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Mikheil Bichia*

The Content of the Right in the Civil Law

Determining the content of the civil right and its main features is one of the most important issues of civil law. The aim of the research is firstly to critically analyze the theories about a right, and then determine the content of the civil right and its features. We will try to throw light on the methodological foundations of civil rights and the relationship between its legal and factual origins.

Clarifying the issue is important to define the legal nature of civil rights and make out what a subject can protect, where the actual opportunity of a person ends, and from which moment it acquires a legal form. Accordingly, the topic is engrossing from the perspective of legal protection of interests of a subject which provides it with more practical significance.

The research has revealed that theories of rights are flawed and cannot explain the legal nature of rights individually. Therefore, a right should not be reduced to only one component recognized by either one or the other theory. It is appropriate to consider a right in close relation to a duty and distinguish it from the actual possibility. A civil right is studied as an opportunity provided by civil law to perform an action that can be based on both law and contract. This is especially noteworthy within the framework of the principle of "Everything that is not prohibited is permitted". Accordingly, the scope of the concept of civil rights should be much wider than the content of public rights.

Keywords: *Right, Signs of right, Civil Rights, Theories, Criticism*

1. Introduction

One of the important issues in the science of civil law is to clarify the content of civil rights. It is also a condition to determine the concept of civil rights and the scope of its protection. However, before identifying the essence of civil rights, it is appropriate to analyze the theories about a right to define its concept and signs. So, the theoretical and practical significance of the research is considerable.

The main goal of the research is to ascertain the exceptional features of the theories about rights and distinguish both positive and negative aspects of these concepts through their critical analysis. In addition, it is necessary to study the basis of right, its legal nature, and the difference from the actual possibility.

* Doctor of Law, Visiting lecturer of Ivane Javakhishvili Tbilisi State University, Professor of European University (Tbilisi), Expert in Accreditation of Higher Education Programs, Chief Researcher at the Institute of Law, https://orcid.org/0000-0003-2297-0326.

Simultaneously, the research aims to identify the content of civil rights and the extent of its concept by employing the theoretical analysis of rights. In this context, it is essential to explicate the role of the principle of private autonomy in determining the content of civil rights. This is the basis for purifying the scope of the concept of civil rights. Therefore, the research implies not only the content of civil rights but also the study of its main features.

The issue is based on the normative-dogmatic method to thoroughly explore the concept of theories. However, the method of synthesis and analysis is also applied in the research because it is the critical understanding of the theories that can lead to the clarification of the legal content of rights and get the results of the research accentuated by comparing the common features.

2. Critical analysis of the theories of right and the main features of right

2.1. Critical analysis of theories

2.1.1. Theory of Will

The theory of Will was active until the middle of the 19th century and **discussed right with the help of will**. According to the theory, the main component of right is the will of a human to be able to enforce or waive some duty on the part of another person.[1] Windscheid considered right as the power of will conferred by law.[2] In this sense, the freedom of an individual was regarded as the space dominated by the will of the person, that is, the right.[3]

According to the theory of will, the law establishes rules which give a person the opportunity to act. Therefore, the will of a person is decisive for the execution of an order (Befehl). Consequently, Right is the power of will transferred to the subject by law.[4] Thus, the law confers willpower on the subject who exercises the command established by law. **In this way, the order established by law turns into the order of a subject of law in which the will of a person is essential**. Consequently, following Windscheid, the most important component of right is the willpower or will of a free individual.[5]

Birling's "power theory" (Machttheorie) is one of the interesting understandings of the theory of will. It does not distinguish between right and authority. Based on Birling, authority is a law associated with the ability of a person to act the way he desires.[6] In this case, will is necessary for the existence of right. However, this hypothesis fundamentally contradicts the entire set of definitions of

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1 Magaziner Ya. M., Selected works on the general theory of law, St. Petersburg, 2006, 153 (in Russian).

2 *Vacheishvili Al.*, General Theory of Law, Tbilisi, 2010, 181 (in Georgian); *Windscheid B.,* Pandektenrecht, 3 Aufl., 1873, § 37

3 *Savigny F. C. von*, System des heutigen römischen Rechts, Bn. 1, 1840, § 4, 7.

4 *Windscheid B.*, Lehrbuch des pandektenrechts, 7 Aufl., I Band Frankfurt a.M., 1891, § 37, S. 87 f; *Schorder R.*, (unter Mitarbeit von *Bar fred G. anspeter Hafermark, Dostal C., Bedau M., Moller Ulr., Revermann M.*), Einfuhrung in die Rechtsgeschichte, Quellensammlung zur vorlesung mit erlauterungen,14. Aufl., 2005, 146.

5 *Windscheid-Kipp B.*, Pandektenrecht, 9. Aufl., 1906, § 37; *Reiser L.*, Der Stand der Lehre vom subjektiven Recht in Deutschen Zivilrecht, Juristen Zeitung, 16. Jahrg. Nr. 15/16, 1961, 465.

