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Defining Non-Property Value within Personal Non-Property Rights in Civil Circulation

The respective article has been developed with regard to raising the challenge of determining property value of the personal non-property rights and its applicability toward fundamental, ideal (non-property) bases. For the sake of comprehensive access to the legal problem – it is important to undertake systematic analyses of various conceptual issues related to the respective challenge; it shall be further determined how much the Georgian model/practice ensures the standard of trust toward protection of personal non-property rights, which has been set forth among progressive legal orders and that complies to all the requirements of the information epoque.

Various ideas have been identified throughout the doctrinal analysis with regard to determining value of property in personal rights, which hinders formation of unified judicial practice on the respective matter.

The research has been based on an analysis of legal doctrine and judicial practice. The respective article demonstrates conceptual approaches of various legal systems and peripeties of legal order of Georgia within comparative legal angle.

Key words: *personal; non-property; rights; economic; property; value; civil circulation.*

1. Introduction

The article № 18 of the Georgia's Civil Code (later to be referred to GCC) protects personal non-property rights, which are regarded as non-material, non-property nature and whose primary targets of protection are non-material values, respect to personality and entailing values of individualism (identity) of each human's existence. The respective rights as part of civil system, are portrayed within general demand ensured by legal order – to be a person[1] and hence, ensure higher unity of values, where legal scale of freedom is defined by human dignity[2]. The supreme right of dignity and connection to the latter serves as a purpose for the respective rights, often, to lack economic essence, since their difference from other rights, on the first place, make them different due to their fundaments of formation, which is simply connected to existence of human being. It implies

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1 *Kereselidze D.,* The Most General Systemic Concepts of the Private Law, Institute of European and Comparative Law, Tbilisi, 2009, 131 (in Georgian); cites*: Gierke O.,* Deutsches Privatrecht, §81, Band I, Leipzig, 1895, 702.

2 The Constitutional Court of Georgia, 1/4/592, October 24, 2015, decision on the case of "Citizen of Georgia Beka Tsikarishvili v. the Parliament of Georgia", II-1.

that by birth, a person is a carrier of non-property rights; personal right classifies him/her as human[3], which to a certain extent excludes economic essence of the latter right. It is permissible to assert that for the purpose of stressing out personal rights – cultivating the term "non-property" also serves purpose to fully distance personal rights from property sphere[4] and stressing out non-property and ideal values within.

Despite of differentiation performed on the grounds of origin, it becomes almost impossible to set strict boundaries between personal rights and economic civil circulation of these rights as it is practically impossible within market economy. In the process of service or production-realization or products, there are certain details frequently used, which do not qualify as trade marks in a classical meaning, however, these are personal elements of various popular persons from politics, music, show business and modeling[5]. The latter becomes especially appealing to advertisement business and media outlets, which serves as a tempting environment for exploiting personal characteristics (name, image, stage image, visual, voice or details of personal life) for the commercial exploit.

Economic evaluation of an individual personality can become source of income not only for popular faces, but also for non-public person, who can turn their personal values (information from personal life, name, voice, image, business reputation) into an object of civil law agreement. In other legislative systems, so called license agreements are being actively utilized; these make it possible for an authorized person to transfer rights on using any of the above-mentioned characteristics to a third person. In case of absence of an agreement, shall the above-mentioned values be exploited by a non-authorized person, then, personal commercial rights turn out to be more infringed and ideal interests[6]

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3 *Klüber R.,* Persönlichketsschutz und Kommerzialisierung, Tübingen, 2007, 14.

4 *Bichia M.,* The Georgian Model of Compensation of Non-property Damage for Violating Personal Rights in Line with European Standards, Journal of Law, № 1, 2017, 9 (in Georgian).

5 *Rixecker R., in:* Münchener Kommentar zum BGB, Allgeimeine Persönlichkeitsrecht, §12, Band 1, 7. Auflage, München, 2018, Rn. 35.

6 BGH GRUR 2000, 709- Marlene Dietrich; comp. Douglas v Hello! [2007]UKHL 21 - the Court of England discussed the respective case with regard to the magazine Hello! exploiting unauthorized use of pictures from wedding of the Michael Douglas and Catherine Zeta-Jones. Only the magazine OK! had been authorized to take pictures at the wedding, exclusively. The court in England's judgement regarded pictures taken by paparazzi and their publishing at a competitor magazine to be a breach of confidence, as the Common Law does not directly imply right to personal image. The court had to review the perspective, whether or not Douglass had a right to keep the ceremony as a secret and how should the latter obligation be fulfilled, after an authorized magazine would lawfully publicize the information? The court regarded that a large portion of claims became a matter of commercial arrangement. The "remaining" of these rights only argued that claimants had a right to select photos taken by the OK! magazine for publishing purposes. The court ruled out that only these "remaining" from right to personal life are not sufficient for prohibiting publishing of photos taken by the Hello!. Comp. – Campbell v MGN [2004] 2 AC 457 – In 2001, newspaper "Mirror" published an article, which discussed how she went under treatment at the anonymous drug-takers group. An article was also accompanied with Campbell's picture in which she wore everyday jeans and was standing at the entrance of a clinic. After the model filed a complaint, the same newspaper published series of articles, which referred to Naomi's latter action in an insulting and cynical forms. The Court made an emphasis on public status of the plaintiff and for the purpose of balancing interests – it stressed out reasonable expectation principle of personal space protection. The Court ruled out that upon

not that much. Due to discussing the latter context, the legal literature widely utilized the term "*personal merchandising*[7]", whose essence is directly connected with commercial use of personality.

