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Official Pursuit Principle in the Georgian Law

1. Introduction

History of creation and development of criminal pursuit, as of a procedural institute of the criminal law, is quite interesting. The mentioned procedural term with its form and meaning established nowadays and reflected in the Georgian science and the legislation, would certainly not exist in the old Georgian law. Establishment of this institute had to pass certain stages and use experience of many countries.

At present, criminal pursuit is a complex of activities considered by the criminal legal proceedings, which are implemented by the relevant state institutions to disclose a person who committed the offence.[1] Criminal pursuit is directed against the person who committed the crime and it serves for protection of the public interest. From this side, it is very interesting to see if a similar institute of criminal pursuit or a state institution entitled to disclose and punish the criminal existed in the old Georgian law.

A lot of interesting information is collected in some of the old Georgian law texts. Some notes about the "pursuit" are also mentioned in historical forms of Georgian legal proceedings.

Historically, there were two different forms of pursuit known in the feudal state court proceedings. The first of them was accusatory process, which existed in the feudal states during the Renaissance period. The second was the criminal investigation or inquisitive process, which was characteristic for the later feudal period.[2] In the 19th century, combination of the elements from the mentioned types of the forms of proceedings created the third type, which is called a mixed process.[3]

Criminal investigation process and civil lawsuits were implemented in the same manner. Each of the cases was a public dispute between a prosecutor and a defendant or a plaintiff and a respondent. Indictment proceedings were started by the initiative of a prosecutor. As for the court, it played a passive role and the scope of its activities was limited to the assessment of the parties' according to the formal requirements of the law. The cases were conducted verbally.

The parties had the equal procedural rights. It was their responsibility to collect and present the evidence. The parties were equally responsible at the court. The prosecution was usually presented by

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[1] *Strogovich M.S.,* Criminal Law Process, Tbilisi, 1948, 104*; Aabashidze G.,* Prosecutor as a Body of Criminal Law Pursuit (at the Investigation Stage), Tbilisi, 2011, 9 (in Georgian).

[2] *Lekveishvili M.,* Court Proceedings in East Georgia During 17th-18th Centuries, Tbilisi, 1963, 3 (in Georgian).

[3] *Vacheisjvili Al.,* Criminal Law Process, Abstracts from History of Criminal Law Proceedings, Part 1, Tbilisi, 1955, 30 (in Georgian).

the victim or his/her closest kin. Representation was not allowed due to the privacy of the process. The defense, with its modern meaning, did not exist. The prosecutor and the defendant were obliged to prove their truth with their speeches defined by the rule and the factual conditions. The silence of the defendant meant a recognition of the charge.[4]

When a struggle started for eradication of scattering and for strengthening the king's governance, the form of the pursuit proceeding was less corresponding to the idea of creation of a central state. For this reason the form of this process gradually changed into so call investigation, inquisitorial process, which soon became the dominant form. So called "official pursuit principle" was developed and "initiation of criminal law pursuit" became the prerogative of the state and not of a private body. With special civil servants, the state started initiation of criminal law proceedings; the investigation process, unlike the accusation process, rejected the competition principle; the legal proceedings became confidential and written. The parties did not have equal rights any more. The process was divided into two stages. The preliminary investigation, when the evidence was collected, got central importance. The judge, who was in charge of investigating the case, had unlimited rights. One more characteristic element of the investigation process was discussion of the case at a closed meeting and rejection of public announcement of the judgment. The first place among the evidence had an acknowledgement of guilt by the accused; it was called "the queen of the evidence". The investigation (inquisitorial) process knew three types of verdicts: "guilty", "not guilty" and "not proven" – leaving the accused suspected. The third type of verdict was taken when the court could not collect enough evidence to consider the defendant guilty or not guilty and the case remained undecided for a definite or indefinite period, until finding some new circumstances.[5]

As for the mixed type of the process, it was established on two different principles: a preliminary investigation – investigation basis and a hearing of the criminal case at the court – competition principle.[6] Thus, the conduction of a legal case knew three forms of the process: accusatory, investigation (the same as inquisitorial) and mixed processes. At the initial stage of development of the law, criminal as well as civil cases were conducted directly by the court. At the later stage of the development, "public basis" was introduced by the criminal investigation (or inquisitorial) proceedings.

New institutes - so called "official pursuit principle" and "preliminary investigation", which were necessary elements for strengthening the central government were established. The state bodies, which implement the mentioned functions, were being established. These bodies were considered as parts of the court or as an effective mechanism subordinated to the court control, which served for fighting against narrow feudal interests and strengthening the idea of the united government. From this point of view, the old Georgian law texts are not exception. They contain important information about the principle of "official pursuit".

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4 *Lekveishvili M.,* Court Proceedings in East Georgia During 17th-18th Centuries, Tbilisi, 1963, 3-4 (in Georgian).

5 Ibid., 6-8.

6 *Vacheisjvili Al.,* Criminal Law Process, Abstracts from History of Criminal Law Proceedings, Tbilisi, 1955, 126; see more in: *Strogovich M.S.*, Criminal Law Process, Tbilisi, 1948, 47-50 (in Georgian).

2. "Samparavtmedzeblo" – A Legal Investigation Institution as the Body Implementing the Pursuit

The first source of the Georgian law, where the term "pursuit" is mentioned, is "The Deep of Renewal for the Land Possession and Inaccessibility to Giorgi III and Shiomgvimi" dated 1170.[7] The mentioned deed mentions "Samparavt-Medzeblo" Court.[8] This document states that "Samparavt-Medzeblo justice is implemented wherever it finds something stolen and kept by a peasant in his home. If someone has stolen several times, our Chenils will hang him, or prosecute him; and if he goes far away, our Chenils will chase him. Our thieves pursuers will take away what was stolen and establish the justice".[9] This section of the deed clearly shows that in that period, in Georgia, there was a state institution of "Samparavtmedzeblo" ("thieves pursuing"), which was in charge of look for the thieves, finding, pursuing and prosecuting them.[10]

With this regard, Iv. Javakhishvili mentioned the following: "the text in the deed of Giorgi III makes it obvious that "justice of Samparavtmedzeblo" was not established in 1170, but earlier".[11] "If the thieves pursuers have not enetered the possessions of Shiomgvimi, because this monastery could not be accessed, it is clear that thieves pursuers should have been there before and had the right to pursue and arrest in all other places".[12] Proceeding from this, Iv. Javakhishvili concluded that in 1170, strict punishments were established for the pirates and incorrigible thieves. To eradicate these crimes and make pursuit of the thieves easier the rights of the officials at the "Samparavt-Medzeblo justice" were expanded.[13]

Based on Iv. Jvakhishvili opinion, we can assume that an element of the investigation process – "official pursuit principle" was established in Georgian law earlier, but there is no historic document proving it. Iv. Javakhishvili discussed about the earlier existence of the "Samparavt-Medzeblo" institution based on the text of the above mentioned deed.

The main activity of the "Samparavt-Medzeblo" was fighting against the crimes related to the property. The aim of the "Samparavt-Medzeblo" institution was to suppress with strict measures the offender who committed the crime against the property. The "thieves pursuer" investigated the cases of this category and had the function of trying the offenders. Later "thieves pursuer" was replaced by "pirates pursuer". And according to "Dasturlamali", "Khevistavs" appeared instead of "pirates pursuers" and had the same function.[14]

Apart from a "thieves pursuer", for these cases "Chenilnis" were appointed. Their obligation, from one side, was searching and detaining and from another side – execution of the verdict after the

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7 Old Georgian Law Texts, Volume II, *Dolidze I.* (Ed.), Tbilisi, 1965, 20 (in Georgian).
8 *Javakhishvili Iv.,* Works in 12 Volumes, Volume VII, Tbilisi, 1984, 343 (in Georgian).
9 Old Georgian Law Texts, Volume II, *Dolidze I.* (Ed.), Tbilisi, 1965, 22-23 (in Georgian).
10 *Javakhishvili Iv.,* Works in 12 Volumes, Volume VII, Tbilisi, 1984, 343 (in Georgian).
11 Ibid., 344.
12 Ibid., 344.
13 Ibid.
14 *Surguladze Iv.,* Abstracts from Georgian Law History, Volume I, Tbilisi, 2000, 24-25 (in Georgian).

court proceedings.[15] "Thieves pursuers", as high officials, presumably had judging functions i.e. they directly judged, while "Chenilnis" had the administrative functions at the court. Their obligation was to pursue the offenders, arrest them and execute the verdict.[16]

It should be mentioned that, the criminal proceedings of that time were based on "accusation" principle, which implied that private individuals were the prosecutors. The court proceedings were lead by these private active bodies. But for one of the components of the legal system, which was targeted at fighting against the thieves, law makers considered it necessary to establish conduction a specific process. This form, as more clear and flexible one, became necessary for the state to fight against the increasing number of crimes, which threatened the public interests. The state used different methods against the criminals who violated established rule of the law. One of these methods is criminal law proceedings.[17]

Based on Al. Vacheishvili's opinion, "accusation" process was recognized and dominant at the courts. It can be considered as characteristic procedural form for the development statehood. But according to the historical sources, it is indisputable that in the Georgian procedural law of that period, there was a kind of a seed of the investigation process; and this is proved by existence of the "Samparavt-Mtdzbnelo" court. With this institution, the Georgian process of that period, which was pierced by "accusation" principle, goes to a new direction – acquires elements of investigation proceedings. "Old accusation process means the initiative of the private bodies in starting a criminal pursuit case, the conduction of the case is based on the activity of the parties. "Samparavt-Medzeblo" court proceedings are built on the contrary principle: the court starts a criminal case *ex. officio*; "Chenilnis" who have special functions are there for pursuing the criminals and detaining them. Initiation of the criminal case proceedings and pursuing is not any more dependent of the initiative of the private bodies and their intentions."[18]

The historic materials prove that in that period, for improving the rule of the law, the government distinguish a special type of court from the common system of the feudal courts. The activities of the special type of court were guided by public i.e. "official principle", because "criminal law pursuit used to be started by the state body". Initially the "Samparav-Medzeblo" court was dealing with a small range of criminal law cases, which was expended afterwards. As we can see, the offences related to property were subject to it. But this was not the only type of the crimes; there were many other forms of offences which were heard at the courts of the ordinary type. [19]

Apart from the ordinary courts reviewing all cases, the existence of the legal body, which was responsible for looking for, finding, pursuing and prosecuting signifies that the state views a crime as a fact which damages the public interests and breaks the established social relationships in the state. Proceeding from this, the state using its body, takes the responsibility to pursue the criminals.

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15 *Javakhishvili Iv.,* Works in 12 Volumes, Volume VII, Tbilisi, 1984, 343 (in Georgian).

16 *Vacheisjvili Al.,* Criminal Law Process, Abstracts from History of Criminal Law Proceedings, Vol. II., Tbilisi, 1948, 31 (in Georgian).

17 Ibid., 32.

18 Ibid., 33.

19 Ibid., 35-36.

Therefore, we can speak about an effective principle of the official pursuit during the mentioned period.[20] In particular, the state from its side creates the powerful mechanism for protection of the public interests.

3. "Pirates Pursuer" as an Official Pursuing Entity

One more old Georgian legal text, which mentions an institution similar to "Sampara-vtmedzeblo" is the deed of King Svimon dated 1590 about the pirates pursuers.

According to the text deed of Kind Svimon, the scope of competence of the pirates pursuers was much wider than that of the thieves pursuers. They were in charge of all criminal cases. Thus, it turns out that in Georgia there was a special criminal court. From standpoint of the law history, certainly, this signified an important establishment.[21] If the deed of the King Giorgi III mentioned thieves pursuers, in the deed of King Svimon pirates pursuers were mentioned instead of them. But the essence and the function of this state servant remained the same. Additionally, according to the deed the responsibility of a pirates pursuer is also dealing with the heavy crimes against the humans like a murder. A case of this category is mentioned as "blood case".[22] "If there is a blood case, he should come to us for establishing justice and have the decision". [23]

Therefore, during the following centuries, along with the decline of the state governance, "principle of official pursuit" must have become also weaker. But it seems that by the end of the 16th century, it was still effective and expended the sphere of it's activities.[24] Thus, it is obvious that "the function of the official pursuit" is a successful mechanism of the state for fighting against the offence and the central government considers it reasonable to widen the area of its competence.

4. Pursuit Principle According to the Laws of Kind Vakhtand VI

Apart from the mentioned law manuscripts and the related researches, "official pursuit principle" is not directly mentioned in other sources of the law history. But some scientific works talk about the institutions like e.g. preliminary investigation, position of Khevistavi etc. This indicates that legal proceedings of that period included the investigation type process and also its characteristic element – pursuit principle.

From this point of view, legal system based on King Vakhtang VI laws is interesting. According to his law text, there was an institute of "Mdivanbegi", which reviewed the criminal and civil cases. "Mdivanbegi" was the chief jury - Chairman of the Court. He had judges, a secretary and also so

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[20] *Vacheisjvili Al.,* Criminal Law Process, Abstracts from History of Criminal Law Proceedings, Vol. II., Tbilisi, 1948, 95 (in Georgian).

[21] *Javakhishvili Iv*., Works in 12 Volumes, Volume VII, Tbilisi, 1984, 344-345 (in Georgian).

[22] *Surguladze Iv*., Abstracts from Georgian State and Law History, Tbilisi, 1963, 46, 51 (in Georgian).

[23] Old Georgian Law Texts, Volume II, *Dolidze I.* (Ed.), Tbilisi, 1965, 204 (in Georgian).

[24] *Vacheisjvili Al.,* Criminal Law Process, Abstracts from History of Criminal Law Proceedings, Vol. II, Tbilisi, 1948, 95 (in Georgian).

called "Iasaulis". Iasaulis were divided into groups: a) "the ones saying the truth and taking no bribes", which were in charge of fulfilling the investigation; and b) "reproaching and detaining Iasaulis", which were responsible for arresting and executing the verdicts.[25]

Additionally, we have to mention one more position, which was called "Eshikaghabashi". His responsibility was fulfillment of the verdicts made by the kind of by Mdivanbegi. He was in charge of "Danistrad Service" and for investigation of cases appointed Kachibs and Iasauls as "Danisters". "Bokaultukhutseses", who had the same functions as "Eshikaghabashes", also "Iasauls" and "Kafiches" represented institutions similar to policy. They were sent to the locations for investigating concrete cases: "check, inquire and bring the true story".[26] In Tbilisi, there was a special "Iasauli" house, where the prisoners were brought for questioning. [27]

All above mentioned, indicates that during that period, there existed the civil servants having investigation functions and the right to carry out an investigation. This means that "Kafiches" and "Iasaulis" could go to the place of the crime, clarify the issue etc. prior to the hearing of the case at the court. Unfortunately, it is not mentioned who would act as prosecutor at the court.[28] But it should be said that, during the period when inquisitorial process was effective, the functions of accusation and decision-making were merged and the court also presented the side of the prosecution. "Mdivanbegi" was a civil servant, who was responsible for establishing the justice and finding out the truth and first of all, he had to be a prosecutor. "Eshikghasbashes", "Bokauls", "Kafiches" and "Iasaulis" were so called assistants of "Mdivanbegi". The obligation was only clarifying the issue, collection of the evidence and execution of verdict. Most likely they did not act as prosecutors at the court. But we can definitely say that they represented the party which is now prosecution.

One more civil servant, which has investigation and pursuing function is "Khaveistavi". "Based on historical sequence, "Khesitavi" must have replaced "thieves pursuer" and "pirates pursuer".[29] "Dasturlamali" states that "Khevistavi" had the function of pursuing the thieves. He has investigation as well as court functions. The investigation function of "Khevistavi" is to pursue and discover the offender. He had to find a thief, study and analyze his case, question the witnesses and the accused.[30]

Thus, according to "Dasturlamali", at the local level, "Khevistavi" is authorized to pursue officially offenders. His authority is not only limited to the pursuit of thieves, but is also function of

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[25] *Vacheisjvili Al.,* Criminal Law Process, Abstracts from History of Criminal Law Proceedings, Vol. II, Tbilisi, 1948, 42 (in Georgian), as the sources it is indicated *Gabashvili V.,* Darbazi Level Civil Servants according to Dasturlamali, Acad. N. Mari Institute of Language, History and Material Culture, "Moambe", XIII, 1943 (in Georgian).

[26] *Vacheisjvili Al.,* Criminal Law Process, Abstracts from History of Criminal Law Proceedings, Vol.II, Tbilisi, 1948, 43 (see: *Gabashvili V.,* Darbazi Level Civil Servants according to Dasturlamali, Acad. N. Mari Institute of Language, History and Material Culture, "Moambe", XIII, 1943 (in Georgian)).

[27] *Surguladze Iv.,* For Georgian State and Law History, State System in Later Feudal Period, Volume I, Tbilisi, 1952, 284 (in Georgian).

[28] *Lekveishvili M.,* Court Proceedings in East Georgia during 17th-18th Centuries, Tbilisi, 1963, 39 (in Georgian).

[29] *Surguladze Iv.,* For Georgian State and Law History, State System in Later Feudal Period, Volume I, Tbilisi, 1952, 339 (in Georgian).

[30] Ibid., 340, 344.

deciding the case. The function of pursuing considers not only physical chasing, discovering and punishing, but also implementing obligatory actions characteristic to the modern legal criminal pursuit.

5. Criminal Law Process in the 2nd Part of the 18th Century

Georgia court process of the 2nd part of the 18th century wad mainly investigation character. But some elements of accusatory process can also be observed. During this period, a preliminary investigation of the cases of the state importance were conducted by the Kind of feudal lords assigned by the Kind of this purpose. In all other cases it was carried out by "Mdivanbegs". It is remarkable that an "Iasaul of a "Mdivaneb", which had investigation function based on the law book of Kind Vakhtang, cannot be observed during the 2nd part of the 18th century.[31] However, generally the position of "Iasauli" existed in that period.[32] In the "Mdivanbegs" Court the functions of "Iasauli" could be given to a wide range of the individuals. They used to lose their function upon completion of their missions.[33]

Based on the studies, M. Melikishvili thinks that an accusatory process type was common during the 17th -18th centuries in the East Georgia. However, the qualities of an investigation so called inquisitorial process were also observable. This type of process was used for investigating the offences against the state of the king. The case was investigated also by the special civil servants at the court – "Iasauls". The investigation function could be given also to the other individuals apart from "Iasauls".[34]

6. Wrapping Up

Thus, based on the historical types of Georgian legal proceedings and the study of the ancient texts of the Georgian law, it can be stated that in Georgia, "official pursuit principle" existed in Georgia. Certainly, it was different from the modern criminal law pursuit. But it should be considered as the forerunner and seed of the criminal law pursuit. According to the historic law sources, "accusatory" process is distinguished by the initiation of the criminal pursuit by the private bodies and qualities of the collection of evidence. The elements of the mentioned process – considering its initiation – are similar to the private criminal law pursuit, which was reflected in the Criminal Code of Georgia dated 1998. "The official pursuit principle" (hen the state is interested that special state institutions start the criminal law proceedings for the offences of a certain type) is a descendant of inquisitorial (or the investigation) process. It can be compared to the modern criminal law pursuit, which aims to protect public interests. As it was mentioned above, creation of the "official pursuit

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31 *Kekelia M.,* Court Organization and Proceedings at the Court Prior to Joining Russia, Book I, Tbilisi, 1970, 272 (in Georgian).

32 *Surguladze Iv.,* For Georgian State and Law History, State System in Later Feudal Period, Volume I, Tbilisi, 1952, 283-287 (in Georgian).

33 *Kekelia M.,* Court Organization and Proceedings at the Court Prior to Joining Russia, Book I, Tbilisi 1970, 272 (in Georgian).

34 *Lekveishvili M.,* Court Proceedings in East Georgia During 17th-18th Centuries, Tbilisi, 1963, 108-109 (in Georgian).

principle" in Georgia was conditioned by the desire of creating a strong, central government and fight against the criminality from the side of the state. Apart from this, the study of the historic sources proved that this institute is such a powerful tool of the state, that the government gradually expands the limits of its activities.

Certainly, it is difficult to discuss about the exactly similar identities the main element of the investigation process of this period – "official pursuit principle" and modern criminal law pursuit, because this depends of many factors, system and structure of the state governing institutions, socio-economic situation, development of the law etc. But the parallels can be drawn between them, namely:

During the period of effectiveness of the investigation process, the "official pursuit" starts by the initiative of the central government; modern criminal law pursuit is also implemented with the initiative of the state by means a special representative – Prosecutor.

Implementation of the criminal law pursuit serves the idea of fighting against the offences and protection of public interests; "pursuit principle" mentioned in the sources of the Georgian Law is targeted for fighting against the offences affecting the state interests and property, because the central government of that time considered that these kind of offences affected the public interests.

Modern criminal law pursuit is a complex of activities considered by the criminal law procedure. It is targeted at discovering the person who committed the crime and ensuring that the measures considered by the law with regards to his action are taken. [35]

As it can be seen from the historic sources "official pursuit principle" is not a single action, but a complex of actions with an objective of punishing the person who committed the crime.

When talking about the resemblance between the "principle of pursuit" - an element of an investigation process of the old Georgian law and the criminal law pursuit, it should necessarily be mentioned that the fact that a special representative, which had different names in different times, (e.g. Mparavtmdzebneli or Thieves Pursuer, Mekobartmdzebneli or Pirates Pursuer, Khevistavi etc.) was given by the feudal state's government the function of pursuing and also the authority of executing the justice and this is unacceptable for the modern Georgian criminal process. Investigation, accusation and judging functions factually were not divided in that period. Proceeding from this, during an effective investigation process, it is unnecessary to discuss the principle of competitions unlike the process of "accusation".

Additionally, when discussing "official pursuit principle" which had been effective in feudal Georgia, as a conclusion, it should also be mentioned that in Georgia, there were public officials, which were not directly involved in the implementation of the criminal pursuit but represented the prosecution party based on their functions. These were "Chenilnis", "Kafichis", "Iasaulis" etc.

As it was mentioned above, based on the historic sources of the law, "accusation" process that was effective in feudal Georgia was characterized by initiation of the criminal law pursuit by the private bodies. This is similar to the criminal law pursuit as it is given in the Criminal Code of 1998, because in the both cases an initiator of the pursuit is a private body – an injured party i.e. disposition is characteristic to this type of process.

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[35] See Georgian Criminal Code of 1998 as it was on April 1, 2009, Article 44, 43^1 Part.

Sulkhan Oniani*

For the Meaning of Term "Btche" in Old Georgian Law

1. Introduction

For law history researches it is known what great importance the clarification of the exact meaning of a juridical concept, term has. It is especially obvious, when a researcher is faced with a task – to study law institutes, about which the direct sources of information are scarce or do not exist at all. In such a case each term that can be at the researcher's hand might be turned into the valuable information.

By paraphrasing H. Berman's idea it can be said that law and moreover a juridical term "has not only history, but it tells us a history itself".[1] In each term there is a historical will of a legislator and it is some kind of clue to understand law philosophy of those times.

Iv. Javakhishvili was paying a great importance to the analysis of terms, by help of which he made lots of valuable conclusions[2] and stimulated next generations to work in this direction.[3]

The term "btche" is often used in juridical monuments, historical documents and literary sources for denoting "judge" and "gate", "doorway". In modern language vocabulary it has the same meaning, but exhaustive studying of etymology and an associative field of "btche" (judge) is still very important to understand the Georgians' attitude to justice. That's why this article can be considered to be the next step in this line after the researches performed by M. Kekelia[4] and G. Nadareishvili.[5]

In modern court activities from the viewpoint of carrying out justice after applying the correct law with the following execution it is very important a function of finding a way of reaching a mutual

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1 *Berman H.J.,* Law Tradition of West: Age of Formation, 2nd Edition, Moscow, 1998, 26 (Russian translation of *H.J. Berman,* Law and Revolution, the Formation of the Western Legal Tradition, Cambridge/Massachusetts/ London, "Harvard University Press", 1983).

2 *Javakhishvili Iv.,* Works in 12 Volumes, Vol. VI, Tbilisi, 1982, 24-35; Vol. VII, Tbilisi, 1984, 188-192, 339-340 (in Georgian).

3 *Dolidze I.,* "Dachkhubilni" or "Dachkhibulni", Bulletin of the Academy of Science of Georgia"Matsne", Tbilisi, 1979, №1, 185-186; *Nadareishvili G.*, Proving Without Cross, Journal "Law", Tbilisi, 1993, №7-8, 77-80; *Nadareishvili G.,* One Old Judicial Evidence, Journal "Soviet Law", №1, Tbilisi, 1984, 45-51; *Surguladze Iv.,* Sulkhan-Saba Orbeliai's Political and Juridical Opinions, Tbilisi, 1959, 185-187(in Georgian).

4 *Kekelia M.,* About Names of Conciliators of Disputes in Old Georgian Literature (V-X Centuries), Bulletin of the Academy of Science of Georgia "Matsne", №2, Tbilisi, 1972, 144-153; *Kekelia M.,* For Content of the Term "Btche" (Judge) in Georgian Law Books, Bulletin of the Academy of Science of Georgia "Matsne", №4,1973, Tbilisi, 160-170 (in Georgian).

5 *Nadareishvili G.,* Why Judge Was Called "Btche" in Feudal Georgia, Bulletin of the Academy of Science of Georgia "Matsne", №3, 1978, Tbilisi, 182-185 (in Georgian).

agreement between parties and some kind of the third alternative, a common way between opposing parties. The present article gives an exhaustive answer to the question why "btche" was used for the word "judge" in old Georgian law and what kind of connection is between "judge" and the second homonym of "btche" – "gate", "doorway".

2. "Btche" in Old Georgian Law

For denoting judge old Georgian law uses different terms: "msajuli" (juryman), "mosamartle" (judge), "diambegi" (senior judge), "moravi" (mediator).[6] Among them is "btche" and words derived from it: "sabtcho" (court); "btchoba", "ganbrtchoba", "gabtchoba" (consideration);[7] "nabtchobi", "ga-nabtchobi" (court decision);[8] "mecnierni sabtchota sakmetani" (Scientists of Court Matter, experts-specialists of law matters)[9] and others.

The opinion connected with the meaning of the term "btche" (judge) in legal history having been expressed so far can be summarized in the following way:

1. According to Iv. Javakhishvili "btche" appears in the X-XI centuries and only during a certain time denotes "judge", and "btchoba" (discussion) – "trial". Later "btche" disappeared, but "btchoba" (discussion) remained in written and spoken language already under the meaning of "conference". In the Georgian translation of Holy Scripts "btche" and its plural form – "btcheni" are only used for expressing "gate" and not for "judge". The remainder of the meaning spread in West Georgia is "tchishkari" (gate), which is derived from "btchiskari" first through progressive assimilation ("s" > "sh") and then by removing the letter "b". According to Iv.Javakhishvili there is not "btche" and "btchoba" in the Georgian Lexicon of Sulkhan-Saba Orbeliani (XVII century), but there is "brtche" and "ganbrtchoba" in it. "Ganbrtchoba" in his dictionary means "trial" and he is grounding it by Exodus 18.16 of the Bible, but in the Bible (one of the Georgian Manuscripts) edited by Baqar instead of "ganbrtchoba" the verb "ganvsji" (judging, discussing) is fixed. Hence Iv. Javakhishvili concludes, that in Sulkhan-Saba's Georgian translation instead of "ganvsji" (judging) was used "ganbrtchoba" (trial).[10]

Iv. Javakhishvili's reference that there is not "btche" and "btchoba" in Sulkhan–Saba's Georgian Lexicon is right in relation to "judge" and "law", but the word "btche" by Saba is really indicated but with the meaning of "gate" (entrance).[11] As for Iv. Javakhishvili's supposition about Sulkhan-Saba having such manuscript, where "ganbrchoba" means "try", is confirmed by M. Kekelia.

2. M. Kekelia specially studied the above mentioned question and cast doubt on Iv. Java-khishvili's reference that "btche" (judge) in X-XI centuries was used instead of the previously existed

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6 *Kekelia M.,* For the Content of the Term "Btche" in Georgian Law Books, Bulletin of the Academy of Science of Georgia "Matsne", №4, Tbilisi, 1973, 164, 170 (in Georgian).

7 *Orbeliani S.,* Georgian Lexicon, Vol. 1, Tbilisi, 1991, 117(in Georgian).

8 *Kekelia M.,* For the Names of Conciliators of Disputes in Old Georgian Literature (V-X Centuries), Bulletin of the Academy of Science of Georgia "Matsne", №2,Tbilisi, 1972, 151(in Georgian).

9 *Javakhishvili Iv.,* Works in 12 Volumes, Vol. VII, Tbilisi, 1984, 386 (in Georgian).