6 *Surguladze I.,* Government and Law, translated by *Gamkrelidze O.,* Tbilisi, 2002, 94 (in Georgian).

positive legislation because right is often attributed to those subjects who cannot execute a will, for example, an unborn child.[7]

The theory of will exposes several flaws:

a. It ignores that the will should not be a compulsory element of right because sometimes a legally valid will cannot be addressed. For example, a child has the right to inherit but the will expressed by him is not legally sufficient to create a legal result. That is why, a custodian is appointed as the legal representative of a child. Thus, the will is essential not for the existence of a right but for its realization.[8]

b. The will theory cannot explain the essence of right, because if will is an individual mental act, a subject who is not a natural person, cannot have a right.[9]

c. The concept of right should be considered with duty. If the right existed without the duty it would become a purely social phenomenon, not a legal one. However, duty is the tool to distinguish the concept of right from the concept of power, because duty is necessary for determining the concept of right. **Duty acquires a legal character only if there is a corresponding right**; Otherwise, it will not be a legal, but a moral duty.[10]

So, the will theory cannot fully explain the right. A right might include legal power or ability but it is not limited to that.

2.1.2. Theory of Interests

The theory of will was **opposed by the theory of interests, according to which the will necessarily needs a certain goal** because without it the will simply remains devoid of content.[11] Accordingly, the theory of interest explains the **essence of law based on interest**. In this sense, the right is a legally protected interest. Unlike the theory of will, it no longer contradicts the thesis that children do not have a conscious will despite having a right.[12]

The theory of interests (Jhering)[13] combined material and formal basis in the concept of right. The **substantive (material) element refers to the practical purpose of right**, in particular, obtaining benefits, and profits, which is ensured by law. **The formal component considers this goal as a means, to be specific, legal protection,** a lawsuit, or understanding of rights serves to ensure the satisfaction of the interest, therefore, rights are legally protected interests.[14] So, the first is the basis of rights, the second is regarded as a means of its protection.[15]

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7 Ibid, 96.

8 *Uex R.,* Philosophy of Law: A Very Short Introduction, Tbilisi, 2012, 153-154 (in Georgian).

9 *Gokieli F.*, Right, Journal "Law", No. 8-9, 1992, 65; On criticism of the will, see. *Amiranashvili G.,* Concept and structure of civil rights, Journal "Justice and Law", No. 4, 2015, 140 (in Georgian).

10 *Surguladze I.,* Government and Law, translated by Gamkrelidze O., Tbilisi, 2002, 113 (in Georgian).

11 *Jhering R. von*, Geist deutschen romischen Rechts, III 1, 1. Aufl., 1865, §§ 60, 61; *Reiser L.*, Der Stand der Lehre vom subjektiven Recht in Deutschen Zivilrecht, Juristen Zeitung, 16. Jahrg. Nr. 15/16, 1961, 465.

12 See. *Magaziner Ya. M.,* Selected Works on the General Theory of Law, St. Petersburg, 2006 (in Russian).

13 *Rozhdestvensky A*., Fundamentals of the General Theory of Law: Course of Lectures, 1912, 121 (in Russian).

14 Jhering R. von., Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, 3. Auflage, Leipzig, 3, Teil, 1, Abt., 1877, § 60, 327; Schröder R. (unter Mitarbeit von Haferkamp Fred G. Bär

A right implies the ability of a person to satisfy his/her interests through the authorized action which is ensured by the duty of the other(s). The goals of a legitimate person are achieved by fulfilling rights however, the legal possibilities of a person are limited. They are precisely defined and a person can act only within this framework.[16] This is a social interest recognized by law. **However, all legitimate interests have the status to be protected by law**; The interest is protected by law, which is recognized by the legislator in the way of conferring a right to its bearer as a means of satisfying the interest.[17]

The purpose of a person's right is to satisfy his real and objective interest. The interest from its subjective individual point of view can create a right if it (interest) is desirable and useful only for those who want to fulfill it. Therefore, will and interest are very close. Following the mentioned, Diug correctly concludes that if **a right is a legally protected interest, it must also include the concept of will,** in this case, the sharp contrast between the theories of will and interests is exaggerated.[18]

A **right is** not only an interest, it is **a legally protected interest**; The concept of legal protection defines not only the right but also the situation of the obliged person, whether specifying directly or not, at least indirectly. That is why it is necessary to distinguish interest from its legal protection. Only interest is useless in conveying the legal concept of rights. Using the concept of legal protection can explain both rights and duties, but it is incomplete to explain the right.[19]

In consequence, the theory of interests is not flawless: first of all, **there is a legally protected interest that is not a right, and on the contrary, there is a right that has no interest in its implementation**. For example, the right of ownership of a thing has no value, or the right of a custodian, who should have no interest in transferring the asset of a minor.[20] The theory of interests cannot explain this; **In addition, the right and its individual-psychological experience of feeling belong to different spheres in respect of methodology.** In particular, a right is a non-existing (ideal) event while the experience of an individual is existing (real). i.e. they are events of completely different connotations. The right exists, regardless of whether the subject experiences it or tries to exercise it. For example, an unborn child cannot experience rights, but it may have defined rights.[21] The mentioned right is applied in the Civil Code of Georgia: the right to be an heir (the first sentence of Article 11 of the Civil Code of Georgia). From this point of view, the theory of interests cannot separate the real and non-existing (ideal) events from each other.

Hans peter, Dostal C., Bedau M., Möller, Ulr., Revermann, M., Einführung in die Rechtsgeschichte, Quellensammlung zur Vorlesung mit Erläuterungen, 14. Auflage, 2005, 147 (in German).