The goal of the respective paper is to scrutinize property element within non-property rights and determine its compatibility with the same rights' fundamental, ideal (non-property) origins; Differentiation of the two named values and determination of property origin in personal law is especially relevant in civil turnover, as making a wrong decision from a systemic point of view directly affects the effective protection of the interests of the authorized person. Thus, the aim of the paper is to develop realistic and tangible recommendations as a result of the analysis of case law and scientific discourse around the research topic, which will significantly raise the standard of protection of personal rights in civil law.

The paper is based on the methods of comparative law, as well as normative and systemic research, predominantly approaches of the German Law and with consideration of making comparison with an order in the Anglo-American legal families. The above-mentioned statements constitute to legitimate interest toward property essence of personal rights, which have been strengthened with various legislative constructions in several countries and differ from one another based on methodological grounds. The respective angle makes it worth to review constrictions formed by various legislative systems from the practice of Anglo-American and continental Europe countries and their compatibility with the Georgian legal order.

Initially, the paper reviews development cycle of the respective legal teaching and contemporary reality with regard to countries that entail the two respective systems and existing theoretical analysis in legal doctrine. The paper is concluded with specific recommendations with regard to key issues set forth within the topic.

2. Development Cycle of Legal Teachings on Economic Value of Personal Rights

Founders of traditional theory of personality did not consider correlation of ideal and commercial elements within personal rights, since legal thinking determined the respective right as solely serving personal and ideal interests of its owners[8], that unlike property rights, are non-alienable goods and cannot be inheritable[9]. Later, specific personal rights, namely, increasing "commercial-lization" [10] cases of using name and image, the 19th century legal dogmatic could no longer bypass the respective matter and difference of opinions arose on the topic of legal methodic, arguing on what was the correlation of the two origins to each other. The three positions deserve to be highlighted from the

publicizing pictures – the plaintiff's respect to personal life was infringed, which weighted over defender's freedom of expression and the latter defender was imposed to pay 1 million pounds to the model.

7 "Vermarktung der Persönlichkeit". *Rixecker R., in:* Münchener Kommentar zum BGB, Allgeimeine Persönlichkeitsrecht, §12, Band 1, 7. Auflage, München, 2018, Rn. 36; *Klüber R.,* Persönlichketsschutz und Kommerzialisierung, Tübingen, 2007, 13.

8 *Götting H., Schertz C., Seitz W.,* Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 196.

9 *Krneta S.,* Kommerziele Aspekte des Rechts am eigenen Bild, GRUR 1996, 299, <www.Beckonline.de> [06.01.2019].

10 "Kommerzialisierung des Persönlichkeitsrechts".

respective discussion[11]: the first which is a traditional one with minority of adherents, who regard personal rights to solely safeguard ideal interests. The second and radically contradictory position regard a notion of commercialization and the corresponding economic bases is related to exploiting name, image, voice and personality elements for profit. Intermediary position does not distance non-material property basis and considers the latter in a unified personality right.

Approaches of economic value of personal rights in the Roman legal family and countries of common law genuinely coincides with each other. It's a well-acknowledged notion is that, more or less, none of the legal orders have escaped from the topic of attaching property interests to personal rights. The difference between these two legal systems is vastly in methods of regulation.

3. Differentiation of Personal Non-Property Rights from Property Aspect within Continental European Law

3.1. General Personal Rights' Property and Non-Property Elements in the German Law

Commercial value of personal rights in Germany is an achievement of judicial practice, where, due to practical needs, the necessity to set boundaries between personal non-material rights and their economic value arose[12]. Already back in 1956, the Federal Court of Justice of Germany, in one of its rulings[13], which, as an enhancement of imperial court's determined practice[14] that regards extended usage of image rights to be non-material goods, hence utilizing the latter for advertisement purposes by a firm which is focused on material profit – constitutes as unauthorized infringement to the person's "exclusive ownership sphere[15]" and therefore qualified the latter as an infringement of non-property value right.

Later, the Federal Court of Justice of Germany, with regard to the case on Marlene Dietrich[16] and "blue angel[17]" ruled that one of the producers used name and image of an actress in an authorized manner and thus infringed personal rights and both aspects of certain elements, such as ideal, as well as economic. The Court generalized its judgement and found that unlawful infringement of any ele-

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11 *Götting H., Schertz C., Seitz W.,* Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 197.

12 Ibid.

13 BGH GRUR 1956, 427, 428-*Paul Dahlke* – peculiarity of the respective decision is that it has served as grounds for setting practice for compensation for infringement of personal rights. The case was related to an actor of theater and cinema – Paul Dahlke and unauthorized usage of his pictures for the purpose of advertisement, which had been published in one of the magazines for the purpose of advertising mopeds.

14 *Alexander Ch.,* Schadenersatz und Abschöpfung im Lauterkeits-und Kartellrechts, Jena, 2010, 257; On dogmatic grounds for damage compensation.: *Dreier Th.,* Kompensation und Prävention, Tübingen, 2002, 256.

15 "Vermögenswertes Ausschliesslichkeitsrecht."

16 BGH GRUR 2000, 709, 713- *Marlene Dietrich* – In the respective case, the plaintiff was Marlene Dietrich's daughter, and defender was one of the producers, who disseminated various types of products with a name of Marlene Dietrich; also, upon contract, the person provided Fiat Automobil AG with a right to use "Marlene" as a name of a car.

17 BGH NJW 2000, 2195; 2000, 2201- Der blaue Engel.

ment of personality and individualism, despite of the level of infringement, grants plaintiff with a right to demand compensation of damage or impose sanction for property authority. The Court stressed out the circumstances that commercial value of personality rights does not lose importance even after the person has deceased and it is inheritable to heirs(ess) of the latter person[18].