10 Ibid., 339-340.

11 *Orbeliani S.,* Georgian Lexicon, Vol. 1, Tbilisi, 1991, 117(in Georgian).

term "Msajuli" (lay judge). After that it only remained in literature with the meaning of "btchoba" (conference) and in the Holy Script it only denotes "gate" (entrance).[12]

M. Kekelia found the cases of using the term "btche" (judge) with the meaning of a person performing trial as in monuments. translated from foreign languages, as well as in Georgian ones: Giorgi Merchule's "Life of Grigol Khantsteli" (953, original Georgian monument); "Martyrdom of forty-five martyrs" (VIII century, translation); "Spacious Balavariani" (IX-X centuries translation); Evsebi Kesarieli "Remembrance of the first deacon first martyr Stephen" (translated before the X century); Iovane clergyman and Polibios epoiscope "Epiphan Kupreli's Life" (982, translation);[13] M. Kekelia specially emphasizes the postscript of the apocrypha, translated before the X century into Georgian "Martyrdom of Philectimon": I, Alexander, bibliographer of "btches" (judges) of King Gordiane, wrote it", which in the scientist's opinion means a person performing a trial (judge).[14] The same interest is caused by mentioning "btche" (governor, judge) many times with the meaning of a person performing a trial in the rewritten Gospel of Adishi in 897 (unlike the Gospels of Parkhali and Jruchi, where in this place "head" is used): "And they bound Him and led Him away and delivered Him up to Pilate the governor" (Matthew 27.2); "And if this should come to the governor's ears" (Matthew 28.14); "Then the soldiers of the governor took Jesus into the Praetorium" (Matthew 27.27); "Now Jesus stood before he governor and the governor questioned Him" (Matthew 27.11); "And He did not answer him with regard to even a single charge, so that the governor was quite amazed" (Matthew 27.14); "Now at the feast the governor was accustomed to release for the multitude any one prisoner they wanted" (Matthew 27.15).[15]

As for the period after the XI century M. Kekelia widely discusses dates in the monuments of law:

It is worthy of attention to mention Aghbugha Law (XIII-XIV centuries), in which intermediary is emphasized, i.e. by help of mediators agreement and truce are reached. "shua dasxmulni" (sitting mediators), "shuaeta shesvlit" (entering mediators), "shuata dakhedvis" (looking mediators), "sapatio katsni" (respectable men) – are those terms,[16] which express not a will of royal authority, but unjudicially functioning persons, chosen by the parties to investigate only a concrete case. In law books of Bagrat Kuropalat and Beqa-Aghbugha there are not terms: "msajuli" (umpire) and "mosamartle" (judge). They are replaced by "btche", which as M. Kekelia says, is quite correctly thought by I. Dolidze to be a person with judicial function given to him by the state authority. In law books of Aghbugha activities of "btche" are called "btchoba" or "ganbtchoba" with the meaning of consideration; in a law book of Vakhtang VI (XVIII century) with the meaning of a person resolving a disputable matter the following terms are used: "msajuli" (umpire), "mdivanbegi"(senior judge), "shuakatsi" (mediator) and "btche". Among them according to M. Kekelia, "btche" has the meaning of "umpire" and "judge";[17] from foreign law books

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12 *Kekelia M.,* For the Names of Conciliators of Disputes in Old Georgian Literature (V-X Centuries), Bulletin of the Academy of Science of Georgia"Matsne", №2, Tbilisi, 1972, 145-146 (in Georgian).

13 Ibid, 149 (in Georgian).

14 Ibid., 150.

15 Ibid.

16 *Kekelia M.,* For the Content of the Term "Btche" in Georgian Law Books, Bulletin of the Academy of Science of Georgia "Matsne", №4, Tbilisi, 1973, 161(in Georgian).

17 Ibid., 162.

included in the collection of Vakhtang VI the term "btche" is known only by the Georgian version of the Greek law with the meaning of "mediator": "When two men had a dispute, they did not apply to a judge, king, patriarch or metropolitan, they did not want their judgment, they chose a man to whom they went and said that they had a dispute and wanted him to settle it. Just that judge is called "btche" (article 136).[18] Just with this meaning "btche" was used in the court documents of East Georgia in the II half of the XVIII century and "the Georgian Customary Legislation" (1813) or the ethnographical reality has kept it with this meaning up to the present.[19]

M. Kekelia thinks that because of the fact that a translator of Greek law is Kvipriane Samtavneli (as a layman Kozma eristavi, leader of Aragvi, Georgian mountain province), he as a resident of the place where customary law is widely used, must have known well the juridical nature of the court chosen by controversial parties and its name too. Hence Greek "aireto crite" described in Article 136 was not translated word-to-word as "distinguished judge", but it appeared as "btche", which had been established in habitual law of the Georgian mountain dwellers.[20] So in legislation for the first time just by this translation "btche" was assigned to a person chosen by controversial parties to settle their dispute, but the law book of Vakhtang VI continued the tradition of Georgian law monuments which had been composed before it and the word "btche" used not to express "mediator", but a king's judge official.[21] Later in the II half of the XVIII century the word "btche" mainly became a judge of a habitual law institute in east Georgia. In the previous period of customary law it was also used with same meaning, but the difference was that in its general meaning a judge of the authorities was also meant. In customary law "btche" with the meaning of an investigator of a dispute became more stable because other terms "msajuli" (umpire), "mosamartle" (judge) could not be established there. The duration of the term originated in the community relations compelled even the state authorities, which had been faced with the fact, to confess to bring only "btche" into legislation acts of the following period as a conciliator of controversial parties by customary law. As for west Georgia there until the abolishment of kingdom-principalities (XIX century) the word "btche" was still used with its general meaning of judge.[22]

According to M. Kekelia in old Georgian literature (V-X centuries) any person conciliating a dispute, secular or ecclesiastical, appointed by the state or chosen by the parties, was called "msajuli" (umpire) or "btche", but later – "mosamartle" (judge). But in legislation monuments for the name of persons conciliating a dispute were used the following terms: "sapatio katsi" (a respected man), "shua katsi" (a mediator), "shuata daskhmulni" (sitting mediators) and others. The terms "msajuli" and "btche" are of older origin, than "mosamartle" (judge); these three terms are completely identical and are used in the same contexts interchangeably; all three were established in a literary language.[23] In west Georgia the term "btche" maintained the meaning of a judge of the authority till the end, but in

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[18] *Kekelia M.,* For the Content of the Term "Btche" in Georgian Law Books, Bulletin of the Academy of Science of Georgia "Matsne", №4, Tbilisi, 1973, 164 (in Georgian).

[19] Ibid.

[20] Ibid., 166.

[21] Ibid., 167.

[22] Ibid., 169.

[23] Ibid.

east Georgia in the XVIII century the term "btche" gradually separated with this meaning and in customary law it was called "mediator". In Svaneti its corresponding word is "morevi".[24]

M. Kekelia also gives several examples from the monuments of before, as well as after the XI century, in which "btche" is used in the meaning of the entrance door.[25]

3. Basing on works of Iv. Javakhishvili and M. Kekelia, G. Nadareishvili took another step in stating the meaning of "btche". According to him "btche" was used for denoting "judge" not only in the early-feudal period, but in the antique period as well.[26] On one side G. Nadareishvili focused on Iv. Javakhishvili's conclusion that the word "tchishkari" (gate) had been derived from the word "Btchiskari" and in the ancient Georgian translations of the Bible texts "btche" means "entrance door",[27] on the other side he based on the research of M. Kekelia, that in the monuments before the X century "btche" means "judgment-making person", "governor" and "head", because in those days administration and justice were less delimitated from each other (in some manuscripts of the Bible Pilate is mentioned as "btche" and "msajuli" (judgment-making person), while in other manuscripts he is mentioned as "mtavari" (governor).[28]

G. Nadareishvili drew very interesting parallels between the customs peculiar to the antique world, namely: by the correct note of the researcher, according to the ceremonies adopted in Israel and Judaea (in general in classical eastern countries) the most important arrangements (e.g. agreement on transferring a piece of land) were made in the presence of all those witnesses who were sitting at the city gate or at the gate of the strengthened area, i.e. sitting at the entrance door. The gate of city as an area for gathering people served as a place of making judgment and concluding arrangements-agreements. Into the fenced cities or privately owned estates people were coming through a gate. Babylon had a hundred gates made of copper. At the city gate of the old country there was arranged a square for gathering people and a trade area. According to N. Mari for Japhetians (Japhet, the youngest son of Noah, to whom Georgians belong themselves) was characteristic high technique of constructing buildings of local stones next to the colossal irrigation facilities: fortresses-cities and trading at the city gates, to which, According to G. Nadareishvili one more custom - justice was added.[29]

As G. Nadareishvili remarks, an echo of the great importance of the city gate is the name of Central government of ottoman's Turkey – "babiali" (that means high Porte, Sublime Porte). In Georgian language "kari" (door) or "mepis kari" (king's door) was also used for denoting a king's house.[30] In the

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[24] *Kekelia M.,* For the Content of the Term "Btche" in Georgian Law Books, Bulletin of the Academy of Science of Georgia "Matsne", №4, Tbilisi, 1973, 169-170 (in Georgian).

[25] Ibid, 151-152 (in Georgian).

[26] *Nadareishvili G.,* Why Judge Was Called "Btche" in Feudal Georgia, Bulletin of the Academy of Science of Georgia "Matsne", №3, Tbilisi, 1978, 182 (in Georgian).

[27] Ibid.

[28] Ibid., 183.

[29] Ibid.

[30] Here can also be mentioned judicial office of the united feudal Georgia – "Saajo kari" ("The pursuing door," The Court), It should be also emphasized that on the whole territory of the Caucasus there are spread lots of place-names having the same stem – "kari" (door): Dariali (door of alans), Klde-kari (the rocky door), Tashis-kari (door of Tashi), Kartlis-kari (door of Kartli).

old world reality the right of the ownership of the city gate, as a rule, belonged to the city. Therefore the word "tchishkari" (door, gate) often meant force, power, strength, which is seen well in the books of the New and Old Testament – Jesus Christ says: "And I also say to you that you are Peter, and upon this rock I will build My church, and the gates of Hades shall not overpower it" (Matthew 16.18).[31] It is also worthy to mention the importance of a wooden door of the house in the old East (Mesopotamia). When people were forced to leave their houses, they took their doors with them. A door, gate had also a religious, cult purpose, in that period justice and religious was one thing.[32]

By G. Nadareishvili's correct remark when Babylon was included in the old Sumerian-Acadian kingdom, in Sumerian it was called "Kadingiri" – "gate of Gods", but in Acadian the later name of Babylon was meant as "Babili", i.e. "gate of God".[33] In Georgian it was used and it is used again to divide a book into divisions – "kari" (door). In the Jews "baba" got the meaning of a part of a canon or a paragraph.[34] According to G. Nadareishvili the fact that "baba" ("tchishkari", gate) was the name of a part of a canon or a juridical tractate (division, paragraph, titulus) and that in the presence of representatives of the authority and people at the city gate the ceremony of making judgments, punishment of offenders, working out juridical acts and etc. take place, became a basis of the fact that door, gate ("tchishkari"), "btche", which in Georgian translations of the Bible is used with the meaning of "kari" (door) became connected with judge and court. "Btche" (main entrance) and judge, who was holding a judgment meeting at the main gate of the city, were connected with each other and "btchoba" (making consideration, judging) was formed from "btche".[35] In one line of "Qilila and Damana" (translation of the XVII century) "btche" is used in both meanings: judge and main entrance in one sentence: "Dear Judge ("btche"), we wish you hundred years of life, and the gate ("btche") of your hart opened for the people, who come to you for the justice". And from the above mentioned G. Nadareishvili concludes that Georgian "btche" (judge), "brchiskari" (gate) allows us to observe reliable testimonies of the mentioned archaic words, these oldest witnesses of history in order to find out the connection between "btche" and "btchiskari".[36]

The similar position has G. Topuria, who thinks that the homonymy is the secondary and is connected with the Bible realities: in Jerusalem and in other cities at the entrance of the city gate were settled judicial, mediatory and other matters. It was a place of meeting, consideration, examination and these activities were conducted by the person standing at the gate, which according to Z. Sarjveladze might have been called "m-btche". Later the letter "m" was removed causing this homonymy. So the basis of the semantics of "btche" (judge) is the meaning of "gate", "entrance".[37]

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[31] *Nadareishvili G.,* Why Judge Was Called "Btche" in Feudal Georgia, Bulletin of the Academy of Science of Georgia "Matsne", №3, Tbilisi, 1978, 184 (in Georgian).

[32] Ibid (in Georgian).

[33] Ibid.

[34] Ibid.

[35] Ibid., 184-185.

[36] Ibid., 185.

[37] *Topuria G.*, For the Etymology of the Word "Btche", Journal "Georgian Heritage", Vol. II, Kutaisi, 1998, 107 (in Georgian).

After summarizing opinions about the term "btche" existed in scientific literature it is really possible to take another step in this direction and ask a question again: Why is such a close associative connection between "judge" and "entrance door"? Did not this phenomenon have deeper symbolic cause other than a tradition of holding juridical processes at the gates of the city? Does it show indirectly legal ideas of its creator?

3. Why Has "Btche" Homonymous Meaning?

To clarify this question the following questions should be put:

- Which space does a door, as an architectural element of a building or facility, belong to: inner or outer space, in other words – to the left or to the right space of it?
- What function does a door, as an architectural element of a building or facility have, of closing or opening?
- What kind of associative connection is between the functions of a door, as an architectural element of a building or facility, and activities of a judge?

It is axiom, that law is a human phenomenon. Man exists in time and of course in space. These are dimensions by which man is restricted and accordingly all human events are restricted by the same dimensions.

About space Lao-tzu wrote: "Crockery is made of clay, but the essence of the crockery is created by the emptiness inside it. Doors and windows are cut in the walls but the essence of the house is created by the emptiness inside. It is true: who recognized what is full and visible, he also recognized emptiness and invisible".[38]

A human as a bio-psycho-social being,[39] is naturally characterized by segmentation of the space around him, which is well known to specialists, studying psychology of behavior. According to behaviorists[40] there are four space zones, characteristic for a modern human being. These are: an intimate zone (15-46 cm), a personal zone (46 cm-1.2 m), a social zone (1.2 m – 3.6 m) and a public (from 3.6 m). By lots of experiments and observations it is confirmed that man differently reacts to the violation of different zones; the strongest reaction to a potential aggressor is expected when the nearest zone is violated; but if a man considers an aggressor of his personal zone to be very close to him, to be his friend, he meets him with "open pose", which shows a high coefficient of trust.[41]

Of course spatial segmentation was also characteristic for our ancestors, which is well seen in lexical units of the language, mainly in antonyms: "shin" (in) – "garet" (out), "shinauri" (domestic) – "gareuli" (wild), "natsnobi" (known) – "utsnobi" (unknown), "chveniani" (ours), "sxvisiani" (theirs),

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[38] *Lao-tzu,* Dao De Jing, Tbilisi, 1990, 93 (in Georgian).

[39] *Kiknadze D.,* For Systematic Understanding of Motivation of Guilty Behavior, Journal "Almanac", №13, Young Lawyers Association, 2000, 123 (in Georgian).

[40] Here it is meant: "Behaviorism" to wide extent, as a science of studying psychology of human behavior and so called "body language".

[41] *Pease A., Pease B.,* The Definitive Book of Body Language, How to Read Others' Thoughts by their Gestures, Published by Pease International Pty, Buderim, QLD, Australia, 2004, 192-208.

"aqauri" (local) – "iqauri" (stranger) and others. It is natural that these terms point to different social behavior and accordingly to different spheres of legal regulation.

In many languages including Georgian to the word "fire" ("tsetskhli", "kera") expressing family unit and denoting society gathered round a campfire, for example Georgian "komli" (smoke) and its Svanian corresponding word "mezge" ("lemesg" – "fire"), "kera" (location of fire) and others. There is an opinion that "kera" was created earlier than a dwelling house and it is possible that it does not only precede the creation of a dwelling house, but it was just one of the reasons of creating a covered building to defend fire from the rain and wind.[42] In such a building one family was gathering; later other terms: "sakhli" (house), "fudze" (basis) and "tcheri" (ceiling) were added to the lexicon denoting family union: "mosakhle" (dweller), "mosakhleoba"(population), "ertsakhli" (one family), "sakhlishvili" (child from the same family); a phrase: "Enjoy the ceiling (family), die the enemy!" and others.[43]

Peoples of the ancient world and including the Caucasians had tradition of settling down in high places. Therefore it is logical that the next term expressing a social circle – a group of genetically bound relatives – "gvari" (family name, surname) is associated with both "mountain-hill" and "resemble", "equal". The Georgian word "gvari" (in mountain dialects "gori") except for the kinship denotes an inhabitant of a mountainous place. The question "Ra gvari khar?" ("What's your family name?") – is identical to the question: "What kind of man are you?" ("Visi gorisa khar?"); the question: "Rogor khar?" ("How are you?" in Svan: "Magvard khari?"), "Kind" ("this kind" or "that kind") denotes distinctive feature or state. The feature is greatly affected by genetic and climatic-geographical factors along with the other factors. In Svan the word "govar" implies "equal", "similar", with whom you are connected by the rights and obligations that are different from those of stranger (or someone who has nothing in common with you). That's why there exists such qualification of guilt as betrayal and an old Georgian juridical term for denoting a person doing this action – "shina-gamtsemeli"[44] ("shina" – yours, your family, "gamtsemeli" – betrayal).

It is not an accidental coincidence that "gaghma" (far from here) and "gamoghma" (near to us) are associated with the opposition of life and afterlife. "Gaghma gasvla" (to go somewhere far from here, outer) with the meaning of death is confirmed in Georgian,[45] as well as in Svan texts, where staying "out" ("qam") is equated with dying: "qam asadkh", "qam lirde" ("died", "perished", "passed away"). "Light" ("samzeo"), as already domesticated zone, is opposed to "darkness" ("shaveti", "suleti"), as a less domesticated space, which along with positive qualities might have negative qualities as well and acting in it might cause more danger.[46] It is also interesting that the word "atviseba"

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42 *Chartolan M.,* From the History of the Material Culture of the Georgian People, Academy of Science, Tbilisi, 161, 64-65 (in Georgian).

43 *Qaldani A.,* Culture of Towers of Mountain Dwellers of the Central Caucasus, Tbilisi, 1990, 41 (in Georgian).

44 *Orbeliani S.,* Georgian Lexicon, Vol. II, Tbilisi, 1993, 302 (in Georgian).

45 "Then the king said to the servants, "Bind him hand and foot, and cast him into the outer darkness in that place there shall be weeping and gnashing of teeth" (Mathew 22.13), see the New Testament, Representation of the Union of Biblical Societies of Georgia, Tbilisi, 2003 (in Georgian).

46 *Qaldani A.,* Culture of Towers of Mountain Dwellers of the Central Caucasus, Tbilisi, 1990, 72-73 (in Georgian).

(acquire) means to know, understand and make "tviseba" (quality) your own, but un-acquired means unknown.

So the answer to the first two questions is obvious itself:

Entrance door is a basic means of communication, which at the same time unites and separates two opposed spaces: macro- and micro- space.[47] In this case there is ideal coincidence of a technological function and symbolic value.[48] Just an echo of a functional meaning is that the door was the only legitimate means for entering into the space confined with walls and finding the other way to enter there from the juridical point of view was automatically associated with illegal act. It is echoed by the following phrase of the New Testament: "Truly, Truly, he who does not enter by the door into the fold of the sheep, but climbs up some other way, he is a thief and a robber. But he who enters by the door is a shepherd of the sheep. To him the doorkeeper opens and the sheep hear his voice and he calls his own sheep by name and leads them out" (John 10.1-3); "I am the door; if anyone enters through Me, he shall be saved and shall go in and out, and find pasture" (John 10.9).[49] Just by this reason door is connected with right – sacrifice of the door of city Ganja to Gelati Monastery by Georgian king Demetre I (XII century) symbolically is an act of conquering the city and disarming the protecting fence, as it was a tradition of handing over a key the city as a sign of capitulation in the Middle Ages Europe.[50]

As a door was a part of both spaces in the opinion of mountain dwellers of the Caucasus it did not belong to either of them and was perceived as the third, intermediate substance between two initial ones. In this relation it is interesting some ritual actions connected with the doorway. One of them is "putting a gun to shame". On seeing the gun put on the doorway the Svans let pigs tramp it, in Abkhazia – dogs. To the same events connected with the doorway belongs the following episode from Svan folklore: A guilty wife by her husband's order was put at the doorway so that people entering through the door would spit at her and wipe their feet on her. A person or an object in this case is at the boundary of inner and outer space, it does not belong to either of them and so is left beyond the net classifying a cultural space.[51] The similar symbolic meaning is in many Georgian folk tales, when a guilty woman is put tied at a crossroad – a crossroad does not belong either one or the other road.

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47 *Qaldani A.,* Culture of Towers of Mountain Dwellers of the Central Caucasus, Tbilisi, 1990, 72 (in Georgian).

48 Ibid., 72-73.

49 See the New Testament, Representation of the Union of Biblical Societies of Georgia, Tbilisi, 2003 (in Georgian).

50 Here is also interesting inseparable attribute of a shepherd – a cudgel, an instrument for both shepherding and guarding sheep from wild animals (a thick end for repelling of animals and a thin end for shepherding sheep). As a door has not only a closing function, but it also has an opening function, it is possible that closing the door is actually closing it with a bolt, bar, stick. A cudgel is one of the earliest instruments of self-defense, because of which since the ancient times it has been considered to be a symbol of power. It is reflected in Roman vindication, which takes its name from "Vindicta" (Praetor's baton, ceremonial staff used in manumission). The same was in the Middle Ages in Georgia, there were institutes of "khelargnosani" ("canes") officials, crosiers of religion servants, kings' and emperors' scepters and even today's patrol police truncheon.

51 *Qaldani A.,* Culture of Towers of Mountain Dwellers of the Central Caucasus, Tbilisi, 1990, 73 (in Georgian).

The dualistic symbolic of a door and that it does not belong either to one or the other space separately, interestingly accumulated in Georgian customary law, namely in Svan mediatory institute – "equality oath" ("tolob maghvra"),[52] when reconciler mediators are making an oath to both parties separately that they will put themselves in their place individually and will judge objectively.[53] At a glance there is an unrealizable promise, as a reconciler is making an oath to both parties which are opposed to each other. Just it is seen here that "moravi" (mediator) "belongs" to both parties and at the same time individually – to neither of them. It is in the neutral space between the opposed parties. This situation is special, as a reconciler judge is not absolutely in an independent category, he is tightly connected with both parties, which is well reflected in the second term of mediatory law: "nensgash megne,"[54] "nesgachu megne"[55] ("standing in the middle"), "nesgamezal" ("coming in the middle") and others.

There can be given such comparison: if the opposed parties are "citizens" of two hostile camps, btche is "double citizen".

The above mentioned is expressed by other words, which in Georgian vocabulary belong to the same associative field, namely: one of the words classifying space is "mkhare", which implies as a geographical territory, as well as – direction. The word is homonymous to a part of human body ("mkhari" - shoulder); a human has two shoulders. There are used words: "tsalmkhrivi" (one-sided) and "ormkhrivi" (two-sided), also "sam-mkhrivi" (three-sided) and "mravalmkhrivi" (many-sided). There is also an associative word "mimkhroba", which means standing by, supporting and helping, otherwise somebody's "mkharshi shedgoma" (when you are following somebody, going behind somebody's shoulder or are standing at somebody's shoulder). Another word denoting "mkhari" in Georgian is "betchi" (shoulder-blade) (moreover, there is a word derived by connecting them – "mkhar-betchi"). The word "betchi" is in associative connection with "btche", because man has two shoulders or shoulder-blades and if conditionally a judge stood at the doorway, in the direction of his one shoulder or shoulder-blade there would be the inner space and in the other direction - the outer space. Accordingly he ought to have been objective, i.e. not to support either party. The above mentioned is directly connected with one of the common symbol of court – scales, which also have two shoulders. With it is connected one Svanian history about the church door: "In old days the Svans used to enter into church with their faces to the church. In this way they were expressing their coming to God and parting from this world, but after finishing prayers they needed to come out through the door: if they came out with their faces forward, they would turn their back upon the icon, but it was not allowed. If they did not turn their back upon the icon and came out with their back turned to the world that was not allowed either. Therefore they were coming out hand in hand and singing. This way was originated Svan Perkhuli (round folk dance)".[56]

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52 *Davitashvili G.,* Mediatory Court in Svaneti, Tbilisi, 2002, 49 (in Georgian).

53 Ibid., 45.

54 *Tsulukiani A.,* Svan Btche-mediatory Court, Georgian Customary Justice, Journal "State and Law", №9, Tbilisi, 1990, 61 (in Georgian).

55 *Davitashvili G.,* Mediatory Court in Svaneti, Tbilisi, 2002, 34 (in Georgian).

56 *Oniani S.,* Big Family Institute in Svan Customary Law, Essays on History of Law and Political Thinking, T. Tsereteli Institute of State and Law, Book 2, Tbilisi, 2012, 477 (in Georgian).

It is possible that the similar connection is with the word "betchedi" (seal), which is a symbol of closing, sealing, tying, and gathering. It denotes as a ring for a finger, as well as a seal for documents (in the Antique period they were one and the same thing). But the point is that in Georgian the term "dabetchduli" (proved) is used as an unchangeable,[57] and sometimes canonic symbol, "dabetchdva" means proving, legitimating. The word "aghbetchdva" means putting a mark, leaving a trace. "Betchva"[58] By old Georgian means knitting, tying (compare – "a woman, knitting a web"[59]). This proves again that there appears rather an idea of gathering, tying, than of opposing two directions.

H. Berman after having observed west tradition of law came to the conclusion, which very precisely corresponds to Georgian historical reality and the old Georgian law. In his words, "As in non-west cultures, law of European people in VI-X centuries was not a set of regulations imposed on people from above, it was more inseparable part of collective consciousness, some kind of "collective conscience". People were creating law and court themselves at their meetings; the first impulse was a desire of taking vengeance, but revenge had to be withdrawn and it used to be done so, there were talks about compensations followed by conciliation. The court decision was often an act of conciliation. The broken peace was restored by diplomacy. Conciliation of feuding parties was more important than issues of law, right and guiltiness. The same can be said about many so called primitive communities, which even now exist in some parts of Africa, Asia and South America. The same is said about many civilizations in the past and in the present".[60]

Maybe such attitude sounds strangely to a contemporary jurist, but H. Berman's remark is absolutely right, that "Law as art or religion, as well as a language itself at the initial stage of the European peoples' history was a set of rules not so much for establishing guilt or imposing punishment, not a means of separating people by some principles, but law was an instrument of connecting and reconciliation of people. Law first of all was perceived as an intermediation process, a way of relationship and not a process of creating norms and making decisions. From this point of view law of German and other old European peoples had lots of common issues with the philosophy of eastern law".[61]

4. Conclusion

So the homonymous term "btche" is directly points out legal images of its creator, namely: a connecting function of a judge, as a conciliator and court, as an instrument of mediation, which like a door has dual functions of connecting and separating two independent spaces in such a way that it does not belong to either of them and at the same time is inseparable part of both spaces.

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[57] *Orbeliani S.,* Georgian Lexicon, Vol. 1, Tbilisi, 1991, 185 (in Georgian); Comp. Isaiah 29.11; Jeremiah 32.11; Jeremiah 32.14; Daniel 12.9; Revelation of John 5.1, 7.4-7.8.

[58] *Orbeliani S.,* Georgian Lexicon, Vol. 1, Tbilisi, 1991, 102; Vol. II, Tbilisi, 1993, 313 (in Georgian).

[59] *Rustaveli Sh.,* The Knight in Panther's Skin, Tbilisi, 1986, 258 (in Georgian).

[60] *Berman H.J.,* Law Tradition of West: Age of Formation, the 2nd Edition, Moscow, 1998, 86 (Russian translation of *Berman H.J.,* Law and Revolution, the Formation of the Western Legal Tradition, Cambridge/ Massachusetts/London, "Harvard University Press", 1983).

[61] Ibid., 87.

Giorgi Amiranashvili[*]

Mistake as to the Identity of a Contracting Party – Feature of the Regulation in the Georgian Legislation

1. Introduction

Inculcation of market economy in Georgia, entailed as a result of dissolution of Soviet system, raised the necessity to amend the legislation base. The new Civil Code in Georgia enacted on November 25, 1997, substituting the then Code of Civil Law of the Soviet Socialist Republic of Georgia, entered into force in 1964 (hereinafter referred to as CCL SSRG). 15 years have passed since enactment of the Code which is quite enough to discuss its positive or negative sides.

The great achievement of Georgian judicial reform is provision of private autonomy of the parties,[1] enabling the parties of civil relations to implement the action, which is not prohibited under the law, including the actions, which are not peculiarly prescribed under the law.

The transaction[2] is the most common mean of implementation of private autonomy. Any type of transaction exists by means of Declaration of the intent. However, there are the events when apparently declared intent does not coincide with the internal intent of the person, declaring thereof which can be implemented with impact of various external factors. Correspondingly, in this event we encounter declaration of the intent with defect.[3]

The thesis provides consideration of one of the sides of the transaction, conducted on the basis of the defect, which is known as a "voidable transaction". It can be stated that the voidable transactions have not yet been monographically inspected in scientific space of Georgia, which is to be regretted for against the background that necessity of thorough and comprehensive analysis as of separate institutions so of specific norms of the Civil Code of Georgia (hereinafter referred to as CIVIL CODE OF GEORGIA) is immense.

It is crystal clear that the article does not concern all types of voidable transactions inasmuch as study of each of the types can become the subject of independent research. Hence, it is an attempt to separate one specific issue, namely the mistake to identity of a contracting party, as the basis for the rescission and to as far as possible analyze the structural elements in details, being the integral parts of the regulatory norm.

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1 *Zoidze B.*, Reception of European Private Law in Georgia, Tbilisi, 2005, 284 (in Georgian).

2 *Chanturia L.*, General Part of the Civil Law, Tbilisi, 2011, 290 (in Georgian).

3 Ib., 360; see also *Zoidze B.*, Commentary to the Civil Code of Georgia, Vol. 1, General Part of the Civil Code, Article 50, Tbilisi, 1999, 166 (in Georgian).

Being in the course of development of the Code, it was mentioned that the mistake to the identity of a contracting party is connected to numerous moot points.[4] In general, the problem of a mistake is not reflected in the identity, though following the technological development, the said issue becomes more and more relevant in e-trade transactions inasmuch as the greatest threat exists in such types of transactions that the person may make a mistake regarding identity of a desired contracting agent.[5]

The thesis provides actually all literary sources concerning this topic, published in Georgian. At that, it reflects the critical opinions available in scientific publications around the norm, regulating the mistake to identity and it as well provides the position of the author. As to Georgian judicial practice, despite the fact that judicial law of the Supreme Court of Georgia is scarce in terms of the mentioned issue,[6] the thesis still provides consideration of the poor practice of our country. The poorness of Georgian judicial law concerning the topic for consideration must not mislead the reader in regards with importance and relevance of the issue. Moreover, I presume the analysis of the problems, discussed in the thesis, shall facilitate to simplification of practical application of Georgian legislation and establishment of uniform judicial practice in this regard.