15 *Rozhdestvensky A.,* Fundamentals of the General Theory of Law: Course of Lectures, 1912, 121 (in Russian).

16 *Alekseev S. C.,* General Theory of Law, B. 2 т., Moscow, 1982, 114-116 (in Russian).

17 *Krasheninnikov E.,* Interest Protected by Law and Means of Its Protection in the Materials of the Scientific Conference – Issues in the Theory of Protective Legal Relations, Yaroslavl, 1991, 12 (in Russian).

18 *Surguladze I.*, Government and Law, translated by *Gamkrelidze O.,* Tbilisi, 2002, 100-102 (in Georgian).

19 Ibid, 102-103

20 *Magaziner Ya. M.*, Selected Works on the General Theory of Law, St. Petersburg, 2006, 155 (in Russian).

21 See *Gamkrelidze O.,* Irodion Surguladze and his book "Government and Law", Tbilisi, 2002, 21 (in Georgian).

2.1.3. Mixed Theory

It is possible to discuss **the Mixed Theory**[22] by comparing the **theories of interests and will**. In 1890, Bernacik speculated the idea that right must have included both will and purpose as they conditioned each other. Later (in 1892) Elinek identified will and interest as the necessary elements of right. According to Elinek, the right is the power of a human will recognized and protected by law, aimed at the benefit or satisfaction of interest.[23]

Elinek noted that any human act must have the content. The law does not recognize a simple will. **Law provides the content for a human will, protects it, and creates proper conditions, so, a person can easily use this.** The content leads an individual to realize his goals. What is kindness from an objective point of view expresses interest from a subjective point of view. **However, there must be another element in right – will. It is applied to achieving goals realized by an individual and the law**. Elinek believes a will is the material component of the right while goodness (interest) is a formal element.[24] In this sense, the will must be directed to a specific interest, otherwise it can remain devoid of the content. The right cannot be understood only as a legally protected interest. The will can steer an interest and become a form of its realization. Accordingly, the right should be understood as the interest (good) protected by the recognition of human will. **Therefore, recognition of will is perceived as a formal moment of right while interest is a material sign, and their unity creates a synthetic coherence**.[25]

At the same time, the theories of will and interests are considered the right from an individual-psychological perspective, which belongs to the real field. **Accordingly, here the right is understood as an event outside the legal area**. So, this theory is only an attempt to explain the problem more completely. Different legal areas of rights are determined not only by the anatomical, physiological, or psychological characteristics of people but also by the individual structure of the existing legal system **because law and order are legal categories.**[26]

It is correctly acclaimed that if law originates in society, the concept of right should include a social aspect, and a right-holder cannot be an independent person but a member of society. On this basis, the material sign of the right is public and private interests, while the purely formal sign of the right is expressed in the protection of the interest.[27] **Since the purpose of the law is to correlate legal interest with social interest and pave the way for positive actions, this is the legal regulation of public relations**. Therefore, legal interests are also social, but they are auxiliary, "instrumental" in nature, and foster to achieve a social goal.[28] Thus, the right is not separated from social reality; it includes legal and social foundations.

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22 See *Surguladze I.*, Government and Law, translated by Gamkrelidze O., Tbilisi, 2002, 107 (in Georgian).

23 *Magaziner Ya. M., Selected Works on the General Theory of Law, St. Petersburg, 2006, 155-156 (in Russian).*

24 *Vacheishvili Al.,* General Theory of Law, Tbilisi, 2010, 183 (in Georgian).

25 *Gokiel F.*, Right, Journal "Law", No. 8-9, 1992, 69 (in Georgian).

26 *Gamkrelidze O.*, Irodion Surguladze and his book "Government and Law", Tbilisi, 2002, 25-26 (in Georgian).

27 *Ninidze T.*, Live Icon of Dignity, Journal. "Georgian SSR. Herald of the Academy ", Series of Economics and Law, No. 3, 1987, 64 (in Georgian).

28 Ibid, 69.

The right has one significant feature – its non-use does not change the right and its scope of application. The existence or non-existence of the right does not depend on the manifestation of will by the subject of law.[29]

As said, **the objectivity of rights and duties is expressed in the fact that they do not obey the regularity of real life.** In addition, **law and sociology have their consistency**. If law is explained by sociological regularities, then it will be sociology and not law. As for fact and law, they do not have the same content; They are two different realms of the same reality.[30]

Mixed Theory also has several flaws: a. **In the mixed theory, it is hard to separate will and interest but they are not identical**; b. According to the mixed theory, **right is considered a subjective-psychological and, therefore, a real phenomenon**. This excludes the determination of the legal content of the right, because reasoning in this way goes beyond the scope of legal research, however, in law the legal nature of right is more important than its actual origin. Consequently, the legal nature of the right is not explained in this theory; c. since the mixed theory includes the will and interest theories, it logically reproduces the shortcomings of these concepts.

