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anniversary of the prominent representative of Georgian legal science
Professor Tedo Ninidze

უნივერსიტეტის გამომცემლობა

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Component Parts of a Thing and Appurtenance in Georgian Property Law

Classification of things into component parts, essential component parts or appurtenances first of all concerns a physical criterion of more or less close linkage between things, though there are quite interesting issues, connected with a subject's will. For example, an owner of a plot of land can appertain the thing possessed by him to an essential component part of an immovable thing by initiating a firm attachment of the thing to land. The same situation is with an appurtenance, which by definition of the Civil Code is a movable thing which, although not being a component part of the principal thing, but is intended to serve the principal thing and is connected to it by common economic purpose and thereby is linked in space to the principal thing and, according to established understanding, is deemed to be an appurtenance. It is important that just an owner can define the economic purpose of the movable things, be an intiator of the linkage of these things in space and in fact by expressing this will he is creating an appurtenance. Although is only the subject's will sufficient or not to offer resistance to the objective criterion of physical connection between things? This issue can be argumented, though presumably an individual, subjective will cannot change terms established by law.The difference between these categories can be found in practical examples and the existed court practice.

Key Words: *a component part of a thing, an essential component part of a thing, a non-essential component part of a thing, an appurtenance, linkage, incorporation, a seeming component part of a thing, superficies solo credit-principle.*

1. Introduction

The main criterion of classification of things is their moveability, subjecting to motion and thus by classical classification things are divided into movable and immovable groups. According to the Civil Code of Georgia (hereinafter CCG) a thing may be either movable or immovable (Article 148). Immovable things include tracts of land and their essential component parts. The rest of the things are movable,[1] because they can change their place spatially and are not localized in any certain place. Apart from the above presented interpretation concerning a pure physical criterion of more or less close connection between things, there is also a rather interesting issue connected with a subject's will. For example, an owner of a tract of land can reveal his will to a certain extent and manage to classify indirectly the thing owned by him and appertain it to immovable things by initiating a firm attachment of the thing to land. For example, an appurtenance, which by definition of the Civil Code is a movable thing which, although not being a component part of the principal thing, is intended to serve the principal thing and is connected to it by common economic purpose and thereby is linked in space to the principal thing and, according to established understanding, is deemed to be an appurtenance (Article 150 I). It should be noted that in relation to the principal things just an owner can define the economic purpose of the movable things, be an initiator of the linkage of these things in space and in fact by expressing this will he/she is creating an appurtenance. Although is

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1 Compare: *Zoidze B.,* Property Law, Tbilisi, 2003, 32 with further notes.

only the subject's will sufficient or not to offer resistance to the objective criterion of physical connection between things? This issue can be argumented, though presumably an individual, subjective will cannot change terms established by law. The CCG states that immovable things include a tract of land with its subsoil minerals, the land, plants grown on it and buildings and other structures firmly attached to the land (Article 149). Accordingly these criteria are difficult to be influenced, though as it was already mentioned, an owner can cause a certain discussion by connecting a movable thing firmly to an immovable one, for example, in case of premises.

2. Component Parts

Parts, composing the existed thing are called components parts. Component parts can be different - essential and non-essential. Essential component parts are those parts of a thing that cannot be severed without either destroying the whole thing or this part, or extinguishing itspurpose (Article 150 I) (for example built-in fireplace). As a result of connection these things lose their independence and become a part of the whole thing(for example, building materials used in construction). The same can be said of cases, when parts canbe severed but expenses for carrying out this process are improperly high. By the definition of the Supreme Court of Georgia on defining a component part of a thing traditions of civil turnover are taken into consideration, but if there are no such traditions, then an economic purpose of the thing itself must be taken into account. A component part of a thing should be admitted which is purposefully connected to it. It is also necessary to consider the results of this linkage as onewhole thing. When a united thing is formed by linkage of things, it is impossible to talk about different things to be having independent possessory rights. So an essential component part is a part, legally linked with a thing and is not an object of special right. That is to say that the fate of the essential component part is completely connected with the thingand it is impossible to dispose a component part independently.[2]

Besides in civil turnover it is difficult to distinguish essential and non-essential parts from each other. In such a case understanding established in civil turnover or natural judgment of an objective observer (the third person) is crucial; important is also the time of connecting of parts.[3] Essential component parts of a right cannot be a subject of somebody else's special rights, or existed in somebody else's possession. Thus a possessor of a principal thing is always a possessor of the essential component part. A purpose of a legislative exigency, according to which a thing and its essential component part must have a united legal fate, is maintenance of economical unity. Thus legal status on the principal thing is also on its essential component part. Moreover it should be noted that accordingly in case of co-ownership of the principal thing its essential component part gets into a legal proportion regime.[4]

The mentioned approach in relation to immovable things in Georgian Law is an echo of "superficies solo cedit" principle, according to which a legal fate of a building on a plot of land is connected with a legal status of this land, providing a legal unity of the plot and the building.[5] The roots of the above mentioned principle are coming from Roman Law. According to Roman Law immovable things included not only a tract of land with its minerals, but every goods on the land surface created by somebody else's or the owner's labor, which was deemed to be an artificial or natural part of the land surface and there was propagated a rule according to which those created on a tract of land were inseparable from a tract of land.[6] According

[2] The Supreme Court of Georgia, № 3ვ-675-02, Decision, 22.10.2002.
[3] See *Wolf/Wellenhofer*, Sachenrecht, §1, Rn. 23.
[4] The Supreme Court of Georgia, № ას-1653-1550-2012, 15.04.2013.
[5] *Staudinger-Jickli/Stieper,* Kommentar zum BG BNeubearbeitung 2004, § 94, Rn. 2.
[6] *Garishvili M., Khoperia M.*, Roman Law, "Meridiani", Tbilisi, 2013, 277.

to Article 193 of the Civil Code when a movable thing is attached to a tract of land in such a manner that it has become an essential component part of this tract, the owner of the tract of land, according to paragraph (2) of Article 150, shall simultaneously be the owner of this thing. Essential component parts of a tract of land, according to the second part of Article 150, include buildings, structures and things firmlyattached to the land. By this way a principle "superficies solo cedit" provides for legal determinacy, as it allows a potential purchaser of a tract of land to define quite simply on which things this rule is propagated. Besides it is a way of avoiding the economic losses, which might be risen in case of appurtenance the craft of the land and the building to different people.[7] It is important that a Georgia legislator made reception of "superficies solo cedit" principle by means of reception of the concept of the essential component part of a thing,[8] although the reception of the mentioned principle in post-Soviet period was connected with a number of difficulties. These difficulties were caused by the fact that Soviet Law did not allow the right of ownership on tracts of land, but considered the right of ownership onbuildings.[9] In Georgia the current law "On Privatization of the State Property" did not regulate an issue of privatization of land,[10] with the exception of agricultural crafts of land,[11] which on alienating of the building by the state was hindering the existence of a single owner. The current law of Georgia "On the Public Registry",[12] in the given part is mostly repeating postulates of the law "On the Public Registry of the Rights on Immovable Things",[13] though in July of 2010 in the sphere of privatization there was adopted a law"On the State Property",[14] stating a privatization rule forimmovable property (including land, which is not of agricultural purpose). It should be noted that a new law On the "State Property" did not foresee preconditions for registration of a building as an object of individual right. In Georgia there are still facts of separate registration of buildings-structures in cases of alienation of lands by the state. The remarked fact contradicts the exigency to the first part of Article 150 of the Civil Code of Georgia, according to which a building in civil turnover is considered as a component part of a land plot. It is a problem, because by such approach there might be a case when on privatizing a plot of land the owner, having acquired the right to the possession of the plot of land, might demand the recognition of his right on the building, the property right to which has already been registered on a different person. It is also interesting that according to (e) subparagraph of paragraph two of the law of Georgia[15] "For Recognition of Property Right on Parcels of Land Possessed (Used) by Natural Persons and Legal Entities Under Private Law" ". . . the interested person is also a person purchased/acquired the property right on the fixed structure built upon this parcel of land from the user of the state-owned non-agricultural parcel of land according to the legislation of Georgia". This fact once again confirms that in law practice the legal fate of the plot of land differs from the legal fate of the building built upon it. It should be noted that in other cases of immovable things in law practice a building (construction) is considered as an essential

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7 Compare: *Staudinger-Jickli/Stieper*, Kommentar zum BGB Neubearbeitung 2004, § 94, Rn. 3; *Palandt-Heinrichs,* Kommentar zum BGB § 94 Rn 1.

8 Compare *Kurzynsky-Singer, Zarandia*, Rezeption des deutschen Sachenrechts in Georgien, Mohr Siebeck, 2014, 131 with further notes.

9 Compare *Gerasin,* Separation of Real Property on Land Plots and Structures Located thereon and its Impact on Transactions Costs, in: *Trunk (Hrsg.)*, Die Transformation dinglicher Rechte an Immobilien in Russland und anderen Staaten Mittel- und Osteuropas, Köln 2010, 49.

10 The Law of Georgia of 30 May, 1997 "On Privatization of State Property".

11 A special law of Georgia on the Right of Ownership on Agricultural Land Plots", adopted on March 22, 1996 (№165-IIc).

12 A law of Georgia adopted on 19 December, 2008 on the "Public Registry" (820-PC).

13 Namely (a) subparagraph of Article 2 of the given law states that an immovable thing is a parcel of land with or without fixed structures built upon it (built, under construction, or destroyed), building unit and line structure.

14 Law of Georgia of July 21, 2010 on "State Property" (№ 3512 – PC).

15 Law of 11 July, 2007, № 5274.

component part of land plot. So for example, by the decision of the Supreme Court of Georgia taken on the 11th of December, 2007[16] a cassation appeal was partly settled, on the basis of which it was pointed out that the court of appeals discussing the case and giving the party a part of the dwelling house, had not taken into account the decision on the property right on the land plot, upon which a building was built. According to the Supreme Court the court of appeals violated requirements of Article 150 of the Civil Code of Georgia.

a) Non-Essential Component Parts

Non-essential parts can be severed from a thing without being destroyed, for example, a replaceable engine in case of a car, tires, and a standard built-in kitchen. So on such things individual rights might be extended.

For example, the Supreme Court of Georgia recognized an annex to a dwelling house as an essential component part of this house[17]. The court pointed out that in the point of view of civil law annexes to the house could not have been an object of individual right, which meant that proprietary right on the house was extended to its annexes too. Accordingly a person having been entitled to acquire a share at an auction acquired the rights on the thing completely.[18]

On the other case the Supreme Court of Georgia admitted that a basement was not an essential component part of the flat and might be an object of individual right. According to the definition of the court a property of a component part of a thing is that it is always connected with the other thing and by means of this connection the whole thing is formed; then we can talk about different things with independent proprietary rights. The disputable basement was located separately and had no connection with the complainant's flat, by linking the basement with the flat the whole thing was not created and they had different purposes. As a result the court of appeals think that the basement is an object of individual right.[19]

It is interesting to discuss the determination of the Federal Court of Germany on one case. It concerned a custom-built module, which was used to supply a small thermo electric power station with electric energy; the Federal Court of Germany did not recognize that module to be an essential component part of a thing, as the remained thing could be used after segregating of the component part, after the other similar module had been built in it. So the part segregated in this way must be estimated as a non-essential part, although a different case is when a part is so specifically adapted to the principal part that it cannot be used after segregating it.[20]

b) An Essential Component Part of a Land Plot

Essential component parts of land are things, buildings firmly attached to the land or soil or to the floor of the building, also plants growing on the land plot, as far as they are connected with land (for example, crops). An essential component part of a land plot should be deemed to be products connected with it, such as vegetables, cereal crops. As for soil, stones, peat, they are not essential component parts; they are deemed to be discussed with the land plot as a united whole thing.[21] Except this, things added for facing of buildings and giving them the finalized look (such as wash-basin) are essential component parts. So the

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[16] See Decision of the Supreme Court of Georgia, 11 December, 2007, on case №ას-274-604-07.

[17] For comparison: In court practice of France a disputable issue was the nature of a verandah as an immovable thing; according to the agreement between the parties by the term of the contract, transferring the proprietary right was suspended until paying the whole amount by the buyer and the verandah was considered to be the movable thing, which would be fixed in the immovable thing. The court considering the public order gave priority to the created legislative statutes and recognized the verandah to be an immovable thing, Mathieu, Droit Civil, les biens, Sirey, 2013, 59.

[18] The Supreme Court of Georgia, №ას-820-872-2011, 29.07.2011.

[19] The Supreme Court of Georgia, №ას-355-641-04, 02.07.2004.

[20] *Wolf/Wellenhofer*, Sachenrecht, §1, Rn. 24.

[21] *Zoidze B.,* Property Law, Tbilisi, 2003,42, with further ndes.

criterion is not the severability, but the intention of the person, who built the building.[22]

The Firm attachment to the Land is Obvious, when a thing cannot be severed from the land plot without essential, in most cases, ill-proportioned expenses; as a rule a fence, as well as a house, a concrete garage, is firmly attached to the land. A concrete fence confining boundaries of the plot is an essential component part of the land plot, though a fence built in the period of construction for the purpose of safety of population shall not be deemed to be an essential component part (Article 150 II).

c) Incorporation

In French Law if movable things become steadily, finally attached to the principal thing by the owner, they are called incorporation.[23] Such are things, which cannot be easily removed and are not foreseen to be removed either, because they are attached to the principal thing, the main immovable thing, in such a way by means of either sealing up with plaster, or using lime or cement, that it is difficult to remove, break off or separate them without damaging or destroying of that part of the principal thing, to which this movable thing is attached, for example, mirrors and pictures, which are placed and attached in such a way that are creating one whole construction. It should be noted that in most cases a category and the status of movable things, physically connected with the principal thing, are decided by a judge.

d) Attaching for Temporary Purpose – Seeming Component Parts of a Thing

In some cases a thing is connected with the principal thing in such a way that it causes the association of an essential component part. This is a case of a seeming component part. Such are cases, when things for temporary purpose are connected with land or a building (for example, the floor); such things are remained as independent movable things and can be owned by a third person. Such is a case when for example, a standard built-in kitchen installed by an employer and which can be removed and installed in the other placewithout great efforts, is not deemed to be an essential component part, because the attachment was temporary from the very start.

Seeming component part of a thing can become a component part, when the owner of the seeming component part transfers it to the owner of the plot of land and they both agree that the seeming component part will lose its independence.[24]

So a component part or a thing, attached firmly to the principal thing shall not be deemed to bean essential component part of a plot of land or the other real property, if this part or a thingis intended for temporary use that may be stipulated by contract (Article 150 II). Such connection or linkage serves the purpose of temporary useonly, when the further segregation was intendedfrom the very start and this will is consistent with an outwardly noticeable fact.[25] When a case concerns an employer or a leaseholder, we can presume from the start that things attached to the plot/buildinghired or rented by them are connected for temporary use. It should be note that the further change of the purpose does not turn a thing into a component part.[26]

Classification of things might become quite important especially when a high-priced movable thing serves the finalization or decoration of an immovable thing: according to Article 525 of the Civil Code of France: "As regards statues, they are immovable things where they are placed in a recess designed express-

[22] *Wolf/Wellenhofer,* Sachenrecht, §1, Rn. 24.
[23] *Mathieu*, Droit Civil, les biens, Sirey, 2013, 58.
[24] *Wolf/Wellenhofer,* Sachenrecht, §1, Rn. 25.
[25] BGHZ, 54, 208, 210; 104, 298, 301; is referred to *Kropholler J.,* The Civil Code of Germany, Teaching Commentary, 2014, 27.
[26] *Kropholler J.,* The Civil Code of Germany, Teaching Commentary, 2014, 27.

ly to receive them, even though they can be removed without breakage or damage".[27]A recess specially designed for statues sufficiently expresses the will (intention) of the owner of an immovable thing to turn the mentioned statues into movable things connected with a principal immovable thing, though sometimes the qualification of such things is quite a delicate issue. It isimportant to know to what extent it is possible by virtue of a certain decision movable things being connectedwith the principal immovable thing, when the issue concerns a historical monument. In such a case a quite careful attitude is required to settle the issue, which concerns whether things or ornaments to be decorated represent immovable things judging from their nature, as they can be removed quite easily and freely,[28] or these ornaments are appurtenance or not.

What kind of things are frescoes in a monastery, which was not functioning. This issue became a subject of heated debates in France. Though by nature they were representing immovable things considering the fact that these frescoes were inseparable parts of the walls, in French court practice they were still deemed to be movable things,[29] though after appealing of the above mentioned decision basing on Article 525 of the Civil Code the frescoes were given the qualification of an immovable thing. The court of appeals thinks that in spite of removing frescoes from the principal immovable thing they would have been perpetually and finally connected with this church, furthermore if separation of frescoes and church had been carried out against the will of the owner of the immovable thing.

In French court practice facing of a building with special wood was also deemed to be an immobile thing considering its nature:[30] A marble bas-relief (figures from marbles on the walls), which from the point of view of distinguishing it from immovable property was almost unnoticed because of its nature, was also deemed to be an immovable thing, though it ws a subject of a heated discussion.[31]

Will the proper qualification be given to such and similar things, which by their nature compose a part of a certain construction? Will they be counted as essential component parts or non-essential component parts or appurtenances? These questions in defining qualifications of things are those important issues, which together with the appropriate definitions of the Code require certain decisions of court practice.

3. Appurtenance

a) General Characterization

An appurtenance is a movable thing, which in contrast to an essential component part is legally independent. Therefore it can be alienated without the principal thing and encumbered, though it often shares the fate of the principal thing.[32]In addition the Civil Code of Georgia makes a clause, according to which if one of the things, according to established understanding, is deemed to be the principal thing,then its owner shall acquire ownership of the appurtenance as well (Article 194 II). Also if a person undertakes the obligation to alienate or encumber his own property, then this obligation shall also extend to an appurtenance(Article 324).So the purpose of inclusion of an appurtenance in contracts concluded on the principal thing is to maintain the economic connection between the principal thing and the appurtenance.

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[27] Méga Code Civil, Dalloz, 2012, 1159.

[28] *Mathieu,* Droit Civil, les biens, Sirey, 2013, 58.

[29] ass. plén. 15 avr. 1988. Bull. civ., n 4; R., p. 198; D. 1988. 325, concl. Cabannes, note Maury; JCP 1988. II. 21066, rapp. Grégoire, note Barbieri, cassant Montpellier, 18 avr. 1984. D. 1985. 208, not Maury, citied in Mathieu, Droit Civil, les biens, Sirey, 2013, 58.

[30] Civ. 1, 19 mars, 1963, JCP 1963. II. 13190, note Es, ein .

[31] CE 24 févr. 1999, Sté Transurba, D. 1999. IR 110; JCP 2000. II. 10232, note Deumier ; JCP 1999. I. 175, n1, obs. Périnet-Marquet (Annulment of the appealed decision, CAA Paris, 11 juill. 1997, RFDA 1998.6 concl. Paitre, note Pacteau, annulant TA Versailles, 4 juill. 1996, D. 1997.33, concl. Demouveaux).

[32] *Zoidze B.,* Property Law, Tbilisi, 2003, 43 with further notes.

b) Economic Purposes of the Principal Thing and Linkage in Space

An appurtenance is a movable thing which, although not being a component part of the principal thing, is intended to serve the principal thing and is connected to it by common economic purpose and thereby is linked in space to the principal thing. So according to Article 151 the noticeable linkage in space is enough. As a rule, the precondition of an appurtenance for service to the principal thing is the possibility of the actual usage of this thing for the economic purpose of the other thing. So for example, a standard built-in kitchen serves the flat, though an appurtenance is not obvious, when a thing in civil turnover is not deemed to be such. It means that difference between an appurtenanceand parts of the thing is determined according to established understanding in civil turnover. For entrepreneurial inventory the *principal thing* might be a plot of land owned by the enterprise, when the latter is intended for a proper long-termed exploitation and when the main load of economic activity of the enterprise is on this plot.[33]

According to the definition of the Supreme Court of Georgia an appurtenance includes furniture, with which the flat is furnished. The property of the appurtenance is that it is connected to the main thing by common economic purpose, under which it is meant that an appurtenance is intended to serve the principal thing. An appurtenance is linked in space to the principal thinguntil proving the opposite and the owner of the principal thing at the same time is deemed to be the owner of the appurtenance. The furniture existed in the dwelling flat is intended to serve it and is connected to it by common economic purpose.[34]

Thus an appurtenance is such a movable thing, which because of its connection to other principal thing is qualified as an appurtenance and represents an "additional" thing. Such purpose of an appurtenance presumably corresponds to the will expressed by the owner of the principal thing to give a certain function to the movable thing, which will be used in favor of the principal thing and will be within the scopes of its possession. However such subjective approach to the principal things is not enough; such intention of the appurtenance must also have objective character; namely between the principle thing and an appurtenance must be physical (spatial) and pure economic ink.

c) Common Economic Purpose

Introduction of the definition of common economic purpose into legislation was due to the evolution of economic activities. According to the first part of Article 151 of the Civil Code of Georgia an appurtenance is a movable thing which, although not being a component part of the principal thing, is intended to serve the principal thing and is connected to it by common economic purpose and thereby is linked in space to the principal thing and, according to established understanding, is deemed to be an appurtenance.

So cattle or other things, which were placed on these plots by the owner of plots of land for the purpose of better exploitation of the land by using them, is an appurtenance of this plot of land.

An appurtenance includes: instruments for ploughing-seeding, seeds of species of cereals; pigeons of pigeon-houses;rabbits of rabbit-houses, bees of bee houses; winepresses, distillation kettles, barrels, hayand fertilizers. It is obvious that the above mentioned list does not require wide explanations, because the possessor of the plot of land simultaneously becomes the owner of the above listed movable things. Moreover, if a personundertakes the obligation to alienate or encumber his own thing, then this obligation shall also extend to an appurtenance thereof, unless otherwise stipulated in the contract (Article 324). The mentioned decision is due to the principle of property wholeness, economic wholeness, so that to maintain the connection-relationship existed between the things.

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[33] BGHZ, 62, 49; BGHZ, 85, 234, 237 §98 №1 Referred to *Kropholler J.,* The Civil Code of Germany, Teaching Commentary, 2014, 28.

[34] The Supreme Court of Georgia, №ას-204-197-2013, 01.07.2013.

It is possible to imagine big diversity of the following exploitation combinations: for example, a case of hotel. In this context a movable thing – for example, furniture, which serves the improvement of the hotel, is an appurtenance, as in relation to the hotel it has common economic purpose and is intended to use this principal thing.[35] We will face the same legal estimation, when we discuss a case of renting an apartment furnished with furniture. In such a case the above mentioned Article is used as a determiner, which implies that the furniture in relation to the apartment has a status of an appurtenance. Such fastening of the appurtenance to the principal things is very important in practice: for example, a purchaser of an immovable thing, unless otherwise is stipulated in the contract, can simultaneously demand to transfer the appurtenance to him. It will be very useful, if parties from the very start define what belongs to the appurtenance of the principal thing in order to avoid all the future presumable disputes, because criteria of belonging the appurtenance to service to the existed principal thing, the existed link with common economic purpose, also link in space and the established understanding are not always obvious.[36]

4. Conclusion

The main criterion of classification of things is their moveability, subjecting to motion and so by classical classification things are divided into movable and immovable groups. Besides apart from the above presented discussion, which concerns the pure physical criterion of more or less close linkage between things, there is quite an interesting issue, connected with a subjec's will. For example, an owner of a tract of land can reveal his will to a certain extent and manage to classify indirectly the thing owned by him and appertain it to immovable things by initiating a firm attachment of the thing to land. It should be noted that just an owner can define the economic purpose of the movable thingsin relation to the principal things, be an initiator of the linkage of these things in space and in fact by expressing this will he is creating an appurtenance. Although is only the subject's will sufficient or not to offer resistance to the objective criterion of physical connection between objects? The difference between these categories can be found in practical examples and the existed court practice.

[35] Compare:*Wolf/Wellenhofer*, Sachenrecht, §1, Rn. 26.

[36] According to French court practice a supply of brandy obtained as a result of production existed in the sphere of agriculture and winery and prepared for selling cannot be deemed as a specially intended thing for exploitation of this sphere, because this production could have been carried out even without the existence of a certain supply: Civ. 1.déc. 1976, JCP 1977. II.18735, concl. Gulphe; RTD civ. 1978.158 obs. Giverdon.

Ketevan Kochashvili*

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

Will and Manifestation of the Will

(Meta-legal and Civil Comprehension)

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

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

Free mind is a real mind.
Hegel.

Human – Being Here and Free Mind

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

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

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

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

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

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

So a human, as a rational being, is authorized to have liberty, a human comprises free mind in himself.[9] Antique people did not have a concept of absolute liberty; in their opinion liberty had a feature of naturality, because they connected liberty with human's background, citizenship and education. They failed to cognize a human as a free being, only with his humaneness. The idea of liberty is connected with Christianity, according to which an individual himself has infinite values, as he is a subject of God's love and a human's aim is to have the absolute relation to God as to the mind and make the mind live in himself.[10] To decline the liberty is the same as to decline the own human dignity, human right (A human is as much a human, as much he is a possessor, expressing these rights),[11] which is incompatible with human nature[12] and there is nothing to be able to compensate the results of this decline.[13] This desire of liberty is no longer striving, which must be satisfied, it is already character independent from striving, transformed into existence, reasoning perception.[14]

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

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

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

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

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

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

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

9 Ibid, 21.

10 Ibid, 332.

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

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

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

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

15 Ibid, 45.

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

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

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

A human considers the existence of the divine mind now and here as kind of social institutes existed in this world.[20] According to the doctrine about natural law [21] individuals' natural state is free and equal, where liberty means absolute liberty of each one, "Here each one is a king equally" (*John Lock*), excluding self-will.[22] Contrary to the natural liberty, where a human recognizes a law of nature as the principle of action, but in socium it obeys the authority established by social contract.[23] The state of absolute liberty of a human, when confined only by a natural factor, is really willfulness, which is an antipode to liberty[24]. So the idea of absolute liberty is abolishing liberty.[25]

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

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

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

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

[19] *Kashia J.,* Liberty nd Federalism (Political culturology), Tbilisi, 2013, 103.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[35] Ibid, 26.

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

[37] *Mamardashvii M.,* Talks about Philosophy, Tbilisi, 1992,121.

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

[39] Ibid, 270.

[40] Ibid, 189.

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

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

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

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

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

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

4. Transaction - Manifestation of the Legally Worth Will

4.1. About the Concept

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

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

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

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

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

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

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

50 Ibid, 63.

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

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

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

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

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

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

A transaction idea is created in the mind of an acting person and is expressed by means of a proper declaration. Before this moment it might experience some change and therefore it has not a juridical significance. There are distinguished two types of the will: transaction will or the will, directed to perform that picture of transaction, which was created in the person's mind and the declared will, by means of which the inner will finds its outer expression,[60] from a subjective state goes to an objective state[61] and achieves its aim. Only outwardly expressed acts of the will belong to a sphere of law; so the will must be not only existed, but it must be shown. The inner will must be got to the other person by that means, by which it gets to know other persons, or by demonstration of the will. So in order to get a legal meaning it is necessary for the will to take a definite outer expression, without which the person's will can't be perceived and will not be subjected to the estimation from the point of view of legal norms,[62] it is inadmissible to connect legal results with the unexpressed will, as the will existed in consciousness is not subjected to a field of law. [63]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

76 Ibid, 240.

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Transaction in Private Autonomy Sphere

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

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

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

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

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

[86] *Chanturia L.,* Introduction to General Part of Civil Law, M., 2006, 231.

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

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

[89] *Diuvernua N.,* Reading in Civil Law, Sankt-Peterburg, 1909, 640.

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

[91] *Kniper P.,* Law and Hustory, Baden-Baden, Almaty, 2005, 33.

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

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

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

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

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

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

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

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

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

Natia Chitashvili*

Specificity of Some Ethical Duties of Lawyer Mediator and Necessity of Regulation**

Mediation in Georgia is supported by state policy and its successful functioning, as part of the whole system of dispute resolution mechanisms, is the demonstration of public interest. Mediation is a significant mechanism for supporting legal, social stability and dialogue, and apolitical means for implementing state policy.

Mediation has the potential to transform not only an individual, but also society. Therefore, it should be based on public recognition, the confidence of the society at large towards the fairness and ethical integrity of the mediation process.

Institutionalization of mediation necessitates the refinement of legal culture and understanding of dispute resolution. The mentioned understanding is largely formed by the setting of ethical standards and the implementation of effective instrumental infrastructure for their enforcement in the internal state system.

Due to the mobility of lawyers through the involvement in traditional formal and alternative dispute resolution procedures in different capacities, and respectively, ever growing demands of the legal profession, it becomes necessary to set ethical standards for "cross-professional" practice of lawyers and its improvement.

The present article is dedicated to the research of the substance of ethical basis for the involvement of lawyers in the capacity of a third neutral party in alternative dispute resolution procedures, as well as the necessity for setting rules of ethical conduct, considering ever increasing demands of the legal profession, for "cross-professional" practice of lawyers.

The standards of ethical conduct of lawyer mediators may be regulated by means of expanding current rules of professional ethics for lawyers, by determining a functionally different, neutral role in the mediation process, as well as by means of setting norms of proper conduct through an independent code of ethics.

In the course of the formation and application of the norms of ethics, ensuring their uniform application within the bounds of the general framework of state policy in ethics field should be a crucial principle.

Key Words: *mediation, lawyer, mediator, conflict of interests, neutrality, self-determination, confidentiality, diligence and competence, equal treatment, mediation agreement, representation in mediation, ethics policy, rules of ethics, lawyer mediator, client, cross-professional practice.*

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I. Introduction

Ever increasing demands of the legal profession necessitate the relevance of regulations in ethics with modern development trends. The above-mentioned is especially the case with determining ethical grounds for participation of lawyers as neutral third parties in alternative dispute resolution procedures.[1]

Regulation of mediation ethics is part of state policy, since it should be based on and factor in national moral values and the culture of social relations of the nation. Therefore, ethics rules cannot be established by means of automatic reception of any universal code in the mentioned field.[2]

The development of the norms of ethics is unique means to ensure the link between procedural and social fairness and at the same time, it will be a guide for mediators while participating in mediation programs.[3] Furthermore, setting ethics standards will facilitate mediation to become professional calling for the specialists.[4]

Legal profession is regulated and implemented at the domestic level.[5] Georgia Code of Professional Ethics of Lawyers[6] does not set the grounds for the so-called cross-professional practice[7], when a lawyer is represented with different statuses in alternative dispute resolution processes. In addition to representing client in dispute resolution procedures, lawyers often participate as a neutral third party. This fact, along with the expansion of mediation practice, will give rise to many ethical dilemmas in terms of the introduction of sound practice in alternative dispute resolution. For the mentioned purposes, institutions operating in the ADR field should be prepared for adoption of ethical standards..

In the USA, the Code of Professional Ethics of Lawyers was first adopted in Alabama State[8], following which, subsequent to the expansion of the scale of lawyer activity, a number of guiding standards were approved. In this direction, the America Bar Association carried out a three-year research, "the Impact of Globalization and Technologies on the Transformation of Legal Profession and Updating Legal Activity in the Context of the Above-mentioned Development."[9] One of key directions of this research was mobility of lawyers that is effected by means of the participation in traditional formal and alternative procedures under different status.[10]

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1 About the necessity of the above-mentioned, as well as ethical dilemmas of mediator's and a lawyer's role, see: *Moffitt M.*, Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-profession Practice, 1 Harv. Negot. L. Rev., 1996, 204, 211; *Folberg J., Golann D.,* Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Busness, Aspen Casebook Series, Austin, Boston,Chicago, New York, The Netherlands, 2011, 424-427.

2 *Rovine A.V.* (ed.), Contemporary Issues in International Arbitration and Mediation, The Fordham Papers 2014, Fordham Law School, Brill – Nijhoff, 2015, 116, With further references.

3 *Alfini J.J.,* Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, South Texas Law Review, Vol. 49, 2008, 837.

4 Ibid.

5 *Brand R.A.,* Professional Responsibility in a Transnational Transactions Practice, 17, J.L.& Comm., 1998, 301-302.

6 Code of Professional Ethics of Lawyers, approved on April 15, 2006, by the General Meeting of the Georgia Bar Association, with additions and amendments effected on December 8, 2012.

7 See *Moffitt M.,* Loyalty, Confidentiality And Attorney-Mediators: Professional Responsibility in Cross-profession Practice, 1 Harv. Negot. L. Rev., 1996, 211.

8 *Parley L.,* A Brief History of Legal Ethics, 33 Fam. L.Q., 1999, 637.

9 American Bar Association Commission on Ethics, 20/20, Introduction and Overview, <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf>.

10 ABA Commission on Ethics 20/20, Resolution 105D (Aug. 6, 2012), <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d.pdfhttp://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d.authcheckdam.pdf>.

The development of the national model of regulating mediator's ethical standards is dependent on the scope of assigned role and authority, as well as the style of the use of various techniques in the mediation process. Furthermore, it would be inadvisable to grant quasi-judicial immunity to court mediators, since this implies excluding the possibility for the parties to resort to safeguards for their rights in case mediator fails to meet ethical obligations. There are many regulations at the international level that envisage appeal procedure in case the violation of ethical duties of a mediator are detected.[11]

II. Mediation Activity as Legal or "Cross-Professional" Practice?

There is an issue in the international practice[12]: a mediator, who helps parties to obtain neutral, unbiased, legal information/advice from lawyers, analyze their case resolution alternatives beyond mediation – in judicial or arbitration proceedings, assess strong and weak legal aspects, factual aspects, render decisions[13] that are informed, consensus based,[14] reflecting free will,[15] develop well-perceived, detailed and implementable and executable mediation agreement, how much can this be considered as the practice of law? In response to the above-mentioned, it has been determined under the ABA Resolution that mediation is not the practice of law.[16]

It is recognized the participation of a client in relations is necessary in order to have the practice of law.[17] There are several criteria for such assessment of work, among them, Legal Assessment Test, according to which, an individual must have special legal education and skills to practice law. "This work involves the application of the principles of law, to provide counsel or meet the needs of an individual through other assistance." [18] This characteristic is also defined as "the skills acquired through legal education, involving the application of the norms of law and philosophical principles in the context of a specific problems of a client, for addressing it."[19]

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[11] National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and Institute of Judicial Administration, 1992, Standard 2.6; Draft of Principles of ADR Provider Organizations, CRP-Georgetown Commission on Ethics and Standards in ADR, 1999, 2000-2002, Principle IV, VI, Complaint and Grievance Mechanisms; *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 340; *Kovach K.K*., Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 426-427.

[12] State Bar of Virginia, Guidelines on Mediation and the Unauthorized Practice of Law, 1999.

[13] American Academy of Matrimonial Lawyers, Rule, 8.4, <http://www.aaml.org/library/publications/19/bounds-advocacy/3-conflict-interest>.

[14] *Burnett C.G.,* Advising Clients About ADR: A Practical Guide to Having Difficult Conversations About Selecting Options, TSU Alternative Dispute Resolution - Yearbook 2014, Tbilisi State University National Center for Alternative Dispute Resolution, Tbilisi, 2014, 187.

[15] *Shin C.P.,* Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1042.

[16] *Kovach K.K.,* Mediation in a Nutshell, 3rd ed., West Academic Publishing, United States of America, 2014, 311.

[17] *Laflin M.E.,* Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators, Notre Dame Journal of Law, Ethics and Public Policy, Vol. 14, Issue 1, Art. 14, 2014, 503; *Kovach K.K.,* Mediation in a Nutshell, 3rd ed., West Academic Publishing, United States of America, 2014, 311; *Meyerson B.,* Lawyers Who Mediate Are Not Practicing Law, 14 Alternatives 74, 1996, referenced in: *Alfini J.J., Press Sh.B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 449.

[18] Oregon State Bar v. Smith, 942 p.2 d 793, 799 (Or. App 1997), referenced in: *Abel R.L.,* Lawyers in the Dock, Learning from Attorney Disciplinary Proceedings, Oxford University Press, 2010, 68.

[19] Committee on Prof. Ethics and Conduct of Iowa State Bar Ass'n v. Baker, 492 N.W.2 d. 695, 701, (Iowa 1992), referenced in: *Meyerson B.E.*, AAA Handbook on Mediation, 2nd ed., American Arbitration Association, Juris, 2010, 764; Washington State Courts General Rule GR 24, 2002, <https://www.courts.wa.gov/court_rules/>.

Lawyer mediator has to exert extreme caution when using the "Reality Test[20], to ensure that this technique is not evaluative and does not transform into the breach of ethical norms. Standards adopted by the Virginia Supreme Court Dispute Resolution Department on Mediation and Unauthorized Practice of Law[21] set forth the scope of assessment by a mediator. Specifically, under these guidelines, mediator, through the use of their skills, shall ensure that parties independently assess strengths and weaknesses of the case, as well as alternatives of resolving beyond mediation or possible obstacles. Under the same standards, mediator is prohibited to forecast possible legal solution of the case,[22] since in this context, it would mean entering into the area of a lawyer's activity and such action forms a client and a lawyer relationship.[23]

Based on the afore-mentioned, a mediator may not extend legal advice,[24] evaluative information, since, following such action, legal advantage of one of the parties will be identified and it will be considered the counsel to a client. This will breach the principle of neutrality of a mediator and transform the powers of a lawyer mediator into the functions of a representative. [25]

A neutral third party may hold evaluative functions, within the established bounds. Specifically, lawyer-mediator may extend advice or provide information to the extent such service does not reach the bounds of representation (lawyer-client).[26] Mediator may not share with the parties personal and professional opinion to persuade them to resolve a dispute; furthermore, mediator may not provide explicit direction for the resolution of issues. In compliance with the principle of self-determination of parties and impartiality, [27] mediator shall motivate a party and representative to identify possible outcomes of the case, deliberate on the advantages of a claim or a counter-claim, strengths and weaknesses of the case.[28]

If a lawyer mediator tries to defend the "positions" of both parties, the above-mentioned will form the source of conflict, since the interests of parties are often conflicting, and such action is considered the breach of ethical obligation under a number of foreign regulations.[29] For example, under the EU Code of Conduct of Lawyers,[30] it is an imperative that lawyer may not provide counsel or represent two or more clients on the same case, provided: there is conflict between the interests of the mentioned clients, or considerable risk for the emergence of such conflict. Similarly, according to the Code of Professional Ethics of

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[20] *Esplugues C., Louis M.,* New Developments in Civil and Commercial Mediation, Global Comparative Perspectives, Ius Comparatum, Springer International Publishing Switzerland, 2015, 280; *Peyerwold D., Mandelbaum M.(ed.),* Wage and Hour, Oakland, California, 2016, 13-18.

[21] Virginia Supreme Court Department of Dispute Resolution, Guidelines on Mediation and Unauthorised Practice of Law (UPL), 1999-2000.

[22] *Brooker P.,* Mediation Law, Journey through Institutionalism to Jurisdiction, Routledge Taylor and Francis Group, London and New York, 2013, 251.

[23] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 450-451.

[24] *Russel M.O.,* The Mediation Handbook, Effective Strategies for Litigators, Bradford Publishing Company, Denver Colorado, 2011, 195.

[25] Washington State Bar Association Advisory Opinion №2223, <http://www.wsba.org/Resources-and-Services/Ethics>.

[26] Fla. R. Civ. P. 10.370 (c) (2002).

[27] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 4, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[28] Ibid, 7, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[29] State Bar of Texas Professional Ethics Committee, Opinion 583, 2008; Washington Rules of Professional Conduct (RPC), Rule 1.7. *Shin C.P.,* Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1045.

[30] Article 3.2.1.

Lawyers of Georgia, a lawyer is not authorized to provide professional advice or represent two or more clients on the same case, provided there is the conflict of interests between the interests of mentioned clients.[31]

There is also the so-called "client's confidence test" in international practice; according to this test, in order for the practice to be named the practice of law, it is necessary that from a client's perspective information provided by a professional is perceived to be legal counsel in line with his/her interests.[32]

Therefore, mediator involved in the review of legal matters shall explain to the parties that a neutral third party does not exercise a lawyer's authority,[33] so that participants of mediation do not develop the expectation that such party will defend the interests of one of the parties.[34]

Despite individual attempts, Arizona State Supreme Court[35] excluded the possibility of precise definition of the practice of law, based on the difficulty of the definition of all actions to be implemented under a lawyer's practice.[36]

If a mediator's work is recognized as the practice of law, duties and ethical norms set forth for lawyers would become applicable to mediators, as well as lawyer's activities would be performed in the course of mediation, which is fundamentally incompatible with the role of a mediator.[37] For example, the obligation to defend the interests of a client[38] is contrary to the obligation of impartiality and neutrality of a mediator towards the parties of the mediation.

If mediation is treated as the practice of law, thousands of representatives of interdisciplinary field would automatically be included in the circle of the practitioners of law; and this will unreasonably expand its scale.[39] Hence, the framework of ethical regulation of mediation should be performed without its recognition as the practice of law.

III. The Substance Content of Ethical Duties of a Lawyer Mediator and the System

In contemporary legal doctrine, the role of a lawyer is construed broadly and involves assistance to clients and other individuals for most effective and least damaging resolution of legal issues.[40] According to EU Code of Conduct of Lawyers, lawyer shall always strive to achieve the resolution of a client's dispute at minimal costs and at relevant stages the lawyer shall advise a client about settlement and/or alternative ways of dispute resolution.[41] Practitioners are serving the above-mentioned values under the status of a represen-

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31 The Code of Professional Ethics of Lawyers, approved by the General Meeting of the Georgia Bar Association on April 15, 2006, with amendments and additions effected on December 8, 2012. Article 6.1.

32 Florida Bar V. Brumbaugh, 355 So. 2d. 1186, (Fa. 1978), referenced in: *Pirsig M.E., Kirwin K.F.*, Cases and Materials on Professional Responsibility, West Pub. Co., 1 Jul 1984, 93.

33 ABA Model Rules of Professional Conduct, 1983, Rule 2.4. (2); See also, *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 451.

34 *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 450.

35 In the case: State Bar of Arizona v. Arizona Land Title and Trust Co., 366, 2, d.1., 8-9, (Ariz. 1961).

36 *Meyerson B.E.*, AAA Handbook on Mediation, 2nd ed., American Arbitration Association, Juris, 2010, 764.

37 *Laflin M.E.,* Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators, Notre Dame Journal of Law, Ethics and Public Policy, Vol. 14, Issue 1, Art. 14, 2014, 501; *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 450.

38 Georgia Law on Lawyers, [29.12.2004 №970], Article 6.

39 *Meyerson B.,* Lawyers Who Mediate are Not Practicing Law, 14 Alternatives 74, 1996, referenced in: *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 450.

40 *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 3, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

41 Article 3.7.1, EU Code of Conduct of Lawyers, referenced in: *Kvachadze, M., Gasitashvili, E., Bochorishvili, K., Kordzakhia, I.,* Commentary on the Professional Ethics of Lawyers, based on the Practice of the Ethics Commission, EU Project – Supporting the Rule of Law, Tbilisi, 2011, 34, <https://www.tsu.ge/data/file_db/faculty-law-public/lawyers%20book-2.pdf>.

tative and a neutral third party.[42]

In international practice, in the process of representing a client, the norms of professional ethics basic are applicable to a lawyer, while in mediation, the scope of ethical obligation of a lawyer mediator are determined primarily under the Model Standards of a mediator's conduct.

In 2002, USA Georgetown Commission on Alternative Dispute Resolution Ethics and Standards, adopted a special rule of model behavior of a lawyer, as of a neutral third party (hereinafter – Model Rule)[43], as an integral part of the ABA Model Rules for Professional Conduct (hereinafter – Model Rules for Professional Conduct).

Model rule is applicable only to a lawyer involved in the capacity of a neutral third party in alternative dispute resolution procedures (arbitration, mediation, pre-trial neutral assessment, etc.), not to representatives of another profession exercising the same functions, or to lawyers involved in similar processes with representative powers.[44] Therefore, the analysis of this special model rule, along with other international acts, is especially important, for it sets forth standards of ethics for lawyer-mediators, based on the characteristic specificity of this role (arbitration, mediation, pre-trial neutral assessment, etc.).

1. Explaining Own Role by Lawyer Mediator to Parties

The obligation to inform parties about the role of a mediator, the scope of his/her authority and key principles of the process is stipulated in Mediation Code of Ethics in a number of foreign states.[45]

According to the commentary to the Model Rules of Professional Conduct 2.4 (b)[46], lawyer mediator is required to explain to parties that his/her powers are distinct from those of a representative and that he/she is not in a capacity to defend the interests of parties in the course of mediation.[47] The content of the mentioned notice and its format is determined based on factual circumstances of the case[48] and the scope of this obligation depends on the degree to which the parties are aware of mediation, prior experience with involvement in mediation, etc.[49] It is desirable that notice is provided in writing and be included in an agreement[50] of the parties to resort to mediation.[51]

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[42] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 3, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[43] Model Rule for the Lawyer as Third Party Neutral, Rule 4.5, 2002, (Final edition - 2004). CPR Georgetown Commission on Ethics and Standards in ADR, <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>.

[44] On the mentioned issue, see *Burnett C.G.*, Advising Clients about ADR: A Practical Guide to Having Difficult Conversations about Selecting Options, Ivane Javakhishvili Tbilisi State University National Center for Alternative Dispute Resolution, Alternative Dispute Resolution, Yearbook 2014, TSU Publishing, 2014, 187-199; *Wolski B.,* On Mediation, Legal Representatives and Advocates, 38 U.N.S.W.L.J., 2015, 5-47; *Clark B.,* Lawyers and Mediation, Springe-Verlag Berlin Heidelberg, Glasgow U.K., 2012, 71-110, 179-181; *Kovach K.K.,* Lawyer Ethics in Mediation: Time for a Requirement of Good Faith, 4 Disp. Resol. Mag., 1997-1998, 9-13; *Hughes P.,* Ethics in Mediation: Which Rules? Whose Rules? 50 U.N.B.L.J., 2001, 251-253; *Douglas K., Batagol B.,* The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal, 40 Monash U. L. Rev., 2014, 758-792; *Sherill J.A.,* Ethics for Lawyers Representing Clients in Mediations, 6 Am. J. Mediation, 2012, 29-40.

[45] JAMS Mediator Ethic Guidelines, Para. 1, <http://www.jamsadr.com/mediators-ethics/>.

[46] *Folberg J., Golann D.,* Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 426.

[47] Similar provision is included in the Virginia Rules of Professional Conduct stipulate similar provision, Virginia Rules of Professional Conduct, 2.10. (b) (1), <http://www.vsb.org/docs/2009-10-pg-rpc.pdf>.

[48] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 452.

[49] Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 288, <abanet.org/cpr>.

[50] agreement to mediate.

[51] *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 452.

USA Minnesota Act on Civil Mediation[52] prescribes that agreement reached between the parties will be considered valid if it contains a provision according to which process participants have been notified in writing, that mediator does not have powers to defend the interests of any of the parties, or to inform them about their legal rights, about possible effect of mediation agreement on their rights; If they were briefed about the right to review mediation agreement conditions with lawyers and the right to solicit counsel from them concerning legal requirements. Therefore, under the Minnesota Act, informing a party about the role of a mediator is treated as a precondition for the validity of a mediation agreement; and this elevates the importance of the mentioned obligation.

Lawyer mediator is facing great ethical challenges, when parties of mediation do not have representatives involved,[53] especially in family disputes, when decision taken by parents has impact on the interests of a child as well. In this case, an issue comes up: how can a lawyer, as a neutral third party, maintain neutrality?[54]

In the above-mentioned case, mediator's duty to inform parties about fundamental difference of a mediator's and a lawyer's role is even more important, to avoid developing wrong expectations.[55]

According to the Procedures and Rules of the Alternative Dispute Resolution Group,[56] to ensure informed decisions by parties, individuals involved in ADR are asked to encourage obtaining independent legal counsel by those parties who do not have representatives, prior to the commencement of mediation process.[57]

2. Fairness of Process and Equal Treatment

Lawyer-mediator, although he/she does not represent interests of any party in mediation, he/she has the duty of equal treatment to all participants of the process.[58]

According to the Ethical Requirements prescribed by the Geneva Dispute Resolution Council Federation, mediator has the duty towards parties, mediation process and the public. This duty may even involve suggesting free mediation services.[59] The duty of ethical integrity of the process and defending equality in relation to all parties of mediation is reflected in the definition of the concept of mediator in the legislation of Ireland.[60] It involves fairness[61] of mediation proceedings, mediation procedures,[62] its fairness, which is

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[52] 572.35, Effect of Mediated Settlement Agreement, <https://www.revisor.leg.state.mn.us/statutes/?id=572&view=chapter#stat.572.35>.

[53] Washington Rules for Professional Conduct, Rule 2.4., Washington State Bar Association Advisory Opinion №2223, <http://www.wsba.org/Resources-and-Services/Ethics>.

[54] *Taylor A.*, The Handbook of Family Dispute Resolution, Mediation Theory and Practice, Jossey-Bass, United States of America, 2002, 171.

[55] On informing about a mediator's role, see also: Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, 7-1, 2015, 2.

[56] ADR Group Mediation Procedure and Rules (in Civil and Commercial Cases), Rule 5.2., <www.adrgroup.com>.

[57] *Boulle L., Nesic M.,* Mediator Skills and Techniques: Triangle of Influence, European Code of Conduct for Mediators , Athenaeum Press, Great Britain, 2010, 418.

[58] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 3, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[59] Dispute Board Federation Geneva, Ethical Requirements, Canon 1, referenced in: *Chern C.,* The Commercial Mediator's Handbook, Informal Law from Routledge, Abindgdon, 2015. See also, *Hopt K.J., Steffek F.,* Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 156.

[60] Draft General Scheme of Mediation Bill, 2012, Head 2, referenced in: *Trevor M.B., Palo G.,* EU Mediation Law and Practice, Oxford University Press, 2012, 183.

[61] See also, *Roberts M.,* Mediation in Family Disputes: Principles of Practice, 4th ed., Ashgate Publishing, Dorchester, 2014, 253.

[62] About procedural fairness of mediation, see Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, 7-1, 2015, 11.

also a precondition for a fair outcome.

European Code of Conduct of Mediators also reinforces the duty to ensure the fairness of the proceedings.[63] EU Directive on Specific Aspects of Mediation in Civil and Commercial Cases Mediation[64] is also applicable to the judges who are involved in the mediation process under the status of a mediator and do not participate in judicial examination of the same case.[65] For ensuring the fairness of proceedings, mediator should be separated from a judge's authority.[66]

A lawyer, in the capacity of a neutral third party, shall take all reasonable measures to lead the process through the maintaining the principle of fairness towards parties. Mediator should demonstrate particular due diligence towards the parties who do not have representatives, so that their views are heard and to enable their full-fledged participation in the dispute resolution procedure.[67]

A lawyer may not engage in the capacity of a neutral third party in such proceedings or procedure that is not agreed with the parties (beside the case when the application of a process/procedure is determined by law, court rules or an agreement).[68] He/she has to apply relevant measures and make sure that parties and their representatives have been briefed about alternative dispute resolution procedure in a clear manner, and that they are providing informed consent for the proceedings, as well as the participation of a specific neutral third party.[69]

Since ethical rules cannot guarantee special procedures and fairness of proceedings, Model Rule sets a requirement for a neutral third party to be cautious towards basic values and the purpose to inform about fair dispute resolution procedure. Basic values in the mediation process involve autonomy of a party, freedom to select process (considering law or contract prescribed limits), right to select a neutral third party and right to provide consent for appointed neutral individual (considering law or contract prescribed limits), fairness of mediator's conduct and the fairness of the proceedings itself[70], equality of parties.[71]

A lawyer, in the capacity of a neutral third party, shall take all reasonable measures and establish that parties have reached agreement based on free will, without duress. Although, according to Model Rules,

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[63] European Code of Conduct for Mediators, Art. 3.2. On the duty of integrity and fairness of the process, see also, *Roberts M.,* Mediation in Family Disputes: Principles of Practice, 4th ed., Ashgate Publishing, Dorchester, 2014, 268-269.

[64] Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, Adopted by the European Parliament and the Council of the European Union on May 21, 2008, L 136/3, 24.05.2008.

[65] Art. 12, Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, Adopted by the European Parliament and the Council of the European Union on May 21, 2008, L 136/3, 24.05.2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>

[66] *Robinson P.,* 2 Journal of Dispute Resolution, 335, 379-380, Referenced in: *Hopt K.J., Steffek F.,* Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 174.

[67] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.6. (c), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>.

[68] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.6. (b), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>.

[69] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.4. (a)(3), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>.

[70] See *Alfini J.J.,* Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, South Texas Law Review, Vol. 49, 2008, 830; *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 22, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[71] *Taylor A.,* The Handbook of Family Dispute Resolution, Mediation Theory and Practice, Jossey-Bass, United States of America, 2002, 171.

neutral third party does not have moral responsibility to guarantee fair outcome of the proceedings.[72] He/she has only to avoid engaging in the behavior that would result in raising doubt about fairness of proceedings that could nullify reached agreement.[73]

In the practice of a lawyer, his/her role is constantly changing between neutral third party and legal representative authority. Therefore, it is important to monitor adherence to the most general criteria of fairness, in terms of access to process, legitimacy and lawful participation of a lawyer in it.[74]

3. Diligence and Competence

According to Model Rule,[75] a neutral third party lawyer shall act by complying with the principles of diligence, effectiveness and timeliness, at the degree of the due diligence he/she is required to exert, based on law or an agreement. He/she has to deny participation in such proceedings where he/she cannot be competent.[76]

The degree of due diligence and prudence of a mediator may additionally be stipulated in an agreement between parties, under the standards of ethics prescribed by a provider organization and its policy.[77]

Mediator, for timely and effective resolution of dispute, has to dedicate reasonable time and avoid the impact of possible obstacles in the mentioned direction. If a neutral third party does not meet the expectations of parties in relation to the resolution of a dispute within reasonable timeframe, then he/she is required to deny services. Ethical Standards of Professional Responsibility contain such provision stating that a neutral third party may undertake the duty to lead proceedings only in case of due knowledge of the process and the subject of dispute.[78]

Several factors should be taken into account when determining the competence of a mediator: reasonable expectations of parties from the proceedings and the role of a neutral third party, substance and procedural complexity of the matter of dispute and proceedings, experience and qualification of a neutral third party in the field of alternative dispute resolution and the practice of law, special knowledge of the matter of dispute, preparatory works a neutral person is capable of performing, actual possibility of involving other neutral individuals or experts in the process in the capacity of assistants, etc.[79]

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[72] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 22, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[73] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.6. (d), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx>.

[74] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 23, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[75] Model Rule for the Lawyer as Third Party Neutral, Rule 4.5.1 (a), 2002, (Final edition - 2004). CPR Georgetown Commission on Ethics and Standards in ADR, <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[76] Ibid, Rule 4.5.1 (b).

[77] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 9, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[78] Similar provision is contained in the Act - Ethical Standards of Professional Responsibility, SPIDR, 1986, Background and Qualifications.

[79] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 10, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

4. Confidentiality

According to the Model Rule, neutral third party has to consider confidentiality terms with parties prior to the commencement of dispute resolution proceedings, and demand preliminary consent on holding private meetings.[80]

Lawyer mediator may not disseminate or use the information obtained over the course of mediation to the detriment of any of the parties. Confidentially requirement is no longer applicable if information is made public, parties have excluded its confidentiality, disclosing information is necessary to avoid liability for the breach of ethical duty by mediator, or is related to the prevention of future death, serious bodily injury, crime or large financial losses due to fraud.[81] Similar exception from confidentiality principle is stipulated by mediation law[82] of many countries and the protection of relevant public interest in these countries is primarily achieved through legislative restrictions.

Mediator, who has received confidential information during proceedings,[83] may not represent parties who have relation to the conducted process or a case[84] that is substantially related thereof.[85] The reason for the above-mentioned restriction, naturally, is that mediator will learn about "facts significant for resolution"[86] (such as financial status and needs of parties, their business plans, trade secret, etc.),[87] which, although may not be of legal nature, but be used in favor or against the interests of any of the parties, in the course of representation.[88]

A lawyer may not represent a person in the alternative dispute resolution proceedings against a party who had participated in the process before, and without their consent,[89] where mediator has received infor-

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[80] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.2. (a) (1), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[81] Ibid, Rule 4.5.2. (a) (3).

[82] For example, Maryland Statute, Virginia Code, referenced in: *Sharp D.,* The Washington, D.C. Lawyer and Mediation Confidentiality: Navigating the Complex and Confusing Waters, 7 Appalachian J. L., 2007-2008, 200; Regulations of States of Florida and New Jersey, referenced in: *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 13, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>. In the EU countries, similar exemptions from the principle of confidentiality are stipulated in the following acts: Bulgaria Mediation Act (Art.7), Estonia Conciliation Act (Section 4 (5)), German Mediation Act (Section 4), Greece, Law on Mediation in Civil and Commercial Disputes (Art. 10), Ireland, Draft General Scheme of Mediation Bill (Head 10), etc. For more details about the principle of confidentiality see the European Union legislation ix. Trevor M.B., Palo G., EU Mediation Law and Practice, Oxford University Press, 2012.

[83] *Moffitt M.,* Loyalty, Confidentiality And Attorney-Mediators: Professional Responsibility in Cross-profession Practice, 1 Harv. Negot. L. Rev., 1996, 203.

[84] Poly Software International, Inc. v. Su, 880 F. Supp. 1487 (D. Utah 1995), < http://law.justia.com/cases/federal/district-courts/FSupp/880/1487/1408247/>. See also, Conference on Mediation, March 29, 1996, Geneva, Switzerland, <http://www.wipo.int/amc/en/events/conferences/1996/gurry.html>.

[85] *Moffitt M.,* Loyalty, Confidentiality And Attorney-Mediators: Professional Responsibility in Cross-profession Practice, 1 Harv. Negot. L. Rev., 1996, 203.

[86] *Menkel-Meadow C.,* The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice, Georgetown University Law Center, 10 Geo. J. Legal Ethics 631, 1997, 641.

[87] *Menkel-Meadow C.,* For and Against Settlement: The Uses and Abuses of Mandatory Settlement Conference, 33 UCLA Law Review, 1985, 503-504.

[88] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 19, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[89] *Moffitt M.,* Loyalty, Confidentiality And Attorney-Mediators: Professional Responsibility in Cross-profession Practice, 1 Harv. Negot. L. Rev., 1996, 206-207.

mation about circumstances significant for the resolution of the case or learned about the circumstances of confidential information protected under the Model Rules.[90] The duty of confidentiality shall be effected by bringing down those risks involved in the disclosure of information presented during mediation.

5. Investigation of the Potential Conflict of Interest

In contemporary law practice, mobility of lawyers across law firms and organizations, in conjunction with the cases to be reviewed by them, is a growing trend. Mobility of lawyers is primarily performed by means of changing of representation functions and the status of a neutral third party, as well as the participation in free programs offered by private and public providers.[91] In the mentioned process, creating safeguards for conflict prevention and impartiality are of utmost importance.

Model Rule prescribes the duty of impartiality[92] for a neutral third party,[93] and to ensure impartiality mediator has to preliminarily, prior to the commencement of the proceedings, solicit information about parties and their representatives, insured parties, defence lawyers, witnesses and possible attendees, to be aware of their identities. The mentioned preliminary review of data serves the purpose of determining potential conflict at an early stage.

Mediator has to perform in-depth study of circumstances that may be demonstrating the conflict of interest.[94] The mentioned factors may emerge not only at the beginning of the process, but over its course.[95]

Uniform Mediation Act also mandates a neutral third party to study circumstances to establish possible or current conflict of interest.[96]

If a lawyer mediator is involved in the dispute resolution proceedings as a volunteer, for public interests, as a neutral third party and discharges mentioned authority at the instruction of court, government agency or other provider organization, then neutral third party will not be able to carry out a full-fledged scrutiny of information for establishing the conflict of interest. In the above-mentioned case, the scope of information to be solicited is limited by reasonable criterion and are dependent on factual circumstances. Nevertheless, if a lawyer mediator is aware at that time of any interest or existing relationship, which has relation to the given case, in terms of conflict of interest, he/she, naturally, has to unconditionally disclose the afore-mentioned.

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[90] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.6. (a), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[91] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 17, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[92] Impartiality, along with the right of self-determination of a party and fair process, is recognized as one of the fundamental principles, and upholding this principle is crucial for establishing sound practice: *Alfini J.J.,* Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, South Texas Law Review, Vol. 49, 2008, 831.

[93] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.3, <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[94] Ibid, Rule 4.5.3. (b) (2).

[95] Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, 7-1, 2015, 11.

[96] See Uniform Mediation Act, 9 (a), <http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf>, referensed in: *Folberg J., Golann D.,* Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 425.

Mediators are required to inform parties about their professional activities, membership or affiliation in law firms or other similar organizations, or any such circumstance that, due to the conflict of interest, forms the basis for disqualifying a mediator from a specific case.[97]

Any financial or personal interest towards the outcome of the case, existing or past financial, business, professional, family or social relationship with a party of mediation, legal representation of any party, their lawyer, witness, or rendering of services in the capacity of a neutral third party, as well as any advantage resulting in bias or leaving the impression of bias is subject to disclosure.[98] Lawyer mediator is restrained with the duty to disclose if the presence of the above-mentioned grounds is related to his/her current family members, employer, partner or business associate.[99]

Furthermore, it is important that the duty to disclose information about past representation, former clients, financial stake in companies is often in conflict with the duty to confidentiality of past representation and the procedures of the dispute resolution.[100] Hence, the goal of ensuring impartiality should be weighed in against the scope of the principle of confidentiality.

6. Limiting Representation

While participating in a dispute resolution procedure in the capacity of a neutral third party, lawyer mediator may not engage in financial, business, professional, family or social relationship without the consent of parties, or acquire any financial or personal interest with any party, institution or representative, that would impact impartiality or leave such impression.[101]

Where circumstances may reasonably form the impression that possible future relationship or possible interest has had impact on a neutral third party in the course of alternative dispute resolution, such person shall not demonstrate relevant interest or represent the party even in a substantially different case during one year or other reasonable period, except the case when both parties, based on informed consent, exempt a neutral third party from the mentioned restriction.[102] According to Article 1.12(a) of the Model Rules of Professional Conduct, a lawyer may not represent an individual in relation of whom he/she had "personally and substantially"[103] been involved in the dispute resolution process, in the capacity of a judge, arbiter, mediator or any other neutral third party, save the case when parties have declared informed consent in writing on his/her participation. According to the mentioned Article, if earlier an individual was involved only in

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[97] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 15, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[98] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.3. (b) (1), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[99] Ibid, Rule 4.5.3. (c).

[100] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 15, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[101] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.3. (d), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[102] Ibid, Rule 4.5.4 (a) (4).

[103] See American Bar Association's E2K Report, <http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html>; *Folberg J., Golann D.,* Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 425.

administering the dispute resolution and was not involved in substantive examination of the case, then the restriction of representation stipulated under the Article will not be applicable.[104]

Similarly, according to the International Chamber of Commerce Alternative Dispute Resolution Rules[105], mediator is prohibited to engage in court, arbitration or other proceedings in relation to a case reviewed by him/her, in the capacity of a judge, arbiter, expert, party representative or counsel, save the case when all parties provide written consent on the above-mentioned.[106] A lawyer who had been engaged in a case in the capacity of a judge, arbiter, mediator or judicial officer status is prohibited to perform representation in relation to the parties associated with the case, without written consent of parties.[107] The Nebraska Code of Professional Responsibility[108], New York Code on Professional Responsibility of Lawyers,[109] Tennessee Supreme Court Rules[110] contain a similar provision.

Protection of neutrality of provider organization is important to make sure that alternative dispute resolution process is not used by them as means for gaining the source of additional and future regular income. Therefore, if a lawyer is disqualified according to the Model Rule, then, none of the lawyers associated thereof in a given law firm is authorized to perform representation in a case subject to review[111], save exemptions set forth under the same Act.[112] Based on the mentioned regulation, disqualifying of a lawyer results in disqualifying his/her firm as well, except for the case when financial stake of a lawyer from the proceeds to be received by a firm from the mentioned case is excluded. While, the right to receive remuneration from services rendered in the past remains valid.[113] Disqualifying of a firm may be necessary especially due to the circumstance that mediator is restricted with the obligation of confidentiality, which precludes the possibility of disclosing information obtained in the course of mediation to employees of the law firm.[114]

Later, approach has changed under the Model Rule 4.5.4 (b) (1), involving the restriction of a lawyer's law firm to provide representation only in the same case[115], in which its lawyer had been involved in the capacity of a neutral third party, even if the latter was removed from the case through the due procedure. It has determined to be admissible for a law firm to perform representation in another case that is substan-

[104] Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 193, <abanet.org/cpr>.

[105] ICC ADR Rules (in Commercial Cases), 1 July, 2001, <www.iccwbo.org>, <www.iccdrl.com>.

[106] Article 7, Sec. 3. See also, *Boulle L., Nesic M.,* Mediator Skills and Techniques: Triangle of Influence, European Code of Conduct for Mediators , Athenaeum Press, Great Britain, 2010, 426.

[107] New Jersey Disciplinary Rules of Professional Conduct, 2001, RPC 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral or Law Clerk, <https://www.law.cornell.edu/ethics/nj/code/>.

[108] The Nebraska Supreme Court Code of Professional Responsibility EC 5-20, (1990, 1995, 2000), 31.21, <https://supremecourt.nebraska.gov/sites/court.cdc.nol.org/files/misc/profresp-31.pdf>

[109] New York Lawyer's Code of Professional Responsibility, EC 5-20, (1999, updated in 2007), 46, <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26638>.

[110] Tennessee Supreme Court Rule 8. Rule of Professional Conduct, (Rule replaced in its entirety by order filed September 29, 2010, effective January 1, 201), < http://www.tsc.state.tn.us/rules/supreme-court/8>.

[111] The ABA Model Rules of Professional Conduct, 1.12 (a.c). See also, *Folberg J., Golann D.,* Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 425.

[112] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.4 (b) (1), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[113] *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 455; Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 194, <abanet.org/cpr>.

[114] A litigative History The development of the ABA Model Rules of Professional Conduct, 1983-2005, 2006, 288.

[115] Through any other lawyer.

tially related or unrelated case, by leaving the mandatory requirement of removing a lawyer through a due procedure.[116]

Immediately after the discovery of the conflict of interest, mandatory notification of parties should be performed. The notice shall describe past dealing of a lawyer with the mentioned case and established procedure for removing a lawyer from the case.[117]

If a lawyer participates in the proceedings in the capacity of a neutral third party, based on the demand from court, government agency or another organization, for public interests, without remuneration and for a minimum period, then legal firm related to a neutral third party may not be disqualified.[118]

Setting ethical rules for the prevention of the conflict of interest is a particularly delicate and responsible step, since disqualifying a lawyer due to a modest mediation may be followed by the disqualifying of a large and powerful law firm.[119] Stringent regulations may cause low interest of qualified lawyers – to participate in mediation, provided in the future this will be the basis for unjustified limitation of their involvement in other proceedings of dispute resolution, representation of clients.

7. Determination of Fair Fees for Services

A lawyer, before engaging in alternative dispute resolution process, in the capacity of a neutral third party, or during the reasonable period after the parties agree to his participation in the proceedings, has to notify parties in writing about the service fee, save the case when he/she is involved in the proceeding on a voluntary basis, gratuitously.[120]

Austrian Code of Conduct for Mediators [121] prescribes that mediation may commence once agreement is obtained from all of its parties as to criteria and rates of a mediator's compensation.[122] Supreme Court of Texas Ethical Standards for Mediators stipulate a similar approach.[123] Furthermore, the act on compensation of lawyers is not applicable to mediation services and a neutral third party lawyer may determine the rate freely, which has to be in line with the most important criteria of rationality. This criterion is a dominant one in the diversion mediation as well.[124]

If a neutral third party leaves the process, he/she has to pay back compensation that has not been earned or which "has been paid in excess in advance".[125]

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[116] Model Rule for the Lawyer as Third Party Neutral, Rule 4.5.4 (b) (1), 2002, (Final edition - 2004). CPR Georgetown Commission on Ethics and Standards in ADR, <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[117] Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 194, <abanet.org/cpr>.

[118] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.4 (d), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[119] *Folberg J., Golann D.,* Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston,Chicago, New York, The Netherlands, 2011, 425.

[120] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.5. (a), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe LawyerasThird-PartyNeutral.aspx>.

[121] Austrian Code of Conduct for Mediators, Art. 2.2.5.

[122] *Hopt K.J., Steffek F.,* Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 268.

[123] Supreme Court of Texas Ethical Standards for Mediators, 2011, Standard 3 - Mediation Costs, <http://www.txmca.org/ethics.htm>.

[124] *Hopt K.J., Steffek F.,* Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 268-269.

[125] Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, 7-1, 2015, 14.

A lawyer involved in the capacity of a neutral third party, who sets tentative expenses, contingent upon the duration of proceedings, reaching an agreement, or certain outcome of dispute resolution, is required to explain to parties that such determination of costs grants direct financial interest to a neutral party towards the outcome of case settlement, which may be in conflict with the right of parties to cease negotiations without reaching agreement on a case. Neutral third party shall also take into account that he/she may leave the impression of bias by determining such system of service fee.[126] In case of the conditional compensation system, there is the risk that concluding mediation through agreement becomes a goal for a mediator.[127] In international practice, some regulations stipulate conditional expenses as unethical[128] and they are prohibited under the ethical norms.[129] Model Rule, although does not ban, but imposes duty on a neutral third party to explain to parties about the expected possible results of applying such rule, including the conflict of interest. Respectively, neutral third party has to assess the likelihood of emergence of the conflict of interest or bias[130] and do their best to prevent it.

Conditional compensation schemes are often used to motivate participation of parties in alternative dispute resolution procedures or settling a dispute. Under legislation and standards of some countries, such system of compensation is prohibited. Model Standards for the Conduct of Mediators[131] stipulate that mediator may not encroach the principle of self-determination of parties, with the purpose of "…gaining increased compensation"[132] Since, self-determination is the most fundamental and leading principle of mediation and any compromise at the expense of the mentioned principle[133] is inadmissible, mediator shall not exert any undue influence, duress[134] over a party to persuade them to reach settlement and participate in the process against own will[135] (prohibited duress).[136]

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[126] CPR Georgetown Commission on Ethics and Standards in ADR - Model Rule for the Lawyer as Third Party Neutral, 2002, (Final edition - 2004), Rule 4.5.5. (c), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRuleforthe-LawyerasThird-PartyNeutral.aspx>.

[127] *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 184.

[128] Mediator Standards Board, National Mediator Accreditation Standards, Professional Standards and Ethics, Australian Center for Justice Innovation, art. 11.2, 7-1, 2015, 14.

[129] California Rules of Court, 3.859 (c), referenced in: *Bullen B.A.*, Mediation, A Training and Resource Guide for the Mediator, Trafford Publishing, United states of America, 2012, 573.

[130] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 21, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[131] Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, *Standard I.B.,* <http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf>.

[132] See *Shapira O.,* A Theory of Mediator's Ethics, Cambridge University Press, 2016, 184; See also, Shapira O., A Theory of Mediator's Ethics, Cambridge University Press, 2016, 184; North Carolina Standards, Rule VII.G.

[133] *Alfini J.J.,* Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, South Texas Law Review, Vol. 49, 2008, 830-831.

[134] *Shin C.P.*, Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1040. See also, *Alfini J.J.,* Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, South Texas Law Review, Vol. 49, 2008, 830.

[135] In case of mandatory mediation, party is engaged in the process based on court initiative; still, over the course of the process, a party is authorized to reject mediation process, provided agreement may not be reached under mediation. Compulsory mediation involves limiting autonomy of the will of a party only in the part of resorting to mediation and does not involve compulsory nature of an agreement. See *Roper I.,* Mediation, Good Faith, Bad Faith, 40 Alternative L.J., 2015, 50. *Comp. Vettori S.,* Mandatory Mediation: An Obstacle to Access to Justice? 15 Afr. Hum. Rts. L.J., 2015, 357-359.

[136] Florida Rules for Certified and Court-Appointed Mediators (ADR Resource Handbook, January, 2015), Rule №10.310 (b), <http://www.mediate.com/articles/floridarules.cfm>.

8. Authority to Draw up Mediation Agreement and its Scope

According to Model Rules of Professional Conduct, mediator may provide assistance to parties in dispute resolution and/or designing an agreement. Furthermore, provision of such assistance is allowable to parties who are engaged in the proceedings independently or through representatives.[137] Court or parties set forth the scope of authority for the participation of a neutral third party in the dispute resolution process.[138]

In various alternative dispute resolution systems, mediator may be granted the right to develop a full mediation agreement[139] or its general outline, based on which representatives, in agreement with parties, determine detailed conditions of an agreement.[140] Only a non-lawyer mediator may be granted the right to perform the mentioned authority in full.[141] Often, special knowledge is required for designing mediation agreement; therefore, involvement of an expert in the mentioned issue is justified.

Lawyer mediator shall "ask questions to specify the conditions of an agreement" [142] and, for avoiding conflict of ethical obligations, he/she may include in an agreement only the wording suggested by the parties.[143] With this scope of authority, mediator may not be deemed practicing law. Yet, often, even most simple contractual provision cannot be drawn up without legal assessment, which may to some extent grant one party advantage over another, which had not been agreed upon during the mediation process by the parties.[144] Therefore, drawing up a legal document,[145] that has impact on rights and duties of parties, is regarded as one of key characteristics of the practice of law.[146]

USA Washington State Supreme Court is the key body in charge of setting the rules of ethics of lawyers, although Bar Association Committee publishes recommendatory opinions[147] and facilitates individuals practicing law with discharging ethical obligations.[148]

An opinion significant in this respect, Washington Recommendatory Opinion №2223, was passed in 2012; according to the decision a lawyer mediator is not allowed to draw up an agreement on the distribution of assets under a family dispute, design a parental duty fulfillment plan and child custody documents, since the above-mentioned is not limited to filling out standard forms and involves developing documents

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[137] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 3, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[138] Annotated Model Rules of Professional Conduct, 6th ed., Center for Professional Responsibility, ABA, 2007, 287, <abanet.org/cpr>.

[139] On this topic see *Kovach K.K.,* Mediation in a Nutshell, 3rd ed., United States of America, 2014, 238-247.

[140] *Shin C.P.,* Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1041.

[141] *Boulle L .J., Colatrella M.T., Picchioni A.P.,* Mediator Skills and Techniques, LexisNexis, 2008, 104-105.

[142] *Shin C.P.,* Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1042.

[143] *Russel M.O.,* The Mediation Handbook, Effective Strategies for Litigators, Bradford Publishing Company, Denver Colorado, 2011, 196.

[144] Ibid.

[145] Not technical support to parties in designing it, *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 451; Washington State Bar Association Advisory Opinion №2223, <http://www.wsba.org/Resources-and-Services/Ethics>.

[146] See Washington State Bar Association Advisory Opinion №2223, <http://www.wsba.org/Resources-and-Services/Ethics>; *Laflin M.E.,* Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators, Notre Dame Journal of Law, Ethics and Public Policy, Vol. 14, Issue 1, Art. 14, 2014, 503; *Boulle L.J., Colatrella M.T., Picchioni A.P.,* Mediator Skills and Techniques, LexisNexis, 2008, 104-105.

[147] Washington State Bar Association Advisory Opinion №2223, < http://www.wsba.org/Resources-and-Services/Ethics>.

[148] *Shin C.P.,* Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, 89 Wash. L. Rev., 2014, 1043.

involving complex content, having impact on the rights of parties and especially their property claims.

CEDR Model Mediation Procedure[149] rules explicitly stipulate that drawing up mediation agreement is a duty of representatives of parties.[150]

Professor *Leonard Ryskin*, several decades ago, wrote that "the philosophical scheme lawyers and professors of law are guided by differs significantly from what should be the calling of a mediator."[151] In case of a lawyer mediator there is a great risk that representatives of parties will be given dominant position during the process, but this has to be prevented by means of determining interests of parties and priorities and bringing it to the forefront.[152] When a lawyer mediator is involved, there may be higher likelihood that the substance of dispute between the parties will be primarily demonstrated in legal and financial matters,[153] and less focus will be made on identifying creative alternatives for identifying personal interests and reflecting them in an agreement, along with resolving financial and legal issues.

Irrespective of the degree of the involvement of a mediator in the process of designing a mediation agreement, their scope of responsibility includes the duty to ensure that parties reach informed, detailed[154], precise and executable agreement.[155] The mentioned duty shall be implemented by maximal realization of the principle of self-determination of parties, and, at the same time, ethical duties of a mediator at the final and considerably responsible stage of the mediation process should be strictly adhered to.

It is recognized in the doctrine that the right of self-determination of parties is considerably broader than the principle of freedom of contract in civil law. Degree of satisfaction from mediation agreement implies gratitude of parties towards a neutral party for their assistance in the process of achieving decision that reflects free will. Therefore, supporting the realization of self-determination right by mediator implies not only obtaining consent of parties on contract terms,[156] but also ensuring that they identify their true will and that it is detailed in the agreement.

9. Conclusion

Two key goals of the alternative dispute resolution policy is to safeguard parties against damage from the conflict of interests and society – against forming the impression of improper impact on the dispute resolution processes. In the context of alternative dispute resolution, these goals are substantially significant,[157] since, in both cases, ethical integrity of the process, reputation of lawyers, confidence of parties and society in dispute resolution procedures is at stake.[158] Determination of ethical grounds for the participation

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[149] CEDR Model Mediation Procedure (used in General Civil and Commercial Cases), <www.cedr.com>.

[150] *Boulle L., Nesic M.,* Mediator Skills and Techniques: Triangle of Influence, European Code of Conduct for Mediators, Athenaeum Press, Great Britain, 2010, 415.

[151] *Riskin L.L.,* Mediation and Lawyers, 43 Ohio St. L.J. 29, 1982, 43-44.

[152] *Alfini J.J.,* Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, South Texas Law Review, Vol. 49, 2008, 834.

[153] Ibid, 835.

[154] *Anderson D. Q.,* Litigating Over Mediation- How Should the Courts Enforce Mediated Settlement Agreements? Sing. J. Legal Stud. 105, 2015, 124.

[155] *Kovach K.K.,* Mediation in a Nutshell, United States of America, 2003, 276.

[156] *Anderson D. Q.,* Litigating Over Mediation- How Should the Courts Enforce Mediated Settlement Agreements? Sing. J. Legal Stud. 105, 2015, 111.

[157] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 17, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[158] Ibid, 18, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

of a lawyer as of a neutral third party in the proceedings will have positive impact on public opinion that is formed in the country, concerning legal processes.[159] The goal of sharing moral responsibility before society is clearly conveyed in the preamble of the Code of Professional Ethics of Lawyers of Georgia. Furthermore, setting and expanding the rules of ethics is especially important, so that potential stipulated under the essence of mediation is utilized in full.[160]

The standards of ethical behavior of lawyer mediator may be regulated by expanding professional ethics rules of a lawyer and differentiating the transformed role in various dispute resolution regimes, as well as by means of setting independent rules of conduct.

In Georgia, combining the practice of law and mediation[161] is an increasing trend, along with increased use of mediation. This process will be significantly accelerated by the determination of ethical grounds of mediation, which will stimulate public confidence and respectively, the use of democratic processes of dispute resolution based on ethical standards. While this will naturally drive increasing demand for lawyers participation in mediation as representative or in the capacity of a neutral third party. Furthermore, when designing ethical standards, significant standard should be to ensure their uniformity within the bounds of the general framework of ethics policy.

[159] *Menkel-Meado C., Plapinger E.,* Model Rule for The Lawyer as Third-Party Neutral, Preamble, CRP Georgetown Commission on Ethics and Standards in ADR, 2002, 22, <http://www.cpradr.org/Portals/0/Third%20Party%20netural%20create%20new%20cover%20page%202012.pdf>.

[160] *Alfini J.J.,* Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, South Texas Law Review, Vol. 49, 2008, 839.

[161] *Folberg J., Golann D.,* Mediation, The Roles of Advocate and Neutral, Wolters Kluwer Law and Business, Aspen Casebook Series, Austin, Boston, Chicago, New York, The Netherlands, 2011, 424.

Lela Janashvili[*]
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Problems with the Modern State Territorial Organization[***]

Among the contemporary problems of Georgian constitutionalism one of the most important issues is the establishment in the country of an effective territorial model.

In the Georgian constitution of August 24, 1995, due to numerous objective circumstances, the decision regarding state-territorial organization issues has been left blank and their organization according to the article 2 paragraph 3 of the constitution has been passed on to constitutional legislation. A very important state decision has to be made, which increases the significance of this subject immeasurably for our country.