Nowadays, it is not a novelty for the contemporary German legal literature[19] that an object for general personal rights protection does not happens to be solely pure personal (ideal) interests[20], but also it equally entails personal aspects with commercial angle, whose elements are inseparable from a human; however, such elements can also be the non-material goods[21] that can be separated from a subject and respond to realization, and which can easily become an object for violations for the purpose of gaining economic profit[22].

3.2. Personal Right, as a Property Type Right in the French Law

The topic over value of personal rights happens to be a matter of discussion also in France[23]; the Court of Cassation of France has not yet determined such admittance as an exclusive statement. Moreover, in the judicial decision of 2005, children of a deceased person demanded compensation for exploiting pictures of their father for commercial use; the Court of Cassation of France single-handedly demonstrated negative position on the matter of recognizing property aspects of personal rights to be inheritable[24]. Therefore, the legal thinking of France has a cultivated idea that personal

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18 It shall be noted that the Federal Court of Justice of Germany, prior to the respective ruling, did not demonstrate its position on passing on personal rights and inheritability of the latter rights. In the case of "Mephisto" (BGHZ 50, 133 [137] = NJW 1968, 1773 = LM Art. 2 GrundG Nr. 40 L), the court ruled out that "rights that are inseparable and organic to the personality, apart from aspects with commercial worth, shall not be made inheritable or made possible for being passed on". In the case of "Nena- Entscheidung" (BGH, NJW-RR 1987, 231 = LM § 812 BGB Nr. 187 = GRUR 1987, 128), one of the singers, upon exclusive contract, provided one of the companies with crucial rights for optical and acoustic spheres for commercial use. The third person, who unlawfully used the rights alienated by the singer, had been imposed with compensating damage for gaining unlawful wealth. The Court left open the matter of right to transfer rights, however, it did not argue the relevance on the personal rights' property aspect.

19 *Kläver M.,* Vermögenrechtliche Aspekte des zivilrechtlichen allgemeinen Persönlichkeitsrechts, ZUM 2002, 205.

20 *Rixecker R., in:* Münchener Kommentar zum BGB, Allgeimeine Persönlichkeitsrecht, §12, Band 1, 7. Aufl., München, 2018, Rn. 3; *Bamberger H., Roth H., Hau W., Poseck R*., Beck'scher Online-Kommentar, §12, 46. Auf., München, 2018, Rn. 9.

21 *Bichia M.,* The Georgian Model of Compensation of Non-property Damage for Violating Personal Rights in Line with European Standards, Journal of Law, № 1, 2017, 9 (in Georgian).

22 *Kläver M.,* Vermögenrechtliche Aspekte des zivilrechtlichen allgemeinen Persönlichkeitsrechts, ZUM 2002, 205; *Hubmann H.,* Das Persönlichkeitsrecht, Köln, 1967, 133.

22 For example, with personal elements of own personality, namely, exploit of name and image for advertisement purposes has brought 22 million German marks for Becker in 80ies of the 20th century, 4,5 million for Bernhard Langer and 3 million for Steffi Graf.

23 *Götting H., Schertz C., Seitz W.,* Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 1072.

24 Cass.Civ. 15.02.2005, D.2005. IR. 597.

rights are strictly personified and inseparable rights from personality[25]. However, it shall also be noted that in the decisions of some of the courts of lower instances there are traces of attempting to separate property aspect[26]. In the latter context, the decision of the Versailles Court of Appeals of 2005 shall be stressed out[27], which related to exploit of one of the artist's picture for illustrating calendars, while, the respective firm had an exclusive authorization to exploit his image. The Court of Appeals did not question that admittance of property type agreement on a picture would imply recognition of the latter within civil circulation.

Aspirations of specific authors within the French legal literature shall also be highlighted, who strive to prove existence of commercial elements within specific personal rights, such as image, voice and name. They argue that a person holds exclusive right on his/her image. Exploit of a picture for public use without authorization constitutes as violation of property rights and shall be restituted independently whether a person's personal life has been infringed or not[28].

3.3. Regulation of Property Element within Personal Non-Property Right in Poland

In Poland[29], commercialization of personal rights is an undoubted social phenomenon, which is more of a factual reality, than a legal category. Those scholars, who regard commercial value within personal rights are in minority[30]; despite of this, the practice determined in Poland portrays authorizations/permits to exploit personal rights and realization of the latter, which makes it possible to reach civil law agreement, however, such agreements are mostly regulated by legal acts on intellectual property, thus, there has not been a need in practice to discuss these within the personal rights angle[31].

3.4. Differentiation of Personal Rights Based on Property Aspect within the Spanish Law

The American Law has influenced the Spanish legal practice[32] and has resulted into an idea cultivated within legal literature[33] that personal rights have property nature. Possibility to exploit

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25 *Götting H., Schertz C., Seitz W*., Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 1072.

26 TGI Lyon 17.12.1980, D.1981. J. 202; TGI Paris 28.9.2006, see: *Götting H., Schertz C., Seitz W*., Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 1072.

27 Cass.Civ. 15.02.2005, D.2005. IR. 597.

28 *Götting H., Schertz C., Seitz W*., Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 1073.

29 *Drobnig U., Kötz H., Mestmäcker E. -J.,* Deutsch-polnisches Kolloquium über Wirtschaftsrecht und das Recht des Perönlichkeitsschutzes, Tübingen, 1985, 9.

30 ob. *Götting H., Schertz C., Seitz W*., Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 1128.

31 Ibid, 1128.

32 STC 81/2001 26.3.2001-Emilio Aragon; STC 117/1994 25.4.1994 (FJ 3) - Ana Garcia Obregon; STC 231/1988 2.12.1988-Paquirri.