2.1.4. The Rejection Theory

According to the rejection theory, **the existence of right is rejected**. From this point of view, the right is not considered an independent category, but only one of the modifications of private law.[31] This concept was followed by Diuges who believed that the right should be understood as a relationship between two subjects. Therefore, an **isolated person not have a relationship with others cannot have rights**. Therefore, an individual can have rights only in society. A human is also considered essentially a social being; He/she cannot live without society; He has always lived in society. Hence, if a person can have rights in society, the emphasis on the rights of people isolated from society is inconsistent.[32]

The French scholar Diuges noted that the outdated concept of rights had to be banished from legal science.[33] According to him, the norm of law does not contribute to relations between people or produce any right and duty; they are created only by the power of desire to possess certain things. Following this norm, a man acquires the power to desire, not to possess. The power of will is not a right, it is an objective power of will causing a legal result. **An objective norm of action is perceived as an objective power that belongs to an individual**. At the same time, the individual is obliged to fulfill an objective duty which is already interesting for law. Indeed, a legal norm cannot create a right, but it can create a subjective legal situation as a result of a legal act. **A legal act is a form that is applied by norms to express the will of a subject to create rights**. Accordingly, a legal act produces

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29 *Gamkrelidze O.,* Introduction I. On Surguladze's work "Authority and Law", Tbilisi, 2002, 20 (in Georgian).

30 Ibid, 30.

31 See *Gokiel F.*, Right, Journal "Law", No. 8-9, 1992, 71 (in Georgian).

32 *Diuges L.*, General Transformations of Civil Law since the Napoleonic Code, translated by Sivers M. M., M., 1919, 16-17 (in Russian).

33 *Duguit L.,* L'Eétat, Le Droit Objectif et Lo Positive, Paris, 1901, 147, cited from the work*: Rozhdestvensky A.,* Mathematical research, part I, 1913, 16 (in Russian).

a legal effect. This legal result is called "subjective legal status" as it arises based on the will of the subject, for example, the legal status of ownership. Therefore, according to Diuges, the concept of right should be replaced by the concept of subjective legal status, because it is more precise.[34]

Comte also rejects the concept of the civil right. By him, a person has a duty to everyone, but no one has a right in essence. In other words, no one has any other right than the right to perform his/her duty.[35]

Rozhdestvensky did not share the opinion of Diuges and noted that **the existence of the right should be determined by the norm of law**. Legal norm does not create a right but it justifies its existence in such a way that gives power to each participant of the legal relationship to acquire, possess, and incline a right. That is why, if the existence of the right is excluded, logically, the actuality of legal norms will lose its meaning. It is significant not to deny the existence of right, but to formulate its legal concept.[36]

A right is neither a legally protected interest nor a legal freedom of the subject. It always reflects the authority granted to the subject. This is its legal origin. In this sense, the right is the action of the subject's legal force or legal power over the object. That is why, a lawyer has to discern a right as a legal power or authority that has nothing to do with actual power. There is no direct connection **between legal and other types of power. Accordingly, if a person has a legal power to exercise his authority, it does not mean that he has actual power simultaneously.** For example, if a child inherits wealth from his father, he has a lot of legal power but he might not have actual power over it. Conversely, a slave may have very significant actual power but he/she does not have any legal power at all.[37]

According to classical doctrine, right includes a prerogative that can be applied by an individual to exercise power over a thing or about other people. Following social doctrine, the law does not recognize or regulate anything except different legal situations between individuals, which are defined by restrictions, conditions, and duties as well as by freedom, power, or rights.[38]

In the end, the Rejection Theories are not flawless either: firstly, it is outlined in the creation of one **extreme from another and the exclusion of the existence of right** instead of explaining its essence. It leads to avoiding solving the problem; Second, by joining **the relations a person gains rights. Talking about its absence means the absence of a perso**n. He/she is a member of society who obtains rights during the interaction with others to protect his interests and not to mistreat the interests of others by applying his right. Thus, arguing about the absence of the right is unjustified and can take us away from the main goal – to determine the essence of the right.

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34 *Rozhdestvensky A.*, The Theory of Subjective Public Rights: A Critical-Systematic Study, Part I. Main Questions of the Theory of Subjective Public Rights, M., 1913, 16-17 (in Russian).

35 *Comte A.*, System of positive politics, ed.1, 1890, (in French) cited from the work: Diuges L., General Transformations of Civil Law since the Napoleonic Code, translated by Sivers M. M., M., 1919, 15 (in Russian).

36 *Rozhdestvensky A.,* The Theory of Subjective Public Rights: A Critical-Systematic Study, Part I. Main Questions of the Theory of Subjective Public Rights, M., 1913, 20 (in Russian).

37 Ibid, 22-24.

38 *Morandier L. J., Civil Law of France, translated by Fleishitz E. A., T. 1, M., 1958, 39-40 (in Russian)..*

2.2. The main features of the right

By analyzing the theories about the right, it is possible to distinguish the main features of the right.

a) **The right must be acquired by law**. An authority is not recognized as a right by law if it is admitted by custom or morality.

b) **The right must belong to a person** (individual and legal entity). The Civil Code prevents the existence of rights without subjects;

c) **Right is the power of will**. It provides the right holder with the ultimate decision-making power to perform a certain action of his own free will. In addition, the right protects the freedom of individuals;

d) **The purpose of rights is to satisfy human interests**.[39]

Consequently, right is an entitlement to satisfy certain interests. It coexists with duty. **A right cannot exist without a duty** and vice versa which makes a correlation[40] between them. The duty is a true source of rights that contributes to fulfilling the right to demand. This connection is stipulated by necessity. Accordingly, **the right, which does not coincide with any duty, loses the nature of a legal concept and during its implementation becomes a bare force**, a coercion that is used by one subject against another. The concepts of right and duty cannot exist separately from each other.[41]

Rights and obligations are formed with the origin of a legal relationship. **A legal relationship is infected by legal fact that makes rights and obligations connected to a specific subject and object**.[42] Then arises a question: can the right exist outside of the civil legal relationship?