Our country for a long period of time did not have the opportunity to independently determine the its state formation issue. Without consideration for Georgian centuries long state traditions and historical development the imposed sate organization system gave rise to many difficult problems, the resolving of which was not possible without consideration for existent reality and objectives and aims that stood in front of the newly formed state. The country must once again follow the path of its traditional historical development, the path of temporarily deranged natural inner evolution. Together with the latter, the new state organizational model must aid the restoration of lost and violated territories wholeness, the country's political, economic and cultural revival. The principles of constitutionalism remain expedient for Georgia, which from the day of obtaining of independence up to the present day is in search of the state model (here the management as well as the territorial organizational model are implied), this in confirmed by the recent formation of another new state constitutional committee with the aim of implementing amendments to our constitution. In Georgia, all of the active constitutional committees executed unsuccessful attempts of resolving the above-mentioned issue and the issue, as of today, is unresolved. Based on the difficulty of the subject the resolving of the problem cannot be the result of a onetime decision, a process must be conducted, which will find its development, which requires solid theoretical basis. Through utilization of the comparative method the study of the main models of state organization for the country in the stage of transformation may be very beneficial, and may help us in finding organic state organization.

From this standpoint, we are not only faced with huge problems related to Abkhazian and Ossian societies, but also in the legal consciences of the Georgian society. For resolving the legal problem (status) of Abkhazia and Ossetia a big compromise must be reached, both sides must be convinced in the offered model's effectiveness, which cannot be reached without bringing up of successful precedents of world constitutionalism.

Which territorial organization model should we choose: Unitary or Federal? What should be the status of autonomies and other territorial units? What quantity of competency will remain with the central government and what quantity of competency should be handed over to territorial units? Which model of federation will be beneficial for Georgia?

With consideration of the official position of the Georgian government, the determination of the

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Abkhazian legal status must be carried out with consideration for the highest legal status for the autonomous units mentioned in the world constitutionalism practice. Thus, several regions of the country (first of all Abkhazia and afterwards Ossetia) unlike from the regions with equal status will have special status, which implies a higher status, more rights and responsibilities in comparison to other territorial units and more inner autonomy. Based on the above-mentioned, we think that in the future Georgian territorial organization model the existence of an asymmetrical model is imminent.

Key Words: *territorial organization, asymmetrical federalism, referendum.*

1. Introduction

In XXI century, the European States political system and the national issue of territorial organization is faced with completely new problems and is in search of new solutions for resolving the above problems.

Today, Europe is faced with new reality, where national state territorial units are demanding to be recognized as independent states. During the analysis of each state's political system, the study of the national territorial organization issue is of utmost importance. The relationship between the regions and the center is one of the most significant subjects, which is based on social, historic-national, geographic and other conditions.

One of the most expedient problems of the contemporary constitutional states remains the resolution of the territorial-organizational issue and when we are discussing the new configuration of the European States, in the first place, we consider Scotland, Catalonia, Basque country[1], Flanders, Southern Tirol, Corsica – the regions of Europe, which historically always endeavored to gain independence from the central state and whose ethnical identity conditions their strive towards establishment of an independent state within Europe. Despite several attempts of each region to place the process towards independence in legal borders, the above was only achieved by Scotland, when the Prime Minister of the United Kingdom and Scotland's first minister signed an agreement regarding the conduction of a referendum on independence of Scotland in 2014[2].

From this aspect, the Catalonia example is very interesting. The economic instability and the concept "Coffee for everyone" made the strive towards independence more intense.

The state territorial organization form determined by the Spanish Constitutional Court – "Autonomous State", which is unidentified by the constitution, has not been considered enough[3].

Unlike the United Kingdom, the Spanish Central Government is abstaining from holding a referendum, despite many political and non-political activities executed by the Catalonians for the benefit of holding the referendum.

Some experts, which are for the independence of Catalonia, are discussing the issue of association. According to Professor Peres Pransech of Autonomous University of Barcelona, independence should not be understood as the complete annexation of Catalonia from Spain. The issue may be the establishment of such relations between Spanish government and the Catalonian government, which exist between Puerto-Rico and USA[4].

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1 Basque country - País Vasco (esp.)

2 *Breda V.,* La devolucion de Escocia y el referendum de 2014: ¿Cuales son las respuestas potenciales en España? UNED. Teoría y Realidad Constitucional. Num.31, 2013. 69-88.

3 *García Barcia, Maria.,* Catalonia: The New Europestate? ILSA Journal of International & Comparative Law ILSA Journal of International & Comparative Law, Summer, 2014, 402.

4 Ibid, 418.

2. Scotland – the road towards the referendum of September 18, 2018

The road that Scotland took towards the referendum was quite difficult, and the results of the referendum more or less hated the started centuries ago process for independence, but the following question is sounded by many – until when?

Despite the results, September 18, 2014 was very significant day for the modern history of Scotland. 5 million of Scotts were presented with the opportunity to determine the future of Scotland after the 300-year integration with Great Britain. The referendum question was established in the following way: "Should Scotland be an independent State? Yes or No?[5]"

In case of majority of Scottish votes for secession, the Scottish government would commence negotiations with the government of the United Kingdom regarding the dismantling of the British United Kingdom.

Nevertheless, the eventual dissolution of Great Britain extremely bothered Europe, according to experts, politicians, analysts and scientists, the late events that took place in Scotland and the results of the Referendum directly influenced the future of Belgium, Italy, and especially Spain.

The contemporary Great Britain perfected the operational parliamentary regime, but this perfection in itself, which is more the result of time, habits and traditions rather than institutions, conditioned its uniqueness. Nevertheless, it must be mentioned, that numerous difficulties, which Great Britain is faced with already for several decades, harmed the functionality of its political system.[6]

The many century long turbulent history of the Kingdom of Scotland terminated in 1707, when the Acts of Union was signed, on the basis of which was established the Great Britain's Kingdom. Negotiations regarding the integration conditions were started between the delegations of two countries in April 1706. Details were agreed on July 22, 1706 in the form entitled Treaty of Union, which later became the basis of the Unity Act. The contract was made up of 25 chapters, in which were mentioned for the first time the unification of Scotland and England as one State called Great Britain; in the contract were also mentioned the conditions for inheritance of power (specifically, the execution of inheritance of power in the newly formed kingdom according to the inheritance act of 1701); regarding the unified parliament, establishment of general trade rules, taxes and other economy based issues; it was highlighted that the special judicial system of Scotland, the state and inheritance of legal positions would persist; regarding the representation of Scotland in the unified parliament and etc., also in the contract was discussed the privileged position of the Scottish Presbyterian Church.

During the reign of Queen Anna on May 1, 1707 the Union Act came into force. The parliaments of Scotland and England became unified in the Great Britain's parliament. The English historians also call the "Union Act" the "Union of Parliaments". In the period following the Union Act there were many attempts to call England and Scotland Southern and Northern Great Britain, nevertheless, the latter idea did not become widespread. 1707

The Stuart Dynasty, who was not satisfied with the Union Act attempted to execute an attack on Scotland. Jacob III Stuart, candidate for the throne, who had the support of France, attempted in 1708 to come in the proximity of the coast of Scotland, nevertheless, this attempt was subsided by Admiral Bing. In 1714, after the death of Queen Anna, according to the throne inheritance act, the crown was given to Gregory Hannover, the son of Sophia and the grandson of Jacob I. In 1715-1716 in Scotland was ongoing the great

[5] *Liñeira R.,* Ha de ser Escócia un país independent? El debat a dos mesos del referéndum, Institut de Ciencia e politique i socials, №7, Julio, 2014, 3; <http://www.icps.cat/archivos/Quaderns/q07_cat.pdf>

[6] *Pacte P., Melen-Sukramanian P.,* Constitutional Law. Tbilisi University Publication, Tbilisi, 2012, 238.

rebellion of the Jacobians, nevertheless, the rebellion was quickly subsided and Scotland remained within the Great Britain.

The Union Act is still in effect as of today, nevertheless, from 1999 the parliament of Scotland was resuscitated on the basis of the act regarding the establishment of the parliament of Scotland issued by the parliament of England (Scotland Act 1998)[7].

2.1. Act Regarding Scotland

In 1707, after the establishment of the United Kingdom, the parliaments of England, Wales, and Scotland stopped functioning. On the span of many decades, the issue of resuscitation of the parliament was the issue, which was traditional and a matter of life and death for Scotland.

In the 60's of XX century, the economic upturn in Scotland (the discovery of oil fields in the northern sea) and the victory of the Scotland's national party candidate in the Westminster parliament, solidified the Scottish parliament establishment supporters position.

In 1969 was established Royal Committee, whose aim was to review different propositions regarding the Scottish and Wale's management structure. The committee came to the conclusion that the best way to resolve the problem was the establishment of an independent parliaments. In 1978 the British parliament passed a law regarding the Scottish assembly, nevertheless, its activation was conditioned by the results of the referendum, which was to be held after the law came into force.

As a result of the referendum held on March 1, 1979, the issue did not receive sufficient votes (only 40%) and it was annulled. The attempt to establish a Scottish parliament failed. In the following years, this issue did not lose its expediency. One of the factors was the circumstance that in 1979-1997 at the head of Great Britain was the conservative party, then, when in the Scottish election districts were victorious representatives of other parties, which significantly aided the idea regarding the establishment of an independent Scottish parliament.

In 1989 a group of parties, social and community organizations created the Scottish constitutional convention, which contained numerous revolutionary regulations regarding the Scottish parliament. This convention became the basis of foundation of Scottish "White book" in 1997 and afterwards the bill of Scotland1989[8].

In 1997 in the British parliamentary election the labor party came out victorious. The Labor party's pre-election promise in case of victory was the establishment of the Scottish parliament.

On November 11, 1997 as a result of a referendum held in Scotland, with the majority of votes citizens supported the establishment of the parliament with the right for tax modifications, and after the latter the government presented the Scottish act project[9] in the parliament. It was passed by the parliament on November 17, 1998 and it was accepted by the queen on November 19, 1998[10].

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[7] *Harlow C., Rawling R.,* Law and Administration, ed. Cambridge, New York: Cambridge University Press, 2009, 87.

[8] In the Bill of 1998 are discussed the general principles of the regional government. These regulations in 1998 became the basis for the Act of Scotland- the general principles of Scottish parliament organization and business.

[9] The act of Scotland determines the mixed system of formation of the Scottish parliament. From 129 deputies 73 will be elected in one mandate districts by means of the majority system and 56 in multiple mandate regions by means of a proportional system. The territory of Scotland is subdivided into 74 election districts, where one deputy is elected, in one district are 8 election regions, in each must be elected 7 deputies. During the European parliament elections the election region borders coincide with the borders of the election district. In the election districts the elections are conducted by means of party lists.

[10] Constitutional legal Assessment of 1707 of the Union Act and the act of Scotland of 1998 see *Tierney S.*, Constitucional Law and National Pluralism, Oxford University Press, Oxford, 2004, 112.

As a result of long-term political negotiations, an agreement was reached between Great Britain's Prime Minister David Cameron and Scottish First Minister Alex Salmond regarding the conduction of a referendum[11]. Prognosis after possible independence were numerous and in many directions, the subjects of the debates were the membership of EU and also economic and financial issues.

3. Example of Belgium

The example of federalization of the unitary state was Belgium, which currently is the newest federal state in the world. In this country in 1993 the constitutional modification process came to an end and the unitary organization mentioned in the constitution of 1831 was alternated by the federal organization. The federalization of Belgium was caused by the conflict between two nations – Valons and Flamandes – who lived in this country.

In 1830 along with the establishment of the new Belgian State people were assuming that also a new unified Belgian Nation would be established, which would unify through State related patriotism the two nations -Valons and Flamandes- living in the country at the time. In the first days of statehood it was revealed that the placement of the two nations under one state would be a very difficult issue to resolve. The national conflict started due to the fact and request of equaling the French tongue with the Native Flemish tongue of the Flanders in order that the latter would receive an equal with the French language status of the state language. After the resolving of the above-mentioned request it was revealed that the national conflict would not be resolved with only the language related issue[12] .

One of the leaders of the Valons, J. Destre, in his manifest "Letter to the king", was announcing to Albert I that the problem of Belgium was not only linguistic but more of national character: A Belgian citizen does not exist because a Belgian should does not exist. Belgium is extremely artificial political formation and not a nationality. The unification of Valons and Flammandes is not desirable and is impossible.

Terrible conclusion: The Belgian Citizen does not exist because Belgian should does not exist, which made it clear to everyone that in order to resolve national problems the qualitative constitutional reforms process should have been commenced, which went on for 25 years. After long analysis and revision of different options the federal resolving of national issues was selected[13].

The State was subdivided into three regions: Valonia, Flanders, and Brussels and into three cultural unions: French, Flemish, and German language cultural unions, each one of the was assigned the status of the federation subject.

Thus, the federation is made up of unions and regions. It contains three unions and three regions: French union, Flemish union and German speaking union. Also the regions of Valonia, Flanders, and Brussels.

The whole territory of Belgium is divided into four linguistic regions: Francophone region, Dutch language region, German language region and the bilingual Brussels.

The legislative authorities of the Federal State are being executed by the house of representatives and the Senate. The members of the Federal chamber according to law are subdivided into French and Dutch

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[11] St Andrew's House Scothish Executive, "Agreement Between the Scottish Goverbnebt abd the United Kingdom Government on the referendum on independence for Scotland 12 October 2012" .

[12] Wilfried Swenden & Maarten Theo Jans, 'Will It Stay or Will It Go?' Federalism and the Sustainability of Belgium, 29 West Eur. Pol. 878,879-81(2016).

[13] Céline Romainville, Dynamics of Belgian Plurinational Federalism: A Small State Under Pressure, 38 B.C. Int'l & Comp. L. Rev. 225 (2015), <http://lawdigitalcommons.bc.edu/iclr/vol38/iss2/3>.

language groups. The house of representatives is made up of 150 members, who are elected directly by the citizens. The Senate is made up of 71 members and its members represent by an uneven number representatives of each national groups and linguistic zones – 25 members are elected by the Dutch Election Panel; 15 by the French Election Panel; 10-10 senators correspondingly are appointed by the Flemish and French Council from their members; 6 senators are appointed by those senators, which were appointed by the Flemish Council and French Unions Council, 4 more by Francophone, German speaking and Flemish population. In the legislative process the rights of the panels are not equal, the role of the house of representatives is more significant than the role of the Senate.

The house of representatives unilaterally makes decisions regarding the rules of naturalization, responsibilities of the government members, state budget and other accounts, and military contingent. For those legislative projects, which require the revision of both chambers, the house of representatives has the right to overturn the veto of the Senate. Such a weakness of the representative body of the federation subjects in the federal legislative process is reflected completely on the weakness of federalism as a whole. If ¾ of one of the linguistic groups presents a motivated resolution in the parliament, with the proof that the legislative project to be reviewed □e□ceptfor the budget law□seriously harms the relations of unions, the parliamentary procedure will be halted and the resolution will be passed on to the council of ministers, which must come up with own conclusion or corrections to the legislative project.

The head of the e□ecutiveauthority is the king, who appoints and releases ministers. If the house of representatives announces vote of distrust towards the government and does not offer a candidate for the post of prime minister to the king, the king then has the right to release the house of representatives, which automatically means that the senate members will also be released.

The king appoints the judges, approves and published laws, and ensures the e□ecutionof the laws. □e does not have the right to disrupt the business of regions and unions. The federal bodies will get involved in the business of provinces and communes when laws are being violated or the common state interests are being harmed.

The monarchy institute does not contain the spirit of federalism, it corresponds to the central state model, the federal state organization form is related to the republican management form, because the principle of election and the parliamentary supremacy directly e□presses the principles of federalism.

The Federal Government is made up of no more than 15 members, where equally are represented French and Dutch speaking persons. The competency of the Federal government is – the determination of rules for naturalization, the issue of responsibilities of Federal ministers, state budget and e□penditures,and military matters. The competency of federal bodies spreads on to only those issues, which are given in the constitution and on the laws issued on the basis of the latter.

The representative bodies of the □elgian regions and unions -councils are established through elections. The government members are elected by the regional councils. The French and Flemish union councils and governments are at the same time the councils and governments of □alonia and Flanders. The latter through its decrees regulate the issues of culture, education, pension regime and relations between the communes. They also have the right to sign international contracts related to the above-mentioned issues. The constitution also places under the French and Flemish competencies the regulation of languages in the spheres of management, training and education, also, during the drawing up of documentations, in the state or state controlled institutions.

The initiative right for amendment of the constitution belongs to both of the chambers of the parliament. □fter the above initiative, the chambers are considered as released. The amendments to the constitu-

tion will be implemented by the newly elected chambers with ⅔ of votes. The amendments do not require ratification from the regions.

The preservation of the Belgian United Statehood which should have disassembled in the beginning of the XXI century, according to general observations, was greatly aided by the following inner and outer historical-political factors: The intensification of the Flemish movement coincided with the first and second World Wars which from their side weakened the above mentioned and rain checked the disassemblement of Belgium; the significant and in essential part of the Flemish supported the cultural autonomy, the strict upholding of the language related laws and support of one language only on the territory of Flanders; in the country was broadly widespread the opinion that the law makers could consider and satisfy all Flemish requirements related to language and culture; the third power was not interested in exacerbation of relations between Flemish and Walons, they could not find other partners to resolve their problems and had to rely on each other; in the moment when during the protracted conflict between Walons and Flamands the balance of power was violated and the superiority was gained by the Walon nationalists who could impose their ideas on the population of their region; the possibility came up to resolve national problems through federalism; the last retaining element of the Belgian unitarism, the Brussels francophone bourgeoisie was defeated in the moment when Walonia and Flandres started resolving their national problems through federalism, including appointment of an equal status for both languages in Brussels[4].

The Belgian disintegration process was ongoing very slowly and it included the essential transitional process towards cultural and social-economical autonomy of all social groups of all regions and populations of the country. The political parties never encouraged violence, that is why Belgium became the locy exception which was not transformed into a terrorist and civil wars country by the national problems. The future will show us the stability and unity achieved by the Belgian state will be long lived. The latter will mostly depend on as to how effective will be federalism for resolving national issues.

4. The Particularities of Establishment of a New State

The state is not a natural given, it is the creation of a human being and it may follow the rules of development of our lives.

The French classic constitutionalists Pierre Pactet and Frederich Melen-Sukramanian thought that besides the three main conditions in the classical theory of statice: territory, population and political and legal organization, that the main characteristic of a state was unity which could not be interchanged with other formations, may they be inside the state or international. The first condition which is essential but not sufficient is related to the state's legal subjectivity and the second one has to do with the sovereignty of the state[7].

During determination of the main characteristics of the state there was difference of opinion among different contemporary constitutionalists. Some authors think that there is no legal criteria which would

[4] Cris Deschouwer, Belgium: Ambiguity and Disagreement in [illegible] at Paolo Dardanelli, Gabriel Bastien Daros eds. [illegible]

[5] Jan Beyers, Peter Bursens, The European Rescue of the Federal State: How Europeanisation Shapes the Belgian State in [illegible] Marleen Brans et al. eds. [illegible]

[6] *Pactet P., Melen-Sukramanian P.,* Constitutional Law, Dalloz Publication, Dalloz, [illegible] Michalon, Thémis, La recherche de la légitimité de l'état, [illegible]

[7] *Pactet P., Melen-Sukramanian P.,* Constitutional Law, Dalloz Publication, Dalloz, [illegible] 7, [illegible] 7.

satisfy the state. The authentic characterization of the state is only possible by means of its historical and pollical criteria[18].

Of course, the above-mentioned concept cannot be considered from the standpoint of absolute criteria. According to French scientists Pierre Pactes and Ferdinand Melen-Sukramanian, this is a concept, which highlights the decisive significance of the fact in the state related sphere and which partially is legal.

Together with the above, the sovereignty issue is of utmost importance, when in the contemporary globalized world sovereignty surpassed the national state borders and it acquired new spaces and new importance. According to Professor Joan Luis Peres Pransech, sovereignty, as of today, is the concept, which slowly loses its force in the globalized world and together with the governmental authority it requires adaptation to the new environment.

Nevertheless, we must mention that for very many states, particularly for the newly formed ones, the notion of sovereignty is very valuable and cannot be consider as cliché or passed stage.[19]

Thus, we can consider sovereignty as legal criterion of the state, which has two directions: sovereignty within the own state borders and sovereignty during relation with other states. According to the classical doctrine of sovereignty, it is the state's political-legal organization's essential element.

The European State territories, which will receive independence through secession, may come to be considered outside of the EU borders. Nevertheless, as has been revealed from the referendum preparation events results, the new independent state, in this case Scotland, will not have to follow all formal procedures and requirements for acceptance of a new state into the EU. The danger that Scotland will be considered outside of the EU in reality does not exist, because there is a way where a new state (in this case Scotland) is not required to undergo all of the procedures necessary for acceptance into EU[20].

There is difference of opinions regarding the above-mentioned. First of all, it must be mentioned that the most important historical objective of the EU is for the European continent to be the space of peace, stability and further development. Article 49 of the EU agreement states those conditions, which must be met by the state wanting to become a part of the union, in order to become a fully-fledged EU member[21]:

1. The newly formed state must be European;
2. It must uphold principles of freedom and democracy, and main human rights and freedoms fundamental values;
3. It must be a legal state.

The EU is open for all European states, which meet the requirements mentioned in article 49, which means, first of all, the legal basis for request of unification. Also, the requesting state must satisfy the principles mentioned in article 6 paragraph 1, which are common for all member states and on the basis of which the EU was founded.

The argument that Scotland will easily become the EU member was considered already decade ago by surveyors Urkens and Keating.[22] Specifically, the exclusion from the EU of the region, which is experi-

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[18] *Colliard C.A.,* Institutions des relations internationals, Dalloz, 1978, №79. 59,

[19] *Beaud O.,* "Le souverain", in Revues Pouvoirs, 1993, n67, p.33; "La souveraineté dans la contribution à la théorie de l'État de Carré de Malberg", Rd, 1994, 1251; "fédéralisme et souveraineré, notes pour une théorie constitutionnelle de la Fédération", RDP, 1998, 83. See also: M. Troper, "Le titulaire de la souveraineté", RDP, 1996, 1504; "M. David, "Positivisme juridique et souveraineté du people selon M.Troper.", RDP, 1997, 965. Two articles by Carl Schmidt on Souvernigty, RDP, 1999, 660; f. Luchaire "La souveraineté, RFDC, 2000, 451; A. Haquet, Le concept de souveraineté en droit constitutionnel français, PUF., 2004., see in the same place, 61.

[20] *Breda V.,* La devolution de Escocia y el referéndum de 2014: ¿Cuáles son las repercusiones?", Teoría y Realidad constitucional, núm. 31, 2013, 70.

[21] <http://europa.eu/legislation_summaries/enlargement/ongoing_enlargement/l14536_es.htm>.

[22] *Breda V.,* La devolution de Escocia y el referéndum de 2014: ¿Cuáles son las repercusiones?, Teoría y Realidad constitucional, núm. 31, 2013, 70.

encing economic upturn, will have a more serious effect, nevertheless, the newly formed state must request new admission to the EU. The assertion that the new state, even if this state was a part of EU in the past, cannot be considered as an automatic argument.

The new state, in this case, the state of Scotland, will be consider as a new subject on the international scene. Then, when the central state (in case of independence of Scotland -Great Britain's United Kingdom and Northern Ireland) will still have the status of an old member.

Despite this, with pragmatic aspects of integration of Scotland, it is less likely that a secessionist region, which in the past was a member state, will be treated as a newly accepted region in the EU. According to experts, it is unimaginable that after a 40-year long membership Scotland would be excluded from the EU. And the population, which had European citizenships for 40 years, will no longer have the right for the latter. The new state – Scotland will have to walk in the same way as the new candidate-member country.

In case if the secession of Scotland from Great Britain would have been executed with most likelihood the independent Scotland would still carry out the international responsibilities of Great Britain (for example, the debts of the United Kingdom). In this case, it is illogical that the new state would share and would be responsible for paying the old state's debts, nevertheless, not international privileges and prerogatives[23].

It will be very difficult for the EU to allow the precedent of integration of a state that acquired its independence through secession. The majority of the EU institutes are located in Belgium, in Brussels. Belgium is the youngest Federal organization state. It is the rare example of federalization of a unitary state, where in 1993 was completed the amendment to the constitution process and the unitary state organization mentioned in the constitution of 1831 was alternated by the Federal organization. The Belgian federalization was caused by the intensified national conflict between two nations abiding this territory – Valons and Flamands. The Flamands and Valons turned to each other for partnership in resolving their problems and did not involve the third power and that is why today Belgium is the rare exception, which was not transformed by the national problems into a country of civil wars.

The example of Scotland will hold incentive for this portion of Belgium and in case of disassembly of Belgium it is possible for a circumstance to be established, where the majority of EU institutes will be located on the territory of a non-member country (if Flanders will be the international legal inheritor of Belgium.)

The above-mentioned circumstances are considered in the Foreign Affairs Committee's report, which was written by Graham Avery[24] and presented to the parliament of Great Britain.[25]

By means of what mechanism can a new country, whose origins are from the old European region-from Member State, can be integrated through simple procedural integration, is so far vague. Nevertheless, the experts deem it possible that this will include simplified procedures for acceptance and that these procedures will be less strict.

It must be mentioned that the big portion of the EU oil, also the supply of natural gas is located exclusively on the territory of Scotland. Taking into consideration the above-mentioned economic reality, there are important pragmatic aspects, so that the integration of Scotland into EU be simplified. And not only Scotland, but other rich EU regions, which are governed by the independence prone parties.[26]

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[23] *Breda V.,* La devolution de Escocia y el referéndum de 2014: ¿Cuáles son las repercusiones…", Teoría y Realidad constitucional, núm. 31, 2013, 70.

[24] Graham Avery – the General director of the European Committee, the advisor of the European Political Center, Brussels. Member of the Oxford Sant Anthony college.

[25] *Avery, G.,* "The Foreign Policy Implications of and for a separate Scotland¨", Forreign Affairs Commite, the UK Parliament, 17 de oc. 2012.

[26] *Breda V.,* Teoría y Realidad constitucional, núm. 31, 2013, La devolution de Escocia y el referéndum de 2014: ¿Cuáles son las repercusiones?", 72.

Nevertheless, we must mention here that as of yet the merger of simplified acceptance with EU norms and international legislation is not institutionally and normatively clear. Also, negotiations are ongoing for the following issues:

- In connection with the foreign debt – Scotland's first minister and the leader of the national party, Alex Almond, stated that Scotland would not share the foreign debt of Great Britain, which will have to be executed by independent Scotland in case if Great Britain refuses to utilize the active currency "pound" in the new state[27]. The above-mentioned request is an answer to the position of Great Britain, the refusal for Scotland of utilization of the pound in the new state. The Britain's position that in case of independence Scotland must create its own currency, or must become a member of the Euro zone.

In relation to economics – Scotland's developing economy gives guarantees for the latter to be a valuable member of the EU. Developing economy sector are: science, tourism, innovative industry, communication, energy, technologies, food and beverage, and financial services.

Below are listed conditions, which may hinder Scotland's economic development:

1. The decrease of capital expenditures by two last government of Great Britain;
2. Refusal for creation of an independent fund financed by the incomes from the extracted oil from the northern sea;
3. Domestic debt accumulated during the governance of the labor party;
4. The instability of incomes from the time of Margaret Techer;
5. Artificial increase of London's economic activity on the expense of other members of the United Kingdom;
6. And finally, the political rigidity of the current British coalition

Alister Darling, who is the leader of the campaign "Together, Better" criticizes the position of the supporters of independence. According to him the economic strategy significantly depends on currency. Also, politicians and experts express concerns regarding security. "In case of independent Scotland, the British Islands will be less secure" the later citation of the minister of internal affairs of Britain was met with counterarguments from the supporters of independence: First, Scotland already has independent police and independent legal system and second, both sides cooperate in relation with anti-terrorist matters. Nevertheless, the argument of the Britain's minister of internal affairs relies on a long-term and multi-directional research. Moreover, according to the statement of the minister the independent Scotland will not be able to utilize British Spy Services[28].

Therefore, by the referendum of September 18, it was possible to put a start to a new era in the European history, nevertheless, this did not happen. Europe and the world was faced with a new reality, when in June 2016 in the United Kingdom was conducted a referendum regarding the leaving of EU with unexpected results.

For leaving EU voted 17.410.742 citizens, and for staying – 16.577.342 participation was at 72%[29].

For the first time in the united Europe's history a member state made the decision regarding leaving the union. Europe was faced with completely new unprecedented reality. There are suppositions that the disassembly of the union will encourage secessionists.

On June 24, 2016, an article written by En Gaiper was published in the "Mirror" -

EU Referendum results fallout explained: What we know so far after Britain votes for Brexit; Britain voted for Brexit but what did it all mean, how, and why?

[27] The given threat-promise was made public during the presentation of the Scotland's Economic strategy.

[28] <http://internacional.elpaís.com/internacional/2013/10/30/actualidad/1383133041_473657.html?rel=rosEP>.

[29] <http://www.bbc.com/mundo/noticias-internacional-36484790>.

By answering the above questions, we will get a completely new European reality not only from the economic and political standpoint, but also from the territorial-organizational standpoint.

5. Perspectives of Territorial Organization of Georgia

In the Georgian constitution of August 24, 1995, due to numerous objective circumstances, the decision regarding state-territorial organization issues has been left blank and their organization according to the article 2 paragraph 3 of the constitution has been passed on to constitutional legislation. A very important state decision has to be made, which increases the significance of this subject immeasurably for our country.

Our country for a long period of time did not have the opportunity to independently determine the its state formation issue. Without consideration for Georgian centuries long state traditions and historical development the imposed sate organization system gave rise to many difficult problems, the resolving of which was not possible without consideration for existent reality and objectives and aims that stood in front of the newly formed state. The country must once again follow the path of its traditional historical development, the path of temporarily deranged natural inner evolution. Together with the latter, the new state organizational model must aid the restoration of lost and violated territories wholeness, the country's political, economic and cultural revival. The principles of constitutionalism remain expedient for Georgia, which from the day of obtaining of independence up to the present day is in search of the state model (here the management as well as the territorial organizational model are implied), this in confirmed by the recent formation of another new state constitutional committee with the aim of implementing amendments to our constitution. In Georgia, all of the active constitutional committees executed unsuccessful attempts of resolving the above-mentioned issue and the issue, as of today, is unresolved. Based on the difficulty of the subject the resolving of the problem cannot be the result of a onetime decision, a process must be conducted, which will find its development, which requires solid theoretical basis. Through utilization of the comparative method the study of the main models of state organization for the country in the stage of transformation may be very beneficial, and may help us in finding organic state organization.

From this standpoint, we are not only faced with huge problems related to Abkhazian and Ossetian societies, but also in the legal consciences of the Georgian society. For resolving the legal problem (status) of Abkhazia and Ossetia a big compromise must be reached, both sides must be convinced in the offered model's effectiveness, which cannot be reached without bringing up of successful precedents of world constitutionalism.

6. Conclusion

Which territorial organization model should we choose: Unitary or Federal? What should be the status of autonomies and other territorial units? What quantity of competency will remain with the central government and what quantity of competency should be handed over to territorial units? The choice is not easy and that is why we think that the special analysis and research of world successful constitutionalism models is of utmost importance, as a result of what can be established the following recommendations regarding the solutions to the problem:

1. Inside the state are functioning two constitutional authorities: Central government and the government of Abkhazian Autonomous Republic. Between them are distributed responsibilities according to the constitution. The Abkhazian Autonomous Republic possesses the government that does not spring

from the central government. The central governments rights belong to the latter and the remaining competencies belong to the Abkhazian Autonomous Unit.

2. The Abkhazian Autonomous Republic possesses the founding government, independently approves its constitution and determines the government bodies system, which does not require the approval of the central government.

3. Between the Central government and the Abkhazian Autonomous Republic's government the rights and responsibilities are distributed in accordance with the constitution, none of the sides has the right to change the balance of powers appointed by the constitution. It is not permitted for the central government to limit or take away the right appointed to the Abkhazian Autonomous Republic's government by the constitution.

4. Dual chamber system. Two chamber parliament. The sovereign government of the Federal state has two sources. The will of all citizens and Abkhazian Autonomous Republic's Achara Autonomous Republic's and other territorial units' will. The Federal government is based on the balance of these two wills. In the Federal State the parts of the federation are simultaneously subjects and objects of the central government. Separate subject cannot hinder the approval of the undesired decision by the central government. The subjects taken as a whole can oppose an undesirable process. Inside the Federal State a state important decision cannot be made without participation and majority approval of the subjects. The source for decisions of the Federal government is a mixture of people's and Federation's parts' sanctions. One chamber of the legislative executive body of the Federal government, which is formed by the subjects of the Federation, protects their interests, and refuses and blocks any attempts of issuing a law that opposes the rights of the subjects. Without the consent and approval of the latter it is impossible to implement constitutional changes. The president should not have the right to release the supreme representative body of the Federation Subjects, i.e. Federal parliament. As the highest body inside the state it can vote for its own release, but the president does not have the right to release the latter. If we give the president such a right that would mean that we would be saying that in the state exists a body, which is more powerful than the state representative council, and this would be in contradiction with the principles of Federalism.

5. The Abkhazian Autonomous Republic has a political organization which is independent of the central government and the role of executing own responsibilities independently. The candidates for judges of the supreme (constitutional) court and the candidacy of the supervisor of the National Bank should be approved by the latter. The Georgian vice-president must speak Abkhazian language.

6. It is not allowed on the territory of the Abkhazian Autonomous Republic to appoint representatives of the central government; the constitution must directly consider any possibilities of involvement in or coordination of the business of the latter.

7. Functionality of languages;

8. The state-legal relations between the central government and the government of the Abkhazian Autonomous Republic are characterized by equality of both parties, there is no subordination between them. None of the parties has the right of changing the above relations or the right to control the business of the other government. The conflicts between the two are reviewed by the courts. Such laws cannot be annulled by the representatives of the center. It is not allowed to get involved in the exclusive competencies of the Abkhazian Autonomous Republic and the limitation of the business of its government except for the cases that go against the constitution regarding national security and common national interests. The decisions of both parties can be annulled by the constitutional court with the motive of non-constitutionalism.

Together with the involvement of members of the federation in the business of the government's federalism concept related highest body, it is important to uphold the principle of independent from the central government organization and functionality by the members of the federation. These two principles logically condition that between these two independent from each other levels-federation's government and federation subjects- the function of resolving conflicts and the control of business must be executed by an independent arbiter. Such a body is the constitutional court.

9. The established constitutional design is eternal, and it has double protection from all of the future revisions: a) the constitution names the established state organization as eternal and continuous. The legislative authority is connected with the constitutional organization; b) it is not permitted to annul the Abkhazian Autonomous Republic, or the change of its territory and other changes.

10. The Georgian Constitutional Court three judges are elected by the parliament of the Abkhazian Autonomous Republic. To the Georgian Constitutional Court belongs the exclusive right and authority to resolve any conflict in relation with the constitution between the central government and the government of the Abkhazian Autonomous Republic (disregarding if the Abkhazian Autonomous Republic's constitution or law corresponds with the constitution or not), and also regarding the two parties' competencies.

11. Foreign relations. The general principles of international law and the norms ratified by the Georgian parliament are indivisible parts of the Abkhazian Autonomous Republic's legislation. It is obligated to provide necessary support for the execution of international obligations of the Georgian government.

Abkhazian Autonomous Republic is authorized with the consent of the Georgian parliament to make agreements with other states and international organizations on the subjects that are in the latter's exclusive competency, which correspond to the sovereignty of the Georgian State and territorial wholeness. The Georgian parliament is authorized to determine through law that some such agreements do not require such consent.

12. Citizenship.

6.1. Separation of Competencies between the Central Government and the Government of the Abkhazian Autonomous Republic

When we talk about the separation of competencies between the central government and autonomous units, first of all must be separated the special competency of the central government. The execution of these matters is authorized only by the Federal government. The involvement of other government subjects in the above-mentioned authority is the violation of the constitution.

II. Special competency of the Abkhazian Autonomous Republic. It has been taken out from the jurisdiction of the central government and the right for its execution belongs exclusively to the Abkhazian Autonomous Republic.

III. Competitive, i.e. common competency. The authorities included in the latter do not belong exclusively to any side, it execution can be carried out by the territorial units only in case, where the federal government has not regulated this issue. The members of the federation execute this competency until the central government issues corresponding norms regarding the above competency. We think that to the common competencies should belong all those rights, for which the central government is authorized to issue legislative norms, and the executive and administration matters is included in the competency of the Federation members. Also those rights, for the execution of which the government's one subjects needs the consent of the government's other subject.

IV. Remaining competencies. Those rights, which are not included in the central government's or federation members' special competencies and which were not included in the competitive competencies, are considered as remaining competencies. It is essential for federalism that the competency of the federal government must be complacently determined, and the remaining competencies must belong to the subjects of the Federation.

6.2. Six Main Legal Principles which Ensure the Wholeness of the State

1. Prohibition of secession;
2. Prohibition of change of federation subject status unilaterally;
3. On the whole territory of the federation free movement of human beings, information and objects. There is no customs service within the federation and there are no state borders;
4. The supremacy of the federal legislation. This general rule of prioritization of common federal legislation has been recognized in all federal states, and according to the latter if some law of the federation subject surpassed its authority and is in opposition with the federal constitution, or other legislative norm (which is assessed by the constitutional court independently from both sides), the advantage goes to the Federal law, and the federation subject law in the portion where it comes into opposition with the federal law becomes passive. Any norm of the Federal legislation hierarchy has advantage over federation subjects' legislation. The decree issued on the basis of the Federal Legislation has more power than the federation member's constitutional norm;
5. The unity of state organization's foundations. According to the principle of subordination, the federation subjects' constitutions must be in conformity with the Federation State constitutional model. The federation subjects form must be the same as the general principles of the federation state political organization, such as are legal state, republican governance, democracy, and social state.

Giorgi Amiranashvili*

Some Characteristics of Formal Requirements for a Legal Transaction in American Law**

The main features of the American regulation of form of transaction are given in the article, providing the opportunity to learn about the experience of legal system, different from continental Europe, in this area. The following issues are discussed in the work: historical and contemporary understanding of formalism; functions of form established by the law and agreed upon by the parties; the Statute of Frauds (1677) as the important regulatory Act of this field; and finally, original historical form of Deed and current functional purpose.

Key Words: *form of transaction, function of the form, the Statute of frauds, deed.*

1. Introduction

Establishment of market economy in Georgia has facilitated the development of production and trade, as well as economic convergence of the country with other states, among them, with the United States of America. The "Treaty between the Government of the United States of America and the Government of the Republic of Georgia concerning the Encouragement and Reciprocal Protection of Investment", dated 7th March, 1994, ratified by the Resolution of 11th December, 1996 of the Parliament of Georgia, represents important contributing condition for strengthening the economic relationships between these two countries.[1] This document was preceded by the agreement of 27th June, 1992 "on Promotion of Investments between the Government of the Republic of Georgia and the Government of the USA". In addition to the above mentioned, later, in particular, on 20th June, 2007, the Framework Agreement "between Georgia and the USA on Trade and Investments" was signed. At the formation stage of the mentioned above relationship it was already discussed that knowledge of the legal norms, regulating the trade and business in these two countries, should have been given the great importance.[2]

In Georgia, in 1990-ies, as compared with the law of continental Europe, one of the main reasons for lower level of study of common law was the fact that Georgia, during the decades, belonged to the socialistic legal system and there was no interest towards the common law. And then, the situation has completely changed. In the process of reformation of the Georgian law, the norms were being introduced from the continental Europe, as well as from common law, raising the issue of study and research of very interesting, but less known for Georgia by that time, common law system.[3]

The Commission, working on the drafting of the Civil Code of Georgia, has not demonstrated particular interest towards the Anglo-American law.[4] Probably, the reason for the above attitude was the fact

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1 *Liluashvili G.,* Sale According to Uniform Commercial Code of the US, Journal "Samartali", №11-12, 1997, 31 (in Georgian).

2 Ibid, 31.

3 Ibid, 32.

4 *Zoidze B.,* The Influence of Anglo-American Common Law on the Georgian Civil Code, Journal "Georgian Law Review", 1999, 14-15 (in Georgian).

that societies of transition period of post-soviet space were not offered to take the Anglo-Saxon model, as far as the precision and compactness of expression of obligations was considered as necessary for them, in accordance with the traditions of continental Europe.[5] It should be also noted that the Greco-Roman law,[6] which is the basis of modern European law, [7] has significantly influenced the old Georgian law.

Nevertheless, at the initial stage of reform, there was some discussion about compatibility of Georgian law to the common law.[8] For example, in general part of Civil Code, the footprints of common law are less observed, however, certain influence on the transactions is still noticeable, as the Commission, in the process of working, was also getting familiar with the provisions effective in the common law. [9]

The purpose of the present work is to review the main features of Anglo-American legal regulation of form of transaction, representing a novelty as in Georgian sources the above issue is mainly reviewed on the basis of German law, which, undoubtedly, makes it interesting, to study the practices of legal system different from the system of continental Europe. Moreover, during recent years, reception of separate legal institutions or norms, characteristic for space of family of common law, in Georgian legislation can be observed.

2. Formal and Informal Contracts

Historically, the formalism meant the administration of oath, written form, seal and dependence on other forms and rituals for concluding the agreements, or for the demonstration of their existence. In modern times, this type of formalism was confronted by the general theory of agreement, which is independent of the form; as, according to the common law, the forms, which usually are recognized for demonstration of the existence of agreement, are - seal (or dead) and consideration; it is not surprising for some authors that in half of the states of America the need for sealed agreement is annulled.[10] Nevertheless, certain formalities accompany the fulfillment of many agreements.[11]

By requirements for the form the certain standards are set, which must be complied by the agreements, in order to be legally valid and/or enforceable. Based on the above, there can be a requirement for the agreement to be in a written form, concluded by means of sealed document, registered at the state bodies, hand-written and etc.[12]

The agreements are classified in different ways, based on this or that purpose. One of the bases for differentiating formal and informal agreements is the method of formation of agreement. Three types of formal agreements are still relevant: (1) contracts under seal;[13] (2) recognizances[14] and (3) negotiable in-

[5] *Knieper R.*, Methods of Codification and Concepts of the Transitory Period Societies (Regarding the Case that of Georgia), in: *Jorbenadze S., Knieper R.*, *Chanturia L.* (eds.), The Legal Reform in Georgia, Materials of International Conference Held in Tbilisi on May 23-25 in 1994, Tbilisi, 1994, 191 (in Georgian).

[6] *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 36 (in Georgian).

[7] Ibid.

[8] *Zoidze B.,* The Influence of Anglo-American Common Law on the Georgian Civil Code, Journal "Georgian Law Review", 1999, 14 (in Georgian).

[9] Ibid, 17-18.

[10] *Coote B.*, Contract as Assumption: Essays on a Theme, Hart Publishing, Oxford, 2010, 29-30.

[11] *Hunter H.O., Rowley K.A.*, Modern Law of Contracts, Vol. 1, Rev. ed., West Publishing, Eagan, 2011, 306-307.

[12] *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 9.

[13] In many jurisdictions, the seal has lost all or some of its effect: *Perillo J.M.*, Contracts, 7th ed., West Academic Publishing, St. Paul, 2014, 19. The contract under seal has been executed based on the written order of the court on existing "covenant" at common law: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 35.

[14] A recognizance takes place when a person, who undertakes an obligation before the court, recognizes the responsibility to implement certain payment, if the certain condition is not fulfilled. In federal courts they are known as "personal ap-

struments[15] and letters of credit.[16] All other types of agreements are considered as informal and are enforceable not by the form of transaction, but based on its contents. Such agreements were also referred to as "simple" and "parol" agreements.[17]

In general, in the law, there are two ways recognized, by which the promise[18] can become legally binding. The formal method makes the promise enforceable simply due to the fact that while giving a promise the certain formalities are observed. Informal method depends on existence of certain elements in promise, such as, for example, intention of interexchange of rights, which, usually, indicates that binding promises were given.[19]

The antithesis of formal agreement is informal agreement.[20] The informal agreement can be in writing, or based on any other formality, or, without it, if the laws have not changed the rules of the Common law. The Statute of Frauds requires confirmation of certain types of informal agreements in writing or by electronic record, in order to be enforceable. The informal agreements are typical agreements, which are well known to the public. The formal agreement, such as sealed agreement, has become rare, since the times when seal no longer represented the efficient mechanism for granting the legal power.[21]

The traditional separation between the "formal" and "informal" agreements was based upon the fact, whether in the process of drafting agreement, the certain ritual formalities were observed or not, such as melted wax imprint on the written agreement, with the imagination, which is known as a "seal". In this regard, the term "formal agreement" was applied for indication to the agreement form and played a role of key element in its enforcement. Its modern examples are negotiable instruments and letters of credit, which are regulated under the special provisions of Uniform Commercial Code. In this context, all other agreements were considered as "informal agreements", notwithstanding the fact whether it was written, or oral, or simple, or complex.[22]

At present, the formal agreement is the agreement, which is diligently agreed and expressed (or "memorialized") in final formal written document. The informal agreement is the agreement, which, without prior intention, may be drawn up without disturbance by any type written form. The differences in degrees

pearance bonds": *Perillo J.M.*, Contracts, 7th ed., West Academic Publishing, St. Paul, 2014, 19. The simple form of the recognizance was voluntary bringing of the debtor to the court, in order to recognize (*recognoscere*), that he/she owed certain amount to the creditor. After that the recognition was being recorded to the protocol of court meeting, which, essentially, represented the court decision, which was repealing the creditor's claim on agreement or debt: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 35-36.

15 Negotiable documents are accepted with special inscription, due to the form, in which they are created. The ordinary printed check contains "words of negotiability" – "Pay to the order of...". Other documents may be "payable to bearer". Such formalities make such documents as freely transferable, when they are transferred to the "holder in due course", which takes the free document from most of the defensive measures, if certain conditions are met: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 36.

16 The transferrable documents and letters of credit are discussed in specialized works. They are regulated by the articles 3 and 5 of the Uniform Commercial Code: *Perillo J.M.*, Contracts, 7th ed., West Academic Publishing, St. Paul, 2014, 19. Another author, who separately distinguishes the transferable documents and letters of credit, indicates, that out of formal agreements, known for early law, only four is significant for the modern lawyer: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 35.

17 *Perillo J.M.*, Contracts, 7th ed., West Academic Publishing, St. Paul, 2014, 19.

18 According to the definition existing in the scientific literature, the promise is a statement, by which one person undertakes the certain future fulfillment, or an obligation to refrain from the fulfillment, in favor of another person: *Hogg M.,* Promises and Contract Law: Comparative Perspectives, Cambridge University Press, Cambridge, 2011, 6.

19 *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 35.

20 Ibid, 36. Restatement 2d § 6 comment a (1973) refers that the terms "formal" and "informal" are annulled: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 36.

21 *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 36.

22 *Ferriell J.*, Understanding Contracts, 3rd ed., LexisNexis, New Providence, 2014, 7.

of formality do not affect the enforcement of agreement, although, they can affect the admissibility of those evidences of promises, which were never recorded in any final written version of agreement between parties.[23]

3. Functions of the Form of Transaction

The requirements for the form established by the law have several purposes. Some of them serve all the tasks given below, but others serve only one or few of them. The purpose of formal document is fulfillment of evidentiary (providing evidence) function. For example, the written or notarized, sealed document of agreement performs the function of reliable documentary evidence for a transaction and its terms and conditions and, thereby, contributes to the resolution of the disputed case at the court. The documents, drawn up in compliance with the requirements of the form, ensure that the registrars of public registry to have obvious reasons for their registration. The formal document serves the purpose to provide clear message to third parties. The requirements for the form perform the cautionary function, in order to avoid the conclusion of transaction hastily and insufficient awareness. The formal nature of document shall remind the parties its significance and warn them on possible negative consequences, in order the party, before the conclusion of the agreement in an appropriate manner, carefully weighs its conditions. According to the requirements for the form, the difference between nonobligatory negotiation and agreement and the obligatory agreement becomes clear, by means of "channeling" (providing of seriousness criteria) the latter to certain form. The requirements for the form become more and more established for the purpose of protection of relatively weak parties, for example, consumers, tenants, employees. The written agreement shall contain all the details of agreement and shall provide consumers with information about their rights. In any case, the requirements for the form serve the function of prevention of using the oral agreement for fraud purposes.[24]

By the requirements for the form considered under the agreement, the parties can achieve the same goals, even when the legislator does not consider the general requirements for the form as necessary for this type of transaction.[25] In particular, the agreed form may entail the constitutional or declarative standard. In case of constitutional goal, the agreement is void, if the requirements for the form are not met. In case of declarative goal, the requirements existing towards the form do not affect the signing of legally binding agreement. In this case, the parties are authorized to request observance of formalities, with the objective to provide evidences, which have retroactive effect over the agreement.[26]

In ancient common law a lot had been done for separation of sealed and unsealed instruments, for the purpose to achieve the order in relationships. On the background of last two centuries, there is unequivocal tendency of simplification of the requirements for the form in common law, where the form is only used for the form. The Contract Law is clear example of it; the emphasis on support of autonomy of parties has embodied the values, in which, as compared with the form, the content is given the preference. In American Law the refusal of form is viewed with doubts; in particular, in the context of activities implemented in business field. The testament and sealed document must still be concluded officially; in case of testament, the requirements to the form, in twentieth century, were mostly tougher compared with the requirement

[23] *Ferriell J.*, Understanding Contracts, 3rd ed., LexisNexis, New Providence, 2014, 7-8.

[24] *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 9-10.

[25] Ibid, 10.

[26] Ibid, 13-14.

valid century earlier; the functional formalities have been maintained in the requirements for the form for American sealed documents; but the ritual and old-fashioned formalities have been reduced. The ritual was abandoned in American Law. According to the current opinion, for the purpose of facilitation of economic growth, the law shall avoid the excessive rituals. The requirements for the form, which do not have any function, are only misleading for defining the revealing of will of parties in terms of rationalization or regulation of transactions; in addition, it conditions unforeseen risks for transactions of economic nature. Formalism itself is unprofitable for business.[27]

Researchers of common law consider exceptional the simplification of form for the economic system, for which the evaluation and consideration of business risk is difficult. However, as noted, the "form" itself had a business function. According to the opinion of some authors, nothing can be much formal than a negotiable instrument, and its form was created not regardless the desire of traders, but taking it into consideration.[28]

One more example of market-oriented formality is the land registration act. The registration of land ownership agreement and sealed document has facilitated maintaining of safety of transaction and simplification of operations in the land market. The registration system has introduced the order in chaos of requirements and interests, by which it performed a vital function. The requirements for the form, unclear for the popular business, were excluded from the law. However, the registration was still admissible. The content of generally accepted thesis was that prior claims in time bore prior rights; "staking a claim" represented a kind of formality itself. The visible records on their requirements on land and country's wealth were needed and desirable for people. Earlier records on securing the demand could be used for balancing the conflicting interests; they were used as the source of information in market relationship, which were defining the value of certain properties.[29]

In addition, the formality represented the way of enforcement of public policy. This purpose was significantly growing over the years, not for supporting the market, but as the tool for its management.[30]

And finally, some authors discuss the option of the most general function, such as equipping of parties with benefit-making powers, by the actions of each other. For example, the aunt draws up the sealed document, by which it gives the promise that transfers 50,000 Pound Sterling to the nephew, with regard to the occasion of twenty-first birthday. Based on the above, the nephew borrows money from the bank, to pay the university tuition fees. The aunt is a person of resticted and variable altruism. If she gives informal promise, probably, she would change her mind to fulfill it, before the nephew reached twenty-one years of age; because she knows that nephew is able to fulfill its promise by powers of law, she fulfills the promise in time and nephew graduates from the university without a large debt. As it is noted, the sealed document has the function, which it performed in this example, in particular, to entitle the recipient of promise to benefit from the promise of other person, which would be quite unreliable in case of fulfillment of informal promise.[31]

4. The Role of the Statute of Frauds

Most important example of apparent persistence on formality was the Statute of Frauds, which was adopted in 1677 in England. It demonstrated particularly great vitality in the United States. There is an assumption that adoption of the law does not reflect the clearly deliberate policy; the law was a part of general

[27] *Friedman L.M.*, Contract Law in America: A Social and Economic Case Study, Quid Pro Books, New Orleans, 2011, 72.
[28] Ibid, 73.
[29] Ibid.
[30] Ibid.
[31] *Black O.*, Agreements: A Philosophical and Legal Study, Cambridge University Press, Cambridge, 2012, 240.

legal tradition and, according to the viewpoint, its non-adoption would require the courage. Essentially, it was considered under the law that certain type of agreements could not be enforced if not drawn up in writing and not signed by the person, who wished to rely on the transaction. During the majority of time-period of law existence, the courts had ruthless attitude towards it. Partially, the fact that law is not a deliberate legislative outcome was named as a reason for the above. The Statute of Frauds is not characterized with accuracy of formalities and regular nature. It represented just one of the "doctrines", which was linked to form of agreements of certain type. As a result, the history about Statute of Frauds is not identified with the history of requirements to the form in contract law; it is characterized by a close relationship with the doctrine, such as consideration, which, also, has been developed from formalistic basics. The abundance of rules and exceptions, created by the law, represents the "frightful source of litigation", as it was noted by the court in 1855. According to some of the authors' opinion, the phrase is exaggerated; however, this law has increased the number of contract cases in the court.[32]

The US and English laws were traditionally applying the Statute of Frauds. In England, all the provisions of Statute of Frauds, related to real property and promises to act as a surety, were annulled in 1954. Therefore, among other jurisdictions, England is considered as the one, not having the requirement for all types of general forms[33]. However, in addition to the Statute of Frauds, there are many other laws, establishing the requirements for the form for specific type of agreements. The outcomes of insecurity vary between the full or partial invalidity of agreement, unenforceable by both parties or enforceable only for one party, but only on the basis of court decision.[34]

In the United States the scope of application of Statute of Frauds is still quite broad. All the states of the United States have enacted certain rules of Statute of Frauds. This legislative act might have different scopes, but most of them includes the agreements listed in the §110 of Restatement (Second) of Contracts: agreements of executors or administrators; suretyship contracts; marriage contracts; contracts for the sale of an interest in land; contracts that are not to be performed within one year from the making thereof. In addition, many states established requirements for the form for other types of agreements.[35]

There are some exceptions from requirements for written agreement (memorandum) established by the law. It is considered as the critically important that the agreement is enforceable, despite non-compliance with the requirements of Statute of Frauds, if it is fulfilled partially or fully. In general, non-compliance with the Statute of Frauds makes the agreement unenforceable, but not void.[36] However, there are many exceptions, which allow the enforcement or claims, with economically similar outcomes, or result in the compensation of losses, which had been caused due to non-compliance.[37]

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[32] *Friedman L.M.*, Contract Law in America: A Social and Economic Case Study, Quid Pro Books, New Orleans, 2011, 74.

[33] "...the general rule of English law is that the parties to a contract may make their contract in whatever form they wish and may choose whether or not they will record all or some of its terms in a permanent form": Law Comm Report 1986, para. 2.37, 22, Cited: *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 10.

[34] *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 10.

[35] Ibid, 11.

[36] The courts use the Statute of Frauds only in case if the party will appeal to it: *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 12.

[37] *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 12.

5. The essence of the Deed

The agreement is not a contract, if the parties do not intend to originate the legal relationships. This condition includes variety of cases, among them, informal, social or domestic agreements; the general rule is that agreement can be concluded free of form[38], but in some cases, the agreement, which does not comply with certain requirements for the form, is not an agreement. These exceptions are now covered by the legislation, which considers that some of agreements, for example, the lease for more than three years, must be made by dead.[39]

The history of the deed emerged from the tradition that courts never looked beyond the sealed document. In 1989 the requirement for actual seal was annulled and in its place the parliament declared that a deed should be evaluated only in essence and shall carry attested signature.[40]

The "seal" had its basis in the ceremony of real seal, by making a wax impression with a ring or symbol affixed to a formally executed document. If the promise was given in written form and sealed and was transferred to promise recipient, it was enforceable, regardless, whether any consideration took place or not. Before 19th century most of the wealth was linked to the land. At this time, giving of promise using the seal (an impression was made with a metal seal on wax) was widely spread. The seal was declared even for cases without consideration in place. With the time, just fixing of the word "seal" on the document, or even its availability on pre-printed form, became regular. Many jurisdictions declined use of seals. According to the Uniform Commercial Code necessity of seal was cancelled for transactions related to sale of goods.[41]

The parties shake hands and sign the documents. Often the notary or other verifying officer confirms the signatures. The paper is decorated with ribbons or sealing wax. Usually, there is the inscription "*L.S.*" (an abbreviation of the Latin term "*locus sigilli*", or "the place of the seal") below each signature. The ceremony of signing of agreement is accompanied by these formalities and it emphasizes the fact of transfer of property, in order to give more importance to the transaction, in social terms. Based on clear utilitarian understanding, they draw a line between the negotiation and transaction. However, a legally enforceable agreement can be drawn up without any signing and exchange of documents. Some formality bear not only historical but bit more meaning as well. There is a position that putting a ribbon around a deed does not add anything substantive to it, however, it can meet the aesthetic urge. Other formalities may be more important and slight negligence can turn into a real difficulty, if parties face further disagreement. Even though the agreement can be concluded via the phone, the rule of oral evidence[42] (Parol Evidence Rule) can make it difficult to verify terms and conditions of the transaction. Shaking of hands may seem as sufficient token of the agreement of parties, but it may not be so if the Statute of Frauds is applied.[43]

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[38] In England, the case is of precedential importance – *Beckham v. Drake*. *Zweigert & Kötz* speak about general principles of informality in modern legal systems, who found the tracks of weakening and strengthening of requirements towards the form: *Black O.*, Agreements: A Philosophical and Legal Study, Cambridge University Press, Cambridge, 2012, 227.

[39] *Black O.*, Agreements: A Philosophical and Legal Study, Cambridge University Press, Cambridge, 2012, 227. According to the opinion of some authors, the warning effect of the form is reflected in the fact that the person may hesitate longer, until a deed is duly signed, than it would have taken place prior to the issuance of an oral promise: *Treitel G.*, The Law of Contract, 11th ed., Sweet & Maxwell, London, 2003, 176.

[40] *Samuel G.*, Law of Obligations, Edward Elgar Publishing Limited, Cheltenham, 2010, 116.

[41] *Russell I.S., Bucholtz B.K.*, Mastering Contract Law, Carolina Academic Press, Durham, 2011, 183.

[42] This method of interpretation of the contract is referred in Georgian sources also as "the rule of oral testimony": *Ioseliani N.,* Interpretation of Agreement, Journal "Justice", 2007, №3, 108 (in Georgian).

[43] *Hunter H.O., Rowley K.A.*, Modern Law of Contracts, Vol. 1, Rev. ed., West Publishing, Eagan, 2011, 307.

6. Conclusion

The discussion developed in the work gives the opportunity to make certain conclusions with regard to some features of Anglo-American legal regulation on the form of transaction.

Historical and modern understanding of formalism radically differ, however, certain formalities of implementation of agreement is not declined at least, which is required for their legal power or enforceability. In addition, the basis for traditional and current separation of formal and informal agreements also differs.

The form prescribed by law has a number of objectives, among them, the classical, in particular, evidentiary, cautionary, clarity and information functions, as well as other specific objectives.

In the period of existence of Statute of Frauds (1677) due to prominent formalistic character, it received strong criticism from courts, as well as from scientists, however, it confirmed the capability for existence. Moreover, some exceptions established under the Statute out of legal consequences of non-compliance with formal requirements enjoy the special appreciation.

And finally, although the deed loses original historic appearance, it still maintains functional purpose among the formal agreements.

Ana Tokhadze*

Legislative Shortfall of Investor's Protection in the Process of Involuntary "Typological Death" of Accountable Enterprise from the Exchange Stock

Scholarly article aims to give an objective coverage of involuntary deregistration of accountable corporations from the stock exchange, causal study of (in)voluntary delisting according to the Georgian regulation, grouping the types of deregistration. Simultaneously, stock price mitigation and small investor's economic interest protection along with the managerial liability are also considered. Due to the unsustainable level of Georgian stock market development, article partially happens to be descriptive; however, with the aim of comparison, foreign regulations in conjunction with the judicial practice analysis are also represented.

Key Words: *accountable corporation, typological conversion, (in)direct voluntary delisting, compulsory deregistration, investor's economic interest, protection of property/financial rights.*

1. Introduction

„One creats laws, the others execute them".[1] In conservative definition of modern corporate law, the area of research of the field, regulating the (entrepreneurial) ordonnance and internal organizational relationships, is quite wide at present.[2] Interest towards the corporate-legal institutions with the objective to identify the links between the corporate law and economic or social sciences or due to already existing relationships between the fields, is increasing. The relationship between the corporate and capital market laws is also interesting, as it is required for the dominant nature of social-economic status of the corporations established in the practical world.

The business subject from its establishment to its organizational "life" at the capital market under the legislative or listing regulations goes through the heterogenous, complex stages of evolution. These stages of development of the economic actor, in the best case, are achieved through the rational management policy oriented towards the capital market. Compliance with the law shall improve the company's value[3] and reduce (in)direct administrative costs.[4] According to the modern tendency, regulation of the capital market is directed towards the reasonable regulation. The above is necessary for the development of financial markets, for the mobilization of long-term investment resources via various financial instruments, which under the Georgian reality would be the alternative to the financing via the banking sector.

With the rising market economy, the attention of the regulating bodies has been driven towards the eradication of problems related to the institutional organization of the capital market, especially in the direction of creation of the trustworthy investment climate. Present work, via the causal study of "typological

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1 *Tocqueville A.,* Democracy in America (trans. *Schleifer J.T., Nolla E.*), 2010, US, 278.

2 *Javakhishvili Iv.,* Works in Twelve Volumes, Vol. VII, Tbilisi, 1984, 235 (in Georgian).

3 On the company value, *Makharoblishvili G.,* General Analysis of Corporate Management, Tbilisi, 2015, 77-90 (in Georgian).

4 *Dines R.,* Does Delaware Law Improve Firm Value? Journal of Financial Economics, Vol. 2001, 526-528.

death" of accountable enterprise – delisting process regulated under the national law, relates to the grouping of its types and protection of proprietary rights of investors. The research is primarily concentrated on the involuntary delisting, for which the issues of reduction of share value as well as responsibility of corporation leadership are relevant. Therefore, first chapter of the work relates to the essence of typological conversion[5] of the enterprise; chapter two studies the dichotomy in two main segments and classification of sub-types; as the research is focused on delisting, protection of economic interests of minority investors is reviewed in relation to the above.

Instable indicators for the development of Georgian Stock Exchange does not provide for the empiric investigation of the topic. Based on the above circumstances, work is partially descriptive; however, for the purpose of comparison, the foreign regulations valid for the topic under research and analysis of court practices are provided in the work.

2. Essence of Typological Changes of Enterprise

Anatomic (organizational-structural) or functional differences between the organizational-legal forms create the explicit differentiation at the legislative as well as law enforcement stages. The legislative deregulation conditioned by the less developed economic conditions, transforms the demarcation boundary of business subjects into the pale contour. This process is demonstrated more in the practical reality and makes the theoretical need for the identification of differences between the business subject questionable. However, normative disposition of organizational-legal forms creates the logical circle, organizational concept of which, one could say, conforms with the stages of society's evolution process (for example, development from the individual entrepreneur to the joint stock company). National organizational management is demonstrated via the establishment of the company, gradual development of the company and achievement of the culmination point – effective operation at the capital market. The above, on one hand, ensures the material wellbeing for all stakeholders (partners as well as third, related parties), and, on the other hand, confirms the qualified administration performed by the management. Logical progression of the business subject[6] is continued by the accumulation of tangible resources at the stock market. Trading at the capital market requires organizational changes (and not only organizational)[7], which is the basis for the typological classification of corporation in "transparent" and "public" manner[8]. Change of reorganizational rank in the essence of deduc-

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[5] *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies Based on the Corporate-legal Actions (acquisition, merger), Tbilisi, 2014, 211, <http://press.tsu.ge/data/image_db_innova/disertacie-bi_samartali/giorgi_maxaroblishvili.pdf>, [25.05.2016] (in Georgian). As in the quoted work "typological conversion" is used in the terminological sense, the variation of above works in the research follow the logical-contents line of the presented argumentation.

[6] Joint Stock Company, as the form designed for the implementation of large scale entrepreneurial activities provided with the relevant capital, has capability to publicly trade with stocks, *Burduli I.,* Fundamentals of Joint Stock Law, Vol. I, Tbilisi, 2010, 109-127; *Makharoblishvili G.,* General Analysis of Corporate Management, Tbilisi, 2015, 31-35, 39-46 (in Georgian). The entrepreneurial company is named as the most acceptable form for the attraction of wealth via the capital market*, Schutz M., Wasmeier O.,* The Law of Business Organizations: A Concise Overview of German Corporate Law, Berlin, 2012, 70-71. According to the article 9, law of Georgia on the "Stock market", issuer of stocks for trade is defined as the accountable enterprise; however, mentioned article does not include indication on the relevant organizational-legal form. At present at the stock exchange of Georgia, for example, the company registered in the form of LTD is freely admitted: Nikora Trader LTD, which trades with B category listed stocks, <http://www.gse.ge/Stocks_G/Issues.htm>, [25.05.2016]. Topic is focused on only one organizational-legal form – Joint Stock Company.

[7] *Judge W., Zattoni A.,* Corporate Governance and Initial Public Offering, An International Perspective, New York, 2012, 9-10.

[8] *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies based on the Corporate-legal Actions (acquisition, merger), Tbilisi, 2014, 31-38 (in Georgian).

tive or inductive typological conversion[9], is demonstrated via the entering the capital market. Corporation transformation in rank terms is equalized with the change to the fundamental category, as the issues related to the protection of proprietary rights of minority investors is distinguished with the particular sensitivity;[10] Accordingly, it is subject to the norms regulating the implementation of fundamental changes.

Chapter below will be devoted to the general comparison of public corporation and private (closed type) corporations; the key motives for *going public* of the private company and *going private of* accountable company will be also reviewed.

2.1. Going Public of the Private Accountable Company

One of the basis for the contents-terminology classification of public and private companies, together with the organizational structure is the mechanism for capital attraction. In case of public corporation, the above is achieved via the placement of stocks at the stock market and trading to the wide public.[11] One of the characteristics of the accountable company is lawful liability on the submission of reports to the stakeholders, stock and stock supervision body and information transparency.[12] Mandatory or voluntary disclosure of information is important not only during the period of operating at the market,[13] but also at the moment of admission to the stock market.[14] The latter ensures the efficiency of capital market, which is demonstrated via the constructive egalitarianism[15] and rational planning of investment policy, wide opportunities for correct investment decisions.[16] Trading with stocks[17] via the primary public offering is subject to the special normative regulations.[18] The "strictness" of two-stage – general-legislative and stock market – regulation

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[9] *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies based on the Corporate-legal Actions (acquisition, merger), Tbilisi, 2014, 207-215.

[10] Corporate transformation of fundamental category also implies: issue of additional shares, reorganization, distribution/ sales of tangible resources, reincorporation, delisting, voluntary liquidation, *Kraakman R., Armour J., Davies P., Enriques L., Hansmann H., Hertig G., Hopt K., Kanda H., Rock E.,* The Anatomy of Corporate Law, 2nd ed., 183-224. *Thompson R. B.,* Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue, Law and Contemporary Problems, Vol. 62, №3, 1999, 217.

[11] *Sims V.,* English Law and Terminology, Aufl.3, Germany, 2010, 119-120. *Schulz M., Wasmeier O.,* The Law of Business Organizations, A Concise Overview of German Corporate Law, New York, 2012, 53.

[12] *Haas J. J.,* Corporate Finance in the Nutshell, 2nd ed., 2011, US, 1-14. *Palmiter A. R.,* Corporations, 7th ed., US, 2012, 432-434.

[13] *Bourne N.,* Principles of Company Law, 3rd ed., GB, 1998, 37-40; *Ladenfeld S. M., Moore A. B., Fischer J. M.,* The Public Company Handbook: A Corporate Governance and Disclosure Guide for Directors and Executives, 3rd ed., New York, 2006, 45-46.

[14] At the stage of making investment decision information included in the issuer's prospect is important, such information is one of the ways for the investor to calculate the ratio of risk and return, *Steinberg M. I.,* Understanding Securities Law, 5th ed., US, 2009, 115-117, *Pettet B.,* Company Law, 2nd ed., GB, 2005, 364; *Bragg S.,* Running a Public Company, From IPO to SEC Reporting, US, 2009 14-18.

[15] Considering the provision of information to the investors in compliance with the principle of the equality of information, *Pettet B.,* Company Law, 2nd ed., GB, 2005, 323. On the contrary, destructive egalitarianism considers partial or unequal disclosure of information.

[16] According to the efficient capital market theory, share value varies according to the availability and changes to the information beyond it; accordingly changes to information impacts the market value of the share, *Haas J. J.,* Corporate Finance in the Nutshell, 2nd ed., 2011, US, 147-151; *Pettet B.,* Company Law, 2nd ed., GB, 2005, 325.

[17] *Hamilton R., Freer R.,* The Law of Corporations in the Nutshell, US, 2011, 290; *Schneeman A.,* The Law of Corporations and other Business Organizations, US, 2010, 432-437; *Bragg S.,* Running a Public Company, From IPO to SEC Reporting, US, 2009, 3-18.

[18] *Haas J. J.,* Corporate Finance in the Nutshell, 2nd ed., US, 2011, 2. With the purpose to avoid speculation with stocks at the market, "Blue sky law" is based on the initiative of the Supreme Court of USA, which in 1929 year conditioned the financial crisis known as "Great depression", *Cox J. D., Hillman R. W., Langevoort D. C.,* Securities Regulation Cases and Materials, 6th ed., US, 2009, 3-10. *Meiners R. E., Ringleb Al. H., Edwards F. L.,* The Legal Environment of Business, 12th ed., US, 2012, 490-491, *Hamilton R., Freer R.,* The Law of Corporations in the Nutshell, US, 2011, 239-265.

is dictated by the need to protect interests of private investors, as well as the need to efficiently manage the macro-economic processes. As an example, for the above, it is sufficient to mention the wide legislative reforms implemented following the 2008-2010 financial crisis.

Generally[19], authorization of accountable company at the stock exchange is implemented in compliance with the general-legislative or listing requirements, setting requirements for internal organizational readiness,[20] mobilization of tangible resources, relevant costs.[21] Hence, not all organizational-legal forms enjoy the possibility for financing through the capital market.[22] The latter is based on the normative will of the legislator as well as the practical capability to operate at the capital market.

Eclectics of positive and negative aspects of transforming the corporation into the accountable enterprise: a) Positive aspects: reduction in costs related to the keeping the capital; simple transfer of shares and increasing liquidity; expansion of corporation via acquisition-merger transactions; positive reputation.[23] b) negative aspects: time and costs required for placing the shares; transparency ("living in the crystal house") – obligation to maintain intermediary and annual reports; danger for hostile takeover; escalation of problem related to agent-principal relationship – problem of information asymmetry; costs related to the compliance with general-legislative or listing rules; danger for the reputation due to the low liquidity; potential increase of shareholders' claims.[24]

Reality established by the national economic history is distinguished with the diverse "anomaly" cases of organizational-legislative forms, particularly in the direction of functional-content wise separation of capital and solidarity entrepreneurial subjects. Deficit of good corporate practices causes devaluation of capital market, which in certain cases encourages the "expansive nature" of the banking sector.

2.2. Transformation of Corporation into Private Company (Going Private[25])

Private company is distinguished with small number of shareholders and concentrated capital structure, which often is not separated from the control (management)[26] and such a "monolith structure" establishes

[19] As an exception, one can name such placement of stock (for example: stocks of educational, religious organization, state), which is released from the compliance with some stock exchange or legislative requirements, implemented by the stock regulator or based on the contractual agreement, *Steinberg M. I.,* Understanding Securities Law, 5th ed., US, 2009, 39.

[20] According to listing requirements of some stock exchanges, it is mandatory for the corporation to create various committees (for example: *risk management committee; audit committee).* According to "*ALI*" corporate management principles, the audit committee shall consist of at least three non-stakeholder members, *Marcey R. J.,* Corporate Governance, New Jersey, 2011, 187; *Bainbridge M.S.,* The New Corporate Governance in Theory and Practice, New York, 2008, 160-161; *Chanturia L.,* Corporate Management and Responsibility of the Management in the Corporate Law, Tbilisi, 2006, 116-117, 123, 135, 175 (in Georgian).

[21] Cost of registration at the stock exchange, initial installment for the initial admission to the stock listing, quarterly payments, *Bragg S.,* Running a Public Company, From IPO to SEC Reporting, US, 2009, 7; *Hamilton R., Freer R.,* The Law of Corporations in the Nutshell, US, 2011, 290.

[22] *Haas J. J.,* Corporate Finance in the Nutshell, 2nd ed., US, 2011, 9.

[23] Ibid, 9-11. *Hamilton R., Freer R.,* The Law of Corporations in the Nutshell, US, 2011, 236-238; *Steinberg M. I.,* Understanding Securities Law, 5th ed., US, 2009, 137-38; *Bragg S.,* Running a Public Company, From IPO to SEC Reporting, US, 2009, 3.

[24] *Haas J. J.,* Corporate Finance in the Nutshell, 2nd ed., US, 2011, 11-13. *Steinberg M. I.,* Understanding Securities Law, 5th ed., US, 2009, 39-42, 137-38.

[25] In the literature transformation of public corporation into the non-accountable company is referred to as using the different terms: going private, doing dark, deregistration, delisting. Each of them are referred to in the different contexts. Based on the objective of the article, going private, generally, due to the termination of turnover of stocks at the stock exchange implies the typological change of the company, and delisting typology is determined according to the reasons for the termination. See chapter 2 of the present article.

[26] *Makharoblishvili G.,* General Analysis of Corporate Management, Tbilisi, 2015, 68-76 (in Georgian).

the different model for the corporate management.[27][28] Due to the reduced conflict of interests, management of the private company is less risky and less costly. Unlike the public corporation, limited opportunities for the sale of shares makes the private company less attractive.[29] As the investment decision is made based on the trustworthiness of the information disclosed by the issuer, in the event of back-conversion of the public corporation, the liquidity, possibility of sales of stocks reduces.[30] Therefore, process, volume of re-purchase of shares from the company by the shareholder often becomes the subject of the specific contractual agreements (*buy-out/buy-sell agreement*).[31]

The delisting concept is presented in a wide perspective in the work; the delisting process for each individual case is managed under the subjective-objective motives, which is achieved via the voluntary decision or forced, exogenic factors and different method, strategy. In a simple definition, the above implies withdrawal of stocks from the listing.[32] However, it does not mean the full de-registration of issuer's all stocks from the stock market, in other words, automatic full de-registration of accountable company. It is possible to carry out full or partial withdrawal of one class from the listing.[33] For more clearance, it is expedient to conduct causal comparative review of methods and essence of *going private* and *going dark* of the corporation.[34] According to the presented classification, both of them belong to the voluntary delisting segment. "*Dark existence*" of delisted corporation continues with non-stock exchange trade,[35] which operates via the *"Pink Sheet"* electronic system or Over-the-Counter system.[36,37] Despite the above, non-stock exchange trade has less reliability for investors, as unlike the initial placement, the imperative requirement for infor-

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[27] In case of each corporation, management and control is achieved via the heterogenous management policy. Difference in models are determined by the characteristics of the maintenance of business activities and economic market, as well as geographic location of the country, social-economic condition or legal order, *Kraakman R., Hansmann H.,* The End of History for Corporate Law, Paper №280, Yale International Center for Finance, Paper №00-09, 2000, 2. *Makharoblishvili G.,* General Analysis of Corporate Management, Tbilisi*,* 2015, 116-122 (in Georgian).

[28] *McCahery J. A., Vermeulen P. M.,* Understanding (Un)Incorporated Business Forms, Topics in Corporate Finance, Amsterdam, 2005, 5-6; *Haas J. J.,* Corporate Finance in the Nutshell, 2nd ed., US, 2011, 15-20. *Palmiter A. R.,* Corporations, 7th ed., US, 2012, 531-535.

[29] *Baingridge St. M.,* Corporation Law and Economics, New York, 2002, 834*; Hamilton R., Freer R.,* The Law of Corporations in the Nutshell, US, 197-202.

[30] *Salzill F.,* Minority Shareholders and Empirical Evidences on Voluntary Delisting Phenomenon, Chair of Advanced Corporate Finance, 2013-2014, 24-25.

[31] *Baingridge St. M.,* Corporation Law and Economics, New York, 2002, 812.

[32] Statutes on the admission of stocks to the trade system and listing, "Stock exchange of Georgia", Paragraph 6, Section 2, Article 1.

[33] Georgian legislation refers to them as "treasury shares" and places certain restrictions to the possibility to repurchase them (up to 25% of placed shares), see paragraph 9, article 531, law of Georgia on "Entrepreneurs". The article does not discuss the possibility to sell treasury shares; the terms for the sales of shares. As for the non-target repurchase, it is ensured by the legal responsibility of management members, *Cox J. D., Hazen Th. L.,* Business Organizations Law, US, 2011, 592, 602.

[34] *Onesti T., Romano M., Favino Ch., Pieri V.,* Going Private and Going Dark Strategies, SSRN Electronic Journal, 2013, 1-2.

[35] *Martinez I., Serve St., Djama C.,* Reasons for Delisting and Consequences: A Literature Review and Research Agenda, 4. *Zetzsche D.,* Going Dark Under German Law – Towards an Efficient Regime for Regular Delisting, Center for Business and Corporate Law Research Paper Series (CBC-RPS), 2013, 3.

[36] *Mecay J., O'Hara M., Pompilio D.,* Down and Out of Stock Market: The Law and Finance of the Delisting Process, SSRN electronic Journal, 2005, 4, 13-14.

[37] The main actor of the secondary capital market is broker-dealer, allowing for the trade with the shares of private corporation. Large corporation, such as *LinkedIn, Groupon* are trading via the market, *Osovsky A.,* The Curious Case of the Secondary Market with Respect to Investor Protection, Tennessee Law Review, Vol. 82: XXX, 2014, 23, 18-26.

mation disclosure is deregulated.[38] Therefore, deregistration is not always followed by the "end of corporate life" (liquidation) of the business subject.

Transaction directed towards the back-conversion of accountable enterprise (Going Private Transaction)[39] implies the opportunism of dominant shareholder or group of shareholders directed towards acquiring the controlling authority, privatization of corporation.[40] Method for the conversion, organizational change via the "going private transaction"[41] could be merger, acquisition, division of shares, tender offer.[42] It differs from the establishment of mandatory sale, which is more characteristic to the closed type corporation.[43] Motive: costs related to fulfilment of the reporting, general-legislative or listing requirements, particularly at the times, when it is not profitable for the company to operate at the capital market and such operations become even more expensive.[44] In this regard, incentive of the management related to the typological change can be reviewed in the positive context, similarly to the delisting as the extreme mechanism for avoiding the potential hostile takeover.[45] On the other hand, there is a possibility, that the objective of delisting is related to the private interests of the majority shareholder[46] or masking the non-qualified administration implemented by the management.[47]

3. Reasons Conditioning the Involuntary Delisting

The rational decision of management is made via the correlation between the legal and economic analysis.[48] Rational choice theory is the formal analysis of structured process used for making reasonable decision, aiming at the achievement of the corporate actor's objective with the most desirable outcome.[49] Obligation to follow the moral principles is the basis for the rational behavior, which opposes the decision

[38] Exception: *Pink Sheet Disclosure Policy*, *Molitor M. K.,* Will More Sunlight Fade the Pink Sheets? Increasing Public Information about Non-reporting Issuers with Quoted Securities, Indiana Law Review, Vol. 39:309, 2006, 347-361. *Leuz Ch., Triantis A., Wang T.,* Why Do Firms Go Dark? Cases and Economic Consequences of Voluntary SEC deregistration, Journal of Accounting and Economics, 2008, 11-12, 18-24. It is possible to voluntarily disclose information to the investor via the corporation web-page as well as electronic address: <www.pinksheets.com>, Ibid, 33. *Salzill F.,* Minority Shareholders and Empirical Evidences on Voluntary Delisting Phenomenon, Chair of Advanced Corporate Finance, 2013-2014, 29-30.

[39] Transaction is also referred to as *Public-to-Private, Borden A. M., Yunis J. A.,* Going Private, New York, 2006, 2.

[40] *Borden A. M., Yunis J. A.,* Going Private, New York, 2006, 1-4. *Bragg S.,* Running a Public Company, From IPO to SEC Reporting, US, 2009, 282-283.

[41] *Cox J. D., Hazen Th. L.,* Business Organizations Law, US, 2011, 658-660.

[42] *Engel E., Hayes R.M., Wang X.,* The Sarbanes-Oxley Act and Firms' Going Private Decisions, SSRN Electronic Journal, 2004, 12.