33 *Götting H., Schertz C., Seitz W*., Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 1160.

personal rights for commercial purposes are regulated by organic law in Spain[34]. However, it shall be taken into consideration that a right of person to image is not protected by fundamental constitutional right and therefore – infringement of the latter rights does not fall under constitutional law[35]. The latter approach of the judicial practice indicates that also in Spain – protection mechanisms of personal right between the constitutional and civil laws are separated. It shall not be argued the similarly to the American notion of "Right of Publicity" – unlawful exploit of elements of personality for commercial use are indicators of unlawfulness. Also, the fact that the Spanish legislators regard possibility for an authorized person to permit authorization to exploit the latter elements as part of the "Right of Publicity"; the latter notion is just another proof that property aspects are integral parts of personal rights[36].

4. Right of Publicity, as a Personality Aspect in the Anglo-American Law

In the countries of common law and unlike the German system, the *Right of Publicity* has derived from commercial enhancement of aspects of personality[37], as a foundation of self-sufficient and independent demand. Due to numerous cases of unauthorized use of certain individual's personal characteristics – formation of economic type of right "*Right of Publicity*" has served as somewhat response in various states of the US, which standalone as an independent and parallel right to the complaints on infringement of right of personal life[38]. According to an opinion expressed within the legal literature, right of publicity entails two aspects in its essence: right in a negative context, which prohibits unauthorized use of certain characteristics of individualism and positive context, which provides an owner with an exclusive right to manage this personality that implies economic realization of the respective right in an economic angle.[39]

Based on a well-established practice in legal literature, right of publicity is a property type of right with a possibility of alienating and is also inheritable[40]. We can assert that right of publicity is a contradictory right to right to privacy, and the difference lies on the right of publicity being focused on not an ideal aspect of protection, but an economic part.

Such dualistic division of mechanism of protecting personality has been caused by an environment in which right to personal life could not ensure effective protection of contemporary world's identities' manifestations[41]. Flaw of the "Right of Privacy" derives from the judicial practice,

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34 Ibid, 1167.

35 Ibid.

36 *Götting H., Schertz C., Seitz W.*, Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 1168.

37 *Sajaia L.,* Author's Personal Non-Property Rights, thesis for acquiring PhD degree, TSU, Tbilisi, 2014, 100 (in Georgina).

38 *Götting H. P.*, Vom Right of Privacy zum Right of Publicity: Die Anerkennung eines immaterialgütterrecht an der eigenen Person im amerikanischen Recht, GRUR Int. 1995, 656.

39 Ibid.

40 Ibid.

41 *Götting H. P.*, Vom Right of Privacy zum Right of Publicity: Die Anerkennung eines immaterialgütterrecht an der eigenen Person im amerikanischen Recht, GRUR Int. 1995, 659.

which could not have been used for ensuring protection of personal life of persons well-known in public; due to the fact that their public interest is concludent to their aspirations toward publicity and excludes protecting rights upon their willingness[42]. The latter judgement has been utilized by judges for a long period of time, as they argued on eradicating unauthorized use of public figure's personal characteristics, which resulted into somewhat judicial practice and pushed the latter persons into unprotectable environment[43].

Justice Jerome Frank made the first fundamental changes to incompatibility of judicial dogmatic and factual requirements of life through his notorious and game-changing decision "Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc." [44] It was the first time when personal characteristics had been addressed within the "price of publicity", which turned right to publicity into "Right of Publicity" and classified as property-type right. An absolutely innovative approach of Frank became well-spread within the legal doctrine[45] and other rulings had been based on it[46].

Nowadays, the right of publicity occupies one of the leading positions within the American Law and serves as an independent institution of intellectual property law. In comparison to the *Right of Privacy*, which safeguards various individual's "right to be alone" [47], however, on the other hand, right of publicity serves as an effective remedy for preventing unlawful use of personal aspects for economic purposes; and it entails exclusive authority of an individual to utilize his/her individual characteristics and also transfer these to third parties for their use through special license. From a

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42 An exception has been a case when exploit of a person's identity's elements for advertisement had been so called "offensive use", which shall not have concludent consent. Please, see Gill v. Hearst Publishing Co., 40 Cal. 2nd 224, 253 (1953).

43 "O'Brien v. Pabst Sales Co 124 F. 2d 167 (5th Cir. 1941) – the plaintiff, which represented a famous football player, argued use of his photo by one of the breweries for advertisement purposes. Besides, the football player was a member of an organization, which aimed at detaching young people from alcohol. Despite of the fact the Court did not regard usage of photo as an infringement of the right of privacy of football player, with a judgement that public figure has somewhat agreed to publicity.

44 Healen Laboratories, Inc. v. Topps Chewing Gum, Inc.202 F. 2d 866 (2d Cir. 1953) – case between two producers of chewing gym, who argued on using the photographs of various popular baseball-players on the packaging of chewing gym, which should have resulted into an increased sales of the product among teenagers. One of the companies, based on a contract, acquired a permission from a basketball player to use his image on the packaging, while another company used image of popular sportsman without any permission. The plaintiff was a company owning a license, which argued about violations of the right awarded through the contract, it demanded eradication of actions and compensation of damage. The defendant tried to dismiss the latter demands in its counterclaim through arguing that the plaintiff did not have a right to argue on use of other person's image by the judgement of having personal connection to the latter person. Justice Frank took a drastically different turn from an incumbent practice with regard to set dogmatic on right to personal life and acknowledged right to publicizing, which safeguards commercial worth of personal aspects and apart from other property rights – provides its owner with exclusive right to manage the latter.

45 *Götting H.P.*, Vom Right of Privacy zum Right of Publicity: Die Anerkennung eines immaterialgütterrecht an der eigenen Person imamerikanischenRecht, GRUR Int. 1995, 661.