For O. Ioffe **the right taken outside the legal relationship turns into the so-called "social zero"**. That is why the study of rights and duties is successful only if rights and duties are presented as the elements of a legal relationship and the legal content of this relationship.[43] The main feature of right is that the ability to act is recognized by law; A right must be opposed to a duty. If the right is considered within the legal relationship, as the right coexists with the duty, the duty cannot be outside the legal relationship.

3. The capacity for a conception of civil rights

3.1. The term "civil rights"

First of all, it should be determined what relationship exists between "objective right" and "subjective right", because this identification can logically determine the aptness of using the term "civil right".

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39 See. *Brox H.*, Allgemeiner Teil des Bürgelichen gesetzbuchs, sechste auflage, Köln-berlin-münchen, 1982, 242-243; *Brox H., Walker W.-D.*, Allgemeiner Teil des BGB, 30. Auflage, München, 2006, 318-319; *Bichia M.*, Legal Obligational Relations, 3rd Ed., Tbilisi, 2020, 19 (in Georgian).

40 See *Surguladze I.*, Government and Law, translated by Gamkrelidze O., Tbilisi, 2002, 134-139; *Kapanadze O.*, Historical Review of Civil Rights Theories, Journal "Young Lawyers", No. 5, 2016, 76 (in Georgian).

41 See. *Surguladze I.*, Government and Law, translated by Gamkrelidze O., Tbilisi, 2002, 110 (in Georgian).

42 *Bichia M.*, Methodological Issues of Civil Legal Relations, TSU "Journal of Law", No. 1-2, 2010, 96-97 (in Georgian).

43 See. *Ioffe O. S., Shargorodsky M. D.*, Questions of the Theory of Law, M., 1961, 227, 229 (in Russian).

In foreign legal literature, law and rights are expressed by one term – "right" (Recht, pravo). Therefore, to find the dissociation between "law" and "right", it was necessary to add the term "subjective" or "objective" to the right.[44] For example**, German lawyers use "law" with the term "objective right" and someone's right with the term "subjective right"**.[45]

Thus, "objective right" includes legal norms that may establish the requirement of one person to protect the good of another.[46] This requirement is reinforced in the law of private individuals. Subjective right is the individualization of these norms. It is an authority that provides the possibility of doing something. So, there is such a relationship between law and right: the existence of right depends on the content and nature of law. Based on implementing norms subjects can acquire certain rights.[47]

Georgian language does not need conveying the concepts of "subjective right" and "objective right", because "objective right" is replaced by the term "law", and "subjective right" by the term "right".[48] However, as a right belongs to individuals, it is subjective[49] and it does not require any additional term.[50]

The Civil Code of Georgia applies the term "civil right". For example, according to the first part of Article 10 of the Civil Code of Georgia, the exercise of civil rights does not depend on the political rights provided for by the Constitution or other public law laws. The legislator establishes a norm for ensuring the uniformity of terms, which means that the terms used in the Civil Code shall be used uniformly in all other legal acts (Article 1519 of the Civil Code of Georgia). Therefore, it is preferable to use the term "civil right".

3.2. The essence of civil rights

The content of the legal relationship **includes the right (legal possibility of action) and duty (necessity of action established by law) of the subjects.**[51] German literature emphasizes that the private legal relationship contains the right and its interrelated duty.[52] A right takes the form of a

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44 *Mautner T.*, How Rights Became "Subjective", in: RationJuris, Vol. 26, No.1, 2013, 114.

45 *Sharon Byrd B., Hruschka J.*, Kant's Doctrine of Right: A Commentary, Cambridge, 2010, 28; *Bichia M.*, The Concept and Content of Civil Legal Relations, Doctoral Seminar Paper, Tbilisi, 2009, 21-22 (in Georgian).

46 *Fikentscher W., Heinemann A.*, Schuldrecht, 10. Auflage, Berlin, 2006, 19.

47 About the subjective and objective right, see, *Ioffe O.S.*, Soviet Civil Law, General Part. Right of Property General Doctrine of Obligations L., 1958, 70-71; (in Russian) *Bydlinski P.* (Hrsg.), Bürgerliches Recht, Springers Kurzlehrbücher der Rechtswissenschaft, Bürgerliches Recht, Band I, Allgemeiner Teil, dritte, überarbeitete Auflage, WienNewYork, 2005, 13, 62.

48 See. *Chanturia L.*, General part of civil law, Tbilisi, 2011, 98 (in Georgian).; *Belov V. A.*, Civil Law, Book. I, General Part, Introduction to Civil Rights, 3rd edition, Moscow, 2014, 23-27 (in Russian).; For another opinion, see *Kereselidze D.*, The most general systematic concepts of private law, Tbilisi, 2009, 76-80 (in Georgian).

49 *Mautner T.*, How Rights Became "Subjective", in: Ration Juris, Vol. 26, No.1, 2013, 112.