[43] *Borden A. M., Yunis J. A.,* Going Private, New York, 2006, 1-4. *Bragg S.,* Running a Public Company, From IPO to SEC Reporting, US, 2009, 5-6.

[44] *Leuz Ch., Triantis A., Wang T.,* Why Do Firms Go Dark? Cases and Economic Consequences of Voluntary SEC deregistration, Journal of Accounting and Economics, 2008, 2; *Boadle S., Jeffery H. M.,* Taking Your Company Private in: Floating Your Company, The Essential Guide to Going Public, 3rd ed., US, 2007, 237-238.

[45] *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies based on the Corporate-Legal Actions (acquisition, merger), Tbilisi, 2014, 211-215 (in Georgian). *Hamilton R., Freer R.,* The Law of Corporations in the Nutshell, US, 312. *Cox J. D., Hazen Th. L.,* Business Organizations Law, US, 2011, 658.

[46] *Ventoruzzo M.,* Freeze-outs: Transcontinental Analysis and Reform Proposals, Virginia Journal of International Law, Vol. 50:4, 2009-2010, 842-847.

[47] *Leuz Ch., Triantis A., Wang T.,* Why Do Firms Go Dark? Cases and Economic Consequences of Voluntary SEC deregistration, Journal of Accounting and Economics, 2008, 6-11.

[48] *Frerichs S.,* The Legal Constitution of Market Society: Probing the Economic Sociology of Law, The European Sociology – The European Electronic Newsletter, Vol. 10, № 3, 2009, 22.

[49] About the corporate actors, *Mashlow J. L.,* The Economic Context of Corporate Social Responsibility, in: Corporate Governance and Director's Liabilities, Legal, Economic and Sociological Approach (eds., *Hopt J. L., Teubner G.*), Germany, 1984, 72-3.

oriented towards the maximization of personal benefits.[50] Alter-objective of the leadership and majority shareholders differ from the interest of minority shareholders, even more aggravating the management policy dilemma. The typological change of the enterprise is not an exclusion, especially in case of voluntary delisting, when the legal cause is to protect the proprietary rights of minority shareholders.

Typological segmentation of delisting is presented in the second chapter, which under the framework of article, reviews the methodology for transformation of accountable company and identification of legal risks. As the research is mainly devoted to the involuntary typological changes, the chapter below is designed to give better picture of the voluntary delisting.

3.1. Differentiation of Voluntary and Involuntary Delisting

In some scientific publications, theoretical classification of delisting is represented in the form of typological dichotomy[51], and often – trichotomy.[52] In schematic terms, deregistration of accountable company can be carried out with two – voluntary and involuntary basis. Out of the above two, voluntary deregistration could be divided into two - direct and indirect (one could refer to subjective or objective) - sub-categories. Direct voluntary deregistration is implemented via the expression of issuer's will, in the second case, the delisting is conditioned by the objective factors, corporate combination. As for the involuntary, forced delisting, it is conducted under the decision of the stock exchange or regulating agency.

3.1.1. Direct Voluntary Delisting

Voluntary delisting differs from the involuntary delisting in several aspects, these aspects being: first - causal aspect, second – aspect of will, third – economic effect over the value of shares and stocks in general. Voluntary deregistration is caused by the unprofitable condition of the corporation and reduction of costs related to the requirements for corporate compliance causes the maximization of shareholders' benefits; logically, involuntary delisting has destructive effect.[53] Avoiding undesirable economic or legal outcome is ensured via the fiducial liabilities of the management bodies.[54] When the management gets information on the devaluation of shares, initiation of delisting serves the purpose of avoiding additional costs.[55] However, prior to the official disclosure of information on delisting, the danger of trading based on the insider information is proportionally increased, and sales have big impact on the market value of the shares.[56] Devaluation of market value reduces chances of minority investors to sell the shares.[57] At this stage, even in case of re-purchase of shares from public, the compensation value calculated based on

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[50] *Little D.,* Diversity of Social Explanation, Introduction to the Philosophy of Social Sciences (translated by *L. Khechuashvili*), Tbilisi, 2003, 90-5 (in Georgian).

[51] Generally, classification is down to differentiation of voluntary and involuntary delisting, which have their sub-categories, *Onesti T., Romano M., Favino Ch., Pieri V.,* Going Private and Going Dark Strategies, SSRN Electronic Journal, 2013, 10-13.

[52] *Salzill F.,* Minority Shareholders and Empirical Evidences on Voluntary Delisting Phenomenon, Chair of Advanced Corporate Finance, 2013-2014, 6-13.

[53] *Martinez I., Serve St., Djama C.,* Reasons for Delisting and Consequences: A Literature Review and Research Agenda, SSRN Electronic Journal, 2-10, 4-16.

[54] *McGuiness M. J., Renbock T.,* Going-Private Transactions: A Practitioner's Guide, Delaware Journal of Corporate Law, Vol. 80, 2005, 437 and subsequent pages.

[55] *Martinez I., Serve St., Djama C.,* Reasons for Delisting and Consequences: A Literature Review and Research Agenda, 6.

[56] *Schneeman A.,* The Law of Corporations and other Business Organizations, US, 2010, 461-462. *Hamilton R., Freer R.,* The Law of Corporations in the Nutshell, US, 2011, 311-312.

[57] *Khort J.,* Protection of Investors in Voluntary Delisting on the U.S. Stock Market, Uppsala Faculty of Law, Working Paper № 4, 2014, 7.

the market value will be much lower. The above has been missed by the national legislation, making the protection of proprietary rights of minority shareholders sensitive. As it is management's "responsibility" to retain high share prices for the prevention of costs caused by the reduced price, the share class could become subject of re-purchase.[58]

One of the important aspects of voluntary delisting is related to the opportunism of the managers; it is especially relevant in the event of Management Buyout, which is also related to the agent-principle problem and procedurally is conducted under the almost same context as the "going private", in case of purchase of company by means of attracted funds[59] (LBO -leveraged buyout).[60] In case of MBO, managers act independently or together for repurchase of shares by means of external borrowings, also requiring disclosure of the relevant information.[61] There is quite extensive review of tender offer for the repurchase of own shares (self-tender)[62] carried out by the issuing party, which is practice parallel to the transaction directed to the privatization in outcome terms in the Anglo-American law. There is also difference in the form of information disclosure.[63]

Generally, voluntary delisting is perceived as the "transaction directed towards the privatization".[64] One of the basis for withdrawal from the trade at Georgian stock exchange could be reorganization of issuer, personal application or termination of concluded agreement.[65] For example, one of the simplest form is provided below: accountable enterprise establishes the company; following the fulfilment of all prerequisites for the merger the affiliate company is merged with the public corporation, where such company generally continues its existence via one shareholder.[66] The acquirer, following the acquisition of the controlling package of shares carries out back-conversion of public corporation via *short-form merger.* [67]

Voluntary delisting is particularly impacting the proprietary rights of the minority shareholders; preventing the negative impact under the stock exchange rules is generally possible by means of decision made by the general meeting and submitting claim against the management appealing to the violation of fiduciary

[58] The difference between the redeem and repurchase in terms of contents and outcomes must be noted. Unlike the first, repurchase implies purchase of share from one specific shareholder, in other words it implies repurchase of share by shareholders and its proportional distribution among other members; as for the redeem is implemented equivalently, in compliance with the principle of equality towards the shareholders of one class, *Hamilton R., Freer R.,* The Law of Corporations in the Nutshell, US, 2011, 311-13. Repurchase could be carried out at the price considered in the founding act or based on the formula for the calculation of amount to be paid, *Schneeman A*., The Law of Corporations and other Business Organizations, US, 2010, 409.

[59] *Maisuradze D.,* Corporate-legal Self-defense Measures in the Process of Reorganization of the Capial Organization (comparative-law research mainly based on the examples of Delaware and Georgian Corporate laws), Tbilisi, 2015, 92-94 (in Georgian).

[60] *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies based on the Corporate-legal Actions (acquisition, merger), Tbilisi, 2014, 134-145, (in Georgian). *Haas J. J.,* Corporate Finance in the Nutshell, 2nd ed., US, 610.

[61] For example: on the repurchase objectives, see ibid, 662-664.

[62] *Haas J. J.,* Corporate Finance in a Nutshell, US, 2011, 660-664.

[63] According to the article 13e-4, act on stocks of USA, in case of self-tender the *Schedule TO* is filled up, and in case of "transaction directed towards the privatization" *Schedule 13E-3* is filled up. In general, the reasons for transaction, financial resources for implementation, involvement of independent leadership in the decision-making process, legal evaluation of transaction implementation from the side of management from the perspective of the minority, non-affiliated investors are indicated in the form *13E-3, Engel E., Hayes R. M., Wang X.,* The Sarbanes-Oxley Act and Firms' Going Private Decisions, SSRN Electronic Journal, 2004, 11, ft. 9. *Clark R. Ch.,* Corporate Law, US, 1986, 523-524.

[64] *Martinez I., Serve St., Djama C.,* Reasons for Delisting and Consequences: A Literature Review and Research Agenda, 6.

[65] Statutes on the admission of stocks to the trade system and listing, "Stock exchange of Georgia", Articles 5.12.1 and 6.10.2.

[66] *Engel E., Hayes R. M., Wang X.,* The Sarbanes-Oxley Act and Firms' Going Private Decisions, SSRN el. Journal, 2004, 13.

[67] Ibid, 13. *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies Based on the Corporate-legal Actions (acquisition, merger), Tbilisi, 2014, 128 (in Georgian).

obligations.[68] In this regard, the decision made by the German federal court for *Macroton* case in 2002 year is quite interesting; according to the above decision, voluntary deregistration of the company shall be carried out based on the simple majority of votes at general assembly, which ensures the protection of proprietary rights of minority shareholders, practical implementation of repurchase of shares from the company.[69] However, according to the decision made by the Constitutional Court of Germany for Frosta case in 2012 year, above approach changed, and voluntary delisting did not any more require calling the general meeting or making an offer.[70] Later, in 2015 year, changes were made to the law of Germany on stock market, according to which, voluntary delisting does not require consent of the general meeting; however, it is mandatory to make tender offer for each shareholder and price paid for share must not be lower than the weighted average market value of the share for the last six month prior to the offer.[71]

3.1.2. General Review of Main Types of Indirect Voluntary Delisting

3.1.2.1. LBO – Anglo-American approach

In the Anglo-American practice, financing of transaction directed towards the company acquisition, privatization is carried out by the attracted, external borrowed funds.[72] Prior to the development of structural strategy for acquisition, the acquisition of target company by the acquirer is partially financed via the attracted, loan capital.[73] This method, is generally used by corporation investors for purchase of company shares via cash.[74]

3.1.2.2. BOSO – Continental European Approach

There is a tendency of large dispersion of ownership structure in the majority of corporations in the Continental Europe. The *Buy-out Offer with Squeeze-Out* made by the majority shareholder to the minority investor is the classical mechanism applied for the company privatization.[75] Back-conversion of the company from the stock exchange via the purchase of controlling share package by the dominant shareholder is regulated under XIII directive.[76] Practically, the mandatory sale practice is used by the dominant shareholders with voting rights via the acquisition of controlling share and "squeezing out of minority from the

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[68] As the conversion conditions modification of proprietary interests of minority investors *Moye J. E.,* The Law of Business Organization, 6th ed., U, 2004, 521. *Khort J.,* Protection of Investors in Voluntary Delisting on the U.S. Stock Market, Uppsala Faculty of Law, Working Paper № 4, 2014, 6-8.

[69] BGHZ 153 S. 47=DB 2003 S. 544, See English language version of the decision in *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge, 2010, 500-509.

[70] *Khort J.,* Protection of Investors in Voluntary Delisting on the U.S. Stock Market, Uppsala Faculty of Law, Working Paper № 4, 2014, 13-15.

[71] *Zimmer L., Imhoff J. V.,* New German Delisting Rules Aim to Protect Investors, Skadden, 2016, 1-2.

[72] *Martinez I., Serve St., Djama C.,* Reasons for Delisting and Consequences: A Literature Review and Research Agenda, SSRN electronic Journal, 4. *Martinez I.,* The Delisting Decisions: The Case of Buyout Offers with Squeeze-out (BOSO), SSRN Electronic Journal, 2011, 2-4.

[73] *Salzill F.,* Minority Shareholders and Empirical Evidences on Voluntary Delisting Phenomenon, Chair of Advanced Corporate Finance, 2013-2014, 9-10.

[74] *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies based on the Corporate-legal Actions (acquisition, merger), Tbilisi, 2014, 2014, 132 (in Georgian). *Haas J. J.,* Corporate Finance in the Nutshell, 2nd ed., 2011, US, 609.

[75] *Martinez I., Serve St., Djama C.,* Reasons for Delisting and Consequences: A Literature Review and Research Agenda, 2.

[76] *Kikvadze G.,* Mandatory Tender Offer, Collection of Corporate Law, Vol. III (ed. *Burduli I., Makharoblishvili G.),* Tbilisi, 2015, 54-57 (in Georgian).

company at a fair price".[77] Later the deregistration of the enterprise is carried out,[78] which, unlike LBO, does not require financing via the attracted capital.[79] Practical implementation of this mechanism is carried out through the following scenario: a) Repurchase offer; b) Activation of *squeeze out* mechanism for minority shareholders automatically or immediately following the completion of the offer.[80]

3.2. Key Motives for Involuntary Delisting

Involuntary delisting could be provoked by the corporate incompliance with the general-legislative norm as well as listing rules valid for the stock exchange. Both motives are enforced via the compliance with the procedural formalities, in stages and in the end, is finalized with the involuntary back-conversion of accountable enterprise from the stock exchange.

Incompliance with the general-legislative rules, for example, could be demonstrated in the form of reduction of number of beneficiaries of the accountable company.[81] For each stock exchange, basis for delisting is individual, and the main basis is incompliance with the qualitative and quantitative standards set under the listing procedures.[82] For example, NASDAQ can carry out delisting of issuer, if the latter does not satisfy the following minimal standards: a) Share capital – in the amount of USD 10 million; b) 750 000 placed shares; c) Market value of placed shares – during the 30 working days, at least USD 5 million; d) Bid price per share during 30 working days – USD 1; e) At least 400 shareholders; f) At least two market intermediaries.[83] The list of noncomplying issuers, not satisfying the listing rules, is displayed on the official web-page of the stock exchange[84], which is the precondition for temporary withdrawal of stock from the trading.[85] Monetary sanctions can also be considered.[86] Decision on temporary suspension is made by the director of stock exchange, who provides notification to the Chairman of the Supervisory Board.[87] According to the regulation valid for Georgian stock exchange, precondition for involuntary delisting is failure to eradicate the reasons for temporary suspension of share listing, the above is also implemented based on the decision of the Chairman of the Supervisory Board. In addition to non-compliance with the listing rules, basis for suspension of quoted shares could be such developments at the market, under which suspension of listing is aimed at protection of investors' interests.[88] The above requires more specification, in terms of

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77 *Ventoruzzo M.,* Freeze-outs: Transcontinental Analysis and Reform Proposals, Virginia Journal of International Law, Vol. 50, 2010, 886.

78 *Martinez I., Serve St., Djama C.,* Reasons for Delisting and Consequences: A Literature Review and Research Agenda, 2.

79 *Martinez I.,* The Delisting Decisions: The Case of Buyout Offers with Squeeze-out (BOSO), SSRN Electronic Journal, 2011, 9.

80 *Martin D. G., Montcel A. R., Baird-Smith M.,* France, Common Legal Framework for Takeover Bids in Europe, Vol. II, UK, 2010, 121.

81 *Bragg S.,* Running a Public Company, From IPO to SEC Reporting, US, 2009, 304-305.

82 Almost identical listing requirements are defined by *NYCE* and *NASDAQ*, *Mecay J., O'Hara M., Pompilio D.,* Down and Out of Stock Market: The Law and Finance of the Delisting Process, SSRN Electronic Journal, 2005, 11, 8-10.

83 NASDAQ Listing Requirements, see <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_4_3&manual=%2Fnasdaq%2Fmain%2Fnasdaq-equityrules%2F>, [27.05.2016].

84 List of issuers not complying with the listing rules at *NYSE* stock exchange web-page: <https://www.nyse.com/regulation/noncompliant-issuers>, [27.05.2016].

85 From 10 June 2015, the trading with shares of JSC "Electric Technical Factory" and "Polygraphist" has been temporarily suspended, web-page of Georgian Stock Exchange: <http://www.gse.ge/default_geo.asp>, [27.05.2016].

86 The list of corporations for which the disciplinary measures are carried out is available at *NYSE* official web-page; the basis for measures could be investors' claims, SEC application. Sanction in the amount of USD 150 000 imposed over "Deutsche Bank" by *NYSE* on 29 December, 2015 year, <https://www.nyse.com/publicdocs/nyse/markets/nyse/disciplinaryactions/2015/DBAB%20(NYSE)%2020130354658-01%20Decision.pdf>, [27.06.2016].

87 Statutes on the admission of stocks to the trade system and listing, "Stock exchange of Georgia", Articles 5.1., 5.2 (in Georgian).

88 Ibid, article 5.4.3; article 6.10.3.

criteria for the interpretation of investors' interests and possible cases of counter-productive developments at the market. Renewal of trading is related to ensuring the safety of investors, again, requiring identification of preconditions for determination of safety. The quantitative requirements set for listing have to be mentioned, practical capability of fulfilment of which must be available for wide circle of companies.

In the best case, share delisting is implemented based on the voluntary decision of corporation,[89] not having major destructive impact over the share price, compared with the impact observed in the period from the announcement of involuntary delisting to its practical implementation.[90] Rationality of timely withdrawal from the market is also related to retaining the share market value, which is prerogative and moreover, the liability of the management.[91]

3.3. Investor's Economic Interest and Prime Defensive Tools while the Delisting Procedure

Compliance with the legislative or listing rules might be a big financial deal for the corporation.[92] In the case of small and middle size companies expenditure of the compliance costs may have a rough impact[93] on the liquidity of the shares and the total firm cost, which is experiencing economic recession. Involuntary delisting is avoidable through: effective corporate governance[94], setting up the board by uninterested individuals, recruiting investors into the administration of the corporation. Director's rational decisions are made by virtue of communication with investors, information disclosure, and accountability. Accounting and reporting to shareholders: preparation of an annual report and it's representation to the shareholders general meeting is one of the expressions of director's accountability, which supports keeping shareholders informed, generally, on financial issues.[95] Thus, expansion of investor's non-property rights, raise of awareness, serves to defense their property rights.

For developing economic markets involuntary delisting happens to be way more rigorous to overthrow.[96] In the terms of an efficient capital market conditions, it is possible to calculate the fair value,[97] which will be paid to an investor leaving the company. The essence of the fair price is articulated in various material categories.[98] For example, if the majority shareholder acquires controlling packet through the acquisition of the shares by cash, then the minorities are entitled to be expelled by receiving the fund of the

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[89] *Mecay J., O'Hara M., Pompilio D.,* Down and Out of Stock Market: The Law and Finance of the Delisting Process, SSRN Electronic Journal, 2005, 14.

[90] *Park J., Lee P., Park Y. W.,* Information Effect of Involuntary Delisting and Informed Trading, Pacific-Basin Finance Journal, Vol. 30, Elsevier, 2014, 251-252.

[91] According to the 1994 decision of Delaware state court, the management of the company were assigned the responsibility for the violation of fiduciary liabilities, as delisting procedure was initiated based on the personal interests, which was demonstrated via the sales of share of minority shareholders at a low price, *Hamilton v. Nozko,* № 13014, 1994, WL413299 (Del. Ch, 26/07/1994). quotation. *Khort J.,* Protection of Investors in Voluntary Delisting on the U.S. Stock Market, Uppsala Faculty of Law, 2014, 11.

[92] *Osovsky A.,* The Curious Case of the Secondary Market with Respect to Investor Protection, Tennessee Law Review, Vol. 82:XXX, 2014, 13-14.

[93] *Engel E., Hayes R. M., Wang X.,*The Sarbanes-Oxley Act and Firms' Going Private Decisions, SSRN Electronic Journal, 2004, 3, 7-8.

[94] *Martinez I., Serve St., Djama C.,* What Do we Know about Delisting?, Thema Working Paper № 38, 2012, 13-17.

[95] Schneeman A., The Law of Corporations and other Business Organizations, US, 2010, 460.

[96] *Park J., Lee P., Park Y. W.,* Information Effect of Involuntary Delisting and Informed Trading, Pacific-Basin Finance Journal, Vol. 30, Elsevier, 2014, 252.

[97] While calculation market price of the firm, capital cost along with income rate are to be considered, U.S. GAAP and IFRS, Fair Value Measurements: questions and answers, 2013, 31.

[98] *Screiter L. R.,* SEC Rulemaking Authority and the Protection of Investors: A Comment on the Proposed "Going Private" Rules, Indiana Law Review, Vol. 51 (2), 1976, 437.

same category.[99] While voluntary delisting process getting paid for the "premium cost" is quite profitable from the perspective of the minority investors,[100] but it's only in the case of voluntary delisting. As for the type of involuntary delisting; it is true that deregistration proceeded by the stock exchange is literally implemented in few days after an announcement,[101] however it is a sufficient condition for the reduction of the share price – firstly and secondly - for the practical incapability to alien the share by the minorities. One of the property rights of the dissident shareholders lays in leaving the company for the air price, redemption of the shares.[102] Thus, leaving the market in a timely manner may or "going dark" may be deemed as a "defensive tool" against involuntary delisting. Formation of such a defensive strategy is a managerial responsibility; to illustrate: issuing bonus or income management, which will make poor financial condition to disguise.[103]

4. Conclusion

Generally, scholarly article regarded an issue of "typological death" of accountable enterprises according to the Georgian law, its classification, motives. Theoretical understanding and practical demonstration of typological conversion of the corporation is displayed while operating on the capital market. In contrast, reverse-conversion of the enterprise voluntarilly or involuntary provoked due to the subjective-objective grounds, is perceived to be an organizational and structural transformation, "privatization" of an enterprise. According to comparative study, it may possibly be claimed, that both categories ((in)-voluntary delisting) fall into legislative and listing regulations for the sake of interested third parties, especially for the protection of the small investors, whilst the national provisions are limited for encompassing itself by stock market regulation. Withdrawal of the "dying" corporation, on the one hand, is refreshing for the capital market, on the other hand, is facilitative for the macro-economic processes (for example, competition between the exchange stock markets, share listing on non-resident exchange stocks (cross-listing)). This objective cannot be pursued in the case of less developed economies, which makes legal protection of the minority's financial interest more urgent. With this respect, Georgian capital market is still at the stage of progression. Although deregulation of the legislation is less promising to guarantee the stability, but, following to the 2015 year's data, amongst the rest 189 countries Georgia happens to be on the 43rd place for protection of the small investors.[104]

Even in the post-mode, delisting has a negative impact over the financial situation of the company, because of the decline in the market value of the shares, which makes investors to sell their stocks for unfavorable price or make the share transferability impossible. Therefore, regulation claiming the protection of investor's economic interest remains to be just figurative. Before the practical implementation of the delisting, stock's market value is probable to fall, thus with this regards, legislative amendments for improvement of the "fair value" payment regulation, are very favorable. In order to preclude the conflict

[99] EU directive 2004/25/EC, *Ventoruzzo M.,* Freeze-outs: Transcontinental Analysis and Reform Proposals, Virginia Journal of International Law, Vol. 50, 2010, 891.

[100] Ibid, 845.

[101] For the reasons of delisting, filled-in Form 25, stipulated according to the law, is sent by the NASDAQ to the Security Exchange Community of US; having the application granted by the SEC, delisting is proceeded in 10 working days after filling the form in, NASDAQ Stock Market, Listing Rules, § 5830.

[102] *Thompson R. B.,* Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue, Law and Contemporary Problems, Vol. 62 № 3, 1999, 217.

[103] *Martinez I., Serve St., Djama C.,* What do we know about delisting?, Thema Working Paper № 38, 2012, 11.

[104] Feasibility of Doing Business 2015, Ministry of Economy and Sustainable Development of Georgia, Tbilisi, 2014, 6 (in Georgian).

Mariam Ioseliani*

The Role of Sydnicated Loan in Project Financing

The Article discusses the mechanism of project financing - loan syndication that has very often been applied during the last decades despite the different needs of lenders. The loan syndication is a means of financing when two or more commercial banks issue loan together and accordingly share risks to finance a project.
The loan syndication is a very commonly applied to finance a project especially such projects which require a big amount of funds. As a rule these are energy sector and infrastructure related projects.

Key Words*: syndicat\ed loan, hydropower plant construction project, agent bank, project financing, risk diversification.*

1. Introduction

The importance of syndicated loan in the project finance increases every day. In the 19th century, banks started syndicating loans to share risks. In addition, most project finance loans were huge and one bank could not manage financing the project without affecting other portfolios.

Loan syndication as a project financing mechanism has been increasing over the last decade. The incentive for lenders to join the syndicate is obscured, though many international project deals are financed through loan syndication. The objective of the paper is to investigate the role of loan syndication in project financing. The motivation for this research paper stems from the importance of credit in the project financing structure and the growing importance of syndicated loans in project financing. The findings indicate that the role of syndication is diverse however, mobilisation of funds and risk diversification prevail over others.

Loan syndication is a funding mechanism where two or more banks come together contribute a portion of the loan to finance the project. Loan syndication is the most common form used for funding project finance deals, especially when it involves large sums. This is especially true for energy and infrastructure projects.

The implementation of the planned project depends on the availability of funds to finance it from start to completion. Equity contribution is usually limited and the project is usually financed by debt for a large proportion of its finance structure, sponsors therefore must ensure that funds are available before the project starts.[1]

Therefore banks need assurance to the effect that the project will be able to generate revenue and pay the loan back. This is done by ensuring that the project has an off-taker, commitment by sponsors through supply contract, construction contract, government support and etc.

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[1] *Sein R.,* Financing Energy Projects in Emerging Economies, Pennwell Publishing, USA, 1996, 15.

The provisions of syndicated loan agreement, as a type of bank credit are very important too. In the process of issuance of syndicated loan several commercial banks and/or credit institutions accumulate financial sources and then one unified loan is issued. The number of lenders create some difficulties and, therefore, syndicated loan agreement shall include the relations between the lenders.

The main objective of this paper is to examine the role of loan syndication in project financing. The motivation for this research paper stems from the importance of credit in the project finance structure and the growing importance of syndicated loan structures in project financing and one of the purpose of this paper is to determine the benefits syndicated loans offer to both lenders and borrowers.

2. The Concept of Syndicated Loan

Syndicated loan institution is initially used by the London, Swiss, American, European and Japanese commercial banks which generally provide a service financially powerful, stable and large clients. Syndicated loan agreement are mostly spread in the London market.[2] London commercial banks and other financial institutions use syndicated loan for different purposes.[3] However, historically syndicated loan is mostly spread in the United States of America and Canada.[4] Syndicated loan institute is very famous on the abovementioned countries' market and is widely used to finance and implement different projects.[5]

Syndicated loan agreement is such agreement, where banks (often non-bank credit institutions) accumulate their financial resources to issue one general loan to the borrower. Syndicated loan is considered as a hybrid institution, which is used by the commercial banks and other credit institutions.[6] Despite the fact that the parties of this syndicated loan agreement are bank and non-bank institutions and the number of the lenders is quite high, the main provisions which regulate loan related relations are envisaged in a one, general loan agreement, which is a complex document.[7] As mentioned above, the existence of the documentation related to bank credit agreement is necessary to finance the international projects. Commercial banks are the main financial resources in the process of construction of hydropower plants.[8] The projects differ from each other with the form of the activity, concept and capacity.

Funding of a hydropower plant construction project is included in the list of the projects for which the mobilization of financial resources to the maximum is required. Therefore, banks and other credit institutions mostly accumulate their financial resources on the basis of the capacity of hydropower plant construction project to issue one general syndicated loan to the lender-project company which is one of the widespread types of bank credit. Syndicated loan agreements are considered as a general form to finance large-scale projects. However, the syndicated loan agreements differ from each other. Despite the quite big difference, the meaning, concept and general provisions of the syndicated loan issued to finance any types of projects are common and similar.[9]

To achieve the set goals, syndicated loan combines all stakeholders' opinions. The process is started by a formal offer of the borrower to the bank. The borrower gives the bank an authority to be a leading bank and the manager of the process. Alternatively, the borrower announce a competitive auction where several

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2 *Fight A.,* Syndicated Lending, Linacre House, UK, 2004, 2.
3 Ibid.
4 *Iannotta G.,* Investment Banking, Springer-Verlag Berlin Heidelberg, Germany, 2010, 107.
5 *Armstrong J.*, The Syndicated Loan Market: Developments in the North American Context, Canada, 2003, 1-2.
6 *Iannotta G.,* Investment Banking, Springer-Verlag Berlin Heidelberg, Germany, 2010, 109.
7 *Niehuss J.,* International Project Finance, West Academic Publishing, USA, 2010, 147-148.
8 *Clifford C.,* An Introduction to Loan Finance (Capital Markets and Funding), Clifford Publishing, London, 2003, 52-53.
9 *Niehuss J.,* International Project Finance, West Academic Publishing, USA, 2010, 147.

bank with favorable conditions/offers are chosen to lead this process. In this case banks appoint bank as a leading bank.[10] At a certain stage of the process of concluding a syndicated loan agreement and fundraising for hydropower plant construction, sponsors and their financial advisors choose a bank, which will be an agent bank in the process of concluding syndicated loan agreement.[11] There are negotiations between the sponsor and main, agent bank related to the: 1. notification about the opening a credit line and letter of credit, which together with other issues is a consent about the appointment of leading manager and determines its obligation regarding loan management and 2. agreement on the main conditions of the offered loan and also agreement which is the initial stage of the negotiation on the final loan agreement.[12]

With regard to the agent bank, it should be noted that there are different requirements for them according to the legislation of every country. The specific requirements of the law is derived from the functions of the agent bank itself – it ensures the implementation of syndicated loan issuance and return procedures and actions in accordance with the interests of the parties.[13] It is required to fulfill the obligations in a good faith and diligently. In addition according to the English legislation it is obliged to keep the information confidentially.[14] On the existing markets in the Unites States of America and Europe functions of the agent bank is delegated to any other bank. [15]

Information Memorandum signed between the agent bank and the borrower is also a part of the syndicated loan, containing the list of the banks that will be the participants of syndicated loan agreement and will undertake to issue the loan. Notification on the opening of credit line with the provisions which are the ground of syndicated loan agreement, also comprise the conditions regarding the capacity building to achieve success. [16] Given the fact that using the syndicated loan is becoming more actual, British Bankers' Association with the help of legal companies developed recommended forms of syndicated loan agreement, which provides guidelines necessary for creditors and lenders and the interests of any parties are envisaged to the maximum through these abovementioned forms. [17]

3. The Obligations of Parties to Conclude A Syndicated Loan

Out of legal issues connected with the syndicated loan the prepcontractual relationship between agent bank, lender and borrower shall be mentioned. Together with precontractual relations the legal standing of agent bank is very interesting, what are its obligations in connection to syndicated loan parties and lastly, it very much important to discuss the relations existing among the parties to the syndicated loan. [18] The syndicated loan agreement envisages and regulates the mentioned conditions.

3.1. The Obligations of Lenders

The loan agreement provisions are datailed and comprise both, the obligations of loan receiver as well as bank's. The lenders agree that financial resources will be available at its maximum amount when the letter is required by the lender. [19]

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[10] *Gatti S.,* Project Finance in Theory and Practice: Designing, Structuring, and Financing Private and Public Projects, Elsevier Inc., California, 2008, 275-277.
[11] *Iannotta G.,* Investment Banking, Springer-Verlag Berlin Heidelberg, Germany, 2010, 109.
[12] *Niehuss J.,* International Project Finance, West Academic Publishing, USA, 2010, 150.
[13] *Fight A.,* Syndicated Lending, Linacre House, UK, 2004,169.
[14] *Roberts G.,* Law Relating to International Banking, Woodhead Publishing, England, 2003, 86-87.
[15] *Price A.,* Financing International Projects, International Labour Organization Publishing, Geneva, 1995, 31.
[16] *Niehuss J.,* International Project Finance, West Academic Publishing, USA, 2010, 151.
[17] *Wood P.,* International Loans, Bonds, Guarantees, Legal Opinions, 2nd ed., Sweet & Maxwell Limited, London, 2007, 35.
[18] *Graham R.,* Law Relating to International Banking, Sweet and Maxwell Limited, London, 2003, 79.
[19] *Graham D. V.,* Project Finance, 2nd ed., Sweet and Maxwell Limited, London, 1998, 62-63.

It is the responsibility of the individual bank to ensure that their respective portion of the loan is paid according to the financial plan. Banks have rights to get their portion of loan repayment in accordance with the provisions of the agreement. In fact all the monies obtained from the borrower, is shared equitably based on the proportions of their loan contributions. They are also obligated to decide whether to continue lending during the subsistence in the event of a default (EoD) [20].

3.2. Obligations of the Borrower

The borrower is responsible for all project activities starting from construction phase in liaison with the contractor and ensuring that the project is going on as planned. It receives draw downs from the agent as provided for in the credit agreement. It is the responsibility of the borrower to ensure that the project passes the completion test and performs as per the agreed performance levels. In the operation phase, the borrower makes payments to the agent as provided for under the repayment schedule. The borrower must ensure adherence to all provisions. Failure to adhere would constitute an event of default which leads to termination of the loan, acceleration or reducing the tenure of the loan.

The borrower does not take any direct risk as to whether the syndication is successful or not. By the time a syndicate loan agreement is signed, the loan agreement should have been signed and thus underwritten by the lead managers.

3.3. Obligations of the Agent

The loan is exclusively granted for a specific purpose specified in the credit agreement. It cannot therefore be used for any other purpose without the approval of the syndicate banks. It is the responsibility of the agent to ensure this. In case the agent detects that the loan has been diverted, this amounts to a default. Therefore banks can terminate the loan or may force the borrower to make early repayments[21], if there is evidence to the effect that the borrower will not be able to repay the loan. It is the duty of the agent to monitor and inform the participating banks the status of the performance of the loan. The agent however, has limited discretion to take minor decisions as spelt out in the credit agreement. Major decisions are taken with the approval of the syndicate. The agent is expected to act in the best interest of the syndicate and performs his duties with skill, care and due diligence.

During construction, the agent organises site visits for the syndicate to keep breast of the progress of the project and obtain formal presentations from the borrower. The agent ensures compliance with all the provisions of the loan agreement for both the SPV and the syndicate banks. In case of detection of non-compliance behaviour, organises impromptu meetings between the parties. Depending on the gravity of the default, the parties may agree to terminate the loan or allow the borrower to accelerate loan repayments. All payments from the project company are received by the agent and remit them to the individual syndicate banks. In case of default, the agent with agreement from syndicate banks takes enforcement action against the borrower.

[20] *Graham D. V.,* Project Finance, 2nd ed., Sweet and Maxwell Limited, London, 1998, 64.
[21] Ibid, 64-65.

4. The Role of Loan Syndication

4.1. Risk Diversification

Completion risk, market risk, political, technological and force-majeure risks need to be analyzed on initial stage in order to persuade each party that project will be profitable. All agreements which concern risk sharing and allocation is cross checked by bank representatives who participate in the process in order to guarantee the compliance with the project financial criteria. Project expanses and financial plan requested by the Parties, technical descriptions of project construction and operation are very essential and useful. When an agreement is reached, each participant agrees that they will proportionally contribute to the loan and sign the syndicated loan agreement. The mentioned confirms that sums will be available in accordance with the financial plan of the project.

The standard theory of why banks join a syndicate is risk diversification. Since mid 1980s, loan syndication has been at the centre stage of financing large projects. . In most cases, these projects require high credit facility that may not be mobilised by one bank. Financing of energy, infrastructural project – bridges, roads, tunnels, railways and public services like hospitals, prisons, and universities require several billions of dollars which may not be available in one bank. In addition, banks have lending exposure limits to specific sectors.

As long as the project is bankable, banks with surplus funds are always happy to join the syndicate and enjoy its benefits. To participate in debt financing, banks employ advisors to ensure that all risks are allocated and the borrower has experience to implement the project in accordance with the provisions of the loan agreement.

4.2. Risk Sharing

Although the risks in project finance structure are transferred to parties competent to bear them, there is uncertainty that the project may not perform according to the financing plans[22] and the loan agreement. The residual risk is also borne by all the participating banks. With many banks involved in the syndicate, the risks are shared according the proportions of their contributions to the loan. In case of default, each bank bears a proportion of the risk, which is offset by returns from successful projects.

4.3. Information Sharing and Competitive Prices

Information sharing between many participating banks reduces risk. Information exchange is paramount for the success of a loan syndicate. However, information gaps between the members of the syndicate, can cause the problems.[23] To the borrower, a harmonized channel of communication reduces costs and time that would otherwise been spent communicating to individual participating banks.

Competitive pricing and more flexible funding structure benefits borrowers and the final consumers. In cases where the process of loan syndication is through competitive bidding, banks that offer the best terms of the loan are awarded the tender[24]. This eases the repayment schedule of the borrower. In case of power

[22] *Nevitt P., Fabozzi F.,* Project Financing, 7th ed., Euromoney Books, London, 2000, 106.

[23] *Godlewski C.,* Banking Environment, Agency Costs, and Loan Syndication. A Cross-Country Analysis, Louis Pasteur University, France, 2008, 14.

[24] Ibid, 15-16.

projects where the tariff is a function of debt service among others, any reduction in interest rate benefits the power consumer.

5. Measures to Ensure Successful Loan Syndication

The credit agreement clearly specifies the remedies in case of default. Default arises from non-payment of the loan, bankruptcy or insolvency, non-compliance with covenants, and non-payment by the sponsor of any other loan when due. However, all events of default must pass the materiality test in order to be considered as an event of default. The remedies include loan cancellation, right to accelerate the loan, limitation of distributions to sponsors and step-in-rights[25]. All participating banks have the same rights to enforce these provisions, however some credit agreements provide right of enforcement to some banks.

A sharing clause is intended to balance the interests of participating banks. The clause is aimed at protecting the minority banks from the majority participating ones and ensures fair distribution of benefits to all participating banks.

The credit agreement contains provisions for decision making by the participating banks. In this regard, the voting clauses are included to ensure that the syndicate obtains majority consensus before making a decision. This power to exercise the syndicate voting rights must be exercised in the interest of the syndicate, but not to the detriment of the voter.

This should normally be at the centre stage. All provisions of the credit agreement and other financing documents are subject to a comprehensive negotiation. In this regard, participating banks appoint advisors from different disciplines to negotiate and ensure that the terms of the agreements are favourable. If the bank finds that the terms are not in its favour, it has the liberty to leave the syndicate. Appending the signature on the loan syndication agreement implies that all participating banks agree to the terms of the agreement and will comply accordingly.

6. Conclusion

Loan syndication plays a significant role in financing projects. Most projects that require large sums of funds are easily financed through syndication mechanism, otherwise it would be difficult for a single bank to mobilize the funds.

To conclude, it has to be noted that syndicated loan plays significant role in the hydropower plant project execution process. In order to ensure the construction of hydropower plant and enable it to sell the produced electricity in the market the financing is needed. The execution of hydropower plant project is a large-scale project which need big financial resources during each phase of project execution.

The issuance of syndicated loan and its repayment process has a very complex character and in order to better understand it, it is needed to discuss the phases in details. As a result of a research it was proved, that before the issuance of the syndicated loan the commercial banks choose an agent bank (leading bank) and its main function is to organize the issuance of syndicated loan and following phases.

Except an agent, as it was noted, special attention is paid to the parties – the lender and the borrower, risk allocation is always associated with each project especially with hydropower plant projects financed with syndicated loan. Importantly, risk sharing reduces risk exposure to individual lenders and this reduces the cost of debt. However for loan syndication to succeed, the credit agreement should be designed to clearly deal with the respective needs of the counterparties to the syndicate.

[25] *Gatti S.,* Project Finance in Theory and Practice: Designing, Structuring, and Financing Private and Public Projects, Elsevier Inc., London, 2008, 274.

Daria Legashvili*

Peculiarities for Definition of the Essential Conditions of the Agreement Concluded in Favor of the Third Party on the Basis of an Independent Require

The Article considers the rule of conclusion of the Agreement in favor of a third party on the basis of an independent demand and reveals the essence thereof. Definition of inter-relation of the rights and duties of the third party entitled on independent demand and the parties of the Agreement concluded in favor of a third party facilitates to establish the limit of the rights of each of them and to substantiate expediency of wide elucidations of the right of the third party in view of provision of proper realization of the objective of the institution of the Agreement concluded in favor of a third party. The hereof manifests the peculiarities of the essential conditions, subject to be taken into account upon conclusion of the Agreement in favor of a third party.

Key Words: *The Agreement concluded in favor of a third party, the third party on the basis of an independent demand, right, acquisition of right, right to impugn, debtor/promisor, creditor/promise, third party.*

I. Introduction

The Agreements are often concluded in the civil legal space, when the right on fulfillment of the subject of the Agreement is granted to the third parties referred by the creditor. The sphere of application of the Agreement concluded in favor of the third party is quite extended. Whereas the Agreement concluded in favor of the third party is not attributed to the separate type of the Agreement, the Agreement concluded in favor of the third party may be of any nature.

The study aims at identification of inter-relation between the rights and obligations of the third party and the parties of the Agreement concluded in favor of the third party and definition whether expression of the will of the third party affects implementation and validity of the Agreement concluded in the favor of the third party.

The Article 351 of the Civil Code of Georgia (hereinafter referred to as CCG) entitles the third party on waiver of the right acquired under the Agreement. In line of the hereof Code, waiver of the third party is expression of unilateral binding will. Validity of expression of unilateral will requires acceptance thereof by the third party. CCG fails to stipulate the reference of the waiver declared by the third party, the addressee of the waiver of the third party; the CCG also fails to define the term and the form of the waiver. It fails to determine when the will expressed by the third party on waiver of the right acquired under the Agreement is to be considered as valid, while it reduces the practical and legal value of the norms regulating the Agreement concluded in favor of the third party.

The study is based on the analysis of the judicial practice and the normative, logical, doctrinal and comparative legal methods.

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The approach provided in the German doctrine is preferably demonstrated for comparison purpose towards the Agreement concluded in favor of the third party, manifesting compatibility of the hereof approaches with the legislation of Georgia.

The Article considers essential conditions of the Agreement concluded in favor of the third

party on the basis of an independent require and demonstrates inter-relation of the rights and obligations of the debtor, promisee (creditor) and the third party.

II. Essence of the Agreement Concluded in Favor of the Third Party

The Agreement, as a rule, is binding for the signatory parties solely, and correspondingly, the parties are equipped with the right on fulfillment of the obligations under the Agreement.[1] The hereof principle is called as the "Priviti of Contract"[2] and any Agreement of nature of private law is to be concluded taking the hereof principle into account.[3]

Hence, the Agreement concluded in favor of the third party shall be considered as an exception from the hereof principle.[4]

Agreements are often concluded in the civil legal space, when the third party is equipped with the right on require towards the subject of the Agreement. It means, that in certain events, the will of the parties in binding legal relations may be directed to the debtor to implement fulfillment towards the third party instead of the signatory party and the third party to be equipped with the right on require under the Agreement.[5] This is the case that the concept of the Agreement concluded in favor of the third party has been established by the law and order.[6]

Peculiarity of the Agreement concluded in favor of the third party lies in the fact that the third party is not the signatory party, the third party shall not express the will on conclusion of the Agreement,[7] therefore, the third party acquires the right on require under the Agreement without participating in the Agreement. The basis of requirement thereof is the Agreement concluded between two other parties.[8] In some cases, conclusion of the Agreement in favor of the third party may require the written approval of the third party as stipulated under the law.

All the Agreements with participation of three parties shall not be considered concluded in favor of the third party. The essence of the Agreement concluded in favor of the third party implies that the promisee (creditor) and the debtor equip the third party with the right on require.[9] As creditor, so the third party in favor of whom the Agreement has been concluded may require implementation of the hereof Agreement. Obviously, the hereof fact shall not imply opportunity to simultaneously realize the rights of the creditor and the third party.

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1 *Ahlefeldt F.,* Der Vertrag zugunsten Dritter unter besonderer Berücksichtigung der Rechtsprechung, Hamburg, 1938, 7, 8; *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn.1, 377; *Tsertsvadze L.,* Contract Law, Tbilisi, 2014, 215.

2 "Privity of Contract".

3 *Tsertsvadze L.,* Contract Law, Tbilisi, 2014, 215.

4 Ibid, 215.

5 *Medicus D., Lorenz S.,* Schuldrecht I, Besonderer Teil 20., neubearbeitete Auflage, München 2012, Rn. 804, 409; *Ahlefeldt F.,* Der Vertrag zugunsten Dritter unter besonderer Berücksichtigung der Rechtsprechung, Hamburg, 1938, 8.

6 *Ahlefeldt F.,* Der Vertrag zugunsten Dritter unter besonderer Berücksichtigung der Rechtsprechung, Hamburg, 1938, 8.

7 *Chanturia L.,* Comment to the Civil Code of Georgia, Vol. III, Tbilisi, 2001, 215.

8 Ibid.

9 *Kroffholler J., Florian I., Heiden M.,* Comment to the Civil Code of Germany, Tbilisi, 2014, Vol. 1, 233.

The Agreement, without participation and consent of the third party, entails the right on require towards the latter, so conclusion of the Agreement to the detriment[10] of the third party is not envisaged under either Georgian or German legislation. Neither the judicial authority considers the Agreement of such type as admissible.[11]

III. The Rule of Conclusion of the Agreement in Favor of the Third Party on the Basis of an Independent Require

1. Concept and the Form of the Agreement Concluded in Favor of the Third Party

According to the current legislation, the Agreement shall be considered concluded in favor of the third party, where the parties agree on implementation for the third party not participating in conclusion of the Agreement and hence, equipping the third party with the right on independent require of implementation of the Agreement without participation therein on the basis of the Agreement peculiarly.[12] The Contractual Agreements shall be dissociated therefrom, where implementation is fulfilled for the third party but the third party does not enjoy the right on independent require towards the subject of the Agreement.[13] In this event, the third party is to expect benefits[14] but has no right on independent requirement. Correspondingly, the right on require of the Agreement is not granted to the third part but the signatory party, making the reservation in favor of the third party.[15] The Agreements concluded in favor of the third party are categorized into two following groups according to the legal perspective of the third party towards implementation under the Agreement: Agreements without independent require of the third parties and the Agreements with independent require of the third parties.[16] They are called genuine and non-genuine[17] agreements.[18]

Upon genuine agreement concluded in favor of the third party, that is – upon the agreement granting the right – the third party acquires the right from the agreement on require towards the debtor.[19]

We deal with non-genuine agreement concluded in favor of the third party, when the debtor is right, implements fulfillment of obligation towards the third party but the latter is not entitled to require fulfillment of the obligation.[20] It means that the agreement fails to entail the independent require therefor[21] and hence, he/she is the party to expect benefits.[22]

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10 "Vertrag zu lasten Dritter".

11 *Medicus D., Lorenz S.,* Schuldrecht I, Besonderer Teil 20., neubearbeitete Auflage, München 2012, Rn. 804, 409; *Joussen J.,* Schuldrecht I, Allgemeiner Teil 3., überarbeitete Aufl., 2015, Rn. 1147, 358; *Chanturia L.,* Comment to the Civil Code of Georgia, Vol. III, 2001, 220.

12 *Ahlefeldt F.,* Der Vertrag zugunsten Dritter unter besonderer Berücksichtigung der Rechtsprechung, Hamburg, 1938, 8.

13 Ibid.

14 *Chanturia L.,* Comment to the Civil Code of Georgia, Vol. III, 2001, 215.

15 *Ahlefeldt F.,* Der Vertrag zugunsten Dritter unter besonderer Berücksichtigung der Rechtsprechung, Hamburg, 1938, 8.

16 *Chanturia L.,* Comment to the Civil Code of Georgia, Tbilisi, Vol. III, 2001, 214; Decision of October 9, 2003 № 3C-AD-J-03 of the Chamber of the Administrative and Other Category Cases of the Supreme Court of Georgia.

17 "Echter und unechter Vertrag zu Gunsten Dritter".

18 *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn.2, 3, 378; *Chechelashvili Z.,* Contract Law, Tbilisi, 2010, 85; *Ahlefeldt F.,* Der Vertrag zugunsten Dritter unter besonderer Berücksichtigung der Rechtsprechung, Hamburg, 1938, 8.

19 *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn.2, 3, 378; *Chechelashvili Z.,* Contract Law, Tbilisi, 2010, 85.

20 Ibid.

21 *Chanturia L.,* Comment to the Civil Code of Georgia, Vol. III, Tbilisi, 2001, 214.

22 Decision of October 9, 2003 № 3C-AD-J-03 of the Chamber of the Administrative and Other Category Cases of the Supreme Court of Georgia.

The Agreement concluded in favor of the third party with peculiarity expressed in existence of the right on independent require of the third party, is called in German law as "the agreement on implementation for the third party"[23. 24]

The Agreement concluded in favor of the third party is not a separate type of the agreement.[25] Any typical and atypical[26] agreement[27] (deed of purchase, lease, rent, contractor's agreement etc.)[28] including the public legal agreement[29] can be concluded in favor of the third party as with so without an independent require.

The Agreement concluded in favor of the third party is not a trilateral agreement.[30] Accession of the third party to the Agreement or any other type of co-participation is not necessary for emergence of his/her right in the Agreement,[31] non-acceptance of participation thereby shall not serve the basis for annulment of the hereof Agreement.[32]

In the event of accession of the third party to the Agreement shall not be considered as the Agreement concluded in favor of the third party. In this event, the third party himself/herself becomes the signatory party. Hence, the Agreement concluded in favor of the third party is evidently considered as the bilateral Agreement.[33]

The general rules shall apply to the form of the Agreement concluded in favor of the third party. Namely, the Agreement is of the free form other than the events if the special form is stipulated under the law.[34]

2. Definition of the Agreement

2.1. Acquisition of the Right by the Third Party

The Agreement in favor of the third party shall not unconditionally provide the rights of the third party. In line with the Article 349 of the Civil Code of Georgia, the Agreement concluded in favor of the third

[23] "Verträge auf Leistung an Dritte".

[24] *Ahlefeldt F.,* Der Vertrag zugunsten Dritter unter besonderer Berücksichtigung der Rechtsprechung, Hamburg, 1938, 8.

[25] Palandt O., *Grüneberg Ch.*, BGB, 74. Aufl, München 2015, §328, Rn. 1, 559; Jauernig, *Stadler A.*, BGB, Kommentar, 15. Aufl, München 2014, 475.

[26] "Typenfremde Verträge" - agreement not attributed to any type of agreements regulated under the law and neither is the result of merger or modification of the agreements regulated under the law; see about typical and atypical agreements: *Larenz K.,* Lernbuch des Schuldrechts, zweiter Band, Besonderer Teil, München 1994, 60-65; *Medicus D., Lorenz S.,* Schuldrecht II, Besonderer Teil 17., neubearbeitete Auflage, 2014, 398-393; *Lohman H.,* Vertragsrecht, Buch 2, Verpflichtungsverträge, Stuttgart, Berlin, Köln, Mainz, 1978, 244-260; *Below K.,-H.,* Bürgerliches Recht, Schuldrecht, Besonderer Teil, Wiesbaden 1978, 191-209; *Eckert J.,* Schuldrecht, Besonderer Teil, Kiel 2000, 189-191; *Ernst A.,* Schuldrecht Besonderer Teil I, München1998, 7-9.

[27] *Medicus D., Lorenz S.,* Schuldrecht I, BesondererTeil , 20., neubearbeitete Auflage, München 2012, Rn. 804, 409; Brox H., Walker W-D., Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn. 8, 380; *Chechelashvili Z.,* Contract Law, Tbilisi, 2010, 86.

[28] *Chanturia L.,* Comment to the Civil Code of Georgia, Vol. III, Tbilisi, 2001, 217.

[29] *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 1, 559.

[30] Jauernig, *Stadler A.*, BGB, Kommentar, 15. Aufl, München 2014, § 328, Rn.1, 475; *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 14.

[31] *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 14; *Jauernig, Stadler A.,* BGB, Kommentar, 15. Aufl, München 2014, § 328, Rn. 8, 475.

[32] Decision of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia of March 19, 2003 № 3j-1492-02.

[33] *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 14; *Jauernig, Stadler A.,* BGB, Kommentar, 15. Aufl, München 2014, § 328, Rn. 8, 475.

[34] *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn. 9, 380; *Chechelashvili Z.,* Contract Law, Tbilisi, 2010, 86.

party grants the hereof right to the third party when it derives from the essence of the obligations. In the event solely, if the person liable, as deriving from the essence of the Agreement, shall be responsible to the third party, the third party is equipped with the right on require.[35]

Should the third party acquire the right, that is whether we deal with the Agreement concluded in favor of the third party, shall be determined through definition of the Agreement. In this regards, the objective of conclusion of the Agreement is of utmost importance. The issue of acquisition of the right by the third party may be determined through extensive definition of the Agreement.[36]

In the event, if the Agreement has been concluded in view of provision of the third party or the interests thereof, there hereof person might acquire the right from the Agreement.[37]

Acquisition of the right by the third party depends on the will of the parties. In the event, if the Agreement fails to envisage special provision on the hereof issue, the issue of acquisition of the right by the third party shall be defined from the circumstances, namely from the objective of the Agreement,[38] and in case of unavailability of the hereof circumstances, which in line with the Article 350 of the Civil Code of Georgia, conditions opportunity of otherwise definition of the ruling stipulated under the Agreement between the parties,[39] the contractual terms shall apply.

Therefore, definition of the issue of acquisition of the right by the third party implies determination whether the Agreement has been concluded in favor of the third party on the basis of the independent require. Whereas, the third party is the party acquiring the right, and in the event if the right is determined not to be acquired, naturally the Agreement shall be considered concluded not with granting the right on independent require thereto.

2.2. Pre-conditions of Emergence of the Rights for the Third Party

Deriving from the analysis of the Article 350 of the Civil Code of Georgia, the full right of the third party may not immediately emerge upon conclusion of the Agreement and realization of the right is related to existence of certain pre-conditions.[40] The Civil Code of Georgia fails to envisage the list of the pre-conditions and the pre-conditions shall be defined deriving from the circumstances, namely the objective of the Agreement in each case. Hence, when defining the Agreement concluded in favor of the third party it is important to correctly estimate the issue of acquisition of the right by the third party. Possibly, acquisition of the right by the third party may be conditional or depend on the term. Besides, the party may make the reservation on annulment or alteration of the third of the third party.[41] The hereof reservation may be directly provided in the Agreement or derive from the circumstances and the objective of the Agreement.[42]

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[35] Decision of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia of November 2, 2001, № 3j/804-01.

[36] *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 3, 559.

[37] Ibid.

[38] *Ahlefeldt F.,* Der Vertrag zugunsten Dritter unter besonderer Berücksichtigung der Rechtsprechung, Hamburg, 1938, 7.

[39] Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of December 15, 2011, № ar-995-1028-2011.

[40] Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of July 29, 2011 № ar-796-850-2011; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of October 03, 2011 № ar-824-876-2011.

[41] *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 4, 559.

[42] Ibid; for instance, the Court of Appeals of Tbilisi in the Agreement on Health and Life Insurance Service concluded in favor of the Judges, considered one of the pre-conditions for emergence of the right of application of the Agreement to be the Judge occupying the position. Whereas, the Insurer, upon dismissal of the Judge, was to terminate insurance service (see, Decision of the Chamber of the Civil Cases of the Supreme Court of Georgia of October 03, 2011 № ar-824-876-2011).

The parties shall define when and upon what pre-conditions acquires the third party the right from the Agreement and whether the hereof right can possibly be annulled without the consent of the third party or changed by the signatory parties.[43]

3. Concept of the Third Party

Any natural person or legal entity can be the third party.[44] Personality of the third party may not be further specified upon conclusion of the Agreement. It would be sufficient to be definable.[45] The Article 836 of the Civil Code of Georgia, envisaging insurance in favor of another party, directly provides that the Insurer is entitled to conclude the Insurance Agreement with the Insured on own behalf in favor of another party. Identification of the hereof party is not mandatory. However, in line with the Article 844 of the Civil Code of Georgia, conclusion of the Agreement in favor of the third party requires written consent of the third party. Therefore, in separate cases, taking the peculiarities of the Agreement, acquisition of the right stipulated under the Agreement by the third party may require identification and consent of the hereof party.

"Another" party, prescribed under the Insurance Agreement – Insured is the third party in favor of which the Insurance Agreement is being concluded in this particular event. Insured is not the independent party of the Insurance Agreement.[46]

4. Subject of the Agreement

Taking the fact into account that any type of the Agreement may be concluded in favor of the third party, the subject of the Agreement shall be defined according to the type of the Agreement. However, regardless of the type of the Agreement, the subject of the Agreement shall always be delegation of any of the rights to the third party. Although, as we have already mentioned, the Agreement may not directly provide that implementation envisaged under the Agreement shall be delegated to the third party. In this event, the subject of the Agreement may provide delegation of the right to the third party.

5. Rights and Obligations of the Parties

There are three subjects participating in legal relations in the Agreement concluded in favor of the third party: debtor, as the "promisor";[47] creditor, as the "promisee",[48] and the third party, as the "beneficiary"[49].[50]

The "promisor" is the party promising implementation of the Agreement to the party in favor of the third party. The "promisee" is the party, implementing the hereof promise in the Agreement in favor of the

[43] *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 14.

[44] *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 1, 559.

[45] *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn. 8, 380; *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 2, 559; *Chechelashvili Z.,* Contract Law, Tbilisi, 2010, 86.

[46] *Tsiskadze M.,* Legal Regulation of Voluntary Insurance, Tbilisi, 2009, 49; *Tsiskadze M.,* Comment to the Civil Code of Georgia, Book IV, Vol. II, Tbilisi, 2001, 159.

[47] "Versprechender=Promittent", see Wall F., Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall – ein Forderungsvermächtnis, Tübingen 2010, 4.

[48] "Versprechensempfänger=Promissar, Stipulant", see *Wall F.,* Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall – ein Forderungsvermächtnis, Tübingen 2010, 4.

[49] "Begünstigter, Destinatar", See *Wall F.,* Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall – ein Forderungsvermächtnis, Tübingen 2010, 4.

[50] *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn. 1, 377; *Joussen J.,* Schuldrecht I, Allgemeiner Teil 3. überarbeitete Aufl., 2015, 358; *Chechelashvili Z.,* Contracual Law, Tbilisi, 2010, 85.

third party. The third party is the person, not representing the signatory party and equipped with the right on require of implementation from the promisor.[51]

There are three categories of legal relations amongst the participants of the Agreement concluded in favor of the third party, where the third party is equipped with the right on independent require towards the debtor, (upon genuine Agreement): between the debtor (promisor) and the creditor (promisee); between the promisee and the third party; between the debtor and the third party.[52]

The debtor (promisor) and the creditor (promisee) enter so-called "implementation relationship",[53] and the promisee and the third party enter so-called "monetary or transfer relationship"[54].[55]

The legal relations emerged between the debtor and the promisee is called implementation relationship due to the fact that the debtor, upon reimbursable agreement, assumes counter implementation for own implementation in favor of the third party.[56] That is, implementation of the obligation by the debtor is ensured with the counter implementation by the promisee for the debtor.[57]

Monetary relations indicate the type of the legal relationship serving the basis for the promisee to implement obligations through the promisor towards the third party,[58] "and why the promisee equips the third party with the right on require and whether the third party enjoys the right to preserve the hereof right on require".[59]

The principle of freedom of the Agreement applies to the Agreement concluded between the promisee and the promisor.

No contractual relationship exists between the third party and the debtor (promisor). The implementation relationship emerges between the third party and the debtor based on the Agreement concluded between the debtor and the creditor.[60]

5.1. Rights and Obligations of the Promisee (Creditor)

The subject of dispute in the Agreement concluded in favor of the third party envisages who is to realize the rights of the creditor – promisee or the third party.[61]

The Article 349 of the Civil Code of Georgia grants the promise (creditor) with the right to require implementation of the Agreement concluded in favor of the third party. However, the hereof Agreement or the essence of the obligation as stipulated under the law may envisage derivation of the right of the third party instead of the right of the creditor. Therefore, the right on require of implementation of the Agreement concluded in favor of the third party is granted as to the promisee so to the third party but the hereof fact

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51 *Wall F.,* Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall – ein Forderungsvermächtnis, Tübingen, 2010, 4.

52 *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn. 7, 379; *Krofholder I., Florian I., Heiden M.,* Comment to the Civil Code of Germany, Tbilisi, 2014, field 3-6, 233.

53 "Deskungsverhältnis".

54 "Zuwendungs-oderValutaverhältnis".

55 *Chechelashvili Z.,* Contract Law, Tbilisi, 2010, 87; *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn. 7, 379; *Joussen J.,* Schuldrecht I, Allgemeiner Teil 3., überarbeitete Aufl., 2015, Rn. 1172, 358.

56 *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn. 7, 379.

57 Compare, *Krofholder I., Florian I., Heiden M.,* Comment to the Civil Code of Germany, Tbilisi, 2014, field 4, 233.

58 *Chechelashvili Z.,* Contract Law, Tbilisi, 2010, 87; *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 39. Aufl., München, 2015, § 32, Rn. 7, 379.

59 *Krofholder I., Florian I., Heiden M.,* Comment to the Civil Code of Germany, Tbilisi, 2014, field 5, 233.

60 Ibid, field 6, 235-236.

61 Ibid, field 13, 18, 235-236.

does not imply possibility of simultaneous realization of the rights of the creditor and the third party, that is realization of the right on require of the promisee excludes the hereof right of the third party and vice versa.

In line with the Article 349 of the Civil Code of Georgia, the promisee (creditor) and the debtor grant the third party with the right on require of implementation of the Agreement but interesting is who is to enjoy the rest of the rights deriving from the Agreement as in the event of failure to implement the obligation stipulated under the Agreement – initial require – the secondary require issue shall be considered.[62] German legal literature provides the opinion that the promisee – the creditor enjoys the right on remuneration of the damage instead of implementation of obligation. He/she also enjoys the right on require of impugnment, secession from the Agreement, termination of the Agreement, annulment of the Agreement,[63] and reduction of purchase price.[64] Although, the possibility of the third party may be determined through definition of the Agreement, to enjoy the full rights deriving from the Agreement. However, we might argue whether the promisee solely is entitled to impugn or the third party as well.[65]

The right on impugnment, in line with the Article 59 (3) of the Civil Code of Georgia, is granted to the "person concerned". Although, Georgian legal literature[66] provides the definition of the "person concerned" to be the "part of the transaction" and the third party, the interests of which may be infringed with the transaction,[67] but the position shall be shared envisaging the right on impugnment is granted to the person expressing his/her will – that is the person, expressing the voidable will.[68] Whereas, the third party shall not express the will for conclusion of the Agreement, he/she shall not be able to enjoy the right on impugnment.

German legal literature provides the presumptions that the third party is as well allowed conceding the require but on the basis of the concession, the third party shall not be granted the right on impugnment inasmuch as the promisee is to enjoy the interest worth superior protection of expression of will.[69]

Although, as the Civil Code of Georgia so the Civil Code of Germany provide, upon infringement of the obligation by the debtor under the norms regulating infringement of the obligation, the right on require of remuneration of damage inflicted in this regards shall be granted to the creditor,[70] however neither the third party shall be restricted in realization of the hereof right. Upon insurance in favor of another party, all the rights reserved by the Insurer under the Agreement, reserved in favor of another person, shall be delegated to the Insured,[71] but the Insure is entitled to directly realize the rights granted under the Insurance Agreement in the event solely if the Insurer delegates the Insurance License thereto.[72]

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[62] *Boeling H.,Lutringhous P.,* System Analysis of the Basis of Separate Requirements of the Civil Code of Georgia, Bremen-Tbilisi, 2009, 30; *Macharadze M.*, Secession from the Agreement and Annulment of the Agreement – Difference and Legal Consequences (according to the legislation of Georgia and Germany), Overview of Georgian Law, special edition, 2008, 126.

[63] "Der Widerruf".

[64] *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 6, 559.

[65] See *Kereselidze D.,* The Most General Concepts of Private Law, Tbilisi, 2009, 360; *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 196; *Chanturia L.,* Introduction to the General Part of the Civil Law of Georgia, Tbilisi, 2000, 390.

[66] *Kereselidze D.,* The Most General Concepts of Private Law, Tbilisi, 2009, 360; *Zoidze B.,* Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 196; *Chanturia L.,* Introduction to the General Part of the Civil Law of Georgia, Tbilisi, 2000, 390.

[67] *Kereselidze D.,* The Most General Concepts of Private Law, Tbilisi, 2009, 360.

[68] Ibid; *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 7, 559.

[69] *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 7, 559.

[70] Article 394 of the Civil Code of Georgia. (1) Upon infringement of obligation by the debtor, the creditor is entitled to require remuneration of the damage inflicted in this view; § 280 of the Civil Code of Germany. (1) If the debtor infringes the obligations deriving from the mandatory-legal relationship, the creditor is entitled to require remuneration of the damage inflicted in this view.

[71] *Tsiskadze M.,* Legal Regulation of Voluntary Insurance, Tbilisi, 2000, 50.

[72] Ibid.

In line with the Article 350 (2) of the Civil Code of Georgia, the party making the reservation in the Agreement in favor of the third party, is empowered to alter the third party provided in the Agreement regardless of approval of the counter-agent. Whereas, the promise (creditor) is to make the reservation in favor of the third party in the Agreement, he/she is authorized to change the third party. Obviously, the promisee enjoys the right to change the third party until obtainment of implementation by the third party as envisaged under the Agreement.

In the event, if the Agreement fails to envisage the special instructions, definition of the Agreement may facilitate to determination of the fact that the signatory parties are entitled to annul the right of the third party or change the right without approval of the third party. Although, the paragraph "c" of the Article 350 (1) of the Civil Code of Georgia grants the hereof right to the signatory parties, the parties shall not be entitled on annulment or alteration of the right of the third party without approval of the promisee inasmuch as the reservation in favor of the third party shall be made by the promisee and he/she is to have the right to annul or alter the hereof right.

In the event, if the third party waives the right acquired under the Agreement, the promisee is authorized to require implementation of obligations in own favor if no otherwise is stipulated under the Agreement or the essence of the obligation.

Therefore, in the event if the Agreement fails to provide the special instructions concerning the rights of the third party, the promisee enjoys all the rights and is imposed with the obligation that may derive from the Agreement.

Hence, in the Agreement concluded in the favor of the third party, the promisee is authorized to require implementation of the Agreement concluded in favor of the third party in own favor but the promisee enjoys the hereof right until the third party obtains envisaged implementation. He/she enjoys the right to annul or change the right of the third party without approval thereof. The promisee as well is authorized to change the third party. Naturally, the promisee enjoys the right to change the third party until the third party obtains implementation as envisaged under the Agreement. The promisee, upon obtainment of implementation, shall be entitled to change the third party or annul the rights thereof solely in the event of availability of the reasonable ground. The reasonable grounds shall be defined in every particular event deriving from the circumstances of the case. The promisee is as well empowered to implement the secondary requires deriving from the Agreement. However, the promisee shall enjoy the hereof rights in the event solely if no otherwise is stipulated under the Agreement, Law or the essence of the obligation.

The promisee, as well as the debtor but not the third party shall have the right to impugn in the Agreement concluded in favor of the third party.

The promisee reserves all the obligations deriving from the Agreement, however in the event if the third party has already obtained implementation as stipulated under the Agreement and in the event of disputability termination of the contractual relations envisages the obligation of remuneration of obtained implementation and the benefit, the hereof obligation obviously shall be granted to the third party but not the promisee.

In the event, if the third party waives the right acquired under the Agreement, the promisee on the basis of the approval of the third party solely shall be entitled to enjoy the right on implementation of the Agreement and in the event of failure thereof to implement – to enjoy the secondary rights,[73] whereas, the legal state of the third parties shall not admissibly be under constant dispute and the will of the promisee shall not define availability of his/her right. Although, the third party on the hereof basis acquires implementation envisaged under the Agreement but inasmuch as the promisee expresses the hereof will, the will shall be

[73] *Krofholer I., Florian I., Heiden M.,* Comment to the Civil Code of Germany, Tbilisi, 2014, Field 18, 236.

self-restricting. According to this logic, the promisee shall be entitled solely to require implementation of the obligations in own favor if the third party waives obtainment of implementation envisaged under the Agreement, other than the events if no otherwise is envisaged under the essence of the obligation.

Therefore, the promise/creditor shall be entitled solely without approval of the third party to enjoy the rights deriving from the Agreement concluded in favor of the third party if the third party waives the rights acquired under the Agreement or if the third party is not entitled to independently require implementation of the obligation from the debtor.

5.2. Rights and Obligations of the Debtor

The primary obligation deriving from the Agreement concluded in favor of the third party, implies implementation of the obligation in favor of the promisee or the third party. The debtor shall implement the obligation in favor of the third party or the promisee in line with the directives of the latter.

Unlike the Civil Code of Germany, the Civil Code of Georgia fails to specify the rights of the debtor deriving from the Agreement concluded in favor of the third party.

In line with the Civil Code of Germany, the counter-claim deriving from the Agreement shall be appurtenant to the debtor towards the third party as well. However, the right on require of implementation of the right on secondary require shall be granted to the debtor from the promisee,[74] deriving that the contractual obligations shall not apply to the third party and hence, he/she shall not be imposed with the responsibility deriving from the secondary require.[75] Though, we shall discuss the target of the right of the debtor on remuneration of the damage upon delay of obtainment of implementation by the third party as defined below.

Although, the Article 350 (1), (2) of the Civil Code of Georgia considers the authority of the parties to imply annulment or change of the right of the third party, the debtor shall not be granted the opportunity of realization of the hereof right without approval of the promisee, whereas the reservation in favor of the third party shall be made by the promisee and he has the interest of implementation of the Agreement towards the addressee. Hence, equipment of the debtor with the right to annul or change the right of the third party is the unjustifiable contractual burden for the promisee having the interest worth implementation.

6. Rights and Obligations of the Third Party on the Basis of Independent Require

6.1. Rights and Obligations of the Third Party with Independent Require towards the Debtor

In line with the Article 349 of the Civil Code of Georgia, the third party, from the Agreement, shall acquire the right on require of implementation solely. German legal literature provides the presumption that failure or undue implementation of obligation, the third party shall not be entitled to require remuneration of damage instead of implementation[76] and to secede from the Agreement.[77] However, definition of the Agreement might determine that the third party enjoys the hereof rights as well. German legal practice provides that upon changing (infringement) the basis of transaction[78] the third party is entitled to require

[74] *Krofholer I., Florian I., Heiden M.,* Comment to the Civil Code of Germany, Tbilisi, 2014, Field 14-15, 235.
[75] Ibid.
[76] §281 ff. BGB.
[77] *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 5, 559.
[78] "Die Störung der Geschäftsgrundlage".

adjustment of the Agreement to changed circumstances.[79] In the event if the third party enjoys the right to require adjustment of the Agreement to changed circumstances, it implies that the third party enjoys the right to require secession from the Agreement as well inasmuch as in compliance with the part three of the Articles 398 of the Civil Code of Georgia, adjustment of the Agreement to changed circumstances is the primary implementation requirement and secession from the Agreement is the secondary right.[80]

In the event, when the third party obtains implementation envisaged under the Agreement, he/she shall be immediately granted the right to enjoy the right implementable by the creditor towards the debtor inasmuch as with delegation of implementation envisaged under the Agreement the third party acquires the rights of the creditors towards the debtor. Though, as mentioned, the third party fails to enjoy the right of impugnment. At that, the obligations shall not be delegated to the third party that might be envisaged under the Agreement, whereas the Agreement binding for the third party is not envisaged under the Civil Code of Georgia.

The Supreme Court of Georgia has defined that deriving from the context of the transaction concluded in favor of the third party, the third party entitled to require implementation was the creditor of the Agreement.[81] Although, deriving from the definition of the Agreement concluded in favor of the third party, the right to require implementation of the Agreement is granted not only to the creditor but to the third party as well in favor of which the transaction has been concluded but it shall not be interpreted in the manner that the third party occupies the place of the creditor in the Agreement substituting him/her but the rights shall be delegated thereto related to require of implementation of the obligation and infringement thereof.[82]

In the event of infringement of the obligation, the third party is empowered to require remuneration of damage instead of implementation of the obligation,[83] and therefore the third party enjoys the right to file the claim towards the promisor as well,[84] however he/she shall not enjoy the right that might be granted to the promisee deriving from the Agreement.

At that, the third party is eligible to enjoy the rights on implementation of the Agreement and the secondary rights in the event of infringement thereof solely in the event if obtains implementation as stipulated under the Agreement.

According to the Court of Cassation, in line with the part one of the Article 350 of the Civil Code of Georgia, upon conclusion of the Agreement in favor of the third party, in the event if the Agreement fails to provide the special reservation, the subject of assessment of the Court is to define as emergence of the right for the third party so annulment or change thereof.[85] Thus, in the event if the Agreement fails to directly provide the rights of the promisee or the third party, the rights of the third party shall be defined on the basis of the essence of the Agreement.

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[79] *Palandt O., Grüneberg Ch.*, BGB, 74. Aufl, München 2015, § 328, Rn. 5, 559.

[80] Article 398 (3) of the Civil Code of Georgia. The Parties shall attempt first to adjust the Agreement to the changed circumstances or if adjustment of the Agreement to the changed circumstances appears impossible, and if another party disagrees, then the party with infringed interests is entitled to waive the Agreement.

[81] Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of May 13, 2015 № ar-274-262-2015.

[82] Compare, Decision of the Chamber of Administrative and Other Category Cases of the Supreme Court of Georgia of October 09, 2003, №3c-ad-185-j-03.

[83] Decision of the Chamber of Administrative and Other Category Cases of the Supreme Court of Georgia of April 16, 2003 № 3c-ad-537-j-02.

[84] Decision of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia of November 02, 2001 № 3j/804-01; Decision of the Chamber of Administrative and Other Category Cases of the Supreme Court of Georgia of April 16, 2003 №3c-ad-53-j-02.

[85] Decision of the Chamber of the Civil Cases of the Supreme Court of Georgia of July 29, 2011 № ar-796-850-2011.

Although, the Agreement concluded in favor of the third party imposes the obligations to the third party, however in the event when the third party waives the rights acquired under the Agreement we should ask who shall remunerate the damage inflicted to the debtor due to delay of implementation of the obligations.[86] In line with the Article 390 of the Civil Code of Georgia, the term shall be considered delayed by the creditor if the creditor fails to obtain implementation offered thereto the term of which has not applied yet. In this event, waiver of the offered implementation may imply the waiver of the rights acquired under the Agreement.

In compliance with the paragraph 333 of the Civil Code of Germany, if the third party waives the right deriving under the Agreement towards the promisor, it shall imply that the right has not been acquired. Correspondingly, the person obliged to remunerate the damage towards the debtor shall be the promisee. Thus, solution of the hereof issue implies no complication in the German Law. Though, the Civil Code of Georgia, in the event of waiver by the third party of the right acquired under the Agreement, fails to envisage similar regulation. As stipulated under the Article 351 of the Civil Code of Georgia, in the event if the third party waives the right acquired under the Agreement, the creditor is entitled to require implementation of the agreement if no otherwise derives from the Agreement or the essence of the obligation. For more clarity, we shall indicate that in this event the creditor is empowered to require "in own favor" implementation of the obligation.[87] Hence, the Article 351 of the Civil Code of Georgia would expediently be formulated as follows: "In the event of waiver by the third party of the right acquired under the Agreement, the creditor is entitled to require implementation of the obligation in own favor if not otherwise stipulated under the Agreement or the essence of the obligation".

In the event, when the third party enjoys the right of independent require in the Agreement, the hereof right shall not imply the right to require implementation of the Agreement solely but it shall be extensively elucidated. The third party enjoys almost all the rights that might related to implementation of the obligation, such are: filing the claim, remuneration of damage, secession from the Agreement, annulment of the Agreement, termination of the Agreement. However, the third party shall not enjoy the right to impugn inasmuch as he/she fails to express the will for conclusion of the Agreement and hence, shall not be considered as the person enjoying the right of impugnment.

Thus, the third party holds certain rights solely, while the rest of the rights and obligation remain appurtenant to the promisee.[88]

6.2. Rights and Obligations of the Third Party towards the Promisee with the Independent Require

The Civil Code of Georgia fails to provide the rights of the third party towards the promisee.

The rights of the third party as to the promisee so towards the debtor shall be defined deriving from the essence of the Agreement.

The Article 351 of the Civil Code of Georgia grants the third party with the right to waive the right acquired under the Agreement. The right of the third party to waive the right deriving from the Agreement is granted in the German Law as well.[89] The waiver by the third party of the right is expression of a unilateral

[86] See Articles 390-393 of the Civil Code of Georgia.
[87] See *Chechelashvili Z.,* Contract Law, Tbilisi, 2010, 90.
[88] *Jürgen H.,* Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 17.
[89] Ibid, 14.

will authenticity of which requires acceptance of the expressed will by the addressee.[90] Though, the Civil Code of Georgia fails to define the addressee of the waiver by the third party.

The opinion has been expressed envisaging the third party to make the declaration towards the debtor as a rule inasmuch as the debtor is to ensure implementation in his/her favor.[91] Hereof considerations are justified deriving from the general principle of implementation of the obligation, whereas the debtor shall identify the addressee of the implementation of the obligation. However, it is important that the waiver of the right acquired under the Agreement concluded in favor of the third party to be declared by the third party towards the promisee as he/she is to implement the reservation in favor of the third party and he/she is to be entitled to change the third party. Hence, first of all the promise shall be aware whether the third party is to accept implementation, inasmuch as in the event of waiver by the third party of offered implementation, responsibility for delay of acceptance of the offered implementation by the debtor shall be imposed to the creditor. As deriving from the contractual principle, it is expedient that the promisee shall be considered as the addressee of the waiver by the third party.

The Civil Code of Georgia fails to as well to define the term and the form of the waiver by the third party. In the event of the waiver by the third party, the Civil Code of Georgia is expedient to at least indicate to the reasonable term in order to allow the signatory parties timely defining the expected consequences. As to the form of the waiver, if adherence to any of the form was prescribed for acquisition of the right, then the form shall be observed in the event of waiver as well.[92]

Thus, the Civil Code of Georgia fails to regulate or define when the will expressed by the third party of the right acquired under the Agreement shall be considered authentic. It declines the practical and legal value of the Article 351 of the Civil Code of Georgia.

Deriving from the Insurance Agreement concluded in favor of the third party, conclusion of the Insurance Agreement solely is not enough for realization of the rights of the Insured and delivery of the Insurance Certificate solely serves the basis thereof.[93]

The third party, under the mandatory insurance, shall be granted with the right to require the responsibility report and in the event if the Insurer fails to implement obligation or improperly implemented the obligation, the third party is entitled to in judicial order require implementation of insurance from the Insurer, and in the event of failure of the Insurer to conclude or conclusion of the Agreement under undue conditions, the Insured (third party) is entitled to require remuneration of damage from the Insurer (creditor).[94]

IV. Conclusion

The Agreement concluded in favor of the third party serves for simplification of the negotiations as the third party, on the basis thereof, is allowed obtaining implementation envisaged under the Agreement without participation therein.

The subject of the Agreement concluded in favor of the third party shall be defined according to the type of the Agreement. However, regardless of whatever the type of the Agreement is appurtenant to, the subject thereof shall always be delegation of any of the rights to the third party. Though, in the event if the Agreement fails to directly provide that implementation as envisaged under the Agreement shall be dele-

[90] *Chanturia L.,* Comment to the Civil Code of Georgia, Book III, Tbilisi, 2001, 228.
[91] Ibid.
[92] Ibid.
[93] *Tsiskadze M.,* Legal Regulation of Voluntary Insurance, Tbilisi, 2000, 51.
[94] Ibid.

gated to the third party, the subject of the Agreement may not provide delegation of the right to the third party.

The Agreement concluded in favor of the third party is not a separate type of the Agreement. Any typical or atypical Agreement (deed of purchase, lease, rent, contractor's agreement etc.) may be concluded in favor of the third party, including the public legal agreement.

The Agreement concluded in favor of the third party is not a trilateral but a bilateral agreement.

The general rules shall apply to the form of the Agreement concluded in favor of the third party.

All the Agreements with participation of three parties shall not be considered concluded in favor of the third party. The essence of the Agreement concluded in favor of the third party with the independent require lies in the fact that the promise and the debtor grant the third party with the right on require. Implementation of the hereof Agreement may be requireed as by the promisee so by the third party in favor of which the Agreement has been concluded. The hereof fact shall not imply the opportunity of the promisee and the third party to simultaneously realize the rights. Realization of right with requirement of the promisee shall exclude realization of the hereof right by the third party and vice versa.