2. The Subjects, the Parties of the Legal Relationship, Prescribed under the Norm

The part one of the Article 74 of the CIVIL CODE OF GEORGIA prescribes the pre-condition of the essence of the mistake to the identity of a contracting party, in the event of satisfaction of which, the transaction may be converted into voidable. According to the second sentence of the part two of the Article 59 of the CIVIL CODE OF GEORGIA, rescission is implemented towards the other party of the agreement and according to the part three of the same Article, the right of rescission is granted to the person concerned. While analyzing the said norms, the question appears of possibility to implement rescission towards the third parties and who the concerned person may be, entitled to rescind.

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4 *Zoidze B*., Transactions in the Future Civil Code of Georgia, in the Collection of Articles: Judicial Reform in Georgia, 1994, May 23-25, Tbilisi, the Material from the International Conference, 1994, 289 (in Georgian).

5 See in details: *Mik E*., Mistaken Identity, Identity Theft and Problems of Remote Authentication in E-commerce, "Computer Law & Security Review", Vol. 28, Issue 4, 2012, 396, available at: <http://ink.library.smu.edu.sg/sol_research/1148/> [28/03/2013]; *Zambakhidze T*., E-trade Legal Regulation Basics (Problems and Prospects), "Georgian Law Review", Vol. 8, Issue 1/2, 2005,124-132.

6 Legal person – the Institute of Development of Freedom of Information, on May 5, 2011 addressed the Supreme Court of Georgia and inquired information about statistics of 2008, 2009 and 2010 in General Courts of Georgia (all three instances), concerning the disputes as a result of transactions made by mistake (Civil Code, referring to the Articles 72-76 and 78), available at: <http://www.opendata.ge/#!lang/ka/cat/other_useful_information_text/id/56> [26/09/2012]. On May 11, 2011 the reply followed by the Department of Judicial statistics and informatization that the transactions made by mistake in the quarterly and annual reports of the current statistical data in the City Courts and the Courts of Appeal are not registered as separate paragraphs. The cases, considered under the said Articles could not be found in the base of the decisions by the Supreme Court, see: <http://www.opendata.ge/pdf_files/uzenaesi_ shecdomit_dadebuli_ garigeba.pdf> [26/09/2012].

2.1. The Circle of the Persons Entitled to Rescind

Formulation – "mistake to the identity of a contracting party", at a glance indicates to the fact that the participant of a transaction is entitled to rescind, who has declared the intent with defect. Though, it is interesting to know how this norm can be applied to the cases when we encounter agency, namely whether it is possible by the agent to make a mistake to the identity of the represented contracting party.

The City Court of Tbilisi, in one of the decisions, did not share the opinion by the defendant on application of the part one of the Article 74 and deriving there from the Article 79 of the CIVIL CODE OF GEORGIA, inasmuch as the plaintiff has not in person participated in conclusion of the agreement. Namely, he/she has not been represented by the agent who signed the agreement. Correspondingly, the latter could not make mistake to the identity of a contracting party. Deriving from this fact, the Court decided that the application of the one-month limitation period, prescribed under the part one of the Article 79 of the CIVIL CODE OF GEORGIA to the plaintiff was groundless.[7]

The approach of the Court is not to be considered as if we take the essence of the agent authority into account, we can be led to an opposite decision.

The characterizing feature of agency is that civil rights and duties are appurtenant to the concrete person but they are implemented by another subject; another feature of agency is that the agent acts on behalf of the principal, thus the rights and duties obtained thereby, in the course of vegetation thereof, are appurtenant to the principal instead of the agent.[8]

The agent conducts the transaction but the result of the transaction emerges for the principal. Upon making a transaction, the agent declares own intent but on behalf of another person.[9]

The agency differs from the events, when a person uses another person to declare his/her intent, who will implement the function of conductive or transporter of the person who declares his/her intent.[10] This person transmits the intent of one person to another, his/her will and word but he/she does not declare own intent, and the agent always acts on own will.[11] Correspondingly, in the event of declaring the intent of another person, we deal with the action, actually and not peculiarly connected with the transaction.[12]

I presume, upon deciding the question, the Court should be guided under the Articles 104 and 106 of the CIVIL CODE OF GEORGIA. The rights and duties emerge to the principal solely under

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7 See the descriptive part of the Judgment N AS-947-1150-08 of March 20, 2009 of the Chamber of Civil, Commercial and Bankruptcy Cases of the Supreme Court of Georgia.

8 *Kakhadze M*., Features of Agent and Attorney Institution, in the Collection of Articles: Judicial Reform in Georgia, 1994, May 23-25, Tbilisi, the Material from the International Conference, 1994, 257 (in Georgian).

9 *Chanturia L*., General Part of the Civil Law, Tbilisi, 2011, 431 (in Georgian).

10 *Kereselidze D*., The General Systemic Notions of Private Law, Tbilisi, 2009, 405 (in Georgian).

11 *Kobakhidze A*., Civil Law, General Part, I, Tbilisi, 2001, 311 (in Georgian).

12 *Henzschel S*., Legal Case Solving Methods, Tbilisi, Publishing House "Siesta", 2009, 157. On difference between the agent and a courier, see also *Erkvania T*., Protection of Interests of the Third Parties in Agency (according to the Civil Codes of Georgia and Germany), Journal "Jurisdiction and Law", #3(34)12, 33 (in Georgian). Similar approach in German Law: *Scheuneman V.B.,* Private Economic Law: Legal Basis for Economists, Minsk, 2007, 128.

the transaction, conducted by the agent within authority thereof. Correspondingly, in the event of defect of declaration of intent upon agency, the principal shall be entitled to terminate the relations under the agreement by means of rescission as according to the part one of the Article 106 of CIVIL CODE OF GEORGIA, upon voidability of the transaction due to the defect of declaration of intent the will of the agent prevails, the principal is entitled to put the transaction with the contracting party under voidability due to the mistake by the agent.[13]

2.2. The Circle of Addressees of Rescission

The part one of the Article 74 emphasizes the identity of a contracting party and his/her personal features. Hence, according to the literal elucidation, the possibility of a mistake on identities of a legal person shall be excluded at a glance. Correspondingly, we deal with the shortcoming of a norm, which from its part, is the pre-condition of application of the analogue by the judge if the legislators fail to deliberately regulate this issue.

Deriving from the Article 5 of CIVIL CODE OF GEORGIA, the pre-condition for application of the analogue is failure to regulate the relevant relations under the law, i.e. the shortcoming of regulation shall exist.[14]

Though, we shall take the fact into account that any shortcoming is not the pre-condition for application of the analogue. Failure to regulate any relations may be the deliberate decision of a legislator, which prohibits development of justice by the judge regarding the mentioned issue, otherwise we would deal with interference of the judicial power in the legislative functions of the authority.[15]

In general, analogy is considered in the event solely when we speak about the extraordinary (i.e. non-deliberately planned) gap of regulation. The extraordinary gap exists when it has not been deliberately planned by the legislator. We shall clarify whether we deal with this case by means of elucidations. We may effectively use the argumentation form by conclusion from a different opinion. If the norm gives the ground for assumption that the legislator aimed at regulation of one specific relation, then it speaks of the fact that he/she deliberately failed to regulate other relations.[16]

As it is known, the entrepreneurs participate in economic relations under own title. The title is the instrument to identify the participants of circulation, i.e. identification of identities and originalities thereof and on the other hand, individualization, i.e. distinction from each other.[17]

According to the paragraph one of the Article 6 of the Law of Georgia on "Entrepreneurs", the firm title, i.e. the company is the title, with which the entrepreneur subject holds his/her activity. Therefore, the title in civil relations is the same mean of individualization of the company as the name

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13 See the similar opinion: *Kereselidze D.*, Mentioned work, 360; *Henzschel S.*, Mentioned Work, 159-160. The similar approach is characterized for Anglo-Saxon law as well: *Turner C.,* Contract Law, 2nd Edition, London, "Hodder Education Group", 2007, 147.

14 See *Henzschel S.*, Mentioned Work, 66.

15 Ib.

16 *Henzschel S.*, Mentioned Work, 66.

17 *Ninidze T.* Comments to the Law on Entrepreneurs, Article 6, 3rd Ed., Tbilisi, 2002, 98 (in Georgian).

and the last name for a person.[18] At that, the title is the mean for separation and individualization between the rival companies.[19]

There are some restrictions in terms of selection and application of the company title, which shall be taken into account as by the partners, so the registering body.[20]

The particular right on the company implies the fact that all other entrepreneurs are forbidden to use the same title in business relations, otherwise it may entail mislead of the society.[21]

This is the objective of the part two of the Article 27 of the Civil Code of Georgia, according to which the title of the non-profit (non-commercial) legal entity shall not include the graphic symbols without the verbal or sonic matching, defined under the lingual norms, as well as designations, characterizing the legal entities under the Laws on "Entrepreneurs" and on "Political Unions of Citizens" and the legal forms of the LEPLs. At that, the title shall not be combined with the addition, which may mislead the third party and/or entail mistake and/or misunderstanding due to the form and activity of the subject. The similar norm appears in the law of Georgia on "Entrepreneurs". Namely, according to the paragraph 5 of the Article 6, the company title shall not include the graphic symbols without verbal or sonic matching, defined under the lingual norms. The company title shall not be combined with the addition which may mislead the third party and/or entail mistake and/or misunderstanding due to the form or activity capacity and/or of the enterprising subject and/or relations between the partners.

According to the part three of the Article 27 of the Civil Code of Georgia, the title of the non-profit (non-commercial) legal entity shall not coincide with the title of already registered non-profit (non-commercial) legal entity. Presumably, the registering body shall verify the coincidence as the founders of a legal entity have poor accessibility to such type of information, though no guarantee exists either that existence of the similar title will be accurately verified upon registration.[22]

Therefore, we may presume that Georgian legislators, based on the above-mentioned norms, exercise preventive oversight in order to avoid mistakes in identity of a legal entity. At that, we shall consider the non-legal entity unions in this context inasmuch as the civil law enables them to participate in legal relations.[23] Correspondingly, it is less expected that the legislator aimed to exclude possibility of rescission of a transaction in the event of mistake on identity of a legal entity, it is as well interesting that despite the multitude of records in the norms of the Constitution of Georgia – "everyone" and "person", it does not mean that they apply to the natural persons solely. For instance, according to the Article 14 of the Constitution of Georgia, "everyone is free by birth and is equal before law", though it is crystal clear that the Constitutional principle of equality applies as to the natural person so to the legal entity.[24]

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[18] *Liluashvili G.,* Substance and Purposes of Entrepreneurs' Registration, Collection of Works: Theoretical and Practical Issues of Modern Corporate Law, Tbilisi, 2009, 150-151 (in Georgian).

[19] Ibid., 156. for this issue, see also: *Kokrashvili K.,* Entrepreneurial Law, Tbilisi, 2007, 75 (in Georgian).

[20] *Liluashvili G.*, Mentioned Work, 153.

[21] *Kokrashvili K.,* Mentioned Work, 76.

[22] *Chanturia L.* General Part of Civil Law, Tbilisi, 2011, 255 (in Georgian).

[23] Ibid., 277.

[24] *Izoria L.*, *Korkelia K.*, *Kublashvili K.*, *Khubua G.*, Commentary to the Constitution of Georgia: Fundamental Human Rights and Freedoms, Tbilisi, 2005, 7. See also: *Kublashvili K.*, Fundamental Rights, Tbilisi, 2010, 58 ff (in Georgian).

Hence, despite the fact that by means of wide elucidation of the norm we can apply it to the legal entity as well, it would be expedient for the legislator to precise the current formulation in order to avoid possibility of the different interpretation.[25]

The assumption in literature is disputable that validity of a different norm, deriving from the literal context thereof, does not include the third parties, the identity of which may become the basis of conclusion of the transaction.[26] It would be preferable to base the discussion on the specific example as it is vogue whom we shall consider as the "third party" in this event, namely: 1) a person, for the benefit of which, deriving from the Article 349 of the Civil Code of Georgia any obligatory legal agreement may be conducted; 2) a person, assuming the debt (re-imposition of debt); or 3) an agent of a contracting party. Below we provide the analysis of one of the integral structural element of the norm – "the principle foundation of conclusion of a transaction", which will enable us to define the event when the identities of the third parties may become the basis for conclusion of a transaction.

3. "The Principle Foundation for Conclusion of a Transaction" – Subjective or Objective Scale of Evaluation?

The Article 72 of the Civil Code of Georgia allows rescission of a transaction in the event solely when the intent has been declared on the basis of an essential mistake. At that, a legislator defines the criterion for evaluation of essence of a mistake in regards with each type of mistakes.

The part one of the Article 74 of the Civil Code of Georgia stipulates that the mistake to the identity of a contracting party shall be considered essential in the event solely, when the identity of a contracting party himself/herself or consideration of personal features thereof are the basis for conclusion of a transaction. Some authors are fair to note that the formulation of the said norm does not give clear picture about the measurement of essence of a person and features thereof, for who it shall serve as the principle foundation for a transaction – direct declaration of intent or an impartial third party.[27]

We, in regards with the part one of the Article 74 of the Civil Code of Georgia, can draw a parallel with the indent II of the paragraph 119 of the Civil Code of Germany, which regulates the mistake in the feature. According to the opinion, dominating in German law, this provision contains

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[25] There are precedents in Anglo-Saxon law on mistakes on identity of legal entities as well, namely in the case – *ex parte Barnett*, a person held the business under the title of *Joseph Reed & Sons*. After some time, he/she became insolvable before covering all debts. He/she has ordered sundry barrels of Heress to the plaintiff. The latter supposed that the order was delivered by *Reed, Brothers & Co.*, namely from another company. The administrator of a debtor, failed to cover the debts, claimed for existence of the right but the court decided that the defendant has not gained any ownership on goods and the owner was to posses the goods back: *McKeag E.C.,* Mistake in Contract: A Study in Comparative Jurisprudence, Studies in History, Economics and Public Law, Vol. *23*, *No. 2*, New York, 1905, 103: <http://archive.org/download/ mistakeincontrac00mckerich /mistakeincontrac00mckerich.pdf> [28/03/2013].

[26] *Kereselidze D*., Mentioned Work, 330.

[27] See *Kikoshvili S*., Defect of Intent in Georgian Law, "Georgian Law Review", Special Edition, 2008, 15 (in Georgian).

exception from the rule that the mistake in a motif is not essential.[28] This norm prescribes expediency of consideration of the features of a person, which are essentially considered in "circulation". Deriving from the fact that the common measurement would not exist, it was up the judges what to consider as an essential feature for circulation. That's why there is an immense judicial practice on this norm of the Civil Code of Germany.[29]

This is the evidence of one of the most important difference between the relevant norms of Georgian and German Codes which is definition of criteria for evaluation of the features of a person. The German legislation indicates that the features are important for the legal consequences which are essentially considered in "circulation".[30] As to Georgian regulation, the literal formulation of the norm gives vague picture whether these features are subject to evaluation with subjective criterion or objective factors are to be taken into account.[31]

3.1. Importance of Identity of a Contracting Party or Personal Features Thereof in the Agreements of Separate Types

Importance of identity of a contracting party or personal features thereof is particularly outlined in so-called fiducial transactions, which are based on mutual trust of the parties. Such transactions are characterized with the fact that trust is of utmost importance inasmuch as trust in general may be a characteristic for almost all agreements. For instance, when a person purchases a thing, he/she declares confidence to the seller though without knowing him/her but trust is of essential importance in fiducial agreement as you shall know the contracting party in order to completely trust him/her.[32]

The persons of some particular category, successfully conducting their professional activity during a long time, may have goodwill.[33] The skills and professionalism of these persons have an immense impact on society. In this event, the personal properties play an important role. Such goodwill is called professional goodwill.

When a natural person gains professional reputation with his/her knowledge and skills, he/she obtains public trust.[34] "Reputation" is an evaluative category. It implies the status of a person in a society and an idea thereof.[35]

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28 See *Markesinis B.S., Unberath H., Johnston A.,* The German Law of Contract: A Comparative Treatise, 2nd Edition, Oregon, "Hart Publishing", 2006, 297.

29 See: *Dornberger G*., *Kleine G*., *Klinger G*., *Posch M*., Civil Law of the *German Democratic Republic*, General Part, Moscow, 1959, 367; *Zweigert K., Kötz H.,* Introduction to Comparative Law, Vol. 2, Tbilisi, 2001, 100 (in Georgian).

30 *Kereselidze D*., Mentioned Work, 330.

31 Cf. *Kereselidze D*., Mentioned Work, 330.

32 *Kobakhidze A*., Mentioned Work, 277-278.

33 On description of the concept of "goodwill" see: *Gugeshashvili G*., Goodwill as the Object of Intellectual Property and its Place in Competitive Relationship, David Batonishvili Law Institute's Edition, Tbilisi, 2013, 14-18 (in Georgian).

34 Ib., 34.

The business reputation of natural persons and legal entities is an aggregation of the features and evaluations, to which the carriers thereof are associated in consciousness of a contracting party and are personified amongst other professionals of this field.[36] Hence, business reputation implies evaluation of the professional and other business features of a person, which serve as the basis for attitude of the society towards the said natural person or legal entity.[37] In regards with the legal entity it must be noted that when success of the latter is conditioned with professionalism and personal features of employee(s) thereof, each success is associated to the legal entity itself in the opinion of society instead of to the concrete employee(s) thereof.[38]

Here we illustrate sundry agreements, upon conclusion of which the identity of another party or his/her personal features are of essential importance. It will enable us to understand Georgian legislator stating "the principle foundation of conclusion of a transaction".

Deriving from the principle of freedom of the agreement, the subjects of private law are empowered to establish relationship with each other even beyond the scopes of the agreements, regulated under the Civil Code, i.e. conclude the agreement, not prescribed under the law, on the basis of which the rights and duties emerge, being not codified in the law.[39] Thus, it would be interesting to consider the agreements of this type.

3.1.1. Loan Agreement

Under the conditions of market economy, the personal features of the participants of economic relations play immense role. The features, such are reliability, generosity, honesty etc. create the basis for stability of loan relations.[40] When a bank concludes the loan agreement, it trusts the borrower, considering him/her as a competitive person. Hence, in this event reliability is a feature, which serves as a basis for the loan agreement.

Correspondingly, in order to define whether we shall consider some specific features of a person as essential, we shall take so-called "the typical economic goal the said transaction" into account.[41]

"Credit" is a Latin word and it means trust. When a creditor lends money to the debtor, renders a service or delivers goods without immediate payment, it means that he/she trusts the debtor and is sure that the latter will return the borrowed money or will pay for service or goods. This trust is based on either personal factor or economic state of a debtor – solvency thereof.[42]

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35 *Moniava P.*, Legal Problems of Protection of Respect, Dignity and Business Reputation, the Dissertation Thesis, Tbilisi, 1999, 34, cit.: *Bichia M.*, Protection of Private Life according to the Civil Law of Georgia, Tbilisi, 2012, 162, available (in Georgian) at: <http://www.press.tsu.ge/GEO/internet/internet.html> [28/05/2013].

36 *Chikvashvili Sh.*, Moral Damage in Civil Law, Tbilisi, 1998, 125, cit. *Bichia M.*, Mentioned Work, 162-163.

37 *Bichia M.*, Mentioned Work, 163.

38 *Gugeshashvili G.*, Mentioned Work, 38.

39 *Bölling H.*, *Lüttringhaus P.*, Systematic Analysis of Certain Causes of Action of the Civil Code of Georgia, Tbilisi, 2009, 23 (in Georgian).

40 *Chanturia L.*, General Part of the Civil Law, Tbilisi, 2011, 371 (in Georgian).

41 *Larenz K., Wolf M.*, Allgemeiner Teil des Bürgerlichen Rechts, 9. Aufl., München, "Beck", 2004, § 36 III 2, Rn. 43, cit.: *Chanturia L.*, General Part of the Civil Law, Tbilisi, 2011, 371 (in Georgian).

42 *Chanturia L.,* Law on Secured Transactions, Tbilisi, 2012, 13 (in Georgian).

The legal outcome of imposition of debt indicates to importance of consideration of solvency a debtor. Namely, according to the Article 206 of the Civil Code of Georgia, immediately upon the transfer of a debt any guaranty or lien securing the debt shall be terminated if the guarantor or the pledgor refuses to continue this relationship. The matter of fact is that the guarantor and the pledgor agreed to secure the requirement by the creditor due to the identity of a debtor. They know and trust him/her; inasmuch as trust not only because he/she will fulfill the duty but because he/she is solvent. This trust vanishes when the debts is re-transferred as a new debtor may appear unfair or insolvent.[43] Correspondingly, inasmuch as in this event the debtor is substituted by a new subject, the identity thereof for the creditor in terms of guarantee of fulfillment of the duties, is of utmost importance.[44]

3.1.2. Contract for Work

The contractor shall have some knowledge and experience to implement the work, prescribed under the contract. Correspondingly, he/she as a rule, shall implement the work personally.

In the event when it derives from the nature of a work or concrete circumstances, the contractor shall in person implement the work, prescribed under the contract.[45]

Therefore, the interest of a creditor for the debtor to fulfill the duties personally shall be protected, otherwise the objective of the contract between the creditor and the debtor cannot be achieved.[46]

3.1.3. Contract for Entrustment of Property

Upon defining the subject of the entrusted owner, the legislator shall not define any restrictions, i.e. he/she may be as natural person so the legal entity but if the type of management is to be implemented, requiring the relevant license, it is natural that the entrusted owner will be a specialized subject. Relations of property entrustment is quite specific, thus we shall be extremely careful when selecting the entrusted owner.[47]

Most of the trust operations are connected with vast sums or an immense volume of property, so the owner attaches great importance to the person, implementing property management and his/her financial situation. Only a few natural persons possess enough property for issuing the guarantee to the trust or of the property for fulfillment of conditions of the agreement.[48]

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[43] See *Chechelashvili Z.*, Assignment of Claim and Transfer of the Debt (Comparative Legal Research), Tbilisi, 2004, 142 (in Georgian).

[44] *Chitashvili N.*, Meaning of Fault for Definition of the Agreement Responsibility, "Law Journal", #1, 2009, 193 (in Georgian).

[45] *Dzlierishvili Z.*, Legal Nature of Contract for Work, Tbilisi, 2011, 69-70 (in Georgian).

[46] *Dzlierishvili Z.*, Legal Nature of Agreements of Transfer of Property under Ownership, Tbilisi, 2010, 381 (in Georgian).

[47] *Zambakhidze T.*, Legal Aspects of Property Management, Entrusted to the Commercial Banks, Law Journal "Samartali" #4-5, 2000, 51 (in Georgian).

[48] Ib., 52.

Trust serves as a basis for construction of property entrustment, voted by the trust or of the property to the entrusted owner. Upon regulating this relation, we may, by means of application of relevant rules of the contract of mandate, define that the entrusted owner shall personally fulfill the imposed duty except the events, prescribed under the law.[49]

3.1.4. Contract for Joint Activity (Partnership)

Each participant of partnership may under the contract be imposed with fulfillment of specific duties for achievement of common goal. A person can be accepted as a member of partnership for the purpose to fulfill the specific duties taking his/her specialty, experience, qualification, personal features and profession into account. For instance, a person may be accepted to the partnership, established in order to jointly manufacture agricultural products, taking his/her knowledge and professional experience into account, i.e. as a specialist of agricultural sphere. Correspondingly, the participants of the partnership may fail to properly evaluate knowledge, experience and general capacities of a person, i.e. we may deal with over-trust towards him/her.[50]

3.1.5. Labor Contract

Labor contract is the bilateral, consensual, paid-for, fiducial and causal agreement.[51]

The interest of an employer before conclusion of the labor contract is immense to as far as possible obtain the detailed information about the personality of a candidate, his/her professional skills or private life. Asking a question to the candidate by the employer is one of the main means for obtaining information, which further becomes the basis for conclusion of the labor agreement.[52]

Upon the pre-contract labor relations the employer shall ask the question, the lawful interest in the answer to which is crucial for establishment of contract relations. And we deal with this when the interest of the employer is important at the extent to outweigh the interest of the candidate not to disclose personal features and private life.[53]

Upon launching the negotiations on occupation of the vacant position, the employer is interested to obtain maximal information about the candidate in order to recruit the optimal person for the position and conclude the labor contract therewith. The employer, in order to conclude the long-term labor relations with the candidate, taking the specification and a nature of work into account, at the

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[49] *Zambakhidze T.*, Legal Aspects of Property Management, Entrusted to the Commercial Banks, Law Journal "Samartali" #4-5, 2000, 56 (in Georgian).

[50] *Ninua E.*, Partnerhsip in Mandatory Legal Relations, the Dissertation Thesis, Tbilisi, 2010, 133, available (in Georgian) at: <http://www.nplg.gov.ge/dlibrary/> [28/05/2013].

[51] *Dzamukashvili D.*, Labor Law, 3rd Elaborated Edition, Tbilisi, 2012, 42 (in Georgian).

[52] *Kereselidze T.*, Legal Consequences of Discriminatory Question of Employer to Candidate Before Conclusion of Employment Contract, in Collection of Articles: Employment Law, I, *Zaalishvili V.* (Editor), Tbilisi, 2011, 176 (in Georgian).

[53] Ib., 198.

same time, reducing the risk, shall obtain information about the education, professional skills, working experience and other features[54] of the candidate.[55]

According to the Article 10 of the Labor Code of Georgia, the employee shall be imposed with the duty to fulfill the work in person. Unlike other types of obligatory agreements, the labor contract always implies the duty of the employee to personally implement the imposed work.[56] This duty is one of the most important characteristic of the labor relations.[57]

3.1.6. Contract for Legal Aid

Assignment for proceedings, i.e. the contract on legal aid between the customer and a lawyer is the civil-legal transaction. Successful activity of a lawyer depends on how he/she is skilled with defense methods, tactics and technique, which implies art of defense. It is arts, when the lawyer masterly combines professionalism, elements of law rhetoric and psychology, oratorical skills, which evidently reveals the skill of a lawyer in law, emotion of word etc. Thus, the activity of a lawyer is creative, requiring high qualification and above-mentioned skills.[58]

True, the activity of a lawyer is quite personal and is based on trust and confidentiality, though taking the fact into account that the same lawyer may have trust by people and enjoy some privileges in business circles, he/she still is able to obtain professional goodwill.[59]

The lawyer, in his/her activity, shall be guided under the general moral principles, such are humanism, justice, impartiality, principality, honesty etc.[60]

The Code of Conduct of European Community lawyers states trust and impregnability amongst the general principles and elucidates that relations based on trust may exist in the event solely, if personal dignity, honesty and impregnability of a lawyer are without a doubt. Deriving from definition

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[54] An interesting example is given in German commentary literature about the mistake to the feature of a person in regards with the health state. Namely, this is the case when pregnancy can be considered as a mistake to the feature of a person. In general, pregnancy cannot be considered as a feature, though the exception is the event, when pregnancy is directly connected to implementation of specific work by a person (for instance, dancer, sports pedagogue, actor etc.) *Kramer E.A., Rebmann K., Säcker F.J., Rixecker R.*, Münchener Kommentar, Bürgerliches Gesetzbuch, Allgemeiner Teil, 4. Auflage, München, "Verlag C.H. Beck", 2001, 1144-1145, cit.: *Jorbenadze S.*, Types of Mistakes Made in a Transaction according to Georgian and German Civil Codes, "Journal Law and Order", #4(31)11, 95 (in Georgian).

[55] *Kereselidze T.*, Mentioned Work, 196. See also *Dzamukashvili D.*, Mentioned Work, 51-52; *Loria A.*, *Masbaum M.S.*, Labor Law Reform in Georgia and EU Standards, "Georgian Law Review", 6/2003-4, 574 (in Georgian).

[56] See *Adeishvili L.*, *Kereselidze D.*, The Draft Labor Code of Georgia and Some General Principles of Labor Law of Continental European Countries, "Review of Georgian Law", 6/2003-1,10 (in Georgian).

[57] *Shvelidze M.*, Characteristics of Legal Status of Employee According to the Labor Code of Georgia, in the Collection of Articles: Employment Law, I, *Zaalishvili V.* (Eds.), Tbilisi, 2011 (in Georgian). Concerning the public service as well, deriving of the specification of which working experience is to be taken into account which is more important than personal features: *Papiashvili Z.*, Legal Problems Connected with the Structure and Official Impact of the Ministry of Internal Affairs, "Law Journal", #1, 2011, 216 (in Georgian).

[58] *Akubardia I.*, Art of Protection, Tbilisi, 2011, 9-10 (in Georgian).

[59] *Gugeshashvili G.*, Mentioned Work, 38.

[60] *Akubardia I.*, Mentioned Work, 254.

of this norm, personal dignity of a lawyer is defining for trust, which at the same time is his/her professional obligation. The preamble of the same Code provides that the profession imposes the number of legal and moral duties on a lawyer. These duties shall imply all the features, which build trust in the society to the concrete lawyer and his/her professional activity in general. One of the most important amongst the main principles of a professional activity is the principle of trust. The Code of Professional Ethics, adopted by the Association of Lawyers of Georgia partially corresponds to the relevant regulation of the Code of Conduct of European Community lawyers. According to the Georgian Code of Ethics, the trust of a customer to the lawyer is based on his/her personal features, such are dignity, honesty, impregnability, competence and impartiality.[61]

3.1.7. The Job Contract

The legal status of a director in the entrepreneurial society depends on the contract of the society concluded therewith, which is called the job contract under the law of Georgia on "Entrepreneurs".[62]

The partners shall trust the director inasmuch as deriving from commercial expediency and public interests, they desire to entrust the company to the best manager.[63]

The earnest administration and duty of loyalty, recognized in contemporary corporate law is called fiducial duties in American legislation.[64]

We will deal with the shortcoming of the job contract when making a mistake upon appointing the member of the council, the member of the supervisory board or the director of limited liability company.[65]

3.1.8. Contract for Mediation

The legal nature of the contract for mediation is variously elucidated in various law and order, however it is communicated to consider that the contract for mediation is the variety of contract for service, which is not directly prescribed under the law and is one of the expression of the principle of freedom of private autonomy and conclusion of a contract.[66]

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61 *Kvachadze M*., *Gasitashvili E*., *Bochorishvili K*., *Kordzakhia I*., Comments to the Code of Professional Ethics of Lawyers based on the Practice of Ethics Commission, Association of Lawyers of Georgia, Tbilisi, 2011, available (in Georgian) at: <http://gba.ge/new/admin/editor/uploads/files/newsebis/page.pdf> [30/05/2013].