50 *Fikentscher W., Heinemann A.*, Schuldrecht, 10. Auflage, Berlin, 2006, 19.

51 *Alekseev S.*, General Theory of Law. vol. II, Moscow, 1982, 114 (in Russian).

52 See. *Brox H.*, Allgemeiner Teil des Bürgelichen Gesetzbuchs, Sechste Auflage, Köln-Berlin-München, 1982, 240; *Brox, H., Walker W.-D.*, Allgemeiner Teil des BGB, 30. Auflage, München, 2006, 315.

request and implies a freedom or an opportunity that an entitled person can use for good, for bad, or not at all. Rights provide individuals with the power to require their interests to be protected.[53] A person is given the right to satisfy his/her interests. Here the influence of the Theory of Interests is obvious but it is important to highlight the active role of an authorized person.[54]

A right is the means, **extent,** and **scope of the possible action provided by law**. In addition, the right should mean asserting the request to the debtor and ensuring its voluntary fulfillment within the regulatory relationship. Besides, the possibility of performing the permitted actions is provided by the performance[55] of a debtor. This is natural because the right is opposed to the corresponding duty. However, the right and duty work for the same goal, the interests of the person authorized by law.[56] Thus, **the right can be interpreted as the possibility of the action of a specific person ensured by law and the performance of the debtor.**[57]

In German law, private law is considered as an essential element of private legal relations. It includes the power[58] or authority[59] entitled to the subject by private law.

A civil right is a legal power (possibility) granted to the participant of civil relations by civil law to protect one's interests, including through the court. **Civil rights are enshrined in the Civil Code, agreements, and statutes of legal entities**.[60]

3.3. The role of private autonomy in determining the capacity for a conception of civil rights

Private autonomy involves the self-regulation of relationships by people and prohibits the intervention of a state or third parties. In this case, the relationship is regulated based on the free will of a person which is legally binding. Accordingly, private autonomy is featured with the **two most fundamental characteristics: (a) the free will of individuals and (2) the recognition of will as binding by law**. Legal consequences arise as a result of providing the created relationship with such an effect by law. Hence, will have a legal force because the law recognizes the autonomous will of a person.[61]

Civil law applies the principle ” everything which is not forbidden is allowed". i.e. **Freedom in civil law is limited by law** (Part 2 of Article 10 of the Civil Code). Additionally, the **imperative norms[62] of the civil law protect the freedom of others from the abuse of rights and establish certain limits**, which should not be exceeded by a subject. Therefore, the law also determines the

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53 *Menke C.,* Subjektive Rechte: Zur Paradoxie der Form, Zeitschrift für Rechtssoziologie, 29, Heft 1, 2008, 90.

54 See. *Bydlinski P.*, Grundzüge des Privatrechts für Ausbildung und Praxis, 7. Auflage, Wien, 2007, 14.

55 *Ioffe O. S.*, Legal relations under Soviet Civil Law, L., 1949, 49, 53; *Bratus S.N.*, Subjects of Civil Law, M., 1950, 11 (in Russian).

56 *Ioffe O. S., Shargorodsky M. D.,* Questions of the Theory of Law, M., 1961, 223.

57 *Bratus S.N.*, Subjects of Civil Law, M., 1950, 13 (in Russian).

58 *Brox H.*, Walker W.-D., Allgemeiner Teil des BGB, 30. Auflage, München, 2006, 315-316.

59 *Bork R.*, Allgemeiner Teil des Bürgerlichen Gesetzbuchs, 2. Auflage, Tübingen, 2006, 116.

60 *Chanturia L.,* General part of civil law, Tbilisi, 2011, 98 (in Georgian).

61 *Artunç Ç. E.*, Vertragsfreiheit als Erscheinungsform der Privatautonomie im deutschen Zivilrecht, Annales de la Faculté de Droit d’Istanbul, XL, N57, Yıl 2008, 296-297.

62 *Jorbenadze S.*, Freedom of Contract in Civil Law, Tbilisi, 2017, 85 (in Georgian).

scope of private autonomy. The action resulting from private autonomy can have legal effects only when a legislator gives it freedom. Consequently, the legislator is allowed to limit private autonomous action.[63] The purpose of civil laws is to ensure the freedom of civil circulation in the territory of Georgia unless the exercise of such freedom prejudices the rights of third parties (Article 9 of the Civil Code of Georgia).

Even within the framework of private autonomy, a person has the freedom to regulate private legal relations with others through contracts. This freedom includes the freedom to conclude a contract, terminate contractual relations, and qualify the content and form of the contract.[64] **In Civil law, disposition must derive from law**. By circumventing the law, a subject cannot become a bearer of disposition, acquire, exercise, or enforce his/her rights.[65]

An obvious manifestation of the autonomy of parties is the right of private law entities to conclude **such an agreement that is not provided by law but does not contradict it**. For example, an essential condition of a contract is that one party invests and another one profits from performing certain works.[66]

4. Conclusion

As research has indicated, each theory has flaws. The **theory of will considers a will to be a central and necessary component of right**, however, the right cannot be reduced to the will. Will is an individual-psychic act, a real event. In addition, the theory of will does not specify that the right should be considered together with the duty, which determines the ideal (legal) nature of a right. Thus, **the theory of will considers the right to be a non-legal (factual) event**, which takes the discussion beyond the science of law.