The peculiarity of the Agreement concluded in favor of the third party lies in the fact that the third party is not a signatory party. He/she shall not express will for conclusion of the Agreement and hence, he/she shall acquire the right to require deriving under the Agreement without participation therein. The basis for the requirement thereof is the Agreement concluded between two other parties.

In the event, when the third party holds the right of independent require in the Agreement, the hereof right shall not imply the right to require of implementation of the Agreement solely but shall be extensively interpreted. The third party enjoys almost all the rights that may relate to the requirement of implementation of the obligation, such are: filing the claim, remuneration of damage, secession from the Agreement, annulment and termination of the Agreement. However, the third party shall not enjoy the right of impugnment as he/she fails to express will for conclusion of the Agreement and neither shall be considered as the person holding the right of impugnment. That is, the person holding the right of impugnment may be as the promise, so the debtor but not the third party.

Definition of acquisition of the right by the third party implies determination whether the Agreement is concluded in favor of the third party with independent require.

Hence, the third party enjoys the certain rights solely, while the rest of the rights and obligations shall remain appurtenant to promisee.

In the event, if the Agreement fails to provide the special directives concerning the rights of the third party, the promisee enjoys all the hereof rights and is imposed with all the obligations that may derive from the Agreement.

In the Agreement concluded in favor of the third party, the promisee is entitled to require implementation in own favor of the Agreement concluded in favor of the third party but the creditor enjoys the hereof right until obtainment of implementation by the third party. He/she is entitled to annul the right of the third party or change it without consent of the third party. Naturally, the promisee is entitled to change the third party until the third party obtains implementation envisaged under the Agreement. Upon obtainment of implementation, the promisee shall be entitled to change the third party or annul the right thereof solely in the event of reasonable ground. The reasonable grounds shall be defined according to the circumstances of the case in every particular event. The promisee is as well empowered to implement the secondary requires deriving from the Agreement. Though, the promisee shall enjoy the hereof rights in the event solely if no otherwise is stipulated under the Agreement, Law or the essence of the obligation.

The promisee shall be entitled to enjoy the right deriving from the Agreement concluded in favor of the third party without consent of the third party solely if the third party waives the right acquired under the Agreement or if the third party is not entitled for independent requirement of implementation of the obligation by the debtor.

It is expedient the Article 351 of the Civil Code of Georgia to be formulated as follows: "in the event, if the third party waives the rights acquired under the Agreement, the creditor is empowered to require implementation of the obligation in own favor if no otherwise is stipulated under the Agreement or the essence of the obligation".

Deriving from the principle of the contractual law, it would be expedient to consider the promisee as the addressee of the waiver by the third party of acquisition of the right.

Nino Pepanashvili*

The Presumption of Fault of Provider of Medical Services Under the Civil Code of Georgia

The presumption of fault of medical service provider is established by the Civil Code of Georgia. However, the denial of presumption of fault of medical service provider takes place in court decisions and the scientific literature, which shall be conditioned by neglecting of legal method of interpretations of the norms. The issue is extremely important, because it is related to the procedure of distribution of the burden of proof between the parties. The purpose of article is to facilitate further study of an issue and establishment of the uniform judicial practice in the relevant field.

Key Words: *The presumption of fault, burden of proof, doctrine of Res ipsa loquitur.*

1. Introduction

Since the day of reestablishing the State independence, the need for complex reforms has emerged in Georgia, the success of which, first of all, depended upon the effective reform of the legislation. The Civil Code of Georgia, [1] (hereinafter referred to as the CCG), adopted in 1997, was based on the Civil Code of Germany. Despite the content convergence of separate norms, in Georgia, unlike Germany, "the more different legal terminology and new understanding of the concepts" [2] has been established. During the process of working on CCG and following its enactment, the provision and teaching of legal methodology has not been implemented in Georgia at proper level, which was very important for understanding and comprehension of mostly continental-European model-oriented laws.[3]

The article 1007 of CCG on compensation for damage inflicted by the medical institution does not have an analogue in the Civil Code of Germany. In accordance with the mentioned article, in the process of undertaking the treatment (consequences of surgical operation or incorrect diagnosis, and etc.) in the medical institution, the damage inflicted to a person's health shall be compensated in accordance with the general basis. The injurer is exempted from the responsibility, if he/she proves that he/she is not at fault in occurrence of damage.

While analyzing the separate court decisions on compensation of damage inflicted by the medical institution under the present research, the tendency of confusion of legal concepts, as well as neglecting of legal method of interpretation of the norms, given in special literature, has been distinguished.

It must to be noted that the Code of Civil Law of neither 1923 [4] nor 1964 [5] contained the special provision about compensation of damage inflicted by the medical institution and, probably, these circumstances

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1 The Civil Code of Georgia, the Parliamentary Bulletin, № 31, 24.07. 1997.

2 Preface: *Bernhard Shloer* and *Zeno Reichenbecher* in work: *Zippelius R.,* Introduction to German Legal Methods, Tbilisi, 2006, XI.

3 Ibid.

4 The Code of Civil Law of Soviet Socialist Republic of Georgia dated 1923.

5 The Code of Civil Law of Soviet Socialist Republic of Georgia (Bulletins of Supreme Council of Soviet Socialist Republic of Georgia, 1964, №36, Article, 662).

have conditioned the lack of researches implemented for the relevant direction. It must be also noted that, at a certain stage, there was a practice established, according to which the state medical institutions were exempt from civil legal responsibility, for the cases of infliction of damage to the health of patient by the doctor employed at the same institution.[6] As for the modern approach to the issue, it must be noted that during interpretation of article 1007 of CCG, in some works and in the decisions made by the Supreme Court of Georgia, the denial of the presumption of guilt of a doctor under the law of torts, can be encountered.

In the decision of Chamber of Civil Cases, the Supreme Court of Georgia, made in 2010 year, the court has defined that "proceeding from the specificity of the relationships generated between the patient and the doctor, the doctor is responsible only for incorrect medical actions, and the assumption of guilt (presumption) towards his/her activities is not applied". [7] In the decision of Chamber of Civil, Entrepreneurial and Bankruptcy Cases, the Supreme Court of Georgia, made in 2005 year, different position is encountered; according to the above position, the defendant shall be imposed the civil responsibility in case if the conditions for imposing of responsibility for infliction of damage are present, in particular, if there is a damage, which is inflicted by unlawful action, there is a causal relationship between unlawful action and the damage caused and an injurer is at fault. In addition, the Chamber indicates that "during infliction of damage there is a presumption of guilt – the injurer is considered as the guilty person, if the fact of absence of his guilt is not proved".[8] In contrast to the above noted, the availability of assumption (presumption) of guilt towards the doctor's activity is denied in the decisions[9] made by the Chamber of Civil Cases, the Supreme Court of Georgia in 2011 and 2013 years.

Comparison of the above decisions clearly indicates that diverse court practice is established with regard to the issue of presumption of guilt for medical service provider.

2. The Burden of Proof

It is stated in the scientific literature that according to the Civil Procedural Law of Georgia, "the burden of proof is fully assigned to the parties and this burden is equally distributed between them".[10] In terms of distribution of burden of proof, it is important to determine, whether there is a contradiction between the rules established under article 1007 of CCG and Civil Procedural Code of Georgia [11] (hereinafter referred

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[6] The decision is available in the publication: indicate – is available in journal "Soviet Justice" («Советская Юстиция»), №9, 1937, 52. The citizen, brought in hospital in unconscious condition, for treatment of which the medical heaters were used (by the prescription of a doctor), got the burn on the body and it took six months treatment for recovery. The patient submitted a claim against the medical institution . Based on article 403 of Civil Code of the Russian Soviet Federated Socialist Republic, the first instance court satisfied the claim, but the Supreme Court changed the decision and indicated that the court, instead of article 407 (where it was noted that the institution is responsible for injury inflicted by incorrect action of official, only in case separately specified by the law, if, at the same time, the incorrectness of action of official is recognized by the appropriate court or administrative body), has incorrectly used the article 403 of the Code. According to the court, imposing of responsibility for the damage inflicted by the medical institution could not be implemented, because there was not a reference in the law about the possibility of imposing of liability upon the hospital employees. Therefore, the citizen was refused to receive compensation for the damage.

[7] The decision of Chamber of Civil Cases, the Supreme Court of Georgia, made on 25 May, 2010 (Case №AS-1268-1526-09), <http://goo.gl/XhEK1T>, [28.08.15].

[8] The decision of Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, made on 13 April, 2005 (Case №AS -33-406-05), <http://goo.gl/vcF2Ym>, [28.08.15].

[9] The decision of Chamber of Civil Cases of the Supreme Court of Georgia, made on 27 June, 2011 (Case №AS-260-244-11), <http://goo.gl/Hk7MUs>, [28.08.15]; The decision of Chamber of Civil Cases of the Supreme Court of Georgia, made on 25 December, 2013 (Case #AS-1163-1092-2012), <http://goo.gl/GGvUfa>, [28.08.15].

[10] *Liluashvili T., Khrustali V.,* Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 196.

[11] Parliamentary Bulletin, 47-48, 31.12.1997.

to as CPCG), according to which each party shall prove the facts, on which it bases its claims and counterclaim.[12]

Herman notes that according to article 102 I of CPCG, each party shall prove the circumstances, which are favorable for them, but "the law also considers the exceptional cases for article 102, CPCG. These articles are: first section of article 394, articles 995, 996 and 997 of CCG. According to these norms the defendant is obliged to prove its non-guiltlessness, when in other cases, according to basic principles of article 102 of CPCG, the plaintiff would be charged with burden of proof, as guiltiness is one of the lawful preconditions for existence of the claim".[13] Therefore, the author identifies "the exceptional cases of article 102 of CPCG" only in indicated articles, in particular, in the article 394 I, articles 995, 996 and 997 of CCG.

One group of authors notes that the norm of article 102 I of CPCG is the expression of principle of competition and "the contradiction existing between the procedural and substantive laws, as a rule, is decided in favor of the latter"[14] (hereby, one of the decisions is provided as an example, where the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia noted that the burden of proof related to illegitimacy and lack of guilt lies with the defendant; "the defendant did not submit sufficient evidences on the circumstances indicated in the counterclaim. According to the report of the forensic-medicine examination appointed by the court's initiative… it is established that the operations were carried out incorrectly – with technical defects. The defending party failed to submit evidences to the court, which would exclude their guiltiness"[15]). Authors note that "in this case, the court gave the preference not to procedural norm, but to the substantive law norm"[16] (in particular, article 1007 of CCG).

Article 1007 of CCG not only contradicts the rules established under the article 102 I of CPCG, but also indicates and determines the procedure of distribution of burden of proof between the parties. In the comment for the article 102 of CPCG it is noted that "often, indicating which party shall prove which facts, is determined under the substantive norms",[17] i.e. there is no contradiction between the norms of procedural and substantive laws and there is not the need for decision in favor of any norm of this non-existent contradiction. The following position coheres to this consideration: "the legislative presumptions have two functions, procedural and substantive. The first is reflected in the fact that these presumptions in separate cases change the rule of proof considered under section I, article 102 of CCG and lay the burden of proof with another party, which is connected to the risk for the latter, that it can fail in a suit, if the evidence is not admitted. The substantive function is that one of the constituent elements of descriptive section of the norm, is considered as given in relation to the specific process and between the specific parties, even when establishment of such circumstances could not be made objectively."[18]

When the legislator establishes the rule of distribution of burden of proof between the parties, according to substantive law norm, as it is carried out in the article 1007 of CCG ('the injurer is exempted from the responsibility, if it is proved that he is not at fault in occurrence of damage~), it is incorrect to prove that the presumption of guilt is not applied towards the doctor's activity, allegedly under the Private Law.

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[12] Article 102 I, the Civil Procedural Code of Georgia.

[13] *Hermann T.,* Law of Evidence (synopsis), Tbilisi, 2016, 8.

[14] *Todua M., Willems H.,* Law of Obligations, Tbilisi, 2006, 49.

[15] The Decision of Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, made on 13 April, 2005 (Case №AS-33-406-05), <http://goo.gl/vcF2Ym>, [28.08.15].

[16] *Todua M., Willems H.,* Law of Obligations, Tbilisi, 2006, 49.

[17] *Liluashvili T., Khrustali V*., Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 196.

[18] *Bölling H., Lüttringhaus T.,* A Systematic Analysis of Fundamentals of Separate Claims of Civil Code of Georgia, Tbilisi, 2009, 68-69.

According to the definition provided by the professor Liluashvili, "the procedural essence of presumption (assumption) considered under the Civil Law is fully exhausted by distribution of burden of proof between the parties. Distribution of burden of proof between the parties based on the claims proceeding from the different institutions of substantive law, is directly or indirectly regulated by the law, which gives the court possibility to accurately determine, which circumstances belong to the facts contained in the grounds of claim, to be proved by the plaintiff, and which circumstances belong to the grounds of counterclaim, to be proved by the defendant."[19]

The following reasoning indicates on the presumption of guilt of medical service provider: "In case if the patient's claim is not satisfied, the illegal action of medical service provider must be excluded by the court decision. In addition, the presumption of guilt of injuring party under article 1007 of the Civil Code is applied and, accordingly, it must be proved that the damage is not result of his/her action. The injured party is not bound by the burden of proof of guilt of medical worker."[20] According to definition, provided by professor Chikvashvili, "the civil responsibility is characterized by ... the principle of presumption of guilt for the injuring party. Injuring party is considered as guilty, if he/she does not prove the fact of absence of his/her guilt."[21]

There is an opinion expressed in the scientific literature, according to which "during imposing the payment for contractual damage the creditor shall prove only the existence of the contract. The debtor's business is to prove that non-fulfillment of the contract is caused by external circumstances, which could not be changed by the debtor. As it is said, the debtor is considered to be guilty. During delict liabilities, quite the contrary, injured party (the creditor) is obligated to justify the defendant's fault. This difference is diminished by the fact that, even in the area of contractual responsibility, when the case refers to certain means belonging to one group, sometimes, the creditor has to prove that the debtor did not act as a good business executive, and, on the other hand, diverse presumptions are established by the law for delict responsibility."[22] The mentioned position is shared in some works: the correlation of contractual and non-contractual requirements is important, as in the first case, the debtor (doctor) is obligated to prove that non-fulfillment of obligations is the result of external factors and he is not guilty in occurrence of damage, but in case of non-contractual liability, the injured party (patient) is imposed the burden of proving the defendant's guilt."[23] The similar position can be encountered in other works: „The doctor is responsible for only the false medical action and the assumption (presumption) of guilt is not applied towards his/her activity."[24] In addition, one group of authors indicate that the CCG "introduces the principle of presumption of non-guiltiness of debtor"[25] and, then notes that "injured party does not have to prove the guiltiness of a person, but, on the contrary, the debtor is imposed the liability to prove that he is not guilty in occurrence of damage."[26] Obviously, if the debtor is required to prove that he is not guilty in occurrence of damage, then the presumption of guilt of debtor, but not "the principle of presumption of non-guiltiness of debtor",

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[19] *Liluashvili T., Khrustali V.,* Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 196.

[20] *Kvantaliani N.,* The Rights of Patient and Fundamentals of Civil Liability of Health Care Personnel (thesis work), Tbilisi, 2014, 190.

[21] *Chikvashvili Sh.,* Commentary to the Civil Code of Georgia, book IV, Vol. II, Tbilisi, 2001, 387. This Position is Shared in the Work: *Kochashvili K.,* Fault, as the Condition for Civil Liability (comparative legal research), „Law Journal ", №1, 2009, 84, <http://goo.gl/aHljoe>, [15.02.15].

[22] *Dundua M.,* Correlation of Delict Liability and Contractual Responsibility, „Law Journal ", №1, 2009, 56.

[23] *Gelashvili I.,* Civil Legal Condition of Embryo (thesis work), Tbilisi, 2012, 133.

[24] *Kvachadze M., Manjavidze I., Kvantaliani N., Mirzikashvili N., Gvenetadze N., Azaurashvili G.,* Book for Patients: Human Rights and Health Care (guide), Tbilisi, 2011, 118.

[25] *Todua M., Willems H.,* Law of Obligations, Tbilisi, 2006, 48.

[26] Ibid.

is evident. The position is shared in the present work, according to which "the presumption of guiltiness is characteristic to delict liabilities, which means that until the person does not prove absence of guilt in his activities (which is indicated by the creditor), he is considered as guilty."[27]

3. Doctrine of Res ipsa loquitur. The Concept of Negligence

If party, which is imposed burden of proof, cannot prove the circumstances favorable for him/her, the hearing can be completed with undesirable results: "these are the cases, when party does not submit evidences at all, or cannot convince the judge by means of the submitted evidences."[28] In addition, the burden of indication of facts and the burden of proof of these facts may not coincide with each other."[29] In terms of comparative legal research of issue, the doctrine of res ipsa loquitur[30] common in Anglo-American law of torts, is interesting.[31]

The representatives of medical field state that "a doctor is not imposed the criminal or disciplinary responsibility for medical mistakes."[32] Hereby, an opinion of Pirogov[33] is cited („I made as a rule nothing to hide to my disciples, during my first ascending to the chair; to acknowledge… mistakes made during setting a diagnosis, or during treatment of disease" [34]), and it is mentioned that: „to acknowledge our mistakes before the colleagues and not the patients and relatives, especially, before lawyers. It is not allowed to endlessly destruct the corporation of medicine." [35]

In general, the doctrine of res ipsa loquitur is considered as effective mean against the phenomenon of so-called "corporate solidarity" (many doctors support their colleague, even if they know that a crime has been committed).[36]

Res ipsa loquitur represents the rule of evidence (and not the norm of substantive law[37])[38] on the cases

[27] The Decision of Chamber of Civil Cases of the Supreme Court of Georgia, made on 29 June, 2006 (Case №AS-1363-1588-05), <http://goo.gl/qAJ5Yx>, [04.09.15].

[28] *Hermann T.,* Law of Evidence (synopsis), Tbilisi, 2016, 10.

[29] *Liluashvili T., Khrustali V.,* Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 197.

[30] Lat. "the thing speaks for itself" (See, Wex Legal Dictionary (Cornell Law School, The Legal Information Institute), <https://goo.gl/KI2dVA>, [03.09.16].

[31] *Prosser W.L.,* Res Ipsa Loquitur in California, "California Law Review", Vol. 37, Issue 2, June, 1949, <https://goo.gl/KSS3We>, [15.07.16]; In addition, *Johnson M.R.,* Rolling the "Barrel" a Little Further: Allowing Res Ipsa Loquitur To Assist in Proving Strict Liability in Tort Manufacturing Defects, "William & Mary Law Review", Vol. 38, Issue 3, 1997, <http://goo.gl/XULZbh>, [15.07.16]; *Carpenter C.E.,* The Doctrine of Res Ipsa Loquitur, "University of Chicago Law Review", Vol. 1, Issue 4, 1934, < https://goo.gl/06eDar>, [15.07.16].

[32] The article of professors of Oncology Department of Tbilisi State Medical University (TSMU): *Shavdia M., Ghvamichava R., Bakradze I.,* Ethics in Oncology, Journal "Modern Medicine", №16, May-June, 2010, <http://goo.gl/l2QbKe>, [15.02.14].

[33] *Nikolai Ivanovich Pirogov*, 1810–1881; Russian surgeon, Professor.

[34] *Pirogov N.I.*, Life Issues. Diary of Old Doctor (the manuscript is dated 1881), <https://goo.gl/W8qtdj>, [05.08.16], indicated: *Shavdia M., Ghvamichava R., Bakradze I.,* named work.

[35] *Shavdia M., Ghvamichava R., Bakradze I.,* Ethics in Oncology, Journal "Modern Medicine", №16, May-June, 2010, <http://goo.gl/l2QbKe>, [15.02.14].

[36] *Fishman P., "*Res Ipsa Loquitur" in Medical Negligence Legal Practice, 2016, <http://goo.gl/uykdJf>, [01.08.16].

[37] The decisions: Benedict v. Eppley Hotel Co., 161 Neb. 280, 283, 73 N.W.2d 228, 230, (1955); Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 925, 62 N.W.2d 127, 129 (1954). Indicated: *Johnson S.C.,* Res Ipsa Loquitur: Pleading Acts of Negligence: Nuclear Corp. of America v. Lang, 338 F. Supp. 914 (D. Neb. 1972), "Nebraska Law Review", Vol. 52, №3, 1973, 406, <https://goo.gl/SFf9aE>, [01.08.16]; In addition, see, *Harper F.V.,* Book Review: Res Ipsa Loquitur: Presumptions and Burdens of Proof, "Virginia Law Review", Vol. 32, 1945, 211, <https://goo.gl/Sr76G5>, [30.08.16].

[38] Eng. "Rule of Evidence"; See, *Sharma B.R.,* Medical Negligence: an Overview of the Opinions and the Controversies, "Anil Aggrawal's Internet Journal of Forensic Medicine and Toxicology", Vol. 8, №2, July-December 2007, <http://goo.gl/hQNUDs>, [01.08.16].

of personal injury law and implies that harmful action is implemented as a result of negligence [39] of defendant party (medical service provider), in other words, we are dealing with rebuttable presumption in which case the fault is presumed, until the defendant party proves the opposite.[40] When a health of a person is damaged and direct evidence against injuring party does not exist, the principle of res ipsa loquitur implies that existence of indirect evidence is sufficient for imposing the compensation for damage. [41]

The purpose of the principle of res ipsa loquitur for cases of compensation of inflicted damage to the patient by the medical service provider, is to simplify for the injured person (patient) to administer the case, as proving that damage is inflicted by the fault of medical service provider, is extremely difficult.[42] For better understanding of the mentioned principle, generally the cases, when during surgical operations the medical instrument remains in the body of patient (any subject of medical purpose, for example, the medical tampon. [43]), are provide as examples.[44]

The doctrine of res ipsa loquitur implies several conditions; in particular, 1. The injury or damages sustained could not, under ordinary circumstances, occur without negligence on the part of the defendant; 2. *the injury is caused by an instrumentality within the exclusive control of the defendant* [45] and 3. The damage has to be caused independently from any type willful action of plaintiff.[46]

In general, the rule applies, according to which the fault is not presumed (the presumption of negligence is not applied), "as a general rule, it may be stated that negligence is a fact which must always be proved and will never be presumed"[47] (in law of torts, the onus of proving negligence lies upon to the individual, who alleges that he has been injured[48]), but the doctrine of res ipsa loquitur represents an exception

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[39] For duty of care see Donoghue v Stevenson [1932], UKHL 100, Lords' Journals, May 26, 1932, <http://goo.gl/cDY0TV>, [31.08.16]; In addition: *Bryden D., Storey I.,* Duty of Care and Medical Negligence, "Oxford Journals", Medicine & Health BJA, CEACCP, Vol. 11, Issue 4, 124-127, <http://goo.gl/UtneQK>, [31.08.16].

[40] Thomson Reuters Business, Res Ipsa Loquitur, <http://goo.gl/BChznU>, [01.08.16].

[41] *Prosser W.L.,* Res Ipsa Loquitur in California, "California Law Review", Vol. 37, Issue 2, June, 1949, 191, <https://goo.gl/KSS3We>, [15.07.16]; California Civil Jury Instructions, Special Doctrines: Res ipsa loquitur, New September 2003; Revised June 2011, December 2011, <https://goo.gl/ZrCHHc>, [08.08.16]; In addition, see, *McBratney W.H.,* Res Ipsa Loquitur, "Washington University Law Review", Issue 4, 1952, <https://goo.gl/306WJQ>, [15.07.16]; *Konig A.H.,* Tort Law – Res Ipsa Loquitur in Medical Malpractice Actions: Mireles v. Broderick, New Mexico Law Review, Vol. 23, 1993, <https://goo.gl/r0F0Yu>, [10.08.16]; *Grady M.F.,* Res Ipsa Loquitor and Compliance Error, "University of Pennsylvania Law Review", Vol. 142, №3, 889, <https://goo.gl/Q89Me2>, [10.08.16].

[42] *Goguen D.,* When a Doctor's Negligence "Speaks for Itself", <http://goo.gl/GJVRfD>, [01.08.16]; *Fishman P.,* "Res ipsa loquitur" in medical negligence legal practice, 2016, <http://goo.gl/uykdJf >, [01.08.16]; *Burnham W.,* Introduction to the Law and Legal System of the United States, 2002, 426.

[43] The patient died in a short time following abdominal surgery. As a result of examination of corpse, it was found that the medical tampon was left in the body (see, Burden of Proof, Mahon v Osborne [1939], 1 All ER 535, CA <https://goo.gl/IvjqIl>, [01.08.16].

[44] Ibid. in addition, see, *Harland J.H.,* Res Ipsa Loquitur in Malpractice Cases in Canada, "Cleveland State Law Review", 302-303; 1961, <http://goo.gl/wXTgMx>, [14.07.16]; *Patel B.,* Medical negligence and res ipsa loquitur in South Africa, "South African Journal of Bioethics and Law", Vol. 1, №2, December 2008, <http://goo.gl/HF0i62>, [14.07.16]; *Tobin P.C.,* 25 Doctrines of Law You Should Know, 2007, 3; *Anderson J.,* What to Do if a Surgical Instrument is Left Inside of You, May 13th, 2013, <http://goo.gl/CkJDeo>, [12.07.16].

[45] Raber v. Tumin [1951], 36 Cal.2d 654, <http://goo.gl/RfXmi0>, [01.08.16]; *Steenson M.K.,* A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability, "William Mitchell Law Review", 1998, 34-46, <https://goo.gl/ELqctL>, [13.08.16]; See: *Heckel F.E., Harper F.V.,* Effect of Doctrine of Res Ipsa Loquitur, "Illinois Law Review", 1928, 725, <https://goo.gl/7A7GZ9>, [16.08.16].

[46] *Fricke G.L.,* The Use of Expert Evidence in Res Ipsa Loquitur Cases, Villanova Law Review, Vol. 5, Issue 1, 1959, 59, <https://goo.gl/ilnWHx>, [03.08.16]; Raber v. Tumin [1951], 36 Cal.2d 654, <http://goo.gl/RfXmi0>, [01.08.16].

[47] Negligence–Res Ipsa Loquitur–Burden of Proof (Comment on Recent Judicial Decisions), Washington University Law Review, Vol. 13, Issue 2, 157, <https://goo.gl/e0B5js>, [19.08.16].

[48] *Heckel F.E., Harper F.V.,* Effect of Doctrine of Res Ipsa Loquitur, Illinois Law Review, 1928, 724, <https://goo.gl/7A7GZ9>, [16.08.16].

from above mentioned general rule.[49]

As for the concept of negligence, the tortious act, committed as a result of negligence considers that the party could take into account the expected damage, with high degree of probability. In case of negligence, the party creates inexpedient risk of infliction of damage, by action or inaction. At first glance, both the negligence as well as intention, reflect the psychical attitude of delinquent offender towards the expected results of actions implemented by him, but in case of such approach, only "careless" or "inattentive" persons could be found among the violators. Barnem notes that in this case there is a presumed fact that, usually, each member of society knows, which of his/her actions or inactions create unreasonable risk for infliction of damage.[50] Accordingly, in line with Restatement (Second) of Torts, §282, the negligence is determined as the action, which does not comply with the standard of care considered under the applicable law, the purpose of which is "to protect others from unreasonable risks of harm"[51] (delinquent's subjective attitude towards the action implemented by him does not have any legally significant meaning).Therefore, negligence means "a breach of duty".[52]

4. Conclusion

Diverse judicial practice, existing for such fundamentally significant issue as presumption of fault on the cases of compensation for damage inflicted by the medical institution, has been revealed in the present research. The analysis of norm specified in the article 1007 of CCG gives a clear basis for conclusion, according to which, the presumption of fault (the fault of defendant is presumed, if it is not proved by him otherwise) is applied to medical service provider (doctor, nurse, medical institution, etc.), under the Private Law, the procedural meaning of which directly relates to the issue of distribution of burden of proof (accordingly, the court determines the facts that must be proved by the plaintiff and the facts that must be proved by the defendant[53]) between the parties, but there is not any type of contradiction between the procedures determined by article 102 I of CPCG and substantive norm defined under the article 1007 of CCG.

In the present work the position is shared, according to which civil responsibility is characterized by the principle of presumption of fault of injuring party and the injuring party is considered as faulted, until the fact of absence of his/her fault is not proved by him/her.[54] Proceeding from the mentioned, it can be expedient to incorporate the last sentence ("The tortfeasor shall be released from liability if he/she proves that he/she is not responsible for the harm) provided in the article 1007 of CCG, in the article 992 of CCG (where the general rule for generation of delict liability as a result of infliction of damage is considered) and, for example, to formulate it as follows: "A person who unlawfully, intentionally or negligently causes damage to another person shall compensate the damage to the injured party. Unless otherwise provided by law, the injuring party is exempt from the responsibility, if he/she proves that he is not responsible at fault in the occurrence of the damage, unless otherwise specified by the law."

The issue requires further thorough research, not only within the framework of article 1007 of CCG, but fully under the framework of Private Law, which, will ultimately facilitate introduction of uniform judicial practice.

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[49] *Finger D.L., Finger L.J.,* The Delaware Trial Handbook (Online Edition), <https://goo.gl/b5iX9v>, [10.08.16]; in addition, see *Carver v. El-Sabawi,* 107 P.3d 1283 (2005), <https://goo.gl/F3cjiM>, [19.08.16].

[50] *Burnham W.,* Introduction to the Law and Legal System of the United States, Saint Paul, City P 2002, 424.

[51] Restatement (Second) of Torts, §282, American Law Institute 1965. Indicated: *Burnham W.,* Introduction to the Law and Legal System of the United States, *Saint Paul,* 2002, 424.

[52] *Burnham W.,* Introduction to the Law and Legal System of the United States, 2002, 424.

[53] *Liluashvili T.,* Khrustali V., Commentary to the Civil Procedure Code of Georgia, Tbilisi, 2004, 196.

[54] *Chikvashvili Sh.,* Commentary to the Civil Code of Georgia, Book IV, Vol. II, Tbilisi, 2001, 387.

Salome Kavtaradze*

On Due Diligence, as the Issue of Legal Notion

Due Diligence, as a kind of assessment of enterprises, is mostly used in the case of M&A transactions. Due Diligence emerged in America, but it developed in the countries of continental European law. With economic advancement, many types of Due Diligence formed, namely, legal, economic, tax, environmental, etc. The list of types of Due Diligence is inexhaustible and its formation depends on the demand of specific enterprise. The conclusion, obtained as a result of conducting of Due Diligence, conditions the fate of M&A transaction, consequently, it is important both for the buyer and the seller.

Key Words: *Due Diligence, merger and acquisition of enterprises, economical, Tax, environmental Due Diligence, economic development, transaction, information asymmetry, goals of Due Diligence, identification of risks.*

1. Introduction

Due Diligence, as an important institute of corporate law, represents novelty for Georgian law. It often plays decisive role in enterprise merger and acquisition (*M&A*) transaction.

Initial emergence of *Due Diligence* is not related to enterprise merger and acquisition transactions, but presently the term *Due Diligence* is used just towards it. Increased role of enterprise merger and acquisition transactions in present-day economic relations, naturally, caused development of many institutions, related to it. *Due Diligence* is one of them. Preparation of such transactions at present occurs through *Due Diligence* directly.[1] Obtaining of maximum information at pre-transaction stagehas obtained growing importance for modern entrepreneurs for avoidance of mistake, minimization of risks and securing purchaser from unnecessary surprises. It might be said that implementation of *Due Diligence* is very important for successful completion of merger and merger. Naturally, there other factors, contributing to success or failure of the transaction, but in both cases people speak about *Due Diligence* being implemented improperly, unsuccessfully, or vice versa, successfully.

Although Due Diligence emerged in the bosom of law, presently it is not the property of the law only. On the contrary, it might be stated that it obtained economic burden and developed in this direction. This fact proves again, that economy doesn't exist without law and law doesn't exist without economy. Accordingly, an entrepreneur can't achieve the goal without examination of legal situation of the target object.

The present article presents information about the notion of *Due Diligence,* it origination, types and course, which is very important for understanding and proper perception of the institute.

2. American Roots and Definition of Due Diligence

The roots of the notion Due Diligence are in American law, implying "the required, relevant and proportional diligence". It represents shortened version of the notion Due Diligence Investigation. Thus, the notion

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[1] *Elfring C.,* Legal Due Diligence Reports, JuS-Beil, Heft 5/2007, Verlag C.H. Beck, 2007, 4.

expresses not the process of implementation of some action, activity, but, primarily, the scale of behavior,[2] which is very important. In American law Due Diligence, on the one hand, it serves as a scale of required behavior of the persons, involved in the transaction (purchaser, vendor and advisor), and, on the other hand, it is the result of the principle"caveat emptor*"* existing in the applicable trade law.[3] It is important to know the difference in Due Diligence according to the trade law and corporate law. In conformity with the principle *"*caveat emptor*"*, existing in the trade law, the obligation of verification of the object of sale lies upon the purchaser and, after verification, he/she can demand the relevant security means from the vendor. This approach is different from the approach, existing in majority of the European law countries. As verification of the object of sale and minimization of risks should be in the purchaser's interest, it is not clear why introduction of Due Diligence, as the scale of assessment, should have become necessary.[4]

The US Security Act of the 1993 required from issuers preparation of the so-called "registration application", which should be presented to the Security Exchange Committee of the relevant state. The application should contain detailed information on the company, its assets and liabilities. By its essence, the report was similarto the *Due Diligence Report,* made up by the companies in the case of sale. The author of the application, the issuer, members of the Board of Directors, all advisors, participating in the preparation and examination of the application, are responsible for the application being prepared with "Due Diligence".[5]

Following from the circumstance that transactions obtained very international character, the notion of Due Diligence was transferred from American law into German legal practice.[6] American entrepreneurs appeared on German market in great number and brought their ideas on entrepreneurial relations, especially on *M&A* (acquisition and merger of enterprises) translations.[7] American origin of the notion Due Diligence and domination of Anglo- American legal culture has its advantages too, but, at the same time, it is accompanied by unconditional transfer of traditions, characteristic for Anglo- American law, which are often unnecessary or illegal according to the national legislation.[8] Naturally, development of the business world and high level of globalization is followed by partial amalgamation of various legal cultures, but referencing needs great attention and analysis so that specific norm or legal tradition does not become artificial outgrowth in the law.

Due Diligence plays important role in *M&A* translations, but there is an opinion that successful company shall use it in certain periodicity[9] to underline the profitability of the company.[10]

Although Due Diligenceis not a new discovery, its unambiguous definition does not exist till present. As it was mentioned above, literally, *Due Diligence* means "the required, relevant and proportional diligence"; nevertheless, it expresses not one action, but rather unity of actions.[11] And literal translation does not express its present-day essence. Although Due *Diligence* has formed as general principle of trade law, presently it is referred

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2 *Schmitz C.,* Due Diligence beim Unternehenskauf: eine Betrachtung ihrer sekundärrechtlichen Auswirkungen nach deutschem Recht sowie ihrer bürgerlichrechtlichen Bezugspunkte, Cuvillier Verlag Göttingen, 2002, 2.

3 Ibid, 29.

4 *Krömker M.,* Die Due Diligence im Spannungsfeld zwischen Gesellschafts- und Aktionärsinteressen, Ein Beitrag zur Offenbarungsbefungnis des Vorstand und zum Offenbarungsanspruch eines Paketaktionärs zum Zwecke der Due Diligence vor einem Unternehmenskauf, Europäische Hochschulschriften, Reihe II, Rechtswissenschaft, Bd./Vol. 3537, Peter Lang, 2002, 4.

5 Ibid, 3-4.

6 Ibid, 31.

7 Ibid, 4.

8 Ibid, 31.

9 *Schmitz C.,* Due Diligence beim Unternehenskauf: eine Betrachtung ihrer sekundärrechtlichen Auswirkungen nach deutschem Recht sowie ihrer bürgerlichrechtlichen Bezugspunkte, Cuvillier Verlag Göttingen, 2002, 5.

10 This opinion is particularly applicable to the companies, shares of which are traded on stock exchanges.

11 *Knöfler K.,* Rechtliche Auswirkungen der Due Diligence bei Unternehmensakquisitionen, Europäische Hochschulschriften, Reihe II, Rechtswissenschaft, Bd./Vol. 3240, Peter Lang, 2001, 23.

to as an addition to the translation of merger and acquisition of enterprises.[12] It shall also be mentioned that due to the lack of unambiguous definition of the term, it is established in foreign languages not through the relevant translation, but in the form of English term directly. It is not the shortcoming of Georgian legal terminology only; even in the countries, where finding of the relevant meanings and establishment of terms in this form is attached great importance (e.g. in Germany), Due Diligencehas not been translated.

3. Due Diligence – in the Case of Merger and Acquisition of Enterprises

3.1. Due Diligencein the Service of Transaction of Merger and Acquisition of Enterprises

Although *Due Diligence* has Anglo- American origin, in the framework of practice *M&A,* the countries of Anglo- American law, historically, made less contribution in its development.[13] In many developed countries (e.g. in Germany) the entrepreneurs arrived to the opinion that before selling, the enterprise should be comprehensively inspected as early as in middle of the 20th century.[14] Although the institute of inspection of enterprises existed, the terms *Due Diligence* for the purposes of *M&A* established in 90-ies.[15]

M&A transaction is always accompanied by certain risk. How this risk turns out, depends on conformity of the information, having by the purchaser about the enterprise, with the reality. *Due Diligence*, which is implemented on the pre-contract stage, more exactly, after achievement of *preliminary agreement,* before signing the *binding contract,* serves just for obtaining of full-value information and insurance of the potential purchaser.[16] As a rule, the purchaserdoes not have much information about the object; he needs it all for determination of the price, reduction of risks, decision-making, etc. And for the counter-part – the vendor - the information is available and implementation of Due *Diligence* is the expression of his preparedness to hand over the knowledge, existing in his ownership, to the potential purchaser.

The above provided definition, the process of its formation does not greatly differ from *Due Diligence*, which is implemented in the case of merger and acquisition of enterprises. Generally, it could be understood as analysis and assessment of the object with particular diligence in the course of business transaction.[17]However, this general statement shall be further specified. In the cases, the object is the enterprise and the enterprise required study and analysis. As far as each object substantially differs from others, only as a result of its detailed examination the purchaser can require exact guaranteed from the vendor.[18] It shall also be mentioned that the exact recipe of implementation of *Due Diligence* does not exist, as the entrepreneurs' approach and the information, interesting for them about the target object changes in each particular case.[19]

In the sense of corporate law, *Due Diligence* means the level of diligence, which the relevant officials of the enterprise shall use in the course of fulfillment of their obligations.[20]

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[12] *Löffler C.,* Tax Due Dilignce beim Unternehmenskauf, Analyse und Berücksichtigung Steuerlicher Risiken und Chancen, IDW-Verlag GmbH, Düsseldorf 2002, 10.

[13] *Fatemi A.,* Die Obligenheit zur Due Diligence beim Unternehmenskauf, Eine Rekapitulation der Fahrlässigkeit, Düsseldorfer Rechtwissenschaftliche Schriften, Nomos, 2009, 16.

[14] Ibid,16.

[15] *Wegmann J., Koch W.,* Due Diligence - Unternehmensanalyse durch externe Gutachter - Ablauf und Technik, Folge-Due-Diligence als neuer Analysestandard, DStR,Verlag C.H. Beck, 2000, 1028.

[16] *Bing G.,* Due Diligence, Planning, Questions, Issues, Praeger, 2008, 1.

[17] *Elfring C.,* Legal Due Diligence Reports, JuS-Beil, Heft 5/2007, Verlag C.H. Beck, 2007, 4.

[18] *Klie M.A.,* Die Zulässigkeit einer Due Diligence im Rahmen des Erwerbs von börsennotierten Gesellschaften nach Inkrafttreten des Anlegerschutzverbesserungsgesetzes (AnSVG), Schriften zum Unternehmensrecht, Band II, Peter Lang, 2007, 28.

[19] *Wegmann J., Koch W.,* Due Diligence - Unternehmensanalyse durch externe Gutachter - Ablauf und Technik, Folge-Due-Diligence als neuer Analysestandard, DStR,Verlag C.H. Beck, 2000,1029.

[20] *Schmitz C,* Due Diligence beim Unternehenskauf: eine Betrachtung ihrer sekundärrechtlichen Auswirkungen nach deutschem Recht sowie ihrer bürgerlichrechtlichen Bezugspunkte, Cuvillier Verlag Göttingen, 2002, 2.

In the cross-section of merger and acquisition of enterprises, *Due Diligence* does not only mean analysis and inspection of the object, as the object of translation, but the inspection reaches to the goals of the related contract.[21]Whether or not the potential purchaser acquires or merges the enterprise depends on many factors. *Due Diligence*, as the collective noun, covers many tasks and works towards this way.[22] During transactions, not only the potential purchaser is interested in maximum inspection of the target object, but the vendor as well. The vendor, on the basis of demonstration of free will, may order the implementation of *Due Diligence* to the professionals and present it as additional documentation (Vendor Due Diligence).[23] By such step, potential purchaser will save both time and money. Implementation of Due Diligencecheck requires such a lot of time and funds that, if the vendor and the purchaser trust each other and the inspection is already conducted, the purchaser shall even be glad.[24] The value of *Due Diligence* shall not be equaled to the value of the transaction, and often it is not determined what percentage share of the transaction value can be used for *Due Diligence* check in the worst case. According to research, mean value of *Due Diligence*, usually, does not exceed 1,08 % of the transaction value.[25] In addition to the amount, the time factor shall also be taken into account, which plays important role in business relations. The potential purchaser shall manage to obtain the information, required for him, in quite short period of time not to hinder the workflow of the company and, at the same time, be the first in the environment of competition and not to concede the object, interesting for him.[26] In *M&A* transactions, the speed of decision-making is particularly valuable; the entrepreneur competes not only with other entrepreneurs, but with the time too.

In practice, the reliability of the information is determined on the basis of three criteria. These criteria are Need to know (obligatory information), Deal Killer (information, lack of which will fail the deal) and Nice to have (desirable, but not substantially necessary information).[27] According to these criteria, the auditors make up a list (Due Diligence Checklist) of what shall be inspected by them.

3.2. Development of Due Diligence up to the Present Standards in the Aspect of Acquisition and Merger of Enterprises

In 80-ies- 90-ies of the 20th century, *Due Diligence* established in M&A transaction as internationally recognized standard. The wave of *M&A* transaction of that period developed the market of sale of enterprises. Since then, *M&A* transactions, actually, became essential constituent element of activities of the enterprises; the enterprises used *Due Diligence* check almost inevitably.[28]

The group of the investors of new generation also greatly contributed to the development of *Due Diligence.* In the middle of 80-ies investors (mostly, the so-called Private Equity Funds) appeared on the market, which invested funds in enterprises for relatively short period (3-7 years), but with the expectation of greater profit in

[21] *Schmitz C,* Due Diligence beim Unternehenskauf: eine Betrachtung ihrer sekundärrechtlichen Auswirkungen nach deutschem Recht sowie ihrer bürgerlichrechtlichen Bezugspunkte, Cuvillier Verlag Göttingen, 2002, 6.

[22] Ibid, 6.

[23] Ibid, 7.

[24] As implementation of full-value inspection requires great expenses (in the form of time, as well as amount), the interested party chooses the segment, interesting for him and conducts inspection in that direction. It could be legal, tax, economic or environmental Due Diligence. The entrepreneur shall understand that the enterprise is a complex organism and even the owner may not know all details about it.

[25] *Fatemi A.,* Die Obligenheit zur Due Diligence beim Unternehmenskauf, Eine Rekapitulation der Fahrlässigkeit, Düsseldorfer Rechtwissenschaftliche Schriften, Nomos, 2009, 18.

[26] Ibid,18.

[27] Ibid, 18-19.

[28] *Liekefett K H.,* Due Diligence bei M&A Transaktionen, Voraussetzungen und Grenzen bei Börsengängen, Fusionen, Übernahmen, Beteiligumgskäufen, Private Equity und Joint Ventures, Duncker und Humblot Berlin, 2005, 26.

the case of sale of the enterprise (leveraged buyout).[29] Investors of this type made their decision just based on the information, obtained as a result of implementation of *Due Diligence*, which included detailed analysis of the enterprise. In 90-ies, *Due Diligence* established even in Germany - the country with quite conservative law and presently it stands on quite high stage of development.

4. The Purposes of Due Diligence

In the course of acquisition of the enterprise, the main problem is the lack of information.[30] The share of failed deals is still quite big in the transactions of merger and acquisition of enterprises. Each case is individual and, accordingly, the causes of failure are diverse. However, the causes may be generated and on the long list, having erroneous or incomplete information against the background of improperly conducted *Due Diligence* is on the first place.[31] Resolution of problems, detected after completion of transaction requires a lot of time and funds, which is not profitable for the entrepreneur. Successfully conducted *Due Diligence*cannot completely resolve problems, but shall ensure their reduction and prediction.

Briefly, *Due Diligence* has the function of assistance in decision making on pre-acquisition stage, strategy planning, structuring and arrangement, determination of the price of acquisition, insurance and guarantee, evidence, facilitation of formalizing the deal.[32] Fulfillment of these functions is the purpose of conducting of *Due Diligence*.[33] Each of the above-specified functions is performed by *Due Diligence* on different stages of deal; some of them are substantial on pre-transaction period, and some – after completion of transaction.

4.1. Detection of Risks

Prior to concluding of agreement, in all cases, certain asymmetry of information exists between the parties[34]. One has more information that the other. Potential purchaser, for obtaining of information, primarily, applies to the public sources of information like Public Register, published annual reports, voluntarily published other reports, etc.; but the events inside the company and important documentation remains unavailable. Many nuances may emerge in legal, financial, tax or many other aspects, which may make the deal unreasonable for the potential purchaser. Certainly, it is possible to formalize a deal without implementation of *Due Diligence*, but in such case, the vendor shall provide many guarantees to the purchaser and the detected shortcoming shall later be eliminated on the basis of these guarantees so that the purchaser's damage is minimized. It seldom happens, but when both parties are in hurry to make a deal, such agreement is possible.[35] Inspection of all types of documentation and their maximum study allows detection of the risks, related to the company and makes it possible to insure them, so detection of risks can be considered as the central goal of *Due Diligence*.

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[29] *Liekefett K H.,* Due Diligence bei M&A Transaktionen, Voraussetzungen und Grenzen bei Börsengängen, Fusionen, Übernahmen, Beteiligumgskäufen, Private Equity und Joint Ventures, Duncker und Humblot Berlin, 2005, 26.

[30] *Fatemi A.,* Die Obligenheit zur Due Diligence beim Unternehmenskauf, Eine Rekapitulation der Fahrlässigkeit, Düsseldorfer Rechtwissenschaftliche Schriften, Nomos,2009, 21.

[31] Ibid, 21.

[32] *Kusche M.S,* Die aktienrechtliche Zulässigkeit der Durchführung einer Due Diligence anlässlich eines Unternehmenskaufs, Mit Due Diligence-Checkliste für die Zielgesellschaft, Studien zum deutschen und europäischen Gesellschafts- und Wirtschaftsrecht, Peter Lang, Herausgegeben von Ulrich Ehricke, Band 2, 2005, 34.

[33] *Kneip C., Jänisch C.,* Tax Due Diligence, Steuerrisiken und Steuergestaltung beim Unternehmenskauf, Verlag C. H. Beck München, 2005, Hogh, 8.

[34] Despite the attempts, full resolution of the problem of asymmetry is a utopic intention and potential purchaser shall take this risk into account too. SeeKlie M.A., Die Zulässigkeit einer Due Diligence im Rahmen des Erwerbs von börsennotierten Gesellschaften nach Inkrafttreten des Anlegerschutzverbesserungsgesetzes (AnSVG), Schriften zum Unternehmensrecht, Band II, Peter Lang, 2007, 44.

[35] See *KuscheM.S,* Die aktienrechtliche Zulässigkeit der Durchführung einer Due Diligence anlässlich eines Unternehmenskaufs, Mit Due Diligence-Checkliste für die Zielgesellschaft, Studien zum deutschen und europäischen Gesellschafts- und Wirtschaftsrecht, Peter Lang, Band 2, 2005, 36.

4.2. Determination of the Value and the Sale Price

Determination of real value of the enterprise and agreement of the sale price has substantial significance for the investor, due to understandable reasons.[36] Real value of the company not always coincide with the sale price.[37] Determination of the deal price depends on many criteria and is subject to agreement between the purchaser and the vendor.[38] Nevertheless, real price of the company identified and the risks detected as a result of implementation of *Due Diligence.* So, one of the important purposes of implementation of *Due Diligence* is determination of the sale price in the course of *Due* Diligence check, clarification of the real value and agreement of favorable price with consideration of other factors (risks, guarantees).

4.3. Guarantees

The catalogue of guarantees is individual for each case and it depends on the detected risks and heir analysis. Often, legislative norms (dispositional and not imperative) of guarantees of specific country are not applied and the guarantee obligations, undertaken by the parties, fully depend on the results of *Due Diligence*.[39][40] In this case, the parties are driven by different interests; the vendor wants to provide as few guarantees as possible and receive as big amount as possible, and the purchaser – vice versa – pay less amount and receive more guarantees. For this reason, after implementation of *Due Diligence* it is the subject of negotiations and agreement. And both parties want to achieve the best results in the course of negotiations on the basis of the existing documentation at their disposal and *Due Diligence* report. The parties have to come to terms and it is natural, as the faultless company, as well as the purchaser with unlimited financial resources, does not exist.

4.4. Obtaining of Evidences

To avoid future misunderstandings and disputes, in close linkage with the guarantee obligations, all important documents shall be recorded so that they have the power of evidence is required.[41] Registration and documenting of the future evidences shall be performed prior to concluding the agreement. In addition to the purchaser, this action may prove to be useful for the vendor in specific case, to prove information of what level was at the purchaser's disposal before concluding the contract.[42]

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[36] *Kusche M.S.,* Die aktienrechtliche Zulässigkeit der Durchführung einer Due Diligence anlässlich eines Unternehmenskaufs, Mit Due Diligence-Checkliste für die Zielgesellschaft, Studien zum deutschen und europäischen Gesellschafts- und Wirtschaftsrecht, Peter Lang, Band 2, 2005, 37.

[37] "Price is what you pay. Value is what you get." See *Klie M.A,* Die Zulässigkeit einer Due Diligence im Rahmen des Erwerbs von börsennotierten Gesellschaften nach Inkrafttreten des Anlegerschutzverbesserungsgesetzes (AnSVG), Schriften zum Unternehmensrecht, Band II, Peter Lang, 2007, 45.

[38] *Kusche M.S,* Die aktienrechtliche Zulässigkeit der Durchführung einer Due Diligence anlässlich eines Unternehmenskaufs, Mit Due Diligence-Checkliste für die Zielgesellschaft, Studien zum deutschen und europäischen Gesellschafts- und Wirtschaftsrecht, Peter Lang, Band 2, 2005, 37.

[39] Ibid, 38.

[40] In the paper the case is discussed, when vendor acts as Due Diligence implementer and one of the bases because failure of further issuance of many guarantees. And its basis is timely detection of risks and optimization, as far as possible. Issuance of many guarantees may cause damage to the vendor and make the transaction in attractivefor him.

[41] *Kusche M.S.,* Die aktienrechtliche Zulässigkeit der Durchführung einer Due Diligence anlässlich eines Unternehmenskaufs, Mit Due Diligence-Checkliste für die Zielgesellschaft, Studien zum deutschen und europäischen Gesellschafts- und Wirtschaftsrecht, Peter Lang, Band 2, 2005, 39.

[42] Ibid, 39.

5. Types of Due Diligence

5.1. General Overview

Complication of business transactions refined and diversified *Due Diligence* step-by-step. Different goals are driving entrepreneur in the case of acquisition and merger of enterprises; consequently, they have different goals when conducting *Due Diligence.* Following from these goals, the presently existing types of *Due Diligence* formed. Obviously, the list will not be comprehensive and emergence of new types is an ongoing process. Nevertheless, this paper will cover the most widely spread types of *Due Diligence*. These are legal, tax, commercial, technical, financial and environmental *Due Diligence*-ი.[43] The above listed types of *Due Diligence* may be considered the most demanded types of *Due Diligence*, although there also are researches of strategic, human resources, organizational,[44] cultural, real estate, insurance[45] and other types of *Due Diligence*.

5.1.1. Legal Due Diligence

The goal of legal due diligence is to understand the legal relations of the target object and assess them. Consequently, the subject of such inspection, primarily, is: foundational agreement (each detail since the day of establishment of the enterprise shall be checked, how correctly it was registered, are all legal requirements, related to establishment, met, etc.), the Charter, contracts between the company and directors, rental and leasing contracts, documentation, regulating relations between the clients and suppliers, labor legal relations, the existing of future disputes, public legal relations (licenses, permits), contractual relations, obligations in regard to environment protection. If the company has daughter companies, documentation, related to them shall also be checked (when it comes to the international company, or the company, which has daughter companies abroad, the inspection complicates, as the auditors have to understand several legal systems and make the relevant conclusions).[46]

According to the country, where the enterprise is being acquired and the legislation the purchaser and the vendor have to obey, the structure of the sale contract itself shall be studied – what elements are included in it.[47] The subject of legal *Due Diligence* may also be study of cartel agreement on the market, as this information is no less important for the future activities. In the aspect of property relations, the function of legal Due *Diligence* is limited by checking the correctness of accounting of the enterprise's assets and liabilities.[48]

5.1.2. Tax *Due* Diligence

The goal of the tax *Due Diligence* is identification of the tax risks of the target object; e.g. are the assets underestimated, or, on the contrary, are the liabilities over-estimated[49]; the issue of hidden incomes; whether the

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[43] In the case of acquisition and merger transaction 94% conducts financial inspection, and alongside with financial Due Diligence, 82% also conducts legal and 78% - tax inspection, see: *Vogt G.,* Die Due Diligence - einzentrales Element bei der Durchführung von Mergers & Acquisitions, DStR, Verlag C.H. Beck, 2001, 2028.

[44] *Kusche M.S.,* Die aktienrechtliche Zulässigkeit der Durchführung einer Due Diligence anlässlich eines Unternehmenskaufs, Mit Due Diligence-Checkliste für die Zielgesellschaft, Studien zum deutschen und europäischen Gesellschafts- und Wirtschaftsrecht, Peter Lang, Band 2, 2005, 44.

[45] *Vogt G.,* Die Due Diligence - ein zentrales Element bei der Durchführung von Mergers & Acquisitions, DStR, Verlag C.H. Beck, 2001, 2028.

[46] *Wegmann J., Koch W.,* Due Diligence - Unternehmensanalyse durch externe Gutachter - Ablauf und Technik, Folge-Due-Diligence als neuer Analysestandard, DStR,Verlag C.H. Beck, 2000, 1028.

[47] *Kneip C., Jänisch C.,* Tax Due Diligence, Steuerrisiken und Steuergestaltung beim Unternehmenskauf, Verlag C. H. Beck München, 2005, 16.

[48] *Wegmann J., Koch W.,* Due Diligence - Unternehmensanalyse durch externe Gutachter - Ablauf und Technik, Folge-Due-Diligence als neuer Analysestandard, DStR,Verlag C.H. Beck, 2000, 1031.

[49] Ibid, 1032.

company enjoys and special tax or customs privileges or, on the contrary, whether there is a risk of increase of expenses in this aspect, etc. In practice, tax *Due Diligence* is often complementary to the legal *Due Diligence* and they are implemented together.[50]

5.1.3. Commercial Due Diligence

Commercial *Due Diligence* is mainly directed towards study of capability of the object in economic relations. To achieve this goal, the present market position of the object, production and the ways of sales, as well as the activities of other entrepreneurs, operating in the same direction, shall be examined. Primarily, analysis of the market structure and its players shall be conducted to plan the future changes.[51]

In addition to the information, which can be obtained from the management, external sources of information are important, like press, consumers, reports of various organizations on operation of the target object, Internet, etc. Naturally, the information sources shall be differentiated based on the reliability.

In the case of merger of enterprises, commercial *Due Diligence* provides information on the effect of synergy.

There effects are expected in the following spheres:

Research and development: reduction of expended and transfer of know-how;

In the case of acquisition: optimization of logistics, equalization of price;

Goods/ services: optimization of standards, distribution of work, consumer contacts;

Marketing: improvement of supply structure;

Shipment: optimization of logistics;

Management: reduction of expenses through centralization.[52]

5.1.4. Technical Due Diligence

Technical *Due Diligence* is used in regard to the enterprises, which produce any kind of goods. It shall be assessed how much the technical equipment, used in production, fits modern standards; how efficient it is, etc. The expenses of supply, personnel are added to the production costs and all together, allow to assess how effective the production is. The goal of technical *Due Diligence* clarification of modernity, innovativeness of equipment, and, on its basis, prediction of future, understanding of the possibility of transfer to production of other goods, advancement of the issue of risks and responsibility, research and development.[53]

In the case of such check, all the equipment, participating in production, as well as the related permits and licenses, are subject to inspection.[54]

As the technical aspect of production greatly depends on environmental issues, technical *Due Diligence* and environmental *Due Diligence* are close to each other.

5.1.5. Environmental Due Diligence

In the course of implementation of environmental *Due Diligence,* the starting point is identification of the risks of damage, which, presently or in the future, may be caused to the environment. Such inspection be-

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[50] *Rödder T., Hötzel O., Mueller-Thuns T.,* Unternehmenskauf Unternehmensverkauf, Zivil- und steuerliche Gestaltungspraxis, Verlag C. H. Beck München 2003, 55.

[51] Ibid, 13.

[52] *Rödder T., Hötzel O., Mueller-Thuns T.,* Unternehmenskauf Unternehmensverkauf, Zivil- und steuerliche Gestaltungspraxis, Verlag C. H. Beck München 2003, 14.

[53] *Kneip C., Jänisch C.,* Tax Due Diligence, Steuerrisiken und Steuergestaltung beim Unternehmenskauf, Verlag C. H. Beck München, 2005, Hogh, 15.

[54] *Wegmann J., Koch W.,* Due Diligence - Unternehmensanalyse durch externe Gutachter - Ablauf und Technik, Folge-Due-Diligence als neuer Analysestandard, DStR,Verlag C.H. Beck, 2000, 1030.

comes more and more topical due to strengthening of environmental legislation and expensiveness of environment-friendly equipment. Law of the number of developed countries actually obliges potential owner to know all issues, related to the relation of the enterprise and the environment.

Legislation, requirements, related to the protection of environment, soil, water, the impact of the production on natural resources, as well as the method of separation and neutralization of waste shall be studied in the course of implementation of environmental *Due Diligence.*

5.1.6. Financial Due Diligence

Financial *Due Diligence* is often referred to as the starting point for other types of *Due Diligence*.[55]

In the course of implementation of financial *Due Diligence* financial accounts of the target object are subject to inspection, as a rule, those of the last year only. Besides, accounting procedures, balancing shall be studied to analyze financial risks; the existing projects are inspected from financial viewpoint, as well as credit history, liabilities, transactions, etc. Past activities are also studied to compile the future picture with more or less accuracy.[56]

6. Difference of Due Diligence according to the Client

6.1. Vendor Due Diligence

The vendor, through *Due Diligence,* conducted by him, tries to create primary impression about the object of sale before 0opening the trade. The motives of such action of the vendor may be different. He may want to be the first to detect the risks, related to the enterprise, improve the situation as far as possible and make the enterprise more attractive.[57] If elimination of the detected problems is impossible, the vendor will be prepared to meet the results of external *Due Diligence.*[58] There are cases, when the vendor himself does not have full-value information, as he is the investor and does not participate in management of the enterprise.[59] As a result of inspection, Vendor Due Diligence Report shall be made up, which will be presented to the potential purchaser. In such case, the purchaser can limit only by crosschecking of the presented report and restrain from extra expenses. Often, together with reports, for more reliability, the so-called *Reliance letter* is presented to the purchaser, which contains the guarantee of correctness and perfectness of the presented report.[60] Obviously, the vendor is not obliged to conduct *Due Diligence*himself, but its implementation increases the purchaser's or the person's, who want to merge, trust towards the vendor.

6.2. Purchaser Due Diligence

According to the established practice, in most cases, *Due Diligence* inspection is implemented by the purchaser. It is kind of repercussion of the principle caveat emptor, when the purchaserbuys item under his own

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[55] *Picot G.,* Handbuch Mergers & Acquisitions, Planung Durchführung Integration, Schaffer Poeschel Verlag Stuttgart, 2000, 232.

[56] *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies on the Basis of Corporate-Legal Actions (Acquisition, Merger), Comparative-Legal Analysis, Publishing House of Tbilisi State University, 2014, 186.

[57] *Elfring C.,* Legal Due Diligence Reports, JuS-Beil, Heft 5/2007, Verlag C.H. Beck, 2007, 4.

[58] *Spill J.,* DueDiligence - Praxishinweise zur Planung, Durchführung und Berichterstattung, DStR, Verlag C.H. Beck, 1999, 1787.

[59] *Elfring C.,* Legal Due Diligence Reports, JuS-Beil, Heft 5/2007, Verlag C.H. Beck, 2007, 4.

[60] Ibid, 4.

responsibility.[61] The purchaser requires from the vendor the desired documentation (Due Diligence Request List) to obtain the understanding in regard to the target object. The vendor will present it physically or in virtually arranged *Data Room*.[62] In the first case, the documents are copied from original and presented to the auditors, assigned by the potential purchaser, and in the second case, they are scanned and supplied to the interested party via the Internet. The presented documentation will be classified and used accordingly, following from the goals.[63] As a rule, the report, generated by the purchaser (Purchaser Due Diligence Report), is not available for the vendor. Naturally, it is the interest of the both parties, especially purchaser, to complete inspection in given time and before formalization of the main contract, so that the due guarantees from vendor are included in the contract. Nevertheless, the practice knows the post-contractual (post-closing DD) *Due Diligence*, which continues after concluding the contract and the purchaser tries to stick to the provided guarantees as much as possible in the case of detection of defect, in order to bear less losses.[64]

The obligation of provision of information may divided into two points. The first is that all documents, presented by the vendor shall comply with the truth and shall be perfect; and the second is that the vendor shall provide to the purchaser also the information, which was not requested but may have great importance for concluding the contract.[65] There is an opinion, that if the *Due Diligence*, conducted by the vendor in advance, already exists, the requirement of the second point will not exist anymore, nevertheless, major part of scientists reject this opinion.[66]

7. Stages of Implementation of Due Diligence

7.1 Preparation

After commencement of negotiations, when the parties express their will (one – of sale and the other – of purchase) and the expression of will, more or less, coincides, before starting implementation of *Due Diligence* check, the so-called Letter of Intent is formalized between the parties.[67] It contains the will of the parties, as well as the list of issues, still requiring clarification and agreement.[68] This document may already contain the list of the required documentation, which the purchaser needs from the vendor, or it may simply specified there what type of *Due Diligence* will be implemented by the purchaser. The Letter of Intern often also contains the provision, according to which the vendor undertakes not to conduct negotiations with the third party and violation of this provision will lead to the relevant responsibility.[69]

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[61] *Elfring C.,* Legal Due Diligence Reports, JuS-Beil, Heft 5/2007, Verlag C.H. Beck, 2007, 4.

[62] Ibid, 4.

[63] Compare: *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies on the Basis of Corporate- Legal Actions (Acquisition, Merger), Comparative- Legal Analysis, Publishing House of Tbilisi State University,2014, 183.

[64] *Elfring C.,* Legal Due Diligence Reports, JuS-Beil, Heft 5/2007, Verlag C.H. Beck, 2007, 5.

[65] And according to the explanation of the Supreme Court of Germany, absolute obligation of the vendor to disclose all details of the business to the purchaser doesn't exist, as the purchaser shall make decision himself and elaborate on what the contract will bring to him, i.e. the risk is mostly with the latter.

[66] *Elfring C.,* Legal Due Diligence Reports, JuS-Beil, Heft 5/2007, Verlag C.H. Beck, 2007, 5.

[67] *Spill J.,* Due Diligence - Praxishinweise zur Planung, Durchführung und Berichterstattung, DStR, Verlag C.H. Beck, 1999, 1787.

[68] *KuscheM.S.,* Die aktienrechtliche Zulässigkeit der Durchführung einer Due Diligence anlässlich eines Unternehmenskaufs, Mit Due Diligence-Checkliste für die Zielgesellschaft, Studien zum deutschen und europäischen Gesellschafts- und Wirtschaftsrecht, Peter Lang, Band 2, 2005, 57.

[69] Ibid, 57.

Following from its importance, *Due Diligence* needs fundamental preparation. On this stage, it is specified what type of information will be inspected and what type of information is to be provided by the other party; negotiations are held. Well-prepared *Due Diligence*is the guarantee of avoidance of excessive spending of financial and human resources. During this period, auditors prepare the list of documentation to be provided to them by the vendor (the so-called *DueDiligence Checklist*). For the purpose of facilitation of the work and avoidance of asking one question several times, it would be appropriate if the implementers of different kinds of *Due Diligence* – legal, financial, etc. – agree the list of the required documentation among themselves and present the uniform list to the vendor.[70]

After presentation of the list, preparatory activities continue on the part of the vendors; they prepare the documentation, required for the purchaser in one space, be it the room or the Internet space.[71] Besides, specific persons shall be assigned for answering the questions and provision of service to the people, sent by the potential purchaser, so prevent the whole workflow from failure.[72] The Board of the target company shall determine the level of the information, which shall be provided to the potential purchaser; they shall also assess the positive and negative outcomes of disclosure of specific information for the company.[73]

7.2. The Process of Inspection

After completion of the preparatory period, the process of the basic inspection begins. Following from the size of the enterprise, inspection may last from several days to several weeks. The process does not imply only documentary inspection, but, often, visit- visual inspection of the enterprise and direct interviews with necessary persons.[74]

After completion of the above-mentioned activities meeting is held with the vendor (directors of the enterprise; shareholders may also be represented) and their advisors to discuss critical questions once again. It gives the issuers the chance to express their opinion on problematic issues and find the ways out, until these problems are documented in the final report. As a rule, the discussion and presentation of documentation is followed by issuance of the Statement of Perfectness the vendors, which means that they take responsibility, that they provided truthful answers to all questions and provided all required information to the interested party.[75]

7.3. Assessment

Assessment is the final part of *Due Diligence*, the goal of which is to reflect the conducted activities clearly and arrive to the relevant conclusions. It is desirable that the conclusions are followed by the recommendations of further actions. Elaboration of the final report is quite labor consuming; the expectation of the clients shall be taken into account and besides, it shall be as detailed as possible.[76] Final report of *Due Diligence* may fail or delay the agreed date of translation, so it shall be prepared with special attention.

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[70] *Müller W., Rödder T. (Hrsg)*, Beck'sches Handbuch der AG, gesellschaftsrecht, Steuerrecht, Börsengang, 2. vollständig überarbeitete und ergänze Auflage, Verlag C.H. Beck München, 2009, Göckeler, Rn. 198.

[71] Ibid., Rn. 199.

[72] *Wegmann J., Koch W.,* DueDiligence - Unternehmensanalyse durch externe Gutachter - Ablauf und Technik, Folge-Due-Diligence als neuer Analysestandard, DStR,Verlag C.H. Beck, 2000, 1029.

[73] *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies on the Basis of Corporate- Legal Actions (Acquisition, Merger), Comparative- Legal Analysis, Publishing House of Tbilisi State University, 2014, 181.

[74] *Müller W., Rödder T. (Hrsg),* Beck'sches Handbuch der AG, gesellschaftsrecht, Steuerrecht, Börsengang, 2. vollständig überarbeitete und ergänze Auflage, Verlag C.H. Beck München, 2009, Göckeler, Rn. 200.

[75] Ibid., 202.

[76] *Spill J.,* Due Diligence - Praxishinweise zur Planung, Durchführung und Berichterstattung, DStR, Verlag C.H. Beck, 1999, 1791.

Final report may be produced in several forms; these are: debriefing, brief presentation, comprehensive presentation and report (the same as conclusion). Debriefing shall be held shortly after completion of inspection; it is presented verbally or in the form of brief notes.[77] Short presentation is structured around the most important issued and is a good method of demonstration of problematic and important issues in short time. Long presentation and report are actually similar; the only difference is that in the report narration is on the first place.[78]

8. Conclusion

Due Diligence is a very wide and comprehensive term, unambiguous definition of which, in spite of many attempts, does not exist up to present. Neither there exists its translation into many languages, which is mostly caused by the absence of definition. The process, implied under the term Due Diligence has significant impact on following modern business interests and the "fate" of many future companies depends on its proper and reasonable implementation. For this very reason, the scientists and practitioner lawyers, auditors actively work in this aspect during the last two decades, which led to the refinement of this issue and took it to the higher level.

Discussion of the goals of *Due Diligence* clarified the need of its implementation in the course of important transactions. Many type of *Due Diligence* allow us say that they are the achievement of developed countries. For example, there will be no need of implementation of environmental *Due Diligence* in the countries, where less attention is paid to the environment. The same applies to the human resources and many other types of Due Diligence.

Implementation of *Due Diligence* is such a labor-consuming, expensive and time-consuming process that its proper planning has substantial significance for its successful implementation. The expenses, related to its implementation, greatly determine limited choice of entrepreneurs – which type of *Due Diligence* is better to implement for obtaining more profit, detection of risks and successful finalization of the deal. The time factor cannot be neglected. In the accelerated pace of modern business each day is important and thus, quick decision-making is highly valued; although, naturally, more mistakes may be made in haste. The properly planned *Due Diligence* does not exclude the possibility of making wrong decision, although, at least, minimizes it in the part, which, generally, follows from the goals of Due Diligence in general.

Business in Georgia is not developed yet to the level, where the acquisition and merger of enterprises is the main occupation of the companies. It, obviously, required great financial resources and the relevant market. In the Association Agreement, concluded between Georgia and EU there are many provisions, which directly envisage development of Georgian corporate law, and, most importantly, Georgian economy at the expense of proper steps, made by the government and certain support from EU. It give us the hope that development of economy willlead to advancement of the need of Due Diligence from time to time. Interesting *M&A* transactions and, consequently, *Due Diligence* inspections have already been registered on Georgian market. It is very appreciated and interesting topic for future research. As this trend has already emerged, development of economy and increase of scale of Georgian market will facilitate its continuation and, at the same time, will lead to its further development.

[77] *Spill J.,* Due Diligence - Praxishinweise zur Planung, Durchführung und Berichterstattung, DStR, Verlag C.H. Beck, 1999, 1791.

[78] Ibid, 1792.

Tamar Khubashvili*

Obligations Related to the Property Rights Subject to Registration with the Public Registry

Property and obligation rights are so closely linked hat in many cases it is difficult to distinguish between these two rights. Though for the rights of obligations the publicity of such rights is not decisive, legal regulation, in certain cases, allows registration of the obligation rights, in addition, in some cases it is not only deemed allowable but also obligatory. The issue is especially problematic where the case deals with registration of obligations related to the property rights, in particular, whether the registered obligations shall be transferred with the property. Legislation does not specify the obligations that shall be registered with the Registry of Immovable Property Rights and what are the outcomes of registration. Goal of the article is development of practical recommendations based on analysis of the obligations registered with the Public Registry.

Key Words: *distinguishing of the property rights and the rights of obligations, publicity, transferability with the property, obligations related to the property rights, obligations subject to registration, purpose of obligations' registration*

I. Introduction

The issue of distinguishing between the property and liability rights became particularly significant when the property became the object of civil rights. Naturally, there is difference between the property and liability rights though they are so closely linked that in many cases it is difficult to distinguish between these two rights. Application of the property law and obligations law is associated with certain difficulties and this is undoubtedly caused by the dual nature (property and liability) of the individual's subjective right.[1]

Property rights result from the normative will of the law only[2] and these are characterized with the closed area.[3] One of the main features of the property right is publicity of such right. In case of movable things, the right on the property is determined based on possession and in case of immovable properties, registration with the Public registry is the guarantee of publicity of the relevant rights. Outcomes of emergence of such right is related to registration with the Public Registry as property right on the immovable property is deemed emerged from the moment of its registration with the Public Registry. Thus, publicity results not from the theoretical necessity but rather from the practices, to prevent the cases where one and the same immovable property is disposed off several times, to different persons.[4] Public access ensures both, reliability of registration and public control over the validity of the registered data.[5]

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1 *Todua M.,* Some Characteristics of Application of the Norms Regulating Rights im Presonam, According to Georgian Civil Code, Obligations Law, Georgian Association of Young Lawyers, 2006, 7.

2 *Akkermans B.,* Standardisation of Property Rights in European Property Law, 2013,12, <http://ssrn.com/en/>.

3 *Mulligan C.,* A Numerous Clausus Principle for Intellectual Property, 235, <http://ssrn.com/en/>.

4 *Emelianova E.,* Legal Issues of the State Registration of the Immovable Property and Transactions thereon, Samara, 2003, cited in the work: *Lapachi E.,* Principles of Registration of the Property Rights in Georgiann annd German Legislation, "Law Magazine" №1, University Publishing House, 2013, 65.

5 Ibid.

In accordance with Article 316 of Civil Code of Georgia (hereinafter CCG), By virtue of an obligation the obligee shall be entitled to claim performance of a certain action from the obligor and according to Article 319, CCG, Subjects of private law shall be free to enter into contracts and determine their contents within the scope of the law. Thus, at one glance, for the liability rights, publicity of these rights is not decisive, these are merely legal relations between the persons - subjects of law and such relations are closed for the third parties. Though, legal regulation, in certain cases, allows registration of the liability rights, the following may be registered with the registry of the rights on real property: hire, sub-hire, lease, sub-lease, leasing, lending and liabilities related to the title on real property.[6] In some cases, such registration is not only allowable but obligatory. For example, if a legal entity of public law makes contract on leasing, hire, lending, hire-purchase for the term exceeding one year, for emergence of the rights they shall be registered with the Public Registry. Hence, what is characterizing the property right, particularly publicity, was acquired by the liability rights as well.

Legislation provides for presumption of correctness of the Public Registry records. This means, that for the third parties, Registry records shall be regarded as correct, until their inaccuracy is proven. Thus, on one hand, the Public Registry plays the role of guarantor of civil turnover and on the other hand it is in full consensus with the principle of trust and honesty adopted in civil turnover[7] and, importantly, the Public Registry has the function of legal guarantor. In particular, the owner, through registration with the Public Registry, protects his/her property from the others and the buyer, on his/her side, trusts the Public Registry record. Similarly, in accordance with the Civil Code of Germany, all transactions with the land shall be recorded with the land registration book and thus becomes known to all third parties.[8] At the same time, registration is not merely documenting of the rights, it is rather the basis for emergence of such rights, end of the rights emergence process.

In accordance with Subsection "l", Article 11 of Georgian Law on Public Registry, the legislator has subjected to registration the liabilities related with the property rights though there is no provision on containing list of liabilities associated with the real property that are subject to registration with Public Registry and this, as such, allows formation of non-uniform practice.

Goal of this article is to study, based on Georgian Law on Public Registry and Supreme Court practice, the liabilities associated with the property rights and subject to registration with the Public Registry and related outcomes. In addition, discuss, whether registration of the liabilities is registration of the rights or emergence of the liabilities associated with the property rights is related to registration? Are such liabilities associated with the real property traceable? Propose the key preconditions for identification of the liabilities that should be subject to registration with the Public Registry and that should not and what is the purpose of registration of liabilities associated with the property rights.

II. Obligations Subject to Registration with the Registry of Immovable Property Rights

According to CCG Section 1, Article 311, The Public Register is a collection of the records of the origin, modification and termination of rights to, attachment and lien/mortgage in things and intangible property. It is also a collection of the records of the origin and modification of the abandonment of the ownership of immovable things and according to Section 2 of the same Article, the rules and conditions for

[6] See Article 11 of Georgian Law on Public Registry.

[7] See Decision of Supreme Court № AS-189-182-2013 of 16 January 2014.

[8] *Lapachi E.,* Principles of Registration of the Property Rights in Georgiann annd German Legislation, "Law Magazine" №1, University Publishing House, 2013, 66. Civil Code of Germany, § 891, 892, 893, 894.

maintaining and accessing the Public Register are defined by law. One of the main features of the property right is publicity of such right. Regarding that the property right is an absolute right, all third parties shall be aware in existence of such right. In case of movable property, rights are established based on their possession and in case of real property, its registration with the Public Register is the guarantee of publicity of the mentioned rights. Outcomes of emergence of such rights are associated with the registration with the Public Register as property right on the real property is deemed existent from the moment of its registration with Public Register. Regulation is different in case of movable property. In such case the main thing is that the seller transferred the property to the buyer on the basis of valid right. Rhys, publicity results not from the theoretical necessity but rather from the practice, to prevent cases where one and the same property is sold to several persons.[9] Public access ensures reliability of registration, as well as public control, with respect of validity of the registered data.[10]

In case of real property, at least, the property rights shall be registered with the Public Register that is public for all. And the rights provided by the obligations law, may be exercised against the other party of legal relations that is frequently called obligor having liabilities to the obligee."[11]

In accordance with Subsection l, Article 11 of Georgian Law on Public Register,[12] the following shall be registered in the Registry of Immovable Property Rights: a) property; b) rights of superficies and mortgage of superficies; c) rights of usufruct; d) easements; e) mortgages; f) rents and sub-rents; g) leases and subleases; h) loans; i) finance leases; j) rights related to ownership and use provided for by public law; k) obligations related to immovable property ownership rights.

Regarding the above, property rights, secondary and limited rights, rights related to ownership and use provided for by public law and obligations related to immovable property ownership rights shall be registered with the Registry of Immovable Property Rights.

According to CCG Section 2. Article 153, a limited right is the one which is derived from a broader right and which encumbers the broader right. Thus, the limited right is an independent right that can serve to better exercising of any main right as well, for example, better exercising of the property rights. In the legal literature, only property rights are regarded as the limited rights, "limited (property) right is derived from a broader right and encumbers the broader right" In Georgian legislation, such rights include superficies (articles 233-241), usufruct (articles 242-246) and servitude (247-253)" [13]. In addition, Civil Code of Georgia, unlike Civil Code of Germany, provides legal definitions of the limited property rights."[14]

In one of its decisions, the Supreme Court of Georgia explained that the "limited rights may be both, property and liability rights" [15]. The limited property rights exist in case of superficies, servitude and usufruct. Liability rights exist, in case of e.g. lease that is derived from the property and comprises contractual burdening of the said property. "Characteristic feature of the limited property rights is that they accompany

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[9] *Emelianova E.,* Legal Issues of the State Registration of the Immovable Property and Transactions thereon, Samara, 2003, cited in the work: *Lapachi E.,* Principles of Registration of the Property Rights in Georgiann annd German Legislation, "Law Magazine" № 1, University Publishing House, 2013, 65.

[10] Ibid, 65.

[11] *Todua M.,* Some Characteristics of Application of the Norms Regulating Rights im Presonam, According to Georgian Civil Code, Obligations Law, Georgian Association of Young Lawyers, 2006, 74.

[12] Current wording of paragraph 5, Article 11 of Georgian Law on Public Registry is effective based on Law of Georgia № 4208-1S on Amendments and Addenda to Georgian Law on Public Registry of 22 February 2011.

[13] *Kereselidze D.,* Most General Systemic Concepts of Private Law, Publishing House of European and Comparative Law Institute, Tbilisi, 2009, 226, reference is made to Article 3:8 of the Civil Code of the Netherlands.

[14] *Chechelashvili Z.,* Property Law (Comparative Legal Research), Second revised edition, Tbilisi, 2010, 17.

[15] See Decision of Supreme Court № AS-820-778-2013 of 02 December 2013. By this decision the Supreme Court has shared the opinion of the court of appeal.

the main right when the proprietor is changed. Only certain liability rights are characterized with such feature, e.g. right to rent. For emergence of the limited property rights they shall be registered with the Public Registry and this is not obligatory, in case of liability rights."[16]

Thus, the Supreme Court has provided significant explanation stating that some liability rights are limited liability rights and this, undoubtedly, is new interpretation of CCG Section 2, Article 153 and on the other hand, disregarding Section 5, Article 11 of Georgian Law on Public Registry, regarded that in case of liability rights, registration of such rights with PR is not obligatory as according to the mentioned Article, in the case of transactions made for more than year with the participation of legal entities under private law on lease, rent, loan, finance lease, for creation of such rights they shall be registered with the Public Registry.

According to Georgian Law on Public Registry, two groups of the liabilities shall be registered with the Registry of Immovable Property Rights: a) liabilities registered on the basis of lease, sub-lease, rent, sub-rent, lend and finance lease contracts and b) liabilities related to the property rights.