62 *Lazarashvili L*., Job Contact with the Director of an Enterprise. The Partner and Director in Inter-society Relations, in the Collection of Articles: Contemporary Corporate Law, Theoretical and Practical Issues, Tbilisi, 2009, 309 (in Georgian).

63 Ib., 318.

64 *Chanturia L*., Corporate Governance and Liability of Directors in Corporation Law, Tbilisi, 2006, 199 (in Georgian).

65 For details see ib., 140-143.

66 *Tsertsvadze G*., Mediation – the Alternative Form of Dispute Resolution (General Review), Tbilisi, 2010, 283 (in Georgian).

The contract for mediation implies mediation for the purpose of organization upon transfer of dispute to the concrete third party. The third party (mediator) shall facilitate to achievement of agreement between the parties.[67]

Personal and professional commitment is necessary for effective exercise of the functions of mediator.[68] As mediation serves for normalization of relations, skillful management of conflicts is one of the expressions of human features.[69]

There is quite a long list of personal features and competences, must-have for the mediator.[70]

The personality, professional skills, experience, education in mediation sphere, the outlook, belief, view and approach to the mediation process, responsibility and other features[71] of a mediator have a great influence on mediation process. Except professionalism and education, the mediator must be dignified with intact moral features as well.[72]

The authority and the reputation of a mediator are important for mediation as of a professional and a person. Although often these two criterions may drastically differ from each other and the reputation of a mediator as a person may not be acceptable for the parties despite the business reputation thereof.[73]

If contract for mediation appears voidable, the relevant norms of the Civil Code of Georgia are to be applied.[74]

3.1.9. Contract for Surrogate Mother

Contract for surrogate mother may be attributed to the contract for service, to which transfer of the result of labor is not mandatory. The identity of a contracting party is of utmost importance inasmuch as conclusion of the contract is conditioned with health, physical and mental state of an implementer. At that, the transaction is based on particular trust.[75]

3.1.10 Contract for Medical Service

According to the paragraph one of the Article 38 of the Law of Georgia on "Medical Activity" of June 8, 2001, the subject of independent medical activity, upon implementing the professional duties,

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67 *Tsertsvadze G.*, Mediation – the Alternative Form of Dispute Resolution (General Review), Tbilisi, 2010, 286 (in Georgian).

68 Ib., 229.

69 Ib., 245.

70 For details see ib., 245-251.

71 See *Tsertsvadze G.* (Ed.), The Prospects of Legal Regulations of Mediation in Georgia, National Center for Alternative Dispute Resolution of the TSU, Tbilisi, 2013, 124, available (in Georgian) at: <http://ncadr.tsu.ge/admin/upload/7706Edited-Final-Version-final.pdf> [30/05/2013].

72 *Tsertsvadze G.*, Mentioned Work, 251.

73 *Tsertsvadze G.* (Ed.), The Prospects of Legal Regulations of Mediation in Georgia, Tbilisi, 126 (in Georgian).

74 *Tsertsvadze G.*, Mentioned Work, 297.

75 *Gelashvili I.*, Legal Status of Embryo, Tbilisi, 2012, 163; see also of the same author: Legal and Ethical Problems of Surrogate, "Law Journal", #1, 2011, 96 (in Georgian).

shall be guided under the principles as follows: on the basis of personal example, to inculcate the rule of health life amongst the patients and in the society, to be guided under the professional standards solely, under the principles of humanism, Georgian legislation, to respect dignity, confession and traditions of a patient, to at the maximal extent consider the interests of health of a patient, to be gratuitous, free and independent upon making the professional decisions, to impartially abide the oath of a doctor.

According to the sub-paragraph "g" of the Article 4 of the Law of Georgia on "Rights of Patients" of May 5, 2000, rendering the medical service is a person, who in accordance with the rule, prescribed under the legislation of Georgia, implements medical service. The Article 8 of the same law provides the right to select and at any time replace the person, rendering medical service; according to the paragraph one of the Article 18 of the same law, the patient is entitled to obtain comprehensive, unbiased, prompt and clear information from the person, rendering medical service about identity and professional experience of the person, rendering the medical service.

3.2. The Approach of the Court of Appeals of Tbilisi

It is interesting to find out the form of elucidation of the formulation by the Court of Appeals of Tbilisi in one of the judgments thereof, provided in the part one of the Article 74 of the Civil Code of Georgia – "principal foundation of making a transaction".

The Court of Appeals attached attention to the actual ground of the claim, namely the plaintiff claimed to declare void the loan and mortgage agreements on the basis of the motif that the mistake was made upon conclusion of the agreement to the identity of a contracting agent.

In opinion of the Court of Appeals, the testimony of a witness could not have an essential importance for case solution in this specific event due to the following circumstances:

First of all, the Court noted that the intent of a plaintiff on conclusion of the loan agreement was evidently confirmed. The plaintiff was the signatory of the agreement which was the evidence of the circumstances that he/she was aware of the content and a contracting agent of the transaction. Deriving from the above-mentioned, his/her position should be considered groundless that he/she has been misled thus concluded the agreement with natural persons instead of the micro-finance organization.

Except the above-mentioned, even in the event of determination of the circumstances connecting with the mistake to the identity of a contracting agent by the plaintiff, we would deal with the ground for declaring the agreement void, inasmuch as the said circumstance could not be considered as a mistake of an essential nature, existence of which is connected to declaration of an agreement void under the part one of the Article 74 of the Civil Code of Georgia. Namely, according to the Article 72 of the Civil Code of Georgia, the transaction may become voidable if declaration of intent was made on the basis of an essential mistake. According to the part one of the Article 74 of the Civil Code of Georgia, the mistake to the identity of a contracting party shall be considered essential in the event, when the identity of a contracting agent himself/herself or consideration of his/her personal features are the principle foundations of a transaction.

In this event, the plaintiff has made voidable the loan and mortgage agreement due to the mistake made to the personality of a lender – contracting party. Deriving from the essence of the

voidable agreement, the interest of a borrower towards conclusion thereof was to obtain the generic thing in the desired amount – the money with the conditions, prescribed under the agreement. The plaintiff, regarding the satisfaction of said interest, has not filed a claim, he/she has not as well grounded the precision of violation of his/her interests under the condition that the money has been transferred by the natural persons instead of a micro-finance organization. The mistake to the identity of a contracting party shall solely be considered essential if the personality thereof or personal features serve as the foundation for conclusion of a transaction. The said regulation implies not the subjective attitude of a party to the contract towards the identity of a contracting party but deriving from the nature of the agreement, the connection between implementation of obligations and the identity of a contracting party. Hence, in order to consider the mistake to the identity of a contracting party as essential, the party to a voidable contract shall ground that with this mistake he/she has not obtained the expected implementation of the agreement. As it was noted, the plaintiff has not indicated to this argumentation.[76]

4. Conclusion

The above-mentioned discussion enables us to make some conclusions in regards with the said problems.

The question whether the agent may make a mistake to the identity of a contracting party, shall be given the positive answer inasmuch as upon real agency in legal terms, rights and obligations emerge to the principle solely, correspondingly, the latter shall have the right to rescission.

From the circle of the third parties, consideration of identities of which may become the principle foundation for conclusion of a transaction, we shall first of all exclude the agreement, made in favor of the third party, as in this event, the third party is either expecting benefits or has the right of independent demand and he/she, as a creditor, is empowered to demand implementation of the obligation by the debtor, as prescribed under the agreement.[77] We shall not consider the agent as a third party, as the person cannot be considered as such, who serves for the interests of one of the parties to the transaction. Presumably, here we speak about the third party, assuming the debt and replaced the initial debtor. According to the Article 204 of the Civil Code of Georgia, the third party and the debtor are entitled to agree on re-imposition of the debt when authenticity of re-imposition depends on the consent by the owner of the demand. In this event we cannot except that the owner of the demand makes a mistake to the personal features of the third party, i.e. the new debtor, such shall be characterizing thereof in the context of credit relations, mentioned above, correspondingly, enactment of the norm shall apply to such event as well.

As to the principal foundation of conclusion of a transaction, the concept shall be considered as such, which aspired one of the parties and without which the said transaction could not be concluded,

[76] See the Descriptive Part of the Judgment #AS-388-367-2012 of April 26, 2012 of the Chamber of Civil Cases of the Supreme Court of Georgia.

[77] See *Chanturia L.*, Commentary to the Civil Code of Georgia, Vol. 3, Article 349, 213 ff (in Georgian).

at that, this concept shall be acceptable for another party. Namely, in this event consideration of interest of another party is crucial; another party should be able to suppose that his/her contracting party was guided under this foundation and this interest when concluding the transaction otherwise the transaction would not be made thereby. Correspondingly, this circumstance is necessarily to be essential at the extent that it could be considered by any conscientious party as the foundation for conclusion of a transaction.[78] The mistake to the identity of a contracting party shall be considered essential, when concluding the fiducial transaction, or a transaction, with which implementation of assumed obligations is possible to the concrete person solely, skilled with dignified features.[79]

Hence, we shall consider not the subjective attitude of a party as a criterion for evaluation towards the identity of a contracting party or features thereof, but the evaluation of an impartial observer.[80]

[78] *Vashakidze G.*, The System of Aggravated Obligations of the Civil Code, Tbilisi, 2010, 216-217 (in Georgian). Similar approach is characterized for the Anglo-Saxon law as well: *Samond D*., *Williams D*., Basics for the Contract Law, M., 1955, 272-273.

[79] For instance, the journalist, holding the investigation on protection of consumers' rights, accommodated in one of the hotels. The hotel filed the claim on voidance of the agreement with the journalist as the administration was not aware that the customer was not an ordinary person. Though, the Court did not satisfied the claim with the motif that the mistake was not essential to the identity of a contracting party: *Gutnikoff O.V*., Void Transactions in Civil Law (Theory and Practice of Rescission), Moscow, "Barator-Press", 2003, 315, cit.: *Lavrinenko I.A*., Essential Mistake as the Foundation for Consideration of a Transaction Void under the Legislation of Ukraine, "Magazine of Scientific Publications of Post-graduates and Doctors", №4, 2013, indent. 24, available (in Russian) at: <http://jurnal.org/articles/2013/uri37.html> [06/05/2013].

[80] See the similar approach: *Kereselidze D*., Mentioned Work, 330; *Kikoshvili S*., Mentioned Work, 15.

Nona Zubitashvili*

Doctrine of Corporate Opportunities in US and Georgian Law

1. Introduction

Prohibition of using corporation's business chances originating from US case law is the component of fiduciary obligations of the managers, in particular – of duty of loyalty.[1] In the corporate law this rule is called the doctrine of corporative opportunities. The doctrine relies upon the judicial practice formed in early 20th century in USA, in particular, decision of Alabama Supreme Court of 1900 on case of *Lagarde v. Anniston Lime & Stone Co*[2] and decision of Delaware Chancery Court of 1939 on case of *Guth v. Loft, Inc*,[3] according to these decisions the managers were prohibited to take advantage of the business opportunities of the corporations for their personal benefit. From the second half of the 20th century the doctrine was modified. Decision on case *Durfee v. Durfee & Canning, Inc. & another*[4] lead to formulation of so called fairness test. According to the test, the fact to be confirmed is not interest (or expectancy) towards the opportunities from the side of corporation or holding of certain rights with respect of the disputed opportunities but rather, whether the actions of director are fair in relation to the corporation. Further stage in development of the doctrine was the last decade of the 20th century, when American Law Institute developed the modern model of the doctrine within the scopes of Principles of Corporate Governance.[5]

In 2005, as a result of the enactment of Georgian Law on Entrepreneurs, the doctrine of corporate opportunities was reflected in Georgian corporations' law as well. According to paragraph 2 of Section 6, Article 9 of the Law on Entrepreneurs, the managers have no right to use information related to activities of the company received in the process of performing of his/her obligations for their own benefit, without prior consent of the partners' meeting. Though, Georgian reception is far from the actual substance of the doctrine. Subject of this work is the doctrine on commercial opportunities, in particular, presentation of historical development of the issue and its modern model through comparison of the judicial practice and theoretical consideration. Goal of the work is adjustment of the key aspects of the doctrine to Georgian corporations' law. We hope that the mentioned would contribute to adequate reformation of this issue.

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1 *Chanturia L.,* Corporative Management and Responsibility of Managers in the Corporations Law, Tbilisi, 2006, 341-347 (in Georgian); *Ramsey R.,* Director's Power to Compete with His Corporation, "Indiana Law Journal", Vol. 18, Iss.4, Article 4, 1943, 301.

2 *Lagarde v. Anniston Lime & Stone Co.,* 28 So. 199 (Ala.1900), known as "interest or expectancy" test.

3 *Guth v. Loft, Inc.,* 5 A. 2d 503 (Del. Ch. 1939), known as "line of business" test.

4 *Durfee v. Durfee&Canning, Inc&another,* 80 N. E. 2d 522 (Mass. 1948).

5 American Law Institute (ALI), Principles of Corporate Governance §5.05, 1994.

2. Corporation "Interest or Expectancy" Test
(Lagarde v. Anniston Lime & Stone Co.)

In consideration of the case of misappropriation of the corporate opportunities the first objective of the court is to establish whether the disputed opportunity comprises actual corporate opportunity or not. One of the methods for finding this out, is the test of "interest or expectancy", as mentioned above, developed in 1900, by the Alabama Supreme Court in relation with the case of *garde v. Anniston Lime & Stone Co*. In this case the company conducted negotiations on purchase of 1/3*La* part of the land parcel where it was performing the mining & industrial activities, though finally, several directors of the company purchased 2/3 of the land parcel for their competing company.[6] In the court's opinion, the corporate opportunity takes place if the corporation, itself, had certain property interest or expectancy before its appropriation by the director, or the case, where intervention of the director into the realization of business opportunity hinders achievement of the corporate goal.[7] The court explained that in this specific case the corporation had reasonable expectations of purchase of 1/3 of the land parcel. Though, no such interest existed with respect of the second 1/3 of the land parcel.[8] Thus, the directors have misappropriated the corporation's opportunity not by purchase of 2/3 of the land parcel, but by purchase of the part, about purchase of which the corporation has been conducting the negotiations.

Test of "interest and expectancy" was subject to criticism in the scientific circles many times.[9] The primary disputed issue is the following: if the corporation had the interest or expectancy protected by the law before director's actions (e.g. project implementation is at the negotiation (pre-agreement) stage), than what is the need in application of the corporate opportunity doctrine? Answer to this question could be found in the decision on case of 1941, *Lincoln Stores Inc. v. Grant* made by the State of Massachusetts.[10] The court regarded that the directors have not violated the doctrine of corporate opportunities by purchasing of the store in Norwich, close to Lincoln Store. According to the court's explanations, the corporation has not expressed any interest to the store before it was purchased by the directors. Thus, the business opportunity of purchasing of the store did not belong to the corporation as it has not considered the issue of purchase of this specific store, neither had it considered the opportunity of expansion in Norwich, generally.[11]

Thus, the prior interest of the corporation is decisive element in the process of determining, whether the opportunity belonged to the corporation or not. As it is recognized by the scholars the goal of corporate opportunities' doctrine is to apply property-like protection where the property rights do

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6 *Lagarde v. Anniston Lime & Stone Co.,* 28 So. 199 (Ala.1900), in: *Epstein R.,* Contract and Trust in Corporate Law: The Case of Corporate Opportunity, 21 "Del. J. Corp. L.", 1996, 14.

7 Ibid.

8 Ibid.

9 *Talley E.,* Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine, "Yale L.J.",Vol. 108, 1998, 293.

10 *Lincoln Stores, Inc. v. Grant,* 34 N.E.2d 704, 707 (Mass. 1941), cited in: *Davis K.,* Corporate Opportunity and Comparative Advantage, "Iowa L. Rev.", Vol. 84, 1999, 236.

11 Ibid.

not exist at all.[12] Corporation's business interest or expectations do not comprise the property rights. Therefore, one could say that the "interest or expectancy" test provides protection of the wealth not protected by the other legal regulations.

3. Line of Business Test
(Guth v. Loft Inc.)

Line of business test was developed by Delaware court in 1939, in relation with the case of *Guth v. Loft Inc*. regarded as the significant case even now.[13] Charles Guth was the president at Loft Inc. Loft Inc produced the fizzy drinks and it needed cola syrup for production and it used to buy it from Coca-Cola Company. Pepsi-Cola had cola receipt as well. It had registered the trademark as well. In 1931, Guth decided to purchase the receipt from Pepsi-Cola as Coca-Cola refused to make discount. Guth had to agree upon this issue with Loft's vice president. Though, through his personal business contacts Guth learned that Pepsi-Cola was about to go bankrupt. Finally, Guth bought cola receipt for himself from Pepsi-Cola, established new company in the State of Delaware and registered Pepsi-Cola trademark in its name. Further, Guth's new company started to sell the receipt to Loft Inc. and at the same time, in the initial years of the corporation's activities, Guth extensively used Loft's laboratory equipment and hired labor.[14] Supreme Court of Delaware established that Guth's activities violated the loyalty duty, which he had towards Loft, as its director. In particular, the conflict of interests took place. In addition, Delaware Court established that Guth has misappropriated Loft's business opportunity of buying the receipt from bankrupted Pepsi and thus caused losses to the corporation, towards which he had the loyalty duty. To establish the mentioned the court applied five-component test known as line of business test. According to this test, the corporate opportunity is an opportunity, which: 1. is affordable for the corporation financially; 2. its nature within the corporation's business line; 3. it can provide practical advantages (benefits) to the corporation; 4. to which the corporation has the interest and reasonable expectancy; and 5. by misappropriation of which the director's personal interests conflict with the corporation's best interests.[15]

As we can see, business line test uses as one of its component the interests of expectancy test. Thus it would be reasonable to state that Guth's test is the improved version of Lagarde's test. As for the financial status component, it is not limited to the corporation's existing assets. The court

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[12] *Salzwedel M.,* A Contractual Theory of Corporate Opportunity and a Proposed Statute, "Pace L. Rev.", Vol. 23, 2002, 104.

[13] *Guth v. Loft*, *Inc.,* 5 A. 2d 503 (Del. Ch. 1939), before 1989 (before development of ALI approach) the most frequently referred case in the disputes dealing with the corporate opportunities was case of Guth, in: *Chew P.,* Competing Interests in the Corporate Opportunity Doctrine, "N.C. L. Rev.", Vol. 67, 1989, 455.

[14] Ibid., 466.

[15] In the literature there are considered two types of the conflict of interests. The first one is so called vertical conflict, where the conflict arises in the subordinated (vertical) relations (for example, case of Guth). Second, horizontal conflict takes place where the competition arises in the equal (horizontal) relations. *Davis K.,* Corporate Opportunity and Comparative Advantage, "Iowa L. Rev.", Vol. 84, 1999, 262-266.

established that the corporation might have no assets though it was able to mobilize the required financial resources through credit.[16]

According to the decision on Guth's case, if the opportunity comes from the director's personal contacts and not from his position and this opportunity, due to its nature, is not significant for the corporation and it has neither interest, nor expectancy towards it, the director shall be entitled to take this opportunity as his own one, with the exception of the case where the director has unduly used the corporation's resources.[17]

3.1. Contemporary Application of the Business Line Test
(Broz v. Cellular Information Systems Inc.)

Guth's approach became significant in one more well-known case at Delaware State Court: *Broz v. Cellular Information Systems Inc*.[18] Robert Broz was the sole shareholder and director of RFB Cellular (corporation established in Delaware providing mobile telephony services to the western states on the basis of license Michigan-4). At the same time, Broz was invited director of the other corporation established in Delaware – Cellular Information Systems, Inc. (hereinafter CIS). In the period of his directorship, company MacKinac Cellular decided to sell the license Michigan-2, the coverage zone of which was adjacent to the coverage zone of Michigan-4 license. Representative of MacKinac Cellular contacted Broz and offered to buy Michigan-2 for RFBC. The representative has not offered to buy the license for CIS.[19] Broz, on his side, informed the president and two other directors of CIS that he intended to buy new license for RFB Cellular. CIS president and the other directors confirmed that the latter company was not interested in buying of the license. In few months Broz purchased the license for RFB Cellular. In the same period, PriCellular, the third company has been conducting negotiations on procurement of CIS Corporation. In few days after purchase of license by Broz PriCellular purchased CIS. Upon PriCellular's request CIS sued against Broz claiming that by procurement of the license Broz has misappropriated CIS's corporate opportunity. CIS recognized that at a time of sale of the license, the board of directors would not be interested in its procurement but according to the plaintiff's opinion, Broz had to fid out, whether PriCellular would be interested in such procurement. Broz had not taken into consideration the interests of PriCellular, as the potential owner of CIS and thus he was in breach of loyalty duty. The court applied Guth test for evaluation of Broz's actions. The court established the following five circumstances: 1. CIS was not financially capable to buy the license; 2. though the license was within CIS's business line; 3. according to the statement of CIS's board of directors, it was clear that CIS had no either interest or expectancy of procurement; 4. material gains were doubtful; 5. Broz had no fiduciary obligations to PriCellular, being the third party in this case and hence, Broz had no obligation to take care about avoidance of the conflict of interests or competition with PriCellular. Finally, the court rejected CIS's claim.

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16 *Broz v. Cellular Information Systems*, *Inc*. 673 A.2d 148 (*Del.1996*).

17 *Guth v. Loft*, *Inc.,* 5 A. 2d 503 (Del. Ch. 1939).

18 *Broz v. Cellular Information Systems*, *Inc*. 673 A.2d 148 (*Del.1996*).

19 In that period, CIS had just overcame the insolvency condition and the representative regarded that it would not be able to purchase Michigan-2 license, ibid.

Novelty of Broz's decision is that it emphasizes the form of notification of the company by director about "appearing" of the opportunity and what should be the form of response. Should be formalities followed? In this case, regarding the factual circumstances (confirmation of absence of interest by the corporation directors), the court stated that absence of the official form should not become the basis for responsibility of the director.[20] This issue is also related to one of the components to the American Law Institute approach and we shall discuss it in more details in description of this approach.

As we can see the key issue of business line test, similar to the interest and expectancy test, is to establish, whether the opportunity belonged to the corporation or not. To establish this, the test uses, on one hand, the wide factual component – finds out, whether the business is within the area of the corporation's business line – and on the other hands, narrows it by the other circumstances. It should be noted that all circumstances should be carefully examined. For example, the corporation may be financially incapable to afford project implementation though competition caused by use of the project by director may cause damages to the corporation. Therefore, the business line test achieves its goal only where all five test components are in place.

4. Fairness Test
(*Durfee v. Durfee & Canning, Inc*)

Fairness test is the most rarely applied test in US judicial practice.[21] The test substance is that presence of corporate opportunities is determined based on the fairness conception. And the low popularity of the test is caused by its substance. Fairness test does not provide to the director any practical instructions for establishing of his/her duties.[22] Court decisions, similar to the various studies, there is the note that the fairness conception can not have any accurate definition.[23] Due to its nature, fairness is not determinable based on the ready formula.[24] Though it should be noted as well, that absence of definition provides certain flexibility to it. It could be said that the fairness test is the flexible one, applicable to the specific facts.[25] Its author is the Supreme Court of Massachusets, which, for the purpose of determining of the corporate opportunity, rejected the interest test and applied so called general fairness conception in case of *Darfee v. Darfee& Canning Inc.* in 1948.[26] In this case,

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20 *Salzwedel M.,* A Contractual Theory of Corporate Opportunity and a Proposed Statute, "Pace L.Rev.", Vol. 23, 2002, 88.

21 *Talley E.,* Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine, "Yale L.J.", Vol. 108, 1998, 296.

22 *Gelb H.,* The Corporate Opportunity Doctrine-Recent Cases and The Elusive Goal of Clarity, "U. Rich. L. Rev.", 1997, Vol.31, 378. As Maine Supreme Court mentioned in case *Northeast Harbor Golf Club, Inc. v. Harris* 61 A.2d 1146 (Me. *1995*), the test should exactly specify, what are the directors entitled to and what they are not. Otherwise they would find themselves facing unclear, unforeseeable responsibilities and this is unacceptable.

23 *Wadmond L.,* Seizure of Corporate Opportunity, "Bus. Law.", Vol. 17, 1961, 74.

24 For this reason some authors criticized the fairness test, for example: *Hetherington J.A.C,* Trends in Legislation for Close Corporations: A Comparison of the Wisconsin Business Corporation Law of 1951 and the New York Business Corporation Law of 1961, "WIS. L. REV.", Issue 1, 1963, 149.

25 *Orlinsky E.,* Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability, "Del. J. Corp. L.", Vol. 24, 1999, 514.

26 *Durfee v. Durfee&Canning, Inc&another,*80 N. E. 2d 522 (Mass 1948).

director of company *Darfee & Canning* (hereinafter D&C) established new company engaged only in procurement of the components required for petrol production and further selling them to D&C at higher price. D&C mixed the procured material with its own products and produced petrol. Regarding that after World War II petrol was a scarce product at market, D&C regarded that the director, instead of establishing of the new company, which plaid the role of intermediate only, should allow D&C to procure the products directly from the suppliers. Director stated that the supplier was not interested in doing business directly with D&C. In his opinion, the product was one of the insignificant components and D&C could not have any interest to it. The director referred to the case of Lincoln stores where the same court applied the test of interest or expectancy. Though the court did not share the director's position and specified that in the case of Lincoln stores the facts were different. In that case the absence of corporation's interest to the opportunities was undoubted while in the given case, the corporation apparently expressed the interest and the director gaining additional profits, through its intermediary role, did not gave up the opportunity. Thus, the court regarded that the director's actions did not correspond to the ethical and fairness standards.[27]

In conclusion, it should be noted that the fairness test is not a test in the traditional sense of the term. It does not specify the components to be examined like the interest and expectancy test or business line test. On the example of *Darfee* case, it could be said that in each specific case the fairness conception is determined by the judge's sense of fairness and ethical views, only in case when the interest or expectancy test can not ensure achievement of the doctrine goal.

4.1. Modification of the Fairness Test

For many years, the US courts developed the doctrine through combination of the traditional tests. For example, the Supreme Court of the State of Minnesota developed the hybrid test through combination of the business line test and fairness conception, so called Minnesota two-stage test in relation with case of *Miller v. Miller.*[28] At the first stage the test examines whether the disputed business project is related with the corporation or not and whether it is of particular significance for the corporation (business line test). If the answer is positive, examination moves to the second stage where it is established whether director is in breach of the loyalty and fair action duty or not (fairness test).[29]

5. Doctrine of American Law Institute

Approach of American Law Institute (hereinafter ALI) was formulated in late 20th century comprising the modern version of the corporate opportunity doctrine. The approach is based on the business line test used in *Guth v. Loft Inc*. case though the new details are added as well.

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[27] *Durfee v. Durfee&Canning, Inc&another,*80 N. E. 2d 522 (Mass 1948).

[28] *Miller v. Miller,* 222 N.W.2d 71 (Minn. 1974).

[29] It should be noted that Minnesota test had negative response, e.g., in case *Northeast Harbor Golf Club*, *Inc. v. Harris* 61 A.2d 1146 (Me.*1995*)Maine Supreme Court stated that, this is the combination of on one hand, contingency of fairness test and on the other – the weakest elements of the line of business test.

Innovation of ALI doctrine and its main element is the obligation of information disclosure. Director may take advantage of the corporate opportunity if: he/she initially offers this opportunity to the corporation and disclose the information about conflict of interests; second, the corporation rejects the opportunity; third, the corporation's rejection complies with three requirements: 3.1 the rejection is fair for the corporation; 3.2 decision about rejection of the proposal was made by the independent and disinterested directors, who are not interested, on the basis of full awareness (or, in case of executive manager, in compliance with the business judgement rule); 3.3 on his side, the director's entitlement to the decision on rejection is provided by the unbiased shareholders or it is further confirmed by them.[30]

Information disclosure duty, as stated above, was one of the disputed circumstances in case of Broz v. Cellular Information systems.[31] On the basis of this argument, the court of lower instance qualified Broz's actions as misappropriation of the corporate opportunities. Though Supreme Court of Delaware, which, finally made decision in Broz's favor, stated that there is the factual reality where the corporation has neither interest, nor expectancy or financial levers to take the opportunity. In such case, the requirement of formal submission of the proposal is excessive burden for the director.[32] Thus, non-submission of information and absence of opportunity rejection should not be unconditionally regarded as misappropriation of the corporate opportunities.

According to ALI doctrine, party desiring to take the opportunity shall bear the burden of proving of existence of the opportunity.[33] Hence, it is necessary to find out, what is a corporate opportunity. In this ALI test applies the traditional business line test used in the decision on case of Guth. In particular, according to ALI, the corporate opportunities are of two types. First is any opportunity known to the corporation director or chief manager: a) in the process of performing of their duties in the corporation; or b) by using of the corporation information or property and has the basis to suppose that the corporation will be interested in such opportunity. According to the second definition, the corporate opportunity is any opportunity close to the business performed or intended to perform by the corporation.[34]

Thus, ALI test is wider than any other test. It includes not only the opportunities within the corporate business area but any other opportunities known to the director through his office.

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30 American Law Institute (ALI), Principles of Corporate Governance §5.05, 1994, § 5.05(a)(1-2).

31 *Broz v. Cellular Information Systems*, *Inc*. 673 A.2d 148 (*Del.1996*).

32 Ibid.

33 *Talley E.,* Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine, "Yale L.J.", Vol. 108, 1998, 297.