46 Zacchini v. Scripps-Howard Broadcasting Co433 U.S. 564 (1977) – in its decision of 1977, the Supreme Court of the United States reiterated argumentation of the Justice Frank and recognized right of publicity as an integral part of protecting a person's identity.

47 "Right to be alone".

methodological angle, such type of regulation implies splitting personality protection mechanisms to "ideal" and "commercial" spheres, which practically implies acknowledging two fully independent demands with different legal outcomes and protection objects. Despite of the fact that initially – the latter right derived from the need to safeguard public figures, nowadays, it is no under argument that scope of the respective right's protection can be adjusted to any person, regardless of his/her status[48]. Therefore, publicity does not serve as a precondition for determining the Right of Publicity, however, plays an integral role in determining amount of property damage to be imposed as a sanction following classification as violation[49].

5. Regulation of Property and Non-Property Elements within Personal Non-Property Rights with an Analogue of Intellectual Law

As a result of assigning personal non-property rights under the system of intellectual property, it became crucial to determine whether author's personal non-property rights "purely" are personal rights[50] and whether it can protect economic interests. It shall be noted that there is absence of unified position among intellectual property law with regard to the respective matters, hence, there have been two theories developed in Europe – **monist and dualistic**.

5.1. Personal Right, as a Unified Legal Construction (Monist Theory)

In a contemporary legal literature, there is a well-cultivated position to utilize monist approach in an intellectual law in order to recognize general personal rights as one solid fundamental right, which unites ideal and material interests in itself[51]. Therefore, based on the respective theory, an author has a two-fold but unified author right, which serves as both, protection of author's personal and property rights in a unified context[52]. Götting[53] is one of the most prominent representatives of the respective approach, which regarded the reason for differentiation between property rights to be mixture of "property" and "non-material" rights. Upon using the respective method of separation, the scholar asserts that deeply personalized rights of personality do not comply to realization in civil circulation, while non-material rights are separately from personality and are intellectual goods compatible to civil circulation. "Property nature of rights are not that legal, then factual matter, which

48 Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F. 2d 821, 824 (9th Cir. 1974).

49 *Götting H.P.*, Vom Rightof Privacy zum Rightof Publicity: Die Anerkennung eines immaterialgütterrecht an der eigenen Person im amerikanischen Recht, GRUR Int. 1995, 662.

50 *Sajaia L.,* Author's Personal Non-Property Rights, thesis for acquiring PhD degree, TSU, Tbilisi, 2014, 21 (in Georgian).

51 *Götting H., Schertz C., Seitz W.*, Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 20-21; *Staudinger J.,* Kommentar zum BGB, §823, Berlin, 2017, Rn. C 149; *Palandt O., Sprau H.*, Band 7, BGB, §823, 76. Auf., München, 2017, Rn. 85;

52 *Sajaia L.,* Author's Personal Non-Property Rights, thesis for acquiring PhD degree, TSU, Tbilisi, 2014, 21-22 (in Georgian); compare. *Ulmer U.,* Urheber-und Verlagsrecht, 3rd edn, Berlin, 1980, 116; *Rehbinder M., Peukert A.,* Uhrheberrecht, 1 Teil, 18. Auf., München, 2018, Rn. 154, 155- with regard to wood metaphor.

53 *Götting H., Schertz C., Seitz W.*, Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 20.

can be resolved by civil circulation"[54]. It does not mean that an abstract content of personal rights does not comply with economic value, however, applying the latter element and its needs had been created by public demand[55]. The legal order is obliged to be accountable to market demands, however, due to principle of private autonomy – it shall authorize parties to the civil circulation to decide whether or not their right becomes an object to exploit and to what extent.

Therefore, by an argumentation set forth, it is worth to transfer monist theory of intellectual law to personal rights as well and unify property and non-property rights under the same notion[56]. Unlike the American law, where rights to personal life and publicity are two independent, sufficient grounds – an incumbent case does not regard transferable and alienable property rights as separate, but it acknowledges personality to be the key integral part of fundamental rights. Monist approach sets forth that while recognizing property aspect – it is possible to turn goods with economic values as objects for agreement without infringement of ideal aspect, which will serve as legal balance between unalienated dignity right protected by fundamental law and right to enhance own personality freely.

5.2. Personal Right as a Non-Material Property Good Related to Personality (Dualistic Theory)

Already in 1963, the German literature witnessed arousal of personal rights' economic aspects protection upon separating these from general personal rights and with an independent ground[57], which would be solely responsible for economic consequences of "exploit of personality". For the purpose of justifying their position, the authors refer to the fact that general personal rights only entail personality aspects and is fully liberated from economic attachments[58]. Due to an acknowledged fact that personal right has a dual essence with a combination of property – non-property rights, therefore, general personal right with only ideal interest cannot be exploited as a norm for protection of the both aspects. Therefore, property element of personality shall not be regarded as an integral part of fundamental rights[59].

Despite of the above-mentioned, the authors reached consensus that the latter two rights have one major point of crossing, which is unified personality of an individual from where one can separate aspects that can potentially lead to economic value and that had been qualified from purely personal to a category of non-material goods through practical modification[60]. Therefore, admissibility of the matters to be discussed within the civil circulation vastly rely on whether or not property equivalent

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54 *Götting H.,* Persönlichkeit als Vermögenswert, Tübingen, 1995, 9; *Götting H., Schertz C., Seitz W*., Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 20.

55 Ibid.

56 *Götting H., Schertz C., Seitz W*., Handbuch des Persönlichkeitsrecht, Verlag C.H. Beck, München, 2008, 20.