1. Obligations Arised on the Basis of Rent, Sub-rent, Lease, Sub-lease, Lend and Finance Lease Contracts

Liability contains two key elements –a person's right to claim performance and the other person's relevant liability to perform, that is applicable since Roman Law". [17] According to CCG Section 1, Article 317, contract is one of the first bases of arising of the obligations. At the same time, according to CGG Section 1, Art. 316, the obligee is entitled to claim from the obligor performance of certain action. "Obligations law regulates relations between the persons, i.e. here the "personal" rights are implied."[18] In addition, these relations cannot ensure obligor's direct relation to the property. In exercising of the relative rights, the relative relations take place on the basis of which the obligee's claim shall be limited to the obligor.[19] Westermann regards as one of such complicated issues the issue of application of CCG Article 242 in property law.[20] According to the said norm, the obligor shall perform the undertaken obligation in good faith and in compliance with the moral norms accepted by the society.

In obligations-law relations, the rights are more detailed and specific, they types of which are unlimited and exhaustive, hence, in obligations law relations there may emerge the contractual rights that are not provided by the law though not contradicting thereto.[21] Though Georgian Law on Public Registry provides thorough list of the rights and obligations subject to registration with the Public Registry. In particular, obligations arisen on the basis of contract are provided thoroughly, these are: lease, sub-lease, rent, sub-rent, lend and finance lease.

According to CCG Section 3, Art. 311[1], where so provided by law, transactions involving things and intangible property shall take effect upon registration of the rights determined by such transactions with the Public Register.

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[16] See Decision of Supreme Court № AS-820-778-2013 of 02 December 2013. By this decision the Supreme Court has shared the opinion of the court of appeal.

[17] *Dzlierashvili Z., Tsertsvadze G., Robakidze I.,Svanadze G., Tsertsvadze L.,* Contractual Law, Tbilisi, 2014, 35.

[18] *Todua M.,* Some Characteristics of Application of the Norms Regulating Rights im Presonam, According to Georgian Civil Code, Obligations Law, Georgian Association of Young Lawyers, 2006, 8.

[19] Decision of the Supreme Court of Georgia №AS-951-989-2011 of 10 November 2011

[20] Westermann, Harry, Sachenrecht, 5.aufl. 1966, 1, II, S.6. referred in work: *Chanturia L.*, Ownership of Immovable Things, Publishing House "Samartali", 2nd ed., Tbilisi, 2001, 157.

[21] *Chiorshvili T.,* Collection of Works Dedicated to Memory of Professor Zurab Akhvlediani, Tbilisi, 2004, 54.

According to CCG, lease and rent, similar to the countries of Continental Europe, are at the top of CCG obligations law.[22] Unlike France, where, in French doctrine, right of lease is regarded as the property right, though to name such right as a property right, this should be done at the legislative level.[23]

According to Section 5, Article 11 of Georgian Law on Public Registry, in the case of transactions made for more than one year with the participation of legal entities under private law (including transactions with a total validity of more than one year), as well as lease, sub-lease, rent, sub-rent, lend, finance lease and for arising of the liabilities related to the immovable property, their registration with the Public Registry is required. Thus, the legislator has linked the issue of arising of the liability right with registration. As this regulation is applicable to the legal entities of private law and it is not –to natural persons and individual entrepreneurs, we can offer that such formulation of the norm is intended for taxation purposes to prevent income tax evasion and ensure transparency of the mentioned relations. Though, regarding direct definition of the law, it is clear that the legislator associates emergence of this right with registration of the liability right with the public Registry[24] and this is beyond the competence of Georgian Law on Public Registry as the issue of establishing – non-establishing of private-law relations is special authority of the Civil Code. In addition, the issue of arising of the relations of obligations should not be associated with registration of such obligations in Public Registry. In addition, it is notable that registration is one of the principles that distinguish property rights from the liability rights. This implies obligatory registration of arising, modification and termination of property rights with the Public Registry.[25] Not only publicity but also arising of such right is associated with Public Registry.[26]

Approach of the Civil Code of Armenia to finance lease is of interest, it does not consider finance lease as the property right though it has the signs characteristic for it. In particular, maintaining of the right of possession and use in case of the new owner. In addition, finance lease is subject to mandatory registration.[27]

2. Obligations Related to the Property Rights

According to Subsection "k", Section 1, Article 11 of Georgian Law on Public Registry, obligations related to the property right shall be registered with the Public Registry though it does not provide the list of such obligations, as well as the principles according to which the registrar should or should not register such obligations and obligation related to the property rights is a record of general nature.

CCG provides for limitations of the property rights. In particular, CCG Article 170 states: an owner may, within the limits of legal or other, namely contractual restraints, freely possess and use any property. In addition, "the owner cannot restrict the other person's use of his/her property within the scopes that he/she has set for him/her."[28] According to CCG Article 172, owner may recover a thing from its possessor, except if the possessor had the right to possess it." Thus, recovering of a thing from its possessor by the owner is subject to the contractual restrictions".[29]

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[22] See Articles 531 and 581 of Civil Code of Georgia.

[23] *Zoidze B.,* Georgian Property Law, Publisher: "Metsniereba", second reviewed and improved edition, Tbilisi, 2003, 8.

[24] See § 5, Article 11 of Georgian Law on Public Registry.

[25] *Lapachi E.,* Principles of Registration of the Property Rights in Georgiann annd German Legislation, "Law Magazine" №1, University Publishing House, 2013, 71.

[26] See *Kurzinski-Singer E., Zarandia T,* Recepton of German Prperty Law in Georgia, magazine Herald of Civil Law, №1, 2012, 34-35.

[27] Civil Code of Armenia, Article 611, <http://www.parliament.am/legislation.php?sel=show&ID=1556&lang=eng>.

[28] *Kereselidze D.,* Most General Systemic Concepts of Private Law, Publishing House of European and Comparative Law Institute, Tbilisi, 2009, 221.

[29] Ibid, 221.

Based on the principle of private autonomy effective in the obligations law, parties may freely state the contents of the contract and this principle provides to the parties the freedom of contracting. This implies the following: parties may make the contract of any type and content unless it is against the law, public order or norms of moral. Thus, obligations related to the property rights may be of many types.

Sections below provides discussion of the brief list of obligations subject to registration with Public Registry or those that have been subject of the legal disputes.

2.1. Installment Sale Contract

Purchase contract, with its legal nature, is the consensual contracts meaning that for execution thereof only expression of the parties' valid will in relation with the key contract terms and conditions is required. This is provided in CCG Article 477, stating that the parties only undertake the obligation of performing certain actions. Hence, both, payment and transfer of the subject of purchase is not a contract precondition but its fulfillment. According to CCG Article 505, in the case of an installment sale the seller shall deliver the thing to the buyer before the price is paid. Payment of the price of the thing shall be made in periodic installments on fixed time intervals. Hence, in case of installment the seller's obligation of delivering of the thing arises before full payment of the price by the buyer and by the delivery of the thing the property right is transferred to the buyer and in relations with the third parties the buyer is the thing's owner. Thus, in case of installment the property right on the contract subject is transferred to the buyer before payment of the price.[30]

In case of submission of the installment purchase contract to the Public Registry the buyer's property right, as well as the obligations undertaken to the seller shall be registered. Here the question arises, whether in case of registration of such obligations is the seller entitled to sell the thing and if yes, whether the registered obligation is transferred together with the real property? In relation with one of the cases related to the installment sale contract, the court of appeal provided the explanation that "restrictions imposed on the property right provides certain security for full payment of the purchase price by the buyer and this cannot affect the legal treatment regime for the mentioned property."[31] Regarding the above considerations, supposedly, the owner may freely own and use the real property, as well as dispose of such real property unless the contract provides for any restrictions on sale of the property up to full payment of the price.

According to CCG Section 1, Article 477, the seller shall transfer to the buyer the title to the property and the documents relating to it and deliver the goods. According to Section 2 of the same Article, buyer shall pay the seller the agreed price and accept the purchased property. Regarding the above, obligations in relation to the real property registered with the Public Registry cannot prevent disposal of the real property (unless restriction otherwise provides) as the obligations relation between the persons is a relation arisen between the parties and in case of the new owner the mentioned obligation shall not be transferred together with the real property.

In case of disposal of real property, for which the obligations are registered due to the installment sale contract, for the registrar authority the question arises whether the consent of a person to whom the obligor has the obligation (payment in installments) should be requested as the registration document. If the registrar requests from the interested person registration document of such type, this should have relevant legal grounds. While considerations discussed in the previous section offers the different conclusions, as "based on the installment sale contract, the buyer becomes the property owner before payment of the price" buyer

[30] See Decision №AS-614-584-2013 of 23 December 2013.

[31] Decision of 28 March 2012 of the Chamber of Civil Cases of Tbilis Court of Appeal (Case №2ბ/777-12), <http://library.court.ge/>.

shall pay the seller the agreed price and accept the purchased property, and the owner's desire to dispose the property shall not be dependent on the consent of a person to whom the owner has the obligation.

In addition, making conclusion that he obligation registered on the basis of installment sale contract is not related to the property, what is the purpose of recording of the rights on real properties in the Registry? If registration is of informative nature, we can regard that it provides unreasonable additional guarantees to the persons for the benefit of whom the mentioned obligation is registered as the Public Registry, the real property rights' registrar, enjoys high degree of trust as expressed in lawful presumption, as per CCG sections 1 and 2, Article 312. In this context, it is significant to explain, what lawful presumption means. It protects the buyer from the outcomes of any errors in the Public Registry records unless such protection is provided for the erroneous record made wrongfully that the buyer may seem correct to the buyer.[32]

Thus, obligation related to the property right – obligation of payment in installments shall not be the right subject to mandatory registration, unless the parties have agreed upon the restrictions on property disposal up to full payment. In the latter case, registration of such obligation is reasonable as the restriction is directly linked with the real property and this should be known to the third parties from the extract from Public Registry. But if the contract does not provide prohibition of disposal, registering of obligation of payment in installments is not grounded as such obligation is linked with an individual and its registration cannot restrict disposal of real property. In addition, if the installment sale contract does not specify the cases where the real property shall be returned to the initial owner of obligation is not fulfilled, for the registrar the problem is, what kind of registration document it should request from the interested person to evidence non-fulfillment / improper fulfillment of the obligation and establish violation of the obligation. According to Section "j", Article 2 of Georgian Law on Public Registry, "registration document - a legal act that directly confers the right to request registration under this Law." LEPL National Agency of Public Registry registers termination of the obligations based on unilateral application unless otherwise is expressly provided in the purchase contract (e.g. specified the bank account to which the payment should be made for the mentioned obligation).

According to CCG Article 508, "where the seller retains the right to repudiate the contract on the ground of the buyer's default, then upon repudiation both parties shall return to each other what they have received under the contract. Any agreement to the contrary shall be void." Thus, where the contract does not provide otherwise, returning of the real property to initial owner (for whose benefit the obligation is registered) may take place based on joint application to the National Agency of Public Registry on returning of the disputed real property to the owner, due to termination, or based on the relevant court decision.

2.2. Purchase with the Redemption Right

Mutual impact of the property and liability rights is demonstrated in the sale contracts made with the right of redemption that is regarded in practice as one of the types of secured property. According to CCG Article 509 if the seller has the right of redemption under a contract of sale, the exercise of the right shall depend on the will of the seller. Based on Subsection "k", Section 1, Article 11 of Georgian Law on Public Registry, in case of purchase of immovable property with the redemption right, such redemption right shall be registered with the Registry of Immovable Property Rights. This is the case where the obligor, instead of making mortgage contract, transfers the title over the immovable property to the obligor, as the security of claim.[33]

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[32] See Decision of 13 December 2012 of Civil Department of Tbilisi Court of Appeal (Case №2□/1232-12), <http://library.court.ge/>.

[33] *Boiling H.,* Securing of the Property with Immovable Property on the Example of Georgian Civil Code, Collection of works dedicated to 75th birthday of Professor Tengiz Liluashvili, Tbilisi, 2003, 70.

According to CCG Article 514, the period of time during which the right of redemption may be exercised may not exceed ten years. This period of time must not be extended. Parties agree upon the term of redemption in the contract. Where the redemption term provided for by the contract expires, in which cases and based on which documents the Public Registry should register the termination of obligation? The solution is easy where the contract contains relevant provision (e.g. specifying bank account etc.) but where no such provision is made in the contract, the registrar requests from the owner the consent of initial owner for registration of such termination. In practice, this causes number of problems and primarily, this hinders transferability of real property.

CCG Article 327 deals with the essential terms of a contract. According to Section 1 of the mentioned Article, contract shall be considered entered into if the parties have agreed on all of its essential terms in the form provided for such agreement. According to Section 2 off the same Article, essential terms of a contract shall be those on which an agreement is to be reached at the request of one of the parties, or those considered essential by law.

CCG Article 515 provides the following definition of the option: the parties may agree on the buyer's unilateral right to buy an object up to a specific time or until the occurrence of a specific event (option to purchase), or, under the same conditions, the seller's right to sell the object to the buyer (option to sell). The norms regulating a contract of sale shall apply to an option contract unless the parties agree otherwise. For example, where the agreement between the contracting parties, as of the date of the agreement was related to the timing of the future actions and provided for fulfillment of the obligations, in particular, one of the parties was oblige to return a property to the other, if the latter, within the stated term, paid the purchase price. Based on the contract contents and effective legal regulations, within the term of effectiveness of the agreement (up to expiry of the redemption term), failure to redeem the immovable property should become the basis for completion of contractual relations and cancellation of the record on existing obligation.

In case of immovable property sale contract providing redemption right, there exists the contractual right, allowing one of the contracting parties, based on the contract terms, to fulfill undertaken obligation and acquire property right on real property or waiver fulfillment. Option is a right and not obligation. Upon expiry of the stated term, the property owner is released from the obligation of selling the property to the redeemer.

If the obligee delays accepting of performance, the obligor may confirm this situation with the Public Registry and register himself/herself again as the immovable property owner. In one of its decisions, the Supreme Court stated that in accordance with CCG Article 434 "in case of delay from the side of obligor, A.D. could deposit the amount and after this, he would be released from the obligations to I.J."[34] Though it is unclear, how the registrar can assess this situation as assessment of whether the obligor delays acceptance of performance is the competence of the court. In addition, according to CCG Section 2, Article 434, the obligor shall be released from the obligation to the obligee if the obligor submits to the Public Registry the certificate (evidence) issued by the notary on depositing of the amount. This shall be the basis for termination of such obligation and restoration of the initial owner for the Public Registry. Attention should be paid to whether redemption has taken place within the stated term.

2.3. Pre-emption Rights

According to CCG Section 1, Article 516, a person having a pre-emptive right may exercise the right if the obligor executes a sales contract for a given thing with a third party. Agreement between the parties is required for pre-emptive purchase right, law does not provide such right for co-owner without agreement.[35]

[34] See Decision of Supreme Court №AS-1532-1538-2011 of 29 December 2011.
[35] See Decision of Supreme Court №AS-1269-1198-2012 of 24 December 2012.

Unless otherwise agreed upon by the contracting parties, pre-emptive right is personified as the pre-emptive purchase right is neither alienable nor hereditary.[36]

If the contract provides for the pre-emptive right, this shall be registered with the Registry of Immovable Property Rights' though redemption right is the obligations relation arisen between the parties, to certain extent it is associated with the immovable property, in particular, the obligor shall immediately notify a person with pre-emptive right about the contents of the contract he/she intends to make with the third parities. Thus, each of third parties shall be informed about pre-emptive rights from the extract from Public Registry.

In addition, according to CCG Section 4, Article 173, pre-emptive right to the acquisition of any share of the common property may be provided by the agreement between parties. Thus, to enjoy pre-emptive right, existence of the relevant agreement is required.

2.4. Registration of the Obligations Undertaken on the Basis of Sale Contract with Regisrar Authority

Based on purchase contract the buyer undertakes to transfer certain area. Where between the parties arise contractual obligations, in particular, obligation of transfer of certain area, should such obligation be registered with the Public Registry? According to CCG Article 319, subjects of private law shall be free to enter into contracts and determine their contents within the scope of the law. Though, in case of registration of such obligations, is the immovable property restrained as such? According to amendments and addenda made to Georgian Law on Public Registry, based on Section 5, Article 11, for the conferral of the rights provided for by section "k" of this article their registration with the Public Registry is required. And the above mentioned section "k" deals with the obligations related to property right. Are such obligations registered in relation to the immovable property or to a contracting party? In this respect, Public Registry practice is of interest. In one of cases dealing with registration of obligations related to the property rights, in particular, according to the purchase contract, the buyer's additional obligation to transfer non-dwelling premises to the seller from the building to be constructed. Public Registry has corrected such registered obligation in the conditions of the new owner's existence as technical defect and did not specify this in the extract from Public Registry. Registrar's judgment was base on the argument that unlike the property rights, the obligation is not of secondary nature and it is not subject to transfer together with the property, it is not automatically attached to the property and it exists between the specific parties only. Claim against the decision of the National Agency of Public Registry, on maintaining of the decision on technical defect correction in force was submitted to the court of appeal. In relation with this case, the court of appeal provided the following explanation: "contractual obligation is not a property right and unlike the latter, contractual obligation does not provide transfer of the immovable property to the new owner in case of non-fulfillment of the obligor's obligation. Hence, even in case of registered right, it is impossible to allow transfer of the contractual obligations."[37]

In accordance with Article 11 of Georgian Law on Public Register the following shall be registered in the Registry of Immovable Property Rights: a) property; b) rights of superficies and mortgage of superficies; c) rights of usufruct; d) easements; e) mortgages; f) rents and subrents; g) leases and subleases; h) loans; i) finance leases; j) rights related to ownership and use provided for by public law; k) obligations related to immovable property ownership rights. According to section 4 of the same article data registered

[36] See CCG §2, Article 516.

[37] See Decision of 27 November 2014 of Tbilisi Court of Appeal (Case 3B/771-14; Case №330310013201147).

with the rights specified in subsections "b"-"j" shall be transferred to the new owner without any changes, with the exclusion of cases specified in Georgian legislation." Regarding the above, the mentioned norm distinguishes between the rights and obligations subject to registration and it does not provide for transfer of the obligations related to the title over the immovable property to the new owner as neither Public Registry and nor the civil law allow transfer of liabilities undertaken by one person to the other one, against his/her will, irrespective of registration of the said obligations with the Public Registry.

Thus, in the case under consideration, only obligation on transaction shall be registered and not any right related to the specific immovable property. In this respect, one of the decisions of Supreme Court of Georgia is of interest.[38] The disputed obligation was a contractual obligation, in particular, obligation of installing of the gates. The court explained that installation of the gate and making expenses for this was not an obligation of termination of the property right. Curt explained that the claim was based on the limited right that resulted not from the obligations relation and not from the property relations. In addition, the disputed right (claim) was not derived from the property (thing) and it was not the contractual burden of the property in the defendant's ownership.[39] The court has made precise emphases on where the obligation should become the right attached to the property – if this is the obligation corresponding to the property right. Though, the Supreme Court does not specify, in this decision, what kind of obligations may correspond to the property right (it states only that installation of the gate is not the obligation corresponding to the property right).

Obligations related to the property rights are registered with the Public Registry in a form of direct sale, at symbolic price, at a time of registration of the property rights on the basis of privatization; normally, this is registration of obligation of payment of GEL 1(one lari). As a rule, in such routine contracts, for registration of termination of the obligation both, the document evidencing payment and obligor's confirmation of performance are required.

2.5. Right of Way

According to the contents of CCG Section 1, Article 170, property right is not an absolute right and the owners rights to possess and use the property (thing) so that to exclude others from using the property, and administer it, may be limited by the law or contract. According to CCG Article 247, if the servitude is associated with possible burdening of the land parcel, the right of way unambiguously implies imperative requirement of burdening of the property with such right. In given case, objective need has created the necessary condition of use of the others' property and legislation associates with this a clear outcome – right of easement. This provision of the law implies burdening of the property with such right only in case of necessity, i.e. necessity of use of the other person's property is caused by the objective circumstances. By the explanation provided by the court of appeal, establishment of the easement, according to CCG Article 180, is allowed only in case of necessity, where no any other option exists and this results from the Constitution of Georgia and freedom of property right recognized by the Civil Code; in addition, restriction of such right is allowed only by the operation of law or binding contract.[40] In addition, in one of its decisions, the court of appeal has documented a different opinion, stating, in particular, that CCG Article 180 "reflects the bases for restriction of the property right by operation of law. Right of use of the neighbors land for securing necessary access to the public road arises only of the land plot is isolated from the public roads,

[38] See Decision of Supreme Court №AS-820-778-2013 of 02 December 2013.
[39] See Decision of Supreme Court №AS-820-778-2013 of 02 December 2013.
[40] See Decision of Supreme Court №AS-1141-1187-2014 of 08 December 2014.

electricity supply, lighting, gas or water supply networks. In case of conditions provided for by this norm, the owners of adjacent plots shall be imposed the obligation of tolerance and right to claim the adequate compensation."[41]

Georgian Law on Public Registry does not make any provisions with respect of registration of the right of way. Therefore, it is unclear, whether it is possible to register the right of way by the owner, based on the unilateral will and whether this will become the right that is attached to the property. According to CCG Article 180, establishment of the right of way is allowed only in case of necessity, where no any other option exists and this results from the Constitution of Georgia and freedom of property right recognized by the Civil Code and limitation of this right is allowed only by operation of law or binding contract. In case of burdening of the land parcel with the right of way, regarding the owner's interests, excessive burdening of the owner and at the same time, existence of the way less damaging for the owner must be excluded[42]. According to the explanation of Supreme Court, the right of way may be established within the binding contract as well. If the right of way is established by contract (within the contract binding), the mentioned legal relations between the parties shall be regulated by the norms provided for the servitude.

Regarding the legal nature of the servitude, it may be established in two ways only: by objective-normative operation of law or on the basis of property transaction where written servitude contract shall be made between the parties. Servitude, as the right to the other person's property may be established in two ways: 1) by objective-normative operation of law or 2) on the basis of subjective will of individuals, i.e. the transaction. To establish the servitude, similar to the other limited property rights, the rules for acquisition of the immovable property shall be applicable implying that the person with the right of servitude and the owner shall make written agreement and register the servitude with the Public Registry based on such agreement. Mandatory registration of the servitude with Public Registry is caused by the necessity of securing of the third party interests.[43] Supreme Court of Georgia, in one of decisions provided explanation that "in case of servitude, servitude of each new owner will be apparent though obligatory registration with the Registry presumes that each new owner is informed about this. In case of such dispute the fact of fairness of the buyer is subject to proving."[44] According to the doctrinal provision accepted in the European civil-law system and shared by the court decisions, the land servitude shall be entered into the register so clearly and in such details that the third parties easily understood its nature." [45] Within the scopes of contractual relations, if the right of way must be registered as the obligation or use related to the property right (in the field of use, in the extract for the immovable property), there will further arise the questions, whether such should be attached to the immovable property. According to the current practice of the National Agency of Public Registry, in case, where Georgian Law on Public Registry does not expressly provide for registration of the right of way, the applications requesting registration of the right of way as the obligation attached to the property right are rejected.

One of the decisions of Supreme Court of Georgia is of significance as therein the court stated that "in accordance with Article 311 of Georgian Civil Code, property and other ownership rights shall be registered with the Public Registry. Right of way is the property right. The court has recognized the property right of B. pipeline on the land parcel of R. Thus, based on the specified provision, the company is entitled to register

[41] Decision of Civil Department of Tbilisi Court of Appeal (Case №2B/2270-09), available at: <http://library.court.ge/>.
[42] Decision of Supreme Court №AS -312-297-2013 of 27 May 2013.
[43] A.n. Yanonopoulos; The Legal Servitude of Passage; Tulane Law Review; 38-42, <http://ssrn.com/en/>.
[44] Decision of Supreme Court №AS -BS-125-122 (K-14) of 28 October 2014.
[45] See Decision of Supreme Court №AS -BS-125-122 (K-14) of 28 October 2014.

the said right with the Public Registry."[46] By this decision, the court has made the fundamental statement, primarily, it has explained that there are the "other property rights" and secondly, it stated that the "right of way" is the property right.

If the right of way is established by the court decision, it shall be registered as the obligation registered with the immovable property. At the same time, it will be stated as the one attached to the immovable property, rather than associated with the individual and hence, it will be transferred to the new owner.

2.6. Registration of Future Rights

Future right shall be registered with the Registry of Immovable Property Rights as the obligation related to the property right. In one of its decisions the cassation court state that "since entry into force of the Civil Code, for the relations, the rights associated with the immovable property (including the future rights) shall be deemed subject to registration and existence of the property right shall be confirmed by means of such registration, in accordance with articles 185 and 312 of the Civil Code. In addition, for the transition period, the law provided for equalization of the technical inventory bureau records with the Registry records (Civil Code, Article 1514)."[47] Regarding the above, cassation court has made a significant statement that the future rights related to the immovable property are subject to registration.

For example, where the parties agree that after completion of the repair works of the immovable property in relation to the part of the house (half) the immovable property purchase contract will be made. This is the future right that is subject to registration with the Public Registry as it is associated not only with an individual but also with the property as well (execution of the purchase contract upon fulfillment of the condition) and that must be known to the third persons as the mentioned obligation is certain restriction on immovable property (transfer of the title to the specific person).

Future rights on the immovable property shall be registered with the Public Registry through transaction of registration of emergence of the attached obligations. "Attached obligations" is not normative regulation and hence, it is unclear, what obligations are implied. For example, by transaction of registration of emergence of the attached obligations the follow8ing obligation may be registered: Company undertakes to sell an apartment located in Tbilisi and the buyer undertakes to accept it and pay to the company, on contract terms and conditions, the amount agreed upon between the parties. In case of registration of such contract, the title in immovable property still is maintained by the company and the other party, in the field of obligations of the Public Registry extract is specified as a buyer.

Similarly, the future owner (buyer) is registered by registration of the attached obligations transaction based on the basis of preliminary contract on sale and purchase of immovable property.

3. Purpose of Registration of the Rights of Obligation with the Public Registry

For the purpose of protection of the civil turnover interests the law adds particular significance to the apparently apprehensible facts to which there is reasonable trust, in specific case, such fact is registration of rights with the Public Registry.[48] "Just like competence emerges with birth of an individual, certain rights emerge with their registration in the Public Registry."[49]

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[46] Decision of Supreme Court №AS -1416-1548-04 of 21 April 2005.
[47] Decision of Supreme Court №AS-623-586-2012 of 25 December 2016.
[48] *Pottage A.,* The Originality of Registration; Oxford J. Legal Stud, 371, 1995, <http://ssrn.com/en/>.
[49] *Zoidze B.,* Reception of the European Private Law in Georgia, Tbilisi, 2005, 274.

Nature of the presumption of completeness and accuracy of the Registry data is a legal fiction, according to which it is assumed that the fact of registration of the right with Registry is provided completely and correctly. The mentioned fiction means that any objectively existing fact evidencing defect of registration cannot exclude assumption protected by Article 312 of Civil Code of Georgia about adequacy of the rights registered with the Registry."[50]

According to explanation provided by the Supreme Court of Georgia "the main purpose of Public Registry is to correctly state all rights subject to registration, including the property right and status. Principle of publicity implies that such right acquires legal force for the third persons from the moment of its registration. The law provides presumption of the Public Registry accuracy and this means that for the third parties Registry records shall be correct until their inaccuracy is proven. Thus, on one hand, Public Registry provides the function of guarantor of civil turnover and on the other - it is in full consensus with the principle of trust and integrity accepted in civil turnover."[51]

In addition, in one of its decisions, Supreme Court of Georgia stated that "Section 2, Article 312 of Civil Code, in its classical understanding, is applicable to the inaccuracy of record where the buyer, within reasonable scopes, regards that the seller's right was valid, though, in the opinion of the cassation chamber, this norm regulates also the relations that include obligations registered with the property, i.e. analysis of these norms offers that where the matter is immovable property legal status, the buyer, to evidence his/her rights, may rely upon the assumption of validity of the facts registered with the Registry and even if the Registry data are incorrect, this situation becomes insignificant due to the buyer's acting in good faith, what means that he/she was unaware that the Registry data were incorrect. The only thing that violates the fiction of Registry data veracity is unfairness of the buyer. The named provisions contain the elements determining legal outcomes of unfair action and in relying upon the presumption provided by the provision – veracity of the Registry records not only Public Registry data should be examined but also it must be reliably established that before purchase, the buyer was unaware and he/she could not be aware that the Public Registry records were inaccurate."[52]

With respect of the property rights, arising of these rights is associated with their registration in Public Registry as well. In case of the property rights, the principle of publicity ensures protection of the third party interests; in addition, several property rights may be registered with one and the same immovable thing and in such case, ranking of these rights results from the publicity principle. At one glance, for the obligation rights, publicity of these rights is not decisive as the obligations-law relations are the legal relations between the persons and such relations are closed for the third parties. Though Georgian Law on Public Registry provides different approach, in relation to the legal entities and associates arising of such rights with registration in Public Registry. Even if this is for taxation purposes, it should not be deemed reasonable as the issue of establishing the private-law rights is beyond the scopes of regulation of Georgian Law on Public Registry as this is special competence of Civil Code. The parties will be still bound by legal relations irrespective of whether these will be registered with the Public Registry or not.

Information of the third parties could be regarded as one of the purposes of the obligations registration with the Public Registry[53] but if such obligation is associated with a person only and at the same time, does not impose any restrictions on immovable property. Such information would provide to the third parties no-

[50] Decision of Supreme Court №AS-1179-1108-2012 of 17 March 2013.

[51] *Zoidze B.,* Reception of the European Private Law in Georgia, Tbilisi, 2005, 275.

[52] See Decision of Supreme Court №AS-394-373-2013 of 20 May 2014.

[53] *Hogg J.E.,* Registration of Title and Contractual Rights, Juridical Review, xxvii 195 (May 1915), 162, <http://ssrn.com/en/>.

tion of the owner of immovable property (a person) rather than the property. Thus, such obligations should not be the ones subject to registration with the Public Registry.

One of the purposes of the obligations with Public Registry can be attraction of the registration fees, as according to Section "a", Article 2, Annex to the Resolution No: 509 of 29 December 2011 of the e Government of Georgia on Approval of the Rates of Services, Payment and Terms of the Services Provided by LEPL National Agency of Public Registry under the Ministry of Justice of Georgia, service fees are established for registration of the rights on immovable property, obligations related to the title in the immovable property, modification and termination thereof.

III. Outcomes of Obligations Registered with the Registry of Immovable Property Rights

As mentioned above, obligations related to the property rights are subject to registration with the Registry. It is significant to describe the expectations of those for whose benefit such obligations are registered. Primarily, the most important issue is, whether such obligations can be attached to the immovable property by the registration. Regarding the above, this chapter will examine the issue of existence/non-existence of the accompanying obligations and identification of the risks.

1. Are the Registered Obligations Transferable with the Immovable Property

In the legal doctrine, droit de suite is regarded as determinant of the proprietary right though, in some cases, this is characteristic for the liability rights as well. Clear example of this is rights of the tenant and lessee arisen from the tenancy and lease contracts that exist in case of the new proprietor as well.[54] Right of use of the immovable, arisen from the tenancy and lease contracts does not terminate in case of purchase.[55] This means that the liability right has acquired the feature of accompanying the immovable property – "droit de suite" that is characteristic for the proprietary rights. By this, it becomes similar to the limited proprietary right, it is clear that similar provisions are applicable to the superficies and usufructs. In particular, according to CCG Art. 241, if superficies is terminated, the owner of the plot of land shall become a party to a tenancy or lease agreement concluded by the superficiary; in addition, after termination of usufruct the owner becomes party to the existing lease or tenancy relations.[56] Thus, the "property is bound with both, the proprietary and obligation rights."[57]

Similar to the proprietary right, the rights of tenancy and lease are guaranteed, protected not only against all third parties but against the proprietor as well and this is established by CCG Art. 575, stating that the lessee may protect his/her possessions from any encroacher, including the owner. The above considerations offer that the rights of lease and tenancy are not typical liability rights and they are characterized with the key features of the proprietary rights (publicity, absoluteness, succession, determination). In addition, the legal doctrine provides the opinion that the transferability is characteristic for the obligations-law relations with the contents oriented towards the property.[58]

As mentioned above, normally, the future rights are registered with the Public Registry as "attached obligation" though, are these such rights related to immovable property that are transferable therewith in case of change of the owner? In such case the starting point is not the type of transaction (attached obligation) in the Public Registry but rather substance if the obligations-law relations. According to the Civil

[54] *Zoidze B.,* Georgian Property Law, Publisher: "Metsniereba", second reviewed annd improved edition, Tbilisi, 2003, 8.
[55] See CCG Article 572.
[56] See *Kurzinski-Singer E., Zarandia T,* Recepton of German Prperty Law in Georgia, magazine Herald of Civil Law, №1, 2012, v. 17; Article 242 of Civil Code.
[57] *Zoidze B.,* From the History of Creation of Georgian Civil Law, Overvview of Georgian Law №6/2003-1.
[58] *Zoidze B.,* Georgian Property Law, Publisher: "Metsniereba", second reviewed annd improved edition, Tbilisi, 2003, 8.

Code of Georgia, regulating the obligations-law relations, arising of the obligation does not require registration with the Public Registry and they exist from the moment of contracting and in case of the property disposal by the buyer, upon registration of the property rights of the next buyer, the obligation of the previous owner shall be cancelled and do not be stated in the extract from Public Registry as the obligation is not a proprietary right transferable together with the property and it may belong to the specific subject of law (contracting party), who can even not perform the obligation undertaken under the same contract and by this reason the obligee may submit to the court while the obligor in the same relations bears contractual civil-law responsibility.

At the same time, though definition of the "attached obligation" transaction is unclear, as no legislative term is stated, it does not originate from the law and though it is called "attached obligation", this cannot add to the obligations the feature of transferability with the immovable property that is characteristic for the proprietary rights.

Yet, it should be noted that registration of the obligations related to the property rights provide unreasonable guarantees to those for whose benefit such obligations are registered as based on the registration, it is regarded that the contractual obligations are guaranteed and this can be clearly seen from the disputes submitted to court.

Regarding the above, registration of the obligations with the registry of Immovable Property Rights is simple documenting of the right rather than the basis of arising of such right.

2. Obligations Registered with the Immovable Properties Sold by Enforcement

If enforcement is performed by the obligee, whose claim is not secured, irrespective of the property transfer, the rights registered with the Public Registry remain unchanged. If enforcement is provided by the mortgagee/pledge holder, all proprietary rights are cancelled as a result of property transfer (with the exclusion of the tax lien/mortgage) registered in relation to the property after the mortgage of the obligee providing enforcement. If the mortgagee performing enforcement is the commercial bank, micro-finance organization, insurance company registered in Georgia, international institutions or finance institutions of the developed countries specified in sub-section "e", Article 1 of Georgian Law on Operation of the Commercial Banks, as a result of property transfer the tax lien/mortgage rights registered after the mortgage of such obligee shall be cancelled. The rights registered earlier (including tax lien/mortgage rights) shall remain unchanged in all cases. New owner of the property sold as a result of enforcement takes the place of the previous owner and becomes participant of the legal relations associated with the property ownership and/or use thereof. At a time of transfer of the property to a new owner the previous one loses all rights to this property.[59] Similarly, by virtue of CCG sections 5 and 7, Article 306[5] with transfer of the property all mortgages and real rights with which the immovable property was encumbered and which have been registered after the mortgage of the enforcing creditor. The rights registered earlier to the thing shall remain unchanged. The new owner of the immovable thing sold at the auction shall take the place of the old owner and become a party to the legal relationship that existed in connection with the thing at the moment of the transfer of ownership. Upon the transfer of the mortgaged immovable thing to the new owner, the old owner shall forfeit all rights to the thing. According to the above stated provisions, primarily the following shall be established: a) whether enforcement takes place for the secured or unsecured oblige; b) whether the obligation related to the property right registered on immovable thing is contractual relation or proprietary right' and c) when the obligation was registered with the Public Registry.

[59] Paragraphs 4, 5 and 6 of Article 75 of Georgian Law on Enforcement.

If the obligations related to immovable property rights specified in sub-section "k", section 1, Article 11 of Georgian Law on Public Registry imply contractual obligations only, than, the immovable property sold through enforcement, with transfer to the new owner (whether secured or unsecured obligee) the obligations shall not be transferred together with the property and time of registration of such property with Public Registry is of no significance.

IV. Conclusion

Though Section 5, Article 11 of Georgian Law on Public Registry has associated the issue of arising of the obligation right with the registration in Public Registry, this should not be regarded as reasonable as first of all, the issue of establishing of the rights (stating of the contract form) is within the special competence of the Civil Code of Georgia and, second, this is against the substance of the contractual relation as obligation-legal relations arise from the moment of contract conclusion.

Regarding the above, supposedly, Section 5, Article 11 of Georgian Law on Public Registry should be revised and it should be formulated so that registration with Public Registry was not required for arising of the obligation. In addition, if the legislator's will is caused by the taxation reasons, it should be included into the sphere of regulation of the Civil Code.

According to Subsection "k", Section 1, Article 11 of Georgian Law on Public Registry, obligations related to the property right shall be registered with the Public Registry though it does not provide the list of such obligations, as, based on the principle of private autonomy effective in the obligations law, parties may freely state the contents of the contract and this principle provides to the parties the freedom of contracting. This implies the following: parties may make the contract of any type and content unless it is against the law, public order or norms of moral. Though, this does not mean that the principles should be set, based on which the registrar would identify the obligations related to the proprietary rights that are subject to registration and those, that are not.

Discussion in this article offers that only the obligations related to the property rights on immovable thing should be registered with the Public Registry that are related to such thing (certain restriction related to the think) but if the obligation is related to the individual and it does not establish any restriction or privilege, such obligations should not be subject to registration.

By registering the obligations that do not impose any restrictions or privilege in relation to the thing, the persons for whose benefit the obligations are registered, are provided with unreasonable guarantees by registration with the Public Registry as such registration ensures trustworthiness of registration.[60]

As for the "attached obligation", it is not a legal term and thus, registration of obligations based on such transaction cannot add to it the feature of transferability together with the immovable thing as determinant of the content of the right is identification of the scopes of such content of the right.

Dual nature of the property right implies that the principles that are regarded as the basis for distinguishing on one hand the property and on the other – right im personam (e.g. principles of publicity and registration), are characteristic for both of them. Development of modern civil turnover and unrestricted use of the principle of freedom of contracting resulted in the trend of approach of certain property and right im personam, conditions of publicity and registration that are regarded as one of the key principles of distinguishing of the property and right im personam, are characteristic for the right im personam.

[60] *Hogg J.E.,* Registration of Title and Contractual Rights, Juridical Review, xxvii 195, May 1915, 168, <http://ssrn.com/en/>.

Maia Kopaleishvili*

For Declaring the Legal Act Void

The author of the study aims to define whether the editorial changes adopted to the legal act entail legal invalidity thereof towards the concrete addressee. The author notes that any changes adopted to the legal norm and/or individual administrative-legal act (for instance, editorial changes) shall not entail invalidity thereof. The Article provides that the legal act is invalid when no further interest therein exists or the actual composition or the legal context thereof has changed so to it appears unavailable in the initial form prior to amendment (it is invalid). The Article provides that declaring the legal norm void is directed ex nun, which shall not exclude the circumstance that it might still apply in the past procede ex tunc. The author indicates that declaring the legal act void in the administrative law shall not be related to illegal nature/illegality thereof. While declaring the disputable act non-Constitutional/invalid in the Constitutional Law means that the hereof act during validity, was contradicting the Constitution or was non-Constitutional. The author notes that adoption of the change to the legal act, which fails to change the normative context thereof and the effect of impact on the plaintiff, shall not create the basis for termination of the case in the Court. The editorial change might entail termination of the case in the Court in the event solely if the changes adopted to the disputable act annul the dipsutable norm with the normative context with which it has been put to dispute under the Constitutional claim.

Key Words: *Legal act, invalidity, legal consequence, legal impact, legal act ex nunc, legal act ex tunc, editorial change, Court precedent, non-constitutional nature/invalidity, interpretation of the norm, normative context, termination of the case in the Constitutional Court.*

1. Introduction

The issue of declaring the legal act[1] void is related to the legal consequence[2] thereof. The hereby study does not aim at consideration of all the basics of declaring the legal act void.[3] The subject of the study is whether the actual composition of the legal act through the editorial changes thereto is always being changed so to entail change of the legal consequence of the initial legal act (prior to amendment) towards the certain addressee – that is, whether it entails legal invalidation of the legal act. As we see, the discus-

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1 The concept of the legal act is prescribed under the Law of Georgia on "Normative Acts" (22.10.1999), Article 2 envisaging the legal act to be as normative so individual. The concept of the legal act is provided with the different term in the law of Georgia on "General Administrative Code of Georgia" (25.06.1999), sub-paragraph "c" of the Article 2. According to the hereof paragraph, the administrative-legal act is the legal act issued by the administrative body on the basis of the legislation. In its turn, in line with the sub-paragraphs "d" and "e" of the same Article, administrative-legal act concludes the individual administrative legal act and the normative administrative-legal act.

2 According to the considerations provided in the legal literature, the edition defining the legal act envisaged under the hereof legislative acts, deriving from the objective of each act in terminological term, is different but it does not entail any problems in conformity of regulations (see, *Z. Abashvili,* Municipal Normative Acts, 8, <http://www.ivote.ge/images/doc/uploadedFiles/files/GTZ_Book_Normatiuli_Aqtebi_Print.pdf>.

3 The basics of declaration of the legal act void are provided as in the Law of Georgia on "Normative Acts" (Article 25), so in the Law of Georgia on "General Administrative Code of Georgia" (Article 61).

sions provided in the hereby Article equally concern the legal acts of both types – normative and individual.

While discussing the hereof subject, we have outlined the issue such is the formal criterion of the legal regulation and individual acts upon evaluation/application thereof. We would like to identify whether the legal acts officially are of legal force in law.[4] The hereof issue, along with the basics stipulated under the law, is related to the skill of the lawyer and a Judge of judgment.[5] Legal act to be in force is the legal issue, which other than the basics directly prescribed under the law, might require interpretation, the space of which can be estimated under various criterion, such is for instance substantiation with rational arguments.[6]

As the scientific material provide, the actual composition[7] of the regulation in the structure of the legal norm defines the pre-conditions[8] of the juridical (legal) consequences. Whereas, the evaluation concepts are provided in the law (for instance, whether the editorial change entails invalidity), the issue of legal impact in evaluation sphere (legal consequence) can be sufficiently substantiated.[9]

The presumption provided in the legal literature on compliance of the normative and actual reality echoes the hereof problem at some extent. "We shall take the fact into account that the norm in the law does not bear independent meaning and hence, there is no form for the form. Any form implies the particular context and implementation or non-implementation of the hereof context is important for the legal order. When the hereof context is converted into the formless reality, it obviously cannot lack the evaluation capacity".[10]

2. Particular Actual and Legal Circumstances

We will consider whether any editorial changes adopted to the legal act entail invalidity thereof and change of the legal consequence/legal impact of the legal act towards the certain addressee on the basis of the concrete examples. The hereof example concerns invalidity of the normative act, however as mentioned above, the issue is equally related to the individual administrative-legal act as well.

The Ordinance of the Minister of Education and Science of Georgia of February 25, 20121 N30/m was the subject of dispute in the Constitutional Law of Georgia. According to the Ordinance of the Minister of Education and Science of Georgia of September 6, 2013 N129/m,[11] the change has been adopted to disputable norms,[12] envisaging the Ministry of Education and Science to administer classification instead of

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4 *Zippelius R.,* Theory of Legal Methodology, 10th ed., Munich, 2006 (Translation in Georgian, 2009), 110 (in Georgian).

5 Ibid, 113 (in Georgian).

6 Ibid, 127.

7 As provided in the legal literature, the fact/actual circumstances shall be differentiated from the actual composition of the norm. The fact is the phenomenon of reality, while actual composition is the normative description of the phenomenon of reality, related to the legal consequences. See, *Khubua G.,* Theory of Law, Tbilisi, 2004, 194 (in Georgian).

8 *Khubua G.,* Theory of Law, Tbilisi, 2004, 54 (in Georgian). The author indicates that the structure of the norm of the law consists of two basic elements: 1) actual composition. and 2) legal consequence.

9 *Zippelius R.,* Theory of Legal Methodology, 10th ed., Munich, 2006 (Translation into Georgian, 2009), 35 (in Georgian). the author indicates that every norm of the law does not relate the legal consequence to the composition of the action (for instance, legislative definitions), See, 37.

10 *Zoidze B.,* Constitutional Control and Order of Values in Georgia, Tbilisi, 2007, 76 (in Georgian).

11 Ordinance of the Minister of Education and Science of Georgia of September 6, 2013 №129/m "on The Rule of Classification to the Text-Books of the Educational Institution and Endorsement of the Fees" on the Change to the Ordinance of the Minister of Education and Science of Georgia of February 25, 2011 №30/m".

12 To avoid overloaded footnotes, I would provide the initial (appealed) edition of sundry disputable norms solely: "According to the Sub-paragraphs "h.a" and "h.b" of the Paragraph one of the Article 6 of the Annex №1 to the Ordinance of the Minister of Education and Science of Georgia of February 25, 2011 №30/m, the contesters, in view to participate in classification, shall submit to the Center the following approvals: a) in the event of classification of the textbook/series submitted for classification, on delegation thereof to the Center under the ordinary license agreement . b) in the event of

the LEPL – National Center for Educational Quality Enhancement and hence, the term "Center" has been correspondingly substituted with the term "Ministry". At that, the term "Facilitative Commission" has been substituted with the term "Classification Commission".[13] As we clearly see from the hereof example, the changes adopted to the disputable norms have changed the authorized subject implementing administration of classification (LEPL - National Center for Educational Quality Enhancement has been substituted with the Ministry of Education and Science of Georgia). At that, the title of the Commission estimating the conclusions of the Subject Groups has been replaced. The rule of classification is identical repeating the normative context used by the plaintiffs to see the problem of Constitutionalism demanding declaration thereof as non-Constitutional.

In compliance with the paragraph two of the Article 13 of the Law of Georgia on "Constitutional Proceedings"[14], annulment or invalidation of the disputable act upon consideration of the case entails termination of the case in the Constitutional Court of Georgia. According to the established practice of the Constitutional Court of Georgia,[15] any change adopted to the disputable norm, including the editorial change to the disputable norm, shall be considered as declaration of the disputable norm void, which entails termination of the case in the Court.[16] In other words, in this event, the Court rejects consideration of the claim, depriving the plaintiffs of capacity to dispute Constitutional nature of the norm, which regardless of being amended, continues application thereto and forces to re-file the claim on so-called changed/edited norm to the Court and join the new waitlist for consideration.

As we see, the Court, as a result of interpretation of the norm, has established the hereof practice as the legislation fails to define the types of the editorial change entailing invalidity of the norm. In general, the Court precedent facilitates to sustainability and certainty of justice.[17] However, at the same time we shall take the fact into account that in particular events, in case of absence of mandatory protection of the precedence, the Court shall not only be assured in inaccuracy of ratio decidendi,[18] but in absence of other possible basics to support the earlier decision.[19]

Description of the norms by the Court/Judge is of utmost importance for proper development of modern law and practice. According to the assumption provided in the legal literature, the norm of the law in the Continental European Law countries often does not apply with the initial meaning as stipulated under the law. It is applied in capacity as established by the Judge in practice and shall be elucidated for the given moment.[20] Elucidation of the norm by the Judge may be based on strictly literal understanding of "legal

classification on the basis of the recommendation by the Facilitative Commission - "Exceptionally the best" – to the textbook/series submitted for classification, delegation of the copyright to the Center under the particular license in exchange for remuneration.

13 See, the Judgment of June 24, 2014 №3/559 of the Constitutional Court of Georgia and the different opinion of the Member of the Court, Maia Kopaleishvili on the subject of dispute: "Constitutional nature of the sub-paragraphs "h.a" and "h.b" of the Article 6 of the Annex №1 to the Ordinance of the Minister of Education and Science of Georgia of February 25, 2011 №30/m, as well as the sub-paragraph "b" of the Article 10 and the sub-paragraphs "b" and "c" of the paragraph 2 of the Article 22 in regards with the second sentence of the paragraphs 1 and 2 of the Article 21 and the paragraph 1 of the Article 23 of the Constitution of Georgia".

14 Law of Georgia on "Constitutional Proceedings", 1996, March 21.

15 We mean the practice established upon development of the hereby Article.

16 For instance, see the Judgment of the Constitutional Court of Georgia of June 28, 2010 №1/1/474 "Public Defender of Georgia vs. Parliament of Georgia". the Judgment of the Constitutional Court of Georgia of December 27, 2013, №2/1/539 "Citizens of Georgia – *Vladimir Sanikidz*e and *Maia Khutsishvili* vs. Parliament of Georgia".

17 See, *Gogiashvili G.,* Comparative Constitutional Law, Tbilisi, 2014, 256 (in Georgian)..

18 Ibid, 257, the principle imposing mandatory protection of the precedents.

19 Ibid, 260.

20 *Kereselidze D.,* The Most General System Concepts of Private Law, Tbilisi, 2009, 59 (in Georgian).

binding", which is consistently substituted with more liberal and loyal approach to the estimation categories. Evolution of the main moments of the elucidation methods is related to consistent "exemption" of the Judge "bound" under the rule of law and creative establishment of the new rules of conduct which is based on the integrity-based values.[21]

3. Legal Problem

The question is, when the legal act terminates impact towards the plaintiff/party concerned, that is – when/since when the impact applies no longer.

Naturally, the misconception is that the any change adopted to the legal norm and/or individual administrative-legal act (for instance, editorial change) entails invalidity thereof. In legal terms, the legal act is invalid, when no further interest therein exists or the legal context or actual composition thereof has changed to eliminate the initial form thereof (invalidated). Adoption of the editorial change to the legal act yet does not indicate to invalidity thereof.

We will discuss the hereof issue regarding the legal act of both types. Invalidity of the individual administrative-legal act is obvious when as a result of the change of actual and legal relations adopted to the law-compliant legal act or in absence of further interests in application thereof, it is necessary to reject and annul it.[22] Naturally, the act is the subject of declaring void, which makes legal impact. Declaring void aims at annulment and prevention of the hereof legal impact and it is the pre-condition thereof as well.[23] The equipped and/or prohibiting (binding) individual administrative-legal act shall be declared void, when the actual or legal basics of issue of the act are being changed in the event of continuing administrative act.[24]

Declaring the act void is inadmissible when the act is issued with the same context, that is – when in legal terms, it is the act of the same context and we still encounter the pre-conditions for declaring the act void, which means that necessity to declare the act void has not been eliminated.[25] Correspondingly, the act shall be declared void only when the actual and legal relations change and the act shall no longer apply. It is related to the legality principle[26] as well, inasmuch as the legality principle requires annulment of the individual administrative-legal act converted into "illegal".[27]

The normative act, as well as the individual legal act is capable to regulate concrete legal relations (concrete issue). It is feasible only when the act impacts the hereof relations (can impact) and hence, if the legal norm impacts, it shall be followed with further legal check thereof in regards with the concrete fact, issue. It is considered that if the legal norm inflicts impact, it relevantly is valid (is in force), is the part of the law,[28] and is enacted.[29]

Naturally, the by-law normative acts are issued within authority stipulated under the legislation. The legislator is to solve who is authorized to decide the issues prescribed under the law, what are the issues to be regulated under the legal act (the context of the act), what are the scopes (regulation area) and the aim of regulation (the objective of the act). The objective shall be sufficiently clear and defined.[30] The aim of

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[21] *Kereselidze D.,* The Most General System Concepts of Private Law, Tbilisi, 2009, 65-69 (in Georgian).
[22] *Maurer H.,* Allgemeines Verwaltungsrecht, München, 2011, 297.
[23] Ibid, 300.
[24] *Turava P.,* General Administrative Law, Tbilisi, 2016, 133 (in Georgian)..
[25] Maurer H., Allgemeines Verwaltungsrecht, München, 2011, 326.
[26] Ibid, 326.
[27] *Turava P.,* General Administrative Law, Tbilisi, 2016, 133 (in Georgian)..
[28] See <https://jura-online.de/lernen/konstellationen-der-rechtsverordnung/46/excursus?unauth=true>.
[29] *Maurer H.,* Allgemeines Verwaltungsrecht, München, 2011, 76.
[30] *Jarass H., Pieroth B.,* Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 9. Auflage, München 2007, 828-829.

regulation is one of the most important categories and thus, if the hereof objective of the legal act towards a certain addressee does not change regardless of the editorial changes adopted thereto, it further continues impact on the addressee. The ability to impact is one of the important conditions of the legal act. The impacting legal act is directed to the addressees, to which it has legal impact.[31]

As to the law, promulgation of the law ends the legislative process. The matter is when the law enters into force and when it has the legal impact and binds or equips the addressees. Entry of the law into force is not the part of the legislative process but the part of the context of the law. The date of entry of the law into force is not the provision on indication of the time solely but it has the substantive-legal impact.[32] Entry of the law/normative act into force is the part of the normative regulation. Entry into force launches the legal impact thereof.[33] In the event, if the legislative rule is in force, it does not matter what entry into force is related to – is it related to a particular date, promulgation, annulment or changes to the norm – control of the rule is still necessary if the legislative rule continues to apply.[34]

In the classic sense, declaration of the legislative rule void is directed to ex nunc. It does not exclude the circumstance that as a result of the actual or legal change adopted to the legal norm it is to continue application retroactively and proceed to the present. It takes place in the event when as a result of the change adopted thereto, the context of the norm has the opportunity to apply ex tunc, namely envisages implementation of earlier arising liabilities in view of achievement of a particular objective. The disputable norm would be invalid in the event of non-alteration thereof in the manner to deprive it of the resources of similar impact towards the addressee. It is inadmissible to recognize the legal norm void when regardless of the changes adopted thereto, it continues the similar material-normative contextual application.[35]

The hereby Article does not aim at discussing application of the decisions of the Constitutional Court in sense of time. However, we could not avoid the circumstance that declaration of the disputable act/norm under the decision of the Constitutional Court is related to application of invalidity of the hereof act/norm in the sense of time. Hence, systematic regulation requires reference to the considerations provided in the legal literature.[36] According to the hereof supposition, the Decisions of the Constitutional Court might as well apply ex tunc and ex nunc.[37] As the legal literature provides, in the first event the decision has the retroactive force and if the normative act is declared as non-Constitutional, it shall be considered invalid upon enactment thereof (the act). Similar solution in practice entails restoration of the legal relations generated as a result of application of the non-Constitutional act to the original state or remuneration of the damage inflicted due to application of the act.[38] Ex nunc decisions are applied in practice more often, which means that validity of the Court orders on declaration of the act void applies ex nunc.[39] The issue of problematic nature of the legal consequences of declaration of the normative act non-Constitutional/void by the Con-

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[31] *Jarass H., Pieroth B.,* Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 9. Auflage, München 2007, 833.

[32] *Maurer H., Staatsrecht I.,* Grundlagen.Verfassungsorgane.Staatsfunktionen, München, 2007, 561.

[33] *Jarass H., Pieroth B.,* Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 9. Auflage, München 2007, 842.

[34] *Hufen F.,* Verwaltungsprozessrecht, München, 2011, 330.

[35] See, the different opinion of the Member of the Constitutional Court of Georgia, *Maia Kopaleishvili* on the Judgment of the Constitutional Court of Georgia of June 24, 2014 №1/3/359, paragraph 12.

[36] See, the Article 20 of the Organic Law of Georgia on "Constitutional Court" envisaging "declaration of the law or any other normative act as non-constitutional does not imply annulment of the earlier made Judgment and the Decisions on the basis of the hereof act but entails suspension of enforcement thereof solely in order established under the Procedural Legislation". See also, Article 310 of the Code of Criminal Procedure.

[37] *Kakhiani G.,* Constitutional Control in Georgia, Tbilisi, 2011, 43 (in Georgian).

[38] Ibid, 43.

[39] Ibid, 43-33.

stitutional Court is the subject of constant discussions. As the legal literature provides, the authors as in Georgian legal literature so the international organizations indicate to fact that the mechanisms established under the legislation on the Constitutional Court in view of restoration of the infringed human rights are not perfect.[40]

At that, in terms of termination of application of the legal act declared void, we shall take the difference between declaration of the legal act void for the purpose of Administrative Law and declaration of the legal act non-Constitutional/void for the purpose of Constitutional justice into account. Declaration of the legal act void in the Administrative Law is not related to the unlawful nature/illegality thereof.[41] While in the Constitutional justice, declaration of the disputable act non-Constitutional/void implies that the hereof act upon validity thereof, was contradicting with the Constitutional nature or was non-Constitutional and as mentioned above, it is up to the Constitutional order whether it is invalid ex tunc or ex nunc, that is the act, declared void/non-Constitutional by the Constitutional Court is considered to be in contradiction with the Constitution as with the fundamental law during validity/upon promulgation thereof, does not correspond thereto and hence, is non-Constitutional.

As the legal literature provides,[42] declaration of the disputable act void under the decision of the Constitutional Court is related to enforcement of the Court order.[43] The issue of the legal force of the decision of the Constitutional Court of Georgia is also relevant.[44] It is the subject of constant discussions. The issue concerns the period upon enactment of the disputable act up to declaration thereof as non-Constitutional. The presumption that the non-Constitutional, invalid act prior to declaration thereof as void or non-Constitutional, was in conformity with the Constitution[45] and the state acted in good faith[46] is a disputable circumstance.

4. Invalidity of the Disputable Act for the Purpose of the Constitutional Proceedings

The paragraph 2 of the Article 13 of the Law of Georgia on "Constitutional Proceedings" shall be interpreted taking the purposefulness thereof and the normative context of the legal act put under dispute by the plaintiff into account. Namely, the paragraph 2 of the Article 13 of the Law of Georgia on "Constitutional Proceedings" aims, upon verification of compliance of the current legal norms put under dispute by the plaintiff with the Constitution of Georgia, to ensure efficiency and affordability of the Constitutional proceedings. Discussions on the void or annulled norm, other than the exceptions stipulated under the law, fail to serve for the Constitutional proceedings. Hence, the terms in the hereof norm "declaring void or

[40] *Khetsuriani J.,* Authority of the Constitutional Court of Georgia, Tbilisi, 2016, 142-154 (in Georgian).

[41] See *Zikow J.,* Verwaltungsverfarengesetz, Kommentar., Stuttgart., 2006., 360. Also see, General Administrative Code of Georgia, Article 61. Compare the sub-paragraph "c" of the paragraph 2 of the Article 61 to the paragraph 6 of the same Article which does not exclude declaration of the act void upon entry thereof into force (regardless compliance thereof with the law upon promulgation). Compare, *Turava P.,* General Administrative Law, Tbilisi, 2016, 121 (in Georgian).

[42] See Article 20 of the Organic Law of Georgia on "Constitutional Court of Georgia", envisaging: "declaring the law or any other normative act non-Constitutional shall not imply annulment of the Court Judgments or Decisions earlier made on the basis of the hereof act but entails suspension of enforcement thereof solely in order established under the procedural law".

[43] *Zoidze B.,* Constitutional Control and Order of Values in Georgia, Tbilisi, 2007, 179 (in Georgian).

[44] See *Eremadze Q.,* Relevant Problems related to the Legal Force of the Decision of the Constitutional Court of Georgia. Overview of the Constitutional Law, Magazine, 2013, №6, 3 (in Georgian).

[45] *Zoidze B.,* Constitutional Control and Order of Values in Georgia, Tbilisi, 2007, 179 (in Georgian).

[46] Ibid, 179.

annulment" shall be interpreted taking the normative context into account, manifested under the disputable norm as a result of the changes adopted thereto.[47]

The legal literature provides the consideration about application of the norm. Existence of the legal norm is explained with application thereof. The norm does not exist when no application thereof exists.[48] The "Law,[49] although is future-oriented but the future concerns not only the newly emerged legal reality but the reality deriving from the past. The most important is the fact that enactment of the new Law sometimes officially annuls the old law while actually it continues application".[50]

For the purpose of Constitutional proceedings, the disputable act is considered void or annulled, when it no longer exists with the normative context which the plaintiff states as basis for putting Constitutional nature thereof under dispute. Deriving from the said fact, all the changes adopted to the disputable norm shall not automatically entail termination of the case in the Court and each case shall be evaluated on individual basis taking the fact into account whether the disputable norm amended or edited by the authorized subject, maintains the same normative context and whether it has impact with the same normative context to the addressee.[51]

5. Conclusion

Adoption of the changes to the legal act/disputable norm failing to change the normative context thereof and the application effect on the plaintiff, which appears obvious within the above-mentioned case, shall not create the basis for termination of the case in the Court.[52] The availability of the editorial changes solely to the disputable norm shall not serve the basis for emergence of the impediment for the Court to discuss the Constitutional nature of the hereof disputable norm.[53] The editorial change shall entail termination of the case in the Court solely if the changes adopted to the disputable act result in annulment of the disputable norm with the normative context with which it has been put under dispute as stipulated under the Constitutional claim.

Entry of the legal norm into force is related to the legal impact of the hereof norm. In particular case, regardless of the changes adopted to the norm, the disputable norm shall not lose the impact force. Naturally, the respective agency is entitled to apply certain legal means (annulment, invalidation) and hence, prevent the possible negative impact of the norm, however it cannot be achieved with the editorial changes that surfaced in the particular event above. In material terms, the disputable norm is in force as towards the addressee of the norm, so towards the issuer agency. In general, invalidation is limitable according to the composition of the normative context of the norm. The act is invalid if it is no longer in force with the same normative context.[54]

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47 See the different opinion of the Member of the Constitutional Court of Georgia, *Maia Kopaleishvili* on the Judgment of the Constitutional Court of June 24, 2014 №1/3/559, paragraph 6.

48 *Zoidze B.,* Test of the Practical Existence Cognition of Law, Tbilisi, 2013, 83-84 (in Georgian).

49 See *Zoidze B.,* Constitutional Control and Order of Values in Georgia, Tbilisi, 2007 (in Georgian). The author discusses the retroactive problem, real and unreal retroaction. With reference to the practice of the Constitutional Court of Germany, the author notes that real retroaction takes place when the new law applies to the relations emerged and terminated in the past and when the new law concerns as the relations emerged in the past continuing through the present, so the relations emerged upon enactment of the law, 67-72. See also, *Jarass H., Pieroth B.,* Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 9. Auflage, München 2007, 490-492.

50 Ibid, 70.

51 See the different opinion of the Member of the Constitutional Court of Georgia, *Maia Kopaleishvili* on the Judgment of the Constitutional Court of June 24, 2014 №1/3/559, paragraph 8-9.

52 Ibid, paragraph 17.

53 Ibid, paragraph 10.

54 Ibid, paragraph 13.

When discussing invalidity of the legal act, we shall as well take the fact into account whether the special regulation in the amended norm deriving from the normative context of the norm prior to amendment has been changed. As noted, the material context has not changed as a result of the change, impact of the hereof norm is obvious and correspondingly, the norm is in force in material and legal terms. At the same time, we shall take it into account that not the fact that the amended act is equipped or prejudicial is the subject of interest but the fact that regardless of the changes, the act entails same impact. At that, we shall as well take the fact into account that the issue body of the act remains unchanged.[55]

[55] See the different opinion of the Member of the Constitutional Court of Georgia, *Maia Kopaleishvili* on the Judgment of the Constitutional Court of June 24, 2014 №1/3/559, paragraph 14.

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Universal System Of Sex/Gender Registration

In this article the author aims at offering and informing the modern world about Universal System of Sex/Gender Registration that he has created. When introduced/applied, this system will meet the challenges of the idea of equality, which are faced globally nowadays.

The Universal System of Sex/Gender Registration (hereinafter referred to as USS/GR) is created on one hand for protecting the human rights in regards to sex and gender selection and belonging, and on the other hand for enabling the state to register sex/gender in an easy and flexible manner.

By introducing and applying the USS/GR, the modern world will be able to ensure the standard of initial equality regarding sex and gender, which has been neglected by the qualified majority of countries to date.

Key Words: sex, gender, intersex, registration, system

1. Introduction

In the modern world, the idea of equality needs a mental, social-cultural and legislative support. Each of these components is an important link of a chain that we call equality today. Equality between genders and non-discrimination in any form, at first glance, represents the basis that has been agreed by most countries so far, however, the ideas of equality often lack normative support even at the legislative level too.

I will not be speaking about the idea of equality and its components in this article, but rather I will be talking about one particular issue, which is about assigning sex to a newborn. Besides, I will refer to the issue(s) of a person's psychological belonging (identity) to sex/gender, and normative regulators linked to this issue(s).

2. Assigning Sex to a Newborn

Before raising the issue and starting the discussion, is necessary to define the meanings of terms used in this article.

Sex refers to a person's biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There is a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia.[1, 2]

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1 The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients, adopted by the APA Council of Representatives, February 18-20, 2011. The Guidelines are available on the APA web site at <http://www.apa.org/pi/lgbt/resources/guidelines.aspx>, <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf >, This Guidelines for Psychological Practice with Lesbian, Gay and Bisexual Clients were adopted by the APA Council of Representatives, Feb. 18-20, 2011, and replace the original Guidelines for Psychotherapy with Lesbian, Gay and Bisexual Clients adopted by the Council, Feb. 26, 2000, and which expired at the end of 2010.

2 See and compare with: *Giddens A., Sutton P.,* Sociology, 7th ed., Sociology:. NY: Polity Press, 2013.

Gender refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Behavior that is compatible with cultural expectations is referred to as gender-normative; behaviors that are viewed as incompatible with these expectations constitute gender non-conformity. [3]

Gender identity refers to "one's sense of oneself as male, female or transgender" (American Psychological Association, 2006). When one's gender identity and biological sex are not consistent, the individual may identify as transsexual or as a person of another transgender category (cf. Gainor, 2000).[4]

Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth, while in others they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all. Intersex people are born with sex characteristics (including genitalia, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.[5]

In the modern world, sex is assigned to a newborn child based on a so-called primary observation of genitalia. The entry about sex becomes the basis for recording a certain sex in the child's birth registration document. In case of intersex, after the primary observation (if the genitalia characteristic to both sexes are not clearly identified), and even in case of identified signs, there is no legal possibility in most countries to mark 'intersex' in the sex graph. There are exceptions only in some countries, namely:

Australia allows to record so called "third sex" in the passport for all the people, who would produce documents proving that its sex meets the definition – unidentified[6] (it has been possible to record "third X-sex"[7] in the birth registration document since 2003)[89] since 2011.

In Germany (being the first European state that recognized and provided legal grounds for the possibility to register the "third sex" (unidentified)) – it has been possible to record the third possible sex in the birth registration document since November 2013, which was acceptable in the cases when the newborn child's genitalia would produce ambiguous answer characteristic to both sexes, regarding the assignment of a biological sex of the newborn.[10]

In India, it has been possible to indicate the third gender option – Eunuch - beside male and female graphs in the passport application form since 2005.[11] In April 2015, the Supreme Court of India recognized

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3 The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients, adopted by the APA Council of Representatives, February 18-20, 2011, <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf>.

4 Ibid.

5 United Nations; Office of the High Commissioner for Human Rights, 2015. Free & Equal Campaign Fact Sheet: Intersex. Citation made from: <https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf>.

6 "Getting a passport made easier for sex and gender diverse people". The Hon Kevin Rudd MP. 14 September 2011, <http://foreignminister.gov.au/releases/2011/kr_mr_110914b.html>,

7 ambiguous genitalia - indeterminate (unspecified, characteristic to both sexes) genitalia

8 Newsletter of the Sociology of Sexualities Section of the American Sociological Association, American Sociological Association Sexualities News, Volume 6, Issue 1, Summer 2003 http://www.asanet.org/sectionsex/documents/SUMMER03sexnews.pdf Retrieved 10 November 2015, also, in addition: Ten years of 'X' passports, and no protection from discrimination, Organisation Intersex International (OII) Australia, 19 January 2013 <http://oii.org.au/21597/ >, [10.11.2015].

9 The word 'indeterminate' is used for refering to the X sex.

10 "Third sex option on birth certificates". DW.DE. <http://www.dw.com/en/third-sex-option-on-birth-certificates/a-17193869>, [10.11.2015].

11 There were three options for sex in the application: (M, F, and E (for male, female, and eunuch, respectively)) Third sex' finds a place on Indian passport forms, The Telegraph, March 10, 2005 <http://www.telegraphindia.com/1050310/asp/nation/story_4474399.asp>, [10.11.2015].

"third sex" as a sex, which is neither female nor male. [12, 13, 14]

In Nepal (2007), the Supreme Court made a decision obligating the authorities to harmonize the legislative environment with the situation where we may have people of another sex other than male and female. A third possible sex graph (category) was added to the ID cards the same year.[15][16]

In New Zealand (2012), it is possible to mark the third X gender in passports, where X determines "indeterminate" sex.[17] Statistics Service of New Zealand presented a new classification of sex in 2015. The sex classifier includes three possible ones: male, female and diverse. The diverse sex classifier can include the following subcategories: gender diverse not further defined, transgender male to female, transgender female to male, and gender diverse not elsewhere classified.[18]

The EU states, namely: Austria, Belgium, Bulgaria, France, Luxemburg, Slovakia, Cyprus, Denmark, Greece, Hungary, Ireland, Italy, Malta, Portugal, Romania, Slovenia, Spain and the UK make it possible to register a newborn child little later after birth. During this time there is an additional medical inspection carried out for determining the sex of the newborn child.[19]

Some countries of the European Union allow registration of so called neutral sex in birth registration documents (as "unknown sex" in Great Britain). There is no sex classifier in birth registration documents in Latvia at all, but there is a definition of an "uncertain sex", and it is recorded in the medical document, which is filed after the baby is born.[20]

As for the Netherlands, if the infant's sex is unspecified, it is indicated in the birth registration document that the infant's sex is indeterminate. A new birth registration document will be issued after three months and the old one becomes void. There is the child's sex indicated in this new document in case if it has been determined during this time as the result of medical examination. However, if the sex is still undetermined, then the document will indicate again – the sex is indeterminate. It is assumed that the intersex person will decide its own gender itself in the future. It will be able to request making respective changes in the birth registration document.[21]

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[12] "Transgenders are the 'Third Gender', Rules Supreme Court". NDTV. April 15, 2014. <http://www.ndtv.com/india-news/transgenders-are-the-third-gender-rules-supreme-court-557439>, Retrieved 10 November, 2015.

[13] See <http://supremecourtofindia.nic.in/outtoday/wc40012.pdf Retrieved 10 November 2015>.

[14] The court recognized the transgender people as the persons of third sex and made a very important definition: „Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue". The court said that transgender people have the right for selfidentification and to request that the possibility for self-identification be secured.

[15] *Knight K.* (24 April 2012). "Nepal's Third Gender and the Recognition of Gender Identity". <http://www.huffingtonpost.com/kyle-knight/nepal-third-gender_b_1447982.html>, Huffington Post. Retrieved 10 November 2015. Compare: Dwyer Arce. "Nepal's Third Gender and the Recognition of Gender Identity"; Jurist.org <http://jurist.org/hotline/2012/04/bochenek-knight-gender.php>, [10.11.2015].

[16] Nepal was the first country to conduct population census in 2011, where the people were able to register as male, female or persons of other sex.

[17] "Transgender applicants - New Zealand Passports (passports.govt.nz)". https://www.passports.govt.nz/Transgender-applicants Retrieved 10 November 2015.

[18] "Classifications and standards – Gender identity". Statistics New Zealand. <http://www.stats.govt.nz/methods/classifications-and-standards/classification-related-stats-standards/gender-identity.aspx >, Retrieved 10 November 2015.

[19] European Union Agency for Fundamental Rights ''The fundamental rights situation of intersex people'' 04.2015, <http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>, Retrieved 10 November 2015; compare: *Agius S., Tobler C. (eds.),* European Commission 2012, Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression, Report by the European Network of Legal Experts in the nondiscrimination field, Brussels.

[20] Latvia 2012, Law on the Registration of the Civil Status Acts (Civilstāvokļa aktu reģistrācijas likums), 29 November 2012, Latvian Herald (Latvijuas Vēstnesis) 197,4800, 14 December 2012, available at:; Latvia, Cabinet of Ministers (Ministru kabineta) 2006, Regulations №265 On the record-keeping procedures for medical documents (Noteikumi Nr. 265 "Medicīnisko dokumentu lietvedības kārtība"), 4 April 2006, 39. pielikums, Latvian Herald

[21] In accordance with the Article 1:24 of the Dutch Civil Code. Dutch Civil Code <http://www.dutchcivillaw.com/legislation/dcctitle044.htm>.

It is impossible to find reliable statistics on intersex persons, as far as even today the qualified majority of countries of the world do not register such people for medical purposes or in birth certificates[22]. According to the generalized statistical data in various countries of the world, the ratio of intersex infants is 1:1000[23]-2000[24] among the newborn children. According to the opinion of various experts, the percentage of intersex people is 0,05% - 1,7%.[25] This rate is quite high which means that it is necessary to create respective legal mechanisms immediately to protect the rights of intersex persons.

In the countries where it is not possible to mark a person's biological sex in birth registration documents, the intersex persons are deprived of an opportunity to select and/or express their belonging to a certain gender, as far as somebody has already done it for them (a medical facility, a parent, a civil registry). Virtually, the existing legislative model makes the person undergo a surgery if this person considers that the record in the document is not consistent with its biological and/or assigned sex (gender), because such surgery is the only way to obtain the medical documentation based on which the respective public registry can change the person's sex.

3. Transgender and Normative Regulation

It is possible to say directly that the people do not choose their initial biological sex and we have it since birth, but it does not mean that everybody will have a mandatory belonging to this sex. Every person should have equal rights for and be able to express the belonging to a certain sex, regardless the initial condition that exists in regards to the biological sex.

What is a legal purpose of registering people according to various sex? Legislation of majority of countries of the present-day world try to reinforce the idea of gender equality in their constitutions or other (derived) normative acts, by ensuring the enjoyment of equal rights. The state needs to disintegrate people based on sex for collecting the demographic data, statistics, or conducting investigation measures as effectively as possible. Otherwise, registration of sexes is related to the provisions in the hypotheses of certain legislative norms (e.g. mandatory military service, mothers, pregnancy, etc.);

In the modern world, the majority of countries pursue mandatory registration of a legal fact of the person's birth/death, which is reinforced by the legislation of these countries.

At what extent it should be mandatory to indicate the infant's sex in the birth registration document? What advantages/disadvantages does it have? It is possible to say that the modern world is set up on the basis of division by sex. Access to spaces or things is provided to the contemporary people according to their division by sex, and most part of the existing items are conditionally classified: majority of names, toys, clothes, accessories; team membership at kindergartens/schools/universities; activities, holidays; changing rooms, restrooms, shower rooms, etc. Besides, this is the case from the legal standpoint of rights/obligations: right to marriage, mandatory military service, work duration, pension age, etc.

If there were no sex registration in the modern world, on one hand, we would possibly get a legal and social (and practical) chaos. In the environment of current legal regulation, however, we get unequal hu-

[22] For Example: GeoStat data of 2012-2015, population of Georiga, <http://www.geostat.ge/cms/site_images/_files/georgian/genderuli%20statistika.pdf>.

[23] Am. J. Hum. Biol. 12: 151-166, 2000 ©2000 Wiley-Liss, Inc, <http://onlinelibrary.wiley.com/doi/10.1002/(SICI)1520-6300(200003/04)12:2%3C151::AID-AJHB1%3E3.0.CO;2-F/pdf>.

[24] Blackless, Melanie, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne, and Ellen Lee. 2000. How sexually dimorphic are we? Review and synthesis. American Journal of Human Biology 12:151-166., Citation made from:< http://www.isna.org/faq/frequency>.

[25] United Nations, Office of the High Commissioner for Human Rights 2015, Free & Equal Campaign Fact Sheet, Intersex, Citation made from: <https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf>.

man rights in regards to the biological sex registration, also in regards to the expression of psychological belonging to sex (from the legal standpoint – also in the light of sex registration).[26]

It is necessary to create a universal legal mechanism that on one hand secures human rights in the part of choosing/belonging to sex and gender, and on the other hand provides a simple and flexible mechanism of sex/gender registration by the state.

4. Universal System of Sex/Gender Registration

By introducing/applying the USS/GR, the contemporary world will be able to ensure the initial equality standard in the part of sex and gender, which has been neglected so far. The system is universal as far as it provides equal opportunity for assigning a biological sex (female/male/other) to a newborn, also for selecting a gender when becoming an adult, and registering the selected one.

The system is based on the principle of unified registration/expression of biological and chosen sex/gender. For example, presently these are the types of models in various countries:

- Male/Female (in most count-ries);
- Male/Female/X[27] (in some countries);[28]
- There is no sex indicated in the birth registration document.

It is possible to say that the modern world is not familiar with registration of a person's psychological belonging to a certain gender in the registration or other identification documents. Information/data about sex can be changed only based on relevant medical documentation and not based on the person's application, which would be grounded on this person's perception of its sexual identity.

As I have mentioned above, the USS/GR is constructed on common expression of sex/gender, where three options are given as an initial biological sex – Male/Female/X. It is interesting how it is possible to reduce the selective gender to several basic options, for example: Male/Female/X/A[29]or B[30]. When speaking about the selective gender, it is important that the selective basic element be universal, which means that the person will have an opportunity to select the mental gender belonging that meets this person's mental identity, and not to be forced to select it only because there is no other option offered to it. Currently, the broadest options of gender belonging in material or electronic registration systems are offered by the social network platform Facebook. The platform has offered 71 gender options to its UK users[31]. Various registration electronic platforms are offering the increasing number of options to the users in regards to selecting their gender belonging, which makes it clear that the gender itself does not fall within the number of categories, which can be included in the list with mathematical precision; which would be sustainable for decades. Time-related, cultural, social and mental changes are directly linked to gender understanding and gender diversity. Hence abovementioned, it is impossible to elaborate a numerus clausus of optional genders, as far as the existing list requires constant verification/adjustment over time, and the USS/GR system should not be in need of the latter.

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[26] *Tumanishvili G. G.,* Acta Universitatis Brunensis Iuridica Vol. 547, DNY PRÁVA 2015 - Days of Law 2015, Conference materials, Brno., 2016., Topical Issues on Equality before the Law for Intersex and Transgender Persons, 132-144.

[27] The word 'indeterminate' is used for refering to the X sex; for the sake of buildind of model, the term "X-sex" also implies 'other' sex/gender and the term 'Intersex' as well.

[28] We have spoken about these countries above.

[29] Non-Gendered, Agender (a person who identifies as agender is one that identifies as neither male nor female).

[30] Bigender, gender identity that falls under the non-binary umbrella. Generally means identify as two genders, could identify as both at the same time.

[31] The Telegraph "Facebook's 71 gender options come to UK users", <http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html>.

Therefore, we are dealing with this situation: it is possible to assign one of the biological sexes to a person at birth – Male/Female/X. However, on attaining adulthood, a person should be able to state its psychological belonging to a certain gender when issuing an ID document. How is it possible?

First and foremost, a binary registration module should be created in the part of assigning a biological sex, which means that the sex will be expressed in a binary mode when a person reaches the age of majority (in the ID cards and passports, also in other documentations where the biological sex is indicated). Namely, if the person's biological sex was determined at birth as male, and if this person has not changed the biological sex after reaching the age of majority or later, then there will be 'Male/Male' (M/M) indicated in the ID documentation, or, in the identical case of female sex – 'Female/Female' (F/F). If the infant's sex is indeterminate at the moment of sex registration, then it is recorded as X-sex (X/X), and if the sex is specified, then either X/M, or X/F. These combinations are universal in regards to biological sex.

In order to let the USS/GR system function in regards to sex/gender expression/registration, it is necessary to add a component, which is not subjected to the marginal, readily available and closed list, namely, to the numerus clausus principle. Otherwise, the system would not be perfect, which I have already discussed above.

Therefore, the USS/GR consists of the following three key components:

First – biological sex at birth;

Second – biological sex existing/changed at reaching the age of majority

Third – a person's psychological belonging to gender.

For example, if the person's biological sex at birth is male, and the gender of psychological belonging remains male at the age of majority, then (M[32]) is recorded in the birth certificate, and (M/M/_____[33]) or (M/M/Agender) in the ID card. If this person changes the biological sex and becomes biologically female, then the record will be changed and replaced by (M/F/_____) or (M/F/Agender). If the change is about the person's mental belonging to its gender, then the third component will be affected by the change. As we see, according to the USS/GR, the first component (biological sex at birth) is always unchanged; the second component is changed either after the sex reassignment surgery, and/or when the biological sex is determined in case of intersex persons; and the third component can be open, or the person's psychological belonging to gender can be indicated therein. It is possible to offer a gender list to the person. Such an offer should only be used for informing the person about gender options provided in the list. This may help the person to correctly select the gender for which the person would like to state/express/register its belonging.

