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The Way of Commemoration of the Primate of Church according to the 1710 Hieratikon of King Vakhtang VI

The Charter of the Georgian Apostolic Orthodox Church, Chapter IV, Para 20, describes the way of liturgical commemoration of the Primate of Church as follows: "all the clergymen during the services have to commemorate the name of the Catholicos-Patriarch of All Georgia in all the churches under the jurisdiction of the Church of Georgia, both in Georgia and abroad, using the following wording: "His Holiness and Beatitude, Catholicos-Patriarch of All Georgia and Archbishop of Mtskheta-Tbilisi, Great Master and Our father (name)" [1]

This wording, namely "Great Master and Our father" derives from Church-Slavonic, better to say Russian liturgical practices as a Georgian translation of "О великомъ господинѣ и отцѣ нашемъ, свѧтѣйшемъ Патрїархѣ (имѧрекъ) Московскомъ и всеѧ Руси"[2]

Naturally, aforementioned arises the zeal to study the old liturgical books in order to restore the original way of commemoration of the Primate of Church in Georgia. Obviously, the study of the old liturgical texts is the sphere of relevant specialists, but in this case we will touch solely the title of the primate of the church, since the issue is connected with the canon law.

Key words: *Church, primate, patriarch, ecclesiastical law, canon law, hieratikon, liturgy.*

1. Introduction

A primate of the church, according to the Orthodox Canon Law is the head of the local autocephalous Orthodox Church which is elected, traditionally, by the council (synod) of hierarchs and his term is determined as limitless. The practice of the Christian states over the centuries showed that the Primate of the Church has been considered as the highest rank person in the country, occurring the equal honour of king, monarch, and in later times, of president. The law-maker King Vakhtang VI, describing in his Code of Law the "cost of blood" according to the various members of society, underlines that the cost of blood of King and Catholicos is priceless.[3] Obviously, indicating on the

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1 *Metropolitan Japaridze A.,* The Book of Ecclesiastical Canons of Georgia, Tbilisi, 2010, 317 (in Georgian). As it is widely known, according to the Decision N1, dated December 21, 2010 of the Holy Synod of the Church of Georgia, "Metropolitan of Bitchvinta and Tskhum-Abkhazia" was added to the patriarchal title.

2 "For Great master and our father, His Holiness Patriarch of Moscow and All Rus' " (translated by *Davit Chikvaidze*).

3 Law of King Vakhtang, Article 33.

king and the catholicos in the same context underlines aforementioned view. Also, worthy to mention that throughout the centuries the hierarchal vestments had been designed similarly as of king's and until today, high clergymen of the Orthodox Church uses sakkos (cape), epigonation (sword) and mitre (crown), which have been the symbols of the royal power. Even in non-Christian countries (e.g. Ottoman Empire), the primate of the church was considered as the head of religious-ethnic minorities (so called "millet") and was authorized to defend the interest of the parishioners at the Imperial Court. Such an approach to the primate of the local church resulted with strengthening of his status and logically, it became as one of the symbols of the statehood at the end. Moreover, in the Orthodoxy, papo-caesarism has been developed, stating that since both the king and the patriarch are the leaders of the nation, in particular, the king – being the corporeal leader but the patriarch – the spiritual and generally, in Christianity the spiritual prevails the corporeal, the leader of the spiritual life has to have more honour. This is reflected at the well-known quotation from the Life of St. Grigol of Khandzta: "Your Majesty, King, you are the ruler of this country, but Christ is ruler of the heaven and the earth and under it. You are the king of a nation, but Christ – all the men ever born. You are the king in a particular time, but Christ is the Eternal King. And He is unchanged, eternal, not created, the king of the angels and mankind".[4]

As a result of all the mentioned above, the significance of each honour and regalia of the primate of the church have been widening. Especially, when it comes to the official title of the primate of the church and way of its commemoration. Primate's title has the importance because the primate of the church has been naming the territory under his authority as king, which was never lacking its political background. Moreover, in most of the cases, the title of the primate of the church included wider territory than king's underlining the higher status of the patriarchs.[5]

2. The Importance of the Commemoration of the Primate of the Church

The way of commemoration of the primate of the church has not only the liturgical but the importance of the inter-church relations. It is known widely that during the divine liturgy the hierarchy of the church is commemorated many times (Great Litany, Litany of Fervent Supplication, Great Entrance and following the chant "It is truly to bless you") according to this rule: the primate of the church commemorates the primates of other autocephalous churches, the bishop – the primate of the church and lower clergy – both the primate and the bishop of the diocese. Commemoration by the bishop and priest the hierarchs above them determined their subordination, but in case of the primates – joint recognition. Accordingly, if any of the clergymen decides to quit the subordination, he stops the commemoration of the hierarchy. When the local churches do not recognize each other or some

[4] The work and life of the holy and blessed father Grigol, the Archimandrite of Kandzta and Shatberdi and their builder and along with him other our blessed fathers, Chapter 26.

[5] This approach remains until today: the jurisdiction of the Patriarchate of Georgia includes Lazeti, Tao-Klarjeti, Agarak-Tashir, Hereti, which are out of the state borders of Georgia. The same approach is in the cases of other local churches.

important conflict arises between them – the primates of the churches shall stop the commemoration of each other.

That is way the formulating of the title of the primate of the church is extremely important because as it was mentioned above, the title of the primate of the autocephalous church and its recognition among the churches have the political background and all the local churches pay special attention on it.[6]

In the modern practice of the Apostolic Orthodox Church of Georgia, as it was mentioned in the foreword of this article, the Russian way is used which is not common not only among the Greek churches, but even in the Slavonic local churches.[7] Hence, before we touch upon the old tradition of Georgia and the Hieratikon of the King Vakhtang VI, it could be interesting if we review the way of commemoration of the primate in the Greek and Slavonic traditions in order to compare them and discuss the differences.

3. The Way of Commemoration of the Primate of the Church in the Greek and Slavonic Traditions

We have mentioned that the primate of the church is commemorated four times during the Divine Liturgy: at the Great Litany, at the Litany of Fervent Supplication, the Great Entrance and following the chant dedicated to the All-holy Theotokos – "It is truly to bless". Since the way of commemoration is the same for all the cases, the text of the Great Litany will be quoted:

The churches of **the Greek Tradition** use the following wording:

„Ὑπὲρ τοῦ Ἀρχιεπισκόπου καὶ πατρὸς ἡμῶν (δεῖνος), τοῦ τιμίου πρεσβυτερίου, τῆς ἐν Χριστῷ διακονίας, παντὸς τοῦ Κλήρου καὶ τοῦ Λαοῦ, τοῦ Κυρίου δεηθῶμεν",[8]

"For our Archbishop and Father (name), for honorable presbyterate and the deaconate in Christ, for all the clergy and his people, let us pray to the Lord" (translation here and afterwards belongs to the author).

As for the local Churches belonging to the Slavonic Tradition, most of them celebrate the Divine Liturgy in modern languages and hence, the way of commemoration differ from each other:

Patriarchate of Serbia: „За најсветијега патријарха (или високопреосвештнога митрополита, или преосвештеног епископа) нашега (име), за часно презвитерство, у Христу ђаконство, за сав клир и верни народ, Господу се помолимо",[9] "For our Holy Patriarch (or Most Reverend

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6 The proof of such policy is, for instance, the updating the patriarchal title of the Apostolic Orthodox Church of Georgia by the words "Metropolitan of Bitchvinta and Tskhum-Abkhazia" and her request disseminated to other sister-churches. At the same time, the refuse of the Patriarchate of Moscow to recognize our Patriarch with his full title also underlines their political views.

7 Those churches which celebrate the Divine Liturgy in Church Slavonic language and/or in any modern language of the Slavic Language Family, do not use the given wording (the next chapter includes the quotations from the practice of other Autocephalous churches).

8 *Επιμέλεια π. Γεώργιος Ι. Θεοδωρίδης,* Ιερατικον, Κάλυμνος, 2018, 55.

9 *Archbishop Taushev A.,* Hieromonk Grigory Svetogorats, Blessed are the Kingdom of Otsa and Sina and the Light of the Spirit - the Misty Light of the Liturgy and their worshipers Orthodox Church, Beograd, 2007, 535 (in Russian).

Metropolitan, or Reverend Bishop), for the honorable presbyterate, the deaconate in Christ and for his all the clergy and faithful people, let us pray to the Lord";

Patriarchate of Bulgaria: „За Високопреосвещения наш митрополит (името), за честното свещенство, за дяконството в Христа, за всички църковнослужители и народа на Господа да се помолим",[10] "For our Most Reverend Metropolitan (name), for the honorable presbyterate, the deaconate in Christ, for all clergy and the people, let us pray to the Lord";

Church of Poland: „Za Wielce Błogosławionego Metropolitę naszego, Sawę, i biskupa (tu są wymieniani kolejni biskupi współcelebrujący), za czcigodne kapłaństwo, w Chrystusie diakońśtwo, za całe duchowieństwo i lud, do Pana módlmy się",[11] "For our Most Blessed Metropolitan Sawa, and Bishop (here to be commemorated co-celebrating bishops), for the honorable presbyterate, the deaconate in Christ, for all the clergy and people, let us pray to the Lord";

Church of Czech Lands and Slovakia: „Za vladyku našeho metropolitu (jméno) [za vladyku našeho (archi-) episkopa (jméno)], za důstojné kněžstvo, diákonstvi v Kristu, za veškeré duchovenstvo a lid k Hospodinu modleme se",[12] "For our Master, Metropolitan (name) [for our Master, (arch-) bishop (name)], for the honorable presbyterate, the deaconate in Christ, for all the clergy and people, let us pray to the Lord".

As we see, the primates of the churches are being commemorated with full title and without any other additional wording. The exception of Greek text, where the word "Father" is added and Czech-Slovak text, where they use "Master". As for the wording of our discussion, namely "for great master and our father" is not common for other local churches and used solely in the Church of Russia. This tradition influenced the Patriarchate of Georgia as well.

4. The Way of the Commemoration of the Primate according to the Liturgical Books used in Georgia

At the beginning, worthy to mention that the most of the liturgical books used in Georgia in modern times, especially those printed in Khutsuri alphabet, are the reprinted versions of the books published in XIX c. under the Imperial Authority of Russia, when the autocephaly was lost. Hence, they name "Holy and Ruling Synod" which was considered as the leadership of the Russian church during the absence of patriarchy and obviously, cannot be used for the purposes of this article. As for the way of commemoration of the patriarch, mentioned above, is used in Russia since the enthronement of Patriarch Tikhon in 1917.

One more interesting detail should be taken into consideration: none of the Charters of the Church of Georgia, adopted since the restoration of the autocephaly, do not give a specific wording for

[10] Divine Liturgy for St. John Chrysostom on Bulgarian Ezik, http://www.pravoslavieto.com/bogosluzhenie/liturgy/1.htm#%D0%92%D0%B5%D0%BB%D0%B8%D0%BA%D0%B0%D0%95%D0%BA%D1%82%D0%B5%D0%BD%D0%B8%D1%8F [19.01.2021] (in Russian).

[11] Tekst Liturgii święta Przemienienia Pańskiego z tłumaczeniem na język polski, Fundacja Hagia Marina, Warszawa, 2019, 17-18.

[12] Božská liturgie svatého Jana Zlatoústého, Praha, 2013, 13.

the commemoration of the primate. All four Charters use the same phrase: "Name [of the Catholicos] shall be commemorated at the divine services by the hierarchy and clergy of the Catholicosate".[13] In very limited editions of the liturgical texts published during the Soviet period (these were mostly the appendix to the Church Calendar) the Russian wording is common, but the current Charter is the first which includes the way of the commemoration of the primate.

Also worthy to mention that neither the current nor the previous Charters do not determine the way of the commemoration of the hierarch of diocese or any specific wording for it. All the Charters shortly rule that the name of the hierarch of diocese shall be commemorated by the clergy of the diocese during the divine services.[14]

Accordingly, it would be interesting if Old Georgian manuscripts of liturgical texts and the way of commemoration of both – primates and hierarchs shall be subject of research. This needs separate, fundamental work. But now the Hieratikon printed in 1710 by the King Vakhtang VI will be discussed which is first printed liturgical book in millennia-old history of the Church of Georgia and edited before the loss of the autocephaly.

5. General Description of the Edition

The hieratikon, as mentioned many times, is printed in 1710, in the publishing house of the King Vakhtang VI, two colours are used (black and red), consists of 212 pages, the main text is in Khutsuri script (i.e. Asomtavruli and Nuskhuri together), introduction includes Mkhedruli script as well. Worthy to underline that at the end of the book, the Romanian text is annexed in Georgian script.

In most of the cases, the primate of the church is commemorated in the same way and only "For our Archbishop" is used. Some parts include the alternatives for the hierarchs. "Patriarch" is mentioned only once, in the text for the ordination of bishop, describing that if the candidate for bishop is to be ordained by the Patriarch, the candidate should be named as "elected and prepared by the reverend metropolitans, archbishops and bishops", but if the candidate is to be ordained by the Metropolitan – "elected and prepared by God-loving bishops and honorable presbyterate". Also it is interesting that the Hieratikon puts Metropolitan higher than Archbishop, apart from the Greek traditions.

The quotations commemorating either primate or bishop are given in full. The quotations keep the original abbreviations (shortened words are restored in square brackets) and two colours. Also, those parts of the Divine Liturgy are given where this Hieratikon does not commemorating the hierarchs, but since it is common in modern practice, it could be interesting for the readers.

Hereby, I would like to express my cordial gratitude to the National Library of the Parliament of Georgia and its staff, and especially those who were involved in the work of digitalization of the unique editions kept in the National Library and of accessibility for the society.

[13] *Metropolitan Japaridze A.,* The Book of Ecclesiastical Canons of Georgia, Tbilisi, 2010, 258, 273, 290, 302 (in Georgian).

[14] Ibid, 260, 274, 298, 304, 321.

Vespers

Great Litany, Page 27:
„მთ[ა]ვარეპისკოპოზისა ჩვ[ე]ნისას[ა]ხელით, პ[ა]ტიოსანთა მღდ[ე]ლთა, ქ[რისტ]ეს მი[ე]რ დი[ა]კ[ო]ნთა, და ყ[ოვლ]ისა სამღდ[ე]ლოსა დასისა და ერისა მისისათ[ჳ]ს უ[ფლისა]ჲ [მი-მართ ვილოცოთ]“
“For our Archbishop (name), for the honorable presbyterate, the deaconate in Christ and all his clergy and people, let us pray to the Lord”

Litany of Fervent Supplication, Page 30:
„მერმეცა გ[ევედრე]ბით მთ[ა]ვარეპისკ[ო]პ[ო]სისა ჩვ[ე]ნისა ს[ა]ხელით, და ყ[ოველ]თა ქ[რისტ]ეს მი[ე]რ ძმ[ა]თა ჩვ[ე]ნთათ[ჳ]ს“
“Again we ask for our Archbishop (name) and all our brethren in Christ”

“Save, oh God”, Page 35:
„მერმეცა გ[ევედრე]ბით მთ[ა]ვარეპისკ[ო]პ[ო]სისა ჩვ[ე]ნისა, ანუ ეპისკოპოსისა ს[ა]ხე-ლით, და ყ[ოველ]თა ქ[რისტ]ეს მი[ე]რ ძმათა ჩვ[ე]ნთათ[ჳ]ს“
“Again we ask for our Archbishop or Bishop (name) and all our brethren in Christ”

Orthros

Little Litany of Fervent Supplication, Page 40:
„მერმეცა გ[ევედრე]ბით მთ[ა]ვარეპისკ[ო]პ[ო]სისა ჩვ[ე]ნისა ს[ა]ხელით“
“Again we ask for our Archbishop (name)”

Great Litany, Page 49:
„For Archbishop…“ *(shortened)*

Litany of Fervent Supplication, Page 53:
„მერმეცა გ[ევედრე]ბით ძმათა ჩვ[ე]ნთათ[ჳ]ს“ *(მღვდელმთავარზე მითითება არ არის)*
“Again we ask for our brethren” *(no commemoration of the local bishop)*

Divine Liturgy (general)

Proskomedia, Pages 64-65
„ამისა შ[ემდგომა]დ მოიღონ მესამე სეფე და თქ[ვა]ნ: მოიჴსენე მ[ეუ]ფჩო კ[ა]ცთ მ[ო]ყ[ვა]რეო ყ[ოველ]ნი მ[ა]რთლმადიდებელნი ეპისკ[ო]პ[ო]სნი და ეპისკოპოსი ჩვ[ე]ნი ს[ა]ხელით.“
“After this the third bread shall be taken and commemorated: remember, oh man-loving King all the Orthodox bishops and our bishop (name)”

Divine Liturgy of St. John the Chrysostom

Great Litany, Page 76:
„მთ[ა]ვარეპისკოპოსისა ჩვ[ე]ნისა ს[ა]ხელით, პ[ა]ტიოსანთა მღდ[ე]ლთა, ქ[რისტ]ეს მი[ე]რ დი[ა]კ[ო]ნთა, და ყ[ოვლ]ისა სამღდ[ე]ლოსა დასისა და ერისა მისისათ[ჳ]ს უ[ფლისა]ჲ მი-მართ ვი[ლოცოთ]“
“For our Archbishop (name), for the honorable presbyterate, the deaconate in Christ and all his clergy and people, let us pray to the Lord”

Litany of Fervent Supplication, Page 86:
„მერმეცა გევედრებით მთავარეპისკოპოსისა ჩვ[ე]ნისა ს[ა]ხელით“
“Again we ask for our Archbishop (name) and all our brethren in Christ”

Great Entrance, Pages 92-93
„თქვ[ე]ნ ყ[ოველ]ნი მოგიჴსენოს უ[ფალმა]ნ ღ[მერთმა]ნ ჩვ[ე]ნმან სასუფ[ე]ველსა მისსა, ყ[ოვლა]დვე აწ და მარადის და უკ[უნით]ი უკ[უნისამდ]ე. ა[მი]ნ“ *(მღვდელმთავარზე მითითება არ არის)*
“May our Lord God remember all of you in His Kingdom, always, now and forever, and for ages of ages. Amen” *(no commemoration of hierarch)*

“Among the first remember”, Page 103:
„პ[ირვე]ლ[ა]დ მოიჴსენე უ[ფალო], მთ[ა]ვარეპისკ[ო]პ[ო]სი ჩვ[ე]ნი ს[ა]ხელით, რ[ომე]ლი მომადლე წ[მიდა]თა შ[ე]ნთა ეკლესიათა, მშჳდ[ო]ბით, ცოცხლებით, პ[ა]ტიოსნად, სიმრ-თელით, დღეგრძელობით, მ[ა]რთლმკვეთელობით სიტყჳსა შ[ე]ნისა ჭ[ეშმარი]ტ[ე]ბისათა“.

“Among the first remember, Lord, our Archbishop (Name); granted him to Your holy churches in peace, safety, honour, and health, unto length of days, rightly teaching the word of Your truth”

Divine Liturgy of St. Basil the Great

Great Litany, Page 118:
„მთ[ა]ვარეპისკოპოსისა ჩვ[ე]ნისა ს[ა]ხელით, პ[ა]ტიოსანთა მღდ[ე]ლთა, ქ[რისტ]ეს მი[ე]რ დი[ა]კ[ო]ნთა, და ყ[ოვლ]ისა ს[ა]მღდელოსა დასისა და ერისა მისისათ[ჳ]ს უ[ფლისა]ჲ მიმართ ვილოც[ო]თ“
“For our Archbishop (name), for the honorable presbyterate, the deaconate in Christ and all his clergy and people, let us pray to the Lord”

Litany of Fervent Supplication, Page 124:
„მერმეცა [გევედრებით] მთ[ა]ვარეპისკოპოზისა ჩვ[ე]ნისა ს[ა]ხელით“
“Again we ask for our Archbishop (name) and all our brethren in Christ”

The words for the Great Entrance is missing and there is an indication to the Liturgy of St. John the Chrysostom as follows:
„და ყონ აქაცა რ[ომელ]ი ჯერ იყოს სათქმელად, მღ[დელმა]ნ და დი[ა]კ[ონმა]ნ, ვ[ითარც]ა ოქრ[ო]პირის წირვ[ა]სა შ[ინ]ა წერილ [ა]რს. ხ[ოლო] რ[ა]ჟ[ამ]ს დაასრ[უ]ლონ ლ[ო]ცვა იგი, ყონ დიდი გ[ა]მოსლვა და შ[ემდგომა]დ შესლვისა გამოვ[ა]ლს დი[ა]კ[ო]ნი და გ[ა]ნწეს[ე]ბ[უ]ლსა ადგილსა თ[ჳ]სსა დადგების და იტყჳს...“
“And same should be said which is necessary by the priest and deacon as described in the liturgy of the Chrysostom. And after the finishing of the prayer, the Great Entrance shall be celebrated but afterwards deacon has to go out and stand on his right place and say…”

“Among the first remember”, Page 146:
„პ[ირვე]ლ[ა]დ მოიჴსენე უ[ფალო], მთავარ ეპისკოპოსი ჩვ[ე]ნი ს[ა]ხელით, რ[ომე]ლი მომადლე წ[მიდას]ა შენსა ეკლესიასა, მშჳდობით, ცოცხლებით, პატიოსნად, სიმრთელით, დღეგრძელობით, მართლ მკვეთელობით და მართლ გამომეტყველებით სიტყჳსა შ[ე]ნისა ჭ[ეშმარი]ტ[ე]ბისასა“
“Among the first remember, Lord, our Archbishop (Name); granted him to Your holy churches in peace, safety, honour, and health, unto length of days, rightly teaching the word of Your truth”

Liturgy of Presanctified Gifts

Great Litany, Page 159:
„მთავარეპისკოპოსისა ჩვენისა“
“For our Archbishop”

Litany of Fervent Supplication, Page 163:
„მერმეცა გ[ევედრე]ბით მთ[ა]ვარეპისკოპ[ო]სი[სა ჩვენისათჳს]“
“Again we ask for our Archbishop”

Ordination of the deacon

Great Litany, Page 181:
„მთავარეპისკოპოსისა ჩვენისა სახელით“
“For our Archbishop (name)”

Ordination of the priest

Litany of Supplication, Page 186:
„მთ[ა]ვარეპისკ[ო]პ[ო]სოსა ჩვ[ე]ნისა ს[ა]ხელით, კ[ე]თილად მღდ[ე]ლობისა ამისთ[ჳ]ს და წ[მიდ]ისა ამის ს[ა]ხლისათ[ჳ]ს, მშჳდ[ო]ბისა, სიმრთელისა და ცხ[ო]რებისათ[ჳ]ს საქმეთა ჴ[ე]ლთა მისთათა უ[ფლისა]ჲ მ[იმა]რთ [ვილოცოთ]“
“For our Archbishop (name), for good priesthood of this [to be ordained] and his holy house, peace, health and salvation by his hands, let us pray to the Lord”

Ordination of the bishop

Presentation of the candidate, Page 189:
„შემდგომად წ[მიდა]ო ღ[მერთ]ოსა, აღვ[ა]ლს მღდ[ე]ლთმთ[ა]ვარი ხარისხსა ზ[ედ]ა ტრა-პეზისასა და მოიყვ[ა]ნენ სამნი ეპისკოპოსნი ჴ[ელ]თ დასხმადსა მას ეპისკოპოსსა მ[ა]რჯ-ვენით კერძო ტრ[ა]პეზისა. ხ[ოლო] წიგნის მკითხვ[ე]ლი მ[ა]რცხენით კერძო მოვ[ა]ლს და წიგნსა მას მისცემს, რ[ომე]ლსა შ[ინ]ა წერილ [ა]რს სიტყ[ვა]ნი ესე. უკეთუ პ[ა]ტრიაქი არს იგი, იტყჳს ამას მ[ა]ღლისა ჴ[მ]ითა: გამორჩეული და მომზადებ[უ]ლი სამღდელოთა მიტ-რაპოლიტთა, მთავარეფისკოპ[ო]სთა და ეპისკოპ[ო]სთა მი[ე]რ.უკ[ე]თუ მიტრაპოლიტი აკ[ურთ]ხევს, იგი იტყჳს ამას: გ[ა]მორჩეული და მომზადებ[უ]ლი ღ[მრთ]ისმ[ო]ყვარეთა ეპისკ[ო]პ[ო]სთა და ღირსთა მღდ[ე]ლთა მი[ე]რ“.
“After the chant of “Holy God”, the hierarch shall go up to the altar and the candidate shall be brought by three bishops, stood on the right hand of the holy table, and book reader shall come on the left hand of the candidate and give the book where these words are written. If the Patriarch is ordaining, shall say with high voice: “elected and prepared by the reverend metropolitans, archbishops and bishops”, if the Metropolitan is ordaining, these shall be said: “elected and prepared by God-loving bishops and honorable presbyterate”

Ordination text, ibid
„საღმრთო მ[ა]დლი, რ[ომელ]ი ყ[ოვლა]დვე უძლ[უ]რებ[ა]სა ჩვ[ე]ნსა ჰკურნებს და ნ[ა]კ-ლულევანებ[ა]სა ჩვ[ე]ნსა აღ[ა]ვსებს, და გ[ა]ნაჩინებს ღ[მრთ]ის მ[ო]ყ[ვა]რესა ს[ა]ხელით მღდელობისაგან ეპისკ[ო]პ[ო]სად, ღ[მრთ]ივდაც[უ]ლისა ამის ქ[ა]ლ[ა]ქისა ს[ა]ხელით, ვი-ლ[ო]ცოთ ამისთ[ჳ]ს, რ[აჲთ]ა დაიმკჳდროს ამას თ[ან]ა მადლმან ყ[ოვლა]დ წმიდისა სუ-ლისამან“.
“The Divine grace, always healing those being infirmed and completing those being lacked, ordains the God-loving Priest (name) to the office of Bishop, of God-protected city of (name). Let us, therefore, pray for him, that the grace of the All-Holy Spirit may come upon him”

Litany, Page 191
„მთ[ა]ვარეპისკოპ]ო]სისა ჩვ[ე]ნისა ს[ა]ხელით და მღდელობისა, შეწევნისა, მშჳდობისა, სიმრთელისა და ცხ[ო]რებისათ[ჳ]ს საქმეთა ჴ[ელ]თა მისთასა უ[ფლისა]ჲ მი[მართ ვილო-ცოთ];
“For our Archbishop (name) and priesthood, sustenance, peace, health and salvation by his hands, let us pray to the Lord”;

„მონისა ამის ღ[მრთისა]ჲ ს[ა]ხელით, აწ ჴ[ე]ლ დასხმულისა ამის ეპისკოპ[ო]სად და ცხ[ო]-რებისა მისისათ[ჳ]ს, უ[ფლისა]ჲ მი[მართ ვილოცოთ“.
“For this servant (name) of God, now ordained as bishop and his salvation, let us pray to the Lord”.

6. Conclusion

The Hieratikon of the King Vakhtang VI clearly shows that the Church of Georgia was using the Greek-style simple way and had been commemoration the primate of the church without specific titles, in shorten form. Should be underlined also that liturgical commemoration of the primate of the church, according to all the Charters since the restoration of autocephaly, has not ever been in full form and besides, there was not any canonical ruling for addition of other titles to the primate of the church.

Taking into consideration, it should be advisable and desirable, if the Primate of the Apostolic Orthodox Church of Georgia to be commemorated as follows:

Full form: "For his Holiness and Beatitude, Catholicos-Patriarch of All Georgia, Archbishop of Mskheta-Tbilisi and Metropolitan of Bitchvinta and Tskhum-Abkhazia, Ilia…"

Shorten form: "For his Holiness and Beatitude, our Catholicos-Patriarch Ilia…"

We express our hope that this shall be taken into consideration by the Patriarchate of our Church and clergymen.

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2. Božská liturgie svatého Jana Zlatoústého, Praha, 2013, 13.
3. Divine Liturgy for St. John Chrysostom on Bulgarian Ezik, <http://www.pravoslavieto.com/bogoslu-zhenie/liturgy/1.htm> [19.01.2021] (in Russian).
4. Kondak Priest, Tbilisi, 1710 (in Georgian).
5. Law of King Vakhtang, in: Law of Batonishvili Vakhtang, in the collection: Monuments of Georgian Law, Vol. I, published texts, research and attached a dictionary by Prof. I. Dolidze, Tbilisi, 1963, 474-552 (in Georgian).
6. *Metropolitan Japaridze A.,* The Book of Ecclesiastical Canons of Georgia, Tbilisi, 2010, 258, 273, 290, 302 (in Georgian).
7. Tekst Liturgii święta Przemienienia Pańskiego z tłumaczeniem na język polski, Fundacja Hagia Marina, Warszawa, 2019, 17-18.

Zurab Dzlierishvili*

Implication of the Principle of Nominalism upon Fulfillment of a Monetary Obligation

Monetary is the obligation[1], the object of which is the payment of a certain amount of money.[2] According to common understanding, money, as an economic category and an article of commerce, accomplishes certain duties in public relationships. The concept of money is a part of not only the economic life, but also of the legal world.[3] The duties of the money are identical functions both in private and public law relations, encompassing the universal option of evaluation, transfer, and accumulation of values, being a settlement unit as well.

Based on the analysis of the doctrine and judicial practice the paper discusses not the specificities of fulfillment of a monetary obligation in general, but rather the legal nature of the so-called principle of 'nominalism' envisaged by Article 389 of the CCG. This rule aims at promoting the development of market economy and procurement for the sustainability of civil-law relations.[4]

Key words: *Monetary obligations; the principle of 'nominalism'; Article 389 of the Civil Code of Georgia (CCG).*

1. Introduction

Money is a universal medium of exchange in civil-law relations.[5] Money is the phenomenon, the origin and existence of which depends on public and economic relations and it can operate only when such relations exist, within the frame of these relations.[6] Money is what money does. [7]

Each and every participant of civil-law relations can acquire some property wealth against the payment of money[8], which wealth will be transferred thereto by the counterpart of the relation in exchange of the paid money[9]. The buying power of money is based on the confidence, the participants

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1 *Donnelly M.,* The Law of Banks and Credit Institutions, Dublin, 2000, 369.

2 *Weiler F.*, Schuldrecht AT, Baden-Baden, Nomos, 2012, § 9, Rn 2.

3 *Mann F. A*., The Legal Aspect of Money with Special Reference to Comparative Private and Public International Law, 5th ed., Oxford, 1992, 3.

4 *Meskhishvili K.,* Topical Issues of Private Law, Vol. I, GIZ, Tbilisi, 2020, 128 (in Georgian).

5 *Grüneberg Ch.,* in *Palandt O.*, BGB Komm., 78 Aufl., München, 2018, § 245, Rn. 2.

6 *Kakulia R., Khelaia G.,* General Theory of Money Circulation and Credit, Tbilisi, 2003, 18 (in Georgian).

7 *Omlor S.,* Geldprivatrecht Entmaterialisierung, Europäisierung, Entwertung, Mohr Siebeck, Tübingen, 2014, 51.

8 *Chanturia L.,* Credit Security Law, Tbilisi, 2012, 7 (in Georgian).

9 *Asatiani R.,* Money and Monetary Systems, Tbilisi., 1996, 31-32 (in Georgian).

of civil-law relations have in it.[10] The value of a banknote, like the value of goods, is defined on the basis of demand-supply ratio and never is an absolute constancy.[11]

The law cannot create an universal medium of exchange, as it is unable to define whether what the object of free-will transaction can be (principle of freedom of contract).[12] In civil-law relations in the case of a credit[13] and transactions, that postpone the performance, a state is given an option to define the object that will act as a medium of fulfillment of the obligation.[14] The legal medium of payment substitutes any object of obligation even when the fulfillment of obligation in kind deems impossible and does not exempt a debtor from the payment of relevant monetary compensation to a creditor.

The legal importance of the status of a legal medium of payment, delegated upon banknotes, is that the creditor's refusal to receive the legal medium of payment, constituting the object of fulfillment of the obligation, results in legal consequences, that are related to the default of the creditor (*mora creditoris*).[15]

As per Article 383 of the CCG, a monetary obligation is expressed in national currency. The parties are free to set monetary obligation in foreign currency as well, provided that the foregoing is not prohibited by law. Currency is the monetary unit of a country,[16] underlying the monetary system of the country concerned.[17] A monetary obligation can be either interest-free or interest-bearing (DCFR, Principle 1:104)[18,19], the amount of which can be defined by a contract (contract interest)[20] or by law (statutory interest).[21;22]

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10 *Keynes J. M.,* Allgemeine Theorie der Beschäftigung, des Zinses und des Geldes, Aus dem Englischen neu übersetz von Nicola Liebert, Buch V, Kapitel 19, Berlin, 2017, 145.

11 *Issing O.,* Stabiles Geld – eine Illusion?, Mohr Siebeck, Tübingen, 2019, 5

12 *Zoidze B*., Reception of European Private Law in Georgia, Tbilisi, 2005, 268 (in Georgian).

13 *Chanturia L.,* Credit Security Law, Tbilisi, 2012, 7 (in Georgian).

14 *Wittreck F*., Geld als Instrument der Gerechtigkeit BRILL, Ferdinand Schöning 2002, 165 ff, <htpp//www. Schöening.de/view/title/45057> [20.03.2020].

15 *Grüneberg Ch.,* in: *Palandt O.*, BGB Komm., 78 Aufl., München, 2018, § 293, Rn. 10.

16 *Lando O., H. Beale H. (eds.),* Principles of European Contract Law, Parts I-II, Kluwer Law International, The Hague, 2000, 374.

17 *Grüneberg Ch.,* in *Palandt O.*, BGB Komm., 78 Aufl., München, 2018, §244, Rn 3; *Smidt-Kessel M.,* in: *Prüting H., Wegen G., Weinreich G.,* BGB Komm., 14. Aufl., Luchterhand Verlag, Köln, 2019, §244, 369.

18 Draft Common Frame of Reference – DCFR, as a project was launched by the EC in 2005. For the time present this document constitutes the collection of the key private law institutes, offering the overview of domestic law, doctrine and judicial practice of almost all the EU Member States. *Schulte-Nölke H., Clive E., von Bar Cr. (eds.),* Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition, Münich, 2009.

19 *Jansen N., Zimmermann R.,* Was ist und wozu der DCFR? NJW, 2009, 3401.

20 *Zoidze B., Chanturia L., Zoidze B., Ninidze T., Khetsuriani J., Shengelia R. (ed.)*, Commentary on Georgian Civil Code, Book Three, Tbilisi, 2001, Article 383, 267 (in Georgian).

21 With regard to interest in monetary obligations see: *Shotadze T.,* Mortgage as a Security Mean for a Bank Credit, Tbilisi, 2012, 138-142 (in Georgian).

22 *Meskhishvili K.,* Payment of Interest in the Case of Overdue Payment of Money (Theory and Judicial Practice), "Georgian Business Law Review", V Issue, 2016, 7 (in Georgian).

2. Essence of the Principle of Nominalism

Of paramount importance in regard to the fulfillment of monetary obligations is whether the change (loss or gain) in monetary exchange rate (buying power) further results in the change of the quantity of the banknotes? According to commonly acknowledged opinion a debtor is required to repay the debt in the same quantity of banknotes, that corresponds the time of origin of the debt. This principle of fulfillment of a monetary obligation is called the *principle of minimalism* and is acknowledged by the law and judicial practice of all the advanced countries.[23]

The principle of *nominalism* was first established by the English judicial Practice back in 1604, in *Gilbert v Brett* Case: the debt should have been paid in England by the unit of "Current and Lawful Money of England". By order of the Queen Elizabeth, the composition of coinage was debased before the payment fell due. However, the court obliged the creditor to accept debased coinage according to their denomination, i.e. according to value they had for the moment of origin of the obligation. This laid the foundation for making similar decisions by English courts in other cases as well.[24]

"The change in the buying power of French monetary unit does not result in the change of the nominal amount of debt. This principle stems from the works of Aristotle and the XVI century French lawyer *Molinaeus,* and it became a legal principle after the adoption of the Napoleonic Code."[25] In the United States the principle of *nominalism* operates[26] on the basis of case law.[27] With regard to the principle of *nominalism* in German law see.[28]

Under Article 389 of the CCG, if before the date when payment falls due, the monetary unit (rate of exchange) appreciates or depreciates, or if the currency was changed, the debtor shall be bound to make payment according to the rate corresponding the period of origin of the obligation. In the case of a change of the currency, the conversion relations shall be based on the conversion rate that existed between these currencies on the date of the change of the currency.

Article 389 of the CCG can be conditionally divided into two parts: the first one can be the change in the buying power of the currency from the moment of origin of the obligation until the date of its fulfillment, and the second part - the change of the currency, i.e. the substitution of the old monetary unit with the new one. "The concept of "rate of exchange", given in brackets of the first sentence of Article 389 of the CCG is recognized as a legislative shortcoming."[29]

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23 *Meskhishvili K.,* Online Commentary of the Civil Code of Georgia, Article 389, field 3, <www.gccc.ge> [30.03.2020] (in Georgian).

24 *Dzlierishvili Z.,* Specificities of Fulfillment of Monetary Obligations, Tbilisi, 2005, 39 (in Georgian).

25 *Lobzhanidze P.,* Exchange Rate in Monetary Obligations, Man and Constitution, № 3, 2000, 70 (in Georgian).

26 *Lenihan N.,* The Legal Implications of the European Monetary Union under U.S and New York Law, 72, <http://ec.europa.eu/economy_finance/publications/publication11220_en.pdf> [30.03.2020].

27 *Dzlierishvili Z.,* Legal Nature of Contracts on Transfer of Property under Ownership, Tbilisi, 2010, 330 (in Georgian).

28 *Gruber G.,* Geldwertschwankungen und handelsrechtliche Verträge in Deutschland und Frankraich. Bestandsaufnahme und Aussichten für das europäische Währungs und Privatrecht, Berlin, 2002, 41.

29 *Vashakidze G.,* Civil Code System of Complicated Obligations, Tbilisi, 2010, 98 (in Georgian).

"The Court explained that the content of Article 389 of the CCG provides for two legal preconditions, specifically: the application of the principle of *nominalism* in the case of devaluation of the currency (rate of exchange) and change of the currency."[30]

"Denomination" means the amount of currency, depicted on a banknote (10 Lari, 50 Lari, etc.) and respectively, the debt should be repaid in the same unit. Hence, the object of obligation is a certain amount of currency and not the buying power of these units.[31] "Currency fluctuation is quite a normal phenomenon in a market economy and principle of *nominalism* is the medium for maintaining financial stability just in such cases."[32]

"A monetary obligation is construed fulfilled when covered in the amount of currency denominations and not on the basis of the buying power of the latter, what, as a general rule, is a category that changes over the time." [33] Smooth operation of international monetary system is associated with the stability of change in the exchange rate.[34] "Changes in the buying power of a currency does not change the amount of debt, does not constitute grounds for revaluation of the payable amount. Irrespective of these changes the buying power of money is defined according to nominal value. When speaking about the exchange rate of money, the account should not be taken of the exchange ratio of national currency with the foreign one, but rather the buying power of specific currency as a payment medium."[35] "Buying power depends on economic processes distinctive of market economy."[36]

"The Court did not uphold the assertions of the employee regarding "inflation amount", as with this respect the Appellant failed to formulate his claim in a manner as to allow for comprehensive definition of normative content of the legal ground of the claim (e.g. Article 389 of the Civil Code of Georgia) and relevant scrutiny.[37] "The Appeals Chamber stressed that there are no conditions, prescribed by Article 389 of the CCG for claiming the compensation of additional amount due to GEL devaluation and, respectively, legal grounds for meeting this part of the claim."[38].

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30 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1162-2018, dated 08 February, 2019.

31 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-217-207-2016, dated 20 May, 2016.

32 *Tskepladze N.,* Payment of Monetary Obligations in the Case of Change of Currency Unit, "Georgian Law Review", № 1, 2003, 194 (in Georgian).

33 *Fox D.*, The Case of Mixt Monies: Confirming Nominalism in the Common Law of Monetary Obligations, Cambridge Law Journal, 70(1), March, 2011, 144-174.

34 *Eichengreen B.,* International Monetary Arrangements for the 21st Century, Integrating National Economies, Washington, 1994, 29

35 *Meskhishvili K.,* Impact of the Change of Currency Rate on Civil Relations, "Georgian Business Law Review", V Issue, 2016, 7 (in Georgian).

36 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-870-1138-2005, dated 09 March, 2006.

37 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1190-2018, dated 12 April, 2019.

38 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1096-1125-2011, dated 6 October 2011.

"Changes in the buying power of the currency do not change the amount of debt, does not constitute grounds for revaluation of the payable amount. Irrespective of these changes the buying power of money is defined according to denomination."[39;40] Upon fulfillment of a monetary obligation, the obligation should be covered according to borrowed amount, as the object of monetary obligation is the certain amount of banknotes."[41]

"The purpose of Article 389 of the CCG is to promote the development of market economy, procurement for the sustainability of civil-law relations. Upon repayment of a debt, the legislator focuses not on the buying power of the denomination, but rather the denomination itself and amount of currency units."[42]

Worth mentioning with regard to the principle of *nominalism* in the legislation of advanced countries is the fact,[43] that after the introduction of the single currency unit - Euro, the problem of definition of the debt currency and payment currency in trade relations lost its practical importance in countries that joined the new currency system, as in such obligations the debt currency and the payment currency are the same.

However, many countries still have different monetary systems, the names of currency units of which do not coincide. Hence, in the case of devaluation or revaluation it is important to define, whether the currency of which country is the debt currency and the currency of which country is the repayment one as the principle of *nominalism* applies to debt currency and the change in the value of payment currency has no impact on the economic content of the obligation.[44]

"If a monetary obligation, defined in a currency other than Euro, is to be fulfilled within the country, than the payment should be made in Euro,[45] except for the case, when paying in other currency is explicitly negotiated.[46] If a monetary obligation is defined in a foreign currency, a debtor is entitled to pay in currency of the country, where the payment is made if the parties have explicitly agreed about the foregoing (Article 84 of the Law of Obligations of Switzerland, judicial practice of the UK and Germany.), according to the exchange rate, existing for the date of payment.[47] Worth mentioning is that there might be an agreement between the states themselves for the maintenance of the stability of the currency and prevention of devaluation. There are such agreements entered between

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39 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-217-207-2016, dated 29 May, 2016.

40 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-762-730-2016, dated 16 January, 2017.

41 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-347-323-2010, dated 19 July, 2010.

42 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-130-122-2017, dated 23 March, 2017.

43 *Weiler* F., Schuldrecht AT, §9, Baden-Baden, Nomos, 2012, Rn 8.

44 *Dzlierishvili Z.,* Contract Law (co-author), Tbilisi, 2014, 262 (in Georgian).

45 *Grothe H.,* in: *Bamberger H. G., Roth H., Hau W., Poseck R.,* BeckOK BGB, 53. Aufl., München, 2020, §244, Rn. 1-3.

46 *Grundmann St.*, in: MüKo, BeckOK BGB, 8. Aufl., München, 2019, §244, Rn. 2.

47 *Dzlierishvili Z.,* Legal Nature of Contracts on Transfer of Property under Ownership, Tbilisi, 2010, 331 (in Georgian).

the certain EU Member States, aiming at Euro's stabilization.[48] The International Monetary Fund tries to act as a guarantor for the fulfillment of obligations, to ensure the stability of the international monetary system.[49]

In monetary obligations, expressed in either national or foreign currency, money acts as a payment medium. In international commercial and banking practice currency is sometimes construed not as a payment medium, but rather as a generic thing, that can be bought. The basis of such relations are the currency exchange transactions.[50] Hence, it is necessary to differentiate between monetary obligations and currency exchange transactions as unlike monetary obligations, the principle of *nominalism* does not apply to currency exchange transactions.[51]

"In the case concerned the sales contract set the price in the USD, while the obligation was fulfilled - the amount was paid - in GEL. The Appeals Chamber stresses that the application of Article 389 of the CCG is not relevant with regard to this case as the normative content of Article 389 of the CCG regulates such legal relations, when the case concerns monetary obligations, when the amount of monetary obligation is defined, however the currency exchange rate or currency unit has changed from the date of origin of the obligation before the date of fulfillment thereof."[52]

"Irrespective of applicants' claim, that the currency unit suffered inflation since the date when they transferred money and thus, the payment obligation was to be imposed on the defendant in the USD. The court stressed, that the applicants made contributions to partnership at different times in the national currency - GEL and respectively, the dependant was to be imposed the payment of money in favor of the applicants in GEL".[53]

"The Court stressed, that upon compensation of damages, the damages in expert opinion, that Court relied on, were calculated in the national currency (GEL), respectively this is not the case of appreciation, depreciation or change of currency."[54]

Article 389 of the CCG can also be applied in the case of denomination[55] (appreciation or depreciation of currency unit) or hyperinflation or change of currency."[56]

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48 *Hofmeister H.,* Goodbye Euro: Legal Aspects of Withdrawal from the Eurozone, European Legal Studies Center, Columbia University Columbia Journal of European Law, Fall, 2011, <http://www.lexisnexis.com/hottopics/lnacademic/> [30.03.2020].

49 *Feibelman A*., Europe and the Future of International Monetary Law, Symposium Issue: The European Sovereign Debt Crisis: A Critical Assessment of the Euro & European Monetary Union, Transnational Law & Contemporary Problems, 22Spring, 2013, <http://www.lexisnexis.com/hottopics/lnacademic/> [30.03. 2020].

50 *Dzlierishvili Z.,* Specificities of Fulfillment of Monetary Obligations, Tbilisi, 2005, 25 (in Georgian).

51 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 248 (in Georgian).

52 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March, 2019.

53 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-762-730-2016, dated 16 January, 2017.

54 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-217-207-2016, dated 20 May, 2016.

55 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №3/K428, dated 05 April, 2000.

"The Appeals Chamber stressed, that Article 389 of the CCG cannot be applied in the case of normal depreciation of the currency exchange rate, as this process is distinctive of every country: it is applied when the face value of the state money is changed or there is a case of hyperinflation (very high level of inflation, which is often defined as inflation, the monthly level of which exceeds 50% over a long period of time). When the case does not concern the change of the denomination by the state or hyperinflation, Article 389 of the CCG cannot be applied."[57]

3. The Principle of *Nominalism* as the Manifestation of Public Order in Civil-law Relations

The principle of *nominalism* can be regarded as the manifestation of public order in civil-law relations[58]. "Public order promotes the establishment of moral and fair civil-law relations. The freedom of civil-law relations is limited and is bound by certain public interests."[59] "Public order is also a set of rules, embodying the core and fundamental interests of the state, the stability of the state is based on."[60]

According to the principle of *nominalism*, 1 Lari is always 1 Lari, in any situation, irrespective of loss or gain in buying power of the money. If parties provide for potential change in money exchange rate, they may safeguard themselves against negative consequences through various stipulations. If this is not the case, owing to objective will of law, *nominalism* will act as a presumable norm and, respectively, the parties will assume the risk of potential negative consequences resulting from this norm: if there is a gain in buying power of the money for the moment of repayment of the debt, this will act in favor of the creditor and the debtor has no right to rely on this situation to his own benefit. And if there is a loss in the buying power of the money for the moment of debt repayment, the creditor mechanically becomes the bearer of this risk and neither the latter is entitled to use this situation against the debtor.[61] Sometimes the principle of *nominalism* places a creditor in a grave position and creates certain benefits for a debtor.[62]

The Appeals Chamber stressed that "Article 389 of the CCG cannot be applied in the case of nominal depreciation of money exchange rate. Correlation between GEL and some foreign currency cannot be taken as a criterion for GEL depreciation as it is a well-known fact that GEL rate against

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56 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March 2019.

57 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-54-54-2018, dated 13 February 2018.

58 *Meskhishvili K.,* Impact of the Change of Currency Rate on Civil Relations, "Georgian Business Law Review", V Issue, 2016, 3 (in Georgian).

59 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-501-475-2015, dated 31 March, 2016.

60 *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 357 (in Georgian).

61 *Zoidze B., Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J. (ed.),* Commentary on Georgian Civil Code, 3rd Book, Tbilisi, 2001, Article 383, 348 (in Georgian).

62 *Meskhishvili K.,* Impact of the Change of Currency Rate on Civil Relations, Georgian Business Law Review, V Issue, Tbilisi, 2016, 2 (in Georgian).

foreign currencies is fluctuating, it may gain with regard to some foreign currency and lose with regard to some other. However, insofar as the guarantor was supposed to perform his obligation according to the USD exchange rate existing for the moment of payment, the principle of *nominalism*, envisaged by Article 389 of the CCG does not apply."[63]

Dispositional nature of the rules, establishing the principle of *nominalism*, allows the parties to apply legal remedies, developed by civil-law and trade relations, aiming at the protection against currency devaluation. The legal remedies are applied by the court of law and due to prior agreement of the parties (protective stipulations); or without prior agreement of the parties (compensation of damages in the case of overdue payment, resulting from currency devaluation, etc.).[64]

"The Appeals Court explained, that if parties provide for potential change in monetary rate, they may protect themselves against negative consequences through various stipulations. If this is not the case, owing to objective will of law, *nominalism* with act as a presumable norm and, respectively, the parties will assume the risk of potential negative consequences resulting from this norm."[65]

4. Relation of the Principle of Nominalism with Contract Adjustment due to Changed Circumstances

A matter of practice is whether or not the principle of *nominalism* is applied in the case of adjustment of a contract due to changed circumstances.[66] By means of Article 389 of the CCG the legislator has already regulated the exemption, which aims at procuring for the stability of prices and protection of the consumers. In the case of conjunction of Article 389 of the CCG (payment of monetary obligation in the case of change in currency rate) and Article 398 of the CCG (adjustment of a contract to changed circumstances), it is not justified to give preference to Article 389[67]. When discussing this issue, it should be evaluated on a case-by-case, whether to what extent and when should the change of currency unit or in currency rate be regarded as such a change that has an essential impact on the content of a contract[68]. Specifically, whether this change is such a circumstance for the parties that, if accounted for, both or either of them would not have entered into this contract or made it under different conditions.[69] Was the change of the circumstance concerned predictable by the

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63 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-130-122-2017, dated 24 March 2017.

64 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March, 2019.

65 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1162-2018, dated 08 February, 2019.

66 *Lorenz St., Bamberger H. G., Roth H., Hau W., Poseck R.,* BeckOK BGB, 53. Aufl., München, §313, Rn. 2-3.

67 *Chachava S.,* Competition of Claim and Grounds for Claim in Private Law, Doctoral Thesis, TSU, Tbilisi, 2010, 71 (in Georgian).

68 *Chitashvili N.,* Adjustment of a Contract to Changed Circumstances as a Legal Consequence of Complication of Fulfillment of an Obligation, Law Journal, № 1, 2014, 204.

69 *Chachava S.,* Competition of Claim and Grounds for Claim in Private Law, Doctoral Thesis, TSU, Tbilisi, 2010, 72 (in Georgian).

parties? Furthermore, the change of circumstances should be apparent and should result in grave consequences for the debtor. "The institute of impossibility to perform does not apply to monetary obligations (*Geld muss man haben*). The impossibility to perform a contractual obligation may become a ground for exemption of a debtor from liability only in cases, explicitly prescribed by law.[70]

Stipulation of Article 389 of the CCG should basically be regarded as an exemption rule with regard to Article 398 of the CCG as it regulates different legal consequences in the case of change of the currency unit (rate).[71] The key precondition for the application of Article 398 of the CCG is such an apparent change of circumstances after the execution of the contract, in the case of accounting for of which, the interest of the parties (or either of them) to enter into a contract would be less probable. The change of the circumstance should be deteriorating the position of one of the parties to such an extent that claiming unconditional performance of obligation from the latter should disproportionally violate his interests.[72] Respectively, if the aforementioned preconditions are present in terms of the change of monetary unit, its rate or the currency, the purposes of both rules should be followed.

"The impossibility of adjustment of a contract to changed circumstances constitutes the statutory precondition for the termination of a long-term contract (Article 399 of the CCG)."[73] "Article 389 of the CCG can be applied in long-term relations only in the case of essential change of circumstances (Article 398 of the CCG), when it becomes necessary to adjust the contract to changed circumstances."[74] Article 389 of the CCG applies when a party bears the obligation to pay money." [75] "The Appeals Chamber explained, that as concerns the application of Article 389 of the CCG, in long-term relations (payment according to exchange rate existing for the moment of origin of the obligation) it can be applied only in the case of essential change of circumstances (Article 398 of the CCG), when it becomes necessary to adjust contract to changed circumstances."[76] "According to the judgment of the Appeals Court, in the case concerned, the position of the debtor has not deteriorated to the extent for claiming unconditional performance of the contract from him to disproportionally impair his interests, respectively, the preference is to be given to the principle of *nominalism*, prescribed by Article 389 of the CCG."[77]

"The Appeals Chamber explained that the principle of nominalism applies only to the change in buying power of the currency and the question of application of this principle should not be raised

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70 *Vashakidze G.,* Civil Code System of Complicated Obligations, Tbilisi, 2010, 96 (in Georgian).

71 Ibid, 98.

72 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22, March 2019.

73 *Meskhishvili K.,* Impact of the Change of Currency Rate on Civil Relations, "Georgian Business Law Review", V Issue, Tbilisi, 2016, 3 (in Georgian).

74 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1153-1173-2011, dated 31 October, 2011.

75 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-239-564-09, dated 17 September, 2009.

76 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-147-143-2016, dated 20 May, 2016.

77 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1162-2018, dated 08 February, 2019.

when the case concerns damages, resulting from national currency rate fluctuation with regard to foreign currency exchange rate."[78]

5. Change of Currency before the Debt Become Due

Different from the change in buying power of the money are the cases when the currency is changed, i.e. the old currency unit is substituted by the new one (e.g. counpon was substituted by lari)[79], what constitutes one of the types of money reform.[80] In this case focal is the question, whether according to what rate is the debtor required to repay the debt? In the case of change of currency unit, the exchange relations should be based on the exchange rate, set by the National Bank of Georgia existing between these currency units for the date of change in currency.[81]

"By Resolution N246 of the Cabinet of Ministers of Georgia, dated 24 March, 1993, On Emission of the Coupon of the National Bank of the Republic of Georgia for the Circulation on the Territory of the Republic of Georgia, "coupon" was introduced as a payment medium." According to Paragraph 2 of the above Resolution, correlation between coupon and maneti was set at 1-1. By Ordinance N262 of the Head of the Government of Georgia, dated 16 September, 1995, On Putting the National Currency "Lari" into Circulation, national lari was declared as the sole legal mean of payment on the territory of Georgia starting from 2 October, 1995 and coupon exchange rate for lari was set at 1 million coupons for 1 GEL. Respectively, as a result of money reforms the payment medium and correlation between them was set in Georgia.[82]

According to the UN Convention on the International Sales of Goods (CISG) the obligation is to be fulfilled in the currency, defined by the contract, but the payment cannot be made in such currency, the payer cannot refer to the impossibility to make the payment, if the alternative currency allows for the payment to be made."[83]

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78 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March, 2019.

79 *Chantladze M.,* Definition of the Declaration of Will, Reduction of Forfeit, Principle of Nominalism, Georgia law Review (journal), № 1, 2002, 172-174 (in Georgian).

80 *Meskhishvili K.,* Online Commentary of the Civil Code of Georgia, Article 389, field 23, <www.gccc.ge> [30.03.2020] (in Georgian).

81 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March, 2019.

82 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-870-1136-2005, dated 09 March, 2006.

83 *Atamer Y. M.,* in: *Kröll St., Mistelis L., Viscasillas P. P,* UN-Convention on the International Sales of Goods (CISG), <https://beckonline.beck.de/?vpath=bibdata/komm/kroemivicisg_1/unkaufrue/cont/kroemivicisg.unkaufrue.a79.glii.gl1.glb.glbb.gliii.htm&pos=0&hlwords=monetary%c3%90obligation%c3%90+monetary%2cobligation+%c3%90+monetary+%c3%90+obligation+%c3%90+monetaryobligation+#xhlhit> [30.03.2020].

"Parties to legal relationship cannot be the bearers of the risk of changing currency, thus the law regulates the method of calculation. Specifically, the obligation should be fulfilled according to the rate, that existed for the date of change of the currency."[84]

"As per the judgment of the Chamber, it is a commonly acknowledged fact, that there was a hyperinflation in the country in 1993-1995. Commodity prices and the currency in circulation were increasing at an extremely high speed, what resulted in dramatic devaluation of the currency unit, disequilibrium of the balance of payments and disruption of normal economic relations. Although it was presumed, that the official rate was established, the country, in fact, had market and commercial rates, the money exchange was based on. Consequently, in the case concerned the relationship between the parties was not to be regulated according to the principle of *nominalism*, but rather according to market rate."[85]

"The Appeals Court stressed, that decisive in the case concerned was the situation, the origin, and consequently, the determination of the amount of obligation was related to. According to the note, issued by SAKSTAT, 111 maneti was equal to 92.59 GEL as of 05.11.2014, accounting for consumer price index. The Cassator failed to present any evidence to the contrary. the Appeals Court has not upheld Cassator's opinion about the necessity of application of Ordinance N363 of the Head of the Georgian State, dated 16 September, 1995 and Article 389 of the CCG."[86]

6. Conclusion

Article 389 of the CCG can be conditionally divided into two parts: the first one can be the change in the buying power of the currency from the moment of origin of the obligation until the date of its fulfillment, and the second part - the change of the currency, i.e. the substitution of the old monetary unit with the new one.

The purpose of Article 389 of the CCG is to promote the development of market economy, procurement for the sustainability of civil-law relations. Upon payment of the obligations this principle, embodied in the law of global civilized countries, focuses not on the buying power of the payable denomination, but rather on the denomination itself and the amount of currency units. According to the principle of *nominalism*, the object of obligation is the amount of currency units and not the buying power of the money.

It is necessary to differentiate between monetary obligations and currency exchange transactions as unlike monetary obligations the principle of *nominalism* does not apply to currency exchange transactions.

The principle of *nominalism* can be regarded as the manifestation of public order in civil-law relations. However the dispositional nature of the rules, establishing the principle of *nominalism*,

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84 *Meskhishvili K.,* Online Commentary of the Civil Code of Georgia, Article 389, field 24, <www.gccc.ge> [30.03.2020] (in Georgian).

85 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1512-1427-2012, dated 01 December, 2014.

86 Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1269-1189-2017, dated 15 December, 2017.

allows the parties to apply legal remedies, developed by civil-law and trade relations, aiming at the protection against currency devaluation.

The principle of *nominalism* can be assessed as the normative basis of the rule of inadmissibility of revaluation of money in economic light. Fluctuations, conditioned by economic factors do not change the purpose of money and the scope of obligation fixed in face value.

In the light of Article 398 of the CCG (adjustment of a contract to changed circumstances) the stipulation of Article 389 of the CCG should be regarded as an exemption rule, as it regulates different legal consequences in the case of change of currency unit (rate). Hence, if the mentioned preconditions are present in terms of the change of currency unit, its rate or currency, the purposes of both rules should be guaranteed.

In the case of devaluation or revaluation it is important to define, whether which currency is the payment currency and which one is the debt currency, as the principle of *nominalism* applies to debt currency and the question of application of this principle should not be posed when the case concerns damages originating from the fluctuation of the national currency rate with regard to that of the foreign ones.

Different from the change in the buying power of the money are the cases when the currency is changed, i.e. the old currency unit is substituted by the new one (e.g. counpon was substituted by lari), what constitutes one of the types of money reform. In the case of change of currency unit, the conversion relations should be based on the conversion rate between these currency units, set by the National Bank of Georgia for the date of change in the currency.

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Legislative Tendencies of Europeanisation of the Georgian Electricity Market

Fundamental change of the Georgian Electricity Market structure and transition to qualitatively new model, emerged necessity of correct perception of new regulation of electricity sector and its proper usage. On the one hand, mentioned model was established with the purpose to facilitate development of competitive market. The new law created possibility to conduct trading with electricity on organized markets (day-ahead and intraday), as well as based on long-term bilateral agreements. New actors appeared on the market. At the same time, strict liability measures were defined for market participants. Development of new model of Georgian electricity market is related to signing of the Association Agreement with the EU and afterwards – accession to treaty establishing Energy Community. Hence, we should search for mechanisms, implementing renewed Georgian energy legislation, in the European legislation.

Key words: *Liberalization of Electricity Market, harmonization, electricity wholesale market, opening of electricity market, target model of electricity market, competition of the electricity market, physical trading with electricity, financial trading, organized market, stock exchange, bilateral agreements, Association Agreement, Energy Community.*

1. Introduction

Trading with energy, as a modern phenomenon, was rooted in commencement of liberalization process of the Energy Sector in Europe. Beginning/Development of liberalization process of Electricity Markets (as well as, in general of Energy Markets) was directly connected to the existence of transparent and competitive environment.

The liberalization process of the Energy Market in Europe is considered to have started in 1990-2000 years. In 1996, by the first directive on Electricity market liberalization, the first common rule regarding the functioning of electricity market was established (Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity).[1] The rules regulating functioning of electricity market were improved and renewed in 2003 (second energy package) and then in 2009 (third energy package). These rules, considering relevant renewals, were gradually incorporated into national legislations.[2] For instance, by special law from April 1998 all consumers in the Federal Republic of Germany were given possibility to freely choose entity, which would ensure provision of electricity.[3]

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1 *Haucap J., Heimeshoff U.,* Energiekartellrecht, Kap. 2, Rn. 4.

2 Ibid.

3 Ibid., Rn. 5.

In November 2016 European Commission initiated amendments, that comprised issues of novel regulation of almost all areas falling under Electricity Sector (issues related to renewable energy, electricity supply infrastructure and energy efficiency) (winter energy package[4]).[5]

"Development of energy law in Georgia, in essence, must be considered as subject of law reform".[6] In the period after restoration of independence, taking into account relevant positive dynamics, the grounds were created to give possibility to the country for taking first steps in establishing open and competitive electricity market.[7] In the establishment and development of electricity market crucial role was played by the law of Georgia from 27 June 1997 on "Electricity and Natural Gas"[8] and Order N77 from 30 August 2006 on "Rules for Electricity (power) market" adopted by the Minister of Energy of Georgia based on this law. Alike European model of electricity market, Georgian legislation envisaged provisions regulating retail, as well as wholesale trading of electricity from the very beginning, however these provisions were substantially different from the European model.

Fact of accession of Georgia to the Treaty establishing Energy Community must be considered as an initial stage of irreversible process for transition of electricity market to the European model, because membership in the Energy Community accelerated the harmonization process of Georgian legislation to the European law. By the Accession Agreement, Georgia took obligation to align its legislation to the European standards in a certain period of time. During last years, several laws and bylaws were released/adopted, which certainly was solid prerequisite for introducing European model of electricity market in Georgia.

Rules existing with regard to the functioning of European model of electricity market in Georgia and grounds for obligation to reflect European standards of electricity market by the country in its own legislation will be overviewed in this article. The purpose of current study is putting in parallel provisions regulating wholesale electricity market of Georgia and rules acting in this area in Europe. As a conclusion, the article will present author's point of view for the perspective of establishing European model of electricity market in Georgia.

2. Wholesale Trading of Electricity in Europe (Brief Overview)

From 1990ies there was an active discussion in Europe, whether the natural monopoly existing in the energy sector (service of electricity transmission infrastructure) should have been isolated from other core activities in this sector (for instance, from electricity production).[9] Precisely this

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4 Energy package comprised issues related to regulation of natural gas trading on the natural gas market.

5 *Haucap J., Heimeshoff U.,* Energiekartellrecht, Kap. 2., Rn. 4.

6 *Samkharadze I.*, Energy Law, as academic discipline, Journal "Justice and Law", №2 (58), 2018, 71 (in Georgian).

7 *Energy Community Secretariat*, Energy Governance in Georgia, Report on Compliance with the Energy Community Acquis, 2017, 10.

8 Law of Georgia on "Electricity and natural gas", Parliament Gazette, №33, 31/07/1997 (repealed, 20/12/ 2019).

9 *Zuber A.,* Energiekartellrecht Kap. 3 Rn 1.

circumstance became one of the most important factors which prompted decision to initiate introduction of unified energy package regulating electricity sector in Europe.[10]

In parallel with the regulation of aggravated economic condition, electricity trading law developed.[11] Electricity trading caused the fact, that along with the receipt of potential benefit by participants of wholesale electricity market, risks related to this process (for instance, differentiated prices and their instability, probability of interruption in electricity supply) emerged as well.[12]

Energy policy of Europe is based on guaranteeing supply of sustainable, competitive and secure energy.[13] Process of harmonization of provisions regulating energy sector in Europe develops continuously, which primarily is evident by the increase of transparency of processes, taking place on electricity markets, and by strengthening of security of these markets.[14] For the systematized functioning of the electricity market in Europe, it is crucial to conduct electricity trading in member countries of the European Union on the basis of determining approximate prices, as far as possible.[15] On the other hand, establishing common European price for electricity is based on necessity to create identical structures of electricity by these countries.[16] Therefore, taking into account these factors, we may say, that, as a result of promoting common wholesale trade with electricity by member countries of the European Union, the unified trading commodity market of Europe was developed.[17]

Europe played very important role in the development of energy trade.[18] The crucial step in direction of opening electricity market was the respective EU directive regulating electricity market, which enforced effective principles restricting competition to be considered during electricity trading.[19] At the initial stage of market development, Europe was trying to accelerate its liberalization process in order to change provisions restricting competition prescribed by member states' legislations and monopolistic structures of market in possible short period.[20]

Another factor considered important for opening of electricity market of Europe is ensuring free accessibility to electricity transmission/electricity distribution lines for third parties, thus giving clients possibility to freely choose electricity suppliers, and entitling electricity producers to export electricity for realization on free market.[21] On the one hand, liberalization of electricity markets aimed at strengthening free movement of goods and trading between EU member states. The solid prerequisite for achieving this aim was ensuring unrestricted and free trade among electricity market participants in

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10 *Hufendiek K.* in: *Hufendiek K.*, *Schwintowski H. P., Scholz F., Schuler A. (Hrsg.),* Handbuch Energierecht, 4. Aufl. Rn. 81.

11 *Zenke I., Dessau C.* in: *Danner W., Theobald C. (Hrsg.),* Werkstand: 99. EL Septemer, 2018, Rn. 3.

12 Ibid., Rn. 2.

13 *Rademaekers/Slingenberg/Morsy*, Review and analysis of EU wholesale energy markets (final report), Rotterdam, 2008, 9.

14 *Zenke I., Dessau C.* in: *Danner W., Theobald C. (Hrsg.),* Werkstand: 99. EL September, 2018, Rn. 3.

15 *Lintzel P., Borchert J.* in: *Zenke I., Schäfer R.(Hrsg.),* Energiehandel in Europa, 2012, Rn. 27.

16 Ibid. Rn. 28.

17 *Hufendiek K.* in: *Schwintowski H. P., Scholz F., Schuler A. (Hrsg.),* Handbuch Energierecht, 4. Aufl., Rn. 111.

18 *Du Buisson J., Dessau C.* in: *Zenke I., Schäfer R.(Hrsg.),* Energiehandel in Europa, 2012, Rn. 3.

19 *Ritzau M., Schuffelen L.* in: *Zenke I., Schäfer R.(Hrsg.),* Energiehandel in Europa, 2012, Rn. 6.

20 *Du Buisson J., Dessau C.* in: *Zenke I., Schäfer R.(Hrsg.),* Energiehandel in Europa, 2012, Rn. 2.

21 *Ritzau M., Schuffelen L.* in: *Zenke I., Schäfer R. (Hrsg.),* Energiehandel in Europa, 2012, Rn. 6.

each country.[22] Hence, cross border trade of electricity gave possibility for optimizing readiness of respective power plants in seasonal and hourly perspective.[23]

2.1. Features Characteristic to Electricity Wholesale Market

Market envisaged (organized) for electricity trading (electricity market) is characterized with 2 specific features:

1) Nowadays it is very complicated to store/warehouse big amount of electricity produced and/or it requires significant expenses. On one hand, generated electricity determines necessity to consume it in certain particular (coinciding) period;[24]
2) Produced electricity must be supplied to the consumer through appropriate transmission/distribution infrastructure.[25]

Producing electricity and its consumption often is not coinciding in geographic perspective. Hence, in order to properly manage the planned process, it is crucial to use electricity transmission/distribution infrastructure.[26] This factor of natural monopoly may be economically unprofitable for parties to the transaction, as it will affect price determination of the electricity to be supplied to end consumer.

Therefore, European legislators payed specific attention to issues such as determining necessary preconditions for using electricity transmission/distribution infrastructure and calculating value for its usage.

2.2. Products Admitted for Trading on Electricity Wholesale Market

According to the European Law, electricity is commodity intended for trade, which evolves from the meaning of fundamental freedom established by the treaty on functioning of the European Union.[27] In line with the uniform practice of the Court of Justice of the European Union, "commodity" is defined widely and includes all goods, which have monetary value, and thus are suitable for trade.[28] For instance, in the Federal Republic of Germany for the sale and purchase of electricity, rules of sale and purchase for movable objects defined by civil law are applied.[29] In general, the notion of electricity is equaled to notions of object or raw material. Therefore, electricity is a product, which, if wanted, may be exchanged. Despite spreading definition of "commodity" to electricity, electricity market significantly differs from markets designed for the trade of other goods, where specific and obligatory rules are defined for electricity suppliers.[30]

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22 Ibid. Rn. 16.
23 Ibid. Rn. 19.
24 *Haucap J., Heimeshoff U.,* Energiekartellrecht, Kap. 2, Rn. 10.
25 Ibid. Rn. 8.
26 Ibid.
27 *Fried J.* in: *Schwintowski H. P., Scholz F., Schuler A. (Hrsg.),* Handbuch Energierecht, 4. Aufl., Rn. 188.
28 Ibid.
29 Ibid. Rn. 189.
30 Ibid. Rn. 190.

In Europe, trading with electricity is, as a rule, conducted in megawatt hour (MWh).[31] The subject for trade on electricity wholesale market may be electricity (physical trading), as well as financial instruments closely related thereto, for instance derivatives (financial trading).[32]

Auxiliary terms - "physical trading" and "financial trading" – give possibility to see the difference, which is related to the following issue: trading with electricity (physical trading) takes place if the agreement is concluded, the aim of which is to provide insurance of future obligation, deriving from the agreement between parties, related to money reimbursement (financial trading).[33] The classical example of financial trading is when one party to the agreement takes obligation to compensate to second party the difference between price agreed in past for the precise amount of electricity and future market price of electricity defined in the specific period.[34]

2.3. Means for Trading With Electricity on the Wholesale Market

The process of liberalization of energy markets of Europe, created increasing demand for trading by diverse means with energy carriers (for instance, electricity).[35] Considering the special character of electricity, as of subject of trade, is possible that trading takes place among interested persons, as well as on specially created markets (stock exchanges).

Modern principles on electricity demand and supply substituted traditional approaches of electricity allocation.[36] The novelty is that the trading with electricity proceeds through direct transmission and consumption of electricity (Over the Counter (OTC) Trade), as well as by special regulated markets (stock exchanges).[37] Big international banks are involved in trading, however this financial institutes are trading not with electricity itself, but with financial instruments related thereto.[38]

2.3.1. Trading Based on Bilateral Agreements (OTC Trade)

The subject of electricity sale and purchase agreements is to provide electricity to purchaser in exchange for compensation. This agreement is concluded for own consumer, as well as for future distribution of electricity.[39] Comparing to trade on stock exchange where because of high quality of standardization and big amount of agreements special mechanisms are created for easing the organization of trade, in case of trade outside stock exchange – so called Over the Counter (OTC)

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31 *Rademaekers R., Slingenberg A., Morsy S.*, Review and analysis of EU wholesale energy markets (final report), Rotterdam, 2008, 11.

32 *Ritzau M., Schuffelen L.* in: *Zenke I., Schäfer R.(Hrsg.),* Energiehandel in Europa, 2012, Rn. 22.

33 *Fried J.* in: *Schwintowski H. P., Scholz F., Schuler A. (Hrsg.),* Handbuch Energierecht, 4. Aufl., Rn. 191.

34 Ibid.

35 *Nill-Theobald C., Theobald C.(Hrsg.),* Grundzüge des Energiewirtschaftsrechts, 3. Aufl., 2013, 138.

36 *Roggenkamp M., Redgwell C., Del Guayo I., Ronne A.*, Energy Law in Europe, second edition, Oxford University Press, 2007, 674.

37 Ibid.

38 Ibid.

39 *Nill-Theobald C., Theobald C.(Hrsg.),* Grundzüge des Energiewirtschaftsrechts, 3. Aufl., 2013, 134.

Trade – it becomes necessary to conduct direct (possibly more expensive) negotiations between parties.[40] Moreover, in case of over the counter trade third persons do not participate in the transaction as important parties, who are responsible for concluding agreement and insuring risks related to payment.[41]

In comparison to trade on stock exchange, the trade conducted based on bilateral (OTC) contracts is not anonymous (parties of transaction are familiar), participants of electricity market are trading through usage of telephone, facsimile or other electronic means and in this case, there is no need to create special environment for trade.[42] As a rule, trade by bilateral contracts proceeds without intermediaries (brokers), who are trading with prepared products identified by priorly defined terms and/or price and do not provide service of coinciding demand and supply in particular period.[43] Activity of broker differs from activity of party to the agreement or commissioner (person, who acts in his/her name but on expense of others) in a way that his/her inclusion is limited to mediation. On the biggest energy markets of Europe (for example, in the Federal Republic of Germany) trading with electricity preferable takes place not through organized electricity markets (stock exchanges), but through long-term bilateral agreements.[44]

2.3.2. Trading on Stock Exchange

Stock exchange is a place where trading with electricity (physical amounts), as well as with other financial instruments takes place.[45] The main function of stock exchange is to provide leading of trade fairly and in accordance with rules, as well as accessibility to proper information related to prices of products purchased on stock exchange.[46]

2.3.3. Electricity Traders

Diverse forms of trading are used on electricity market.[47] As a rule, sellers of electricity are energy companies having proper title and experience. However, considering the specifics of electricity sector, comparing to electricity sellers, purchasers of electricity may be intermediary energy companies (with the purpose of distributing this electricity later on), as well as end consumers.[48]

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40 *Fried J.* in: *Schwintowski H. P., Scholz F., Schuler A. (Hrsg.),* Handbuch Energierecht, 4. Auflage, Rn. 198.
41 Ibid.
42 *Rademaekers R., Slingenberg A., Morsy S.*, Review and analysis of EU wholesale energy markets (final report), Rotterdam, 2008, 13.
43 Ibid.
44 *Haucap J., Heimeshoff U.,* Energiekartellrecht, Kap. 1, Rn. 40.
45 *Rademaekers R., Slingenberg A., Morsy S.*, Review and analysis of EU wholesale energy markets (final report), Rotterdam, 2008, 12.
46 Ibid.
47 *Nill-Theobald C., Theobald C.(Hrsg.),* Grundzüge des Energiewirtschaftsrechts, 3. Aufl., 2013, 133.
48 Ibid. 134.

3. Novel regulation of the electricity sector of Georgia

As mentioned above, in Georgia the rules more or less approximate to the European model related to electricity retail, as well as wholesale trade, were determined by the law of Georgia on "Electricity and natural gas" and by the order N77 from 30 August 2006 on "Rules for Electricity (power) market" adopted by the Minister of Energy of Georgia based on this law. In particular, before transfer to new model of electricity market, acting legislation related to the electricity trade entailed (considering the period of validity of normative acts, partially entails also today) wholesale trade with electricity (power), electricity production, transmission, dispatching, export, reexport, import, transit and other important issues.[49] "Performing these activities properly has particular importance in terms of organized and secure functioning of electric power sector."[50]

For ensuring fulfillment of obligations by Georgia – approximating with European standards – it became necessary to revise and renew legislation regulating electricity market. Exactly for this purpose the new legislative package was elaborated, the part of which is enacted. The named issues will be discussed in details in this article.

3.1. International Obligations Taken by Georgia in the Electric Power Field

European Union is "exporter" of its energy rules and the area of their coverage may include many non-member states as well.[51] Georgia, as one of such countries, took obligation to harmonize its legislation with the European law by signing Association Agreement with the EU and acceding Treaty establishing Energy Community.[52]

3.1.1. Association Agreement, Deep and Comprehensive Free Trade Area

On June 17 of 2014 the "Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part", including Deep and Comprehensive Free Trade Area.

The second chapter of the Association Agreement determines core principles and aims for cooperation in the field of energy, where the key issues are integration of energy markets and regulatory approximation, considering need for provision of secure, ecologically clean and accessible energy.[53] According to the Agreement cooperation must include diverse areas, involving energy strategies and policy, development of competitive, transparent and effective energy market, where third persons will be given possibility to access, in non-discriminative way, networks and consumers,

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49 *Gatserelia A.,* Energy law. See *Khubua G., Zimmerman K. (eds.)*, Legal basis for public administration, Handbook, Tbilisi, 2016, 347, area 901 (in Georgian).

50 Ibid. Area 902.

51 *Samkharadze I.*, Energy Law, as academic discipline, Journal "Justice and Law", №2 (58), 2018, 68-69 (in Georgian).

52 Ibid.

53 *Kvernadze M.,* Commercial-legal aspects of electricity trade and perspectives of its development in Georgia, Master's Thesis, TSU, 2016, 43 (in Georgian).

in line with the EU standards.[54] The agreement foresees obligatory reservation on accession of Georgia to the Energy Community.[55]

Deep and Comprehensive Free Trade Area, which is the part of Association Agreement, includes obligations to ensure free trade with energy resources, as well as free transit.[56] Hence, Georgia belongs to those countries (their number is small), which have free trade regime of the EU.[57]

3.1.2. Energy Community

Energy Community is an international organization working on energy policy issues.[58] This is a group mostly comprising countries (by now 9 countries) located in south-east Europe, which tends to harmonize its legislation regulating energy sector with the EU legislation, what practically means development of energy markets (electricity, as well as natural gas market) and free trade.[59]

Georgia had observer status in the Energy Community from 2007. On 14 October 2016 in Sarajevo, on the 14th Meeting of Ministerial Council of the Energy Community the accession of Georgia to the Treaty establishing Energy Community was approved (accession treaty). The respective protocol entered into force on 21 April 2017 after ratification by the Parliament of Georgia.

Accession treaty, in its essence, is the timetable confined to the specific period of time (schedule), which indicates to EU directives and decisions. Energy legislative database of the EU is regulated by structure of well advanced, legally binding directives and decisions.[60]

The main mission of the Energy Community is to regulate relations between signatory parties to the "Charter establishing Energy Community" and creating binding legal framework, which entails several issues, including implementation issues defined by the Energy Community charter for set of EU legal acts in the field of electricity.[61]

The set of EU legal acts in the field of electricity are following:

- Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity;
- Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity;[62]
- Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment;

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54 Ibid.
55 Ibid.
56 Ibid. 44.
57 *Devidze A., Mirianashvili G.,* Manual for European Union Law, Tbilisi, 2019, 118 (in Georgian).
58 *Kvernadze M.,* Commercial-legal aspects of electricity trade and perspectives of its development in Georgia, Master's Thesis, TSU, 2016, 43 (in Georgian).
59 Short overview of Regulatory Impact Assessment of the Draft Law of Georgia on "Energy and Water supply", prepared by USAID Energy Project and Ministry, 2019, 1 (in Georgian).
60 Ibid.
61 *Kvernadze M*., Commercial-legal aspects of electricity trade and perspectives of its development in Georgia, Master's Thesis, TSU, 2016, 45 (in Georgian).
62 Repealed by Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019.

It must be noted, that the level of implementation and application of relevant legislation of Energy Community by potential candidate country tending to become EU member, is decisive in ongoing negotiations regarding the membership in the EU.[63] Meanwhile, signatory parties evaluate correspondence with legislation not only on the basis of transposition, but its effective implementation and application.[64]

3.2. Legislation of Georgia Regulating Electricity Sector

Introduction of new legislation regulating energy sector creates numerous practical challenges for the existing framework and requires systematic approach to law reform.[65] For this purpose we must discuss what steps have been taken for approximating legislation of Georgia to the European legislation.

3.2.1. Concept for Electricity Market Model (Initial Version)

For developing competition on electricity market all relevant consumers must have possibility to select electricity supplier by themselves.[66] Attempt to establish liberal model determined by energy legislation of Europe, oriented on encouraging competition, anticartel, enforcement of market economy and information transparency, as well as to improve legislation for the purpose of harmonization with this model and to adapt to modern reality is a total novation for Georgia.[67]

By the Order №1-1/605 of Minister of Economy and Sustainable development from 24 December 2018 on the "Concept for electricity market model of Georgia" (hereinafter – Concept) was approved, which was document of recommendatory nature supporting process of energy sector reform of Georgia and would have been used during elaboration of respective draft legislative, normative acts and bylaws in the process of reform.[68]

Legally the concept was a viewpoint of the Ministry of Economy and Sustainable Development (hereinafter - Ministry) on general structure, organization and functioning of electricity market of Georgia and would have been used as guideline document for development and opening of organized electricity market of Georgia.

The core, guiding principles of concept included electricity sale purchase on organized electricity markets – day-ahead, intraday and balancing markets, as well as during trading over the

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63 *Kochladze M., Gochitashvili T., Tchiabrishvili I., Maghradze N., Kvaratskhelia T*., Georgia and Energy Community of Europe, Green Alternative, 2015, 18 (in Georgian).

64 Ibid.

65 *Samkharadze I*., Energy Law, as academic discipline, Journal "Justice and Law", N2 (58), 2018, 71 (in Georgian).

66 *Kochladze M., Gochitashvili T., Tchiabrishvili I., Maghradze N., Kvaratskhelia T.,* Georgia and Energy Community of Europe, Green Alternative, 2015, 26 (in Georgian).

67 *Samkharadze I.,* Foreign aspects of Energy law of Europe and their impact on Georgian legislation, "Law Journal", №1, 2018, 250 (in Georgian).

68 Order №1-1/605 of Minister of Economy and Sustainable development from 24 December 2018 on the "Concept for electricity market model of Georgia".

counter of organized electricity markets ensuring non-regulated pricing in bilateral wholesale agreements.

Article 5 of the concept determines general characteristics of organized electricity market. According to this norm participants of market will have possibility conclude agreements with the aim to trade with electricity (or instruments related thereto) on organized electricity markets, as well as in conditions of bilaterally agreed free price, however this process must be leaded in accordance with relevant legal provisions of Energy Community.

It is inherent, that the mentioned bilateral agreements must be concluded between wholesale purchasers and sellers, without intermediary (Over the Counter (OTC)) and final payment must be carried out among these subjects.

As it was noted, in Georgia, along with market of bilateral agreements, intraday and balancing markets must be established.[69]

According to article 6 of the concept, relations between market participants and Energy Exchange must be regulated with standard terms, that will facilitate establishment of self-regulating regime in Georgia.

3.2.1.1. Day-Ahead Market

According to the concept, on the day-ahead market trading must be conducted in the hourly perspective for the 24 p.m. of the next day through placed bids. Hence, the process of sale and purchase of electricity must be regulated on the basis of single anonymous auction algorithm. The day-ahead market suggests to its participants organized, marginal pricing structure, which gives possibility to place the named bids.

3.2.1.2. Intraday Market

As stated in concept, comparing to trading on the day-ahead market, on the intraday market trading takes place during trade hours, in automatic regime, based on registration of corresponding bids in trading system. Participants of the market may be entitled to negotiate on financial agreements, which must be executed in accordance to requirements prescribed by electricity market rules.

3.2.1.3. Balancing Market

Special attention in the concept is given to the necessity of existence of the balancing market. According to the Document, balancing market and mechanism for managing unbalance must exist in the country, the aim of which is ensuring power balance. At the same time, responsibility of those market participants must be defined, whose actions result in unbalance.

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[69] *Bochorishvili E., Chakhvashvili M.,* Overview of Electricity Market, Galt & Taggart, 2019, 11 (in Georgian).

3.2.1.4. Financial Agreement

Financial agreement is a novelty for electric power sector of Georgia. It is not defined comprehensively in the concept, however, as mentioned above, according to the document, market participants will have right to freely negotiate on financial agreements. Issues related to financial agreements must be regulated by rules of electricity market.

3.2.1.5. Transitional Period

As stated above, electricity market model is on transitional stage. According to the concept, purpose of the reorganization of market structure is to create possibility of coexistence of regulated and deregulated sectors. For this reason, development of systems, procedures and software has started and launched in pilot regime.

According to the concept, in the regulated segment the price for electricity to be supplied to non-qualified consumers may be limited with respective marginal tariff rate, as for the competitive segment, trading will be conducted there on the basis of bilateral agreements and/or on organized electricity markets.

The government of Georgia has been entitled to renew the concept and prepare even more detailed document.[70]

3.2.2. Law of Georgia on "Energy and Water Supply" (New Law)

In May 2019, the Parliament of Georgia started discussion of the draft law of Georgia on "Energy and Water supply" (new law), which mostly repeated main essence of energy legislation of Europe and was in compliance with obligations taken by Georgia after accession to Energy Community.[71] Moreover, the draft law envisaged significant reform of existing energy market and aimed at determining fair prices on the electricity market, and through creating reliable and attractive environment for investors , developing competitive and transparent market.[72]

The Parliament of Georgia adopted the law of Georgia on "Energy and Water Supply" (hereinafter – new law) on 20 December 2019. It establishes general legal framework of production, transmission, distribution, supply and trade in the electric power sector. The new law creates legal framework for adopting and implementing requirements of the Energy Community into the legislation of Georgia.[73] Its purpose is to ensure facilitation for creation, opening, development and integration of organized, transparent and competitive electricity market. In addition, the new law regulates free access to competitive electricity market and issues related to cross border trade with electricity.

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70 Ibid.

71 Ibid. 9.

72 Ibid.

73 Forbes Georgia, Energy reforms 2020 (Interview with Davit Narmania), Tbilisi, 2020. See: <https://forbes.ge/news/7833/energoreformebi2020?fbclid=IwAR0PkwK7x3N8p_LHgCel8YWGMraANLw_q_WgYuk9gyVh8gT4BrRk7THPgIQ> [17.12.2020].

The reservation of paragraph 4 of article 1 of the new law is highly important for electricity trading, according to which this law creates legal framework in the legislation of Georgia for future consideration and application of requirements of the following EU legal acts:

1) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;
2) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003;[74]
3) Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment.

Requirements of the named legal acts must be considered in the legislation of Georgia and must be enacted in accordance with the decisions of the Ministerial Council of Energy Community and protocol on accession of Georgia to the Treaty establishing Energy Community.

3.2.2.1. Novelty in the Energy Legislation of Georgia

Comparing to the Law of Georgia on "Electric power and natural gas" acting before enactment of the new law adopted on 20 December 2019,[75] in the new law, new actors of the electricity trade process appeared on retail, as well as wholesale market.[76] In this regard, special attention must be given to the status and functions of electricity traders on wholesale market – supplier (supplier of last alternative and supplier of universal service) and trader.

3.2.2.1.1. Trader

Trader is participant of wholesale market, who trades with electricity.[77] Trader performs its activities with the purpose to sale and purchase electricity on the territory of Georgia or outside its borders, based on the rule determined in line with electricity market rules approved by the Georgian National Energy and Water Supply Regulatory Commission (hereinafter Commission).

It must be noted that trader enjoys status of consumer,[78] in general, as well as additionally nonresidential consumer[79] status. The new law does not consider system operators[80] and small enterprises[81] as traders.

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74 Repealed by Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019.

75 Law of Georgia on "Electric Power and Natural Gas" of 27 June 1997 (Parliamentary Gazzette, №33, 31 July, 1997, p.20).

76 *Bochorishvili E., Chakhvashvili M.,* Overview of Electricity Market, Galt & Taggart, Tbilisi, 2019, 10 (in Georgian).

77 Ibid, See also Article 124 paragraph 4 of the new law (in Georgian).

78 Consumer is considered to be a person, who purchases electricity with the status of end consumer, trader or power supplier. See article 3 subparagraph "t" of the new law, Law of Georgia on "Energy and Water Supply", 20/12/2019.

79 Status of nonresidential consumer is enjoyed by people, who purchase electricity from nonresidential usage, including enterprises and traders. See Article 3 subparagraph "h[48]" of the new law.

Activities of a trader, that does not require a license from the Commission,[82] may be completed by small power plants and power supplier, however, in accordance with the requirements of the new law (see Article 11, paragraph 4), they are required to notify the Commission about the above decision.[83] The commission maintains a registry of traders. Data and contact information of these persons are published on the official website of the said body.[84]

The new law does not directly define the list of sources of electricity providers for a trader. This does not apply to the case where the trader is the generator of electricity himself. It can be assumed that the trader buys electricity in an organized market of electricity.

3.2.2.1.2. Electricity Supply

An electricity supplier is a power supplier that delivers electricity[85] to an end consumer.[86] Thus, as an electricity supplier is considered as a person or entity that provides electricity to the end consumer (including the population).[87]

It should be noted that, under the new law, we find the term "electricity supplier" only in the "definition of terms", namely, in Article 3, subparagraph "h[4]", while, in other places, the general term – "supplier" - is used. However, as the new law provides electricity and natural gas supply, given the teleological interpretation of the norm, a "supplier", depending on the context, should be considered an electricity or natural gas supplier. From the point of view of legal technique, the purpose of defining a term in law (to give it a corresponding meaning) is to use it later in that sense, and if the term is not used in law, it is unjustified to give it any meaning.

Excluding the exceptions directly provided by the new law, the supplier provides unregulated electricity supply to the customer on the basis of a supply contract, and the supplier himself buys electricity on an organized market or on the basis of a bilateral contract.

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80 In the sector of electric power, the system operators are operator of electricity transfer system and operator of electricity distributor. See Article 3 subparagraph "h[66]" of the new law.

81 Small enterprise is nonresidential consumer, where number of employees, annual turnover, accounting balance and/or other indexes do not exceed the amount prescribed by the Government of Georgia. See Article 3 subparagraph "h[60]" of the new law.

82 See Article 11 paragraph 4 of the new law.

83 With regard to the imposed obligations and respective terms see Article 102 of the new law.

84 See Article 102 paragraph 6 of the new law.

85 See Article 3 subparagraph "h[4]" of the new law.

86 End-consumer is a person, who purchases electricity for his/her own use (See Article 3 subparagraph "h[13]" of the new law). Therefore, the end-consumer is considered as: 1) Qualified consumer, which is entitled to purchase electricity from the selected supplier or on the organized market, in accordance with the supply or market rules (See Article 3 subparagraph "h[9]" of the new law). All end consumers are entitled to register as qualified consumer. Moreover, the government of Georgia has the right to determine terms for considering end-consumer as qualified consumer in compulsory manner and registration terms (respective criteria and timeframes) (See Article 166 paragraphs 1 and 2 of the new law); 2) Residential consumer, which purchases electricity for own, residential use, and this does not entail commercial and professional activity (See Article 3 subparagraph "h[18]" of the new law).

87 *Bochorishvili E., Chakhvashvili M.,* Overview of Electricity Market, Galt & Taggart, Tbilisi, 2019, 10 (in Georgian).

3.2.2.1.3. Electricity Supply in the Form of Public Services

The objective of the new law is to provide the conditions for fulfilling the public service obligation to protect the interests of the end user in the electricity sector.[88] A public service obligation[89] is imposed on the electricity utility, considering the common economic interest, to provide services that may be related to safety (including security of supply), continuity, quality or price, environmental protection. At the same time, this obligation must not discriminate and restrict competition more than is necessary for the provision of public services.[90] The Government of Georgia has the authority to impose public service obligations as well as to determine the recipients of these services based on consultation with the relevant competent authorities, the Commission and the Secretariat of the Energy Union.[91]

The Commission oversees the high-quality delivery and implementation of obligation of public services.[92] Additionally, this body is authorized to set the relevant tariff for the delivery of public service obligations.[93]

Electricity supply, as a public service, is provided in the form of universal service as well as the last alternative form.