57 *Heitmann L.,* Der Schutz der materiellen Interessen an der eigenen Persönlichkeitssphäre durch subjektiv-private Rechte, Hamburg, 1963, 23; *Kläver M.,* Vermögenrechtliche Aspekte des zivilrechtlichen allgemeinen Persönlichkeitsrechts, ZUM 2002, 205.

58 *Fikentscher W.,* Deutsches Wirtschaftsrecht, Bd. 2, 1983, München, 112, 131 ff.; *Kläver M.,* Bereicherungs-rechtliche Ansprüche bei einer Verletzunh des allgemeinen Persönlichkeitsrecht, Hamburg, 1999, 205.

59 *Peukert A.,* Persönlichkeitesbezogene Immaterialgütterrecht, 2000, Berlin, 11.

60 Ibid, 3; *Hartl M.,* Persönlichkeitsrechte als verkehrsfähige Vermögensgüter, Dissertation, Konstanz, 2004, 120, <https://d-nb.info/975522981/34> [30.05.2019].

complies with it or not and also, whether universally acknowledged exchange constitutes to the interest of incorporating the respective good into civil circulation.

Some of the scholars have broadened the respective idea and have shaped the theory of specifying "economic personality" (*Wirtschaftspersönlichkeitsrechts*), whose legal technic and methodological angle within the torts of German Civil Code would ensure the letter into section 823 with an inclusion of each of economic elements related to personality into the protected spheres[61]. According to the offered position[62], the "economic personality" rights could have also been disseminated upon an authorized person's willingness on property freedom in the personality sphere, which would differ from "personality use" (*Persönlichkeitsnutzungsrechte*) right due to protected spheres' scale, since the latter had been bound purely by material interest of personality, while "economic personality" has constituted to a wider demand ground.

It can be asserted that an argumentation of supporters of dualistic theory goes beyond the principle adhered within the German doctrine with regard to recognizing general personal right as a unified right; supporters of the dualistic theory give preference to governing specific personal rights. It shall also be noted that despite of acknowledging dualistic construction, the authors could not escape elements with property value and the reality of solid ties between unified personal right. As supporters of the respective doctrine have stated, solely the fact that personality tied to an individual and dignity does not comply to monetization unlike its external elements – does not mean that these "external elements" are objects of civil circulation; instead, these elements portray wide essence of personality's control system, since they constitute to creating image and are not entirely separated from a person's "internal personality"[63]. Therefore, weakness of the approach lies within an argumentation that on one hand recognized possibility for fully separating personal elements from personality, however, on the other hand it considers existence of these elements as separate object for rights, which arises vagueness around the matter of protecting value and also contradicts with a fundamental idea of strengthening unified framework provision.

6. Property Value of Personal Right in Georgian Legislation

Georgian legal frameworks of factual "commercialization" of specific elements of personality are closer to the German legal order and within monist theory angle. Similarly, to Germany, Georgian lawmakers also do not see the necessity to introduce an independent mechanism for being protected from commercial exploit of personality in a way of "economic right". It shall be noted that none of the decisions of the judiciary practice has separated personal rights in two, "ideal" and "economic" areas. Moreover, the judicial practice often performs statement of general postulates that "non-property

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61 *Kläver M.,* Vermögenrechtliche Aspekte des zivilrechtlichen allgemeinen Persönlichkeitsrechts, ZUM 2002, 205.

62 Ibid.

63 *Beuthien V., Schmölz A.,* Persönlichkeitsschutz durch Persönlichkeitsgüterrechte, München, 1999, 45, where American "Right of Privacy" is also regarded as non-material good.

relations are deprived of economic essence and have no value" [64]. Usually, reference to the latter argumentation has been used by the courts to decrease amount of compensation of damage[65]. In such scenario, the latter does present non-material value primate and stresses out on more ideal aims for monetary compensation of damage, rather than economic, such as compensation for moral damage, improvement of negative emotions and acquittal of a person among the public view[66].

Nevertheless, there are possibilities to seek for decisions in which the Georgian courts could not have bypassed the topic of "commercialization" of personal right; one of the cases is related to reasoning on protection of business reputation, which is one of the elements for non-property right[67]. The same pathos can be traced down within the legal doctrine[68], which stresses out that effective protection of non-property rights can be expressed if upon infringement of these, a person may demand monetary compensation also for non-property (moral) damage, which by its nature is a property good[69].

6.1. Dualistic Nature of Right of Name

A right of a person's name is a decent example of non-material rights in civil circulation and possibilities of realization. A well-spread approach within the modern-day civil law regards right of name as a personal and absolute right[70], whose non-material value derives from its legislative mechanisms[71]. Non-property nature of a name is defined by the fact that it is impossible to incorporate it into civil circulation [72]. For the scholars of civil law, it is no novelty, that a right to name is assigned to non-material property rights, especially within commercial affairs[73]. The purpose of the right to a name and its encumbrance in the modern reality is a legal guarantee of the precondition for the protection of property rights, both non-property and in some cases[74]. Therefore, attempts of

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64 The Supreme Court of Georgia, № AS-1084-1034-2014, Decision, 11.05.2015; The Supreme Court of Georgia, № AS-1084-1034-2014, Decision, 14.04.2004.

65 For more on non-pecuniary damages in the context of personal rights, see *Katamadze N.,* The Impact of Non-Property (Moral) Damage Functions on the Criteria for Determining the Amount of Compensation, Journal of Law, № 1, 2018, 95.

66 The Supreme Court of Georgia, № № AS-1433-1531-04, Decision, 30.06.2015.

67 Compare to the Supreme Court of Georgia, № AS-1084-1034-2014, Decision, 11.05.2015; The Supreme Court of Georgia, № 3c/376-01, Decision, 18.07.2001.