5. Conclusion

As you see, the USS/GR system that I am offering can be used in every possible variation of sex/gender. Besides, the field of its application is not limited to any country. Most importantly, the system ensures realization of human right in regards to the selection, belonging to, registration and expression of sex and gender. The system also ensures that the state interest is secured/represented in regards to registration of sexes, and facilitates making changes related to sex and gender in the person's identification documents. It is important that the system has been created proportionate to the human and state interests, which I hope will serve as a basis for its introduction and implementation.

[32] Male.

[33] It is possible to leave the component of psychological belonign to gender open, or not to have any record at all in the ID documentation. If this component is not visible, the implication is that it is open, and in this example the 'M/M/____' is the same as 'M/M'.

Lasha Margishvili*

Federalism as the Territorial Organization Form Historically Existing in Georgia

Federalism represents one of the most optimal and democratic ways for the resolution of ethnic, religious and other conflicts. Federalism as the form of realization of the uniqueness, strives for the unity of diversity. It simultaneously protects the differing features of various social groups and unites them under one system.

During the history of existence of independent Georgia, despite having several constitutions and making number of amendments and changes to the above, up to date, the issue related to the territorial organization of the country remains one of the most acute issues faced by the constitutional development of Georgia.

Historical experience clearly shows that at no stage of its existence the centralized principle of state governance was traditional for Georgia. Territorial organization of Georgian state based on federal principles better matches the historical development of the country, its traditions and national interests and ensures reinforcement of country's security as well as its economic development and social-cultural progress. Mentioned above model will facilitate the restoration of territorial integrity of our country and regulation of existing conflicts in a peaceful manner.

Key Words: *territorial organization of the state, constitution; Autonomous Republic of Abkhazia, Autonomous Republic of Adjara, federalism, conflicts, ethnic minority. Federalism as the Territorial Organization Form Historically Existing in Georgia*

1. Introduction

At almost all stages of society development, settlement and maximal neutralization of various type conflicts in the world remains the critical problem, as without peace it is impossible to establish and develop stabile state.

Conflicts in the society are not homogenous in terms of their emergence (social, economic, religious, ethnic and etc.) as well as their progress. In majority of cases, origin of such conflicts is to be found in the long past and despite the development of society, it becomes more complex by its nature, acquires new scales and generates serious problems in the internal as well as foreign policies of many countries.

Destruction of socialist system by the end of the twentieth century created new areas of conflict (mainly ethnic and social) all over the world, and particularly, in Russia and the Europe.[1] Negative consequences conditioned by these conflicts, generally, go beyond the boundaries of one country and become the part of world politics.

At present, there are different views in the scholarship, in terms of assessment of current conflicts as well as in terms of ways for their resolution. Even, on the example of our country, it is difficult to agree with the position of part of conflict scientists, according to which the conflict is recognized as the mean for

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[1] *Khubua G.,* Federalism, as the Mean for Overcoming Ethnic Conflicts, Journal "Law", № 6-7, 1999, 15 (in Georgian).

stimulating progress and society development. Reality shows that social and ethnic conflicts in the society, in majority cases bring such negative consequences for the specific groups of people or countries, that they become the center of attention of the world and governments of certain states, leading politicians of various countries or scientists of social scholarship pay particular attention to the settlement and neutralization of such conflicts; moreover, there have been number of scientific concepts developed for the above purpose.

Neutralization of various type conflicts existing in the society, especially those, created on the ethnic grounds, is very complex, long-term process and one of the most difficult tasks and therefore, presently, their final liquidation is very long process and in most of the cases almost unachievable task. Therefore, based on the present reality, all models created with the purpose to settle discussed conflicts, are mainly directed towards their maximal neutralization.

During the history of existence of independent Georgia, despite having several constitutions and number of amendments and changes to the above, up to date no optimal form for the territorial organization of the country has yet been yet identified.

Up to date the issue related to the territorial organization of the country remains as one of the most relevant problems faced by the constitutional development of Georgia. According to the constitution, the territorial organization of the country will only be defined after the restoration of Georgian jurisdiction over the whole territory of Georgia. Number of times the above discussed article became the subject of criticism. Even today, the Constitutional Commission established under the ordinance of the Parliament of Georgia, dated 04 October 2013[2] raised the issue, whether existence of mentioned norm in the main part of the constitution was reasonable, consideringthat territorial organization of Georgia was already defined at some level (for example constitutional law of Georgia on the "Status of Adjara Autonomous Republic", Code on Self-governance). Accordingly, there is a discussion in the Constitutional Commission on the transfer of paragraph 3, article 2 of the Constitution of Georgia to the transitional provisions.

Establishment of issue on the territorial organization of the state in such a general manner conditioned number of problems for the country. More so, as it is impossible to precisely estimate, when the restoration of the territorial integrity of the country will be completed. If years ago the model of territorial-political organization of our country had been defined that would evidently be step forward in the process of reintegration and better situation would have existed today.. Accordingly, at present, it would be much more expedient not to transfer the provision into the transitional provisions, but to find the best favorable solution for the above-mentioned problem and to offer to the society the optimal model for the territorial organization of Georgia.

In the modern law theory one of the recognized forms for the territorial-political organization is federal organization. At present, increasing number of countries are moving towards the federalism. Mainly the countries, overwhelmed with ethnic movements or separatist movements of religious minorities and civil wars are demonstrating the desire to adopt to the territorial organization based on federal principles. Relevance of federalism, as one of the forms of territorial organization of the state, in the legal-political scholarship is determined by the multi-nationality and religious diversity of the world population, willing to peacefully co-exist in the stabile and free environment. One of the key objectives of federalism is to achieve unity between people and at the same time retain identity, culture, traditions and habits of specific group of peoples. Federalism, via the decentralization of government, ensures the unity of objectives and values of the federal subjects and the central government.[3]

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[2] See Ordinance №1479, dated 04 October, 2014 year, the Parliament of Georgia.

[3] *Elazar J.D.,* Federalism on the World Scene, Update on Law-Related Education, Vol. 19, №3, 1995, 43.

Moreover, federalism represents the mean for facilitating the peace. The main characteristic of organization of the state, based on federal principles is that it encourages the parties to lay down the arms and to make decisions via the peaceful, political and diplomatic ways.

Territorial organization of Georgian state based on federal principles fits well with the historical development of the country, its traditions and national interests and ensures reinforcement of country's security as well as its economic development and social-economic progress. Above mentioned model will support the restoration of country's territorial integrity, regulation of existing conflicts in a peaceful manner and will enable ethnic Abkhazians and Ossetins to implement their political-legal and cultural rights in an extensive manner.

The Constitution shall specifically define the legal status of Abkhazia, Adjara and Southern Ossetia. Moreover, taking into account the social-economic development and number of population, Tbilisi must have the special status. Moreover, it is necessary to have asymmetry of competences between the subjects holding different statuses.

In addition to the above, federalism ideology will facilitate approximation of the state government and people and establishment of democratic foundations for the political system. On the one hand, it provides the certain territorial units with autonomy in the political, economic and cultural areas, and, on the other hand, ensures their political, economic and military integration under the united state. Accordingly, one of the key strengths of federalism is its ability to ensure the peaceful co-existence of various ethnic groups within one country. In Georgia, the settlement of ethnic conflicts via the peaceful ways and ensuring the cohabitation of Georgians, Abkhazians and Ossetins in the united state shall become the motive behind the federal organization of the state.

As for the remaining territory of Georgia, it will be divided into the lands (regions); hence, the regional organization of Georgia will be regulated by the Constitution. Regional organization, first of all, shall be based on the infrastructural and social-economic development potential and shall consider the principle of social-economic equalization of regions. Their competences shall be symmetric and relatively low, compared with the status of Adjara, Abkhazia, South Ossetia and Tbilisi.

2. Federalism and its Characteristics

Federalism represents one of the forms of territorial-political organization of the state. In the jurisprudence federalism is defined in various ways.

According to Elazar, federalism is the divine and secular agreement between the nations striving for the integration.[4]

According to sociologist Aron, federalism is the only complex way for the finding the solution to deadlocks in the ethnic conflicts and establishment of the order.[5]

However, if federalism is not based on the key principles of democratic and lawful state, it might entail the counter-effects; in particular, it will arouse animosity and confrontation between the various ethnic, religious and national groups. The evident example of the above is the totalitarian regime coming into the power as a result of revolution in Russia, in 1917 year. The above regime, as though provided the ethnic groups living on the territory of Russia with the opportunity to act independently in certain areas and granted the autonomous status, however, the above had only formal nature. As a result, the discontent and

[4] *Elazar J.D.*, Federalism and the Way to Peace, Institute of Intergovernmental Relations, Queens University Kingston, 1994, 4.

[5] Federalism, Encyclopedic Vocabulary, Moscow, 1997, 248.

confrontation was aggravated between the nations living under the formal autonomy. Each ethnic group was willing to acquire real freedom and independence, which in some cases grew into the bloody conflicts (for example: Autonomous Republic of Chechnya, Herzegovina). Accordingly, only federalism based on the democratic and legal values ensures peace and respect between the nations.[6]

According to the widely-spread position, federalism represents democratic development of society, the strongest guarantee for ensuring the human rights and freedoms.[7]

Its positive aspects are also underlined in the encyclopedic vocabularies – federalism is the unity, under which the territories of federal subjects create the integrated and wholesome state, the geo-political space.[8]

Organization of the state based on the federal principles implies special agreement between the subjects of the federation. This is a free agreement, as it fully depends on the expression of the free will by the subjects. By entering the federation, subject is integrated in the common state system.[9]

In legal terms, it is possible to define the federalism in the following manner: Federalism is the form of state's territorial organization, which consists of state establishments, in particular federation subjects holding the limited sovereignty. Federalism is a model of integrated state, in which the subjects have their state bodies, some features of judicial system and the state, however, do not represent the state.

With its essence, federalism compared to the unitarism, is recognized as more progressive and democratic form. The high level of decentralization of state government is considered as the characteristic, determining its level of democracy. In this regard, two levels of powers are distinguished: federal power and powers of subjects of federation. At the general federal level, the state power is executed by the two-chamber representative body; one of the chambers, namely the upper chamber, represents the interests of the federation subjects at the highest representation level.[10]

It is noteworthy that federalism as the form of territorial-political organization, stimulates such values as protection of minority rights and their involvement in the process of resolution of common state issues, government decentralization, establishment of lawful and democratic state.[11]

In case of federation, certain territorial units of the state have the key elements characteristic to the state: legislative, executive and judicial powers, state apparatus, financial independence and etc. Accordingly, there are supreme bodies of the central government and federation subjects functioning in the state, by which the major function of the state decentralization is implemented.

It must be noted that federation system based on the principle of unity ensures existence of federation in the form of united sovereign states. Through this way one of the key principles of federalism, such as function of integration of differing territorial units, is fulfilled. The fact that in this case there is a common state competence and united system of federal bodies in place indicates the importance of this function and unity of federal state.[12]

In the legal science, there are two classic forms distinguished for the establishment of federation: non-contractual – constitutional, which is established via the granting of autonomous status to the federation members by the center (Germany, Canada, India) and contractual (USA, Switzerland, Australia). How-

6 *Elazar J. D.,* Federalism on the World Scene, Update on Law-Related Education, Vol. 19, № 3, 1995, 44.
7 *Kurashvili K.T.,* Federal Organization of the Russian State, Moscow, 2000, 20.
8 Federalism, Encyclopedic Vocabulary, Moscow, 1997, 244.
9 *Schmitt C.,* Constitutional Theory, Duke University Press, 2008, 384.
10 *Demetrashvili A.,* Constitutional Law, Tbilisi, 2005, 160.
11 *Wiessner S.*, Federalism: An Architecture for Freedom, New Europe Law Review, Vol. 1:129, 1992-1993, 138.
12 *Rukhadze Z.,* Constitutional Law of Georgia, 1999, 186.

ever, it must be noted that these two forms do not exclude each other and do not contradict, as relationship established via agreement or contract could also be formalized constitutionally, and in case of federation established constitutionally, it is admissible to have contractual mechanisms in place.

In general, federation is based on the following key principles: federation and its subjects possess the source of state system; the equality of federation subjects must be ensured, first of all, in relation to the federal government; the rights possessed by the indigenous population shall be granted to any citizen of federation on the territories of all subjects of the federation; unilateral withdrawal of federation subject from the federation, in other words, the right for secession is prohibited.[13]

The following features characteristic to the notion of federation are distinguished in the jurisprudence:

1. Federal state facilitates adoption of business like decisions oriented towards the local requirements. Under the federal order, citizens have higher chances to actively participate in the political processes;[14]
2. Moreover, federalism supports implementation of the effective management all over the country. Public servant employed at the government body of the federation subject has better knowledge about the local problems, compared with the representative of the central government. Accordingly, local servant can more effectively and timely resolve the existing problems at the federal level.[15]
3. Federation unites its subjects under common political system and limitation of authority of federation subjects can only be implemented if the above is envisaged under the constitution of the federation;
4. Federal agreement aims to establish permanent and not temporary order; in other words, federalism must ensure existence of long-term and safe system. The evident example of the above is the following thesis provided in the Vienna 1820 year Act: "Federation is inviolable union, accordingly none of its subjects are entitled to enjoy the secession right;"
5. Federal agreement concluded between the federal government and subjects represents the special type of constitutional agreement. Constitutions adopted by the subject shall necessarily be based on the federal constitution;[16]
6. Federal state reduces the chances for the power abuse via the balancing of powers, which is achieved via the vertical distribution of powers. Accordingly, federalism ensures high level of individual freedoms in the state and establishes the additional guarantee for the stability of state system;[17]
7. Federalism excludes establishment of governance, where the excess powers are concentrated in the hands of one person or group of persons. As mentioned above, state government is characterized with the high level of decentralization, the powers are distributed among the central and federation subjects. Accordingly, it is almost impossible to have totalitarian governance in the state with federal system.[18]
8. Federation aims to ensure the political existence of each subject within the integrated state framework. Existence of federation subjects is guaranteed via the inter-connection existing between the federal state and its subjects;

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[13] *Melkadze O.,* Constitutionalism, Tbilisi, 2008, 154 (in Georgian).

[14] *Khubua G.,* Federalism as the Normative Principle and Political Order, Review of the Georgian Law, Tbilisi, 1999, 19 (in Georgian).

[15] *Rubin L., Malcolm Feeley E.,* Federalism: Some Notes on a National Neurosis, 41 UCLA Law Review, 1993-1994, 910.

[16] *Schmitt C.,* Constitutional Theory, Duke University Press, 2008, 386.

[17] *Khubua G.,* Federalism as the Normative Principle and Political Order, Review of the Georgian Law, Tbilisi, 1999, 20.

[18] *Rosenn S. K.,* Federalism in the Americas in Comparative Perspective, Inter-American Law Review, Vol:26, 1994-1995, 6-7. See also: *Rubin L., & Malcolm Feeley E.,* Federalism: Some Notes on a National Neurosis, 41 UCLA Law Review, 1993-1994, 903. It is indicated in the article that organization of the state on federal principles contradicts the concentration of power in the hands of one body/ person and directed towards the timely and effective resolution of political crises.

9. It must be taken into consideration that changes to or annulation of the borders of federation subjects is only possible with the consent of such subjects;
10. Federal organization of the state ensures the protection and safety of its members from all external interventions and threats. Within the country, it aims at the establishment of civic peace between subjects of federation;[19]
11. Federalism significantly improves the level of political culture in the society. Political centers existing in the federal state, generally, do not represent the association of persons with the common political views. Forces with differing political ideology and orientation are forced to hold dialogue, respect the views and positions of other parties. The federal system is characterized with the polycentrism, enabling the opposition to at least partially implement the alternative political program at the federation subject level and by this way prove the readiness for coming to the power;[20]
12. Moreover, federalism facilitates the resolution of social problems existing within the country by means of new innovative ways, as the management bodies of the federation subjects, in the process of decision making, unlike the central government bodies, are less bound.[21]
13. The unconditional duty of the federalism is peaceful resolution of conflicts between the subjects in a legal manner;
14. Federation cannot exist without intervention in the business of membes, as the federation is the political unity, and it must have right to "manage" its subjects. It also shall define the methods required for preservation of the state and ensuring the state security.[22]

According to the popular view, among the forms of territorial organization established in the modern society, federalism represents the most democratic way for the resolution of existing problems. It provides for the national minorities inhabiting the certain territories to live with their individual characteristics; in other words, federalism, as the form for the realization of uniqueness, strives for diversity in the integrity. It concurrently protects the individual characteristics of various social groups and unites them under the integrated system.

Establishment of the state on the federal basis expresses the sovereign will of nations to establish united state via the constitutional or contractual way, where the interests of the state, constituing parts and citizens will be in harmony.[23]

It is also noteworthy that federalism ensures offering of effective services to the population of the federation. Under such conditions, the minorities have much more opportunities to protect their rights and freedoms, participate in the formation and implementation of the united state will.[24]

The Supreme Court of the United Stated for the case Gregory VS Aschroft defined that federalism significantly increases the opportunities of the citizens to be involved in the process of building the state and actively participate in the implementation of state powers.[25]

Moreover, ideology of federalism facilitates approximation of state government and people and establishment of democratic foundations for the political system. On the one hand, it provides the certain

[19] *Schmitt C.,* Constitutional Theory, Duke University Press, 2008, 386-387.
[20] *Khubua G.,* Federalism as the Normative Principle and Political Order, Review of the Georgian Law, Tbilisi, 1999, 19-20 (in Georgian).
[21] *Rosenn S. K.,* Federalism in the Americas in Comparative Perspective, Inter-American Law Review, Vol:26, 1994-1995, 6-7.
[22] *Schmitt C.,* Constitutional Theory, Duke University Press, 2008, 386-387.
[23] *Kurashvili K.T.,* Federal Organization of the Russian State, Moscow, 2000, 20.
[24] *Wiessner S.,* Federalism: An Architecture for Freedom, New Europe Law Review, Vol. 1:129, 1992-1993, 140.
[25] *Rubin L., Malcolm Feeley E.*, Federalism: Some Notes on a National Neurosis, 41 UCLA Law Review, 1993-1994, 907.

territorial units with autonomy in the political, economic and cultural areas, and, on the other hand, ensures their political, economic and military integration under the united state. [26]

Federalism is based on the one fundamental idea, according to which federation subjects shall be united under the federation only in the event of expression of their free will. Need for uncompromised compliance with this principle was confirmed by the breakdown of Czechoslovakia, Yugoslavia and Soviet Union during the recent past. The basis for the federal organization of the mentioned states was not only the desire of subjects constituting the federation, but also their fear and compulsion, hence the critical element of Federalism notion was ignored, which implies the desire and consent of people who are members of the federal state. Based on the above, federalism and nation's right for self-determination do not contradict, but supplement each other.[27]

Despite the above listed advantages, several disadvantages of federalism could be distinguished. For example: federalism hinders the pace of economic development, as there are regulations hindering the business initiation and conduct, at the federal, as well as local levels. In addition, the government costs are increased significantly, United States of America is a good example of the above, where the staff numbers for central government and government of states exceed 83 000. Moreover, in certain cases, for the preservation of territorial integrity of the state and protection of constitutional order, the central government may have to carry out military operations in the certain regions.[28]

As mentioned above, the main idea of federalism is the existence of diversity within the unity. Federal order is the only real guarantee that peaceful coexistence between the groups with differing interests, cultures, history, religion and traditions will be ensured. According to the wide spread position, federalism is an institutional agreement, by means of which central government actively collaborates with the member subjects of the federation in the process of decision making.[29]

Accordingly, the main strength of federalism is demonstrated by its capability to ensure peaceful cohabitation between different ethnic groups within one country. And if Georgia chooses this form of territorial-administrative organization, the motive determining the federal organization of the country must be regulation of ethnic conflicts in a peaceful manner and ensuring the cohabitation of Georgians, Abkhazians and Ossetins within one state.

3. Federalism as the Historically Existing Form in Georgia

Territorial-political division of country is one of the most sigficant basis of existence, history, success or failure of any state, defining its political image as well as its cultural, economic and social status.[30]

Federalism, as the territorial organization form of the state has multi-century development history. There are four basic ways for the establishment of federal states recognizedin the legal doctrine: first – when several existing colonies/ territorial units express their desire for integration and establishment of federation (for example: confederation of Switzerland, United States of America); second – federation "artificially" created by the colonial regime (for example: Australia, Canada); third – when federal system is created in the state based on cultural-political signs (for example: Belgium); fourth – federations estab-

[26] *Kurashvili K.T.,* Federal Organization of the Russian State, Moscow, 2000, 20-21.
[27] *Wiessner S.,* Federalism: An Architecture for Freedom, New Europe Law Review, Vol 1:129, 1992-1993, 129.
[28] *Rosenn S. K.,* Federalism in the Americas in Comparative Perspective, Inter-American Law Review, Vol. 26, 1994-1995, 7-8
[29] *Chen P.,* Federalism and Rights: A Neglected Relationship, South Texas Law Review, Vol. 40, 1999, 850
[30] *Melikishvili G.,* Antient Unions of Population of South-Western Georgia, Works on Georgian History, Vol. I, 1970, 361 (in Georgian).

lished as a result of military intervention (for example: Federal Republic of Germany, which was created after the Second World War with the active involvement of allied states).[31]

In any case, in the process of defining the territorial-political organization form for the state, it is desirable to consider the historical development of the country and its characteristics. Adoption of forms, which is traditionally unacceptable or radically different from already existing form may bring heavy outcomes for people and the country.

The model of state organization together with many aspects shall facilitate general advancement of the country and preservation of its territorial integrity.

3.1 Territorial-Political Organization Form of the State in Earlier Period of Georgian History

During its multi-century history, Georgia rarely had opportunity to independently determine the form of territorial-political organization of the country. In addition, historical experience clearly shows that even in the period of independent existence and strength, the only and traditional form was not the centralized principle of state governance for our country. Georgia has always consisted of regions different from each other with ethnographic, business or economic conditions, which was requiring the specific approach of governance with regard to each region.[32]

The Caucasus is one of the regions, where the state formations already existed during the ancient times. The state units, formed on the territories of Transcaucasia, took an important place among them, out of which such unions, mentioned in Assyrian or Urartian incused inscriptions such as "Upper coastal states", are particularly noteworthy for us. According to the justified opinion, existing in the modern historiography, the mentioned term implied Black Sea and "the territory located on the Black Sea coast".[33]

Among the countries, located on the Black Sea coast, Kolkheti, i.e. Kolkha Kingdom was the most significant. It is clearly shown in the "Myth of the Argonauts" that Kolkheti (Kolkha) was united and strong, culturally and economically advanced political unit, with its royal cities, strong king, governors of provinces, also, its influence was extended not only over the neighboring provinces but over quite distant countries. The Kolkheti Kingdom played the major role in formation and strengthening of the cultural unity, which is known as "Kolkhetian culture".[34]

During VIII-V centuries, BC, the Kolkheti Kingdom weakened, due to foreign invasions. Instead of powerful king, it was headed by "Arkhinti" (Eristavi), who paid certain tribute to Iran. At the end of the fourth century weakened Kolkheti (Egrisi) joined the newly formed kingdom of Kartli in a peaceful way, in particular, via the dynastic "marriage". This was the first fact of political union (Pharnavaz-Kuji) in the history of Georgia.[35]

According to old Georgian or foreign historical sources, origination of united Georgian state and establishment of Georgian royal dynasty was associated with the name of Pharnavaz, who, according to Leonti Mroveli, together with Kuji, the governor of Egrisi managed to defeat the Kartli invaders and united these two regions - Kartli and Egrisi.[36]

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[31] *Schuk H. P.,* Federalism, Case Western Reserve Journal of International Law 5, 2006, 8, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2659&context=fss_papers>, [06.07.2016].

[32] *Gogiashvili G.,* Comparative Federalism, Tbilisi, 2000, 234 (in Georgian).

[33] *Melikishvili G.,* The Ancient Unions of Population of South-west Georgia, Essays of History of Georgia, Vol. I, 1970, 361-362 (in Georgian).

[34] Ibid, 371.

[35] *Melikishvili G.,* Unions of Georgian Tribes on the Territory of Georgia, At the End of II Millennium, BC, in III century, BC, History of Georgia, Vol. I, 2006, 39 (in Georgian).

[36] Georgian Chronicles (Life of Kartli); Edition of *Simon Kaukhchishvili*, Vol. I, 1955, 21-22 (in Georgian).

At his accession to the throne, Pharnavaz began long cycle of reforms, the final goal of which, *inter alia*, was strengthening of country's power, out of which " spread of Georgian language", i.e. its declaration as the state language and "creation of Georgian literacy" were particularly important.[37]

Pharnavaz carried out the first administrative reform in the state of Georgia. In particular, "He organized the kingdom like the kingdom of the Persians, divided it in separate districts – in dukedoms, led by dutchies, and the governance of central district (Shida Kartli) was entrusted to Spaspet, the Commander, strengthened the city of Mtskheta and other cities and castles of Kartli".[38] As a result of administrative reforms, carried out by Pharnavaz, the country was divided into 8 dukedoms, which was governed by dukes, and, as already noted, Spaspet was assigned as the governor of Shida Kartli. In Georgian Chronicles (Life of Kartli) we can read: "Pharnavaz became fearless of all the enemies and he was the king of Kartli and Egrisi, and he multiplied all the riders of Kartli, assigned eight dukes and Spaspet".[39]

Division of Georgia in separate areas was so well-considered in all aspects that, notwithstanding the several changes in historical destiny, the political map, established as a result of this reform, had remained unchanged over the centuries.

Further most significant changes, implemented in Kartli Kingdom in administrative-political sphere, also aimed at strengthening and consolidation of the country and essentially determining the political face of the state, is associated with the name of Vakhtang Gorgasali, among the activities of whom, the country's administrative reform took important place.

King Vakhtang was well aware that without such reforms and economic-political strengthening of country, he could not restrain the increased attacks of Iranians. Actually, Gorgasali did not change the rule of administrative division, carried out by Pharnavaz; he only added one duchy to Kartli Kingdom, in the form of Hereti.[40] But, most importantly, during his ruling, the largest part of historical Georgia was united under one government. Gorgasali subordinated each administrative unit to the strong centralized governance, however, at the same time, strictly defined its territorial jurisdiction and responsibilities of governors with regard to local , as well as nationwide objectives of unified Georgia. ,

In economic, political or legal terms, these divisions were not equal, but all of them were subordinated to the governor of united Georgia. Of course, in the modern understanding or terminology, it is impossible to speak about the form of federal organization in that period, but, such territorial-administrative division, no matter for which goal it had taken place, already had the first signs of federalism, even in terms that it was establishing the principle of decentralization of government in the country and was introducing local self-government with wide rights in separate regions.

On the eve of VIII-IX centuries, several separate kingdom-princedoms, independent from each other, have originated on the territory of Georgia, "there were number of principals emerged in the country of Kartli", the main reason of which was the economic and political degradation of the country, as well as the character of Arab conquerors, which not only prevented the social and economic development of Georgia, but by all means impeded even the attempt of creation of strong local government – "as soon as somebody appeared among the children of Vakhtang, worthy to be a king, he would be oppressed from the side of Saracens".[41]

Such situation impoverished the country for a long time; decentralizing of governance and breaking up in independent small size units had severe impact on economic, political or social state of Georgia.

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[37] Georgian Chronicles (Life of Kartli); Edition of *Simon Kaukhchishvili*, Vol. I, 1955, 26 (in Georgian).
[38] *Melikishvili G.,* Kartli (Iberia), in VI-IV Centuries, BC, Origination of Kingdom of Kartli, 1970, 439 (in Georgian).
[39] Georgian Chronicles, Edition of *Simon Kaukhchishvili,* Vol. I, 1955, 24-25 (in Georgian).
[40] Georgian Chronicles, Chief Editor, *Metreveli R.,* 2008, 200-201 (in Georgian).
[41] Georgian Chronicles, Edition of *Simon Kaukhchishvili,* Vol. I, 1955, 250 (in Georgian).

According to the reasonable opinion of famous Georgian historians, the reasonable administrative-territorial division of the country had paramount importance at each stage of development of our state. In particular, the strengthening of country's central government was followed by the successful defense from the invasion of external enemies, restoration of territorial integrity of the state and annihilation of conflicts existed within the country, in addition, improvement of state's external and internal policy, economic and cultural progress.

One of the most important periods of history of Georgia is X-XI centuries; following accession of Bagrat the Third (years 975-1014) to the throne, unification of separate political units, existing on the territory of our country, is beginning. In the last years of his reigning, "the west Georgia, Shida Kartli, Kakheti-Hereti, Trialeti and former Courapalates of Georgia to Basiani" was united as one kingdom, "only Tbilisi and its surroundings were left without unification".[42]

Final unification of Georgia is associated with the activities of David IV the Builder (Aghmashenebeli). He "seized a town" in 1122 "and, with this, completed the unification of Georgia".[43]

All the above listed authority of a country, starting from King Pharnavaz, was attempting to find most optimal ways of internal administrative-territorial organization of the state, because each of them was well aware that internal strength of a country, strong centralized government, the regions subordinated to the reasonable policy, regulated relationships between them as well as between the center and separate parties, was the fundamental basis, on which the strength of the state, as well as the success of internal and external policy was based.

At each stage of our history, the authorities of Georgian state tried to find the ways of peaceful and friendly relationship with neighboring states, especially, with the people living in the Caucasus.

It is also noteworthy, that in the era of independence and strength, in particular, during the reign of David IV Aghmashenebeli (years 1089-1125) and King Tamar (years 1184-1213), Georgia was not only appending the new domains (Shirvani, Chaneti, Sinopi and others), the countries (Rhani, Dzurdzuketi, Azrumi and Rumi Emirate, Erzinki Sultanate and others), cities (Tavrezhi, Zenjani, Marandi and others), as well as the people of Caucasus mountains, characterized with the comparatively low level of development in economic, political or cultural terms, were voluntarily entering under its patronage and were strongly obeying the authorities of Georgia. Despite these circumstances, the governance rules, existing there, were actually remaining unchanged, which demonstrated the reasonable policies and perspicacity of Georgian authorities. They were well aware that unity of Caucasian people was such a great power, which could give adequate response to any aggressor.[44]

At the beginning of thirteenth century, invasion of Mongols into Georgia and their occupant policy has totally collapsed the country's defense capabilities and facilitated the final division of kingdom of Georgia. The united Georgia was destroyed in three parts – west Georgia, Samtskhe and east Georgia, which caused irreparable damage to the country. Mongols carried out the military and administrative reform in Georgia and Georgia became part of state of Mongols as separate military and administrative unit, "Gurjistani Viliety", divided into eight military-administrative units.

The country's reunification and rejection of yoke of Mongol's supremacy is associated with the name of George V the Brilliant (years 1314-1346). In 1329-1334, he occupied Imereti and Samtskhe and re-

[42] *Berzenishvili M.,* Historical-Geographic Review, Essays of History of Georgia, Vol. III, 1979, 67 (in Georgian).
[43] Ibid, 67.
[44] *Lortkipanidze M.*, Strengthening of Feudal Monarchy of Georgia, History of Georgia, 1988, 152-153. Also, see, Georgian Chronicle, Edition of *Metreveli R.,* 2008, 509 (in Georgian).

stored the unity of state of Georgia.[45] The country, united by him, existed only until the second half of XV century and in 1490 ended up in disintegrated territorial units of Imereti, Lartli and Kakheti kingdoms and Samtskhe Atabagate.[46]

In 1762, in the history of independent Georgia, Erekle II has for the last time united Kartli and Kakheti kingdoms. A wise ruler was well aware that he neither could nor restrain the ungovernable feudals nor stand up to advancing enemy without relevant administrative-territorial reforms. In addition, it would be impossible to even think about economic-political or cultural progression of the state. Therefore, in 1743-1777 Erekle the Second annulled Duchies of Aragvi, and then, Ksani, in the meantime, limited the rights of strong nobles.

For the purpose to strengthen the central governance, he subordinated the peripheral sides of Kartli-Kakheti. However, at the same time, the collapse of central authority, neglecting of general governance, ambitions of separate parties and unhealthy attitude to neighboring regions, was especially manifested in western Georgia, where the disintegration of kingdom of Abkhazia and Svaneti Principality in smaller domains, has facilitated the animosity, confrontation and bloody clashes. The weakened country was also suffering from the external enemies.

3.2 Territorial-Political Organization Form of Georgia in Years 1783-1918

Unification of Transcaucasian nations was actively opposed by external, especially Russian imperial forces, which see in this relationship the formidable opponent, real balancing power and tried to eliminate this desire, fuel national strife and raise conflict between Caucasus people in every possible way.

According to Treaty of Georgievsk, concluded in 1783, Georgia has voluntarily entered under protection of Russia. In accordance with conditions of agreement, the state independence of Georgia had to be maintained and Russia had not to interfere in the domestic affairs of country, but on January 18, 1801, following death of Giorgi XIII, Paul I has finally abolished Kartli-Kakheti kingdom and appended to Russia by the special manifest. Later, in particular in 1810, Imereti kingdom shared the same fate. All this transformed Georgia into conquered and occupied country.

The Tsarist Russia introduced the same political-administrative system as it was in Russia, in particular, Kartli and Kakheti provinces were divided into districts (uyezds). Imereti military district has been established in west Georgia. The heaviest national and social conditions caused the formidable rebellions of peasants in Mtiuleti (1804) and Kakheti (1812), however, both of them have failed finally. During the history of Georgia, requirement of new form of governance, in particular, the idea to declare Georgia as a parliamentary republic was raised by one part of conspiracy of 1832 - the nobles, however, the plans of conspirators were not destined and the participants of conspiracy were severely punished by the authorities of Tsarist Russia.

The great Georgian writer and public figure, Ilia Chavchavadze, which played the largest role in Georgia of XIX century in reawakening of national identity and the revival of the national consciousness, saw the way for deliverance of Georgia in amalgamation of federalism and Unitarianism. In his opinion, these two forms did not prevent each other in normal country; on the contrary, they were complementing and uniting each other. In Ilia's view, it was necessary to subordinate the central and local governance to the general interests.

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[45] *Lominadze G.,* Dominance of Mongols in Georgia and Battle against It, Essays of History of Georgia, Vol. III, 1979, 629 (in Georgian).

[46] Ibid, 748-750.

The forms of fighting for independence of country was later changed by the socialistic-federalist party, established in 1904, and its leader, Archil Jorjadze, requiring the federalism, restoration of national state structures, own territorial organization and autonomy for Georgia.

The members of socialistic-federalist party worked hard in Georgia. They had their own legal periodical publications: "The Bulletin", "People's Newspaper", "Public paper", "Socialist-Federalist" and others, in which they were requiring the restoration of statehood of Georgia, raising the idea of autonomy and federalism of Georgia. The same requirements were established in their program and statutes.[47] In their opinion, the autonomy had to be the first stage on the way of fighting for independence. The disagreements within the party, especially, inclusion under the pressure of strictest communist regime, persecution and repressions have further caused inevitable failure of socialistic-federalist party.

In years 1918-1921, the breakdown of the Russian Empire brought the independence to Georgia, but following victory of dictatorship of the proletariat in Russia, the Bolshevik organizations have intensified their activities in Transcaucasia too. For avoiding the possible "red threat", the "Transcaucasian Commissariat" has been created in Tbilisi under the leadership of Evgeni Gegechkori, the "National Councils" and "National Regiments" have been established.[48]

Long after, the Transcaucasia people were given the opportunity for the first time to define their own fate themselves, including , the form of territorial organization. Realistically-minded political parties were feeling well that separately they were not able to protect themselves from Russian bolshevism, therefore, they made the only right decision – on 10 (23) February, 1917, they convened the "Transcaucasian Sejm", which was confronted by protest rallies of Bolsheviks. The Russian communists realized from the beginning that existence of Sejm in Transcaucasia would not allow them to implement their own policy and they declared the life-and-death war of these republics to aspiration to independence.

As early as in December, 1917 the Bolshevistic communist party of Russia adopted a resolution on establishing of soviet authority in Transcaucasia, and S. Shaumiani was appointed as Temporary Emergency Commissioner of Caucasus, who was in Tbilisi already from January, 1918 and led the preparation of armed rebellion. The Bolsheviks arranged the mass protests in Lechkhumi, Tskhinvali region and Abkhazia.

The Commissariat of Transcaucasia made every effort to withstand the violent actions of soviet Russia, and, with the support of international forces, in April 9 (22), 1918, it created the "federal republic of independent Transcaucasia". This was the only case in history of nations of Transcaucasia, when they, with their own will, implemented an equal unification, which could transform into increasing power in future and actually confront the aggressive policy of Soviet Russia.

As a result of pressure of Bolshevik forces and active provocative actions, the federal republic of independent Transcaucasia lasted only for 35 days and broke up as independent republics of Georgia, Azerbaijan and Armenia, but it showed the only right way of survival and maintaining of distinctive character to the nations of Transcaucasia.

3.3 Territorial-Political Organization Form of First Democratic Republic and Soviet Period

Free republic of Georgia, existing in years 1918-1921, which was headed by social-democrats, represented the unitary-decentralized state with autonomies. The first Constitution (1921) of independent Georgia did not implied the federal organization of a country, but in accordance with Article 107 of Constitution,

[47] Georgian Soviet Encyclopedia, Vol. 9, 1985, 495.
[48] Soviet Socialist Republic (SSR) of Georgia, Georgian Soviet Encyclopedia, 1981, 81.

the integral parts of Georgia – Abkhazia (Sokhumi district), Muslim Georgia (Batumi area) and Zakatala (Zakatala district) were given the autonomous governance in local activities, but the local self-governance was provided for the rest of the administrative-territorial units. In addition, the Constitution envisaged the wide cultural autonomy for national minorities and protection of their interests.[49]

According to the federal principle, the idea of organization of country was raised again by Georgian emigration having fled to France following occupation of Georgia by the Red Army. In years 1925-1939, the newspaper of Georgian nationalists "Tetri (white) Giorgi" was publishing, where the numerous letters related to federal organization of Georgia were printed. In the opinion of majority of authors, this form of territorial organization had to be based upon the existing historical experience. They considered the separate areas of Georgia as areas having the distinguished individual type, history, morals and manners and culture, and they believed that participation of representatives of all parties in central authority of Georgia excluded any confrontation between these areas.[50]

Upon communists' initiative an idea of organization of country by federal principle was radically differently implemented in federation of Transcaucasia, in which Georgia was included as one of the subjects and, with such status further joined the Union of Soviet Socialist Republic (SSR).

The political and ideological objectives of communists became the basis for establishment of federation of republics of Transcaucasia: "Following victory of socialistic revolution in Georgia and Transcaucasia, a task of maintaining and strengthening of dictatorship of the proletariat was set before the communist organizations… one of the conditions for this was eradication of the national strife and hostility kindled between the nations of Transcaucasia, strengthening of friendship of people by the bourgeois-nationalistic parties… the Bolshevik party considered the federal unification of republics of Transcaucasia as one of the reliable means for successful solution of this big task".[51]

The Russian communists considered the federal unification as especially necessary and acceptable form, however, they pointed out that stereotyped transfer of Russian model of federal state would be unacceptable in Transcaucasia, due to its different historical features. On July 3, 1921, the Caucasian Bureau of Central Committee of Russian communist party (RCP (B)), based on the special resolution, set the program for federal unification of republics before the communists of Transcaucasia, and by the end of the same year, following unification of some of economic bodies, the question of federal unification of these republics was decidedly raised.[52]

The small group of Georgian communists, so called nationalists-deviationist, which at the same time were included in the composition of central committee and clearly stated their positions in authoritative circles of Soviet Russia, have actively protested against this union. Despite their resistance, on December 10, 1921, the 3rd congress of Councils of Transcaucasia was opened, which endorsed the idea of further rapprochement of Soviet socialistic republics of Transcaucasia and created the federal state of Transcaucasia, selected the Central Executive Committee and constitutionally strengthened establishment of this state.[53]

The federal state of Transcaucasia was different from federation of Soviet Russia – whereas subjects of Russian federation were autonomous republics and districts, subjects of the federation of Transcaucasia were sovereign republics , which allegedly voluntarily restricted their sovereignty and transferred it to fed-

[49] *Gogiashvili G.,* Comparative Federalism, 2000, 239-240 (in Georgian).
[50] *Kashia J.,* Thoughts on the Ways of Development of Civilization, City-States and Federal Organization of Georgia, "Community", 1994, №2, 3 (in Georgian).
[51] *Kacharava I.,* Federal Union of Republics of Transcaucasia. Establishment of Soviet Socialistic Republic (SSR) Union, Essays of History of Georgia, in 8 Volumes, Vol. 7, 1976, 80 (in Georgian).
[52] Ibid, 84-85.
[53] Ibid, 95-96.

eral authority. They were considered not as allies , but as republics, which have self-restrained themselves by treaty. Soon after the Russian communists perceived as real threat that the federation, created upon their initiative and with their effort, could be joined by other Caucasian nations thus creating a power capable of taking significant independent decisions. Such attempts have already taken place from the side of Georgian nationalists-deviationists in November, 1922, which adopted the resolution at one of the illegal meetings to openly protest against the national politics of Stalin and Orjonikidze, and to unite in the Third International, evading the Russian Communist Party (B).[54]

The Russian communists start active movement around Russia for the purpose to unite the Soviet Socialistic Republics. In July, 1922, the issue of liquidation of independence of existing republics and transforming it into wider autonomy was discussed at the meeting held in Moscow, and despite the resistance of the Georgian representation, the thesis project known as "autonomism" was adopted. Georgian nationalists-deviationists, who participated in the meeting, have also actively protested against creation of autonomous units in Georgia. Nevertheless, the Government of Georgia gave autonomy rights to Adjara – on July 16, 1921 and South Ossetia – on April 20, 1922. On March 21, 1921 Abkhazia was declared as independent soviet socialistic republic and entered into composition of Georgia in December of the same year.[55]

The obstacles originated in separate republics brought the Russian Bolsheviks and their leaders to the decision to replace the unification in form of autonomism with the union of independent soviet republics, which was actually carried out on December 30, 1922 at the first Union Congress of Councils, which declared the establishment of Union of Soviet Socialist Republic (SSR). Actually, it was the union of republics around the Russian Federation, deprived of sovereignty and based on principles of inequality of rights and involuntariness of republics, totally unreal and with independence, existing only on the paper.

At the end of 20th century the unification of Soviet Union based on forcible policy was destroyed and, together with other republics, Georgia gained independence, but the Russian imperial forces could not easily reconcile with fair verdict of the history. They turned the Caucasus into the polygon of bloodshed and confrontation of national minorities.

The issue of territorial-political organization of country, finding of such form of governance, which will facilitate restoration of territorial integrity of Georgia, peaceful coexistence of Georgian, Abkhazian and Ossetian people, still remains a crucial problem in today's Georgia. Historical experience clearly shows that for Georgia, the centralized principle of state government was not the traditional at no stage of its existence. Therefore, the XIX-XX century- as well as modern famous Georgian analysts and political experts acknowledge and support the federal organization form of country as most effective mean for eradication of national conflicts and integration of country, which will be the guarantee for stability, integrity and peacefulness in the region.

4. Conclusion

Federalism, as the form of territorial-political organization of the state, has multi-century history and for a long time it was mainly used as cohesive and uniting mechanism for regions with various interests and traditions, which, much more successfully, could resolve the issues related to foreign relations and defense, as well as the regulation of country's internal political situation, rather than divided, separately existing territorial units.

[54] *Kacharava I.,* Federal Union of Republics of Transcaucasia. Establishment of Soviet Socialistic Republic (SSR) Union, Essays of History of Georgia, in 8 Volumes, Vol. 7, 1976, 94-97 (in Georgian).

[55] Soviet Socialist Republic of Georgia, Georgian Soviet Encyclopedia, 1981, 84.

According to today's dominating opinion, the federalism represents one of the most optimal and democratic ways of problem solution, among the forms of territorial organization known in the modern society. It ensures peaceful coexistence between the groups with different interests, culture, history and customs, i.e. the federalism, as the form of realization of uniqueness, seeks the diversity in integrity. It simultaneously protects the individual peculiarities of various societies and, at the same time, combines them into one system.

Establishment of the state on the federal principles expresses the sovereign, freewill of people, to create a united state via the constitutional or contractual means, where the harmonic coexistence of the state, its components and citizens will be provided.

Historical experience clearly shows that for Georgia, the centralized principle of state government was not the traditional at any stage of its existence. Therefore, the recent century- as well as the modern famous Georgian thinkers acknowledge and support the federal organization form of country as most effective mean for eradication of ethnic conflicts and integration of country, which will be the guarantee for stability, integrity and peacefulness in the region

Federalism, as the form of territorial-political organization of the state, can be used as the effective mean for resolution of ethnic conflicts. The federal state represents one of the best mechanisms for ethnic minorities for far more free and more successful development of their national and cultural distinctiveness. In this way, it neutralizes the conflict situations to a certain degree and facilitates their peaceful resolution, in the meantime, it protects the state unity and territorial integrity.

Taking into consideration the current situation, when the Georgian jurisdiction is not effective throughout the country, it is urgently necessary to take effective steps in order to ensure timely and reasonable territorial organization of Georgia, which can significantly and positively contribute to the country's reintegration process, to conciliate the ethnic conflicts existing in the country.

Accordingly, it is desirable to timely and specifically determine the place of mentioned regions in state governance, which will facilitate restoration of confidence between the parties, regulation of conflicts and placing them under united space of state, which will be the guarantee for peaceful coexistence of these people.

Zurab Jibgashvili*

Definition of the Role of Arbitration of the President of Georgia and Some of its Features

The article discusses the arbitration phenomena of the Head of the State, as the authority to carry out actions for detaining and balancing the powers by the Head of the State, to mitigate the risks of society disintegration.

Under the above context, the work discusses the formally defined relationships of the President of Georgia with the power branches and their mobility in terms of simultaneous existence of meta-legal factors, the unity of which defines the practical effectiveness of President's arbitration activities.

Key Words: *Arbitration (of the head of the state), guarantor, discredit to the government, semi-presidential republic (systems), president, prime-minister, head of the state presidential republic, ensuring, suspension-enforcement veto.*

1. Introduction

According to the major principles of the Constitutional Law of Georgia "on making changes and amendments to the Constitution of Georgia"[1], dated October 15, 2010, in line with the establishment of innovative system for the governance directed towards the parliamentary system, the article 69, defining the role of the President, has been established in a new way. This wording declares the President only as the Head of the State and expresses the arbitration function of the President, already dominated in post-socialistic constitutionalism, in this norm-principle, in of functioning of the state bodies. In accordance with the Constitution of 1995, under the conditions of distancing of the President of Georgia from executive authority for the first time, the analysis of legal basis, defining arbitration and the picture of political relationships implemented within this framework, causes great scientific interest.

2. Cognition of the President – as the Arbitration of Head of the State

The arbitration doctrine of the President, which is founded on the semi-presidential republics, was reflected normatively, highlighted in modernity, in post-socialistic constitutionalism. The arbitration of the Head of the State represents the normatively regulated (predominantly negative – deterrent and balancing, sometimes for influencing purposes, positive – supported by the interventional mediatory rights) capability to evaluate political situation and to make the appropriate decision. Arbitration authorities objectively represent the opportunity of influencing the activities of constitutional bodies, but subjectively – the capability for the above. The effectiveness of arbitration function of the President, among precisely defined, not in one but several (mainly two) alternatives, according to evaluation of situation (and its development among them), is expressed in the right of discretional choice, but not (always) only in formalization by the precisely determined procedure of agreement of parties. The monistic parliamentary system of governance

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[1] Constitution of Georgia, <https://matsne.gov.ge/ka/document/view/30346>.

does not consider the legally solid and separative condition of arbitration of the Head of the State. It often runs down to the institutional mechanism, required for formalization of will of the government (which is dictated by its parliamentary representation and prevision of its own perspective for new parliamentary elections, or moreover, prevision of their perspectives – in case of agreement of parties on the appointment of early elections).

Considering the president's arbitration rights separately - there is nothing. The President, as the representative of united society of the state, shall minimize the possible risks of disintegration of this society, proceeding from their activities, under the specific rights towards the different branches of the government. The unity of the state, together with the unity of society, means the social unity and continuity of state authorities. Therefore, the arbitration authorities of the Head of the State, represents the unity of measures of facilitation of this continuity and institutional embodiment of its unity. The primary nature of arbitration authorities of the President should be of preventive nature and shall be directed towards the prevention of development of processes leading to the conflict; only after this, other specific rights shall include the response mechanisms for conflicts, failed to be prevented.

The practical effectiveness of arbitration role of the Head of the State essentially depends on the formally defined legal inter-relationships with the branches of state authority and the political art of using such relationships in different political configurations.

Two tendencies have been distinguished in Georgian constitutional science:

1. According to the first position, the President "shall hold the capabilities strictly regulated by the Constitution, for participation in the implementation of executive, as well as legislative authorities".[2]
2. The President shall have the influence over the branches of power, if required, and mechanisms for influence, but not the authorities of these branches of the government. These are two different issues, which are of particular importance for the fulfillment of the role of arbitrator by the President ".[3]

The first position, which implies involvement of the President in activities of these branches, in my view, unambiguously goes beyond the deterrent nature of arbitration and considers the expansion of President's authorities at the expense of intervention of the state authority in activities of two independent branches. The "watershed" here is the understanding of function of constitutional arbitration, that it is not the co-participant and divider in activities of government bodies, but capable of retaining and balancing their activity, if any one of them poses a threat to the balance preserved by the constitution. Therefore, the intention of establishment of efficient arbitration of President requires its functional distancing-independence from branches of power. With its arbitration function the President should be the efficient instrument of protection from infringement of this balance, but not the interested "player", that would make the President capable to react on the changes of the balance. Belonging of President to one of the branches of power, exactly makes him not the impartial arbitrator, but pushes him to be actively interested player in political "games", as well as responsible participant of such debates. Therefore, the presidential institutions (US, Brazil, Mexico and the Philippines) indentified with executive authority, are not considered as arbitrators in constitutional terms. One branch of the power cannot be objective judge between itself and

[2] *Eremadze K.,* Problems of Inter-Relationship of Legislative and Executive Government in Georgia, the Dissertation for Receiving of Science Degree of Candidate of Legal Sciences, Tbilisi, 2003, 145-146; *Nakashidze M.,* In Doctoral Thesis: Peculiarities of President's Relationships to the Branches of the Government in Semi-Presidential Systems of Governance (by the example of Republic of Azerbaijan, Georgia and Republic of Armenia), 50, <https://www.tsu.ge/data/file - db/faculty-law-public/Malkhaz%20Nakashidze.pdf>.

[3] *Nakashidze M.,* In Doctoral Thesis: Peculiarities of President's Relationships to the Branches of the Government in Semi-Presidential Systems of Governance (by the example of Republic of Azerbaijan, Georgia and Republic of Armenia), 50, <https://www.tsu.ge/data/file - db/faculty-law-public/Malkhaz%20Nakashidze.pdf>.

a political competitor. However, it is a fact that original proximity of functions of the Head of the State to executive nature excludes its complete separation from the executive authority. Also, it is a fact that distinguishing/further development of arbitration role of the President has caused the weak and (sometimes, with counter-assignation) balanced permeability of the President in some executive functions. The major limit to be observed here is that the President not to be essentially involved in the governance activities, not to become the second subject of executive authority, who actually would separate the government – supreme body bearing the executive authority – from this constitutional status and would transform from the arbitrator to the competitor of the Prime Minister by the way of turning into the interested "player" in the political processes. The perception of arbitration role of the President is variable according to the systems of governance, and the appropriate legal constitutional concept of the President also varies according to the dependence upon the systems of governance. In semi-presidential systems the arbitration authorities are mixed up with executive authority, which is expressed by active participation in government's activities – inviting and chairmanship of sessions, in addition, registration of results of government sessions by the Act of President and active participation in executive authority. Therefore, number of scientists believes - idea that, allegedly, the President of semi-presidential republic acts as neutral arbitrator is an illusion.[4]

Resulting effectiveness of arbitration itself, not as formal basis for these authorities but as practical realization of these rights – material event, is revealed in their effective application, with the consideration of time and given political situation. Exactly in this given situation, the President, under the balance prescribed by the Constitution, may facilitate the strengthening of one political group (all the more if it is part of it), by this or other particular arbitration right, or hinder the growing tendency for any of them, or in case of its improper use towards the political situation and time, contrary to its intention – unintentionally facilitate the growth tendency. However, in all cases, its intention shall be inviolability of protected balance.

Post-socialist constitutionalism considers the understanding of President as arbitrator, as the essential constituent element of status of the Head of the State. In this regard, post-socialist constitutions are relatively expressive. The President of Belarus is "the guarantor… of Constitution… of the Republic of Belarus and provides… the heredity and interaction of state governmental bodies, implements mediation between state governmental bodies" (article 79);[5] the President of Poland is "the guarantor of continuity of implementation of state authority (paragraph 1, article 126);[6] "the President of Romania supervises the observance of the Constitution and proper operation of public authority. For this purpose the President carries out mediator's function between the branches of power of the country, in addition – between the state and the society" (paragraph 2, article 80);[7] "the President of the state of Hungary… protects the democratic operation of state structures" (section (1), article 9)[8]; "the President of Republic of Croatia provides the normal and harmonic operation and stability of state governance" (paragraph 2, article 94);[9] In accordance with the first paragraph, article 69 of the Constitution of Georgia, "the President of Georgia shall ensure the operation of state bodies, within the powers vested to him/her by the Constitution".[10] The philosophy of ar-

[4] *Veser E.,* Semi-Presidentialism – Duverger's Concept – A New Political System Model, Department of Political Science, School of Education, University of Cologna, 1977, 55-56, See *Nakashidze M.,* In doctoral thesis: Peculiarities of President's Relationships to the Branches of the Government in Semi-Presidential Systems of Governance (by the example of Republic of Azerbaijan, Georgia and Republic of Armenia).

[5] Constitution of The Republic of Belarus, see <http://kodeksy-by.com/konstitutsiya - rb.htm>.

[6] Constitution of The Republic of Poland, see <http://www.wipo.int/wipolex/en/text.jsp?file - id=194980>.

[7] Constitution of Romania, see <http://www.wipo.int/wipolex/en/text.jsp?file - id=129513.

[8] The Fundamental Law of Hungary, see <http://www.wipo.int/wipolex/en/text.jsp?file - id=325825>.

[9] The Constitution of the Republic of Croatia, see <http://www.wipo.int/wipolex/en/text.jsp?file - id=246241>.

[10] Constitution of Georgia, see <https://matsne.gov.ge/ka/document/view/30346>.

bitration function of the President is exactly expressed in these provisions, which are distributed in various specific authorities. In these definitions all kind of approaches can be met – beginning with ones oriented (Croatia, Georgia, Hungary, Poland) towards the system with possibly harmonious / less crisis condition of state authority of arbitration, before the announcement of it as a party (R.Ph., Belarus). Proceeding from the arbitration nature of the Head of the State – ability to prevent the conflict situations or further respond and protect the society from infringement of unity, through deterrent-balancing and mediatory influences over the different branches of state authority, there is a requirement for protection of President from binding by specific narrow political interests. In case of active belonging to specific party, the President cannot be equipped with such freedom. And this is one of the essential reasons of skepticism of perception of the President as neutral arbitrator in semi-presidential republics.

The content and volume of arbitration powers faces total deformation in deformed semi-presidential republics, in these systems, the scale of President's– as the arbitrator's – authorities are increasing so much that, actually, the status of its impartial arbitrator is lost and it becomes active and interested participant of everyday political anxiety. The impartial authority of dissolution of parliament changes the character and is transformed from crisis handling mechanism into "punishment" mechanism for refractory parliament, and the government, as we already noted, is responsible for its activities not only before the parliament, but before the President too. In this case, the presidential arbitration is essentially transformed into a full-power "presidential government".

But the authors of a number of positions, as opposed to our views, see the political justification even in such relationships of president-parliament-government. And accordingly, dramatically differently perceive the role and status of arbitration of the President, for example, while characterizing the arbitration nature of the President of Kazakhstan, we understand that: "as the President represents the "arbitrator" in the system of state bodies, he/she holds quite effective state-legal institutions. First of all, he/she enjoys the right to dismiss the Parliament in cases prescribed by the Constitution, the government's responsibility before the Head of the State. The relations between the President and government institutions provide solidity of presidential authority in Kazakhstan, as well as permanence of State leadership and heredity, political stability. The provisions, defining relationship of government with President facilitates avoidance of executive authority from dualism, in addition, includes serious preconditions of political integrity of the President of Republic of Kazakhstan and the government".[11]

The actual regulation of the role of President – as the arbitrator – is implemented by not only the system of formal-constitutional norms, but, together with it, political, including party, system. In many cases, mostly, under not so solid party system, and when the situation is brought to the crisis or on the edge of crisis, effective enforcement of arbitration authorities at President's disposal and implementation of stabilizing influence over the processes, becomes critical.

Hence, viability of arbitration authorities, beyond their objective formal-normative basis, essentially depends upon the given subjective-material situation. The latter considers the opportunities of use of formal rights in given political situation – to what extent the political configuration allows the President to frequently enjoy his/her rights. For example, broad and not solid coalitions often are not happy with negative-restrictive activities of the President, and, in some cases, the need of positive interventions may arise for mediation purposes; that is why, the President will allow himself to enjoy such rights. In addition, the degree of sustainability of public powers together with the political powers, play essential role. The

[11] Institute of presidentship and its influence on world politics, see <http://www.e-ng.ru/mezhdunarodnye - otnosheniya - i - mirovaya/institut - prezidentstva - i - ego - vliyanie - na.html>.

status of one governing party or small size and solid coalition abolishes the need of such activities of the President and his/her political activity loses its reasonable grounds. These authorities were many times directed towards the resolution of governmental crisis in the Eastern European countries. The best examples took place in Romania, where, under the situation created following the announcement of election results for Chamber of Members, during 1991-1992, 1992-1996, 1999-2000, 2012 and 2015 years, the Presidents, taking into consideration the impossibility to create the majority, have managed the consolidation of diverse members of Chamber of Members around the non-party candidacies for Prime-Minister. In addition, the President of Lithuania, has significantly influenced the process in 2009, during resignation of the Prime Minister, and parliamentary consensus around the new candidacy. By this measure, the Presidents, as the political leaders of the process, essentially conditioned adoption of the presidential governments.

If, generally, it is clear for constitutionalism, what are outcomes the arbitration is carried out for, as it is evident from the above discussed, according to the governance system, it always requires clarification, what are the forms representing the fulfillment of this function in the system. According to the current wording of the Constitution of Georgia, similar to various countries, the arbitration "arsenal", includes the rights of dissolution (in basics, as well as in time) of parliament, typical for rationalized parliamentary system, calling of strictly regulated extraordinary meeting of parliament and session, appointment of the referendum, constitutional claim, request for the discussion of issue at the government meeting (together with the right to participate in appropriate meeting), as well as "delay-executive veto" for protection of government.

In Georgia the state power was almost always (among them, formally, in mostly divided governance systems of authority - even in the presidential republic) concentrated and the system of relationship of state branches was mostly characterized by the collaboration and - the elements of balances, deterring and competition were less.[12] Even under conditions of system based on major principles of parliamentary republic (where the unity of government shall be demonstrated), the principle of distribution of powers has become perceptive for the first time, with all its features, including such features as competition and discussion on competition.[13]

In accordance with the Constitution, the President has twice requested to discuss the particular issue at the government meeting, which was not followed by counter positive will from the government. The request of the President, which at the same time does not obligate the government for fulfillment, is the opportunity to influence but not interfere in the activities. In the meantime, we think that several rights in configuration, submitted by the President contain certain vagueness and relevant risks. In this particular system we will attempt to essentially review the major arbitration constitutional accents introduced as a result of changes of October 10, 2015, with the intention to be oriented on future effectiveness of arbitration authorities of the President.[14]

3. Superlative Definitions in the Area of Arbitration

Ensuring operation of the state bodies by the President of Georgia is determined by the framework of authorities awarded by the Constitution. Accordingly, it is clear that the President cannot call for other right additionally, but what consequences he/she "ensures" for? Or how much do the President's possible

[12] Which was mainly explained by an inadequacy of multi-party system and this was generating only uni-influential (pro-presidential) party.

[13] Which was essentially conditioned by coalition nature of governance and burden.

[14] Constitution of georgia, see <https://matsne.gov.ge/ka/document/view/30346>.

actions correspond to the objective - ensuring? Will the mentioned rights be transformed into guarantee for ensuring? We are of the view that other problem is created here; in particular, shall the President ensure the activity of each body individually? If yes, it shall be considered as integral part of such bodies separately body, by which the system of distribution of authority would be violated, if the President would interfere in carrying out of particular governmental function and empower himself to ensure implementation of activities by each body?! This, on the one hand, would equip him/her, as the President, with full power; on the other hand, the "space" of appealing on "implied" rights is revealing here, for which it seems it does not leave the place - "within the powers envisaged by the Constitution for the President" - the President is not granted with such functions. The interpretation of this norm will become the source of conflict, or its viability will come into question. It is noteworthy that the Head of the State objectively does not have the opportunity to (ensurance of as necessary consequence) operation of the state bodies, due to impossibility to be supported by specific rights. Such type of abstract norm, directed towards the President, cannot have direct action, due to impossibility of specification. The "ensuring", not "nourished" via the specific rights, cannot be the liability of non-governing President and independent component of its arbitration. Even is skeptical about this obligatory normative definition; however, in terms of functional collision to Constitutional Court, he notes that "this guarantee is provided by the Constitutional Court of Georgia".[15]

However, one of the authors of this reform - the Chairman of the State Constitutional Commission of that time, Mr. develops the opposite position: according to new wording of article 69 of the Constitution of Georgia, the President of Georgia shall fulfill the obligations of guarantor for "unity of country and national independence", he/she shall ensure functioning of the state bodies. Although the President, according to the constitution, allegedly does not enjoy the necessary and sufficient powers for proper implementation of high status and per se highly busy functions, careful reading of new wording makes clear that the President, as the first person of the State, has the proper competences".[16] Such authorities belong to the rights of dissolution of the Parliament, proclamation of martial law without counter-assignation of the Prime Minister, solution of issues related to citizenship and granting pardons to convicts, in addition, statement to the nation and submission of report before the parliament. Sense of insufficiency of rights required for proper implementation of this role is linked with the analysis made on the basis of comparison of institutions of President existing on the day when it was equipped with extra powers.[17] Undoubtedly, and as mentioned above, each of this specific rights represents the mechanism for implementation of presidential arbitration; however, our thoughts are directed towards the following: how much the objective of is incontrovertibly achieved through these rights.

4. The President of Georgia – Conductor or Interventionist of Confidence-Non – Confidence?

In the governance system established since 2010, the President is authorized to oppose declaration of non-confidence to the government by majority of listed composition of the parliament, by "delayed-enforcement veto". For overriding the veto of President, no less than 3/5 votes of the listed composition (in case of full composition – 90 members of the Parliament) are required. By this authority the President (more pre-

[15] *Babeck W., Pish S., Raihenbeher Ts.,* Revision of Constitution - the Road of Georgia to Europe. Wolfgang Babeck. Lessons from Georgia: Good Example of Constitutional Reform? Tbilisi, 2012. 130.

[16] *Demetrashvili A.,* Constitutional Chronicles of Georgia. Constitutional Reform of 2009/2010 in Georgia, Tbilisi, Batumi, 2012, 25.

[17] *Demetrashvili A.,* Constitutional Chronicles of Georgia. Constitutional Reform of 2009/2010 in Georgia, Tbilisi, Batumi, 25-26.

cisely, the Prime Minister [if they represent one political force], via the President, as the President will make decision on hindering [with the right of veto and dismissal] of procedure of vote of no confidence, of course, under the dictation of current Prime Minister) intrudes into the competence of parliament in the system of distribution of authority and deprives it of the classical function - the right of control over the government. The President, with its right of influence over the natural ability of parliament - to dismiss the government by vote of no confidence, is given the opportunity to interfere in the solution of vote of no confidence to the government, to have the artificial impact - to maintain the government with lost confidence from the Parliament, by which it violates the principle of distribution of authority - infringes the right of the parliament, to be the permanent and continuous sole supreme source for formation and support of executive power.

Formally, this rule empowers the President and, in the meantime, together with parliament authority, reduces the political responsibility of the Prime Minister. "The strong rights of the Prime Minister are reasonable until the Prime Minister remains under the control of the Parliament and in case if the Parliament has the opportunity, to vote no confidence and easily appoint a new Prime Minister".[18] I am afraid that by means of leverages available for the government, direction of President's political subjectivism in favor of the government, is not in compliance with the President's objective arbitration authorities. The right of President - to maintain the government with lost confidence from the parliament, violates the boundaries of distribution of authority - infringes the right of the Parliament to be the permanent and sole supreme source for formation and support of executive authority, which means denial of supremacy principle of the Parliament; setting up of higher parliamentary barrier of protection strengthens the Prime Minister not compatible for the system, which already represents the deformation developed to percussion of conception of parliamentary system. Therefore, we think that, for the President, the right of maintaining the government with lost confidence from the Parliament, is not the measure oriented towards the strengthening of effectiveness of the President's arbitration nature, but mainly represents a tool available for the government - technical right to be protected by the Prime Minister, the fair and rational provision of responsibility procedures of which shall be the cornerstone of the system. This subjective authority of the President, to protect the Prime Minister, is not compatible with the objective arbitration status of the President. The arbitrator President, who is also responsible for public consolidation function, becomes predestined for political subjectivism, which undoubtedly causes the loss of power of political morale and morale authority, which he/she shall have before each political group.

Development of procedure typical for parliamentary governance – vote of no confidence, even in terms of increase of presidential powers, causes such deformation of parliamentary system that removes it from this system of governance and, finally, will become painful for Parliament-President-government relationship system. Given option of vote of no confidence dramatically reduces the controlling powers of the Parliament, and, moreover, gives the opportunity to the President to use it against the parliament, as well as the government with the same success. The President, which, in particular political circumstances - as the arbitrator, has the legal-political leverage to be applied effectively, and which observes the variation of balance of political forces in the Parliament, can easily provoke the process of vote of no confidence. After that, it depends only on President's will, whether to allow the parliament to dismiss the government or not. Therefore, given procedure of vote of no confidence may facilitate confrontations within the government.

[18] Venice Commission, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia CDL(2010) 028, № 110, CDL-AD (2010)028 Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), see <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)028-e>.

The veto of President on the decision of Parliament to vote for no confidence to the government cannot remain as the normative category apart from the political factors - uncontrolled discretion of the President. Frequency and expediency of its application will be essentially regulated by the real political factors, among them:

1. General political inter-disposition and sympathies of the President and parliamentary majority (accordingly, the government);
2. Preliminary consultations and achieved agreement with governing and oppositional political forces;
3. Increasing rating of the political party voting for no confidence. This will be directly linked with the opportunity of discussed extraordinary elections for both cases: is the President considered as supporter of a new possible coalition, and accordingly, may the President be reviewed as the power encouraging this process or fully resisting the decision of no-confidence of parliament.

The President, by the right of "delayed-enforcement veto", may temporarily maintain the government without legitimacy and hinder signing of a new will, already formed, but this contradiction in implementation of distribution of power is not favorable for the President; does not transform him/her into independent player - effective arbitrator. Notwithstanding the fact whether the President and Prime Minister are representing one political force, in procedure of confidence-non-confidence, only the Prime Minister may get the benefit by rights of the President. The right of "delayed-enforcement veto" of the President, aiming at protecting the government, will be applied informally, but, most probably, via the consultations with Prime Minister. On these grounds, political "divorce" is inevitable between them, or, in addition, the President should be under the control of the Prime Minister, by which it will suppress the mechanisms of political activity, awarded to the President - mechanisms of deterrent influence on activity of government. The latter will be followed by political negligence of the President, which, will contain the risk of losing the institutional authority (among them, as an arbitrator) of the President.

In general, existing scheme of vote of no confidence, together with essential reduction of controlling authorities of the Parliament, gives the opportunity to the President, according to given political situation, to successfully use it against the Parliament, as well as government, is given the right to allow the Parliament to dismiss the government, or (by enjoying the rights [accordingly, right of veto and dismissal] envisaged under paragraphs 3 and 6 of the article 81 of the Constitution) oppose such intention. But, as we already noted, taking into consideration the leverages available for the government, the political subjectivism of the President could be mostly in favor of the government, which does not comply with the objective essence of arbitration authorities of the President.

5. Conclusion

For the purpose of maximum clearness of relationships normatively easily predictable and constitutional institutions in the system of power, taking into consideration the argumentation presented in discussion, during future constitutional reforms, we consider desirable:

1. to edit the norm of article 69 of the Constitution of Georgia, which imposes less real burden of ensuring the functioning of state bodies to the President. For this purpose, I consider that the term "ensuring" requires replacement;
2. in addition, if ensuring is still intended not for control of fulfillment of their function, but for facilitation of each branch of the authority (and that is how it must be), this is not readable. Arbitral constitutional rights shall not be used by the President for granting the right of ensuring the individual functioning of

any state body to the President (which would violate the principle of distribution of power), but shall be focused on their political communion relationship. And if so, presumably, this sentence requires to be filled in with appropriate word (which could be:" rectified"," according to the Constitution"," mutually agreed" or any other);

3. For the implementation of representational and arbitration functions, the President shall be free from party belonging. By his/her status, he is superior over the branches of state power, formed with the party sign and in delaying relationship with them, it is desirable for the resident to be free from burden of party belonging, which in future would reduce the basis for demanding political subjectivism and accusations towards him/her from the side of various political groups.
4. Eradication of interventional authorities in confidence-non-confidence matters, in order to ensure the continuity of confidence-non-confidence of the government, and to avoid separation of unity of source of support for the formation and activity of the government.

Revaz Khoperia*

A Rule of Carrying out Discretionary Power of an Administrative Agency

In the article on the basis of analysis of German scientific literature and court practice a concept of discretionary power, development of history of the discretionary power institute and principles of recognition it have been discussed. In the article there is also given classification of discretionary power into categories and a rule of realization of discretionary power, namely, carrying out it in accordance with its purpose and within the scopes of the law, observing the proportionality principle of public and private interests.

Key Words: *discretionary power, administrative agency, purpose of discretionary power, scopes of discretionary power, the proportionality principle of public and private interests.*

1. Introduction

In a contemporary state it is unimaginable for an administrative agency to carry out its activity without a certain degree of freedom. However discretionary power is not only a needful and necessary instrument for effective activities of the administrative agency. Some scientists think that the discretionary power institute is one of the guarantees of protection of human rights and freedom secured by the constitution. In the opinion of critics a constitutional state must be hostile to the discretionary power institute. Discretionary power and freedom of estimation are inseparable concepts of the administrative agency's activities, which is due to the thought that a legislator cannot define a legal consequence of each concrete case.[1]

In Georgian administrative law created by the influence of German administrative law discretionary power is admitted. Thus the purpose of this article is to state the importance of discretionary power and its realization rule on the basis of the comparative legal analysis.

2. Development History of Discretionary Power and Definition of the Concept

2.1 Development History of Discretionary Power

According to the classical doctrine of the administrative law and administrative court practice after the second half of the 19th century it was admitted for state authorities to have freedom for decision making – freedom from legislative restrictions and court control. However in the course of time according to the principle of the established legality the requirement of the existence of legal grounds for restriction of citizens' rights and freedom became mandatory. The legal grounds must have been in the law, which would have been adopted by representatives chosen by people. In spite of this fact there was no requirement for

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1 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg, 1998, 1.

the legal grounds to regulate exhaustively and state preconditions of restriction of citizens' rights and freedom. Administrative courts within the scopes of discretionary power did not have the authority of checking up the made decision. Discretionary power for monarch's governing bodies was creating freedom of decision-making according to their own opinions about the attainable aim. It was deemed that an administrative agency was granted discretionary power, unless a scale of measures of the administrative agency was strictly pre-defined by law. As judged by the essence of law the administrative agency should have stated the scope itself. Checking up of indefinite legal concepts (for example, "public interest" or "economic necessity") by court was not possible. Such approach was especially recognized by in administrative court practice of Austria from 1888 to 1967. According to Austrian regulations a court was authorized to control all kind of administrative acts with the exception of those, which were issued within the scope of discretionary power. In Germany the approach to the discretionary power institute changed after 1945. There appeared narrow understanding of discretionary power and it was a result of striving for building of a legal state. A new understanding of a legal state was the opposite to the totalitarian state regime of 1933 – 1945, when a state and administrative agencies had full power, but administrative court was powerless. Therefore discretionary power was defined not as a full power, but as restricted flexibility of the administrative agency during the enforcement of law. Before 1955 German courts, like the Austrian administrative court practice, were not controlling activities of administrative agencies and were giving the final decision-making authority to administrative agencies. In establishing a contemporary approach to discretionary power and indefinite legal concepts a very important role was played by the necessity of stricter observance of the principle of legality and the constitutional principle of judicial protection. In scientific literature there has been established an opinion, according to which indefinite legal concepts are not a component part of discretionary power.[2]

2.2 Definition of a Discretionary Power Concept

A law[3] on German administrative proceedings adopted in 1976 and effective in 1977 does not define a concept of discretionary power. In the law there is not given an answer to debates connected with interpretation of a concept of discretionary power. The German law only states scopes of discretionary power.[4] In scientific literature several definitions are very common. Namely: in the opinion of Merkl discretionary power is "legal opportunity" to express own will because of the lack of binding regulations stated by the will of a stranger.[5] According to Czermak an administrative agency is granted discretionary power in cases, when considering certain factual circumstances the administrative agency can adopt only one decision out of several ones.[6] In the opinion of Ossenbühl discretionary power is the choice of administrative authority in defining of legal opinion corresponding to the law.[7] In contemporary scientific literature it is deemed that discretionary power is concerned the definition of legal result and an administrative agency is autho-

[2] *Bullinger M.,* Das Ermessen der öffentlichen Verwaltung, JZ 1985, 1001-1003.
[3] *Kopp F., Ramsauer U.,* Kommentar zum Verwaltungsverfahrensgesetz, 10, vollständig überarbeitete Auflage, München 2008, 3.
[4] *Sachs M.* in *Stelkens P., Bonk H.J., Sachs M.,* Kommentar Verwaltungsverfahrensgesetz, 7. neubearbeitete Auflage, München, 1348.
[5] *Merkl A.,* Allgemeines Verwaltungsrecht, Darmstadt 1969 (Unvärenderter reprografischer Nachdruck der Ausgabe Wien und Berlin 1927), 152.
[6] *Czermak F.,* Was ist Verwaltungsermessen?, DÖV 1966, 751.
[7] *Ossenbühl F.,* Tendenzen und Gefahren der neueren Ermessenslehre, DÖV 1968, 619.

rized to choose different actions. An administrative agency is authorized to define a legal result itself, as a legal norm does not state a legal result. An administrative agency can make a choice between two or more measures.[8]

In Georgia legislation includes definition of a concept of discretionary power, namely according to subparagraph "L" of Article 2 of General Administrative Code of Georgia discretionary powers is powers granting freedom to an administrative agency or official to choose the most acceptable decision out of possible decisions under the legislation, to protect public or private interests.

3. Grounds of Recognition of Discretionary Power

The ground of granting discretionary power to an administrative agency is an opinion that a legislator is not able to define a legal result for all the individual cases. A legislator does not have such an obligation either. One of the purposes of granting discretionary power to an administrative agency is exclusion of necessity of acceptance many legislative or subordinate legislation acts. Besides considering circumstances of concrete cases administrative agencies must have opportunity to take a flexible decision. It will increase effectiveness of activities of these bodies. As a main task of the administrative agency in a certain case is to take a fair decision, the importance of granting of discretionary power must be seen in the opportunity of taking a fair decision. Therefore special responsibility is imposed to an administrative agency when exercising discretionary power.[9] A political-legal motive of granting discretionary power to an administrative agency is consideration of special character of each case and not promotion of subjective willful decisions. However discretionary power is such a legal institute, which allows the administrative agency to base the decision on illegal motives.[10]An administrative agency, which for solution of a case has discretion, is not authorized to carry out it willfully. Discretion rather means restriction of an administrative agency. [11]

4. Classification of Discretionary Power into Categories and Its Functions

4.1. Classification of Discretionary Power by Form of Granting Discretionary Power and Cognitive or Willful Elements of Taking a Decision

By granting form it is possible to distinguish several types of discretionary power:

a) Statutory discretionary power and non-statutory discretionary power;

b) Discretionary power in the factual circumstances part of the norm and discretionary power in the legal result part of the norm;

c) There are also distinguished from each other cognitive discretion and willful discretion.[12]

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[8] *Maurer H.,* Allgemeines Verwaltungsrecht, 16. Auflage, München 2006, 135-136.

[9] *Rode L.,* §40 VwVfG und die deutsche Ermessenslehre, Frankfurt am Main, 2003, 10.

[10] *Merkl A.,* Allgemeines Verwaltungsrecht, Darmstadt 1969 (Unvärenderter reprografischer Nachdruck der Ausgabe Wien und Berlin 1927), 152.

[11] *Jellinek W.,* Verwaltungsrecht, Bad Homburg V.D. Höhe, Berlin, Zürich, 1966 (Unveränderter Nachdruck der dritten Auflage von 1931 Berlin), 30.

[12] *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg, 1998, 84-85.

4.2 Classification of Discretionary Power by Its Characteristics

The second group is followed from characteristics of discretionary power, which are connected with exercising of discretionary power, object and result. According to scientific literature and court practice the second group includes many kinds of discretion. Classification of discretionary power by kinds helps us to understand the discretionary power institute better.[13] One of the kinds of discretionary power, which was also distinguished in earlier scientific literature, is "procedural discretion", more exactly discretion, which is granting freedom to an administrative agency to define a procedure of taking decision. This kind of discretion means freedom of the administrative agency to choose a form of taking decision, namely in order to take a concrete decision the administrative agency is authorized to issue an individual administrative-legal act or make an administrative arrangement. In contrast to "procedural discretion" there is "material discretion" or a case when an administrative agency is granted freedom to choose a proper legal result.[14]

4.2.1. Freedom in Tactical Thoughts (Discretion in Tactics)

Discretion in tactics means cases, when an administrative agency is granted freedom to choose a proper tactics basing on the object of a statute. On the basis of the object of a statute an administrative agency has freedom to carry out a strategically important object, foreseen by law, flexibly and effectively. Such are cases, when in order to protect public safety and considering concrete factual circumstances the police is entitled to choose a proper tactics. For example, the Federal Bank of Germany has tactical discretion to adjust decisions connected with currency to the changed economic situation. Tactical discretion cannot be defined preliminarily by law or a subordinate normative act, because tactical discretion requires the fastest reaction of the administrative agency to settle a concrete case. Judging from the principle of a legal state tactical discretion might not be foreseeable, as in such a case an effect of the measure will lose its sense or become weak. For example, if it is known in advance when and what kind of rate the Federal Bank states, commercial banks will preliminarily adjust to the changed situation. Such decisions will lose their sense, as it will not have an intended effect.[15]

4.2.2. Discretion in Law Fulfillment Obligation

According to law an administrative agency can be granted power to exempt itself from fulfillment of legislative obligations in individual cases. The law might foresee obligation of taking the preliminarily defined decision. However the administrative agency might have been granted power when there are special preconditions to decline "literally" fulfillment of obligations envisaged by law. Such a case might take place when an administrative agency is authorized to give permission on construction beyond the range of the admissible zone, if this decision does not contradict the public interest. Though an administrative agency should have been authorized by a legislator to take exceptional decisions, it does not mean that a legislator is obliged to point out decisions appropriate to all atypical cases. Besides an administrative agency might be granted discretionary power to exclude fulfillment of statutory obligations by means of

[13] *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg, 1998, 85.
[14] Ibid, 85-86.
[15] *Bullinger M.,* Das Ermessen der öffentlichen Verwaltung, JZ 1985, 1007.

own regulations. But in this case the achievement of the object of a law is mandatory. The achievement of the object of a law is carried out according not to the rule given in the law, but to the rules stated by the administrative agency. For example, the administrative agency can admit cartel, in spite of the fact that it is forbidden by law. Such decision can be taken by a minister of the appropriate sphere considering "special circumstances of general economic situation", even with the object of creating the proper opposite force for foreign competition.[16]

4.2.3. Discretion in Making Plans Concretizing Law and Issue Acts Similar to the Plans

Since 1960 discretion in planning has been recognized to be a part of activities of an administrative agency. Such type of discretion means that an administrative agency is entitled to make action plans taking into account objectives of a law. For example, considering the objective of a federal law about construction an administrative agency is authorized to create an action plan. Discretion might be granted to an administrative agency by law or might be followed from interpretation of the norms of the law. It should be noted that an administrative agency has discretionary power, when it is taking "complex decisions", for example, when the Federal Bank is defining amount of minimal reserve and in the law there is only given an objective that currency must be hard.[17]

4.2.4. Discretion in Improvement of State Service (Discretion in Management)

An administrative agency might be granted discretion in taking decisions connected with management. Similar cases are often in such administrative agencies, as for example, state banks, state or municipal transport, water and electric energy service sphere, state radio. Such type of discretionary power was not recognized in earlier literature, as it was deemed that such legal relationship between administrative agencies and customers was of private legal character. Thus an administrative agency had not only discretion in management, but the absolute autonomy in taking decisions connected with management.[18]

4.3. Classification of Discretionary Power by Legal Binding Degree

This category includes such types of discretionary power, which are divided according to the intensity of legal binding and court control. There are distinguished two different types of discretion: "free" and "mandatory". The latter means that discretionary power must be exercised in accordance with the objective of the norm granting discretionary authority within the scopes stated by legislation. "Free discretion" is a less understandable term and in scientific literature there are different opinions about it, though most scientists agree that discretionary power free from legislation restrictions does not exist, as a rule of exercising discretionary authority is stated by law. According to the consideration expressed in scientific literature "free discretion" means the freedom of the administrative agency to take decision to act or not in a concrete case and if it acts, what measure it will choose.[19]

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[16] *Bullinger M.,* Das Ermessen der öffentlichen Verwaltung, JZ 1985, 1007-1008.
[17] Ibid,1008-1009.
[18] Ibid, 1009.
[19] *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg, 1998, 86-87.

