taking into account the definition of disciplinary misconduct, proper evaluation should be given to damage to property and creation of the risk of such damage, during which the severity of inflicted damage in former and certainty of danger in latter should be analyzed.

Also current classification of types of disciplinary misconducts should be considered as a positive development. While it does not contain a list of concrete actions, it still nevertheless provides an important framework for qualifying an action as a specific type (minor or serious) of disciplinary misconduct.

Concerning the principal challenge of implementing existing regulations, it is the existence of evaluatory categories/definitions, regarding the content (essence) of the disciplinary misconduct and types thereof.

Therefore, thanks to the legislative changes in the public service sphere norms regulating disciplinary misconduct have been laid down, which correspond to the requirements of modern civil service and provide the possibility for a proper assessment of civil servants' behavior. In such case the core legal aspects of valid regulations must be taken into account.

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[65] *Loria V.,* Administrative Law of Georgia, Tbilisi, 2005, 244-245 (in Georgian).

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