3.2.2.1.3.1. Universal Service

Within the framework of universal service, household consumers and small enterprises are entitled to purchase electricity from universal service provider.[94] In this case, the following question arises: why is a small enterprise authorized to receive this service, and why qualified customers are not given such opportunity directly by the new law? This view is also supported by the fact that the universal service provider ensures the supply of electricity to end-users as defined by public services and takes measures to set the most acceptable prices for them.[95]

3.2.2.1.3.2. Supplying Last Alternative

Supplying last alternative is carried out when the electricity supplier terminates market activity predictably or unpredictably or recklessly breaches obligation and end consumer cannot receive electricity, provision of electricity to end consumer is ensured by supplier of last alternative. The agreement on supply between supplier of last alternative and end consumer is considered to be stipulated from the day of electricity supply to the consumer. This term does not depend on the fact, whether there was or not respective query from the consumer.

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88 See Article 2 subparagraph "f" of the new law.

89 Obligation of public service is not considered as performance of public law authority and is only a temporary measure, See Article 3 subparagraph "h[55]" of the new law.

90 Ibid. Article 3 subparagraph "h[55]".

91 Ibid. Article 9 paragraphs 2 and 5.

92 Ibid. Article 29 paragraph 1 subparagraph "a.t".

93 Ibid. Article 9 paragraph 6.

94 Ibid. Article 108 paragraph 1.

95 Ibid. Article 108 paragraph 8 subparagraphs "a" and "d".

It must be noted that the time for alternative supply is not unlimited. It is possible to conduct last alternative supply not more than during 3 calendar months. If the end consumer does not/cannot conclude respective agreement with the new supplier, the electricity will be cut off.

The tariff for last alternative supply is defined by the Commission in transparent and non-discriminative way, however the Commission must ensure that this tariff shall exceed the average market price of electricity supplier in normal conditions for the same category of consumers.

The supplier of las alternative is chosen by the Government of Georgia through open bidding. It is admissible that the supplier of last alternative is supplier of universal service. The government of Georgia, along with other requirements of bidding terms, determines period for authorization of supplier of las alternative, which must not exceed 5 years. If the bidding is not held, the Government of Georgia is entitled to name power supplier suggested by the Ministry without conducting bidding.

Additional issues related to the supply of las alternative is regulated by the rules of las alternative supply approved by the Commission.

3.2.2.2. Functioning of the Electricity Market

The basis for establishment of electricity markets was fast development of industrialization process, as in parallel to the dynamics of this process the speed of demand and supply of electricity was increasing.[96] Electricity market (as well as, energy market, in general) is definitely in the center of special attention, as two qualitatively different market area are intercrossing each other, which, on the one hand, participate with different level in the operational process and are based on different rules and principles (energy field and financial market).[97]

3.2.2.2.1. Electricity Market

Electricity market is an organized market in accordance with the terms prescribed by the legislation for electricity and supporting service trade.

Electricity market entails organized market (electricity day-ahead market, electricity intraday market, electricity balancing market) and bilateral agreements' market.[98] Hence, market created for electricity trade implies organized market, as well as bilateral agreements' market. It must be noted, that for electricity trade electricity market is organized not by the new law, but by the rules of electricity market.[99]

Bilateral agreements' market (market for so called over the counter trade) exists independently from organized market. In the Guiding document of the Energy Community the fact is underlined, that trade with bilateral agreements has important function, and hence, destruction of structures of organized market, in short perspective, shall not change the possibility to trade with bilateral

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96 *Hufendiek K.*, in: *Schwintowski H. P., Scholz F., Schuler A. (Hrsg.),* Handbuch Energierecht, 4. Aufl., Rn. 103.
97 *Du Buisson J., Dessau C.* in: *Zenke I., Schäfer R.,* Energiehandel in Europa, 2012, Rn. 3.
98 See. Article 2 subparagraph "h" of the new law.
99 Ibid. Article 121 paragraph 1.

agreements.[100] The right of participants of electricity market to trade with electricity unlimitedly based on bilateral agreements, must be preserved as an alternative mechanism of organized market.[101] This opinion is partially reinforced by the norm, envisaged in the concept approved by the Order of the Minister of Economy and Sustainable Development N1-1/65 from 24 December 2018, which, as mentioned above, strengthening of possibility of nonregulated pricing in the bilateral wholesale agreement during trading outside organized electricity market is the guiding principle of this concept.[102] Therefore, electricity market encompasses organized market and market of bilateral agreement. Market of bilateral agreements functions along with the organized market or independently.

In the new law there are numerous gaps with regard to the definition of "electricity market". In the "Definition of terms", namely in the subparagraph "h" of article 3, "electricity market" is defined as "organized market … and/or bilateral agreements' market", which, on the one hand, implies only wholesale market. In the article 120 paragraph 1 of the same law it is noted, that "electricity market entails retail and wholesale electricity markets." Hence, the significance of "electricity market" provided in the "Definition of terms" differs from the meaning of electricity market presented in the same law.

3.2.2.2.1.1. Retail Electricity Market

On the retail electricity market respective trading transactions take place between the end consumer and supplier. Therefore, end consumer (including heavy user) purchases electricity based on the agreement concluded with the supplier selected by himself/herself/itself.[103]

3.2.2.2.1.2. Wholesale Electricity Market

Comparing to trading on retail electricity market, the new law envisages how trading of electricity is managed on the wholesale electricity market. It imposes an obligation to elaborate rules for organizing this market on the Government of Georgia. For this purpose, segments of wholesale electricity market must be regulated by the concept of electricity market model approved by the Government of Georgia. The concept of electricity market model (new concept) was approved on April 16 of 2020.

As for the organization of segments of electricity organized markets, this obligation is imposed on electricity market operator, which performs this activity in accordance with the concept of electricity market model, within the framework of duties conferred by the new law and rules of electricity market. [104]

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100 Energy Community, Policy Guidelines on the Promotion of Organised Electricity Markets in the Contracting Parties, PG 03 / 2015 / 24 September 2015, 7.

101 Ibid.

102 See Article 3 subparagraph "e" of the concept.

103 See Article 7 of the Concept of Electricity market model (new concept).

104 See Article 121 paragraph 1 of the new law.

3.2.2.2.2. Participants of Electricity Market

Power suppliers and other legal entities or natural persons have possibility to obtain status of electricity market participant with the purpose to purchase and sale electricity. Besides, for receiving this tatus they must satisfy terms prescribed by the new law and rules of electricity market. This rules also regulate the framework of executing rights and obligations deriving on the basis of agreement concluded between electricity market participants.

All participants of the electricity market have possibility to trade on the organized electricity market in accordance with the requirements determined by the new law and rules for electricity market.

While carrying out electricity purchasing obligation with particular purpose and in cases directly prescribed under the new law, it is possible that respective persons would be special participants of the electricity market, however their special characteristics are additionally defined by electricity market rules.

3.2.2.2.3. Opening Electricity Market

In the process of liberalization of electricity markets, considering difficulty of implementing respective directives, European countries applied diverse approaches and made particular exceptions deriving from their markets' structures.[105] In Georgia, by the decision of responsible persons, possibility of opening electricity market at once was not discussed. Generating objects were given possibility to trade for the price defined by the Commission on so called regulated market, the volume and size of which will decrease constantly. In future they will continue trading on day-ahead and intraday markets, as well as on the grounds of bilateral agreements.[106]

2020 is the first year of reform in terms of the total modernization of the Georgian electricity market.[107] As it was mentioned, for the development of competition on electricity market all respective consumers must be given possibility to freely choose electricity supplier.[108] However, as it was mentioned, on the first stage electricity market will open partially, because, considering practice of the European countries, for ensuring competition full opening of the market needs at least 5 years.[109]

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105 *Kochladze M., Gochitashvili T., Tchiaberashvili I., Maghradze N., Kvaratskhelia T*., Georgia and the European Energy Community, Tbilisi, 2015, 24 (in Georgian).

106 Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, *Jalaghonia D*., 2019, <https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi--interviu-irina-miloravastan-/45341> [16.07.2020] (in Georgian).

107 Interview with Davit Narmania, Energy reforms 2020, Forbes Georgia, 2020, <https://forbes.ge/news/7833/energoreformebi2020?fbclid=IwAR0PkwK7x3N8p_LHgCel8YWGMraANLw_q_WgYuk9gyVh8gT4BrRk7THPgIQ> [16.07.2020] (in Georgian).

108 *Kochladze M., Gochitashvili T., Tchiabrishvili I., Maghradze N., Kvaratskhelia T*., Georgia and Energy Community of Europe, Green Alternative, Tbilisi, 2015, 26 (in Georgian).

109 Interview with Davit Narmania, Energy reforms 2020, Forbes Georgia, 2020, <https://forbes.ge/news/7833/energoreformebi2020?fbclid=IwAR0PkwK7x3N8p_LHgCel8YWGMraANLw_q_WgYuk9gyVh8gT4BrRk7THPgIQ> [16.07.2020] (in Georgian).

3.2.2.2.4. Legislative Regulation of the Opening of Electricity Market

Qualified consumer is entitled to freely choose and then, in case of such desire, change electricity supplier.[110] This norm is unconditionally the first and most important indication to the fact, that the electricity market of Georgia has moved to essentially new stage. The mentioned norm may become precondition for development of numerous events with interesting, and the same time, in some occasions, unpredictable scenario in the field of trading with electricity. If before adoption of the new law, electricity retail consumer maybe in reality did not have information on the status and functions that the electricity supplier had (at that time – distribution licensee),[111] the new law "imposes burden" exactly on the consumer to individually search and carefully select electricity supplier, which will provide proper service.

Hereby, it must be mentioned that one of the main preconditions for liberalization of the electricity market is effective implementation of the competition law. As it is known, the aim of competition law is to liberalize market in Georgia, facilitate free trade and competition.[112] This filed of law stipulates norms prohibiting Anticompetitive Agreements, as well as abuse of market power by dominant economic agent and concentrations restricting effective economic competition.[113] For this purpose the new law envisages norm, according to which, the commission, in case on necessity, determines vital and proportional measures for ensuring proper functioning of the electricity market, in order to promote development of effective economic competition on the market.[114]

3.2.2.2.4.1.1. Importance of Competition of the Electricity Market

Effective competition[115] results in effective distribution of resources in the society and effectiveness of production, which is unconditional guarantee for growing welfare of consumers.[116] Obligation to ensure proper conditions for the existence and development of effective competition on the electricity market is imposed on the Commission, which supervises market for timely identification and suppression of actions restricting market, and in case of necessity conduct market research.[117] In this regard, the term prescribed in the paragraph 2.3.2 of the Guiding Document of the

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110 See Article 114 paragraph 1 of the new law.

111 *Gatserelia A.,* Energy law. See *Khubua G., Zimmerman K. (eds.),* Legal basis for public administration, Handbook, Tbilisi, 2016, 360, area 955 (in Georgian).

112 See Article 2 of the Law of Georgia "on Competition".

113 *Menabdishvili S.*, Essence of cartel and modern tendencies of its development (in particular on the example of competition law), Dissertation, TSU, Tbilisi, 2016, 11 (in Georgian).

114 See Article 115 paragraph 1 of the new law.

115 Effective competition implies such optimal combination of market structure and market activity of economic agents, when market successfulness equals to possibly high index. See Article 2 Paragraph 1 sub-paragraph „a" of the „Methodic indication of market analysis" approved by the order N30/09-3 from 30 September 2014 of the Chairperson of the Competition Agency.

116 *Menabdishvili S.*, Essence of cartel and modern tendencies of its development (in particular on the example of competition law), Dissertation, TSU, Tbilisi, 2016, 12 (in Georgian).

117 See Article 117 paragraphs 1 and 2 of the new law.

Energy Community is noteworthy (Requirement of Market Functioning), according to which, among three strategies for reaching market liquidity the first one is creating proper stimulating environment by total suppression of factors obstructing competition, which will ensure uninterrupted participation for market participants.

3.2.2.2.4.2. Significant Impact on the Electricity Market

Enterprise participating in the electricity market is considered as having important influence, if it holds significant market share independently or by agreement with one or more enterprises. Significant is the market share, which gives economic power, to conduct commercial activity characteristic to electricity market independently from competitors, clients and/or consumers. The new law defines amount of significant market share and the rule of its determination. This authority is conferred on the Commission.

It is noteworthy that the new law does not indicate on those legal consequences, which could be related to the existence of significant influence on the electricity market and abuse of this influence. There is only mentioned, that, if the Commission identifies fact of existence of significant influence on the electricity market, this may result in applying measures for stimulating market opening.

It is obvious, purpose of the determination of respective code of conduct is always achievement of precise, legitimate result. For identifying purpose of the mentioned norm of the new law, in particular to determine, wither the abuse of influence obtained in such way by the enterprise having significant influence on the electricity market will results in respective legal responsibility, it is reasonable to call on the acting law on competition. This opinion is reinforced by article 30 of the Law of Georgia "on Competition", according to which, the Competition agency and respective body regulating field of economy, subject to regulation (in such case Commission) are cooperating, in order to study and eliminate cases of violating competition in the regulated field of economy. As in electricity sector (subject to regulation) Commission is studying the infringement of competition legislation, it is considered as executive body in the competition sector and exactly this commission must apply provisions prohibiting abuse of dominated position, prescribed in the Law "on Competition".

According to the Law of Georgia on "Competition", dominating position of the economic agent, along with other factors of market power, is determined on respective market considering the market share thereof.[118] Moreover, the law stipulates, that abuse of dominated position by one or several (in case of group domination) economic agents is inadmissible.[119] On the one hand, purpose of prohibiting abuse of dominated position is reinforcing competitive environment, as the competition, as legal welfare protected by the legislation, is considered as dynamic process, preservation of which aims at ensuring sound competitive environment in the respective market.[120]

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118 Law of Georgia "on Competition Law", date of adoption, Article 5 paragraph 1.

119 Ibid. Article 6 paragraph 1.

120 *Adamia G.*, Perspective of private enforcement of competition law in Georgia, on the example of abuse of dominating position, "Comparative Law Journal", M10, 2020 (in Georgian).

It must be asked, whether the term "significant influence" is recognized as synonym for "dominating position". Considering the aim of the mentioned norm of the new law, it is clear that definition of "significant influence" implies occasions of dominating position.

Deriving from the all presented above, it is prohibited for enterprise to abuse significant influence obtained on the electricity market, and in case of this fact, it is charged with the respective responsibility.

In this regard, it must be noted that also Article 102 of the Treaty on functioning of the European Union, which prohibits abuse of dominating position having on the market.[121] Besides, it is possible to impose stricter prohibitions under respective legislation for the singe unilateral actions restricting competition carried out by dominating enterprises (Unilateral Behavior by Dominant Firms).[122]

3.2.2.2.4.3. Concentration of the Electricity Market

In the new law "concentration" is not defined. However, analysis of the content of legal norms shows that in the new law "concentration" is used to express merger and/or acquisition of regulated enterprises participating in the electricity sector.

The purpose of control over merger/acquisition of enterprises is to avoid possibility for restricting competition on the market, based on creation of the Excessive Market Power as a result of enterprise growth.[123]

For this purpose, the new law determines that such concentration, which restricts effective competition on the market of Georgia, its part or any party to the Energy Community, is inadmissible.[124] Besides, if competition creates or reinforces dominating position, it is presumed that this restricts effective competition, and obligation to prove contrary and respective burden is imposed on regulated enterprise.

The question is, whether the concentration, which does not essentially restrict effective competition, is admitted on the market. This question derives from the law of Georgia "on Competition", which established such possibility, that, if concentration does not essentially restrict effective competition on the market of Georgia, or its biggest part or service market and its result is to obtain or reinforce dominating position, it may be considered compatible with normal competitive environment.[125] In this regard, it must be studies whether the mentioned norm of the law of Georgia "on Competition" specifies provisions determined by the new law, the new law simply excludes possibility to apply this rule of competition law on the electricity market.

As it was mentioned above, in general, the new law prohibits concentration, which restricts effective competition. Moreover, it does not exclude existence of such concentration, during which

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121 *Zuber A.,* Energiekartellrecht, Kap. 3, Rn. 58.
122 Ibid.
123 *Doms B.,* Energiekartellrecht, Kap. 5, Rn. 54.
124 See Article 119 paragraph 3 of the new law.
125 See Article 11 paragraph 4 of the Law of Georgia "on Competition".

restriction of effective competition may be nonessential. The mentioned occasion, on the one hand, is completely compatible with competitive environment. Hence, it is presumed that in case of concentration on the electricity market the quality of restriction (essential/nonessential) must be evaluated by the rules of competition law. If the restriction of effective competition is nonessential, this fact shall not be considered as illegal action. It must be mentioned, that during discussion of the draft new law at the Parliament of Georgia, in the remarks presented by the Commission there is indication on inadmissibility of such concentration, which essentially restricts effective competition.[126]

As it was said, in the energy sector concentration is strictly controlled. The new law obliges regulated enterprises, participating in the concentration, to provide notification about concentration to the Commission, beforehand, before realization of concentration, and Commission prepares conclusion on the competitive effect of prospective merger/acquisition.[127] For the merger registration of regulated enterprise, it is necessary to have positive conclusion of the Commission on the competitive effect of prospective merger/acquisition.[128]

Hereby it must be mentioned, that restriction does not apply to all regulated enterprises and is applied only to those regulated enterprises participating in concentration, which have actives, individual, as well as common, or annual turnover (according to the data of financial year before concentration) that exceeds marginal amount defined by the Commission.

3.2.3. The New Concept of the Electricity Market Model

The new concept of the electricity market model (hereinafter – new concept) was elaborated by the Ministry in collaboration with the Commission.[129] It was adopted by the Decree of the Government of Georgia N246 from 16 April 2020. The new concept significantly differs from the concept, which is the document of recommendatory nature supporting reform process of the energy sector of Georgia and is limited to the vision of the Ministry on general structure, organization and functioning of the Georgian electricity market – it is only a guiding document.

The new concept, by its essence, is a document defining particular measures. Its main purpose is to outline electricity market model, which ensures creation of attractive investment environment on retail, as well as wholesale level, and also possibility of free choice for the consumer. Target (Market) Model envisages creation of equal, non-discriminatory environment for participants of free market and establishment of competitive price on the market through transparent methods.

In this regard, guiding principles of the new concept are noteworthy, which are novelty for the new electricity market of Georgia. They include trading electricity through competitive market mechanisms (bilateral agreements and/or on organized electricity markets), as well as so called self-dispatching, responsibility on unbalance and ensuring establishment and application of completely new mechanisms of public service.

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126 See Explanations for remarks on the draft law of Georgia "on Energy and Water Supply" presented by the Commission with the letter №1/01-1-4009 dated of 30 April 2019, 23 (in Georgian).

127 See Article 119 paragraphs 1 and 2 of the new law.

128 Ibid. Article 119 paragraph 5.

129 Ibid. Article 123 paragraph 1.

3.2.3.1. Segments of Wholesale Market and Their Operating

The new concept defines segments of wholesale market. They are following:

1) Day-ahead Market;
2) Intraday Market;
3) Bilateral Agreements Market;
4) Balancing and Anicllary Service Market.

As it was mentioned, issues related to organization of electricity market are regulated by the rules of electricity market, and authority to organize relevant segment (segments) of organized electricity market, for the purpose of electricity trade, is conferred on the electricity market operator.[130]

Electricity market operator can operate a respective segment (segments) of electricity market only on the grounds of license issued by the Commission. For operation of this segment (segments) only one license is issued, which gives to licensee exclusive right to conduct specific activity prescribed by the license on the territory of Georgia for indefinite period of time.[131]

Right to operate on Day-ahead and intraday electricity markets (segments of wholesale market) is conferred on operator of the stock exchange.[132] Even thought, in the new concept the electricity market operator is considered as a subject of wholesale market, and not the stock exchange operator,[133] from the purpose of the document, it is undisputable, that stock exchange operator and electricity market operator is the same person.

"In Georgia liberalization of electricity market was surpassed by the process of energy exchange establishment".[134] "Energy Exchange of Georgia" was founded by direction and coordination of the Ministry, with 50-50% share participation of "Georgian State Electrosystem" and "Electricity System Commercial Operator".[135] The stock exchange conducts development and operation of Day-ahead Market and Intraday Market through software service of consulting company "Nord Pool Consulting".[136]

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130 Ibid. Article 3 subparagraph "h^1". Electricity market operator is the person, which is responsible for organization of certain segments of electricity market of Georgia, which is defined by the new law and bylaws adopted based on that law.

131 Ibid. Article 15 paragraphs 1 and 2.

132 See Article 5 paragraph 1 of the new concept.

133 Ibid. Article 4 subparagraph "a".

134 Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, *Jalaghonia D.*, 2019, <https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi--interviu-irina-miloravastan-/45341> [16.07.2020] (in Georgian).

135 Web page of the Ministry of Economy and Sustainable Development, "Energy exchange has been established in Georgia", 3/12/2019, <http://www.economy.ge/?page=news&nw=1353&s=saqartveloshi-energetikuli-birja-dafudznda> [16.07.2020] (in Georgian).

136 Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, Jalaghonia D., 2019, <https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi--interviu-irina-miloravastan-/45341> [16.07.2020] (in Georgian).

3.2.3.2. Period and Stages of Transition to Target (Market) Model

Physical bilateral agreements (forward) market and electricity stock exchange (except intraday market) will be launched from 1st July 2021, however this process must be preceded by establishment-arrangement of respective systems[137] and platforms,[138] testing and launching in the simulation regime.[139] From 1st July 2022 stock exchange operator must ensure operation of the intraday market platform as well.

It is noteworthy that annex N1 of the new concept defines precise stages of market opening. Until 1st July 2026 market must be open for all consumers (except residential consumer and small enterprise).

3.2.4. Electricity Market Rules

Organization and operation of electricity market, including all procedures related to any segment of market prescribed under new concept, are regulated with market rules approved by the Commission.[140] These rules, along with other terms, determine products intended for trading on the electricity market, as well as types and samples of contracts to be concluded. Moreover, it is the most important, that for transition to Target (Market) Model the mentioned rules define issues related to calculation of unbalance and responsibility for unbalance.

4. Conclusion

Before adoption/after adoption of the new law and new concept the structure of trading with electricity entailed/entails many technical, commercial and legal aspects, without comprehensive analysis of which, it would be impossible to properly manage difficult and complex process related to trading with electricity. During years establishment and application of existing methods of trading in Georgia has resulted in many outcomes: positive, as well as in certain occasions – negative. Persons responsible for Energy Sector had to deal with many nonstandard circumstances, however difficulties related to trading still were increasing yearly.

Transition to qualitatively new model, related to electricity trading, is huge challenge for energy sector participants. Legislative framework changes radically in terms of technical and legal standpoint. Opening of electricity market, free formation of price on the market and determination of new periods of time for electricity trading (for instance trading on day-ahead or intraday market) will definitely become attractive for representatives not only of energy sector, but other sectors as well. Along with the development of electricity trading, development of trading with instruments closely related to

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137 System necessary for organizing of wholesale public service by JSC "Electricity System Commercial Operator" (ESCO) is implied.

138 Day-ahead market and balancing market platforms are implied.

139 Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, *Jalaghonia D.*, 2019, <https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi--interviu-irina-miloravastan-/45341> [16.07.2020] (in Georgian).

140 See Article 123 paragraph 2 of the new law.

electricity market is also expected. Electricity market will be saturated with completely new and unknown products and therefore, proper management of these processes will be possible on the example of European countries having long-standing experience. It is important, that the content of new law and bylaws adopted based on the law does not cause additional questions and does not create artificial barriers obstructing free and competitive trade. Georgia has historical possibility to create legal base for making its electricity market interesting for foreign investors.

It must be mentioned, that this article is one of the first attempts to compare Georgian electricity market, after renewal of legislation, to the European market (in direction of academic research), however during superficial comparison of norms regulating mentioned markets, those active issues were relieved, which need additional research and deep/systemic analysis for establishing in practice. Hopefully, representatives of academia and practicing lawyers will pay more attention to these extremely interesting issues related to legislation regulating the sector full of challenges.

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36. Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, Jalaghonia D., 2019, <https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi--interviu-irina-miloravastan-/45341> [16.07.2020] (in Georgian).
37. Web page of the Ministry of Economy and Sustainable Development, "Energy exchange has been established in Georgia", 3/12/2019, <http://www.economy.ge/?page=news&nw=1353&s=saqartveloshi-energetikuli-birja-dafudznda> [16.07.2020] (in Georgian).
38. Energy Community Secretariat, Energy Governance in Georgia, Report on Compliance with the Energy Community Acquis, 2017, 10.
39. Energy Community, Policy Guidelines on the Promotion of Organised Electricity Markets in the Contracting Parties, PG 03 / 2015 / 24 September 2015, 7.

Giorgi Aladashvili*

The Essence of Corporation and Corporate Personality through Ontological Perspective

In modern world corporations play a crucial economic, social and legal role. Both organizationally and in its very essence, a corporation represents a complex phenomenon in which numerous interesting and quite problematic issues intersect, with one of the most significant being the nature of the corporation itself. As a participant in legal relations, it is equalized with the physical person as a "legal entity" with its own separate personality. Despite this fact, a legal person, in and of itself, is undoubtedly a legal fiction lacking its own physical distinctiveness and veritable existence, bereft of the capability to cognize its own actions and to make decisions without its constituent physical individuals.

As a fictional phenomenon, both sociologically and philosophically, having its origins in the attribution of human properties by humans themselves to such certain phenomena (i.e. anthropomorphization), detailed analysis of corporation and its corporate personality as well as the study of its interrelation with its constituent natural individuals is necessary to ascertain, what does it precisely represent from ontological standpoint and not only what specific descriptive characteristics its bears in the eye of the law.

Keywords: *Corporation; legal person; legal fiction; nature of corporation; ontology of the person; separate corporate personality; definition of the person; anthropo-morphization*

1. Introduction

The impact of contemporary corporations on the global economic, social and political scene is truly immense. They constitute such an inseparable part of our daily lives that an average man does not even think much about them and only a large establishment may attract his or her attention, even then, only due to some widely publicized case or complete bankruptcy of latter. At the same time, the influence of international corporations is rising not only in economic and financial, but also in political and social areas.[1] "*Islands of conscious power in this ocean of unconscious co-operation, like lumps of butter coagulating in a pail of buttermilk*." – so eloquently described one British economist these corporations in the last century.[2]

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1 *Bottomley S.,* The Constitutional Corporation: Rethinking Corporate Governance, Ashgate Publishing, Aldershot, 2007, 1-3.

2 *Robertson D.H.,* Control of Industry, Nisbet and Co., Ltd., London, 1923, 85.

Such power of corporations should not, of course, be understood as something absolute. It is constrained with ever-changing caprices of the market, official regulations and public opinion. In spite of this, it can be stated without reservations, that corporations do have actual power and have the capability to make decisions that may entail severe economic or social consequences.[3]

At a certain stage of its historical development, with the conferral of fiction of separate personality and limited liability, corporation was equalized with the natural person in legal realm. Today it benefits from almost all rights that the individual does, leaving out obvious exceptions and particular restrictions conditioned by the very nature of the legal person. In spite of the existence of this legal fiction, the law can not simply turn a blind eye on the fact that a corporation is not a full equivalent to a physical, natural person, that it is a wholly different thing, organized and structured, in the hands of which large power may also accumulate. From a purely naturalistic standpoint, corporation as a certain separate *being* does not even exist, it comes into being as a result of human actions and therefore it would be appropriate to aver that it demands a different, special approach.

Regulating corporations was never a simple task. If, in the eye of the law, a legal person today is equalized with the natural person, then interference in its business should be deemed impermissible without a proper justification. However, as a corporation is not a true individual from naturalistic and social viewpoints, regulations applying to it are far more extensive than in the case of a natural entity. This specifically concerns a legal form established for drawing in large capital – the joint stock (public limited) company, which is stringently regulated even under the most liberal legal regimes due to the latter's economic and social significance.

Hence, instead of analysing corporation through a purely legal prism, as a mere subject of law and a person equalized with an individual, it would be incorrect to ignore the legal person as a social phenomenon – such social element should definitely be taken into account during regulation. The latter is occasioned by a simple axiom that the law itself is a social phenomenon, born within the community. By such interpretation any large corporation, in certain terms, becomes a so-called "social enterprise", whose freedom of decision-making is hamstrung by public or social interests.[4]

When moving from the general notion of a legal person to its typology, it is important to stress that several types of persons are signified under this term. Discussing non-commercial (non-entrepreneurial) legal entities goes outside the scope of the present work. It would be sufficient to state, that aspects such as separate personality, commercial activities and limited liability apply to them just as well, but the exclusions from the latter principles are generally more relevant for those complex types of legal persons, which play a key role in the economic, social and political life of the world. Such are the corporations and public companies, about which present article will concern itself.[5]

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3 *Parkinson J.E.,* Corporate Power and Responsibility: Issues in the Theory of Company Law, Clarendon Press, Oxford, 1993, 10.

4 Id. 23.

5 In English language, the word „corporation" mainly denotes a joint stock company (JSC) and does not include the limited liability company (LLC). Concurrently, by a far broader definition, it is often used to mean any registered legal person as well. In German law, two main subjects are signified under

The present work shall analyze the nature and essence of a legal person, including ontologically, in which case not only legal, but also the philosophical dimension shall be discussed. In second chapter of the work such nucleus of the legal entity will be dissected through social and ontological perspectives. Third chapter shall expound on the importance of the legal fiction and the role it plays in both corporate law and law in general. Fourth chapter the concept of corporate personality shall be analyzed in general terms, both through the lens of notion of personality as well as from the viewpoint of its "humanification" (anthropomorphization). The final chapter shall contain a conclusion, summarizing the issues discussed in the present article.

2. The Essence of Corporation from Legal, Social and Philosophical Perspectives

A number of authors invoke specific properties of a corporation, that it is characterized in modern legal system, in order to explicate its essence: legal power to conclude contracts and own property; capacity to delegate powers to its representatives; file a lawsuit and hence be a claimant or defendant.[6] From the point of view of modern legal science, such explanation is technically correct, but it stresses what *characteristics* and *signs* a phenomena called a corporation has, without giving a detailed explanation as to what specifically it *is*.

Numerous theories have been voiced regarding the essence of a corporation. Within the German private law, three main theories have been established under significant influence of Roman law: the fiction theory[7] of Carl Friedrich von Savigny, the real entity theory[8] of Otto von Gierke and the ownership theory of Brinz.[9] Much like these three theories, others have also been put forth, of which particularly notable is the concession theory, similar (albeit not equivalent) to fiction theory, which related the entire existence and being of the legal entity to the permission (concession) granted by the

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corporations (capital associations): a joint-stock (public limited) company (*Aktiengesellschaft*) and a limited liability company (*GmbH - Gesellschaft mit beschränkter Haftung*). The third one, a registered cooperative (*eingetragene Genossenschaft*) is also considered to be a corporation (capital association), but due to its relative rarity and certain idiosyncracies, only LLC and joint-stock company shall be meant under corporations (capital associations) in this paper. *Wolf M., Neuner J.,* Allgemeiner Teil des Bürgerlichen Rechts, 11. Auflage, C.H.Beck, München, 2016, §16, Rn.23-28, s.169-170.

6 *Armour J., Hansmann H., Kraakman R., Pargendler M.,* What Is Corporate Law? in: *Kraakman R., Armour J., Davies P., Enriques L., Hansmann H., Hertig G., Hopt K., Kanda H., Pargendler M., Ringe W., Rock E.,* The Anatomy of Corporate Law: A Comparative and Functional Approach, 3rd Edition, Oxford University Press, Oxford, 2017, 8. Although these authors also claim that, while a legal subject may possess all aforementioned rights, it may still not qualify as a legal person. For instance, a partnership in common law countries fully benefits from these rights, but majority of jurists do not regard it as a legal subject having corporate personhood and separate from its constituent individual members. Id. n.27.

7 *Fiktionslehre*.

8 *reale Verbandstheorie*.

9 *Zweckvermögen*. *Wolf M., Neuner J.,* Allgemeiner Teil des Bürgerlichen Rechts, 11. Auflage, C.H.Beck, München, 2016, §16, Rn.13, s.167. For quite an informative short overview of this classical theoretical triad, see: *Chanturia L.,* General Part of Civil Law, "Samartali Publishing", Tbilisi, 2011, 224-228 (In Georgian). Some authors add a fourth theory to this trinity: according to *Jhering's* symbolistic theory, a legal entity is only a convenient symbol, a mere abbreviation used by its constituents. This theory has not gained much traction and its detailed analysis is beyond the scope of this work.

state (sovereign) and which, after reception of the principle of free establishment of legal entities, has lost its relevance. Similarly, other theories were developed in common law, in particular, the aggregate theory, for which an association is the union, aggregate of its constituents and the contracts theory,[10] which analyzes the corporation and the legal relations within through the prism of specific contracts concluded.

Theories on legal persons may, in general, be divided into two groups, with authors distinguishing corporate realism and corporate nominalism. If, in case of former, a corporation is a real entity and its corporate personality simply reflects its position in modern society (e.g. real entity theory of Gierke), for the latter nominalists a corporation remains, at its core, as a conglomeration of individuals and the corporate personhood is nothing more than a shortening of their names, a certain abbreviation for the purposes of flexibility and simplicity.[11] Logical extension of these two theories may be to view the entity as a real person, with its separate existence (e.g. the already mentioned real entity theory of Gierke or the realistic theories in general) or to consider it as an association based on the contracts concluded by its constituent members (e.g. the contractual theory or the aggregate theory).[12]

These theories on the legal persons are not merely of legal or philosophical[13] significance – they have other, more important functions as well and oftentimes influence official state and legislative policies.[14] For example, according to the real entity theory, a certain entity either has separate corporate personality or not, in contrast to common law jurisdictions in which until the 20th century, the issue of corporate personality was frequently contingent on specific *ad hoc case* as due to the then-popular aggregate or fiction theory, the full separation of a corporations from its constituents was never considered to be firm. [15] A different outcome may be brought about by a wholesale reception of the concession theory – by treating corporation as just a creation of the law and the state, one arrives at a conclusion that norms regulating corporations must inevitably be derived from public interests.[16]

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10 *Nexus of contracts.*

11 *Iwai K.,* Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance, The American Journal of Comparative Law, Volume 47, No. 4, Autumn, 1999, 583-584. The author does mention other alternatives, which, despite different designations, in general, stand in the same or similar positions with regard to corporations.

12 *Iwai K.,* What Is Corporation?, The Corporate Personality Controversy and the Fiduciary Principle in Corporate Governance, in: Legal Orderings and Economic Institutions, Ed. *Cafaggi F., Nicita A., Pagano U.,* Routledge, London, 2007, 243.

13 It is curious that not many authors in the philosophy of law and philosophy in general touch upon the problem of the essence of the legal entity and the corporation and despite the importance of corporations in modern life, its analysis through philosophical (and not sociological) lens seems to have been of lesser relevance to many famous philosophers. Several political philosophers, including Hegel, represent a notable exception. See: *Goedecke W.R.,* Corporations and the Philosophy of Law, The Journal of Value Inquiry, Volume 10, Issue 2, June 1976, 81-82.

14 *Blumberg P.I.,* The Corporate Personality in American Law: A Summary Review, The American Journal of Comparative Law, Volume 38, Supplement. U. S. Law in an Era of Democratization, 1990, 51-52.

15 *French D., Mayson S., Ryan C.,* Mayson, French & Ryan on Company Law, 33rd Ed., Oxford, Oxford University Press, 2016, 154.

16 *Ripken S.K.,* Corporations Are People Too: A Multi-dimensional Approach to the Corporate Personhood Puzzle, Fordham Journal of Corporate & Financial Law, Vol. 15, No. 1, 2009, 101.

Nowadays a legal person truly is more than just an artificially created fiction, it is a social reality equalized with the physical person, in the eye of the law at least. Rights and duties are assigned to it notwithstanding the presence of any property.[17]

Aside from the legal dimension, the legal entities have economical significance as well. In this economical sphere, a legal person (and more so, the corporation (capital association) is a mechanism, an instrument with which human or humans conduct their affairs (including business). In a joint stock company, for example, a third person intercedes between the shareholder and the business, a real person, even if it is an undoubtedly artificial entity.[18] That the increase of economical efficiency lies behind the idea of separate corporate personality has been noted quite a few times in literature. To perform larger and larger economic activities, more capital and investments are to be attracted and involvement of more people is needed which is easier if they, instead of unlimited liability, are held liable only within the limits of the amount they have contributed. In the end, this increasing capital is transferred in the hands of several people for efficient management. Corporate personality from this point of view is a logical instrument for the liability to be limited with such contributions deposited by the partners.[19] A contributed deposit then constitutes not the property of a particular shareholder, but that of a separate legal person. Thereby investors usher into bolder and riskier projects, which in long term positively affects the economy.[20]

Discussion on the nature of a legal person may be conducted from multitudinous angles, both philosophically and socially. If we delve deeper into its essential, physical elements, its ontological substance, then it can be said that a legal entity is, in fact, a fiction.[21] Unlike a natural person, a legal entity does not have the capacity to understand its own actions and act without its constituent natural persons. This element of self-consciousness is crucial in the notion of a human as a philosophical category. In this particular instance, when describing a legal entity as fiction, a *social* fiction, *bestowed by the human mind* is meant and not the *legal* fiction as mentioned by Savigny in his theory. A joint stock company "making" a decision does not mean that a legal person has itself cognized, through its own consciousness, existing circumstances and alternatives and hence arrived at a decision. In reality such decision is made by governing bodies of this entity, comprised of natural persons. Not a single

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17 *Wolf/Neuner.,* Allgemeiner Teil des Bürgerlichen Rechts, 11. Auflage, C.H.Beck, München, 2016, §16, Rn.14, s.167.

18 *Gas Lighting Improvement Co Ltd v Inland Revenue Commissioners*, (1923) AC 723 at 740-741.

19 *Radin M.,* The Endless Problem of Corporate Personality, Columbia Law Review, Volume 32, No. 4, April 1932, 654.

20 *Bainbridge S.M.,* Abolishing Veil Piercing, Journal of Corporation Law, Volume 26, No. 3, Spring 2001, 488-489.

21 *Demos R.,* Legal Fictions, International Journal of Ethics, Volume 34, No. 1, October, 1923, 44. Contrary to this idea, according to the "functionalist" understanding, any agent which is capable of acting as a person in the existing social environment is regarded as such, including corporations. With this approach, corporations definitely are not "fictions". See: *List C., Pettit P.,* Group Agency: The Possibility, Design, and Status of Corporate Agents, Oxford University Press, Oxford, 2011, 176. Other commentators suggest, and rightly so, that for the entity to be held liable for its actions, it must have a certain veritable physical dimension and not to be a mere fiction. See: *Tuomela R.,* Social Ontology: Collective Intentionality and Group Agents, Oxford University Press, Oxford, 2013, 236.

corporation can, with the literal meaning of the word, reach such a decision "by itself".[22] If a partner of a legal person is another legal entity, than we can catch sight of natural persons behind these legal entities as well. No matter how long this chain of ownership of legal entities, in the end one still comes to natural persons, who make decisions on the behalf of the corporation.[23] Actual volition, capacity to reflect upon the situation and act according to one's own mental processes – none of legal persons have this due to their own nature.[24] It also has no interest of its own, strictly speaking and in literature the situation when a legal entity is created as means, as an instrument to further the goals of its constituent natural persons is considered completely normal.[25]

From a non-legal standpoint, often corporate identity is synonymous with the body or person which influences it or with which it is related to in various circumstances. This may be a founder, manager, board of directors, dominant shareholder, etc. Such equating should not be taken as a mere coincidence – in the eyes of common laypeople, it is the physical persons that stand behind the corporations.

To put it otherwise, without natural persons, no legal entities would exist, while the reverse does not hold – a natural person is already present in modern world and it is due to him that a legal person even comes to existence. [26] A natural person is ontologically primary[27] and at its center, corporations *are* only groups and aggregates of individuals.[28]

If the theory of legal person as a legal fiction is less relevant today and realist theory of *Gierke* is widely accepted, the topic of legal person as a *social* or *philosophical* fiction is more contentious. The opponents of fiction theory make the case that artificial does not necessarily mean fictional. An artificial lake or a waterfall actually exists and is neither a fiction nor an illusion.[29] Others refer to the fact in case of decision-making by corporations, actually determining the part of individuals is not

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22 See, for example: *Ripken S.K.,* Corporations Are People Too: A Multi-dimensional Approach to the Corporate Personhood Puzzle, Fordham Journal of Corporate & Financial Law, Vol. 15, No. 1, 2009, 100.

23 The aforementioned should not be taken as the support of fiction theory of Carl Friedrich von Savigny.The fiction theory, at its heart, defines the *approach* of the legislator and law in general concerning such legal entities as fictions. Concurrently, even though the separateness of a legal entity is widely recognized in almost every single legal system, a fact remains, that it does not exist as a physical, natural thing. It remains fiction in view of the latter simply not possessing its own essence, life and consciousness. The present paper is chiefly elaborated from this very proposition.

24 *Gierke O.,* Political Theories of the Middle Age, Tran. *Maitland F.W.,* Cambridge, Cambridge University Press, 1900, xx-xxi.

25 *Grigoleit H.,* Gesellschafterhaftung für interne Einflussnahme im Recht der GmbH: Dezentrale Gewinnverfolgung als Leitprinzip des dynamischen Gläubigerschutzes, C.H.Beck, München, 2006, 6-7.

26 („*it would be absurd to say that corporations could act even though all human beings have perished*"). This quote is associated with *Irving Grant Thalberg Jr*. (1930-1987) and is cited in: *Held V.,* Shame, Responsibility and the Corporation, Ed. *Cutler H.,* Haven, New York, 1986, 170.

27 *Scruton R., Finnis J.,* Corporate Persons, Proceedings of the Aristotelian Society, Supplementary Volumes, Volume 63, 1989, 254.

28 *Dan-Cohen M.,* Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society, University of California Press, Berkeley, 1986, 15-16. The author indicates that, unlike the "atomistic" theory, which represents a corporation as a mere assembly of individuals, a holistic approach deems corporation as a truly existing entity.

29 *Machen A. W.,* Corporate Personality, Harvard Law Review, Volume 24, No. 4, February 1911, 257.

quite so simple. Disagreements and dissenting opinions are frequent and the decision arrived at by the corporation may be radically different from the mere mathematical sum of the decisions made by the constituent members.[30] It is quite possible to remove all individual elements and natural persons from a legal entity and for it to maintain, both conceptually and legally, its core essence, as an *intelligent machine*.[31] Philosophically, it is quite interesting to consider the legal entity as the modified condition of the persons' substance. Called the founder of modern philosophy, Rene Descartes[32] distinguished between primary unalterable properties of the substance from its modifications and changed conditions, which still belonged to substances.[33] A legal entity which would not have existed if not for its constituent individuals likewise would have been able to perform any actions.In this sense, a legal person, according to the Cartesian philosophy, may be regarded a modified variation of the substance of these individual persons, its extension.[34]

Before analysing the legal entity as essentially a fiction, it must be concisely stated what fiction means, what roles it plays in modern law and how important it is. A fiction of a legal entity is only one of a sundry of legal fictions, however it can be said, that unlike many of them, its impact is immeasurably bigger on the modern economic or social world.

3. Legal Fiction, Its Importance and Role

Legal fiction, in and of itself, represents a presumption in law, that a certain event is true or corresponds to reality, while in truth such is or may not be case. In theoretically inchoate state, it was widely practised in Roman law[35] and to this day, it occupies a central place in legal science. Blackstone[36] has remarked on the importance and benefit of legal fiction as instrument to prevent mischief and injury or to overcome legal complications.[37] Not an insignificant number of legal

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30 A decision may be reached that none of the members of the managing bodies of the corporation desired., but was made as a "collective" decision following joint discussion and deliberation. In other words, corporation receives actions and decisions of the individuals as an *input*, but the final *output* may be completely different. See: *Kim S.M.,* Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations, University of Illinois Law Review, Volume 2000, Issue 3, 2000, 790-791.

31 *Dan-Cohen M.,* Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society, University of California Press, Berkeley, 1986, 49.

32 *René Descartes* (1596-1650).

33 *Descartes R.,* Principles of Philosophy, Tran., *Miller V.R., Miller R.P.,* Kluwer Academic Publishers, Dordrecht, 1982, 23-25. *Williams B.,* Descartes: The Project of Pure Inquiry, Routledge, London, 2005, 108.

34 Based on Descartes's philosophy, Baruch Spinoza (1632-1677) elaborated this difference between the properties and modified conditions and considered the latter "something" in which substance finds its own manifestation. For instance, if persons set up a club and this club performs legal actions (purchases property, stands in court), in actuality, from this point of view, the club is the *collective extension* of these persons, as without them it would not have been able to conduct any of the actions itself. See: *Scruton R.,* A Short History of Modern Philosophy, 2nd Ed., Routledge, London, 2002, 51.

35 See examples in: *Ando C.*, Law, Language, and Empire in the Roman Tradition, Philadelphia, University of Pennsylvania Press, 2011, 115-131.

36 *Sir William Blackstone* (1723-1780)

37 *Blackstone W.,* Commentaries on the Laws of England, Book III: Of Private Wrongs,, Ed. *Prest W.,* Oxford University Press, Oxford, 2016, 28.

institutions are legal fictions. These include not only the legal entity and corporate personality, but also the notion of personality itself.[38] The fictions or other metaphors should be utilized for decision-making, they are merely means to achieve an objective and therefore it would be erroneous to blindly submit to them without question.[39]

A fiction may generally be a) positive, meaning presumption of that which does not exist; 2) negative, meaning that, which actually exists, is ignored legally and 3) when an action of one person is deemed as an action of another.[40] Of these three, it would be logical to categorize the fiction of a legal entity in the first category. In reality, a legal entity does not exist, but the law presumes the opposite.

There are other classifications of fictions, for example, into historical and dogmatic fictions.[41] If historical fictions are instruments for chai=nging the law, dogmatic fictions go one step further and attempt to place existing fictions under the single unified dogmatic framework.[42] In fact, a legal entity represents the most complex fiction in modern jurisprudence – it is, in its very foundation, underpinned by an intricate dogmatic basis that bolsters its position, equalizes it with a physical individual and allows it to take part in legal, economic or day-to-day social interactions.

4. Separate Corporate Personality[43]

In common parlance, "person" and "personality" denote a certain private individual and under these terms his or her personal and individual characteristics and habits are signified, manifested in his or her "personality". For the purposes of this article, only legal dimension shall be meant under corporate "personality" and not its sociological or cultural connotations.[44]

In literature separate corporate personality, as well as the institution of limited liability logically derived therefrom, is considered to be a fundamental, core principle of corporate law, i.e. the standard which enables the basis of its further regulation.[45]

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38 *Note* – What We Talk about When We Talk about Persons: The Language of a Legal Fiction, Harvard Law Review, Volume 114, No. 6, April 2001, 1745-1747.

39 *Berger R.,* "Disregarding the Corporate Entity" for Stockholders' Benefit, Columbia Law Review, Volume 55, No. 6, June, 1955, 814.

40 *Miller S.T.,* The Reasons for Some Legal Fictions, Michigan Law Review, Volume 8, No. 8, June, 1910, 624-625.

41 *Demos R.,* Legal Fictions, International Journal of Ethics, Volume 34, No. 1, October, 1923, 44.

42 Id.

43 There is quite an extensive literature on separate corporate personality. As ab example, see the list in: *Iwai K.,* Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance, The American Journal of Comparative Law, Volume 47, No. 4, Autumn, 1999, 583-584, n. 2

44 Sociologically, there is no unified corporate personality (that does not merge with the image and face of the corporation) as the primary actors – the shareholders, employees, etc. see the corporation from their own distinctive, particular vantage points. See: *Martineau P*, Sharper Focus for Corporate Image, in: Revealing the Corporation: Perspectives on Identity, Image, Reputation, Corporate Branding, and Corporate-level Marketing, Ed. *Balmer J.M.T., Greyser S.A.,* Routledge, London, 2003, 203.

45 e.g., see: *Blumberg P.I.,* The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality, Oxford University Press, Oxford, 1993, 153. *Bourne N.,* Bourne on Company Law, 6th Ed., Routledge, London, 2013, 19. *Talbot L.,* Critical Company Law, Routledge-Cavendish, New York, 2007, 29.

As of today, the principle of separate legal personality and limited liability is ingrained in the constitution of the law itself. It is acknowledged as self-evident and beyond doubt[46] and takes up a central position among various characteristics of the corporation.[47]

Legally, in order to be recognized as a "person", means to become a member of the society, to be endowed with the rights and duties, enjoyed by a natural person in contemporary community.[48] From such a standpoint, a person should not be equated with the ethical connotations of this word, but only with its formal aspects.[49] The doctrine of separate corporate personality gives rise to the possibility for the legal person, which from philosophical and naturalistic perspectives, *is* a fiction, to be viewed as a true person, with its own will and actions, to a degree that it is taken as wholly separate from even its single constituent member. [50]

Historically, it was not always the case. For quite a while, the identification of a legal person with its constituent individuals remained a principal doctrine. In England, United States of America and Germany too, even as late as the end of 19th century, even such complex organizational formations, as joint stock companies were not considered to be entities wholly separate from its partners.[51] Giving the same rights to corporations as were enjoyed traditionally by physical persons was seen as dubious and even dangerous by many jurists.

A legal definition of a person does not coincide with its philosophical or social definitions. In jurisprudence, a person is a subject with legal rights and duties.[52] Such definition of personality does not lack its own critics according to whom there is certain degree of "parasitism" on the philosophical and linguistic term of a human as a separate individual.[53]

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46 As noted in one of the Canadian manuals of corporate law: *„[w]ithin the realm of legal analysis, corporate legal personality is unquestionable; outside the realm of legal analysis it is doubtful whether corporate legal personality is of any interest at all*." Cited in: *Hamilton S.N.,* Impersonations: Troubling the Person in Law and Culture, University of Toronto Press, Toronto, 2009, 33. Today the second part of this sentence definitely does not hold up as clearly shown by the sheer increase of public interest in corporations and also corporate responsibility.

47 *Armour J., Hansmann H., Kraakman R., Pargendler M.,* What Is Corporate Law? in: *Kraakman R., Armour J., Davies P., Enriques L., Hansmann H., Hertig G., Hopt K., Kanda H., Pargendler M., Ringe W., Rock E.,* The Anatomy of Corporate Law: A Comparative and Functional Approach, 3rd Edition, Oxford University Press, Oxford, 2017, 1.

48 *Hoffmann D. N.,* Personhood and Rights, Polity, Volume 19, No. 1, Autumn, 1986, 74-76.

49 *Wolf M., Neuner J.,* Allgemeiner Teil des Bürgerlichen Rechts, 11. Auflage, C.H.Beck, München, 2016, §16, Rn.14, s.167.

50 To illustrate this point, a New Zealand case *Lee v Lee's Air Farming Ltd.,* [1960] UKPC 33 would be fitting, in which the court determined that, as the limited liability company was a separate entity, the sole partner of such company, who was also the manager, had the right to conclude a labor agreement with such an enterprise with the help of the „magic" of corporate personality and become „both servant and the master". See: *Davies P.L.,* Gower and Davies' Principles of Modern Company Law, 8th Edition, Sweet and Maxwell Ltd., London, 2008, 202.

51 *Ireland P.,* Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality, The Journal of Legal History, Volume 17, Issue 1, 1996, 45-46. *Angell J. K., Ames S.,* Treatise on the Law of Private Corporations Aggregate, 8th Ed., Little, Brown, and Company, Boston, 1866, 764.

52 *Gray G. C.,* The Nature and the Sources of Law, 2 Ed., The Macmillan Company, New York, 1921, 27.

53 *Teichmann J.,* The Definition of Person, Philosophy, Volume 60, No. 232, April, 1985, 179.

Paradox lies at the heart of separate corporate personality: the ownership of property, a critical element, is bifurcated in corporation. Officially, property is under the ownership of the corporation, but the shares and stocks are in the possession of stakeholders. It is impossible to observe the issue from a single perspective, as in such case one arrives at contradictory, polar-opposite results. If the entity is thought to be the owner of property and capital, it will be easier to strengthen and substantiate separate legal personality. On the other hand, if one takes into account, that in the very same corporation stocks or shares are owned by other persons, the strength of this theory will be under question.[54]

The blind obedience to the fiction of personality, though the latter does constitute a legal principle, as already noted, is impermissible. When discussing the separation of the said corporation and its constituents (partners, directors, etc.), what must be taken into consideration is that their complete separation, even in the event of misuse of limited liability and hence unfair or illegal consequences, is an incorrect and rationally untenable position. In any case, the interest of equity (fairness), if the issue is brought forward with particular acuteness, overrules (or must overrule) the fiction of corporate personality.[55]

4.1. Concept of Person and Personality

The issue of what, in essence, is the "person" or "personality" chiefly belongs to the domain of philosophy and psychology rather than to any particular legal category. Naturally, the word "person" and even more so "personality" ("personhood"), has multiple dimensions: cultural, philosophical, social and legal.

From a legal viewpoint, the concept of "person" in general is connected with the notion of carrying legal rights.[56] As already noted, the legal definition of a legal person often has descriptive nature rather than explanatory: it highlights principal rights and duties that legal persons have, while defining the essence of the legal person with the wording of "legal subject" Other definitions of a "person" (e.g. sociological or psychological) may be delineating the essence of this notion more precisely, but taking a physically existing individual as their baseline, their extension to legal persons maybe fraught with difficulties. For example, the modern psychological conception of "person" as "*a stable system that mediates how the individual selects, construes, and processes social information and generates social behaviors"* [57] perfectly fits a physical person, but to precisely conform it to legal persons even as an analogy may be problematic.

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54 *Iwai K.,* What Is Corporation?,The Corporate Personality Controversy and the Fiduciary Principle in Corporate Governance, in: Legal Orderings and Economic Institutions, *Cafaggi F., Nicita A., Pagano U., (ed.)*, Routledge, London, 2007, 244-249.

55 *Berger R.,* "Disregarding the Corporate Entity" for Stockholders' Benefit, Columbia Law Review, Volume 55, No. 6, June, 1955, 814.

56 *Teichmann J.,* The Definition of Person, Philosophy, Volume 60, No. 232, April, 1985, 177-180.

57 *Mischel W., Schoda Y.,* A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure, Psychological Review, Volume 102, No. 2, April 1995, 246.

Here it would be appropriate to delve deeper into the notions of "person" and "personality" and to discuss similarities and differences through those historical and philosophical lens that will be present in case of their application to physical or legal persons.

Historically the "person" was associated with physical (natural) persons for the simple reason, that there was not even an approximate notion of a "legal" person and only with the gradual development of "*persona ficta*" in Middle Ages and theoretical work done at the cusp of 18th and 19th centuries did it emerge. Otherwise, application of this term to other animate or inanimate objects (animals, nature) mostly carried abstract, philosophical or literary meaning. Some historical exceptions are noteworthy though. For instance, for the early medieval philosopher Boethius[58], a person is an "individual substance of rational nature".[59] Such definition is quite flexible and may cover not only natural, but contemporary legal persons as well. It should be emphasized, that it was due to this definition by Boethius that metaphysical properties were started to be attributed to persons.[60] The already mentioned Cartesian system was distinct in that it separated mind and body from each other and framed them in a dualistic system, in which the personality was assigned strictly to mental and not physical sphere.[61] Today such dualistic system is less popular and has been supplanted by other theoretical constructs. As an example, one of the first philosophers who stressed personality and identity, was the English philosopher John Locke.[62] He not only distinguished man and personality, but also quite originally considered a person to be a being with a mind and consciousness, which could comprehend its own existence (the "me"-ness) at different places and times and with this, was characterised by permanence and continuity.[63] In this way, consciousness and personal memory would be at the forefront of the notion of personality.

Modern philosophical notions of person and personhood are more limited and are based on the possibility of attributing consciousness and physical characteristics to a particular object.[64] Today a person may be defined as an agent, an active person, which has the capability to partake in so-called agency-regarding relations.[65]

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58 *Anicius Manlius Torquatus Severinus Boethius* (c. 480-524).

59 *Boethius.,* The Theological Tractates, The Consolation of Philosophy, The Loeb Classical Library, Tran. *Stewart H. F., Rand E.K.,* Harvard University Press, Cambridge, 1968, 85.

60 *French P. A.,* The Corporation as a Moral Person, American Philosophical Quarterly, Volume 16, No. 3, July, 1979, 208.

61 *Burr V.,* The Person in Social Psychology, Psychology Press, Hove, 2002, 7.

62 *John Locke* (1632-1704).

63 *Locke J.,* An Essay Concerning Human Understanding, Volume I, Clarendon Press, Oxford, 1894, 448-449.

64 When discussing personhood, the presence of these two elements – consciousness and body – is emphasized. See: *Strawson P.F.,* Individuals: An Essay in Descriptive Metaphysics, Routledge, London, 1990, 101-102. *Ayer A.J.,* The Concept of Person and Other Essays, Macmillan Education, London, 1963, 82.

65 *Rovane C.,* The Bounds of Agency: An Essay in Revisionary Metaphysics, Princeton University Press, Princeton, New Jersey, 1998, 5, 72. Here a philosophical definition of the word "agency" is crucial, as it signifies the ability, capacity for the person or other subject to carry out actions, possess its own consciousness. In other words, in the mind of the subject, to have "agency" means a certain feeling that it (he or she) is the author or the cause of this or that action or movement. See: *Gallagher S.,* The Natural Philosophy of Agency, Philosophy Compass, Volume 2, Issue 2, 2007, 348.

The "personhood" itself may be understood as an immanent property, a set of characteristics that essentially distinguishes one order of subjects from another and simultaneously can be comprehended in functional terms as well: *something* that makes an active person, an agent (in philosophical sense). In this case, it is not the case that something, in essence, *is,* in and of itself, the carrier of personality, but rather something that *acts, does*. [66] If first road puzzled philosophers, psychologists and other specialists for a long time, the second explanation is more practical and analyzes the issue through more of a social lens. A majority of commentators agree on the functional role of the corporation with its separate personhood and limited liability: it has economical, legal or perhaps other benefits. Therefore, with this latter approach, one may consider it a "person" without any deep philosophical or metaphysical analysis.

The aforementioned method is quite useful, as it accentuates specific factors that engender the establishment of a legal person in practice, more specifically– its functional economic aspects. Historically, it was from this very angle that definitions of corporation tried to solve the riddle of the corporation: by describing its rights to own property or to litigate in court, they left its ontological nature open, without detailed dissection. However, such an approach today, when the importance and role of legal persons and especially corporations, have grown immeasurably, may seem to be insufficient and unsatisfactory. Even if an unanimous answer may not be feasible, it is important to delineate approximate contours of the notion of the legal entity and corporation to determine with what type of legal, social or philosophical phenomena one is dealing.

Despite the ready definition of "personhood" for a natural person, the question on the prospect of fitting such term to legal persons remains unanswered. However, if one considers the capacity to make diligent and reasonable decisions (as often highlighted by numerous definitions of personhood), as the definitive factor for personality, then it would be incomprehensible, why such a legal person should not be considered a legal entity, as the latter may fully plan out its own actions and take care of its "well-being".[67]

The corporate identity too is quite multifaceted and is not confined to mere reflexive self-representations: if its identity can be defined through its characteristic signs and elements (such as structure, type of activities, financial state, etc.), sociologically, the identity may be associated with corporate image, reputation, its place within the wider community and market.[68]

Generally, the attribution of the ability to grasp one's own actions to legal persons may be still controversial. As already noted above, behind a legal entity, in the end, it is always the natural persons who emerge. Question whether or not the will expressed by these constituent members, their collective

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66 *List C., Pettit P.,* Group Agency: The Possibility, Design, and Status of Corporate Agents, Oxford University Press, Oxford, 2011, 171.

67 *Rovane C.,* The Bounds of Agency: An Essay in Revisionary Metaphysics, Princeton University Press, Princeton, New Jersey, 1998, 71-72.

68 *Balmer J. M. T., Greyser S. A.,* Managing the Multiple Identities of Corporation, in: Revealing the Corporation: Perspectives on Identity, Image, Reputation, Corporate Branding, and Corporate-level Marketing, Ed. *Balmer J. M. T., Greyser S. A.,* Routledge, London, 2003, 16-17.

consciousness so to speak, can be considered as the mind and will of the corporation is relevant from more of a philosophical view.[69]

In this case one may aver, that *personification* of a group takes place, its transformation into a single entity, which, in the end, is the corporation. In order to take part in activities and achieve a set goal, persons are obligated to look at the situation not only from their own perspective but also from that of other persons and thereby take this point of view into consideration.[70] Thus the outlook of persons is expanded and state of thought alters from "I" to "We", which is called *collective intentionality*.[71] Here one can think of an interesting case when a separate common will (*Gesamtwille*) emerges from the wills expressed by individual constituents and based on which certain actions are performed.[72] For these "group agents" personhood may be granted, but this, of course, will not be biological personality, but rather institutional, organizational personhood given that corporations do not possess feelings, emotions, the capacity for cognition and hence they still require a different approach – they cannot be equalized with natural persons completely.[73]

Simultaneously, it should be noted that consciousness and presence of corporeal characteristics is not limited to only humans. Even today, certain personality aspects may be imputed to animals, which also possess consciousness (even if limited) and for that reason, they have been and are, primary subjects of "humanification" (anthropomorphization).[74] In actuality, the main distinctive characteristic of human personality and what differentiates it from other animals, is the capacity to undergo in-depth self-evaluation, realize and cognize one's own existence, have desires other than basic instinctual ones and the capacity to rein in, control or constrain latter through one's freedom of action.[75]

Naturally, on the other hand, if the definition of a person shall be confined to physically existent individuals, such explanation shall leave no place for legal entities and corporations as, no matter how the concept of "personality" is extended, a corporation can never be perceived as an *individual* with its own separate consciousness. This is true in spite of the fact, that a corporation does possess certain individual qualities: in the eye of the law it is separated from its constituents, it may own property, be represented in court. The function of the law here is precisely to equalize it with the natural person, but not turn it into an individual, as the legal entity simply lacks separate consciousness characteristic of the former.

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69 Meaning in non-legal, philosophical sense. From legal standpoint, a decision made at the shareholders' meeting is naturally viewed as an expression of the will of the enterprise.

70 *Rovane C.,* The Bounds of Agency: An Essay in Revisionary Metaphysics, Princeton University Press, Princeton, New Jersey, 1998, 138.

71 *Tuomela R.,* Social Ontology: Collective Intentionality and Group Agents, Oxford University Press, Oxford, 2013, 5-6.

72 *Wolf M., Neuner J.,* Allgemeiner Teil des Bürgerlichen Rechts, 11. Auflage, C.H.Beck, München, 2016, §16, Rn.14, s.167.On the personhood of this "group personality", see: *Rovane C.,* The Bounds of Agency: An Essay in Revisionary Metaphysics, Princeton University Press, Princeton, New Jersey, 1998, 137-141.

73 *List C., Pettit P.,* Group Agency: The Possibility, Design, and Status of Corporate Agents, Oxford University Press, Oxford, 2011, 176-185.

74 This phenomenon will be expanded upon later in the article.

75 *Frankfurt H. G.,* Freedom of the Will and the Concept of a Person, The Journal of Philosophy, Volume. 68, No. 1, January 14, 1971, 7.

In general, concerning the personality, legal theory puts forth a logical question: is any type of legal personhood, be it of a natural or a legal entity, wholly a creation of the law?[76] Behind the recognition of corporate personality, one may discern not only a crucial economical instrument or an abbreviation and a handy symbol streamlining communication (for example one speaks not of thousands of shareholders and intricate, complex organizational relations, but simply of a "company"), but also a financially and accounting-wise a much-needed phenomenon completely divorced from its legal dimension.[77]

Despite what has been written above, one should still be reminded, that these theoretical ruminations about the personhood of legal entity and corporation should not divert our attention from practical aspects of the institution. Notwithstanding the quite intriguing philosophical or social properties, the significance of the economical factor in the theory of separate corporate personality is beyond any doubt. Indeed a corporation (capital association) is economical in character, established for economical objectives and this forms the very background, the bedrock of this concept.

4.2. Separate Corporate Personality as the Case of Its Anthropomorphization

Conferring human properties to a modern legal entity, its "humanification" constitues one of the more interesting manifestations of legal anthropomorphism.[78] The anthropomorphism is a phenomenon when properties characteristic of humans are attributed, by humans themselves, to non-humans, such as animals, other animate or inanimate objects, etc. As the usual case, when discussing anthropomorphism, animals are invoked as the primary examples – live beings which can act and, in limited terms, may actually possess consciousness, which simplifies the process of ascribing more human characteristics to them. Law too, in this way, bestows human faculties to such fictional constructs as the corporations. In essence, a corporation is "*humanified*" and given the same rights, duties and capacities that individual natural persons enjoy.

In philosophy, the anthropomorphized events or things or, in any case, their framing within a system in which one is able comprehend them, is analyzed in different ways. To explain such complex phenomena, some authors turn to specialized *systems*,[79] according to which, some occurrences are cognized through the attribution of thoughts, worldviews and desires already ingrained in human brain.[80] A corporation may be viewed exactly as such an anthropomorphized system. To better grasp its functions, one applies more familiar notions and concepts, such as personality, liability, designation and then, through this, ascribes actions to it as well ("corporation purchased", "corporation laid off its

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76 *Radin M.,* The Endless Problem of Corporate Personality, Columbia Law Review, Volume 32, No. 4, April 1932, 647.

77 Id. 652-653.

78 *Wormser I. M.,* Piercing the Veil of Corporate Entity, Columbia Law Review, Volume 12, No. 6, June 1912, 496.

79 *Intentional Systems.*

80 *Dennett D. C.,* Brainstorms: Philosophical Essays on Mind and Psychology, The MIT Press, Cambridge, Massachusetts, 1981, 3.

workers", etc.).[81] However, such anthropomorphic understanding will be viable only if we deem corporation a metaphor.

A anthropomorphic description of a corporation is well shown in one of English legal cases:[82]

*A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as su*ch.[83]

When talking about "humanification" of corporation, this, naturally, signifies the latter within reasonable capacities conferred to such entity. All rights and duties that apply to physical persons are not automatically transferred to corporations. For example, it is obvious and self-evident, that a corporation (capital association) ca not marry and create a family.[84] It is not possible for the legal entity to have emotions, drive a car or to be arrested and sentenced to prison as, at the end of the day, fiction can not step outside the boundaries of reality and can not endow a corporation with capacities absolutely identical to those of a natural person.[85] Philosophically, a legal entity does not have mental faculties one may call "feelings", they are not, strictly speaking, subjects of consciousness.[86] Famous German jurist Kelsen[87] also viewed the incorrect understanding of this anthropomorphic metaphor and pushing it to the extreme as unacceptable and presented it only as an ancillary concept (*Hilfsbegriff*) made up by jurisprudence.[88]

One more important distinction between natural and physical entities is their creation and end. Physical (also called "natural" person) person is born, he/she grows up and dies. A natural person exists as a biological organism. Of course, one can also speak, by an analogy, of the legal entity being "born" and dying, but this would be an approximate metaphor at best. Even though the concession theory is almost universally rejected, even today all countries, all legal regimes require the legal entity

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81 *Werhane P. H., Freeman R. E.,* Corporate Responsibility, in: The Oxford Handbook of Practical Ethics, Ed. *Lafolette H.,* Oxford University Press, Oxford, 2005, 521.

82 *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd*, [1957] 1 QB 159.

83 See *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd*, [1957] 1 QB 159, p 172. cited in: *Talbot L.,* Critical Company Law, Routledge-Cavendish, New York, 2007, 38.

84 *Maitland F. W.,* Moral Personality and Legal Personality, Journal of the Society of Comparative Legislation, Volume 6, No. 2, 1905, 193.

85 *French D., Mayson S., Ryan C.,* Mayson, French & Ryan on Company Law, 33rd Ed., Oxford, Oxford University Press, 2016, 5.

86 *Scruton R., Finnis J.,* Corporate Persons, Proceedings of the Aristotelian Society, Supplementary Volumes, Volume 63, 1989, 253.

87 *Hans Kelsen* (1881-1973).

88 *Kelsen H.,* Reine Rechtslehre, 2.Auflage, Österreichische Staatsdruckerei, Wien, 1992, 182.

to be registered and only after this will it acquire separate personality and become a true subject in the eye of the law.[89] A legal entity, a corporation can not simply be "born" and die as a human or any other biological organism.

5. Conclusion

Detailed theoretical discussion on the essence and being of legal entity and corporation, both from legal and philosophical viewpoints, is a very broad topic and is outside the scope of the present work. Even though a legal person has been recognized as a fully fledged person by law, which, with certain reservations, benefits from all the main rights and duties, as a natural person, both sociologically and philosophically, it constitutes a creation of private individuals, a laborious abstraction of their mental processes. Here the social character of the legal entity must be underlined: if not for the individuals–the physically existing humans– it would not have been capable to come to being, perform actions or end its own existence.

To conclude, it would be appropriate to summarise the definition of the legal entity: a legal entity and corporation is an independent social unit (*Einheit*),[90] affirmed by the law via the analogy to physical entities as a separate person and a legal subject. Present work discussed the ontology of the legal entity and corporation, its essence, not only from the standpoint of law, but also through multidisciplinary and multifaceted lens. Even though it may be impossible to give a uniform answer to the phenomena of legal person and that of corporation and hence to fully and exhaustively elucidate them, from what has been analyzed in the article, it may be concluded, that corporations are the creations of physical individuals, which are then, through the process of humanification, i.e. anthropomorphization, are imputed with the traits of personality and consciousness by humans themselves.

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4. *Ayer A. J.,* The Concept of Person and Other Essays, Macmillan Education, London, 1963, 82.

[89] Naturally, a notion of a „pre-enterprise" (*Vorgessellschaft*) does exist, to which corporate law applies some regulations and norms, but corporate personality is granted to such entities only after registration. See: *Andenas M., Wooldridge F.,* European Comparative Company Law, Cambridge University Press, Cambridge, 2009, 77.

[90] *Wolf M., Neuner J.,* Allgemeiner Teil des Bürgerlichen Rechts, 11. Auflage, C.H.Beck, München, 2016, §16, Rn.14, s.167.

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Givi Adamia*

The Term of Undertaking in Georgian Competition Law

Through the Association Agreement with EU, Georgia has committed to creating comprehensive competition legislation, that, in turn, gave rise to the need to approximate Georgian national competition law to the European one. In the process of approximation thorough analysis of respective case law established at EU and its member states' level is of great significance. Sharing the achievements of European legal science plays an important role as well. Precisely this is the preceding article's principal objective, which serves to discuss the term of undertaking as one of the most substantial concepts of competition law. Moreover, the paper makes a distinction between institutional and functional approaches to the undertaking based on European experience. It focuses on the relative nature of the notion as well. Finally, the research examines one of the most significant theories acknowledged in the European competition law, known as the "Single Economic Entity Doctrine."

Keywords: *Competition, Competition Law, Undertaking, Single Economic Entity Doctrine.*

1. Introduction

The primary addressee of the prohibitive norms of the competition law is an undertaking. It constitutes the critical element of every type of competition infringements and is the central subject of this legal field. For the effective enforcement of competition law, it is essential to follow and use the universal definition of the term of undertaking concerning every legal instrument of competition law and to take into consideration main essence, legal nature or critical objectives of these instruments.

Competition law is a self-sufficient and autonomous field of law. With its own unique and independent principles and legal concepts, it has a precise scope of application. Definition of the concepts and institutions of competition law, including the concept of the undertaking, usually occurs without any reference to other fields of law.[1] In this regard, noteworthy is the fact that Georgian competition law has adopted a unique approach regarding the notion of the undertaking, insofar as it contains a legal definition of this term.

Unlike Georgian legislation, neither the primary nor the secondary sources of EU competition law do not include any legal definition of the undertaking. Due to this fact, the establishment and development of the concept of undertaking have become the duty of ECJ. Therefore, the case-law of ECJ has an essential scientific value in the process of identification of the critical elements and the unique characteristics of the notion in question.

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1 *Zimmer D.,* in Immenga/Metsmäcker GWB Kommentar, 3. Auflage, München 2001, § 1, Rn. 24.

Compared to the competition law of the EU or its member states, in Georgia, there is not established sufficient theoretical basis or gathered enough experience to determine true legal nature or exact characteristics of an undertaking. However, for the proper functioning of the Georgian competition rules, the legal definition of the term of the undertaking is of crucial importance. Henceforth, based on the achievements of European and German legal doctrine and case law preceding paper, provides with thorough discussions regarding the elements of the concept of the undertaking.

2. Institutional Concept of Undertaking

As noted above, the definition of this concept and the identification of its essential elements fell within the competence of the ECJ. Noteworthy is also the fact that before establishing a unified and final definition of undertaking in the case-law of ECJ, the concept has experienced significant changes and transformations over the years. Based on the interpretations of the ECJ, legal literature makes a distinction between institutional and functional approach regarding the concept of the undertaking.[2]

According to the institutional approach, legal form and organizational structure of an entity constitute a milestone of the concept of the undertaking.

The case law of ECJ barely applies the institutional approach, but still, in the first practice, there can be found some decisions where the Court relies on it. Over the sixties of the last century, the case-law of ECJ defines an undertaking as a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim.[3] Accordingly, the Court further notes that the creation of every new legal entity indicates the establishment of a separate undertaking.[4] In this case, the Court disregards a form and activity carried out by a particular entity. In determining whether an undertaking is present or not in this exceptional case, it is sufficient for the Court to state that it refers to the subject with particular legal form, organizational structure or purpose.

Over this period, ECJ was applying this approach due to several grounds, and it served particular objectives. E.g., such kind of definition of the undertaking was a convenient and straightforward way for the Court to prove that a parent and a subsidiary company constitute a single economic unit.[5]

However, this approach has lost its relevance over time.[6] It has failed to gain recognition and further development in the subsequent case law of ECJ. It could not respond to the challenges faced by competition law and policy since the institutional approach was significantly narrowing the scope of the undertaking, that, in turn, was limiting the area of application of competition law.

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2 *Füller T. J.,* in Kölner Kommentar zum Kartelrecht, Bd. 3. 2016, § 101. Rn. 11; *Zimmer D.* in Immenga/Metsmäcker GWB Kommentar, 3. Auflage, München 2001, § 1, Rn. 24.

3 ECLI:EU:C:1962:30, *Klöckner-Werke AG,* Joined cases 17/61 and 20/61.

4 Ibid.

5 *Füller T. J.,* in Kölner Kommentar zum Kartelrecht, Bd. 3. 2016, § 101. Rn. 11.

6 *Zimmer D.,* in Immenga/Metsmäcker GWB Kommentar, 3. Auflage, München 2001, § 1, Rn. 24.

3. The Functional Concept of Undertaking

In contrast to the institutional approach, the functional concept of undertaking extends the scope of the term of the undertaking. According to the letter approach, the determination of a particular entity as an undertaking is not dependent on the legal form or organizational structure of it. The landmark of the functional path is a practical activity, regardless of the particular legal type or organizational structure.

German case-law shares this concept as well and is reluctant to apply the institutional approach of the undertaking.[7] According to the German Federal Court, every entity that carries out an economic activity is to be regarded as an undertaking.[8] The Federal Court also notes that German competition legislation is based on the autonomous functional concept of an undertaking. An entity to be considered as an undertaking it is sufficient for this entity to be engaged in independent and active economic activity of any kind.[9]

Over the period, the case-law of ECJ also switched to the functional approach of an undertaking and its definition tightly linked to the engagement in economic activity. Similar to the German Federal Court, ECJ also defined an undertaking as an entity that carries out economic activity.[10] According to the established case-law[11] of ECJ and prevailing opinion,[12] precisely the engagement in an economic activity constitutes an essential precondition for an entity to be regarded as an undertaking.

However, this definition of an undertaking requires the exact determination of the content of an economic activity to ascertain precisely what kind of activity leads to the presence of an undertaking. According to the established case-law of ECJ, economic activity is any activity consisting in offering goods and services on a given market.[13] Furthermore, economic activity does not require the activity to be profit-oriented.[14] However, in the case of profit-oriented activity, an entity should be regarded as an undertaking. Furthermore, any kind of offering goods or services for payment on a given market always constitutes an economic activity.[15] However, ECJ states that if providing goods or services occurs without any kind of payment it is to be determined whether it is possible to offer particular goods or services for payment or whether other entities carry out the similar activity for payment.[16]

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7 *Zimmer D.,* in Immenga/Metsmäcker GWB Kommentar, 3. Auflage, München 2001, § 1, Rn. 30.

8 BGH NJW 1962 196.

9 BGH Urt. v. 05.05.1981, KZR 9/80, §. 5.

10 ECLI:EU:C:1984:271, *Hydrotherm,* Case 170/83, § 11; ECLI:EU:C:1991:161, *Klaus Höfner,* Case C-41/90, § 21.

11 ECLI:EU:C:1993:63, *Poucet,* Joined Cases C-159/91 und C-160/91 § 17; ECLI:EU:C:1994:7, *Sat Fluggesellschaft,* Case C-364/92 § 18; ECLI:EU:C:1997:603, *Job Centre,* Case C-55/96 § 21; ECLI:EU:C:2000:428, *Pavlov,* Joined Cases C-180/98 to C-184/98 § 74; ECLI:EU:C:2002:98, *Wouters,* Case C-309/99 § 47.

12 *Füller T. J.,* in Kölner Kommentar zum Kartelrecht, Bd. 3. 2016, § 101. Rn. 11 {cited, Säcker/Hermann, in: MünchKommKartR, Einl. Rn. 946; Weiß, S. 76.}.

13 ECLI:EU:C:2000:428, *Pavlov,* Joined Cases C-180/98 to C-184/98 § 75; ECLI:EU:C:1987:283, *Commission v Italy,* Case C-118/85 § 7; ECLI:EU:C:1998:303, *Commission v Italy,* Case C-35/96, § 36.

14 *Faul J., Nikpay A.*, the EU Law of Competition, 3rd ed., 2014. § 3.28.

15 ECLI:EU:C:2000:428, *Pavlov,* Joined Cases C-180/98 to C-184/98 § 76 ; ECLI:EU:C:1998:303, *Commission v Italy,* Case C-35/96, § 37; ECLI:EU:C:2002:98, *Wouters,* Case C-309/99.

16 *Füller T. J.,* in Kölner Kommentar zum Kartelrecht, Bd. 3. 2016, § 101. Rn. 14.

Noteworthy is also the fact that the legal definition of the undertaking offered by Georgian legislator is mostly based on the functional concept of the undertaking. However, unlike the European practice, under Georgian competition legislation, the mandatory precondition of an undertaking is engagement in entrepreneurial and not in economic activity, that significantly limits the scope of this term.

According to the definition given in Article 3 of the Georgian law on competition, an undertaking is a person who carries out entrepreneurial activities. However, the law does not contain any special instructions on what kind of activity should be considered as an entrepreneurial activity. Therefore, in this case, the concept of entrepreneurial activity is defined with reference to the Georgian law on entrepreneurs,[17] according to which the critical precondition of entrepreneurial activity is profit orientation.

In the case-law of the ECJ, the connection of the notion of undertaking with economic activity and the broad definition of economic activity serve to fulfil the objectives of competition law. Usually, the assessment of particular anticompetitive conducts starts with the identification of potential infringer of competition law. When the potential breach of competition legislation reveals in an anticompetitive agreement, abuse of dominant position or unfair competition, the initial stage of legal appraisal is to determine whether the entity of which conduct is under investigation constitutes an undertaking. Accordingly, the application of basic competition rules mostly depends on whether there is a possibility particular entity to be regarded as an undertaking. For the effective enforcement of competition law and policy, the application of competition law to any action influencing the competitive environment is of crucial importance. Consequently, if the vital objective of competition law is to respond to a wide range of anticompetitive practices, then the notion of an undertaking should also be interpreted as broadly as possible. Due to this fact, competition legislation shall provide with a broad definition of the concept of undertaking to encompass every entity that can make an adverse effect on the market structure and competitive environment.

However, a broad definition of an undertaking is not available when it is linked only to entrepreneurial activity. The necessity to carry out entrepreneurial activity significantly limits the scope of the concept of the undertaking, since it makes it mandatory to be engaged only in a profit-oriented activity. Such a kind of approach adopted by Georgian legislator leaves behind the competition law all activities that are not profit-oriented but may have some effect on the market and cause significant damage to a competitive environment. The clear evidence of this position is the case-law of ECJ, which states that engagement in entrepreneurial activities is not a mandatory element of the term of the undertaking.[18]

Thus, taking into account the critical objectives of competition law, the starting point for the notion of an undertaking should also be other market actions that may go beyond profit-oriented activities. According to the prevailing opinion delivered in the German legal literature, the need for a broad definition of the concept of an undertaking is derived from the necessity to maximize the

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17 *Zukakishvili K., Japaridze L. (eds.), Kobadze N., Zhvania N., Gvelesiani Z., Akolashvili M., Sergia N., Momtselidze S.,* Georgian Competition Law, Tbilisi, 2019, 180.

18 ECLI:EU:C:1995:392, *Fédération Française,* Case C-244/94.

protective effects of competition law.[19] For the comprehensive and effective enforcement of competition law, the main feature of undertaking should be the involvement in the competitive process, and its ability to influence a competitive environment on a particular market.[20] Such influence may be exerted not only with the profit-oriented activities but also with other ways of offering goods or services that may not be intended to make any profit.

Besides, the connection of the term of undertaking with the entrepreneurial activity leaves the free professions, whose actions are not considered as entrepreneurial activities under Article 1, section 3 of the Georgian Law on Entrepreneurs, beyond the scope of competition law. The exclusion of these professions from the competition rules is contrary to the case-law of ECJ, which states that the representatives of free occupations should be considered as undertakings. E.g., representatives of legal professions are regarded as an undertaking because they operate on the legal service market and offer respective services in return for remuneration.[21]

4. Relativity of the Concept of the Undertaking

The connection of the notion of the undertaking and economic activity, in turn, gives rise to a specific obstacle when it comes to an entity whose shares are owned by the state. According to ECJ, a particular entity, on the one hand, may exercise public authority, and it can not be perceived as an undertaking. However, on the other hand, it may engage in economic activity and be considered an undertaking.[22] Hence, the same entity may be an undertaking in one case and not in another. Precisely this is an indication of the relative and not absolute character of the notion of the undertaking.[23]

From the abovementioned interpretation of the Court,[24] it is clear that the concept of an undertaking is directly linked to the potential infringement action, which is being judged in a particular competition case. An entity is not considered as an undertaking when through the disputed action, it executes public authority. Such kind of situation takes place when there is an action that is typical for the exercise of a public body.[25]

The relative nature of the undertaking and its functional understanding is closely related to the activities carried out by a particular entity. However, its relativity and functional definition do not have a similar meaning, and they follow different goals. As introduced, according to the functional understanding, the main element of the concept of an undertaking is the engagement in an activity, which under case law of ECJ means economic, and under Georgian competition legislation - entrepreneurial activity. The relative nature of undertaking disregards the nature of the usual activity

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19 *Zimmer D.,* in Immenga/Metsmäcker GWB Kommentar, 3. Auflage, München 2001, § 1, Rn. 31 {ციტ: *Emmerich* § 2 1 a (S.17); *Möschel* Rdnr. 100; *Hootz* in GK Rndn. 12; *Bunte* in Langen/Bunte Rdnr. 8.}.

20 *Füller T. J.,* in Kölner Kommentar zum Kartelrecht, Bd. 3. 2016, § 101. Rn. 13.

21 Opinion of Advocate General Leger, delivered on 10 July 2001, ECLI:EU:C:2001:390, § 46.

22 ECLI:EU:C:1987:283, *Commission v Italy,* Case C-118/85 § 7.

23 *Jellis J.,* The concept of undertaking in EC competition law and its application to public bodies: Can you buy your way into article 82, Competition Law Journal, Vol.2, 2003, 118.

24 ECLI:EU:C:1987:283, *Commission v Italy,* Case C-118/85 § 7.

25 ECLI:EU:C:1994:7, *SAT Fluggesellschaft mbH v Eurocontrol,* Case C-364/92 § 30.

and relies on the essence of the particular disputed action. Accordingly, an entity may generally engage in economic/entrepreneurial activity. However, specific contested action may exceed its regular activity. This entity may not be considered as an undertaking and vice versa - the entity may typically not engage in economic /entrepreneurial activity. However, a disputed action may be conducted as such kind of activity that makes this entity an undertaking.

Such relative nature of an undertaking determines and ensures the flexibility of competition law and the additional possibility of its effective enforcement. Accordingly, the determination of the presence/absence of an undertaking in each particular case depends not on the entity's usual activities but the content of the specific disputed action. If a specific contested action is carried out within the exercising of public authority, then the economic activity is absent in this case, and the entity is no longer regarded as an undertaking. Moreover, if the disputed action refers to economic activity, the entity should be deemed as an undertaking and fall within the scope of the respective provisions of competition law. Thus, acknowledgement of the relative nature of the concept of undertaking serves to provide the broadest possible range of application for competition law and to cover all actions that may harm the competitive environment.

An additional function of the relative concept of undertaking in Georgian competition law lies in the fact that it enables to make a clear separation of the actions carried out within the public authority from the scope of application of the critical instruments of competition law, such as the prohibition of abusive practices, anticompetitive agreements and unfair competitive practices.

The Georgian Law on Competition entails special norms regarding the restricting of competition in the process of exercising public authority, which prohibits the state, autonomous republic or local self-government bodies to restrict certain types of anticompetitive actions. In particular, such actions fall within the scope of the Georgian law on competition in the cases envisaged by Article 10 and the provisions regarding the state aid regulation. In this regard, the problem arises when, for example, a legal entity under private law, in one case, acts to exercise the public authority delegated by the state, and in the other case, carries out entrepreneurial activities. According to the Law of Georgia on Entrepreneurs, this entity is an entrepreneur and therefore, it is an undertaking. However, in the context of an action that is carried out to exercise public authority, it cannot fall within the scope of the respective provision regarding abuse of a dominant position, anticompetitive agreements or unfair competition.

The rules provided by Georgian law on competition which regulates the state aid also serve to prevent the threat of competition restriction by the state authorities. In this case, the relevant state bodies appear on the market in the role of granting state aid and intervene in various ways in the process of the free market process. However, the same entity may, at the same time be an undertaking to the extent that it may engage in economic activity in conjunction with the exercise of public authority. Therefore, it is essential to create a clear dividing line between the granting authority of state aid and an undertaking. Fully separation of the undertaking and the entity exercising public authority is impossible by using the institutional understanding of the concept of the undertaking, since institutionally the same entity may simultaneously perform an economic activity and exercise public authority. According to the institutional understanding of an undertaking, if the main starting point for identifying a relevant addressee of competition law is the organizational arrangement and

legal form of a particular entity, then in the process of qualifying the specific disputed action, the content of this action will be neglected that threatens mobility and effective enforcement of competition law. Consequently, it is once again clear that the institutional understanding of the undertaking cannot meet the objectives and modern challenges of competition law.

The complete elimination of the problem of separation cannot be achieved by using only the functional concept of the undertaking since its central starting point is the general activity of the entity and not the content of a particular action. To make a clear distinction between an undertaking and a public authority, the main starting point must be the content of the disputed action of a particular case and consequent determination of the category of activity (economic activity or exercising of public authority) to which the disputed action belongs. Therefore, it is vital to acknowledge the relative nature of the concept of the undertaking, along with the functional definition of it.

Whereas the relativity of an undertaking requires in each particular case to focus solely on the content of the disputed action, it also ensures the correct qualification of that action with maximum accuracy. In particular, if the challenged operation is carried out within the framework of economic/entrepreneurial activity, then the subject implementing the action is automatically regarded as an undertaking. Therefore it will be assessed within the context of the norms prohibiting abuse of a dominant position, anticompetitive agreements or unfair competition. Moreover, if the disputed action is carried out within the public authority, then the entity implementing it will not be considered as undertaking and the activity will be assessed only under Article 10 of the Law on Competition or the rules regulating state aid.

5. Single Economic Entity Doctrine

Involvement in anticompetitive agreements constitutes one of the most common infringements of the competition law. In particular, Article 7 of the Georgian law on competition prohibits any agreement, decision or concerted practice between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the relevant market. Accordingly, the primary precondition of this provision is the coordination of at least two undertakings.

However, the existence of two or more legally independent and separate entities may not be sufficient for the presence of two independent undertakings for the application of this provision in a particular case. In particular, for competition law, different actors of the relevant market may be considered as one entity, which precludes the possibility of anticompetitive coordination between them, since there is no agreement between two or more independent undertakings.

Besides, the consideration of several individuals as one economic entity also plays an essential role in determining the liability deriving from the competition law. According to the established case-law of ECJ, the unlawful conduct of a subsidiary may be attributed to the parent company if, despite the separate legal personality, the subsidiary cannot determine its market actions independently. It merely follows the instructions given by the parent company.[26]

[26] ECLI:EU:C:2009:536, *Akzo Nobel NV*, Case C-97/08 P. § 58; ECLI:EU:C:1972:70, *Chemical Industries,* Case 48-69, §§ 132/133; ECLI:EU:C:1972:73, *Geigy AG*, Case 52-69, § 44; ECLI:EU:C:1973:22, *Europemballage and Continental Can,* Case 6/72, § 15.

In European legal literature and case law, this approach is based on the theory known as the "single economic entity doctrine." The Court of Justice clarifies that several natural persons and legal entities may be considered as one undertaking based on this doctrine.[27] According to the single economic entity doctrine, legally distinct entities are not considered as independent undertakings if there is a certain degree of interdependence between them, which justifies the consideration of these entities as one undertaking. Sufficient degree of interdependence is determined by the extent of real autonomy in decision-making and the ability to decide on their economic policies.[28] Furthermore, the Competition Agency of Georgia clarifies that the mere existence of interdependence of two legal entities does not mean in itself that they have to be regarded as one economic entity. Despite a certain degree of dependence, an entity may enjoy autonomy to some extent that excludes the formation of a single economic unit.[29] Therefore, if a particular entity enjoys real independence in the decision-making process and a sufficient degree of autonomy, it constitutes a separate undertaking.

However, determining the degree of independence of any legal entity in a particular case may be related to specific problems. According to the case-law of ECJ, if one company owns 100 per cent of the shares in another company, then there is a presumption that the parent company has a decisive influence on the economic policy of the subsidiary. This means that the subsidiary does not have real autonomy in determining its economic policy.[30] Its competence is limited to merely following the instructions given by the parent company.[31] The Court also clarifies that in such a case, the actions of the subsidiary that violates competition law will be fully imputed to the parent company unless the latter proves with appropriate evidence that the subsidiary enjoys the ability to act independently in the market.[32] Therefore, in the case of a 100 per cent shareholding, it is presumed that the parent and subsidiaries form a single economic entity unless they substantiate the contrary. In such a case, all relevant circumstances related to economic, organizational, or legal ties should be taken into account. The mere fact that the parent company does/did not interfere in the decision-making process of the subsidiary is not sufficient.[33] At the same time, it is noteworthy that to rebut this presumption is in the interests of the relevant entities only if the violation of competition law by the subsidiary is stated. If the presumption is denied, the action will not be attributed to the parent company. The sanction will be imposed only on the subsidiary.