5. Granting of Discretionary Power

5.1 Granting of Discretionary Power Basing on a Law

An issue, concerning whether a norm grants or not discretionary power to an administrative agency, is a question to be interpreted. At this time grammar contents of the norm is important. System connection with other norms should be also taken into consideration. [20] Especially important is how a decision of the administrative agency is formed. Discretionary power is granted to the administrative agency when from the norm structure it is clear that the administrative agency is able to choose one out of several measures appropriate to the objective of legislation. Discretionary power might be granted to the administrative agency by the norm, according to which with the purpose of taking decision in a concrete case the agency is authorized to use only one preliminarily defined measure. In order to understand the norm containing discretionary power it is important to formulate the text of the norm. As a rule, discretion is included in the form, formulation of which does not force the administrative agency to take decision, it points out to a possible potential decision. There is also a case when discretionary power might be followed not from the grammar contents of the norm, but from systemic and teleological interpretation.[21]

As a rule, a norm points out to discretionary power, if it contains the word "can", but it should be taken into account that in some cases the word "can" implies taking only one decision conformable to the concrete case, when relevant preconditions are fulfilled. Differences must be stated on the basis of interpretation of norm.[22]

5.2. Concreteness Principle of the Norm Granting Discretionary Power

Constitutionally-legally discretionary power is admissible. However the principle of a legal state requires that if a norm containing discretionary power is granting administrative agency the authority to issue a restricting individual administrative-legal act, its contents, objective and size must be concrete enough. In such a case it will be possible to define the intervention scope in advance. The norm granting discretionary power to an administrative agency must be concrete to such extent, that a citizen will be able to anticipate a legal result. Principle of legality requires concretizing the power granted to the executive authority, so that the administrative agency will not define independently the rate of freedom. The authority distribution principle also implies concretizing of legal grounds, because without concreteness an administrative agency will take a legislator's place instead of execution of a law.[23]

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[20] *Kopp F., Ramsauer U.,* Kommentar zum Verwaltungsverfahrensgesetz, 10. vollständig überarbeitete Auflage, München 2008, 786.

[21] *Wolff H., in Sodan H., Ziekow J.,* Großkommentar zur Verwaltungsgerichtsordnung, 2. Auflage, Baden-Baden 2006, § 114, Rn 68 ff.

[22] *Kopp F., Ramsauer U.,* Kommentar zum Verwaltungsverfahrensgesetz, 10.vollständig überarbeitete Auflage, München 2008, 787.

[23] *Liebetanz S., in Obermayer K.,* Kommentar zum Verwaltungsverfahrensgesetz, 3. völlig neu bearbeitete Auflage – Neuwied, Kriftel, Rn 5.

6. Rule of Exercising of Discretionary Power

6.1. The Objective of Granting of Discretionary Power

According to paragraph 40 of German Administrative Procedure law an administrative agency is obliged to exercise discretionary power only according to the objective of a law. It means that justification of the decision taken within the scopes of discretionary power must be possible judging from the objective of a law.[24]

6.2. Scopes of Exercising Discretionary Power

When exercising discretionary power an administrative agency must observe the scopes of the law. It implies the observance of scopes envisaged by concrete norms, as well as generally scopes foreseen by normative acts.[25] Scopes of discretionary power might be followed from special statutory and subordinate acts, also from European Union Law,[26] even when norms of European Union Law are not implemented in national law by a German legislator.[27] Scopes of exercising of discretionary power must be deemed to be requirements stated by the constitution, first of all a principle of legal state and a proportionality principle, a principle of lawful confidence, a principle of a social state. Human rights and freedoms together with a proportionality principle are directly active scopes of discretionary power. In exercising discretionary power a principle of equality is of special importance. Here is meant a general, as well as a private part: paragraphs 1, 2 and 3 of Article 3, paragraph 5 of Article 6 and paragraphs 1 and 3 of Article 33 of the Main German Law. It must be also taken into consideration discrimination banning against citizenship existed in European Law.[28] A rule of exercising discretionary power is given in Article 6 of general Administrative Code of Georgia, namely, the first part of the above mentioned Article states that an administrative agency must exercise its discretionary power within the scope stated by law. According to the 2nd part of Article 6 an administrative agency must exercise its discretionary power in the conformity with the purpose of granting discretionary power.

6.3. Proportionality Principle of Public and Private Interests

In contrast to German law the Georgian General Administrative Code is concretizing a rule of exercising discretionary power. Namely, according to paragraph one of Article 7 of Code when exercising discretionary power it is inadmissible to issue an administrative-law act, if a harm done to a person's protected interests exceeds goodness, for receiving of which an administrative-legal act was issued. According to part 2 of the same article measures considered by the administrative-legal act issued as a result of exercising discretionary power must not cause groundless restriction of a person's legal rights and interests. This Article

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[24] *Kopp F., Ramsauer U.,* Kommentar zum Verwaltungsverfahrensgesetz, 10. vollständig überarbeitete Auflage, München 2008, 789.

[25] *Sachs M.* in *Stelkens P., Bonk H.J., Sachs M.,* Kommentar Verwaltungsverfahrensgesetz, 7. neubearbeitete Auflage, München, 1369.

[26] Ibid,1371.

[27] *Rode L.,* §40 VwVfG und die deutsche Ermessenslehre, Frankfurt am Main, 2003, 135.

[28] *Sachs M.* in *Stelkens P., Bonk H.J., Sachs M.,* Kommentar Verwaltungsverfahrensgesetz, 7. neubearbeitete Auflage, München, 1371-1373.

of the Code points out that discretionary power must be exercised on the basis of considering both – public and private interests.

It should be noted that it is impossible to grant priority to either individual public or private interest. When taking each concrete decision they must be compared to each other. The means of achieving a goal must be in conformity with the goal. This is a case when an administrative agency having several measures is choosing such a measure, which will result the least harm to a person's interests and rights.[29] Exercitation of discretionary power is connected with estimation of public and private interests, which in most cases contradict each other. A process of interconsistency includes several phases: revealing of interests, stating their significance and finally matching.[30]

7. Conclusion

At the initial stage of discussion about discretionary power it was deemed that agencies of state administration should have had discretion – freedom from legislative restrictions and court control. Such was legislation and court practice too.

After the Second World War in German scientific literature there was established a narrow interpretation of discretionary power, which was a result of striving to build a constitutional state.

In Georgian Law innovative interpretation of discretionary power became possible in 1999 after adopting the General Administrative Code, oriented on German law.

The main function of discretionary power is to assist an administrative agency in achieving a statutory objective. On exercising discretionary power the administrative agency can fulfill statutory objectives flexibly and effectively. Having been granted discretionary power the administrative agency can use administrative resources effectively. Discretionary power in a concrete case serves taking fair decision, as the administrative agency can consider special character of an individual case and circumstances connected with the case.

AS in German, as well as in Georgian Administrative Code it is deemed that discretionary power must be carried out by the norm of granting discretionary power according to the statutory scopes and objectives of law.

[29] *Turava P., Tskepladze N.,* General Guide of Administrative Law, Tbilisi, 2010, 38.

[30] *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg, 1998, 54.

Giorgi Getiashvili*

Substance of Community Service

The article provides discussion of the community service substance. It describes the main purpose of community service as alternative punishment, its significance and rehabilitation effect. Article offers practical analysis of the issue and significant changes in the period after "zero tolerance". Part of the article is based on analysis of the legal acts, clearly demonstrating significance of the issue and existing weaknesses.

Key Words: *Community service, non-custodial sentence, probation, rehabilitation, community sanctions, re-socialization, alternative punishment*

1. Introduction

Community service belongs to the category of non-custodial sentence and is distinguished with high rehabilitation effect – the sentenced stays with the society and he/she has opportunity to atone damage caused to the society by his offensive action with his/her labor, in addition, community service is cost-effective for the state and helps the sentenced to acquire and elaborate various additional skills. Social purpose of the punishment is restoration of the public order and compensation of caused losses using efforts of the convicted person.[1]

State policies should not be strengthening of repressions and increasing sanctions against the offenders, rather, this requires from the state introduction and development of the punishments and measures other than deprivation of liberty.

Switch from the "zero tolerance" politics to liberalization put on agenda liberalization of the sphere of the criminal justice and within the scopes of this politics, attention was focused on launching of the alternative and preventive mechanisms of non-custodial sentence and responsibility, resulting, ultimately, in prevention of crime. Preventive programs can reduce the crimes, though, certainly, this phenomenon cannot be eliminated fully. In this respect, non-imprisonment punishments, alternative measures of criminal responsibility, isolation and community service programs play significant role and this is the prevention of the third level.[2] Such alternatives, in many cases, reduce the risk of recurrence much better than deprivation of liberty. This article deals with the substance of community service. Part of the article relies upon international practices and analysis of the legal acts, clearly evidencing significance of the issue and existing gaps. Article offers critical analysis of the issues, identifies the weaknesses and provided recommendations may be subject of interest of the group working on the criminal law reform. And all these may positively impact the future of the system.

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1 *Arsoshvili G.,* Re-socialization of the Offender, Tbilisi, 2009, 4.

2 *Criminal Law Reform Coordination Council,* Strategy for Prevention of Juvenile Crimes, Tbilisi, 2012, 3.

2. History

Community services were first applied in 1966, in the USA, against the people driving in drunken condition.[3] In the Europe, these were first applied in 1970, in England and Wales, for the purpose of reduction of quantity of the convicts in penal institutions. Such punishment was regarded as alternative to deprivation of liberty characterized with high effect of reintegration and rehabilitation.[4] "In 1976, Probation Service of Ministry of Justice of Quebec, introduced community services at number of courts, as experiment, Due to success of the experiment, in 1980, such punishment was adopted all over Quebec. Community service was unified with probation, as one of the types of punishment imposed by the judge."[5] After England and Wales, in 1981, community service was introduced in the Netherlands, in 1982 – in Denmark, France and Ireland and in 1984 – in Norway. Currently, legislation of almost all European states provides for community service and categorizes it as community sanctions and measures.[6] This is the title of Recommendation No: R (92) 16 of the Committee of Ministers of the Council of Europe to the member states, on the European Rules of Community Sanctions and Measures dealing with off-prison punishment for the adult offenders only and such measures imply, primarily, the community service. Term "Community sanctions and measures" is applicable to the sanctions and measures providing maintenance of the offender within the community. This implies restriction of the convict's freedom by imposing specific terms and conditions and obligations.[7]

The convicts that are not arrested, have opportunity to live with their families, maintain their jobs, participate in various rehabilitation programs and compensate damages caused to the society by their offensive actions,[8] avoid violence and harmful influence of the prison subculture.[9] It is regarded that the prison protects from committing of recurrent crimes only in the period of imprisonment while the community sanctions and measures are intended for the future.[10] Community sanctions and measures reduce crime and proves that placement in the penal institution is not an only way for elimination of crime.[11]

In Georgia, community service, as the punishment was adopted in 1999, with adoption of the Criminal Code of Georgia, though, for long period, this was so called "dead norm". Its actual application commenced from 11 March 2011, after implementation of legislative changes. As of today, community service is applied not only as a punishment but it is one of conditions of diversion as well.

At the world level, community service is implemented in different ways. Its adoption and application depends on the state formation, public attitude towards the crime and criminals in general, as well as resources available in the country and priority directions.[12]

3. Concept of Community Service

According to the Dictionary of Civil Education, labor is an individual's conscious, targeted physical or mental activity creating tangible or intangible product and serving to maintenance of mental or physical ex-

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3 *Klaus J.,* Handbook on Probation Services, Rome/London., 1998, 15.
4 *Van Kalmthout A., Durnescu I.,* European Probation Service Systems, CEP., 2011, 26-27.
5 *Pradel Zh.,* Comparative Criminnal Law, Tbilisi, 1999, 437.
6 *Van Kalmthout A., Durnescu I.,* European Probation Service Systems, CEP., 2011, 26-27.
7 Collection of International Standards of Probation, Tbilisi, 2010, 183.
8 *Vuong L., Hartney C., Krisberg B., Marchionna S.*, The Extravagance of Imprisonment Revisited, NY, 2010, 70.
9 *Alarid L. f.,* Community-Based Corrections, TX., 2013, 1
10 See <http://rethinking.org.uk/informed/pdf/alternatives_to_prison.pdf>, 11.
11 *Lundman R.,* Prevention and Control Juvenile Delinquency, NY, 1993, 233.
12 *Klaus J.,* Handbook on Probation Services, Rome/London, 1998, 17.

istence of the individual.[13] On the contrary – unemployment frequently causes existence crisis for individuals. Loss of economic status may cause fall of individual's self-esteem and harm to his/her personality."[14]

Community service fully corresponds to the labor definition, the only difference is that in this case labor is not a voluntary activity but rather it is one of the punishment types. Community service is sound alternative measure of punishment beneficial for the convict, as well as for the community and the state government. Such type of punishment is cost-effective and helps the state to save the resources. The convict is instructed to perform certain works for free, under the supervision of probation officer. The main purpose is that the offender understood that he/she has committed the crime and that he/she bears responsibility for this.[15] In addition, community service shall be used only where there is no any specific victim.[16]

According to Section 47 of the Recommendation CM/Rec (2010)1 of Committee of Ministers to Member States on Council of Europe Probation Rules, Community service is a community sanction or measure which involves organizing and supervising by the probation agencies of unpaid labor for the benefit of the community as real or symbolic reparation for the harm caused by an offender. Community service shall not be of a stigmatizing nature and probation agencies shall seek to identify and use working tasks which support the development of skills and the social inclusion of offenders. According to UN Standard Minimum Rules for Non-custodial Measures, community service requires that the offender performed unpaid work or special work.[17] Community service shall not be associated with physical pain or with humiliation of personal dignity.[18] Court shall apply such punishment only where serious offence is committed though not so serious that only imprisonment could be applied.[19]

With its substance, such punishment is a form of restitution.[20] Punishment function of the public service is that it restricts the offender's liberty and takes his/her time for certain term.

4. Community Service and Plea Bargain

According to Paragraph 1, Article 44 of the Criminal Code of Georgia, Community service shall mean free labor of a convicted person where the type of labor is determined by the probation bureau. Community service shall be imposed from 40 to 800 hours in case of adults and if the fine is substituted with community service or if deprivation of liberty is substituted with community service, or if the parties conclude plea bargain, it may be imposed for longer term. As for the juveniles, according to Article 71 of the Juvenile Justice Code, they are imposed from 40 to 300 hours and if the fine is substituted with community service or if deprivation of liberty is substituted with community service, or if the parties conclude plea bargain, it may be imposed for longer term.

In case of plea bargain, imposing of community service for the term exceeding the term provided for by the law "is apparently against the constitutional principle of law determination and court independence. Law determination principle ensures legal stability. The legislator shall make critical decisions on the types and scopes of proposed legal outcomes and show to the judge the limits of his/her action, as clearly as possible."[21]

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[13] See <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=6&t=7413>.
[14] *Schvabe I.,* Decisions of German Federal Constitution Court, Tbilisi, 2011, 316.
[15] See <http://pja.gov.pk/system/files/Probation.pdf>, 6-7.
[16] *Abadinsky H.*, Probation and Parole, Theory and Practice, NJ, 2009, 336.
[17] *Ivanidze M.,* Alternative Punishments, Criminal Law, General, Tbilisi, 2016, 470.
[18] Ibid.
[19] See <http://rethinking.org.uk/informed/pdf/alternatives_to_prison.pdf>, 8.
[20] *Branham L., Krantz S.,* The Law of Sentencing, Corrections, and Prisoners, Rights, MINN, 1997, 151.
[21] *Arsoshvili G., Mikanadze G., Shalikashvili M.,* Probation Law, Tbilisi, 2015, 135-136.

According to Article 82 of the Constitution of Georgia: "The judiciary shall be independent and exercised exclusively by courts." The plea bargain shall be concluded between the offender and prosecutor while the judge only approves it.[22] This deprives the judge opportunity of imposing punishment at his/her discretion. And the punishment is legal outcome of the offence and it is imposed on person who has committed crime or offence by the court only.[23] Though procedural legislation does not entitle the judge to reduce or change the punishment autonomously. This cannot justify approval of excessively light or severe punishment relying on the fact that the prosecution has filed such motion. The judge shall observe the process of determination of punishment attentively and in case of inadequacy offer the parties to change conditions or reject the plea bargain.[24] Analysis of court decisions clearly showed the weaknesses of application of such punishment in Georgia.

By the decision №1/154-13 of 27 March 2013 of Gori District Court plea bargain was approved between A.B. and prosecutor, where, the offender, together with the main punishment, was imposed additional punishment in a form of community service for 150 hours. At a time of the offender's registration it turned out that she had two minor children, of 6 and 4 years age. As she stated, neither prosecutor, at a time of concluding the plea bargain and nor judge, at a time of approval thereof have asked him/her whether there were any preventing circumstances while Paragraph 4, Article 44 of Criminal Code of Georgia specifies the groups of persons that shall not be imposed community service by the court, these are: disabled persons of first and second categories, pregnant women, women with children aged under seven, persons of retirement age, as well as for recruited military service persons. The circumstances prohibiting community service imposing were missed by the defendant's counsel as well, he/she has not found out, whether there were any preventing circumstance or not. In the descriptive-motivation section of the court decision there is specified only that the offender pleaded guilty, she is aware in plea bargain terms and conditions that no coercion or threatening etc. against her has taken place. It also states that based on assessment of the presented evidences, the court was convinced that the defendant was guilty and regards that the punishment specified in the prosecution's application was lawful. Where the court states that the evidences confirming the offender's guilt are provided, it should have also discuss whether there were existed any circumstances excluding imposition of community service, especially regarding that in the preamble of the sentence there is stated that the offender had the family and at a time of sentence she was 28 years old. The offender's age and family status provides basis for reasonable doubt that she should have child under seven. This provided the basis for rejection of the plea bargain and returning of the case to prosecutor.

In addition to the above, there is the other case where the other preventing circumstances were neglected and a person was still imposed the community service. By the decision #1/431-13 of 13 September 2013 of Gori District Court the plea bargain was approved and N.G. was convicted in accordance with Paragraph 1, Article 177 of Georgian Criminal Code and together with 3-year suspended sentence, he was imposed 150-hour community service. At a time of registration with the Probation Bureau, when the probation officer was explaining the rules and conditions of the punishment, N.G. stated that he/she had eyesight problems and in few days provided the relevant health certificate stating that in 2009 the offender was awarded status of the disabled person of second category. Interview showed that he/she was informed about the substance of punishment at the Probation Bureau and neither at a time of concluding the plea bargain, as well as the hearings he/she received any explanations with respect of the substance of punishment

[22] *Arsoshvili G., Mikanadze G., Shalikashvili M.,* Probation Law, Tbilisi, 2015, 135-136.
[23] *Turava M.,* Criminal Law General Part, Doctrine of Crime, Tbilisi, 2011, 46.
[24] Guidance Proposals on the Form of Criminnal Judgment, its Reasoning an Stylistic Accuracy, Tbilisi, 2015, 63.

and no one has asked about his/her health status. The mentioned decision states also that the punishment provided by the plea bargain is lawful, though similar to the former case, here the basis exists for rejection of the plea bargain and returning of the case to prosecutor.

In addition to the prohibiting circumstances directly stated by the law, analysis of judicial practices also showed that the judges, at a time of concluding of the plea bargains, fail to examine such characteristics of the offender as his/her health status and ability to perform the community service. Such is decision # 1/109 of 23 June 2014 by Gori District Court. By this decision M.Z. was found guilty in committing crime provided for by Article 111 and Section 1, Article 1261 of Criminal Code of Georgia and his punishment was community service for 90 hours. He had problems with attending the Probation Bureau as he had physical health problems. When the probation officers visited him at home, it turned out that he could walk only with the crutches only for last 3 years. According to the health certificate in Form #100, he had vertebral column trauma and his right leg was partially paralyzed. He had no formal document evidencing his disability as he was not able to visit medical facility and he had no any allowances. Though here the violation of legal norms does not take place in this case, the court should have taken into consideration M.Z.'s health status and should not have applied community service as punishment, The state should not gain benefits from application of the alternative punishments in such case but rather measure of evaluation should be whether the punishment corresponds to the physical abilities of the offender and whether the Probation Bureau is able to enforce the punishment. The type and measure of punishment shall be reasoned similarly to the offender's guilt.[25] The court decision shall not only prove the offender's guilt but also justify reasonability of the applied punishment. This would be quite high standard, excluding the above legal gaps. If the imposed punishment is unjust, irrespective of how well the sentence is justified, the applied punishment will be regarded as less effective.[26]

The substance of punishment is that the judge should apply the principle of individualization of punishment and ensure its suitability to the offender's personal characteristics, his/her health status, physical abilities. For this purpose, the offender's personal characteristics do not include only positive or negative ones, his/her education, desires, activities but rather personal values.[27] Offenders are distinguished with their individuality and this makes the judge to impose the punishment with due regard of such individual nature.[28] "Punishment individualization has certain pedagogical aspect. The problem of upbringing cannot be properly solved by means of pedagogical cliché, without taking into consideration the student's individual characteristics, similarly, the principle of individualization of responsibility cannot be practically exercised without taking into consideration the offenders' personal nature."[29]

The substance of actual operation of the punishment is that the judge should think, in determining of punishment, how effective the imposed measures will be for achievement of preventive goals.[30] And preventive goals should be set based on the assessment of committed offence and the offender's personal characteristics and the punishment should be set regarding such preventive goals. Positive prevention implies that the offender should be given opportunity of staying within the community and correction in such

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[25] *Tskitishvili T.,* On the Issue of Punishment Application, Guram Nachkebia 75 Anniversary Collection of Works, Tbilisi, 2016, 150.

[26] Comment to Criminal Procedure Code of Georgia, Tbilisi, 2016, 724.

[27] *Ivanidze M.,* Alternative Punishments, Trends of Liberalization of Criminal Legislation in Georgia. Tbilisi, 2016, 342.

[28] *Dvalidze I.*, Genenral Criminal Law, Punishment and Other Criminal-Law Outcomes of the Crime, Tbilisi, 2013, 72.

[29] Ibid, 73.

[30] Ibid, 72.

way.[31] "Re-socialization or correction implies such transformation of the offender's personality that he/she never violates the criminal law and respects the rules of human cohabitation." [32]

While the judges regard that the level of legal culture of the society is low, the society should undertake its own role in prevention of offences and promote law obedience among its members.[33] The above court decisions clearly show that where the court imposes unfair and unjust punishment, the society alone cannot play its role in crime prevention. Primarily, the court shall be the guarantor of just and lawful decisions and the imposed punishment shall be adequate for the committed offence, suitable to the personality of the offender and intended for re-socialization. "Imposing of punishment should not be based on the abstract idea of justice; it should be reasonable and, most importantly, the court should actually ensure implementation of the principle of punishment individualization." [34]

In imposing punishment, the court should not only ask the offender whether he/she agrees with the terms and conditions of plea bargain but explain to him/her the substance of imposed punishment. The judge should find out, whether the defendant understands the contents of punishment provided by the plea bargain and whether he/she is aware in legal outcomes expected in case of attempt of avoidance thereof. Only awareness is not sufficient. In accordance with Article 209 of Criminal Procedure Code of Georgia, the offender must agree with the punishment provided by the plea bargain, before giving his/her consent, it is necessary that he/she received information about punishment from his/her legal counsel and prosecutor and the judge, according to Article 212 of Georgian Criminal Procedure Code, shall examine, whether the offender understands, what is the punishment provided for by the plea bargain and only after this approve the latter. In such cases the judge should perform the controlling function. When the prosecutor negotiates with the defendant about the plea bargain, this is nothing but negotiations on punishment and in such cases the plea bargain is the means of enforcement.[35] And the defendant, to avoid imprisonment, accepts any punishment. "Prosecutor's authority to offer the defendant any measures of punishment allows him/her to influence the defendant and receive the confessionary statement from him/her."[36] The judges shall pay attention, whether the defendant's will is true and this should not be limited to formal hearing of oral consent.[37] Most of the offenders who were imposed community service learn about this type of punishment at Probation Bureau only while explanations should be provided by the prosecutor and legal counsel, at a time of concluding plea bargain, as well as the judge, at a time of issuance of the court decision. Some offenders state that they agreed to accept this type of punishment as they did not want to be in prison, As one of the probationers stated, "it is better than be in the cell and do nothing, a person should work, if a person is able to work, it is better to leave him/her and employ. In case of imprisonment, re-socialization is more difficult; people leave prison embittered, especially regarding how they are treated there."[38]

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[31] *Turava M.,* Criminal Law General Part, Doctrine of Crime, Tbilisi, 2011, 44.

[32] *Arsoshvili G.,* Re-Socialization of the Offender, Tbilisi, 2009, 6.

[33] *Shalikashvili M.,* Study of Alternative Punishment in Georgia, *Mzia Lekveishvili* – 85 Anniversary Collection of Works, Tbilisi, 2014, 96.

[34] *Lekveishvili M.,* Individualization of Punishment as Significant Principle of Punishment Application, Trends of Liberalization of Criminal Legislation in Georgia, Tbilisi, 2016, 194.

[35] *Shalikashvili M., Mikanadze G.,* Juvenile Justice (Textbook) Tbilisi, Pr., Str., 2016, 77.

[36] Ibid, 77.

[37] Guidance Proposals on the Form of Criminnal Judgment, its Reasoning an Stylistic Accuracy, Tbilisi, 2015, 63.

[38] *Shalikashvili M.,* Study of Alternative Punishment in Georgia, Mzia Lekveishvili – 85 Anniversary Collection of Works, Tbilisi, 2014, 98.

5. Community Service and Principle of Proportionality

To find out, whether the applied punishment is proportional to the committed action, the legitimate purpose of the imposed punishment should be established. Proportionality is determined based on the correlation between the purpose and means.[39]

Principle of proportionality is well defined in Article 7 of Juvenile Justice Code stating that Measures applied against minors in conflict with the law shall be proportionate to the acts committed and appropriate for their personal needs, their age, and their educational, social and other needs.

Principle of proportionality requires that not only the type of the applied punishment but also its measure shall be proportional to the committed action. European Court recognized this principle as the universal one, for applying of punishment.[40]

Principle of proportionality is frequently violated in the decisions made by the local councils of the Ministry of Corrections, where the convict's remained imprisonment term is replaced by the community service. By the decision of 10 December 2009 of Gori District Court, E.A. was found guilty in committing crime provided by Subsection "a", Part II, Article 260 of Criminal Code of Georgia and he/she was sentenced to deprivation of liberty for the term of 12 years, 11 months and 27 days. Punishment term commenced on 18 August 2009. According to the resolution of 12 February 2013, based on amnesty, term of his imprisonment was finally reduced to 6 years. Term of his imprisonment had to expire on 18 August 2015. By the decision #05/13/K/Z-005 of 23 November 2013 by the Permanent Commission of the Ministry of Corrections of Georgia, remained part of the imprisonment term was substituted by community service – 3155 hours. Permanent Commission multiplied 1 year, 8 months and 26 days, equaling to 361 days by 5 hours and obtained 3155. Though even 3155 hours of community service is indeed better than spending of the term in prison, it should not be of stigmatizing nature. 3155 hours of work can impact the offender severely and for him, it would be much better to be released on parole and attend Probation Bureau once per week while community service is regarded as proven punishment promoting rehabilitation and re-socialization, compared with any other types of punishment. Here, the main problem is calculation. Absence of the upper limit allows the local councils to set excessively long term of community service resulting not in re-socialization but rather in stigmatization and impacts severely the offender.

Such cases are frequent in the practice of local councils. By the decision No 02/14/SH-063-13 of 29 May 2014 of Local Council of Eastern Georgia convict K.N.'s remained term was substituted by community service for 1690 (one thousand six hundred ninety) hours. By the decision #05/13/K/Z-006 of 23 November 2013 by the Permanent Commission of the Ministry of Corrections of Georgia, Nn. Gh.'s remained part of the imprisonment term was substituted by community service for 2370 (two thousand three hundred seventy) hours.

All above decisions state that the council, in making decision, has relied on the criteria (nature of the offence, the offender's behavior in the period of imprisonment, effects of the offender's past offences, criminal record, family conditions and offender's personality) established by Article 13 of Order No 138 of 19 October 2015 of the Minister of Corrections on Approval of the Number of Local Councils of the Ministry of Corrections, Territorial Jurisdiction and Typical Statutes of Local Councils". This is not grounding of the decision. The council must state the results of assessment of the specific criteria to judge, whether they were released from the custody justly. Similar to the court decision, the one of the local council shall be well grounded to establish, whether it was lawful and fair or not.

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[39] *Tskitishvili T.,* Proportionality for Punishment, Trends of Liberalization of Criminal Legislation in Georgia. Tbilisi, 2016, 502.

[40] *Jishkariani B.,* European Criminal Law within European Union, Tbilisi, 2013, 85.

In these specific cases, excessively long term of the community service is much more problematic than grounding. All mentioned cases show that establishment of standards is needed at the legislative level to prevent excessively long terms of community service. In addition to the standard, the upper limit shall be established for local councils. For example, according to Article 59 of Criminal Code of Georgia In the case of recidivism, term of imprisonment imposed as a final sentence may not exceed 30 years even if the sum is 32 years. In the case of cumulative sentences, the term of imprisonment imposed as the final sentence may not exceed 35 years even if the sum is 40 years. Similarly, the maximal term should be stated for local councils irrespective of the remained term of punishment.

Where the plea bargain allows imposing of community service for the term exceeding the upper limit, there is a high probability that the principle of proportionality will be violated. Member of local council, judge, prosecutor, in making decision on imposing community service should ask themselves, whether they would be able to provide public service without any payment for 800 hours and whether such unpaid work would have any positive impact on them. Where the offender is juvenile, whether their minor children would be able to work for 300 hours without payment and whether effect of such work would be positive? For the minors, 300 hours of community service is regarded as task that cannot be fulfilled regarding their psychical nature.[41] And 3000 hours of community service is a humiliating punishment for any individual. Work without any wages and vacations for 2 years is indeed very harmful. At the institutions of confinement people lose their skills and motivation, frequently they are irritated, are aggressive and excessively sensitive and this complicates their integration.[42] After being at the institutions of confinement they require delicate treatment, to facilitate their adaptation to the new environment and integration in the society but instead, they have to work for 3000 hours without any payment. Deprivation of liberty is the most severe punishment but regarding that at the institutions of confinement the offenders' subculture and values change and after release they lose self-confidence and are unable to deal with their problems[43] and in addition, they have to be engaged in community service without any payment, the desire of the repeated offence and return to the institution of confinement may emerge.

Article 17 of the Constitution of Georgia ensures protection of personal dignity and limits the activities of the state and binds it. This implies that the punishment must be adequate regarding the severity of crime and guilt.[44] Community service shall not humiliate human dignity. The fact that a person gas committed the crime does not mean that he/she has lost dignity. Humiliation of dignity is not only imposing of the humiliating work. Excessively long term of community service can be regarded as humiliating and degrading, similar to the content of the work and form of its fulfillment.[45] Regarding that such labor is not subject to payment in case of imposing of such punishment, applying excessively long term of community service means placing an individual into unbearable situation and this, as such, is degrading and humiliating human dignity. "Degree of an individual's humiliation should not exceed the extent that co-exists with any punishment imposed by the court. Public attitude towards humiliating nature of any punishment should be taken into consideration; though this is not decisive and the victim's perception, his/her personal attitude can be deemed sufficient for regarding the punishment as "humiliating". [46] Plea bargain limits the judge's

[41] *Shalikashvili M., Mikanadze G.,* Juvenile Justice (Textbook) Tbilisi, Pr., Str., 2016, 144.
[42] *Shalikashvili M., Mikanadze G., Khasia M.,* Penitentiary Law (Textbook) Tbilisi, 2014, 472.
[43] Ibid, 472
[44] *Kublashvili K.,* Fundamental Rights, Tbilisi, 2014, 88.
[45] Comment to the Constitution of Georgia, Chapter Two, Citizenship of Georgia, Human Rights and Freedoms, Tbilisi, 2015, 120.
[46] Ibid, 120.

ability to prevent imposition of community service over 800 hours and the judge who must administer justice, signs the document humiliating human dignity. Order of calculation of the unpaid labor term by the decision of local council is absolutely inadequate, resulting in humiliating lasting for years, impacting severely the offender, with actual danger of harm to health, undermining psychological stability and finally, instead of prevention, stimulates further offences while the main substance of such punishment is that the community service was beneficial for both, the community and the offender, by his/her re-socialization and rehabilitation.

6. Place of Community Service

In Georgia community service is understood directly, implying that it shall be necessarily performed at public institutions. Currently, in Georgia, most convicts are engaged in municipal services, cleaning and greening services or at the churches and monasteries, performing certain construction works. Comment to the Criminal Code of Georgia explains that "community service is performed normally at the public institutions (city hall; local councils; companies that are legal entities of public law). Work may include performing work of assistant at cleaning service, assistance to the cooks at the assisted care facilities etc."[47] Though this is about isolation, in case of punishment, enforcement is provided similarly and the difference is only the legal outcomes.

It is impossible that the convict or isolated subjects were always employed at the municipal or public institutions as such services are very scarce in Georgia while application of community services expands every day. This is confirmed by the practical experience of the probation officer – "there are many problems, when I instructed to arrange community service there always is a problem, where to employ the offenders, in many cases they are rejected and we have to beg to employ them to deal with this problem. It would be good if there existed guaranteed jobs.[48]

I regard that community service does imply that the community received direct benefits from it. The outcomes should be useful for the society. In case of employment with the private company, the convicts and isolated subjects can acquire certain professions, crafts and their re-socialization will be provided. Is not this good for the society?! If the benefits are to be direct for the community, the private organization that have won the city cleaning tender is the convict and isolated subjects perform similar works at this organization and municipal cleaning service?! The main emphasis should be made on re-socialization, correction, crime prevention; it should be also taken into consideration that of the person employed in such organization works well, he/she will have the opportunity to receive the employer's offer and in case of desire, be employed at paid job with the same organization, thus ensuring stable income for him/her and his/her family. Main purpose of community service is that the convict elaborated skills required for living independently. After completion of punishment he/she should be able to live in the community without committing any further offences. Re-socialization serves to the community as well, as it is interested that the recidivism did not take place.[49] This means that re-socialization is effective where labor is adequately recognized. Recognition does not mean financial aspect rather it implies demonstrating and providing understanding of the priorities of regular job to the convict, as the available and noticeable benefit, which can be gained after completion of punishment, in the period of honest life, free of offences[50] relying on

[47] Comment to the Criminal Procedure Code of Georgia, Tbilisi, 2015, 489-490.
[48] *Shalikashvili M.,* Study of Alternative Punishment in Georgia, *Mzia Lekveishvili* – 85 Anniversary Collection of Works, Tbilisi, 2014, 102
[49] *Schvabe I.,* Decisions of German Federal Constitution Court, Tbilisi, 2011, 215.
[50] Ibid, 216.

the skills and experience gained in the period of community service. Therefore, the place of community service should not be limited to the public institutions only; they should be employed with the private entities as well where specific activities are not based on certain professional skills as "sense that a person is not necessary, especially in such society where individual person's value is mostly dependent on his/her professional activities, may result in moral trauma. All this is particularly heavy in case of long-term unemployment, when finding of job is particularly hard and hence, they have fewer opportunities to get employment."[51]

One more significant issue related to the profile and status of the employer organization is religious associations and religious organizations.

On 12 March 2010, Main Prosecutor's Office of Georgia, Ministry of Corrections and Patriarchy executed Memorandum on Cooperation. According to Section 1.1 of the Memorandum the parties agreed to employ the convicts at churches and monasteries in case of application of community service.

One of the NGOs criticized this cooperation, stating that: "1. This agreement is discriminative and preferences are given to the Orthodox Christian Church and 2. Whether work at the churches and monasteries and not participation in social activities arranged by the churches can be regarded as community service." [52]

Regarding that this Memorandum was made when the type of community service, its place and duration was set by the court, by virtue of the Memorandum, that does not create any legal outcomes, the court could not set any monastery as the place of punishment. After amendments of 11 March 2011, Probation Bureau may, without the said Memorandum, make agreement with any eparchy of the Patriarchy of Georgia and employ the convict at construction or area improvement works at church. In addition, according to the Memorandum, term "service" is not used in religious sense. Here community service is understood similar as elsewhere. Advantage of employment at the churches and monasteries is that in conversations with the ecclesiastic men the offender better understands the negative outcomes of the offence. He/she has the opportunity of mental development and this is certainly very important for re-socialization.

The subject of critic was also that as though the Memorandum was discriminative for the representatives of the other religious confessions. The Memorandum does not create any legal obligations and in addition, if any of the offenders expresses his desire to work at construction of the mosque, Probation Bureau is entitled to make relevant agreement and the offender will be employed without any memorandum.

As mentioned above, the main thing is offender's re-socialization and if this takes place by his/her employment at any religious organization, this absolutely acceptable for both the state and society.

At international level, there are no any restrictions, with respect of employment place and employer's profile. In New Jersey a person adjudged to community service may be employed at the public institution, as well as private non-entrepreneurial, non-profit organization.[53]

Community service includes performing of various tasks, in USA the list of such works is quite long and includes: cleaning of the parks and gardens, attending of education programs and preparing presentations dealing with negative aspects of crimes, explaining to the school students why drunk driving is dangerous, employment at the enterprises, performing repair works, clear the walls from drawings, work for charity, learn law, be children's tutor, work at construction works in poor urban districts, assist the elderly, take care of animals, at shelters, participate in operations of the emergency medical service and rescue

[51] *Schvabe I.,* Decisions of German Federal Constitution Court, Tbilisi, 2011, 316.
[52] See <https://emc.org.ge/2014/02/25/sazogadoebisatvis_sasargeblo_shroma/>.
[53] *Abadinsky H.*, Probation and Parole, Theory and Practice, NY, 2009, 336.

services, take care about city improvement, clear the leaves and mow the lawns, clean the windows, clear entrances, install and dismantle the Christmas decorations, work at organizations informing about breast cancer cases, work for water conservation.[54]

Type of work shall not be related to the main business of the convict, otherwise this would not be effective, in psychological respect. It is possible that the offender worked in his/her profession as community service but it is necessary that this was unpaid.[55]

7. Conclusion

Finally, it should be noted that due to the reforms implemented in the recent years Georgia makes significant steps with respect of development of the sanctions and alternative measures. More efforts are required to ensure implementation of the norms with due regard to the country's mentality and legal structure. At the same time, innovations should be introduced with long discussions. "Non-custodial measures should be used in accordance with the principle of minimum intervention." [56]

Community service should obtain greater load. Private sector should be actively involved in exercising of this process. The state, on its side, should stimulate the employers participating in this process and offer them certain tax exemptions.

State should make statistical reports about benefits of community service to calculate the savings via such measures so that their effectiveness was clearly seen by the society, municipal services. As a result of survey in Essex, England, in year 2013, the individuals on whom community services were imposed, have performed work for £2.000.000 and for 5-year period, up to 2013, inclusive, Essex has saved £12.000.000.[57] And saving of the state expenses positively impacted socioeconomic status of the population.

The state should orient its efforts to improvement of the legal norms and limit hours of community services – set strict upper limit and do not allow the prosecutor's office to impose community service for excessively long term inn case of plea bargains. State should revise the authorities of local boards of the Ministry of Corrections and set the upper limit of community service time for the boards. Absence of upper limit allows the state authorities to act deliberately in the sphere of human rights and "deliberation automatically implies humiliation of human dignity as the highest principle of constitutional order, rule-of-law state and other constitutional principles; violation of human rights and fundamental freedoms against constitution."

In all cases of application of such measures the court shall evaluate the health status of a person and examine whether preventing circumstances exist.

National Probation Agency should develop cooperation with the private enterprises to expand employment scopes, provide actual opportunity of employment to the offenders that, undoubtedly, would contribute greatly to re-socialization.

State should ensure wider application of such measures to both, adults and juveniles, regard offences committed by the latter as actions resulting from their immaturity and provide to them opportunity of reparation of damages caused to the society, with their work.

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[54] See <http://pja.gov.pk/system/files/Probation.pdf>, 7.
[55] *Dvalidze I.*, Genenral Criminal Law, Punishment and Other Criminal Law Outcomes of the Offence. Tbilisi, 2013, 49.
[56] Handbook on Basic Principles and Promising Practices on Alternatives to Imprisonment, UNODC, NY., 2007, 26.
[57] Journal, Essex Probation, Cutting Crime, Protecting the Public, Working in Partnership, Witham, 2013, 12 -13.

Maia Kvirikashvili*

Witness Coaching by a Prosecutor

The Article touches the rule of admissibility of communication of the Prosecutor with the witness in view of his/her preparation for the trial and the line between coaching and preparation of the witness by the prosecutor. The Code of Criminal Procedure fails to regulate the hereof issue and thus, allows interpretation of the parties of the criminal proceedings. The Article analyzes the degree of compliance of the witness preparation by the prosecutor with the principles of equality and adversarial principle between the parties of the criminal proceedings, provides the mechanisms for risk prevention not to allow coaching of the witness by the prosecutor prior to testimony turning into coaching and hence, the Article provides proposals in view of regulation of the hereof issue on the legislative level.

Key Words: *witness, preparation of the witness, coaching of the witness, adversarial principle and preparation of the witness, communication of the prosecutor with the witness, admissibility of communication with the witness, communication rule.*

1. Introduction

The Criminal Procedure Code of Georgia [1] (hereinafter referred to as the CPCG) fails to provide the hierarchy of evidences according to their prevalence. Testimony of the witness is one of the types of evidence; however there is no criminal case where the state prosecutor has not obtained the testimony of a witness in capacity of one of the evidences to confirm the culpable actions of a person. According to the testimony of a witness, as deriving from importance of one of the most relevant evidence types, the method of obtainment of testimony from a witness was long enough the subject of discussions as amongst the scientific circles so amongst the legislators. Finally, on February 20, 2016 the rule was enacted envisaging obligation of a witness to give testimony to the Court and upon investigation and the method of voluntary provision of information within interrogation to the prosecutor. The hereof legislative change aimed at exclusion of usage of a testimony obtained from the witness by means of any type of pressure thereto by the representatives of the investigative bodies at the stage of Court consideration, restriction of the witness upon testifying to the Court with the testimony given during investigation and moreover, intimidation thereof with criminal responsibility for giving conflicting testimony. However, the issue was any way put to agenda in practice whether the prosecutor is allowed of any type of communication with the person voluntarily interrogated at the investigation stage and subject to be interrogated in the Court in capacity of the witness of the prosecutor, prior to interrogation; what is the possibility, form and scopes of communication between the witness and the prosecutor to prevent any doubts about possible pressure on the witness by the prosecutor. The hereby Article aims at, though analyzing the practice of the countries of adversarial system of jurisdiction of criminal law, answering the hereof questions and submission of respective recommendations.

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[1] Law of Georgia on "Criminal Procedure Code of Georgia", the Legislative Herald of Georgia 31, 03.11.2009.

2. Admissibility of Communication with a Witness

The reform of the Criminal Procedure Code of Georgia since 2004 has finalized with adoption of the new Criminal Procedure Code by the Parliament of Georgia on October 9, 2009. The Institutional changes have been introduced to the Criminal Procedure Code. From the principles of inquisitional (continental) law, the Criminal Process has been transferred to the system of the common (adversarial) law. The Criminal Procedure Code aimed at establishment of a system based on the adversarial, publicity, equality of arms, direct examination of evidences, respect of rights of a accused person and other progressive principles. Hence, criminal proceedings should be implemented within the adversarial process.

The key element of the adversarial process is the principles of "equality of arms", envisaging all the parties of the process to be equipped with equal opportunity to introduce their case, as actual so legal issues and to have equal possibility to submit their comments/express counter opinion to the issue raised by the opponent/adverse party.[2]

Besides, "the key elements of the adversarial principle are as follows: dissociation of the functions of the parties; adversarial principle as on the Court so on the investigation stages; right of the parties on obtainment of evidences; equality of arms to submit own evidences and the right to examine the evidences of the adverse party".[3]

Thus, the function of the state prosecution has been defined to be obtainment and submission of the evidences to the Court within the adversarial principle to, beyond the reasonable doubt, argument culpability of a person.

The testimony of a witness is one of the types of the evidence - the information provided by a person concerning the circumstances of a criminal case. True that the procedural legislation fails to envisage the hierarchy of the reliable and authentic evidences according to their form, the testimony of a witness still remains obtainable in the criminal case and thus, the most common evidence.

The prosecutor in the Court is a state accuser imposed with the burden to prove the accusation. The prosecutor, in view of confirmation of a crime, shall introduce the evidences and the hereof obligation at that shall be implemented with high professional quality and responsibility.[4] Introduction of evidences by a prosecutor implies submission thereof to the Court in due procedural form and within due terms, definition of sequence thereof, visual representation (especially if the case is considered by a jury) to facilitate to understanding of complicated legal issues. And testifying by a witness of a prosecutor is an integral part of this very process as submission of one of the evidences.

The CPC of Georgia does not provide communication either with the witness of a prosecutor or with the witness of a defense prior to testifying in the Court and especially, the rule of communication. The hereof issue has become disputable on November 16, 2015 in Tbilisi City Court upon essential hearing of the case against the employees of the Ministry of Defense of Georgia. Namely, the witness has declared that he/she met with the prosecutors prior to the trial and has been through "rehearsal". In opinion of the Public Defender of Georgia, consideration of the case circumstances with the witness prior to the interrogation at

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2 *Wasek-Wiaderek M.,* The Principle of "Equality of Arms" in Criminal Procedure under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries, 2000, 23.

3 The Collective of the Authors, *Giorgadze G.* (ed.), the Comment to the Code Criminal Procedure of Practice of Georgia, Tbilisi, 2015, 85.

4 The Decree of the Prosecutor General of Georgia of June 19, 2006 №5 on "Endorsement of the Code of Conduct for the Employees of the Prosecutor's Office of Georgia", Article 10, part 1.

the Court contradicts with the rule established under the Law on Interrogation of a Witness and breaches the right of the convicts on fair trial inasmuch as they never took part in this process.[5]

The hereof issue is the subject of legal discussions even in the countries with the adversarial justice. The Department of Appeals of the Supreme Court of the State of New York in re People v. Liverpool, where the lawyer put the issue under dispute that the prosecutor made the witness through improper instruction to "clean" the report of a policeman upon testifying from the problematic parts, the Court has elucidated to the jury that there was nothing wrong in communication of a prosecutor with a witness prior to the trial.[6]

"Preparation of a witness by a prosecutor is considered to be an ethical practice. The behavior shall be considered unprofessional if a witness is not prepared for testifying prior to the trial. Preparation of a witness under the Code CriminaL Procedure is an important and unalterable process allowing the prosecutor achieving the outlined goals upon seeking for justice".[7] "The prosecutor can introduce the examples to the witness about what types of issues the cross-interrogation he/she can be subject to".[8] This practice will encourage the witness to acknowledge the expected trial, to voluntarily appear to the Court and give testimony.

Under the Procedural legislation of Georgia, non-regulation of the rule of communication with the witness prior to the trial does not imply inadmissibility of communication with the witness of a prosecutor prior to the Court considerations. The prosecutor shall be granted the right to communicate with the witness prior to the trial (similar right is envisaged for the defense in regards with own witnesses) if the hereof communication aims to enable the witness prior to the Court to recall the circumstances, refresh memory in regards with the information given to the law-enforcement agencies and to be prepared for the Court.

"Meeting of a prosecutor with own witness in view of prepare thereof for the trial shall not be equalized with improper coaching of a witness. Moreover, [Anglo-American] Case Law provides that repeated hearing of the direct testimony of a witness is admitted in view of prepare of a witness for the trial".[9] The countries with the adversarial principle consider that "due preparation of a witness is an important method for the prosecutor and a witness to be prepared for the adversarial test. By means of close cooperation with the witness, the prosecutor is allowed 1) seeking for the truth in full, due and unbiased manner; 2) submitting truth in the form as he/she has become aware in the diligent, fair and effective form; and 3) protecting truth from discrediting and distortion upon adversarial attack.[10]

Thus, the prosecutor shall have the opportunity to meet with, speak with and prepare the witness of the prosecution prior to testifying in the Court. Preparation of a witness does not imply only refreshment of his/her testimony in his/her mind but provision thereof with the information about the rule of conduct in the Court, importance of his/her testimony, the course of the trial etc. The Witness-Victim Coordination Service set up at the Prosecutor's Office system of Georgia serves for support of the witness and the victim and coaching thereof, one of the functions of which, in view of increase of efficiency of communication with the Court,

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5 See in details the Report by the Public Defender of Georgia on the State of Protection of Human Rights and Freedoms in Georgia for 2015, 648, <http://www.ombudsman.ge/uploads/other/3/3512.pdf#page=16&zoom=auto,-121,792>, [seen 05.09.2016].

6 People v Liverpool, 262 AD 2D 425 (2d Dept 1999).

7 *Brittany R.C.,* Whose Line Is It Anyway? Reducing Witness Coaching by Prosecutars, Legislation and Public Policy, Vol. 18, 989.

8 Ibid, 990.

9 Nixon v. United States, 563, 1988, Smith V. Kelly, №7:07 cv 00536, 2008 wl 345838.

10 *Bennett L.G.,* Witness Coaching by Prosecutors, 23 Cardozo L.Rev., 2002, 834.

is provision of the witness with the detailed information about the Court-related procedures and about the rights and obligations of a witness.[11]

Thus, communication of a prosecutor with the witness prior to testifying in the Court is uniquely admissible (at least, the prosecutor shall hold the information about the intentions of the witness supporting his/her position to appear at the trial), as well as preparation of a witness is admissible in regards with the information given thereby at the investigation stage. However, this process shall not turn into the instructing at the extent that may possibly entail unlawful impact on a witness and modification of his/her testimony.

3. Margin Between Preparation and Coaching of a Witness

In line with the CPC of Georgia, the witness is a person who may know the data necessary for determination of the circumstances of a criminal case and at that, physical and mental state of which allows him/her properly acknowledging, remembering and restoring the circumstances, necessary for the case.[12] "The greater part of the scientists considers that memory is prone to mistakes and restoration and reconstruction of stored memories is a very fragile process. …memory, language, habits – as the cognitive factors – can have impact on accuracy and precision of testimony of a witness".[13]

Thus, it is important how the prosecutor conducts preparation of a witness. The method of interviewing can trigger the witness to fill the gaps in his/her memory, eliminate vagueness or contradiction, enhance language, make accents etc. At that, the witnesses of a certain category have high acceptability of the advices by the prosecutor, for instance minor witnesses.

The margin, lying between coaching and preparation of a witness is too fragile. "The prosecutor, upon preparation a witness, shall be careful not to cross the margin serving the starting point of coaching of a witness. The term "witness coaching" implies the behavior of a prosecutor, striving to change the attitude of a witness regarding particular events. The examples of coaching of a witness are to give the records to a witness to be used upon testifying, to tell a witness that if he/she fails to say so, the case will be lost, to coach witnesses together to ensure compliance of their testimonies".[14]

The prosecutor shall particularly not consider and resume the testimony of one witness with another. This rule, in general, derives from the procedural law of Georgia, prohibiting communication of witnesses prior to their testifying. Namely, the Article 118 of the Criminal Code of Practice of Georgia, envisaging interrogation of witnesses separately from the witnesses not yet interrogated. Besides, the Court shall prevent communication of the witnesses of one and the same case prior to accomplishment of interrogation. "…Consideration shall not be admitted between the witnesses. The Statement made by one witness and evidence provided shall not be introduced to another… The witness shall give testimony free of influence of any other person. This rule hopefully reduces all possibilities that the evidences provided by a witness will be influenced by another person and also equally excludes all substantiated perception or opinion that it may take place. This is the risk, accompanying witness preparation process".[15]

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[11] See the detailed information about the functions of the Witness-Victim Coordination Service on the web-site of the Prosecutor's Office of Georgia <http://pog.gov.ge/geo/witness>, [03,09,2016].

[12] See the Code Criminal Procedure of Georgia, the Legislative Herald of Georgia 31, 03.11.2009, Articles 20 and 50.

[13] See *Bennett L. G.,* Witness Coaching by Prosecutors, 23 Cardozo L.Rev., 2002, 833.

[14] See *Brittany R.C.,* Whose Line Is It Anyway? Reducing Witness Coaching by Prosecutars, Legislation and Public Policy, Vol. 18,989.

[15] R v Momodou & Limani (2005) EWCA Crim 177. §.61 (2005) <http://swarb.co.uk/regina-v-momodou-and-limani-cacd-2-feb-2005-2/>, [280.2016].

Thus, "the margin telling the witness preparation apart from improper training of a witness is not always clear".[16] The prosecutor, upon preparation a witness, shall aim at "reduction of anxiety of a witness regarding appearance at the Court, at making witness familiar with the respective processes and procedures which the witness perceives intimidating and at outlining of expectations of the trial process",[17] also, the witness shall as clear as possible provide the information available in due sequence in the Court and the hereof information shall not be at any extent altered or interpreted.

4. Mechanisms Protecting a Witness from Coaching

Interrogation of a witness by the adverse party upon the adversarial process is considered to be the "mean to put the version by the prosecutor about the occurred fact under doubt".[18] It means that cross-interrogation of a witness by an adverse party is considered as a protective mechanism allowing revelation of the circumstances putting accuracy of the testimony of a witness under doubt. In re Geders v. United States, the US Supreme Court has expressed the opinion that the masterly cross-interrogation is a vital protective mechanism, the guarantee to reveal improper coaching and training of a witness. The Court presumes that the margin between ethical training and unethical witness coaching is easy to be detected and the adverse party, upon interrogation of a witness, can reveal improper impact.[19]

However, other procedural mechanisms are necessary to exist to at maximal extent reduce likelihood of witness coaching by the prosecutor and at that, availability of the hereof mechanism will prevent substantiated appeal by defense regarding putting authenticity of the testimony of a witness on the hereof basis under doubt. The hereof mechanism implies existence of prior procedural rules and protection thereof.

Witness preparation shall be conducted in camera without video or audio surveillance and without procedural documentation as the witness coaching aims at creation of stress-free environment for the witness, encouragement of the witness for cooperation and video or audio surveillance may have negative impact on his/her attitude. At that, all these are related to excessive costs.

According to the opinion that "absence of the protocol reflecting witness coaching by a prosecutor facilitates to improper coaching as the hereof process thus appears to be concealed from the supervision of the Court and the Defense",[20] it would be preferable to conclude the document reflecting witness coaching by a prosecutor to provide the time, venue, objective and the context of the meeting. In terms of the context, the hereof document is not to be the protocol of investigative actions but to be a certain procedural document composed upon witness-prosecutor communication, which according to the current practice, shall be implemented prior to initiation of the Court consideration of the case or upon essential hearing of the case in the Court. The protocol of the meeting shall be signed by the both parties, also in the event of remarks regarding accuracy, the parties will be able to introduce the hereof remarks into the protocol. Obligation to compose a certain procedural document re-regulates unsubstantiated and purposeless communication of a prosecutor with the witnesses, which can as well be recognized as the leverage for influence on a witness. Besides, the hereof protocol shall serve the defensive document of the prosecutor and the evidence confirming non-coaching of a witness thereby.

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[16] See *Bennett L.G.,* Witness Coaching by Prosecutors, 23 Cardozo L.Rev., 2002, 830.

[17] Speaking to Witnesses at Court, Draft cpsp Guidance for Consultation, January 2015, 4, <https://www.cps.gov.uk/consultations/speaking_to_witnesses_at_court_responses.html>, [28.07.2016].

[18] Ibid.

[19] Geders v. United States, 425 U.S., 80 (1976).

[20] See *Bennett L.G.,* Witness Coaching by Prosecutors, 23 Cardozo L.Rev., 2002, 834.

Besides, the rule of witness-prosecutor communication and coaching shall necessarily be outlined in capacity of the guidelines. Availability of the hereof guidelines and existence of due retrained prosecutor re-regulate commitment of ethical misconducts due to the minor negligent behavior of a prosecutor inasmuch as often even the prosecutor may not clearly know his/her rights on providing a witness with a certain information. The best example of the similar guidelines is the Guideline developed by the Crown Prosecutor Service of UK in 2016 on "Conversation with a Witness in the Court". The hereof document aims at establishment of clear rules for the prosecutors about the ways of support the witness making him/her give the best testimony in the Court.[21]

5. Conclusion

Hence, the communication between the prosecutor and a witness, prior to testifying of the latter in the Court, is admissible and is in compliance with the equality of arms and adversarial principle inasmuch as the Defense is not prohibited from communication with the witness at any stage of case hearing.

Equality of arms implies the parties to be equipped with equal opportunities not to only provide evidences but to be prepared for provision of evidences. Thus, preparation of the witness by a prosecutor prior to testifying in the Court is an admissible and acceptable practice to ensure the witness being confident and informed about the rule of testifying in the Court providing the available information which may serve one of the important bases for enforcement of justice. However, witness training by a prosecutor shall not turn into coaching of a witness aiming at provision of the modified testimony by a witness as a result of influence by a prosecutor. In view of prevention of doubts about the communication with the witness by the prosecutor prior to testifying in the Court to allegedly have unlawful influence on a witness, the respective legislative changes to the Criminal Procedure Code of Georgia shall assign the prosecutor to compose the procedural document reflecting the communication with a witness. The hereof document will carry double meaning: first – restriction of unsubstantiated communication of a prosecutor with the witnesses, which can as well be recognized as an attempt of influence on a witness; and second – the hereof document will serve the protective document of a prosecutor himself/herself and the evidence confirming non-influence on the witness thereby.

At that, due to complexity of establishing clear margin between witness coaching and witness preparation, it is recommended to develop the detailed guideline regulating the hereof issue for the prosecutors to assist the state prosecution in exercise of their functions in professional manner and in prevention of any doubts regarding ethics of their behavior.

[21] The best practice can be the process of development of the Guideline by the Crown Prosecutor Service of UK, namely the hereof document has been uploaded on the web-site of the Crown Prosecutor Service in January, 2015 for public consideration allowing all persons concerned expressing own opinions and sharing experience. The current edition of the Guideline was published in 2016. See <https://www.google.ge/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwiTwpPSif3OAhXLOhQKHT2fDmQQFggtMAM&url=https%3A%2F%2Fwww.criminalbar.com%2Ffiles%2Fdownload.php%3Fm%3Ddocuments%26f%3D160627063558-SpeakingtoWitnessesatCourtguidance-Mar16.pdf&usg=AFQjCNHX_jY629D3oW5-WzUHUdMcFeGxAg&cad=rja>, [07.09.2016].

Lasha Panchulidze*

The Concept of Customs Value, Determination of its Essence and Amount According to the Note to Article 214 of the Criminal Code of Georgia

When the regulation of the goods transportation over the customs border is violated, it is extremely important to determine the customs value to mark off the administrative and criminal liability there is a specific limit, which the customs value of the goods has to exceed. In practice, often the customs value of the goods is often incorrectly evaluated. Usually, the tax authorities are inclined to raise the customs value of the goods. The customs value of goods is set beyond the criminal proceedings since the specific entrepreneur involved in the criminal proceedings who is accused of violating the customs rules, becomes the part of the criminal process, only after the customs value has been determined.

The article deals with the rules of determining the customs value under the current legislation and debates on what should be changed not to breach the defendant's rights granted under procedural legislation.

Key Words: *customs border, customs value, the transaction value, the transaction value of identical goods, he transaction value of similar goods, the unit price of goods, the computed value, the reserve method.*

1. Introduction

Determination of the customs value in the event of violation of the customs regulations is the main basis for definition of legal responsibility. The concept of the customs value is diversely perceived in the scientific material and practice and thus, it is necessary to discuss the issue in view of identification of the essence thereof.

In addition to the hereof, the customs control shall be implemented by means of certain methods, however practice of application of the hereof methods does not correspond to the principles of legal regulations. Definition of the customs value is of utmost importance for violation of the customs regulations as the customs value of goods shall exceed the specific limit set in order to dissociate administrative and criminal responsibility. Often, the customs value of goods is wrongly defined in practice. The Tax Agency tends to apply the methods increasing the customs value of goods, while the criminal legislation envisages all the suspicions to be solved in favor of the accused party. The customs value of goods is to be defined beyond the criminal proceedings and the particular entrepreneur participating in the criminal proceedings accused of violation of the customs regulations becomes the party of the process when the customs value of goods is already defined. Practice often provides when the investigative body has already defined the customs value of goods on the basis of the respective expert examination, though the Defense has held the alternative expertise at the stage of Court hearing revealing much less customs value. Taking the hereof into

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account, it is necessary to accurately define the customs value of goods by means of proposed new method of value definition, excluding reduction of the customs value already established upon implementation of the criminal proceedings.

Thus, the principles of selection of methods for establishment of the customs value are to be defined. We will consider each method severally. We will as well define the principles of the methodology in general. Identification of the principles will facilitate to effective legal regulation to prevent unlawful restriction of human rights and freedoms.

Hence, the objective of the work is to determine the essential elements, methods and principles of establishment of customs value.

The methods of comparison, deduction, analysis and synthesis are applied in the survey.

2. Concept and the Essence of the Customs Value of Goods

"The Customs value of goods is the price of goods upon crossing the Customs frontier of Georgia on which basis a Customs duty is computed".[1]

The Customs value of goods comprises the transaction price upon acquisition of goods, the cost of their transportation to the crossing point of the Customs frontier of Georgia, the loading-unloading, insurance, commission and brokerage charges[2], as well as direct and indirect license and other fees by the buyer for using intellectual property objects.

The person, conducting economic activity, upon import/export of goods to/from the economic frontier of Georgia, shall pay the State Budget tax. Definition of the amount of the tax payable by the entrepreneur requires establishment of the customs value. The following customs duties are computed from the customs value: import duties and VAT.

The customs value shall differ from the customs tariff. A Customs tariff is a systematized entity of Customs duty rates applicable to the imported to and/or exported from the Customs territory of Georgia goods.[3]

The main difference between the customs value and the customs tariff is the fact that the customs value is the price of goods, while the customs tariff is the duty payable to the state from the price of the hereof goods.

The concept of the customs value shall derive from the market value of goods upon crossing the customs frontier of the country, which is separated from the customs duties as the amount paid to the State Budget does not matter for violation of the customs regulations.

"Establishing a customs value of goods for the purposes of application of trade policy measures means the valuation of goods on the day of declaring thereof"[4]. Correspondingly, the prosecution, for the purpose of the Article 214 of the Criminal Code of Georgia (hereinafter referred to as the CCG), is interested in the value of goods, established upon implementation of an action. However, definition of the customs value of goods requires sundry methods. Sequence thereof has been established under the Tax Code of Georgia.

The customs value of goods upon declaring shall be determined by the declarant providing it in the customs declaration. The goods shall be declared by means of submission of the customs declaration in ver-

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1 See the Law of Georgia on "Customs Tariff and Customs Duty", Article 10.

2 See *Sandler G.L.,* Customs Valuation and Customs Enforcement, "Lawyer of the Americas", Vol. 11, Issues 2 3 (Summer/Fall 1979), 333, <http://heinonline.org/HOL/Page?handle=hein.journals/unmialr11&div=29&start_page=333&collection=journals&set_as_cursor=0&men_tab=srchresults>, [14.07.2016].

3 See the Law of Georgia on "Customs Tariff and Customs Duty", Article 2.

4 See Tax Code of Georgia, Article 213.

bal form or otherwise as stipulated under the law. The customs declaration can be submitted in electronic or written form. Verbal declaration is permitted in the event of passenger solely. It requires the passenger to express his/her will on import/export of goods at least in verbal form. The hereof action shall be considered as submission of the customs declaration.

The law does not dissociate the customs control regulations for imported and exported goods. In both events, the similar tax regulations are applied. Taking the fact into account that decrease of the customs value mostly serves for evasion from payment, the different limit shall be set upon export inasmuch as mostly expert is subject to taxation with zero percent rate.

There are six methods established for determination of the customs value of goods imported to Georgia.[5] The hereof methods are based on the Agreement on Application of the Article 7 of the General Agreement on Tariffs and Trade adopted by the World Trade Organization in 1994.[6] It is noteworthy that the Tax Code of Georgia, as well as the hereof Agreement adopted by the World Trade Organization, establishe the rules for determination of the customs value for imported goods solely.[7] As to the goods exported from Georgia or put to other commodity transactions, they are subject to application of the hereof rules regardless that the legislation does not envisage mandatory nature thereof. In view of determination of the customs value of goods, the methods shall be applied according to the sequence as follows. "Each following method shall be used in case the preceding method cannot be justifiably applied".[8] Exception is envisaged as the sequence of the fourth and the fifth methods.

3. Customs Proceedings

3.1. Filling the Customs Declaration

The Customs declaration shall be filled out by the Revenue Service, entitled to delegate authority to another person. For instance, inspection of the vehicles in capacity of goods and examination of the details (identification, marking, norm) thereof, entering Georgia under the regime of free circulation (import) of goods, subject to be registered by the Vehicle Registration Service at the Ministry of Internal Affairs of Georgia, shall be implemented with participation of the specialists of the hereof agency. The person is authorized to fill out the customs declaration. The Tax Code prescribes the concept of the enterprise and the organization while the concept of a person is provided from the Civil Code. "The person – natural person or legal entity in line with the Civil Code of Georgia, the enterprise or the organization in line with the Tax Code of Georgia".[9] The person shall fill out the customs declaration if declaring on own behalf and holding capacity to connect to the respective server of the Revenue Service and admission to "ASYCUDA" and/or "ORACLE".[10]

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5 See the Law of Georgia on "Customs Tariff and Customs Duty", Article 10.

6 See United States Customs United States Customs Service Appraisals: The Dutiability of Buying Agent Commissions - An Application of the Trade Agreements Act of 1979 , "Georgia Journal of international and Comparative Law", Vol. 19, Issue 3, 1989, 642, <http://heinonline.org/HOL/Page?handle=hein.journals/gjicl19&div=57&start_page=639&collection=journals&set_as_cursor=0&men_tab=srchresults>, [14.07.2016].

7 See *Wulf L.D.,* Determinants of the Contribution of Customs Duties to Budgetary Revenue in Less Developed Countries, 449, <http://www.jstor.org/stable/40911626?seq=1#page_scan_tab_contents >, [14.07.2016].

8 Tax Code of Georgia, Article 213.

9 Ibid, Article 8.

10 See the Decree of the Head of the Revenue Service №12858.

The owner of goods is entitled to appoint the proxy to on his/her behalf to fill out the customs declaration, which requires the power of attorney certified by a notary.

The Revenue Service shall control the correctness of the establishing the customs value of goods and in case it disagrees with the declared value shall establish such value itself.[11] Correctness of the customs value defined by the Declarant shall be controlled by the Tax Agency upon inspection of submitted customs declaration by means of the special software "ASYCUDA", which in case of significant discrepancies, notifies the Customs Agency regarding questionability of the customs value.

3.2. Documents to be Submitted upon Definition of Commodity Procedures

The transport document and the document certifying purchase of goods shall be submitted upon definition of the commodity procedures by the person. The hereof documents shall as well be attached with: the documents certifying representation in the event when the goods are being declared through a proxy.

The tax offense report or the administrative offense report, as well as the respective document certifying payment of an imposed fine shall be submitted to the Tax Agency upon occurrence of the tax or administrative offense to the declared vehicle. The hereof fact facilitates the Tax Agency to correctly define the customs value.

The following documents shall as well be on preliminary basis submitted (if any): the customs declaration, certificate, application; license/permit/certificate. At that, submission of the documents upon application of the export commodity procedures, is permitted with the seal of a declarant (if any) and signed and certified with copies.

In the event of export of black and/or non-ferrous metal scrap and/or black and/or non-ferrous wastes – the document certifying payment of service tariff.

The customs value shall be impossible to be defined without submission of the hereof documents inasmuch as the document certifying purchase of goods serves the basis for definition of customs value of goods and the document certifying purchase of goods shall be attached with the hereof documents. Goods shall be impossible to put within the import regime without the hereof documents.

Upon simplified fill out of the customs declaration, the entrepreneur enjoys the tax remissions, for instance on fruits and vegetables. The tax remissions as follows have been established under the Decree of the Head of the Revenue Service of 2011 N2284: the entrepreneur was entitled to remove his/her goods from the economic zone of registration of goods without payment of tax duties. The entrepreneurs should be notified regarding the liability thereof to pay the duty within the term of 05 days upon removal of goods from the economic zone of registration of goods. The absolute majority failed to pay the duty. The hereof event shall not be considered as an offense under the Article 214 of the Civil Code of Georgia as the hereof persons deceptively removed the goods without intention to pay the duty. The Article 214 of the Civil Code of Georgia fails to provide regulations regarding similar deception.

According to the disposition of the Article 214 of the Civil Code of Georgia, the objective part of an offense envisages deceptive usage of the document or identification mean. Deceptive usage implies submission of inaccurate false documents to the economic zone of registration, submission or illegally adopted, filled and certified document.[12] In this event, we do not deal with the usage of false or illegally ad-

[11] See *Togan S.,* Effects of a Turkey-European Union Customs Union and Prospects for thefuture, 9, <http://www.jstor.org/stable/27749536?seq=1#page_scan_tab_contents>, [14.07.2016].

[12] See *Lekveishvili M., Todua N., Gvenetadze N., Mamulashvili G.,* The Comments to the Private Part of the Criminal Code of Georgia, Vol. 2, Tbilisi, 2011, 496.

opted, filled or certified documents. In terms of the documents, no offense is envisaged. The entrepreneurs shall not pay the duty. The Article 218 of the Civil Code of Georgia envisages responsibility for deliberate evasion from payment. In this event, we deal with the objective part of the hereof offense, however the disposition of the Article 218 provides preference term of 45 days upon submission of the tax notice. The entrepreneurs were not provided with the tax notice but the notification instead granting the term of 05 days to pay the duty, due to which the disposition of the Article 218 is not as well obvious.

3.3. Accomplishment of Inspection of the Customs Declaration

The decision on release of goods shall be made through conference of an valuation number to the customs declaration. The barcode shall be automatically conferred to the customs declaration along with the valuation number. In the event when due to technical or other grounds, automatic conference of a barcode to the customs declaration appears to be impossible, accomplishment of registration shall be confirmed with the Stamp of the authorized employee of a Tax Agency – "Release Admitted", with the Seal providing the personal number (in the event of customs clearance zone), with indication of a date and signatures.

Upon detection of the signs of an offense in the course of clearance of goods, the employee of a Tax Agency shall notify the superior regarding the hereof fact. Deriving from urgent necessity, the Tax Agency, in view of undertaking the procedural measures, is entitled to refer to the Investigation Service of the Ministry of Finance of Georgia. The case material shall without delay be submitted to the respective investigation agency according to subordination and the Tax Agency shall make the decision on suspension of the procedures of clearance of goods. In the event when clearance of goods is suspended, the Tax Agency is empowered to define the customs value on the basis of the respective expert examination.

4. Methods of Definition of the Customs Value of Goods

4.1. Method of the Transaction Value

The customs value of goods shall be defined with the transaction value, that is the price actually paid or payable for goods if:

Sale or the price of goods is not related with any condition or circumstance estimation of which (definition of value) is impossible in regards with the value of goods. In the event if definition of value of such a condition or circumstance is possible, the hereof value shall be recognized as indirect payment by a buyer and correspondingly, shall be considered as the part of actually paid or payable price;[13] relevantly, if the Tax Agency appears capable to define the condition, it is entitled to impute the hereof condition to the transaction value.

Upon defining the customs value of imported goods, the transaction value shall be added to the costs as follows under the condition that the hereof costs have actually been incurred by the buyer but they have not been imputed to the transaction value:

a. Commission and brokerage charges other than the commission charges incurred for purchase. Commission charges for purchase – these are the commission costs paid by the importer to his/her agent in exchange for the service rendered for purchase of the goods subject to valuation;

[13] See *Wulf L.D.,* Determinants of the Contribution of Customs Duties to Budgetary Revenue in Less Developed Countries, 449, <http://www.jstor.org/stable/40911626?seq=1#page_scan_tab_contents >, [14.07.2016].

b. The price of the containers considered for import purpose in aggregation with the imported goods. In the event, if such container is reusable, the value thereof with the demand of the declarant, shall be pro rata distributed to the valuated goods by means of the international accounting standards; the value of the container shall be distributed pro rata to each import. For instance: containers valued of 1000 GEL per 10 imports shall be distributed as follows: 100 GEL of the container shall be added to each imported goods;
c. The cost of packing of goods, including the labor and the packing material.

The value of goods and services, subject to be included into the customs value, shall be defined at the price paid by the buyer for acquisition thereof. In the event, if the goods are produced by the buyer himself/herself, the price thereof shall be defined on the basis of the accounting documents of the buyer. It is the event, when the buyer exported goods abroad to be used by a foreign company for manufacture of the final product. Upon import of the final product to Georgia, the person and the Tax Agency shall be entitled to apply the accounting documents of the Georgian company in view of definition of the customs value. Although, in this event the final product is not the goods manufactured by a buyer but these documents will facilitate the Tax Agency to define the customs value. The hereof documents shall provide the quality and the material of the product and the purchase price thereof.

Upon defining the customs value of goods, the transaction value shall be added with the value of the part of profit directly or indirectly appurtenant to the seller upon every resale, disposition and usage of goods.[14] For instance, the Georgian limited liability company bought 10 tons of flour at the price of 10 000 GEL provided to resell the goods to the third party at the price of 13 000 GEL within the current year and to pay 10% of the over-sold price – 1 300 GEL to the initial buyer. In this event, the initial transaction value constitutes 11 300 GEL (10 000+1 300).

4.2. Method of Transaction Value of Identical Goods

Identical goods are the goods, compared to the valuated goods, including the physical specifications, quality and reputation, are similar and originate from one and the same country. Minor superficial differences shall not impede to recognition of goods as identical if with other specifications they correspond with the hereof definition.[15]

The minor superficial differences shall imply the differences as follows:

a. Difference in sizes (for instance, shoes of sizes 41 and 43 shall be considered as identical if all other parameters thereof are identical);
b. Difference in labeling (for instance, the label material - paper or cardboard, used polygraph or label design);
c. Difference in colors (for instance, the data is submitted concerning two operations of dresses imported to Georgia, manufactured in one country, fabricated with one and the same silk of 100% according to one and the same model, but are of various color and size. At that, in one case the dresses have the mark of a famous designer and in another case they do not. In view to decide whether the dresses are identical, it is important to take the fact into account that the trademarks impact on the reputation of goods on the market inasmuch as the mark of a famous designer defines

[14] See *Wulf L.D.,* Determinants of the Contribution of Customs Duties to Budgetary Revenue in Less Developed Countries, 450, <http://www.jstor.org/stable/40911626?seq=1#page_scan_tab_contents >, [14.07.2016].
[15] See *Wulf L.D.,* Determinants of the Contribution of Customs Duties to Budgetary Revenue in Less Developed Countries, 450, <http://heinonline.org/>, [05.11.2015].

another market segment for goods and correspondingly, converts it into the goods with higher value. Hence, the hereof dresses shall not be considered as identical.

In the event of impossibility to define the customs value of imported goods according to the transaction value, the transaction value of the identical imported goods shall be considered as the customs value of goods, which have been sold in Georgia in export view and have been exported the same or almost the same time as the goods subject to valuation have been sold.[16] "Same or almost same time" implies that the difference between the export date of the identical goods and export date of the goods subject to valuation does not exceed 30 calendar days as 30 days prior to export so 30 days after export.

The transaction value of goods produced by another person shall be taken into account solely when no data about the transaction value of the identical goods produced by the same manufacturer is available.

In the event, if the Tax Agency detects one or over transaction values for identical imported goods, the lesser shall be applied upon definition of the customs value of goods.[17]

4.3. Method of Transaction Value of Similar Goods

Similar goods shall be the goods that are not specifically valuated and have one and the same country of origin, similar characteristics and are composed of similar components that enable them to perform the same functions and be commercially substitutable.[18]

In view to determine whether the goods are identical to the goods subject to valuation, we shall analyze the parameters and characteristics as follows:

a. Physical specifications:

a.a. size and color;

a.b. technical and other characteristics (degree of complexity, quality and accuracy of processing);

a.c. methods of manufacture;

b. Integral components:

b.a. used material (glass, plastic);

b.b. black, ferrous or precious metal;

b.c. textile or paper etc.

c. Functions:

c.a. functions to be exercised by the goods subject to valuation and comparison;

c.b. sphere of utilization thereof;

c.c. possibility of implementation of the same functions;

d. Substitutability in commercial terms, namely whether the buyer accepts one type of goods instead of another (as taking the functions of goods, so commercial characteristics into account). At that, we shall take the quality of goods, reputation thereof on market and the trademark into consideration.

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[16] See *Charles E.,* Rationale of Valuation of Foreign Money Obligations, "Michigan Law Review", Vol. 54, Issue 3, 312, <http://heinonline.org/HOL/Page?handle=hein.journals/mlr54&div=26&start_page=307&collection=journals&set_as_cursor=0&men_tab=srchresults>, [14.07.2016].

[17] See *Sandler G. L.,* Customs Valuation and Customs Enforcement, "Lawyer of the Americas", Vol. 11, Issues 2 3 (Summer/Fall 1979), 333, <http://heinonline.org/HOL/Page?handle=hein.journals/unmialr11&div=29&start_page=333&collection=journals&set_as_cursor=0&men_tab=srchresults>, [14.07.2016].

[18] See Tax Code of Georgia, Article 18.

For instance, we have the consignments of two tires of the same size. The tires are manufactured in one country by two different manufacturers. At that, both types have own (different) trademarks. Besides, tires of both manufacturers enjoy high reputation on Georgian market as their production is manufactured according to the similar standards and correspondingly, the productions have the similar quality. Both types of tires are sold on Georgian market. Let's consider whether they shall be considered as similar goods for the purpose of definition of customs value thereof. Despite that the tires shall not be considered utterly similar (the fact solely that they have different trademarks is the basis for non-consideration thereof as identical), taking the fact into account that the tires are produced according to one standard, implies that they are produced out of the same components, have the same quality and capability to exercise the same functions. Hence, the tires shall be considered as similar in view of definition of the customs value thereof.[19]

4.4. Method of Unit Price of Goods

In the event, if identical or similar goods subject to valuation are sold in Georgia in the same commodity form (unaltered), as they were imported to Georgia, the customs value of goods subject to valuation shall be defined according to the price of the unit of goods, at which the identical or similar goods subject to valuation have been sold to the persons in the highest total amount the same or almost the same time as import of the goods subject to valuation upon the first sale after import. "Imported goods" are the goods subject to valuation, the customs value of which shall be defined. "Identical goods" and "similar goods" shall be considered as they are elucidated in the above-mentioned articles. "Goods of the same class or type" are the goods, which according to the basic specifications are similar to the imported goods. They shall be at maximal extent approximated to the characteristics of imported goods and shall be attributed to the small group of the types, sequence and nomenclature of imported goods. At that, the goods shall be considered as of the same class or type, imported as from the countries of imported goods so from other countries.[20]

However, upon definition of customs value according to the unit price method of goods, the following shall be deduced from the value:

1. Commission charges, which ordinarily are subject to be paid or preliminarily agreed to be paid, or markups, which ordinarily are implemented in view of earning the profit and covering the costs related to sale of goods of one and the same class or type in Georgia; goods of one and the same class or type are the goods, which according to the main characteristics, are similar to the goods subject to valuation. They shall at maximal extent be approximated to the characteristics of the goods subject to valuation and shall be attributed to the small group, sequence and nomenclature of the type of goods subject to valuation. At that, the goods shall be considered as of the same class or type, imported as from the countries of imported goods so from other countries.[21]
2. Ordinary costs for transportation and insurance incurred in Georgia and other related expenses;
3. Duties and other charges stipulated under the legislation of Georgia related to import or sale of goods;

In the event, if the identical or similar goods or goods subject to valuation fail to be sold the same or almost the same time as import of goods for valuation, identical or similar goods sold in Georgia during the last 90 days shall be obtained upon definition of customs value of goods for valuation.