34 American Law Institute (ALI), Principles of Corporate Governance §5.05, 1994, § 5.05(b)(1)(A). It should be noted that approach of ALI, according to which the corporate opportunity is also placed within the future business, according to the decision of Illinois Supreme Court on case of *Kerrigan v. Unity Savings Association*58 Ill.2d 20, 317 N.E.2d 39 (1974), the line of business includes any opportunities, reasonably related to the current or prospective activities, cited in *Schaller W.,* Corporate Opportunity and Corporate Competition in Illinois: A Comparative Discussion on Fiduciary Duties, "J. Marshal. L. Rev.", Vol. 46, 2012, 19.

5.1. Practical Application of American Law Institute Doctrine
(Northeast Harbor Gulf Club Inc. v. Harris)

Example of practical application of the doctrine is the decision on well-known case of *Northeast Harbor Gulf Club Inc. v. Harris*[35] by the court of the State of Maine. Harris was the president of gulf club, who, in the period of his presidency, acquired in his personal ownership various land parcels adjacent to the club territory two times. First procurement took place in 1979. Broker contacted Harris and informed him that the owner of land parcels adjacent to the playground owned by the club was interested in disposal of these parcels and offered him to purchase them.[36] Harris agreed to personally acquire these land parcels. Before acquisition he had not disclosed his intention to the board of directors. He informed them about this fact only at the board session arranged after acquisition, stating that he intended to maintain the land parcels in his personal ownership. At that stage the board of directors has not taken any measures against Harris.

Second acquisition took place in 1984. When Harris was playing gulf with his former colleague he learned that the land parcel bordered from three sides by the club playgrounds was intended for sale. Harris purchased this land parcel as well. He informed about his decision several members of the board of directors and at the board meeting in August 1985 he informed them formally that he had already acquired the land parcel and that he did not intend to develop the parcel. The board had not taken any measures in that case as well.

In 1988, the board of directors learned that Harris intended to commence development of the land parcels. In 1991, the directors brought the proceedings against him based on violation of the loyalty duty. In particular, the club stated that Harris had purchased the land parcels without prior notification of the club and thus deprived it of the chance of making decision, whether it desired to take this opportunity or not; the plaintiff stated also that use of the land parcels according to Harris's intentions was against the club's interests. In the courts of the first and second instances decisions were made in favor of Harris though the Supreme Court of the State of Maine made the different decision. The court again attempted to find out, whether the opportunity of purchasing of the land parcels belonged to the club. Firs of all the court applied the business line test. The court decided that different development of the land parcel adjacent to the club (for example, construction) was against the corporation's interests. Though, business line test was unable to justify that Harris has misappropriated the club's opportunities as the business line of the club did not include procurement of the real property. It could be said that based on the fairness sense the court rejected Guth test and emphasized its weaknesses.[37] Further, the Supreme Court if Maine

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[35] *Northeast Harbor Golf Club*, *Inc*. *v*. *Harris* 61 A.2d 1146 (Me.*1995*).

[36] At the court session the broker stated that he contacted Harris as the president of gulf club as he proposed that the club would be interested in acquisition of the adjacent land parcels, *Northeast Harbor Golf Club*, *Inc*. *v*. *Harris* 61 A.2d 1146 (Me.*1995*).

[37] Court of Maine regarded as the weakness that according to Guth rule, it is hard to determine, what is implied in such opportunity, which is within the corporation's business line and how should be evaluated, whether the opportunity is within this line or not. The court also criticized the first element of Guth rule – use of the corporation's financial lever to take the opportunity. The court stated that emphasizing of this issue would allow the corporation managers, who have information about corporation's financial capacities, not to take care about development of these capacities and take advantage of the fact of lack of funds for the personal deals profitable to them, *Northeast Harbor Golf Club*, *Inc*. *v*. *Harris* 61 A.2d 1146 (Me. *1995*).

applied the fairness test and referred to the case of *Darfee v. Darfee & Canning Inc*. Though, in the court's opinion, this test was even more general. The court rejected also the Minnesota two-stage test applied in case of *Miller v. Miller*.[38]

Finally, the court regarded that the most appropriate would be to apply the doctrine of corporate opportunities developed by American Law Institute. The court decided the following: the first acquisition of real property by Harris, in result of offer to him as the representative of corporation and not to the natural person was unambiguously the corporate opportunity. As for the second acquisition, though Harris learned about it through private conversation, the court regarded it as the corporate opportunity as well. The court stated that Harris, as the president, knew about corporation's interest towards these lands. The court regarded as significant circumstances that Harris had not disclosed the corporate opportunity. In result, the Supreme Court of Maine decided that Harris had violated the loyalty duty and misappropriated the corporation's commercial opportunities.

As we can see, the court has adjusted the existing views to the practical example and thus demonstrated the weaknesses of the traditional models of doctrine.

6. Right to Claim

Corporation is the addressee of protection of fiduciary duties. Thus, in case of violation of the obligations of this category the right to claim belongs to the corporation. Though, in cases where the relevant representatives of the corporation fail to act, the partners become entitled to submit the claim in their own name, for the purpose of protection of the corporation's interests for misappropriation of the corporate opportunities, with due regard of the relevant restrictions (e.g. minimal ownership interests). Such disputes, regarding their nature, are unambiguously the derivative ones.[39]

7. Responsibility for Misappropriation of the Corporate Opportunities

To institute proceedings against the director for misappropriation of the corporate opportunities the court shall establish the following facts: whether the opportunities belong to the corporation? If the answer is positive (i.e. if it establishes that the disputed commercial chance is really a corporate opportunity), whether the director has offered it to the corporation (i.e. whether he/she has disclosed complete and accurate information about the opportunity)? Whether after disclosure the corporation has clearly and reasonably rejected the opportunity? If based on these facts it is established that the director has misappropriated the corporate opportunity, the court may apply against him/her the sanctions in a form of compensation, imposition of the preliminary or permanent injunction, compensation of losses with increasing interests, deduction of the salaries etc.[40]

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[38] The court stated that the test should allow the corporate managers accurate determination of what they are entitled to and what they are not as it is inadmissible that they faced contingent responsibilities. *Northeast Harbor Golf Club*, *Inc*. *v*. *Harris* 61 A.2d 1146 (Me. *1995*).

[39] Complexity in Corporate Governance: The Case of the Corporate Opportunity, OECD, 2012, 4.

[40] *Schaller W.,* Corporate Opportunity and Corporate Competition in Illinois: A Comparative Discussion on Fiduciary Duties, "J. Marshal. L. Rev.", Vol. 46, 2012, 17.

8. Georgian Reception of the Doctrine

In result of reform of 2005 to Georgian Law on Entrepreneurs, the Law reflected the doctrine of corporate opportunities.[41] Initially, in Section 7 to Article 9 of the Law,[42] with the following contents: "without consent of the partners' meeting the directors shall not be entitled to use the information related to the company's activities known to them in the process of performing of their duties or due to their office, for their own benefit." According to the paragraph three, this duty, by virtue of the director's employment contract, may survive for three years after the director's retirement. It is possible that the director was paid compensation for fulfillment of this duty. From 2008, this regulation was moved to the sixth section of the same article, without any changes. Though, Georgian version does not respond to the original model of the corporate opportunities' doctrine for three reasons. First, the regulation uses term "information" though there is difference between the information and opportunity and this could be clearly seen in the case of Gulf Club.[43] On the example of this case, information is the broker's notification about sale of the land parcel. Broker's offer to Harris turned this information into the opportunity. Thus, the opportunity includes information and therefore, it should be regarded as the wider concept than the information is. Second, supposedly, the regulation implies restriction of use of the information gained in the period of employment after retirement and not an information about the company received after retirement. Basis for such conclusion is provided by consistent explanation of the second and third paragraphs of Article 9, as obligating the director not to use the information gained after retirement, through external relations, using personal contacts, is a fettering condition. Logically, the regulation should imply use of the information gained due to the office after retirement, and this is closer to the obligation of competition restriction provision. Though, such obligation, on its side, is considered in Section 5 of Article 9. Third, the component of the company's consent mentioned in the regulation is problematic as well. The company may refuse to give consent to the director on use of the opportunity not causing competition with the company and at the same time, having no intention to take this opportunity by the company. In such case "wasting" of the opportunity takes place and doctrine attempts to avoid this.[44] Thus, it would be reasonable that the regulation specified gaining of the reasonable information about absence of interest towards the opportunity from the company's side, rather than its consent. It should be also noted that there is no explanation of paragraph 2, Section 6 of Article 9 in the practice of Supreme Court of Georgia.

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41 *Chokheli N*., *Svaniudze A*., *Papuashvili S*., Reform of Georgian Law on Entrepreneurs, "Georgian Law Review", 8/2005-1/2/2005, 22 (in Georgian).

42 Georgian Law of 24th June 2005 No 1781 on Amendments and Additions to Georgian Law on Entrepreneurs.

43 *Northeast Harbor Golf Club*, *Inc*. *v*. *Harris*61 A.2d 1146 (*1995*).

44 It should be said that the doctrine attempts not to leave unused opportunities. This proposal is based on the fact that all versions of the doctrine specify that in case of presence of the relevant basis, the right of use of the opportunities should be given to the directors.

8.1. Recommendations in Relation with Paragraph Two, Section 6, Article 9 of Georgian Law on Entrepreneurs

Regarding the weaknesses discussed above, it would be reasonable that the Law contained the following regulation, instead of paragraph two of Section 6, Article 9: The managers and members of supervisory board, if any, shall be prohibited to take the opportunities for their own benefit, which became known to them through performing of their duties, use of the company's information or property or, if the opportunity is related to current or intended business of the company. Such prohibition shall not exist if a person gains the reasoned refusal of the partners' meeting on use of such opportunity. Refusal of the general meeting shall be deemed reasoned if the meeting states that it has no interest in taking of the said opportunity or absence of funds and at the same time, it does not regard that increase of capital through imposition of additional contributions or undertaking of new liabilities would be reasonable.

In our opinion, such content would reflect the best elements of modern and traditional approaches of the doctrine of corporate opportunities more reasonably.

9. Conclusion

In conclusion, it should be said that the main problematic issue of the doctrine is to establish, whether the opportunity belongs to the corporation or not. This could be found out by means of the tests considered in this article and choice of such tests should be at the discretion of the court considering the case. When the answer to this question is given, the situation develops by simple algorithm. Director can not use the opportunity personally, until he/she offers to take the opportunity to the corporation and the latter, through its authorized body, rejects the offer.

Judicial practice considered in this article showed that century-long genesis of the doctrine of corporate opportunities in the USA, formulated in early 20th century in a form of single-component interest or expectancy test, in few decades developed, improved and modified and in the end of the century was formulated into the constructive doctrine.

Work also demonstrated inadequate approach of Georgian Law on Entrepreneurship to the doctrine. In our opinion, this weakness should be improved in the nearest future and this would undoubtedly bring Georgian corporations law to the right way of development.

Ketevan Iremashvili*

Insurable Interest Doctrine and Analysis of Its Critics

1. Introduction

The topic of the present article is the notion of insurable interest as the integral element of norms regulating the insurance contract. The objective of presented research is: demonstration of importance of insurableinterest doctrine; definition of its place in the Georgian legislation and court practice; study and analysis of doctrine critics and relevant conclusions.

Insurable interest doctrine plays key role in the interpretation of insurance contract. Doctrine is acknowledged valuable for determination of the purpose of insurance contract and its legal nature.

In legal terms, insurance is considered as the "important guarantee for the protection of rights of participants of civil turnover",[1] as it is "the mean for ensuring the reimbursement of possible loss".[2]

Historically the purpose of insurance was the restoration of *status quo* following the damage incurrence.[3]Under the modern legal system insurance still serves the function of loss reimbursement. It is important to consider the above, as classical insurance doctrines are based on this key principle.

Insurable interest doctrine is a part of heritage received by the insurance from the English law. The establishment of insurable interest requirements was caused by objective reasons. As on marine ships gambling and wagering were increasing, the incentive of causing damage to the insurance object was growing. Under the conditions of increased moral risk insurance was losing its protective function. Therefore, English legislators of 18th century deemed it expedient to establish the requirement for continuous interest of retaining the insured object by the insured. Such interest is referred to as insurable interest and the annulation of agreement is considered as legal consequence of its absence.[4]

The insurable interest doctrine had huge impact on the development of insurance law. According to the definition provided by US Supreme Court – if not an insurable interest, the insurance contract would look like a gambling and wagering. As a result, the insurer would always have incentive to destroy the insurance object. According to the American doctrine, gambling and wagering consider the possibility of gaining profit. As for the insurance contract it fulfills the socially beneficial function. The purpose of insurance contract is not gaining of profit by the insured, but protection of insured from the potential damage.[5] Therefore, although the insurance agreement contains the

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1 Resolution as-663-624-2011, Supreme Court of Georgia, 2012 (in Georgian).

2 Ibid.

3 *Jerry R.*, *Richmond D.*, Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 15.

4 Ibid., 273.

5 Ibid., 275.

conditionality elements, due to the insurable interest, it does not belong to the alleatory agreements.[6] Insurable interest doctrine prohibits gaining of profit by the insured and excludes the probability of dishonest behaviour from the insured.[7]

The objectives of insurable interest doctrine were from the beginning set as establishment of good faith relationships between the parties[8] and protection of public order. According to one of the first decisions addressing the insurable interest issued in USA, the existence of doctrine was justified by the requirements of public order.[9]

Diverse utilization of doctrine by US judges significantly enriched the doctrine. However, diversity of court interpretations at the same time created many problems. As a result, along with the supporters of doctrine the "opposition" was also created; such "opposition," based on the economic analysis, came to the conclusion of rejecting the doctrine.[10]

2. Essence of Insurable Interest

Insurable interest is the legal interest held by the insured towards the insured object.[11] In case of personal insurance is directed towards the retaining of life and health of insured, and in the event of property insurance – protection of the property.[12]

The insurable interest shall be clearly separated from the insurable object. Insurable interest does not consider only the right over the insurable object or its part. Insurable interest demonstrates the close connection between the insured and insurance object. Value of insurable object is denominated in cash units. Value of insurable interest might be much higher than value of insurable object, as insurable interest is aggregate of material and moral interests.[13]

In insurance practice insurable interest serves the objective of reduction of moral hazard. Moral hazard is the danger of reduction or loss of insured's interest towards the insurable object.[14] From the very beginning reduction of moral hazard was considered as one of the purposes of insurable interest. However is has to be mentioned that, insurable interest doctrine reduces the level of moral hazard, but does not exclude such risk from the insurance contract. Doctrine is effective for annulling the agreement containing high moral risk, hence fulfilling the function of protection.[15]Accordingly,

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6 *Garner B*. (Ed.), Black's Law Dictionary, 8th Edition, "Thomson West", 2004, 829.

7 *Jerry R*., *Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 276.

8 Ibid., 173.

9 *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 4.

10 Ibid.

11 *Garner B*. (Ed.), Black's Law Dictionary, 8th Edition, "Thomson West", 2004, 829.

12 *Cannar K*., Essential Cases in Insurable Law, Cambridge,"Woodhead-Faulkner", 1985, 4.

13 Ibid., 5.

14 *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 14.

15 Ibid., 7.

insurable interest and moral hazard are not the notions bearing the similar significance. Insurable interest is considered as one but not the only mean for the reduction of moral hazard.[16]

Insurable interest doctrine indisputably has the purpose of protecting third parties. For example, if according to the insurance contract formed between the A (insurer) and B (insured) the life and property of C was determined as the insurable object, the interest of C's protection requires B to have insurable interest towards the life or property of C. In other case, the intention of destroying the insurable object can be generated in B.[17]

The problem related to the insurable interest is created when it turns out that the insurer did not have information on absence of insurable interest at the moment of contract formation; or that the insurable interest was lost following the contract formation. In such cases, it is essentail to determine the existence of insurable interest. The court shall interpret how the interest of insured towards the legal goods envisaged under the contract is demonstrated.[18]

2.1 Composition of insurable interest

The court must correctly determine the composition of insurable interest by defining its contents. In this regard insurance doctrine has three different approaches: legal interest,[19]economic interest[20]and mixed form of cumulative composition. Composition of insurable interest is differently defined for various types of insurances.

2.1.1. Composition of insurable interest in property insurance

It is problematic to determine the contents of insurable interest in property insurance. Since 1805 the existence of legal and economic interests composing the insurable interest has become important. Decision of Court of England on case *Lucena v. Craufurd* reveals the heterogeneous approach of judges to the issue. USA courts had different approach to the issue in different times; however the insurable interest essence is determined with the consideration of factual circumstances of specific case in question.[21]

Legal interest considers the various types of legal relationships to the insurable object,[22] for example, right of ownership.

Economic interest is determined in the wider sense. This is the interest of receiving economic benefit from the insurable object. Such interest may exist independently from the legal interest and

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16 *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 7.

17 Ibid.

18 *Jerry R.*, *Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 277.

19 legal expectancy.

20 factual expectancy.

21 *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 6.

22 *Jerry R.*, *Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 283.

according to many authors, it might be sufficient for the development of insurable interest. Economic interest reflects the close connection of insured with the property, which is directly, reflected in his/her wellbeing. For example, it is indicated in the legal literature that the expectation of child to receive the inherited property from deceased parents is not considered as economic interest.[23]

2.1.2. Composition of Insurable Interest in Life Insurance

In case of life insurance the composition of insurable interest is presented as aggregate of legal and economic interests. Moreover, life insurance in terms of insurable interest has certain characteristics. Legal interest in life insurable includes blood and legally defined family/relative relationships. Economic interest considers the economic relationships held by the "beneficiaries" towards the insured.[24]

In terms of applying insurable interest for life insurance cases American doctrine distinguishes two different cases: a) when insured insures his own life and indicates the third person as a beneficiary; b) when insured insures the other person and he pays the insurance premium.

In the first case, the probability of dishonest behavior (intention to terminate life of insured) from insured and beneficiary is minimal. It is less probable that insured can plan "enrichment" of third party by terminating his own life. There is also low probability that the person indicated by the insured is potential "killer".[25] However existence of such dangers can't be excluded.

In the second case there is a high risk of termination of insured's life. Therefore it is very important to have insurable interest demonstrated in the strong family or economic connection.[26]

In the American doctrine, spouses have insurable interest towards the lives of each other, which is lost in the event of divorce. However, if one of the spouses is assigned to pay the aliment to the other the economic connection will be created, which can be used as an important argument to evidence the insurable interest.[27]

American courts have different approaches about existence of insurable interest in the relationships created as a result of child adoption. Moreover the courts do not have homogenous approach to the circle of relatives over which the presumption of existence of insurable interest should be expanded.[28]

It has to be mentioned that economic interest may be given the decisive importance when there is no relative relationship, but the close economic connection exists. For example, business partners, parties to the contract may have interest to the lives of each other. Death of the partner may cause material loss for other partners. According to the American doctrine, in case of unsecured credit creditor does not have interest to the property of the borrower, (unlike the secured credit, where there is interest to the property as security),[29] but he has interest to the life of borrower.[30]

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[23] *Jerry R., Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 289.
[24] Ibid., 293.
[25] Ibid.
[26] Ibid., 294.
[27] Ibid.
[28] Ibid., 295.
[29] Ibid., 287.

It is problematic to define the insurable interest in employment relationships. Insurable interest towards the lives of each other may include the employer and employee. In this case it is important to consider several factors. First of all, it has to be determined what type of relationship exists between the employer and employee; how close and intensive is such relationship. In large companies, where the number of employees is large, the relationship between the employer and employee is distanced and existence of insurable interests becomes doubtful.[31] Moreover, it is impossible to have same interest towards all employees. For the employer the employees important for the company become especially significant.[32]

It is also important, that if employment relationships are based on *at will* doctrine then the interest of employee might be minimal towards the relationships due to their instability.[33]

Insurable interest is related to the relationships. Therefore it is based on subjective standards rather than objective ones. The interest of persons towards retaining lives of each other depends on the contents of relationship between them. The development of relationships can't be projected and they may often change. Accordingly there are as many different expectations as relationships.[34]

US courts use the evaluative categories in the process of interpretation of insurable interest. By this, on the one hand, they demonstrate the priority of their control and, on the other hand, reinforce the non-homogeneity of the doctrine. For example, in one of the decisions of the US Supreme Court (1881) addresing the life insurance case the insurable interest was interpreted as interest of preserving life of insured based on blood relationships, non-blood close relationships and monetary interests (elements are alternative). However there is some uncertainty behind such formulation: what circle of blood relationship and what type of monetary interest was considered by the court? Courts indicate to different levels of interest in the process of interpretation of insurable interest, hence the essence of insurable interest remains vague.[35] The US courts have heterogeneous approaches to the cases when, on the one hand, the persons are under the un-registered marriage, however living together and, on the other hand, when the persons under the registered marriage have atypical relationship: for example, when a woman is a victim of demostic violence and etc.

2.1.3. Composition of Insurable Interest in Georgian Court Practice

In Georgian court practice, in terms of defining the composition of insurable interest, the following decision is important – cassation chamber considered the right of ownership on property by the plaintiff as the basis for the existence of insurable interest.[36] However it has to be mentioned that

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30 *Jerry R.*, *Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 296.

31 Ibid.

32 *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 5.

33 *Jerry R.*, *Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 289.

34 *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 11.

35 Ibid., 5.

36 Resolution as-733-1003-05, Supreme Court of Georgia, 2005 (in Georgian).

in its justification the cassation chamber uses term proprietary interest, and the appeal chamber for the same case uses term insurable interest. In terms of terminological and contextual clarity, it is important to clarify that proprietary interest and insurable interest are not the identical notions. Insurable interest comprises of proprietary as well as non-proprietary interests. By this particular desicion cassation chamber made decision on the insurable interest composition in favor of legal interest.

In case of property insurance the use of term - proprietary interest is partially justified by the argument that the insured might have less material interest towards the property. By using such argument, in case of property interest the insurable interest is only demonstrated in the proprietary interest to the insured property. However, it cannot be excluded that as a result of property infringement the insured may undergo the moral damage. For example, piano player insured his/her piano. In case of damage to piano, piano player is under material as well as moral damage. In case of life insurance, it is unjustified to equalize the insurable interest with the proprietary interest. In such case, insurable interest covers the proprietary as well as non-proprietary interests. Therefore, it is necessary to clearly separate insurable interest and proprietary interest in the doctrine and court practice.

2.2. Determination of Insurable Interest in Case of Fair Possesion

It is problematic to determine the insurable interest in the event of fair possesion. Possesion itself contains economic interest. According to the American doctrine, as in the event of fair possesion the property is subject to withdrawal from the owner, possessor does not have economic interest towards the property. Therefore, in relationships, where the insured is in unstable condition towards the insured object, similar to the *at will* doctrine used in empolyment relationships, the existence of insurable interest is excluded. However, there is an opposite view in the American doctrine, which is inclined towards the insurable interest of fair possessor. Fair possessor has rights related to the item to any persons except for the owner. The above is sufficient for proving the existence of insurable interest.[37] Moreover, fair buyer has interest to retain the item, as s/he incurs costs for buying the item.[38]

2.3. Devaluation of Insured Property

It is problematic to determine the insurable interest for the cases, when the insured property loses its economic value. For example, dismantling of building on the land plot, carried out by the insured himself. The problem arises if insurance event occurs before starting the dismantling or in the process of dismantling. American doctrine develops different view for this case. On the one hand, court deems that insured does not lose insurable interest towards the "devalued" property, which is demonstrated in the intention to dismantle the building and in the objective of further usage of the land plot.[39] However, there are decisions, where the US courts present opposite views. Namely, based on their view, if the dismantling of the building was caused by the fire and insured did not have to incur

[37] *Jerry R., Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 304.
[38] Ibid., 305.
[39] Ibid., 306.

costs for its dismantling, there is no damage to the insured.[40] It is important to consider the view of the court on imprudence of estimating the precise economic value of the building under dismantling process.[41] In conclusion, existence of insurable interest creates the right of request for the insured. However, it is deemed that the loss incurred by the insured is minimal in case of devalued building.[42]

2.4. Holders of Request in Case of Life Insurance

For life insurance, American doctrine considers the right of changing the beneficiary under the contract in case of worsening of relationship with him/her, as one of defense mechanisms.[43]

In case of property and liability insurance, only the insured has right to request the insurable interest. Third person cannot have interest to the annulation of such agreement. This view partially contradicts with the purpose of insurable interest doctrine in terms of protection of public order; however it is relevant in practical terms.

US courts have different approaches to the insurable interest in terms of request of third parties. Some judges are of the view that granting the right to request insurable interest to third parties is not reasonable and is against the autonomy of will of parties to the contract. However, the argument, that limitation of holders of insurable interest request hinders prevention of moral hazard, has to be also considered.[44]

Therefore, in case of life insurance, third parties also have right to present the insurable interest right. Namely, according to the American doctrine, if there is justified doubt that beneficiary has some connection with the termination of life of insured, then a family member of insured can claim the annulation of contract.[45]

2.5. Defining the Moment of Presence of Insurable Interest

In practice it is problematic to define the moment of presence of insurable interest. The practice established in English law is still valid in general law area. According to this rule, it is necessary to have insurable interest at the moment of contract formation as well as at the moment when insurance event occurs.[46]

Existence of insurable interest at the moment of contract formation does not exclude probability of losing such interest afterwards, before the insurance event takes place. Therefore the existence of insurable interest shall be given special importance at the stage when insurance event occurs. There is

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40 *Jerry R., Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 308.
41 Ibid.
42 Ibid., 307.
43 *Jerry R., Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 309.
44 *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 13.
45 *Jerry R., Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 310.
46 Ibid., 298.

logic behind such conclusion: if there is not insurable interest, there is no damage and then the insured loses the right to request.[47]

There are problematic cases, when at the moment of insurance event occuring, despite the existence of insurable interest court still deems it important possesing insurable interest at the moment of contract formation. There is a big difference between two following examples: in one case person insures the neighbor's house and does not have an interest and in the other case person insures the neighbor's house, which s/he planns to buy in nearest future. In the second case, it would be illogical to reject the request from the insured with the argument, that there was no insurable interest at the moment of contract formation. According to the American doctrine, existence of insurable interest at the moment of insurance event occurring must be sufficient for the confirmation of existence of insurable interest.[48]

In case of life insurance, it is essentially important to have insurable interest at the moment of contract formation. If at the moment of contract formation the insurer (insuring the other person) or beneficiary (when the insurer names him/her as beneficiary) has interest to the life of insured, the probability of terminating of insured's life is minimal.

2.6. Giving Up the Insurable Interest Request

According to the American doctrine, insurer does not have right to give up the insurable interest. However the American courts reveal the differing approaches. In practical terms, the problem of giving up the insurable interest request is in place when the rejection to repay the insurance payment to the insured is opposed by the counter-request from the insured. In such request the insured states that the insurer according to his will, through its concluding actions gave up the insurable interest request.[49] Hence, there is exception from the general rule, which prohibits the insurer to give up the insurable interest request. The insurable interest request is considered as rejected, if insurer (his representative) knew about absence of insurable interest.[50]

2.7. Returning the Paid Premium

There are different views related to the repayment of paid insurance premiums. In most cases, it is deemed unreasonable to return paid premiums, as because of bearing risk by the insurer the premium is considered as deserved.[51] Such practice itself may increase the motivation of insurer to

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47 *Jerry R*., *Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 278.

48 Ibid., 299.

49 Ibid., 302.

50 Ibid., 303.

51 In this regard it might be expedient to consider the view expressed regarding the return of remuneration in the employment agreement. Insured cannot return the service provided (bearing of risk), as the employee cannot return the provided service to employer. It is not reasonable to request return of insurance premium or paid remuneration. See *Shvelidze Z*., Characteristics of Legal Status of Employee Envisaged under the Labor Code of Georgia, in collected articles: Labor Code, I, *Zaalishvili V.* (Ed.)*,* 2011, Printing House "Meridiani", 119 (in Georgian).

carry out unfair behaviour, which considers contract formation under the condition of absence of insurable interest and receiving illegal profits. In fact, annulation of agreement is more favorable for the insurer than its execution.[52] However repayment of premium can be considered as justified based on the fair expectation of insured to have authentic agreement.[53]

3. Regulation of Insurable Interest in Georgian Legislation

3.1. The Regulation of Insurable Interest's Notion

For the determination of place and importance of insurable interest in the Georgian insurance doctrine and court practice it is essential a) to determine the place this notion holds in the system of Georgian civil code, b) to clearly define the insurable interest term.

Georgian legal literature and court practice does not know the insurable interest term. On the one hand, there is a view that "insurable object" is considered as the insurable interest.[54] On the other hand, insurable interest considers the party's interest to the contract.[55]

3.1.1. The Regulation of 815 II

Based on the norm considered under the Georgian Civil Code (GCC) - 815 II, legislator regulates the cases of losing the interest towards the insurance contract. Interest existing towards the insurance contract (insurable interest) is not identical to the insurable interest known for the international insurance doctrine. Clear definition of above mentioned terms is key for the resolution of specific disputes.

At some extent, insurable interest reflects the interest of insured towards the contract. Absence of such interest may cause annulation of contract according to the article 54 of GCC. However, analysis of insurable interest doctrine makes it possible to distinguish interest to the insurance contract from the interest towards the insurance object, as losing the first not always automatically implies losing of the other one.

Difference between the presented notions can be demonstrated by specific examples. For the loss of insurable interest a case might be used in which under the motive of loss of interest towards the insurance contract insured declined to pay the second premium. In the given case[56]life insurance agreement was concluded between the bank and LTD based on the general credit agreement. Under

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[52] *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 8.

[53] *Keeton R., Widiss A.,* Insurable Law – A Guide to Fundamental Principles, Legal Doctirnes, and Commenrcail Practices, "West Group", 2003, 161.

[54] *Tsiskadze M*., Legal Regulation of Voluntary Insurance, Printing House "Meridiani", Tbilisi, 2001, 8 (in Georgian).

[55] Resolution as-719-674-2010, Supreme Court of Georgia, 2011 (in Georgian).

[56] Ibid.

the insurance contract on the life of 100% owner partner of the LTD, the parties agreed to pay premiums in two tranches. The insured repaid the amount taken as a loan following the payment of the first premium, before the time for the payment of second part of the insurance premium. As a result of fulfillment of loan liability insured lost interest towards the insurance agreement and did not pay the second insurance premium. Interest of insured towards the insurance contract may be lost due to various reasons.