There is no such presumption if the parent company does not own the entire shares of the subsidiary.[34] According to the ECJ, in such a case, the competition authority must base on economic,

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27 ECLI:EU:C:2009:536, *Akzo Nobel NV*, Case C-97/08 P. § 55; ECLI:EU:C:2006:784, *Confederación Española,* Case C-217/05 § 40.

28 ECLI:EU:T:2005:322, *DaimlerChrysler AG*, Case T-325/01 § 85; ECLI:EU:T:2012:46, *DuPont Performance Elastomers*, Case T-76/08, § 58.

29 Decision of Competition Agency of Georgia №04/166, 06/07/2018, 17.

30 ECLI:EU:C:2009:536, *Akzo Nobel NV*, Case C-97/08 P. § 61;

31 ECLI:EU:C:1996:405, *Viho Europe BV*, Case C-73/95 P, § 16.

32 Ibid.

33 ECLI:EU:C:2012:479, *Alliance One International Inc*, Joined Cases C-628/10 P and C-14/11 P, § 45; ECLI:EU:C:2013:514, *Stichting Administratiekantoor Portielje,* Case C-440/11 P § 66;

34 *Faul J., Nikpay A.,* the EU Law of Competition, 3rd ed., 2014. § 3.59.

organizational, or legal ties to prove that the parent company exercised decisive influence over the subsidiary.[35] In this case, the competition authority bears the burden of proof.

An agreement between legal entities, which are regarded as a single economic unit, is usually considered a division of specific functions in a single corporate group. It does not constitute an anticompetitive agreement between independent competitors,[36] because the particular degree of interdependence existing between them already precludes the competition with each other. Therefore their agreement is not able to restrict competition since they are not competitor undertakings. Furthermore, the unlawful conduct of a subsidiary is attributed to the parent company if the letter exercises a proper degree of influence on the decision making of the subsidiary.

6. Conclusion

A review of the best German and European practices and western scientific trends discussed in this paper reveals that there are two distinct understandings of the concept of the undertaking.

According to the institutional understanding, an entity is considered as an undertaking based on its legal form or its organizational arrangement. However, over time, this approach has lost its relevance. It has failed to gain recognition in the case-law and legal doctrine, as it has significantly narrowed the concept of the undertaking and was unable to meet the challenges facing by competition law and policy.

Unlike institutional understanding, under the functional concept, the consideration of a particular entity as an undertaking does not depend on its legal form or organizational arrangement. The cornerstone of functional understanding is an entity's practical activities, regardless of its legal type or organizational arrangement. In European practice, an entity who carries out economic activities is considered as an undertaking in this sense. Furthermore, economic activity means delivering goods and services to the market in any form.

Besides, it was revealed that the legal definition of the concept of undertaking proposed by the Georgian legislator shares a functional approach. However, instead of economic activity, the idea of an undertaking is associated with entrepreneurial activity, which significantly narrows the notion and thus the competition legislation. To achieve large-scale and effective enforcement of competition law and policy, it is necessary to use economic activity in defining the concept of undertaking instead of entrepreneurial activity.

Moreover, the relative nature of the undertaking must be acknowledged. In each case, the existence/absence of undertaking must be determined based on the content of the disputed action of a particular situation.

Also, based on the practice of the Competition Agency of Georgia and the ECJ, the "Single economic entity doctrine" was analyzed, according to which companies with separate legal personalities are considered as one undertaking for competition law.

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35 ECLI:EU:T:2012:46, DuPont Performance Elastomers, Case T 76/08, § 61.

36 ECLI:EU:C:1974:114, *Centrafarm BV*, Case 15-74, § 41.

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17. ECLI:EU:C:1991:161, *Klaus Höfner,* Case C-41/90, § 21.
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19. ECLI:EU:C:1994:7, *SAT Fluggesellschaft,* Case C-364/92 §§ 18, 30.
20. ECLI:EU:C:1995:392, *Fédération Française,* Case C-244/94.
21. ECLI:EU:C:1996:405, *Viho Europe BV*, Case C-73/95 P, § 16.
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24. ECLI:EU:C:2000:428, *Pavlov,* Joined Cases C-180/98 to C-184/98 §§ 74, 75, 76.
25. ECLI:EU:C:2002:98, *Wouters,* Case C-309/99 § 47.
26. ECLI:EU:T:2005:322, *DaimlerChrysler AG*, Case T-325/01 § 85.
27. ECLI:EU:C:2006:784, *Confederación Española,* Case C 217/05 § 40.
28. ECLI:EU:C:2009:536, *Akzo Nobel NV,* Case C-97/08 P. §§ 55, 58, 61.
29. ECLI:EU:T:2012:46, *DuPont Performance Elastomers*, Case T 76/08, §§ 58, 61.
30. ECLI:EU:C:2012:479, *International Inc*, Joined Cases C 628/10 P and C 14/11 P, § 45.
31. ECLI:EU:C:2013:514, *Stichting Administratiekantoor Portielje*, Case C 440/11 P § 66.
32. BGH NJW 1962 196.
33. BGH Urt. v. 05.05.1981, KZR 9/80, §. 5.

Nino Basiladze*

"De Facto Marriage" - Nature, Term, Signs, Subjects and Concept

According to the Article 1151 of the Civil Code of Georgia, the personal and property rights and duties of spouses arise only from a marriage registered in accordance with the legislation of Georgia. Different interpretation of the named norm contradicts its normative content. Nevertheless, there are frequent cases of "De facto marriages" between men and women, which, due to the legal ignorance of its consequences, leads to the appeal of the persons involved in the relationship to the judiciary bodies and to the interest of researchers of the field. The purpose of the present study is to compare the named social institution with marriage, as to the most similar legal institution to assess and determine the legal nature of cohabitation outside of marriage. In addition, to determine the full terminological designation of the relationship, the socio-legal features, the characteristics of its subject and according to all above said the concept of the relationship.

Keywords: *"de facto marriage", cohabitation outside of marriage, transaction, de facto public relation, de facto family cohabitation outside of marriage, absence of registration, living together, common household, de facto spouses.*

1. Introduction

According to the social tendencies of the last decades, the "family" can exist independently from the law. An increase in the number of divorces[1] may not indicate the unpopularity of marriages, but studies show that those who have never been in marriage, are more likely to choose cohabitation.[2] It is important to note that, cohabitation outside of marriage is seen as a choice of couples, which is largely no longer socially stigmatized, because of its causing reasons.[3] Due to many social factors, couples may find it impossible to marry (e.g. study or unemployment reasons, lack of housing, etc.), or ideologically did not share the importance of marriage. At the same time, the increase in such cohabitation cases is a cause for concern about the legal ignorance of its consequences.[4]

Although cohabitation is ultimately the couple's voluntary choice, it is often based on coincidence rather than the couple's deliberate decision. Replacing marriage with cohabitation is usually a

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1 <https://www.geostat.ge/ka/modules/categories/324/gankortsineba> [30.04.2020] (in Georgian).

2 *Rodgers M. E.*, Understanding Family Law, London, 2004, 36, <https://www.geostat.ge/ka/modules/categories/323/kortsineba> [30.04.2020] (in Georgian).

3 *Diduck A., O'Donovan K.*, Feminist Perspectives on Family Law, Abingdon, 2006, 39.

4 Tsiala Pertia v. The Parliament of Georgia, №1351 Constitutional Lawsuit of September 12, 2018. Appeals against the constitutionality of the normative content of the Article 1151 of the Civil Code of Georgia, which stipulates that "the rights and obligations of spouses arise only from a marriage registered in accordance with the rules established by the legislation of Georgia."; *Burton F.*, Family Law, London, 2003, 41.

lengthy process. Establishing regular sexual relations, common dwelling, or common household often takes weeks, months, and years.[5] In addition, sometimes a couple maintains a separate dwelling, even though they are engaged in a common household.

Social practice shows that there are different categories of cohabitants, with different goals and perspectives. Some couples in cohabitation are hardly different from married couples, so many relationships are often referred to as cohabitation outside of marriage, non-marital cohabitation's relation,[6] marriage-like relationship, civil marriage, unregistered marriage, or "de facto marriage".

Article 1151 of the Civil Code of Georgia (hereinafter referred to as - CCG) states that, the personal and property rights and duties of spouses arise only from a marriage registered in accordance with the legislation of Georgia. Pursuant to the practice of the Supreme Court of Georgia, another interpretation of the norm is in contrary to its normative content.[7] According to the practice of the European Court of Human Rights (hereinafter referred to as - ECHR), the notion of family within the framework of article 8 of the European Convention on Human Rights is not limited to marital relations and may include other de facto family ties.[8]

The purpose of the present study is to compare the named social institution with the marriage, as to the most similar legal institution to assess and determine the legal nature of cohabitation outside of marriage. In addition, to determine the full terminological designation of the relationship, the socio-legal features, the characteristics of its subject and according to all above said the concept of the relationship. This study will provide an initial theoretical basis around the cohabitation, that will facilitate its further complex study, be it the aspects of legal ignoring of the consequences of the relationship, the possible mechanism of legal development of the institute, etc. From a practical point of view, the results of theoretical research may be used by the legislator in case of strengthening the institution of cohabitation outside of marriage, when working on relevant amendments.

2. Nature

According to the article 1106 of the CCG,[9] "marriage is a voluntary union of a woman and a man for the purpose of creating a family, which is registered with a territorial office of the Legal Entity under Public Law – Public Service Development Agency of the Ministry of Justice of Georgia".

Mainly there is discussed three versions about the nature of marriage: marriage - transaction; marriage - mystery; marriage - a special category of institution. The institution of marriage as a

5 *Thornton A., Axinn W. G., Xie Y.,* Marriage and Cohabitation, The University of Chicago Press, USA, 2007, 79.

6 *Kropholler I*., German Civil Code, Study Commentary, *Darzhania T., Chechelashvili Z. (Trans.)*, *Chachanidze E., Darjania T., Totladze L. (ed.)* 13th Revised Edition, Tbilisi, 2014, §138, Field 8 (in Georgian).

7 The Ruling of March 16, 2016 of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №As-7-7-2016, 33; The Ruling of January 12, 2012 of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №As-1653-1641-2011; The Ruling of May 15, 2008 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia on the case №As-968-1269-07.

8 Van der Heijden v. the Netherlands, [2012], ECHR, 50; Johnston and Others v. Ireland, [1986], ECHR, 56.

9 The Parliamentary Gazette, 31, 24/07/1997.

transaction was born in Roman law, which considered marriage to be a civil-legal transaction. In this sense, marriage had little to do with human relationships. At the same time, the exclusion of divine and moral composition was seen as a fair idea that these institutions existed beyond the legal regulation.[10] Marriages took place in a written form and during the process witnesses were presented.[11] Exists an opinion pursuant to which the term often used in the definition of marriage - union[12] reflects the mutual will of the persons entering into the marriage to live together, that causes for them certain rights and responsibilities[13] and not its special nature. The deal is precisely an expression of the will of the parties to achieve the desired legal result.[14]

The theory of marriage - mystery, itself, emerged with the rise of the role of the Christian Church, which considered marriage to be a sacred mystery. It is noteworthy, that according to Western tradition, the participation of a representative of the church in the performance of the sacrament of marriage was secondary and not obligatory.[15] In contrast, the Orthodox Church considered not only the in-depth involvement in the performance of marriage, its form and termination, but also the joint regulation of the institution of marriage by the church and the state.[16] The regulation of personal and property relations has traditionally been within the competence of the state, while procedural matters (performance and termination of marriage) have been within the competence of the Church.[17] It should be stated, that the procedural issues related to marriage have also been transferred to the competence of the state after the February Revolution of 1917.[18]

The definition of marriage as a special institution is a more modern phenomenon and is a kind of unity of the first two theories. Proponents of this theory[19] more or less acknowledge the existence of various elements of the transaction in the institution of marriage, but deny the nature of its unconditional transaction.[20] It can be said, that the theory does not include anything qualitatively new in itself.

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10 <https://ka.wikipedia.org/wiki/%E1%83%A5%E1%83%9D%E1%83%A0%E1%83%AC%E1%83%98%E1%83%9C%E1%83%94%E1%83%91%E1%83%90>, [30.04.2020] (in Georgian).

11 *Laneyrie-Dagen N*., How to Read Paintings, 2007, 4-5.

12 *Surguladze I*., Government and Law, Part One, Tbilisi, 2002, 62, "Legal relation is any life connection, if it is defined by the norm of law." (in Georgian).

13 *Orlova N. V*., Legal Regulation of Marriage in the USSR, Moscow, 1971, 23 (in Russian).

14 The idea of marriage – transaction is shared e.g. by *Chanturia L.* - *Chanturia L*., Commentary of the CCG, Book I, Tbilisi, 2017, Article 50, Field 3 (in Georgian).

15 *Emelina (Tishchenko) L. A*., Development of Family Law in Russia: Theoretical and Historical - Comparative Analysis, Monograph, Moscow, 2000, 16 (in Russian).

16 Comp.: "On the approval of the Constitutional Agreement between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia" the Resolution of October 22, 2002 of the Parliament of Georgia, the Constitutional Agreement between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia, Article 1, Clause 1, LHG, 116, 27/11 / 2002.

17 *Emelina (Tishchenko) L. A*., Development of Family Law in Russia: Theoretical and Historical - Comparative Analysis, Monograph, Moscow, 2000, 14-18 (in Russian).

18 The Code of Laws on Marriage, Family, and Guardianship with Amendments, State Publishing House, Moscow, 1/08/1933, Chapter 1, Paragraph 2; Chapter 4, Paragraph 19, 19/11/1926 (in Russian).

19 *Jorbenadze S*., Soviet Family Law, Tbilisi, 1957, 174 (in Georgian); *Ninua E*., Some Legal Aspects of Spousal Relations, "Justice and Law", № 3 (34), 2012, 45 (in Georgian) - "Marriage is not only a voluntary union between a man and a woman, but also a law determining legal fact.".

20 Comp. *Krotov M. V*., Civil Law, Vol. 3, Moscow, 2004, 372 (in Russian).

Comparing the above-mentioned theories, it becomes clear that the main distinguishing criterion between them is who is considered the guarantor of free will of the parties. The named element of the relationship - the expression of free will, that intends achieving a legal result, should be considered as a determining criterion for the nature of the transaction. The mechanism for ensuring free will of the parties is the law, the enforcement of which is prerogative of the state.

Marriage, like a transaction,[21] is the result of a voluntary agreement between the parties, it requires the protection of a written form, there is established a system of conditions that determines the authenticity of the marriage, and so on. Opponents of the marriage - transaction state that, when entering into a marriage, the parties do not specify the subject of the agreement[22] and that the powers of the parties are not agreed (about the property rights a marriage contract is an exception).[23] Nevertheless, the rights and obligations of spouses still arise, but by force of law and not agreement. The subject of the agreement does not need to be specified in each particular case, it is one and is expressed in the essence of the marriage. Individuals expressing the will to marry trust the subject of the relationship defined by the legislature, they agree with it and want it.

With regard to cohabitation outside of marriage, there is an opinion that it has the nature of transaction too. Some authors believe that cohabitation outside of marriage is based on a transaction not expressly provided by law.[24] Transactions provided by law, as well as those not directly covered by law, but not contradicting it, are a type of a legal fact.[25] According the articles 10 and 319 of the CCG persons are not prohibited to enter into lawful transactions not directly considered by the law or other legal act. In view of the above said, the parties may agree to be in marriage-like relationship and they may determine the property and non-property aspects of their relationship, although this does not mean that this will be a legal recognition of cohabitation outside of marriage, as an institution itself. In the latter case, there might exist only the freedom of the parties – to enter into a transaction directly unforeseen by the law and determine its content within the scope of the freedom of civil turnover. At the same time, even in the absence of a special agreement between the cohabitants, certain rights may still arise between them, but they will be related not directly to the cohabitation outside of marriage and to it as to a legal fact, if it will be recognized as a lawful transaction not directly considered by the law, but to other legal facts. For example, the right to property share acquired by the cohabitants will be due to the fact that both of their funds (legal obligations, shared rights)[26] were spent on its acquisition and not because they are cohabiting. It follows, therefore, that an agreement on cohabitation itself cannot be considered as a transaction, since it is not an action, which aims achieving

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21 By the nature of the relationship under consideration, a bilateral transaction-agreement is implied; *Chanturia L.*, Commentary of the CCG, Book I, Tbilisi, 2017, Article 50, Field 3 (in Georgian).

22 *Yugay O. D.*, On the Question of the Concept and Legal Nature of Marriage, Journal of Family and Housing Law, No. 3, 2006, 26-30 (in Russian).

23 The CCG, Article 1172, Part 1.

24 *Manankova R. P.*, Explanatory Note to the Project Concept of the New Family Code of the Russian Federation, Tomsk, 2008, 29 (in Russian).

25 *Belov V. A.*, Civil Law, General Part, Volume II, Persons, Benefits, Facts, Moscow, 2011, 466 (in Russian).

26 The CCG, Articles: 953-968.

a legal result, despite the will of the parties. If the signs of the mentioned relationship will be strengthened by the legislation, it would be possible to discuss it in the context of transaction.

It should be noted that the transaction is concluded if the parties have agreed on all its essential terms. According to the article 327, part 2 of the CCG, the terms of the contract are essential, on which an agreement must be reached at the request of one of the parties, or which are considered as such by the law. Each type of the contract has a "minimum content" defined by the law and created by those conditions, on which the agreement should be done, otherwise the contract will not be concluded.[27] For example, if the condition to live together with the future de facto spouse is a condition upon which the necessity of the parties' agreement is derived from the minimum content of the relationship itself, their specific place of residence, i.e. the definition of a common address should be considered as a condition, for which an agreement is a requirement of one or both parties. In view of all abovementioned, for the purpose to determine the content of the relationship, it is necessary to ascertain the signs of the social institution. If these signs will be strengthened by the law, they will determine the "minimum content" of the relationship and accordingly, its essential terms.

When considering cohabitation outside of marriage as a transaction, it should be mentioned about its form. Since local legislation does not recognize such an institution and it can only be a free agreement between the parties (de facto public relation), that does not aim achieving a legal result, in such a case its form is also the subject of an agreement between the parties. And if the legislation strengthens the signs of de facto cohabitation, the form of such an agreement depends on the model that the state chooses to determine the existence of a relationship.

3. Term

Cohabitation outside of marriage is often referred to as "de facto marriage" and even "civil marriage." These terms are not legally correct, because they do not meet legal logic. The notion of "de facto marriage" has never been strengthened at the legislative level in Georgia, while marriage and civil marriage have always been seen as the union of woman and man registered by the relevant state body.

It should be noted that according to the double theory in general theory of law, the legal relationship is a special kind of (ideological, so opposite to de facto relation) public relation, which by its formal side is the effect of the legal regulation, while from its content side is the result of de facto public relation, that exists in parallel with them.[28] Accordingly, it is a legally incorrect term - de facto marriage / transaction, since a transaction under the CCG, including a lawful provision not directly provided for by law under the articles 10 and 319 of the CCG, is an action that aims achieving a legal result.

Marriage is a civil act (fact of legal significance),[29] the registration of which is the registration of a fact of legal significance.[30] The legal fact differs from other real facts only in that they are

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27 *Baghishvili E.*, Commentary of the CCG, Book III, Tbilisi, 2019, Article 327, Field 8 (in Georgian).

28 *Belov V. A.*, Civil Law, General Part, Volume I, Introduction to Civil Law, Moscow 2011, 376 (in Russian).

29 The Law of Georgia on "Civil Status Acts", Article 3, Subparagraph "A", Website, 111228058, 28/12/2011.

important to the law.[31] In view of all above said, the incorrectly established term - "de facto marriage", or other named terms can be replaced by the following terminological description - de facto family cohabitation outside of marriage (i.e. without registration of a civil act). In addition, it indicates existence of de facto family cohabitation. It should also be noted that, if the relationship will be strengthened at the legislative level, i.e. If the de facto public relationship will be framed within the framework of a legal relationship, it would be appropriate to develop a kind term that responds to the nature and content of the legal relationship established by law.

4. Signs

The main purpose of marriage is to create a family, but this goal is not legally guaranteed. The legal mechanism of marriage can only protect the personal and property rights of spouses, thus contributing to the functioning of the family and its stability. As some authors point out, an agreement on de facto family cohabitation outside of marriage, unlike marriage, is primarily intended to regulate property issues.[32] It should be noted that de facto family cohabitation outside of marriage, as a social event that is not recognized by law, is completely free from legal elements. Consequently, if the parties agree about it, the agreement itself will not be of a property nature. As for certain rights, that may arise between the parties, derive from other facts e.g. the right to the property share acquired by the de facto spouses will be due to the fact that both of them have spent the money on its purchase and not because they are cohabiting. Accordingly, if the legislation does not recognize the named institution, in this case the agreement of the parties about de facto family cohabitation outside of marriage has personal purposes and concerns only cohabitation and the production of a common household.

In order to assess de facto family cohabitation outside of marriage, when there is not the legal framework defining it, the ECHR takes into consideration the fact of the parties living together,[33] the length of the relationship, as well as the extent of responsibilities the couple reveals toward each other by having common children,[34] in general if there really exists or not close personal relations between them,[35] etc.

As a result of comparing de facto family cohabitation outside of marriage with marriage, as with the most similar legal institution to it, it's possible to define its essential signs. At the same time, it should be noted that since comparison is made with the institute of marriage under the CCG, it is possible that this or that sign of this institute might be defined differently when compared with the institution of marriage given by the legislation of another state.

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30 Ibid., Article 3, Subparagraph "A", "C".

31 *Belov V. A*., Civil Law, General Part, Volume II, Persons, Benefits, Facts, Moscow, 2011, 454 (in Russian).

32 *Kosova O. Yu*., Family and Inheritance Law of Russia, Moscow, 2001, 69 (in Russian); Comp.: *Chanturia L*., General Part of Civil Law, Tbilisi, 2011, 6 (in Georgian).

33 Johnston and Others v. Ireland, [1986], ECHR, 56.

34 X, Y and Z V. The United Kingdom, [1997], ECHR, 36.

35 *Baarsma N. A*., The Europeanisation of International Family Law, Hague, 2011, 62; Paradiso and Campanelli v. Italy, [2017], ECHR, 140; *Livermore M*., The Family Law Handbook, Third Edition, Pyrmont, 2013, 34.

4.1. Hetero Character

With regard to a marriage, article 12 of the European Convention on Human Rights stipulates that a man and a woman who have reached the marriageable age, have the right to marry and to found a family in accordance with the national law. The first clause of the article 30 of the Constitution of Georgia[36] establishes the heterosexual nature of marriage. Therefore, according the Georgian legislation, the first sign of de facto family relation outside of marriage should be its heterosexual nature.[37]

In case of legal regulation of the question in review, an important issue would be whether it is possible to consider a relationship as the de facto family cohabitation outside of marriage, when one of the cohabitants changes his/her sex during such a relationship. This issue should first be discussed in relation with marriage.

The ECHR has stated that a person who officially changes sex and acts as a person of the opposite sex is entitled with right to enter into a marriage with the person of the same sex as he/she had before sex reassignment.[38]

According to some researchers, a person who has changed his/her sex should have the right to marry, but the marriage registry should has an obligation to provide information about this to the other party, as this party may not be psychologically prepared to marry such a person and hope to have children in the family.[39] In the case of de facto family cohabitation outside of marriage, such a procedure is not possible as registration is not provided. Although in case of legal regulation of such a cohabitation, specific procedure might be considered by the relevant authority.

Later, in case of a legal settlement of de facto family cohabitation outside of marriage, if a person, who in his/her relevant official documents has changed notification about sex and notifies about this the person with whom he or she wishes to cohabit, their relationship must be admissible. In case, if this requirement is not met, it will be possible to refuse acknowledgement of de facto family cohabitation outside of marriage, on the grounds that the person does not have the voluntary consent to such a feature of his/her partner. In case if the change of sex takes place during the period of persons' cohabitation, such a relationship must be considered terminated from the moment, when (if that happens) in the relevant documents changes are made.[40] It is noteworthy that by the judgement of the

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36 The Georgian Parliamentary Gazette, 31-33, 24/08/1995.

37 It is noteworthy, for example, that in France (The Civil Code of France, Articles: 515-1; 515-8, 21/03/1804), In Irland **(**The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Ireland, Article 3, 19/07/2010**)** and in some other countries, same-sex cohabitation is recognized and protected equally to the de facto family cohabitation outside of marriage of persons of different sexes.

38 Goodwin V.T.UK, [2002], ECHR, 56, 97-104.

39 *Maleina M. N*., Changing the Biological and Social Sex: Prospects for the Development of Legislation, Journal of Russian Law, №. 9, 2002, Moscow, 58 (in Russian).

40 *Basiladze N*., Legal Challenges of Sex Change in Marriage, Justice and Law, №1 (61), 2019, 175-176. (In Georgian); For the interests of the parties, there is an opinion that they should have the right to maintain the marriage, because of the weighted interest. Such an agreement between the parties shall be dealt in accordance with the clause 2 of article 10 of the CCG, according to which civil relations' participants may carry out any action not prohibited by law, including those not directly provided by law. According to the

ECHR, the applicant, who was in marriage and wanted to change the record of sex in the civil act, was refused because he was in marriage.[41]

4.2. Voluntariness

Voluntary nature should be considered as a second sign of de facto family cohabitation outside of marriage. In respect of marriage, volunteering means the full and free consent of both parties.[42] Such an understanding of voluntariness is acceptable also for the relationship under consideration.

It is interesting to note the issue of voluntariness of de facto family cohabitation outside of marriage, when even one party is mistaken about the nature of this relationship. Entry into cohabitation is a de facto act, which in the case of cohabitants' desire (if the legislation regulates this relationship) should be given legal significance. Consequently, it is important the existence of willingness toward the nature of the relationship and its consequences.

The issue about the existence of de facto family cohabitation outside of marriage can be disputed if one of the parties is mistaken about the characteristics of his/her partner and in his or her uniqueness as of an individual. Some authors consider it as a trait of an individual to have a dangerous and severe illness.[43] Concealment of such diseases in the event of de facto family cohabitation outside of marriage should be considered as a deception of the partner.[44] Volunteering, as an essential sign of de facto family cohabitation outside of marriage, will not be on the face, when cohabitation is based on deception,[45] as well as on compulison.[46]

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first clause of article 319 of the CCG, the subjects of private law can enter into agreements that are not provided by law, but do not contradict it. Accordingly, if the marriage is to be maintained in which one of the spouses has changed the record of the civil act on sex, this would have been inconsistent with the first clause of the article 30 of the Constitution of Georgia, which stipulates marriage between a man and a woman.

41 Hamelainen V. Finland, [2014], ECHR, 108, 110-113.

42 The Convention on "Consent to Marriage, Minimum Age for Marriage and Registration of Marriages", Article 1, Clause 1, 7/11/1962; The Universal Declaration of Human Rights, Article 16, Clause 2, 10/12/1948.

43 *Haderka I*., Entering into a Marriage, Legal Aspects, Zaporozhchenko L. (translated from Czech), Moscow, 1980, 165 (in Russian); *Darjania T*., Commentary on the CCG, Book I, Tbilisi., 2017, Article 74, Field 4 - The essential quality of the counterpart, according the content and purpose of the transaction, may be age, health condition, sex, etc. In addition, the error in the qualities of the counterpart must be substantial according the civil turnover (in Georgian); *Kereselidze D*., General System Concepts of Private Law, Tbilisi, 2009, 330 − It is important that the counterpart's personality and personal qualities are the basis of the transaction, and this should be evaluated by objective criteria, so that the error in the qualities does not equate to the error in the motive. (in Georgian).

44 *Rusishvili G*., Commentary of the CCG, Book I, Tbilisi, 2017, Article 81, Field 1 − Deception violates the freedom of expression of will when making a transaction (in Georgian); See: *Kikoshvili S*., Lack of Will in Georgian Law, Journal. "Review of Georgian Law", Special Edition, 2008, 17 ¬ "Deception is done by hiding the information provided to the other party by silence." (in Georgian); *Kropholler I*., German Civil Code, Commentary, *Darzhania T., Chechelashvili Z. (Trans.)*, *Chachanidze E., Darjania T., Totladze L. (ed.)* 13th revised edition, Tbilisi, 2014, §123, field 4 (in Georgian).

45 *Chanturia L*., Commentary of the CCG, Book I, Tbilisi, 2017, Article 61, Fields: 19-21 (in Georgian).

46 The Criminal Code of Georgia, Article 1501, LHG, 41 (48), 13/08/1999.

4.3. Absence of Registration

The absence of its registration by the state's relevant service should be considered as the third sign of de facto family cohabitation outside of marriage.[47] Some researchers note that, de facto family cohabitation outside of marriage should differ from marriage only in the absence of a registration act.[48] Consequently, if the de facto cohabitants decide to marry, there should be no impediments to the marriage. Practice abroad shows that it is possible to register cohabitation in a different way from the registration of marriage and in another state body.[49] At the same time, it should be noted that, if the cohabitation outside of marriage is a legal relationship regulated by law, the existence of a component of its registration directly depends on the model that the state chooses to regulate the relationship. E.g. If the existence of an extramarital cohabitation is confirmed by a couple's relevant agreement, or by a court's assessment, the registration of the agreement will no longer be necessary to confirm the fact.

4.4. Living Together

Living together can be considered as the fourth sign of de facto family cohabitation outside of marriage. The fact of living together was the main evidence of existence of the relationship under the RSFSR's Code on Marriage, Family and Custody Laws, 1926.[50] The similar position is reflected in most normative acts abroad.[51]

Living together must be actual, that is, the couple must live together (in one apartment, one house). Two person may be registered at one address, but in fact they have lived in different places, in this case living together will not take place. In addition, the lack of a common address is not evidence that individuals do not live together. Couples, whether they are married or cohabiting in an actual family cohabitation, have periods when they have a long distance relationship. During this period (whether due to their profession or other reasons), the couple can live in different countries,[52] and at the same time their unified household can be stopped. While cohabitation may not be the main criterion for determining the stability of a long-term relationship, it is still a factor, that can outweigh the doubts that may arise about the existence and authenticity of a family relationship.

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47 The CCG and other laws of private law provide cases when for the validity of a transaction it is necessary to be protected by another additional form, in particular, the expression of will before a special state body. An example of this is marriage.

48 *Tarusina N. N.*, Marriage in the Russian Family Law, Eroslavl, 2007, 148 (in Russian); See: *Chikvashvili Sh.*, Family Law, Tbilisi, 2004, 69. "Marriage registration is established in order to protect the personal and property rights and duties of both the state and public interests, as well as the spouses and their children.". (in Georgian).

49 Ley 11/2001, de 19 de Diciembre, de Uniones de Hecho de la Comunidad de Madrid, Articulo 1, Cláusula 1, 19/12/2011; Civil Code of France, Article 515-1, 21/03/1804.

50 The Code of Laws on Marriage, Family, and Guardianship with Amendments, State Publishing House, Moscow, 1/08/1933, Chapter 1, Paragraph 3, 19/11/1926 (in Russian).

51 The De facto Relationships Act 2005, Island, Act No. 5 of 2006, Introductory Part, 28/02/2006; The Civil Code of France, Article 515-8, 21/03/1804; The Family Law Act 1975, Australia, №53, Introductory Part, 1975; The Civil Code of The Republic of Lithuania, Article 3.229, 18/07/2000.

52 Oliari and Others v. Italy, [2015], ECHR, 169; Vallianatos and Others v. Greece, [2013], ECHR, 49, 73.

It should be noted that even in the absence of life at one address, there may still be enough nodes[53] for family life, since the existence of a strong connection is sometimes independent from living together.[54] For example, the wife and husband may have been living apart during the working week, but they may have spent the holidays together. Such a form of cohabitation must also be permissible for a de facto family cohabitation outside of marriage, under the condition that the time spent together regularly takes place. In the latter case, parties must be required not only to spend time together, but also to live at the same address together, and this must be done regularly.

It should be noted that joint living should not be equated with living together. Cohabitation involves living together, but it's only one part of it. Cohabitation may occur in the absence of living together. For example, married people may live in different locations, but may live together. Article 1157 of the CCG allows spouses to do so, i.e. Joint living is possible without living together, and this is important, because in the absence of cohabitation, fictitious marriage,[55] or such marriage may take place, when marital relations are terminated. Common life is the mutual unity of family interests (spiritual, economic, property, children's issues, etc.), the need for people to have a constant relationship with each other, the need for mutual care, even though they may not living together.[56] In the latter case, it is important that family members enjoy being together.[57]

The cohabitants had to act in such a way that third parties perceived them as spouses. This sign is sometimes referred to in legal acts as "couple" living together as a family.[58] At the same time, its publicity should not be considered as a sign of a relationship.[59] Latter is true, because according to the first clause of the article 15 of the Constitution of Georgia, a person's personal and family life is inviolable. Consequently, its protection should not be depended on the couple's disclosure of the relationship to third parties. However, if necessary, the testimony of third parties may be used to confirm the existence of de facto family cohabitation outside of marriage.

4.5. Common Household

Common household production should be considered as the fifth sign of a de facto family cohabitation outside of marriage. Household farming is one of the non-specific functions of the family.[60] It is closely connected with living together. Lawyers understand this as satisfying daily needs by obtaining food, preparing food, cleaning the house, washing laundry, buying household items,

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53 Kroon and Others v. The Netherlands, [1994], ECHR, 30; Shakhmatov V. P., Legislation on Marriage and Family, Tomsk, 1981, 126-127 (in Russian).

54 Vallianatos and Others v. Greece, [2013], ECHR, 49, 73.

55 The CCG, Article 1145.

56 *Belkova A. M., Vorozheikin E. M*., Soviet Family Law, Moscow, 1974, 33-34 (in Russian).

57 Comp. Olsson v.Sweden (no. 1), [1988], ECHR, 59.

58 The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Ireland, Article 172, Clause 1, 19/07/2010; The Family Code of Ukraine, Article 74, Clause 1, 10/01/2002.

59 Comp. *Tarusina N.N*., Essays on The Theory of Russian Family Law, Yaroslavl, 1999, 74 (in Russian).

60 *Eriashvili N.D., Belsky D.I., Kravchenko A.I., Kurganov S.I.,* Sociology for Lawyers, Tbilisi, 2011, 139 (in Georgian).

buying personal necessities, and so on.[61] It is argued that the production of a common farm should not be equated with a common budget,[62] but that the production of a common farm proves the existence of a common budget.[63] A shared budget does not necessarily mean that de facto spouses should combine all of their income, but some portion of their income should be spent on certain common household needs. It is interesting to note that one of the rulings of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, considers the care of the parents of one of the cohabitants by another cohabitant to be a joint household.[64]

4.6. Relationship Continuity

As the sixth sign of a de facto family cohabitation outside of marriage, it is advisable to consider its definite continuity. As it is well known, cohabitation can last from a few days to several years, or even forever. The ECHR takes into account duration when assessing the existence of a de facto family cohabitation outside of marriage.[65] If the issue is regulated at the legislative level, such a mechanism may be envisaged, according to which not any cohabitation of a woman and a man may be known as a de facto family cohabitation outside of marriage, but only one that would be sufficiently stable in terms of continuity. At the same time, if the relationship needs to be confirmed, the continuation of the relationship will create an opportunity to assess the existence of signs of a de facto relationship. This mechanism will also be a kind of prevention in relation to fictitious relationships.[66]

In many countries, which have regulatory acts for a de facto cohabitation (eg France, etc.), the minimum duration of a relationship is not specified at all. The term mentioned in the Autonomy of Madrid and the Republic of Lithuania should not be less than 12 months,[67] 2 year is defined in Catalonia, however, in order to gain certain rights, before the expiration of this period, the parties may notarize their cohabitation.[68] At the same time, it is not allowed to set a maximum term, as the determination of the term will be in conflict with the essence of a relationship. Also interesting is the example of Ireland, which sets a 5-year standard for a relationship, but in case of having children, the term can be reduced to 2 years.[69] The reason for increasing this time may be the break in cohabitation continuity and common farming. The above-mentioned terms are related to granting the status of a

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61 *Tarusina N. N*., Marriage in Russian Family Law, Yaroslavl, 2007, 143 (in Russian).

62 *Kurilenko O. G.,* Regulation of Marriage Relationships, according to the Legislation of the Russian Federation: Dissertation of the Candidate of Legal Sciences, Moscow, 2003, 17 (in Russian).

63 *Manankova R. P.,* Explanatory Note to the Project Concept of the New Family Code of the Russian Federation, Tomsk, 2008, 11 (in Russian).

64 Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, December 16, 2003, on Case №As-595-1248-03.

65 X, Y and Z V. The United Kingdom, [1997], ECHR, 36.

66 Comp.: The CCG, Article 1145.

67 Ley 11/2001, de 19 de Diciembre, de Uniones de Hecho de la Comunidad de Madrid, Articulo 1, Cláusula 1, 19/12/2011; Civil Code of The Republic of Lithuania, Article 3.229, 18/07/2000.

68 Ley 25/2010, de 29 de Julio, Del Libro Segundo del Código Civil de Cataluña, Relativo a la Persona y la Familia, Articulo 234-1, 29/07/2010.

69 The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Ireland, Article 172, Clause 5, 19/07/2010.

qualified cohabitants, which gives them the right to appeal to the court regarding property, residence and pension due to cohabitation.[70]

4.7. Sexual Relations

When characterizing the signs of a de facto family cohabitations outside of marriage, it is important to consider the issue of sexual relations. The existence of sexual intercourse should not be an independent sign for mentioned relation. Foreign lawmakers have such a position.[71] In this regard, some researchers point out that individuals who do not have the ability to have sexual relations, due to age or a particular disease, may be involved in a de facto family cohabitation outside of marriage, but despite this, cohabitants should aim to live as a husband and a wife.[72] Although one of the specific functions of a family is sexual control,[73] it does not deprive individuals who do not have sexual abilities the right to have cohabitants.

Accordingly, the absence of children should not be a necessary characteristic for a de facto family cohabitation outside of marriage, although it would be prudent to take having children into account when assessing existence of a relationship.[74] The birth of a child in a family can be considered as one of the reasons that may lead to a reduction of the defined minimum term for living together.

5. Subjects

It is necessary to consider a number of issues concerning the subjects of a de facto family cohabitation outside of marriage. Firstly, it should be noted that, married couples are called as spouses, wives, and husbands, While those outside of a marriage may be called “de facto cohabitants,” “non-marital cohabitants,” just “cohabitants”[75] and “de facto spouses”.

It is debatable whether 18-year-olds can enter into a de facto family cohabitation outside of marriage. For example, the legislation of Catalonia (The Catalan law of July 29, 2010 "On Persons and the Family", Art. 234-2, P. "A") and the French law (The Civil Code of France, Art. 515-1) require the age of 18 years from cohabitants. At the same time, there is no such restriction for simple cohabitation in France.[76]

According to the first part of the article 1108 of the CCG, marriage is allowed from the age of 18. In case of regulation of de facto relations by law, a person who has reached the age of 18 should be

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70 Ibid., Articles 173-175, 187.

71 The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Ireland, Article 172, Clause 3, 19/07/2010.

72 *Douglas G*., An Introduction to Family, “OXFORD University Press”, Oxford, 2004. 50.

73 *Eriashvili N.D., Belsky D.I., Kravchenko A.I., Kurganov S.I*., Sociology for Lawyers, Tbilisi, 2011, 138 (in Georgian); *Malcolm C. Kronby*, Canadian Family Law, 10th edition, Ontario, 2010, 9; *Livermore M*., The Family Law Handbook, Third Edition, Pyrmont, 2013, 34.

74 X, Y and Z V. The United Kingdom, [1997], ECHR, 36.

75 *Kosova O.Yu*., “Actual Marriages“ and Family Law, Journal of Jurisprudence, №3, 1999, 106-107 (in Russian).

76 The Civil Code of France, Article 515-8, 21/03/1804.

able to enter into cohabitation, but if the legislation provides for the minimum duration of the relationship, the person must be not only 18 years old, but after he/she reached the age of 18 year, it must be gone that minimum duration of time defined for recognizing that kind of de facto relation. A different model would be at odds with the state's approach to the minimum age limit for personal family relationships.

As a sign of the mentioned relationship's subject might be considered that the cohabitants should not be presented in another de facto family cohabitation outside of marriage or marriage,[77] that is also considered in almost all relevant legal acts of foreign countries.[78] Notwithstanding the abovementioned, a person in such a relationship must be entitled to marry at any time, including to another person. In this case, it is advisable to consider the de facto family cohabitation outside of marriage ended. Also, if a person in a de facto family cohabitation outside of marriage enters into another cohabitation of the same nature with another person, the first relationship must be terminated. If the marriage or the first de facto family cohabitation outside of marriage exists at the beginning of the relationship, but it is interrupted at the time the issue is assessed - it is advisable to report the relationship existed, but the moment for starting the relationship should be considered the moment when a marriage or a de facto relation is terminated. This sign of the relationship under consideration stems from the existence of monogamy, that is, the relationship between one man and one woman. In addition, if the marriage is considered void on any ground, the existence of a de facto family cohabitation outside of marriage may be recognized from the moment of entering info de facto cohabitation.

When describing the subjects of a de facto family cohabitation outside of marriage, the question arises as to whether relationship can be considered as a de facto family cohabitation outside of marriage, when one of cohabitants is a person in need of psychosocial support (hereinafter - beneficiary of support). According to the article 1120, part 1, subparagraph "e" of the CCG, marriage is not allowed if the person is the beneficiary of support and he/she has not entered into a marriage contract provided in the part 2 of article 1172 of the CCG. In parallel with this article, it should be noted that in the case of a de facto family cohabitation outside of marriage, the parties can not enter into a marriage contract, that is a kind of guarantee for protection of the property rights of the beneficiary of support. However, a beneficiary of support may enter into an agreement with his or her future de facto spouse to agree on the settlement of property issues within their cohabitation, be it financial matters related to household production, property acquired during their cohabitation or otherwise. At the same time, in case of entering family cohabitation outside of marriage (if this kind of agreement is followed by a legal result) or signing a contract for regulating property issues it should be taken into account provisions of the article 58^1 and 1120 (subparagraph "e") of the CCG.

It is interesting to assess the existence of a de facto family cohabitation outside of marriage, if one of the cohabitants is an adult with limited legal capacity.[79] Pursuant to the article 1108, part 2 of

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77 The CCG, Article 1120, Part 1, Subparagraph "A".

78 Ley 25/2010, de 29 de Julio, Del Libro Segundo del Código Civil de Cataluña, Relativo a la Persona y la Familia, Articulo 234-2, Cláusula "C", 29/07/2010; Ley 11/2001, de 19 de Diciembre, de Uniones de Hecho de la Comunidad de Madrid, Articulo 2, Cláusula 1, "B", 19/12/2011; The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Ireland, Article 172, Clause 1, 19/07/2010.

79 The CCG, Article 14, Part 2.

the CCG, the marriage of an adult with limited legal capacity shall be permitted with the prior written consent of the guardian. In case of limited legal capacity, entering into a de facto family cohabitation outside of marriage should depend on the consequences of such relationship. If the relationship under consideration is not legally regulated and does not have any legal consequences for the couple, then the person, despite his limited legal capacity, should be able to enter the relationship without restrictions. In case, if the de facto family cohabitation outside of marriage will be a legally regulated institution, that gives the parties some personal and property authority, similar to marriage, it would be valid to enter it on the basis of the prior written consent of the caregiver of a person with limited legal capacity.

It should be noted that due to the nature of a de facto family cohabitation outside of marriage, entry into it through a representative should not be allowed.[80]

The absence of a close relative[81] connections between the cohabitants should be considered as a sign of the subject of a de facto family cohabitation outside of marriage. In particular, according to the first part of article 1120 of the CCG, marriage is not allowed directly between relatives of the ascending and descending branch, between biological and non-biological siblings, and between adoptive parents and adopted children. The same limitation should be imposed for a de facto family cohabitation outside of marriage. Intimate relationships with relatives may actually take place, but such relationships should not be protected by law as potentially dangerous relationships from a medical-biological point of view. Similar restrictions apply, for example, in France and the Republic of Lithuania.[82]

6. Conclusion

The investigation revealed that Articles 10 and 319 of the CCG do not prohibit persons from entering into lawful transactions that are not provided for by law or other legal act. In view of the above said, parties may agree to be in a similar relationship to the marriage and they can determine the property and non-property aspects of their relationship, although this does not imply that it would legally recognize cohabitation as an institution. Moreover, even in the absence of a special agreement between the cohabitants, certain rights may still arise between them, but they will relate not directly to cohabitation and to it as a legal fact, if it is considered a lawful transaction directly provided by law, but to other legal facts. Consequently, an agreement on cohabitation cannot be considered as a transaction, since it is not an action aimed at achieving a legal result, regardless of the will of the parties. In case the signs of this relationship are strengthened by the legislation, it will be possible to discuss it in the context of the transaction.

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80 Ibid., Article 103, Part 2; Comp. *Antropova I. R.*, On the Legal Nature of the Marriage Agreement in Modern Family Law of Russia, Bulletin of the Udmurt University, Series of Economics and Law, №2, 2013, 114-115 (in Russian).

81 See: *Eriashvili N. D., Belsky D. I., Kravchenko A. I., Kurganov S. I.*, Sociology for Lawyers, Tbilisi, 2011, 137 – Kinship is combination of people, who share common ancestry. In addition to blood relations, there is a social institution of "recipient kinship" related to the adoption of a child (in Georgian).

82 The Civil Code of France, Articles: 163, 515-2, 21/03/1804; The Civil Code of The Republic of Lithuania, Article 3.17, 18/07/2000.

Marriage is a civil act (a fact of legal significance)[83], the registration of which is the registration of a fact of legal significance.[84] A legal fact differs from other real facts only in that they are important to the law.[85] Due to the above said, the incorrectly established term - "de facto marriage", or other named terms can be replaced by the following terminological notation – de facto cohabitation outside of marriage (i.e. without the registration of a civil act). This term indicates that there is no marriage, i.e. registration of a civil act. In addition, it points out that in fact there is family cohabitation. It should also be noted that in case of strengthening the relationship in question at legislative level, i.e. If de facto relations in question fall within the framework of a legal relationship, it would be appropriate to develop a term that addresses the nature and content of the legal relationship enshrined in law.

Based on the comparison of de facto family cohabitation outside of marriage to marriage as to the most similar legal institution, its main features were distinguished. In addition, it should be noted that since the comparison was made directly with the institution of marriage provided by the CCG, it is possible that when comparing with the institution of marriage under the law of another country, this or that sign of de facto family cohabitation outside of marriage is defined differently.

As the first clause of article 30 of the Constitution of Georgia[86] defines the heterogeneous nature of marriage, its heterosexual character was named as the first sign of a de facto family relationship outside of marriage.[87]

The second sign of de facto family cohabitation outside of marriage was defined his voluntariness. With regard to marriage voluntariness is understood as full and free consent of both parties.[88] Such understanding of voluntariness is acceptable to the relationship in question as well.

As it is argued that de facto family cohabitation outside of marriage should differ from marriage only in the absence of a registration deed,[89] if the de facto cohabitants decide to marry, there should be no impediments to the marriage between them. Accordingly, the third sign of de facto family cohabitation outside of marriage was stated the absence of its registration in the relevant state service.[90]

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83 The Law of Georgia on "Civil Status Acts", Article 3, Subparagraph "A", Website, 111228058, 28/12/2011.

84 Ibid., Article 3, Subparagraph "A", "C".

85 *Belov V. A*., Civil Law, General Part, Volume II, Persons, Benefits, Facts, Moscow, 2011, 454 (in Russian).

86 The Georgian Parliamentary Gazette, 31-33, 24/08/1995.

87 It is noteworthy, for example, that in France (The Civil Code of France, Articles: 515-1; 515-8, 21/03/1804), In Irland **(**The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Ireland, Article 3, 19/07/2010**)** and in some other countries, same-sex cohabitation is recognized and protected equally to the de facto family cohabitation outside of marriage of persons of different sexes.

88 The Convention on "Consent to Marriage, Minimum Age for Marriage and Registration of Marriages", Article 1, Clause 1, 7/11/1962; The Universal Declaration of Human Rights, Article 16, Clause 2, 10/12/1948.

89 *Tarusina N. N*., Marriage in the Russian Family Law, Eroslavl, 2007, 148 (In Russian); See: *Chikvashvili Sh*., Family Law, Tbilisi, 2004, 69. "Marriage registration is established in order to protect the personal and property rights and duties of both the state and public interests, as well as the spouses and their children." (in Georgian).

90 The CCG and other laws of private law provide cases when for the validity of a transaction it is necessary to be protected by another additional form, in particular, the expression of will before a special state body. An example of this is marriage.

The fourth sign of de facto family cohabitation outside of marriage is living together. Living together must be de facto, i.e. the couple must live together (in one apartment, in one home). It should be noted that even in the absence of living at the same address, there may still be sufficient nodes for family life,[91] since the existence of a strong connection is sometimes independent from living together.[92]

Co-production of a household was considered as the fifth sign of de facto family cohabitation outside of marriage. Household production is one of the non-specific functions of the family.[93] It is closely related to life together.

The sixth sign of de facto family cohabitation outside of marriage is its definite continuity, since the European Court of Human Rights takes into account its duration when assessing the existence of de facto family relations.[94]

Having sex is not an independent sign of de facto family cohabitation outside of marriage. Consequently, the absence of children is not a necessary feature of the relationship.

Participants of de facto family cohabitation outside of marriage can be referred to as "de facto cohabitants", "cohabitants outside the marriage", simply "cohabitants"[95] and "de facto spouses".

According to the first part of article 1108 of the CCG, marriage is allowed from the age of 18. If the de facto family cohabitation outside of marriage is regulated by law, a person who has reached the age of 18 shall be able to enter into cohabitation, but if the law provides for a minimum duration of the relationship, the person must be not at least 18 years old when his or her relationship is considered as de facto family cohabitation outside of marriage, but the minimum duration of cohabitation specified by law must have expired after the age of 18.

The sign of the subject of the relationship was considered to be that the cohabitants should not be in another de facto family cohabitation outside of marriage or in marriage,[96] which is provided for in almost all relevant legal acts of foreign countries.[97]

In case of de facto family cohabitation outside of marriage, the parties cannot enter into a marriage contract, which is a kind of guarantee of protection of the property rights of a beneficiary of support. However, the beneficiary of support may enter into an other agreement with the future de facto spouse under which they will agree to settle property issues within their cohabitation.

According to article 1108, part 2 of the CCG, the marriage of an adult with limited capacity is allowed with the prior written consent of his/her custodian. In case of limited capacity, entering into de facto family cohabitation outside of marriage should depend on its consequences. In case when the

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91 Kroon and Others v. The Netherlands, [1994], ECHR, 30; Shakhmatov V. P., Legislation on Marriage and Family, Tomsk, 1981, 126-127 (in Russian).

92 Vallianatos and Others v. Greece, [2013], ECHR, 49, 73.

93 *Eriashvili N.D., Belsky D.I., Kravchenko A.I., Kurganov S.I.,* Sociology for Lawyers, Tbilisi, 2011, 139 (in Georgian).

94 X, Y and Z V. The United Kingdom, [1997], ECHR, 36.

95 *Kosova O. Yu*., "Actual Marriages" and Family Law, Journal of Jurisprudence, №3, 1999, 106-107 (in Russian).

96 The CCG, Article 1120, Part 1, Subparagraph "A".

97 Ley 25/2010, de 29 de Julio, Del Libro Segundo del Código Civil de Cataluña, Relativo a la Persona y la Familia, Articulo 234-2, Cláusula "C", 29/07/2010; Ley 11/2001, de 19 de Diciembre, de Uniones de Hecho de la Comunidad de Madrid, Articulo 2, Cláusula 1, "B", 19/12/2011; The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Ireland, Article 172, Clause 1, 19/07/2010.

relationship in question is not legally regulated and does not cause any legal consequences for the couple, then the person, despite the limited capacity, should be able to enter into relationship without restriction. However, if the de facto family cohabitation outside of marriage will be a legally regulated institution, like marriage, it will be valid to enter into it with the prior written consent of the custodian of a person with limited capacity.

It should be noted that due to the nature of de facto family cohabitation outside of marriage, it should not be allowed to enter through a representative.[98]

The absence of close kinship[99] between cohabitants was also considered as a sign of the subject of de facto family cohabitation outside of marriage.

Based on the analysis of signs and other characteristics (the legal nature of institution, term, subjects and other characteristics) of the relationship identified as a result of the study, the concept of the institution under consideration can be formulated as follows – de facto family cohabitation outside of marriage is a de facto existing voluntary public relation of an indefinite period of time between an adult woman and a man, for the purpose of living together and producing a common household, that is unregistered in the relevant body of the state in accordance with the rules established for registration of marriage, or a voluntary transaction of an indefinite period of time, that is concluded by them for the same purposes (in case if the legislation strengthens the signs of the mentioned relationship), which are characterized by the existence of close personal relations between the couple. In addition, there should be no close kinship between the couple and neither of them should be in the same kind de facto relationship or marriage with another person.

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[99] See: *Eriashvili N.D., Belsky D.I., Kravchenko A.I., Kurganov S.I.*, Sociology for Lawyers, Tbilisi, 2011, 137 – Kinship is combination of people, who share common ancestry. In addition to blood relations, there is a social institution of "recipient kinship" related to the adoption of a child (in Georgian).

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69. <https://www.geostat.ge/ka/modules/categories/324/gankortsineba> [30.04.2020]. (in Georgian).
70. <https://www.geostat.ge/ka/modules/categories/323/kortsineba> [30.04.2020]. (in Georgian).
71. <https://ka.wikipedia.org/wiki/%E1%83%A5%E1%83%9D%E1%83%A0%E1%83%AC%E1%83%98%E1%83%9C%E1%83%94%E1%83%91%E1%83%90> [30.04.2020]. (in Georgian).

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State Immunity in the Process of Recognition and Enforcement of ICSID Arbitral Awards

The present paper focuses on the determination of the role of state immunity in the process of recognition and enforcement of ICSID arbitral awards. It examines the effectiveness of the Convention on the Settlement of International Investment Disputes in the light of domestic and international laws on State immunity. The paper, mainly, discusses the approaches of Anglo-American and French legal systems along with the 2004 UN Convention. Within the scope of this area of research, the paper offers an analysis of the respective articles of Georgian legislation.

Key words: *Recognition and enforcement of international arbitral awards; ICSID Convention, State immunity.*

1. Introduction

In today's global economy there has been a noticeable growth in a number of private international transactions involving State parties and enterprises with state shareholding along with private parties. Such a remarkable increase in international transactions involving State parties has led to the growth of international arbitration disputes, which can be explained not only by economic factors but also by significant advantages of arbitration when compared to court litigation.[1]

The eventual goal of international arbitration is recognition and enforcement of an arbitral award. However, in the event of an unfavourable award against a State or State enterprise, the successful party usually faces the plea of sovereign immunity by the State party during enforcement proceedings. Multiple unsuccessful attempts of the former Yukos shareholders to execute the award rendered by the Permanent Arbitration Court in the Hague in July 2014 against the government of Russian Federation is sufficient to illustrate the complexity of the problem.[2]

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1 *Brazil David R.,* International Commercial Arbitration Involving a State Party and the Defense of State Immunity, American Review of International Arbitration, Vol. 22, 2011, 241.

2 *Hulley Enterprises Limited (Hulley) v. the Russian Federation*, *Yukos Universal Limited (YUL) v. the Russian Federation, Veteran Petroleum Limited (VPL) v. the Russian Federation,* (Final Awards) PCA Case Nos AA226, AA227, AA228, 18/07/2014, <https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf> [18.06.2020]; *Croisant G.,* Recent developments in the Yukos saga see assets in Belgium belonging to Russia unfrozen, 27/06/2017, <https://www.arbitrationlinks.com/recent-developments-in-the-yukos-saga-see-assets-in-belgium-belonging-to-russia-unfrozen> [18.06.2020]; *Knowls B., Moyeed K., Lamprou N.,* The USD 50 billion Yukos Award overturned – Enforcement becomes a game of Russian Roulette, 13/05/2016, <http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/> [20.06.2020]; *Bucki K., Poloni F.,* The Yukos Case: Former Shareholders Lose their Legal Battle in France but continue the War,

While States have been evading enforcement of international arbitral awards by raising State immunity before national courts, an effective international legal instrument ensuring, on the one hand, enforcement of an arbitral award rendered in favour of a private party, and on the other hand, protection of sovereign interests of a State acting as a subject of public international law, has become more and more important.

To improve an investment climate and promote private foreign investments the Convention on the Settlement of Investment Disputes Between States and Nationals of other States was adopted (hereinafter – the Convention)[3] by the Executive Director of the International Bank for Reconstruction and Development, establishing a special international arbitration forum - the International Centre for Settlement of Investment Disputes (hereinafter – the Centre), which provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of another Constracting States – private investors.[4] The Convention is a prominent international mechanism, as it creates a comprehensive and self-contained regime for recognition and enforcement of arbitral awards. This autonomous and delocalized enforcement scheme shelters the arbitral awards from the scrutiny of national courts in contrast to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – the New York Convention).[5]

The issue of State immunity from jurisdiction does not arise under the Convention as a Contracting State's consent to the jursidcition of the Centre is considered as a consent to the jurisdiction of national courts over the recognition and enforcement of arbitral awards rendered under the Convention (hereinafter – the ICSID awards).[6] However, the question whether or not the Convention offers effective recognition and enforcement of ICISD arbitral awards still arises, as execution is still barred by State immunity from execution. The Convention entitles the courts of State parties to the Convention to enforce ICSID awards according to their law governing State immunity from execution of judgements and arbitral awards.[7] In its turn, the rules governing State immunity differ according to the States.[8]

The issue is relevant in Georgia, especially, in the light of an increasingly significant role that international arbitration plays in the resolution of cross-border investment disputes. As of today, Georgian legislation offers only "episodic" regulation of State immunity. Hence, considering the role of State immunity in the process of recognition and enforcement of international arbitral awards is of a central importance.

04/12/2017, <https://www.august-debouzy.com/en/blog/1092-the-yukos-case-former-shareholders-lose-their-legal-battle-in-france-but-continue-the-war> [20.06.2020].

3 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), 575 UNTS, 1965, 159.

4 Preamble, Introduction, article 1 (1), ICSID Convention, 575 UNTS, 1965, 159.

5 *Reed L., Paulsson J., Blackaby N.,* Guide to ICSID Arbitration, Kluwer Law International, 2010, 181.

6 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1129.

7 Art. 54 (3), ICSID Convention, 575 UNTS, 1965, 159.

8 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1154.

The research is aimed at identifying the essence of the problem at issue on the basis of a comparative analysis for future regulation of State immunity in terms of recognition and enforcement of international arbitral awards under the ICSID Convention.

2. Finality and the Binding Nature of the Award

According to the Convention, the obligation to comply with the ICSID award is automatic and begins immediately upon its rendering.[9] The ICSID award is self-executing and the prevailing party does not need to take any steps of any kind for that purpose.[10] That is wholly contained in Article 53, which states that the award shall be binding on the parties and each party shall abide by and comply with the terms of the award.[11]

The ICSID award is independent of judicial control of the arbitration forum[12] and it shall not be subject to any other remedy except those provided for in the Convention.[13] This highlights the finality of the award and a delocalized nature of ICSID arbitration, as well as an exhuastive and autonomous character of the Convention, making it distinctive and a truly international mechanism in international arbitration.[14]

The obligation of the parties to the dispute to comply with the award is independent of any enforcement proceedings. Moreover, the need to resort to enforcement under Article 54 (1) arises only when an award debtor does not comply with the award voluntarily.[15]

Non-comliance with the award by the party, even as a result of procedural obstacles that may arise in the course of enforcement, would be a breach of the Treaty obligation.[16] Therefore, the obligation to comly exists even where a State party finds that it can rely on State immunity in accordance with Article 55 of the Convention. Hence, failure of a State party to the Convention to comly with the award constitutes a violation of the Convention by that State.[17]

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9 Ibid, 1111.

10 *Alexandrov S. A.,* Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention, International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, *Binder Ch., Kriebaum U., Wittich St., (ed.)*, Oxford, 2009, 325.

11 Art. 53 (1), ICSID Convention, 575 UNTS, 1965, 159.

12 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1103.

13 Art. 53 (1), ICSID Convention, 575 UNTS, 1965, 159; The post-award procedures provided for in the Convention entail addition to, and correction of, interpretation, revision, and annulment of the award under articles 49 (2), 50, and 51 respectively.

14 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1103.

15 Ibid, 1106.

16 Ibid.

17 See *MINE v. Guinea,* ICSID Case No. ARB/84/4, Interim Order No. 1 of 12 August 1988, para. 25, <https://jusmundi.com/en/document/other/en-maritime-international-nominees-establishment-v-republic-of-guinea-interim-order-1-friday-12th-august-1988> [07.02.2020]; *Mitchell v. DR Congo,* ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award of 30 November 2004, 20 ICSID Review – Foreign Investment Law Journal, 2005, 598.

There are two types of legal actions available under the Convention to secure compliance with an award.[18] One is taking an action of recognition and enforcement in accordance with Article 54 of the Convention against either the investor or the host State.[19] The other is a legal action by the investor's home State against the host State in accordance with Articles 27 and 64 providing for the right of exercising diplomatic protection by an investor's home State or instituting proceedings against host State in the International Court of Justice.[20] However, apart from the above-mentioned results, non-compliance with the ICSID award may have a negative effect on the host State's position in the international community with respect to the continuance of international financing or the inflow of other investments.[21]

3. Recognition and Enforcement[22] in Accordance with Article 54

Article 54 (1) is the center of the Convention's automatic recognition and enforcement regime.[23] While Article 53 (1) concerns only the parties to a dispute, the obligation to recognize and enforce awards under Article 54 applies to all Contracting States of the Convention.[24] In particular, each Contracting State is obliged to recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories "as if it were a final judgement of the court in that State."[25]

Hence, Contracting States have two obligations: to recognize an award as binding and enforce the pecuniary obligations imposed by it. The arbitral award is equated to a final decision of the national court for both purposes, expressing the essence of the Convention, i.e. if the final judgement of the national court in question is enforceable, the ICSID arbitral award shall be also enforceable in that State.[26]

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18 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1108.

19 *Broches A.,* Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987*,* 294.

20 Ibid, 1108.

21 *Mitchell v DR Congo,* ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award of 30 November 2004, 20 ICSID Review – Foreign Investment Law Journal, 2005, 598.

22 Articles 54 (1) and 54 (2) both refer to "enforcement", whereas Article 54 (3) refers to "execution", in the official English version of the text. By contrast, equally authentic Spanish and French texts do not. Professor Schreuer suggests that the interpretation that best reconciles these differences under Article 33(4) of the 1969 Vienna Convention on the Law of Treaties is to conclude that the terms "enforcement" and "execution" are identical in meaning. See *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1136; In Georgian "enforce", "enforcement", and "execution" have the same meaning, therefore, to differentiate "enforcement" and "execution", the last one shall be translated as "forcible execution" for the purposes of this paper.

23 *Reed L., Paulsson J., Blackaby N.,* Guide to ICSID Arbitration, Kluwer Law International, 2010, 182.

24 Ibid.

25 Art. 54 (1), ICSID Convention, 575 UNTS, 1965, 159.

26 *Broches A.,* Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987*,* 316-317; See also, The History of the ICSID Convention, Documents Concerning the Origin and the Formulation of

The restriction of the obligation to enforce only pecuniary obligations is the result of the difficulty that might have arisen if the award provides for forms unknown to the law of the Contracting State where the enforcement is sought, wheareas, the pecuniary obligations is likely available under every legal system.[27]

The above-mentioned does not refrain the tribunal from the right to impose non-pecuniary obligations under the award, however, while imposing non-pecuniary obligations, the tribunal shall keep the impossibility to enforce them in mind in a particular case, and ensure that a pecuniary alternative is provided in case of non-performance.[28]

3.1. Nonreviewability of the Arbitral Award

In order to obtain recognition or enforcement of the arbitral award in the territories of a Contracting State, a party shall furnish to a competent court or other authority, which such State shall have designated for this purpose a copy of the award, certified by the Secretary-General.[29]

The power of a competent court or authority is restricted to ascertaining the authenticity of the award, which excludes exercise of judicial control of national courts on the recognition and enforcement proceedings. Hence, national courts are not entitled to re-examine the arbitral award on merits, or the jurisdiction of the tribunal or examine the fairness and propriety of the proceedings before the ICSID tribunal.[30] This is in contrast to non-ICSID arbitral awards, which may be reviewed under domestic laws and applicable treaties, i.e. the New York Convention, setting forth a detailed list of grounds for refusing recognition and enforcement.[31]

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the Convention, Vol. 2, Part 2, 1968, 889, <https://icsid.worldbank.org/en/ Documents/resources/ History%20of%20ICSID%20Convention%20-%20VOLUME%20II-2.pdf> [15.03.20209].

27 *Cane G.,* The enforcement of ICSID Awards: Revolutionary or Ineffective, The American Review of International Arbitration, Vol. 15, 2004, 456; See also, Carias-Borjas S., Recognition and Enforcement of ICSID Awards: The Decision of the French *Cour de Cassacion* in *SOABI v. Senegal*, The American Review of International Arbitration, Vol. 2, 1991, 359; See also, *Broches A.,* Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application, 18 Yearbook of Commercial Arbitration, 1993, 703-704.

28 *Schreuer C. H.,* Non-Pecuniary Remedies in ICSID Arbitration, 20 Arbitration International, 2004, 332.

29 Art. 54 (2), ICSID Convention, 575 UNTS, 1965, 159.

30 See *MTD Equity Sdn Bhd & MTD Chile SA v. Republic of Chile*, ICSID Case No ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution of 1 June 2005, para 31, <https://www.italaw.com/sites/default/files/case-documents/ita0545.pdf> [07.04.2020]; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of 1 September 2006, para 40, <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4/DC505_En.pdf> [07.04.2020]; See also, *Parra A.,* The Enforcement of ICSID Arbitral Awards, 24th Colloquium on International Arbitration, Paris, November 2007, <https://www.arbitration-icca.org/media/4/39889320043113/media012144885278400enforcement_of_icsid_awards.pdf > [19.03.2020].

31 Art. 5, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 330 UNTS, 1958, 38; See also, *Sempra Energy International v. Argentine Republic,* ICSID Case No ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of 5 March 2009, 7, <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/

Nonreviewability of ICSID arbitral awards is a distinctive feature of the Convention. However, according to the court practice, national courts do not seem to have fully aware of their lack of power to review ICSID awards.[32] For example, in *Benvenuti & Bonfant v Congo*[33] the *Tribunal de Grande Instance* of Paris its decision to grant an *exequatur*[34] based on the fact that the award contained nothing that was contrary to French law and public order.[35] In *SOABI v. Senegal*[36] the *Cour de cassation* of France also found it necessary to remind the *Cour d'appel* that the regime established by Articles 53 and 54 of the Convention excluded the remedies of the French Code of Civil Procedure in recognition and enforcement proceedings of ICSID awards.

In Argentina, Argentine officials have suggested that its national courts might review ICSID awards in the event recognition and enforcement was sought in Argentina.[37]

3.2. Recognition

Recognition of an arbitral award is a confirmation that the award is authentic and that it has the legal consequences by the law. [38] Specific procedures that the awards may be subject to vary depending on the law of the country where recognition is sought, however, as already mentioned above, in the event of recognition of ICSID awards, the power of national courts or other competent authority, designated for that purpose, is limited to veryfying the authenticity of the ICSID award and refusal of recognition on the basis of domestic legislation is not allowed.[39]

OnlineAwards/C8/DC991_En.pdf> [09.04.2020]; Comp., *Sicard-Mirabal J., Derains Y.,* Introduction to Investor-State Arbitration, Kluwer Law International, 2018, 243-245; Article 52 of the Convention lists the grounds on which the ICSID arbitral awards may be annulled by the *ad hoc* committee of the Centre. It is of note that several of the reasons in Article 52 are covered by the reasons for non-enforcement under Article V of the New York Convention.

32 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1141.

33 *Benvenuti & Bonfant v Congo,* ICSID Case No. ARB/77/2, Decisions of Tribunal de Grande Instance, Paris of 23/12/1980, 13/01/1981, 1 ICSID Reports, 1993, 368.

34 *exequatur* – (lat); French term referring to the court decision or order on the enforcement of foreign court decision/arbitral award in France. Under French law arbitral awards becomes title for forcible execution only through *exequatur* (leave for enforcement) of the respective court of the place of arbitration. See *Broches A.,* Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987*,* 316-318.

35 See *Delaume G. R.,* France: Court of Appeals of Paris Judgement Concerning Recognition and Enforcement of Award in Context of ICSID Convention, ILM Vol. 20, No 4, 1981, 877-882.

36 *SOABI v. Senegal,* ICSID Case No. ARB/82/1, Decision of Cour de Cassation, Paris, 11 June 1991, 2 ICSID Reports, 1994, 341.

37 *Uchkanova I., Temnikov O.,* Enforcement of Awards Under the ICSID Convention – What Solutions to the Problem of State Immunity?, ICSID Review, Vol. 29, No. 1, 2014, 191-192; See also, *Marzorati O. J.*, Enforcement of Treaty Awards and National Constitutions (The Argentinian Cases), Business Law International, Vol. 7, 2006, 239.

38 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1128.

39 Ibid; See also, *Cane G.,* The enforcement of ICSID Awards: Revolutionary or Ineffective, The American Review of International Arbitration, Vol. 15, 2004, 445-446.

As a consequence of recognition, the award enjoys the effect of *res judicata*[40] and becomes a valid title, forming the basis for execution.[41]

It is of note that the obligation to recognize extends to the entire ICSID award; by contrast, the obligation to enforce extends only to the pecuniary obligations imposed by the award.[42]

A clear destinction should be drawn between the recognition of an award and its execution. This excludes the application of the provision of sovereign immunity from execution in Article 55 of the Convention at the stage of recognition. Therefore, recognition may not be refused for reasons of immunity from execution of domestic law, and the effect of the award as *res judicata* will apply irrespective of the immunity from execution.[43] This was confirmed in the decision of the *ad hoc* committee on the stay of enforcement of the ICSID award in *Ioannis Kardassopoulos and Ron Fuchs v Georgia,*[44] according to which a simplified and autonomous regime created by Article 54(1) of the Convention is independent from the enforcement measures imposed by the enforcement order rendered by the courts in accordance with Article 54(2) for the purpose of execution of the award. However, national courts have interpreted Article 54 (1) variously and the violation of the autonomous enforcement regime by the courts has been also observed.[45] In this respect, it is also important that Cour de cassation and Cour d'appel of France have also confirmed distinction between the stages of recognition of the award and its execution, and that there is no sovereign immunity with respect to the recognition of an award, and the recognition of the ICSID award is not subject to the provisions of domestic law dealing with the recognition and enforcement of other arbitral awards.[46]

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40 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1128.

41 *Delaume, G. R.*, ICSID Arbitration in Practice, 2 International Tax and Business Law, 1984, 74.

42 *Broches A.,* Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987, 316.

43 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1129.

44 *Ioannis Kardassopoulos and Ron Fuchs v Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Decision of the ad hoc Committee on the Stay of Enforcement of the Award of 12 November 2010, para 30, <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C63/DC3354_En.pdf> [16.06.2020].

45 See *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1130; *Davin S.,* Enforcement of ICSID Awards in the United States: Should the ICSID Convention be Read As Allowing a 'Second Bite at the Apple'? 44 New York University Journal of International Law and Politics, 2016, 1274-1275; *Benvenuti &Bonfant v. Congo,* ICSID Case No. ARB/77/2, Tribunal de Grande Instance, Paris 13/01/1981, 1 ICSID Reports, 1993, 369; შეად. *Benvenuti &Bonfant v. Congo,* Cour d'appel, Paris, 26/06/1981, 1 ICSID Reports, 369.

46 *SOABI* v. *Senegal*, Cour d'appel, Paris, 05/12/1989, 2 ICSID Reports, 1994, 337; *SOABI* v. *Senegal*, Cour de cassation, 11/06/1991, 2 ICSID Reports, 1994, 341; *Benvenuti &Bonfant v. Congo,* Cour d'appel, Paris, 26/06/1981, 1 ICSID Reports, 369; See also, *Ziade N. G.,* Some Recent Decisions in ICSID Cases, ICSID Review – Foreign Investment Law Journal, Vol. 6, Issue 2, 1991, 521-524.

4. State Immunity from Execution

4.1. State Immunity from Execution and ICSID Convention

Article 54(3) of the Convention states that execution of ICSID awards "are governed by the laws concerning the execution of judgements in force in the State" in which execution is sought. Furthermore, according to Article 55, "nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

As Professor Schreuer points out, Article 55 may be seen as the Achilles' heel of the Convention.[47] A weak point of otherwise effective mechanism of arbitration shows up, when it comes to the actual execution of pecuniary obligations imposed by the award. The Convention does not entitle the courts of Contracting States to enforce arbitral awards if this would contradict to the domestic laws governing state immunity from execution of judgements and arbitral awards.[48]

While the laws on State immunity, as well as respective judicial practice of States varies, still some main principles governing State immunity from execution can be observed.[49]

The statutes dealing with State immunity from execution, as well as court practice in some countries without comprehensive legislation on State immunity, apply exceptions from immunity from execution, in principle, only to commercial property.[50] Furthermore, some counrties require a special link between the underlying claim and the property that is subject to execution,[51] which is another serious limitation to the execution of ICSID awards, as it is unlikely that a host State will keep commercial assets in another country that might have a direct connection to the investment in its territory.[52]

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47 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1153;See also, *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, No. 1, 2015, 47-99; *Bjorklund A. K.,* Symposium: Arbitration and National Courts: Conflict and Cooperation: Sovereign Immunity as a Barrier to the Inforcement of Investor-State Arbitral Awards: the Re-Politicization of International Investment Disputes, 21 American Review of International Arbitration, 2010, 236.

48 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1154.

49 Ibid, 1156; See also, *Broches A.,* Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987*,* 333-34.

50 *Cane G.,* The enforcement of ICSID Awards: Revolutionary or Ineffective, The American Review of International Arbitration, Vol. 15, 2004, 453; See also, *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1159-1168.

51 *Bernini G., Van den Berg A.*, The Enforcement of Arbitral Awards Against States: The Problem of Immunity from Execution, Contemporary Problems in International Arbitration, *Lew J.* ed., 1987, 364; *Van Blankenstein A.*, Enforcement of an Arbitral Award against a State: With Whom Are We Dealing?, The Flame Rekindled – New Hopes for International Arbitration, *Muller S., Mijs W.,* eds., 1993,159; *Schreuer C. H.,* State Immunity: Some Recent Developments, VIII Hersh Lauterpacht Memorial Lecture Series, Cambridge, 1988, 134.

52 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1166.

The exception added to the Foreign Sovereign Immunities Act of the United States (hereinafter – the FSIA) through a 1988 amendment is an important step towards facilitating the execution of ICSID awards.[53] Pursuant to the amendement the presence of property used for a commercial activity in the United States is still required, by contrast, a special nexus between the property and the claim underlying the award is not compulsory. In this respect, the FSIA is more generous to arbitral awards than to court decisions.[54]

The execution of ICSID awards reaches it deadend when it comes to the specially protected property, such as assets held by central banks, military and diplomatic property.[55] As a general rule, those types of assets are protected by State immunity from execution and exceptions from immunity do not apply to them.[56]

4.2. Waiver of Immunity

The problem of State immunity from execution that an investor faces when attempting to execute the ICSID award can be resolved through an arbitration agreement on the waiver of immunity from execution.[57] It is of note that participation in the Convention cannot be construed as an implied waiver from immunity from execution.[58]

Laws on State immunity contain various provisions regarding the waiver of immunity from execution. The waiver of immunity is one of the exceptions from immunity from execution listed in

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53 The Foreign Sovereign Immunities Act of the United States of 1976 (FSIA), 15 ILM 1388 (1976); a 1988 amendment, 28 ILM 396 (1989).

54 28 USC §1610(a)(6), ILM 398 (1989); *Delaume G. R.*, Enforcement of State Contract Awards: Jurisdictioanal Pitfalls and Remedies, ICSID Review – Foreign Investment Law Journal, Vol. 8, Issue 1, 1993, 42.

55 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1168.

56 See 28 USC §1611, 15 ILM 1391 (1976); The United Kingdom State Immunity Act of 1978 (SIA), 17 ILM 1123 (1978), Sec. 16 (1)(2); იხ. Also, *AIG Capital Partners Inc. and another* v. *Republic of Kazakhstan (National Bank of Kazakhstan Intervening)*, High Court, Queen's Bench Division (Commercial Court), 20 October 2005, [2005] EWHC 2239 (Comm), 11 ICSID Reports 118; *LETCO* v. *Liberia*, United States District Court, District of Columbia, 16 April 1987, 2 ICSID Reports 390. For further discussions on those cases see *Van den Berg A. J.*, Recent Enforcement Prob- lems under the New York and ICSID Conventions, Arbitration International, Vol. 5, Issue 1, 1989, 12-13; *Broches A.*, *Broches A.,* Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal, Vol. 2, Issue 2, 1987*,* 324-334; *Choi S.*, Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions, 28 N.Y.O. Journal of International Law&Politics, 1995-1996,184-186; *Franzoni, D. B.*, Enforcement of ICSID Awards in the United States, 18 Georgia Journal of International and Comparative Law, 1988, 101; *Kahale G. III.*, Enforcing an ICSID Arbitral Award, 6 International Financial Law Review, 1987, 40.

57 *Barbosa F. S.,* The Enforcement of International Investment Arbitral Awards: Is there a better way?, Revista Brasileirade Arbitragem, Vol. 6, Issue 21, 32-34.

58 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1173; Comp., *Turck N. B.,* French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards, Arbitration Internatinal, Vol. 17, Issue 3, 2001, 327-343.

the FSIA and the United Kingdom law on State immunity.[59] However, after adding an arbitration exception to the FSIA, the role of waiver exception from immunity is not quite clear for purposes of enforcement of ICSID awards.[60] The FSIA is also unique in that it extends waiver of immunity from execution only in respect of State property used in commercial activity in the United States.[61] Conversely, waiver of immunity is available in respect of any property in the United States of an agency or instrumentality of a foreign State engaged in commercial activity in the United States.[62] However, still the requirement of a commercial activity of the agency or instrumentality in the United States largely devalues the provision for the purposes of enforcement of ICSID awards.[63]

By contrast, the United Kingdom State Immunity Act ((hereinafter – the SIA) does not require a commercial purpose of the property and provides for the waiver of immunity from execution on the State property expressed with the written consent of the State.[64] The European Convention on State Immunity (hereinafter – the European Convention)[65] and the United Nations Convention on the Jurisdictional Immunities of States and Their Property (hereinafter – the UN Convention)[66] also contain a provision on express waiver of immunity from execution. In both cases, the waiver of immunity is independent of the commercial or non-commercial nature of the State property subject to execution, concluding that general waivers of immunity from execution should be interpreted as extended to non-commercial State property.[67]

The effect of the waiver of immunity from execution in respect of the property that is granted special protection is even more doubtful.[68] For example, under the FSIA the waiver of immunity does not extend to the military and diplomatic property.[69] Furthermore, special protection is granted to the assets of central banks, however, a foreign state is entitled to explicitly waive immunity from execution in respect of those assets.[70]

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59 28 USC §1610 (a)(1); SIA, Sec 13 (4).

60 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1174.

61 Ibid; See also, *Af-Cap, Inc v. Chevron Overseas (Congo) Ltd*, 475 F3d 1080, 1087 (9th Cir. 2007); The Court of Appeal of the 9th Circuit of the United States ascertained that the State's waiver of immunity over its entire assets is not valid.

62 28 USC §1610 (b)(1), 15 ILM 1391 (1976).

63 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1184.

64 SIA, Sec 13(4), 17 ILM 1126 (1978).

65 European Convention on State Immunity of 1972 (European Convention), ETS 74, 11 ILM 470 (972); See also, *Reinisch A.,* European Court Practice Concerning State Immunity from Enforcement Measures, 17 European Journal of International Law, 2006, 805

66 United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (UN Convention), UN General Assembly, A/59/508, 02/12/2004, Is not in force yet, <https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf> [17.09.2020].

67 Art. 23, European Convention, 11 ILM 478 (1972); Art. 19 (a), UN Convention, UN General Assembly, A/59/508.

68 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1174.

69 28 USC §1611 (b)(2), 15 ILM 1391 (1976).

70 28 USC §1611 (b)(1), 15 ILM 1391 (1976).

The SIA has a similar approach regarding the assets of central banks.[71] As for diplomatic and military property, it is doubtful, whether or not it is possible to waive immunity from execution with respect to that property.[72] Only the Autralian Act states that an express waiver of immunity can be extended to military and diplomatic property.[73] It is remarkable that the UN Convention provides for the waiver of immunity from execution with respect to the military and diplomatic property, as well as the assets belonging to central banks, notwithstanding the fact that they are not considered as commercial property and are not given special protection under the UN Convention.[74]

As a general rule, courts do not enterpret either waiver of immunity from jurisdiction, or conclusion of arbitration agreement, as implicit waiver of immunity from execution.[75]

Express waiver of immunity from execution would promote enforcement of arbitral awards voluntarily.[76] At the same time, it is important that the waiver clause is broad and not aimed specifically at execution in one particular State.[77] To avoid narrow interpretation of a waiver clause, it should cover all types of property, including bank accounts belonging to the State, whether held in the name of diplomatic missions or otherwise. Furthermore, a waiver clause should contain provision regarding the assets of central banks. [78]

Obviously, the terms and conditions of the waiver clause would be subject to negotiations of the parties concerned, however, it is doubtful, that a State would agree on such a waiver clause.[79]

5. The Convention and Georgia

In Georgia the Convention went into force on 6 September 1992, but the Parliament of Georgia has not still adopted an implementing legislation of the Convention. Accordingly, the Law of Georgia on Arbitration is applied to the recognition and enforcement of ICSID awards.[80] The Law on Arbitration lists the grounds for refusal of the recognition and enforcement of arbitral awards[81] that are identical to the grounds for refusal listed in the New York Convention,[82] whereas, the Convention provides for the automatic regime for the recognition and enforcement excluding verification of the

71 SIA, Sec 14(3), 17 ILM 1126 (1978).
72 Ibid, Sec. 16 (1)(2), 17 ILM 1127 (1878).
73 Art. 31(4), The Australian Foreign States Immunity Act of 1985, 25 ILM 722 (1986).
74 Art. 21, UN Convention, 44 ILM 803 (2005).
75 See *Sornarajah M.,* The Settlement of Foreign Investment Dipsutes, Kluwer Law International, 2000, 298-299; *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1175; *Bernini G., Van den Berg A.*, The Enforcement of Arbitral Awards Against States: The Problem of Immunity from Execution, Contemporary Problems in International Arbitration, Lew J. ed., 1987, 364.
76 *Schreuer C. H., Malintoppi L., Reinisch A., Sinclair A.,* The ICSID Convention: A Commentary, 2nd ed., Cambridge, 2009, 1179.
77 Ibid, 1179-80.
78 Ibid, 1180-81.
79 Ibid, 1180.
80 Art., 73^1 of the Law of Georgia on Private International Law, Parliamentary Gazette, 19-20, 29/04/1998.
81 Art. 45 of the Law of Georgia on Arbitration, LHG, 13, 02/07/2009.
82 See Art. 5, New York Convention, 330 UNTS, 1958, 38.

award on the basis of a domestic legislation.[83] Therefore, the Supreme Court of Georgia should abide by the requirements of the Convention and limit itself with verifying the authenticity of the award during the recognition and enforcement proceedings of ICSID awards. However, the Supreme Court of Georgia, the practice of which includes only one case concerning the recognition and enforcement of ICSID awards, violated the above-mentioned basic requirement of the Convention.[84]

In particular, on 8 October 2009 the Supreme Court of Georgia issued an Order[85] granting recognition and enforcement of the arbitral award of 28 February 2008 rendered by the ICSID tribunal in *Ares Internationales S.r.l. and MetalGeo S.r.l. v. Georgia,* imposing on Georgia pecuniary obligation in favour of *Ares Internationales S.r.L and MetalGeo S.r.l.*[86] It is of note that for that period the Law of Georgia on Private Arbitration was still in force, which did not govern recognition and enforcement of arbitral awards rendered outside Georgia at all.[87] Accordingly, the Court based its Order on Articles 68 and 69 of the law of Georgia on Private International Law, Article 68 of which refers to the recognition of foreign judgements and lists the grounds for refusal of them.[88] Consequently, in contrast to Article 54 of the Convention, the Supreme Court of Georgia examined the compliance of the award with the grounds for the recognition of foreign judgements under the domestic legislation, and exceeded its power granted under the Convention.

Eventually, the Court confirmed that the arbitral award "shall be recognized in the territory of Georgia and shall be subject to enforcement."[89] It is remarkable that the Court does not consider either the issue of forcible execution under the Order, or State immunity from execution, which is in compliance with Artcile 54 of the Conevntion.[90] Accordingly, the Court drew a distinction between the stages of recognition and enforcement under Articles 54(1) and (2), and measures of execution under Article 54(3) of the Convention.

As may be seen from the above-mentioned, the court practice on recognition and enforcement of ICSID awards is very scant and it does not refer to the issue of State immunity at all. To date there are only two pending arbitration cases against Georgia registered in the Centre.[91] Eight cases are

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83 Art. 54(2), ICSID Convention, 575 UNTS, 1965, 159.

84 See Order N A-1858-S-53-09 of 8 October 2009 of the Supreme Court of Georgia.

85 Ibid.

86 *Ares Internationales S.r.l. and MetalGeo S.r.l. v. Georgia,* ICSID case ARB/05/23, Award of 28 February 2008. The award is not publicly available upon request of the Parties concerned. For case excerpts from the Tribunal's legal justification See *Yannaca-Small K.,* Case Excerpts, Ares Internationales S.r.l. and MetalGeo S.r.l. v. Georgia*,* (ICSID case ARB/05/23): Introductory Note, ICSID Review – Foreign Investment Law Journal, Vol. 23, Issue 1, 2008, 186-188.

87 *Tsertsvadze G.,* International Arbitration, Tbilisi, 2008, 42; See also, the Law of Georgia on Private Arbitration, Parliamentary Gazette, abolished 19/06/2009.

88 Art., 73^1 of the Law of Georgia on Private International Law, Parliamentary Gazette, 19-20, 29/04/1998; Order N A-1858-S-53-09 of 8 October 2009 of the Supreme Court of Georgia.

89 Order N A-1858-S-53-09 of 8 October 2009 of the Supreme Court of Georgia.

90 Ibid.

91 *Gardabani Holdings B.V., Inter RAO UES PJSC, Telasi JSC v. Government of Georgia, Ministry of Economy and Sustainable Development of Georgia, State Service Bureau Ltd* (ICSID Case No. ADM/18/1 and SCC Case No. V2018/039); *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia* (ICSID Case No. ARB/17/29).

completed.[92] In most ICSID cases against Georgia the decision on discontinuance of arbitration proceedings have been made by the Centre and the dispute have been settled through negotiations between the parties concerned, or the enforcement of ICSID awards have been also settled through negotiations between the parties thereof.[93]

Georgian court practice does not include any case concerning ICSID awards rendered against foreign States sought to be recognized and enforced in the territory of Georgia.

In its turn, Georgian legislation does not provide for a comprehensive law on State immunity contrary to i.e, the United States and the United Kingdom. Furthermore, Georgia is not a party to either the European Convention or the UN Convention. However, Civil Code of Georgia (hereianafter – the Civil Code) sets forth that "State and local self-governing units participate in civil law relations in the same manner as legal entities under private law. In this respect, the powers of the State or of a local self-government shall be exercised by its organs without being legal persons."[94] In civil law relations a State may be also represented by legal entities.[95] In this respect, the status of the legal entity is irrelevant, whether it is a legal entity under private or public law, as pursuant to the Civil Code, a legal entity under public law participates in civil law relations in the same manner as legal entities under private law.[96] Hence, it can be said that Georgian legislation acknowledges the doctrine of restrictive State immunity, which extends State immunity only on the acts performed by the State in the exercise of its public authority.[97] However, there is no State immunity from jurisdiction with respect to the Convention, since a State waives its immunity from jurisdiction by signing the Convention and expressing its consent to the ICSID arbitration.[98]

As for the immunity from execution, the law on Arbitration states that enforcement of arbitral awards are carried out in accordance with the law of Georgia on Enforcement Proceedings (hereinafter – the law on Enforcement Proceedings) on the basis of a court Order.[99] In its turn, the Law on

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92 *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18); *Ares International S.r.l. and MetalGeo S.r.l. v. Georgia* (ICSID Case No. ARB/05/23); *Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15); *Zhinvali Development Ltd. v. Republic of Georgia* (ICSID Case No. ARB/00/1); *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/08/7); *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v. Georgia* (ICSID Case No. ARB/08/19); *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/09/22); *Bidzina Ivanishvili v. Georgia* (ICSID Case No. ARB/12/27).

93 See *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18); *Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15); *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/08/7); *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v. Georgia* (ICSID Case No. ARB/08/19); *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/09/22); *Bidzina Ivanishvili v. Georgia* (ICSID Case No. ARB/12/27).

94 Art. 24(4) of the Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997.

95 *Liluashvili B.,* Recognition and Enforcement of foreign Judgements in Georgia, dissertation, Tbilisi University Press, 2009, 71.

96 Art. 24(3) of the Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997.

97 *Liluashvili B.,* Recognition and Enforcement of foreign Judgements in Georgia, dissertation, Tbilisi University Press, 2009, 71.

98 *Delaume G. R.,* Foreign Sovereign Immunity: Impact on Arbitration, Arbitration Journal, Vol. 38, 1983, 35.

99 Art. 44(4) of the Law of Georgia on Arbitration, LHG, 13, 02/07/2009.

Enforcement Proceedings defines a list of assets that may not be subject to the execution measures,[100] most of which is the property of Georgia that may not be privatized pursuant to the law of Georgia on State Property.[101] State immunity from execution also applies to the property of diplomatic and consular missions in Georgia in accordance with Vienna Conventions.[102]

It should be noted that Georgia has concluded Bilateral Investment Agreements (hearinafter – BIT), which define that the Centre shall consider the disputes between the parties concerned. However, those BITs state that the issue of State immunity from execution shall be governed on the basis of the law of a State where enforcement is sought.[103]

6. Conclusion

The Convention is a considerable mechanism for the recognition and enforcement of arbitral awards rendered against States,[104] which provides for a delocalized, automatic, self-sufficient and self-executing regime for the recognition and enforcement of arbitral awards involving States and private investors, which excludes exercise of a local judicial control over recognition and enforcement of an award.[105]

The Convention is an important step forward in the process of recognition and enforcement of international arbitral awards involving State party, as, contrary to the New York Convention, it offers more favourable scheme to the parties to the dispute. However, the Convention has its Archilles' heel in the form of State immunity from execution. Accordingly, the finality of the enforcement proceedings of ICSID awards depends on the law governing State immunity in the country where enforcement of ICSID awards is sought.[106]

On the basis of the laws governing State immunity and relevant court practice discussed above, it may be said that State immunity from execution is a barrier, which would be quite difficult to overcome if not impossible at all, in particular cases.

Creation of a complex, unified regime in respect of State immunity from execution is problematic taking into account the approaches that various States have regarding the issue, and the solutions are also less politically feasible.[107]

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100 Art. 2^1 of the Law of Georgia on Enforcement Proceedings, LHG, 13(20), 01/05/1999.

101 Art. 4 of the Law of Georgia on State Property, LHG, 48, 09/08/2010.

102 Art. 22(3) of the 1961 Vienna Convention on Diplomatic Relations, 18/04/1961; Art. 31(4) of 1963 Vienna Convention on Consular Relations, 24/04/1963.