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[19] See the Decree of the Minister of Finance of Georgia №996 on "Endorsement of Methods of Definition of the Customs Value of Goods".

[20] See *Sandler G. L.,* Customs Valuation and Customs Enforcement, "Lawyer of the Americas", Vol. 11, Issues 2 3 (Summer/Fall 1979), 334, <http://heinonline.org/HOL/Page?handle=hein.journals/unmialr11&div=29&start_page=333&collection=journals&set_as_cursor=0&men_tab=srchresults>, [14.07.2016].

[21] See *Wulf L.D.,* Determinants of the Contribution of Customs Duties to Budgetary Revenue in Less Developed Countries, 449, <http://www.jstor.org/stable/40911626?seq=1#page_scan_tab_contents>, [14.07.2016].

For instance, various amounts of goods are sold at various prices:

Unit price of sold goods	Total amount
65	90
50	95
60	100
25	105

The hereof example provides that the consignment of maximal amount constituted 65 units, so the unit price of goods is 90.

4.5. Method of Computed Value

The computed value shall be considered as the customs value of goods, composed of the elements as follows:

Value of material used for production of goods, manufacture and/or processing; including:

a. Commission and brokerage charges other than the commission charges incurred for purchase ("commission charges for purchase" – the commission charges paid by the importer to his/her agent in exchange for the service rendered for purchase of goods for valuation);
b. The price of the containers considered for the purpose of import in aggregation with the imported goods. In the event, if such containers are reusable, the value thereof with the demand of the declarant, with application of the international accounting standards, shall be pro rata distributed to the goods for valuation;
c. Price for packaging of goods, labor and the packaging material;

b) Amount of profit and total costs taking place upon sale of goods of one and the same class or type by the manufacturer for export to the exporting country; "general costs" comprise direct and indirect costs for production and sale of goods for export;

c) Transportation value and costs for loading-unloading and processing (including, storage). In the event, if various consignments are imported by the same transport means, transportation costs shall be pro rata distributed and shall be defined according to the agreement concluded with the forwarder;

d) Insurance costs if the hereof costs are incurred by the declarant.

The Customs Authority shall not be entitled to demand submission of the documentation from the non-resident. Application of the computed value method of goods utterly depends on the seller, namely on probability of provision of necessary information thereby to the Customs Authorities.[22]

4.6. Reserve Method

The last method for definition of customs value of imported goods is the reserve method. In this event, customs value shall be defined with application of expedient means corresponding to general provisions and the data available in Georgia on definition of customs value of goods.

The method of transaction value of identical goods, transaction value of similar goods and unit price of goods shall be applied within the reserve method in contrast that the volume of the hereof methods is admissible to be applied in flexible manner. Namely, any other method shall be applied to define the possible value and what cannot be defined with the reserve method.[23] For instance, upon flexible application of

[22] See *Nadaraia L., Rogava Z., Rukhadze K., Bolkvadze B.,* Comments to the Tax Code of Georgia, Tbilisi, 2012, 316.

[23] See *Wulf L.D.,* Determinants of the Contribution of Customs Duties to Budgetary Revenue in Less Developed Countries, 469, <http://www.jstor.org/stable/40911626?seq=1#page_scan_tab_contents >, [14.07.2016].

the transaction value method of similar goods – the demand of export of similar goods same or almost the same time as the goods for valuation, can be freely interpreted. Identical imported goods manufactured in any country other than the exporting country of the goods for valuation can serve the basis for definition of the customs value. The customs value of identical imported goods never defined can as well be applied.

Flexible application of the method of the unit price of goods – the demand on sale of goods in the same condition as the goods were upon import can be freely interpreted: the demand on the term of 90 days can be flexibly applied, namely the term may exceed 90 days.

The prices applicable upon control of correctness of definition of customs value of goods by means of the reserve method may conclude the information obtained from open sources and the data obtained with generalization of practice, which is of the informative nature and shall be applied solely in view of determination of accuracy of definition of the customs value of goods by means of the reserve method.[24]

In practice we often encounter the events when the investigative body defines the customs value of goods on the basis of the respective expert examination, though the Defense holds the alternative expertise on the stage of Court hearing, revealing much less customs value. Despite that sequence of application of each method is defined under the Tax Code, we shall start application of methods deriving from the lightest position for the tax-payer less restricting his/her rights and freedoms. Namely, in the event of application of the method of identical goods, we shall determine sundry identical goods instead of one and the lightest version shall be applied to the entrepreneur. As the Tax Code envisages, estimation of the customs value starts with the first method. In the event, if the first method fails to define the value, estimation proceeds according to sequence of methods allowing alteration of the method N4 (unit price of goods) and the method N5 (computed value) solely. When we deal with the identical method or similar method etc., sundry identical/similar methods shall be applied and the cheapest amongst shall be selected in order to prevent restriction of the rights of the accused.

After the tax-payer is accused, he/she shall enjoy the rights of the accused, including the most important right on solution of all the doubts in favor of the accused. It allows us preventing protracted investigation and preventing violation of the rights of the accused as investigation takes higher efforts to define the customs value and sometimes, it directly relies on the material provided by the Tax Agency.

5. Conclusion

The opinions provided in the paper can be formulated into the theses as follows:

Concept of definition of the customs value is irregularly interpreted. We hereby have formulated the position envisaging the concept of the customs value to derive from the market value of goods upon crossing the customs frontier, which is separated from the customs duties as the amount of the duty payable in favor of the budget does not matter for violation of the customs regulations.

We hereby in details considered the methods of definition of customs value and application rules thereof. Despite that the hereof methods are common, they are improperly applied. We often can find examples in practice when verification of the customs value is implemented at the stage of Court hearing, resulting in detection of the fact that the customs value is lesser. The problem lies in inconsistency of application of the hereof methods. We expressed our position envisaging application of the methods to start with the lightest for the tax-payer, namely in the event of application of the method of identical goods, we shall determine

[24] See *Sandler G. L.,* Customs Valuation and Customs Enforcement, "Lawyer of the Americas", Vol. 11, Issues 2 3 (Summer/Fall 1979), 335, <http://heinonline.org/HOL/Page?handle=hein.journals/unmialr11&div=29&start_page=333&collection=journals&set_as_cursor=0&men_tab=srchresults>, [14.07.2016].

sundry identical goods instead of one and the lightest version shall be applied to the entrepreneur. We, upon application of other methods, shall as well apply the same which less restricts the rights and freedoms thereof.

The legislation fails to dissociate the rules of customs control of imported and exported goods, and both are subject to application of same tax regulations. Taking the fact into account that reduction of the customs value mostly serves for evasion of payment of taxes, we shall set different limit upon export inasmuch as mostly, export is subject to taxation with zero percent rate.

Khatia Shekiladze*

The Substance of the Best Interests of the Child

Primary consideration of the best interests of the child is a guiding principle in terms of construing legislation, collision among specific rights and the assessment of juvenile justice, in general. Legal analysis of the principle provided in the paper evidences that main issue is the absence of definition of and the vagueness of the concept of best interests, giving rise to the risk of misinterpretation. Furthermore, it is extremely important that relevant entities analyze the standard of "primary" consideration of the mentioned principle, and duly apply it. Hence, in-depth analysis of the substance and purpose of the principle is of decisive importance.

Key Words: *juveniles, justice, best interests, primary consideration, international standards, the Convention on the Rights of the Child, Juvenile Justice Code, the role, importance, substance of the principle.*

1. Introduction

The principle of the best interests of the child is a novelty in Georgia criminal law. The Parliament of Georgia passed the Law of Georgia on Juvenile Justice on June 12, 2015, making a step towards the liberalization of criminal legislation. Prior to the adoption of the mentioned Code, the norms governing juvenile justice were stipulated in substantive, as well as procedural legislation of the Criminal Law of Georgia. The legislation recognized the necessity of special approach to juveniles, and set forth for them different regime than for adults, but juvenile justice did not take account of best interests of the child, which is a key pillar of the Convention on the Rights of the Child. Although Georgia joined the mentioned Convention back in 1994, the principle was included in Georgia legislation only in 2015.

The concept of best interests of the child obligates not only the parties administering the justice process and those participating in the proceedings to give primary consideration to best interest of the child, but legislation governing juvenile justice should itself be in line with the mentioned principle; since, first and foremost, legislation should ensure establishing solid safeguards for juvenile rights, constraining decision makers to act according to the norms of the law that are adapted to best interests of the child.

Since the best interests of the child is a novelty for juvenile legislation of Georgia, also, considering the great importance of the principle, its substance should be analyzed and examined in a full-fledged manner, in order to avoid incorrect interpretation.

The goal of the paper is to present the history of establishing and development of the best interests of the child in international or regional acts, as well as review the scale of its reflection in Georgia legislation, the essence and importance of the principle according to the Convention on the Rights of the Child, and the Juvenile Justice Code of Georgia, relation and link with other general principles of juvenile justice, main role and functions.

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2. Origin

The concept of best interests of the child has emerged relatively recently. Its application started mainly from 1800's, for resolving child custody matters. Specifically, child welfare or best interests of a child was a key pillar in the decision-making process.[1]

It should be noted that, historically, the principle of the best interests of the child was absolutely alien for the Western world. Society and legislation did not recognize children as individuals independent from parents, with independent rights and interests.[2] In general, the concept of the rights of the child, promoting development of and the protection of this right, did not exist in families or in the society; rather, a child was considered as property of their parents, who enjoyed unlimited authority over them.[3] Similarly, British Customary Law gave minimal attention to child rights and there were no legal safeguards for the protection of child rights, among them, the duty of parents to attend to their children.[4] In ancient Roman law, there was the so-called "father's power" (Patria Potestas) principle, according to which, fathers held absolute power over their children.[5]

From mid and late 1800's, as well as early 1900's, foundations for significant change of perceiving a child as an object of property have been laid. Main goal of reformers was the development of laws and policy focused on child interests and needs. Subsequent to their efforts, Western countries developed legislation governing child labor, adopted legislative regulations for the protection of children against domestic violence, a new system of juvenile justice was developed. The mentioned change also involved the expansion of the legal doctrine so called "paternalistic state (Parents Partie).[6]

In late 1800's, the principle of the best interests of the child was formed based on the very Parents Partie doctrine. As has been mentioned, initially it was used for resolving custody matters. In the US, its emergence is related to the state of Dakota, where, in 1877, the court applied the principle, as a decisive factor when reviewing the custody case. This was a precedent-setting decision in the Dakota State, from which the principle gradually spread out across Americas, as well as in the Western states.[7] Not only the principle of the best interests of the child, but in general, juvenile justice has originated in the United States of America.[8] In Great Britain, gradual development of juvenile well-being focused justice started from the 20th century, from about 1960's.[9] Well-being of minors was regarded as the only factor to be reckoned with in custody cases, which was regulated at the legislation level as well.[10]

It should be noted that the application of the best interests of the child is not related to just family law. The principle spread widely in other fields of law as well, including in criminal law. It has also been reflected in international law.

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1 *Howe R.B., Covell K.,* Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013,16.

2 Ibid, 17.

3 *Van Deusen Ch.R.,* The Best Interests of the Child and the Law, Journal "Pepperdine Law Review", Vol. 18, 1991, 418.

4 *Alston P., Gilmour-Walsh B.,* The Best Interests of The Child-Towards a Synthesis of Children's Rights and Cultural Values, UNICEF, 1996, 3.

5 *Howe R.B., Covell K.,* Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013, 17.

6 Ibid, 17-18.

7 Ibid.

8 *Bokhashvili I., Benidze M.,* Juvenile Justice Matters, Law Journal, № 2, TSU Press, 2009, 35.

9 *Maguire M., Morgan R., Reiner R.,*The Oxford Handbook of Criminology (5th ed., Oxford, 2012, 506.

10 *Alston P., Gilmour-Walsh B.,* The Best Interests of The Child-Towards a Synthesis of Children's Rights and Cultural Values, UNICEF, 1996, 3.

3. Normative Basis for the Best Interests of the Child

3.1. International acts

1924 Geneva Declaration on the Rights of the Child, which recognized the necessity of special approach towards minors, is considered the primary source for the best interests of the child in international law.[11] Since 1924, until the passing of the 1989 United Nations Convention on the Rights of the Child, numerous international acts had recognized the necessity of the best interests of the child, through focusing on well-being of the child. 1948 Universal Declaration on Human Rights, as well as International Pacts on Civil and Political Rights, and on Economic, Social and Cultural Rights should also be mentioned.[12]

The level of consideration of the best interests of the child in the above-mentioned international acts is not extensive. Unlike them, the first international document, where best interests of the child is indicated explicitly, as one of the key principles, is the 1959 Declaration on the Rights of the Child, which set forth a fairly high standard. Specifically, it took account of best interests of minors as the only circumstance to take into account, which, in turn, excludes the consideration of other interests.

The reinforcement of the concept of the best interests of the child was due to the passing of the 1979 Convention on the Elimination of All Forms of Discrimination against Women by the UN General Assembly.

UN standard minimum rules, the so-called Beijing Rules, for the administration of juvenile justice, is an important international document, passed by the UN General Assembly in 1985. It is underscored in the mentioned document that the juvenile justice system should be directed at the welfare of minors in conflict with the law, and additionally calls for adequate attention to full mobilization of all resources to promote welfare of juveniles.[13] Unlike UN standard minimum rules for the administration of juvenile justice, UN Guidelines for the Prevention of Juvenile offences, the so-called Riyhad guidelines, envision the term Well-being of Young Persons, as well as Best Interests of the Young Person. Specifically, it provides that institutionalization of young persons should be used as a measure of last resort, for the minimum necessary period, and best interests of the young person should be of paramount importance.[14]

The UN 1989 Convention on the Rights of the Child stipulates firm legal safeguard for reinforcing the best interests of the child; Georgia joined the Convention in 1994 and Article 3 of this convention envisages primary consideration of best interests as one of the key principles. All rights in the Convention on the Rights of the Child demonstrate the effect of the best interests of the child.[15] According to the UN Committee on the Rights of the Child, best interests of the child is a guiding principle that has considerable effect in terms of the application and construing of the Convention. Moreover, it agrees that the mentioned principle is a key means for taking a decision, whenever there is a collision between the rights enshrined in the Convention.[16]

In addition to Article 3, best interests of the child are also found in other articles of the Convention on the Rights of the Child. Among them, Articles 37 and 40, that govern the matters of criminal proceedings in relation to juveniles, and consider best interests of the child as primary guiding principle.

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[11] Draft Law of Georgia Juvenile Justice Code, Explanatory Note, 55, <http://info.parliament.ge/#law-drafting/8688>, [25.09.2016].

[12] See International Pact on Economic, Social and Cultural Rights, UN General Assembly, 1966, Art. 10 (3). International Pact on Civil and Political Rights, UN General Assembly, 1966, Art. 10 (2,3), 14(1,4), 24.

[13] Guideline 1.3.

[14] Guideline 46.

[15] *Alston P., Gilmour-Walsh B.,* The Best Interests of The Child-Towards a Synthesis of Children's Rights and Cultural Values, UNICEF, 1996, 3.

[16] Ibid.

3.2. Regional Acts

International legal acts on the rights of the child have had considerable influence on reinforcing the best interests of the child at the regional level.

1950 European Convention on Human Rights and Fundamental Freedoms should be noted; it does not explicitly envisage best interests of minors; still, European Court on Human Rights demands from national courts that they maximally consider the rights and interests of juveniles. Specifically, court explains: "national authorities should direct best efforts so that the interests, rights and freedom of all stakeholders are considered, especially, best interests of a child. Fair balance has to be established. Best interests of a child should be the primary matter and, based on its nature, seriousness, may supersede the interests of others."[17]

Out of regional legal acts, the African Charter on the Rights and Well-being of the Child should also be noted; this Charter, as compared to the Convention on the Rights of the Child, envisages a considerably broader, general and comprehensive definition of best interests of the child. According to the Charter, best interests is the only circumstance to be taken into account, which has a "superseding effect" and effectively excludes other circumstances, while the Convention on the Rights of the Child, during the decision-making process, along with best interests of a child, admits the possibility of considering other circumstances as well. Furthermore, a circle of individuals who are mandated to defend best interests of minors, is not specified; this creates a firmer guarantee for the protection of the rights and interests of children. Notably, the principle of best interests of the child is included in the Constitution of South Africa, following the influence of the Charter.[18]

4. The Role of the Best Interests of the Child

4.1. Best Interests, as a Guiding Principle for Construing Specific Articles

The Committee on the Rights of the Child, in communications to states, rarely focuses on the breach of a specific article of the Convention. It regards the Convention as a set of interrelated rules, where the principle of the best interests is superior.[19]

Consideration in relation to best interests sheds more light on the rights stipulated in the Convention. The principle also provides guidance to problems and situations not specifically mentioned in the Convention. For instance, although Article 40(3) of the Convention mandates the states to establish a minimum age for criminal responsibility, it makes no mention of what exactly that should be. Hence, in this case, when setting minimum age, best interests of the child should primarily be envisaged.[20] Stephen Parker is of the same opinion, where constitution does not comprehensively regulate a specific issue, he regards that the best interests is main source for the assessment of legislation and practice of states.[21] Similarly, in the presence of vagueness or a gap in national legislation, decision-maker should be guided by the principle of best interests.

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[17] N.Ts. et al vs Georgia, [2016], ECHR, 34.

[18] *Dausab Y.,* The Best Interests of the Child, Children's Rights in Namibia, Edited By Ruppel C.O., Namibia, 2009, 152.

[19] *Hammarberg T.,* The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults, Strasbourg, 2008, 3.

[20] Ibid.

[21] *Freeman M., A* Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 32.

4.2. Best Interests of the Child, as a Guiding Principle in the Presence of Collision Between Specific Rights

In case of collision between several rights, best interests of a minor should supersede. Specifically, there may be a collision between a child's right to have contact with their parents and thee protection against any violence. In such case, the only solution is acting according to the best interests of the child.[22] Philip Alston develops the same view; he thinks that the principle of best interests serves as a mediator in the presence of collision among rights; although, explains that, in such case, an individual who applies such principle plays significant role, since such person has to determine importance of the rights and their superiority.[23]

4.3. Guiding Principle for the Evaluation of Juvenile Justice

The principle of best interests has impact on law-making activity, decisions taken by state bodies, or any other action performed in relation to a minor. Furthermore, the principle is a basic tool in the process of evaluation of legislation and policy related to juveniles. Particularly, how the principle is reflected in legislation and policy documents, whether there is practice that ensures the consideration of best interests in the process of decision making.[24]

5. Best Interests of the Child as a Right, Principle and Procedural Norm

5.1. Best Interests as an Entitlement of a Minor

The Convention on the Rights of the Child considers juvenile justice as an integral part of child rights and introduces relevant standards for juvenile justice. Furthermore, it mandates states to establish solid safeguards for children in conflict with the law, and use criminal proceedings in relation to children in conflict with the law, as a last resort measure.[25]

According to the Committee on the Rights of the Child, primary consideration of the best interests of a child is an entitlement of a child to have his/her best interests evaluated and be granted priority in the decision making process, above other interests. Best interests, first of all, is an entitlement, not a principle.[26] Such interpretation of best interests envisages also creating safeguards, so that the right are exercised in cases of decisions related to child/children.[27]

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[22] *Hammarberg T.,* The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults, Strasbourg, 2008, 3.

[23] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 32.

[24] *Hammarberg T.,* The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults, Strasbourg, 2008, 3.

[25] *Emelonye U.,* Proportionality and Best Interests: Calibrating the Twin Pillars of Child Justice in Nigeria, Helsinki, 2014, 78.

[26] *Zermatten J.,* The Best Interests of The Child, Literal Analysis, Function and Implementation, The International Journal of Children's Rights, Vol. 18, Issue 4, 2010, 483.

[27] General Comment №.14, On the Rights of the Child to have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 4.

5.2. Primary Consideration of Best Interests, as a Fundamental Principle

Best interests, as one of the important principles, implies the obligation of an authorized individual, to take decision in favor of a minor. Specifically, in case a norm of law allows interpretation, the interpretation that serves the protection of the interests of a minor the best should be favored.[28] Hence, best interests, as a right, bestows a minor with authority to require decision maker to consider his/her best interest in the priority order, while as a principle, mandates a decision maker to act according to best interests of a minor.

5.3. Primary Consideration of Best Interests, as a Procedural Norm

In the process of taking decision in relation to a minor, it is necessary to evaluate possible positive, as well as negative impact of final decision on a minor. Evaluation of best interests and determination calls for the presence of a number of procedural safeguards. Furthermore, taken decision should demonstrate that the rights of the child have been fully considered. In this respect, it is the duty of the state to determine how well child rights have been respected in taken decision, what was considered as best interests of a child. Based on what criteria a decision was taken and how the interests of a child have outbalanced other interests.[29] Therefore, not only final decision should be in line with best interests of a child, but the process of decision-making should also be in line with best interests of a minor.

Hence, best interests of a child comprise the above-mentioned three dimensions. It is considered as a right of a child, as a key principle and as a procedural rule.

6. Legal Analysis of the Principle of Best Interests of a Minor

6.1. Interpretation of the wording of Article 3(1) of the Convention on the Rights of a Child

Draft of Article 3 of the Convention had been developed by Poland and was presented to the working group in 1979, while the revised text was discussed at a meeting in 1980, where, Australia and the United States of America brought forward their suggestions. Feedback and comments related to the text have always been the subject of ongoing review. Delegations of a number of countries expressed their views, while in 1988, technical adjustment of the text took place, while in 1988-1989 a second hearing was held, following which the text was adopted in its current wording.[30]

Article 3(1) of the Convention on the Rights of the Child reads as follows: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." For in-depth analysis of the principle, detailed interpretation and analysis of the mentioned text is necessary.

6.1.1. "In all actions"

Primary consideration of best interests is guaranteed in all actions concerning children, which, in turn, is an indication of a wide scope of the application of the principle.[31] The implied meaning of "action" is the

[28] General Comment №.14, On the Rights of the Child to have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 4.

[29] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 44.

[30] Ibid.

[31] *Detrik S.,* A Commentary on the United Nations Convention on the Rights of the Child, The Hague, Boston, London, 1999, 90.

subject of interpretation. It was first reflected in the corrected text version suggested by Poland 1981; while, during the second hearing, a number of delegations raised questions whether primary consideration of best interests would be possible in all cases, given other competing interests. For instance, the interests of justice and society may often have value equal to best interests of a minor, if not superior to it.[32] According to the suggestion by the United Kingdom, which was supported by Norway as well, the word "all" was to be taken out of the text of the principle, otherwise, best interests would become one of the circumstances to be taken into account.[33] Following this very reasoning, best interests became a factor to be considered on a primary basis, instead of being just a factor to be considered.

Throughout all these discussions, no discussion was held about what was implied under the word "action". Whether or not it also implied omission. Notably, the Convention should be construed in a purpose-specific manner.[34] Hence, elimination of omission from the principle of best interests would not be justified for the purposes of the Convention, since, in this case, for example, relevant offices working on social welfare would not have the duty to protect children against violence, separate them from offensive parents, which is explicitly best interests of the child. Respectively, for the purposes of Article 3 of the Convention, omission is also an action.[35] In other words, decision about refraining from an action is, also an action.[36]

6.1.2. "Towards Children"

Primary consideration of the best interest in all actions performed in relation to children has wide, as well as narrow sense. Specifically, in a broad sense, absolutely all actions of the state may have certain impact on the interests of children. Such a broad interpretation is based on two arguments. First, it is advisable to use best interest maximally broadly and second, the word "children" is used in the text, i.e., plural sense, and not singular, which indicates to the goal of wide application of best interests.[37] It should be noted that wide interpretation might be applied to the extent that will not render the principle very general and comprehensive.

Legal obligation to adhere to the principle applies to a group (wider sense), as well as individual child (narrow sense) involved in the juvenile justice process.[38]

When considering a criminal case, best interests of a child are primary in relation to individuals in conflict with the law, witnesses and victims, as well as in relation to the children affected by crime committed by their parents.[39]

Thus, the term "in relation to children" is construed in wide sense and best interests should be considered in all cases when an action or decision has at least some, direct or indirect impact, on minors.

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[32] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 45.

[33] Ibid.

[34] Ibid.

[35] General Comment №.14, On the Rights of the Child to Have his or her best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 7.

[36] *Howe R.B., Covell K.,* Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013, 16.

[37] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 46.

[38] *Hamilton C.,* Guidance for Legislative Reform in Juvenile Justice, New York, 2011, 34.

[39] General Comment №14, On the Rights of the Child to have his or her best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 8.

6.1.3. "State or Public Institutions"

Article 3(1) of the Convention mandates not only state parties to respect and protect best interests of minors, but state and private institutions operating in social welfare also have such duty. Hence, relevant parties shall ensure the application of articles of the Convention in practice, for the protection of best interests of a minor.[40] In this respect, it is important to interpret the implied definition of state and private institutions.

The draft prepared by Poland in 1979 mandated parents, caregivers, social and state institutions, especially courts, legislative and administrative bodies to respect the principle.[41] While, an alternative version offered by the USA has limited the application of this principle to the following condition: "any official action related to the child, by state or public institutions working on social welfare, by courts or administrative bodies." Notably, the suggested model was not accepted by either Poland or the USA. The word "official" was removed and a reference to a legislative body was added.[42] The final version of the text explicitly indicates that the duty does not apply to parents and caregivers; just the mandate to take official decisions in consideration of best interests.

Thus, the principle of best interests primarily applies to decisions and actions taken by public entities, while reference to private institutions working on social welfare issues indicates to the application of the scope of the principle only to the private sector institutions with the status of an institution working on social welfare issues.[43]

6.1.4. "Courts, Administrative and Legislative Bodies"

According to the Committee on the Rights of the Child, courts of all instance are implied under courts.[44] Respectively, the principle of best interests of minors should be upheld in court at any stage of consideration of the case, and a judge is required to base any decision taken in relation to a minor on his/her best interests. In general, court is the only body authorized to administer criminal justice and render a final decision.[45] Notably, court is the highest institution that protects best interests of a minor and when deciding on a child welfare issue, a judge has the final say.[46]

The committee explains that the protection of best interests of minors involve the replacement of traditional goals of criminal law, retaliation and punishment, with rehabilitation and restorative justice objectives. The above-mentioned can be achieved concurrently with the focus on public safety.[47]

The Committee on the Rights of the Child explains that decisions rendered by administrative bodies are wide and cover almost all areas. Specifically, education, care, health, living conditions, shelter, etc. Respectively, when taking decision about a minor, administrative bodies must be guided by the very best

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[40] *Guat T. Ng.,* The Rights of the Child and The Best Interests of the Child, "Asia Pacific Journal of Social Work and Development", Vol. 15, № 2, 2005, 1.

[41] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 47.

[42] Ibid.

[43] *Detrik S.,* A Commentary on the United Nations Convention on the Rights of the Child, The Hague, Boston, London, 1999, 90.

[44] General Comment №.14, On the Rights of the Child to Have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 8.

[45] *Tumanishvili G.,* Criminal Law Process: Overview of the General part, Tbilisi, 2014, 90.

[46] *Dausab Y..,* The Best Interests of the Child, Children's Rights in Namibia, Edited By. Ruppel C.O., Namibia, 2009, 147.

[47] General Comment №10, Rights of the Child in Juvenile Justice, UN Committee on the Rights of the Child, 2007, 5.

interests of a child.[48] As for legislatures, they are mandated to, in the process of discharging authority, when adopting any law, to primarily take into account best interests of a minor. The right of a child must be assessed and considered in a primary fashion, and his/her best interests must be clearly reflected in relevant legislation.[49]

Criminal legislation governing the matters of minors should be oriented at the welfare of youth and be aimed at their rehabilitation, not punishing.[50]

Thus, the principle of primary consideration of best interests of the child should be reflected in the legislation; and at the same time, juvenile legislation itself should be in line with the mentioned principle. Otherwise, it cannot be implemented adequately.

6.1.5. "Best Interests"

The Convention on the Rights of a Child does not offer the definition of best interests of minors, nor refers to specific factors for its definition. Best interests should be interpreted in close relationship with the Convention on the Rights of the Child, and other international acts.[51]

First attempt to define best interest of minors was observed in the draft developed by Poland; this became a matter of debate among state delegations. New Zealand noted that best interests of a child should be defined by states, according to their laws and practice, which is accepted and established in their society.[52] Ultimately, agreement had not been reached and Article 3 of the Convention does not offer any indication as to what is implied under the best interests of minors. The above-mentioned may be due to the following: firstly, since very many countries were engaged in the drafting process, it was practically impossible to reach agreement and develop a concept; Secondly, the difficulties of assessment of best interests based on the complexity of the issue was taken into account, especially when the matter was still the matter of study. Therefore, a decision was reached not to define the concept and leave it flexible; thirdly, various cultural or religious traditions were taken into account. Therefore, the issue was left open and up to the interpretation of states.[53]

The term "best interests" describes welfare of a minor in a broad sense.[54] Welfare, in turn, is defined by considering such individual circumstances as: age, level of development of a child, relations with parents, environment and experience of a minor.[55] The very age, biological and psychological development is the peculiarity of criminal responsibility that distinguishes a minor from an adult. Hence, knowing these circumstances will significantly help a judge in deciding on a relevant punishment and achieve resocialization of a minor,[56] which, in turn, is aimed at the protection of best interests. Welfare test differs from primary consideration of best interest in that the former does not mandate decision maker to render a decision that

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[48] General Comment №.14, On the Rights of the Child to Have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 8.

[49] Ibid.

[50] *Shalikashvili M., Mikanadze G., Khasia, M., Penal Law, Tb.,* 2014, 348.

[51] UNHCR Guidelines on Formal Determination of the best Interests of the Child, United Nations High Commissioner for Refugees, 2006, 6.

[52] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 50.

[53] *Howe R.B., Covell K.,* Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013, 23.

[54] UNHCR Guidelines on Determining the best Interests of the Child, United Nations High Commissioner for Refugees, 2008, 14.

[55] Ibid.

[56] *Shalikashvili M.,* Criminology, Tb., 2011, 156.

is best for the interests of a child. Decision taken in consideration of welfare does not mean that it is the only best choice.[57]

In literature, there is no unified approach for the interpretation of best interests, since it is impossible to precisely define best interests of a minor. In the opinion of some of the scientists, best interests can be broken down into basic (physical, emotional, intellectual), developmental (transfer into adult age without any obstacle), and autonomous (selection of the style of life independently) interests.[58] Moreover, according to another view, in terms of time, interest may be short, medium-term and long-term. Hence, future interest may not just differ, but it may collide with short-term interests or a present interest.[59] The concept of best interest of a minor or a true interest of a child combines two issues: control and the search for a solution. Control criterion implies ensuring duly exercising of child rights and obligations in relation thereof, while the solution search criteria implies finding and assessing all possible solutions, when taking decision in a specific case.[60]

The concept of best interests is not defined. Furthermore, it is quite complex, comprehensive, and must be interpreted in consideration of the circumstances of each specific case.[61] Defining it is the same as predicting the outcomes in the decision-making process.[62] The absence of the definition of the concept of best interests is due to the vagueness as to what is good for a minor.[63] Courts have had numerous attempts to define it, although all such attempts failed, since individual characteristics of every case differed and there were different evidences in all cases for the assessment of best interests. Hence, specific elements could not be determined.[64] The concept of best interests is quite flexible and should be adapted on a case-by-case basis, considering specific, concrete circumstances of a juvenile's case. When examining individual cases, the needs of just specific minor are taken into account, while a legislator should evaluate the interests of minors, or those of a certain group of minors. In both cases, best interests should be assessed in concurrently with the consideration of universally recognized child rights and freedoms.[65]

It should also be taken into consideration that the definition of best interests is quite closely linked to culture, and the perception of best interest of young persons varies from culture to culture.[66] Hence, the importance of best interests in different cultures remains the subject of debate.[67]

For some societies, best interests mean just satisfying material needs. Some pay attention to emotional feeling of safety, psychological well-being and development. While some, although, at present, less so, focus on moral and religious well-being. As for the decision, it depends on the view of a judge and a legislator in relation to best interests of a child. In other words, there is a system of values of each individual

[57] *Elliston S.,* The Best Interests of the Child in Healthcare, London, New-York, 2007, 14.

[58] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 27.

[59] Children's Rights Knowledge Centre, Children's Best Interests between Theory and Practice, 2014, 2, <http://www.keki.be/sites/default/files/Policy%20advice_Best%20interests%20of%20the%20child.pdf>, [25.09.2016].

[60] *Shalikashvilil M., Mikanadze G.,* Juvenile Justice, Tb., 2016, 73.

[61] General Comment №14, On the Rights of the Child to Have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 9.

[62] *Skivenes M.,* Judging the Child's Best Interests: Rational Reasoning of Subjective Presumptions?, Journal "Acta Sociologica", Vol. 53, №. 4, 2010, 340.

[63] *Elliston S.,* The Best Interests of the Child in Healthcare, London, New-York, 2007, 14.

[64] *Van Deusen Ch. R.,* The best Interests of the Child and the Law, Journal "Pepperdine Law Review" , Vol. 18, 1991. 420.

[65] Ibid.

[66] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 33.

[67] Children and Transnational Justice: Truth-telling, Accountability and Reconciliation, UNICEF, edited by Rarmar S., Roseman M.J., Siegrist S., Sowa T., 2010, 17.

and ensuing subjective attitude. Therefore, it is most important to justify taken decisions with relevant arguments, and minimize biased and/or wrong decisions.[68] Decision-makers are not granted unlimited discretion, which would enable them to base their decision on just subjective views; rather, when evaluating best interests, they are required to take into account view and opinions of a minor; [69] this, naturally, does not mean shifting responsibility to a minor.[70]

It should be underscored that the best interest test requires that decision makers decide on just best result for a young person. Such decision should not be one of the good or acceptable out of several alternatives, but the best one.[71] The doctrine of best interests sets forth highest standard, at the same time, it is a subjective, but the most credible and befitting test, given the absence of a better guideline in juvenile justice.[72]

6.1.6. "Best Interests Should be a Primary Consideration"

According to the Principle Two of the Declaration on the Rights of the Child adopted by the UN General Assembly in 1959, "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."[73]

Original draft of Article 3 of the Convention on the Rights of the Child envisaged the above-mentioned principle. A standard that was set forth by the mentioned principle is important. Specifically, best interests were not considered as one of the factors among others, or the factor to be considered in a priority order, or was the most important factor; rather, it had paramount importance. Representatives of some countries expressed discontent concerning the mentioned regulation, as a result of which, in 1980, the following alternative version was submitted to the Human Rights Committee Working Group: "in all actions in relation to children, irrespective of social welfare state or private institutions, courts, or administrative bodies, best interests of the child are given primary consideration."[74]

The above-mentioned edited text was reviewed in 1981. Although additional comments were expressed, but ultimately the submitted version was adopted.[75] Thus, the best interests test enjoys prominence among other interests and it does not have absolute predominance.

The standard of priority consideration means that best interests of a minor may not be considered at the same level at which other interests are considered. Such approach is justified based on the condition of a minor. Unlike adults, children have fewer possibilities for defending their own interests.[76]

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[68] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 28.

[69] *Howe R.B., Covell K.,* Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013, 22.

[70] *Hammarberg T.,* The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults, Strasbourg, 2008, 5.

[71] *Elliston S.,* The Best Interests of the Child in Healthcare, London, New-York, 2007, 19.

[72] *Kohm L.M.,* Tracing the Foundations of the best interests of the Child Standard in American Jurisprudence, "Journal of Law and Family Studies", Vol. 10, №2, 2008, 337.

[73] *Freeman M.,* A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 25.

[74] Ibid, 26.

[75] Ibid.

[76] General Comment № 14, On the Rights of the Child to Have his or her best Interests taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 10.

Best interests of minors may conflict with other interests, such as the interests of other children, society, justice. While working on the text of the Convention, delegations of a number of countries expressed opinion that the interests of justice and society could have at least equal or higher value than those of best interests of a juvenile.[77] In such case, collision should be addressed on a case-by-case basis, taking into account specific circumstances of the case, and by maintaining balance among interests.[78]

6.2. The essence of Primary Consideration of Best Interests of a Child, According to Juvenile Justice Code of Georgia

Article 1(2) of the Juvenile Justice Code of Georgia sets the protection of best interest of minors as one of the goals, which, naturally, indicates to great importance of the principle of best interests of the child in juvenile justice. At the same time, it indicates that it is not just the parties engaged in the process of justice that must ensure the protection of best interests, but the justice code itself should allow for such action. Specifically, each regulation envisaged under the Code should serve the protection of best interests of minors.

The principle of primary consideration of best interests of a child is enshrined in Article 4 of Juvenile Justice Code, according to which, "in the process of juvenile justice, best interests of a child are to be considered in a priority order."

The above-mentioned principle is quite widely used in juvenile justice. Specifically, it comprises administrative or criminal proceedings with the involvement of a minor, among them, investigation of an offence, criminal prosecution, judicial review of the case, enforcement of a sentence or other measure, and rehabilitation and resocialization.[79] Respectively, all entities administering the juvenile justice process, or all individuals involved in the proceedings have the obligation to defend the principle of best interests of a child.

The principle of best interests is not applicable only to a minor in conflict with the law, but in the justice process best interests of a minor witness and a minor victim are also protected.[80]

The Juvenile Justice Code takes account of best interests of minors, as the subject of primary consideration. The term "primary" indicates to the possibility of considering other circumstances, interests as well. Hence, in the process of justice it is not just best interest of minors that are taken into account; rather, the desired goal is achieved in parallel to focusing on the interests of justice. Nevertheless, I believe, that although primary consideration of best interests does not preclude the possibility of focusing on other interests, and is not the only aspect to be taken into account, at the same time, it does, in a certain way, limit a decision maker's options to consider other interests. Specifically, due to primary consideration of best interests, all other circumstances and interests, including the interest of justice, are secondary. Best interests of minors have great superiority over other interests and it is not merely one of the circumstances to be considered.

As for the concept of best interests, it should be noted that, unlike the Convention on the Rights of the Child, Article 3(4) of the Juvenile Justice Code does offer the definition of best interests. Specifically, "the interests of safety, well-fare, healthcare, education, development, resocialization-rehabilitation and other

[77] *Detrik S.,* A Commentary on the United Nations Convention on the Rights of the Child, The Hague, Boston, London,1999, 91.

[78] General Comment №14, On the Rights of the Child to Have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 10.

[79] The Law of Georgia Juvenile Justice Code of Georgia, 3708-IIს, Legislative Bulletin of Georgia, Website, 24.06.2015, <https://matsne.gov.ge/ka/document/view/2877281>, [25.09.2016], Article 3.

[80] Ibid.

interests of juveniles, that are determined according to international standards and other individual characteristics, as well as considering his/her own opinion." Apparently, the provided definition does not offer complete and comprehensive definition of best interests and provides just main directions. Respectively, it leaves broad discretion to decision makers to determine best interest of minors on a case-by-case basis. In this regard, review of several court decisions are important. Specifically, the vision of a judge in relation to best interests of minors is of interest. Out of the studied five decisions,[81] in all ones, judge is guided by international standards, specifically, Article 3 of the Convention on the Rights of the Child, Beijing Rules, and indicates that such traditional goal of criminal law as punishment is less priority and priority should be given to rehabilitation of minors and restorative justice. At the same time, it is explained that best interests of minor may not be regarded at an equal level with other interests. Based on the mentioned reasoning, in two cases[82], judge regarded welfare, education, development of a minor in conflict with the law to be the best interest, and based on the above-mentioned reasoning, deemed it advisable to count the deprivation of liberty sentence conditional. In other case, under the same reasoning, plea bargain was applied.[83] Notably, in one of the cases, the judge, based on best interests of a minor, administered home arrest for a minimum period.[84] Out of five reviewed cases, deprivation of liberty was used in one case only; this was justified by the fact that loyal attitude towards a minor did not have corrective effect and the minor did not discontinue delinquency.[85] In the same judgment, it is noted that at the rehabilitation facility minor has the possibility to develop and get education. Hence, possibly, court deemed the deprivation of liberty of a minor to be his best interest. In such case, underage offender is given possibility to study, take upon responsibility and return to society. While, the possibility to get education, ensures minor to leave incarceration facility more educated, equipped with better skills and higher self-confidence,[86] which is one of the preconditions for his/her resocialization.

When reviewing the assessment of best interests of minor, the Supreme Court of Georgia June 29, 2015 Decision №265ბ-15 is important;[87] this decision was rendered prior to the entry of the Juvenile Justice Code into effect. The Cassation Chamber was guided by international standards, and explained that Article 63(5) of the applicable Criminal Code of Georgia, which prohibited the possibility of using conditional sentence in case a convict turned eighteen as of the rendering of judgement, irrespective of the crime committed while being underage, was contrary to international acts; while Article 316 of the applicable Criminal Procedure Code of Georgia envisaged full adherence to the above-mentioned acts. The Cassation Chamber, being guided by the best interests of the minor, according to the Constitution of Georgia, in relation to national legislation, gave preference to international standards and counted the deprivation of liberty sentence conditional.

Notably, the principle of best interests has been criticized because of its vagueness, which may give rise to wrong interpretation of the principle and be used to justify actions that are detrimental to the rights of a child.[88]

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[81] Tbilisi City Court 2016 Decisions: №1/181-16, №1/571-16, №1/313-16, №1/144-16, №1/184-16, Can be accessed in court archive.

[82] Case №1/181-16, 16.03.2016, Case №1/144-16, 28.01.2016.

[83] Case №1/184-16, 15.02.2016.

[84] Case №1/571-16, 22.03.2016.

[85] Case №1/313-16, 16.03.2016.

[86] *Kavtuashvili E.,* Underage Offender and the Prevention of Delinquency, Journal Justice and Law, №3, 2013, 156.

[87] See <http://prg.supremecourt.ge/DetailViewCrime.aspx>, [25.09.2016].

[88] *Hammarberg T.,* The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults, Strasbourg, 2008, 4.

7. Conclusion

The matters covered in the paper evidence that the principle of best interests of a minor plays significant role in juvenile justice and is a key safeguard for the protection of rights and interests of minors in conflict with law.

Similar to the Convention on the Rights of the Child, key achievement of the Juvenile Justice Code of Georgia is the very principle of best interests of the Child, without which, the justice system would not fully ensure the development of liberal approach towards minors in conflict with the law. This very principle is a watershed between the juvenile justice and traditional criminal law system. Furthermore, it clearly evidences the presence of a different regime for minors and for adults.

Best interests of the child plays significant role in terms of the interpretation of legislation, as well as in case of collision among specific rights, and at the same time, is used as a key tool for the assessment of legislation and policy governing juvenile justice. Furthermore, best interests has multiple importance. It is not just a principle, but also a right and a procedural norm.

Following the analysis of best interests of minors, the absence of the definition and vague nature of the concept of best interests has been identified as a key problem, raising the risk of its misinterpretation. Respectively, exceptional competence and due diligence is required on the part of decision-makers for the assessment of best interests.

Ushangi Bakhtadze*

The Harm Principle as One of the Bases of Criminalization

Criminalization is directly connected with values and moral of society. Accordingly all types of criminalization must be based on a main moral theory. Criminalization must be accompanied by a legal or other solid justificative argument – criminalization principles. The mentioned principles must be in accordance with liberal values. In the present work one of the most important principles of a criminalization process - the harm principle has been discussed, a concept of this principle has been represented and its weak and strong points have been estimated. The article concludes that the harm principle on the one hand protects a human right of freedom and on the other hand imposes a burden of evidence on the state for justification of prohibition of an individual action.

Key Words: *criminalization, harm, the harm principle, prohibition, the principle of well-being, the principle of autonomy.*

1. Introduction

One of the most repressive acts from the state is putting a criminal statute into operation, as it not only restricts person's freedom of act but at the same time punishes the person for violation of law (including imprisonment). In today's liberal democratic society, the uppermost principle of which is the supremacy of law, the daily communication between a person and the state is based on the previously established certain rules of ''fair game'' and accordingly the state must not be able to set prohibition for its own citizens. This issue becomes more actual, when it concerns criminal prohibition from the state – criminalization.

Criminalization of a concrete act is directly connected with values and moral of society. Accordingly all types of criminalization must be based on a main moral theory. As criminal law is the strictest means of social control, a negative influence of which follows a person till the end of his/her life, its usage must be minimized. Thus the main hypothesis of the present work is the following: when the state is performing criminalization of some act, a person's life and values must be privileged compared with the state's interests. In other words criminalization of an act must be accompanied by a legal or other solid justificative argument – criminalization principles. These principles must be in accordance with liberal values.

The main goal of the present work is to explore one of the most important principles of the criminalization process, well known for General Law – the harm principle, to explain its concept and to reveal its strong and weak points. For achieving this goal the present work is starting with a talk about criminalization and two significant principles – individual autonomy and well-being principles. Then it will be followed by the analysis of the principle of harm and its scopes. In the same chapter there is discussed unlawfulness and the essence of a legal claim. In Chapter three kinds of harm are discussed; just because of division of harm into types the harm principle becomes a perfect principle. And finally the talk concerns such acts, which are

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unlawful, though don't cause harm and in spite of this fact is subjected to prohibition. The article concludes that the harm principle on the one hand protects a human right of freedom and on the other hand imposes a burden of evidence on the state for justification of banning of an individual act.

Though in the present work the talk is mostly about criminal prohibition established by the state, in order to explore the harm principle thoroughly and represent its potential perfectly there is an additional talk in this work about administrative and civil prohibition, as very often just by this type of prohibition the nature of the harm principle is shown better.

2. Criminalization

According to the criminologist Edwin Sutherland "The main subjects of criminology are adoption of law, violation of law and reacts on violation of law"[1]. In the criminology context adoption of law means adoption of a criminal statute, for example, criminalization. Accordingly in spite of the fact that criminalization is a third of the above mentioned interpretation of criminology, extremely less attention is paid to this issue, than to the remained two-thirds of this concept (violation of law and reacts on violation of law). In literature there are very few important scientific works on criminalization.

A reason of the above mentioned fact at least partially might be a political character of criminalization. Politics has never been popular among criminal sciences, because in most cases just in this sphere is seen the authority's priority over a law. Nevertheless it is hard to deny that criminalization is a political process, the process, during which politics by means of criminal legal policies is penetrating into a legal world, the process, which in spite of everything must be guiding by legal principles, rules and standards.[2] It must be based on the fact that criminalization of a human's act represents revealing of enormous power from the state, which forms our values, divides population into guilty and unguilty categories, restrains humans' freedom and can (applying proper sanctions for appropriate acts) significantly worsen their life.[3] Just that's why Douglas Husak remarks the following: "In a liberal state one of the most important rights is impunity right. Accordingly when the state uses its power and declares a certain conduct as punishable, the burden of evidence is just placed on it, so that it will give the argued reasons of prohibition of the act."[4]

The goal of the present paragraph is to explore several main principles, which must be taken into consideration, when criminalization of this or that act takes place. Just for this reason before starting discussion about the harm principle there will be explained two important principles – the individual autonomy and well-being principles.

2.1 The Principle of Individual Autonomy

One of the fundamental principles for justification of applying a criminal law is the principle of individual autonomy, which means responsibility of everybody for their own conduct. This principle has factual and normative elements, which will be briefly discussed in the present paragraph.

In factual element of the autonomy principle it is meant that man has enough capability and freewill to take significant decisions. It is hard to prove to what extent the above mentioned is in conformity with the

1 *Sutherland E.H.,* Principles of Criminology, 2nd ed., Lippincott, Philadelphia, 1934, 3.
2 *Persak N.,* Criminalizing Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts, New-York, Springer, 2007, 5.
3 *Schonsheck J.,* On Criminalization: An Essay in the Philosophy of Criminal Law, New-York, Kluwer Academics Publishers, 1994, 1.
4 *Husak D.,* Overcriminalization: The Limits of the Criminal Law, Oxford University Press, 2008, 8.

truth. To the contrary of "freewill" there has been a "deterministic" argument for centuries, according to which man's behavior is defined by reasons, which cannot be controlled by everybody.[5] Most philosophers have some compromise in connection with this issue and they agree with the position that human behavior is often so much indefinite that blaming him/her is generally unfair and improper, but in some cases human behavior is so much definite that a presumption of freewill is quite narrow.[6] In order to support this approach we can use a fact that daily life is based on individual responsibility and when there is no evidence about determinacy of behavior, a supposition about freewill, which is a basis of man's various behaviors, cannot be neglected.

A general conclusion from the above mentioned discourse is that a sane adult (here is meant a person, who is not insane because of psychic state) might be called to answer for an act committed by him/her, over which he had control, with the exception of a case when at the same time there is the circumstance excluding responsibility, such as for example, necessary repulse, mistake and so on. [7]

A normative element of the individual autonomy principle is equally important – it regards man as a being, which is able to choose own acts himself and without recognition of the aforesaid it cannot regard him as a moral being.[8] The autonomy principle gives high significance to freedom and human rights; moreover its most part proves that persons must be protected from criminal charges, except a case when they committed an act, for which responsibility is unavoidable.[9]

A problem connected with this principle is ascertainment of its limit. Though the autonomy principle is quite a strong instrument to show the priority of person's interests to the state's interests, but it is less convincing in other aspects. The question:"whose autonomy?"- must be always asked, as one individual's autonomy contradicts and restricts the other individual's autonomy. Besides the autonomy principle does not pay attention to the social environment, in which the individual is growing (which might restrict his/her striving to reach a desirable goal), and that weakness context, in which many people have to live.[10] A main idea, that man must be free in choosing a way of life, will not be maintained without other conditions. Just for this reason in the following paragraph there will be discussed the principle of well-being, without which the autonomy principle is not perfect.

2.2 The Principle of Well-Being

As it was seen the principle of individual autonomy is rather restricted. For this reason Joseph Raz and his colleagues worked up an approach, according to which the state is obliged to create all social conditions in order to enable its citizens to reach complete autonomy.[11] A jurist Nicola Lacey is stating the principle of well-being, which includes "satisfying such fundamental interests, as safety, health and opportunity of following a way of life, chosen by him/her".[12] The specificity of this principle is that a list of interests, which the state will observe by all means, depends on the process of taking a democratic decision; it means that in this process interests are defined objectively and not according to a concrete individual's interests.

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5 For more details about this issue see: *Kenny A.,* Freewill and Responsibility, London, Routlege and Kegan Paul, 1978.
6 *Fischer J.,* Responsibility and Control, Journal of Philosophy, 1982, 72, 24.
7 *Duff R A.,* Law, Language and Community: Some Preconditions of Criminal Liability, 18 OJLS, 1998, 189.
8 See *MacCormick D. N.,* Legal Rights and Social Democracy, Oxford: Clarendon Press, 1982, 23-4.
9 *Feinberg J.,* Harm to Self, Oxford University Press, 1986, 54.
10 *Hudson B.,* Punishing the Poor: A Critique of the Dominance of Legal Reasoning in Penal Policy and Practice, *Duff A. et. al*. (eds.) Penal Policy and Practice, Manchester University Press, 1994, 302
11 *Raz J.,* The Morality of Freedom, Oxford University Press, 1986, 425.
12 *Lacey N.,* State Punishment, Oxford, Routlege, 1988, 104.

It follows from it that those persons' interests, which don't correspond to collective interests, will be disregarded. However defining interests in a similar way is a well known feature of our social life.[13]

While the autonomy principle is mainly focusing on human rights, the well-being principle is recognizing a social context, in which law must be in effect and gives collective goals certain importance.[14] If the autonomy principle needs positive freedom (for example, freedom of choosing a concrete goal), the well-being principle might have also the same tasks from the point of view that it is trying to create favorable environment for citizens in order to reach a sane and collective goal, the environment, which will be secured and in case of arising any hazard, it will be possible to apply even a criminal law, as an extreme means.[15] From this it follows that an individual kind of criminalization can be justified as it can be considered as a final way to maintain social order and collective goals, for example, setting an income tax by the state certainly restricts the principle of individual autonomy, nevertheless the state is not only setting an income tax, but violation of this rule in many countries of the world is criminalized too. The same can be said about the rules of industrial safety, food safety and environmental protection. Here the following question is arising: To what extent is justified punishment of a person for violation of the above mentioned rules by the state using criminal sanctions? On the other hand, justification of criminalization of individual acts basing on the autonomy and well-being principles of course does not raise doubt.[16] Thus those versions of autonomy, according to which in all the cases a human must decide what is better for him, are not solid.

3. The Harm Principle: Where is Limit?

After discussing two important principles connected with criminalization – individual autonomy and well-being – in this paragraph the harm principle will be discussed.

Traditionally a starting point of a talk about criminalization is the harm principle, which cannot be discussed without such a philosophical opinion as liberalism. One of the main principles of liberalism is the following phrases of John Stuart Mill: "The only one justificative reason, because of which it is acceptable to apply force on a member of the civilized world against his/her own will is that others must be protected from harm. Personal wellbeing of a person committing an act, whether moral or physical, is not a sufficient ground for the state to intervene in this person's act".[17]

The harm principle expressed in this way is a negative restriction, which means that in case when there is no harm or no danger of harm, the state is not authorized to intervene in its citzens' "activity". Accordingly when talking of the harm principle a question is naturally arising about the consequences of the act: Does it harm anybody? According to the harm principle justification of prohibition of the act only because its immorality, as it is supposed by the supporters of criminal prohibition, will not be sufficient. They must prove that an act is followed by certain negative effects inflicting other people's life.[18]

For better understanding of the aforesaid is an example of Brown case in which the House of Lords of the United Kingdom of Great Britain and Northern Ireland obtained a judgment, according to which even a minor bodily damage in sadomasochistic sexual acts is unlawfulness, in spite of the "victim's" conscious

[13] *Ashworth A., Horder J.,* Principles of Criminal Law, 7th ed., Oxford University Press, 2013, 26.
[14] *Feinberg J., Feinberg J.,* Harm to Self, Oxford University Press, 1986, 37-38.
[15] Ibid.
[16] For more details see: *Brudner A., Agency* and Welfare in the Penal Law, in *Shute S., Gardner J., Horder J.* (eds), Act and Value in Criminal Law, Oxford University Press, 1993.
[17] *Mill J. S.,* On Freedom, London: Parker, 1859, Chapter 1,§ 9.
[18] *Feinberg J.,* Harm to Self, Oxford University Press, 1986, 33.

agreement.[19] The analogous prohibition was justified by the House of Lords, as they thought that if there had been no prohibition, the juveniles would have been involved in such sexual activities and it would have been massive.[20] But would it have been so? To give a positive answer to this question is hard, when there is no evidence to deny what is not justified. As it was already mentioned on prohibiting of an act/criminalization the burden of evidence is imposed on the supporters of prohibition of acts and just they are obliged to produce empirical evidences to confirm how by creation of a new crime others will not be inflicted.

Here it is interesting what is meant under harm. For example, Stuart Mill does not give anything concrete connected with it and so the harm principle interpreted by him can be deemed to be unlimited. According to Feinberg harm is "obstruction of a human's some interest, giving in or devastation".[21] A human is inflicted, when his/her one or several interests turned out to be in a worse state than they were before the committed act. Everybody have future perspectives and plans to make their life better. When men are inflicted, it means that their perspectives are getting worse. But it does not mean that their life always gets worse. They might reach the intended goals, but it is not a determiner. A determiner is that a man is reaching his goals with more difficulties than in case when there is no harm. In other words important is not a fact that the act is unlawful, but the fact that an analogous act has a negative influence on human's wellbeing. For example, health damage is harmful, because in such a case a human is not able to satisfy his/her demands.[22] Damaging or destroying a thing is inflicting harm, as it deprives a victim of the opportunity to dispose the thing at his/her own discretion.

Besides, harms are those bad effects, which are worsening resources (physical, property or others) on which a victim has a legal right. Here it is meant that a person's interests concern not only those resources, which he/she has in a concrete period of time, but also those, which he/she might have in the future. These are actives, which man has in life and on which he might be relied in order to improve living conditions.[23] The above mentioned resource has at least three characteristics: the first, as a rule, they exist for a long time, such as man's personal belongings, health, or his good reputation; the second, they influence or can influence on life level, such as for example, property interests will be deemed to be resources only because they can satisfy man's material requirements and the third, they have objective dimension, insofar as a resource is usually independent from personal consciousness.[24] Resources might be material and non-material (for example, intellectual property). It is necessary to discuss this issue, as a man's resource is just that goodness, which can be inflicted and talking about the harm principle without this issue is unacceptable.

3.1 Several Examples for Better Presentation of the Harm Principle

In the previous paragraph it was remarked that when a man is inflicted, he is losing his opportunities to be occupied with activities valued for him and enter into the desired relationships and at the same time to follow his goals. Most often harm is caused by outraging of property right. Of course people are interested in safety and physical integrity of their property. Except the property right man might experience harm from the other side (for example, physical harm). Moreover, man can be inflicted even when he is not a victim and even when there is no identified victim (for example, crimes without a sufferer). For example,

[19] *Brown R. v A*gainst a House of Lords judgment [1994] 1 AC 212.
[20] Ibid, 246 (Lord Jones' opinion).
[21] *Feinberg J.,* Harm to Self, Oxford University Press, 1986, 34.
[22] Ibid, 53.
[23] *Simester A. P., Hirsh Von. A.,* Crimes, Harms and Wrongs: On the Principle of Criminalisation, Oxford, Hart Publishing, 2011, 37.
[24] Ibid.

avoid payments[25] is an offence in spite of the fact that there is not defined an individual victim, which is directly inflicted. Surely it is not the same wrongness, as theft offence, but if for example, "A" unlawfully is decreasing his tax payment in order to avoid it, it means that he is stealing and inflicting other citizens. Public welfare needs money, which must be coming from taxpayers, when "A" is not paying a tax payment, other citizens are doing it. Tax payment is a collective duty and everybody is obliged to pay it not for the state, but just for his fellow citizens.

An analogous example is counterfeiting of money, [26]which undermines the economic regime set by the state, which exists for wellbeing of all citizens. When an analogous regime is jeopardized, in such a case the intervention by the state is justified, as society members are also experiencing harm. Counterfeiting of big amount of money might cause devaluation of money and destabilization of the system supervising the economic activities of the state. In the above mentioned cases in spite of the fact that acts are indirectly inflicting citizens and these offences don't have a concrete sufferer, the state is obliged to criminalize such acts, because nobody must get undeserved advantage in the society founded on the collective principle.

3.2 Harm, Wrongfulness and Legal Claim

When talking of criminalization of any act, with the harm it is necessary to be wrongfulness, because criminal liability never exists without wrongfulness. Wrongfulness implies non-conformity of a human's act to law order, legal norms and means that objective legal norm negatively estimates a human's concrete act or inact, because such behavior is impeding realization of legal goals.[27]

A task of criminal law based on the harm principle is identification of harm for each crime and showing that the harm caused by the act is sufficient for justification of the state's intervention and annulment of contradicting opinions (including of individual freedom, which contradicts the state's intervention). Besides it is necessary to prove why the act committed by the offender is unlawful. To understand it better the following case will be suitable: suppose "A" is stealing an old T-shirt of "B". The T-shirt is useless for "B" and he is not going to use it, moreover, it's habitual for him to throw away old things and he has generally forgotten about it. Losing it has not any negative influence on him. By contrast to this "A" has very hard economic conditions and needs clothes. Despite this even in such a case the act of "A" is unlawful, but after some time when "B" learns about the loss and gets his T-shirt back, the act of "A" will not be deemed to be unlawful. Requesting the own T-shirt by "B" does not get into the scopes of the harm principle, because despite the infliction to well-being of "A" by returning the T-shirt, he is not losing anything, on which he had a legal claim.[28]

There are cases when as a result of a certain act the harm is evident, but it is not accompanied with wrongfulness, for example, in case of necessary parrying, a repulsing person in defending his or somebody else's legal goodness might injure the intruder, but there will not be unlawfulness there. Analogously when a judge is sentencing imprisonment to the accused in spite of that this punishment is harming the accused, the judge is not acting unlawfully.

In the following paragraphs a talk will be about the secondary harm, but before starting this talk it is necessary to discuss another case, which is similar to the cases of necessary self-defense and the judge. Suppose "a" and "b" are business competitors and "b" at the expense of clever advertising activities is

[25] For example see Article 218 of the Criminal Code of Georgia.
[26] For example see Article 212 of the Criminal Code of Georgia.
[27] *Tsereteli T.,* Social Hazard and Wrongfulness in Criminal Law, the Caucasian House, 2006.
[28] *Gardner J., Shute S.,* The Wrongness of Rape in *Horder J.* (ed), Oxford Essays in Jurisprudence (4th series, Oxford: Oxford University Press) 193, 201.

depriving "a" of consumers. Moreover in his advertising activities "b" has not used any adverse publicity and everything has been done within the scopes of law.[29] In all the above discussed cases there is no unlawfulness, though this last case anyway differs from the two previous ones. Though interests of "a" might be inflicted by the advertising company, but there is no harm to him (according to the point of view of this paragraph), because he is not losing anything, on which he had the right of demand in advance. The cases of the necessary self-defense and the judge differ from the advertising case, because in those cases there is prima facie [30] unlawfulness, which is not in the advertisement case. This difference is important, as it emphasizes the importance of the right of demand when the discourse is about the harm principle. In connection with this the criminologists Von Hirsh and Simester are right, when they remark: "When we are harmed, not a mere interest but our interest is harmed. Those interests, to which we have no access and no right of demand, are left beyond the harm principle.[31] The result is that when there is harm, definition of the place of the right of demand is of the same importance as unlawfulness.

3.3 The Harm Principle and Property Right

When a talk is about the harm principle it is easy to conclude, that harm to the property is less important, than acts directed against a person's health. In concrete cases it might be so, but to prove systematically that an act directed to the property is less important, is groundless. For example, if a person had to make a choice between a light damage of health and losing a house, it is expected that most of people would choose damage of health. According to the spread opinion protection of property right must be justified by the rule of criminal law that it harms a person's interests.[32]Let's imagine a case when because of book-accounting cheating some big company is liquidated. In such a case the most important is not the fact of cheating, but its negative influence on the people working in this company and the harm them. Namely, the employees will lose their jobs, sharers will lose their shares and etc. It is obvious that in this case the harm is also done to the person's property, but the main question here is to what extent is justified to deem analogous acts to be a crime by the motive that humans' interests are inflicted or how to explain the state's intervention in favor of one person (employees, sharers and etc.) and to the harm of the other person (offender)?

On the contrary to the acts directed against human health, which obviously inflicts human's rights and is punishable in every country, it is questionable whether acts directed against the property right inflict human's rights and interests to such an extent that the state's intervention becomes necessary. In connection with the right of property it should be noted that recognition it as an important interest for a human is based on such legal regulations, which were changing in the course of time and the social and legal context of which are different in different countries.[33] In other words the ground of property, as a formal category, is legal. In order to understand it better there is the following example: I do not need a law to recognize that this hand is mine, but a law is inevitable to state that this table is mine, that house is someone else's. Furthermore, in case of intellectual property the only true way to state the ownership is just a law. Within the scope of the harm principle infringement of the other person's property right is the prima facie harm, but recognition it as harm, is the state's prerogative, which is obliged to prove that it is justified to protect the property right by the criminal law regulations.[34]

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[29] *Chan W., Simester A. P.,* Duress, Necessity: How many Defences?, 2005, 16 King's College LJ 121, 123-27.

[30] Prima facie – is a Latin word and means the following: a fact is deemed to be proved, until the opposite of it is proved.

[31] *Simester A. P., Hirsh Von. A.,* Crimes, Harms and Wrongs: On the Principle of Criminalisation, Oxford, Hart Publishing, 2011, 40.

[32] *Feinberg J.,* Harm to Self, Oxford University Press, 1986, 39.

[33] *Duff R. A., Green S.,* Defining Crimes: Essays on Criminal Law's Special Part, Oxford University Press, 2005, 168.

[34] *Simester A. P., Hirsh Von. A.,* Crimes, Harms and Wrongs: On the Principle of Criminalisation, Oxford, Hart Publishing, 2011, ,41.

In order to be arranged the aforesaid by the state it is necessary to separate the following two questions from each other: why does the state maintain the right of property and must the property right be protected or not by using mechanisms of criminal law? For the second question the harm principle is vital, but in order to answer it the first question must be analyzed. The harm principle is obvious even when prohibition of the act is subjected not only to criminal, but to civil legal prohibition too. In the previous paragraphs the obligation stated for the state by Stiuart Mill –the state can regulate an act forcibly only when this act creates harm to others or creates hazard of such harm – concerns prohibitions of civil law too.[35] It turns out that theoretically the state must not intervene in issues of infringement of property right, neither by establishing of civil law prohibition unless it bases on the harm principle.

Property law promotes to establish different important instruments for wellbeing and development of human, which would have been without the property right. Just for this reason when the right of property is harmed, is created hazard of harm to it, the whole property regime is harmed, as one of the guarantees of human well-being. In such a case if the state does not intervene, it means ineffectiveness of the regime and this ineffectiveness will impede opportunities of personal and social development and will confine the right of being as an owner peacefully and etc. Because of the fact that these opportunities and generally human well-being is interlinked with property, it is necessary for the state to establish prohibitions.[36] The prohibition from the state for protection of the property right is justified even when harm is not obvious, but the act generally contradicts the harm principle. For better understanding it is reasonable to recall the example of the "useless T-shirt", discussed in the previous paragraph. "A", which takes into possession the T-shirt of "B", does no harm to "B", as the material condition of "B" is not getting worse. However the right of property grants "B" the right of supremacy over his own thing, including the useless one. From that it follows that just "B", and not "A", is authorized to decide what is useless for him and what to do with his own thing (to throw it away, destroy it or give it to somebody for charity). Accordingly stealing of the T-shirt is wrongfulness in spite of the fact that in this case the property regime is harmless. At this stage the harm is indirect, but prohibition of analogous acts is necessary so that such acts will not become massive, that in the end will harm the property regime. By prohibiting stealing criminal law is protecting a person on the one hand from becoming a victim of this act and on the other hand is protecting his property, more widely is protecting the property regime. Despite that the property right in most cases might be protected by setting civil prohibitions, criminalization is adding more protection and safety to it. From the aforesaid it follows that the state's intervention for regulating the act is only justified, when the property right is recognized by the state. In other words only the fact that an act is causing harm, even the direct harm, will not be enough to justify the state's intervention until the property regime itself, creating the concrete property right, has been justified. Let's imagine a slave state, in which "A" departs from the existed regime and emancipates slaves of "B". Of course in similar legal system interests of "B" are infringed, but despite this any interpretation of the harm principle, which is always based on liberal values, cannot justify prohibition of "A"'s act, because in a slave state the property regime itself cannot be justified.

After discussion of the harm principle and the property right it is important to direct our attention towards the kinds of harm, because just this latter defines the volume of the harm principle.

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[35] *Smith S.,* Towards a Theory of Contract, in *Horder J.*(ed), Oxford Essays in Jurisprudence, Fourth Series, Oxford University Press, 2000, 107.

[36] *Coleman J.,* Risks and Wrongs, New York: Cambride UP, 1992, 350-351.

4. Kinds of Harm

Following from the harm principle the essence of criminalization of an act is avoiding harm. In the harm-based prohibitions harm is a component of crime or a descriptive element of crime. For example, murder does not exist without a person's death – just a person's death is the harm justifying criminalization of this act. Except murder, a person's life can be protected by prohibition of attempted murder, unlawful bearing of arms, violation of traffic safety rules and etc. These last crimes belong to incomplete or formal crimes, when for their criminalization it is not necessary the objective existence of harm. The mentioned acts belong to a crime, as they are creating danger of crime and the danger of crime gets into jurisdiction of the harm principle, as a realized harm itself.

In the present chapter there will be discussed relation of incomplete or formal crimes to the harm principle. To understand the mentioned issue better three main kinds of harm must be distinguished.

4.1 Straight and Direct Harm

Straight and direct is such a type of harm, which directly does harm to a person's health or property. In such cases wrongfulness is based on the harm. For example, when "A" harms health of "B", his act prima facie is wrongfulness and potentially is the ground of criminalization. In other words, infringement to the health of "B" is wrongfulness, as it harms him.[37] Suppose "A" hurts "B" and breaks his hand. Why is this act prima facie wrongful? Because the hand belongs to "B" and it's broken by "A". Accordingly nothing more is necessary to prohibit the act.

According to the harm principle to prohibition are subjected those acts of a human, by which he directly harms other person (for example, murder) or creates danger of direct harm (for example, violation of traffic safety rules). These examples are standard cases. Despite this according to the harm principle before prohibition of the act interests must be balanced. Attention should be paid to presumable consequences of the harm or of the danger of the harm and on the other hand results of criminalization.[38] In discussing this issue Feinberg distinguishes several important issues which should be taken into account before criminalization of the act:

a) The bigger is the harm, which might follow the act, the less presumably might be the probability of its occurrence to justify prohibition of this act; to justify prohibition

b) The higher is the probability of harm, the less severe might be the harm to justify prohibition;

c) The more significant is danger of the harm, the less reasonable is to neglect this danger;

d) The more significant (necessary) is a danger- containing act as for an offender, as well as for others, the more reasonable is neglecting dangerous results of the harm;

e) The more real the danger of the harm is, the less justificative is to prohibit the act, which is causing it.[39]

Accordingly in deciding a criminalization issue a legislator must take into consideration the severity of the harm, the probability of its occurrence and adapt them to the social value of the act to be prohibited and the degree of intervention in human's freedom. The bigger the severity of the harm and the probability of its occurrence is, the more justified is criminalization of the act; and just the opposite, the more valuable and important is the act or the more restricts criminalization the human's freedom, the more unjustified is

[37] *Husak D.,* Overcriminalization: The Limits of the Criminal Law, Oxford University Press, 2008, 160.
[38] *Feinberg J.,* Harm to Self, Oxford University Press, 1986, 216.
[39] Ibid.

prohibition of the act. When prohibiting the act except freedom other human rights must be paid attention to, such as freedom of speech, personal privacy and etc.

On the above mentioned calculation was based for example, the prohibition of speeding. In Georgia on autobahn it is prohibited motion at more than 125 km/hr.[40] Is it a legitimate prohibition? The answer should be positive. From a glance, motion at 130 km/hr speed is not immoral or unlawful, but the faster a man is driving, the more is the probability of an accident and the harm will be done to the human's health (life) and the property. So the above mentioned gets under jurisdiction of the harm principle and is the ground of criminalization. But on the other hand, though lessening of the speed, for example, by 30 km/hr would more significantly protect human's health or property. But setting the analogous prohibition would not have been justified, because the existence of effective transport system has high social value and in this case this value would have been decreased significantly.[41]

On deciding the criminalization issue different factors must be balanced in an analogous way. In the above discussed case the harm principle is obvious, because speed exceeding generally causes or creates harm danger, in spite of a fact that danger rate in each concrete case is different. It should be also noted that in the process of balancing it is impossible to calculate each concrete case in advance or to adapt the prohibition of the act to each human's demands. Criminal law prohibits acts by the average index or is based a typical risk of act and effects.[42] As it was said motion on the autobahn at a speed more than 125 km/hr is wrongfulness despite that the mentioned speed has no internal meaning (in most cases driving at this speed does not cause any danger). Though on concrete roads concrete limits must be set to regulate traffic safety rules, but limits can be defined by average indexes of standard cases.

4.2 Remote Harm

As it was said in the previous paragraph, to standard cases belong the acts, which straight and directly harm a human, though of course it is not serious to prove that only analogous acts must be subjected to criminalization. According to the harm principle lots of harmless acts might be a criminalization object.

To such type of acts are those, which might be followed by harm not instantaneously, but after some time. For example, buying of arms does not do any direct harm to the buyer, but it puts him into condition, when he might do harm to the others. The analogous approach is in case of incomplete crimes, for example, attempting of murder.[43]

As it was already said, imposition of a penalty to a human does not only mean punishing him, it also means reproaching. When talking of a remote harm it is quite hard to justify reproaching because of the act, over which he had no control and depends on a future actor or on a choice of a third person. For example, criminalization of selling firearms is based on a future danger, which can be caused by the act of the firearms buyer. The danger will be materialized only after the buyer of firearms uses it unlawfully.

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[40] Though the mentioned is subjected to administrative prohibition, as it was noted at the beginning of the work, to show the criminalization issue perfectly it is necessary to conduct discussion in parallel with civil and administrative prohibitions. On the autobahn driving at speed 110 km/hr is permissible, but the Code of Administrative Violations has a record, according to which speeding violation by 15 km/hr or in this case driving at 125 km/hr is punishable.

[41] *Grundy C., et. al,* Effect of 20 mph traffic speed zones on road injuries in London, 1986-2006: controlled interrupted time series analysis, 2009, British Medical Journal 339:b4469.

[42] *Simester A. P., Hirsh Von. A.,* Crimes, Harms and Wrongs: On the Principle of Criminalisation, Oxford, Hart Publishing, 2011, 46.

[43] *Simester A. P., Hirsh Von. A.,* Crimes, Harms and Wrongs: On the Principle of Criminalisation, Oxford, Hart Publishing, 2011, 47. Here is not meant a complete attempt, which in most cases causes a direct harm.

The problem is just it, that the seller of the firearms is punished because of the harm, which might not be occurred in general, because selling of the firearms is already a complete crime and materialization of the remote harm has no sense.

4.3 Secondary, Reactive Harm

Harm might be also obvious, when humans experience influence not from the reality of the act, but from the future consequences; for example, one of the main reasons why graphite[44] is prohibited in many countries of the world is not that graphite itself is harmful for anybody, but correction of the consequences of this act is connected with great problems.

In connection with this Gardner and Shute partly fairly remark the following: "According to the harm principle prohibition of such acts, which do not cause harm or danger of harm does not represent any restriction. The main point for it is overcoming a criterion by the act, by which it will cause harm in such a way, that a separate act will not be criminalized."[45] In other words, it is important not which act causes harm, but what result will be, if a concrete act is pronounced admissible. For example, if thieving by breaking into house were admissible, a human would be forced not to leave house without watching for a long time, would have to insure it, to install signalization and etc. It will be connected with expenditures, which in normal conditions will not be spent by him. He will be feeling unprotected and uncertain, as his house might be robbed any time. So basing on this as criminalization of robbery done by getting into the house wrongfully partly is decreasing the possibility of committing this act, it will also decrease the harm. What Gardner and Shute don't envisage is that their discussion is rather extensive and that the reactive harm is secondary. It is important to emphasize that when the talk is about criminalization of the act, which causes secondary harm, it is necessary to prove that the act is wrongful despite the harm. So the wrongfulness of the act becomes very important. For prohibition of the act it is not enough only the fact that one person does not like someone's behavior. For example, "A" does not like when "B" walks his dog in the street. Accordingly he does not come out in the morning and thinks that he must make a high fence in order not to see "B's" behavior every morning. "A" can demand prohibition of the analogous act, as an act causing harm, only if it is unlawful. Accordingly, unlawfulness of "B's" act must be existed objectively and not only in "A's" imagination.[46]

For perfection of the mentioned issue let's discuss one more example. Burglary is obvious when "A" gets unlawfully into the "B's" house in order to commit another crime, namely robbery. According to the Criminal Code of Georgia getting into the house illegally is already an unlawful act[47] and is a good argument for criminalization of this act, because it causes direct harm. But criminalization only of this case would be unjustified, because it does not properly estimates the importance and a real nature of getting into the house unlawfully. The aggravated circumstance of this act is a fact, that it includes in itself a remote harm too. By getting into the house illegally "A" is creating danger of a new crime – robbery and just this remote harm turns this act into a very dangerous one; but in spite of all these the main reason of referring burglary to the aggravated circumstance is that secondary harm, which causes this act. Getting into the

[44] Graphite – writings or drawings on the walls of public streets, underground passages, metro and etc. Though such act is not mentioned in our Criminal Code, but Article 187 of the Civil Code of Georgia (damage or destroy a thing) includes this act.

[45] *Gardner J., Shute S.,* The Wrongness of Rape in *Horder J.* (ed), Oxford Essays in Jurisprudence (4th series, Oxford: Oxford University Press) 193, 216.

[46] *Simester A. P., Hirsh Von. A.,* 48.

[47] For example see Article 160 of the Civil Code of Georgia "Violation of Violability of Housing and Other Ownership".

house illegally does not only create danger of a new crime (for example, robbery), but violates human's personal privacy too. Just for this reason it's not surprising that any crime committed by getting into a house unlawfully causes big excitement of the victim, even if he were not at home then.

From all the above mentioned it is possible to make several important conclusions. First, getting into the house illegally in order to commit another crime turns it into a specific crime and its criminalization is justified, because it combines the three kinds of harm. Second, from these three kinds of harm the secondary or reactive harm can be distinguished, because just the danger of the mentioned harm emphasizes the risk of this crime. Third, when reactive harm is obvious, the act causing it must be unlawful in order to be subjected to criminalization.

5. Wrongful Act Not Containing Harm

To distinguish different kinds of harm is important from the point of view to state which harmful act is under the definition of the harm principle and which not. In connection with this issue let's discuss Feinberg's opinion about trespassing on somebody else's plot of land: "When a person without permission goes into some landowner's plot of land, he violates his rights. Technically violation of these rights starts from the moment this person makes his first step without permission. With this act this person violates the landowner's interest in spite of the fact that there is no harm to the landowner's other interests and on the contrary, it might be even profitable for him".[48] The problem of this reasoning is that it does not contain a boundary between the harm and wrongfulness, as people always have an interest in not being done any wrongful act in relation to them. Accordingly in this case a person trespassing the landowner's plot of land is committing a wrongful act in such a way that it does not cause any direct harm or violation of his interest is just based on wrongfulness.[49] Supposition of the opposite of this will confirm that violation of a separate right in any case must be deemed to be harm and there will be lost such acts, which are criminalized because of their wrongfulness, but not causing direct harm.

It's hard to deny that there are such acts, which are wrongful nevertheless they cause harm or not (whether direct or secondary). For example, conceptually if analyzing it, false testimony does not cause any concrete harm. This act is criminalized because it is wrongful; it is a completed crime, no matter any harm was done or not to somebody. This must not be interpreted as if prohibition of false testimony is not based on harm; on the contrary harm is an important element of this act. But prohibition of this act differs from such a resultative act, as for example murder, that on giving false testimony harm is not a source of wrongfulness. This act is wrongful despite the harm, which is caused or the danger of the harm, which might be caused by it. So harm is one of the components, because of which criminalization of false testimony is justified, but this crime might be committed in such a way, that harm will not be obvious.[50]

Analogous opinion can be said about incomplete crimes. It's the truth that wrongfulness of the attempted assassination is more based on the intention of a criminal, than on the results of this action, but the base of its criminalization is that this act might also cause harm. Here attention should be paid to useless attempts, especially absolutely useless attempts (such as for example, attempt of murder using "Voodoo" Doll). In such a case criminalization of harm has nonsense, as there is neither the ground of occurrence of harm, nor a similar action itself is wrongful. As a summary it should be said, that in general there is no preventive reason for criminalization of those acts, which are wrongful in spite of the prejudicial result.

[48] *Feinberg J.,* Harm to Self, Oxford University Press, 1986, 107.
[49] See *Duff A.,* Intention, Agency and Criminal Liability, Oxford: Blackwell, 1990, § 5.3.
[50] *Duff R. A., Green S*., Law, Language and Community: Some Preconditions of Criminal Liability, 18 OJLS, 1998, 168.

6. Conclusion

As it was seen criminalization is the most important means of stating legitimacy of criminalization. Besides the harm principle is a guarantee of protection of humans' freedom too, because by this principle in order to justify setting of criminal prohibitions by the state it must show why a concrete person's act is causing harm to others or why his act is deemed to be having danger of harm.

In addition for completion of the above mentioned principle it is necessary to foresee an element of wrongfulness and just this latter turns this principle into the completed one. The harm principle is based on wrongful acts, which inflict harm on other people. There are also cases when a separate unlawful act does not infringe the sufferer's interests. Then such acts at a glance must not be under jurisdiction. From this point of view it is remarkable a philosopher John Kleinig's example on short-term false imprisonment. In this case unlawfulness is undoubtedly obvious, but there might not be any harm.[51] Prima facie, the above mentioned act is not getting under jurisdiction of the harm principle, but the above discussed kinds of harm revealed that the harm principle can be used more widely, than it is generally recognized. Just for this reason the harm principle can be used for those acts, which don't cause direct harm, but cause secondary harm. So the above discussed act and generally those acts, which are unlawful, are subjected to criminalization, irrespective of harm.

[51] *Kleinig J.,* Crime and the Concept of Harm, 15American Philosophcal Querterly, 1978, 27, 32.

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