According to the theory of interests, an interest is a real psychological phenomenon. The main interest of a **right is combining subjective-psychological aspects**. However, the psychological perception of a right belongs to the real realm, and the right to the ideal. Therefore, events from **the area of the already non-existent and existing – are disarranged in the theory of interests**.

Mixed Theory was an attempt to explain the essence of a **right by comparing the theory of interests with the theory of will but unsuccessfully.** In the mentioned case the will and the interest are not separated, and the legal nature of a right is not analyzed. Mixed Theory replicates the flaws of theories of will and interests as well.

Rejection Theory moves from one e**xtreme to another extreme denying the existence of a right and moving away from the main task – to explain the essence of a ri**ght.

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63 *Artunç Ç. E.,* Vertragsfreiheit als Erscheinungsform der Privatautonomie im deutschen Zivilrecht, Annales de la Faculté de Droit d'Istanbul, XL, N57, Yıl 2008, 296-298.

64 *Huemer D., Lenz W., Kerschner F., Lux D., Schlager J., Szep C., Wittmann E., Schlager S., Trausner M.,* Handbook of Contract Drafting: Civil Law, Corporate Law, Tax Law, For Practice and Study, edited by Kerschner F., 2013, 29.

65 *Khetsuriani J.*, Functions of Civil Law, Vol. 1995, 102 (in Georgian).

66 Ruling No. As-1300-1320-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia dated March 27, 2012 (in Georgian).

Research shows that law is not an authority established by custom or morality; **it must be recognized by law to be considered a right.** However, a right must belong to the person and includes the power of will that a person uses to satisfy his interests. **The fulfillment of the right is ensured by the duty of the obliged person because the right exists only together** with the duty as they are related categories.

It has been decided that the **usage of the term "civil right" is more appropriate than "subjective civil right". This develops from the principle of ensuring the unity of** concepts recognized by law. In addition, it has been revealed that **civil rights are the legal power conferred on a subject of civil relations by civil law to require a certain action, refrain from** acting, and get protected by the court.[67] This power is based on both civil law and statutory contracts.

So, compared to public rights, the **concept of civil rights is much more extensive**. The subject of a private legal relationship has the authority to carry out any action not prohibited by law. Nevertheless, a person's freedom of action is limited by law and the rights of third parties, because the subject can act freely as long as the interests of third parties are not violated.

Bibliography:

1. Civil Code of Georgia, 26/06/1997 (in Georgian).
2. *Alekseev S.C.*, General Theory of Law, V. 2 vols., Moscow, 1982, 114-116 (in Russian).
3. *Amiranashvili G.*, Concept and structure of civil rights, Journal "Justice and Law", №4, 2015, 140 (in Georgian).
4. Annales de la Faculté de Droit d'Istanbul, XL, N57, Yıl 2008, 296-298.
5. *Artunç Ç. E.*, Vertragsfreiheit als Erscheinungsform der Privatautonomie im deutschen Zivilrecht,
6. *Belov V. A.*, Civil Law, T. I, General Part, Introduction to Civil Law, 3rd ed., Moscow, 2014, 23-27 Annales de la Faculté de Droit d'Istanbul, XL, N57, Yıl 2008, 296-298 (in Russian).
7. *Bichia M.*, Legal Obligational Relations, 3rd ed., Tbilisi, 2020, 19 (in Georgian).
8. *Bichia M.*, Methodological Issues of Civil Legal Relations, TSU "Journal of Law", № 1-2, 2010, 96-97 (in Georgian).
9. *Bichia M.*, The Concept and Content of Civil Legal Relations, Doctoral Seminar Paper, Tbilisi, 2009, 21-22, (in Georgian).
10. *Bork R.*, Allgemeiner Teil des Bürgerlichen Gesetzbuchs, 2. Auflage, Tübingen, 2006, 116.
11. *Bratus S.N.,* Subjects of Civil Law, M., 1950, 11, 13 (in Russian).
12. *Brox H.*, Allgemeiner Teil des Bürgelichen Gesetzbuchs, Sechste Auflage, München, 1982, 242-243.
13. *Brox H., Walker, W.-D.*, Allgemeiner Teil des BGB, 30. Auflage, München, 2006, 318-319.
14. *Bydlinski P.* (Hrsg.), Bürgerliches Recht, Springers Kurzlehrbücher der Rechtswissenschaft, Buergerliches Recht, Band I, Allgemeiner Teil, dritte Auflage, WienNewYork, 2005, 13, 62.
15. *Bydlinski P.*, Grundzüge des Privatrechts für Ausbildung und Praxis, 7. Auflage, Wien, 2007, 14.
16. *Chanturia L.*, General part of civil law, Tbilisi, 2011, 98 (in Georgian).

[67] *Chanturia L.*, General Part of Civil law, Tbilisi, 2011, 98 (in Georgian).