68 *Akhvlediani Z., Zoidze B., Ninidze T., Chanturia L., Jorbenadze S. (eds.),* Comment of the Civil Code of Georgia, Book I, General Provisions of the Civil Code, Tbilisi, 1999, 77 (in Georgian).

69 *Sajaia L.,* Author's Personal Non-Property Rights, thesis for acquiring PhD degree, TSU, Tbilisi, 2014, 98 (in Georgian).

70 *Sajaia L*., Right of name and author – Georgian intellectual law and contemporary legal trends, Journal of Law, № 1, 2013, 236 (in Georgian). *Jorbenadze S., Akhvlediani Z., Zoidze B., Ninidze T., Chanturia L.,* Comment of the Civil Code of Georgia, Book I, art. 17, Tbilisi, 2002, 52 (in Georigan); *Chanturia L.,* General Provisions of the Civil Code, Tbilisi, 2011, 199 (in Georgian); *Klass N.,* in: *Ermann M.,* Kommentar zum BGB, §12, 15. Aufl., Band I., 2017, Köln, Rn. 14.

71 *Jorbenadze S.,* Comment of the Civil Code of Georgia, Book I, art.17, Tbilisi, 2017, 99 (in Georgian).

72 Ibid, 99.

73 *Chanturia L.,* General Section of Civil Law, Tbilisi, 2011, 199 (in Georgian).

74 *Jorbenadze S.,* Social Media Law, Tbilisi, 2019, 63 (in Georgian).

differentiating right of name can be traced down, which regard commercial aspect of right of name in civil circulation, which permit exploit of landmark name and trademark upon authorization[75]. The latter finding and dogmatic classification of a right of name and review of its abstract notion, single-handedly as purely person and solely non-material property good, which is vastly difficult and nonpractical. On a doctrinal level, it is of higher importance to define which component of right of name and to what extent it shall be transferred to the third persons, which on one hand is related to stressing out property element in personal right and therefore – positioning it as an object of exchange of goods.

6.2. Property Element of Image Rights

As we discuss right to physical image, based on an acknowledged approach, the article № 18 of the Civil Code of Georgia sets forth the latter right as sole non-property right of a physical person, however, paragraph № 4 of the same article makes it possible for an authorized person, upon consent, to grant rights to using goods to the third persons, even for the sake of receiving commercial profit. Thus, the imprinted person must decide for himself in what form the image will be published[76]. In case we dedicate more time to analyzing legal content of the respective consent, one will determine that the consent, as set forth by the article № 100 of the Civil Code of Georgia, is a form of expressing will with the legal meaning, which is directed to legal outcome and is an ordinary civil law agreement. Besides, agreement of publication can be published as unilateral permission, as well as in a form of contract element[77], when a person undertakes corresponding duty and by such condition, he/she transforms his/her personal character as an object of civil circulation, and that is being actively used in professional photo models practice. Meanwhile, while analyzing bilateral interests, one shall take existing circumstances and informational value of a person into consideration, which requires comprehensive study of carious peculiar details of a specific case.

The paragraph 5 of the article № 18 of the Civil Code of Georgia and the exception set forth by the latter requires explanation within the context of consent, when the photo-taking is not connected to cultural purposes, however, permission of an authorized person is not required for publishing an image, if he/she has received honorarium for posing. Text of the respective law shall be more accurate, whether any case of receiving honorarium means implies that a person agrees to make these photos known to any circle of the society. The Supreme Court has absolutely wisely responded to the latter question that every person has a right to vote and disseminate his/her image[78]. It means that getting honorarium/paid does not necessarily mean giving consent to exploiting his/her image for any purpose. The respective circumstances only arise assumption that a person has given consent for

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75 *Jorbenadze S.,* Comment of the Civil Code of Georgia, Book I, art.17, Tbilisi, 2017, 99 (in Georgian).

76 Ibid, 2017, 131 (in Georgian).

77 *Akhvlediani Z., in: Chanturia L. (ed.), Akhvlediani Z., Zoidze B., Jorbenadze S., Ninidze T.,* Comment of the Civil Code of Georgia, Book I, Tbilisi, 1999, 66 (in Georgian); *Jorbenadze S.,* Comment of the Civil Code of Georgia, Book I, art.18, Tbilisi, 2017, 131 (in Georgian).

78 The Supreme Court of Georgia, № AS-370-352-2013, Decision, 8.11.2013.

exploiting his/her image for "specific, specifically indicated purpose within the agreement or other purposes, which derive specifically from the latter agreement" [79].

According to the opinion expressed in the legal literature, the transfer of the right to an image, unlike copyright, does not constitute a property encumbrance of the personal right, because, first of all, the protection of non-property rights is exercised[80]. However, the named case of violation of personal rights still failed to escape the legal consequences of property type.

6.3. Person's Right to Voice

The fact that the article № 18 of the Civil Code of Georgia leaves behind legislative regulation right person's right to his/her voice if the latter does not portray artistic of musical performance[81] and hence does not regulate under property law regulation sphere – can be regarded as a serious flaw of the respective article. Often, depending on the profession of a person, his/her voice has more value that a person's image and happens to portray his/her personality[82], which can easily become a subject of infringement in economic relations. In an absence of legal bases, it becomes impossible to execute protection of rights on it and also, possibility of free use by an authorized person is also limited.