103 See for example, Agreement between the Government of Georgia and the Government of the Republic of Finland on the Promotion and Protection of Investments, 24/11/2006; Agreement between Georgia and the Republic of Austria on the Promotion and Protection of Investments, 18/10/2001; For a full list of BITs see, <http://www.justice.gov.ge/Ministry/Index/101> [20.10.2020].

104 *Bjorklund A.K.,* State Immunity and the Enforcement of Investor-State Arbitral Awards, International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, edited by *Binder Ch., Kriebaum U., Wittich St.,* Oxford, 2009, 321.

105 *Delaume G. R.,* Foreign Sovereign Immunity: Impact on Arbitration, Arbitration Journal, Vol. 38, 1983, 35.

106 *Bjorklund A.K.,* State Immunity and the Enforcement of Investor-State Arbitral Awards, International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, edited by *Binder Ch., Kriebaum U., Wittich St.,* Oxford, 2009, 321.

107 Ibid.

Although, States rarely refuse to enforce ICSID awards, the number of such instances may increase due to the absent of effective sanctions against States who deny to perform their international obligations.[108]

There is a significant danger, that States who willingly pay pecuniary obligations imposed on them by the ICSID award, may re-think their approach.[109] Furthermore, by examining the right of diplomatic protection envisaged under the Convention, there is a risk of re-politization of arbitration, since an investor from powerful State would more likely achieve success through diplomatic protection, than the investor from less powerful States.[110]

As a result, State immunity from execution still remains a "last bastion" in the process of execution of international arbitral awards even under the ICSID Convention.[111]

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108 *Bjorklund A. K.,* Symposium: Arbitration and National Courts: Conflict and Cooperation: Sovereign Immunity as a Barrier to the Inforcement of Investor-State Arbitral Awards: the Re-Politicization of International Investment Disputes, American Review of International Arbitration, Vol. 21, 2010, 241.

109 Ibid; See also, *Luke Eric Peterson L. E.*, How many states are not paying awards under investment treaties? Investment Arbitration Reporter, 7/05/2010.

110 *Bjorklund A. K.,* Symposium: Arbitration and National Courts: Conflict and Cooperation: Sovereign Immunity as a Barrier to the Inforcement of Investor-State Arbitral Awards: the Re-Politicization of International Investment Disputes, American Review of International Arbitration, Vol. 21, 2010, 241.

111 Ibid; See also, *Ostrander J.,* The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgement, Berkley Journal of International Law, Vol. 22, 2004, 541-582.

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58. *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia,* ICSID Case No. ARB/17/29, pending.
59. *Gardabani Holdings B.V., Inter RAO UES PJSC, Telasi JSC v. Government of Georgia, Ministry of Economy and Sustainable Development of Georgia, State Service Bureau Ltd,* ICSID Case No. ADM/18/1 and SCC Case No. V2018/039, pending.
60. *Hulley Enterprises Limited (Hulley) v the Russian Federation*, *Yukos Universal Limited (YUL) v the Russian Federation, Veteran Petroleum Limited (VPL) v the Russian Federation,* (Final Awards) PCA Case Nos AA 226, AA227, AA228, 18/07/2014, <https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf> [10.12.2020].
61. *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v. Georgia* ICSID Case No. ARB/08/19, 09/08/2012.
62. *Itera International Energy LLC and Itera Group NV v. Georgia*, ICSID Case No. ARB/08/7, 19/11/2010.
63. *Bidzina Ivanishvili v. Georgia*, ICSID Case No. ARB/12/27, 10/12/2012.
64. *Ioannis Kardassopoulos and Ron Fuchs v Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Decision of the ad hoc Committee on the Stay of Enforcement of the Award, 12/11/2010, <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C63/DC3354_En.pdf> [10.12.2020].
65. *Itera International Energy LLC and Itera Group NV v. Georgia,* ICSID Case No. ARB/09/22, 19/11/2010.
66. *Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15, 03/03/2010.
67. *Sempra Energy International v. Argentine Republic,* ICSID Case No ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award 05/03/2009, <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8/DC991_En.pdf> [10.12.2020].
68. Order N A-1858-S-53-09 of 8 October 2009, Supreme Court of Georgia.
69. *Ares Internationales S.r.l. and MetalGeo S.r.l. v. Georgia,* ICSID case ARB/05/23, 28/02/2008.
70. *Af-Cap, Inc v. Chevron Overseas (Congo) Ltd*, 475 F3d 1080, 1087 (9th Cir. 2007).

71. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 01/09/2006, <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4/DC505_En.pdf> [10.12.2020].
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74. *Mitchell v DR Congo,* ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30/11/2004, 20 ICSID Review – Foreign Investment Law Journal, (2005), 598.
75. *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, 24/01/2003.
76. *SOABI v. Senegal,* ICSID Case No. ARB/82/1, Decision of Cour de Cassation, Paris, 11/06/1991, 2 ICSID Reports, 1994, 341.
77. *SOABI* v. *Senegal*, Cour d'appel, Paris, 05/12/1989, 2 ICSID Reports, 1994, 337.
78. *MINE v. Guinea,* ICSID Case No. ARB/84/4, Interim Order No 1, 12/08/1988, <https://jusmundi.com/ en/document/other/en-maritime-international-nominees-establishment-v-republic-of-guinea-interim-order-1-friday-12th-august-1988> [10.12.2020].
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80. *Benvenuti & Bonfant v Congo,* ICSID Case No. ARB/77/2, Decisions of Tribunal de Grande Instance, Paris, 23/12/1980, 13/01/1981, 1 ICSID Reports, 1993, 368.
81. *Benvenuti &Bonfant v. Congo,* Cour d'appel, Paris, 26/06/1981, 1 ICSID Reports, 369.

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Fostering E-commerce in the light of the Deep and Comprehensive Free Trade Area (DCFTA): A Case Study of Georgia

E-commerce by constituting a revolutionary shift from a traditional business model to an Internet-based economic structure has influenced the way commerce is done in the 21st century. While e-trade promotes an economic enhancement by offering unlimited access to global markets with less operational costs and increased productivity, state legislators find it difficult to align their policies with ever-changing technologies. Although applying laws to e-commerce transactions is to certain degree settled in the developed world, developing countries are considerably lagging behind in their experiences.

To address this deficit, the present paper analyzes the e-commerce structure, its deployment strategies, and the legal implications thereof. It argues that e-commerce serves as a strong basis for macro and micro economic growth and, therefore, it should be thoroughly embraced by third countries[1] especially in the aftermath of the Covid-19 pandemic when the governments are trying to preserve its economy by switching businesses to online platforms. Nevertheless, the adoption and implementation of e-trade should occur in a systemic manner with corresponding legal ramifications at national and international levels. In order to enrich the paper with some practical insights, this research introduces a case-study of Georgia as a part of Eastern Partnership countries. It presents relevant provisions of the Association Agreement concluded between the European Union and Georgia, as an underlying basis for e-commerce deployment in the country. Where applicable, the paper also looks at the national legislation and further uncovers issues that are likely to emerge for Georgia in the course of adopting a new framework.

Key words: *Europeanisation, E-commerce, digital platform, business, Association Agreement, developing countries, Eastern partnership, directive, regulation, GATS, GATT.*

1. Introduction

The hasty proliferation of Information and Communication Technologies (ICT) has given rise to electronic commerce (hereinafter e-commerce), which encourages enterprises and individuals to engage in digital trade. Internet-based economic structure is the new business reality. It eases the

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1 A country that is not a member of the European Union as well as a country or territory whose citizens do not enjoy the European Union right to free movement, as defined in Art. 2(5) of the Regulation (EU) 2016/399 (Schengen Borders Code).

purchase of goods and services from different venues by one click on "add to cart" button followed by instructions upon order confirmation. Notably, this process leads to mutual satisfaction. On the one hand, there is a blissful seller who had set up a company with limited investment (capital, time) or expenditures on physical infrastructure[2] and went global practically overnight avoiding further barriers to trading activities. On the other hand, there is a delighted customer who received the product of his/her choice without spending much time in a physical shop in exhausting ques.

The benefits that e-commerce may confer to economies ranges from unlimited access to purchasers and providers internationally at any given time, increasing business productivity due to the global reach and immediacy of the internet, eliminating financial constraints of having a fixed place of business, to instant payment transactions through offline methods. Such "rewards" ultimately serve as a strong basis for macro and micro economic growth by creating a new playing field for competition where companies are operating with increased efficiency and decreased costs in world markets.[3]

Nevertheless, most developing countries are far from experiencing the e-commerce socio-economic enhancement. Although it is widely accepted that electronic trade (hereafter e-trade) should be embraced by developing countries thoroughly, there are many factors that hinder e-commerce from flourishing.[4] First and foremost, acquiring the benefits is excluded as a result of a huge gap in the e-readiness including adoption rates, implementation and use of e-commerce between developed and developing countries, the latter lagging behind to a considerable extent.[5] The local problems even wide the disparities. The state restrictions, inadequate telecommunication and payment facilities serve as a hindrance to these countries in their quest for economic success via e-trade. Apart from the logistical problems, the lack of a regulatory base is acting as one of central barriers increasing the use of electronic businesses in developing countries. Similar to traditional trade, e-commerce activities also require some standardization, compliance with rules and regulations and guidance by responsible authorities so that enterprises are able to compete globally.

To address this deficit, the paper provides an overview of the legal ramifications for e-commerce deployment in third countries. The potential scope comprises many acts and regulations. This thesis, nonetheless, limits its scope to Georgia from Eastern Partnership countries (EaP)[6] in European Union's (EU) neighborhood. In doing so, the paper scrutinizes the corresponding provisions of Deep and Comprehensive Free Trade Area (DCFTA) which are an integral part of the EU-Georgia Association Agreement (AA)[7] and invites additional comparative analysis with the AAs between the

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2 *Alyoubi A. A.*, E-commerce in Developing Countries and How to Develop them During the Introduction of Modern Systems, 65 ICCMIT, 2015, 479.

3 *Marzangou A., Ghorbani M., Vandi S. R., Khodami S., Saadati S., Aminian M.,* E-commerce in a digital economy, the challenges and advantages, 4 International J. Soc. Sci. & Education, 2014, 6.

4 *Alyoubi A. A.*, E-commerce in Developing Countries and How to Develop Them During the Introduction of Modern Systems, 65 ICCMIT, 2015, 479.

5 Ibid, 482.

6 Eastern Partnership, Communication from the Commission to the European Parliament and to the Council, Brussels, 3/12/2008, COM (2008), 823 final, 13.

7 The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, entering in force on 01/07/2016. Moldova and Ukraine are two more additional countries with DCFTAs with the European Union. Apart

EU and Moldova and Ukraine. Where applicable this paper will assess the domestic legal framework of Georgia concerning e-commerce activities. By the same token, it will also provide an impetus for the future e-commerce legislation harmonization processes in the country. Ergo, the paper is structured to address the following *research questions*: 1. What legal obligations for electronic commerce arrangements does the DCFTA with Georgia impose on a state and what economic benefits may the country get by undertaking these commitments? 2. Which further legal steps are there for Georgia to take in order to develop its e-commerce industry?

2. E-commerce: Digital Opportunities and their Impact in Shaping Developing Countries' Future

The rapid alteration pace of international trading activities in recent years has created difficulties for national governments. They have had to evolve their policies in order to protect their interests in the new economic environment. Although the growth of ICT has provided immense opportunities for states' economies to flourish, it must be noted that opportunities have not been equally shared both legally and economically. Therefore, in legal education nowadays information technology-based trade is the main actor that experiences changes the most and requires more scrutiny from law scholars.[8]

2.1. General Overview of E-commerce and Digital Economy

Increasing use of the e-commerce has forced businesses to become more familiar with the complexities of the digital economy,[9] which converges computation, communication and information. It has played a significant role in transition from industrial based approach to information and services economy, exploiting ideas more than materials.[10] Although the basics for the digitalization routes comprise gaining access to the networks and distributing the Internet, more requirements come up at governmental, societal and economical level while starting trading operations.

Electronic commerce is generally defined by the WTO to cover "the production, distribution, marketing, sale or delivery of goods and services by electronic means."[11] Due to its complex nature, the scholars divide the concept into a narrow and a wide definition. Its narrow meaning involves buying and selling commodities and services through the Internet, while the wide definition includes the interchange of business information, upholding business dealings, and steering business

from Georgia, Moldova and Ukraine, EaP also includes Armenia, Azerbaijan and Belarus. For more information on Eastern Partnership Initiative, see: The European Union External Action, 'Eastern Partnership (EaP)', <https://eeas.europa.eu/diplomatic-network/eastern-partnership/419/eastern-part ner ship_en> [07.05.2020].

8 *Nirmal B. C., Singh R. K.,* Contemporary Issues in International Law, Springer Singapore, 2018, 22.

9 *Kennedy M. D.,* Key Legal Concerns in E-Commerce: The Law Comes to the New Frontier, 2001, 18 T.M. Cooley L. Rev., 18-19.

10 *Gangopadhyay A.,* Managing Business with Electronic Commerce: Issues and Trends, Baltimore, Maryland, USA, 2001; *Gupta J. N. D., Sharma S. K.*, Cyber Shopping and Privacy, Ball State University, USA, 2001, 235-249.

11 WTO Work Programme on Electronic Commerce, WT/ L/274, 01/03/1998.

transactions by means of ICTs.[12] Therefore, any commercial transaction that take place in or is supported by the Internet can be classified as e-commerce.[13]

Above and beyond, the differences should be made on the basis of presence of the enterprises involved in e-trade. At this stage, only a small number of companies, mostly locally concentrated, can be classified as genuine "bricks and mortar" businesses.[14] The majority of the enterprises have integrated e-commerce at different levels of their operations, therefore, constituting "bricks-clicks and mortar" or solely "clicks and mortar"[15] because of their foremost Internet presence, the latter having less in common with traditional models of conducting business.

Throughout the development of e-commerce four main types have been evolved: *Business-to-Consumer (B2C), business-to-business (B2B), consumer-to-consumer (C2C)* and *consumer-to-business (C2B).*[16] Moreover, from time to time new categories are added involving not only private sector, but also public governance. All these models have their unique characteristics, however, discussing them in details goes beyond the scope of this research.

Adding points to general analysis, e-commerce takes on two major roles. Firstly, it is an "effective conduit and aggregator of information" and secondly, the potential substitute to many economic activities. It is fair to say that e-commerce leads to revolution of global trade in many respects, particularly in terms of customer's "personalization." [17] Since the e-commerce captures contact information, the physical presence of the customer makes no difference in terms of individualized offer. Therefore, there are more opportunities for businesses to easily "scale up" than physical retailers in the same circumstances.[18] E-commerce intensifies competition and produces benefits to consumers and retailers by decreasing the costs and prices while reaching out to all chains.[19] The efficient logistics allow entrepreneurs to respond to the market trends promptly. It is simpler to get customer insights through tracking and analytics that give inputs for user experiences, marketing and pricing strategies. Ultimately, the e-commerce businesses result in efficiency enhancements, improvements in asset utilization, reduction in time consumption and better customer services.[20]

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12 *Slavko D.,* Electronic commerce, 4 (2) Economics, 2016, 3.

13 *Ho S., Kauffman J. R., Liang T.,* Internet-based Selling Technology and E-commerce Growth: A Hybrid Growth Theory Approach with Cross-model Inference, 12 Inf Technol Manag, 2010, 409-429.

14 *Kennedy M.* D., Key Legal Concerns in E-Commerce: The Law Comes to the New Frontier, 18 T.M. Cooley L. Rev. 2001, 18-19.

15 *Pappas W. C.*, Comparative U.S. and EU Approaches to E-Commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation, 31 Denv. J. Int'l L. & Pol'y, 2002, 327.

16 Ibid, 326.

17 *Nuray T.,* The Impact of E-commerce on International Trade and Employment, 24 Procedia Social and Behavioral Sciences, 2011, 746.

18 It is due to the fact that this model is not bound by physical limitations like inventory storage, space or office hours; See *Khurana A.,* 'Advantages and Disadvantages of Ecommerce,' (2018), <https://www.thebalancesmb.com/ecommerce-pros-and-cons-1141609> [20.04.2020].

19 *Bernardes E. S.,* The Socio-Economic Impacts of E-commerce: A review of Understanding the Digital Economy, In: *Brynjolfsson E., Kahin B.* (*ed.*), Data, tools, and research, Cambridge, MA: MIT Press, 2000.

20 *Nuray T.,* The Impact of E-commerce on International Trade and Employment, 24 Procedia Social and Behavioral Sciences, 2011, 746.

2.2. Digital Link for Developing Countries: Two Sides of the Same Coin

Through the ability to sell online many businesses have made themselves viable and profitable. Nevertheless, the rapid movement to electronic model of performing commercial functions has its own advantages and disadvantages. As the research focuses on more specific legal issues, this subchapter will only provide a general outlook of e-commerce development gains and barriers.

2.2.1. Development Gains from E-commerce and Digital Platforms

The unique feature of the e-trade for economic prosperity of the state is that business transactions can be made whenever and wherever, nationally or internationally, by use of the Internet.[21] Without any conclusive evidence, the advantages of e-business would indicate that developing countries engaging in e-commerce are on the right track, though, there is still a rocky road to go. As *Mansel* points out, there is a "missing link" for developing economies in the global e-commerce share.[22] Due to the differences in IT infrastructure, the usage and adoption of technologies, the developing world cannot embrace e-commerce opportunities thoroughly.[23]

The gains from "technological leapfrogging" in trade is, firstly, associated with productivity improvement.[24] According to *Mansel*, industrialized countries endure the difficulties in raising already high levels of productivity, whereas developing countries take the advantage of progress.[25] Therefore, e-commerce tends to eliminate the gaps in productivity and output between these two actors in world economy. However, this result is hard to achieve without transitional period for adoption and learning of ICTs,[26] in as much as developing countries will need to circumvent the "highly predictable stages of development."[27]

Secondly, the most important consequence that developing countries' presence causes in the global trade order is the "price equalization effect."[28] This particular economic theory by *Samuelson* (1948) suggests that when free trade among countries equalizes the output of goods, then the prices of

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21 WTO Secretariat highlights potential trade gains from electronic commerce, See WTO Declaration on Global Economic Commerce, WT/MIN 02/12/1998.

22 *Mansel R.,* Digital Opportunities and The Missing Link for Developing Countries, 17 (2) Oxford Review of Economic Policy, 2001, 284.

23 *Molla A., Heeks R.,* Exploring E-Commerce Benefits for Businesses in a Developing Country, 23 (2) The Information Society, 2007, 95-108.

24 *Bhagavan M. R.,* Technological Leapfrogging by Developing Countries, Encyclopedia of Life Support Systems, see: *Reddy P. (ed.),* Globalization of Technology, EOLSS Publishers Co Ltd., Research Policy Institute, Lund University, Sweden, 2009.

25 *Mansel R.,* Digital Opportunities and The Missing Link for Developing Countries, 17 (2) Oxford Review of Economic Policy, 2001, 284.

26 *Steinmueller W. E.,* Possibilities of Leapfrogging to Higher Value-Added Production for Developing Countries as a Result of New Information and Communication Technologies, 140 (2) International Labour Review, 2001.

27 *Rostow, W. W. (ed.),* The Stages of Economic Growth, Cambridge University Press, 1962, 30.

28 *Samuelson P. A.*, International Trade and the Equalization of Factor Prices, LVIII Economic Journal, 1948 163-184.

identical factors of production (e.g. labour, capital) will also be equalized among those countries. Following this theory *Mansel* asserts that the long-run equilibrium arising from international trade will lead to the wage rates equalization between industrialized (high wage) and developing (low-wage) countries.[29] It does not necessarily mean that industrialized countries will suffer and wages will fall, but developing countries will try to "bid up" because of a high demand on their services.

Losing personal touch with physical retailers constitutes the main disadvantage of e-commerce. E-commerce creates new challenges and competition for regional retailers when trading activities are outsourced from a region. This can create the "social isolation" leading to less trading activities performed by the people in their region.[30] This makes clear that domestic businesses may struggle to survive in the highly competitive market. Moreover, security and credit card fraud also present huge risks. E-commerce requires fully functioning "reverse logistics. Delaying product deliveries, relying solely on websites, limiting availability of merchandise (i.e. some goods cannot be sold online) and need of permanent internet access are also seen as obstacles for e-commerce deployment, especially for countries lacking e-infrastructure and investments in e-learning.

Therefore, developing countries should aim to avoid unjustified trade barriers. In particular, they should address the lack of trust in e-trade, payment system disparities, logistical and infrastructural problems, digitalization implications on taxation systems and lack of regulations at the national and international level. Thus, developing countries will have to offer sufficient protection and structure for e-businesses and consumers to compete on both local and cross-border levels.

3. Legal Framework for Fostering E-commerce Activities in Third Countries

Living in the era in which e-commerce continues to proliferate rapidly has been quite challenging for state legislators willing to catch up with the constantly changing technology.[31] A new wave of commerce facilitated by ICTs has transformed the global economic shares by enabling SMEs from developing world to engage in universal trade without any footprint on the territory together.[32] In order to fully benefit from global e-commerce industry, developing countries will, however, need to cope with certain legal challenges.

This chapter will provide an overview of global e-commerce regulations with the main focus on the EU and World Trade Organization (WTO) endeavors. More importantly, it will assess Georgia's current e-commerce legal framework in the light of EU-Georgia AA and outline some further developments.

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29 *Mansel R.,* Digital Opportunities and The Missing Link for Developing Countries, 17 (2) Oxford Review of Economic Policy, 2001, 284.

30 *Gershuny J.,* Changing Times. Work and Leisure in Postindustrial society, 2000, Oxford University Press, 1.

31 *Cirstea A.,* Implications of Electronic Commerce Law in Romania, 3 (1), Perspectives of Business Law Journal, 2014, 139.

32 *Bieron B., Usman A.,* Regulating E-commerce through International Policy: Understanding the International Trade Law Issues of E-commerce, 46 (3) Journal of World Trade, 2012, 545.

3.1. Global E-commerce Regulation in a Nutshell

The emergence of e-commerce has been perceived to be linked with the development of the Internet. However, the first roots of shifting from traditional commerce can be seen in the 20th century in the US. [33] The innovative approaches evolved by the US' enterprises (American Airlines launched a control system of sold, canceled and free seats on flights, the First Interstate Bank in the US started to adopt a Home Banking system operated by personal computers and the first travel reservation system was introduced by Sabre Travel Network in 1985) stimulated the legislative talks that are until now under discussion.

3.1.1. The EU Approach to Regulate E-commerce: From Guiding Principles to Legal Acts and Comparative Analysis with US E-trade Arrangements

Trade policies governing e-commerce transactions vary from state to state. The goal is to reach the ideal form of consumer protection and enhance the trust in this new method of trade that will increase the amount of e-commerce transactions and promote economic growth.[34] Since many vendors use the Internet as a mean of avoiding day to day regulations and laws, it is crucial to adopt global and state-oriented e-commerce legal framework.

Today, most countries, influenced by the US, are attempting to implement *"laissez-faire"* philosophy in domestic e-commerce regulatory framework. This theory constitutes an economic system in which transactions between private parties are free from governmental intervention.[35] According to *Magaziner*, they build up their national framework on the basis of the following principles: (1) The private sector should be the driving force; (2) Governments should avoid unjustified and undue restrictions on e-commerce; (3) The only interference from the government is allowed if it aims to support and enforce a predictable, consistent, and simple legal environment for e-commerce; (4) Facilitating domestic e-commerce on a global level.[36] All these criteria allow the market to generate innovation, broaden variety of services and push engagement in e-trade . Further to this, the main goal is to exclude outdated provisions which do not accompany the technological evolution.[37]

The EU has been the main actor in the global e-commerce regulatory arena since 1988 when the Commission launched TEDIS (Trade Electronic Data Interchange Systems). It aimed at promulgating an appropriate level of protection for the increased use of Electronic Data Interchange (EDI). Two

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33 *Capisizu L. A.,* EU acquis on E-commerce, Challenges of the Knowledge Society, Internetul, Bucureşti: Prietenii Cartii, 2008, 379.

34 *Felicity G., Berova N.,* The Rule of Online Law: Treating Data Like the Sale of Goods: Lessons for the Internet from OECD and CSIG and Sacking Google as the Regulator, 30 Computer Law and Security Review, 2014, 473.

35 *Reidenberg J. R.,* E-Commerce and Trans-Atlantic Privacy, 38 Hous. L. Rev., 2001, 717-718.

36 *Magaziner I. C.,* Creating a Framework for Global Electronic Commerce, 1997, <http://www.pff.org/issues-pubs/futureinsights/fi6.1globaleconomiccommerce.html> [05.05.2020].

37 Ibid.

e-commerce key directives are: Directive 1999/93/EC[38] on electronic signatures and Directive 2000/31/EC[39] on e-commerce. In aftermath, the Member States (MS) started to create the normative base on a domestic level so that similar situations in the Union would not be dealt differently. The key objective of the EU regulation was to establish an integrated European internal market for e-commerce.[40] The regulations concerning safety standards, labeling, and liability for goods, by contrast, were left to MS.[41]

Since 2015, the EU works on a new policy strategy called "Digital Single Market (DSM)"in which e-commerce is one of the cornerstones. A DSM, consisting of sixteen specific initiatives, [42] ensures conditions of fair competition, consumer, copyright and data protection, as well as, removing geo-blocking for online activities.[43] The main goal of legislative bodies is to foster digital services and reveal the companies which are hiding behind websites in an attempt to escape their responsibilities.[44] Secondly, official statistics show that the DSM builds opportunities for startups and allows existing companies to reach the market of over 500 million people.[45] Therefore, the EU intensively pushes to realize the full potential of e-commerce by revising Payment Services Directive[46] and consumer protection rules.[47] It also adopts new rules on cross-border parcel delivery services and unjustified geo-blocking. Lastly, it will introduce new VAT provisions for online sales of goods and services entering in force in 2021.

While the goal can be different, as a free-market economy, the US minimalistic and hands-off approach to regulate e-commerce, parallel to the desires of the EU. [48] The first attempts to administer the e-trade in the US was hard-pressed by the corporate powers that is now known as "big tech's influence." This influence was later on reflected on the WTO agenda.

In the absence of any substantive outcomes from the US and later on the EU pressure on WTO, it should also be noted that both the EU and US are now inclined to manage the cross-border

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38 Council Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures [1999] OJ L 013 19/01/2000.

39 Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, [2000] OJ L 178 17/7/2000.

40 Ibid, 7-9.

41 *Pappas W. C.,* Comparative U.S. and EU Approaches to E-Commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation, 31 Denv. J. Int'l L. & Pol'y, 2002, 331.

42 Ibid.

43 Shaping the Digital Single Market, <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market#Moredocuments> [05.05.2020].

44 *Cirstea A.,* Implications of Electronic Commerce Law in Romania, 3 (1) Perspectives of Business Law Journal, 2014, 140.

45 Ibid.

46 Council Directive 2007/64/EC of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, [2007] OJ L 319, 5.12.2007.

47 See, New EU Rules on E-commerce, <https://ec.europa.eu/digital-single-market/en/new-eu-rules-e-commerce> [05.05.2020].

48 *Eichengreen B.,* Globalizing Capital: A History of the International Monetary System, 2nd ed., Princeton University Press, 1996.

e-commerce transactions through free trade agreements (FTA)[49] containing provisions on e-commerce. These provisions largely transpose the general principles of trade agreements (e.g. removing tariffs, national treatment and most-favored nation (MFN) principles) to the realm of e-commerce.[50] By the same token, they also reflect obligations on legal harmonization in their neighborhoods with the general focus on "important protections for the digital economy (e.g. no geo-blocking, digital taxes, transparency in regulation, and free flow of information)." One of the apparent examples of regulating e-commerce through FTA chapters are the DCFTA provisions on e-commerce between the EU and EaP countries, Georgia, Ukraine and Moldova, the US-Korea and US- Jordan FTAs (one of the first containing e-commerce chapter).[51]

Although some similarities between the EU and the US approaches may exist, it is notable that the EU is more concerned with internal market, consumer protections and MS sovereignty,[52] while the US tries to get hegemonic position in the international e-commerce market.[53]

3.1.2. UN and WTO on E-commerce Regulation

From the viewpoint of multilateral arrangements on e-commerce, the responsible bodies have been struggling a lot to regulate the area. The main hardships in this regard are associated with the aspiration of states to keep the Internet open, conflicting opinions on the regulatory framework and the overall fear of creating barriers to trade.[54] Nevertheless, the move towards a unified e-commerce structure must be noted. A substantial contribution to the development of global e-commerce regulation was made in 1997 by the International Chamber of Commerce adopting the General Usage for International Digitally Ensured Commerce (GUIDEC) - specific guidelines for ensuring the trustworthiness of digital transactions done via the Internet.[55] Another clear example is the United Nations (UN) Convention on the Use of Electronic Communications in International Contracts (CUECIC) in 2005, however, it is not very powerful as only eighteen states are parties to the convention.[56] It should be noted that the UNCITRAL Model laws on Electronic Commerce[57] and

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49 *Bieron B., Usman A.,* Regulating E-commerce through International Policy: Understanding the International Trade Law Issues of E-commerce,' 46 (3) Journal of World Trade, 2012, 547-548.

50 The Digital 2 Dozen, Office of the United States Trade Representative, <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/digital-2-dozen> [05.05.2020].

51 *Chander A.,* Exporting DMCA Lockouts, 54 Clev. St. L. Rev. 205, 2006, 212.

52 *Trimble M.,* Geo-blocking, Technical Standards and the Law, Scholarly Works Paper, № 947, 2016, 55.

53 *Capisizu L. A.,* EU acquis on E-commerce, Challenges of the Knowledge Society, Internetul, Bucureşti: Prietenii Cartii, 2008, 379.

54 *Bieron B., Usman A.,* Regulating E-commerce through International Policy: Understanding the International Trade Law Issues of E-commerce, 46 (3) Journal of World Trade, 2012, 546.

55 *Capisizu L. A.,* EU acquis on E-commerce, Challenges of the Knowledge Society, Internetul, Bucureşti: Prietenii Cartii, 2008, 380.

56 *Rowley K. A.,* Meanwhile, on the UNCITRAL Front, Commercial Law, (2010) <http://ucclaw.blog-spot.com/2010/06/meanwhile-on-uncitral-front.html> [05.05.2020].

57 UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998.

Signatures[58] seem to be "popular" among the states across the globe to create the basic regulatory standards on national levels.

Currently, the WTO is in quest of including e-commerce provision in agreements during the Doha Round, but due to the slow progress of Doha Development Agenda (DDA) the WTO Members have not been able to reach any fruitful decisions on the substantive aspects of e-commerce regulation.[59] Even though, e-commerce is paramount of the "new issues" now scheduled for WTO negotiations, it faces some resistance from majority of developing countries.[60] They assert that before accommodating new issues, the asymmetries in the existing WTO agreements need to be addressed.

Historically, the need for the e-commerce regulation emerged within the WTO shortly after its creation. As some members were already able to see the upcoming digital revolution, the first efforts to regulate e-commerce are rooted in the second Ministerial Conference in 1998, when the Members adopted the "Declaration on Global Electronic Commerce". The Declaration has recognized the "new opportunities for trade" and referred to the General Council to "establish a comprehensive work programme to examine all trade-related issues for global electronic commerce". [61]

Nonetheless, it is up until now controversial whether electronic transmissions should fall under General Agreement on Tariffs and Trade (GATT) or General Agreement on Trade in Services (GATS) or there should be a new agreement amending the missing link for e-commerce in WTO system. Theoretically, all options have their right to exist, however, they may render different outcomes, especially for developing countries.[62] If e-commerce is solely governed by GATT, it is likely to end up by WTO Members commiting themselves to realize free trade in all transactions conducted via Internet, therefore, impose National treatment and Most-favoured Nations (MFN) treatment obligations on themselves and cannot discriminate against Internet imports by introducing domestic taxes. On the opposite side, a search for an entirely new agreement might be quite demanding considering how difficult it is to reach multilateral decisions in WTO. Further to this, time constrains should also be considered: it will take too long to start negotiations and there will be no immediate effect on regulations. And, lastly, the rules to regulate e-commerce can still be found either in GATT or GATS.[63]

The best solution lies in applying GATS to all Internet trade. Firstly, in the absence of the new disciplines, the main provisions of the e-commerce under the existing WTO legal framework can be found in the GATS Telecom Annex, which sets out the basic rights of access to and use of public

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58 UNCITRAL Model Law on electronic signatures (2001).

59 *Gao H.,* Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation, 45 (1) Legal Issues of Economic Integration, 2018, 50.

60 *Kelsey J.,* How a TPP-Style E-commerce Outcome in the WTO would Endanger the Development Dimension of the GATS Acquis (and Potentially the WTO), 21 Journal of International Economic Law, 2018, 274.

61 WTO Declaration on Global Electronic Commerce, WT/MIN (98)/DEC/2, [1998].

62 *Panagariya A.,* E-Commerce, WTO and Developing Countries, 2 Policy Issues in International Trade and Commodities Study Series, Geneva, 2000, 3.

63 Ibid, 3.

telecommunications transport networks and services by e-commerce suppliers.[64] Secondly, while some activities could arguably be classified as trading in goods according to "technology-neutrality" principle, [65] mostly they are similar to trade in services.[66] Therefore, the adoption of the "across-the-board definition" will automatically minimize the possibility of disputes about the classification differences (as intangible goods or as services) of electronic transmissions among WTO Member. Thirdly, the choice of GATS is beneficial in terms of liberalization. The obligations under GATS follow "positive listing" approach, meaning that WTO Members only commit themselves if they have included a given e-commerce activity in their schedule of specific commitments. Finally, the legitimate policy reasons, "General Exceptions" clause enables a WTO Member to deviate from trade obligations. [67] The latter is beneficial to developing countries that may have different concerns as highly industrialized states.

Howbeit, applying GATS to all Internet trade also raises the efficiency shortcomings and challenges from the regulatory outlook.[68] To start with the classification issues, the first problem arises in terms of finding a place for e-commerce activities in the commitment schedule. Classification lists are based on the United Nations Provisional Central Product Classification (CPCprov),[69] which is quite obsolete for electronic transmissions to be involved in it.

As far as obligations under schedules concern, apart from the commitments for applying MFN principle, the WTO Member may choose the level of market access[70] and national treatment[71] that wishes to introduce for other Members. These commitments are subject to sector and mode specific limitations. In this regard, the first problem is ambiguity in sectoral coverage. E-commerce activities are predominantly inclined to interpretive uncertainties due to the classification difficulties mentioned above.[72] The second problem is associated with modes of supply, which is very difficult to distinguish for e-commerce activities in cyberspace.[73] The solution to this may be seen either in a set of

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64 WTO, Annex on Telecommunications, in General Agreement on Trade in Services, [1994], Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results of The Uruguay Round of Multilateral Trade Negotiations 284, 1999, 1869 U.N.T.S. 183, 33 I.L.M. 1167, 1994.

65 The principle of technological neutrality states that provisions related to trade in services do not distinguish between the different technological means through which a service may be supplied. The GATS is in this sense technologically neutral. See WTO Council for Trade in Services, Work Program on Electronic Commerce: Progress Report to the General Council, adopted by the Council for Trade in Services on 19 July 1999, S/L/74, 27 July 1999, at para. 4.

66 *Gao H.,* Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation, 45 (1) Legal Issues of Economic Integration, 2018, 51.

67 GATS, art. XVI: Market Access; GATS, art. XIV.

68 *Willemyns I.,* The GATS (in)consistency of Barriers to Digital Services Trade, European Society of International Law (ESIL) Conference, UK, 2018, 4.

69 United Nations, Provisional Central Product Classification, 1991.

70 GATS, art. XVI.1.

71 GATS, art. XVII.1.

72 *Gao H.,* Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation, 45 (1) Legal Issues of Economic Integration, 2018, 55.

73 *Wunsch-Vincent S., Hold A.,* 'Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral Versus Preferential Trade Negotiations,' in: *Burri M., Cottier T. (ed.)* Trade Governance in the Digital Age: World Trade Forum, Cambridge University Press, 2012, 182.

scheduling guidelines for e-commerce activities, avoiding future complications, or forming a set of minimum regulatory standards for e-trade. By suggesting the latter, Telecommunications Reference Paper[74] can be seen as a good model.

To compound the entire puzzle around the WTO e-commerce regulations, the current structure does not perfectly match the e-trade challenges. However, there is a great potential in the system to keep up with the regulatory tasks. If the WTO is still striving to be the leader on global e-commerce regulatory platform, it needs to come up with new approaches dealing with key issues such as classifications, commitments and exceptions. Before making the shift happen, the solution that is seen to achieve uniformity in this global reality lies in bilateral and multilateral FTAs, which lead states to adopt e-commerce guiding principles for the facilitation of trade.[75] However, it is crucial for the WTO, as an international trade agenda setter, to strike a fair balance between the states interests and the deployment of e-commerce regulations.

3.2. The EU's Eastern Neighborhood: Georgia and E-commerce Regulation

It is no longer a fresh word that the EU's interests to build "a common area of shared democracy, prosperity, stability and increased cooperation"[76] go beyond the physical borders of its MS. This tendency became particularly remarkable in the aftermath of 2004 with so-called "big-bang" enlargement.[77] It served as an impetus to pursue the revitalized cooperation between the EU and its eastern neighborhood: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. However, due to political reasons,[78] only three out of six EU's eastern target countries reached the pre-final stage and in 2014 the EU concluded Association Agreements with Georgia, Moldova and Ukraine.[79] These AAs are unique in their legal nature for the countries mentioned, in as much as they create rights and obligations enabling the parties to benefit from the EU internal market regulatory regime, enjoy free trade arrangements (e.g. elimination of customs duties on export and import)[80] and trade-related institutional improvements.

Standing at the crossroads of accession to the EU, Georgia tries to succeed in the EU's conditionality policy and to follow the legal obligations articulated in the AA. However, there is still a long way to go. This particular subchapter does not aim to scrutinize the general trade arrangements

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74 WTO, Negotiating Group on Basic Telecommunications, Telecommunications Services: Reference 24/04/1996.

75 *Weber H. R.,* International E-Trade, 41 Intl. L. 51, 2007, 845.

76 Eastern Partnership, <https://eeas.europa.eu/diplomatic-network/eastern-partnership/419/eastern-partnership_en> [05.05.2020]. The 2004 enlargement of the EU was the largest single expansion of the European Union when the accession of the following countries, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, extensively increased the territorial scope and population of the EU.

77 Ibid.

78 *Verdun A., Chira G.,* The Eastern Partnership: The burial ground of enlargement hopes?, 9(4) Comparative European Politics, United Kingdom, 2011, 448–466.

79 *Gylfason Th., Artínez-Zarzoso I., Magnus Wijkman P.,* Free Trade Agreements, Institutions and The Exports of Eastern Partnership Countries, 53 JCMS, 2015, 1215.

80 Article 28 and Article 29 of the AA.

and its implementation in domestic legal framework. Rather, it will narrow down its focus to Georgia's legal obligations and future prospects with respect to e-commerce regulations under DCFTA.[81]

3.2.1. Digital Environment in Georgia: "Matching" or "Missing" Link?

In the aftermath of the AA's very ambitious and far-reaching plans have been set out in Georgia, according to which both parties have to discover the untapped areas of cooperation, ensure mutual benefits and deepen the level of integration.[82] However, it is arguable whether Georgia is in the position to acquire all the benefits from digitalization ranging from economic prosperity to creation of a competitive environment for both public and private sectors.[83]

To start with the recent past, the 2000s were challenging for Georgia a former Soviet country, which had to fight for its independence and statehood. No one could have dreamed of creating even basics of modern ICT infrastructure in the country due to the limited national resources and growing social problems. However, now the developing pace of Georgia's digitization has been remarkable.[84] Recently, Georgia has introduced the Trade Facilitation System (TFS). It ensures the electronic flow of information among chief players in international trade (i.e. traders, customs brokers, freight forwarders, shipping lines and other) through a single-entry point.[85]

At this stage it should be noted that the electronic communication market in Georgia is quite attractive and diverse. This is clear from the amount of Internet-based companies, their revenues and effectiveness, Internet users, numbers of websites and applications as well as e-commerce income for Georgian enterprises. According to the survey, the companies in Georgian market are very much open to offer innovative approaches in terms of services, supply, logistics, distribution and supporting activities like purchase, accounting and calculating systems.[86] There are a high number of entrepreneurial activities taking place in the digital space of the country. More companies are introducing new technologies for popularization of their products (e.g. new advertising methods, image brands, customer cards, etc.) and a new medium for product installation and selling (e.g. franchises or distribution certificates, exclusive retail selling, direct sales, new approaches to product presentation, etc.).[87]

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81 According to Article 7 of the Law of Georgia on 'Normative Acts' and Article 6 of the Law of Georgia on International Treaties,' the AA becomes an inherent part of the Georgian legal system as duly ratified by the Parliament of Georgia, 4. Law of Georgia on Normative Acts, LHG, № 33, 22/10/2009; 3. Law of Georgia on International Treaties, Parliamentary Gazette, 44, 16/10/1997.

82 *Andguladze A.,* Digital Economy: New Opportunity for a Greater Integration with European Union, ISFED, Tbilisi, 2007, 1 (in Georgian).

83 Ibid.

84 *Abuladze R., Gigauri I.,* Ecosystem of Digital Economy in Georgia, Tbilisi, 2017, 5-9 (in Georgian).

85 Ibid. This system mainly concerns the information about logistics, shipping and transport industries.

86 *Abuladze R., Gigauri I.,* Ecosystem of Digital Economy in Georgia, Tbilisi, 2017, 3 (in Georgian).

87 National Statistics Office of Georgia, <http://www.geostat.ge/?action=page&p_id=2290&lang=geo> [01. 04.2020].

All the above, indicates that there can be a "matching link" for Georgia to benefit from prospects of digital economy. The infrastructural developments undertaken by the country, innovative approaches and the e-readiness of the enterprises show a huge potential to develop Internet-based economic system which is promising in terms of strengthening the microeconomic environment and improving country's competitiveness in global market.

3.2.2. Georgia's Path in E-commerce Regulation

The pressure on the Georgian legislator to regulate e-commerce has reached particularly higher levels in the aftermath of the AA. Specifically, the legal obligations on e-commerce that stem from the Art. 76 of Chapter 6 of the DCFTA. While the latter is regarded as a general provision that stipulates the need of "cooperation on electronic commerce,"[88] Section 6 of the Agreement requires a higher degree of legal approximation promoting Georgia's involvement in online trade activities.[89] As both, the EU and Georgia, recognize the boost that e-commerce provides to trade, Georgia is attempting to fulfil its legal obligations. However, it is very hard for a country with no technical expertise in e-commerce to create a framework without any external support. Therefore, harmonization of the national legislation with the 'EU *acquis'* play an important role in setting today's e-commerce legal agenda in Georgia.[90]

3.2.2.1. Zooming in on E-commerce Legal Obligations under DCFTA: Overview of the National Framework

The legal approximation is one of the cornerstones of the DCFTA. Already in 2006 Georgia has "celebrated" a fundamental and unilateral liberalization of its external trade policies in 2006.[91] Therefore, the provisional application of DCFTA is merely perceived as the EU's action to catch up and finalize the free trade area with its tariff liberalization for Georgia.

According to "Harmonization of the digital markets in the Eastern Partnership" study report, the protection of consumer rights and e-logistics represent the weakest areas in the e-commerce implementation process in Georgia.[92] Moreover, the considerably less engagement of domestic enterprises in this particular sector in comparison to foreign-owned companies creates an impression

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88 Article 76 (1) of the EU-Georgia AA: "The Parties, reaffirming their respective commitments under the WTO Agreement hereby lay down the necessary arrangements for the progressive reciprocal liberalization of establishment and trade in services and for cooperation on electronic commerce."

89 Article 127 (1) of the EU-Georgia AA: "The Parties, recognizing that electronic commerce increases trade opportunities in many sectors, agree to promote the development of electronic commerce between them, in particular by cooperating on the issues raised by electronic commerce under the provisions of this Chapter."

90 *Andguladze A.,* Digital Economy: New Opportunity for a Greater Integration with European Union, ISFED, 2017, 5.

91 *Emerson M., Kovziridze T. (eds.),* Deepening EU-Georgian Relations What Why and how? Second edition, Centre for European Policy Studies, Rowman & Littlefield International, Brussels, 2016, 31.

92 Harmonisation of the Digital Markets in the Eastern Partnership, Study Report, 2015, see <https://europa.eu/capacity4dev/hiqstep/document/harmonisation-digital-markets-eastern-partnership-study-report> [05/05/2020].

that today Georgia is not able to export its digital services in the EU market.[93] Therefore, for the time being, an update to the DCFTA Services Annex XIV to contain more specific components of DSM legislation like e-commerce is not envisaged.[94] However, it does not prevent the country from the obligations under DCFTA to address the e-commerce regulatory shortcomings domestically according to international standards. Even more, Georgia's first target should be the enactment of attractive and business-supportive e-commerce laws that will ultimately lead to the development of exporting opportunities.

The Articles 127-128 of the EU-Georgia AA impose obligations on the state in regard to its e-commerce legal framework. Firstly, paragraph 127 (1) expects from the parties that they promote electronic commerce as a mean of trade. Secondly, "development of electronic commerce must be compatible with the international standards" with the special emphasis on data protection (Art 127 (2)). Although, the agreement does not explicitly refer to the implementation of the corresponding EU e-commerce regulations and directives, the process of Europeanization[95] in Georgia is irreversible. Therefore, paper argues that "international standards" should indicate on the WTO provisions (GATS as discussed above) and the EU legal *acquis*.

The first legal document, in which these basic EU principles are applied, is the *Law of Georgia on Electronic Documents and Electronic Trust Services* adopted in 2017. It "sets forth the legal grounds for using electronic documents, electronic signatures and electronic trust services."[96] The Georgian legislator tried to create a mixture of Electronic Signatures Directive 1999/93/EC and Regulation (EU) No 910/2014 (i.e. trust services for electronic transactions)[97] and at the same time followed the UNCITRAL Model Law on Electronic Signatures (2001) with country-specific modifications. Therefore, the law of Georgia does not contain provisions that are relevant to the EU internal market,[98] issues concerning the MS recognition and liability. All these significantly narrows down its scope of application. While the EU may have an all-embracing and complex approach to regulating trust services for electronic transactions, Georgia is introducing basic principles and does not provide detailed rules. Therefore, it leaves ample room for practice to complement further improvements.

Beyond that, up until now there is only a pending version of the draft law awaiting for the detailed scrutiny and approval by competent authorities. The idea to adopt an e-commerce framework according to the UNCITRAL Model Law on Electronic Commerce and the EU Directive on electronic

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93 *Emerson M., Kovziridze T.* (*eds.*), Deepening EU-Georgian Relations What Why and how? Second edition, Centre for European Policy Studies, Rowman & Littlefield International, Brussels, 2016, 84.

94 Ibid, 85.

95 *Radaeli* defines Europeanization as 'the incorporation of formal and informal rules, procedures, policy paradigms, styles, ways of doing things, shared beliefs and norms, which are first defined and consolidated in the making of EU public policy.' *Featherstone K., Radaelli, C.,* The Politics of Europeanization, Oxford University Press, 2006, 27.

96 Law of Georgia on Electronic Documents and Electronic Trust Services, LHG, № 639-IIS, 21/04/2017, Article 1(1).

97 Council Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures [1999] OJ L 013 19/01/2000.

98 No market access and internal market principles (article 3 and 4 of the directive).

commerce was firstly introduced by the MoESD and emphasized on e-commerce advantages, namely, simplified reach to the global market conferred to SMEs and increased competitiveness in the range of products and services. In absence of the consolidated version of the law, it is hard to assess its scope of application, legal impacts or shortcomings.

Yet there are number of unresolved issues. For instance, what about consumer and data protection, intellectual property rights (IPR), the basic principles of electronic contracts, legal rights and obligations, e-logistics? What happens in the case of a dispute between the consumer and these digital platforms? How can an average person protect themselves from an abuse of power by those huge vendors? Should the basic principles of contract law apply, or should there be a *lex specialis* governing the e-commerce transactions? Although there is no simple answer to these questions, it is supposed that the basic contractual norms will be governing this type of disputes. Nonetheless, the state should start to fulfil its positive obligation and adopt the legislation which will increase consumer's trust and ensure full enjoyment of fundamental rights as soon as possible. This article looks at the legislative changes optimistically due to the fact that it is drafted in the ambit of the EU Directive capturing the best experiences of the EU Member States. However, a simple 'copy-paste' approach of harmonising national law does not suffice for a successful legal harmonisation. It is crucial that the national circumstances, corresponding markets and participants are taken into consideration when transposing the Directive into national order.[99]

Bringing Georgia's e-commerce legislation in line with the EU standards is an ambitious project. Speaking of similar examples, Moldova has passed the law on e-commerce already in 2004 regulating the main aspects of the Internet transactions and introducing the electronic contracts.[100] Ukraine has enacted the final version of e-commerce law in 2015 that fully legalized e-contracts and facilitated the use of e-money.[101] Accordingly it is clear, that both Moldova and Ukraine have adopted the e-commerce laws before concluding the AAs with the EU. However, the DCFTAs still contain e-commerce facilitation and its regulatory aspects, which are equivalent to the provisions of Georgia's DCFTA with only one exception. The agreements with Ukraine and Moldova explicitly refer to the obligation of approximation with the EU e-commerce directives. [102] Therefore, it can be assumed that while Georgia is drafting its legislation according to the EU legal *acquis* on e-commerce, Moldova and Ukraine have to rearrange already well-established framework. This may rise more concerns from the market participants about their already well-established business operations.[103]

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99 See *Samkharadze I.,* Europeanization of Georgia: The Key Legal Aspects of EU Membership, 5 J. Justice and Law, 2015, 41.

100 Moldova E-commerce, <https://www.export.gov/article?id=Moldova-eCommerce> [13.04.2020].

101 kraine Enacts E-Commerce Law, Legalizes E-Contracts <https://www.bna.com/ukraine-enacts-n5798205 9078/> [05.05.2020].

102 Article 139, 140 of the EU-Ukraine AA (DCFTA); Article 99 (c), 202 (1), 254, 255 of EU-Moldova AA (DCFTA). Article 139, 140 of the EU-Ukraine AA (p. 1741); EU-Moldova AA (p. 410-411).

103 Legal Issues with Regard to Business Operations and Investment in Ukraine, OECD Policy Brief, 2004 <https://www.oecd.org/countries/ukraine/34514482.pdf> [05.05.2020]; *Emerson M., Cenuşa D. (eds.),* Deepening EU-Moldovan Relations What Why and how? 2nd ed., Centre for European Policy Studies, Rowman & Littlefield International, Brussels, 2016.

It is fair to conclude that fully structured e-commerce framework cannot be reached solely by providing and improving the above-mentioned regulations. As e-commerce activities are highly interlinked with other disciplines, it is crucial to address deficiencies in specialized legal fields. Therefore, it is recommended that Georgia takes further steps towards revising and adopting legal outlook with regard to custom's regulations (e.g. procedures and duties on returned goods), IP law (e.g. businesses subject to IP infringements, copyrights, domain grabbing), data protection (e.g. cross-border data transfer, customer protection), sales law and consumer information principles (e.g. product labeling, website content rules). Most importantly, Georgia should introduce also digital economy taxation regime, that will facilitate the country to expand economically and legally.

5. Conclusion

This article illuminates that the rise of the digital economy has added further challenges to state legislators in developing countries. However, the huge potential that e-commerce offers to those fragile economies, undoubtedly, prevails over any challenge. This paper advanced the idea that building up sound policies and strategies on e-commerce deployment for a better economic environment is of vital importance. It is believed to benefit not only a state or two, but the whole international community. It will particularly facilitate e-businesses in reaching the global markets, expanding their activities and diversifying the production range.

By the same token, this paper concluded that there are a number of factors that act as a hindrance to e-commerce deployment in developing countries. *Inter alia,* infrastructural, logistical and regulatory barriers take the lead, the latter being scrutinized thoroughly in the course of the paper. Although the ongoing changes in legal environments are promising, the WTO finds it complicated to accommodate all the needs in its e-commerce structure. However, as an international trade agenda-setter, the WTO is under the obligation to address this deficit and include "new issue" in its system regardless the high opposition from the developing countries. This paper suggests that in the given circumstances they must be fully embraced by GATS.[104]

Since no practical solutions are foreseen on international regulatory arena, countries tend to secure e-commerce deployment by bilateral measures. This practice has posed shortcomings, such as fragmentation and mismatches in the global legal order. In the absence of international consensus, concluding FTAs has been widely embraced by developed countries, who seek to export their norms internationally. In this regard, the paper examined the EU-Georgia Association Agreement and its impact on country's e-commerce legal framework. Taking recent developments in Georgia's e-commerce regulations into account, the country is ready to align its domestic legislation with the EU *acquis*. However, a simple 'copy-paste' approach does not suffice for a successful legal harmonization. Alongside with specific e-commerce laws Georgia needs to revise the existing legislation or adopt new standards in the fields that have particular links with e-commerce deployment.

[104] *Gao H.,* Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation, 45 (1) Legal Issues of Economic Integration, 2018.

Meanwhile, while the world is coping with the outcomes of Covid-19 pandemic, the e-commerce is gaining its momentum. Ergo, it is strongly recommended Georgia to enact its e-commerce legal base in a very short time span to secure electronic transactions and guide online businesses and consumers. This revolutionary shift of entrepreneurial activities will not remain untouched after the pandemic but will attract more and more consumers and companies worldwide.

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Nino Katamadze*

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

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

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

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

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

1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 "Kommerzialisierung des Persönlichkeitsrechts".

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

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

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

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

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

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

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

12 Ibid.

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

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

15 "Vermögenswertes Ausschliesslichkeitsrecht."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31 Ibid, 1128.

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

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

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

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

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

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

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

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34 Ibid, 1167.

35 Ibid.

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

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

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

39 Ibid.

40 Ibid.

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

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

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

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

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

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

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

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

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

47 "Right to be alone".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55 Ibid.

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

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

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

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

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

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

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

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

6. Property Value of Personal Right in Georgian Legislation

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

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

62 Ibid.

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

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

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

6.1. Dualistic Nature of Right of Name

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

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

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

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

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

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

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

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

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

72 Ibid, 99.

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

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

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

6.2. Property Element of Image Rights

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

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

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

76 Ibid, 2017, 131 (in Georgian).

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

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

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

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

6.3. Person's Right to Voice

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

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

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

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

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

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

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

82 Ibid.

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

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

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

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

7. Conclusion

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

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

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

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

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

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The private, the Virus and the Leviathan: The Sars-Cov-2 Crisis and the Metamorphosis of the State

Along the last decades, especially after the Regan-Thatcher de-regulation period, we have assisted to the dismantling of the State, from its conceptualization as a manager of the Common-Good and the embodied of the Common-interest (Rousseau), to its transformation into a formula of indirect private government produced by the constant privatization of basic services such as security, healthcare or education, and the transfer of wealth from the middle and low class to the upper elite. A pattern that represents the destruction of the fundamental pillars that have gestated the very first formula of the liberal state. A transformation, that has been practical, as well as psychological, deeply affecting the behavior we develop as member of a society where values such as solidarity has been completely overcome by a social Darwinism. Having as main consequences the constant degradation of the democratic process and the erosion of the system of check and balances. Through this article, we aim to analyze how the response to the Sars-CoV-2 represents the dissolution of the State, showing the configuration of a system, that tends to "privatize" the government interest. While affirming a very complex phenomenon that we could describe as the "return to authoritarian formulas".

Key words: *Sars-Cov-2 Crisis, Metamorphosis of the State.*

1. Introduction

(…)I like to think
(it has to be!)
of a cybernetic ecology
where we are free of our labors
and joined back to nature,
returned to our mammal
brothers and sisters,
and all watched over
by machines of loving grace.

(Richard Brautingan)

"All Watched Over by Machines of Loving Grace" is the title of poem written by Richard Brautigan and first published in 1967 in a collection of the same name. A depiction of a utopian future where our species is finally able to find equilibrium with the rest of life forms of our planet thanks to the role of modern computation. A poem, related with an ideological and philosophical school,

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objectivism, that blossom in the 90's under Clinton administration (in the economical field) thanks to the role of Alan Greesnpan, objectivist himself (President of the Federal Reserve from 1987 to 2006), and whose impact in the configuration of the current Global Economy is key to understand the metamorphosis of the State and its legal frameworks. Because it's precisely the trend of de-regulation (standard bearer by the Regan-Thatcher administration and their followers) inflamed by the believe that techno-scientific progress the one that identifies the technological progress as the philosopher stone of a new global order based on "Machines of loving grace". Ultimate responsible of the degradation of the idea of democracy and the ultimate responsible of the metamorphosis of the state in a form of private governance.

Objectivism, as a philosophical school of thought can be understand as anti-communist approach to the organization of society and individual behavior. It was gestated by Ayn Rand, born in Russia in 1905, fled to the United States after the Russian revolution. She considered communism to be deeply immoral, proposing an approach based on radical egoism, a reinvention the "Invisible Hand" of Adam Smith, that in her case not only will be key for the development of the economy, but all aspects of human life, evolving to a radical form of social Darwinism. A philosophy that has its major spread thanks to her novels, first "The Mountain head" and then "Atlas Shrugged" which fully defined the four tenets of objectivism: reality, reason, self-interest and capitalism [1].

Four tenants that reflect the pillars over Global Economy has been built over the last decades, and whose results are well known to everybody, materialized in the constant erosion of the middle class, and the constant enrichment of those who are already rich. Where the economic boom of the 90's was just a mirage that hide the degradation of the middle-class, camouflaged by data reflecting a constant growth without taking into account the nature of this growth and its distributions among all layers of society, just such happened with the boom and fall of some Asian Economies; South Korea, Thailand and Indonesia also in the 90's. A growth structure that laid the foundations of future global economic crisis, where austerity policies where put in place degrading the quality of life of everyone, except the upper class.

All this process can be explained through the evolution of the Gini Coefficient. Where we observe a constant trend from the 90's in which the capital is concentrating in fewer hands, as it can be clearly observed in the cases of Italy, Spain and the United States of America, three of the countries most affected by the current Pandemic. Italy moved from a 32.5 in 1986 to a 35.9 in 2017 based on estimations of the World Bank [2], Spain from 31.8 in 2003 to a 34.7 in 2017, and the US from 35.3 in 1974 to a 41.4 in 2016. A trend that can actually can be easily transfer to our global society, where according to the Credit Suisse Global Wealth Report, the world's richest 1 percent, those with more than $1 million, own 44 percent of the world's wealth [3] Their data also shows that adults with less than $10,000 in wealth make up 56.6 percent of the world's population but hold less than 2 percent of

1 *Rand A*., 2020, <https://aynrand.org/ideas/philosophy/> [12.04.2020].

2 WorldBank, GINI Index World Bank Estimate, 2020, <https://data.worldbank.org/indicator/SI.POV.GINI> [12.04.2020].

3 Credit-Suisse, The Global Wealth Report 2019,<https://www.credit-suisse.com/about-us/en/reports-research/global-wealth-report.html> [12.04.l 2020].

global wealth. Individuals owning over $100,000 in assets make up less than 11 percent of the global population but own 82.8 percent of global wealth. [4]. A process that also has been accompanied by a set of austerity policies (fundamentally in Europe), applied since the break-out of the economic crisis of 2008 that have had as main consequence and erosion of the public services, with an especial impact on the Health Care system. If we attend to the Current health expenditure per capita (in US$) Spain moved from 2.967.68 in 2008 to 2.389.89 in 2016 and Italy, from 3.489.99 in 2008 to 2.738.71 in 2016 [5]

This massive concentration of wealth only can be explained through the existence of a legal framework, that not only has allowed this trend to happen, but facilitate the whole process posing into question the very nature as the state not as the holder of the common interests (as we have been told) but the materialization of the willing of the wealthy/oppressors. A process that nowadays is been accelerated by the massive use of algorithms and AI by the financial institutions which is having a very perverse effect as pointed out by Cathy O'Neil [6] not just is the dehumanization of the system but in the crystallization of the inequality with special impact over already marginalized communities [7]. As also has been pointed by several scholars [8] [9] [10].

But the very beginning of this system should be found in the post-WWII agreement for the reconstruction of the International society, where the Bretton Woods Conference officially known as the United Nations Monetary Financial Conference (July 1 to 22, 1944) in New Hampshire, when 730 delegates from all 44 Allied nations agreed upon a series of new rules for the international monetary system. And stablished a system based on free trade relied on the free convertibility of currencies. Giving also birth to the International Monetary Fund, and the World Bank (from now on Breton Woods Institutions). A conference that result in the victory of the American model that at the time represented the 50% of the world GDP with just a 7% of the population [11].

The new economic system required an accepted vehicle for investment, trade, and payments. Unlike national economies, however, the international economy lacks a central government that can

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4 FACTS - Global Inequality, <https://inequality.org/facts/global-inequality/> [12.04.2020].

5 WorldBank, Current Health Expenditure per Capita (Current US$), Google Public Data Explorer, 2020, < https://www.google.com/publicdata/explore?ds=d5bncppjof8f9_&ctype=l&met_y=sh_xpd_pcap&hl=en_US&dl=en_US#!ctype=l&strail=false&bcs=d&nselm=h&met_y=sh_xpd_chex_pc_cd&scale_y=lin&ind_y=false&rdim=world&idim=world:Earth&idim=country:ESP:ITA&ifdim=world&hl=en_US&dl=en_US&ind=false>[15.04.2020].

6 *O'Neil C.*, Weapons of Math Destruction : How Big Data Increases Inequality and Threatens Democracy, Broadway Books, 2017.

7 *Martinez-Quirante R., Rodríguez-Alvarez J.*, Inteligencia Artificial y Armas Letales Autónomas: Un Nuevo Reto Para Naciones Unidas, Oviedo: Trea, 2018.

8 *Boyd D., Levy K., Marwick A.*, The Networked Nature of Algorithmic Discrimination, 2014, <http://www.danah.org/papers/2014/DataDiscrimination.pdf> [15.04.2020].

9 *McQuillan D.,* Algorithmic States of Exception, European Journal of Cultural Studies, 18.4–5 2015, 564–76, <https://doi.org/10.1177/1367549415577389>.

10 *Umoja S.*, Algorithms of Oppression : How Search Engines Reinforce Racism, 2016.

11 *Bordo M.*, The Bretton Woods International Monetary System: A Historical Overview in A Retrospective on the Bretton Woods System: Lessons for International Monetary Reform,Chicago University Press, 1993, 3–108.

issue currency and manage its use. In the past, this problem had been solved through the gold standard, but the architects of Bretton Woods did not consider this option feasible for the postwar political economy [12]. Instead, they set up a system of fixed exchange rates managed by a series of newly created international institutions using the U.S. dollar (which was a gold standard currency for central banks) as a reserve currency. Until in 1971, Richard Nixon end international convertibility of the U.S. dollar to gold [13] on August 15, exhausted due to the economic landscape generated by the Vietnam War.

The tensions raised during the Cold War between Communism and Capitalism embodied by the USSR and the USA produce a set of anomalies that can be categorized as ideological fundamentalism in both sides having a clear translation through the Bretton Woods Institutions, in a moment in which liberal democracy, was irremediably linked with a capitalistic structure of production [14], just a few countries where able to develop some alternate models based on wealth redistribution strategies, the so-called Social Democratic model (normally attached to the European Nordic countries) during a brief time-lapse (50's to 70's) which finally evolve to the current "laissez-fer" redefined by the Chicago School of Economics. And Economical model that evolve into an holistic interpretation of society were *"market decisions were always right and profit values the supreme ones"* as pointed out by Paul Douglas [15].

2. The Private

The mix represented by the mainstream thought of the School of Chicago, Objectivism and the tool for praxis implementation offered by the Breton Woods Institutions, generated a new whole system by the end of the Cold War, due to the constant pressure exercise by the US administrations in order to export and consolidate their economic model, sometimes by diplomacy sometimes by force; Coup d'état in Venezuela 1948, Paraguay 1954, Guatemala 1954, República Dominicana 1963, Brasil 1964, Argentina 1966, Bolivia 1971, Uruguay 1973,Chile in 1973, Argentina 1976, El Salvador 1979, Panamá 1989, just to name the ones produced in Latin America with direct involvement of the USA during the Cold War period.

A process that collaborated in the generation of private indirect governments, where the private capital have not just a word in the state affairs, but a complete control, supported but the liaisons with the military elites where the Spanish economic miracle during the end of Franco's fascist dictatorship is just a paradigmatic example [16] of this new World economic order. Where countries, divided

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[12] *Bordo M.*, The Gold Standard, Bretton Woods and Other Monetary Regimes: An Historical Appraisal, 1993.

[13] *Douglas I.*, The Nixon Shock after Forty Years: The Import Surcharge Revisited, World Trade Review, 12.1 2013, 29–56.

[14] *Leeson R.*, Ideology and the International Economy: The Decline and Fall of Bretton Woods, Springer, 2003.

[15] *Douglas P.*, In the Fullnes of Time, 1972, 127-128.

[16] *Lieberman S.*, Growth and Crisis in the Spanish Economy: 1940-1993 (Vol. 1) London/New York: Routledge, 2005.

following the same schemes of social classes, where the wealth concentrated in a few, and the rest act as providers of cheap labor, and natural resources under the fierce control of the new metropolitan order [17]; first by major uses of force, and secondly by a carefully manufactured consent [18]. And where the interest of the private not only influenced governance but determined it, a phenomenon that is not completely new, but expanded itself at exponential rate.

The materialization of this private indirect government, can be exemplified with the case of Chiquita Brands International, formerly known as United Fruit Company. An American corporation that traded tropical foods, (primarily bananas) that has had a deep and long-lasting impact on the economic and political development of several Latin American countries, representing an evolve form of neocolonialism, focus in the interest of the private, not the state, close to the case of the Congo Free State, stablished in 1885, at the Berlin Conference, as an African colonial domain privately owned by King Leopold II of Belgium, who from then on administered it privately until 1908, when the territory was ceded to Belgium, after a period of horror that Sir Marti Ewans qualified as an European atrocity[19].

The case of Chiquita exemplified the behavior of the economic elite, a pattern that now a days goes beyond the interference with external countries interest, but also the one where the companies are from. This company became in 2007 *"the first U.S.-based corporation convicted of violating a U.S. law against funding an international terrorist group – the paramilitary United Self-defense Forces of Colombia (AUC). But punishment for the crime was reserved only for the corporate entity, while the names of the individual company officials who engineered the payments have since remained hidden behind a wall of impunity."* [20] but their history of involvement in the region is much bigger, as portrayed in the work *The Octopus and the Generals: The United Fruit Company in Guatemala* [21].

In 1901, the government of Guatemala hired the United Fruit Company to manage the country's postal service and in 1913 the United Fruit Company created the Tropical Radio and Telegraph Company. By the 1930s the company owned 3.5 million acres of land in Central America and the Caribbean and was the single largest land owner in Guatemala. Such holdings gave it great power over the governments of small countries. That was one of the factors that led to the coining of the phrase "banana republic" [22], in a continent still determined by the Monroe Doctrine [23].

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17 *Balibar E., Wallerstein I.*, Race, Nation, Class: Ambiguous Identities, 1991.

18 *Herman E., Chomsky N.*, Manufacturing Consent: The Political Economy of the Mass Media, 2nd Ed., London: Random House, 2010.

19 *Ewans M.*, European Atrocity, African Catastrophe: Leopold II, the Congo Free State and Its Aftermath, Psychology Press, 2002.

20 National Security Archive, The New Chiquita Papers: Secret Testimony and Internal Records Identify Banana Executives Who Bankrolled Terror in Colombia, 2017 <https://nsarchive.gwu.edu/briefing-book/colombia-chiquita-papers/2017-04-24/new-chiquita-papers-secret-testimony-internal-records-identify-banana-executives-who-bankrolled> [12.04.2020].

21 *Jones G., Bucheli M.*, The Octopus and the Generals: The United Fruit Company in Guatemala, 2005, <https://store.hbr.org/product/the-octopus-and-the-generals-the-united-fruit-company-in-guatemala/805146?sku=805146-PDF-ENG> [12.04.2020].

22 *Livingstone G.*, America's Backyard: The United States and Latin America from the Monroe Doctrine to the War on Terror, Zed Books, 2009.

This form of indirect government, lead not only to the manufacturing of governments through American Intervention (CIA, School of the Americas) [24] but also new forms of workers exploitation and new forms of practical slavery through the structuration of monocultures where United Fruit Company was the single employer, imposing it's rules and work conditions, showing the true nature of wage labor as a mechanism for reproducing traditional slavery as pointed out decades before by Kropotkin [25].

A situation that lead to episodes such as "The Banana a massacre" of United Fruit Company workers that took place between December 5 and 6, 1928 in the town of Ciénaga near Santa Marta, Colombia. The strike organized by the workers began on November 12, 1928, when work ceased until the company would reach an agreement with them to grant them dignified working conditions. After several weeks with no agreement and no work, costing the company severe financial losses, the conservative government of Miguel Abadía Méndez sent the Colombian army in against the strikers, resulting in the massacre. After U.S. officials in Colombia and United Fruit representatives portrayed the workers' strike as "communist" with a "subversive tendency" in telegrams to Frank B. Kellogg, the United States Secretary of State, the United States government threatened to invade with the U.S. Marine Corps if the Colombian government did not act to protect United Fruit's interests [26]. Around 5000 workers were brutally murdered in that event [27] .Which, in fact, directly link the history of exploitation with the recent activities of Chiquita funding paramilitary and terrorist groups. But are not the only atrocities perpetrated by this Company which in collaboration with the Bio-Chemical conglomerate have been poisoning Central America since the beginning of the Green Revolution [28]. A revolution that was powered up due to the stock of bio-chemical weapons that the allies didn't use during the WWII [29].

The case of United Fruit Company/ Chiquita, is just an example of the marriage between economic and political elite, that ultimately has led to a complete erosion of the state, not just in third world countries, but also in the first world generating a new dynamic that has been described as Necropolitics [30]. A system that represents a new phase of the Bio-politics as described by Foucault [31] determined by the rule of profits over all spheres of life. Mbembe theorizes the genealogy of a contemporary world, plagued by ever-increasing inequality, militarization, enmity, and terror as well as by a resurgence of racist, fascist, and nationalist forces determined to exclude and kill. And he

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23 *Gildrhus M.,* The Monroe Doctrine: Meanings and Implications', Presidential Studies Quarterly, 36.1 2006, 5–16.

24 *Gill L.*, The School of the Americas: Military Training and Political Violence in the Americas, Duke University Press, 2004.

25 *Kropotkin P.,* The Conquest of the Bread and Other Writings, Cambridge University Press, 1995.

26 *Wolf P.*, The Santa Marta Massacre , Internet Archive, 2012, <https://web.archive.org/web/20120717004708/http://www.icdc.com/~paulwolf/colombia/santamarta.htm> [12.04.2020].

27 *Castrillón A.*, 120 Días Bajo El Terror Militar, Bogotá: Tupac Amaru, 1974.

28 *Wheat A.*, Toxic Bananas, Multinational Monitor, 17.9 1996, 9.

29 *Shiva V.*, The Violence of the Green Revolution: Third World Agriculture, Ecology, and Politics, University Press of Kentucky,, 2016.

30 *Mbembe A.*, Necropolitics, in Foucault in an Age of Terror London: Palgrave Macmillan, 2008, 152–82.

31 *Foucault M.*, Microfísica Del Poder, 1st Ed., Madrid: Endymion Ediciones, 1978.

outlines how democracy has begun to embrace its dark side -what he calls its "nocturnal body"- which is based on the desires, fears, affects, relations, and violence that drove colonialism. Where human life is quantified and stocked as a mere mean of production, where its value is just related with its position in the social ladder [32].

This shift has hollowed out democracy, thereby eroding the very values, rights, and freedoms liberal democracy routinely celebrates. As a result, war has become the sacrament of our times in a conception of sovereignty that operates by annihilating all those considered enemies of the state. And it's precisely the concept of war and enemy of the state, which allow us to trace a relation with the current situation developed by the Sars-CoV-2 which has been currently presented by official speeches as an enemy, embedded in a renovate war dialectics, even with the constant apparition of soldiers at government press conferences accompanying civil decision-makers.

3. The Virus

Richard Horton, the editor of "The Lancet" has qualified *"The global response to Sars-CoV-2 is the greatest failure of science policy of our generation. The signs were there. Hendra in 1994, Nipah in 1998, Sars in 2003, Mers in 2012 and Ebola in 2014; all those great epidemics that affected humans were caused by viruses that are born in animals and then jump to humans. Covid-19 is caused by a new variant of the virus that caused Sars."* [33].

A situation, that only can be explained through the erosion of the state, and the indirect private governance path that identifies profit as good governance. Resulting in the configuration of States that has been organize as a productive system, where the balance between labor rights and capital gain turned to be determined again by the "Iron law of wages", a proposed law of economics that asserts that real wages always tend, in the long run, toward the minimum wage necessary to sustain the life of the worker [34] [35].

And where democracy falls again into the "Iron Law of oligarchy", first developed by the German-Italian sociologist Robert Michaels in his 1911 book, Political Parties [36]. A law that states that all forms of organization, regardless of how democratic they may be at the start, will eventually and inevitably develop oligarchic tendencies, thus making true democracy practically and theoretically impossible, especially in large groups and complex organizations. The relative structural fluidity in a small-scale democracy succumbs to "social viscosity" in a large-scale organization. According to the "iron law," democracy and large-scale organization are incompatible, as it seem to be cleares in the

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32 *Rodríguez, J.*, La Civilización Ausente: Tecnología y Sociedad En La Era de La Incertidumbre, 1st Ed., Oviedo: Trea, 2016.

33 *Horton R.*, La Gestión Del Coronavirus Es El Mayor Fracaso En Políticas Científicas de Nuestra Generación, Eldiario.Es, 2020, <https://www.eldiario.es/theguardian/gestion-coronavirus-politicas-cientificas-generacion_0_1015248658.html> [17.04.2020].

34 *Wolf J.*, Iron Law of Wages, The Encyclopedia of Political Thought, Wiley, 2014.

35 *Marx K.*, Critique of the Gotha Program, Wildside Press, 2008.

36 *Michaels R.*, Political Parties: A Sociological Study of the Oligarchial Tendencies of Modern Democracy, Martino Fine Books, 2016.

management of the current pandemic, where the Chinese model has been repeated praised by International Organizations and western countries [37], leading to strategies based in the erosion of civil freedoms.

So, we found ourselves defenseless in front of a situation, that wasn't at all unexpected as pointed out by Horton: *"In 1994 Laurie Garrett published a clairvoyant book, a notice, The Coming Plague. Her conclusion was: "As mankind fights each other, the game falls on the side of the microbes, which are gaining ground. They are our predators and will win if we Homo sapiens do not learn to live in a global village that leaves few opportunities for microbes.* (…) *The risks of a pandemic can be measured and quantified. As Garrett and the Institute of Medicine have shown, the dangers of a new epidemic have been known and understood since the emergence of HIV in the 1980s. Since then, at least 75 million people have become infected with the virus and have died 32 million people. It may not have spread across the planet at the speed of Sars-CoV-2, but its long shadow should have put governments on alert to take the necessary measures in the face of the outbreak of a new virus."* (op.cit)

Oppressed by States whose interest are far away from the safety and security of its citizens, but guided by the greed of the economical elite and private sector, surrounded by legal framework that allow the state to risk the life of its citizens just to maintain economic productivity, making our life's, as pointed out by Mbembe just as objects of consumption. Where the situation of the nursing homes in the case for example of Spain is paradigmatic of the protection of the non-productive elements done by the State. Till 10th of April were accounted 8,500 seniors died in public and private nursing homes [38]. A situation that also affected other non-productive groups, such us the people with disabilities (at least in Madrid), who are being discard for Intensive Care Units, a questions that is currently under the investigation of the Office of Attention for people with disabilities [39].

But the central point is not just the deaths (collateral damage) of non-productive citizens, but the political and "democratic" assumption of this deaths. Just is necessary to remember the declarations of the Lieutenant governor of Texas, Dan Patrick to Fox News *"Do we have to shut down the entire country for this? I think we can get back to work"* and *"My message: let's get back to work, let's get back to living, let's be smart about it, and those of us who are 70-plus, we'll take care of ourselves,"* Representing the complete moral decay of a system able to sacrifice the elder to maintain the capital gains of the big corporations. Examples of immoral greed that can be find all over, but especially in those countries most affected by the Sars-Cov-2. A behavior that has been even more radical in the case of the speakers of the private sector.

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37 AP, 'WHO Chief Praises China's Virus Fight, Urges More from World', AP, 2020, <https://apnews.com/d305b8c6fcc5ac1f1a6e24382e6769fb> [17.04.2020].

38 EuropaPress, Más de 8.000 Mayores Han Fallecido En Residencias En España En El Marco de La Pandemia', *Europa Press*, 2020, <https://www.europapress.es/sociedad/noticia-mas-8000-mayores-fallecido-residencias-espana-marco-pandemia-20200409194727.html> [17.04.2020].

39 *Pérez-Mendoza S.*, Rosa, Una Mujer Contagiada Con Discapacidad Intelectual: En El Hospital Nos Dijeron Que No Entraría En La UCI, Eldiario.Es, 2020, <https://www.eldiario.es/sociedad/denuncia-UCI-discapacidad-intelectual-Madrid_0_1015598504.html> [15.04.2020].

For example, in Italy, epicenter of the European crisis, on February 28, in full emergency for Coronavirus the Italian industrial employers, Confindustria, started a campaign in networks with the hashtag #YesWeWork. "We have to tone down, make public opinion understand that the situation is normalizing, that people can return to live as before," said the president of Confindustria Lombardy, Marco Bonometti, in the media. While the same day, Confindustria Bergamo, epicenter of the Italian crisis, launched its own campaign aimed at foreign investors to convince them that nothing was happening there and that they were not going to quit. The slogan was unequivocal: "Bergamo non si ferma / Bergamo is running" (Bergamo does not stop) [40].

The message of the promotional video for international partners was: *"Coronavirus cases have been diagnosed in Italy, but like in many other countries,"* and *"The risk of infection is low."* While blaming the media for unwarranted fear-mongering, and while showing workers working in their factories. They affirmed that all factories would continue *"open and at full capacity, as always."* And exercise of immorality and a show of force over the working classes, something very similar to the strategies developed by United Fruit Company a century ago.

Just five days later, the huge outbreak of infections and deaths broke out, which ended up being the most important in Italy and Europe (till the moment). But neither did they withdraw the campaign, much less did they consider closing the factories. Confindustria Bergamo that groups 1,200 companies that employ more than 80,000 workers. All were exposed to the virus, forced to go to work, largely without adequate measures - overcrowded, without a safety distance or protective material - putting themselves and their entire environment at risk. With complete complicity of the Italian government that chose the interest of the economy over the health of its citizens. [41]

But their praxis didn't end in the moment they realized the magnitude of the catastrophe. On Saturday, March 21, when Italy achieved the record of almost 800 daily deaths. Moment, when the governors of Lombardy and Piedmont - another great industrial pole of northern Italy - declared that the situation was unsustainable and that it was necessary to stop productive activity [42]. Conte, Italian primer minister, who until then had been contrary to the measure, appeared overwhelmed at night to say yes, that now, *"all non-essential productive economic activities"* would be closed [43]. Confindustria was immediately activated and launched a pressure offensive against the Government. "*Not all non-*

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40 Bergamonews, Coronavirus, "Bergamo Non Si Ferma": Sui Social Il Video d'incoraggiamento', <https://www.bergamonews.it/2020/02/28/coronavirus-bergamo-non-si-ferma-sui-social-il-video-dincoraggiamento/356658/> [16.04.2020].

41 *Sidera A.*, Bérgamo, La Masacre Que La Patronal No Quiso Evitar, *Ctxt*, 2020 <https://ctxt.es/es/ 20200401/Politica/31884/Alba-Sidera-Italia-coronavirus-lombardia-patronal-economia-muertes.htm> [17.04.2020].

42 ANSA, Coronavirus: "Close Piedmont", Governor Cirio Calls for More Stringent Measures, *ANSA*, 2020, <https://www.ansa.it/english/news/politics/2020/03/11/coronavirus-close-piedmont-governor_4937c432-a7c6-4afe-adcd-7801b259defd.html> [14.04.2020].

43 *Leali G.*, 'Italy Closes All Nonessential Factories to Halt Spread of Coronavirus', *Politico.Eu*, 22 March 2020, <https://www.politico.eu/article/italy-closes-all-nonessential-factories-to-halt-spread-of-coronavirus-giuseppe-conte/> [14.04.2020].

essential activities can be closed," they said in a letter to the premier detailing their demands. The industrialists managed to take the decree 24 hours to be approved and Conte to accept its conditions. [44]

Confindustria, managed to add many that were not essential to the list of activities that could continue to operate, such as those of the arms and ammunition industry (maybe to fight against the virus). In addition, they included a kind of clause that allowed, in practice, any company that declared that it was "functional" for an essential economic activity could remain open. This caused that in just one day, in Brescia, the other Lombard province hit by the coronavirus, more than 600 companies that were not on the essential list began the procedures to continue operating. (Íbidem)

Showing not just the control that the private exercises over the state, but also, the immorality of State, the government, and the capitalistic system, nothing new, but this time it's not experienced by a country in Latin America or Africa, silenced by the mass media. This time the massacre is happening in Europe and the USA, lead by those who find themselves extremely comfortable in the balance between profit and litigation cost.

The attacks from the economic elit didn't cease once the magnitude of the tragedy was perfectly visible, and they move on with the old alliances, where the military appear into the scene. Maybe the most paradigmatic case is Spain, embodied now a day in a belligerent and pseudo militaristic dialectics, where speakers of the army appear daily, with members of the government, to explain us that we are in war against a virus in order to generate a smoke curtain of diversion in order to make people forget, that the enemy it's not the virus, but the system. Even, Pedro Sanchez, prime-minister of Spain, ruling thanks to a "theoretically" leftist coalition, use more and more in his speeches words like "war", "postwar" or "mortal enemy" [45] curiously referring to a virus, and not to those that are forcing the workers to expose themselves and die. A Prime minister to order to reopen factories the 13th April, following the dictates of the private sector [46].

4. The Leviathan

"For it must be cried out, at a time when some have the audacity to neo-evangelize in the name of the ideal of a liberal democracy that has finally realized itself as the ideal of human history: never have violence, inequality, exclusion, famine, and thus economic oppression affected as many human beings in the history of the earth and of humanity. Instead of singing the advent of the ideal of liberal democracy and of the capitalist market in the euphoria of the end of history, instead of celebrating the 'end of ideologies' and the end of the great emancipatory discourses, let us never neglect this obvious, macroscopic fact, made up of innumerable, singular sites of suffering: no degree of progress allows

[44] *Sidera A.*, Bérgamo, La Masacre Que La Patronal No Quiso Evitar, *Ctxt*, 2020, <https://ctxt.es/es/20200401/Politica/31884/Alba-Sidera-Italia-coronavirus-lombardia-patronal-economia-muertes.htm> [17.04.2020].

[45] *CadenaSer*, El Lenguaje Bélico de Sánchez Que No Pasa Desapercibido En Redes Sociales, CadenaSer, 2020, <https://cadenaser.com/ser/2020/04/12/politica/1586703945_346985.html>.

[46] Aljazeera, Spain Loosens Coronavirus Lockdown, Aljazeera, 2020, <https://www.aljazeera.com/ news/2020/04/spain-loosens-coronavirus-lockdown-200413104227651.html>.

one to ignore that never before, in absolute figures, have so many men, women and children been subjugated, starved or exterminated on the earth "[47]

Technological progress and egoism didn't fulfill the promises of utopian scenarios as imagined by Rand or Greenspan, neither history have achieved no end as predicted by Fukuyama [48], nor we find ourselves in a clash of civilizations [49]. We are in a recurrent cycle determined by the clash between the owners of the means of production and "the others" as identifies by historical materialism [50], with the difference that in the current system nothing produces more than capital.

It doesn't matter how many times liberal intellectuals and scholars try to confront us by nationality, race or religion as shown by Balibar and Wallerstein [51]; material reality, in this case embodied by the Sars-CoV-2 always find its ways. The social crisis, the crisis of the state and the chaotic management of the pandemic, only can be explain through the materialization of the power of the state over its citizens, and the power of the private sector over the state. Which translate itself in the degradation of the working conditions and the constant devaluation of human life, as highly replaceable when non-productive.

Never through history we have been able to achieve so much techno-scientific progress in less time. Never we have been able to construct models to predict future development with such accuracy as today, and never we have been able to develop a bigger corpus of International regulations for our Global society, but all these efforts are useless if greed it's at the center of our cosmovision. Because technology it's just an amplifier of the human will as affirmed by Kentaro Toyama [52]. And the State and it's legal frameworks, it's nothing else than the materialization of the willing of the powerful. Allowing us to discover, that under one of the major crisis of the century, the system is able to sacrifice people before nationalizing companies, because the private sector and its interest is who really is controlling the state and its interest.

We are ruled not by Machines of Loving Grace, but by an elite that loves greed, and use all the means necessary to reproduce the context of privileges they are embed on. An elite, that as always, is able to appropriate of all means of production, also the digital ones in order to reproduce and maintain the system of privileges they profit from. Whose materialization could be find in the regulations and measures put in place in the current health crisis, where a citizen isn't able to say goodbye to his mother dying in a hospital, or even organize a funeral due to the policies of social distancing, but is called to go to work using public transportation. A set of contradiction that as so visible that results into a tremendous obscenity, but accepted through heavily develop mechanisms of social control that allows it to manufacture consent [53].

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47 *Derrida J.,* Specters of Marx: The State of the Debt, The Work of Mourning and the New International, Routledge, 2012, chpt. 3,87.

48 *Fukuyama F*., The End of History and the Last Man, Simon and Schuster, 2006.

49 *Huntington S. P.*, The Clash of Civilizations?, Foreign Affairs, 72.3 1993, 22–49.

50 *Marx K.*, *Capital.* A Critique of Political Economy, Arkose Press, 2015.

51 *Balibar E., Wallerstein I.,* Race, Nation, Class: Ambiguous Identities, London, New York, 1991.

52 ITU and XPRIZE, AI for Good Global Summit Geneva, 2017, <https://www.itu.int/en/ITU-T/AI/Documents/Report/AI_for_Good_Global_Summit_Report_2017.pdf> [27.03.2017].

53 *Herman E., Chomsky N.,* Manufacturing consent: The political economy of the mass media, 2nd ed., London: Random House, 2010.

The Leviathan is dead if ever existed, been just the suit wear by the corporate interest, the banking and financial companies, the tech giants that announce agreement to fight Sars-Cov-2 using our data in ways that can compromise future notions of privacy [54]. The State is today declaring states of alarm, restricting rights and civil freedoms, applying censorship through internet and other forms of social control in a new love-affair with authoritarian expressions of power. States of alarm that prohibit you to go out to the street, except it is for work and serve the interest of the capital.

5. Conclusion

The domestication of the Leviathan by the private interest, represent just the confirmation of an historical trend where the owners of the means of production in their constant look for profit, have exposed their population, workers, to innumerable risk all along history, degrading their living conditions while preventing all kind of freedom or self-organization through the means provided by the state of law. Something that has happened in all previous systems, with big difference that represents globalization and modern technology, allowing new forms of social control, and alienation of the population. A new phase of the shock doctrine [55] that probably could be avoided if the policies of Austerity dictate by the Bretton Woods Institutions in collaboration with other Administrations such as the EU but always under scrutiny of the private, haven't be put in place degrading the welfare state, and specially the healthcare system in such dramatic way.

The current crisis, is just an expression of the contradictions of late-capitalism [56], in a moment when globalization has made especially easy a domino effect with affectations over all layers of the system. The attempts to save the elite from the disastrous effect of this crisis, through the continuation of the economic activity instead of being looking for alternatives for the reconstruction is just a proof of the submission of the state to the corporate.

Every democratic state exists "theoretically" to protect its citizenship, if it is to be regarded as a true democratic state and of law as portrait by the defenders of the liberal democracy. Citizens cede their rights to the state to regulate them so they can exercise rights and freedoms, without fear that could be loose, even in cases of confrontation or a collision of interests. Because - even if it happens - there will always be "theoretically" a law and courts that will determine the just reason for one or the other in the conflict.

When the state does not regulate the rights that have assigned to it, when it loses its obligations, when it does not protect or respect the citizens or when it tramples on rights and freedoms, then it loses its legitimacy, it denies itself, it ceases to have *auctoritas* and it is no longer the rule of law and

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54 *Brandom R.*, Answering the 12 Biggest Questions about Apple and Google's New Coronavirus Tracking Project, The Verge, 2020, <https://www.theverge.com/2020/4/11/21216803/apple-google-coronavirus-tracking-app-covid-bluetooth-secure> [27.03.2017].

55 *Klein N., Peet R.*, The Shock Doctrine: The Rise of Disaster Capitalism., Human Geography, 1.2 2008, 130–33.

56 *Jameson F.*, Postmodernism, or The Cultural Logic of Late Capitalism, Postmodernism: A Reader, 1st Ed., London, Verso Books, 1992.

democracy to which its citizens had freely ceded their rights for a specific purpose. It becomes --with the idea of the Italian philosopher and scholar Donatella Di Cesare - an incontestable 'non-state' [57].

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2. ANSA, Coronavirus: "Close Piedmont", Governor Cirio Calls for More Stringent Measures, ANSA, 2020, <https://www.ansa.it/english/news/politics/2020/03/11/coronavirus-close-piedmont-governor_4937c432-a7c6-4afe-adcd-7801b259defd.html> [14.04.2020].
3. AP, 'WHO Chief Praises China's Virus Fight, Urges More from World', AP, 2020, <https://ap-news.com/d305b8c6fcc5ac1f1a6e24382e6769fb> [17.04.2020].
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Constitutional Court Decision Pro Futuro Effect and its Development in Georgia

Article concerns effects of constitutional court decisions in time, more precisely, suspension of rendered decisions enactment (Hereinafter -"Pro Futuro Effect"). The first part of the article discusses development tendencies and characteristics of range of specialized constitutional control countries' Pro Futuro Effect legal and judicial practice. As for the second part, it concerns Pro Futuro Effect of the Constitutional Court of Georgia judicial practice and afterwards, its establishment in normative structure of the Constitution of Georgia.

Article's Special attention is dedicated to identification and discussion of Pro Futuro Effect usage legal grounds. In the light of experience of various specialized constitutional control mechanism countries, issues regarding constitutional court decision inactment suspension for concrete term and its determination principle will be reviewed.

Study and analysis of various countries experience introduced in the article and so as of Constitutional Court of Georgia practice gives us an opportunity to get specific idea about the basis of operation and need of the Pro Futuro Effect within the constitutional ruling practice. Outcome of the research presented to you as the article, in our reality, contributes to guaranting the usage of Pro Futuro Effect in constitutional ruling practice to be subordinated to right direction of legal logic.

Article is based upon analizing methods of comparative, judicial practice and normative acts.

Key Words: *Constitutional court decision, effect in time, suspension of rendered decisions inactment, Pro Futuro Effect, specialized constitutional control mechanisms.*

1. Introduction

Constitutional court decision has Pro Futuro Effect when it states that declared unconstitutional normative act continues to be in legal force for some time in the future which means that the decision will enter in legal force when stated time expires and the time is stated by the decision of constitutional court itself. In the examples of various countries, Pro Futuro Effect is not considered as a general rule from the perspective of national law but constitutional control bodies still use it in specific cases when they see that It is necessary to give time to the lawmakers in order for them to amend declared unconstitutional normative act or if the want to avoid "legislative hunger" or to maintain legal foreseeability principle.