The unfair insured does not lose interest to the insurance contract due to the loss of insurable interest. For example, in one of the cases known to the internationalinsurance practice,[57] wife of the uncle of an infant concluded life insurance for the girl with several insurance companies. The woman clearly did not have interest towards the insurance object, as she intentionally terminated life of the child. Despite this fact, the woman had interest to the insurance contract, which indicated her as beneficiary and from which she was expecting the illegal income. In the given example the interests towards the insurance object and insurance contract differ, moreover actually absence of the first is precondition for existence of the second. Based on the presented example it is clear that insurable interest expresses the interest towards the insurance object and legislator aims to protect the public order by establishing requirement for existence of such interest.

3.1.2. Regulation of Insurable Interest by Special Norms

GCC contains norms considered under the insurable interest doctrine for the regulation of specific forms of insurance. The above is reflected in Articles 829, 842, 849, 850 and 856 of the GCC. Analysis of the indicated articles makes it clear that insurable interest considered under these articles is presented as a precondition for the request for reimbursement of the loss. It is very important to have such provisions in the norms regulating the insurance. However it would be desirable to have the request for the insurable interest regulated systematically in the general provisions.

In some cases of preventing unjust enrichment it is reasonable to divide the imperative norms according to the insurance types. For example, the norms regulating property insurance consider the principle prohibiting gaining of profit by the insured. Despite the relevance with the general principles of insurance, above mentioned prohibitions are based directly on the principle of reimbursement effective for the property insurance and are separated from the practices established for the personal insurance. Unlike the above mentioned, requirement of insurable interest serves the purpose of preventing from unjust enrichment as well as protection of public order. Therefore requirement for the insurable interest should be reflected in the general provisions regulating insurance along with the rest of general principles applying to the insurance contract. Such regulation would more clearly demonstrate its importance and on the other hand, make it easier for the judges to make interpretations.

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[57] *Liberty National Life Insurable Co.v.Weldon* (in: *Jerry R.*, *Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 313).

3.2. Legal Results of the Utilization of Insurable Interest

For the definition of legal results of the utilization of insurable interest it is essential to define the meaning assigned to it by the civil code. Absence of insurable interest might be reviewed on the one hand, as the basis for annulation of the insurance contract and come under the regulation of article 54 of GCC. Historical analysis of insurable interest doctrine and its modern context, as of a mechanism for preventing of fraudulent actions, provides the basis for such formulation. In such case judge can easily interpret it based on the article 54 and general principles of the contract.

On the other hand, existence of insurable interest can be considered as a precondition for the right of the insured to request. Such conclusions are indirectly derived from several resolutions of Georgian court.[58] In this term it is necessary to consider the relationship of insurable interest doctrine with the reimbursement principles. Connection between the two is the clearest in case of property insurance: if the insured does not have interest towards the insurance object, it is considered that the insured does not incur the loss. And if there is no loss as a precondition for the request of reimbursement, there is no request for reimbursement.[59]According to such argument insurable interest is considered as one of the central elements of insurance notion. In the process of defining of the moment of existence of insurable interest, under such argument, the phase of loss incurring becomes the key.[60]

In the process of insurable interest interpretation the Supreme Court is of the view that insurable interest is an integral part of insurance contract, namely according to the article 799 I 1 of GCC sentence one at the moment of contract formation parties agree on the insurable interest. However for the given case, the cassation chamber does not specify what is implied under the insurable interest.[61]

In the process of interpretation of insurable interest, judge should pay utmost attention to the condition for the insurable interest in the agreement, in case of presence of such circumstances. For every specific dispute the judge can base his resolution on either one or another conclusion. However the legal outcomes have to be considered. In case of consideration of insurable interest as a precondition for the request of reimbursement, it must be noted that this is not the only precondition. Moreover, unsatisfaction of request of the insured does not automatically result in the termination of contractual relationships between the parties. Annulation of agreement due to the absence of insurable interest requires restoration of initial condition between the parties. In such case the issue of repayment of premiums to the insured becomes critical.

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58 Resolution as-733-1003-05, Supreme Court of Georgia, 2005 (in Georgian).

59 *Jerry R., Richmond D.*, Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 278.

60 Ibid.

61 Resolution 3k-310-03, Supreme Court of Georgia, 2003 (in Georgian).

4. Critics Against the Insurable Interest Doctrine

Besides the supporters the insurable interest doctrine has its opposition. The opponents refer to its ineffectiveness. According to their view result of utilization of insurable interest doctrine can't be assessed positively, as utilization of doctrine does not meet the established expectations.[62]

It is important to distinguish several important arguments in the critics against the insurable interest doctrine: 1) Encouraging unfair actions from the insurer; 2) Deepening the asymmetry between the insurer and the insured; 3) Decreasing effectiveness of insurance market.[63]

4.1. Encouraging Unfair Actions from the Insurer

According to the American doctrine, absence of insurable interest causes termination of contract. As a result of contract annulation the insured loses the right to request loss reimbursement. Accordingly insurer is not imposed the liability to reimburse. According to the principle established in the insurance practice, paid premiums are not subject for repayment. Gaining such an unfair advantage by the insurer is a result of vagueness of the doctrine. The insurable interest doctrine is criticized due to the fact that its non-straightforward interpretation became the rule in the US.

On its own, unfair actions of insurer deserve imposing of responsibility. However according to the position it is difficult to justify that the insurer knew beforehand about the absence of insurable interest and for gaining of illegal profits entered such contract with such knowledge. Therefore, insurers often issue the insurance policies with the higher risks. Hence utilization of insurable interest doctrine establishes the poor practice preventing of which is the purpose of the doctrine.[64]

In terms of economic result, the following conclusions may be made: a) if the insurer does not return paid premiums, its profit equals to the sum of premiums paid by the insured. b) If the insurer returns premiums then his/her profit equals to zero. In both cases annulation of contract is more favorable for the insurer than its execution.[65]

Finally, according to the doctrine critics, in return for the increase of intention for the unfair actions from the insurer, demonstrated in the issue of high risk polices, the level of unprotection of third parties is increased.[66]

The insurer may know about the absence of insurable interest at the moment of contract formation and/or inadequately warn the insured about its importance, and at the moment of insurance event occurring decline reimbursement of loss due to the absence of insurable interest.[67] Insurable interest doctrine shall not become the tool for gaining of illegal profit for the insurer. Utilization of

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62 *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 2.

63 Ibid., 3.

64 Ibid., 8.

65 Ibid.

66 Ibid., 11.

67 *Jerry R., Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 311.

doctrine in this way is fundamentally against its purpose of protection of public rule and protection of good faith relationships.[68]

It is equally important to consider such cases, when the insurer due to his carelessness (or his representative) supports the implementation of illegal actions by the beneficiary/insured. In case of life insurance determination of insurable interest is especially important, as the object of insurance is life of human being. According to the definition of US Supreme Court physical persons have general liability to prevent harming each other. As a result of careless underwriting implemented by the insurance company there is a possibility of creating serious danger for the life of human beings.[69]

One of the ways to avoid such danger is inclusion of requirement for the consent of insured in the life insurance contract.[70]

4.2. Deepening Asymmetry between the Insurer and Insured

Critics of the doctrine are of the view that as a result of utilization of insurable interest doctrine, the rights of insured are violated.[71] In the process of contacting with the unfair insurer the fair insured is at unequal condition in terms of information.

Insurer holds the informational advantage characteristic to the entrepreneurial entity against the insured. The vagueness of insurable interest notion significantly increases the asymmetry of information.[72]

In this case the insurer acts according the insidious two phase plan: 1) at the stage of contract formation the insurer does not provide oral or written explanation related to the requirement for the insurable interest; 2) at the moment when the insurable event takes place insurer declines to fulfill liability of reimbursement due to the absence of insurable interest.[73]Vagueness of the doctrine and imposition of burden of proof on the insured increases motivation of insurer to act unfairly.

As a result of informational asymmetry between the parties, insured pays more for the insurance service than the value of such service.[74]

4.3. Decreasing Effectiveness of Insurance Market

The third problem indicated by the critics of insurable interest doctrine – utilization of doctrine brings negative results for the insurance market. In this regard, utilization of doctrine damages legitimate interests of parties to the contract – the insurer and the insured.The above concerns such

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68 *Jerry R., Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 311.
69 Ibid., 313.
70 Ibid., 314.
71 *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 9.
72 Ibid., 1.
73 Ibid., 9.
74 Ibid., 10

cases, when both parties are equally informed and agree on the insurable interest requirement. In such case there is less danger for the encouragement of unfair actions from the insurer and unequal condition of the insured. However, according to the doctrine critics, with the consideration of the interest of the market and parties of the contract, unreasonable result is generated. Namely, under such conditions, the level of "moral hazard" is not considered. As a result such agreements are annulled which do not require such termination due to the low level (minimal) of moral risk.[75] Namely, with the consideration of doctrine vagueness, there is a possibility that due to the absence of insurable interest the court deems annulled such insurance contract which contains minimal moral risk.[76]

By annulation of contract not containing the high moral risk the interests of the parties are violated. Such transactions are also ineffective in economic terms.[77]

According to the suggestion of insurable interest doctrine critics insurance company is more effective than court in identifying and evaluating moral hazard. Accordingly in their view, insurable interest doctrine shall not be any more used and discretion for the management of moral hazard shall be fully transferred to the insurer.[78]

According to the position of doctrine critics, unlike the court insurance companies hold special competence and experience in anticipating and evaluating the risks.

The critics are of the view that by assigning the function of control over the moral risk to the insurer, the insurer will issue policies with high risks with more attention and care. The insurer will implement the above only if segregation adequate to such risk will be possible. The high premium defined for such insurance will force insurer to approach the contract with higher attention. If the insurer is not able to make adequate segregation then the insurance company will decline issuing such policies. Doctrine critics are of the view that in such way the moral hazard will be managed according to the economic rules.[79]

5. Assessment of Critics

The views expressed by the critics of insurable interest doctrine must be partially shared. Namely, the argument that the insurance companies have advantage in terms of competence is acceptable. Unlike court, which is based on the law, homogenous practice and internal belief of the judge, insurance companies are equipped with unique resources in the form of underwriting service. They have access to the statistical information. They have historical data on the clients. Insurance company bases its evaluation of moral risk on probabilities and reasonable assumptions.

Despite the advanced competence, insurance companies act within the limited "company interest" framework. In this regard insurance company can't be considered as equal to the court, which is equipped

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[75] *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 10.

[76] Ibid.

[77] Ibid., 11.

[78] Ibid.

[79] Ibid., 15.

with the function of serving public order and executing justice. Insurance company is the entity oriented on profit generation, as for the court – it is central and independent unit of the State. Accordingly, the conclusion made by doctrine critics about excluding of role of judiciary in determining the moral risk is not justified. Such offer is against the constitutional right to have acess to court.

The problems distinguished by the doctrine critics are also unjustified. Namely, reduction of motivation of unfair action from the insurer by the court is objectively possible through the interpretation of insurable interest doctrine and satisfaction of request to repay paid insurance premium. Straightforward and clear definition of doctrine[80] would significantly reduce the burden of proof over the insured during the civil hearings. Court's decision on satisfaction of request for the return of paid premiums will be justified with the necessary reaction to the unfair actions of the insurer and fair expectation of insured towards the authenticity of the contract.[81]

The other problem related to the deepening of asymmetry between parties and presented by the insurable interest doctrine critics is not convincing either. It is important to note that information asymmetry as the characteristic of modern market relationship, naturally exists in the insurance contract. Therefore we cannot assign the blame for the development of such asymmetry to the utilization of insurable interest doctrine. It is evident that at the moment of contract formation business entity has more information than the insured on the product offered. However, based on the same logic, one can also consider the insured in the same advantageous conditions. In the process of interpretation of insurance contract it is considered that the insured holds more and comprehensive information on the insurable object compared with the insurer. The above was reason for the establishment of duty to inform in insurance law.[82] With the consideration of presented arguments the view that the utilization of insurable interest doctrine is reason for the deepening of informational asymmetry can not be shared.

As for the argument related to the reduced effectiveness of market, it would not be reasonable to share such view in legal terms. According to the logic of doctrine opponents any deal which was annulled and considered the payment of price is economically ineffective. Utilization of principles of freedom of contract has its objective limitations. One of such limitations is related to the annulation of deals contradicting with the public order. Insurable interest doctrine is one of such limitations.[83]

Based on the above discussed, in the process of doctrine utilization and for the purpose of prevention of related dangers it is not necessary to reject the doctrine, it is more appropriate to develop doctrine based on the legislative regulation of doctrine and establishment of court practice.

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[80] With consideration of *Case by case* principle.

[81] *Keeton R., Widiss A.,* Insurable Law – A Guide to Fundamental Principles, Legal Doctirnes, and Commenrcail Practices, "West Group", 2003, 161.

[82] *Merkin R*., *Rodger A*., EC Insurable Law, "Longman", 1997, 29.

[83] *Kotz H., Flessner A.,* European Contract Law, Oxford, "Clarendon Press", 1997, 124

6. Conclusion

Presented article clearly defined the value of insurable interest as of the legal notion. Under the straightforward definition the purpose of insurable interest doctrine is protection of proprietary and non-proprietary interests of parties to the contract. In wider terms the doctrine serves the protection of public order.[84]

For Georgian insurance doctrine and court practice it is important to define the essence of insurable interest as well as to consider the critics against it. With the development of insurance market the need for utilization of insurable interest doctrine will become more relevant. As it was revealed in the article, for the development of doctrine the maximal utilization of court resources is essential for the resolution of insurance disputes. On the other hand, the court should define clear and straightforward interpretations not to allow the insurer to use the vagueness of the doctrine for his interests.

As a result of analysis of critics against the doctrine conclusion has been developed in the article on the importance of retaining the insurable interest doctrine. As it was revealed in the study, the views rejecting the doctrine are based on legally unjustified arguments. Rejection of insurable interest doctrine can not be considered as the only means for overcoming such complex problems as encouragement of fair actions from the insurer, deepening of asymmetry between the parties, and reduced market effectiveness. Idea to reject the doctrine is based on the economic analysis of the law and ignores the ultimate protection purpose of the doctrine.

Taking into account Georgian reality, in the process of doctrine development it is important to maximally limit utilization of evaluative categories by the judge in the interpretation of insurable interest. Otherwise, the danger for uneven development of doctrine will be created, which under the condition of imperfect legal regulations will make the insurable interest notion even vague.[85]And finally definition of insurable interest notion for specific cases requires consideration of factual circumstances and analysis of their relevance to the insurance principles.[86]

Development of insurable interest doctrine will significantly improve the good faith approach of parties to the contract, as well as trust of the society towards the insurance market. Increased trust will be reflected in the increased demand for the insurance products and finally will support the effectiveness of the market.

With the consideration of arguments presented in the article, assigning the function of protection of public order to the insurance sector would be a big mistake. And finally, segregation is not sufficient mean for the protection of third parties. The result of its utilization is achievement of price proportion between the policy and risk and it is not defense mechanism for such cases as *Liberty National Life Insurable Co. v. Weldon.*[87]

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[84] *Cannar K.*, Essential Cases in Insurable Law, Cambridge, "Woodhead-Faulkner", 1985, 19.

[85] *Loshin J.,* Insurable Law's Hapless Busybody: A Case Against Insurable Interest Requirement, "The Yale Law Journal", Vol. 117, Number 3, 2007, 5.

[86] Ibid.

[87] *Jerry R.*, *Richmond D.,* Understanding Insurable Law, 4th Edition, "LexisNexis", 2007, 313.

Daria Legashvili[*]

The Impact of Changed Circumstances on Contractual Relations

I. Introduction

In the setting of unstable civil transactions, adapting a contract to changed circumstances is especially important.

The basis of any contract can be affected by substantially changed circumstances. In unstable economic situation it is impossible for a concluded contract to become a permanent "constraint/shackles" for one of the parties.[1] In case of complicated civil-legal relations the parties of a deal come to face a problem of performing a contract according to its original provisions, therefore it becomes increasingly necessary to adapt a contract to changed circumstances. Such cases are governed by Article 398 of the Civil Code of Georgia. Although, a number of significant gaps can be identified as a result of the analysis of the provision. Despite a number of ambiguities in the given provision it is part of the Civil Code according to its 1997 redaction[2] and it has not been amended to date. Having Article 398 in the Civil Code in its current form gives rise to non-uniform application of the concept of adapting a contract to changed circumstances in practice or the possibility of ignoring this concept, which jeopardizes adhering to the most important principle[3] of fulfillment of contracts. Respectively, it is very essential to improve this article in the given conditions in order to support the objectives of the Law.

The purpose of the present paper is to set forth additional preconditions that are not yet expressly stipulated in Article 398 of the Civil Code of Georgia that are necessary for adapting contract to changed circumstances;[4] Determine interrelation between Articles 73(c) and 398(2) of the Civil Code of Georgia; review the interrelation of inability of performance and changed circumstances; determine the scope of Article 398 of the Civil Code of Georgia in relation to the principle of nominalism; as well as determine as to how necessary it is to apply to court prior to abandoning a contract in such conditions.

The study is based on the analysis of judicial practice, normative, logical, doctrine, synthesis and comparative legal methods. For comparison purposes predominantly the approach towards changed circumstances in German Law and the compatibility of these approaches to Georgian law is shown.

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1 *Zoidze B*., Constitutional Control and the Order of Values in Georgia, Tbilisi, 2007, 23 (in Georgian).

2 Civil Code of Georgia, 1977, available (in Georgian) at: <https://matsne.gov.ge>.

3 "pacta sunt servanda".

4 *Chitashvili N*., Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Law Journal", N 2, 2011, 139 (in Georgian); see also *Zweigert K*., *Kotz H*., Introduction to Comparative Law in the Field of Private Law, Volume 2, Tbilisi, 2011, 159 (in Georgian).

The second chapter of the paper reviews critical importance of the concept of adapting contract to changed circumstances in the performance of contractual obligations.

Sub-chapter three of this Chapter formulates preconditions necessary for modifying a contract and substantiates the advisability of considering those in Article 398 of the Civil Code of Georgia.

Chapter three of the paper reviews the rights to claim arising due to changed circumstances. Mutual relation between inability to perform and changed circumstances in German law is shown. The role of court, its scope in adapting[5] a contract to changed circumstances are reviewed, namely, the justification is provided for the advisability of applying to court prior to abandoning a contract in order to maintain the balance of interests of parties and ensuring the maintenance of contractual stability.

Chapter four of the paper is about drawing the line between changed circumstances and mistaken belief. For showcasing this difference the interrelation of misbelief and changed circumstances is analyzed. Misbeliefs are reviewed as a type of an essential mistake – error in the basis of a deal that gives rise to the right of contending and not adapting a contract to changed circumstances.

Chapter five of the paper is about the regulation of the area of risk of parties. The scope of the principle of nominalism. Sub-chapter 2 of this Chapter reviews interrelation of Article 398 of the Civil Code of Georgia and the specific norms of the same Code and justifies the superiority of consideration of special provisions in specific cases.

II. The Importance and the Grounds for Legal Regulation of Adapting Contract to Changed Circumstances

1. The Emergence and Evolution of the Concept of Adapting a Contract to Changed Circumstances

Almost all legal systems recognize the importance of changed circumstances when determining the issue of discharging an obligation.[6]

The school of thought about the basis of a deal has historically derived from the concept of "essential change of circumstances".[7] According to which every contract is restricting until the point when relations set forth at the time of concluding a transaction change substantially.[8]

"Legal importance of changed circumstances is recognized in different legal systems with various modifications, such as "freezing contracts", "dissolving the basis of a deal", a term "hardship" is used in

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5 *Chitashvili N.*, Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Law Journal", N 2, 2011, 171, 161, 163 (in Georgian).

6 *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 399 (in Georgian).

7 "clausula rebus sic standibus".

8 *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Grundlage, Rn.2.

international commercial transactions.[9] In German Law "change (violation) of the basis of a deal" is an equivalent of changed circumstances.[10]

Originally the concept of "a fundamental change of circumstances"[11] was not reflected in the German Civil Code.[12] The concept about the "basis of a deal"[13] was developed in Germany in 1921 by Ortman.[14]

German judiciary recognized the "basis of a deal" in case of special economic hardships resulting from inflation.[15]

In German judicial practice the evolution of the concept of "dissolution of the basis of a transaction"[16] was a result of the following case, "in May, 1919 a partner of an enterprise sold its share, the buyer was granted the ownership to an enterprise on January 1, 1920 when the buyer paid part of the purchase price. Per agreement the payment of the second part was due in 1921. From May 1919 to the beginning of 1920 the purchasing power of the currency decreased by 80%. The buyer demanded the performance of a contract at the original conditions."[17]

In order to simplify the results of change of price the German Court adjudicated the above-mentioned case on the basis of the approach[18] developed by Ortman, thereby confirming the superiority of maintaining a contract through modifying thereof versus the dissolution of a contract.[19]

The German Law could not bypass the legal regulation of changed circumstances.[20] The gap of not having a special legal regulation for a long time was filled by that the concept of the dissolution of the basis of a deal was first developed in judiciary[21] and was reinforced through the Civil Code of

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9 *Zoidze B., Chanturia L.* (Eds.), *Ninidze T*., *Shengelia R*., *Khetsuriani J*., Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 400 (in Georgian).

10 "Störung der Geschäftsgrundlage".

11 "clausula rebus sic standibus".

12 *Chitashvili N*., Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Law Journal", N 2, 2011, 139; see also *Zweigert K*., *Kotz H*., Introduction to Comparative Law in the Field of Private Law, Volume 2, Tbilisi, 2011, 210 (in Georgian).

13 "Lehre von der Geschäftsgrundlage".

14 *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl, München, 2006, §313 BGB Rn.1; *Rösler H.,* Grundfälle zur Störung der Geschäftsgrundlage, "JuS", 2004, 1058.

15 *Unberath, Bamberger, Roth*(Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Grundlage, Rn.2; *Rösler H*., Grundfälle zur Störung der Geschäftsgrundlage, "JuS", 2004, 1058.

16 "Wegfall der geschäftsgrundlage".

17 *Rösler H*.,Grundfälle zur Störung der Geschäftsgrundlage, "JuS", 2004, 1058 ("Ein Teileigner einer Spinnerei verkaufte im Mai 1919 seinen Gesellschaftsanteil. Am 1.1. 1920 war die Spinnerei zu übereignen und Käufer hatte zugleich die Hälfte des Kaufpreises zu erbringen; die zweite Kaufpreisrate war vereinbarungsgemäß Anfang 1921 fällig (vgl. § 271 II BGB). Von Mai 1919 bis Anfang 1920 betrug der Kaufkraftschwund jedoch mehr als 80%. Der Käufer verlangte zu Anfang 1920 die Vertragerfüllung gemäß der alten Bedingungen").BGB

18 "von *Oertman*(1865-1938) entwickelte Lehre von der Geschäftsgrundlage".

19 *Rösler H*., Grundfälle zur Störung der Geschäftsgrundlage, "JuS", 2004, 1058.

20 *Chitashvili N*., Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Law Journal", N 2, 2011, 139 (in Georgian).

21 *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Normzweck, Rn.1.

Germany after the reform of the Law of Obligations.[22] The relevant paragraph § 313[23] was introduced in the Civil Code of Germany (hereinafter CCG) only from 2002, after the Law of Germany about Modernizing Law of Obligations of Germany entered into force.[24]

Adapting a contract to changed circumstances is "governed" by Article 398 of the Civil Code of Georgia. When adopting a new redaction of the Civil Code of Georgia in 1997 Article 398 was worded in its current form due to the influence of the German law.[25, 26]

2. The Essence of Legal Regulation of Adapting a Contract to Changed Circumstances

Contractual relation is directed at fulfilling undertaken obligation[27] although obligations are not always fulfilled according to the requirement. Its objective, due to the behavior of a debtor or a creditor, as well as due to various other circumstances, may be deteriorated, temporarily or permanently, partially or fully.[28]

In the relations involving obligations complications demonstrate emerge in various ways. The concept of "complicated obligation"[29] comprises: inability of performance;[30] missing the deadline;[31] undue performance of obligation;[32] delay of the acceptance of performance by a creditor;[33] the violation of parties obligation to consider legal benefits and interests of another party (the violation of the duty of diligence);[34] as well as the change (dissolution) of the basis of a transaction[35] on the basis of changed circumstances.[36]

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22 *Rösler H*., Grundfälle zur Störung der Geschäftsgrundlage, "JuS", 2004,1058.

23 "Störung der Geschäftsgrundlage".

24 *Feldhahn P.,* Die Störung der Geschäftsgrundlage im System des reformierten Schuldrechts, "NJW", 2005, 3381; *Braunschneider H.,* das Skript, Schuldrecht AT, 3. Aufl., 2002, 131.

25 Although the CCG did not include this concept at that time and it was introduced in the legislation at a quite later stage German legal sciences field was aware of it and it was also applied in the judicial practice of Germany. See: *Chechelashvili Z*., Contractual Law, 2nd Edition, Tbilisi, 2010, 122 (in Georgian).

26 *Zoidze B., Chanturia L.* (Eds.), *Ninidze T*., *Shengelia R*., *Khetsuriani J*., Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 400 (in Georgian).

27 *Brox H., Walker W.,* Allgemeines Schuldrecht, 32. Aufl., 2007, Rn.1, 205.

28 Ibid.

29 About the concept of complicated obligations and types see: *Vashakidze G*., System of Complicated Obligations, Hamburg – Tbilisi, 2010, 23-27 (in Georgian).

30 "Unmöglichkeit der Leistung".

31 "Verzug".

32 "Schlechtleistung".

33 "Verzögerung der Leistung".

34 "Verletzung einer Schutzpflicht".

35 "Störung der Geschäftsgrundlage".

36 *Brox H., Walker W.,* Allgemeines Schuldrecht, 32. Aufl., 2007, Rn.3, 206.

Adapting a contract to changed circumstances is not used in obligation relations at-law,[37] nor in unilateral deals. For, according to Article 398 of the Civil Code of Georgia a contract has to be concluded between parties, obligation relations at law and unilateral deals are excluded from its scope.

Article 398 of the Civil Code of Georgia is mainly applied in long-term contractual relations,[38] further, naturally, changed circumstances can be present in short-term relations as well.[39] The provisions of the law of obligations in case of long-term relations of obligations requires modification, since long-term relations of obligations constantly gives rise to new obligations.[40] Therefore, in unstable economic setting against the background of financial and economic crisis there is increased interest towards the need of such mechanisms that enable the modification of a contract.[41] Although "contracts have to be performed"[42] a party may not bear all types of performance risks.[43]

Adapting a contract to changed circumstances is regarded as a mechanism limiting[44] a "contract's obligatory nature".[45, 46] Although, the mentioned issue is arguable.[47]

It should be noted that actually the provision regulating adapting a contract to changed circumstances serves fully to the stability of civil transactions and not weakening or strengthening any specific principle.[48] Since the emergence of changed circumstances causes essential disbalance in the mutual performance of parties[49] while a "contract has to be workable for both parties, at the time of its conclusion, as well as afterwards."[50] At the time of emergence of changed circumstances on the one hand there is the interest of a party – recipient of benefit in the performance of an obligation, and on the other side – the interest of an affected party for adapting contract to changed circumstances or

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37 *Joussen J.*, Schuldrecht (1) Allgemeiner Teil, 2008, Rn.738.

38 *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl., München, 2010, §314 BGB, Rn. 2.

39 *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 403 (in Georgian).

40 *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl., München, 2010, §241 BGB, Rn. 5.

41 *Mekki M., Pelese M.K.,* Hardship and Modifikacation (or "Revision") of the Contract, 2010, 2, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

42 "pacta sunt servanda".

43 *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 403 (in Georgian).

44 An opinion has been expressed that if this concept contradicted the obligatory nature of a contract it would not have been recognized in various law systems. See *Mekki M., Pelese M.K.,* Hardship and Modifikacation (or "Revision") of the Contract, 2010, 2, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

45 "pacta sunt servanda".

46 Compare *Vashakidze G.*, The System of Complicated Obligations, Hamburg–Tbilisi, 2010, 213 (in Georgian); *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl, München, 2006, §313 BGB, Rn.1.

47 *Vashakidze G.*, The System of Complicated Obligations, Hamburg–Tbilisi, 2010 (in Georgian).

48 In this case the "limitation" of obligatory nature of performance of a contract is justified also due to the principle of "equality of parties" in private legal relations (See Civil Code of Georgia, Article 1).

49 *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 399 (in Georgian).

50 *Zoidze B.*, Constitutional Control and the Order of Values in Georgia, Tbilisi, 2007, 23; See also Decision №1/3/136, the First Board of the Constitutional Court of Georgia, 2002 (in Georgian).

ending the relations of obligations. The purpose of a provision is to balance interests between the recipient of benefit and affected party.[51]

It is important to have the above-mentioned concept not just for justice, but also purely from economic standpoint,[52] further, this Article envisages modifying contract for the very benefit of the mandatory nature of its performance, therefore, position that does not consider the concept of adapting contract to changed circumstances as the limitation of "the mandatory nature of a contract" should not be accepted.

Therefore, the concept of adapting a contract to changed circumstances is aimed at the maintenance of contractual equilibrium and creates possibility of performance of a contract on the basis of good faith principle, even in the modified form, but the content of Article 398 of the Civil Code of Georgia is not complete and does not support the purposes of the law maker for on the basis of this very provision the performance of a contract is compromised – a party is authorized to abandon a contract. It has to be deemed advisable to develop a mechanism that excludes the right to reject a contract unconditionally and will consider it as just an extreme right, otherwise the foundation of the stability of civil transaction will be deteriorated and main principle "contracts have to be fulfilled"[53] of the Law of Obligation will become questionable.

3. Preconditions for Adapting a Contract to Changed Circumstances

In legal literature there is no definition of changed circumstances. A circumstance may be any event, fact, subject of an agreement, purpose, reason that indicates why or for what a contract is concluded. If they are changed after the conclusion of a contract it may be about changed circumstances.