17. *Comte A.*, System of positive politics, ed. 1, 1890, 361 (in French) cited from the work: *Diuges, L.*, General Transformations of Civil Law since the Napoleonic Code, translated by Sivers M. M., M., 1919, 15 (in Russian).
18. *Diuges L.*, General Transformations of Civil Law since the Napoleonic Code, translated by *Sivers M. M.*, M., 1919, 15-17 (in Russian).
19. *Duguit L., The State, objective law and positive law, Paris*, 1901, 147, (in French) cited from the work: *Rozhdestvensky A.*, The Theory of Subjective Public Rights: A Critical-Systematic Study, Part I. Main Questions of the Theory of Subjective Public Rights, M., 1913, 16 (in Russian).
20. *Fikentscher W., Heinemann A.*, Schuldrecht, 10. Auflage, Berlin, 2006, 19.
21. *Gamkrelidze O.*, Irodion Surguladze and his book "Government and Law", Tbilisi, 2002, 20-21, 25-26 (in Georgian).
22. *Gokieli F.*, Right, Journal "Samartali", No. 8-9, 1992, 65, 69, 71 (in Georgian).
23. *Huemer D., Lenz W., Kerschner F., Lux D., Schlager J., Szep C., Wittmann E., Schlager S., Trausner M.*, Handbuch Vertragsgestaltung: Zivilrecht, Geselschaft, Steuerrecht, Für Praxis und Studium, herausgegeben von *Kerschner F.*, 2013, 29.
24. *Ioffe O. S.*, Legal relations under Soviet Civil Law, L., 1949, 49, 53 (in Russian).
25. *Ioffe O. S., Shargorodsky M. D.*, Questions of the Theory of Law, M., 1961, 227, 229 (in Russian).
26. *Ioffe O. S.*, Soviet Civil Law, General Part. Property Right. General Doctrine of Obligations, L., 1958, 70-71 (in Russian).
27. *Jorbenadze S.*, Freedom of Contract in Civil Law, Tbilisi, 2017, 85 (in Georgian).
28. *Jhering R. von*, Geist deutschen romischen Rechts, III 1, 1. Aufl., 1865, §§ 60, 61.
29. *Jhering, R. von,* Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, 3. Auflage, Leipzig, 3, Teil, 1, Abt., 1877, § 60, 327.
30. *Kapanadze O.*, Historical Review of Civil Rights Theories, Journal "Young lawyers", № 5, 2016, 76 (in Georgian).
31. *Kereselidze D.*, The most general systematic concepts of private law, Tbilisi, 2009, 76-80 (in Georgian).
32. *Khetsuriani J.,* Functions of civil law, Tbilisi. 1995, 102 (in Georgian).
33. *Krasheninnikov E.*, Interest Protected by Law and Means of Its Protection in Materials of the Scientific Conference – Issues in the Theory of Protective Legal Relations, Yaroslavl, 1991, 12 (in Russian).
34. *Magaziner Ya.M.*, Selected Works on the General Theory of Law, St. Petersburg, 2006, 153, 155-156 (in Russian).
35. *Mautner T.*, How Rights Became "Subjective", In: Ration Juris, Vol. 26, No1, 2013, 112.
36. *Menke C.*, Subjektive Rechte: Zur Paradoxie der Form, Zeitschrift für Rechtssoziologie, 29, Heft 1, 2008, 90.
37. *Morandier L. J.*, Civil Law of France, translated by *Fleishitz E. A.*, T. 1, M., 1958, 39-40 (in Russian).
38. *Ninidze T.*, Live Icon of Dignity, Journal "Georgian SSR. Herald of the Academy", Series of Economics and Law, No. 3, 1987, 64 (in Georgian).
39. *Reiser L.*, Der Stand der Lehre vom subjektiven Recht in Deutschen Zivilrecht, Juristen Zeitung, 16. Jahrg. Nr. 15/16, 1961, 465.
40. *Rozhdestvensky A.*, Fundamentals of the General Theory of Law: Course of lectures, M., 1912, 121 (in Russian).

41. *Rozhdestvensky A.*, The Theory of Subjective Public Rights: A Critical-Systematic Study, Part I. Main Questions of the Theory of Subjective Public Rights, M., 1913, 16-17, 20, 22-24 (in Russian).
42. Ruling No. As-1300-1320-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia dated March, 27.2012 (in Georgian).
43. *Savigny F. C. von*, System des heutigen römischen Rechts, Bn. 1, 1840, § 4, 7.
44. *Schorder R.,* (unter Mitarbeit von *Bar fred G. anspeter Hafermark, Dostal C., Bedau M., Moller Ulr., Revermann M.*), Einfuhrung in die Rechtsgeschichte, Quellensammlung zur vorlesung mit erlauterungen,14 (neu barbeitete) Aufl., 2005, 146.
45. *Sharon Byrd B., Hruschka J.,* Kant's Doctrine of Right: A Commentary, Cambridge, 2010, 28.
46. *Surguladze I.*, Government and Law, translated by *Gamkrelidze O.*, Tbilisi, 2002, 94, 96, 100-102, 110, 134-139.
47. *UEx R.*, Philosophy of Law: A Very Short Introduction, Tbilisi, 2012, 153-154 (in Georgian).
48. *Vacheishvili Al.*, General theory of law, Tbilisi, 2010, 181, 183 (in Georgian).
49. *Windscheid B.,* Lehrbuch des pandektenrechts, 7 Aufl., I Band Frankfurt a.M., 1891, §37, S. 87 f.
50. *Windscheid B.,* Pandektenrecht, 3 Aufl., 1873, §37.
51. *Windscheid-Kipp B.,* Pandektenrecht, 9. Aufl., 1906, § 37.