This issue has been urgently raised in lawmaking of Constitutional Court of Georgia because of which we have decided to study Constitutional court decision Pro Futuro Effect. Firstly, we will focus

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on practice of foreign countries in terms of Pro Futuro Effect establishment in their legislation and development of the effect. Afterwards, normative acts and practice of Constitutioanal Court of Georgia towards Pro Futuro Effect will be reviewed.

Purely for the purposes of terminology matters, it has to be noted that Pro Futuro Effect in Israel is called-"Suspension of annulment declaration" and in France-"Delayed annulment".[1] Notwithstanding terminology differences, scholars agree to gather those different terminologies under the umbrella of Pro Futuro Effect.

2. International Experience

2.1. Federal Republic of Germany

Germany is one of the countries which applies Federal Constitutional Court (hereinafter-GFCC) decision's Pro Futuro mechanism. If normative act is declared unconstitutional GFCC establishes deadline for provisional use of the act. GFCC aslo has power to establish deadline for lawmaker to create new normative act. The deadline's term hinges upon infringement importance or other emergency circumstance. We have to also take into account complexity of the normative acts which have to be issued and special requirements for the matter to be regulated.[2]

It has to be noted that Pro Futuro mechanism isn't directly regulated in constitutional justice legislation of Germany. Instead of invalidating normative act GFCC fairly often uses the latter exclusive measure, which, as a matter of principle, is not exclusive any more. From the perspective of retroactivity legal basis of shifting to Pro Futuro function is article 35 of the Law on GFCC according to which: "GFCC is empowered to determine adressee of its decision and in specific cases, it is also entitled to state in its decision method of execution".

2.1.1. General Basis for Use of Pro Futuro Effect

According to the GFCC judicial practice usually two alternative circumstances shall exist for GFCC to avoid invalidation of normative act and instead to use Pro Futuro Effect.[3]

- First circumstance appears towards laws which can't become constitutional only just by invalidation and their "constitutional healing" is only possible by using other way.

- Second circumstance is present when invalidation of normative act appears to be much more conflicting with the constitutional system than provisional application of the unconstitutional law.

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1 *Millet F. X.,* Temporal Effects of Judicial Decisions in France, the Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 114.

2 *Gertrude L. W.,* The Constitutional Court's Relationship to Parliament and Government, National Report Prepared for The XVth Congress of the Conference of European Constitutional Courts by The Federal Constitutional Court of Germany, 2011, 285.

3 See there, *Bluggel J.,* Unvereinbarerklaung Normkassation durch das Bundesverfassungsgericht, Humbolt, 1998, 3.

2.1.2. Tax Cases

A basis for Pro *Futuro* mechanism application, establishment of the practice and the interpretation of abovementioned normative act is also legal safety (GFCC is especially oriented at this matter) for the purpose of giving to the legislator enough time for "soft" shifting from unconstitutional act to constitutional one avoiding sensitive side effects of the process. This matter is especially important for tax legislation where specific public interest such as of fiscal nature does exist. GFCC decisions where Pro Futuro mechanism is applied in most cases concerns tax legislation constitutionality issues.[4] According to aforementioned motivations GFCC not once hindered application of Pro Futuro Effect when using it would much more mitigate taxpayer's burden. Beginning of this practice is connected to the GFCC case called "incompatibility" in 1966 where with retroactivity effect Federal lands of Germany were losing 41% of their annual tax income.[5]

Cases of Tax Law, Law on Public Officer and Budget Law prove fiscal reasonableness of GFCC towards legislator and also its preliminarily readiness to safeguard public funds from squandering unconstitutionality and hesitant budgetary outcomes which would result from immediate annulment of unconstitutional act. Accordingly, court highlights that continuing application of unconstitutional[6] tax law act which as well is limited to specific time may be necessary for protecting state's fiscal activity and stability as a whole.[7]

It has to be also noted that GFCC in some cases inspite of its fiscal reasonableness avoids application of Pro Futuro Effect because it doesn't consider impact of unconstitutionality declaration to be important enough from the perspective of fiscal logic.[8] For example, GFCC in students' tuition fee (the fee was due and payable at the beginning of each semester) case decided not to use Pro Futuro Effect. The court interpreted that party's financial loss that might result from not using Pro Futuro Effect may not justify avoidance of immediate annulment ("Ex Nunc") taking into account reliable fiscal and budget planning interest. According to the case, accumulated tuition fees were not as important for the budget as to stop the court from applying "Ex Nunc" effect because this kind of decision couldn't jeopardise fiscal stability.[9]

2.1.3. Alternatives to Prevent Unconstitutionality

There are cases suggesting alternative means for preventing unconstitutional situation alongside annulment of unconstitutional act. This usually concerns laws which contradict equality right. The

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4 *Drinoczi T., Scheider P.,* The Legitimation of a Re-Enactment of Former Law and Temporial Effects of Judgments in a Constitutional Democaracy, Comparative Study in the Light of Recent Jurisprudence of Crotias Constitutional Court, 2009, 36.

5 BVerfGE 21, 12 (p. 39f).

6 *Schroeder W.,* Temporal Effects of Decisions of the German Federal Constitutional Court, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 28.

7 BverfGE 3153.

8 *Schroeder W.,* Temporal Effects of Decisions of the German Federal Constitutional Court, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge 2014, 29.

9 BverfGE 1733.

right is infringed when substantially equal individuals are treated unequally and substantially unequal individuals are treated equally. When the right is infringed there are usually several ways to solve the problem.

Legal norms discriminating groups of citizens may be expanded or annulled. The third option is abolishment of discrimination by establishing new legal regime based on completely new legal basis. Separation of Powers Principle suggests that it's legislator's prerogative to decide how to manage discriminating legal norm. On the contrary, court has a discretion to only interpret the law not to write one. In these kind of cases GFCC respects legislator's aforementioned basic responsibility to choose from several ways and solve the circumstance causing discriminating situation.

One of the typical example is GFCC's decision on the case regarding law on non-smokers in 2008. The law differentiated between big restaurants and little pubs and bars. The court defined that legislator is entitled to allow or prohibit smoking in public entities and restaurants or to suggest specific exceptions that's why GFCC after declaration of unconstitutionality of the norms of the law left the arena for legislator to solve the problem of differentiation.[10]

2.1.4. Sport Bet Case

Sport Bet Case of GFCC is one of the most interesting cases which represents attitude of Germany towards applying Pro Futuro Effect. The court has to deliver a judgment on private bookmaker's constitutional claim on the issue whether State Lottery Act of Bavaria was in consistent with Freedom of Work Principle thus, 12th article of Basic Law of Germany. The act provided the monopoly of state lottery (betting) in Bavaria so prohibited betting opportunity for any kind of private party. What's more, betting was considered a crime according to the Criminal Law of Germany. GFCC decided, that the act was inconsistent with the Basic Law of Germany. The court didn't immediately annulled the act but stated that it would be in legal force until 31th of December in 2007 (The Transitional Period).[11]

GFCC defined that legislator had two constitutional ways to enforce the judgment and thus, reselove the problem. Among those ways it was upon legislator to choose. One way was to maintain the monopoly of the state but in this case the legislator would become obliged to manage and fight against gambling problems of Germans. On the other hand, the legislator could liberalise the whole market of betting but in the meantime, effectly control the industry together with the state.[12] GFCC trusted the choise to the legislator.

2.1.5. Public Workers' Wage Case

The classical older example of application of Pro Futuro Effect is a decision of GFCC on Public Worker's Wage Case.[13] The court stated that the Federal Law on Wages wasn't adequately consistent

10 BverfGE 2409, 2419.
11 BverfGE 1054/01.
12 *Schroeder W.,* Temporal Effects of Decisions of the German Federal Constitutional Court, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 25.
13 BverfGE 1261,1267.

with the minimum living requirements of Public Workers thus, GFCC declared the specific norms of the law unconstitutional. In case the court declared the law unconstitutional immediately, the beneficiaries of the law couldn't have chance to any way claim their wages until the enforcement of judgment because the Basic Law of Germany fully trusted the public worker's wage issues to the existing regulation. GFCC didn't see the opportunity to establish transitional period itself. Thus, declaring the norms unconstitutional together with the application of Pro Futuro Effect guaranteed that public workers wouldn't lose their existing income until revised constitutional regime would come into force.[14] According to the rendered decision of GFCC unconstitutional situation is maintained. Thus, the court avoids "Legal Vacuum" from coming into force as the court calls it itself or "Legal Chaos" as called in legal academic literature. GFCC makes choice in favour of the unconstitutional situation but slightly closer to the constitution than would be in case of a situation not managed and regulated by legal norms at all.[15]

2.1.6. Establishment of Deadlines and Instructions

In Germany maximum deadlines for Pro Futuro Effect fluctuates between 1 to 2 years but in some case it may be much longer.[16] For example, after declaration of unconstitutionality of one of the norms of the Law on Elections (concerning observation procedures of election process) almost 3 years were granted to the legislator for issuing a new law. Also, there are cases when less than 1 year is applied.[17] GFCC declared unconstitutional norms concerning social benefits and the given deadline for the legislator was less than 11 months for issuing a new regulation. The reason for that was that amounts dedicated to the social benefits concerning living minimum wasn't taken into account in budget.[18]

GFCC decided that the Law on Property Tax has to continue functioning because in that way the Court had avoided undesirable legal outcome that might appear if the Legislator wouldn't do it's job of issuing new rule or couldn't do it within the specified deadline. GFCC stated that the law has to continue being in legal force until 31th of December in 1996. If until the end of transitional period new regulation wouldn't be issued, it's clear that after elapsed term the unconstitutional norm of the law wouldn't be applicable any more and if the tax is collected it would be arbitrarily against the judgment of GFCC.[19]

In some cases GFCC also gives binding instructions concerning the requirements for the legislator that should be taken into account before revision of the unconstitutional act.[20]

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14 *Schroeder W.,* Temporal Effects of Decisions of the German Federal Constitutional Court, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 25.

15 See there, *Schupport G. F.,* Rigiditat und Flexibilitat von Verfassungsrecht, 1995, 32.

16 BVerfGe 117.

17 *Barbateanu V.,* The action in time of constitutional courts, Journ. Constitutional review constitutional jurisdictions, 2004, 507.

18 BVerfG, Judgment of the First Senate of 9 February 2010 – 1 BvL 1/09.

19 BVerfGE Judgment of the First Senate 93, 121.

20 BverfGE 2487.

The Court often doesn't fully trust the legislator in terms of how the revisions are made to the unconstitutional act in order for it to become constitutional. For example, in Sport Bet Case GFCC explicitly interpreted "Legal requirements of the Basic Law of Germany according to which new regulations should be adopted" for the legislator.[21]

2.2. Republic of France

Constitutional Council of France also has the right to determine the time which would be initial point for its decisions to come into force which at the same time means for unconstitutional outcomes to become effective. The legal basis for the aforementioned right is 62th article of the Constitution which entitles the Court to set annulment date and also to apply Pro Futuro Effect.[22] What's about the council, from the very beginning we have to identify the difference between the rights-constitutional a priori and constitutional a posteriori.[23]

It has to be noted that the council rarely applies Pro Futuro Effect in terms of its a priori right.[24] For instance, in case of the law on Genetically Modified Products the council delayed coming into force of its decision. The council established 6 months interval for the legislator to have opportunity of resolving unconstitutional problems of the law. The Parliament has quickly fulfilled its obligation of issuing new law which would be in consistent with the Constitution.[25]

From the perspective of the statistics, one of the researcher's numbers are interesting which states that the council applied Pro Futuro Effect at 19% of the cases out of 110 cases which declares partial or full annulment of norms. This numbers are good examples to measure the following: to what intensity is Pro Futuro Effect applied in France.[26]

Amendments in 2008 gave the green light to a posteriori constitutional review. The amendment itself was revolutionary towards legal customs of France. From the start of 1st of March in 2010 Constitutional Court of France has started new era of evolution. The new wording of article 62, part 2 of the Constitution states that in accordance with a posteriori review, unconstitutionally declared norm is annulled from the moment of the judgment's publication or from the date indicated in the judgment.[27] On the basis of the aforementioned rule constitutional council is entitled to decide the issue of time shifting for the annulment effect.[28]

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21 BverfGE 1054/01.

22 Constitution of France 4 October 1958.

23 *Kakhiani G.,* Institute of Constitutional Control and Problems of Its Functioning in Georgia: Analysis of Legislation and Practice, Dissertation, 2008, 26 (in Georgian).

24 *Sweet A. S.,* The Constitutional Council and the Transformation of the Republic, Journ. Yale Law School Legal Scholarship Repository, 2008, 2.

25 The French Constitutional Council Decision 2008-564 DC of the 19th of June 2008.

26 *Millet F. X.,* Temporal Effects of Judicial Decisions in France, The Effects of Judicial Decisions in Time, ,Ius Commune Europaeum, Cambridge, 2014, 116.

27 Constitution of France 4 October 1958, Articl 62.

28 *Barbateanu V.,* The Action in Time of the Constitutional Courts, Constitutional Review, Constitutional Jurisdictions, 2004, 508.

Constitutional Council of France has already utilized its right to apply Pro Fututro Effect. By this means the council gave the legislator an opportunity of amending argued norm and thus, avoidance of "Legal Vacuum". If legislator doesn't enforce a judgment in given deadline and doesn't do it's job of filling up of "Vacuum", thus, solving the problem of unconstitutionality, the norm declared unconstitutional stops being in legal force automatically which should be somewhat considered as sanction towards legislator.

For example, from the aforementioned perspective interesting judgment of Constitutional Council of France is about norms providing pension of soldiers which lost french citizenship in result of decolonization. The council decided that the norms declared unconstitutional should stay in legal force until 1st of January in 2011.[29]

2.2.1. General Motivation of the Constitutional Council for Applying Pro Futuro Effect

There are several reasons for applying Pro Futuro Effect, thus, utilizing the right guaranteed by the Constitution rather than immediate annulment of the act by the constitutional council.[30] The delayed time ussually fluctuates between 3 to 17 months. The main motivation behind this tactic for the council is not to interfere in legislator's competence. The council always tries to show its institutional respect towards the parliament. What's about other reasons, from the short-term perspective an immediate annulment might have much more damaging results than provisional maintaining of unconstitutional act would have. As a rule, in such cases the constitutional council between rule of law and foreseeability principles makes choice in favour of the latter.[31]

It's legislator's competence to fill up the unconstitutional act. According to this principle, the council is always careful not to intervene in legislator's prerogative so to be safe from being blamed for exceeding its powers. Thus, the court often prefers to apply Pro Futuro Effect and to determine transitional measures itself rather than the immediate annulment. By this means the court upholds its decision and states that a court doesn't have as much general power of review as it has a legislator. The council especially showed this attitude in criminal justice cases. For example, in its well-known case by annulment of the law regulating arrestment the council decided that "It's not the council's discretion to make changes to the rules concerning criminal procedures in order to compensate existing unconstitutional situation".[32] The same approach was showed in case called Names of Internet Domains where judges[33] applied the following argument: "The council isn't obliged to determine principles of civil and commercial obligations which is able overcome unconstitutionality of a normative act".[34]

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29 The French Constitutional Council Decision 2010-1 QPC of the 28th of May 2010.

30 The French Constitutional Council Decision 2012-268 QPC of the 27th of july 2012.

31 *Millet F. X.,* Temporal Effects of Judicial Decisions in France, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 116.

32 The French Constitutional Council Decision 2010-14/22 QPC of the 30th of july 2010.
The French Constitutional Council Decision 2010-32 QPC of the 22th of September 2010.

33 The French Constitutional Council Decision 2010-45 QPC of the 6 October 2010.

34 *Millet F. X.,* Temporal Effects of Judicial Decisions in France, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 117.

2.2.2. Landmark Case

In France landmark case in which the council initially established its area of power towards Pro Futuro Effect is considered the case rendered in 25 March of 2011.[35]

In the aforementioned case judges reviewed the code on civil and military pensions which set up right on heir's pension when it was more than one successors from various families. In case of being at least two families with one or more adoptees the argued norm stated that from the perspective of dividing of the heritage on equal parts between families number of their adoptees shouldn't be taken into consideration. The members of the council decided that the argued act infringed the equality principle. They have also decided to apply Pro Futuro Effect during 9 months in order for the legislator to have time for reconsidering the act. Annulment delay is closely connected to the Separation of Powers Doctrine. Often, respect to a legislator appears in connection with the presence of competitive interests which has to be balanced towards constitutional rights being at stake.[36]

The aforementioned decision mainly is based upon the circumstance that the council didn't have such power as has the legislator and declaration of unconstitutionality of the argued act for the adoptee would have the effect of annulment of its granted rights (already existing social aid is implied)[37]. If the court would have decided otherwise, thus, not have used Pro Futuro Effect which also means that it had immediately declared the argued act unconstitutional we would have been in the "Legal Vacuum" mentioned above and at the same time the claimant would have lost its pension until readoption of the new act.[38]

2.3. Republic of Austria

In Austria the Constitution dated in 1920 centralized reviewing of normative acts in one constitutional court. At that time, the court had already had the power of applying Pro Futuro Effect.[39] Initially, application of Pro Futuro Effect was limited up to 6 months. Later, in 1929 the term prolonged to 1 year and in 1992 to-18 months.[40]

In spite of legislation on constitutional court of Austria directly stating as a rule ex nunc effect application for decisions, in fact (at this point, dominant idea of Austrian system is "Legal Reliance"), Constitutional Court of Austria in almost half of its so called "annulling" decisions applies Pro Futuro Effect instead of ex nunc effect (application of Pro Futuro Effect is an exception rather than a rule).[41]

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35 The French Constitutional Council Decision 2010-108 QPC of the 25th of 25 March 2011.

36 See there.

37 It is Interestingly, when using the Pro Futuro mechanism for the right to equality, a similar practice has been established in Georgia, which we will discuss below.

38 *Millet F. X.,* Temporal Effects of Judicial Decisions in France, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 120.

39 *Stelzer M.,* The Constitution of the Republick of Austria: A Contextual Analyses, Hart Publication, 2011, 176.

40 *Stelzer M.,* Pro Futuro and Retroactive Effects of Rescissory Judgments in Austria, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 64.

41 *Popelier P., Verstraelen S., Vanheule D., Vanlerberghe B.,* The Effect of Judicial Decisions in Time: Comparative Notes, Ius Commune Europaeum, Cambridge, 2014, 7.

Applying Pro Futuro Effect on annulling decisions by Constitutional Court of Austria means that a judgement while enforcing is formulated with a priori constitutional regulation of positive legislator which signifies that the final result of annulling decision of the constitutional court is present by means of annulling unconstitutional norm with adopting a new one which has to be done by the constitutional court in specified deadlines.[42] In terms of procedural nuance, also interesting fact is that the constitution entitles the constitutional court to establish Pro Futuro Effect and specific deadline if it considers being necessary which doesn't need a motion from a respondent.

2.3.1. Respodent's Interest Towards Applying Pro Futuro Effect

According to Austrian researchers the government of Austria requires from the constitutional court to apply Pro Futuro Effect on the regular basis. The reason for that as the government itself states is that the reforms are needed to make certain legal norm constitutional and at the same time by this means "Black Holes" in legislation are avoided. As a requirement from the government concerns idea of time establishment right the court appears to be excited to accept the requirement as somewhat compensation for losing a case. In the constitutional court judicial practice there are only several cases when the court strictly stated that annulment delay and detailed setting of legal measures weren't manifestly[43] necessary or weren't taken into consideration in specific cases.[44] Despite of this the court almost regularly sets time. Setting of time is managed by the exact date or in some cases there is time period appointed which is limited to 18 months. The court often gets criticized for intensive time setting and especially for not giving reasons and argumentation for this kind of actions.[45] Year 1929 revision of the Constitution requires for the court to determine specific reasons for time setting. By refusing this requirement the court obviously infringes initial idea of Pro Futuro Effect and applies it more as a rule than an exception.[46]

Local researchers also state that taking into consideration all aforementioned, the court's approach in the last decade towards several cases was much more careful. They bring an example of a case in which the court refused to apply Pro Futuro Effect in spite of demand of the government.[47] In this case, the act declared unconstitutional not only wasn't consistant with the constitution but also infringed constitutional principles of rule of law and democracy.[48] What's more, the court at least in several cases respected obligations of Austria coming from the contract with European Court of Human Rights by refusing the demand of the government to apply Pro Futuro Effect. The court with

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42 *Haller H.,* Die Prufung von Gesetz. Ein Beitrag zur verfassungsgrichtlichen Normenkontrolle, Springer Verlag, 1979, 248.

43 VFSLG 18603/2008.

44 VFSLG 12649/1991.

45 *Stelzer M.,* Pro Futuro and Retroactive Effects of Rescissory Judgments in Austria, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 68.

46 See there, 69.

47 VFSlG 16327/2001; VFSlG 17394/2004.

48 VFSlG 15488/1999; VFSlG 11646/1988; VFSlG 11591/1987; VFSlG 15129/1988; VFSlG 12649/1991.

this decision to some extent took into account international obligations of Austria. In a case similar to aforementioned, the court decided that demanded term should be reduced to 6 months.[49]

2.3.2. Drawbacks of Pro Futuro Effect

Taking into consideration of the fact that in Austria researchers criticize the constitutional court for applying Pro Futuro Effect. Specifically, they think that by means of applying the effect by the court it gives some kind of compensation to the legislator for lost case. Therefore, the legislator wins time and has opportunity to revise the act found unconstitutional in calm manner in paralell to the infringement of the constitutional rights. Because of all this, functions of constitutional control bodies in Austria become at stake.

Stating that in Austria applying Pro Futuro Effect from an exception became a rule is quite fair and this is also shown by statistics. According to the last decade's research (2002-11): the court applied Pro Futuro Effect in 103 cases out of 213 which is almost 50% of total cases. In 2010, when the court applied the effect most actively, there were 13 cases in favour of applying Pro Futuro Effect out of 16 which amounts to 80% of total cases. In 2004, the court used the effect more moderately and the result was 10 cases out of 35 which amounts to almost 30% of total cases. It is hard to imagine that all of the cases even in 2004 were exceptions.[50]

Schedule №1

Statistics of normative acts' annulment delay by Constitutional Court of Austria, reviewed period (years 2002-2011)[51]

Years	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**
Fully atisfied/ partially satisfied	30	26	35	23	23	19	14	7	16	20
Delayed	19	15	10	8	10	7	7	3	13	11

3. Establishment of Applying The Pro Futuro Effect by Constitutional Court of Georgia

The legislation on the Constitutional Court of Georgia didn't provide for The Pro Futuro Effect since its establishment till 2018. More than two decades were necessary for Georgian constitutional justice for the implementation of The Pro Futuro Effect. First steps in this regard were made in 2002 when the second and third paragraphs of article 25 of the organic "Law on Constitutional Court" were formed as follows:

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49 *Stelzer M.,* Pro Futuro and Retroactive Effects of Rescissory Judgments in Austria, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 69.

50 See there, 67, 75.

51 See there, 75.

1. "A legal act or its part declared as unconstitutional shall become void from the promulgation of a relevant judgement of the Constitutional Court, unless a different time limit is set by the law".[52]
2. "An act of the Constitutional Court must be enforced immediately after promulgation unless a different time limit is set in the act".[53]

According to these revisions the court was entitled to apply The Pro Futuro Effect but at the same time its decision was enforceable from the moment of its announcement. As we have already mentioned above, with these contradictory norms the court functioned for a long time and because of that realization of constitutional justice, also principles of rule of law and legal security faced serious problems.

What's more, application of The Pro Futuro Effect by the court was hindered by Article 89, paragraph 2 of the Constitution of Georgia which stated that a judgement of the Constitutional court of Georgia was final and legal act or its part declared as unconstitutional became void from the promulgation of a relevant judgement of the Constitutional Court.[54] By means of the constitutional reform in 2017, paragraph 5th of the article 60 of the constitution newly stated that "An act or a part thereof that has been recognized as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof".[55] It can be considered that the latter constitutional revision has established the normative basis for applying The Pro Futuro Effect. The important impact on starting this reform was made by practician lawyers' and researchers' opinions stated in various international conferences and scientific researches.[56]

The court's judgement has two different outcomes. Often, with a declaration of unconstitutionality a legislator doesn't need to adopt a new law because a declaration of unconstitutionality of a legal norm itself is enough for the prevention of future infringement of constitutional rights.[57] In specific cases, after the annulment of the argued legal norm it is also necessary for a new act to be adopted which will regulate legal relationships as to become inconsistent with the Constitution.

Georgian practician lawyers indicate on the organic law on "Constitutional Court of Georgia", paragraph 3 of the article 25, regarding aforementioned second option and state that a process of lawmaking, objectively, needs some time, that's why immediate enforcement obligation can't create a reasonable expectation for a legislator to enforce these changes second or third day after the promulgation of judgment. Nevertheless, legislative changes need to be made in a reasonable time. In

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52 Organic Law of Georgia on the Constitutional Court, Article 25, Paragraph 2, Parliamentary Agencies of Georgia №001, 31/01/1996.

53 See there, article 25, paragraph 3.

54 See there, article 89, paragraph 3.

55 See there, article 60, paragraph 5.

56 *Babeki V., Fishi S., Reichenberger Ts.,* Revision of the Constitution - Georgia's Road to Europe, 2012, 172 (in Georgian).

57 *Eremadze K*., Problems Related to the Issue of Legal Force of the Decision of the Constitutional Court of Georgia, Journ. Review of Constitutional Law, 2012, 6th ed., 18 (in Georgian).

any case, it's interesting what would be the future of specific legal relationships before adopting changes even if they would be issued by a legislator in a limited and reasonable timeframe (but, in certain cases, it can objectively take a long time because of possible complicated nature of an act or maybe because of a possible disagreement between political powers). In this case the reality is that an unconstitutional act is already annulled and a new one isn't yet adopted. How should legal relationships be continued and what practical power does a decision of the Constitutional Court have?[58]

Corresponding the aforementioned legal matter, until 2017 there wasn't any solution to the problem in the legislation on constitutional control but despite this fact, there were examples from the practice of the Constitutional Court where the court itself tried to find the most acceptable and right way.

3.1. Initial Practice of the Constitutional Court of Georgia

The very first attempt of the Constitutional Court of Georgia regarding the aforementioned matter is connected with the case called "Shalva Natelashvili Case"[59] where the court declared partial unconstitutionality of the resolution adopted on 15 September 2002 by the Energy Regulatory National Committee of Georgia (SEMEK) regarding electricity tariffs. The part of the resolution which concerned electricity tariffs' procurement for the Georgian population and "Electricity Fee Payment Rule According to the Fixed Tariff" adopted by SEMEK's resolution of 31 December, 2001 was declared unconstitutional.

The problematic issue was that declaration of unconstitutionality of the act regulating electricity tariffs would have caused the abolishment of the tariffs itself until a new normative act was adopted. Thus, the electricity supply would have been terminated to the Georgian population until a new tariff was set. That's why the court tried to resolve the problem by stating in the decision that the argued act is declared unconstitutional from the moment of the decision's promulgation and in addition to this, the court granted to the legislator 2 months for the setting of new tariffs, thus it applied The Pro Futuro Effect.

Therefore, the court formally didn't infringe the obligation of the Constitution and the law concerning time for enforcement of decisions and annulment of an act declared unconstitutional, by stating these requirements in its decision but meanwhile the court also applied The Pro Futuro Effect as not doing so can cause an infringement of the rights of the Georgian population and thus, in reality, the court prolonged operation of acts declared unconstitutional.[60]

The aforementioned decision was criticized a lot because according to the legislation applicable at that time, the court wasn't empowered by the right of applying The Pro Futuro Effect. The organic law on "Constitutional Court of Georgia", specifically, paragraph 3 of article 25 grants the right to the

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58 See there, 19.

59 Decision of the Constitutional Court of Georgia of December 30, 2002, №1 / 3/136.

60 *Eremadze K.,* Problems Related to the Issue of Legal Force of the Decision of the Constitutional Court of Georgia, Journ. Review of Constitutional Law, 2012, 6th ed., 19 (in Georgian).

court of delaying to render a decision but not to delay an annulment of an act declared unconstitutional.

It has to be noted that the aforementioned problematic issue concerning the application of The Pro Futuro Effect was known to the court as well that's why in its decision following the mentioned case the court still applied The Pro Futuro Effect but not indicated at the organic law on "Constitutional Court of Georgia", paragraph 3 of article 25 at all.

The Constitutional Court of Georgia in its 29th January of 2003 N2/3/182, 185, 191 cases called "Georgian citizens Firuz Beriashvili, Revaz Jimsherishvili and Public Defender of Georgia against the Georgian Parliament" declared unconstitutional several norms of criminal procedure code concerning arresting of a person and its right to defense. It was inevitable for the argued norms to be declared unconstitutional as long as they caused infringement of constitutional rights. Though, at the same time, the court acknowledged that argued norms like most of the norms of the Criminal Procedure Code were applicable in every minute towards the unspecified circle of persons. That's why the argued norms needed to exist in order to avoid on the part of the legislator while in a legal vacuum a possibility of abuse of power, thus concluding with infringement of constitutional rights granted to the people. The court granted to the legislator reasonable time (3 months) for adequate regulation of these matters but it wasn't clear whether the court meant to keep the application for legal norms declared unconstitutional until adoption of new ones just like it did in the previous case. What's more, the court didn't state in its decision about the annulment of the normative act declared unconstitutional.[61]

Notwithstanding the aforementioned issues, the Constitutional Court of Georgia established the practice of applying The Pro Futuro Effect towards legal acts declared unconstitutional. Examples of this are decisions rendered until 16th of December, 2018 which is the time before legal activation of The Pro Futuro Effect towards decisions of the Court. It is interesting that in aforementioned decisions the court indicated at the paragraph 3 of the article of the "Organic Law on Constitutional Court" as the legal basis for application of the The Pro Futuro Effect in spite of the fact that this legal norm's regulatory purpose was clear not to be application of The Pro Futuro Effect.

3.2. Basic Motivation of the Constitutional Court of Georgia for Applying The Pro Futuro Effect

The motivation of the Constitutional Court of Georgia when applying The Pro Futuro Effect basically stands for avoiding "legal vacuum" and to grant an opportunity to the legislator according to public, private interests to enforce a decision of the court in a reasonable timeframe and in accordance with the Constitution. For instance, in the "Case of 112"[62] the court took into account the circumstance the basic source for the "LEPL 112" was the tariffs payed by the Georgian population by cutting off amounts from their telephone balance. Purely to avoid ceasing of the main financing source for this important public authority the court applied The Pro Futuro Effect, thus, it gave a time for the state to search for alternative sources. Also, in one of the cases the court directly stated that the immediate annulment of the argued norms at the time of promulgation of the decision may cause negative effect

[61] See there, 20.

[62] Decision of the Constitutional Court of Georgia of July 5, 2019 №2 / 3/1279.

for the market of defending service and for its customers. Therefore, the legislator has to be granted to a reasonable time for resolving the aforementioned issue in consistent with the Constitution. The court also could took into consideration the approach of the GFCC according to the "Student Tuition Fee Case".[63] Thus, the court could took into account the amount of the unearened income and according to this approach it could has thought on not applying The Pro Futuro Effect. Therefore, customers won't be in a situation where 112 tariffs are cut of on the basis of the unconstitutional legal norm lasting for a half of the year.

3.3. New Practice of the Constitutional Court of Georgia

The Constitutional Court of Georgia in the "Zero Auction Case"[64] also stated that the immediate annulment of the argued act until solving its problem of consistence with the Constitution would cause the second repetitive auction (including the property on which transitional property rights disappear after realization) impossible to be held which may infringe rights of participants of the enforcement procedure. Therefore, the court considers that the Minister of Justice of Georgia should be given a reasonable time for resolving unconstitutional matters towards concrete auction procedures.[65]

The court in "Justices' Disciplinary Proceeding Case"[66] also stated that in case of immediate annulment of the argued legal norms there will be the situation when disciplinary measures can't be applied against justices until legal norms declared unconstitutional won't become in consistent with the Constitution. The impossibility of applying disciplinary measures against judges isn't a demand of claimant and also, it isn't the purpose of the court for declaration of unconstitutionality of argued norms. Therefore, the court considers that the legislator has to be given a reasonable time for resolving the problem of the rule according to which judges are dismissed from their duties.[67]

The interesting practice[68] of the court has been also established towards the article 14 of the Constitution (Nowadays, the article 11 of the Constitution). When unconstitutional legal norm grants inappropriate privilege to one party or vice versa, the court states that it's the legislator's discretion to decide in favour of one of ways for removing inequality. Specifically, whether it empowers second party with the same privilege or ceases the favoured party's privilege. In these kinds of cases the court states that it isn't a positive legislator and that's why the court applies the The Pro Futuro Effect, thus granting the right to the legislator to choose which way to move forward in terms of removing inequality. It's interesting that the GFCC has a similar practice towards the equality right and so does the Constitutional Council of France and the Supreme Tax Court of the Netherlands.[69] In latter's cases

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63 Decision of the Constitutional Court of Georgia of December 14, 2018 №2 / 11/747.

64 Decision of the Constitutional Court of Georgia of May 28, 2019 №2 / 2/867.

65 See there.

66 decision of the Constitutional Court of Georgia of November 16, 2017 №2 / 5/658

67 See there.

68 Decision of the Constitutional Court of Georgia of December 14, 2018 №2 / 13 / 1234,1235.
Decision of the Constitutional Court of Georgia of July 2018 №1 / 2/671.
Decision of the Constitutional Court of Georgia of April 18, 2019 №1 / 1/655.

69 BNB 1999/271, 12 May 1999; BNB 2006/322, 11 August 2006.

it's clear that when infringement of the equality right appears the court lets a legislator to choose how to solve this problem. This kind of approach also is applied towards the Tax Law in terms of applying of the The Pro Futuro Effect.[70]

In the judicial practice of the Constitutional Court of Georgia we can find cases when the court applied the paragraph 3 of the article 25 of the "Organic law on Constitutional Court" in its initial content and delayed enforcement of a decision without delaying annulment of legal norms declared unconstitutional. The same issues were present in cases of "Gelbakhiani, Nikolaishvili, Silagadze"[71] and "Hearings".[72]

Schedule №2

Statistics of normative acts' annulment delay by Constitutional Court of Georgia, reviewed period (years 2014-2019, September)

Years	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Fully satisfied/ partially satisfied	11	9	12	18	14	9
Delayed	2	0	1	4	6	5

4. Conclusion

Analysing legal acts and judicial practices of several countries show that a farely considerable part of Specific Constitutional Control countries including Georgia came into the conclusion that it's crucial to establish flexibility in time which means taking action towards legal mechanism implementation for The Pro Futuro Effect.

Such a delay of enforcement of an act of a constitutional control organ in which annuls outcomes of decisions of constitutional courts may from time to time be applicable when neat restoration of unconstitutionality has a priority towards immediate annulment of an argued act. Constitutional Courts while applying The Pro Futuro Effect also take into account a risk of immediate annulment of an argued act. The balance between constitutional values is always taken into account and what's about human rights and freedoms providing their guarantor-legal stability is a permanent purpose for the constitutional jurisdiction.

Clearly the decision of a constitutional court shouldn't infringe public or private interests. When a court based on proportionality principle and after a thorough examination of private and public interests, would conclude that an act is unconstitutional it has to render this kind of decision because if

[70] *Gribnau H., Lubbers A.,* The Temporal Effect of Dutch Tax Court Decisions, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 191.

[71] Decision of the Constitutional Court of Georgia of November 13, 2014 №1 / 4 / 557,576.

[72] Decision of the Constitutional Court of Georgia of April 14, 201 №1 / 1/625, 640.

not a court itself would infringe the Constitution. Despite the aforementioned, this kind of "right" decision shouldn't create much more serious problems in terms of infringing human rights or public interests.

According to the aforementioned review of legislation and judicial practices of various countries we can put out the cases where a court considers that applying the Pro Futuro Effect, thus, maintaining unconstitutional legal norms for some time, is much less harmful than applying ex nunc effect. These kind of cases are as follows:

- The Situation according to which by the annulment of a legal norm "legal vacuum" is created which jeopardizes legal security and leaves concrete legal relationship out of any kind of regulation at all;
- Annulment of tax legislation norms which jeopardize state fiscal discipline and its firmness;
- Declaration of unconstitutionality towards the equality right when it becomes a positive legislator's discretion to choose which way to be favored in terms of restoration of the equality right;
- Also, cases when a decision of a court isn't self-enforceable and enforcement issues are shifted towards legislator.

Based on reviewed countries examples a general approach of granting to a legislator a certain time for applying appropriate measures is revealed. As it appears, the time fluctuates between 5 months and 2 years. Also, it has been revealed that constitutional control bodies not almost trust a legislator's good faith towards a decision's appropriate enforcement. In their decisions they indicate obligatory instructions which have to be definitely taken into consideration on the side of a legislator when adopting a new regulation.

Together with the issue of The Pro Futuro Effect of decisions of a constitutional court and in the example of Austria it has been revealed that this mechanism can also have side-effects which should be also regarded as a bad example. The bad example in the case of Austria was that application of the Pro Futuro Effect has been like a reverence towards a losing party-the legislator. Another disadvantage of the effect in case of Austria was that according to the statistics (the court applied The Pro Futuro Effect in 103 cases out of 213 which is almost 50% of total cases) application of the Pro Futuro Effect from an exception became a rule which is inadmissible from the perspective of the Austrian legislation.

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18. Decision of the Constitutional Court of Georgia of May 28, 2019 №2 / 2/867.
19. Decision of the Constitutional Court of Georgia of April 18, 2019 №1 / 1/655.
20. Decision of the Constitutional Court of Georgia of December 14, 2018 №2 / 11/747.
21. Decision of the Constitutional Court of Georgia of December 14, 2018 №2 / 13 / 1234,1235.
22. Judgment of the Constitutional Court of Georgia of July 2018 №1 / 2/671.
23. Decision of the Constitutional Court of Georgia of November 16, 2017 №2 / 5/658.
24. Decision of the Constitutional Court of Georgia of November 13, 2014 №1 / 4 / 557, 576.
25. Decision of the Constitutional Court of Georgia of April 14, 2011 №1 / 1/625, 640.
26. Decision of the Constitutional Court of Georgia of December 30, 2002 N1 / 3/136.
27. The French Constitutional Council Decision 2012-268 QPC of the 27th of july 2012.
28. The French Constitutional Council Decision 2010-45 QPC of the 6 October 2010.
29. The French Constitutional Council Decision 2010-32 QPC of the 22th of September 2010.
30. The French Constitutional Council Decision 2010-14/22 QPC of the 30th of july 2010.
31. The French Constitutional Council Decision 2010-1 QPC of the 28th of May 2010.
32. The French Constitutional Council Decision 2010-108 QPC of the 25th of 25 March 2011.

33. The French Constitutional Council Decision 2008-564 DC of the 19th of June 2008.
34. BVerfG, judgment of the First Senate of 9 February 2010 – 1 BvL 1/09.
35. BVerfGE judgment of the First Senate 93, 121.
36. BNB 2006/322, 11 August 2006.
37. BNB 1999/271, 12 May 1999.
38. BverfGE 1733.
39. BverfGE 2409,2419.
40. BverfGE 1054/01.
41. BverfGE 1261,1267.
42. BVerfGe 117.
43. BverfGE 2487.
44. BverfGE 1054/01.
45. VFSLG 18603/2008.
46. VFSlG 17394/2004.
47. VFSlG 16327/2001.
48. VFSlG 15488/1999.
49. VFSlG 12649/1991.
50. VFSLG 12649/1991.
51. VFSlG 11646/1988.
52. VFSlG 15129/1988.
53. VFSlG 11591/1987.

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Legal Grounds and Factual Preconditions for the Reinstatement of Unlawfully Dismissed Public Officer

The legal instrument for reinstating an unlawfully dismissed public officer has been stipulated by Article 118 of the Law of Georgia on Public Service. In case the decision to dismiss the officer is declared null and void, the rule lays down consecutive procedures and establishes guarantees of legal protection.

Dictated by existing normative regulations, following the nullification of the decision on dismissal of the officer, the public authority shall be liable to immediately reinstate the servant to the same position and if such appointment does not exist – to an equivalent position at the same office or, failing that, in the public service system at large. If reinstatement is ultimately impossible, then the officer shall be enrolled in the reserve and granted compensation.

The detailed legislative regulation of the issue should have prevented varied implementation of the norm in practice, however court decisions have highlighted different approaches, in certain cases pertaining to the labor rights of other public officers and thus necessitating scientific analysis.

Key words: *Unlawfully dismissed public officer; Public officer reinstatement; Principle of "primo in tempore, potior in iure"; Principle of legitimate expectations; Restitution of officer's rights.*

1. Introduction

In Georgia a career public service system, founded on the concept of a professional public servant, is in effect. It represents a crucial guarantee for the implementation of a stable and efficient public service. The cornerstone of such a career public service system is formed through public law instruments for protecting officer's rights. To balance out the duty of loyalty,[1] the legislator acknowledges the state's duty to ensure legal and social protection of the public officer by laying down legal mechanisms that shall make up a certain guarantee to restore (restitute) public servant's infringed rights and to procure his or her professional and loyal service to the country.

The public law safeguards to take care of the professional public officer and secure his/her rights foremost serve the protection of public interests. The demand of the society that the officer serve him/her with loyalty, in good faith, impartially and in full accord with the principle of legality, at

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[1] See: *Turava P*., *Pirtskhalaishvili* A., *Dvalishvili M*., *Tsulaia I*., *Kardava E*., *Sanikidze Z*., *Makalatia G*., The Law of Georgia on Public Service: Commentary, *Kardava E. (ed.),* Tbilisi, 2018, 43-45 (in Georgian).

the same time denotes the need for the existence of appropriate guarantees for legal protection in law in exchange for such service.[2] In view of such public demand, the Law on Public Service, enacted on October 27th, 2015, regulates in detail the issues of legislative and social protection of the wronged officer. Such an approach from the legislator is different and more exhaustive than the content of the previous law, which may be explained by the necessity to regulate these guarantees on legislative level. Similarly important to note is, that the aspiration of the legislator to lay down a detailed regulation on legal and social protection of the infringed officer, must be underpinned by both executive and legislative powers, so as not to jeopardize the systemic enforcement of public interests by any particular branch of government. The principle of separation of powers must be a safeguard ensuring protection of the officer's rights. The will as formulated in law (the will of the majority, that is) must be enforced with the same spirit as the legislator intended and at the same time, justice should also ensure protection thereof. Hence case law[3] should be deemed unsuitable as the source of law in regards to the legal order affirmed by public law norms.

Chapter XIII of the Law of Georgia on Public Service, adopted within the scope of public administration reforms,[4] regulates issues pertaining to the protection of public officers, including setting out rules and preconditions for reinstating an unlawfully dismissed civil servant. If the decision on dismissal is declared null and void, the duty to reinstate the officer shall be determined on the basis of Article 118 of the Law of Georgia on Public Service. This rule has taken on particular significance in the realm of public service. Additionally, court precedents have likewise emerged with different interpretations of its contents and aims. For public offices, such circumstances have tended to obfuscate the normative instruments for enforcing court decisions and prerequisites for applying thereof. Doubts were also raised about the uniform understanding of the overall intentions as envisioned by the legislator in the Article 118 of the Law of Georgia on Public Service.

As a result, considering all these matters and taking into account protection of officer's rights and interests of public service, special importance should be given to the scientific analysis of the issues related to the reinstatement of the public officer, as it illuminates the actual will and intent of the legislator with regard to the Article 118 of the Law on Public Service.

The aim of this article shall be to analyze the reinstatement of unlawfully dismissed public officer and, if reinstatement is not feasible, to dissect the instruments of legal and social protection that exist to counterbalance infringed rights. The study discussed restitution of rights as it concerns principle of legitimate expectations. In the article presented here, the scientific study of the inappropriateness of applying case law within the framework of administering justice when deciding civil service disputes.

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2 Ibid, 20.

3 See *Khubua G.*, Legal Theory, 2nd Ed., Tbilisi, 2015, 159 (in Georgian).

4 Notably, the Article 228 of the Association Agreement between European Union and the European Atomic Energy Community and their Member States, on one hand and Georgia, on the other, of June 27th, 2014, prescribes increased protection of labour relations and compliance thereof with internationally recognized standards.

2. Constitutional Foundations for Protecting Public Officer's Rights

The Article 18 of the Constitution of Georgia stipulates the right to fair administrative proceedings, access to public information, informational self-determination and compensation for damages inflicted by a public authority. According to the Paragraph 4 of the Article, everyone shall be guaranteed full compensation, through court proceedings, for the illegal damage wrought by the authorities of the State and autonomous republics as well as local self-governance (municipal) bodies or by civil servants from the respective (State, autonomous republics, local self-governance) funds.

The establishment of fair administrative procedures as a constitutional right represents a legal innovation of the 2017 Constitutional Reform.[5] The decision to dismiss the officer from the work is the outcome of administrative proceedings, therefore following the principle of fairness in respect thereto is the requirement of the highest law of Georgia. When an officer is unlawfully dismissed from his or her position, this means that the public authority has enacted an illegal managerial decision and made a judgement conflicting with the law. In that event, "it is necessary for an accessible and efficient instrument to exist by which, in case of an illegal act committed by state authorities and public officials, the person may restore his rights and receive compensation for material or moral damages."[6] The Article 18 of the Constitution likewise expressly states the limits on restitution for damages by prescribing *full* compensation.

In case of unlawful dismissal of the public servant, restitution signifies, first and foremost, the return to the initial state of affairs as much as possible. If reinstatement is unattainable, then the duty to compensate damages shall remain as one of the principal means of restoring rights.

According to the practice of the Constitutional Court, unlawful dismissal may inflict both material and moral damage to the person, the compensation of both of which is guaranteed by the Paragraph 4 of the Article 18 (Paragraph 9 of Article 42 of the previous version of the Constitution). The Court similarly declared that the application of this constitutional rule is not limited to merely regulating damages in a certain field and any kind of harm caused by the actions of public officers of the state authorities, those of autonomous republics or self-governance bodies shall be covered within its scope. The obligation to compensate damages in full as stipulated by the Constitution means not a duty to recompense within limited amounts predefined by a certain subject (or even legislator), but the responsibility to pay the person actual damages inflicted in their entirety.[7] Hence, compensation of damages by the public office may follow the reinstatement of the civil servant.

Regarding the Article 25 of the Constitution of Georgia, the norm establishes that any citizen has the right to occupy any public position, provided the requirements set by law are satisfied. As for the Article 29 of the old version of the Constitution, which had the similar gist as the Article 25 today,

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5 Constitutional Law of Georgia – On the Amendment of the Constitution of Georgia, № 1324-RS, LHG, 19/10/2017.

6 Decision № 2/4/735 of the Constitutional Court of Georgia, of July 21st, 2017, "Citizens of Georgia – Meri Giorgadze and Pikria Merabishvili vs Parliament of Georgia".

7 Decision № 2/3/630 of the Constitutional Court of Georgia, of July 31st, 2015, "Citizen of Georgia – Tina Bezhitashvili vs Parliament of Georgia".

the Constitutional Court clearly averred that "these Constitutional norms guarantee the right of the citizen of Georgia to occupy both electoral and appointive positions and lay down constitutional grounds for the execution of public service functions. Furthermore, this constitutional rule guarantees not only occupation of a specific position, but also unobstructed enforcement of such positional authority and protection thereof from unjustified dismissal.[8] Likewise, the Article 25 of the Constitution ordains that the provisions on public offices shall be stipulated by law. Hence it is the Law of Georgia on Public Service that prescribes such provisions, which, among else, also regulates, in detail, protection from unlawful dismissal. In particular, Chapter XIII of the Law contains both absolute and other (discretionary) grounds for dismissal of a public officer and thus is in compliance with the objectives of aforementioned constitutional rules.

The Law of Georgian on Public Service of October 27th, 2015, established an even higher standard with regards to reinstating unlawfully dismissed public officer than what was stipulated previously by Chapter XIII alone. The Article 118 includes specific rules on reinstatement and thus in certain ways, conforms to the spirit enshrined in constitutional aims. Specifically, when the officer can not be protected from unlawful dismissal through legal guarantees included in the law, the detailed rules on the reinstatement of the officer should become one of the crucial instruments for the actualization of the objectives of such constitutional norms. Taking into consideration all that has been stated above, the legal provisos in the reinstatement of the public officer is in absolute accord with Constitutional aims and more so, stipulate, in meticulous detail, the rules on the organization of the public service.

3. Legal Grounds for Reinstating Unlawfully Dismissed Public Officer

The admission of an officer into service, as well as his or her dismissal is effectuated on the basis of an individual administrative act. Public servant believing dismissal from public office unlawful has the right to contest the legality of such dismissal within one month after the official familiarization (notification) with the act. As there are administrative rules on protecting rights in public service,[9] the administrative complaint on the annulment of the individual administrative act on dismissal shall be submitted first to a superior authority (an official) and if left unsatisfied, the dismissed officer then shall be entitled to proceed by disputing in courts though a claim. In both instances the nullification of the decision on dismissal, which is an individual administrative act, shall be contingent on it being deemed unlawful,[10] while the burden of proof regarding the legality of the disputed act shall be borne by the public office.[11]

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8 Decision № 1/2/569 of the Constitutional Court of Georgia, of April of 11th, 2014, "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili vs Parliament of Georgia".

9 Paragraph 1 of the Article 118 of the Law of Georgia on Public Service, LHG, 11/11/2015.

10 On legal grounds for annulling an administrative act, see: *Turava P*., General Administrative Law, 2nd Ed., Tbilisi, 2018 (in Georgian). Also: Article 60^1 of the General Administrative Code of Georgia, LHG 32(39), 15/07/1999. Article 32 of the Administrative Procedure Code of Georgia, LHG, 39(46), 06/08/1999.

11 The Administrative Procedure Code of Georgia, Paragraph 2 of Article 17, LHG, 39(46), 06/08/1999.

The overturning (annulment) of the decision to dismiss the officer by the superior executive authority or by the court is the prerequisite for reinstating the officer, notwithstanding whether such reinstatement was a separate matter of dispute during the proceedings. In essence, reinstatement represents a legal outcome which follows the annulment of the individual administrative act.

"Certain legal norms, alongside with substantive (primary – "*primär*") rules of behavior, also contain procedural (formal) components."[12] The Article 118 of the Law of Georgia on Public Service is precisely such a rule, in essence laying down a procedural norm (hence formal, procedural law) in spite of the fact that the law regulating public service is a set of substantive norms. In fact, majority of substantive laws contain formal, procedural norms in practice.[13] As regulating the matter in such a way constitutes an exception from general rule, it is necessary for the legislator to clearly state the aims of regulating the reinstatement of the unlawfully dismissed public officer through procedural norms. Foremost, it should be noted that "legal norms containing procedural (formal) requirements make up procedural (formal) law. Fundamentally, procedural law encompasses preconditions and outcomes of the operation (functioning) of legislative acts."[14] Substantive norms, on the other hand, are essential (substance) norms. More so, there is quite a close interrelation between procedural (formal) and substantive norms. "The procedure is not a goal within itself, but serves the eventuation of legitimate legal acts, i.e. has ancillary functions. Formal law must be construed in accordance with substantive law, that is, it can not be interpreted in a way that disregards the values of substantive law.[15] Regulating reinstatement through formal rules is occasioned by the intention to achieve a rightful outcome. The substantive legitimacy of law necessitates the existence of "true", "correct" law.[16] Lawfulness as a measurement of a fair decision is a significant value when protecting rights and it is flat-out necessary to recognize and protect this principle when reinstating the unlawfully dismissed public officer. The legislator prescribes detailed procedure in Article 118 in order to arrive at a lawful decision. The procedure encompasses several stages and as a whole, they comprise a cycle guaranteeing the protection of officer's rights. Understandably, through this approach, the legislator endeavors to achieve justice, prompted by the intention to care about the officer as he or she adheres to the duty of loyalty at public office on a regular basis.

The Article 118 of the Law of Georgia on Public Service lays down the stages for the reinstatement of a public officer unlawfully dismissed and sets out preconditions therefor. Similarly, the breaking-down of the restitution process of the public officer's infringed rights into specific stages denotes the attitude of the legislator. Considering the complicated nature of restoring infringed rights, the law envisions several possibilities not as simple alternatives to each other, but as sequential stages, meaning that in case of failure of the first hypothetical reinstatement procedure, the second possible

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12 *Zippelius R*., Theory of Legal Methods, 10th Ed., GIZ, Tbilisi, 2009, 122 (in Georgian).

13 *Schlieffen K*., *Haass S*., Grundkurs Verwaltungsrecht, Paderborn, Deutschland, 2019, 55.

14 *Muthorst O.,* The Foundations of Law: Method, Definition, System, *Maisuradze D. (Trans.), Miminoshvili M. (ed.),* Tbilisi, 2019, 281 (in Georgian).

15 Ibid, 283.

16 See: *Khubua G*., Legal Theory, Tbilisi, 2004, 43-44 (in Georgian).

scheme should be applied, the non-performance of which creates the prerequisites for performing next one and so forth.

This norm first and foremost calls for the immediate reinstatement of the officer to the same position occupied before dismissal. In general, a position is a career stage with a set of functions, determining the place and role of the officer in the overall public service system.[17] The officer positions are reflected in the staff roster and its existence generally is corroborated based on such an enumeration. To be reinstated to the same place, the presence of such an appointment at the public office is necessary in the same form it existed at the moment of employee's dismissal. Specifically, this means the sameness of the very essence and functions of the position. Granted, it is possible for the name of position to be changed by the time of reinstatement or it may add on other functions, which does not necessarily mean that the position for reinstatement does not exist.

If a position occupied by the officer before dismissal no longer exists,[18] a second procedural stage specified by law is inaugurated, which signifies the search for an equivalent position at the same public office in order to reinstate the dismissed civil servant. To establish equivalency of the position, the law lays down its definition[19] as a position of the same rank and file (category) with the work description/functions and duties as well as qualification requirements identical or mostly similar. Therefore, reinstatement to a lower position is not envisaged by present regulations and hence only an *equivalent* position should be considered for restitution.

In case of infeasibility of reinstating the officer back as mentioned, when there is no equivalent position within the structure of the same public office, then a stage of searching for such a position commences throughout the entire public service system. In this instance, the reinstatement of the public officer to an equivalent position is permitted with his or her consent and that of the particular public office. Notably the procedure calls for the participation of LEPL – Civil Service Bureau, which on the basis of an appeal by the public office, directly undertakes the search for an equivalent vacant position and through this facilitates the functioning of those very normative instruments aimed at protecting officer's rights. Concurrently, the Civil Service Bureau, a neutral body between the public office and the unlawfully dismissed public officer, is involved in the reinstatement of the servant as an authority enforcing supervision of uniform administration of the entire civil service system. Its engagement guarantees the protection of public interests in public officer reinstatement procedures on one hand and promotes organized management of the system in light of the administration of the system as whole. Similarly, the hunt for the equivalent position through the entire civil service system is a symbolic representation of the unity of civil service and in regards to the reinstatement of the dismissed officer, it embodies the collective responsibility of the whole public service as a unified system. More precisely, the issue of reinstatement goes beyond the responsibility of a single public

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17 Subparagraph (k) of Article 3 of the Law of Georgia on Public Service. LHG, 11/11/2015.

18 The absence of a vacancy may be caused by the position being abolished due to reorganization or by such alterations in the substance and functions that these significantly transform the character of work from its initial variant.

19 Subparagraph (f) of Paragraph 1 of Article 3 of the Resolution № 199 of the Government of Georgia, of April 20th, 2017, on the Rules of Mobility of Professional Public Officers, LHG, 21/04/2017.

office and becomes one of the the whole system, the object of care for the entire united civil service. The LEPL–Civil Service Bureau is involved (within its competence) in upholding this very unity and by this the legislator elevates the restoration of public officer's rights to a higher level.

Following the consecutive implementation of said stages, if, however, the public servant still can not be reinstated back, the final measure for protecting his or her rights shall be to grant compensation in the amount equal to the full work remuneration for a period of 6 months and then to enroll in the reserve system. By regulating the issue of restoration of public officer's infringed rights in such a way, the legislator set up an approach different to that of the Law on Public Service of October 31st, 1997, which prescribed only the immediate reinstatement of the civil servant, even at the expense of other's rights (which were also protected by law).

4. The Absence of a Vacant Position as the Basis for Refusal to Reinstate the Officer and the Principle of Legitimate Expectations

The Article 118 of the Law of Georgia on Public Service deems the non-existence of a vacant position at the public office, the illegal decision of which led to the dismissal of the officer, as well as in the entire public service system as the grounds for finally rejecting reinstatement. It is precisely here, regarding this issue, that determining what legislator meant by stipulating "absence of such position" is important, as this provision has taken on particular significance when the Court of Appeals thought it appropriate to dismiss the officer appointed to the job in order to reinstate the previous unlawfully dismissed servant on the basis of so-called "first come principle"[20] and thus made a decision conflicting with the practice established by the Supreme Court. In particular, the Supreme Court stated that, "The instances when reinstatement is not possible include the absence of a position or the occupation of such a position by another person".[21]

Such interpretation by courts is derived from the spirit of the Article 118 of the Law on Public Service and conforms to the principles of public service law and administrative law in general. First, it must be emphasized that public law norms exclude the possibility of restoring a person's rights at the expense of someone else's. Such an approach has been elevated to a status of a value within the intricate relations protected by public law norms, foundations of which are laid down by the principle of legitimate expectations affirmed by the General Administrative Code. Anyone who trusts the legality of the decision made by a public office should be protected. They likewise should have trust towards those administrative acts which benefit them.[22] One of the functions of administrative acts is precisely to establish such expectations and ensure legal protection.[23]

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[20] Decision № 3B/1195-19 of the Court of Appeals of Tbilisi, of October 16th, 2019.

[21] Decision № BS-595-595(2K-18) of the Supreme Court of Georgia, of April 17th, 2019 and Decision № BS-376-376(2K-18) of the Supreme Court of Georgia of December 11th, 2018.

[22] *Seerden R., Stroink F*., Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis, Antwerpen – Groningen, 2002, 119.

[23] *Fleiner T., Fleiner L. R. B.,* Constitutional Democracy in a Multicultural and Globalised World, Verlag, Berlin, Heidelberg, 2009, 259-260.

The German law upholds the principle of legitimate expectations, which is connected with the fundamental principle of protecting trust (*Vertrauensschutz*).[24] At the same time, in some instances these principles are deemed to be identical to each other[25] and it takes up a special place in the law of the country.[26] When declaring administrative acts null and void, the review of legitimate expectations is undertaken both to protect the interests of the addressee (the subjective side of legitimate expectations) and those of public at large (the objective side of legitimate expectations).[27] Likewise significant is not only to review what subjective result will be achieved through the repeal of an administrative act, but also necessary to comprehend the scale of objective harm in detriment of public interests caused by the disregard of the principle of legitimate expectations. As such expectations are of the evaluative category in administrative law, their examination and protection are unconditionally necessary to ensure realization of principle of fairness.[28] "Legitimate expectations existent to benefit citizen's interests are the good by which a law-based state affirms its legal order".[29]

The Georgian law likewise recognizes the validity of legitimate expectations both with regards to the decision issued by the administrative authority as well as to the promises made.[30] The expectations of the citizen must be considered as more important than the interests protected by the administrative body.[31]

The officer appointed to the position of the unlawfully dismissed servant has legitimate expectations towards the empowering administrative act on his/her appointment (*bona fide* acts)[32] and such expectations should be honored and protected. The officer partakes in governmental procedures starting from the day of his appointment and thus executes acts of legal significance. Simultaneously, the interests worthy of protection in this case are stand high as the annulment of the act will result in self-evident harm to him/her.

The aim of the principle of legitimate expectations is to protect the rights of an "innocent" person even in case of an illegal administrative act. This also means that an illegal act can not be

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24 *Potestà M.*, Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, 7, <https://lk-k.com/wp-content/uploads/potesta-legitimate-expectations-inv.-treaty-law-2013.pdf> [26.04.2020].

25 *McKinnon T.,* The Doctrinal Foundations of Legitimate Expectations, 2013, 7, <https://www.academia.edu/4841134/Thoughts_on_the_Doctrinal_Foundations_of_Legitimate_Expectations> [26.04.2020].

26 See: *Rennert K.,* The Protection of Legitimate Expectations under German Administrative Law Paper given on the occasion of the seminar on the protection of legitimate expectations of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) on 21 April 2016 in Vilnius, Lithuania, <https://www.bverwg.de/medien/pdf/rede_20160421_vilnius_rennert_en.pdf> [26.04.2020].

27 *Wolff H. J., Bachof O., Stober R.* – "Verwaltungsrecht I", 10. Auflage, München, 1994 , 745.

28 *Kopp O. F., Ramsauer U.,* Verwaltungsverfahrensgesetz – Kommentar, vollstaendig ueberarbeitetet Auflage, Muenchen, 2016, 49-30.

29 *Battis U*., Allgemeines Verwaltungsrecht, 3. Aufl., Heidelberg, 2002, 179 (quotation translated by *Kardava E*.).

30 Article 9 of the General Administrative Code, LHG, 32(39), 15/07/1999.

31 See: *Turava P*., General Administrative Law, 2nd Ed., Tbilisi, 2018, 122 (in Georgian).

32 *Seerden R., Stroink F.,* Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis, Antwerpen – Groningen, 2002, 119.

voided within the scope of legitimate expectations [i.e. if they are present]. This legal provision is the guarantee of "untouchability" of the officer, of his or her "protectability".

The Article 97 of the Law of Georgia on Public Service of October 31st, 1997, directly accounted for the reinstatement of the unlawfully dismissed servant as the grounds for dismissal of (other) officer as it overlooked the principles of the General Administrative Code.[33]

Acknowledging the public service reform as a priority, the legislator had, by Resolution №627 of the Government of Georgia, of November 19th, 2014, on Approval of the Concept of Public Office Reforms and on Certain Measures Pertaining Thereto affirmed the need for the public service rules to be in compliance with requirements of the General Administrative Code and stipulates, that "Reinstatement of a person shall not entail dismissal of a person appointed to a position from the civil service structure. It shall be deemed impermissible to protect rights of one through the infringement of another's. The State shall take care of the employment of such a person. The principle of cadre stability demands for the law to precisely define the legal grounds for the dismissal of a public officer from work as well as legal and social protection guarantees.[34]

5. The Principle of *Primo in Tempore, Potior in Iure* and Priorities of Protecting Rights in Public Service Law

Considering that during administration of justice, the approach laid down by the Law of Georgia on Public Service, of October 31st, 1997, nowadays criticized based on numerous conceptual studies and brought down by current effective legislation, was applied through the lens of the principle of *primo in tempore, potior in iure* ("First in time, greater in right."), it would be appropriate to define the essence of such principle and its admissibility in public law relations. However, what also must be stated, is that the during such administration of justice the courts are bound by Constitution and effective laws alone, which rules out the possibility for the court to pass judgement outside of law and renders the creation of law through case law unjustifiable in light of existence of detailed public law rules regulating the disputed matter. "Case law is the act of imposing law and not making law".[35] The case law does not envisage formulation (drawing-up) of rules. It is not intended for general regulation and only in certain circumstances does it allow for the factual assessment of the law. When the case law is used to rectify the law, it, in substance, challenges the Constitution and thereby endangers the principle of separation powers.[36]

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33 The General Administrative Code of Georgia was promulgated on June 25th, 1999 and therefore, the Law of Georgia on Public Service of October 31st, 1997, could not have been in compliance with the principles of general administrative law.

34 The Paragraph 7.3 of the concept as approved by the Resolution №627 of the Government of Georgia, of November 19th, 2014, on Approval of the Concept of Public Office Reforms and on Certain Measures Pertaining Thereto, GLH, 20/112014.

35 *Khubua G.*, Legal Theory, 2nd Ed., Tbilisi, 2015, 160 (in Georgian).

36 *Schmidt R.,* Allgemeines Verwaltungsrecht, 16. Auflage, 2013, 57.

["[T]he notion that being there first somehow justifies ownership rights is a venerable and persistent one."].[37] Such an idea is directly linked with the main gist of the principle of "*primo in tempore, potior in iure*". The "first come" principle ("*primo in tempore, potior in iure*" in Latin) mentioned in the decision of the Court of Appeals,[38] is an ancient principle and humans have long since abided by it in their social interactions as unwritten law.[39] It was applied already by the times of Emperor Caracalla (213 AD) and since then has taken up a special place in the law of intellectual property and property law (law of things)[40] in general.

Notably the "first come princple" has both typical and atypical applications. Its typical manifestation is extrapolated from the legal system itself and originates in Roman law while the atypical one is the choice of the legislator.[41] In specific areas of law the principle of "*primo in tempore, potior in iure*" is formulated through legislation (law) and complements other core principles of the relevant field. In particular this means that the application of such an approach must be sanctioned by law itself, more so in subfields of law that belong to public law.

The precedent for applying this principle in Georgian public service law was laid down by the decision of the Tbilisi Court of Appeals, which expounds that "If the reinstatement of the unlawfully dismissed public officer to same position as existed before dismissal and now occupied by another employee shall engender the dismissal of such person hence resulting in the juxtaposition of two honorable interests: first, the interest of the unlawfully dismissed and subsequently reinstated employee to take back the position occupied before dismissal and second, the interest of the person appointed to such position to keep the place to which he was assigned lawfully, then such conflict of interests should be resolved in favor of the public officer first appointed to this staff job, subsequently dismissed unlawfully and legally reinstated. Resolution of conflict of interests this way is in accord with the principle instilled in the legal doctrine - "First in time, greater in right." (i.e. first come principle) as well as adheres to the understanding of custom law and fairness."[42]

To reinstate the unlawfully dismissed officer, the issue of applying the principle "*primo in tempore, potior in iure*" as the grounds for dismissing another civil servant requires reflection in light of existing regulations and public law principles.

It must be taken into account that, in line with first paragraph of Article 106 of the Law of Georgia on Public Service, the officer shall be dismissed from work only when the grounds for such are included in that law and reinstatement of another (previous) public officer is not one of them.[43] The aforementioned decision by the Tbilisi Court of Appeals also specified that "Reinstatement of a

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37 *Berger L,* An Analysis of the Doctrine That "First in Time is First in Right", Nebraska Law Review, Vol. 64, Issue 3, 1985, 354, cited in *Becker L.,* Property Rights: Philosophic foundation, 1977, 24.

38 Decision № 3B/1195-19 of the Court of Appeals of Tbilisi, of October 16th, 2019.

39 *Berger L.,* An Analysis of the Doctrine That "First in Time is First in Right", Nebraska Law Review, Vol. 64, Issue 3, 1985, 350.

40 *Hoog L. M.,* De prioriteitsregel in het vermogensrecht, Bodegraven, 2018, 261, <https://openaccess.leidenuniv.nl/handle/1887/66890> [20.04.2020].

41 Ibid 265.

42 Decision № 3B/1195-19 of the Court of Appeals of Tbilisi, of October 16th, 2019.

43 Articles 107 and 108 of the Law of Georgia on Public Service, LHG, 11/11/2015.

person back to the same position may denote the positional relocation of another to an equivalent or other appointment".[44] In accordance with the the Law of Georgia on Public Service, the positional relocation of the employee, horizontal advancement or, in other words, career development, is linked with the will of the public officer himself while demotion to a lower position has its own causes and the law does not lay down any exception therefrom.

For this reason, such ruminations of the Court of Appeals do not conform to the rules set out in the Law of Georgia on Public Service. Moreover, there are in contradiction with the principles recognized by administrative norms themselves and as public law exhaustively regulates this contentious matter within the scope of Article of 118, discarding this rule and its "substitution" with a private law approach lacks scientific basis and may lead to unenforceable decisions in practice. Similarly, decisions enacted outside the procedures of the Article of 118 will assuredly entail the infringement of other rights protected by the Law of Georgia on Public Service and/or conflation with other legal relations and may even lead to organizational crisis.

On the question of the prioritization of interests and ways of protecting the rights of the unlawfully dismissed public officers, the law proposes coherent alternatives for the reinstatement. In such a way, the context of conflict of interests is not relevant to the present question at hand. The Article 118 of the Law of Public Service expressly prescribes, stage-by-stage, instruments serving to protect the rights of the unlawfully dismissed public officer and such it does not encroach on the interests of other public officers. As the Supreme Court elaborates, the Paragraph 3 of Article 118 of the Law of Georgia on Public Service envisages a myriad of regulations depending whether or not a possibility of reinstatement exists so the right to work of another person is not infringed upon. However, the Chamber underlines, that "the possibility for the dismissal of a person assigned to a disputed position can not be encompassed within the terms of reinstating the officer as it is unacceptable for the right of the civil servant to be protected at the expense of another officer's rights".[45]

Additionally to be taken into account is that a position in public service is no "fox"[46] nor an object of property law or even private law and different legal frameworks apply to it in the form of administrative law.

6. Legislative Alternative to the Restitution of Rights of the Unlawfully Dismissed Public Officer and Extent Thereof

Taking into consideration what was stated above, a logical question arises on how can the legislator restore the rights of the unlawfully dismissed officer when another servant appointed to the position (before the decision on dismissal was declared null and void) had legitimate expectations?

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44 Decision № 3B/1195-19 of the Court of Appeals of Tbilisi, of October 16th, 2019.

45 Decision № BS-376-376 (2K-18) of the Supreme Court of Georgia, of December 11th, 2018.

46 In United States property law, the precedential case *Pierson v. Post* lies at the foundation of the "first come" principle, which concerned a dispute in 1802 regarding property rights over a fox on an uninhabited land between two locals. See: Pierson v. Post, Supreme Court of New York, 3 Cai. R. 175 Supreme Court of New York, <http://www.courts.state.ny.us/reporter/archives/pierson_post.htm> [24.04.2020].

Similarly, as the principle of "*primo in tempore, potior in iure*" is inadmissible in public service law and it is outright prohibited to restore one's rights at the expense of another's, what does the legislator offer to the wronged public officer considering the obligation of legal and social protection? Such issue is relevant from the standpoint of restoring justice as well. The lawmaker shall, if the person's reinstatement is not possible, stipulate the obligation to enroll him/her in the reserve system and compensate accordingly and with that, considering the circumstances at hand and by social protection instruments, substitute the inability to restore rights with these alternative legal methods.

In line with Paragraph 3 of Article 118 of the Law of Georgia in Public Service, annulment of the individual administrative act on the dismissal of the public officer from work is sufficient for the restoration of claimant's rights borne before the disputed order was issued.[47] Concurrently, this norm sets out the coherent alternatives allowing the restitution of the dismissed public officer's rights. It is true that the principle of fairness requires such restoration to be complete and that the person should return to the state of affairs that existed before dismissal, however such restoration can not be of absolute character, not the least for the natural passage of time alone. Similarly, restitution may not lead to the return to the same configuration as existed before the right was infringed upon. Therefore the impossibility to restore rights in absolute terms also leads to the presence of duty to compensate as a kind of balancing instrument. Compensatory justice is extremely conservative and multifaceted spectrum of its application, as a rule, serves the restoration of status quo ante.[48]

Whether compensation is sufficient or not may be the subject of endless dispute and individual assessment. For the purpose of preventing

these very ambiguities, the lawmaker itself defines the sum (value) of compensation in form of a definite amount or a periodic payment and thus rendering the issue somewhat more foreseeable and transparent.[49] Public service legislation is no exemption in this case as the Article 118 stipulates a set predictable 6-month period compensation to offset the right not restituted in full. This, in turn, foremost excludes vague decisions in the reinstatement cases of the unlawfully dismissed public officers and likewise such formal rule ensures smooth, unimpeded operation of public offices and protects them from unenforceable decisions or more severe cases of rights infringement.

7. Conclusion

The Article 118 of the Law of Georgia on Public Service lays down the priority of successive measures following the nullification of the decision to dismiss the officer from work. The exhaustive, consistent regulation on reinstatement of the unlawfully dismissed public officers echoes the spirit formulated through the prism of legal protection of the officer in counterbalance to the duty of loyalty.

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47 Decision № BS-944(K-19) of the Supreme Court of Georgia, of October 10th, 2019.

48 *Goodin R. E.,* Compensation and Redistribution, Nomos*,* Vol. 33, Compensatory Justice, 1991, 143.

49 For example, Paragraph 2 of Article 82 of Organic Law on Prosecutor's Office provides a compensation of 7000 GEL if the employee of the Prosecutor's Office suffers bodily damage or other kind of deterioration in health conditions during the line of duty, following which he/she will be qualified as a person with a disability or such shall also possible in case of mutilation.

The mechanism for reinstating a public officer prescribed in current law establishes a foundation for protecting one's rights that does not encroach on the principle of legitimate expectations of other public servants. Through such a resolution, the public service law affirms the values enshrined in general administrative law.

Likewise so, by defining legal instruments for reinstatement to an equivalent position, compensation and reserve, the lawmaker lays down rules on reinstatement that leave no place for the principle of "*primo in tempore, potior in iure*" in legal relations within the public law sphere.

Hence, the substance of the Article 118 of the Law of Georgia on Public Service does not envisage the dismissal of a public servant from work to reinstate another as it enables the interests and rights of both to be protected.

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Legal Grounds for Operative-Investigatory Activity and European Standards

The article is related to non-procedural activity executed outside the criminal law proceeding, which plays significant role in identification and solution of crime. The article discuses legal nature of operative-investigatory activity, its role in the process of investigation, control mechanisms over operative-investigatory measures, problems of protection of privacy of personal life and European standards for executing operative-investigatory activity. Attention is accented on the risks and challenges existing in the process of execution of operative-investigatory activity, on the necessity to harmonize legislation regulating operative-investigatory activity with European standards and create solid legal guarantees for human rights protection.

Key words: *Operative-investigatory activity, solution of a crime, investigation, protection of human rights, interference in the privacy of personal life, operative information, confidant, European standard.*

1. Introduction

In the process of investigating criminal law case two main directions are outlined – in the form of investigative/other procedural activities and operative-investigative measures.

Operative-investigatory activity is the unity of non-procedural measures conducted outside the criminal legal proceeding.

The aim of operative-investigative activity is protection of human rights and public security, which is attributed to legitimate constitutional aims.[1]

Similar to majority of European countries, in the acting Criminal Procedure Code of Georgia initially there was an attempt to merge operative-investigative measures and investigative activities. The mentioned measures were envisaged in the Criminal Procedure Code in the form of secret investigative activities. However, at last the legislator rejected such merger and before entrance into force amendments were introduced to take out secret investigative activities, and the law on operative-investigative activity remained in force.

By the amendments introduced to the Criminal Procedure Code in 2014, such measures included in the law on operative-investigative activity were moved into the scope of regulation of Criminal Procedure Code in the form of secret investigative activities, which in their content give more possibilities to restrict constitutional rights of person.

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1 Decision of the Constitutional Court of Georgia from 24 October 2012 on the Case №1/2/519: "Georgia's Yong Lawyers' Association and Citizen of Georgia Tamar Chugoshvili Versus Parliament of Georgia", II-10.

The purpose of putting some operative-investigative measures in the framework of legal procedure was "to ensure them with proper procedural guarantees, including with high quality judicial control and effective mechanism for appealing results".[2]

In comparison to the legislation regulating operative-investigative activity, in the Criminal Procedure, protection of human rights is more guaranteed. Therefore, transposing secret investigative activities to Criminal Procedure Code represents a step forward.

Besides, as part of operative-investigative measures is still regulated under the law on operative-investigative activity, it is important to define – to what extent are the guarantees for protection of legality of operative-investigative activity envisaged in the acting legislation, whether human rights are protected, including privacy of personal life during executing of those measures, which are left outside the scope of regulation of the Civil Procedure law and whether acting regulations comply with the European standards.

2. The Role of Operative-Investigative Activity in the Process of Investigation

2.1. The Essence and Legal Grounds of Operative-Investigative Activity

"Operative-investigative activity resolves widescale problems by virtue of bodies conducting this activity and relates to the criminal procedure only in that part, which assists court, prosecution and investigative bodies in solving diverse types of crime and other unlawful actions, also in identification and exposure of persons committing crime".[3]

The operative-investigative activity is system of measures executed with overt and covert methods within the competence of special services of state bodies defined under the law, and the aim of this system is to protect human rights and freedoms, rights of legal persons, public security from criminal and other unlawful infringement.[4] Protection of the named public interests is the obligation of legal state. The scope of public interest is defined in article 8 of the European Convention on Human rights, according to which interference in the right is admissible when it is necessary: for the national security in the democratic society, public safety, interests of country's economic welfare, avoidance of disorder or crime, protection of health or moral, or other rights and freedoms.[5] Moreover, interference into the right must be legitimate, along with the public interest the necessity of protection of this interest must be present.

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2 See Explanatory Note for Draft Law on Introducing Amendments to Law on "Operative-investigative Activity", <http://www.sps.gov.ge/images/files/pdf/text_14206257815.pdf> [21.12.2020].

3 *Lekiashvili D.,* General Opinions on Procedural and Non-Procedural Activities, in the Collection: Actual Problems of Criminal Procedure and Criminal Law Policy, Tbilisi, 2012, 100 (in Georgian).

4 Law of Georgia on Operative-Investigative activity, LHG, 14(21), 30/04/1999, article 1.

5 Decision of the Constitutional Court of Georgia from 26 December 2007 on the Case №1/3/407: "Georgia's Yong Lawyer's Association and Citizen of Georgia Ekaterine Lomtatidze Versus Parliament of Georgia", II-8.

The operative-investigative activity foresees conspiracy… restricting constitutional rights and obligations of citizens… within the scope of legislation and, as a rule, control in order to reach state purposes and tasks.[6]

Comparing to other forms of restricting rights, operative-investigative measures are characterized with secret nature, the vast part of it is invisible to the public, and therefore cannot be controlled by the public. Considering this, comparing other occasions, there is a higher temptation and risk from the side of executive government to disproportionally interfere in the right.[7]

Operative-investigative activity is based on combining overt and covert methods, but it is strictly classified. Right to look through the data, documents and sources including information on such activity, with the established procedure, is given only to persons determined by the law, as well as in occasions prescribed by the law. The exception from this rule is classification of the data pointed out by the prosecutor with the purpose of using it as an evidence, in case if classification of such documents and materials does not infringe vitally important interests of country in the sphere of defence, economy, foreign relations, intelligence, state security and legal order.

In the literature there is a discussion on particular national character of operative-investigative activity, on its strategic importance and preventive nature.[8]

Combatting crime does not imply only planning repressive measures by the prosecutor (at his desk), but it is realized by operative bodies with execution of operative-investigative measures (in the street) having preventive character.[9]

While performing operative-investigative activity, acquired information is only documented in line with the law and this document itself is confidential. Hence it is prohibited to use operative-investigative data as an evidence in criminal procedure, if it is not checked by the rule prescribed in the procedural law.[10] Operative-investigative data is always characterized with high level of probability, therefore the procedural filter must exist, which will legally check this data in line with the rule prescribed under the law.[11]

The legal basis for operative-investigative activity along with the law on operative-investigative activity, are also institutional normative acts issued on particular issues by state bodies executing operative-investigative activity with the consent of General Prosecutor of Georgia. The mentioned acts are not public, moreover, they are classified as act including state secret and are not available, which reduces the reliability of execution process of operative-investigative measures.

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6 *Buadze K.,* Predicting Operative-Investigative Information and State Control Mechanisms, Journ. "Justice and Law", №2, 2016, 139 (in Georgian).

7 Decision of the Constitutional Court of Georgia from 29 February 2012 on the Case №2/1/484: "Georgia's Yong Lawyers' Association and Citizen of Georgia Tamar Khidasheli Versus Parliament of Georgia", II-20.

8 See *Buadze K., Mzhavanadze O.,* Legal Grounds for Operative-Investigative Activity, Tbilisi, 2011, 17 (in Georgian).

9 *Khodeli M.,* Secret Overhearing of Telephone Talk in the Criminal Procedure (According to Georgian and German Law), Tbilisi, 2019, 244., See citing: Kniesel, ZRP, 1987, 378 (in Georgian).

10 *Mepharishvili G.,* Life and Law, T. II, Tbilisi, 2008, 52 (in Georgian).

11 Ibid, 66-67.

2.2. Role of Operative-Investigative Activity in the Process of Investigation

Operative-investigative activity plays significant role in combatting crime, identification of crime and its resolution. Operative-investigative activity may be performed after initiation of investigation, as well as before investigation is commenced. Information acquired through this measure may be the basis for initiating investigation. Results of operative-investigative activity may be used for preparation or execution of different investigative and procedural activities after starting investigation, with the purpose to plan and perform other measures for avoiding, preventing and solving crime.

National, as well as international experience points that using only public and overt methods against crime is less effective. Solving some types of crime is impossible without confidential cooperation with operative-investigative bodies. This mostly relates to precluding and avoiding latent serious and exceptionally serious crime. Receiving, fixing and properly using operative information mostly is the result of intelligence/confidential work of confidant. Hence, it is quite natural that particular attention is given to the aspect of participation of confidant in operative-investigative activity.[12]

"Secret collaborator is not forbidden to acquire information important for criminal case through secret video or audio recording, or filming and photo shooting, and using other technical means, if the judge issues permission as prescribed under the law. Obtained data may be admitted as an evidence in criminal case, if requirements determined under the law for its obtaining are preserved".[13]

The European Court of Human Rights outlined necessity of using secret agents, informants and secret methods in combatting organized crime and corruption, and underlined: in order to avoid threat of encouragement from police, it is crucial to put usage of such technical methods into particular framework. Of course, "Convention does not prohibit relying on such sources in pre-investigation stage, as anonym informants, when the character of crime gives such possibility". However, "another issue is using such sources for convicting person by the court discussing the case and it is admissible only when there are adequate and sufficient means for protection from abuse of the authority. Besides, there must exist clear and predictable procedures for issuing permission – for conducting investigative measures in question and providing their control". Moreover, "it is possible to approve usage of secret agents with the condition, that it will be subject to clear restrictions and protection guarantees, however, public interest cannot justify usage of evidence obtained in result of encouragement from police. In other case, defendant will be under threat that he/she will lose chance for fair trial form the beginning".[14]

In practice, using operative activity in parallel with investigation can be explained with the fact that operative work is more flexible and effective comparing to investigation, as it requires different,

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12 *Semidjen P. V., Petlitski S. V.,* About the Essence of Social Protection for Persons Collaborating on Confidential Basis with Bodies Conducting Operative-Investigative Activity. In Collection: Actual Questions on Operative-Investigative Activity, Minsk, 2017, 115.

13 *Tumanishvili G.,* Criminal Procedure, Review of General Part, Tbilisi, 2014, 279-280 (in Georgian).

14 Ramanauskas v. Lithuania, [2008], ECHR §53-54.

lower standard for conduct, comparing to procedural activities.[15] Based on primary factual material obtained as a result of operative-investigative activity, an investigation may start, investigative versions may be built up and a plan of investigation composed.

Information obtained through operative way may become ground for prosecutor's motion before the court for receiving ruling for conducting investigative activities restricting constitutional human rights. For justifying a motion police officer's report is used, as well as his/her questioning minutes without declassifying confidant's name.

The practice shows that operative-investigative activity is "especially important for combatting drug related and organized crime, as in sphere of these crimes providing information from third persons, making statement or it's occasional determination is rare".[16] With regard to many other crimes, especially commencing investigation on facts of drug purchase and storage and conducting initial investigative activity – personal search is mostly carried out base on operative information. As a rule, court admits as one of the evidences a testimony of police officer questioned as a witness, who names information received from operative officer, confidant as a basis for starting investigation.

For instance, in one of the criminal cases (№1-532-18) operative officer G.V., questioned as a witness, showed that "he received information in the unit that defendant should have flown from Turkey to Tbilisi and he would have narcotic substance personally or hidden in the body." Analogous testimony was made in court by other operative officers.[17]

It is noteworthy that law does not foresee checking source of operative information on any stage of legal procedure. This information is not subject to prosecution control and there is no judicial control carried out as well. Moreover, operative information does not represent an evidence. It is only a ground for initiating investigation. The evidence is a testimony of operative officer, who received this information. The reliability of mentioned testimony is problematic, which in most cases depends on the content of information and correlation of other evidences collected on the case with the said testimony.

It is important that according to article 8 paragraph 1 subparagraph "b" of the law on operative-investigative activity, the operative-investigative measure may be conducted when a crime is committed, which must be investigated, but there are no signs of crime or any other unlawful action, that would be sufficient for initiating investigation.

The mentioned provision contradicts with the requirement of article 100 of the Criminal Procedure Code, according to which investigation must be started upon receipt of application/notice about crime. The procedural law does not oblige investigation bodies to study/check facts mentioned in the application through operative-investigative measures before commencing investigation, and therefore, does not consider operative-investigative activity as a prerequisite for starting investigation,

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15 *Gvasalia T.,* Operative Activity in Law-Enforcement Bodies, Human Rights Education and Monitoring Center (EMC), 2019, 34, <https://emc.org.ge/uploads/products/pdf/GEO_WEB_1576492182.pdf> [21.12. 2020] (in Georgian).

16 *Laliashvili T.,* Criminal Procedure of Georgia, General Part, Tbilisi, 2015, 45 (in Georgian).

17 Research of Unit for National Judicial Practice and Generalization of the Supreme Court of Georgia on Illegal Purchase-Storage of Narcotic Substances, January-June, 2018, 5 (in Georgian).

because investigators/prosecutors are obliged to initiate investigation upon receiving information. Consequently, the law on operative-investigative activity must comply with Criminal Procedure Code and respective norms must be specified/refined.

It is noteworthy that some operative measures envisaged under the law at the same time are prescribed in Criminal Procedure Code, as investigative action (for instance questioning), as well as by the law on police (for instance identification of person). Despite the purpose, it is necessary to differentiate investigative, preventive or operative character of the mentioned actions and to determine their functional conferment issue for avoiding parallelism.

3. Control Mechanisms on Operative-Investigative Measures

"Vast part of operative-investigative activity remains invisible for society, which excludes possibility of public control over it."[18]

For having good system of control and supervision over operative activity, firstly the nature of operative activity itself must be determined clearly.[19]

There is an institutional control, judicial control and procuratorial supervision over operative-investigative activity.

Within the framework of institutional control leaders of bodies performing operative-investigative activity are personally responsible for organization and legality of execution of operative-investigative measures.[20] Institutional control is carried out on every stage of operative-investigatory measure entirely, starting from process of receiving information, ending with its realization and result – with prevention or solution of case, or arrest of wanted persons, etc.[21]

Procuratorial supervision implies control over precise and uniform application of the law during execution of operative-investigative measures, as well as control over legality of decisions made in the process of performing operative-investigative measures. However, data on those persons who confidentially assist or were assisting operative-investigative bodies, collaborate or were collaborating with them, also methods for obtaining information of operative-investigative character, tactics and organization is not subject to Procuratorial supervision.[22] Right to operatively process the case, to look through secret materials of cases on operative-investigative register is attained only to persons envisaged under article 25 paragraph 5 of the organic law on "Prosecutor's office".[23] Operative-investigative activity which does not require approval from prosecutor, is not subject to procuratorial

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18 Decision of the Constitutional Court of Georgia from 26 December 2007 on the Case №1/3/407: "Georgia's Yong Lawyer's Association and Citizen of Georgia Ekaterine Lomtatidze Versus Parliament of Georgia", II-13.

19 *Gvasalia T.,* Operative Activity in Law-Enforcement Bodies, Human Rights Education and Monitoring Center (EMC), 2019, 79, <https://emc.org.ge/uploads/products/pdf/GEO_WEB_1576492182.pdf> [21.12.2020] (in Georgian).

20 See Law of Georgia on Operative-Investigative activity, LHG, 14(21), 30/04/1999, article 19.

21 *Elenskii V. I.,* Grounds of Methodology of Theory on Operative-Investigative Activity, Monography, M., 2001, 204.

22 Law of Georgia on Operative-Investigative activity, LHG, 14(21), 30/04/1999, article 21.

23 Organic Law of Georgia on Prosecutor's Office, LHG, 3794-IS, 30/11/2018, article 25, paragraph 5.

supervision. Hence, we may conclude that control over legality of execution of operative-investigative measures is carried out by prosecutor's office, but it is not clear what is included in the mentioned supervision and what is the scope of its performance, as far as the law does not indicate distinct and precise methods for carrying out supervision. Therefore, such supervision is not effective and sufficient. According to definition of European Law, it is necessary to issue permission for operative-investigative measures and supervision over them must be clear and predictable.[24]

Judicial control over operative-investigative activity is performed in accordance with the rules prescribed in the law on operative-investigative activity and criminal procedure code of Georgia. In the process of investigation court issues permission for executing investigative activities that restrict constitutional human rights, but judicial control is not covering all operative-investigative measures. The court permission is needed for body conducting operative-investigative activity while searching for missing person, while searching for accused or convicted person for presenting him/her to relevant state bodies, if he/she avoids executing imposed coercive actions or serving sentenced penalty, while searching for assets lost as a result of crime, in case of requesting data identifying electronic communication from electronic communication company or legal entity of public law - operative-technical agency of Georgia in accordance with article 136 of the Civil Procedure Code of Georgia.[25] Moreover, the mentioned authorized body shall address legal entity of public law – Operative-technical agency of Georgia, in accordance with chapter XVI[1] of the Civil Procedure Code of Georgia, for carrying our activity of determining geolocation of mobile communication equipment in real time. Obtaining data identifying electronic communication towards judge, may be also carried out by ruling of the Supreme Court of Georgia based on the motivated motion from the General Prosecutor of Georgia.[26]

As we see, paragraph 3 of article 7 of the law on operative-investigative activity is a blanket norm and includes indication on regulating this issue by procedure code. Besides that, determining geolocation in real time is envisaged under the criminal procedure code as secret investigative activity. Moreover, procedural legislation regulates obtaining identifying data of electronic communication for the purpose of investigation. Such regulation of judicial control over operative-investigative measures shows that despite implemented reform, the problem of differentiating operative and investigative activities is still on the agenda.

It is noteworthy that conducting other operative-investigative measures, the list of which is quite comprehensive,[27] does not require court permission under the law.

In order to exclude arbitrariness, disproportionate and improper interference into the protected sphere, while conducting operative-investigative measures, exclude non legitimate restriction of human rights, and ensure reliability of the information obtained through this activity and use this information in legal proceedings, it is necessary to enforce control mechanisms, including on those operative-investigative measures, which are carried out without court ruling. It is necessary to exercise

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24 Case of Khudobin v. Russia, [2006] ECHR №59696/00, 135.
25 Law of Georgia on Operative-Investigative activity, LHG, 14(21), 30/04/1999, article 7, paragraph 3.
26 Ibid, article 7, paragraph 3[1].
27 Ibid, article 7, paragraph 2.

judicial control through presenting result of conducted activities to the court and checking their legality.

4. Protecting Privacy to Personal Life During Conduct of Operative-Investigative Activity and European Standards

In the democratic society, interference into the right may be justified only if legislation will ensure effective mechanisms for protection from abuse of power. The state with puts its citizens at a risk of secret control, must not have unlimited authorities.[28]

Information obtained through operative-investigative activity mostly entails data on personal life. If it is not related to criminal activity, these data shall not be publicized or used for any purpose. As storage of such information is forbidden, it must be destroyed immediately, and in case of requesting from electronic communication company or operative-investigative agency data identifying electronic communication under article 136 of the Criminal Procedure Code of Georgia, it must be destroyed immediately after 6 months from the end of operative-investigative measure.