According to the definition of the Supreme Court of Georgia changed circumstances may be caused by force majeure as well as any other circumstance that actually renders performance difficult.[54]

Force majeure[55] does not exclude the possibility of adapting a contract. "Article 398 of the Civil Code of Georgia is also applicable in relation to those complicated performances that are caused due to the force majeure[56] and which can still be adapted to changed circumstances."[57]

The issue of the applicability of Article 398 of the Civil Code of Georgia has to be determined on a case by case basis considering relevant preconditions for Article 398 of the Civil Code of Georgia

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[51] This is natural as well for in such conditions it is necessary to apply the method of civil legal regulation and maintain balance between parties. Compare *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Rn.1.

[52] This provision is based on the idea that a contract has to be socially and economically useful and it has to be maintained. *Mekki M., Pelese M.K.,* Hardship and Modifikacation (or "Revision") of the Contract, 2010, 1, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

[53] "pacta sunt servanda".

[54] Ruling №as-7-6-2010, Supreme Court of Georgia Civil Board, 2010 (in Georgian).

[55] "force majeure".

[56] Compare *Akhvlediani Z.*, Law of Obligations (Second Edition), Tbilisi, 1999, 58; *Imnadze D.*, Adapting a Contract to Changed Circumstances, Journal "Law", N 8-9, 2000, 54 (in Georgian); *Sukhanov E.A.* (Ed.), Civil Law, Vol. III, Moscow, 2006, 231 (in Russian).

[57] *Vashakidze G.*, The System of Complicated Obligations, Hamburg–Tbilisi, 2010, 219 (in Georgian).

relates the emergence of the right to adapt a contract to changed circumstances to the presence of certain preconditions. Although, the given provision does not expressly define all preconditions necessary for adapting.

Paragraph 6:111 of the European Contract Law Principles[58] and Paragraphs 6.2.1, 6.2.2 and 6.2.3[59] of UNIDROIT International Commercial Contracts provide a detailed regulation of the issue of modifying a contract.[60]

Pursuant to Article 6.2.2 of UNIDROIT principles of International Commercial Contracts "circumstances are considered to have changed in case any event fundamentally changes the equilibrium of interests of parties protected under a contract because the performance costs have increased or the value of performance has diminished".[61]

The following grounds should be in place for the emergence of the right of adapting a contract to changed circumstances:

3.1. Basis of a Deal

It is essential to determine the basis of a transaction for the emergence of the right to adapt a contract for the matter of adapting a contract to changed circumstances emerges only in case of the change of the circumstances that underlie the contract. Further, it is notable that not all circumstances and beliefs are considered to be the basis of a deal. When determining the scope of Article 398 of the Civil Code of Georgia first it has to be clarified as to what is the basis of a deal.

In German legal literature an idea is expressed according to which the content of a contract is not the basis of a deal[62] therefore the basis of a deal (contract) and the content of a contract is differentiated.[63]

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58 The Principles of European Contract Law 2002, available at: <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/6.111.html>

59 UNIDROIT Principles of International Commercial Contracts, available at: <http://www.cisg.law.pace.edu/cisg/principles.html#NR93>.

60 In the situation of "extraordinary and unforeseeable events" that "have rendered the performance excessively expensive" the procedures to be effected during the negotiations of parties about adapting a contract are also detailed in Article 157 of the so-called European Code of Contracts developed under the leadership of G. Gandolfi by the lawyers of the European private Academy. See *Mekki M., Pelese M.K.,* Hardship and Modifikacation (or "Revision") of the Contract, 2010, 10, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1542511>.

61 UNIDROIT Principles of International Commercial Contracts, Article 6.2.2 - Definition of Hardship ("There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished…"), available at: <http://www.cisg.law.pace.edu/cisg/principles.html#NR93>.

62 *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn.744; Compare also *Unberat, Bamberger*, *Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Vertragsinhalt, Rn.17; *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl, München, 2006, §313 BGB, Rn.10.

63 In a specific case it is absolutely possible for the contract content to take account of the elements of the basis of a deal therefore stating unilaterally that the content of a contract may not be the basis of a deal is unjustifiable. Furthermore, the content of a contract and the basis of a deal may not be differentiated. See *Finkena-*

The basis of a deal is "joint, express, clear beliefs of parties at the time of concluding a contract. The basis of a deal also include such beliefs one party to a contract had, which had been known to another party and the latter has not challenged it. Circumstances significant for a contract on which the will to conclude a deal is based are considered to be the basis of a deal."[64]

Therefore, basis of a deal is considered to be joint beliefs of both parties, as well as the beliefs of one party only, although in order for unilateral beliefs to become the basis of a contract they have to be known to another party. Otherwise the belief of just one party may not become the basis of a contract.

The following circumstances determine the basis of a deal:[65]

a) that have been considered, realized by at least one party – actual element;

b) without which the parties would not have concluded a contract, or would not have concluded it with the content as has been concluded – hypothetical element;

c) which the second party would agree to in good faith – a normative element.[66]

The first element cannot determine the basis of a deal for it is always fulfilled, the second element is important although neither it resolves the issue whether or not the circumstance is the basis of a deal, the third element is decisive.[67] A normative element is the most important for it forms the basis of a contract for both parties.[68]

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*uer,*Münchener Kommentar zum BGB, 6. Aufl., 2012, BGB § 313 Störung der Geschäftsgrundlage, Rn.9 (..."eine Unterscheidung zwischen "Grundlage" und "Inhalt" des Vertrags daher nicht möglich"); Compare *Vashakidze G*., The System of Complicated Obligations, Hamburg-Tbilisi, 2010, 215 (in Georgian).

64 *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn.744 ("Als Geschäftsgrundlage versteht man die nicht zum eigentlichen Vertragsinhalt erhoben, aber beim Abschluss des Vertrages offensichtlichen gemeinschaftlichen Vorstellungen beider Vertragsparteien; in gleicher Weise gehören hier hienzu die dem Geschäftsgegner erkennbaren und von ihm nicht beanstandeten Vorstellungen der anderen Vertragspartei vom Vorhandensein,.. vertragswesentlicher Umstände, auf denen der Geschäftswille der Parteien beruht"); Comp. also: *Lettl T.,Weiden A.*, Die Anpassung von Verträgen des Privatrechts, "Jus", 2001, 248; *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Begriff, Rn.4; *Finkenauer,* Münchener Kommentar zum BGB, 6. Aufl. 2012, BGB § 313 Störung der Geschäftsgrundlage, Rn.22; *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl, München 2006, §313 BGB, Rn.2; See also *Kereselidze D*., Most General Systemic Concepts of Private Law, Tbilisi, 2009, 334-335 (in Georgian).

65 *Riesenhuber K., Dömrose R.,*Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS", 2006, 210 ("wird die Geschäftsgrundlage durch drei Kriterien bestimmt: Die Geschäftsgrundlage bilden nach gängiger - freilich etwas unscharfer und daher zu konkretisierender - Definition Umstände,1.die mindestens eine Partei vorausgesetzt oder sich vorgestellt hat ("reales Element") und2.ohne die sie den Vertrag nicht oder nicht so abgeschlossen hätte ("hypothetisches Element") und3.auf die sich die andere Partei redlicherweise eingelassen hätte ("normatives Element"); *Hütte F., Helbron M.,* Schuldrecht AT, 3.Aufl., 2005, 310.

66 See also *Chitashvili N*., Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", N2, 2011, 145; *Vashakidze G*., Complicated Obligations System, Hamburg – Tbilisi, 2010, 216 (in Georgian); see also *Hütte F., Helbron M.,* Schuldrecht AT, 3.Aufl., 2005, Rn. 806 ff.

67 *Riesenhuber K., Dömrose R.,*Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS", 2006, 210.

68 *Chitashvili N*., Hardship Due to Changed Circumstances and Inability of Performance (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", N 2, 2011, 146 (in Georgian).

Therefore, only those circumstances may form the basis of a contract about which a party would say: "if I had known this I would not have concluded a contract, or would not have concluded with this content".[69] Those circumstances falling under the contractual risk of one of the parties is not the basis of a contract,[70] for example, when a fixed price has been agreed upon, "inherent" risk (i.e., the expected risk of change of prices) is always present.[71]

In German law when the basis of a deal is determined the following is taken into account: circumstances stipulated under Paragraph 313[72] of the CCG that are objective basis of a deal and the "circumstances" indicated in its paragraph 2 – ideas of parties – subjective basis of a deal.[73]

Article 398[74] of the Civil Code of Georgia also stipulates objective and subjective criteria of the basis of a deal which first paragraph refers to "circumstances", while paragraph refers to "beliefs".

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[69] *Lettl T.,Weiden A.,* Die Anpassung von Verträgen des Privatrechts, "Jus", 2001, 248; *Riesenhuber K., Dömrose R.,* Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS", 2006, 210 ("um das Bild deutlicher zu machen, das Fundament des Vertrags können nicht beliebige Umstände bilden, sondern nur solche, mit denen der Vertrag steht und fällt: "Hätte ich das gewusst, hätte ich nicht (so) abgeschlossen!").

[70] It includes, for example, political, economic, social conditions, the case of war, natural and ecological disasters, and other changes unforeseen by the parties. See *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn.744.

[71] *Riesenhuber K., Dömrose R.,* Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS", 2006, 210 ("Nicht zur Geschäftsgrundlage gehören daher Umstände, in denen sich Risiken verwirklichen, die dem Vertragsrisiko einer Partei zuzuordnen sind, wie etwa bei der Vereinbarung eines Festpreises, in der regelmäßig eine (stillschweigende) Risikoübernahme liegt").

[72] BGB § 313 Störung der Geschäftsgrundlage. "(1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann.

(2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen.

(3) Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung."

[73] *Finkenauer,*Münchener Kommentar zum BGB, 6. Aufl. 2012, BGB § 313 Störung der Geschäftsgrundlage, Rn.12; *Riesenhuber K., Dömrose R.,*Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS", 2006, 208 ("Die erste Frage ist, was überhaupt Geschäftsgrundlage sein kann. Dafür kommen nach Absatz 1 Umstände und nach Absatz 2 Vorstellungen in Betracht… so genannten objektiven Geschäftsgrundlage, die in Umständen besteht, und der subjektiven Geschäftsgrundlage, die sich aus den Vorstellungen der Parteien ergibt").

[74] Article 398 of the Civil Code of Georgia: "1. In case the circumstances that formed the basis for concluding a contract clearly changed following the conclusion of a contract and the parties would not have concluded this contract or would have concluded it with a different content if they had considered these changes then adapting a contract to changed circumstances may be demanded. Otherwise, considering individual circumstances a party of a contract may not be demanded to strictly adhere to the contract that has not been modified. 2. It equals to the change of circumstances when the beliefs that formed the basis of a contract turned out to be wrong. 3. The parties have to try first to adapt a contract to changed circumstances. If it is impossible to adapt a contract to

They distinguish between "major"[75] and "minor"[76] basis of a deal although their classification is not important for resolving a specific case.[77]

3.1.1. An Objective Basis of a Deal

Neither Article 398 nor Paragraph 313 of the CCG differentiate between the basis of deal in legal terms.[78] According to the content of these provisions both cases give rise to the grounds for adapting a contract although it is arguable as to how justifiable it is to entitle a party to adapting a contract on the basis of Article 398(2) of the Civil Code of Georgia. Which will be reviewed below.

Objective basis of a deal relates to the circumstances that were taken into account by the parties at the time of conclusion of a contract, as well as the circumstances they were not aware of and did not even have any idea about those.[79]

Article 398(1) of the Civil Code of Georgia envisages substantial change in objective grounds, change following the conclusion of a contract, similar to Paragraph 313(1) of the CCG.[80]

For example, the disruption of parity of a contract and change of the purpose falls under an objective basis of a deal.[81]

Parity does not mean the identity of performance in terms of value.[82] In contractual relation parity is disrupted when there is such a mismatch between performance and reciprocal performance as a result of unforeseeable, essentially changed relation that the modification of contract provisions is justifiable.[83] The change (dissolution) of a purpose is a case when performance is still possible but a creditor is no longer interested in performance for the relation that formed the basis of a contract changes.[84]

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changed circumstances, or another party disagrees with this, then the party whose interests were violated may abandon a contract."

75 "große Geschäftsgrundlage".

76 "kleine Geschäftsgrundlage".

77 For example, "major basis of a deal" comprises an underlying expectation of a contract that there will be stable economic and political environment, as well as the events caused by war, hostilities, natural disasters, currency reform. All other expectations and change belong to the "minor basis of a deal". See *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Begriff, Rn.6; See also *Finkenauer,* Münchener Kommentar zum BGB, 6. Aufl. 2012, BGB § 313 Störung der Geschäftsgrundlage, Rn.17; *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl, München, 2006, §313 BGB, Rn.5.

78 *Riesenhuber K., Dömrose R.,* Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS", 2006, 209.

79 Ibid.("Beider objektiven Geschäftsgrundlage geht es um Umstände, die die Parteien voraussetzen, auch wenn sie sich das nicht bewusst machen, sie darüber also keine aktuellen Vorstellungen haben").

80 Ibid.

81 *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Begriff, Rn.6.

82 *Zoidze B*., The Reception of European Private Law in Georgia, Tbilisi, 2005, 295 (in Georgian).

83 *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn.754.

84 The purpose of a contract is the basis of a deal in case the purpose of use is determined by parties clearly, expressly. See *Joussen J.*, Schuldrecht (1) Allgemeiner Teil, 2008, Rn.755.

3.1.2. Subjective Basis of a Deal

Article 313(2) of the CCG implies initial absence of subjective circumstances, general mistake in motivation, cases when a party mistakenly assumes the presence of certain circumstances.[85] Subjective basis of a deal is joint beliefs of parties.[86]

Article 398(2) of the Civil Code of Georgia envisages such a case when the basis of a deal does not exist "from the beginning".[87] The absence of the basis of a deal from the beginning the so called "changed circumstance" is just a subjective circumstance and not an objective one.[88] Although, German law does not differentiate between the basis of a deal in terms of legal outcome.[89] Specifically, it is not important if the basis of a contract changes in the future (Paragraph 313(1) of the CCG) or does not exist from the beginning (Paragraph 313(2) of the CCG), a contract can be adapted to changed circumstances in both cases.[90] A similar outcome is envisaged by Article 398(1) and (2) of the Civil Code of Georgia, which gives rise to the right of adapting a contract in case of the change of circumstances as well as "mistaken beliefs" of parties.

3.2. Change of Circumstances Following the Conclusion of a Contract

In order for the emergence of a right to adapt a contract to changed circumstances the circumstances that formed the basis of a deal have to change after the conclusion of a contract. Naturally, not all circumstances are considered to be the basis of a contract, but when a circumstance is the basis of a contract it is necessary that only their future change is considered.[91]

Pursuant to Article 6.2.2(a) of UNIDROIT Principles of International Commercial Contracts circumstances are treated to have changed "in case an event took place or became known to an affected party following the conclusion of a contract"[92] (This is one of the conditions and not the only one).

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85 *Chitashvili N.*, Hardship in Performance and Inability of Performance due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", N2, 2011, 146 (in Georgian).

86 *Riesenhuber K., Dömrose R.*,Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS ", 2006, 209 ("Bei der subjektiven Geschäftsgrundlage handelt es sich hingegen um gemeinsame Vorstellungen der Parteien").

87 *Tchetchelashvili Z.*, Contract Law, 2nd Edition, Tbilisi, 2010, 122 (in Georgian).

88 *Riesenhuber K., Dömrose R.*,Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS", 2006, 209 ("Fälle des anfänglichen Fehlens der Geschäftsgrundlage gehören damit immer zu Absatz 2, nur die subjektive Geschäftsgrundlage kann mit anderen Worten anfänglich Fehlen. Das ist schlüssig, wenn man Umstände streng objektiv versteht. Einen anfänglich fehlenden bzw. "veränderten" Umstand kann man nicht objektiv voraussetzen, sondern sich nur subjektiv vorstellen").

89 *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Begriff, Rn.6.

90 Ibid.

91 *Riesenhuber K., Dömrose R.*,Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS", 2006, 210.

92 UNIDROIT Principles of International Commercial Contracts, Article 6.2.2 - Definition of Hardship ("the events occur or become known to the disadvantaged party after the conclusion of the contract"), available at: <http://www.cisg.law.pace.edu/cisg/principles.html#NR93>.

Article 6:111(2) (a) of the European Law of Contracts principles also stipulates the change emerged following the conclusion of a contract.[93]

Article 398(1) of the Civil Code of Georgia too, implies only the circumstances that have changed after the conclusion of a contract.[94] It is possible that the change of circumstance may commence from the instance of the conclusion of a contract and the change be identified after its conclusion[95] as long as the changes were not known to the parties prior to the conclusion of a contract.[96] In case the circumstances that give rise to the entitlement of the change of contract already existed as of the instance of the entry of a contract into effect then the claim of a party for adapting due to the change of the situation will be ungrounded.[97] Given the specificity of changed circumstances in some cases circumstances change gradually, after some time.[98]

Therefore, pursuant to Article 398 of the Civil Code of Georgia, right to adaptation may emerge in case the circumstance changes after the conclusion of a contract. Further, in specific cases the specificity of a concrete circumstance has to be considered on a case by case basis.

3.3. Obvious Change of Circumstances

Pursuant to Article 398(1) of the Civil Code of Georgia the circumstances have to change "obviously" after the conclusion of a contract. Paragraph 313(1) of the CCG indicates to "essential", "aggravating" change of circumstances.[99, 100, 101]

Circumstances may change any time, but not any type of change is taken into account. In order to consider a circumstance as substantially changed the outcome caused by the change has to be hard to perform.[102] In general it can be said that a change is hard, substantial (obvious), when the matter about that at least one party would not have concluded a contract if it had known about change or would have concluded it with a different content is not questionable.[103]

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93 The Principles of European Contract Law 2002, Article 6:111(Ex Art. 2.117), ("the change of circumstances occurred after the time of conclusion of the contract"), available at <http://www.jus.uio.no/lm/eu.contract. principles.parts.1.to.3.2002/6.111.html>.

94 *Vashakidze G.*, The System of Complicated Obligations, Hamburg–Tbilisi, 2010, 224; See also the Ruling №as-630-593-2012 of the Supreme Court of Georgia Civilian Panel, 2012 (in Georgian).

95 *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 402 (in Georgian).

96 *Vashakidze G.*, The System of Complicated Obligations, Hamburg–Tbilisi, 2010, 224 (in Georgian).

97 Ruling №as-630-593-2012, the Supreme Court of Georgia Civil Board, 2012 (in Georgian).

98 For example, negative effects of war are not over with the end of hostilities and it has a quite continuous nature. See the Ruling №as-7-6-2010, Supreme Court of Georgia Civil Panel, 2010 (in Georgian).

99 Civil Code of Germany (Translator and Ed.-*Tchetchelashvili Z.*), 2010, §313.

100 "schwerwiegend verändert" BGB §313 (1).

101 BGH, Urteil vom 04-10-1988 - VI ZR 46/88 (Celle), "NJW", 1989, 289 ("Erforderlich ist vielmehr eine schwerwiegende (wesentliche) Änderung"); also, BGH, Urteil vom 9. 3. 2010 - VI ZR 52/09 (OLG Stuttgart), "NJW", 2010, 1874.

102 *Riesenhuber K., Dömrose R.,*Der Tatbestand der Geschäftsgrundlagenstörung in § 313 BGB - Dogmatik und Falllösungstechnik, "JuS", 2006, 211("DieÄnderung der Umstände muss schließlich schwerwiegend sein").

103 *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Schwerwiegende Änderung, Rn.25 ("Allgemeinlässt sich sagen, dass eine Störung (nur dann) schwerwiegend

Change of circumstances has to render the performance hard to the extent that the "demand of performing a contract at the determined conditions has to contravene with the principles of justness and good faith specific to civil transaction".[104] Subjective opinion about hardship of performance of the party for whom the performance became hard is not taken into account. Hardship of performance has to be measured by objective circumstances.[105]

Neither the Civil Code of Georgia nor the Civil Code of Germany set forth the concept of an "obvious" change. Something that is treated as an "essential" change in one case in another case may not be "essential". Pursuant to Article 451 of the Civil Code of the Russian Federation "the change of circumstances is considered essential when they have changed to the extent that if they have changed to the extent that if the parties would have reasonably considered their change they would not have concluded a contract or would have concluded it at significantly different conditions."[106]

Whether or not the circumstances have changed substantially, clearly, has to be determined on a case-by-case basis based on actual circumstances of the case, but on the basis of the judicial practice analysis the most general concept of an "obvious change" may be determined. Namely, in order to consider a circumstance as having changed "substantially" "changed circumstances have to give rise to extreme hardship in the performance of an obligation and the hardship of performance has to be caused by the very "obviously" changed circumstances, i.e., a causal relation has to be present."[107]

I.e., if the causal relation is established between the hardship of performance and the change of circumstance it is considered that the change is "obvious"[108] while in case the change of circumstance violates the balance of mutual obligations of parties the performance has become extremely hard. Further, the change of a circumstance has to give rise to performance hardship, otherwise the change, no matter how substantial, does not give rise to the right to a demand adaptation. Therefore, another element that is necessary but is not envisaged under the norm is identified, causal relation – between the changed circumstance and hardship of performance.

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ist, wenn nicht ernstlich zweifelhaft ist, dasszumindesteine der Parteien bei Kenntnis der Änderung den Vertrag nicht oder nur mit einem anderen Inhalt abgeschlossen hätte").

104 Ruling №as-7-6-2010, Supreme Court of Georgia Civil Board, 2010 (in Georgian).

105 Ruling № as-466-707-08, Supreme Court of Georgia Civil, Business and Bankruptcy Board, 2008 (in Georgian).

106 The Civil Code of the RF, 1994, N 51-FZ, Chapter 29, Article 451 ("...the change of circumstances is considered essential when they have changed to the extent that if they have changed to the extent that if the parties would have reasonably considered their change they would not have concluded a contract or would have concluded it at significantly different conditions"), available (in Russian) at: <http://www.consultant.ru/ popular/gkrf1/5_61.html>; *Sukhanov E.A.* (Ed.), Civil Law, Vol. III, Moscow, 2006, 230; *Tolstoy U.K.*, *Sergeeva A.P.*, Civil Law, Part 1, Saint Petersburg, 1996, 456 (in Russian).

107 Ruling № as-7-6-2010, Supreme Court of Georgia Civil Board, 2010; Ruling № as 1153-1173-2011, Supreme Court of Georgia Civil Board, 2011 9 (in Georgian).

108 Comp. *Chachava S.*, Competition of Demands and the Grounds for a Demand in Private Law, Tbilisi, 2010, 78 (in Georgian).

3.4. Unacceptability of the Maintenance of Unmodified Contract

According to the idea established in legal literature it is unjustifiable that any significant change of circumstances become the basis for applying the right of adapting a contract.[109] After the emergence of changed circumstances the adhering to the unchanged contract has to be unacceptable[110] to one party (parties) of a contract. Whether or not to maintaining a contract without modification is tolerable is determined by a strict relation of interests and benefits, namely, there should be notable disbalance between performance and reciprocal performance.[111]

Whether or not maintaining a contract with unchanged conditions is acceptable has to be determined on a case-by case basis.[112]

3.5. Inability of Foreseeing the Change of Circumstances (Unexpected Nature)

A change, no matter how "obvious", and even if it renders the performance of an obligation very hard, does not give rise to entitlement to adaptation, in case a party could have foreseen it at the time of concluding a contract. Therefore, first it has to be established whether or not the parties could have foreseen the change.[113] "It should not be possible to reasonably foresee the change of circumstance at the time of concluding a contract, i.e., the changed circumstances should not be within the control of an affected party."[114] The right of adapting will be unjustifiable in case it was possible to foresee changes at the time of concluding a contract.[115][116]

For example, "a company undertook to supply the city with oil over one year. In the second half of the year due to the oil crisis in Near East oil purchase costs increased by 100%. The company tried to modify the supply price (demanded price increase from the recipient) but to no avail."[117] The Supreme Federal Court of Germany did not grant the demand of changing contract price. The decision was justified by the fact that there were hostilities in Near East and against this background the supplier had full ability to foresee subsequent raise in prices, to reasonably assume its possible increase.[118]

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[109] *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, BGB §313, Unzumutbarkeit, Rn. 33.

[110] *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn.749.

[111] *Lettl T.,Weiden,* Die Anpassung von Verträgen des Privatrechts, "Jus", 2001, 250.

[112] For example, in German Law the matter of adapting the charge agreed upon under a contract to changed circumstances is taken into account in case the cost of living is increased by 150%. See *Lettl T.,Weiden,* Die Anpassung von Verträgen des Privatrechts, "Jus", 2001, 250.

[113] *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn.748.

[114] Ruling №as-7-6-2010, The Supreme Court of Georgia Civil Board, 2010 (in Georgian).

[115] "imprevision".

[116] *Lettl T.,Weiden*, Die Anpassung von Verträgen des Privatrechts, "Jus", 2001, 248; *Sukhanov E.A.* (Ed.), Civil Law, Vol. III, Moscow. 2006, 230 (in Russian).

[117] *Lettl T.,Weiden A.,* Die Anpassung von Verträgen des Privatrechts,"Jus", 2001, 248.

[118] Ibid. ("sie habe im Juni die Faktoren für die spätere Preisentwicklung gekannt un als Ölkaufmann mit kriegerischen Entwicklungen im Nahen Osten rechnen müssen").

I.e., in case it is possible to foresee the change of circumstance at the time of concluding a contract based on the assessment of the current situation, it is not considered as a changed circumstance. The term "unforeseeable" refers to the case which could not have been reasonably foreseen by the parties of a contract at the time of the entry of a contract into force, while its occurrence modifies the contract equilibrium and imposes excessive burden to one of the parties.[119] Further, not all unforeseen changes are considered for the purposes of Article 398. Just severe (essential, obvious) change is important.[120]

This provision is about whether or not a party could have foreseen the change and not about whether or not it actually considered this change. Otherwise a party would always be able to allege it had not considered a change. The change of circumstance has to be so unexpected that not considering it at the time of resolving the matter of subsequent performance of an obligation has to contravene with the good faith principle of good faith.[121] Such resolution of the matter is appropriate so that not any type of change becomes the basis for revisiting a contract.

Article 398 of the Civil Code imposes on the parties the duty of exceptional foresight, the "obligation" to reasonably foresee situation. It is important that the parties consider every condition of a contract from the very beginning, "no party has to sign a contract that envisages undertaking obligations questionable to perform by one of the parties."[122] Since in case it was possible to foresee the change the right of adaptation is cancelled, it is advisable that there is a relevant reference in Article 398 of the Civil Code of Georgia on this, so that a party does not learn about this from court decision and for the material law provision to "notify" the parties at the stage of concluding a contract about expected results so that they are able to determine at which conditions to conclude a contract.

Hence, the legality of applying Article 398 of the Civil Code of Georgia has to be examined in relation to the necessary preconditions of this norm of established factual circumstances.

III. Rights to Claims Due to Changed Circumstances

1. The Right to the Demand of Adapting a Contract

If the preconditions necessary for adapting are present adapting a contract to changed circumstances is a predominant demand to be implemented by a party.[123] Predominance of this

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[119] *Mekki M., Pelese M.K.,* Hardship and Modifikacation (or "Revision") of the Contract, 2010, 1. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

[120] *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Schwerwiegende Änderung, Rn.25.

[121] Ruling № as-466-707-08, Supreme Court of Georgia Civil, Business and Bankruptcy Board, 2008 (in Georgian).

[122] *Zoidze B.,* Constitutional Control and the Order of Values in Georgia, Tbilisi, 2007, 23 (in Georgian).

[123] *Hütte F., Helbron M.,* Schuldrecht AT, 3. Aufl., 2005, Rn.809 ("In erster Linie ist also der Vertragsinhalt an die veränderten Verhältnisse anzupassen"); see also: *Finkenauer*, Münchener Kommentar zum BGB, 6. Aufl., 2012, BGB § 313 Störung der Geschäftsgrundlage, Rn.1; *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl, München, 2006, §313 BGB, Rn.40; *Chachava S.*, The Competition of Demands and Grounds of Demand in Private Law, Tbilisi, 2010, 79 (in Georgian).

demand is based on Article 398(3) of the Civil Code of Georgia according to which "parties have to first attempt to adapt a contract to changed circumstances", a similar regulation is envisaged under Paragraph 313(3) of the Civil Code of German as well.

1.1. The Term of Adapting a Contract to Changed Circumstances

Article 398 of the Civil Code of Georgia does not set forth a term during which it is possible to consider adapting a contract to changed circumstances. According to the definition of the Supreme Court of Georgia "from the essence of the indicated norm it is identified that such demand towards another party has to be implemented immediately, upon the occurrence of changed circumstance."[124] Due to the specificity of changed circumstances it is possible for the change of circumstances to take place gradually, in such case it is admissible to bring forward the demand later on from the instance of emergence of the change of circumstance.[125]

The court did not consider the application five days before the expiration of contract term by a complainant to a respondent demanding the adaptation of contract to changed circumstances as the demand performed within the allowable period from the emergence of changed circumstance. While the complainant indicated that the party was entitled to this demand any time prior to the performance of a contract for Article 398 of the Civil Code of Georgia does not refer to any specific timeframe in relation to the demand of adapting a contract to changed circumstances.[126] The position of a complainant based on the wording of the provision is absolutely logical.

Where the emergence of legal relation, change or termination thereof is dependent on some timeframe lawmaker either sets forth a specific timeframe, or makes reference to the reasonable period.[127] Therefore, it is unfair under Article 398 of the Civil Code of Georgia for a party to become dependent on the term about which the norm is silent. The analysis of judicial practice evidences that reference to such term in this Article is essential for if a party does not demand adapting a contract on time from the emergence of changed circumstances the court will "deprive" it of a right granted under Article 398 of the Civil Code of Georgia.

Therefore, it is advisable and even necessary that Article 398 of the Civil Code of Georgia makes reference to reasonable timeframe so that a disadvantaged party is given actual possibility to adapt a contract to changed circumstances.