6.4. The Principle of Transferring Personal Non-Property Rights as Inheritance

In the Georgian reality, it has been set forth unanimously that personal non-property rights are not transferred as inheritance. An heir/heiress demands protection of deceased's personal rights and not the protection of personal rights inherited from a deceased.[83] According to the article #19 of the Civil Code of Georgia, protection of personal rights may also be exercised by a person who, although not the bearer of the name or the right to personal dignity; however, he/she shall not be allowed to claim material compensation for moral damages. In its essence, the same provision can be found in the Law of Georgia on the "Freedom of Speech and Expression", article #6 (4^1).[84] The article #1328 of the Civil Code of Georgia set forth that an estate shall include the aggregate of both property rights and liabilities (liabilities of the estate) of a decedent as of the moment of his/her death. Also, the article № 1330 of the same Code also sets forth that an estate shall not include the property rights or duties that are of a personal nature and may belong only to the decedent.

It is obvious that the respective order does not differentiate which of personal rights can become of commercial meaning and without any conceptual merging will accumulate each and every aspect of personality, despite of the fact that certain aspects of personality can successfully become target of

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79 *Kereselidze D.,* Personal Rights (Analysis and Conclusion), <http://newvision.ge/ge/content/vi-vi-პიროვნული-უფლებები-ანალიზი-და-დასკვნა> [30.12.2019] (in Georgian).

80 *Jorbenadze S.,* Comment of the Civil Code of Georgia, Book I, art.18, Tbilisi, 2017, 131 (in Georgian).

81 *Sajaia L.,* Author's Personal Non-Property Rights, thesis for acquiring PhD degree, TSU, Tbilisi, 2014, 93 (in Georgian).

82 Ibid.

83 The Supreme Court of Georgia, № 3c/754-01, Decision, 5.12.2001; The Supreme Court of Georgia, № AS-1401-1526-04, Decision, 14.04.2005.

84 Older version of the Law of "Georgia on Freedom of Speech and Expression", LHG, 19, 15/07/2004 .

economic use in factual reality. In parallel to admission of the latter, we may address as decisions of lawmakers on prohibiting inheritance of the personal rights as contradictory order, as well as prohibiting to claim material compensation for moral damages after his/her death as set forth by the article № 19 of the Civil Code of Georgia.

Therefore, while discussing commercial value of the non-property rights, it is admissible to consider that owner of the respective right has not been deprived from the possibility of providing his/her heirs/heiresses with rights to use his/her non-property sphere for commercial purposes; for example – to publish his/her image. In parallel with such admission, within the limitation set forth by an incumbent legislation, if after death of the person - the non-authorized third party will exploit non-material property of a deceased without any permission and for the sake of receiving goods, then this third person will be in a better state because persons having legitimate interests for protecting rights will be deprived from the possibility to demand monetary compensation of non-property damage.

7. Conclusion

It is obvious that in the process of increasing growth of digital technologies – the need for determining commercial aspects and regulations within unified context of personality also increases. The research has also identified that Georgia is among those countries, where an axioma regarded as an absolute truth also happens to be absent: matter of assigning personal non-property rights to pure personal rights and due to peculiarities of implementing these – both, judicial practice and legal doctrine are obliged to acknowledge economic interests in these, even if not directly. It shall be noted that we do not argue positive outcome, which results from economic value of personal rights and which arises within effective mechanisms of eradicating use of aspects of personality for non-authorized commercial purposes. It is a fact that in Georgian legal reality - American differentiation and German dualistic theories does not sufficiently portray each characteristics of non-property rights, which shall not be regarded as a generalized analyses of personality's legal nature. However, as a whole, taking the respective theories into consideration enables to reach specific consensus.

As an outcome of generalizing the discourse identified, it can be asserted to share German approaches and ensure differentiation of non-material rights based on ideal (non-property) and property wise while having monist theory in mind. It is crucial to determine unified definition of personal rights, nevertheless, merging personal rights fundamental base (ideal aspect, which relates to an integral part of human dignity and unified concept) from the possibility of applying the corresponding and specific peculiarities within civil circulation; and which shall be in full compliance with private autonomy that is a fundamental principle of civil law.

As a model for the suggested differentiations could be regarded an existing principle within copyright law, which divides non-property rights in positive and negative rights. For the sake of considering personal rights deriving from human dignity in a unified and general concept - one shall take into consideration characteristics of personality, thus, implementing of which requires decision of an owner of rights, they can be regarded as permissible within civil circulation and can also be passed on as inheritance. It can relate to name, business reputation or aspects of personality, such as voice,

stage image, or image rights. The commercial aspects drawn in these rights, as set for by the European approaches, shall become an object for legal turnout and passed on as inheritance to the deceased's anticipated and true will. The respective admissibility also related to the rights to restitute non-property damage. The Germany's legal thinking has approved such differentiated approach based on an argument that when a potential abuser completes committing probate fraud of the sphere under other's non-property rights and such fraud becomes known to a deceased's relatives after it has already been committed – declaring protection property rights only does not practically ensure effective restitution of rights violated. Absence of the respective approach constitutes to increasing threats for abusing economic aspects of personality by third parties without having a fear of sanctions, and which obviously violates right of dignity of the deceased person. The above-mentioned argumentation will serve as a guarantee for logical balance, not to allow absolute ignorance of rights of deceased person's respect and dignity; on the other hand, Georgian legislation shall be fully harmonized with the European approaches, which utilize the respective differentiated approached for responding to an increasing need of the contemporary reality.

So called pure personal rights shall be provided as a second category of rights, which, due to their ideal value, arise only protection right, which shall be used as a target to applying to the article № 19 of the Civil Code of Georgia and Law of Georgia on the "Freedom of Speech and Expression" with regard to the prohibit set forth by the Georgian legislation on not allowing to claim material compensation after his/her death. Therefore, in case of violation, heirs of a subject are equipped with the respective type of rights, can only utilize protection leverages, which does not imply rights to demand compensation of property damage.

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