As operative-investigative activity is based on conspiracy principle, data describing this activity represents a state secret. Therefore, there is a criminal responsibility envisaged for its dissemination. In such case the subject of crime is a person, who was confided with data describing operative-investigative activity. Also, a person, who got familiar with these data in relation to work or other obligations. Besides that, despite the time passed, it is inadmissible to disclose the secret employee who conducted operative-investigative activity or the source of received information, except in cases prescribed by the law.

The law on operative-investigative activity does not foresee right to inform person on interference into his/her personal life, which directly contradicts with the standard approved by European Court of Human Rights. In the case Klass and others v. Federal Republic of Germany,[29] the European Court declared that state is obliged to post factum give person a relevant information. A person must know that he/she is subject to operative-investigative measure. The European Court has established infringement of article 8 of the Convention, it also has stressed the necessity to inform person in many other cases as well.[30]

It is extremely noteworthy that the object of secret control may be other persons as well, when contacting by diverse ways those, who are subject to operative-investigative measure.

The law foresees right to appeal, in particular, if person considers that operative-investigative measure conducted towards him/her resulted in unlawful restriction of his/her rights and freedoms, he/she may challenge legality of the named measure in respective superior state institution, at Prosecutor's office or court (if after appeal the conducted operative-investigative activity is declared

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28 Decision of the Constitutional Court of Georgia from 26 December 2007 on the Case №1/3/407: "Georgia's Yong Lawyer's Association and Citizen of Georgia Ekaterine Lomtatidze Versus Parliament of Georgia", II-9.

29 Klass and Others v. Federal Republic of Germany, [1978], ECHR 1978, (Ser. A.).

30 See Weber and Saravia v. Germany, [2006], ECHR №54934/00, 135; Shimovolos v. Russia, [2011], ECHR №30194/09, 68.

illegal, the information obtained in line with Criminal Procedure Code of Georgia, will be announced as inadmissible evidence), but is it practically impossible to realize this right for simple reasons, that person who is/was subject to operative-investigative measure will not be informed about that. Comparing to secret investigative activities, person does not and may not know that he was subject to operative-investigative measure, which represents a shortcoming of legislation.

In majority of European Countries secret investigative measures which entail secret investigative activities, as well as operative-investigative measure, may be conducted only in case of serious crime, comparing to Georgia, where it is possible to conduct secret investigative activities in case of less serious crime as well, and conduct of operative-investigative measure is not restricted by the category of the crime. Besides, operative-investigative measures mostly are conducted without decision, permission, control or supervision of authorized body. Only in some exceptions it is necessary to have court ruling.[31] As for the assignment of prosecutor/investigator to conduct operative-investigative measure – the law does not stress out justification/argumentation of such assignment. Moreover, while conducting operative-investigative measures, comparing to secret investigative activities, there is no necessity of having evidence of justified assumption standard with regard to commitment of crime by a person. Such measures mainly are conducted based on doubt, assumption. According to European standards secret investigative measures/special investigative methods may be used only in cases when there is sufficient ground for the doubt about committing of serious crime.[32]

Purposes of operative-investigative measures and secret investigative activities are identical, which points to necessity of establishing high standard towards operative activity in terms of protecting human rights. In particular, operative-investigative activity may be conducted: for ensuring national security or public safety, for avoiding disorder or crime, for protecting interests of economic welfare of country or rights and freedoms of other people. Moreover, operative-investigative activity is conducted only in the case, when its conduct is envisaged under the law and it is necessary for reaching abovementioned legitimate aims in the democratic society. Data obtained through this activity must be proportionate to legitimate aim of operative-investigative measure.[33]

It must be said that mechanisms for implementing these aims, in comparison to secret investigative activities, are not outlined in the law. The rule, procedure, grounds and conditions of conducting these measures are not distinctly, clearly and comprehensively/sufficiently regulated under the law.

European Court of Human Rights has determined minimal standards for using operative-investigative activities. In particular, precise circle of crimes, which may be subject to operative-investigative measures, timeframes for mentioned measures, procedure of checking, using and storing obtained information, using cautionary measures in case when data are connected to other persons.[34]

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31 See Law of Georgia on Operative-Investigative activity, LHG, 14(21), 30/04/1999, article 7, paragraph 3, 3^1.

32 Council of Europe, Committee of Ministers, Recommendation CM/Rec(2017)6 of the Committee of Ministers to Member States on "Special Investigation Techniques" in Relation to Serious Crimes Including Acts of Terrorism 5/07/2017.

33 See Law of Georgia on Operative-Investigative activity, LHG, 14(21), 30/04/1999, article 2.

34 Iordachi and Others v. Moldova, [2009] ECHR №25198/02, §95.

With regard to the monitoring of lawful conduct of operative-investigative activities, European Court defines that showing results of conducted activities to the court represents ground for checking legality of conduct of these activities. It may be stated that named standards are not incorporated into the Georgian legislation.

Conduct of operative-investigative activities subjected to judicial control is not limited under acting legislation, which is in compliance with European Court standards. Such activities must be limited by categories of crime, or by particular composition of crimes, as it is in many countries, for instance in Germany it is mainly extended to crimes against state, as well as to organized crime and some other crimes listed in the law. In France they are limited by types and size of penalties.[35]

In general, category of crimes must be taken into account during conduct of operative-investigative activities, as it is also determined by norms regulating secret investigative activities. The minimal evidential standard of executing operative-investigative activity must be established, also the circle of subjects must be determined, against whom it can be conducted. Besides that, post factum judicial control must be carried out of every type of operative-investigative measure. As for the operative-investigative measures to be conducted by the permission of court, from the interests of investigation person who is subject to operative-investigative measure, does not participate in judicial procedure. Hence, they lack protection means, which must be balanced with mechanisms of notifying and appealing conducted measures.

5. Conclusion

Operative-investigative activity plays significant role in identifying and solving, as well as preventing crime. Moreover, as these measures are mainly conducted secretly, conspiratorially, there is a threat of arbitrariness from authorized persons and high risk of unlawful restriction of human rights. Hence, it is necessary to approximate operative-investigative activity regulations with European Standards, enforcing mechanisms for protecting legality of the named activity, existence of solid legal guarantees and clear provisions in the legislation, which will reduce to minimum the possibility of illegal restriction of human rights and make process of operative-investigative activity more distinctive and predictable.

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[35] See *Usenashvili J.,* Problem of Realization of Right to Privacy of Personal Life During Conduct of Operative-Investigative Measures Subject to Judicial Control, "Law Journal", №2, 2012, 95-96 (in Georgian).

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Zurab Gogshelidze*

Illicit Income Legalization – Analysis of Judicial Practice of Georgia

Legalization of illicit income is a type of transnational crime, with many questions relating to the doctrine as well as a court practice remaining unaddressed.

For example, there is still no common opinion on whether to consider the subject of a previous (predicative) crime as its perpetrator; If it is to be considered, whether it refers to any action envisaged under the objective aspect of Article 194 of the Criminal Code of Georgia (hereinafter: CC).

As for the judicial practice, it is still unclear how the legalization of illicit income differs from the crimes against the property, which constitutes group of the most common previous (predicative) crimes of acquisition of "dirty" money; or whether spending of funds possessed as a result of a previous crime (e.g. the fraud) by the offender for his/her personal intent, can be qualified as legalization of illicit income (Article 194 of CCG) and etc.

The objective of the present article is to answer the questions raised in the judicial practice, within the format of the article.

The article answers, shows, how to separate, differentiate money laundering from crimes, that are committed against property (Property Crimes). Also, who is the subject of this (Money Laundering) crime.

Key words: *Illicit income, legalization, predicative crime, organized crime.*

1. Introduction

Legalization of illicit income belongs to a category of crimes, where purely criminal issues are not given a due attention not only in Georgian but also in foreign literature.

The researchers are more engaged in research of the practical manifestation of this crime (ways of legalization of illicit income) and pay less attention to the challenges faced by the judicial practice in terms of proper qualification of the action.

My study of the judicial practice in Georgia related to the legalization of illicit income aimed to identify problematic issues faced in terms of both the qualification of the action and the imposition of a sentence.

The analysis of practice revealed that in many cases, both the investigation body and the court misunderstand the legal essence of legalization of illicit income and, therefore, the wrongful qualification of the action takes place. In particular, an action is qualified as a combination of crimes, when in essence there is one crime actually committed. In addition, the action is qualified as legalization of illicit income, when in fact another crime is in place.

Deficiencies are also observed in terms of sentencing.

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Present article will focus on some of the shortcomings that were identified during the qualification of the action under the Article 194 of the CC.

2. A Shortcoming Revealed in Practice, when the Action is Qualified by a Combination of Offenses

The study of practice has revealed a case where a single offense (e.g., an offense against the property) takes place; however, the action is qualified under a combination of offenses (including legalization of illicit income along with the offense under discussion).

It is interesting, whether the case is understood correctly**,** when a person commits a crime (e.g., fraud or appropriation) misusing his/her official position and then withdraws the funds, unlawfully (e.g., fraudulently or other illegal way) transferred to the organisation's account, from the organization's account to use it for personal needs?

The example from the judicial practice of Georgia:

On August 8, 2014, the Judicial Panel of Criminal Cases of the Tbilisi City Court considered that the criminal case (without essential consideration) with the participation of the accused K., satisfied the motion of prosecutor and brought in a verdict of guilty **in fraud** for K., considering commitment of crime using the official position and in large quantities ("a" and "b" sub-paragraph, part 3, Article 180 of CC), **in legalization of illicit income**, which considers commitment jointly by more than one person, and accompanied by receipt of large income (sub-paragraph "a", part 2, Article 194 of CC, sub-paragraph "c", part 3 of the same Article) and **in illegal participation in entrepreneurial activities by an official** (Article 337 of CC).[1]

How the fraud and legalization of illicit income committed by K. is justified?

The essence of the case was as follows: On January 8, 2007, K. was appointed to the position of the Deputy Governor of Old Tbilisi District of Tbilisi. On February 15, 2009 he was dismissed from this position. Thus, from January 8, 2007 to February 15, 2009, he was a public servant. Accordingly, he was prohibited the entrepreneurial activities and the right to hold a managerial position in an entrepreneurial institution.

According to the accusation, despite the prohibition, K. and the governor of Old Tbilisi intended to use their official position to obtain additional illicit income and subsequently legalize it. In particular, they made the relatives to establish the LTD with a 25-25% shareholding on May 1, 2007. On November 16, 2010, with the change made in the Entrepreneurial Registry, they became partners of the company and K. was appointed to the position of Director of this company (who had already been dismissed from the position of the Deputy Governor).

The mentioned LTD was systematically executing the state projects. During 2007-2012 it participated in number of tenders announced by the Administration of Old Tbilisi District, Tbilisi City Hall and other state bodies, and regularly won such tenders. Whereas, in most cases, the mentioned procurements were announced by K. and the Governor of Old Tbilisi, they were ex officio responsible

[1] See, 2014 Archive of Tbilisi City Court for criminal cases (since the case materials were provided in encrypted form, the case number cannot be specified).

for determining the terms and conditions of the state procurements, leadership and membership of the tender commission, as well as concluding contracts and controlling the execution of works. Due to the felonious intent, they performed this duty unscrupulously and supplied goods to the Old Tbilisi Administration at much higher price than to other parties, hence generating illicit income.

This section of accusation relates to K.'s fraud and unlawful participation in entrepreneurial activities, committed by using an official position.

The committed act can be divided into two stages:

The first stage covers the period from 2007 to 2009, when K., as a public servant, was responsible for announcing the tenders, definition of terms and conditions of public procurements, leading and membership of the tender commission, concluding a contract and controlling the execution of the work.

During this period, he was using the official position and systematically declaring the LLC, established on behalf of his relatives, as winner in the announced tender, and the LLC, in turn, was supplying the goods to the Old Tbilisi Administration at a much higher price, with the prior agreement with them. Thus, misappropriation of someone else's property (state property) took place fraudulently, and an official position (namely, of a public servant) was used. Thus, the fraud, using official position, is present.

The second stage covers the period from 2009 to 2012, when K. was no longer a public servant, but was the official Director of the LLC. At that time, he as the executive of a private organization, using his official position, knowingly was supplying the goods to the Administration of Old Tbilisi at a much higher price. That is, he was using the method of deception to embezzle money - he lied to the Administration.

As we can observe, there is illicit income obtained through fraud, which is transferred to the account of the LLC (the Director of which is the accused K.).

How the legalization of illicit income by K. is justified? According to the judgment, it is substantiated as follows:

"In order to give a legal form to this illicit income and to cover its illegal origin, they did not distribute net profit generated by the LLC and, allegedly, for the purpose of reinvestment, invested illicit profit into the enterprise operational turnover. To disguise the unlawful action, later, they, under the name of fictitious founder of the enterprise, prepared the false minutes for the partners' meeting on profit reinvestment...

For the purpose of final legalization of a particularly large amount of income received as a result of the use of the dividend accrued from the net profit of LLC and illegal participation in the management of the entrepreneurial activity, on February 10, 2011, November 1 of the same year and January 25, 2012, K. and his old partner withdrew GEL 1 927 237 in three stages, thus creating a legal basis for the use of the mentioned illicit income for personal purposes".

Let's follow these two sections of the judgment in stages.

As we can see, according to the judgment, the first stage of legalization of illicit (received fraudulently) income was manifested in the fact that K. did not distribute the net profit generated by

the LLC, but included this illegal profit in the turnover of the enterprise ostensibly for its reinvestment, for which he later drawn up a false protocol of the partners' meeting.

If we do not consider disputable that the illicit income received by the LLC was indeed fictitiously included in the turnover of the enterprise, several issues come up:

A) In particular, what kind of practical manifestation of the objective part (giving a legal form to illicit income) is the act incriminated to the convicted person, envisaged under the Article 194 of CC (use of property, purchase of property, possession, conversion, transfer or other action is present)?

It must be noted that this issue is not addressed, even superficially, in the judgment. It simply states that there is providing legal form to illegal income present in the case and judgement describes the action committed by K. Accordingly, the subsumption of action is not in place, and this must be considered as a drawback of this judgment;[2]

B) In general, to what extent can the action in question be considered as a method of legalization of illicit income?

Indeed, what could be a purpose of fictitious inclusion of illicit income obtained through fraud in the turnover of the enterprise – to disguise the fact of fraud or to legalize the illicit income?

In other words, how will the fraudulent income get the legal form through its fictitious involvement in turnover (through illusory reinvestment)?

Illegal income cannot get the lawful form through this action, as reinvestment of an organization's revenue generates an obligation for that organization for its subsequent inclusion in the turnover. Consequently, if the mentioned LLC does not use (even fictitiously) this amount for further turnover, but, on the contrary, withdraws it for private persons (even the heads of the LLC) to use for personal purposes, this action in itself raises legitimate doubt and additional question – whether the fact of reinvestment was fictitious? If it was not like that, then how can it be explained that the money invested for reinvestment purposes was not used purposefully and was withdrawn from the account of the LLC by the private persons for personal use?

Therefore, a fictitious transfer of illegal income transferred by the perpetrator of a previous crime (in this case fraud) to the account of his/her organization to the reinvestment fund of the same organization **does not serve** as the method for legalization of this income. On the contrary, it is more likely to raise additional questions and may be used as evidence to expose a crime (fraud).

It is rightly mentioned in the legal literature: in order to the transactions/transfers be chaotic, vague, the money launderers primarily use a wide range of ways, methods to disguise the dirty money, conceal illegal origins, in order to further convert them, transfer them to assets in other form - to other types of assets and, finally, to integrate them into the legal economy.[3]

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[2] When qualifying the action as an offense, on the issue of subsumption, see *Mtschedlishvili-Hedrich, K*., Special case solving methods in criminal law, Tbilisi, 2010, 11-22 (in Georgian); *Turava M*., Criminal Law, General Part Review, Tbilisi, 2013, 379-383 (in Georgian); *Gvenetadze N., Turava M.,* Methodology of Decision-Making in Criminal Cases, Tbilisi, 2005, 108-109 (in Georgian); *Dvalidze I., Tumanishvili G., Gvenetadze N.,* Special case solving methods in criminal law, with attached special case samples, Tbilisi, 2015, 61-75 (in Georgian).

[3] Transnational Organized Crime Analyses of a Global Challenge to Democracy, *Schönenberg R*., (*ed.*), Germany, 2013, 17.

It is recognized that the main areas, where the legislation and regulations related to money laundering need to be effective, are: 1) organized crime; 2) drug trafficking; 3) terrorism financing.[4]

According to the FATF, the legalization of illicit income is described as "the processing of criminal income to disguise its illicit origin" in order to "legitimize"[5] the illegally obtained income.

Therefore, the action in question **can only serve as a way** to legalize illicit income, if the actual turnover of that income is formally recorded in the productive process; in other words, if another fictitious document is drawn up, thus confirming the turnover of this income in the productive process. Such a fictitious document facilitates the "confusion" and formally "removes the dirt" from the money obtained through fraud, "legitimizing" it.

However, in this case the partners of the LLC (or its Director) did not take such an action (did not draw up a new fictitious document on the further turnover of the income in productive activities).

As for **the second and final stage of legalization** of illicit income, according to the judgment, it was manifested in the fact that K. and his partner withdrew the income, obtained as a result of their unlawful participation in entrepreneurial activities, from the account of the LLC in three stages, thus creating the legal basis for personal use of the illicit income.

Several questions arise in relation to the action taken:

a) In general, in what extend can one consider withdrawal of illegal income recorded on the organization's balance from this organization, as the way of legalization of illicit income? What is a likelihood of "washing away" the "dirt" from the money with such an action?

b) If withdrawal of illicit income from an organization's account can generally be considered as means of money laundering, then why could not these individuals withdraw that income from the organization's account before it was fictitiously transferred to the operational turnover as if for reinvestment? Why did the partners need to ostensibly reinvest this income? This money has already been transferred to the legal account of the LLC and it was possible to withdraw it

The above question should be answered as follows: The partners at their discretion can withdraw the income (of course, legal as well) from the account of the LLC at any time; moreover, they even can make decision on liquidation of this LLC. No matter when the partners of the LLC withdrew illicit income – immediately after its transfer on the account or following further fictitious reinvestment, thus **they would not be able** to create **a legal basis** for its use as needed. This creates **only a factual basis** for its use. Indeed, the **fact of withdrawal** of funds from the account (especially from its reinvestment fund) of the LLC cannot be fully substantiated to prove that the money was obtained legally ("it is clean"); this fact cannot disguise its illegal origin. In other words, a person is not released from the obligation to substantiate the origin of the said amount in respect of the amount withdrawn from the account of the LLC (when the time for its further use comes) - there is no regulation that removes the obligation to substantiate the legal origin of the amount taken from the organization's account. **As for the money transferred for reinvestment in the organization**, its withdrawal for personal purposes is unlawful, because it should serve a specific purpose (further

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4 *Cox D.,* Handbook of Anti-Money Laundering, West Sussex, United Kingdom, 2014, 8.

5 *Yikona S., Slot B., Geller M., Hansen B., El Kadiri F.*, Ill-Gotten Money and the Economy: Experiences from Malawi and Namibia, World Bank Study, Washington, DC, United States 2011, 2.

turnover) and not someone's personal purpose. Accordingly, in the present case, withdrawal of money from the reinvestment fund could not serve the legalization of this income, could not create **a legal basis** for its use for personal purposes. **On the contrary, it would have made it clear** that this money had not been used for reinvestment purposes. Consequently, such an action **creates a legal basis only** for the disclosure of these persons.

Therefore, the illicit income obtained through fraud cannot be "laundered" either by withdrawing it after the transfer to the account of the LLC, and **moreover, or** by transferring it to the reinvestment fund and then withdrawing it from there. There is no doubt that withdrawing of money from reinvestment fund for personal purposes raises legitimate suspicion and forms the basis for initiating an investigation.

It is fairly mentioned in the legal literature that throughout the history people have developed various tactics to ensure the peaceful use of their criminally obtained property, and on top of that, not leading to initiation of criminal prosecution against them and confiscation of that property.[6]

The question is: whether the action under consideration gives us **any indication** of the objective composition of the crime under Article 194 of the CC? In other words, it is true that the judgment does not focus on this issue, but the action actually taken by the convicted person could really include sign of the objective composition of Article 194 of the CC? In particular, could we have in place assigning the lawful form to illegal property **by owning** this property?

This question arises naturally, as K., withdrawing illegally transferred amount from the reinvestment fund of the LLC, actually exercised **its possession**, which, according to the first part of Article 194 of the CC, is one of the ways of assigning legal form to illegal property.

As it is fairly recognized in the legal literature, possession of property is one of the ways of giving legal form to an illegal property, if it is implemented not by perpetrator or accomplice of a previous (predicate) crime, but by a third party, who was not related to the previous crime (in this example, fraud). He/she later became involved in a criminal scheme - money laundering process. The legal definition of money laundering is very broad from an economic point of view. If even the possession of money obtained from an illegal source is called "money laundering", then money laundering is no longer an action, but simply a label for money that is of illegal origin.[7]

This means that possession of money obtained from an illegal source can only be considered as "money laundering" if it is owned **not by** the person who had committed previous act (received the money through illegal action), **but by a completely different person**.

For example, in agreement with the bank manager, the perpetrator of the previous crime transferred illegally obtained money to this bank in order to launder funds through various further banking transactions. From the moment of transferring money to the bank (before performing other actions), possession of illegal property is evident in the actions of the bank manager.

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6 Transnational Organized Crime Analyses of a Global Challenge to Democracy, *Schönenberg R. (ed.),* Germany, 2013, 18.

7 *Yikona S., Slot B., Geller M., Hansen B., El Kadiri F.*, Ill-Gotten Money and the Economy: Experiences from Malawi and Namibia, World Bank Study, Washington, DC, United States, 2011, 3.

As for the example under consideration, K. is a person who has committed the previous crime (fraud, using official position). Thus, he is not a third person. **This fact in itself precludes** the possibility of qualification of K.'s action under property possession, since the final stage of fraud naturally implies the acquisition (or possession) of a movable item.

As mentioned above, the action taken by K. (withdrawal of money from the reinvestment fund) also cannot be considered as "other action" envisaged under the first part of Article 194 of the CC, as one of the ways of giving legal form to illegal property.

The first part of Article 194 of the CC provides for other methods of assigning legal form to illegal property (use of property, purchase of property, conversion, transfer), but it is indisputable that none of them is present in the case under consideration. Thus, we will not focus on the above.

Finally, in connection to this case, it must be noted that K. has been over-charged under the Article 194 of the CC - legalization of illegal income; there are no signs of this crime in his actions.

3. Shortcoming of Judicial Practice in Case of Qualification of Action under the Article 194 of CC

The study of the practice also revealed a case, when person's action includes signs of another crime, but it is erroneously qualified under the Article 194 of the CC (legalization of illicit income).

Example: On November 12, 2013, according to the judgment of Tbilisi City Court, citizen K.K. was found guilty of legalization of illicit income in a group, which was accompanied by receiving a large amount of income (four episodes) and preparation of false settlement documentation for selling and its use (four episodes) – according to subparagraph "a", part 2, Article 194 of the CC, subparagraph "b", part 3 of the same Article and the first part of Article 210 of the CC.[8]

The essence of the case was as follows: On February 2, 2007, K., under prior agreement with citizen B., established LLC; K. K. was appointed on the position of company Director; however, the actual owner and manager of the company was B.

In the same year, the mentioned LLC has signed two agreements with Tbilisi City Hall, the total value of which (including VAT) amounted to GEL 5 405 577, fully reimbursed by the City Hall. K.K., in agreement with citizen B., misappropriated approximately GEL 1 800 000 from the mentioned amount. In particular:

According to the accusation, in order to assign legal form to misappropriated funds or to disguise the source of origin and to hide the ownership right, they have drawn up fictitious cash withdrawal orders, according to which the false pay-rolls were issued in 2007-2008, where the salaries actually paid to individual employees were artificially increased, after which said pay-rolls were registered in the LLC accounting system;

According to the accusation, K.K., in agreement with B., has drawn up fictitious cash withdrawal orders in his own name, as the Director of the organization, according to which GEL 981 900 was allocated to him in the form of a fictitious loan;

[8] See, Tbilisi City Court Archive of 2013 on Criminal Cases. The case number could not be specified as the case materials were provided in encrypted form.

According to the accusation, K.K., also under prior agreement with B., in 2007-2008, in order to give a legal form to the illicit income, prepared false invoices, cash withdrawal orders and fictitious purchase orders, according to which they allegedly purchased goods of different denominations from various individuals and legal entities. They were preparing invoices, as if to buy goods from different persons, the above purchases not really taking place. False documents confirming the purchases were registered in the company's accounting system.

These actions were assessed by both the investigation and the city court as legalization of illicit income.[9]

How correct is the legal assessment of the committed act?

Can the artificial increase (inflation) of salaries paid to the employees of the organization be considered as a way of giving a legal form (its legalization) to illicit income?

As it is not clearly stated in the judgment under consideration, whether the total amount (GEL 5 407 577) was transferred to the account of the LLC before the commencement of works, the question **should be answered in two ways** with the stipulation that in both cases the Director of the LLC, K. K. was definitely preparing fictitious document indicated above:

1. The City Hall transferred the entire amount to the above-mentioned LLC from the very beginning (immediately after concluding two contracts in November 2007);

2. The City Hall was transferring the amount specified in the contracts to the account of the LLC in tranches, after submitting the relevant documentation to the City Hall about the work performed.

In the first case, i.e. when the amount stipulated by the agreement of the parties was transferred by the City Hall to the account of the LLC from the very beginning, the mentioned amount was already transferred to the lawful management of the Director of the LLC (as the person responsible for its activities). This means that K. K. was officially obligated to ensure its targeted spending.

Accordingly, the first option shows the money legally transferred to the account of the LLC.[10]

This means that there is "clean" money, which does not need to be "laundered". In addition, these funds are under lawful management of K.K., however, of course, not in his possession.

K. K. decided to acquire it unlawfully, to transfer it to his illegal possession.[11]

As for money laundering, its implementation is caused by the requirement, according to which a false legal origin shall be created for funds/means that have been affected by their illicit origins or other individual ways. Representatives of all types of underground world feel the fear that the illegal path that helps them to receive illegal income may be revealed, leading to the detection of a crime and seizure/confiscation of funds received.[12]

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9 See descriptive-motivational part of the judgment.

10 The question of how to qualify an action when the organization executive appropriates the amount transferred to the account of this organization on the basis of the submission of inflated expenses prepared by him/her in advance will be discussed below.

11 See *Lekveishvili M., Todua N.,* in the book: Criminal Law, private section. Book I., Tbilisi, 2019, 534 (in Georgian).

12 Transnational Organized Crime Analyses of a Global Challenge to Democracy, *Schönenberg R. (ed.),* Germany, 2013, 17.

Thus, K.K. **faces the task** to acquire these funds by using his official positions and **not with the task of money laundering**, and at the same time he must perform the task in such a way as to disguise this action well and formally make everything look legal. In other words, K. K. **is faced with the task**:

A) to appropriate a certain part of the funds transferred to the account of the LLC;

B) to disguise the appropriation committed.

One task (and relatively easy) is to appropriate the property in your legitimate management (or in possession), but it is quite another task (and more complicated) to do this in a way to formally provide legitimacy to the action.

Indeed, the perpetrator of any deliberate crime (especially when the deliberate intent is present) makes every effort to commit crime and not leave any evidence. All the more, no surprise that a person who uses his/her official position to commit a crime and has the legal instrument to make everything look legal, uses such instrument.

This is exactly the case we are dealing with, where the appropriation takes place committed through the use of official position (subparagraph "c", part 2, Article 182 of the CC).

As one can see, money laundering is carried out not to acquire the property that is in the lawful possession of a person, but to prevent a person from being exposed for a crime already committed and, at the same time, not to be seized of illegally acquired property, thus making it impossible to integrate it into the economy by the offender.

It is acknowledged that "illegally obtained money" includes income generated as a result of crime, fraud, corruption and evasion of the tax - regardless of whether these actions are criminalized in a given jurisdiction. A crime includes all actions that are determined by law as a "crime".[13]

In addition, Article 182 of the CC is a special delict. Its perpetrator is not any subject of criminal law, but only a person who legally owns or administers someone else's property.

In particular, the subject of appropriation and embezzlement provided for **in the first part of this Article** is a person, who has lawful **physical access** to another's item (seller of a commercial object, distributor, etc.).

As for subparagraph "c", **part 2, Article 182** of the CC, its perpetrator has **not only** physical (physical access is not decisive) but also **legal access** to this item, which is not characteristic of the perpetrator of the first part of Article 182 of the CC.[14] This means that a person has the right to make decisions on various legal issues related to someone else's item. For example, to determine the price of an item, to regulate it, to dispose the item, to announce a tender or auction, to invest property to achieve a legitimate purpose, etc. He/she can be a civil servant, a person equated to it, or a state-political official, but also a person in a responsible position in the private sector (executive of a private

[13] *Yikona S., Slot B., Geller M., Hansen B., El Kadiri F*., Ill-Gotten Money and the Economy: Experiences from Malawi and Namibia, World Bank Study, Washington, DC, United States, 2011, 3.

[14] See *Lekveishvili M., Todua N*., in the book: Criminal Law, private section. Book I, Tbilisi, 2019, 522 (in Georgian).

organization, a person with representative or special powers).[15] Director of LLC is exactly one of the above.

Unlike the subject of appropriation/embezzlement, the subject of legalization of illicit income is illegal or unjustified property. Thus, a necessary precondition for the realization of its objective side is that the **special subject of the crime must** already **be present -** Illegal or unjustified property, and only then implementation of actions (use of property, purchase, ownership, etc.), aimed at its legalization, begins for any purpose provided for in Article 194.[16]

It is recognized in the literature that money laundering is manifested in three types of active action *(actus reus)*. Article 6 of the Strasbourg Convention[17] calls on the States to incriminate three types of actions of illicit income legalization:

(i) the conversion or transfer of property, **realizing** that such property is originated/received by offence or offences set forth in sub-paragraph "a" of this paragraph, or establishes an action by a party to such offense or offenses, for the **purpose** to conceal or disguise the illegal origin of ownership/property, or to assist any person involved in the committing of such offense or offenses in order to avoid the legal responsibility for the act committed;

(ii) Disguising or concealing the true nature, source, location, placing, movement, rights directly related to the ownership/property, or ownership of the property, **realizing, knowing** that the property is originated/obtained through an offense or offenses, established in sub-paragraph "a" of this paragraph, or through participation in such offense or offenses.

(iii) acquisition, possession or use of property upon receipt and **realizing** that such property is acquired/received through an offense or offenses established in accordance with sub-paragraph "a" of this paragraph, or through participation in such offense or offenses.[18]

As we can see, in order to qualify an action as legalization of illicit income, **it is not sufficient** to have illegal or unjustified property, but it is **also necessary** to be aware of this fact in advance.

This initial precondition **is not in place** in the case under consideration, as the executive of the LLC had legally transferred the money from the City Hall to the account of this LLC. Thus, this property was neither illegal nor unjustified. Consequently, the question of its "laundering" should not have arisen.[19]

Let us consider is stages the actions taken that, according to the accusation, were implemented for the purpose of legalization of illicit income.

As mentioned, actions include drawing up of fictitious cash withdrawal orders, according to which false pay-rolls were issued in 2007-2008, where the salaries actually paid to individual

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15 About these persons see *Mamulashvili G*., in the book: Criminal Law, private section. Book I. Tbilisi, 2019, 660.

16 See *Todua N.*, in the book: Trends of Liberalization of Criminal Legislation in Georgia, *Todua N. (ed.)*, Tbilisi, 2016, 397 (in Georgian).

17 See Convention on Money Laundering, searching, seizure and confiscation of incomes obtained as a result of criminal activities, Strasbourg, 8.XI.1990.

18 *Guy S.,* Money Laundering, A New International Law Enforcement Model, Cambridge, 2000, 113.

19 See *Todua N.,* in the book: Trends of Liberalization of Criminal Legislation in Georgia, *Todua N.* (*ed*.), Tbilisi, 2016, 397 (in Georgian).

employees, were artificially increased, after which the mentioned pay-rolls were included in the accounting system of LLC.

The question arises: what legal assessment should be given to the actions of the Director of LLC when he artificially inflated the salaries actually paid to employees to create the impression that the amount in his legitimate administration (namely, the part of the amount transferred by the City Hall that was shown in the pay-roll) was ostensibly used for a legitimate purpose (employee salaries), but in fact the difference between the amounts was appropriated by him?

When the executive of this or that organization consciously inflates the amount of remuneration to be paid to employees, in order to appropriate the difference between the funds (and even manages to do that), appropriation of property (salary fund), being under legal management of a person, takes place, committed using the official position, but not the legalization of illicit income. It is acknowledged and not arguable that one of the means of appropriation by using the official position is the deliberate inflating (so-called "non-commodity operations") of real costs (including the wage costs), which gives the offender a factual opportunity to appropriate (or misappropriate) the part of property under his/her management (though not ownership).[20]

It is rightly mentioned in the legal literature that the legalization of illicit income is gradually expanding and gaining a foothold in more sectors. In this process, the criminals and their intermediaries invent and create an innumerable number of money laundering schemes. What all these schemes have in common is that they try to conceal the “dirty” origin of existing funds and create a false legitimate presentation through a series of deals/transactions.[21]

As we can see, concealing of "muddy" ("dirty") origins of money, as well as creation of a false legitimate presentation through a number of deals or transactions, are recognized as purposes of money “laundering”.

Thus, creation of false pay-rolls by the Director of the LLC, artificially inflating the amounts paid to employees, **served not** providing legal form to the misappropriated money, disguising its source of origin and concealing the ownership over it (as indicated in the descriptive-motivational part of this judgment),[22] but to appropriate the property (money) under its legal management. This appropriation had to be performed in a way to ensure it perception as legal.

Indeed, if the fictitious data entry did not take place in the official document (in this case - the pay-roll), how would the LLC Director have appropriated part of the amount transferred from the City Hall to the LLC account? He did not have physical access to these funds (he did not own it physically) and had only legal access to the funds.

Consequently, it is indisputable that the director of the LLC would not have been able to do so in the given case without drawing up a fictitious document.

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20 See *Lekveishvili M., Todua N.,* in the book: Criminal Law, private section. Book I, Tbilisi, 2019, 526-527 (in Georgian).

21 Transnational Organized Crime Analyses of a Global Challenge to Democracy, *Schönenberg R. (ed.),* Germany, 2013, 21.

22 See Archive of 2013 of Tbilisi City Court on criminal cases. 3. Since the case materials were provided in encrypted form, we were not able to specify the case number.

It should be noted here: The above should not be understood in such a way that in other cases of appropriation, when appropriation is possible even without drawing up a fictitious document, the fact of entering false data in the document should be assessed as legalization of illicit income.

It is true that entering false information in a document often serves not the appropriation of property (in many cases, appropriation using official position is possible even without such a document), but concealing the appropriation; **however, this does not mean** that the action directed to cover the fact of appropriation is legalization of illicit income;[23]

Nevertheless, why is it not legalization of illicit income? Namely, is this an action to hide or disguise the source of the origin of illegal property, which is one of the signs of the objective side of Article 194 of the CC?

To find out why this question should be answered negatively, we need to distinguish between:

a) appropriation committed using official position, when a fictitious document is drawn up to disguise the fact of appropriation (and not to carry out appropriation);

b) legalization of illicit income carried out by hiding or disguising the source of origin of illegal property.

In the first case, the person in a responsible position has not yet acquired the illegal income, however, we have in place someone else's property, which is under his/her legitimate management (i.e., "clean" money is in place). He/she intends to acquire this property and at the same time, to acquire it in a way to be perceived as legitimate. In other words, to acquire in a way that the fact of illegal and gratuitous acquiring is not recorded in the documents. **The purpose of this action is** to increase the proprietary funds of the offender at the expense of someone else's property.[24]

As for the subsequent use of the appropriated funds, it may not even be connected to the legalization of illicit income, i.e. the laundering of this appropriated money. In other words, the perpetrator may further spend funds gradually in a way that the question of substantiating the lawful origin of this amount does not even arise. However, whether the above issue is raised in the future, is not relevant for qualification of action as appropriation.

In the second case (in the case of legalization of illicit income), the person does not face a problem of acquiring someone else's property (he already owns the illegal income), but **a person faces completely different problem that serves a completely different purpose.** Namely, there is a problem of how to "wash away the dirt" from this property that has already been transferred to its illegal ownership. The purpose of this action is not to increase the own property at the expense of others, but to seamlessly **integrate it into the country's economy**.

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[23] For detailed information on this issue, see *Mamulashvili G*., Legalization of illicit income, in the book: Problems of criminalization and conviction of modern manifestations of organized crime in Georgian Criminal Law, Tbilisi, 2014, 147-163 (in Georgian); *Todua N.,* in the book: Trends of Liberalization of Criminal Legislation in Georgia, *Todua N. (ed.),* Tbilisi, 2016, 396-402 (in Georgian); *Todua N.*, Money laundering and separate crimes against the property, in the book: Europeanization of Georgian Economic Criminal Law, Conference materials, Tbilisi, 2017, 43-56 (in Georgian).

[24] On the signs of criminal appropriation against the property, see detailed information: *Todua N.*, in the book: Criminal Law, Private Section, Book I., Tbilisi, 2019, 458-469 (in Georgian).

For example, to start an entrepreneurial activity using this property, or to buy a property of a value, for the purchase of which proving of origin of funds is necessary etc. Appropriation is not characterized by the above-mentioned purpose, even if it is committed using fictitious documents drawn up to disguise the appropriation.

It is recognized that using the financial system for achieving the criminal purposes, such as money laundering, **undermines** the functioning and integrity[25] (and not right of ownership) of the financial system.

The doctrine rightly states that since the "offenders" have a fear of exposing their crimes and thus face a risk of confiscation of the property, they resort to legalization of illicit income. The wider the scope of criminalization and the stronger the law enforcement authorities, the more difficult it becomes for criminals and they try harder to provide their assets with a legal form (legalization of income).[26]

It is also rightly pointed out that one of the negative consequences of legalization of illicit income for the economy is outflow of capital (Capital Flight).[27]

Capital outflow/flight is the indistinct and active movement of large sums of money outside the country. The Overseas Development Institute (ODI) of Great Britain determines the capital outflows as "resident/local capital outflows, motivated by economic and political uncertainty-instability."

What is the main cause of capital outflow?

There are several possible reasons for this issue, namely lack of investor confidence - these factors also include:

1) political unrest/unrest, which may lead to public demonstrations/risk of civil conflict;

2) fear that the government is planning to take the property/assets under the state control;

3) exchange rate volatility, e.g., expectations related to the possible devaluation;

4) fears concerning the stability of the country's banking system.[28]

Moreover, as Baker (2005) argues, the outflow of "dirty money" from developing countries to the economies of advanced countries is 10 times greater than the amount of foreign aid.[29]

As we can see, it is emphasized that money laundering damages country's economy as capital outflows may exceed capital inflows. Consequently, the above also reflects the social threats for the country's economy related to this action.

This is why the financial institutions need to pay special attention to business relationships and personal transactions, involving companies and financial institutions from the countries not applying

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25 Combating Money laundering and the Financing of Terrorism: A Comprehensive Training Guide, The international Bank for Reconstruction and development/The World Bank, Washington DC, 2009, 20.

26 Transnational Organized Crime Analyses of a Global Challenge to Democracy, *Schönenberg R.* (*ed.*), Germany, 2013, 20.

27 *Yikona S., Slot B., Geller M., Bjarne Hansen, El Kadiri F.*, Ill-Gotten Money and the Economy: Experiences from Malawi and Namibia, World Bank Study, Washington, DC, United States, 2011, 12-15.

28 <https://www.tutor2u.net/economics/reference/what-is-capital-flight> [16.03.2020].

29 Stuart Yikona, Brigitte Slot, Michael Geller, Bjarne Hansen, Fatima el Kadiri, Ill-Gotten Money and the Economy: Experiences from Malawi and Namibia, World Bank Study, Washington, DC, United States, 2011, 13.

or implementing insufficiently the *FATF* recommendations; in addition, when these transactions have no apparent economic or visible legal purpose, their origin and purpose should be re-examined as thoroughly as possible.[30]

Therefore, it is undeniable that the intent of the offender in money laundering is not to find ways of spending illegal or unjustified property, but to "wash away the dirt" from it, in order to integrate it into the economy.

Approaching the issue differently, we get the following picture:

The action of a thief, who bought various items (say, a car, clothes or jewellery) for himself, his wife or another family member with stolen money, should be qualified under the Article 177 of the CC (theft) along with Article 194 of the CC.

In addition to the above, along with the murder committed for mercenary purposes (Article 109 of the CC), Article 194 of the CC should qualify the action of the grandson, who killed his grandfather in order to come into fortune, and after receiving the fortune the same person bought the apartment (or, for example, a car) with the money received.

Accordingly, after appropriation of another person's property, further disposal of the object of offense by the offender at his/her own discretion must in all cases be qualified under Article 194 of the CC.

Moreover, according to this logic, the act of committer of theft (or receiving a bribe) presenting a stolen item (or subject of bribe) to a relative or paying off a debt using such funds, should be qualified as legalization of illicit income.

Such an approach to the issue would contradict not only the essence of Article 194 of the CC, but also the Convention,[31] on the basis of ratification of which this Article has been included in our Criminal Code, as well as the general principles of Criminal Code.

Namely, according to the Criminal Code of Georgia, **the purpose** of introducing the liability for legalization of illicit income **is not** to qualify all cases (including spending) of further use of illegally obtained property under Article 194 of the CC. **The purpose** of introducing this norm is **quite different** and it is easy to determine, taking into account the systemic position of this Article.

Legalization of illicit income is positioned in the chapter of the Criminal Code, where the entrepreneurial or other economic activities are the specific objects[32] of criminal protection against these offenses.

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30 Combating Money laundering and the Financing of Terrorism: A Comprehensive Training Guide, The international Bank for Reconstruction and development/The World Bank, Washington DC, 2009, 63.

31 See Convention of Council of Europe on Money Laundering, searching, seizure and confiscation of revenues obtained as a result of criminal activities and the financing of terrorism, Warsaw, May 16, 2005, 1st and 3rd sections of Article 6.

32 On the object of criminal protection and its types, see Criminal Law, General section, *Nachkebia G.* (*eds*.), Tbilisi, 2007, 110-114 (in Georgian); *Turava M.,* Review of general section of criminal law, Tbilisi, 2013, 83-84 (in Georgian); Criminal Law, General Section, Manual, *Nachkebia G., Todua N.* (*eds.*), Tbilisi, 2019, 125-126 (in Georgian).

Thus, this chapter contains Articles, some of which infringe, and some threaten[33] the entrepreneurial or other economic activities of the country. Inflow of "dirty" money into the country's economy takes place, which hinders healthy entrepreneurial or other economic activities.

The fact that money laundering is not reflected in the spending of illegally obtained property is evidenced by the opinion expressed in the literature about the dangers of various banking services.

It is considered that specific banking services are means that carry a high risk of money laundering and simplify the money laundering process. Such services may include, for example: electronic payment services, electronic banking, mobile banking and others.[34]

In fact, these services simplify the process of legalization of illicit income, as by using this service an individual is provided with an opportunity to make bank transfers not only within the country, but also abroad, so as not to use the direct services of the bank, which could hinder suspicious transfer. Therefore, it can be said that such action is more covered up for the monitoring service. It is also faster and simpler and has a somewhat disguised nature.

Finally, we should answer the following question: Is it appropriate to consider the appropriation using official position as the means of providing legal form to illegal income? Can the property appropriated through fictitious documents look as legally obtained?

Let's discuss this issue in the context of the given case.

The Director of the LLC appropriated the part of the money legally transferred from the City Hall by entering the inflated data in the pay-rolls. In particular, he appropriated the difference between the salaries to be actually paid and the salaries actually registered. Thus, he already acquired illegal income - appropriated money.

It is interesting to understand, if the money appropriated through fictitious documents could look like ostensibly legally earned income? Namely, if the Director of an LLC is faced with the issue of investing this appropriated money in legal circulation, how would he substantiate its legal origin? Would the documents (pay-roll) registering salaries in the accounting system be useful for this purpose?

Of course - not. He cannot use this document to justify the legality of the money in his illegal possession. On the contrary, if the Director of LLC submits the employee pay-rolls to the appropriate authority in order to justify the legality of the money in his possession, he will be "self-incriminated" as the legitimate question arises: how did he get the part of the money to be issued to other persons?

Consequently, it is indisputable that the entry of fictitious data in the official document (pay-rolls) **was aimed not** at giving legal form to the illicit income, **but** at embezzlement and, at the same time, in such a way that the fact of embezzlement was to be covered (and not to "wash away the dirt" from the appropriated property).

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[33] On the delict of infringement and danger, see *Tsereteli T.,* Criminal Problems, Volume 4, Tbilisi, 2010, 175-225 (in Georgian); *Tskitishvili T*., Delict endangering human life and health, Tbilisi, 2013, 22-110 (in Georgian); *Mchedlishvili-Hedrikhi K.,* in the book: Criminal Law, General Section, *Nachkebia G., Todua N. (ed.),* Tbilisi, 2019, 367-371 (in Georgian).

[34] *Chatain P. L., McDowell J., Mousset C., Schott P. A., Willebois E. V. D. D. D*., Preventing Money Laundering and Terrorist Financing, A Practical Guide for Bank Supervisors, The World Bank, Washington DC, 2009, 223-225.

The second action, which according to the judgment is also assessed as legalization of illicit income, is that K.K., in agreement with M.B., drawn up the fictitious cash withdrawal orders in his name, as the Director of the organization, according to which GEL 981 900 was disbursed to his name in the form of a fictitious loan.

What legal assessment should be given to this fact? Can the fictitious loan be used as a way of legalization of illicit income?

To clarify this issue, the following question must be answered: was the amount, part of which has been transferred to the LLC Director in the form of a fictitious loan, an illegal income (or this was "dirty" money), or whether it was the amount legally owned by the LLC?

Undoubtedly, the amount was transferred to the account of the LLC on the basis of a proper agreement concluded with the City Hall in line with a legitimate objective. Thus, it was legally transferred to the account of the LLC. I will repeat once again that the **Director** of the LLC **was not faced with** the issue of "laundering" this amount. **He was faced with** the issue of appropriation of its part and in such a way that the appropriation would have a legitimate appearance.

Only after this action (i.e. when the Director of LLC could appropriate it), it already turned into illicit income. Consequently, in the future it may become the subject of legalization of illicit income, although, committing such an action by the Director thereafter cannot be observed in case materials.

It is recognized that the idea of money laundering is quite simple. A person who is in a possession of purchase of illegal origin, aspires, attempts to use these funds in a way that the public is not able to identify the improper origin of the funds.[35]

As we can see, when evaluating money laundering activities, the emphasis **is not on the purpose** of offender, how to appropriate someone else's property, but on the purpose to use the already illegally possessed property so that no one can learn about its illegal origin.

Third action: According to the accusation, K. K., again under prior agreement of B., in 2007-2008, in order to give a legal form to illicit income, prepared false invoices, cash withdrawal orders and fictitious purchase orders, according to which they allegedly bought goods of different denominations from various individuals and legal entities. They were preparing invoices, as if to buy different goods from different individuals, however such purchases never took place. False documents confirming the purchase were registered in the company's accounting system.

It shall be determined, what legal assessment should be given to the fact of executive of any organization (e.g., LLC) making fictitious purchases to appropriate a part of the property (e.g., the money) under his/her legitimate management?

In this case the person, using his/her official position, appropriates part of the property that is under his/her legal control or management. Accordingly, this property is not illicit income. It becomes illicit income only after its appropriation for the purpose of misappropriation, i.e. when it is appropriated.

One of the recognized ways of carrying out appropriation by a manager is so-called "non-commodity operation".[36]

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[35] *Cox D.*, Handbook of Anti-Money Laundering, West Sussex, United Kingdom, 2014, 6-7.

Unlike the legalization of illicit income, when a person buys the property with "dirty" money, or also imitates its purchase with "dirty" money (i.e. the fictitious purchase of goods takes place), in case of appropriation the fictitious purchase is made with "clean" money that is in the rightful possession or management of that person. Accordingly, the issue is not its "laundering", but its appropriation, which is carried out by the manager of the organization.

We have to also consider the second option for this case - the City Hall was transferring the amount specified in the contract to the account of the LLC not in full, but in tranches, following submitting the relevant documentation to the City Hall about the works performed by the LLC.

The director of the LLC (in agreement with the other person) was implementing the various illegal operations discussed above. In this way he was inflating the amount of money required and submitting the relevant documents to the City Hall, thus misleading it. Accordingly, the City Hall was transferring to the LLC's account the larger amount than actually required to perform the agreed work. The difference between the above amounts was appropriated by the Director of the LLC (as well as another person).

How is this version different from the first option discussed above? Namely, is appropriate to qualify the committed act as legalization of illicit income in the second version of events?

The point is that the question is more relevant for the second version, because, unlike the first version, the amount transferred to the LLC's account is not in its (LLC's) rightful possession or administration, on the basis of fictitious documents (i.e. on the basis of fraud).

Therefore, it can be said that, unlike the first version, in this version illegally received money - "dirty" money is in place.

Nevertheless, the legalization of illicit income is not present in this version either. The point is that in all cases when the illicit income takes place, the unlawful act committed does not substantiate the composition of Article 194 of the CC.[37]

In the case under consideration, the fraud committed using official position (of course, also in large quantities and by prior agreement in groups) is in place.

Namely, the Director of LLC (along with his accomplice) uses the method of deception. Fraud precedes the transfer of money to the account of the LLC and conditions the amount of money transferred. This means that there is a causal link[38] between the fraud and the transfer of the inflated amount of money to the account of the LLC. In addition, when committing a fraud, the official position is used - a person holds an official position, which gives him the right to compile and sign the document to confirm its authenticity, document further submitted to the relevant body (sub-paragraph "a", part 3, Article 180 of the CC).

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[36] On the essence of so-called "non-commodity operations" see *Lekveishvili M., Todua N.,* in the book: Criminal Law, Private section, *Mamulashvili G., Todua N. (eds.),* Tbilisi, 2019, 527-528 (in Georgian).

[37] See *Todua N.,* in the book: Trends of Liberalization of Criminal Legislation in Georgia, *Todua N. (ed.),* Tbilisi, 2016, 402-407 (in Georgian).

[38] See *Lekveishvili M., Todua N.,* in the book: Criminal Law, Private section, Book I. *Mamulashvili G., Todua N.* (*eds.),* Tbilisi, 2019, 506 (in Georgian).

By submitting these documents to the City Hall, the Director of the LLC deceived the relevant service of the City Hall contracting the company. Proceeding from these false data presented as real, the City Hall was transferring accordingly increased amount to the LLC. The difference between the amounts was appropriated by the director of the LLC.[39]

Thus, the use of method of deception is indisputable, because if the director of the LLC had reflected the correct data in the relevant documents, then the City Hall would have transferred much smaller amount (the amount spent for the works performed).[40]

And yet, why the legalization of illicit income does not take place in this case?

As already mentioned, the point is that by drawing up and using fictitious document, by which the fact of money transfer to other persons (and not to that person) is formally lawfully proved, the Director of LLC cannot create the legal basis necessary for substantiation of legality of illegally obtained income. **These documents cannot serve to prove** that this amount fell into the hands of the Director of the LLC in a lawful manner. **This document may be used only to prove** that the money was lawfully moved to other persons (e.g. the employees). Thus, on the contrary, such a document will most likely create a legal basis for the disclosure of the Director of LLC.

Accordingly, creation and use of a fictitious document only serves the transfer of property to the LLC's account via fraud and gives the impression that the LLC (and not its Director) allegedly received the money on a lawful basis and also spent it for lawful purposes.

Thus, the fraud committed using official position takes place.

4. Conclusion

The following conclusions are made in the article regarding the legalization of illicit income:

1. Withdrawal of money illegally transferred to an organization's account as a result of an offense committed using the official position (e.g., fraud or appropriation) for the purpose of personal use, cannot be assessed as legalization of illicit income;

2. A fictitious reinvestment of funds credited to organization's account into a productive turnover, as a result of a crime committed using official position (e.g. fraud), **can only be considered** as legalization of illicit income if second stage is carried out before the offender withdraws funds from the account of the organization – other fictitious document is prepared confirming turnover of this income in the productive process;

3. Possession of property can only be considered as one of the ways of giving a legal form to illegal property, if it is committed not by a perpetrator or accomplice of a previous (predicative) crime, but by a third party, who was not related to the previous crime and, thus, became involved in a criminal scheme - in the process of money laundering;

4. Unlike the subject of appropriation/embezzlement, the subject of legalization of illicit income is illegal or unjustified property. Thus, a necessary precondition for the implementation of its objective

[39] Comp. *Todua N.,* in the book: Trends of Liberalization of Criminal Law in Georgia, Tbilisi, 2016, 401 (in Georgian).

[40] Comp. Ibid, 401-402.

side is that **a special subject of the crime is in place** - illegal or unjustified property, and **only after that** the implementation of actions aimed at its legalization (use of property, purchase, possession, etc.) begins, for any purpose provided for in Article 194 of the CC;

5. If the executive of any organization deliberately inflates the amount of remuneration to be paid to employees in order to appropriate (and even manage to do so) the difference between the amounts, the appropriation of property (salary fund) being under lawful administration of a person **takes place**, committed by using the official position **and we do not** have legalization of illicit income in place;

6. When legalizing the illicit income, a person is faced not with the problem of acquiring someone else's property (he/she already took a possession of illegal income), but with the problem to somehow "wash away the dirt" over property that has already been transferred to his/her illegal ownership, but is not yet possible (or risky) to integrate it into the economy. **Accordingly, the purpose of the action is not** to increase his/her property at the expense of another and without the will of the rightful owner, **but** to integrate the already owned property into the economy of the country without hindrance; for example, to start an entrepreneurial activity using unjustified or illegal income, or to acquire property of a value for the purchase of which it is necessary to justify the origin of money, etc.;

7. When a fictitious loan is registered using the amount transferred to the organization's account (for the purpose to appropriate this amount) for a legitimate purpose, appropriation and not legalization of illicit income takes place, because this money is not "dirty" and does not need "laundering";

8. Implementation of fictitious purchases (so-called non-commodity operations) with the money in the rightful possession of the organization for the purpose of appropriation of the money also does not represent the legalization of illicit income, as it does not serve money “laundering” (it is not "dirty") but appropriation of property under lawful possession;

9. For qualification of action under the legalization of illicit income, it is not sufficient just to have illegal or unjustified property, but it is also necessary for a person to be aware of this fact in advance.

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4. *Cox D.*, Handbook of Anti-Money Laundering, West Sussex, United Kingdom, 2014, 6-7, 8.
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14. *Todua N.* (*ed*.), Trends of Liberalization of Criminal Law in Georgia, Tbilisi, 2016, 397, 401, 396-402, 402-407 (in Georgian).
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16. *Turava M*., Criminal Law, General Part Review, Tbilisi, 2013, 379-383 (in Georgian).
17. *Tskitishvili T.,* Delict Endangering Human Life and Health, Tbilisi, 2013, 22-110 (in Georgian).
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20. *Yikona S., Slot B., Geller M., Hansen B., El Kadiri F.*, Ill-Gotten Money and the Economy: Experiences from Malawi and Namibia, World Bank Study, Washington, DC, United States 2011, 2, 3, 13, 12-15.
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Historical and Legal Aspects of the Origin and Development of Juvenile Justice (Comparative Analysis)

The following article discusses one of the most pressing issues in today's world – juvenile justice. The article discusses the history of the origins of juvenile justice, the stages of development, including issues related to juvenile court and on criminal liability of a minor in conflict with the law, current approaches and realities, both in the world and in Georgia. The article focuses on the best interests of the minor as the main principle of juvenile justice. The article also discusses the Juvenile Justice Code, as the first special law on juveniles in the Georgian legislature.

Key words: *juvenile justice, history of juvenile justice, juvenile court, Juvenile Justice Code, a minor in conflict with the law.*

1. Introduction

The world has long acknowledged that minors should be considered separately from adults. This approach has historically been formed. For example, the Norwegian Criminal Code of the 13th century states that "Adults can have both hands cut off for theft and children – only one."[1] Juvenile justice[2] was established as a humanitarian institute for the protection of the rights of children and adolescents in the orbit of justice, which considers, on the one hand, perpetrators of crimes and on the other hand, juvenile victims of crime and other criminogenic situations.[3]

Juvenile justice has gained relevance in our country especially in recent years. Significant political and socio-economic developments in Georgia have necessitated the establishment of an appropriate legislative framework in the field of juvenile justice. Our country, on the path to democracy, has set out to create and develop a system of juvenile justice in the country in order to bring it closer to international standards. The first attempt to do this is to adopt a special legislative act. While Georgia did not even have a juvenile justice reform strategy until 2009, radical changes took place in 2015. On June 12, the Parliament of Georgia adopted Juvenile Justice Code, which main part came into force on January 1, 2016.

The purpose of this article is to review the origins and development stages of juvenile justice in both legal and historical aspects. The subject of the research is covered on the example of Georgia as

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1 *Independent Council of Advisors of the Parliament of Georgia, The United Nations Children's Fund,* Juvenile Crimes Administration, Training Modules on Juvenile Crime Administration, Georgian Legislation and International Legal Mechanisms, Tbilisi, 2003, 119 (in Georgian).

2 Juvenile Justice is an internationally recognized term. The word "justice" is used in several senses. It is primarily defined as justice (as well as the judiciary, the judiciary system, etc.) (in Georgian).

3 *Bokhashvili I., Benidze M.,* Juvenile Justice Issues (According the Current Procedural Law, the New Criminal Procedure Code and International Legal Acts), Journal of Law, № 2, 2009, 35 (in Georgian), Cited: *Petrukhin I. L.,* Criminal Procedure Law of Russian Federation, 2007, 592 (in Russian).

well as the world. A separate chapter in the article is devoted to juvenile court. Also, due attention is paid to the stages of juvenile sentencing in the national and international prism.

2. Origins and Stages of Development of Juvenile Justice

The juvenile, due to his or her legal status, has always been, is and will be the center of attention of the state and society. As historical research shows, there was still a teaching in Roman law on juvenile justice, but later, in the inquisition justice, juvenile status was equated with adult and the torture, death penalty and other severe punishments for adults, were also used towards children.[4]

In one of the states in the United States, Massachusetts (where today is one of the most powerful law schools in the world at Harvard University), there was an ordinance according to which a minor under the age of 16 who did not obey his or her parents would be sentenced to death.[5] There was no alternative sentence to such misconduct. It was an absolute tribute to the authority of the parent and the desire for strict law to be enforced.[6]

Children and adolescents differ from adults in development, therefore, their justice should be more focused on rehabilitation. Previously it was less important to understand the individual needs of the juvenile and then take care of him or her. The reason for the juvenile's involvement in justice was the negligence and uncontrollability from his or her parents.[7] The child was perceived as a "reduced older person." Only in the 19th century was there talk of a child's full life, his or her personality, the importance of upbringing. The basis of children's and pedagogical psychology was laid in this century.[8]

The juvenile justice system was first established in the United States. The system aim was to release minors from violent and destructive justice and offer them the standards based on individual approaches. The main issue was that juvenile justice should be radically different from adult justice. The legal proceedings were informal, focusing on the minor and his or her needs and not on the actions he or she had taken. Acts committed by a minor in juvenile justice should not be considered as a crime. It should have been assessed as an offence. Consequently, the child was not criminal. He was a offender. According to the reformers, the child should not be sent to prison, but to a special school or juvenile correctional facility.[9] It should also be noted that, the above approaches are also considered by the Juvenile Justice Code. There is no criminal in the legislative act, but there is a person in conflict with the law. The use of the mentioned term implies that children who are accused of committing a

4 *Jensen E. L., Metsger L. K.,* A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime, Journal of Crime and Delinquency, Vol. 40, 1994, 99.

5 *Wiley B.,* The General Laws and Liberties of the Massachusetts Colony (1672) in Juvenile Offenders for a Thousand Years, New York, 1970, 318-319.

6 *Davis S. M.,* Children's Rights Under and the Law, Oxford University Press, England, 2011, 71.

7 *Schlossman S.,* Coalition for Juvenile Justice, DeKalb, Illinois, United States, 1998, 4.

8 *Chrisman O.,* Paidology the Science of the Child, The Historical Child, Richard G. Badger Gorham Press, Boston, 1920, 11.

9 *National Research Council and Institute of Medicine,* Juvenile Crime, Juvenile Justice, The National Academies Press, Washington, DC, 2001, 154.

crime should not be considered and treated as adults. This is due to children's limited intellectual abilities, psychological, emotional, moral and social development. There is also no prison in the legislative act, but there is a juvenile rehabilitation facility, which is a step forward and emphasizes the sharing of the basic principles of juvenile justice in Georgian legislation.

Significant reforms in juvenile justice took place in the 1980s. The states rejected the strict approach and punished and focused on the re-socialization and rehabilitation of minors.[10] Different laws have been enacted in all states of the United States regarding minors, but the approach was the same everywhere – to give preference to the minors' best interests and alternative measures.[11] The traditional juvenile justice model focuses on a convicted minor rehabilitation, balancing the needs of a victim, an offender and the community.[12] However, in practice the problem was to maintain a balance between social welfare and social control, that is, on the one hand, to focus on the best interests of the child, and on the other hand, to punish the juvenile and protect society from certain crimes. These contradictory views have changed over time and have come under the best interests of the child, [13] which has survived to this day. The first and one of the main goals of the Juvenile Justice Code is – to protect the best interests of the juvenile in the justice process.

Juvenile justice has developed rapidly in the early 20th century, in both the United States and Europe. Over the years, the institute has undergone a number of changes, however, the basic characterization has remained the same – Juvenile Justice – this is educational justice. Juvenile justice is mainly seen as a procedure of release from sentence, however, many countries, including the Juvenile Justice Code of Georgia, do not require release from sentence of a person in conflict with the law. The law does not prohibit the conducting of a criminal case, as well as a criminal liability in case of a crime, which ends an imposition of sentence and execution of it.

According to the Juvenile Justice Code, one of the purposes of the code is to re-socialise and rehabilitate minors who are in conflict with the law.[14] According to the same code, the objective of a sentence imposed on a minor is the re-socialisation and rehabilitation of the minor and the prevention of new crimes.[15] As we see, unlike the Criminal Code of Georgia, the Juvenile Justice Code refused to restore justice as the purpose of a sentence. The probable reason for this is that the restoration of justice is inextricably linked to the goal of retaliation, which is unacceptable in juvenile justice. This fact also significantly proves that the Juvenile Justice Code focuses on the perpetrator and not on the act committed, which is also an echo of the traditional juvenile justice model.

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10 *Torbet P., Szymanski L., Griffin P.,* Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, United States, 1998, 10.

11 *Orsagh T., Chen J. R.,* The Effect of Time Served on Recidivism: An Interdisciplinary Theory, Journal of Quantitative Criminology, Vol. 4, № 2, 1988, 155.

12 *Bazemore G., Umbreit M.,* Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime, Journal of Crime and Delinquency, № 41(3), 1995, 299.

13 *National Research Council and Institute of Medicine,* Juvenile Crime, Juvenile Justice, The National Academies Press, Washington, DC, 2001, 154.

14 Juvenile Justice Code, 3708-IIS, 12/06/2015, Article 1(2).

15 Ibid, Article 65.

3. Historical Excursion on Juvenile Court

The juvenile justice system center is a juvenile court.[16] At first, the term – "Juvenile Justice" was used as a synonym if juvenile court, however, over time the term has undergone a change, because justice may include other establishments expect the court, for example, the police, the prosecutor's office, the bar association, probation, juvenile detention centers and minors' prisons.[17]

The first juvenile court was established in 1899 in Chicago according the Illinois Juvenile Court Act.[18] The court administered justice to minors under the age of 16. It focused more on rehabilitation than on punishment. The court records, in order to reduce the stigma, were confidential. Under the law, minors must be separated from adults. The use of imprisonment direct children under the age of 12 was also prohibited. The law also provided informality in court proceedings.[19] The purpose of the court was to assist the juvenile in resolving family, social, or personal problems and to form a healthy, productive, and law-abiding person. A court should be a defender for a juvenile in conflict with the law, not as an enemy,[20] as it was in the previous system. Previously, adults and minors were treated equally, with the same approaches and punishments, including long-term imprisonment. They had the same rights and even served the sentence together.[21]

The idea of a juvenile court quickly spread. By 1925, the juvenile court existed in all states of the United States except Maine and Wyoming.[22] The establishment of the juvenile court was considered radical news at the time, but despite this practice, in addition to the United States, it soon found development in foreign countries: Great Britain (1905), Russia (1910), France and Belgium (1912), Spain (1918), the Netherlands (1912), Germany (1922) and Austria (1923).[23]

Already in the early 20th century, appeals to juvenile courts were significantly increased, both by law enforcement agencies and by parents and relatives of adolescents. As a result, the role and relevance of juvenile courts in the country has increased. The court sought to show compassion, trust and mutual understanding,[24] and not fear, intimidation and imprisonment, as it was before.[25] The establishment of juvenile court completely changed juvenile justice system, goals and principles.

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16 *Moore M. H., Wakeling S.,* Juvenile Justice: Shoring Up the Foundations, Crime and Justice: A Review of Research, Vol. 22, The University of Chicago Press, Chicago, 1997, 260.

17 *Rosenheim M. K., Zimring F. E., Tanenhaus D. S.,* A Century of Juvenile Justice, Chicago, Illinois, United States, 1983, 18.

18 *Lou H. H.,* Juvenile Courts in the United States, Chicago, Illinois, United States, 1927, 14.

19 *Mack J. W.,* The Juvenile Court, Harvard Law Review, Vol. 23, № 2, 1909, 111.

20 *Cintron L. A.,* Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court, Northwestern University Law Review, Vol. 90, 1996, 1262.

21 *Larsen K. L.,* With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts, William Mitchell Law Review, Vol. 20, 1994, 5-6.

22 *Schlossman S., Sedlak M.,* The Chicago Area Project Revisited, Journal of Crime and Delinquency, Vol. 29, 1983, 400.

23 *Independent Council of Advisors of the Parliament of Georgia, The United Nations Children's Fund,* Juvenile Crimes Administration, Training Modules on Juvenile Crime Administration, Georgian Legislation and International Legal Mechanisms, Tbilisi, 2003, 120 (in Georgian).

24 *Schlossman S., Sedlak M.,* The Chicago Area Project Revisited, Journal of Crime and Delinquency, Vol. 29, 1983, 411.

From the 1910s, the criticism of the fairness and efficiency of the juvenile court has began. Part of the critics accused the court of informality, excessive generosity and improper attention to the process. They did not like to treat all the children in court equally – those who committed the crime and those who did nothing, which did not give the proper result.[26] Unlike an adult, a juvenile's case could have ended in such a way that there had been no oral hearing, the convict had not had the opportunity to use his or her right to protection or even been properly informed about his or her charges.[27]

Significant changes in juvenile justice have taken place in the mid of 20th century, which is related to three decisions of Supreme Court of the United States. The decisions determined procedural formalities in juvenile justice and established the mandatory rights of a minor in conflict with the law. Precedent law is the source of law in the United States.

The first case was *Kent v. United States*, in which a court denied a juvenile Moris Kent to consider his case, because the previous instance court considered his case without an oral hearing and his lawyer did not have access to the information on which the court's decision was based. The juvenile was in the worst situation at the time. He could not use rights that could be used in an adult court because his case was considered by a juvenile court where these rights were not allowed to be used.[28]

The second case, which was considered by the Supreme Court of the United States a year later, was *Gault v. United States*. This decision further demanded to the court to protect the rights of minors. 15 years old Gerald Gault was sentenced to life in prison for an indefinite period of time. His action was that he made an obscene phone call, for which the maximum penalty for adults was a fine of 50$ or imprisonment for 2 months. Almost all procedural disorders took place in this case: the juvenile was detained by the police, who did not inform the parents about it during the whole night; The case was heard in the juvenile court the next day. Witnesses were not called to the trial; The process was not recorded; The juvenile had no lawyer,[29] etc. By this decision of the Supreme Court, minors were given the right to receive information about the charges against them, to have a lawyer, to invite witnesses, as well as to question the witnesses of the prosecution, to receive a record of court hearing and to appeal any judge's decision.[30]

In 1970, the Supreme Court of the United States established a "standard of beyond reasonable doubt" in juvenile justice by the case *In re Winship*, which is about 11 years old Samuel Winship. A minor in conflict with the law must be found guilty by the combination of agreed evidences beyond reasonable doubt.[31]

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25 *Schlossman S.,* Love and the American Delinquent, Journal of Juvenile Family Court, Vol. 28, 1977, 63.

26 *Difonzo J. H.,* Parental Responsibility for Juvenile Crime, Vol. 80, №1, 2001, 4.

27 *Dawson R. O.,* The Future of Juvenile Justice: Is It Time to Abolish the System, Journal of Criminal Law and Criminology, Vol. 81, 1990, 141.

28 *Kent v. United States*, (1966), 383 US 541.

29 See also on this issue. Salduz v. Turkey, [2008], ECHR, №36391/02, §59; Adamkiewicz przeciwko Polsce, [2010], ECHR, № 54729/00, §49, European Court of Human Rights Found a Violation of Article 6 of European Convention on Human Rights (Right to a Fair Trial) in Cases Where Juveniles', Who Were Not Given the Right to Use a Attorney's Service, Confessional Testimony Were Used as Evidence.

30 *Gault v. United States* (1967), 387 US 1.

31 *In re Winship*, (1970), 397 US 358.

The Supreme Court of the United States has delivered several decisions in this period which contributed to the establishment of juveniles' rights. The principle of prohibition of the "double sentence" has emerged in juvenile justice by case *Breed v. Jones*, in which the court clarified that a person should not be tried for the same act as a minor and later in adulthood. The court acknowledged that the juvenile's case is a criminal and not a social welfare case.[32] Nevertheless, juveniles were still not given full access to criminal procedural rights. In the case of *McKeiver v. Pennsylvania* the Court clarified that juveniles have no right to use the jury trial, which is a restriction of their procedural rights.[33] Judges consider many cases and have some ideas about the evidences or the parties, and jurors are focused on only one case, so it may be better that juries consider juvenile's case. Also, jurors review the case as a group and make a decision that may also be positive for the juvenile.[34] After this decision, the juveniles were allowed to use the jury trial.

From the day of its establishment, the juvenile court has also considered cases that were not a crime but a "bad behavior." In particular, actions such as running away from home, missing school, drinking alcohol in public places or engaging in prostitution. The court sentenced them to take appropriate corrective measure (for example, they could be placed in psychiatric, drug, and alcohol treatment facilities by court order). These children were minors who were out of control and needed help, a reference that they would not become criminals in the future.[35]

The juvenile court also considered administrative offenses. In the 1960s, many states revised the code of Administrative Offenses and repealed some of the offenses, while those who committed them were referred to in other terms instead of offenders, as well as juveniles who needed supervision and control. Accordingly, in 1974, the United States Congress passed the Law on the Prevention of Juvenile Justice and Crime. Also established the State Department of the same name, which was governed by this law. The law applied to both persons in conflict with the law and to minors with "bad behavior." In the early 1980's, the number of such minors decrease significantly.[36] In the same year, an amendment to the law was made, according to which anyone who disobeyed a court order would be sentenced to imprisonment. With the amendment of the same law of 1988, the medical and prison facilities for minors and adults were separated.[37]

The establishment of special courts and detention facilities for juveniles was part of the reforms of the Progressive Era.[38] The treatment of minors, as well as that of adult criminals, is exaggerated. The main reason for establish a juvenile court is to prevent children from becoming criminals.[39]

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32 *Breed v. Jones,* (1975), 421 US 519.

33 *McKeiver v. Pennsylvania,* (1971), 403 US 528.

34 *Feld B. C.,* Criminalizing the American Juvenile Court, Crime and Justice, Minnesota, United States, 1993, 66.

35 *Krisberg B., Schwartz I.,* Rethinking Juvenile Justice, Journal of Crime and Delinquency, Vol. 41, 1983, 350.

36 *Krisberg B., Schwartz I.,* Rethinking Juvenile Justice, Journal of Crime and Delinquency, Vol. 41, 1983, 350.

37 *Schwartz B.,* Psychology of Learning and Behavior, United States, 1989, 103.

38 *Schlossman S., Sedlak M.,* The Chicago Area Project Revisited, Journal of Crime and Delinquency, Vol. 29, 1983, 399.

39 *Waters M. V.,* Parents on Probation, New York: New Republic Company, 1927, 21.

Consequently, one of the main goals of juvenile justice from the beginning was to prevent crime. Unfortunately, due to resources or other reasons, we have never had a juvenile court in Georgia.

4. Historical Excursion on Juvenile Sentences

A sentence is a method of social control that determines the maximum of individual freedom within the legal framework established in different areas.[40] The main purpose of criminal punishment is to establish a certain standard of conduct and to impose punitive measures for violating these rules.[41]

Juvenile justice legislation should include norms where should point clearly that the principle of the best interests applies to any decision. In addition, the legislation should state that the principle the best interests of minors applies to all aspects of juvenile justice and all actions to be taken within it,[42] including sentences. Initially, juvenile sentences were not subject to the principles of juvenile justice. In particular, in the United States before the beginning of the 19th century, criminal liability was introduced from the age of 7, so that they could be sentenced to any punishment, including imprisonment and the death penalty.[43]

Sentences should be divided into two groups according to their form and content. In particular, sentences that restrict or detain a convict's liberty (house arrest, restriction of liberty, life imprisonment) and sentences that are not related to restriction or deprivation of liberty of a convict (fine, deprivation of the right to work, community service).[44] Imprisonment is usually considered the most severe sanction. In the United States in 1996, 18% of juvenile offenders (320,900 cases) were serving sentences in a detention facility. The types of crimes for which juveniles were serving sentences were mostly violent,[45] as well as against property and drugs.[46] There were no alternative punishments, the existence of which is directly related to proper criminal policy. Without alternative punishments, juvenile justice can not acquire the humanitarian character necessary for a democratic state. Punishment in a penitentiary institution further encouraged juveniles to commit crimes. That is why the the necessity of existence of alternative sentences become a plan.

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40 *Haney C.,* Reforming Punishment, Psychological Limits to the Pains of Imprisonment, American Psychological Association Washington, DC, 2006, 32.

41 *Hart H. L. A.,* The Presidential Address: Prolegomenon to the Principles of Punishment, Journal of Proceedings of the Aristotelian Society, New Series, Vol. 60, Oxford University Press, England, 1960, 21.

42 *Hamilton C.,* Guidance for Legislative Reform on Juvenile Justice, *The United Nations Children's Fund (Trans.)*, Tbilisi, 2015, 35 (in Georgian).

43 *Schlossman S., Sedlak M.,* The Chicago Area Project Revisited, Journal of Crime and Delinquency, Vol. 29, 1983, 399.

44 See Also *KherKheulidze I.,* Community Service – One of the Best Agents for the Re-socialization of Juvenile Offenders Among Non-custodial Sentences (Comparative Analysis of the Criminal Approach of Georgia and the United States), Journal of Justice and Law, № 2(29), 2011, 119 (in Georgian).

45 *Soringer W. D., Roberts R. A., Brownell P., Torrente M., Lippman P. D. A., Deitch M.,* A Brief Historical Overview of Juvenile Justice and Juvenile Delinquency, United States, 2006, 10.

46 *National Research Council and Institute of Medicine,* Juvenile Crime, Juvenile Justice, The National Academies Press, Washington, DC, 2001, 186.

At the initiative of the "Annie E. Casey" Foundation,[47] in 1992, the United States began working on alternatives to juvenile detention. The grant was awarded to several states,[48] on the condition that instead of better organizing and expanding penitentiary institutions, the money would be spent on the introduction of new alternative sanctions. The project has been going on for years and was finally evaluated in 2000. According to the assessment, alternative sentences have significantly reduced the number of detention facilities, so that the increase in crime has not taken place.[49] Alternative sanctions were: community service, medical care, compensation, commitment to stay at home or elsewhere, monitoring school attendance, general behavioral supervision, passing a therapeutic course, communicating with a senior friend, etc.[50]

The new juvenile sanctions were based on the needs of the offender and focused on the well-being of the child.[51] It was so-called "Proportional punishments", whose philosophy focuses on the perpetrator.[52] The main purpose of the sentences was to rehabilitate the offender. Over time, legislative changes have removed penalties for rehabilitation purposes. A sentence became based on a crime, not a criminal. The sentence based on the crime is aimed at retaliation.[53] In response of this, in some states of the United States, were spreaded so-called "Mixed (combined) sentences", which meant that a juvenile would be imposed to a sentence in a juvenile correctional facility, however, another sentence would be imposed, which was intended for an adult. The execution of the second sentence was suspended until the juvenile served the first sentence, and if he did successfully, the second sentence would be revoked.

Supporters of this system noted that by this a minor should get rid of the severe punishment in case of a particularly serious crime, but opponents noted that this system contradicted the essence of juvenile justice. The use of adult sentences led to procedural and legal violations.[54] In most states, the system of mixed sentences was in force, however, in some states a judge could impose a sentence on a minor which was only for a minor or only for an adult.[55]

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47 One of the Most Famous and Powerful Charitable Foundations of Child Welfare System in the United States (in Georgian).

48 Cook County, Illinois (Chicago); Milwaukee County, Wisconsin; Multnomah County, Oregon (Portland); New York City; and Sacramento County, California.

49 *Kendrick M.,* Reducing Disproportionate Minority Contact in the Juvenile Justice System: Promising Practices, Aggression and Violent Behavior, United States, 2007, 145.

50 *Mallett Ch. A.,* Predicting Juvenile Delinquency: The Nexus of Childhood Maltreatment, Depression and Bipolar Disorder, Journal of Criminal Behaviour and Mental Health, 19(4), 2009, 66.

51 *Torbet P.,* State Responses to Serious and Violent Juvenile Crime, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, United States, 1996, 12.

52 *Christy N.,* The Limits of Pain, the Role of Punishment in Penitentiary Politics, *Bakhtadze U. (Trans.)*, *Shalikashvili M., Giorgadze G. (ed.),* 1st Ed., Tbilisi, 2017, 64 (in Georgian).

53 *Torbet P., Szumanski L., Griffin P.,* Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, United States, 1998, 11.

54 *Feld B. C.,* Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy, Journal of Criminal Law and Criminology, Chicago, United States, 1997, 100.

55 *Redding R. E.,* The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications, Youth Violence and Juvenile Justice, United States, 2003, 137.

Mandatory minimum sentences have been imposed since 1992. For example, a juvenile under the age of 14 should have been sentenced to at least 15 years in prison for murder. In addition, the United States allowed the use of the death penalty for juveniles in 23 states. Moreover, in 1989, the United States Constitutional Court upheld the death penalty for a minor over the age of 16.[56] This practice was condemned by the Convention on the Rights of the Child, adopted in the same year and found to be quite the opposite - no child can be put to death.

One of the main drawbacks of juvenile justice was that it could not adequately punish juveniles. According to the study, at least 63% of convicts were sentenced to imprisonment.[57] The Convention on the Rights of the Child also condemned this practice. Imprisonment is allowed only as an extreme measure for the shortest possible time. The Convention on the Rights of the Child has been the main focus of the world for countries to reject time-consuming, brutal punishments in juvenile justice and to start thinking and working on humanitarian sanctions. The Juvenile Justice Code provides alternative sentences of imprisonment. In addition, the code does not allow the restriction of liberty for a minor if it is possible to achieve the purpose set by law by using a lighter measure. Imprisonment is allowed only as an extreme measure, which should be used for as short a time as possible and subject to regular revision.[58]

5. History of Juvenile Justice in Georgian Criminal Law

There were special norms for juveniles in Georgian criminal law for a long time, but they were quite rare and illiberal. There was no special normative act regulating juvenile justice in the legislation, which would unite the specific rules on the participation of minors in the justice process and would simplify their perception. Nevertheless, Georgian criminal law still provided for different norms from adulthood for juvenile delinquency.

The Criminal Code of the Soviet Socialist Republic of Georgia, adopted in 1960 and enacted on March 1, 1961, recognized the notion of a minor. Under the code, criminal liability began at the age of 16, only for specific offenses listed in the same legislative act (murder, premeditated bodily harm, rape, theft, possession of a firearm, ammunition or explosive, etc.).[59] One of the manifestations of the special approach to juveniles should be that the legislative act provided for the means of avoiding the use of punishment, such as apologizing to the victim, warning, reprimand, etc.[60] According to the same code, the death penalty did not apply to minors, and the size of imprisonment could be a maximum of 10 years.[61] The code also recognized the possibility of early release, a conditional

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56 *Torbet P.,* State Responses to Serious and Violent Juvenile Crime, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, United States, 1996, 14.

57 *Kinder K., Harland J., Wilkin A., Wakefield A.,* Three to Remember: Strategies for Disaffected Pupils, The National Foundation for Educational Research, England, 1995, 73.

58 Juvenile Justice Code, 3708-IIს, 12/06/2015, Article 9.

59 Criminal Code of Soviet Socialist Republic of Georgia, the Bulletin of the Supreme Council of the Soviet Socialist Republic of Georgia, №1, Art. 10, 30/12/1960 (Annulled, 01/06/2000), Article 12.

60 Ibid, Article 64.

61 Ibid, Articles 25-26.

sentence and the ability to change the sentence into a lighter sentence.[62] The sentence was aimed not only at punishing the offender, but also at bringing him up, stimulating respect for labor, strict enforcement of laws, respect for common rules of life, crime prevention, in particular, article 22 of the Criminal Code of the Soviet Socialist Republic of Georgia - "Punishment is not only a punishment for the crime committed, but also aims to correct and re-educate convicts in the spirit of honest attitude towards labor, strict observance of laws, respect for common rules of life. Also should be avoided of new crimes by both convicts and others."[63]

Also, it is important to note in a positive light that the purpose of punishment was not physical suffering or humiliation of human dignity. The norms of the code accurately reflected the wishes of the government of that time. In particular, it was far more important for the state to have an honest citizen who would be involved in public life than a criminal who would sit in jail, be at the expense of the state and not bring benefits to the welfare state.

The Criminal Code of Georgia, adopted in 1999, which came into force on June 1, 2000, already provided for a separate criminal liability for a minor. A minor was a person under the age of 14 to 18 who could have been sentenced or given educational coercive measure.[64] According to the first version of the legislative act, the types of punishment were: fine, deprivation of the right to work, community service, remedial work, strict isolation from society and imprisonment.[65] Juvenile who has committed a minor offense for the first time, the court could release from criminal liability if it is considered that a correction was appropriate educational coercive measures,[66] which are the following: a warning, to be given supervision, imposition of damages, behavior restriction, to be placed in a special educational or medical-educational institution.[67] The code also provided for exemption from sentence and parole.[68] It should be noted that during the sentencing of a juvenile, along with the general principles of sentencing, the conditions of his or her life and upbringing, the level of mental development, health condition, other personal characteristics, the influence of an older person on him were taken into account.[69]

Even before the adoption of the Juvenile Justice Code, Georgian criminal law did not leave juveniles unattended. The norms in the discussed legislative acts, in accordance with the time, reflect the care and special approach towards minors. At least for the time being, we have a kind attitude towards adults. In a time of repressive, strict rule of law, where human rights have been less protected, the existence of special norms for minors can already be considered a special case.

In Georgia, juvenile justice was transformed in 2015 with the adoption of the Juvenile Justice Code, the main part of which came into force on January 1, 2016. The Juvenile Justice Code establishes special criminal and administrative liability for juveniles and the administration of juvenile

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62 Criminal Code of Soviet Socialist Republic of Georgia, the Bulletin of the Supreme Council of the Soviet Socialist Republic of Georgia, №1, Art. 10, 30/12/1960 (Annulled, 01/06/2000), Article 55.

63 Ibid, Article 22.

64 Criminal Code of Georgia, 2287, 22/07/1999, Article 81.

65 Ibid, Article 82.

66 Ibid, Article 90.

67 Ibid, Article, 91.

68 Ibid, Articles 97-98.

69 Ibid, Article 89.

offenses, peculiarities of criminal proceedings, special rules for the execution of sentences and other measures. According to the new code, the juvenile justice process is conducted only by specialized persons. Despite all the above, this field still needs to be perfected in the Georgian reality, at least with the existence of the Juvenile Court, in connection with which history has not been reviewed in the article, because it has never been in Georgia. However, it should be noted that a special legislative act has taken the juvenile justice of Georgia to a new level. The Juvenile Justice Code is indeed an achievement of the Georgian legislative space, which raises a number of issues in a new way and in accordance with international standards.

6. Conclusion

Recognition of a child as a subject of rights in the world happened a long time ago, which should be treated with dignity and respect. In all developed or developing countries, the notion has been established that a minor needs a special approach, especially if we are dealing with a minor who is in conflict with the law. In almost all developed countries there is a specialized legislative act for juveniles in conflict with the law. Fortunately, Georgia is among these countries today.

Although Georgian criminal law has not neglected juveniles in the past, the adoption of the Juvenile Justice Code in 2015 was a truly progressive step. The state has shown its will to pay more attention to the child, to the new generation that is actually the future of the country. The state, on the example of international law and progressive countries, has committed itself to developing and bringing juvenile justice to a new level.

Juvenile justice is currently a developing field in Georgia, shaped by the experience of countries and the gradual better understanding of what works effectively and what does not. Legislative, executive, and judicial bodies must commit themselves to establishing, strengthening, or expanding the institutions and programs necessary for successful implementation. The state should pay due attention to both the principles of traditional juvenile justice and new approaches. In addition, it is necessary for there to be a juvenile court in the country that is focused on enforcing justice for juveniles in conflict with the law.

Georgia has long chosen the European path, and therefore it is necessary to continue to take consistent steps in our country to bring national legal bases, policies and measures in line with international standards. The legislature must repeatedly reaffirm its commitment to the promotion of juvenile justice in Georgia and reaffirm the country's aspirations and commitment to universally recognized democratic principles.

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Zaza Meishvili*

Origin and Development of Jury Trial in Georgia (General Overview)

Jury trials have a long-standing history of origin and development. However, initial models of public participation in the administration of justice, dating back to the 11th century England, were substantially different from the modern jury trials.

Despite the different forms of public participation in the administration of justice, jury trials were introduced in Georgia during the First Republic (1918-1921) when significant number of cases were adjudicated. However, soon after the commencement, it was abolished in 1921 as a result of the Soviet occupation. After the restoration of the Georgian state independence, jury trials became operational since October 1, 2010. The scope of the crimes to be adjudicated by the jury trial, as well as its territorial jurisdiction gradualy expanded. Therefore, the number of cases heard by the jury trials has been increasing despite the controversial and incompatible positions prevailing around the institution.

Key Terms: *jury trial, jury, origination of the jury trial, development of the jury trial, jurisdiction of the jury trial.*

A jury is the person who safeguards our property, our dignity, life,
soul and flesh, in a word, our manhood, and our humanity.
It is a realized conscience, and yet to be realized scruples of
an entire nation, to the extent possible purified from
the best of the men and elevated to a deserved heights.

Ilia Chavchavadze[1]

1. Introduction

Alongside the conventional procedures of rendering decisions by a professional judge during the criminal proceeding, a specific form of judicial proceeding is in place in various countries, when the decision is rendered not by a professional judge, but a juror.

A jury trial[2] consists of group of individuals (historically comprised of 12 people), who give an oath to render a verdict on a legal case based on the evidence submitted to them by a court[3].

Jury trial can be considered as (1) a right of the party to have the case reviewed by the civilians; (2) guarantee of the right to life and freedom in cases when an accused can be sentenced to death or to

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1 *Bezhashvili T.,* Jury Trial (Brief History of Origin and Development), Tbilisi, 2014, 8 (in Georgian).

2 In English – Jury Trial.

3 Jury Trial is also called: Petit Jury, Petty Jury. The concept originated from late middle ages, in England: from Old French juree 'oath, inquiry, Latin – jurata. See *Feinman J. M.,* 1001 Legal Words You Need to Know, Oxford, 2005, 105.

a deprivation of liberty; (3) right of the citizens to participate in the judicial proceeding and a civic responsibility to get engaged in public processes.[4]

However, the institution of a jury trial, perhaps, is one of the most debatable issues among the representatives of legal profession (in Georgia, as well as in other countries).

Jury trial originates from the early stages of states' foundation. Public was participating in the administration of justice in various forms in Greece, Scandinavian countries, Norway and Sweden.[5]

Based on some resources, scholars believe that jury trials were first established in the IX century, in France. The institution was introduced by Normans in England, in 1066 and since then it had been perceived as an indispensable part of the judicial system of England.[6] However[7], the origin of a modern jury trial is still associated with the 11th century England[8].

Before the enactment of the institution of a jury trial in Georgia, public representation in the administration of justice was ensured through various forms.

It is noteworthy that despite a brief existence of the Democratic Republic of Georgia (1918-1921), jury trial was introduced pursuant to the law adopted by the Parliament of Georgia and Republic of Georgia on January 17, 1919[9]. The institution reviewed multiple cases, whereas under Article 81 of the Constitution, adopted by the Georgian Founding Congress on February 21, 1921, a chapter on Judiciary contained a statement: "Institution of a jury trial exists for reviewing grave criminal offences and political and print crimes"[10].

As a result of the Soviet occupation, jury trial was abolished, however, after the restoration of independence, jury resumed reviewing cases in the Common Courts of Georgia in cases and manner prescribed by the law pursuant to the Constitutional Law of Georgia "On the Introduction of Amendments and Addendums to the Constitution of Georgia" dated as of February 6, 2004.[11] Subsequently, since October 1, 2010, a new Criminal Procedure Code of Georgia stipulates enactment of a jury trial. However, initially, jury trials operated only in Tbilisi City Court reviewing criminal cases (only completed) under Article 109 of the Criminal Code (premeditated murder).[12]

Jury trials commenced in Kutaisi City Court since October 1, 2012[13] resulting in a slight increase of cases reviewed under relevant articles of Criminal Code of Georgia. From January 1, 2017,

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4 *Shvangiradze T., Chkaidze G.,* Jury in the Criminal Proceeding, Tbilisi, 2016, 22 (in Georgian).

5 *Jorhand L., Tsikarishvili K.,* Jury Court (Review of Western Systems), Tbilisi, 2007, 11 (in Georgian).

6 See citation: *Melkadze O., Dvali B.,* Judiciary in Foreign Countries, World Parliamentarism Research Center, Series of Political-legal Literature, Book XI, Tbilisi, 2000, 148 (in Georgian).

7 The possibility of origination of jury trials in the IX century France is presumed.

8 See citation: *Jorhand L., Tsikarishvili K.,* Jury Court (Review of Western Systems), Tbilisi, 2009, 12 (in Georgian).

9 *Bezhashvili T.,* Jury Trial (Brief History of Origin and Development), Tbilisi, 2014, 8 (in Georgian).

10 *Gurgenidze E.,* Compilation of Legal Acts of a Democratic Republic of Georgia – 1918-1921, Tbilisi, 1990, 472 (in Georgian).

11 Constitutional Law of Georgia "On the Introduction of Amendments and Addendums in the Constitution of Georgia", №3272, LHG, 2, 06/02/2004.

12 Law of Georgia "On Introduction of Addendums and Amendments to the Criminal Procedure Code of Georgia", №3616, LHG, 50, 24/09/2010.

13 Criminal Procedure Code of Georgia, 09/10/2009, Article 330.

jury trials started operation in Tbilisi, Kutaisi, Batumi and Rustavi City Courts and Zugdidi, Telavi and Gori Regional Courts[14], therefore, number of cases reviewed according to relevant articles of Criminal Code of Georgia, increased.

From October 1, 2010 to December 31, 2018, jury reviewed 38 criminal case against 49 people at the Regional (City) Courts and relevant verdicts were rendered[15], which indicates that the number of cases reviewed with the participation of the citizens of Georgia, has increased.

The article reviews origin and the relevant stages of development of a jury trial in Georgia starting from the early period until 2019.

2. Origin and Development of Jury Trial in Georgia (Early Period)

While studying issues related to the institution of the jury in Georgia, some scholars draw parallels between mediation and jury trials, arguing that two main details connecting those are – the rule of giving an oath and jointly selecting non-professional jurors.[16]

Mediation court in Khevsureti was called "*Rjuli*" (The word "Rjuli" means faith in Georgian). Local law was also called "*Rjuli*" in Khevsureti. Selected mediators were named as "*Rjulis Katsi*" (Men of Faith/Men of Law), oftentimes – "*Bches*" (Adjudicators). Substantial discussion of the disputed case was called "*Garjulva*" (bringing to faith), verdict – "*Narjulevi*", parties – "*Merjuleebi*".[17]

Alongside the mediation courts, public self-government bodies also performed judicial functions in different parts of Georgia, specifically in the mountainous areas.[18]

The concept of a "judge" was expressed by the term "*Msajuli*" (Juror), "*Bche*" (Adjudicator) in the 11th century Georgian law. According to the Georgian scholars, the term "judge" denoted a public official having a judicial power, who was specifically assigned to hear the disputed cases, as well as a person, who as a nominee of the appellant, performed the functions of a judge in cooperation with others only for that particular case.[19]

Customary law of Khevsureti recognized judicial proceeding, such as "*Rjuli*", i.e. a court comprised of 4 to 12 selected people. It is noteworthy that the court members were called "*Msajulebi*". The cases, such as, reconciliation of blood feuders, theft, divorce and other relevant cases were

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14 Law of Georgia "On Introduction of Amendments to the Criminal Procedure Code of Georgia", №5591-IIს, 24.06.2016.

15 Web-site of the Supreme Court of Georgia: supremecourt.ge, Statistics of the cases reviewed by jury, 2019, 1, <http://supremecourt.ge/files/upload-file/pdf/nafici-msajulebis-mier-ganxiluli-saqmeebis-statistika.pdf> [10.03.2020].

16 Web-site of jury court: msajuli.ge, Georgian history – mountain law – mediation court, 2010, 1, <http://msajuli.ge/index.php?m=794> [10.03.2020].

17 Web-site of jury court: msajuli.ge, Georgian history – mountain law – mediation court in Khevsureti, 2010, 1, <http://msajuli.ge/index.php?m=794> [10.03.2020].

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19 See citation: *Bezhashvili T.,* Jury Trial (Brief History of Origin and Development), Tbilisi, 2014, 16 (in Georgian).

reviewed according to ancient customs.[20] "*Rjuli*" (Faith) or the mediation court was most frequently addressed in Khevsureti for reviewing cases involving physical assault (*Chra-Chriloba*), murder and robbery.[21]

The author of the book "Five Years in Pshav-Khevsureti", Giorgi Tedoradze, claims that "Entire *Rjuli* (Faith) was designed in the ancient times; first – in Likoki Valley, where Khevsurians from all parts had gathered and decided on the aforementioned."[22] However, Aleksi Ochiauri, the author of the book "Georgian Public Fairs in the East Mountainous Georgia" and a writer of "Arkhoti New Faith" believes that the institute of "*Rjulis Katsebi*" (Men of Faith/Men of Law) is associated with Erekle II and Khevsurian Mamuka Bakalishvili.[23]

The position of "*Rjulis Katsebi*" did not exist in Khevsureti, therefore, parties themselves would decide on the jurors. They would chiefly select the honorable, authoritative and a religious person, who knew Khevsurian "*Rjuli*" (law) well.[24] As a rule, the murderer and the family member of the victim would select only an authoritative person.[25] The same position is shared by Aleksi Ochiauri, who when speaking about the rule of physical assault, claims that "*Rjulis Katsebi"* were selected by the parties themselves."[26]

The number of jurors/adjudicators depended on the gravity of the case. A simple case could have been heard by two jurors, but murder would have been decided by 12 jurors.[27] The jury could consist of 5-6 men as well.[28]

"*Narjulevi*" or the verdict was unanimously reached and not by the majority of votes.[29] If the "Men of Faith/Men of Law" could not reach a unanimous decision, the Jurors would have been dissolved and the parties were advised to select new Jurors. The reasons of not reaching the decision or the position of each juror was kept confidential. Anecdotal evidence suggests that adjudications on the same case could have been arranged nine times only.[30]

Svanetian mediation court or so-called "*Morvali*" is one of the unique legacies of Georgian judiciary. Svanetian law recognized one of the ancient forms of judicial proceeding – indictment procedure, with all its characteristics. Namely, the parties decided on the composition of the court,

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20 Ibid.

21 Web-site of jury court: msajuli.ge, Georgian history – mountain law – mediation court in Khevsureti, 2010, 1, <http://msajuli.ge/index.php?m=794> [10.03.2020].

22 See citation: *Jalabadze D.,* Georgia Customary Law 2, Tbilisi, 1990, 67 (in Georgian).

23 Comp. Ibid, 82.

24 Web-site of jury court: msajuli.ge, Georgian history – mountain law – mediation court in Khevsureti, 2010, 1, <http://msajuli.ge/index.php?m=794> [10.03.2020].

25 The conclusion is suggested by *Tedoradze G.* in "Khevsurian Rjuli". See citation: *Jalabadze D.,* Georgian Customary Law 2, Tbilisi, 1990, 66 (in Georgian).

26 See citation: ibid, 82.

27 Web-site of jury court: msajuli.ge, Georgian history – mountain law – mediation court in Khevsureti, 2010, 1, <http://msajuli.ge/index.php?m=794> [10.03.2020].

28 The conclusion is suggested by *Tedoradze G.* in "Khevsurian Rjuli". See citation: *Jalabadze D.,* Georgian Customary Law 2, Tbilisi, 1990, 66 (in Georgian).

29 Web-site of jury court: msajuli.ge, Georgian history – mountain law – mediation court in Khevsureti, 2010, 1, <http://msajuli.ge/index.php?m=794> [10.03.2020].

30 Ibid.

presented evidence that were evaluated by the mediators and verdict was rendered. The Judge took passive role in collecting evidence. The proceeding was adversarial, and the parties were absolutely equal. The mediator in Svaneti was named as "*Morevi*" (singular) ("*Morvali*" – plural).[31]

Existing sources indicate that the party could name minimum number of two (one per party), and maximum number of 24 mediators. The number of such mediators would change according to the case nature, gravity, difficulty and significance. 24 mediators were appointed only in case of a murder. Another member of the mediation court was a Chief Mediator, called "*Mutsvri*", or "*Nugsachu Megne*". "*Mutsvri*" was appointed for extremely complicated and grave cases.[32]

Likewise Khevsureti and Svaneti, mediation court operated in different parts of mountainous Georgia, almost analogous to Khevsureti but known with different names. Mediator-judges in Pshavi are recollected as "*Tavkatsebi*" (Chiefs), "*Kats Sakitkavebi*" (Councilors of Men), "*Natsadi Katsebi*" (Men of Wisdom), "*Kitkhuli Katsebi*" (Men of Books), "*Rjulis Katsebi*" (Men of Faith), "*Soplis Tavkatsebi*" (Heads of Village), "*Mebcheebi*" (Keepers), "*Merjuleebi*", "*Bcheebi*", and mediators. Mediator-judges in the valley were called "*Temis Katsebi*" (Men of Community), "*Kitkhuli Katsebi*" (Men of Books) and "*Temis Khalkhi*" (Community People). According to scholars, mediation court existed in Tusheti as well, however, mediators for reconciliation and agreement to a court, were selected by "*Khevisberi*" (Community Leader).[33]

3. Origin and Development of Jury Trial in Georgia (Period of Russian Empire – 1868-1917)

During the rule of the Russian Empire, the tradition was changed by resorting on the Russian model of a Reconciliation Judge. The governors of the Russian Empire believed that Georgian population was not ready for the jury trials due to the development of the country's judicial system.[34]

The fact is interestingly explained by a historian and philologist, Sargis Kakabadze. He claims that "Unlike Russia, jury court was not introduced in Georgia and Transcaucasia. In Eastern Georgia, as well as in other parts of Georgia, for instance, horse theft in Odishi, or blood feud and robbery in other parts, were considered to be honorable acts among some of the retrograde nobilities. Therefore, it was considered that creating jury court from the locals could have diminished the fight against the criminals."[35]

Other scholars have different opinions flagging various factors. For example, the prominent scholar, Doctor of Historical Sciences, Professor Abel Kikvidze believes that "The Government of the

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31 Web-site of jury court: msajuli.ge, Georgian history – mountain law – mediation court in Svaneti, 2010, 1, <http://msajuli.ge/index.php?m=794> [10.03,2020].

32 Web-site of jury court: msajuli.ge, Georgian history – mountain law – a meaning of mediation court in Svaneti, 2010, 1, <http://msajuli.ge/index.php?m=794> [10.03.2020].

33 Web-site of jury court: msajuli.ge, Georgian history – mountain law – mediation court – Pshavi, Mtiuleti, Khevi, Tusheti, 2010, 1, <http://msajuli.ge/index.php?m=794> [10/03/2020].

34 *Bezhasvili T.,* Jury Trials (Brief History of Origin and Development), Tbilisi, 2014, 16 (in Georgian).

35 See citation: *Kakabadze S.,* History of Georgian Nation 1783-1921, 2nd edition, Tbilisi, 2003, 173-174 (in Georgian).

Russian Empire considered irrelevant to elect public jurors in Georgia. As if Georgian people were not ready for this; Georgian judicial reform in 1868 resulted in imposition of so-called Government Courts, comprised of Russian officials."[36]

Almost the same opinion is shared by the member of the extraordinary commission of the Transcaucasian Committee, M. Gruzenberg, who claims that "aspiring for maintaining criminal proceedings under its control on the coastline, as a mean of achieving its objectives, the governing circles of the time were terrified by the jury trials, perceived as an opportunity of expressing public justice and people's rights, therefore, objected to its creation not only in Caucasus, but on other coastline areas (for example in Poland).[37]

Georgian society awaited for the introduction of the jury trials in Georgia (then the province of Russia) with great hopes.[38] The aforementioned is confirmed by the statement of one of the authors of the 1921 Constitution of Georgia, Samson Dadiani, claiming that "the desire and need of that[39] need no proof for us, for our people, – we were begging Russian government for almost half a century to grant us such an institute."[40] However "Russian authority and local government imposed new law slightly differently,"[41] according to which, considering prevailing traditions and customs, jury trials were considered to be inappropriate for the region.[42]

4. Origin and Development of Jury Trial in Georgia (First Republic – 1918-1921)

Jury Trials in Georgia started operating during the First Republic. Temporary government decided to implement judicial reform immediately after coming to power, which also envisaged creation of Jury Trials. The first legal act governing the institution was "The Resolution of Judicial Institution" adopted on September 21, 1917. Later, relevant amendments were elaborated for "Criminal Proceeding Resolution".[43]

On January 17, 1919, Government of Georgia adopted the law on "Introduction of Jury Trials". According to the law, a jury with the composition of 12 persons, traditionally without interference of a judge, declared the accused guilty or not guilty.[44] It is noteworthy that "Resolution of Jury Trial" adopted on January 17, 1919 by Georgian National Council and government of the Republic of

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36 Comp. *Kikvidze A.,* History of Georgia XIX-XX cen. (1861-1921), Volume II, Tbilisi, 1959, 34-35 (in Georgian).

37 Comp. *Gruzenberg M. O.,* Jury Trial in Transcaucasia, Tbilisi, 1917, 1 (in Russian).

38 *Nachkebia G., Lekveishvili M., Ivanidze M., Shalikashvili M., Tumanishvili G., Gogniashvili N., Bokhashvili Ir.,* The Institute of Jury Trial in Georgia, Tbilisi, 2013, 20 (in Georgian).

39 Jury Trial is presumed.

40 See citation: *Kordzadze Z., Nemstsveridze T.,* Chronicles of Georgian Constitutionalism, Tbilisi, 2016, 275 (in Georgian).

41 See citation: *Metreveli V.,* Akaki Tsereteli's Political and Legal Opinions, Tbilisi, 1980, 117 (in Georgian).

42 *Nachkebia G., Lekveishvili M., Ivanidze M., Shalikashvili M., Tumanishvili G., Gogniashvili N., Bokhasvhili Ir.,* The Institute of Jury Trials in Georgia, Tbilisi, 2013, 21 (in Georgian).

43 Web-site of jury court: msajuli.ge, Georgian history – 1917-1921 – Jury Trials under Independent Georgia (1917-1921), 2010, 1, <http://msajuli.ge/index.php?m=796> [10.03.2020].

44 *Bezhashvili T.,* Jury Trials (Brief History of Origin and Development), Tbilisi, 2014, 7 (in Georgian).

Georgia, was very progressive and stipulated democratic principles of selecting jurors.[45] The resolution of "Jury Trial" also included the rule of elaborating questions for jurors.[46]

Provisional law of the Georgia's Founding Congress and the Republic of Georgia dated as of April 23, 1920, "Introduction of Amendments in the Resolution of Jury Trial" regulated issues such as remuneration for the absenteeism of jurors and imposing punitive and other liabilities for the failure to show up in court due to irregular reasons.[47]

Article 81 of the Constitution of Georgia adopted by the Georgia's Founding Congress on February 21, 1921 contained the statement regarding the jury trials: "Institution of a jury trial exists for reviewing grave criminal offences and political and print crimes."[48] However, jurors changed during the Soviet occupation period by the public jurors who maintained functions in courts formally.[49]

5. History of Jurors' Rulings in Press (1920-1921)

In February 1921, as a result of the Soviet occupation, jury trials, alongside other democratic institutions, were soon abolished in Georgia. However, some information regarding the rulings of jury trials on criminal cases and verdicts rendered in 1920-1921 in Georgia are preserved. Therefore, it is possible to form a certain opinion by getting acquainted and reviewing those cases.

The information on the first jury proceeding is given in the newspaper "S*akartvelos Respublika*" (Republic of Georgia) dated as of March 10, 1920. The newspaper stated that "the first jury trial was held on March 8, 1920 in the District Court of Jurors. The court reviewed two cases of theft."[50]

The analysis of the criminal cases reviewed by the jurors indicate that the institution decided on the inconsistent types and categories of crimes committed by different people. For example, in some cases, the jury acquitted the person charged with intentional/premeditated murder. The Stolerman case, when the person was charged for the murder of his wife, confirms the fact. The murder committed by Stolerman was reviewed as an intentionally deliberated one and should have been sentenced to lifetime imprisonment at hard labour, however the court acquitted the person.[51]

Jury trials also reviewed the cases of former officials and military personal. For instance, on July 5, 1920, Tbilisi District Court, with the participation of jury, started reviewing the case of a former general-governor, Shalva Maglakelidze, former marshal of Tbilisi Provincial Battalion,

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45 *Gurgenidze E.,* Compilation of Legal Acts of the Democratic Republic of Georgia – 1918-1921, Tbilisi, 1990, 207-208 (in Georgian).

46 Ibid, 214.

47 Ibid, 382-383.

48 Ibid, 472.

49 *Bezhashvili T.,* Jury Trials (Brief History of Origin and Development), Tbilisi, 2014, 17 (in Georgian).

50 Web-site of jury court: msajuli.ge, Georgian History – History in Press – History of Georgian Judiciary in Newspapers, 2010, 1, indicated newspaper article, newspaper "Sakartvelos Respublika", 10/03/1920, <http://msajuli.ge/index.php?m=797> [10.03.2020].

51 Web-site of jury court: msajuli.ge, Georgian History – History in Press – History of Georgian Judiciary in Newspapers, 2010, 1, indicated newspaper article, newspaper "Sakartvelos Respublika", 06/03/1920, <http://msajuli.ge/index.php?m=797> [10.03.2020].

Chachibaia and the public servants of the same battalion – Shengelia, Khoshtaria, Aznaurovi and Iushkevichi. It was one of the most famous cases reviewed by the jury trial in the history of 1918-1921 independent Georgia. The review of the Maghlakelidze's case continued for almost two weeks, therefore, the proceeding was considered the longest in the work of judiciary of that time. The detained public officials were charged under several articles. After a lengthy deliberation, jury acquitted some of the convicts, and pleaded others guilty.[52]

Jury trial also reviewed the bribery convictions. For instance, according to the information published in newspaper "*Sakartvelos Respublika*" dated as of March 10, 1920, "On January 29, a case against investigator Badashvili commenced at Tbilisi District Court. On January 31, 1920, charges were brought against Badashvili for bribery. The case review finished in favor of the investigator, jurors acquitted the investigator and ruled for his release."[53]

The consideration of expansion of the jurisdiction of jury trials in Georgia then, could be considered as a proof of the institution's successful existence. For instance, according to the member of the Tuapse Department of the Literacy Society, Evgeni Gabunia, "institution of jury trials at the District Courts operates only in the department of the criminal proceedings. It should also be introduced in the civil proceedings department, so that all cases are reviewed with the participation of jurors."[54]

6. Development of Jury Trial in Georgia (2004-2010)

After the restoration of the independence of Georgia, according to the constitutional law of Georgia dated as of February 6, 2004, "On the Introduction of Amendments and Addendums to the Constitution of Georgia", the cases in the Common Courts of Georgia can be reviewed by the jury according to the cases and rules prescribed by the law.[55] Thus, since October 1, 2010, according the new Criminal Procedure Code of Georgia, jury trial started operation. However, at the initial stage, the jury trials operated only in Tbilisi City Court and reviewed the cases (only completed) stipulated under Article 109 of the Criminal Code of Georgia (murder under aggravating circumstances)[56].

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52 Web-site of jury court: msajuli.ge, Georgian History – History in Press – History of Georgian Judiciary in Newspapers, 2010, 1, indicated newspaper article, newspaper "Sakartvelos Respublika", 25/11/1920, <http://msajuli.ge/index.php?m=797> [10.03.2020].

53 Web-site of jury court: msajuli.ge, Georgian History – History in Press – History of Georgian Judiciary in Newspapers, 2010, 1, indicated newspaper article, newspaper "Sakartvelos Respublika", 12/02/1920, <http://msajuli.ge/index.php?m=797> [10.03.2020].

54 Web-site of jury court: msajuli.ge, Georgian History – History in Press – History of Georgian Judiciary in Newspapers, 2010, 1, indicated newspaper article, newspaper "Public Affair", 04/12/1920, <http://msajuli.ge/index.php?m=797> [10.03.2020].

55 Constitutional Law of Georgia "On the Introduction of Amendments and Addendums in the Constitution of Georgia, N3272, LHG, 2, 06/02/2004.

56 Law of Georgia "On the Introduction of the Amendments and Addendums in the Criminal Procedure Code of Georgia", №3616, LHG, 50, 24/09/2010.

It is noteworthy that sociological surveys were conducted in Georgia from 2004 to 2010. The aim of the surveys was to observe public awareness regarding the essence of the jury trial and its operation, thus, to assess the readiness of the society for the institution.

The analysis of the findings of the sociological survey[57] demonstrated high awareness level about the institute of jury trials: majority of respondents have heard about jury trials[58], and the attitude towards the introduction of the jury trial in Georgia was positive.[59]

Nevertheless, scepticism regarding the readiness of the society for the reform, as well as the hypothesis that proper functioning of the jury trials could have been hindered by the unlawful mentality of the society, were also voiced.[60] Besides, the attitude towards jury trials was chiefly formed based on the selection principle of jurors and on the ground of the decision-making mechanisms: attitudes towards the jury trials were mainly formed based on jurors' selection, mechanisms of recusals/refusing to perform function and prohibitions imposed for the jurors, indicating that personal factors prevailed over formal factors.[61]

According to the findings of the sociological survey[62] conducted in 2009, 66.1% of the respondents knew about the intention of introduction of jury trials in Georgia. It is noteworthy, that the indicator significantly increased since 2007, when 39.9% of the respondents declared the same.[63] 62.2% of the respondents would not agree to serve as a juror,[64] while the most frequent responses to the question "What can make the service as a juror prestigious?" were "the court taking fair decisions" (19.4%) and "fairness" (12.9%).[65]

Besides, some respondents knew who renders conviction at the jury trials. For example, 37.4% of the respondents believed that conviction is rendered jointly by a judge and the jurors[66] and only 26.7% knew that the decision is only made by the jurors (and not a judge and/or jointly by a judge and the juror). It should also be noted that these parameters significantly decreased compared to 2007 – 42.7% of the respondents were correctly informed then.[67]

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57 *Company "Nikolo M",* sociological survey "Public Awareness and Attitudes towards Jury Trials (Main Conclusions and Findings)", the survey was conducted under the auspices of the United Nations Development Program (UNDP) project, "Supporting Judicial System", Tbilisi, 2007, 2, <http://msajuli.ge/uploads/2007.pdf> [10.03.2020] (in Georgian).

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid, 3.

62 *Institute of Social Researchers,* Basic Knowledge and Perception Regarding Judicial System in Georgia (Final Report), the survey was conducted under the auspices of the United Nations Development Program (UNDP) project, "Supporting Judicial System", Tbilisi, 2009, 2, <http://msajuli.ge/uploads/2009.pdf> [10.03.2020] (in Georgian).

63 Ibid.

64 Ibid.

65 Ibid.

66 Ibid, 4.

67 Comp. Ibid, 2.

7. Development of the Jury Trial in Georgia (2011-2018)

Since October 1, 2012, Jury Trials started operation in Kutaisi City Court[68] and the number of the cases reviewed under the relevant articles of the Criminal Code of Georgia slightly increased. However, since January 1, 2017, Jury Trials were created in Tbilisi, Kutaisi, Batumi and Rustavi City Courts, as well as Zugdidi, Telavi and Gori Regional Courts,[69] therefore, number of the cases reviewed under relevant articles of the Criminal Code of Georgia, increased.

According to the statistics published on the web-page of the Supreme Court of Georgia, since the enactment of the institute of jury trials (October 1, 2010) till December 31, 2018, in total 38 criminal cases were reviewed by the jurors against 49 people at the Regional (City) courts. Out of this number:

– In 2011, 2 cases were heard against 4 people;
– In 2012, – 1 case against 1 person;
– In 2013, – 4 cases against 7 people;
– In 2014, – 4 cases against 7 people;
– In 2015, – 9 cases against 10 people;
– In 2016, – 4 cases against 4 people;
– In 2017, – 9 cases against 10 people;
– In 2018, – 5 cases against 6 people.[70]

The cases are distributed among courts in the following way:

– Tbilisi City Court reviewed 27 criminal cases (71.1% of the total cases reviewed);
– Kutaisi City Court reviewed 8 cases (21.1% of the total cases reviewed);
– Rustavi City, Gori and Zugdidi Regional Courts reviewed – one case each (2.6% - 2.6%-2.6% of the total cases reviewed).
– Batumi City and Telavi Regional Courts have not heard any cases with the participation of the jurors.[71]

As for the types of crimes, since the enactment of the institute of the Jury Trials (October 1, 2010) until December 31, 2018, the jurors reviewed:

– Under Article 108 of the Criminal Code of Georgia (premeditated murder) – 7 cases (against 7 people), including one case under Article 11^1-108 of the CCG (premeditated murder committed by one family member against another family member);
– Under Article 109 of the Criminal Code of Georgia (premeditated murder under aggravating circumstances) – 14 cases (against 19 people), including one case under Article 11^1-109 of CCG (premeditated murder committed by one family member against another family member under aggravating circumstances);

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68 Criminal Procedure Code of Georgia, 09.10.2009. Article 330.
69 Law of Georgia "On the Introduction of the Amendments in the Criminal Procedure Code of Georgia", №5591-IIS, 24.06.2016.
70 Web-page of the Supreme Court of Georgia: supremecourt.ge, Statistics of the Cases reviewed by the jury trials, 2019, 1, <http://supremecourt.ge/files/upload-file/pdf/nafici-msajulebis-mier-ganxiluli-saqmeebis-statistika.pdf> [10.03.2020].
71 Ibid.

– Under Article 19-109 of Criminal Code of Georgia (the attempt of premeditated murder under aggravating circumstances) – 9 cases (against 9 people);

– Under Article 342 Crimial Code of Georgia (Neglect of official duty) – 2 cases (against 3 people);

– Under Article 25-109 (premadetated murder under aggrevating circumstances), Article 180 (Fraud), Article 182 (Appropriation and Embezzlement), Article 185 (Damage of property by deception, Article 186 (Purchase or sale of property obtained knowingly by illegal means), Article 333 (exceeding official powers) – one case each (Total 6 cases against 11 people).[72]

It is noteworthy that out of every 4 accused, on average 3 people were indicted and 1 was acquitted by jurors; more specifically, since the enactment of the Jury Trial (October 1, 2010) till December 31 2018, out of 38 cases reviewed by the jury trial (against 49 people) judgement of conviction was rendered against 36 people (73.5%), while 13 people were acquitted (26.5%).[73]

Out of every 3 accused, two were fully convicted, whereas one – partially acquitted; more specifically, judgement of conviction against 36 people rendered by the jury, 24 people were pleaded guilty on all charged, while 12 were partially acquitted.[74]

Statistical data on appealing decisions rendered by the Jury Trial is particularly interesting, since it could also be perceived as a criteria determining trustworthiness of the verdicts reached by the jury; more specifically, out of 38 cases reviewed by the Jury Trial (against 49 people), cassation appeal against a judgement on 18 cases were brought in the Appellate Court (37.5%) against 21 people (42.8%).[75]

In addition to that, out of the cases heard by the Appellate Court:

– 3 cases were claimed inadmissible (16.6%) against 7 people (33.3%);

– 2 cases remained unheard (11.1%) against 3 people (14%);

– The judgement remained unchanged on 10 cases (55.5%) against 10 people (48%);

– The judgement was revoked in the part of imposing sentence and was sent back to the court for imposing the sentence on 1 case (5.5%) against 1 person (5%).[76]

The analysis of the statistical data indicates that Criminal Law Chamber of the Appellate Court revoked the judgement of the Jury Trial only in 1 case, in the part of sentencing only.

8. Conclusion

Considering public participation in the administration of justice, jury trial is an important institution uniting the state and the public. A citizen decides the fate of another member of the society and acknowledges his/her responsibility in the process. A judge participates in this process as an arbitrator; he/she controls the process of the fulfilment of jurors' duties and rendering a verdict based on the adversarial system and equality principle.

72 Ibid, 2.
73 Ibid, 3.
74 Ibid, 4.
75 Ibid, 7.
76 Ibid, 7.

The establishment of a jury trial in a certain country has always been shrouded in controversy. The concept was either eagerly supported or criticized. Compared to a jury trial, no other legal institution has ever caused such a dispute and debate up to date.[77] In fact, in comparison to the ancient or modern judicial mechanisms (judicial structures or forms), it is factually impossible to compare jury trials with any other institution that could be more controversial due to its intrinsic nature or causing more diametrically debatable assessment among the attorneys and the public.[78]

Jeffrey Abramson claims that "Jury trial is the best and the worst legacy of democracy."[79] The statement is extremely interesting since it shows a stark contrast between two opposite concepts: more public involvement and thus integrating independent components in the judiciary, and the necessity of equipping judiciary with more competency and qualification. According to the definition of the Constitutional Court of Georgia: "Both arguments are extremely important for a proper exercise of the judicial power."[80]

The former president of the American Bar Association, Robert J. Grey Jr. states that "Jury trial guarantees that our democracy is not managed by only powerful and rich, but rather than that, it is constructed through equal votes of citizens."[81]

Naturally, the same controversial attitude regarding jury trial exists in Georgia.

Jury trial was introduced pursuant to the law of the Parliament of Georgia and the Republic of Georgia dated as of January 17, 1919[82]. Jury court reviewed number of cases. However, before the enactment of the jury trials, public participation in the administration of justice were ensured through different forms.

Jury trial was abolished as a result of the Soviet occupation, however, after the restoration of the independence of Georgia, the jury system was reestablished since October 1, 2010 pursuant to a new Criminal Procedure Code of Georgia

In contrast to the negative perception prevailing among some lawyers regarding the institution, some scholars believe that "establishment of the jury court will require significant time, but the delay of its implementation (by the time when people are ready for the system) is not a solution. Introduction of the jury court will always be considered premature, unless the first attempts of its establishment are implemented."[83] Besides, special attention is paid to the statement that introduction of the jury trial in

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77 *Nachkebia G., Lekveishvili M., Ivanidze M., Shalikashvili M., Tumanishvili G., Gogniashvili N., Bokhashvili Ir.,* Jury Trial in Georgia, Tbilisi, 2013, 24 (in Georgian).

78 *Gabisonia I.,* Jury Trial, Magistrate and Reconciliation Courts, Tbilisi, 2008, 92 (in Georgian).

79 See citation: *Abramson J.,* We, The Jury: The Jury System and the Ideal of Democracy, Harvard, 2003, 1.

80 *Kublashvili K., Mumladze G., Gabunia M., Melikidze T., Simsive T.,* Viable Constitution – Definition of the Constitutional Norms, Tbilisi., 2018, 512 (in Georgian), see citation: Decision of the Constitutional Court of Georgia, dated as of November 13, 2014 on the case №1/4/557,571,576, II-93, <http://www.constcourt.ge/ge/legal-acts/judgments/saqartvelos-moqalaqeebi-valerian-gelbaxiani-mamuka-nikolaishvili-da-aleqsandre-silagadze-saqartvelos-parlamentis-winaagmdeg-872.page> [10.03.2020].

81 See citation: *Widman N., Hans V.P.,* American Jurors – Verdict, Tbilisi, 2019, 9 (in Georgian).

82 *Bezhashvili T.,* Jury Trial (Brief History of Origin and Development), Tbilisi, 2014, 8 (in Georgian).

83 See citation: *Songulia N.,* Jury Court, Journal "Judiciary and Law", №1(32), 2012, 86 (in Georgian).

Georgia may contribute to the development of citizens' state consciousness[84], whereas the existence of the jury court will nurture democratic values and realization of self-governance principal through involving ordinary citizens in the governance process.[85] According to the proponents of the institute: "The answer to a question whether jury trial is an ideal of a democracy or not – is apparent. Jury trial is one of the institutions among many others that should strengthen democracy."[86]

Interestingly enough, the same position was shared a century ago by one of the authors of the 1921 Constitution of Georgia, Samson Dadiani, who believed that "wherever the state belongs to people and they are the governors and rulers of their public life, the power of adjudicating fellow citizens should be vested in them as well."[87]

On the case Citizens of Georgia – Valerian Gelbakhiani, Mamuka Nikolaishvili and Aleksandre Silagadze vs. Parliament of Georgia, the Constitutional Court of Georgia ruled that "The main aim and the objective of the administration of justice with the participation of jurors is boosting democratic principles in the government generally, therefore, implementing and strengthening democratic component in the judicial system. Public trust towards government is increased through a direct participation of people in the governance on all levels and its branches."[88]

The hearings conducted with the participation of the jurors in Georgia are not sufficient for conducting a comprehensive analysis and drawing final conclusions, however, as the Doctor of Jurisprudence, Guram Nachkebia indicates, "Jury trials justified its existence in the Georgian reality."[89] Within the framework of the project "Implementation, Study and Analysis of the Institution of Jury Trial", implemented under his leadership, the scholars pinpointed that verdict has to be reached by non-professionals, which has frequently become the matter of debate among scholars. According to them, the judicial proceedings conducted with the participation of jurors in Georgia showed that the case was reviewed and decided based on jurors' inner belief and based on the summary of the

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84 See citation: *Nachkebia G., Lekveishvili M., Ivanidze M., Shalikashvili M., Tumanishvili G., Gogniashvili N., Bokhashvili Ir.,* Jury Trial in Georgia, Tbilisi, 2013, 364 (in Georgian).

85 See citation: *Melkadze O., Dvali B.,* Judiciary in Foreign Countries, World Parliamentarism Research Center, Series of Political-Legal Literature, Volume XI, Tbilisi, 2000, 154 (in Georgian).

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88 Decision of the Constitutional Court of Georgia, dated as of November 13, 2014 on the case №1/4/557,571,576, II-92, <http://www.constcourt.ge/ge/legal-acts/judgments/saqartvelos-moqalaqeebi-valerian-gelbaxiani-mamuka-nikolaishvili-da-aleqsandre-silagadze-saqartvelos-parlamentis-winaagmdeg-872.page> [10.03.2020].

89 The project was funded by "Open Society – Georgia". The aim was to explore and analyse the innovation enacted in 2010 in Georgia – Jury Trial Institution. Within the frameworks of the project, the scholars of the Tbilisi State University Faculty of Law explored and analysed three criminal cases heard with the participation of jury in Georgia. See: *Nachkebia G., Lekveishvili M., Ivanidze M., Shalikashvili M., Gogniashvili N., Tumanishvili G.,* Project – "For Implementing, Studying and Analysing the Institute of the Jury Trials", Tbilisi, 2013, 1, <http://online.tsu.edu.ge/ge/science/9972/?p=18> [10.03.2020] (in Georgian).

evidence presented by the parties;[90] while the introduction of the jury trials in Georgia will support development of all basic principles for the administration of justice – fairness, collegiality, public wisdom and prudence.[91]

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[90] For justifying the aforementioned conclusion, the authors indicate that during the research, there was an instance, when the votes of the jurors split when rendering the verdict. In addition, jurors were not able to adopt unanimous decision within first three hours. Ibid.

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Kakha Tsikarishvili*

Intention and Negligence in Complicity in Georgian and American Criminal Law

The given article relates to the problem of intention and the negligence in the context of complicity in Georgian and American criminal law. Mens rea of complicity raises many disputable questions in contemporary criminal law. The author of the article concludes that the complicity by dolus eventualis is possible in certain categories of crimes while negligent complicity should be generally left unpunished. However, the legislator can introduce provisions in specific part of the criminal code criminalizing complicity by recklessness (as well as dolus eventualis) and negligence in specific cases.

Keywords: *Complicity, principle, recklessness, negligence, excess of the principle offender.*

1. Introduction

Complicity in the crime constitutes a significant but complex problem in criminal law. The question of what should be the mental state or objective link of the accomplice towards the principal and his conduct is decided differently in different countries. In this respect it is important to compare the similarities and differences between Georgian and American criminal law. Georgian criminal law requires that accomplice should be linked to the main crime objectively by causation and subjectively by intention. In difference, American criminal law does not require causation as a prerequisite and on the other hand, negligence suffices for holding the accomplice liable. In Georgian as well as in American criminal law, problematic issues are the content of the intention in case of complicity, the liability for complicity with recklessness and negligence and the assistance by "neutral" actions. The given article overviews the specific features of two legal systems in the light of the specific practical examples and concludes the line between the criminally punishable and non-punishable complicity should be drawn in the forms of intention. In the result crimes complicity should be limited only by such cases where the principle has the first or second degree intention with regard to the result of the crime and this is known to the accomplice. However, the accomplice can have *dolus eventualis* towards the result of the crime in such circumstance. Georgian criminal code contains provisions by which the assistance by *dolus eventualis* (when the accomplice is not sure about principle's intention) is criminalized in the form of a separate offence. The author also overviews the cases of so called negligent complicity and believes that such cases should not be punished at all.

2. Cases for Consideration

In order to analyze the problems presented in this article, it shall be useful to consider several cases, which shall be discussed at the end of this article.

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1. In order to dig a tunnel from his house to reach a safe of a bank and steal money B has borrowed a spade from A. "A" which was convinced that "B' would not be able to dig a tunnel and neither penetrate into the safe. However he did not want to anger B and gave him the spade. By using the spade, B has dug a hole, penetrated the safe of the bank and stole the money. Shall "A" be responsible for complicity in the theft

2. B has made a bet with his friends that he would be able to cross the entire city by car in 10 minutes in the afternoon hours, for which he has borrowed a car from A. A knew was that such conduct was highly dangerous, however, we was completely reckless to the consequences. By speeding up, B crashed into a car at a crossroad and caused death of two persons. Shall A be responsible for the results of this crime?

3. Shop seller A has overheard a conversation between clients wishing to buy knifes in the shop and guessed that they wanted to commit robbery using these knives. Despite that, A has sold knives to the clients, by which they committed bank robbery. Shall A be responsible for the assistance in the bank robbery?

4. A who was a security guard of a store has forgotten to turn on the alert system during the night. The thieves have seized this opportunity and robbed the store during the night. Shall A be criminally liable?

5. A who was late for the work told the tax driver that he would pay double in case of speeding up. The taxy driver has complied with the request and speeded up the vehicle in the excess of speed limit. However he has caused an accident and death of several persons. Shall A be responsible for the results?

6. A has borrowed money from B. Later he told B that he would not be able to pay the debt, but proposed him to break into his aunt's house and steal the jewellery. B broke in the house of the aunt of A, however the aunt was there and has resisted to the breaking, during which she was killed. Shall A be responsible for the murder of his aunt?

3. Forms of Intention and Negligence in Georgian and American Law.

Before we examine the mens rea of complicity, we should compare each other the forms of negligence and intention in Georgian and American criminal law.

US model criminal code differentiates between four types of mens rea: Purpose, Knowledge, Recklessness and Negligence. In Georgian criminal law, the corresponding forms of mens rea would be first degree intention, second degree intention, *dolus eventualis*, conscient negligence and unconscious negligence.[1] The concept of recklessness in American criminal law, which is in the middle way between negligence and intention corresponds with *dolus eventualis* and conscious negligence in Georgian criminal law.[2] We should bear this in mind while discussing the mens rea of complicity in Georgian and American criminal law.

[1] See *Tsikarishvili K.,* Dolus Eventualis in Contemporary West European and American Criminal Law, Journal "Justice and Law", №3, 2008, 35 (in Georgian).

[2] Ibid.

4. The Question of Intentional and Negligent Complicity in Georgian Criminal Law.

In soviet legal literature there was no uniform approach to the mens rea of complicity. Part of the scholars believed that complicity was possible only in case of intentional crimes, while the others believed that it was also possible in negligent crimes.[3] Some authors believed that complicity was possible only with direct intent, while the others recognized complicity with *dolus eventualis*.[4]

Tinatin Tsereteli believed that complicity was possible only in intentional crimes. She thought that an accomplice in negligent crime should be considered as principle acting through intermediate person, while complicity in negligent crimes should be left unpunished.[5] As to the negligent crimes, she believed whenever there is a result caused by negligence, the person should be liable directly as a principle of negligent crime.[6]

With regard to the complicity in the negligent crimes, professor Otar Gamkrelidze wrote following:

"If we may not talk about complicity in cases, where one party is acting negligently, it will be even more difficult to classify as complicity those cases, where all participants act negligently. In such case, everyone of them should be deemed as principle and they should be independently punished for the harm done.[7]

Professor Ketevan Mchedlishvili is also in favor of considering negligent participants as principles: "everyone who has violated a norm of foresight and has thus caused criminal result should be recognized as principle. The negligent co-principle or accomplice is a dogmatic nonsense, because people may not act jointly for the achievement of the common goal if they are not aware of this goal and do not seek it.[8]

Professor Merab Turava believes that negligent participant in another's crime can be deemded as a principle offender: "negligent participant in criminal law legally constitutes a negligent principle, because in this case, the person who has persuaded the other negligently and made him commit the crime has violated a norm of foresight causing specific result".[9]

With regard to this issue, it must be said that the problems are not connected to the cases in which several people jointly violate the norms of foresight and each of them directly causes the harm. The problem is the cases when one of the participants is a factual aider or instigator and another is factual principle. Part of the Georgian scholars believe that such cases should not be punished, while the others believe that they should be classified as parallel principles.[10]

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3 For the detailed examination of this issue see, *Gamkrelidze O.*, Problems of Criminal Law, T. II, Tbilisi, 2010, 261-292 (in Georgian).

4 Ibid.

5 *Tsereteli T.*, Problems of Criminal Law, T. II, Tbilisi, 2007, 38-45 (in Georgian).

6 Ibid, 42.

7 *Gamkrelidze O.,* Problems of Criminal Law, T. II, Tbilisi, 2010, 319 (in Georgian).

8 *Mchedlishvili-Hadrich K.,* Criminal law, General Part, Specific Forms of Execution of the Crime, Tbilisi, 2011, 197 (in Georgian).

9 *Turava M.*, Criminal Law, General Part, 9th ed., 2013, 249 (in Georgian).

10 For example, when a passenger pushes the driver to speed up, ending up in fatal consequence, M. Turava classifies such case as parallel perpetration, while K. Mchedlishvili Hadrich believes that such case is not

In his work "problem of criminal unjust and the ground of liability for complicity in crime" professor Otar Gamkrelidze overviewed one of the cases from court caselaw where one of the hunter told the other hunter that there was a bear on the other side of the river. Both of them seized guns and shot in the direction of the moving object, which was in fact a human being shot by a bullet. The investigation could not conclude which hunter was the owner of the fatal bullet and thus was directly responsible for the result. The trial court has convicted both hunters for negligent homicide, while the superior court has reversed the judgment and acquitted both persons. The court noted that when we are dealing with a negligent homicide, criminal liability shall be attributed only to the person who has directly caused the result and this could not be proven in the given case.[11]

Professor Otar Gamkrelidze believes that this was the right decision. Which means that he is not in favor of application of the concept of "parallel principle" in such cases.[12]

The legal provisions formulated in 1999 criminal code exclude the negligent participation. The art. 22 stipulates that a complicity is an intentional participation of two ore more persons in an intentional crime. Thus the law requires the existence of double intent: an accomplice participates intentionally in the crime intentionally committed by the principle.

The legislative formula of art. 22 has left open the possibility of complicity by *dolus eventualis*.

Majority of scholars in Soviet criminal law and among them Tinatin Tsereteli were in favor of the opinion that complicity is possible by way of *dolus eventualis*.[13] Professor Otar Gamkrelidze, which is against such position believes that complicity is possible only with direct intent. In support of his position, he has brought many arguments. In the first place, he emphasized that it is impossible to think about complicity with *dolus eventualis* in crimes, which can be committed only with direct intent.[14] The author believes that if we admit the possibility of complicity with *dolus eventualis*, we should also admit the possibility attempt with *dolus eventualis* to which he is categorically opposed.[15] The author also believes that the recognition of complicity by *dolus eventualis* should logically lead us to the admission of reckless complicity.[16]

In the opinion of Otar Gamkrelidze, complicity with *dolus eventualis* contradicts with the concept of joint wrong (unrecht-in german), which according to him constitutes the foundation of complicity. The author believes that it is important to identify an objective and non personal element

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punishable (See *Turava M.,* Criminal Law, General Part, 9th ed., 2013, 249 (in Georgian). *Mchedlishvili-Hadrich K.,* Criminal Law, General Part, Specific Forms of Execution of the Crime*,* Tbilisi, 2011, 213 (in Georgian).

11 *Gamkrelidze O.,* Problems of Criminal Law*,* T. II, Tbilisi, 2010, 316 (in Georgian).

12 See ibid. Tinatin Tsereteli examines similar cases with the difference that in this case the court could identify the owner of the fatal bullet. Tinatin Tsereteli believes that both persons should be found as principle offenders of negligent crime. *Tsereteli T.,* Problems of Criminal Law*,* T. II, Tbilisi, 2007, 42 (in Georgian).

13 *Tsereteli T*., Problems in Criminal Llaw, T. II, Tbilisi, 2007, 152 (in Georgian).

14 *Gamkrelidze O.,* Problems of Criminal Law*,* T. II, Tbilisi, 2010, 324 (in Georgian).

15 In contemporary criminal law of Georgia, attempt with dolus eventualis is disputed issue. Professor Merab Turava endorses such theory. See *Turava M.,* Criminal law, General Part, 9th ed., 2013, 136 (in Georgian).

16 Ibid.

in the subjective aspect of crime, which will unite the conduct of two persons and turn them into complicity.[17] Professor Gamkrelidze believes that such element is purpose. He states following: " The purpose of achieving the result described in corpus delicti is a founding element of subjective side of criminal wrong. Thus it is common for every participant, irrespective of personal capabilities".[18]

The opinion of Professor Gamkrelidze, according to which complicity is possibly only with direct intent is not uniformly supported in Georgian legal literature. Part of the Georgian authors do not agree,[19] while the others admit only the possibility of excess of the principle with *dolus eventualis*.[20]

The other question is how Georgian authors understand the complicity with *dolus eventualis*. In her work, professor Tinatin Tsereteli discusses an example, which according to her points to *dolus eventualis*: "Voronin did not want to anger his friend Glazgov and gave him his revolver while knowing that Glazov was intending to kill Danilov. Voronin did not want to kill Danilov. On the contrary, he wanted to dissuade Glazgov to commit the crime, however could not manage it and thus gave him the gun for the murder". Tinatin Tsereteli concludes that in such case we have *dolus eventualis*.[21] However, Otar Gamkrelidze disagrees with this conclusion: "if the accomplice is aware of the criminal purpose of the principle and objectively assists the principle in the accomplishment of this goal, than this criminal purpose is also attributed to the accomplice".[22]

A similar opinion was expressed by Prof. Elene Gventsadze who believes that the concept of intent has different features in case of complicity. Namely, the volitional and intellectual aspects of the accomplices are directed not to the result of the crime but to the conduct of the principle. The accomplice is familiar with the criminal goal of the principle and intentionally contributes to the achievement of this goal.[23] Such approach is not justified. We shall discuss that issue below.

In Georgian criminal literature, we also encounter a discussion on the issue of possibility of assistance by neutral conduct, such as selling a knife to the person who later commits murder with this knife, or taxi driver bringing the person to the scene of the crime, etc.[24] Prof. Ketevan Mchedlishvili Hadrich, after overviewing German criminal law theories on this issue supports the dominating view

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17 Ibid, 331.

18 Ibid, 387-389.

19 See *Turava M.,* Criminal law, General Part, 9th ed., 2013, 334 (in Georgian).

20 See *Nachkebia G., Dvalidze I.,* General Part of Criminal Law, Manual, Tbilisi, 2007, 198 (in Georgian).

21 See *Tsereteli T.,* Problems of Criminal Law, T. II, Tbilisi, 2007, 200 (in Georgian).

22 *Gamkrelidze O.,* Problems of Criminal Law, T. II, Tbilisi, 2010, 392 (in Georgian). Contrary to this allegation, in another place, Professor Otar Gamkrelidze points to the following: "Intentional participation means intention not towards the conduct but intentional attitude towards the results.". See ibid, 313. In the opinion of Professor Ketevan Mchedlishvili Hadrich, similar case points not to the *dolus eventualis* but the direct intent of the second degree, because the accomplice is aware of the inevitability of the conduct committed by the principle offender" See *Mchedlishvili-Hadrich K.,* Criminal law, General Part, Specific Forms of Execution of the Crime, Tbilisi, 2011, 237 (in Georgian).

23 *Gventsadze E.,* Subjective Side of Complicity in Crime, Tbilisi, 2012, 149 (in Georgian).

24 See *Mchedlishvili-Hadrich K.,* Criminal law, General Part, Specific Forms of Execution of the Crime, Tbilisi, 2011, 239 (in Georgian).

according to which in order to punish a person for such assistance, the helper should express solidarity and step on the side of the principle offender. At the same time, she notes that part of the German authors apply subjective criteria for the qualification of assistance with neutral conduct. Namely, this is the case, when the person is certain (second degree intention) that he is contributing to the implementation of the crime. Thus if the person is not particularly certain how his contribution shall be used and only admits such possibility, such cases should not be qualified for complicity.[25]

We should separately note the issue of excess of the principle. According to art. 26 of the criminal code, the excess of the principle is the commission by the principle of such conduct which was not covered by the intent of the co-principle or accomplice. Second part of the article clarifies that accomplice or co-principle shall not be liable for the excess of the principle. In Georgian criminal literature, the issue of the access of the principle to which the accomplice is connected by *Dolus eventualis* is disputable. Part of the authors are in favor[26] and others are against the punishment of such cases.[27]

5. Question of Intention and Negligence in Case of Complicity in American Criminal Law

In American criminal law, the caselaw as well as doctrine is controversial in relation to the mens rea of complicity. We can clearly identify two differing views: 1. For the accomplice it is enough to know that he is assisting or inciting a principle in the commission of the crime 2. That the accomplice has the intent towards the commission or facilitation of the principle offence.[28]

In the middle of last century, this issues were subject of animated discussion during the preparatory works for drafting model penal code in US.[29] Part of the authors insisted that any other standard beyond criminal intent of the accomplice would dangerously extend the scope of liability while the opponents affirmed that the limitation of complicity by intent would produce gaps in the criminal law. Namely would leave unpunished the instigator and aider who were acting knowingly but without intent. Thus, final version of the MPC rejects the knowledge standard and states that the accomplice should have a goal to contribute or facilitate the offence.[30] The commentary of the MPC rejects complicity in cases where "[a] lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in the

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25 Ibid.

26 *Turava M.,* Criminal law, General Part, 9th ed., 2013, 344 (in Georgian).

27 *Mchedlishvili-Hadrich K.,* Criminal law, General Part, Specific Forms of Execution of the Crime*,* Tbilisi, 2011, 250 (in Georgian).

28 *Courteau C.,* The Mental Element Required for Accomplice Liability: A Topic Note, Louisiana Law Review, Vol. 59, 328.

29 Ibid, 329.

30 Model Penal Code (1962) § 2.06. one of the defects of the knowledge standard is also believed to be the fact that in purposeful offences knowledge standard does not enable the conviction of the accomplice (which was aware of the purpose) with lesser degree of culpability than purpose. See *Dubber M., Hörnle T.,* Criminal Law, A Comparative Approach, Oxford University Press, 2014, 324.

commission of the crime. A doctor counsels against an abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist". [31] At the same time MPC has adopted following formulation: "when causing particular result is an element of the offence, as accomplice shall be deemed a person with enough mental element towards this result, which is sufficient for the commission of this crime".[32]

US federal code, chapter 2 states that " Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.". [33] The code is silent with regard to the subjective side of complicity and the court caselaw is also controversial. Some federal courts support knowledge standard, while the others endorse "intent standard".

In Backun v. United States the seller sold stolen item at a low price knowing that the buyer would transport these items to another state to find a better market. The seller was found guilty of Federal Law on stolen goods (18 U.S.C.A. @145), which criminalized transportation of goods above value 5000 USD from state to state knowing that it is stolen.[34] The court stated that because it is a moral obligation of every human being to prevent the commission of grave crime, the sale of item with the knowledge of criminal intent of the buyer is sufficient for the liability of the accomplice and that the seller cannot wash hand or ignore the purpose for which the purchase was made if he was notified about that purpose.[35]

A different stand was taken in the case "United States v. Peoni. In this case, the judge learned hand stated following "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used even the most colorless, "abet" carry an implication of purposive attitude towards it."[36]

The caselaw of state courts is also divergent: Part of the states recognize complicity with the knowledge of the criminal purpose of the perpetrator, while the others maintain another approach. This is visible from following cases:

In People v. Beeman, the defendant was convicted of complicity in robbing his sister in law. He has communicated information to the perpetrators about whereabouts of the residence of the victim knowing their purpose. California Supreme Court has reversed this judgement and stated that the helper should act in knowledge of criminal purpose of the perpetrator and act in furtherance of its commission.[37]

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31 Model Penal Code § 2.06 commentary (1985), par. 315.

32 Commentary to the MPC points that this provision enables knowing participation in negligent crimes.

33 18. U.S.C. & 2, <https://www.law.cornell.edu/uscode/text/18/2> [30.10.2020].

34 Backun v. United States, 112 F.2d 635, 4th Cir. 1940, <https://law.justia.com/cases/federal/appellate-courts/F2/112/635/1498899/> [30.10.2020].

35 Ibid.

36 Ibid.

37 People v. Beeman, №22525, Supreme Court of California, February 6, 1984, <https://law.justia.com/cases/california/supreme-court/3d/35/547.html> [30.10.2020].

In People v. Germany, the defendant has landed gun to the principle, who used it to commit murder. The California appellate court found that assistance with the knowledge of the perpetrator's criminal purpose is sufficient for imposing liability for complicity.[38]

In line with the caselaw, the legal doctrine is also controversial. Part of the authors endorse knowledge standard and others endorse intent standard.[39] The supporters of the intent standard emphasize the principle of personal culpability.[40] In addition, they believe that the intent standard ensures that the accomplice has a stake in the principle's conduct and makes it as his own. [41] Sheriff Girgis believes that because in American criminal law, objective connection of the accomplice with the main offence may be minimal (causation is not required), [42] this should be compensated by high level of subjective connection, which can only be intent. As to the supporters of knowledge standard, they focus on the need of the prevention of the crime.[43]

Some writers believe that knowledge standard makes accomplices liability too broad and endangers lawful business,[44] while the intent standard makes it too narrow.[45] Thus some authors try to find middle way between purpose and knowledge.

For example, Guidion Yaffe thinks that line between punishable and non punishable complicity should be found in the different forms of intention. He believes that the intention disposes the accomplice in two directions 1. Take appropriate measures for the assistance of the principle 2. not to reconsider assistance in the light of the fact that the aid will be used for the commission of the crime. Yaffe believes that from this two elements the existance of the second one is sufficient for complicity. He believes that this is the minimal standard of intent for complicity. [46]

Sheriff Girgis believes that what matters is not the mental attitude of the accomplice towards the conduct of the principle, but towards his intent. Namely, the accomplice should aim to ensure that the

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38 People *v.* Germany, 42 Cal. App. 3d 414, <https://law.justia.com/cases/california/court-of-appeal/3d/42/414.html> [30.10.2020].

39 *Courteau C*., The Mental Element Required for Accomplice Liability, Luiziana Law Review, Vol. 59, 1998, 328.

40 *Rogers A.*, Accomplice Liability for Unintentional Crimes: Remaining within the Constraints of Intent, 31 Loy. L.A. L. Rev. 1351, 1998, 1351.

41 Ibid.

42 See *Tsikarishvili K.,* Causation During Complicity in Georgian and Anglo-American Criminal Law, "Journal of Law", №1, 2016, 314 (in Georgian).

43 *Courteau C.,* The Mental Element Required for Accomplice Liability: A Topic Note, Louisiana Law Review, Vol. 59, 325-329 See *Westerfield L.,* The Mens Rea Requirement of Accomplice Liability in American Criminal Law - Knowledge or Intent, Miss. L. J., 1980, 25.

44 According to Gwidion Yaffe, if we were afraid of liability for what others might do because of our conduct, this would very much limit our everyday activities. See *Yaffe G.,* Intending to Aid, Law and Philos, Vol. 33, 1-40, 2014, 15.

45 For example, the knowledge standard would enable the conviction of a person who gives money to the penhandler with the knowledge that this money shall be used for the purchase of drugs, while with intent standard we shall not be able to convict the driver who takes robbers to the scene of the crime. *Yaffe G.,* Intending to Aid, Law and Philos, Vol. 33, 1-40, 2014, 10.

46 Ibid, 13.

principle procures or maintains his own intent to commit crime. At the same time, the accomplice should not expect that the crime shall be thwarted.[47]

Professor Alexander Sarch believest that the complicity comes in degrees, which are dependent on the level of condoning of the crime by the accomplice. Condoning the crime does not necessarily mean wishing it or being in its favor. Condoning the crime may mean also tolerance to the crime. In order to measure the level of condoning, the author proposes following test: the person shall be deemed as full accomplice if his negative attitude towards the crime committed by the principle is so minimal that if he were in a position to dominate the principle, he would allow him commit the crime (authorization test). According to the scholar, traditional forms of mens rea – intention and negligence and accomplice's contribution to the crime are the indicators of level of condoning.[48] Thus the question of who will be full or lesser accomplice should be decided case by case.[49]

Professor Luis Westerfield proposed that the knowledge standard should be used only in case if the accomplice knowingly and substantially contributes to the commission of the offence.[50]

Several US states have adopted so called reckless facilitation statutes, according to which assistance (without intent) to the principle with the knowledge he intends to commit the crime shall be a felony of lesser degree and punished less severely than the participation in the same crime[51] Professor Lafave believes that this approach enables to punish less culpable accomplice with lesser sentence.[52]

As to the question of reckless/negligent participation, this problem is approached differently in different states. Namely, the caselaw of several courts admits such possibility, while others exclude. In the case of State v. Etzweiler,[53] New Hampshire court has established that Etsweiler, which landed money to a drunk co-worker, resulting in car accident and loss of human life, could not be held liable for the result which was caused by negligence. New Hampshare State legislation accomplice's liability ought not to extend beyond the criminal purposes that he or she shares.[54] " State must establish that the accomplice's acts were designed to aid the primary actor in committing negligent homicide, yet under the negligent homicide statute, the primary actor must be unaware of the risk of death that his conduct

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47 *Girgis S.,* The Mens Rea of Accomplice Liability: Supporting Intentions, 123 Yale L. J. 460, 474-476.

48 *Sarch A.,* Condoning the Crime: The Elusive Mens Rea for Complicity, 47 Loy. U. Chi. L. J. 131, 2015, 155, 172.

49 For example, the driver who brought the robbers to the scene of the crime and which profits from the crime proceeds represents a full accomplice, while the driver who is not entirely certain that his passengers are going to commit robbery, but nonetheless is reckless to this fact represents an accomplice of lower degree, *Sarch A.,* Condoning the Crime: The Elusive Mens Rea for Complicity, 47 Loy. U. Chi. L. J. 131, 2015, 176.

50 *Westerfield L.*, The Mens Rea Requirement *of* Accomplice Liability *In* American. Criminal Law-Knowledge or Intent, 51 Miss. LJ. 177, 177-79, 1980, 30.

51 See e.g. Criminal Code of North Dacota, chapter 12.1, <https://www.legis.nd.gov/cencode/t12-1.html> [30.10.2020], NY criminal code, section 114, <http://ypdcrime.com/penal.law/article115.htm> [30.10. 2020].

52 *Wayne R., Lafave W., Austin W.,* Criminal Law, 2rd ed., 1986, 584.

53 State v. Etzweiler 480 A.2d 870, 1984, <https://casetext.com/case/state-v-etzweiler> [30.10.2020].

54 Ibid.

created, and the court could not see how an accomplice could intentionally aid the primary actor in a crime that the primary actor was unaware that he was committing.".[55]

In a similar case of United States v. Brown, federal appellate court convicted defendant for as direct perpetrator of negligent crime in bypassing the institution of complicity.[56]

In difference with the New Hampshire, Colorado state courts recognize complicity by negligence. In the case of People v. Wheeler, Colorad State Court stated following: "Therefore, for a person to be guilty of criminally negligent homicide through a theory of complicity, he need not know that death will result from the principal's conduct because the principal need not know that. However, the complicitor must be aware that the principal is engaging in conduct that grossly deviates from the standard of reasonable care and poses a substantial and unjustifiable risk of death to another. In addition, he must aid or abet the principal in that conduct and, finally, death must result from that conduct.".[57]

Similar issue was handled by the court in the case of People v. Abott[58] which involved two racing drivers, one of which hit a car and caused death of all passengers. The driver of the second car was found guilty in negligent homicide. The court concluded that he intentionally assisted in the commission of reckless crime, which caused death. The court held that in order for a person to be found accomplice in a reckless crime 1. he should have the same mens rea which is required by law for the commission of this crime 2. should intentionally facilitate the commission of the offence.[59]

Some courts admit participation in the reckless crimes and not in the negligent crimes[60]

With regard to the complicity in negligent crime there are differing views in the legal doctrine as well:

The first category of statutes contains language that predicates accomplice liability solely on the intent to aid in the commission of a specific offense. The second category of statutes are those similar to the first category, but it further provides that for result-oriented crimes, an "accomplice in the conduct causing such result" is culpable if he acts with the requisite mens rea for that offense. Third category requires that the accomplice should intentionally aid the principal's conduct and have the mens rea required by the underlying crime. Based on this, Audrey Rogers believes that first and second category legislation admit participation in negligent offence. [61]

Stanford Kadish believes that criminal law penalizes negligent causing of harm, thus the complicity should not be an exception[62] Kadish believes that not only knowing assistance in negligent

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55 Ibid.

56 United States v. Brown, 22 M.J. 448, 449, C.M.A.196, cited from: *Rogers A.*, Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent, 31 Loy. L.A. L. Rev. 1351, 1998, 1370.

57 People v. Wheeler, 772 P.2d 101, 1989, <https://law.justia.com/cases/colorado/supreme-court/1989/87sa379-0.html> [30.10.2020].

58 People v. Abott, 445 N.Y.S.2d 244, N.Y. App. Div. 1981, < https://casetext.com/case/people-v-abbott-17> [30.10.2020].

59 Ibid.

60 *Rogers A.*, Accomplice Liability for Unintentional Crimes*:* Remaining within the Constraints of Intent, 31 Loy. L.A. L. Rev. 1351, 1998, 1385.

61 Ibid, 1364-1365.

62 *Kadish S.,* Reckless Complicity, Journal of Criminal Law and Criminology, Vol. 87, №2, 369.

crime (such as car owner landing key to a drunk driver), but also reckless assistance in intentional crime (such as mother leaving daughter to violent boyfriend, or police officer negligently leaving gun in a criminally dangerous neighborhood)[63]

On the other hand, according to the Kadish, the intention of the accomplice means intention not to the result of the crime but to the conduct of the crime:

"The intention requirement, however, does not preclude holding a person for complicity in a crime for which recklessness or negligence suffices for liability, so long as the secondary actor intended to help or persuade the primary actor to do the reckless or negligent act. If person does an act that recklessly causes the death of another, he is liable for manslaughter as a principal offender. That he did not intend the death is irrelevant. Likewise, when another person intentionally helps or influences the principal to do a reckless or negligent act, he shares the criminal liability of the principal. Thus, one who knows a boiler is defective, but nonetheless encourages another to fire it, is an accomplice to the crime of manslaughter if the boiler explodes and kills someone".[64]

According to Kadish, those who recklessly assist others in the commission of intentional crimes are not less culpable than those who recklessly assist others in the commission of reckless crimes.[65]

As to the crimes, which can be committed only by specific intent (such as theft), Kadish believes that a separate legal construct should be created for such crimes and reduced sentences may be introduced.[66]

On this question an interesting view was proposed by prof. Grace Mueller. He believes that because the requirement of causation is waived in case of complicity, subjective element should be given more weight, thus, the accomplice should have same mental requirement to the main crime as the principle offender. In case of contrary, the accomplice shall be liable with a lower standard of subjective element than required for principle offender. Thus, accomplices in intentional crime should act intentionally and in negligent crimes negligently.[67]

Candace Courteau believes that recognition of negligent complicity shall have preventive effect, because the owner of the care will think twice before landing key to the drunk driver.[68]

In difference, Scott and Lafave disagree the possibility of negligent complicity. They believe that negligent complicity shall dangerously broaden the scope of criminal liability and create the risk of punishment of remote and irrelevant links to the crime.[69]

Some American authors believe that in case of negligent participation in negligent crime, a person may be found guilty directly as principle, bypassing complicity.[70]

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63 Ibid, 383.

64 *Kadish S. H.,* Complicity, Cause and Blame, Study in the Interpretation Doctrine, California Law Review, Vol. 73, Issue 2, 1985, 76.

65 Ibid.

66 *Kadish S.,* Reckless Complicity, Journal of Criminal Law and Criminology, Vol. 87, №2, 389.

67 *Mueller G.,* Mens Rea of Accomplice Liability, 61 S. Cal. L. Rev. 2169, 1987-1988, 2190.

68 *Courteau C.,* The Mental Element Required for Accomplice Liability: A Topic Note, Louisiana Law Review, Vol. 59, 345.

69 *LaFave W., Scott A.*, Criminal Law, 2rd ed., 1986, 584-586.

The issue of excess of the principle should be separately dealt with. If the principle offender deviates the common plan and commits a substantially different crime, the aider and abetter shall not be responsible only for the agreed crime, but also for any other crime which is a natural and probable consequence of the crime agreed. Thus for the accomplice, *dolus eventualis* and even conscious negligence suffices.

For example in State v. Foster the defendant and the principal confronted the victim, whom they suspected had raped the defendant's girlfriend. The defendant beat the victim and then left the principal with a knife to guard the victim while the defendant retrieved his girlfriend to identify the victim as the rapist. While the defendant was away, the victim charged at the principal, who then fatally stabbed the victim. The court convicted defendant for complicity to murder.[71]

According to Stanford Kadish, the doctrine of natural and probable consequences is defective in a way that in enables to convict the accomplice with a lesser degree of culpability than required for the commission of the main crime. This means that accomplice may be convicted for murder despite the fact that he had no intention to kill.[72]

6. Analysis

In this part, we believe it is appropriate to compare with each other the approaches of Georgian and American criminal law in the light of the abovementioned cases and express opinion on the problematic issues.

6.1. Intention and Complicity

In Georgian and American criminal law we see different approaches with regard to the content of intention during complicity. Professor Elene Gventsadze believes that in complicity the intention is directed not towards the result of the crime, but towards the conduct of the principle.[73] Similar opinion was expressed by Prof. Stanford Kadish in American Criminal Law.[74] Prof. Otar Gamkrelidze believes that if the accomplice helps the principle with the knowledge of his criminal purpose, this means that he joins the principle in the accomplishment of this purpose.[75] I believe that such understanding of intend does not fit with the legislative definition formulated in art. 9 of the criminal code. In this article different degrees of mens rea depend on the mental attitude of the offender to the result of the crime. Different forms of intention and negligence are determined by the willingness to bring about the result and awareness of its probability.

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70 *Courteau C.,* The Mental Element Required for Accomplice Liability: A Topic Note, Louisiana Law Review, Vol. 59, 345.

71 See State v. Foster, 522 A.2d 277, 283, Conn. 1987.

72 *Kadish S.,* Reckless Complicity, Journal of Criminal Law and Criminology, Vol. 87, №2, 375

73 *Gventsadze E.,* Subjective Side of Complicity in Crime, Tbilisi, 2012, 149 (in Georgian).

74 *Kadish S.,* Reckless Complicity, Journal of Criminal Law and Criminology, Vol. 87, №2, 347.

75 Ibid.

Taking into account the abovementioned example of Voronin and Glazgov, where Voronin did not want to anger his friend Glazgov and gave him his gun to commit murder, the view of Otar Gamkrelidze that this case corroborates direct intent is not convincing. We may change the following case in a way that we have a conscious negligence with respect to the fatal result. For example, let's assume that Voronin thinks that the distance between him and Danilov is 250 meters and he thinks it is almost impossible to kill someone from this distance. At the same time, Voronin knows that Glazgov is a bad shooter. Thus he hopes that the bullet shot by Danilov will not reach target. In such case we shall not have *dolus eventualis* with regard to the result of the crime but a conscious negligence.

On the other hand, the existence of different forms of negligence and intention does not only point to the degree of culpability but also to the degree of objective danger posed by the crime to the society.

In case of the first degree intention, the conduct of the defendant is more dangerous than in case of indirect intention (*dolus eventualis*). In such case, the defendant aims to achieve the criminal result and consciously choosing best means for the achievement of such results, later adjusting the means to the goal. Thus, when the principle acts with the intention of the first degree, his conduct is more dangerous and the same should be said about the accomplice. If the accomplice has first degree intention towards the goal of the crime, than he shall provide to the principle offender the most effective means for the commission of this crime.[76] If the accomplice has *dolus eventualis* towards the goal, than he will be reckless while choosing the means. If the accomplice has conscious negligence towards the goal, it is clear that the accomplice will chose the most ineffective means, in order to prevent the occurrence of the result. Thus, the effectiveness of the criminal aid depends on the degree of mens rea. With the higher degree of mens rea, provided means will be more effective.

The first case which was brought at the beginning of this article constitutes a clear example of conscious negligence toward the result and does not constitute a punishable complicity.

Presumably, in American criminal law this case will be solved differently by different jurisdictions. The courts which endorse the knowledge standard shall qualify this case as complicity in difference with the courts which endorse the intent standard.

This case shall probably successfully pass Guidion Yaffe's test, because the accomplice knows that his contribution shall be used for the commission of the crime. This case shall not probably pass Sheriff Girgis test, because the accomplice hopes for failure of the crime. However, as to Alexandre Sarch test, which ties complicity to the degree of condoning the crime, this case shall probably qualify as incomplete complicity, because the accomplice has lesser degree of culpability towards the result.

The second example which was brought above constitutes an example of complicity by *dolus eventualis*. In American criminal law *dolus eventualis* and conscious negligence are covered by "recklessness". Thus the American courts which admit complicity by recklessness, will probably punish the defendant for complicity in this case.

The given case will presumably pass Guidion Yaffe, Sheriff Girgis and Alexander Sarch tests and qualify for complicity. As to the Georgian authors, they shall probably have different views

[76] *Gamkrelidze O.,* Problems of Criminal Law, T. II, Tbilisi, 2010, 313 (in Georgian).

concerning this issue. The authors, which are in favor of complicity by *dolus eventualis* will probably classify this case as intentional complicity in difference with those who recognize only with direct intent.

Georgian criminal law should clearly delineate between punishable and non-punishable complicity and this line should be found in the different forms of intention. Thus, we do not agree with the opinions of American authors, who are seeking to draw this borderline beyond intention and negligence. We believe that we should qualify as punishable complicity only those cases, where the principle has first or second degree of intention towards the result and this is known to the accomplice. Such approach better corresponds with the common use of the word assistance. It is difficult to imagine to assist someone to achieve a result that he/she is not interested in or does not foresee it as inevitable. The aider may act with first or second degree intention towards the result, which means that he may desire the result actively. If the aider is hoping that the result will not happen, this will not constitute complicity. As to the instigator, he/she may act only with direct intent because it is impossible to convince someone with *dolus eventualis*.[77]

Thus, using this test, we should exclude liability for complicity in the first and second cases. To put it simply, reckless helper and reckless principle cannot form complicity. As a minimum, principle should be acting with knowledge or intention.

6.2. Assistance with so Called "Neutral Conduct"

The third case considered above constitutes an example of assistance with neutral conduct. According to the approach proposed by Otar Gamkrelidze and Elene Gventsadze, this case shall probably qualified as assistance with direct intent. As to prof. Ketevan Mchedlishvili, in accordance with the formula proposed by her, the accomplice should reveal solidarity towards the principle offender and this case shall presumably not classify as punishable complicity.

As to the American authors, it is difficult to evaluate whether this case will pass Guidion Yaffe's or Sherif Girgis Test. However, according to the test of condoning the crime, this shall be counted as imperfect complicity. American courts which share knowledge standard will probably qualify this case as complicity in difference with the court who focus on the intent standard.

In accordance with the legislation of the states, which endorse knowing facilitation, this case shall qualify as separate crime, which is punishable by reduced sentence compared to the crime committed by the principle.

American authors often point out that knowing facilitation shall be burdensome for everyday busyness. This assumption is not entirely ungrounded. Although in practice, the cases are rare in which the provider of common goods or services knows for certain that his goods or services will be used for criminal purpose, thus we think it is more important to solve moral and legal dilemma which is raised by this question. Namely, should we punish the seller of the match, which knows that his client is going to burn the city with it. Solidarity test, which was proposed by Ketevan Mchedlisvhili

[77] *Girgis S.*, The Mens Rea of Accomplice Liability: Supporting Intentions, 123 Yale L. J., 2013, 470-472.

does not provide any clear criteria. The seller which sells the goods, as a rule does reveal any solidarity towards the client. He is only interested to sell the goods. At the same time, selling the goods is his legal obligation and if refuses to do it, he will face problems with the law as well as with criminal world. Despite that, we believe that the cases of so called neutral conduct do not constitute any special category and they should be subjected to the general rule discussed above: namely, if the accomplice knows that the principle offender is acting with first or second degree intention, than the accomplice should also be criminally liable.

It is noteworthy that the criminal code of Georgia contains articles criminalizing specific cases so called knowing assistance such as art. 223 such as art. 223^4 (funding an illegal formation i.e. collection and delivery funds and other property with the knowledge that they shall be used or may be used for the activity of illegal formation. A similar crime is envisaged by art. 331^1 (funding of terrorism) and 321^1 (funding of crime directed against constitutional order) of the criminal code of Georgia. We believe that the text of these articles require modification, namely if the funder knows that his funds will be used for the commission of the crime, than we should qualify this case as complicity, but if the funder only assumes this possibility, than this is assistance with *dolus eventualis* which does not constitute a punishable complicity. However, this may be criminalized by application of special articles. Thus we believe that the words "shall be used" should be extracted from this articles and only the words "may be used" should remain.

Part of the American authors limit knowing assistance only to cases where the accomplice has substantial role in the commission of the crime. This approach deserves consideration. However, the question is what is substantial participation. Presumably, in the third case, the sale of knife shall not be considered as substantial assistance. However, if this is the only shop where the knife can be bought during this time of the day, than we have different situation and this assistance may become substantial.

6.3. Negligent Assistance in Intentional Crimes

The fourth case cited above constitutes negligent assistance in intentional crime. The criminal code of Georgia excludes negligent participation in intentional crime. Professor Merab Turava believes that this can be qualified as direct offending, if the proper conditions are present,[78] however, even with this approach the given may not be qualified as crime, because a negligent theft does not exist. The given case shall probably be left unpunished according to the doctrine as well as the case-law of the United Stated. Stanford Kadish believes that the law may separately envisage the possibility of punishing negligent participation in intentional crime.

Criminal code of Georgia contains norms, which criminalize specific case of negligent participation. Namely this is art. 238 which makes punishable the negligent storage of firearms, which has created condition for its use by other person resulting in the death or any other grave harm.[79] This means that the negligent participation in intentional crime is punishable only in cases stipulated by the law.

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[78] *Tskitishvili T.*, Offences Endangering Life and Health, Tbilisi, 2015, 311 (in Georgian).

[79] Professor Irakli Dvalidze disagrees with the opinion that this article covers the commission of intentional offence by weapon. He believes that we do not have objective imputation in this case. See, *Dvalidze I.,*

6.4. Instigation in Negligent Crime

The fifth case cited above constitutes a negligent instigation in negligent crime. With respect to this case, US doctrine as well as the caselaw is controversial. Part of the courts qualify it as complicity while the others leave this case unpunished. Stanford Kadish believes that the instigation of the person towards the violation of the rules of conduct in reality constitutes intentional participation because the intention refers to the attitude of the person towards the conduct of the principle offender and not towards the result.[80] The instigator intentionally pushes the principle offender towards the violation of the norms of foresight. Part of the Georgian authors believe that this case should not be punished, while the others think that this is the case of direct offending.[81]

We believe that the second approach is not justified because Georgian criminal code is familiar only with three type of principle offender: direct principle, indirect principle and co-principle. Presumably the authors of the view mentioned above focus on the figure of the direct principle. However, according to art. 22 of Georgian criminal code, direct principle is a person who has directly committed the crime. Thus, Georgian criminal code differentiates direct principle from indirect and co- principle exactly by way of this objective element. Thus, the approach, according to which the persons acting intentionally, considered as accomplices (if we assume that there was an intentional instigation to murder) will turn into direct principles in case of negligent participation is unfounded.[82] Based on the above mentioned, the law does not enable the punishment of the offender in the fifth case, neither in the status of the principle offender nor accomplice.

6.5. Excess of the Principle Offender

The sixth case constitutes a specific case of the excess of the principle offender for which Georgian criminal code excludes the liability of the accomplice. However, the instigator may be liable for the assistance in the attempted theft, because in the given case the principle offender has committed the attempted theft. As to the American criminal law, some of the states endorse the doctrine of natural and probable consequences according to which accomplice is guilty of natural and probable consequences of the crime agreed with the principle. Thus, in this case, the accomplice can also be acting with *dolus eventualis* or conscious negligence or even unconscious negligence as to the results of the unplanned crime.

Some American authors severely criticize natural and probable consequence doctrine. According to Stanford Kadish this doctrine enables us to punish the accomplice which is acting with

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Objective Imputation of the Crime and Careless Storage of Weapon in Georgian Criminal Law, "Journal of Law", №1, 2017.

80 Ibid.

81 Professor Turava believes that this is a case of parallel perpetration, while Mchedlishvili Hadrich believes that this case is not punishable (See *Turava M.,* Criminal law, General Part, 9th ed., 2013, 249, *Mchedlishvili-Hadrich K.,* Criminal law, General Part, Specific Forms of Execution of the Crime*,* Tbilisi, 2011, 213 (in Georgian).

82 *Turava M.,* Criminal law, General Part, 9th ed., 2013, 249, *Mchedlishvili-Hadrich K.,* Criminal law, General Part, Specific Forms of Execution of the Crime*,* Tbilisi, 2011, 213 (in Georgian).

lesser degree of culpability for the same crime as principle offender. Thus, the accomplice may be charged for the murder even though he/she has no intent to kill.

The question of the excess of the principle offender to which the accomplice is connected by *dolus eventualis* is disputable in Georgian legal literature. Part of the scholars are in favor[83] of this question while the others are against.[84]

Thus with respect of the excess of the principle offender, Georgian law is much stricter and introduces higher standard than American counterpart. In Georgian law, the excess of the principle offender can be punished as a minimum upon *dolus eventualis*, while in American law recklessness and negligence suffices. We believe that the question of the excess of the principle offender should be solved in the same framework as in the other issues of complicity. Namely if the accomplice is not aware that the accomplice has intention to commit different crime, than he should not be charged with the excess of the principle offender.

7. Conclusion

The present article corroborates that in Georgian as well in American criminal law there are a number of key aspects which are still subject to dispute and require a solid theoretical solution.

The principle of legality which is one of the fundamental principles of substantive criminal law implies the prohibition of indefinite nature of criminal norms.[85] Thus, the line between the punishable and non punishable complicity should be clear.

Georgian criminal law, this line is drawn with the concept of intent, because according to art. 23 of the Georgian criminal code, complicity is intentional participation in intentional crimes. However, the code does not specify which form of intention is sufficient for accomplice's liability. In American criminal law, this scope is much broader because legal doctrine as well as legislation and caselaw of some states admit complicity by recklessness and negligence. In Georgian criminal law there is a dispute on possibility of participation by *dolus eventualis*. We conclude that we should punish only such cases of complicity where the principle offender is acting with first or second degree of intention and this is known to the accomplice. In such case, the accomplice can also have *dolus eventualis* with respect to the result. The questions of so called neutral conduct and excess of the accomplice should be solved based on these general rule, namely, the assistance with the neutral conduct can be punishable if it corresponds to the proposed formula of subjective aspect of the complicity. The excess of the principle, e.g. the deviation of common plan does not constitute punishable complicity.

In Georgian as well as in American criminal law a disputable question is the liability for negligent complicity. Many American authors as well as case law in the US admits negligent

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83 According to art. 22 of the criminal code of Georgia " A principal is a person who immediately commits or has immediately participated in the commission of a crime together with another person (joint principal), also a person who has committed a crime through another person who, under this Code, shall not be criminally liable due to his/her age, insanity or other circumstances.

84 *Turava M.,* Criminal law, General Part, 9th ed., 2013, 344 (in Georgian).

85 *Mchedlishvili-Hadrich K.,* Criminal law, General Part, Specific Forms of Execution of the Crime*,* Tbilisi, 2011, 250 (in Georgian).

participation, however, in Georgian criminal law, while the legislation excludes negligent participation, several authors believe that these cases can be punished as direct perpetration of the crime. This approach is not justified because Georgian criminal code defines principle (perpetrator) as direct executor of corpus delicti, which does not take place in case of factual instigation or factual assistance. On the other hand, Georgian criminal code separately envisages specific cases of participation with negligence or *dolus eventualis* and the list of these crimes can be broadened based on criminal policy considerations.

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31. United States v. Brown, 22 M.J. 448, 449, C.M.A.196.

Giorgi Nakashidze*

Georgia v. Russia (II) and International Humanitarian Law: Challenge and Opportunity for the European Court of Human Rights

Following the international armed conflict ('IAC') between the Russian Federation and Georgia in August 2008, Georgia lodged an interstate application against Russian Federation before the European Court of Human Rights ('the Court'), alleging violations of the European Convention on Human Rights ('the Convention') by the Russian armed forces and/or by the separatist forces of Tskhinvali Region/South Ossetia, Georgia, and Abkhazia, Georgia, placed under the control of Russian Federation. The application gave rise to the case Georgia v. Russia (II), declared admissible in 2011 and currently pending before the Grand Chamber of the Court after a hearing on the merits in 2018.

Since IACs are primarily regulated by international humanitarian law (IHL), in Georgia v. Russia (II) the Court is to examine the applicability of the Convention and IHL. While the Court has traditionally distanced itself from applying IHL, over the recent decades the Court's gradual openness to IHL can be observed. However, the approach of the Court to IHL remains incoherent or contradictory. In this respect, the present article intends to demonstrate that Georgia v. Russia (II) is both a challenge and an opportunity for the Court in terms of its approach to IHL. On the one hand, the Court will have to come out of its comfort zone to deal with the interrelation between the Convention and IHL. On the other hand, Georgia v. Russia (II) enables the Court to develop its working methodology towards IHL within its original mandate.

***Key words**: Georgia v. Russia (II), international humanitarian law, European Court of Human Rights, European Convention on Human Rights, international armed conflict, lex specialis, derogation, right to life, internment, forcible transfer and right of return, destruction of property.*

1. Introduction

On 23 May 2018, 10 years later from "a little war that shook the world",[1] a hearing on the merits was held before the Grand Chamber of the European Court of Human Rights ('the Court') in Strasbourg in the case of *Georgia v. Russia (II)*.[2] The case concerns alleged violations of the

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1 *Asmus R.,* A Little War That Shook the World: Georgia, Russia, and the Future of the West, St. Martin's Press, 2010.

2 *Georgia v. Russia (II)*, [2008], ECHR, App no 38263/08.

Convention by the Russian Federation during the international armed conflict between Russian Federation ('Russia') and Georgia in August 2008. One of the central legal issues the Court has to address in this case is the relationship between the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') and international humanitarian law ('IHL'). By the time of writing, the judgment on merits is pending before the Grand Chamber.

This article intends to demonstrate that *Georgia v. Russia (II)* is a challenge and an opportunity at the same time for the Court in the context of its fragmented and inconsistent approach to IHL. As a challenge, *Georgia v. Russia (II)* is a precedential case with far-reaching implications since the clarifying the relationship between the Convention and IHL seems to be unavoidable for the Court as the case involves active military operations in international armed conflict. Therefore, it is highly unlikely that the Court will on purpose shy away from examination of the issue in question. As to the opportunity, this case has every necessary feature to enable the Court to clarify its incoherent or contradictory approach to IHL and to develop its views in a clear and consistent manner.

2. The European Court of Human Rights and International Humanitarian Law: A Complicated Relationship

IHL[3] regulates armed conflicts, namely the situations "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[4] This definition encompasses the both international[5] and non-international armed conflicts.[6] As for the Convention, it was always intended to protect human rights during peacetime.[7] In defiance of this, the Court often confronts the applications which, as a central claim, allege the lawfulness of military operations conducted by armed forces of contracting parties to the Convention during armed conflicts.[8] Examination of applications emerged from armed conflicts by applying solely the human rights provisions of the Convention, which are of

3 The main legal instruments of IHL are Hague Conventions of 1907, Four Geneva Conventions of 1949 (GC I-IV) and their Additional Protocols of 1977 (AP I-II).

4 *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, IT-94-1-A, 2 October 1995, §70.

5 According to Common Article 2 of the Geneva Conventions, international armed conflict is "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." In addition, "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

6 Non-international armed conflicts are defined in a negative manner and pertains to situations, which meets the armed conflict threshold and is not of international character.

7 *De Koker C.*, The European Court of Human Rights' Approach to Armed Conflict and Humanitarian Law: Ivory Tower or Pas De Deux?, Convergences and Divergences between International Human Rights, International Humanitarian and International Criminal Law, *De Hert P., et al. (eds.)*, Intersentia, Cambridge, 2018, 195.

8 For a general overview, see Factsheet – Armed Conflicts, Press Unit of the European Court of Human Rights (March, 2020), <https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf> [08.05. 2020].

general and peacetime-oriented nature, in most cases proves to be an insufficient normative framework to fully consider the context of armed conflicts.[9]

Insomuch as the Court is *expressly* mandated to interpret and apply only the Convention,[10] it traditionally refrained from considering IHL. For the most part, the Court's attitude towards IHL, due to its inconsistent nature, is considered as "its own approach".[11] Some authors, taking into accounting the Court's practice, suggest the emergence of 'a European human rights law of armed conflict."[12] The reason behind such views is the fact that, save the exceptional occasions, the Court assess the claims from armed conflict situations exclusively through the prism of the Convention, resulting in total avoidance of direct interaction with IHL, which is, however, still detectable in some judgments.[13]

The Court's "own approach" increases the risk of fragmentation of law of armed conflict on a regional level. In this regard, in 2015 the Steering Committee for Human Rights of the Council of Europe (CDDH) adopted the Report on the Longer-term Future of the System of the European Convention on Human Rights,[14] which *inter alia* concerned interaction between human rights law and other fields of international law. The Report noted that "an interpretation of the Convention which is at odds with other instruments of public international law (such as *international humanitarian law* [emphasis added]) could have a detrimental effect on the authority of the Court's case law and the effectiveness of the Convention system as a whole."[15] Thus, in the context of one of the challenges for the Court, it was decided to examine whether "the Court always achieves an interpretation of the Convention which is in harmony with the general principles of international law."[16] Provided that the Convention is interpreted at variance with the states' obligation under other international treaties or international customary law, the credibility of the Court may be weakened.[17]

In response to this challenge, in 2019 the CDDH adopted the new Report on the Place of the European Convention on Human Rights in the European and International Legal Order, concerning, among other things, the relationship between the Convention and IHL.[18] According to this Report,

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9 *Kleffner J. K., Zegveld, L.*, Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law (2000) Yearbook of International Humanitarian Law, Vol. 3, 2000, 387-388.

10 According to Article 32 of the Convention, the Court's jurisdiction extends to interpretation and application of the Convention and its Protocols.

11 *Forowicz M.*, The Reception of International Law in the European Court of Human Rights, Oxford University Press, 2010, 313-318.

12 *Oberleitner G.,* Human Rights in Armed Conflict: Law, Practice, Policy, Cambridge University Press, 2015, 309-311.

13 *Uriarte J. A.*, The Problems the European Court of Human Rights Faces in Applying International Humanitarian Law, The Humanitarian Challenge: 20 Years European Network on Humanitarian Action (NOHA), *Gibbons P., Heintze H. J. (eds.)*, Springer, Cham, 2015, 201-202.

14 Report of the Steering Committee for Human Rights (CDDH). The Longer-term Future of the System of the European Convention on Human Rights. Council of Europe, 11 December 2015, <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> [08.05.2020].

15 Ibid, §186.

16 Ibid, §187(iv).

17 Ibid.

18 Report on the Place of the European Convention on Human Rights in the European and International Legal Order, adopted by the CDDH at its 92nd meeting (26–29 November 2019) 72-80, <https://rm.

over the last few years the openness of the Court towards IHL is increasing. Moreover, following the overview of the case law of the Court, the Report identified the stages of the "evolution" of the Court in this respect: 1) cases where IHL is fully ignored; 2) cases with secondary references to IHL; 3) cases which examine IHL without the substantive impact on the outcome of judgments, and 4) cases where the Court directly applies IHL.[19]

The climax of such "revolution" is considered the case of *Hassan*, which remains the clear-cut example of direct application of IHL by the Court. *Hassan* was the first case when the respondent state asked the Court not to apply Article 5 of the Convention in respect of detentions or to interpret this article in light of powers authorised under IHL,[20] which were in direct normative conflict with Article 5 of the Convention.[21] The Court held that notwithstanding that detention of persons with the aim of interment under IHL was against the Article 5 of the Convention, it did not violate that provision. However, the Court observed that such detention shall be "lawful", i.e. internment under IHL must be consistent with IHL itself and "most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from *arbitrariness*" (emphasis added).[22] *Hassan* has not expanded the exhaustive list of exceptions to restrict Article 5 by way of incorporating additional ground of deprivation of liberty in the form of internment in armed conflict. The Court in *Hassan* merely acknowledged that paragraphs (a)-(f) of Article 5(1) of the Convention cannot be considered to be of exhaustive nature when the Convention continues to apply to armed conflicts as those exceptions are designed for peacetime.[23] In this case, the Court relied on harmonious interpretation to solve the problem of incompatibility of the Convention with IHL and accommodated Article 5 of the Convention with Geneva Conventions.[24]

Despite the diverse views on *Hassan*,[25] it remains undisputable that *Hassan* is the first case when the judges of the Court examined IHL in detail, which attests to the willingness of the Court to

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coe.int/steering-committee-for-human-rights-cddh-cddh-report-on-the-place-of-t/1680994279> [08.05.2020].

19 Ibid, 75-79. The Report also briefly refers to case law under Article 7 of the Convention, where the Court considers IHL in the context of conviction for war crimes and the principle of *nullum crimen sine lege* (§§78-79), which are discussed in legal scholarship as incidental or *incidenter tantum* application of IHL by the Court. See e.g. *Sicilianos L-A.,* Les Relations entre Droits de L'homme et Droit International Humanitaire dans la Jurisprudence de la Cour Européenne des Droits de L'homme, The International Legal Order: Current Needs and Possible Responses - Essays in Honour of Djamchid Momtaz, *Crawford J., et al. (eds),* Brill Nijhoff, Leiden, 2017, 618-620.

20 *Hassan v United Kingdom* [GC], [2014], ECHR, App no 29750/09, §99.

21 Normative conflict between the Convention and IHL exist when "two rules or principles suggest different ways of dealing with a problem". See *Koskenniemi M.,* Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (International Law Commission 2006), Geneva, 2006, §25.

22 *Hassan* (n 20) §105.

23 *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, §68(2).

24 *Hassan* (n 20) §§102, 104.

25 See eg *von Arnauld A.*, An Exercise in Defragmentation: The Grand Chamber Judgment in *Hassan v UK*, The 'Legal Pluriverse' Surrounding Multinational Military Operations, *Geiß R., Krieger H. (eds.)*, Oxford University Press, 2020, 179-197; *Geiß R*., Toward the Substantive Convergence of International Human Rights Law and the Laws of Armed Conflict: *The Case of Hassan v. the United Kingdom*, Seeking

engage with IHL to assess and consider its impact on the scope of the Convention in international armed conflict. However, it should be emphasised that *Hassan* does not address every aspect of the relationship between the Convention and IHL, as the judges acted in strictly defined factual circumstances of the case in question and developed their reasoning solely in the context of internment during international armed conflict. *Georgia v. Russia (II),* on the other hand, due to its widespread nature, enables the Court to establish its approach to IHL on a more general level.

3. *Georgia v. Russia (II)* and the Decision on Admissibility of the Application of 2011

On 11 August 2008, in response to international armed conflict between Russia and Georgia, Georgia lodged an application against Russia before the Court, alleging numerous violations of the Convention. As noted in the introduction, by the time of writing, the Court has not delivered its judgment on merits. Thus, the only publicly available document which can be analysed in the present article is the decision on admissibility of 13 December 2011 (the Decision), where the Court declared Georgia's application as admissible, without prejudging the merits of the case.[26]

According to Georgia's major claim, Russia, by its armed forces and/or the separatist forces of Tskhinvali Region (also known as South Ossetia), Georgia, and Abkhazia, Georgia, placed under its control, permitted/facilitated unlawful actions in the form of administrative practice, including *indiscriminate* and *disproportion* attacks against civilian population and their property in Tskhinvali Region/South Ossetia, Georgia, and Abkhazia, Georgia. From the beginning, Russian forces occupied the Georgian territories. Despite ceasefire, Russia remained the occupying power and exercised effective control over the occupied territories both directly, through its armed forces, and indirectly, through control of its agents – *de facto* organs of Tskhinvali Region/South Ossetia, Georgia, and Abkhazia, Georgia. Georgia asserted that "in the course of indiscriminate and disproportionate attacks by Russian forces and/or by the separatist forces under their control, hundreds of civilians were injured, killed, detained or went missing, thousands of civilians had their property and homes destroyed and over 300,000 people were forced to leave Abkhazia and Tskhinvali Region/South Ossetia."[27]

Therefore, Georgia argued that these acts by Russia and its subsequent inaction to investigate those allegations violate Article 2 (right to life), Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the Convention, as well as Articles 1 (right to property) and 2 (right to education) of Protocol No. 1 and Article 2 (freedom of movement) of Protocol No. 4 to the Convention.[28] Insomuch as *Georgia v. Russia (II)* concerns active military operations during international armed conflict, the Court is to examine the relationship between the Convention and IHL in the context of admissibility due to alleged *ratione materiae* incompatibility of the application with the Convention, as argued by Russia.

Accountability for the Unlawful Use of Force, *Sadat L.N. (ed.),* Cambridge University Press, 2018, 252-272.

26 *Georgia v. Russia (II)* (dec.) [2011], ECHR, App no 38263/08 (hereinafter - *Georgia v. Russia (II)* (dec.)).

27 Ibid, §21.

28 Ibid §§10, 26-38.

Due to the fact that active conduct of hostilities from war theatre are the central facts of the case, the Court is expected to overcome its apparent reluctance to consider the provisions of IHL, because addressing the issue of interaction between the Convention and IHL in this case appears unavoidable.[29] It is also hoped that in this case the Court will clarify its own approach to IHL[30] and will further elaborate on findings of *Hassan*.[31] It can be asserted that in this case the Court has not only an opportunity, but also an obligation to discuss the relationship between the Convention and IHL and to develop systematic and consistent approach to IHL to establish normative paradigm for applications arising out of armed conflicts.

The Decision addressed the following objections raised by Russia to the jurisdiction of the Court to entertain the claims filed by Georgia: 1) extraterritorial application of the Convention and "jurisdiction" of Russia in the meaning of Article 1 of the Convention (objection of incompatibility *ratione loci* of Georgia's application with the Convention); 2) applicability of the provisions of the Convention and the rules of IHL (objection of incompatibility *ratione materiae* with the Convention); 3) objections based on failure of Georgia to comply with the six-month time-limit and failure to comply with the rule on exhaustion of domestic remedies; and finally, 4) objection based on the similarity of Georgia's application with the application lodged with the International Court of Justice (ICJ). Whereas the Court dismissed Russia's objections regarding six-month time-limit and the similarity of applications, the rest of them were joined to the merits. Among these objections, the central issue of interest for this article is the Court's preliminary pronouncements on Russia's objection of incompatibility of Georgia's application *ratione materiae* with the Convention, that is, applicability of the provisions of the Convention and the rules of IHL, as addressed in detail herein.

4. Applicability of the Provisions of the Convention and the Rules of International Humanitarian Law

Georgia v. Russia (II) concerns international armed conflict, as the type of the conflict is also legally acknowledged.[32] The significance of international character of the armed conflict guarantees

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29 *Hampson F. J.,* The Relationship between International Humanitarian Law and International Human Rights Law, Routledge Handbook of International Human Rights Law, *Sheeran S., Rodley N. (eds)*, Routledge, London and New York, 2013, 209.

30 *Cathcart B.,* The Legal Advisor in the Canadian Armed Forces Addressing International Humanitarian Law and International Human Rights Law in Military Operations, Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations, *de Wet E., Kleffner J. (eds.),* Pretoria University Law Press, 2014, 285-286.

31 *Hailbronner M.,* Laws in Conflict: The Relationship between Human Rights and International Humaniarian Law under the African Charter on Human and Peoples' Rights, African Human Rights Law Journal, Vol. 16, 2016, 354-355; *Hampson F.J.,* Article 2 of the Convention and Military Operations during Armed Conflict, The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v. the United Kingdom - in Honour of Michael O`Boyle, *Early L., Austin A. (eds.)*, Wolf Legal Publishing, Paris, 2016, 211.

32 In 2016, the International Criminal Court (ICC) determined that armed conflict during August 2008 was of an international character. See *Situation in Georgia*, Decision on the Prosecutor's Request for Authorization of an Investigation. Pre-Trial Chamber I, ICC, ICC-01/15-12, 27 January 2016, §27.

that the Court will not face the difficulties which are related to qualification a situation as a non-international armed conflict.[33] Therefore, it is highly likely that the Court will endeavour to develop consistent approach to relationship between the Convention and IHL. Moreover, as it is underscored "[t]aking into account IHL in such cases is not only crucial in order to maintain the credibility of the European system of protection of human rights but also to ensure the consistency of the international legal system as a whole."[34]

4.1. IHL as lex specialis: Russia's Arguments

Russia argues that as the alleged violations are related to the international armed conflict, Georgia's application is incompatible *ratione materiae* with the Convention and it shall be examined only under IHL, as *lex specialis* body of law.[35] This logic excludes the applicability of the Convention, leading to absence of the entire jurisdiction of the Court. According to Russia:

"[…] international human rights law was of extremely limited application in periods of armed conflict and of no application at all in a situation of international armed conflict. Accordingly, the Convention was of limited application to cases of internal disturbances amounting to less than armed conflict, as could be inferred from Article 2 which permitted the use of force for the purpose of quelling a riot or insurrection. Where internal disturbances reached the level of non-international armed conflict, a State Party could be permitted to derogate from its obligation to extend Convention rights throughout its territory under Article 15, but only in so far as was strictly necessary. Lastly, the Convention did not apply to a situation of international armed conflict where a State Party's forces were engaged in national defence, including in respect of any required operations abroad. In such circumstances the conduct of the State Party's forces was governed exclusively by international humanitarian law."[36]

Russia accentuates that since Georgia claims violations of the right to life, the proportionality of attacks and the internment of prisoners of war and civilians, IHL, as *lex specialis*, replaces the Convention under the principle of *lex specialis derogat generali.* It is noticeable that Russia, among

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33 The Court is usually reluctant to qualify situations as non-international armed conflict, as it is demonstrated in Turkish and Chechen cases. The former concerned the conflict between Turkish security forces and the Workers' Party of Kurdistan (PKK) in South-East Turkey in 1990s, whereas the latter cases concerned the conflict between Russian armed forces and Chechen fighters in the Chechen Republic of the Russian Federation at the end of the 1990s. Notwithstanding that both situations objectively met the threshold of an armed conflict, the Court held that since Respondent States had not formally derogated from the Convention, the situation must have been adjudged "against normal legal background." It is understandable that the Court is more at ease with qualifying the situation as international armed conflict since it does not have to prove the particular threshold and with reference to common Article 2 of the 1949 Geneva Conventions, citing the cases of "declared war" or "any other armed conflict [...] between two or more" states, is sufficient.

34 *Gowlland-Debbas V., Gaggioli G.,* The Relationship between International Human Rights and Humanitarian Law: An Overview, Research Handbook on Human Rights and Humanitarian Law, *Kolb R., Gaggioli G. (eds.)*, Edward Elgar Publishing, Cheltenham, UK and Northampton, USA, 92.

35 *Georgia v. Russia (II)* (dec.) (n 26) §69.

36 Ibid.

others, relies on the case law of the ICJ, in particular specific paragraphs of *Nuclear Weapons*[37] and *Wall* advisory opinions,[38] in fact not supporting Russia's arguments. In this respect, Georgia argues that:

"[Russia] misinterpreted the judgments of the ICJ on the relationship between international humanitarian law and international human rights law in situations of armed conflict. In their view, in the advisory opinions referred to by the respondent Government, and in a subsequent judgment [*Case concerning armed activities on the territory of the Congo" (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, ICJ, § 216], the ICJ had stated, on the contrary, that international human rights law continued to apply during an armed conflict. That had also been confirmed by the United Nations Human Rights Committee. In fact international humanitarian law and international human rights law applied in parallel."[39]

4.2. IHL, as a Guiding Law for the Interpretation of the Convention: Georgia's Arguments

Georgia submits that the alleged violations shall be examined exclusively under the Convention as none of the international bodies had ever implied, let alone held, that IHL replaces international human rights law. On the contrary, all the international judicial or quasi-judicial bodies always applied the human rights treaties to the armed forces of a state engaged in an armed conflict.[40] Moreover, with reference to *Varnava* case,[41] in which the Court considered the principles of IHL solely for the purposes to ascertain the scope of the rights under the Convention, Georgia contends that in the present case "regard should be had to international humanitarian law principles because they provided guidelines for interpreting specific human rights standards [in armed conflicts]."[42]

In light of these arguments, Georgia asserts that Russia's objection of incompatibility *ratione materiae* of the application with the Convention is unfounded.

4.3. The Court's Assessment

The Court held that the issue of interaction between IHL and the Convention is to be decided when the case is examined on the merits and joined this question with merits stage of the proceedings. However, the Court made some preliminary observations in light of its previous case law regarding Article 2, as it stood by 2011, and noted that:

"[…] the procedural obligation under Article 2 of the Convention continued to apply even where the security conditions were difficult, including in the context of armed conflict. Furthermore, Article 2 must be interpreted in so far as possible in the light of the general principles of international

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37 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ, Reports 1996, § 25

38 *Legal Consequences of the Construction of a Wall in Occupied Palestin*e, Advisory Opinion, ICJ, 9 July 2004, §106.

39 *Georgia v. Russia (II)* (dec.) (n 26) §70.

40 Ibid.

41 *Varnava and Others v. Turkey* [GC], [2009], ECHR, App nos 16064/90 *et al*., §185.

42 *Georgia v. Russia (II)* (dec.) (n 26) §70.

law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict. In a zone of international conflict Contracting States are under an obligation to protect the lives of those not, or no longer, engaged in hostilities. Generally speaking, the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part."[43]

Despite the joining this issue with the merits, it would be safe to assume that the cited paragraph of the Decision is a starting point for the Court, that it has prepared legal foundation to address the question of the relationship between the Convention and IHL. It is therefore expected that the Court will support harmonious interpretation of the Convention in light of IHL and will dismiss the claim of IHL being a *lex specialis*.

5. The Possible Effect of Absence of Derogations: Closed Road Towards IHL?

Official derogation from the Convention by a state under Article 15 is considered to be the case when the Court is indirectly authorized to consider IHL.[44] The Court's approach on the legal effects of formal derogations seems to be contradictory: according to *Isayeava* case, the existence of a formal derogation under Article 15 of the Convention is a prerequisite for the Court to consider and examine IHL rules in a particular case (constitutive approach). This approach was developed in the context of non-international armed conflict whereas the absence of formal derogation urges the Court to apply solely the Convention, i.e. to decide the cases "against normal legal background". In contrast, according to *Hassan* case, the formal notice of derogation is not required (declaratory approach).[45] In this case, opposed to the approach in *Isayeava* case, the Court did not consider it necessary to find a formal derogation to directly apply IHL in the context of occupation, which is a specific regime governed by the law of international armed conflict.[46]

During an armed conflict, on 10 August 2008 Georgia informed the Secretary General of the Council of Europe that on 9 August 2008 a state of war was declared in the whole territory of Georgia for fifteen days. However, and more importantly, Georgia underlined that it had not derogated from the Convention under Article 15.[47] Russia also abstained from derogation. As the Court noted:

"[…] neither Party requested a derogation under Article 15 of the Convention, which provides that in time of war or other public emergency a Contracting Party may take measures derogating from

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43 Ibid, §72 (references omitted).

44 *Oellers-Frahm K.,* A Regional Perspective on the Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations: The European Court of Human Rights, *de Wet E., Kleffner J. (eds.),* (n 30) 342. *O'Boyle M., Costa J. P.,* The European Court of Human Rights and International Humanitarian Law, The European Convention on Human Rights: A Living Instrument, *Rozakis C. (ed.)*, Bruylant Press, Brussels, 2011, 115.

45 *Oellers-Frahm K.,* (n 44) 341-342.

46 Under IHL, occupation as a legal notion cannot be established in non-international armed conflicts.

47 *Georgia v. Russia (II)* (dec.) (n 26) §1. See also Council of Europe: Commissioner for Human Rights, *Human Rights in Areas Affected by the South Ossetia Conflict. Special Mission to Georgia and Russia, by Thomas Hammarberg, Council of Europe Commissioner for Human Rights (Vladikavkaz, Tskhinvali, Gori, Tbilisi and Moscow, 22-29 August 2008)*, CommDH(2008)22, 8 September 2008, §12.

its obligations under the Convention "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."[48]

The cited paragraph does not answer what may be the effects of absence of making derogations from the Convention in the present case. However, some extrapolations may still be made following the *Hassan* case. In *Hassan,* the Court did not consider it necessary for a formal derogation to be lodged for the provisions of Article 5 to be interpreted and applied in the light of IHL "where this is specifically pleaded by the respondent State."[49] Some argue that this finding is problematic as it involves the threat of expanding the Court's *ratione materiae* jurisdiction based solely on a state's request.[50] Unlike the UK in *Hassan,* Russia does not plead with the Court to solve the possible normative conflict between the specific provisions of the Convention and concrete rules of IHL, rather it denies the Court's jurisdiction *in toto* over the Georgia's application in blanket terms, by trying to establish the status of IHL as *lex specialis*.

In *Hassan,* the Court agreed with the UK and stated that "the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case."[51] However, drawing generalized conclusions from *Hassan* is not justified as the Court's "revocation" of the requirement of formal derogation is strictly confined to the factual circumstances of *Hassan*, that is, internment during an extraterritorial international armed conflict. Hence, in all other situations it is assumed that, as stated in *Isayeava* case, the formal derogation remains relevant, absence of which will lead the Court to adjudicate a case "against normal legal background".[52]

In light of this, one difficulty can be observed: the Court applies *Isayeava's* approach in non-international armed conflict, whereas *Georgia v. Russia (II)* concerns international armed conflict. Therefore, it is not plausible to anticipate that the Court will strictly follow *Isayeava's* approach and will not consider IHL in examining alleged violations during Russia/Georgia (II) international armed conflict simply because of lack of formal derogation from the Convention. However, IHL is to play only the role of guiding interpreting law and not a function of *lex specialis* replacing the Convention.

6. Interpreting Specific Provisions of the Convention in International Armed Conflict in Light of IHL: What Approach will the Court Choose in *Georgia v. Russia (II)*?

While it is recognized that ultimately it is up to the individual judges as to what extent the Court will rely on IHL, it is argued that the Court should consider IHL in examining *Georgia v Russia (II)* to prevent anomalies when the specific conduct is a violation of the Convention, but is lawful under IHL.[53] At the outset it should be noted that the applicability of IHL to a situation is not a reason for an

48 *Georgia v. Russia (II)* (dec.) (n 26) §73.
49 *Hassan* (n 20) §107.
50 *Oellers-Frahm K.,* (n 44) 343.
51 *Hassan* (n 20) §103.
52 *Isayeva v Russia*, [2005], ECHR, App no 57950/00, §191.
53 For the detailed analysis of the necessity to consider IHL by the ECtHR in light of Russian-Georgian armed conflict of August 2008, see *Japaridze S.*, The Necessity to Apply International Humanitarian Law by

international human rights court to decline its own jurisdiction.[54] However, it is often emphasized that applying IHL will result in reducing a high degree of protection ensured by human rights law.[55] *Amicus curiae* in *Georgia v Russia (II)* case argues that on the one hand, there will only be a violation of the Convention if there is a violation of IHL. On the other hand, the only law applicable will be the Convention, but the situation of conflict may be relevant for context. In the middle, the two bodies of rules may both be relevant.[56] Since in practice both body of law often complement and overlaps each other, there is less likely to be a direct normative conflict between them.[57] The challenge are only those situations when "status-based" conduct (the distinguishing feature of IHL) and active hostilities are to be assessed.

Hence, the author is of the view that the Court should develop common, but differentiated approaches when choosing applicable law in light of specifics of the provisions of the Convention and the factual circumstances of a case, as making findings on general relationship between the Convention and IHL will not be sufficient to decide specific cases.

Georgia claims the violations of several provisions of the Convention and Protocols thereto.[58] For the purposes of the present article, alleged violations of Articles 2 (right to life), 5 (right to liberty and security), Articles 1 of Protocol No. 1 (protection of property) and Article 2 of Protocol No. 4 (freedom of movement) are of particular interest, as their scope may be significantly modified by taking into account factual realities of international armed conflict and/or by applying relevant IHL rules for the purpose of harmonious interpretation.

6.1. Right to Life and "Deaths Resulting from Lawful Acts of War": Which Paradigm?

International law recognizes two different paradigms of use of lethal force against a person: law enforcement paradigm, which is regulated solely by international human rights law and armed conflict paradigm, which is governed by IHL alongside with international human rights law.[59] Whereas the former aims to ensure protection of *all* persons, the latter focuses on the status of a person

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Human Rights Monitoring Mechanisms – Case Study of the Russian-Georgian Armed Conflict of August 2008, Protection of Human Rights: Achievements and Challenges, *Korkelia K. (ed.),* GIZ, Tbilisi, 2012, 190-228 (in Georgian).

54 *Amicus Curiae* Brief Submitted by Professor Francoise Hampson and Professor Noam Lubell of the Human Rights Centre, University of Essex, *Georgia v. Russia (II)*, 38263/08, §22 <http://repository.essex.ac.uk/9689/1/hampson-lubell-georgia-russia-amicus-01062014.pdf> [09.05.2020].

55 *Ulfstein G., Risini I.,* Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges. *EJIL*: Talk!, January 24, 2020, <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/> [09.05.2020].

56 Amicus Curiae (n 54) §22.

57 Ibid, §§22-23.

58 Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the Convention, and of Articles 1 (protection of property) and 2 (right to education) of Protocol No. 1 and of Article 2 (freedom of movement) of Protocol No. 4.

59 *Yeini S. A.,* The Law Enforcement Paradigm under the Laws of Armed Conflict: Conceptualizing *Yesh Din v. IDF Chief of Staff*. Harvard National Security Journal, Vol. 10, Issue 2, 2019, 469-470.

(combatant/civilian) under IHL to decide whether the use of force against a person would be permissible. Therefore, the right to life in these paradigms is protected by "different legal constructions."[60]

The European Convention is the only exception among the international human rights treaties which expressly authorizes the derogation from the right to life in time of "war".[61] Paragraph 2 of Article 15 of the Convention envisages derogation from the right to life "in respect of deaths resulting from lawful acts of war." As the Court has never pronounced on this issue since no state has derogated from Article 2 of the Convention so far, the content of this exception remains ambiguous.[62] It is suggested that the drafters of the Convention purposely inserted the possibility of derogation from the right to life during war, since "status-based targeting could not on its face fit any of the Article 2(2) exceptions".[63] The underlying rationale is that Article 2, unlike other international human rights treaties, sets forth exhaustive exceptions to intervene instead of "arbitrariness" standard[64] and does not provide enough legal space to interpret Article 2 of the Convention in line of IHL.[65] Therefore, direct reference to "in respect of deaths resulting from lawful acts of war" was made to facilitate the application of the Convention in the context of armed conflicts and to easily ascertain the lawfulness of deprivation of life during the circumstances of derogation, particularly in case of "war".[66] It remains to be seen whether the Court will address this issue in the present case in the absence of formal derogations by Georgia and Russia.[67]

Georgia claims that Russia violated substantive and procedural obligations of Article 2 "during the armed conflict and subsequent occupation" by killing a total of 228 civilians and wounding 547.[68] It is interesting that Georgia's claims regarding the violations of the Convention are formulated with IHL terminology:

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60 For details, see *Gaggioli G., Kolb R.,* A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights, Israel Yearbook on Human Rights, Vol. 37, 2007, 127-134.

61 *Oberleitner G.,* (n 12) 133.

62 *Schabas W.A.*, The European Convention on Human Rights: A Commentary, Oxford University Press, 2015, 156; Milanovic M., Extraterritorial Derogations from Human Rights Treaties in Armed Conflict, The Frontiers of Human Rights, *Bhuta N. (ed.),* Oxford University Press, 2016, 61; *Gowlland-Debbas V.,* The Right to Life and the Relationship between Human Rights and Humanitarian Law, The Right to Life, *Tomuschat C., Lagrange E., Oeter S. (eds.)*, Martinus Nijhoff Publishers, 2010, 129.

63 *Milanovic M.* (n 62), 62. See also *Bethlehem D.,* When Is an Act of War Lawful?, *Early L., Austin A. (eds.),* (n 31) 235.

64 E.g. Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the American Convention on Human Rights in identical terms state that "no one shall be *arbitrarily* deprived of his life" (emphasis added). Against this background, Article 2 of the European Convention guarantees that "no one shall be deprived of his life intentionally" and enunciates the specific exceptions in an exhaustive manner. The latter is much stricter and less flexible standard than prohibition of "arbitrariness".

65 *Milanovic M.* (n 62), 62.

66 As early as the 1970s, Draper argued that "under article 15 of the European Convention, the whole of the Law of War as to killing has been incorporated by reference. That Law may therefore have to be considered by the European Commission and the Court". See *Draper G.I.A.D.,* Human Rights and the Law of War, Virginia Journal of International Law, Vol. 12, Issue 3, 1972, 338.

67 See *supra* section 0.

68 *Georgia v. Russia (II)* (dec.) (n 26) §26.

"[...] during the attacks carried out by the Russian forces and/or South Ossetian or Abkhaz militias acting under their orders, *no distinction had been made between combatants and civilians*; by *indiscriminately* bombing and shelling areas which were not *legitimate military targets*, and by using means of warfare such as landmines and cluster bombs, the respondent Government had failed to take sufficient precautions to protect the lives of the *civilian population*" (emphasis added).[69]

Case law relating to armed conflicts in the South-East Turkey and Chechnya[70] made it clear that despite avoiding to apply IHL, the Court has struggled to adopt its Convention-based law enforcement paradigm of use of force, established in *McCann* case, with those military operations which fall outside of traditional police operations and fall under the paradigm of armed conflict.[71] Consequently, the previous case law does not make it clear what effect the context of armed conflict may have on the scope of Article 2 while interpreting that article in armed conflict. It is noticeable that in armed conflict cases the Court interprets Article 2 of the Convention flexibly, but inconsistently.[72] In the Decision, the Court noted that Article 2 should be interpreted in light of and in harmony with IHL rules. This approach was inspired by the judgment in *Varnava* case, decided two years earlier.[73] In *Varnava*, the Court for the first time expressly referred to IHL, which was viewed as "a turning point", as the Court tried to accommodate the standards of the Convention with IHL by way of harmonious interpretation.[74] Moreover, the Court did not consider IHL as *lex specialis* and relied on it solely for the purpose of systematic interpretation,[75] modifying the scope of the provision of the Convention which was initially thought to be applied during only peacetime.[76]

Besides, the Court singled out situations in "a zone of international conflict" and imposed the obligation on a state "to protect the lives of those not, or no longer, *engaged in hostilities*" (emphasis added).[77] Nevertheless, it is still difficult to draw a clear-cut conclusion to what extent the Court will consider IHL as the cited considerations concern the procedural obligations under Article 2 and not substantive scope of right to life in armed conflict under the Convention.

It is noteworthy that by the time the Court delivered the Decision, the judgment in *Hassan* had not been yet delivered, which is fairly labelled as the first case when not only the European Court, but, generally, any international court "set out a detailed model of the interaction between humanitarian law and human rights in the context of an international armed conflict and applied it in a concrete

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69 Ibid, §27.

70 See *supra* n 33.

71 *De Koker C.* (n 7) 214; *Moir L.,* The European Court of Human Rights and International Humanitarian Law, *Kolb, R., Gaggioli G. (eds.)*, (n 34) 483; *Oberleitner G.,* (n 12) 299. See also *McCann and Others v. The United Kingdom* [GC], [1995], ECHR, App no 18984/91.

72 *Hampson F.J.,* (n 31) 193-195.

73 *Varnava* (n 41).

74 *Uriarte J.A.*, (n 13) 208.

75 *Borelli S.,* The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict, General Principles of Law - The Role of the Judiciary, *Pineschi L. (ed.),* Springer, Cham, 2015, 281.

76 *De Koker C.* (n 7) 209.

77 *Georgia v. Russia (II)* (dec.) (n 26) §72.

case."[78] Some authors, Bethlehem, for example, argue that in *Georgia v. Russia (II)* in regard of Article 2 the "the methodological approach it [the Court] adopted in *Hassan* is the right one". According to Bethlehem, therefore, the Court should interpret Article 2 of the Convention in the same manner as it interpreted Article 5 of the Convention in *Hassan*.[79] Bethlehem's logic appears to be plausible with respect to the specific provisions of the Convention. In the present case, however, it would be unwise for the Court to assess the alleged *ratione materiae* incompatibility of Georgia's application with the Convention by the same methodology it applied in *Hassan,* since the latter concerned assessing the scope of the specific provision in armed conflict rather than examining the admissibility of the entire application, as Russia contends.

It must be further observed that while Court in *Varnava* has affirmed armed conflict related context-based interpretation of Article 2 of the Convention, that is, interpretation in harmony with relevant rules of IHL,[80] *Varnava* is hard to be conceived as the general pronouncement by the Court on the substantive scope of Article 2 in armed conflict. However, in *Georgia v. Russia (II)* the Court is in a position to develop practical approach to what extent and in what manner Article 2 of the Convention is to be applied in international armed conflict. What is more, it is interesting whether the Court modifies the logic of *Bankovic*, when the Court refused to consider law of international armed conflict on the ground that air operations conducted by NATO was not sufficient to bring the territory of the former Yugoslavia within the "legal space" of the Convention and the application was dismissed.[81] In contrast to air military operations in *Bankovic*, in *Georgia v. Russia (II)* Russian armed forces "penetrated deep into Georgia",[82] thus, it follows that, unlike *Bankovic*, the Court will consider IHL.[83]

6.2. Internment and Detention: Facing the Hassan Legacy

Under Article 5 of the Convention, Georgia submitted that "approximately 160 civilians, including 40 women, had been illegally captured by the Russian armed forces and/or separatist militia under their control and held for up to fifteen days in some cases",[84] asserting that "[t]hose detentions were clearly illegal in so far as the detainees, who were mainly old people and women, *had posed no security threat whatsoever*" (emphasis added).[85]

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78 *Ovey C.,* The Right to Life in Situations of Armed Conflict, *Early L., Austin A. (eds.)* (n 31) 269.

79 *Bethlehem D.,* (n 63) 239-240.

80 Some judges argue that findings in *Varnava* equally applies to all the provisions of the Convention. See Dissenting Opinion of Judge Pinto De Albuquerque, *Sargsyan v. Azerbaijan* [GC], [2015], ECHR, App no. 40167/06, 120, fn. 25.

81 The facts of *Bankovic* concerned international armed conflict in the former Yugoslavia. Thus, the Court could have examined IHL had the application not been declared inadmissible. Therefore, it is ambiguous whether or not the judges purportedly ignored IHL. See *De Koker C.* (n 7), 207.

82 *Georgia v. Russia (II)* (dec.) (n 26) §19.

83 *Margalit A.*, Recent Trends in the Application of Human Rights and Humanitarian Law: Are States Losing Patience?, Journal of International Humanitarian Legal Studies, Vol. 7, 2016, 161-162.

84 *Georgia v. Russia (II)* (dec.) (n 26) §30.

85 Ibid.

Interestingly, Georgia's arguments of illegality of detentions are based on the claim that detainees "*had posed no security threat whatsoever*", which mirrors the standards of internment under IHL. Article 42 of GCIV stipulates that the internment or placing in assigned residence of protected persons may be ordered "*only if the security of the Detaining Power makes it absolutely necessary*" (emphasis added). Furthermore, Article 78 of GCIV permits the internment in occupied territories only if the Occupying Power considers it necessary "*for imperative reasons of security*" (emphasis added). In both occasions, the conduct of civilians must pose a threat for public order.[86]

For the Court, as a human rights mechanism, it may be advantageous to use two-step approach: firstly, lawfulness of detention should be judged against the Article 5 of the Convention and secondly, the Court should examine the specific case under both the Convention and IHL by "a contextual analysis."[87] It should be stressed that Georgia's reliance on internment standards under IHL does not mean *lex specialis* application of IHL. It merely develops the alternative arguments for alleged violations of Article 5 of the Convention from IHL perspective.

To put it another way, Article 5 of the Convention does not envisage the detention of persons for security reasons, that is, *absolute security necessity* and/or *for imperative reasons of security*, which results in *a priori* incompatibility of Article 5 of the Convention with internment under IHL.[88] Internment is viewed as "anathema" for Article 5 of the Convention.[89] Therefore, if the Court applies solely the Convention, it will definitely find a violation. Provided that the Court follows *Hassan* and adopts the scope of Article 5 with armed conflict in *Georgia v. Russia (II)*, Georgia submits, *arguendo*, that detentions were unlawful under IHL as well. In *Hassan*, the Court held that deprivation of liberty pursuant to powers under IHL (internment) must be lawful not only under IHL, but "most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness".[90] Hence, in case the Court finds that in *Georgia v. Russia (II)* Article 5 should be interpreted in light of IHL, it will have to assess whether each of the detainees actually posed a threat to security of Russia in the armed conflict.

6.3. Freedom of Movement of Civilian Population during an Armed Conflict

Under Article 2 of Protocol No. 4 (freedom of movement), Georgia alleged that Russia, together with the separatist forces acting under their control, had imposed illegal restrictions on civilians' freedom of movement and right to choose their residence during the recent *armed conflict* and *subsequent occupation,* by restricting civilians' freedom of movement in the vicinity of occupation

86 *cf. Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, §58. According to the Supreme Court of the United Kingdom, the difference between the wordings of Articles 42 and 48 of GCIV implies that while there are no substantial differences in terms of necessity under those two articles, "internment in an occupied territory may be necessary for the security of those interned".

87 *Amicus Curiae* (n 54) §30.

88 *Favuzza F.,* 'It was the Best of Times, it was the Worst of Times': A Tale of Detention in Time of Emergency, *De Hert P., et al. (eds.)* (n 7) 171.

89 *Shany Y.,* A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention. International Law Studies, Vol. 93, 2017, 128.

90 *Hassan* (n 20) §105.

lines of Abkhazia, [Georgia], and Tskhinvali Region/South Ossetia, [Georgia], which resulted in displacement of over 23,000 civilians (internally displaced persons) and their prevention from returning home.[91]

Pursuant to Article 2 of Protocol No. 4, "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Notwithstanding that Abkhazia and Tskhinvali Region/South Ossetia are occupied by Russia, these regions still fall within the internationally recognized borders of Georgia. Therefore, the right of internally displaced persons to return to the occupied territories and freely choose their residence is a guaranteed right under Article 2 of Protocol No. 4.

The provision, protecting freedom of movement, is closely related to Article 5, ensuring right to liberty and security. However, they are not interchangeable. The Court has explained that while Article 5 relates to the physical freedom of the person, the latter concerns restrictions on the freedom of movement.[92] The difference concerns "a difference in degree or intensity, not of nature or essence."[93] In order to differentiate between them, "the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question."[94] In *Georgia v. Russia (II)*, due to duration, effects and manner of the measure, the Court is likely to apply Article 2 of Protocol No. 4 to widespread forcible displacement and prevention from return of Georgian civilian population to their houses.

IHL prohibits the deportation or transfer of civilians in both types of armed conflict unless the security of the civilians involved or imperative military reasons require the evacuation.[95] In international armed conflict such protection is provided for the population residing in occupied territories.[96] It shall also be noted that IHL indirectly affirms the right of IDPs to return to their homes as soon as hostilities in the area in question have ceased.[97] Even though freedom of movement under the Convention is not an absolute right and is subject to restrictions,[98] such restrictions are designed to be applied during peacetime. Thus, it is expected that the Court may make recourse to IHL standards or to accommodate this right with those standards.

In light of Georgia's submission that Article 2 of Protocol No. 4 was violated *during the armed conflict and subsequent occupation*, the Court will likely endeavor to interpret Article 2 of Protocol

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91 *Georgia v. Russia (II)* (dec.) (n 26) §§36-37.

92 *Villa v. Italy,* [2010], ECHR, App no 19675/06, §41.

93 Ibid.

94 *Guzzardi v. Italy*, 6 November 1980, Series A no. 39, §92.

95 GCIV, Article 49; API, Article 85(4)(a); APII, Article 17; CIHL Rule 129. See also API, Articles 51(7) and 78(1) and APII, Article 4(3)(e).

96 GCIV, Article 49: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

97 Ibid. See also *Sargsyan* (n 80), §232.

98 According to paragraph 3 of Article 2 of Protocol No. 4: "No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

No. 4 in harmony with IHL principles to fully take into account intricacies of normative and factual dimensions of armed conflict and establish the relevant standard.

6.4. Destruction of Property in Armed Conflict: the Necessity to Consider IHL

Under Article 8 of the Convention and Article 1 of Protocol No. 1, Georgia submitted that Russian armed forces and/or separatist forces operating under their control violated those provisions by systematically looting and burning property in entire civilian villages for several weeks after the formal cessation of hostilities, resulting in considerable damage caused by the deliberate burning of property and by the indiscriminate bombing and shelling in the areas invaded by them.[99]

Destruction of property and forcible transfer of population are, unfortunately, integral part of armed conflicts. With regard to destruction of property, two types of situation must be distinguished for the purposes of the present article: destruction of property during an occupation and destruction of property in active hostilities. The applicable legal regimes are contingent upon those factual circumstances.[100] The Court to some extent has rendered the case law relating to destruction of property in armed conflict, finding the violations of Article 8 of the Convention and/or Article 1 of Protocol No. 1.[101] However, those cases are related to non-intentional armed conflicts only, when the Court usually does not refer to IHL.

The challenge for the Court is that is has never examined the lawfulness of destruction of property on merits in the course of active hostilities during an international armed conflict.[102] Assessing destruction of property in this context increases the relevance of IHL as these questions are primarily regulated by IHL principles by taking into account the nature of destroyed property,[103] precautions,[104] indiscriminate attacks and collateral damage,[105] whereas such legal notions are

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99 *Georgia v. Russia (II)* (dec.) (n 26) §§31-33.

100 *Gioia A.,* The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict, International Humanitarian Law and International Human Rights Law, *Ben-Naftali O. (ed.),* Oxford University Press, 2011, 242-245.

101 See e.g. *Akdivar and Others v. Turkey,* 16 September 1996, Reports of Judgments and Decisions 1996-IV; *Ahmet Ozkan and Others v Turkey*, [2004], ECHR, App no 21689/93; *Isayeva, Yusupova, and Bazayeva v. Russia*, [2005], ECHR, App nos 57947/00, 57948/00, and 57949/00.

102 It should be noted that on 20 November 2018, the Court decided three cases against Georgia related to international armed conflict of 2008: *Dzhioyeva v. Georgia* (dec.) [2018], ECHR, App nos. 24964/09, 20548/09, 22469/09; *Naniyeva and Bagayev v. Georgia* (dec.), [2018], ECHR, App nos. 2256/09, 2260/09; *Kudukhova and Kudukhova v. Georgia* (dec.), [2018], ECHR, App nos. 8274/09, 8275/09. They concerned the applications lodged by the residents of Tskhinvali Region, alleging that Georgia risked their lives and damaged and destroyed their property. However, the Court examined the question of proof only and did not address the issue of substantive standards of how the relevant provisions of the Convention applied to armed conflict. Thus, there was no need for the Court to consider IHL.

103 Civilian objects are all objects which are not military objectives, i.e. they are not those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. See API, art 52.

104 In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects (API, art 57(1)).

unknown to the Convention. The right of property is deemed to the "paradigmatic example" of the situation when the solely Convention-based law is insufficient for the correct assessment of alleged violation of the right to property in active hostilities.[106] The main reason is that the basis of such determination is civilian or military status of the attacked property and the analysis of principle of proportionality under IHL, which are usually eschewed by the Court in an unpersuasive manner.[107]

It follows that *Georgia v. Russia (II)* gives rise to necessity for the Court to substantively consider the possible role of IHL while interpreting Article 8 of the Convention and Article 1 of Protocol No. 1 in the context of assessing the lawfulness of destruction of property in armed conflict. This is due to the fact that the Convention itself does not have sufficient normative capacity to deal with the notions of IHL by distinguishing between the civilian and military objectives.

Cases regarding the right to property of forcibly displaced persons in the context of international or non-international armed conflicts are not new to the Court. This issue was raised before the Court in light of the occupation of the North Cyprus by Turkey, security operations by Turkey and Russia and other conflict situations.[108] In *Cyprus v Turkey,* in which the former European Commission abstained from applying IHL rules, one of the members of the Commission noted that there existed relevant IHL instruments outside the Convention, which would strengthen the conclusions reached by the Commission.[109]

The shift, albeit limited, in the Court's reluctance can be observed in judgments of *Sargsyan* and *Chiragov* cases,[110] decided by the Grand Chamber in 2015. The Court for the first time examined the applications of those persons who were displaced from their homes and abandoned their property due to Nagorno-Karabakh armed conflict between Armenia and Azerbaijan. These cases once again gave rise to relationship between the Convention and IHL which the majority of the Court avoided to deal with.[111] However, the Court in both cases referred to relevant IHL rules in the context of the relevant international law, including Article 49 of the Fourth Geneva Convention. The Court noted that despite the absence of rules of IHL which explicitly address the issue of preventing access to homes or property, it observed that:

"Article 49 of the Fourth Geneva Convention applies in occupied territory, while there are no specific rules regarding forced displacement on the territory of a party to the conflict. Nonetheless the right of displaced persons "to voluntary return in safety to their homes or places of habitual residence

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105 Indiscriminate attacks, that is, an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited (API 51).

106 *Molango M.M.,* The Right of Property in Situations of Armed Conflict: The Application of IHL Principles by the European Court of Human Rights, 2008, ILSP Law Journal, 37-38.

107 Ibid.

108 See e.g. *Cyprus v. Turkey,* Commission Report (1976); *Kerimova and Others v. Russia,* [2011], ECHR, App nos 17170/04, *et al.*; *Doğan and Others v. Turkey*, [2004], ECHR, App nos. 8803/02 *et al*.

109 *Cyprus v Turkey,* no 8007/77, EComHR (1983), Separate Opinion by Mr G. Tenekides.

110 *Sargsyan v. Azerbaijan* [GC], [2015], ECHR, App no 40167/06; *Chiragov and Others v. Armenia* [GC], [2018], ECHR, App no 13216/05.

111 Dissenting Opinion of Judge Pinto De Albuquerque, *Sargsyan* (n 110) 108-109.

as soon as the reasons for their displacement cease to exist" is regarded as a rule of customary international law that applies to any kind of territory."[112]

Interpretation of the scope of Article 49 of GCIV by the Court is progressive: whilst the initial reach of this Article is only the occupied territories, the Court expanded its scope "to any kind of territory" by way of labelling it as a rule of customary international law. The Court relied on this interpretation when it examined Article 1 of Protocol No. 1 in *Sargsyan*, in which Azerbaijan submitted that the refusal to grant any civilian access to Gulistan was justified by the security situation pertaining in and around the village. While referring briefly to their obligations under IHL, the Government did not submit any detailed argument in respect of their claim that their refusal to grant civilians access to Gulistan was grounded in IHL.[113] The Court observed that:

"[…] international humanitarian law contains rules on forced displacement in occupied territory but does not explicitly address the question of displaced persons' access to their home or other property. Article 49 of the Fourth Geneva Convention prohibits individual or mass forcible transfers or deportations in or from occupied territory, allowing for the evacuation of a given area only if the security of the population or imperative military reasons so require; in that case, displaced persons have a right to return as soon as hostilities in the area have ceased."[114]

However, the Court considered that Article 49 was not applicable in that context as "they only applied in occupied territory, whereas Gulistan was situated on the Government's own internationally recognised territory."[115] Instead, the Court emphasized the right of displaced persons to return voluntarily to their homes as soon as the reasons for their displacement cease to exist, as this right applied to all kinds of territories:

"the right of displaced persons to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist, which is regarded as a rule of customary international humanitarian law applying to all territory whether "occupied" or "own". However, it may be open to debate whether the reasons for the applicant's displacement have ceased to exist. In sum, the Court observes that international humanitarian law does not appear to provide a conclusive answer to the question whether the Government are justified in refusing the applicant access to Gulistan."[116]

The Court eventually held that, amongst others, there had been a continuing violation of Article 8 of the Convention and Article 1 of Protocol No. 1. The Court acknowledged the relevance of IHL,

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112 *Sargsyan* (n 110) §95*; Chiragov* (n 110) §97 (references omitted).

113 *Sargsyan* (n 110) §§230-231

114 Ibid, §231 (references omitted).

115 Ibid.

116 *Sargsyan* (n 110) §232. See also the dissenting opinion of Judge Albuquerque, who argued that the Court should have examined the case "in conjunction with the international humanitarian law obligations", since such *renvoi* would render Article 1 of Protocol No. 1 contingent upon the *incidenter tantum* application of IHL by the Court, which follows from the principle of harmonious interpretation from *Varnava*. According to this dissenting opinion, considering Article 1 of Protocol No. 1 in line with IHL would contribute to the prevention of fragmentation. See Dissenting Opinion of Judge Pinto De Albuquerque, *Sargsyan* (n 110) 120, §20 and fn. 25.

but concluded that it did not provide "a conclusive answer". Despite that in *Sargsyan* and *Chiragov* cases IHL did not play substantial role in finding violations of Article 8 of the Convention and Article 1 of Protocol No. 1 by the Court, for the present article it is sufficient to conclude that the Court showed openness towards conventional and customary IHL, changing its attitude in previous case law.

7. Conclusion

Georgia v. Russia (II) is both a challenge and an opportunity for the Court. It is to be a seminal case, which will outline the future relationship between the Court and IHL. It seems unavoidable for the Court to consider IHL, as the case concerns active hostilities in international armed conflict, for which IHL was developed. The Court also has an opportunity to pronounce on its role as the monitoring mechanism of IHL.

On the one hand, the Court will have to come out of its comfort zone to deal with the relationship between the Convention and IHL, which it more or less successfully managed to avoid on many occasions, resulting in its inconsistent, fragmented and ambiguous approach to IHL. On the other hand, addressing this challenge in *Georgia v. Russia (II)* enables the Court to shed more light and further interpret the findings of *Hassan*, when the Court for the first time applied IHL directly and in detail. Consequently, the Court will have an opportunity to establish both general and article-specific model of the relationship between the Convention and IHL. This expectation, in the author's view, is based on the several aspects of *Georgia v. Russia (II)*.

Firstly, Russia argues that alleged violations submitted by Georgia exclusively fall under the ambit of IHL, therefore, the only applicable law is IHL as *lex speciaslis* and they are *ratione materiae* incompatible with the Convention, which means that the Court does not have jurisdiction. The Court postponed the examination of this issue for merits stage.

Secondly, *Georgia v. Russia (II)* concerns armed conflict of international character. Thus, the Court is unlikely to turn a blind eye to IHL as it has done in cases regarding non-international armed conflicts. To this end, it can be asserted that the Court made a kind of foundation in the Admissibility Decision in 2011 where it noted that the Convention should be interpreted in harmony with international law, including the rules IHL, in particular in *a zone of international conflict*.

Thirdly, neither Georgia nor Russia made formal derogation from the Convention during armed conflict in 2008. Despite the fact that in such cases the Court examines the cases "against normal legal background" i.e. in the light of the Convention only, in the author's opinion, the Court is unlikely to follow *Isayeva* and will consider IHL due to the obvious international nature of armed conflict.

Furthermore, one cannot escape the impression that claims submitted by Georgia are formulated with IHL terminology. Thus, Georgia urges the Court to a certain extent to consider IHL, but solely for the purpose of interpretation and determining scope of the specific provisions of the Convention in armed conflict. In Georgia's view, IHL and the Convention are to be applied in a complementary and not exclusionary manner. Such regime ensures that the Convention applies directly and IHL indirectly, playing the role of authoritative guidance for interpreting the Convention.

In this regard, right to life (indiscriminate attacks), internment of civilians (right to liberty and security) and destruction of property (right to respect for private and family life and right to property) are of particular significance for the Court. This is because applying those rights in the context of an international armed conflict solely under the Convention, without considering IHL, is not sufficient.

The Convention is unable to legally make distinction between civilians and combatants, assess indiscriminate attacks, legitimate military objectives and collateral damage, precautions and principle of proportionality in hostilities. Therefore, for the correct legal assessment the Court should apply not only peacetime regime of the Conventional protection, but also the regime of armed conflict paradigm, as the underlying idea of IHL is to regulate conduct of hostilities based on statuses of persons and objects, where such statuses are unknown to the Convention.

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Cyber-Attack in the context of the prohibition of the use of force – The need for Reconsideration of International Law?

With the development of modern technology, the issue of reassessment of international law is becoming more and more critical in order to enable adequate regulation of technologies by static norms of international law. The cyberspace is regarded to be one of those cases. With illegal cyber-attacks, states often violate the cyberspace of other countries. Examples of such interventions are 2007 cyber-attack on Estonia, the virus found in the computer system in Iran's nuclear power plant in 2010, and the cyber-attack on the Georgian cyberspace during the 2008 Russian-Georgian armed conflict. While currently there are no special regulations on cyberspace, the role of international law is often diminished.

The article aims to discuss the current international legal regime that applies to cyber operations. In this regard, the focus will be on the relationship between cyber operations and the United Nations Charter, the prohibition of the use of force, and the principle of non-intervention in the internal affairs of states. Analysis of the state practice shows that states perceive cyber-attacks as an independent form of use of force, and they seek legal assessment within the framework of current international law. There is also a tendency to regulate cyber-attacks with specialized norms.

Cyber-attacks require a new understanding in the terms of international law. However, this does not mean that cyber-attacks cannot fall within the framework of the current international conventional and customary law and go beyond its scope. A new understanding is needed only within the framework necessary for the incorporation of cyber-attacks into the already existing international legal framework.

Keywords: *cyber-attack, cyber operation, cyberspace, use of force, international customary law, international law of treaty, evolutionary interpretation, Tallinn Manual, intervention in domestic affairs.*

1. Introduction

The importance of technological development is rapidly increasing in the modern world. In parallel, the norms regulating it remain to be more static. Since the end of the last century, a debate began over putting cyber operations in the framework of law. The 9/11 attack on the United States of America (hereinafter "the USA") raised a concern that cyber terrorism would expand soon. States often infringe on the cyberspace of other states, subsequently, due to the lack of specific regulations, the role of international law decreases. For instance, In 2007, a massive cyber-attack caused a severe

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obstruction of the banking system in Estonia. In 2010, a computer virus provoked problems for the nuclear plant in Iran. The Georgian cyberspace had also become the target of hacker attacks during the Russian-Georgian armed conflict in 2008. It was the most apparent manifestation of cyber-attack in the context of armed conflict. That cyber-attack of an unprecedented scale accompanied aggression of the Russian Federation against Georgia.

The purpose of this article is to examine the instruments of international law that apply to the cyber-attacks, including the evolutionary interpretation of the United Nations (hereinafter UN) Charter to determine: Whether or not the prohibition of the use of force applies to cyber-attacks? Does international law demand new understanding in the context of cyber operations, especially the cyber-attack? Moreover, whether are there rules of international law securing states from cyber-attacks that do not amount to the use of force as given in the UN Charter?

To responding to these questions, the paper addresses state practice and particular examples for better analyzing international customary law concerning cyber-attacks and cyber operations.

It shall be emphasized that the research refers to cyber operations only in the context of *jus ad bellum*. Indications from international humanitarian law will be invoked for resolving the main issues that the article introduces.

2. Law Applicable to Cyber-Attacks

2.1. Do any Existing Treaty-based Norms Address to Cyber-Attacks?

The norms of international law are divided into two categories, first, primary norms that determine general rules for conduct of the states and secondary rules that determine the responsibility of states.[1] For this reason, answers shall be delivered for questions such as what type of norms of international law applies to the cyber-attacks? Furthermore, if there are no specific rules, then is it possible for international treaties to apply to the cyber-attacks?

Since 2000, in its resolutions, the UN General Assembly repeatedly reiterated about the interest of the international community to regulate the use of modern technologies.[2] The General Assembly drew attention to the fact that unlawful utilization of these technologies could badly impact states,[3] and it could pose a critical threat to international peace and security.[4] In 2003 and 2005, the General Assembly held two world summits in Geneva and Tunis on the matters of cyber security.[5] In 2010 in

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1 *See e.g. Cassese A. (ed.),* The Oxford Companion to International Criminal Justice, Oxford University Press, 2009, 19-20.

2 *See e.g.* United Nations General Assembly (UNGA) Resolutions 55/28 of 20 November 2000; 56/19 of 29 November 2001; 59/61 of 3 December 2004; 60/45 of 8 December 2005; 61/54 of 6 December 2006; 62/17 of 5 December 2007; 63/37 of 2 December 2008; 64/25 of 2 December 2009; 65/41 of 8 December 2010; 66/24 of 2 December 2011; 67/27 of 3 December 2012.

3 UNGA Resolutions 55/63 of 4 December 2000; 56/121 of 19 December 2001, Preamble.

4 UNGA Resolutions 58/32 of 8 December 2003; 59/61 of 3 December 2004; 60/45 of 8 December 2005; 61/54 of 6 December 2006; 62/17 of 5 December 2007; 63/37 of 2 December 2008; 64/25 of 2 December 2009; 65/41 of 8 December 2010; 66/24 of 2 December 2011; 67/27 of 3 December 2012.

5 *Roscini M*., Cyber Operations and the Use of Force in International Law, Oxford University Press*,* 2014, 3-4.

Astana, the memorial declaration of the OSCE acknowledged cyber operations as ”increasing transnational threat”.[6] In November of the same year, NATO stated that cyber-attacks could reach such level that may endanger the security and stability of the alliance.[7] In 2011, China, the Russian Federation, Tajikistan, and Uzbekistan, jointly initiated a project of resolution on the international code of informational security.[8] However, the initiative was unsuccessful.

The abovementioned is a manifestation of the rising concern of the international community towards cyber operations and a sign of the approaching universal and specific document on this issue. There have already been such efforts on the regional level, such as the Convention of Cybercrime of the Council of Europe.[9] Also, in 2001 the Dakar summit passed the Additional Protocol to the Convention of the Organization of African Unity on the Prevention and Combating of Terrorism, referring to the cyber-attacks as well.[10] Nevertheless, specific binding document on cyber operations still does not exist.

2.2. Evolutionary Interpretation of International Treaties: Does Current Legal Regime Apply to the Cyber Operations?

Absence of specific treaty norms in cyberspace raises a logical question - does the current international legal regime cover cyber operations? It is not a matter of dispute that international humanitarian law, known as *jus in bello*, in particular, Geneva Conventions of 1949 and its Additional Protocols of 1977 apply to the cyber-attacks as it applies to all of the means and methods of warfare.[11] This approach is supported by the International Court of Justice (hereinafter "ICJ") in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*, stating that the Martens Clause “has proved to be an effective means of addressing the rapid evolution of military technology.”[12] The question arises, whether it is possible to apply UN Charter and other international legal documents to the cyber operations through evolutionary interpretation? A positive answer to this question is essential for having any further discussion.

International law of treaties frequently faces issues of evolutionary interpretation of various treaties. Because of technological advances and other factors, treaties often lose adequacy to modern challenges. Annulment or replacement of these treaties is associated with difficulties and lengthy

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6 OSCE, Astana Commemorative Declaration – Towards a Security Community, SUM.DOC/ 1/10/Corr.1, 3 December 2010, § 9, <http://www.osce.org/cio/74985?download=true> [16.05.2020].

7 NATO, Active Engagement, Modern Defence. Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation, November 2010, §§ 7, 12, <http://www.nato.int /lisbon2010/strategic-concept-2010-eng.pdf> [26.05.2020].

8 UN Doc A/66/359, 14 September 2011.

9 Convention on Cybercrime, Council of Europe, ETS No185, (opening of the treaty to sign: 23.11.2001; entry into force: 01.07.2004).

10 *Salinas de Frias A. M., et al. (ed.),* Counter-Terrorism: International Law and Practice, Oxford University Press, 2012, 1005-1006.

11 For further reading *See*: *Scmitt, M. N.,* Wired Warfare: Computer Network Attack and Jus in Bello, International Review of the Red Cross, Vol 84, Issue 846, 2002, 365-399.

12 *Legality of the Threat or Use of Nuclear Weapons,* ICJ, Advisory Opinion, 8 July 1996, §78.

procedures. In such situations, a primary consideration is given to the contemporary interpretation of the problem, labeled by legal academics as evolutionary interpretation.[13] In *Dispute Regarding Navigational and Related Rights*, ICJ highlighted that the parties to the treaty were conscious of the fact that in time, the interpretation of the treaty would evolve, and hence the treaty was open-ended, there was a presumption that it's terms had evolutionary character.[14] This is one of the remarkable examples of evolutionary interpretation of the treaty.[15] Noteworthy, except for the ICJ, the doctrine of evolutionary interpretation is often used by the European Court of Human Rights as well, indicating that the European Convention on Human Rights is "a living instrument that must be interpreted according to present-day conditions."[16]

Therefore, the evolutionary interpretation of international treaties performs a vital function in the development and codification of international law. Though, it shall be noted that such an interpretation of the law is strongly interlinked with judicial bodies. ICJ or any other international court or tribunal has not yet delivered a judgment on the cyber-operations. Nevertheless, the UN Charter and international legal system still apply to it if interpreted through the virtue of evolutionary theory, in particular with regard to the prohibition of the use of force that corresponds to cyber-attacks.

2.3. Does Customary International Law Apply to Cyber-Attacks?

The positive answer on the problem of evolutionary theory leads us to the next question, notably whether or not we could find any general or particular rule in customary international law that applies to the cyber-operations. Or moreover, whether or not we are facing the process of emerging new rules of customary international law.

Article 38 of the Statute of ICJ defines customary international law "as evidence of a general practice accepted as law."[17] Customary international law, that is mainly represented in a verbal form,[18] consists of two cumulative elements. These elements are State practice and cognitive element or *opinio juris ac necessitates,* that is defined as „evidence of belief that the [State] practice has a binding character and is reinforced by the appropriate rule of law."[19]

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13 *Cannizzaro E, (ed.),* The Law of Treaties Beyond the Vienna Convention, Oxford University Press, 2011, 125.

14 *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua),* ICJ, Judgment, 13 July 2009, §§ 49-52, 66.

15 *Bjorge E*., The Evolutionary Interpretation of Treaties, Oxford University Press, 2014, 1-22.

16 *See e.g. Rasmussen v Denmark,* ECtHR, Judgment, 28 November 1984, Series A, No. 87, § 40; *Guzzardi v Italy,* ECtHR, Judgment, 6 November 1980, Series A, No. 39, §95; *Rees v the United Kingdom,* ECtHR, Judgment, 17 October 1986, Series A, No. 106, § 47; *Ireland v United Kingdom,* ECtHR, Judgment, 18 January 1978, Series A, No. 25, § 239.

17 The Statute of the International Court of Justice, Article 38.

18 Though, there are many conventions that itself represent customary international rules. For example, the Vienna Convention on the Law of Treaty, 1907 Hague Convention, or four 1949 Geneva Conventions.

19 *North Sea Continental Shelf* (Germany v. Denmark/The Netherlands), ICJ, Judgment of 20 February 1969, §77; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US), Merits, ICJ, Judgment of 27 June 1986, § 183.

First and foremost, the existence of cyber specific norms in customary international law shall be determined. The Tallinn Manual is essential in this regard. The introduction of the Tallinn Manual suggests – "because State cyber practice and publicly available expressions of *opinio juris* are sparse, it is sometimes difficult to conclude that any cyber specific customary international law norm exists."[20]

Despite above-mentioned, it is not proper to contend that current customary international law does not apply to cyber operations since the existence of cyber specific rules is under doubt.[21] As Dinstein rightly argues, "State practice shall not necessarily evolve separately towards each weapon."[22] Furthermore, there is an increased number of States whose military manuals consider utilization of cyber forces as a precondition for the application of the right to self-defense. The importance of military manuals in the determination of the customary rule was acknowledged in the *Tadic Case* by the International Tribunal for the Former Yugoslavia.[23] Even though the number of such documents is not impressive, the formation of a customary rule does not require a clear demonstration of support by every State. ICJ reasoned in the *Fisheries Case* that by not protesting on the existing customary rule of straight lines, the United Kingdom had recognized the customary character of the rule.[24] States and international organizations that acknowledge cyber-attacks as a prerequisite for the right to self-defense are following: USA, China, Australia, Cuba, Hungary, Italy, Iran, Mali, Netherlands, Qatar, the Russian Federation, the United Kingdom and European Union.[25] Remarkably, any protest is missing that could obstruct the emergence of a customary rule that deems cyber-attacks to be covered by the prohibition of the use of force or conceiving it as a prerequisite for the right to self-defense.

Hence, emerging state practice is evident and as it is illustrated by more and more states, by including cyber-operations into their military manuals. Also, concrete cases show states invoking the right to self-defense in response or for the prevention of cyber-attacks. As for the second element of customary law, the *opinion juris* is not evident in our case. However, the lack of protest of states leads us to consider that silence as an expression of acceptance. This may be a starting point for emerging customary rule. "The soft law" could also play a crucial role in this process, and it will be reviewed in the next chapter. Before that, in conclusion, it shall be stated that current customary international law applies to cyber operations.

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20 *Schmitt M. N.,* Tallinn Manual on the International Law Applicable to Cyber Warfare, Cambridge University Press, 2013, 5;

21 *Roscini M.,* Cyber Operations and the Use of Force in International Law, Oxford University Press, 2014, 3-4, 25-26.

22 *Dinstein Y.*, Cyber War and International Law: Concluding Remarks at the 2012 Naval War College International Law Conference, International Law Studies, Vol. 89, 2013, 280.

23 *The Prosecutor v. Dusko Tadic,* ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case IT-94-1, 2 October 1995, § 99.

24 *Fisheries Case (United Kingdom v. Norway)*, ICJ, Judgment, 18 December 1951.

25 *Roscini M.,* Cyber Operations and the Use of Force in International Law, Oxford University Press, 2014, 21-23.

2.4. 2009 Tallinn Manual as a Soft Law

In response to the 2007 massive cyber-attack on Estonia,[26] NATO established the Cooperative Cyber Defense Center of Excellence. In 2009, NATO invited 20 distinguished international law experts to draft guiding principles based on international law that would apply to cyber operations both in the situations of *jus ad bellum* and *jus in bello*. As a result, the Tallinn Manual on the International Law Applicable to Cyber Operations was prepared.

Since the Tallinn Manual is the only specific and codified document on cyber warfare, it is necessary to determine its nature. In particular, whether it is a mere opinion of scholars and, therefore, a secondary source of international law according to Article 38(1)(d) of the ICJ Statute or a "soft law" that could be considered as a preliminary stage for the formation of a customary international law.

The term "soft law" was first introduced by Lord MaCnair to describe indirectly binding documents.[27] Soft law is primarily associated with international governmental organizations and resolutions or recommendations they pass. A soft law itself could be categorized as follows: non-binding documents of international organizations such as resolutions, non-binding agreements between states,[28] and non-binding parts of interstate binding conventions.[29]

Soft law is often discussed in the light of *lex feranda*, which is preferably a direction towards which international law should develop.[30] Besides that, soft law is characterized by different traits. Notably, it may be considered to be a mean of reinforcement for traditional sources of international law.[31] Especially interesting seems to be its correlation with customary international law. For instance, in international environmental law, it plays an essential role since it carries *de facto* binding effect[32] and, at the same time, accelerates the formation of a customary rule. Notably, such an approach is not limited only by environmental law. The existence and mandatory character of soft law were recognized as well by the ICJ in the *Oil Platforms Case*. In the *Oil Platforms Case*, Iran based its *compromis* on the 1955 bilateral agreement with the USA that highlighted the necessity of peace and cooperation among the parties. The point is that this agreement did not constitute an international treaty as it represented soft law; however, ICJ considered it and stressed that the agreement should have been applied for interpretation and examination of the conduct of the state parties.[33]

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26 See below section 3.1.

27 *Thurer D.,* Soft Law. Max Planck Encyclopedia of Public International Law, Oxford University Press, 2009, §5. *Roscini M.*, Cyber Operations and the Use of Force in International Law, Oxford University Press, 2014, 45.

28 For example, the 1975 Helsinki Final Act represents soft law by its nature. See Final Act, Conference On Security and Co-Operation in Europe, 1975.

29 *Thurer D.*, Soft Law, Max Planck Encyclopedia of Public International Law, Oxford University Press, 2009, §§ 9, 15.

30 *Thirlway H.*, The Sources of International Law, Oxford University Press, 2014, 165.

31 Ibid.

32 *Beyerlin U., Stoutenburg J. G.*, International Protection of Environment, Max Planck Encyclopedia of Public International Law, Oxford University Press, 2015, §§ 2, 8, 21, 30.

33 *Oil Platforms case (Iran v. USA)*, ICJ, Judgment, 6 November 2003, §52; Also See: *Thirlway H.*, The Sources of International Law, Oxford University Press, 2014, 167.

The reasoning, as mentioned above, is essential for determining the legal nature of the Tallinn Manual. At a glance, this document is a work of universally acknowledged scholars, but the crucial fact is that it uses normative language. Furthermore, the manual was prepared under the auspices of the NATO, and international (intergovernmental) organization - a fully-fledged subject of international law. The Tallinn Manual is more than just mere paperwork of scholars. At least, the manual shall be considered as a subsidiary means for interpretation of international law and placed in the list suggested by Article 38 of the ICJ Statute. It must be highlighted here, that some scholars advocate against formal hierarchy among sources of international law.[34] Besides, the Tallinn Manual could be regarded as a part of soft law that demonstrates the emergence of customary law. Historical facts also support this proposal. For example, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea[35] was prepared by the International Committee of the Red Cross as a part of soft law, however today, that manual is actively exploited by states as customary international law.[36]

3. Inter-State Cyber-Attacks in Practice

3.1. Estonia 2007

In spring of 2007, the Estonian Government announced that the statue of the "Russian Soldier" would be removed to the new location in the suburb of Tallinn. The statue was erected in memorial of soviet soldiers who fell during the war against the Nazi regime. But according to the government statement, now the statue became a symbol of occupation. The ethnic Russian population disapproved the decision of Estonia, and soon the dissatisfaction converted into demonstrations. The cyber-attacks, accompanying violent manifestations, targeted on Government and private sector (such as the media and banking system). There had been launched DDoS (Distributed Denial of Service) type hacker attacks, meaning that websites received excessive requests of information, leading them to slow down or entirely stop functioning. As a result, legitimate customers are distracted from using websites. In the beginning, the DDoS was clumsy and easy to avoid,[37] but soon it upgraded and became difficult to detect. The Botnet had also been exploited. The Botnet is a computer web that is used without permission of the owner. In the Estonian case, 85 000 computers were manipulated to send requests of information to the government websites. Estonian websites could not withstand such a flow and were ultimately crushed.[38] Cyber-attacks continued for three weeks (from April 26 to May 19), although the Government of the Russian Federation denied any link with them. The involvement of the Russian Government was not approved; however, Estonia still seeks Russian Federation responsible.[39]

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34 *Thirlway H.,* The Sources of International Law, Oxford University Press, 2014 117-128.

35 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, ICRC. <https://www.icrc.org/ihl/INTRO/560?OpenDocument> [25.05.2020].

36 *Roscini M.,* Cyber Operations and the Use of Force in International Law, Oxford University Press, 2014, 32-33.

37 *Tikk E., Kasha K., Vihul L.,* International Cyber Incidents: Legal Considerations, Cooperative Cyber Defence Centre of Excellence, 2010, 19.

38 *Steed D.,* The Strategic Implications of Cyber Warfare, Cyber Warfare: A Multidisciplinary Analysis, *Green J. A.*, Routledge, 2015, 78.

39 Russia Accused of Unleashing Cyberwar to Disable Estonia. The Guardian (17 May 2007) <https://www.theguardian.com/world/2007/may/17/topstories3.russia#maincontent> [09.05.2020].

The question was raised in the media and academics whether the DDoS type cyber-attack could be considered as unjustified use of force. Uniquely, those attacks caused severe damage to Estonia. In May 2007, Estonian Parliament Speaker compared effects of the cyber-attacks to the effects of the use of nuclear weapons and stated that cyber-attacks do not cause bloodshed; however, they destroy everything and everyone.[40]

3.2. Russian Cyber-Attacks Against Georgia During the 2008 War under International Law and Tagliavini Report

2008 was remarkable not only because of the aggression against Georgia but because of the massive, unprecedented cyber-attack that the Russian Federation carried out against the public and private sector of Georgia as well.

The first wave of attacks shut down government websites and replaced the information with fake notifications. Lots of disinformation was disseminated, aiming to sow fear among the citizens.[41] Georgian Government even announced that the Russian Federation was carrying out cyber war.[42]

The second wave of attacks targeted at blocking of civil and private websites. For some time, the population had been prevented from access to broadband. Public panic and feeling of helplessness raised, respectively.

The 2009 Tagliavini Report that was prepared by the fact-finding mission on the 2008 war has found: „If these attacks were directed by a government or governments, it is likely that this form of warfare was used for the first time in an inter-state armed conflict.“[43]

Reports on cyber-attacks are one of the distinct specifications of the 2008 Russian-Georgian war.[44] Beyond doubt, cyber-attacks were being executed during the armed conflict. In the first days of the war, Georgian governmental and information websites had been damaged or became inaccessible. Later, some websites had been moved to American, Estonian, and Polish servers.[45] Some experts suggest that these attacks could have weakened the decision-making ability of Georgia, as well as communications with its allies, ultimately leading to a decline in the operational mobility of Georgian forces. The most exciting events that effected the sustainability of the state and where Russian Federation invaded into sovereign rights of Georgia were the followings:[46]

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40 *Ergma E.,* Speaker of the Estonian Parliament, cited in *Davis J.,* Hackers Take Down the Most Wired Country in Europe, Wired Magazine (21 August 2007) <https://www.wired.com/2007/08/ff-estonia/> [23.05.2020].

41 *Markoff J.,* "Before the Gunfire, Cyberattacks", The New York Times*,* 2008. <http://www.nytimes.com/2008/08/13/technology/13cyber.html?_r=0> [17.05.2020].

42 *Swaine J.,* "Georgia: Russia 'Conducting Cyber War'", The Telegraph, 2008. <http://www.telegraph.co.uk/news/worldnews/europe/georgia/2539157/Georgia-Russia-conducting-cyber-war.html> [17.05.2020].

43 Report of the Independent Fact-Finding Mission on the Conflict in Georgia, Vol. II, September 2009, 217–219.

44 *Korns S. W., Kastenberg J. E.,* Georgia's Cyber Left Hook, Small Wars Journal Parameter, Winter Edition, 2008-2009.

45 For example, Polish Server, <www.president.pl>.

46 Georgian government blamed the Russian Federation for instigating "the virtual fire". RFERL 12.08.2008. <http://www.rferl.org/content/Georgian_Government_Accuses_Russia_Of_Cyberwar/1190477.html>; <http://georgiamfa.blogspot.com/2008/08/cyber-attacks-disable-georgian-websites.html> [25.05.2020].

- On July 20, website of President of Georgia was shut down for 24 hours;
- On August 7, several Georgian servers and the Internet traffic were seized and placed under external control;
- On August 8, large-scale cyber-attacks against sites in Georgia began. The source of the cyber-attacks was uncertain. Some reports attributed them to an organization called the "Russian Business Network."[47]
- At this time, it was reported that all Georgian Government websites were unobtainable from the US, UK, and European cyberspace. The Turkish AS9121 TTNet server, one of the routing points for traffic into the Caucasus, was blocked, reportedly via COMSTAR;
- On August 9, the Georgian Ministry of Foreign Affairs website was defaced by hackers, who replaced it with offensive photographs. Other Georgian websites that also suffered cyber or hacker attacks included those of the Ministry of Internal Affairs, the Ministry of Defence, and the website of Sanakoyev's pro-Georgian Interim Administration of South Ossetia. Besides, reportedly the National Bank of Georgia was defaced, and Georgian news portals were affected by DDoS (distributed denial of service) attacks.
- By August 12, website of the President of Georgia and a popular Georgian TV website were transferred to Tulip Systems. Tulip was then also attacked;
- On 12-13 August, websites of Ministry of Internal Affairs and the Ministry of Defence experienced extensive cyber-attacks and two periods of downtime.

At the same time, more limited attacks have been launched against Russian sites as well (Web-site of Ria Novosti (РИА Новости) went offline for 10 hours).

With high probability, cyber-attacks against Georgia were directed by the Russian Government. If that is true, then the 2008 war was the first case ever where cyber-attacks had been carried out in the context of warfare. It must be noted that such attacks are easy to undertake, though challenging to prevent or track origins.

As mentioned in the Article, while considering cyber-attack as a use of force, attention should be drawn to the scale of the attack and the damage it caused. Tagliavini's suggestion that the Russian Government could have managed cyber-operations sheds light on many things.

Absolute blocking of broadband, dissemination of disinformation, and purposeful spreading of fear among the population is nothing but an attempt to cause disturbance and inability to maintain order in the State. Such circumstances threatened the lives of hundreds of thousands of persons whose houses had already been bombed by the Russian air forces. Russian forces had also paralyzed the highway connecting East and West Georgia as they locked Georgian town, Gori. As a result of cyber-attacks, communications between Georgians were obstructed. Indeed, such damage is still unprecedented in the world. Even the attacks on Estonia are not close to the scale of strikes against Georgia.

Thus, the course of Russian cyber-attacks in the 2008 Russian-Georgian war represents yet another case of aggression and unjustified use of force.

[47] Report of the Independent Fact-Finding Mission on the Conflict in Georgia, Vol. II, September 2009, 218.

3.3. Iran 2010

In July 2010, the Government of Iran discovered a virus, later called Stuxnet, installed on its computers. The virus was explored on numerous computer systems of Iran, with epicenter in the Natanz Nuclear Power Plant.

Used for the enrichment of uranium, Natanz is Iran's most advanced nuclear power plant. The Government of Iran claimed that the aim of their program was peaceful, in particular - the production of atomic energy. Though, the international community still has doubts about the possible use of that nuclear energy for the creation of the weapon of mass destruction.[48]

Enrichment of uranium requires thorough perseverance of specific conditions. Firstly, uranium shall be freed of extra admixtures. Then, placed in the centrifuges, it spins with constant speed under certain pressure and temperature.

Stuxnet virus started to change the speed of centrifuges; however, devices did not indicate any malfunction.[49]

The Government of Iran did not disclose details of the virus effects. The Head of the Atomic Energy Organization of Iran announced about detecting the virus before it penetrated the apparatus.[50] On the contrary, according to the statement of the President of Iran, the virus inflicted severe problems on several centrifuges and proper functioning of the software.[51]

Other reports claim that the damage was much more large-scale than the government representatives of Iran declared. The Institute for Science and International Security insisted[52] on alleged damage of not only uranium but of the centrifuges too. According to the evidence of the International Atomic Energy Agency, Iran replaced 1 000 centrifuges in 2009 and 2010 - seemingly as a result of the Stuxnet virus.[53]

Considering that Article 2(4) of the UN Charter is a result-based prohibition, those attacks on Iran could hardly be evaluated as unjustified use of force since, during the attacks, the virus had not been identified and revealed. As the President of Iran declared, intrusion induced malfunction of centrifuges by which enrichment of uranium had been obstructed. This type of attack does not count as unlawful use of force since the material property had not been impaired.[54] On the contrary, if the suggestion of the International Atomic Energy Agency about the breaking down of centrifuges is real, then such kind of harm could constitute a violation of Article 2(4) of the UN Charter.

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48 United Nations Security Council (UNSC) Resolution 1696, 31 July 2006.

49 *Shakarian P.*, Stuxnet: Cyberwar Revolution in Military Affairs. Small Wars Journal, Vol. 7, 2011, 1.

50 "Iran Briefly Halted Enrichment", Aljazeera (23 November 2010), <http://www.aljazeera.com/news/middleeast/2010/11/201011231936673748.html> [11.05.2020].

51 "Iran says Cyber Foes Caused Centrifuge Problems" Reuters (29 November 2010). <http://www.reuters.com/article/iran-ahmadinejad-computers-idAFLDE6AS1L120101129> [24.05.2020].

52 *Albright D., Brannan P., Walrond C.,* Did Stuxnet Take Out 1,000 Centrifuges at the Natanz Enrichment Plant?, Institute for Science and International Security, 2010, <http://isis-online.org/uploads/isis-reports/documents/stuxnet_FEP_22Dec2010.pdf> [22.05.2020].

53 *Katz Y.,* Stuxnet Virus Set Back Iran's Nuclear Program by 2 Years. Jerusalem Post (Jerusalem, 15 December 2010), <http://www.jpost.com/IranianThreat/News/Article.aspx?id=199475> [26.05.2020].

54 *Woltag J. C.,* Computer Network Operations below the Level of Armed Force, European Society of International Law Conference Paper Series, 2011, 1. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1967593> [26.05.2020].

4. The Lawfulness of Cyber-Attacks under the UN Charter

4.1. Examination under Article 2(4) of the UN Charter

Article 2(4) of the UN Charter[55] was referred as a cornerstone of the Charter by ICJ in *Nicaragua Case*.[56] This norm, being part of customary international law,[57] represents a *jus cogens* norm as well.[58] As mentioned in the previous chapter, evolutionary interpretation may apply to the international treaties and among them the UN Charter. Though, in this chapter, the following questions shall be answered - whether or not the UN Charter prohibits cyber-attacks? Does cyber-attack amount to the use of force? Furthermore, if so, then what types of cyber-attacks could constitute the use of force, and how shall be determined whether or not a specific cyber-attack meets the criteria of the use of force?

Experts of the Tallinn Manual suggest that *jus ad bellum* also applies to the particular categories of cyber-attacks.[59] This reasoning stems from the assessment by ICJ in the *Nuclear Weapons Case*, indicating that right to self-defence "apply to any use of force, regardless of the weapons employed".[60] Since the invocation of the right to self-defense correlates with Article 2(4) of the UN Charter and "any weapon" may also imply both the electric means and cyber-attacks, it is evident that *jus ad bellum* in the modern era also spreads over cyber operations. While taking actions in cyberspace, conducting cyber-attack by one State against another one should be perceived as an conduct, while electronic means is the instrument for performing such conduct.

Noteworthy, commentaries to the UN Charter do not oppose the estimation of computer attack, having a similar effect to the weapon, to constitute use of force in the light of Article 2(4) of the Charter.[61] Moreover, in certain circumstances, it may amount to the armed attack, triggering Article 51 of the Charter.[62]

Cyber-attack constitutes the use of force if three prerequisites are met: a) The attack shall be carried out by a State; b) Cyber operation must be perceived as a threat or use of force; c) Threat or use of force shall be undertaken in the context of international relations between states.[63]

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55 "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

56 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ, Judgment, 27 June 1986, §§ 188–190.

57 Ibid*,* §§187-190.

58 *Roscini M.,* Cyber Operations and the Use of Force in International Law, Oxford University Press, 2014, 44.

59 *Weller M. (ed.),* The Oxford Handbook of the Use of Force in International Law, Oxford University Press, 2015, 1112.

60 *Legality of the Threat or Use of Nuclear Weapons,* ICJ, Advisory Opinion, 8 July 1996, §39.

61 *Simma B., et al (eds.),* The Charter of the United Nations: A Commentary, Vol. I (3rd ed.), Oxford University Press, 2012, 210.

62 Ibid*.*

63 *Roscini M.,* Cyber Operations and the Use of Force in International Law, Oxford University Press, 2014, 44.

As for the first criteria, it may entail not only official or *de jure*,[64] but *de facto* organs of state aw well,[65] including non-state actors who remain under the effective control of a state.[66]

Concerning the threat or use of force, the Tallinn Manual declares that this precondition is satisfied whenever the results and effects of cyber operation could be compared to the damage caused by the conventional weapon, which would be enough to assess the action as the use of force.[67]

On the one hand, the prohibition of the threat or use of force under Article 2(4) may apply to cyber operations. However, a clear definition of what may constitute a threat or use of force does not exist. In situations like that, the 1969 Vienna Convention, reflecting customary international law, acknowledges interpretations based on contextual analysis. It must be highlighted that the term "force" is also given in the preamble of the UN Charter as well as in Articles 41, 44 and 46. In all of these cases, the word "force" is preceded by the word "armed", while Article 44, in general, refers to the use of armed forces. Such a distribution causes a diversity of opinion. On the one hand, it could be assumed that Article 2(4) also relates "use of force" to the armed context, similar to other articles of the Charter. Likewise, it is arguable that Article 2(4) purposefully omitted the term "armed" because its scope is broader than other norms. The latter argument is supported by the spirit of the Charter too, since the Charter aims to protect future generations from the cruelty of the war.[68] Even if the argument for the narrow scope of Article 2(4) wins, cyber-attacks would still fall into its ambit as they obviously may constitute an armed attack. The only remaining question here addresses the degree of a scale that a cyber-attack shall have so that it could amount to the "armed attack" for the UN Charter. In this regard, legal doctrine uses three distinct factors: assessment of the means of attack, assessment of the target, and assessment of the effects of the act. In scholarship, more dominant is the latter approach that draws attention to the assessment of the direct and devastating effects on property and humans.[69]

4.2. Factors Established by the Tallinn Manual

Group of international experts agrees that when determining whether cyber-attack constitutes use of force or not, states shall pay attention to the following factors: severity; immediacy, directness; invasiveness; measurability of effects; military character; state involvement; and presumptive legality.[70]

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64 Articles on State Responsibility for Internationally Wrongful Acts, International Law Commission, 2001, art. 4.

65 Articles on State Responsibility for Internationally Wrongful Acts, International Law Commission, 2001, art. 8, It shall be emphasized that the ICJ confirmed customary character of both Article 4 and 8. *See*.: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment, 26 February 2007, §§ 385, 398.

66 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ, Judgment, 27 June 1986.

67 *Schmitt M. N.,* Tallinn Manual on the International Law Applicable to Cyber Warfare, Cambridge University Press, 2013, art. 11, 45.

68 *Roscini M.,* Cyber Operations and the Use of Force in International Law, Oxford University Press, 2014, 45.

69 Ibid*,* 47.

70 *Schmitt M. N.,* Tallinn Manual on the International Law Applicable to Cyber Warfare, Cambridge University Press, 2013, წესი 11, § 9(a-t), 54-55.

Severity is the most important of all the factors listed above. Indeed, a cyber-attack followed by the destruction or death of humans falls within the scope of use of force. Whenever such a material loss is absent, cyber-attack may still fall in the ambit of Article 2(4) considering its scale, length, intensity, etc.[71] Immediacy is determined by the period between the beginning of an attack and the emergence of its effects. Directness reflects the causality between the attack and damage inflicted. Invasiveness is given whenever incursion into another state's cyberspace occurs without approval. The measurability of effects deals with the ability to measure the damage inflicted. Unlike other factors, presumptive legality shall be absent. For example, the economic pressure of one State on another falls within the presumptive legality and therefore does not violate international law, nothing to say about Article 2(4) of the UN Charter. In the end, a cyber-attack must carry the military character. However, this should not be perceived as just an attack on military facilities.[72]

It shall be noted that, cyber-attacks on Estonia in 2007 can be freely assessed as the use of force in the light of Article 2(4) of the UN Charter. But the problem is the lack of evidence that the Russian Government had planned or organized the above-mentioned cyber-attack.

4.3. Principle of Non-Intervention as an Alternate to Prohibition of Use of Force for Low-Intensity Cyber-Attacks

In particular cases, cyber operations may not reach the threshold required for qualifying it as the use of force, even though such acts remain within the margins of international law.

Those cases would constitute interference in the internal affairs of a state, a prohibited act under international law that infringes state sovereignty[73] and the customary law principle of non-intervention.[74]

Whenever the primary rules of international law are violated, the secondary rules trigger and establish responsibility. Obviously, in case the threshold of threat or use of force is not reached, a military response could not be justified. However, the matter is regulated by alternative means. In this respect, 2001 Articles on State Responsibility for Internationally Wrongful Acts[75] plays a significant role as it reflects customary international law and establishes state responsibility.

Traditionally, the principle of non-intervention in the domestic affairs was always discussed in light of the use of force.[76] However, ICJ in the *Nicaragua Case* distinguished the use of force as a

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71 *Weller M. (ed.),* The Oxford Handbook of the Use of Force in International Law, Oxford University Press, 2015, 1114.

72 Ibid, 1115-1116.

73 For example, *See*.: GA Resolution 2131(XX) of December 21, 1965, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, that condemns armed and any kind of intervention in internal affairs of States. 1970 Declaration of the UN General Assembly and 1975 Helsinki Final Acts are also relevant in this context. (Final Act, Conference On Security and Co-Operation in Europe, 1975).

74 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US),* Merits, ICJ, Judgment, 27 June 1986, §202.

75 Articles on State Responsibility for Internationally Wrongful Acts, International Law Commission, 2001.

76 *Damrosch L.,* Politics Across Borders: Nonintervention and Nonforcible Influence of Domestic Affairs, American Journal of International Law, Vol. 83, 1989, 3.

"particularly obvious" form of illegitimate intervention.[77] Therefore, despite having clear margins that place the customary rules on the principle of non-intervention alongside the prohibition of the use of force, the former shall still be considered as a distinct concept.[78] According to Judge Jenning's declaration, "the principle of non-intervention stands as an autonomous rule of customary international law".[79]

The principle of non-intervention could be viewed as a beneficial legal tool for states to avoid cyber-attacks not causing material loss, but have adverse effects.

Notably, the literature mainly places cyber-attacks in the context of the use of force. Thus, a lack of examination of cyber-attacks in light of the principle of non-intervention provokes a question.

This fact may stem from the understanding of sovereignty that is a legal category, defined by the geographical borders. As ICJ ruled "the basic legal concept of State sovereignty in customary international law... extends to the internal waters and territorial sea of every State and the air space above its territory."[80]

This kind of definition of sovereignty affects the scope of the principle of non-intervention which accompanies the principle of sovereignty.[81] As for the effects of territorial understanding of the principle of sovereignty, unjustified intervention could be at hand whenever it occurs on the territory or against the territory of a state.[82]

In light of this, cyberspace is thought to be a dimension where states could not exercise their territorial control. The International Institute of Humanitarian Law observes that "the distinctive feature of cyberspace is that it is a national environment and beyond the jurisdiction of any single nation."[83]

However, the US Department of Defense advances the opposite approach, observing cyberspace as a common area, similar to high seas, air, and space.[84]

Thus, it does not come as a surprise that international law commentators avoid from arguing that intervention into the virtual space of State is an intervention against sovereignty. For instance, in the context of cyber-attacks, the intervention of one State into another's non-material area, such as electricity or radiation, could hardly be considered a breach of obligation.[85]

Nevertheless, arguably, state sovereignty is not strictly limited since customary international law is familiar with a broader interpretation of sovereignty. Sovereignty protects states from external interference, affecting their capacity of decision making and a process of internal policy development.

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77 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, ICJ, Judgment, 27 June 1986, § 205.

78 *Jennings R., Watts A.,* Oppenheim's International Law (9th Edition): Volume 1 Peace, Oxford University Press, 2008, 429.

79 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US),* Merits, ICJ, Judgment, 27 June 1986, § 534.

80 Ibid, § 212.

81 Ibid, § 202.

82 *SS Lotus Case (France v Turkey)* [1927] PCIJ Rep Series A. No. 10, 18.

83 *International Humanitarian Law Institute,* Rules of Engagement Handbook. September 2009, 15.

84 *US Department of Defense,* The Strategy for Homeland Defense and Civil Support, June 2005, 12.

85 *Kanuck, S.,* Recent Development: Information Warfare: New Challenges for Public International Law, Harvard International Law Journal, Vol. 37, 1996, 288.

ICJ has established an approach in favor of the broad interpretation of sovereignty. While determining the customary status and its margins for the principle of non-intervention, the Court declared in the *Nicaragua Case* that:

"A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely. One of these is the choice of a political, economic, social, and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention…"[86]

Accordingly, prohibited intervention comprises coercive actions that fall within the scope of the non-intervention principle. In this regard, the exact scenario would be a state intervention aiming to coerce another state to change its policy.[87] Still, coercion solely is not enough. *Nicaragua Case* defines that the coercion shall relate to an affair in which State has complete discretion. This element is also highlighted in the literature.[88] Observing these elements is essential for the prevention of all forms of intervention to become unlawful, since, through their practice, states may change the cause of the evolution of customary international law. For example, in *Nicaragua Case,* ICJ discussed the possibility of such a customary rule that would allow states to intervene directly or indirectly, with or without using force whenever moral or political reasons justified this.[89] Nevertheless, ICJ stated that there is no such right to intervene in modern international law.[90] This approach is essential since there is always a chance of modification of the principle of nonintervention in case of appropriate state practice and *opinion juris*.

The purpose of this paper is not to define the scope of the principle of non-intervention, but to demonstrate that this principle applies to cyber-attacks whenever the later probably amounts to the use of force. For that, based on the above-mentioned analysis, it is vital to establish a) whether or not the intervention targets to coerce a state to change its policy and b) if the coercion is used. Provided that the conclusion is affirmative, as the next step, it should be assess whether such intervention affects those issues that are at the discretion of the targeted State. Deciding the first issue necessitates an assessment of the effects on the targeted State. The second issue deals with the purpose of the intervention.

Considering this, it is interesting whether the 2007 attacks on Estonia represent prohibited intervention. To explain that, first, we should determine whether those attacks aimed to modify the policy of the Estonian Government. Here we need to estimate the scale of damage done by cyber-

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86 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US),* Merits, ICJ, Judgment, 27 June 1986, § 205.

87 *Jamnejad M., Wood M.,* The Principle of Non-Intervention, Leiden Journal of International Law, Vol. 22, 2009, 348.

88 *Damrosch L.,* Politics Across Borders: Nonintervention and Non-forcible Influence of Domestic Affairs. American Journal of International Law, Vol. 83, 1989, 2.

89 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US),* Merits, ICJ, Judgment, 27 June 1986, § 206.

90 Ibid, § 207.

attacks. In 2007, having had the most prominent web in Europe, Estonia was called "the information society".[91] Government, citizens, and private sector were highly dependent on internet services. In 2007, 95% of banking operations had been enforced through the internet.[92] That is why the cyber-attacks on the banking system damaged the economic activities.

Media stations also became the target of attacks. Mostly, the population had been accessing media through the internet as well. Due to this, the disconnection of primary information websites prevented the population from understanding the scale and results of the cyber-attacks. Additionally, after discovering the foreign origin of the attacks, the incoming internet traffic had been disconnected, and thus, Estonia had been cut off from the world.

Attacks had a substantial adverse effect on the public sector too. Websites of the Prime-Minister and its political party, apparatus of the President, Parliamentary and State Audit's sites also became targets. These sites went dysfunctional, unable to update information, or maintain communication via e-mail.[93]

Finally, it is noteworthy that the attacks on Estonia lasted for the whole three weeks. Taking into consideration this amount of time alongside the intensity, arguably, those attacks bear elements of coercion, attempting to change the Estonian Government's decision on relocation of the statue of the soldier.

As for the question - whether or not the attacks related to the matter that should have been freely decided by a state - it goes without saying that a state does not possess the right to interfere with another state's decision regarding relocation of statue of utmost importance and particular interest. In other words, this is a field where the principle of non-intervention unconditionally protects a state.

In conclusion, 2007 cyber-attacks are a manifest violation of the principle of non-intervention and sovereignty of Estonia. This determination is critical for suppression of unlawful acts, prevention of their repetition, and whenever possible, claiming of reparations.[94] Besides, customary international law allows states to take countermeasures in case the unjustified acts are enduring.[95] Such countermeasures shall satisfy the criteria of necessity and proportionality.[96]

All that being said, the principle of non-intervention creates a legal framework securing states from cyber-attacks when cyber-attack does not constitute use of force but is characterized by coercion of other states with regards to the matters that fall entirely in their domestic discretion.

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91 *Tikk E., Kasha K., Vihul L.,* International Cyber Incidents: Legal Considerations, Cooperative Cyber Defence Centre of Excellence, 2010, 16.

92 Ibid. 17.

93 *Woltag J. C.,* Computer Network Operations below the Level of Armed Force, European Society of International Law Conference Paper Series, 2011, 5.

94 Articles on State Responsibility for Internationally Wrongful Acts, International Law Commission, 2001, Art. 30-31.

95 Ibid, Art 49.

96 Ibid, Art 51.

5. Conclusion

In the footsteps of technological advancements, reassessment of the conservative approach towards international law becomes more and more relevant. One of the main reasons for the initiation of such a process lies in the need for regulation of cyber-attacks that are undertaken on an international level. Cyber security is strengthening its position in state security matters.

With regards to the questions raised in the introduction of this paper, based on the presented analysis, could be summed up as follows:

1) Cyber-attacks shall be thought to be within the scope of Article 2(4) of the UN Charter since:

- Conduct is considered to be a use of force according to its results. If cyber-attacks would cause effects similar to the armed attacks, then according to the cyber equivalence approach, they would constitute a use of force;
- The concept of the use of force is not as strictly limited with the "armed" criteria. For example, as "armed attack" defined in Article 51 of the UN Charter;
- Article 2(4) is a contractual clause opening the way for evolutionary interpretation - the purpose of this rule was to forbid actions in international relations bearing coercive elements. It was impossible in the drafting process of the UN Charter to foresee the appearance of cyber operations. Evolutionary interpretation is essential for both the security of the intention of the rule and the filling of its gap. Accordingly, whenever certain criteria (scale, intensity, gravity, etc.) are met, cyber-attacks could constitute prohibited conduct under Article 2(4) of the UN Charter.

2) On the other hand, a cyber-attack not reaching the threshold of the use of force would still fall within the scope of international law, in particular the principle of non-intervention. To benefit from such protection, it is necessary that:

- The purpose of the intervention is coercion of a state to modify or change its policy;
- Coercion shall be related to the matters that may be freely decided by the targeted State.

3) In light of this, there is a trend of regulating the cyber-attacks by specialized legal norms. A good demonstration of this is the Tallinn Manual that was advanced by an international organization such as NATO. The involvement of NATO in the drafting of that document raises its authority. Moreover, the authority of the Tallinn Manual as a source of soft law increases because it was drafted by the most qualified scholars and using normative language.

4) Furthermore, state practice and their cognitive attitude towards cyber-attacks play an essential role as well. Examination of military manuals and growing state practice demonstrates that cyber-attacks are perceived as a distinct form of use of force, and their assessment is undertaken through the current state of international law.

5) Cases of Georgia, Estonia, and Iran indicate the scale of damage that may be inflicted by the intervention into cyberspace. In this view, we may assume that soon a new branch of law, namely international law of cyber operations, would emerge, focusing on the means of response and state responsibility.

6) ICJ has established an *obiter dictum* that the interpretation of the contractual clause may evolve from time to time. This allows the application of current legal rules on cyber-attacks. Such an approach implies a novel understanding of international law regarding cyber operations.

In conclusion, to answer the question posed by the article, it can be submitted that cyber-attacks require a new approach in the context of international law; however, it does not mean that such an attack stays beyond the scope of current international conventional and customary law (prohibition of the use of force and principle of non-intervention). A new understanding is decisive concerning the incorporation of cyber-attacks into the current system of international law.

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