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[124] Ruling № as-7-6-2010, Supreme Court of Georgia Civil Panel, 2010 (in Georgian).

[125] *Zoidze B., Chanturia L.* (Eds.) *Ninidze T*., *Shengelia R*., *Khetsuriani J*., Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 402.F (in Georgian).

[126] Ruling № as-466-707-08, Supreme Court of Georgia Civil, Business and Bankruptcy Board, 2008 (in Georgian).

[127] For example see Article 269(2), Article 335(1), Article 399(3), Article 405(5), etc. of the Civil Code of Georgia, 1997.

1.2. Revisiting a Contract by Parties on the Basis of Good Faith Principle

At the time of emergence of changed circumstances it is important that parties hold negotiation about adapting.[128] Article 6:111 of the European Contract Law envisages the negotiation of parties, namely, "A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract..."[129]

The negotiation of parties has to be based on the principle of good faith.

Although good faith is fully a fundamental principle of private law but under Article 398 of the Civil Code of Georgia it is granted special importance for this concept developed on the basis of good faith principle.[130]

The negotiation of parties about adapting a contract to changed circumstances under Article 398 of the Civil Code of Georgia has to be based on the good faith principle, a disadvantaged party has to conscientiously believe in the need of revisiting of contract provisions.[131][132] The demand of good faith does not have absolute superiority over contractual freedom but on the basis of good faith the parties may be denied in every specific case be denied[133] from safeguarding the given right.[134] Under the good faith both parties are bound to consider changed circumstance in relation to contractual terms and thereby facilitate the performance of an obligation.[135]

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[128] *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn.752.

[129] The Principles of European Contract Law 2002, Article 6:111(Ex Art. 2.117), ("(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract..."), available at: <http://www.jus.uio.no/lm/eu.contract.principles. parts. 1.to.3.2002/6.111.html>.

[130] *Erman, Westermann* (Hrsg.)*,* Handkommentar,12. Aufl., 2008, §313, Rn.47; see also *Ioseliani A*., The Principle of Good Faith in the Law of Contract (Comparative Study), "Georgian Law Review", Special Edition, 2007, 26 (in Georgian); *Braunschneider H.,* das Skript, Schuldrecht AT, 3. Aufl., 2002,131.

[131] *Mekki M., Pelese M.K.,* Hardship and Modifikacation (or "Revision") of the Contract, 2010, 2 (the term "modification" of a contract conveyes the essence of this concept better than the term "revisiting") <http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

[132] *Zoidze B., Chanturia L.* (Eds.), *Ninidze T*., *Shengelia R*., *Khetsuriani J*., Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 406 (in Georgian).

[133] For example, at the decision of the Supreme Court of Georgia did not grant the demand for adapting a contract to changed circumstances five days before the expiration of contract term because court deemed that the application filed late was not based on the principle of good faith while changed circumstances existed some time before the mentioned time. See Ruling № as-466-707-08, Supreme Court of Georgia Civil, Business and Bankruptcy Board, 2008.

[134] *Vashakidze G*., Good Faith According to the Civil Code of Georgia – Abstraction or Applicable Law, "Georgian Law Review", 10/2007-1, 18, 22 (in Georgian).

[135] Ruling № as-7-6-2010, Supreme Court of Georgia Civil Board, 2010 (in Georgian).

Main function of a good faith principle is the achievement of a fair result and at the same time avoidance of expressly unfair outcome, to which the stability of civil transactions is directly related.[136] Article 398 of the Civil Code of Georgia serves the avoidance of the very unequal outcome, by means of adapting a contract to new terms.

Since the exercising of the right granted under Article 398 of the Civil Code of Georgia is related to adherence to the good faith principle even if all preconditions of adapting are in place, the demand about revisiting a contract has to be based on good faith principle. In case it is disregarded the grounds for the right to adaptation will be eliminated, no matter the extent of the onerousness of discharging an obligation due to a changed circumstance.

2. Relieving from the Obligation to "Strictly Adhere to" an Unmodified Contract in the Conditions of the Change of Circumstances

On the basis of Article 398(1) (2) of the Civil Code of Georgia if adapting a contract to changed circumstances is not demanded[137] "a party of a contract may not be demanded to strictly adhere to unchanged contract." The mentioned part of the provision is vague for it is absolutely unclear as to what "strictly adhere to" a contract implies. The concept of discharging an obligation is provided in Article 361 of the Civil Code of Georgia according to the paragraph two of which "an obligation has to be discharged in a due manner, in good faith, at the set time and place." The Civil Code of Georgia does not stipulate any other type of discharging an obligation.

On the basis of Article 398 of the Civil Code of Georgia the outcome of changed circumstances is adapting a contract to such circumstances or abandoning a contract. Therefore, it is not determined as to what "strict adherence to a contract" means is it relieving from the obligation taken under a contract? Partial relief? The content of the provision does not enable us to analyze as to what type of a benefit lawmaker wanted to grant to a party of a contract. Paragraph 313 of the Civil Code of Germany does not have such a provision.

It cannot be established from the analysis of court decisions either.[138]

To avoid ambiguity it is advisable to remove the word "strictly" from this part of the provision.

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[136] Ruling № as-7-6-2010, Supreme Court of Georgia Civil Board, 2010 (in Georgian).

[137] *Chitashvili N.*, Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", №2, 2011, 160 (in Georgian).

[138] Court indicates that "a party of a contract may not be demanded to strictly adhere to unchanged contract" but in none of its decisions defines as to what the above-mentioned implies. For example see: Ruling № bs-1360-1318(k-08), Supreme Court of Georgia, Administrative and other Category Cases Panel, 2009; Ruling № as-466-707-08, Supreme Court of Georgia Civil, Business and Bankruptcy Panel, 2008; Rulings № as-630-593-2012 and№ as-7-6-2010, Supreme Court of Georgia Civil Panel (in Georgian).

3. Interrelation of the Inability of Performance of an Obligation and Changed Circumstances

It is impossible to equate the inability of performance with changed circumstances.[139] When establishing interrelation between inability of performance and changed circumstances it is advisable to judge on the basis of Article 275 of the CCG for in Georgian law there is no unified norm that governs the inability of performance.

Prevalent idea in Georgian legal literature that in German law the concept of changed circumstances is not defined and that it is reviewed together with the concept of inability of performance[140] should not be accepted for in German law these two concepts are not mutually inclusive. Specific types of inability of performance are stipulated in Paragraph 275 of the CCG, while changed circumstances – in Paragraph 313. Further, it is important to differentiate those[141] for the legal outcome stipulated under Paragraph 313 (adapting a contract, abandoning a contract or dissolving a contract) occur only in case when the debtor is not exempted from the obligation of fulfillment in reference to Paragraph 275 of the CCG.[142] The matter of adapting of a contract is not brought up if, in accordance with Paragraph 275(2) of the CCG a debtor is not bound to discharge an obligation.[143]

The German doctrine differentiates between practical inability of performance[144] and economic inability. Paragraph 313 of the CCG comprises special hardship in performance when the event/case of practical inability is excluded.[145]

Paragraph 275 stipulates a rare case of hardship – exemption from principal obligation in case of inability of performance.[146]

Establishing interrelation between changed circumstances and inability of performance is important not in case of any type of inability of performance, for in case of absolute inability of performance (Paragraph 275(I) of the CCG) performance is absolutely impossible but only in case of factual (effective) inability of performance (Paragraph 275(II) of the CCG)).

Effective inability of performance in German doctrine differs from economic inability of performance that is governed by Paragraph 313 and not Paragraph 275(2).[147,148]

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[139] *Zoidze B., Chanturia L.* (Eds.), *Ninidze T*., *Shengelia R*., *Khetsuriani J*., Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 404 (in Georgian).

[140] Ibid., 400.

[141] *Musielak H.,*Grundkurs BGB, 10. Aufl, 2007, Rn.368.

[142] Since the provision governing changed circumstances is subsidiary to the provision about inability of performance it has to be examined last. See *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn. 740; *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl., München, 2010, §313, Rn. 1; *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl, München, 2006, §313 BGB, Rn.15.

[143] *Musielak H.,*Grundkurs BGB, 10. Aufl, 2007, Rn.368.

[144] For types of inability of performance see *Brox H.,* Allgemeines Sculdrecht, 27. Aufl., München, 2000, Rn. 231ff.; *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl., München, 2010, §275 BGB, Rn. 4. ff; *Braunschneider H.,* Das Skript, Schuldrecht AT, 3. Aufl., 2002, 126.

[145] *Chitashvili N*., Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", №2, 2011, 155 (in Georgian).

[146] *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl., München , 2010, §275 BGB, Rn. 1.

Significant compositions of hardship falls under the scope of Paragraph 275(2); these are the cases which a reasonable creditor could not have estimated in advance, when the action stipulated under an obligation in technical terms, in theory is possible, although according to general realistic assessment is not reasonable (for example: bringing up a ring stipulated under the obligation from the bottom of the sea).[149] Conversely, it is possible for the so-called economic inability to be subjected to Paragraph 313(1).[150] There is economic inability when an action to be carried out under the obligation is unacceptable economically for a debtor ("extreme onerousness of performance, "going beyond the limits of ability").[151]

It is economic inability when performance of a contract becomes difficult as a result of such circumstances as inflation, increase of prices on products, etc.[152] Since in such cases discharging obligation is still possible, this is not about inability of performance but the hardship in performance due to changed circumstances, which is governed by Article 398(1) of the Civil Code of Georgia.

Therefore, the non-genuine inability stipulated under Paragraph 275(2) and (3) has to be differentiated from the cases of the change of the basis of a deal, i.e., economic impossibility[153] can be considered only in the frame of Paragraph 313.[154]

The current redaction of the Civil Code of Georgia unlike the CCG does not regulate the matter of inability of performance through one specific article. The specific cases of inability of performance are reflected in the norms that regulate the deal, fault, changed circumstances and force majeure.[155] "Reflecting" the inability of performance in Article 398 of the Civil Code of Georgia means not all types of inability of performance but only economic inability of performance. "Economic inability" of performance is essentially equal to the change of circumstances.[156] Economic inability of performance does not give rise to legal effects of performance in the German Law either and it is the basis for adapting a contract to changed circumstances.

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147 CCG (Translator and Ed.- *Tchetchelashvili Z.*), 2010, 275(2), "a debtor may refuse to discharge an obligation since the performance requires inadequate costs that considering the content of obligation legal relation and the good faith principle is significantly inadequate to the interest of a creditor towards performance."

148 *Chitashvili N.*, Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", №2, 2011, 154 (in Georgian).

149 *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn. 740; *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl., München, 2010, §313, Rn. 3.

150 Comp. *Zweigert, K.*, *Kotz H.*, Introduction to Comparative Law in Private Law, Vol. II, Tbilisi, 2011, 211 (in Georgian).

151 *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl.,München, 2010, §313 BGB, Rn. 3.

152 *Zoidze B.*, *Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 379 (in Georgian).

153 in case of the so-called economic inability, i.e., when discharging obligation by a debtor involves disproportionately high costs, efforts, which, due to the contractual relations may not be bearable for a debtor, the provision governing the adapting a contract to changed circumstances is used and not that of the inability of performance (Paragraph 275(2)(1)). See *Musielak H.,* Grundkurs BGB, 10. Aufl, 2007 , Rn.368.

154 *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12., Aufl., München, 2010, §313 BGB, Rn. 3; see also *Musielak H.,* Grundkurs BGB, 10., Aufl, 2007, Rn.368.

155 *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 376 (in Georgian).

156 Ibid., 379.

Paragraph 275(2) of the CCG is not applicable to a case when a symmetrical increase of a creditor's interest in performance corresponds to a debtor's contractual obligation related to high costs.[157]

In case of hardship of performance a debtor cannot outright refuse to perform and primarily the possibility of applying Article 398 of the Civil Code of Georgia has to be examined.[158]

Therefore, Paragraph 275(2) of the CCG is applicable in case there is obvious disbalance between the costs necessary for performance and a creditor's interests.[159] But in case a creditor's interest towards performance increases pro rata with the increase of costs of performance then the provision governing adapting a contract to changed circumstances is applied.[160]

And finally we can say that when the matter of adapting a contract to changed circumstances comes up in German law it has to be examined whether or not a party is exempted from obligation of performance in reference to the provision of inability of performance (Paragraph 275(1) of the CCG). In case the grounds for relieving of the obligation of performance is not present in case of hardship first the possibility of adapting a contract has to be examined and in case of relevant preconditions adapting a contract to changed circumstances may be demanded. If economic inability cannot be distinguished from inability of performance priority is given to contractual definition[161] because it is possible for a contract to be adapted to reality through definition.[162] And in case neither interpretation solves the issue ultimate legal outcome is achieved on the basis of a provision regulating changed circumstances.

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[157] *Chitashvili N.*, Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", №2, 2011, 157 (in Georgian); e.g.: "an enterprise promised to undertake construction at a fixed price. During the implementation of works it appeared that the foundation required works that involved special costs. Which had not been expected by either of the parties. Therefore, costs increased significantly for an enterprise and the agreed upon price appeared to be not sufficient". In such case an enterprise is not relieved of the obligation of performance based on the provision of inability of performance. Since it is possible to "save" a contract in case a creditor incurs additional costs. Therefore, a contract will be adapted to a changed price, or a contract will be abandoned. See *Medicus D.,*Bürgerliches Recht, 21. Aufl., 2007, Rn. 158.

[158] *Vashakidze G.*, The System of Complicated Obligations, Hamburg – Tbilisi, 2010, 105, 109 (in Georgian).

[159] *Chitashvili N.*, Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", №2, 2011, 157; *Hütte F., Helbron M.,* Schuldrecht AT, 3. Aufl., 2005, 310 (in Georgian).

[160] *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Unmöglichkeit, Rn.22.

[161] Contractual definition is taken into account only when a contractual agreement has a flaw. Further, the focus is very rightly is made on that not all issues remaining beyond regulation are the flaws of a contract. When a contract does not make reference to such flaw or a contract interpretation cannot eliminate contract fault because a contract does not contain a specific basis on which the interests of parties is based that would have resolved the flaw later the decision is made on the basis of a provision regulating changed circumstances. See *Musielak H.,*Grundkurs BGB, 10. Aufl, 2007, Rn.369.

[162] *Medicus D.,*Bürgerliches Recht, 21. Aufl., 2007, Rn.154.

4. The Rule of Emergence of a Right to Abandon a Contract

4.1. An Exceptional Rule for the Emergence of a Right to Abandon a Contract

The emergence of changed circumstances in the majority of cases renders the performance of contractual obligation in its original form impossible. The honorable interest of parties becomes the basis for the transformation of obligation.[163] Honorable basis is significant changes resulting from changed circumstances.[164]

Article 398(3) (2) of the Civil Code of Georgia entitles a party to reject a contract.[165][166] A disadvantaged party, i.e., a party whose interests were violated is authorized to reject a contract.[167] Article 352 (1) of the Civil Code of Georgia relates the emergence of the right to abandon a contract to the presence of a condition stipulated under Article 405. Namely, the precondition of abandoning a contract always is essential breach of an obligation,[168] but in case of Article 398 of the Civil Code of Georgia the basis of abandoning a contract is the refusal to adapt a contract to changed circumstances.[169] Therefore, this provision stipulates the possibility of abandoning a contract even if there is no breach of contractual obligation due to a debtor's fault, therefore the above-mentioned is treated as an exceptional rule of emergence of the right of abandoning a contract.[170]

Adapting to changed circumstances under Article 398(3) of the Civil Code of Georgia is a superior demand, while a secondary right is abandoning a contract. A contract may be abandoned in case z"if a contract may not be adapted to changed circumstances", as well as in case another party disagrees to adapting. In the latter case it is unjustifiable for the refusal of just one party to give rise to the right of abandoning a contract because abandoning a contract is used as an extreme measure,[171] when continuing a contract is pointless. While under Article 398 of the Civil Code of Georgia a party is entitled to abandoning a contract at the negotiations stage.

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[163] *Zoidze B*., Reception of European Private Law in Georgia, Tbilisi, 2005, 300 (in Georgian).

[164] *Macharadze M*., Abandoning a Contract and Dissolving a Contract – Difference and Legal Outcomes (According to the Law of Georgia and Germany), "Georgian Law Review", Special Edition, 2008, 147 (in Georgian).

[165] In the Civil Code of Georgia the term "reject a contract" is used to denote abandoning a contract as well as the dissolution of a contract. Therefore, in every specific case it has to be established whether a lawmaker implied abandoning a contract or dissolution of a contract. See *Macharadze M*., Abandoning a Contract and Dissolving a Contract – Difference and Legal Outcomes (According to the Law of Georgia and Germany), "Georgian Law Review", Special Edition, 2008, 158 (in Georgian).

[166] From the content of the provision, practice of the Supreme Court of Georgia and Georgian legal literature as well it is confirmed that in Article 398(3) of the Civil Code of Georgia "rejection of a contract" implies abandoning a contract. See Ruling № as-7-6-2010, Supreme Court of Georgia Civil Cases Panel, 2010; Ruling №as-487-461-2011,Supreme Court of Georgia, 2011 (in Georgian).

[167] BGB§313 (3) "...so kann der benachteiligte Teil vom Vertrag zurücktreten."

[168] *Macharadze M*., Abandoning a Contract and Dissolving a Contract – Difference and Legal Outcomes (According to Georgian and German Law), " Georgian Law Review", Special Edition, 2008, 156 (in Georgian).

[169] Ruling №as-487-461-2011, Supreme Court of Georgia Civil Cases Panel, 2011.

[170] *Chachava S*., The Competition of the Demands and Grounds for Demand in Private Law, Tbilisi, 2010, 80 (in Georgian).

[171] *Hütte F., Helbron M.,* Schuldrecht AT, 3.Aufl., 2005, 310 ("ultima ratio"); *Macharadze M*., Abandoning a Contract and Dissolving a Contract – Difference and Legal Outcomes (According to Georgia and German Law), "Georgian Law Review", Special Edition, 2008, 127 (in Georgian).

4.2. The Role of Court in the Process of Adapting a Contract

Specific facts, events that may be recognized as essential change of circumstances may be evaluated by court when reviewing a relevant demand.[172] In European law as well changed circumstances are mainly the circumstances "established" primarily in judicial practice.[173]

For such cases when one party refuses to adapt it is advisable that the law stipulate the obligation of applying to court prior to abandoning a contract.

"The triggering of the demand of abandoning a contract has to be admissible only after the court deems the adapting of a contract to changed circumstances impossible and not at the stage when parties are unable to agree the terms of adapting a contract to new circumstances."[174]

Real essence of Article 398(3) of the Civil Code of Georgia is in that adapting a contract to changed circumstances has to take place under the court decision.[175]

Abandoning a contract may be allowable without applying to court in case when none of the parties wish to continue contractual relations, for in such case it would be unfair for court to force parties to keep a contract. But when parties cannot agree on the rule and conditions of adapting applying to court has to be necessary.

In a number of countries legislation makes special reference on the above-mentioned.[176]

Pursuant to Article 451 of the Civil Code of the Russian Federation in case of substantial change of circumstances a contract may be changed under the court decision only in case if the dissolution of a contract[177] will be contrary to public interests, or its dissolution will cause harm to parties provided such harm is significantly higher than the costs of performing a contract at conditions changed through court.[178]

In case of substantial change of circumstances first the parties have to try to restore the balance of interests, through concluding a contract with changed provisions. Only in case of failure to achieve such agreement an interested party may apply to court demanding modification or dissolution of a contract.[179]

Article 6:111(3) of the Principles of the European Law of Contracts stipulates the involvement of court in the process of adapting a contract to changed circumstances according to which "if the parties fail to reach agreement within reasonable timeframe court is authorized to modify a contract and based on the fairness principle distribute loss or profit caused by the change of circumstances

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[172] *Sukhanov E.A.* (Ed.), Civil Law, Vol. III, Moscow, 2006, 230 (in Russian).

[173] *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 399-400 (in Georgian).

[174] *Chitashvili N.*, Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", №2, 2011,163 (in Georgian).

[175] *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 407 (in Georgian).

[176] See Ibid. *Mekki M., Pelese M.K.,* Hardship and Modifikacation (or "Revision") of the Contract, 2010, 5, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

[177] "Dissolution".

[178] *Sukhanov E.A.* (Ed.), Civil Law, Vol. III, Moscow, 2006, 232; *Tolstoy U.K., Sergeeva A.P.,* Civil Law, Part 1, Saint Petersburg, 1996, 457 (in Russian).

[179] *Sukhanov, E.A.* (Ed.), Civil Law, Vol. III, Moscow, 2006, 231 (in Russian).

between parties", further, "court is authorized to impose the reimbursement of damages on a party that refuses to enter into negotiation unconscientiously."[180] According to Article 6.2.3(3), (4) of UNIDROIT International Commercial Contracts Principles "in case of failure to reach agreement within reasonable timeframe both parties are entitled to apply to court. If court rules that circumstances have changed, if this is advisable, it is authorized to terminate, or modify a contract in order to restore equilibrium."[181]

The position that refers to the advisability of application of Article 325[182] in the mentioned relation and thereby demonstrating the role of court[183] is to be accepted. Further, it has to be mentioned that certain scientists do not agree to the approach through which court is entitled to modify a contract for they deem such interference excessive. [184]

In the conditions of unstable economy change of circumstances is frequent[185] and the stability of contractual transaction will be compromised in case a party will be unconditionally granted the right to abandon a contract in case of failure to agree on adapting. By entry of this Article in a way a mandatory nature of a contract was specified[186] therefore in order to fully realize the goal of the lawmaker refusal of one party should not be giving rise to the entitlement of abandoning a contract. In case court deems adapting a contract to changed circumstances impossible then "there is no contract that cannot be dissolved."[187]

Therefore, Article 398 of the Civil Code of Georgia may be considered on the one hand, as the guarantor for the stability of civil transactions, and secondly, as hazard to such stability for on the basis of the same norm contractual relation is finished.

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[180] The Principles of European Contract Law 2002, Article 6:111(Ex Art. 2.117) ("If the parties fail to reach agreement within a reasonable period, the court may: (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing"), available at: <http://www.jus.uio.no/lm/eu.contract. principles.parts.1.to.3.2002/6.111.html>.

[181] UNIDROIT Principles of International Commercial Contracts, Article 6.2.3. - Effects of Hardship ("(3)Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed; or(b) adapt the contract with a view to restoring its equilibrium."), available at: <http://www.cisg.law.pace.edu/cisg/ principles. html#NR93>.

[182] Civil Code of Georgia, 1997, available at: <https://matsne.gov.ge>, Article: "1. In case the provisions of discharging an obligation have to be set forth by one of the parties of a contract or a third party then in case of doubt it is assumed that such determination has to be performed on the basis of justness. 2. In case a party does not deem conditions just an equitable, or their determination is delayed, decision is taken by court."

[183] See *Chitashvili N.*, Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", №2, 2011, 163-166 (in Georgian).

[184] *Mekki M., Pelese M.K.,* Hardship and Modifikacation (or "Revision") of the Contract, 2010, 1, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

[185] *Zoidze B*., Reception of European Private Law in Georgia, Tbilisi, 2005, 303 (in Georgian).

[186] Ibid., 302.

[187] *Zoidze B*., Constitutional Control and the Order of Values in Georgia, Tbilisi, 2007, 23 (in Georgian).

The obligation of applying to court excludes simplifying the right to refuse a contract without grounds[188] and thereby ensures the maintenance of contractual stability.

4.3. General Rule of the Right to Abandon a Contract

"Article 398 of the Civil Code of Georgia stipulates exception and conditions of the emergence of the right to abandon a contract although in case of the composition stipulated under Article 398 of the Civil Code of Georgia abandoning a contract is performed according to a general rule,"[189], i.e., in case of abandoning a contract on the basis of changed circumstances legal result stipulated under Article 352 of the Civil Code of Georgia will be produced,[190] respectively, the situation prior to the conclusion of a contract will be restored.

Under Paragraph 313(3) (1) of the Civil Code of Germany in case it is impossible to adapt a contract to new relation or it is unacceptable for one of the parties[191] a disadvantaged party is entitled to abandoning a contract while Paragraph 313(3) (2) sets forth the right to terminate a contract.[192] Specifically, according to Paragraph 313(3) (2) of the CCG "in case of long-term obligation-legal relation termination of a contract is used instead of abandoning a contract."[193]

In long-term obligation-legal relations termination of a contract is more convenient in terms of legal outcome in case the interests of parties does not include the return of received performance and benefit. After the matter of adapting a contract is excluded and the restoration in original condition is not impossibly difficult a disadvantaged party has to be granted the right to either abandon a contract on the basis of Article 352 of the Civil Code of Georgia, or terminate a contract on the basis of Article 399.

Since changed circumstances are mainly used in long-term contractual relations it is advisable to accept the approach of the Paragraph 313 of the CCG to the issue and entitle a party[194] to the termination of a contract in long-term contractual relations under Article 398(3) of the Civil Code of Georgia, of course in case the matter of adapting is resolved negatively.

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[188] *Zoidze B*., Reception of European Private Law in Georgia, Tbilisi, 2005, 300 (in Georgian).

[189] *Chachava S*., The Competition of Demands and the Grounds of Demands in Private Law, Tbilisi, 2010, 80 (in Georgian).

[190] Ruling № as-7-6-2010, Supreme Court of Georgia Civil Board, 2010 (in Georgian).

[191] BGH, Urt. v. 30. 9. 2011 − V ZR 17/11 (OLG Hamm), "NJW", 2012, 373 ("Der Rücktritt ist in § 313III BGB nur nachrangig für den Fall vorgesehen, dass eineVertragsanpassung nicht möglich oder einer der Parteien nicht (mehr) zumutbar ist"); also comp. *Feldhahn P.,* Die Störung der Geschäftsgrundlage im System des reformierten Schuldrechts, "NJW", 2005, 3382.

[192] *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn.753.

[193] BGB §313(3) ..."An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung"(<http://www.gesetze-im-internet.de/bgb/__313.html>); *Feldhahn P.,* Die Störung der Geschäftsgrundlage im System des reformierten Schuldrechts, "NJW", 2005, 3382.

[194] Comp. *Chachava S*., Competition of Demands and the Grounds for Demands in Private Law, Tbilisi, 2010, 30 ("Article 398 of the Civil Code of Georgia, in relation to Article 399 of the same Code, undoubtedly stipulates exceptional rule and preconditions and excludes the application of the latter") (in Georgian).

IV. "Misbeliefs" Equalized by the Lawmaker with Change of Circumstances

1. Error in the Basis of a Deal

Pursuant to Article 73(c) of the Civil Code of Georgia "it is considered to be an essential error when there are no such circumstances that the parties consider as the basis of a deal based on good faith principles."

Joint beliefs of parties about circumstances due to which a deal is concluded is considered to be the basis of a deal. In case after the conclusion of a contract it turns out that the circumstances that formed the basis of a deal did not exist or did not exist in a manner that the parties had imagined this is a mistake. For treating beliefs as erroneous it is decisive that parties trust actual existence of circumstance in good faith.[195]

Misbelief may be due to such circumstance that, in the capacity of the basis of a deal, existed as of the instance of concluding a deal, as well as due to a future circumstance. The time of emergence of a misbelief is irrelevant in terms of legal outcome, "in both cases a deal may be deemed annulled."[196]

"A mistake in the basis implies the error in defined circumstances. These circumstances are subjectively necessary element and it is deemed as the basis by an entity that is mistaken."[197] Not only subjective beliefs of an entity who is mistaken are taken into account but also objective condition of the case[198] that has to be evaluated based on the principle of good faith of the transaction.

"Error in the basis implies on the one hand, error in the motif, and secondly, the mistake in the demonstration of the will."[199] Based on Paragraph 119 of the CCG in case of the error in motif the will is based on a misbelief.[200] Therefore, misbeliefs in the basis of a deal is one of the types of a mistake.

Error in the basis of a deal is considered in relation to arguable deals in Georgian legislation as well as the legislation of other countries[201] and there is no reference about that the error in the basis of a deal gives rise to the entitlement to adapting or refusal of a contract.

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[195] *Chanturia L.*, Introduction in General Part of the Civil Law of Georgia, Tbilisi, 2000, 369 (in Georgian).

[196] Ibid.

[197] *Zoidze, B., Chanturia L.* (Eds.), *Ninidze, T., Akhvlediani Z., Jorbenadze S.,* Commentary to the Civil Code of Georgia, Book One, Tbilisi, 2002, 226 (in Georgian).

[198] Ibid.

[199] Ibid.

[200] *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl., München, 2010, §119, Rn. 12.

[201] The absence of the basis of a deal in relation to the deals concluded erroneously were considered as void of legal force by Grocius. According to Article 6:228(I)(c) of the Civil Code of the Netherlands a contract concluded on the basis of mistaken beliefs "may be challenged or declared void", when "another party acted on the basis of the "mistaken beliefs". Similar legal outcome is stipulated under Article 1429(I) of the Civil Code of Italy. See *Kereselidze D.*, Most General Systemic Concepts of Private Law, Tbilisi, 2009, 334-335 (in Georgian).

2. Interrelation of "Changed Circumstances" and "Misbeliefs"

Pursuant to Article 398(2) of the Civil Code of Georgia "it equals the change of circumstances when the beliefs that formed the basis of a contract appeared to be wrong".

"In this case there is no change of circumstances, but an error. At the time of concluding a contract parties were in the situation of error".[202]

It is unjustifiable to equalize "misbeliefs" with changed circumstances. "Misbeliefs" are not characterized by the preconditions that give rise to the entitlement of adapting a contract. The belief that formed the basis of a deal is wrong from the very beginning, not that it changes later.

Although misbeliefs represent the basis (subjective basis) of a contract but having beliefs or circumstances as the basis of a contract does not mean that it by default gives rise to the right of adapting a contract or rejecting a contract.

Notably, the content of Article 313(2) of the CCG is essentially identical to Article 398(2) of the Civil Code of Georgia.[203, 204]

It is arguable as to what is the correlation between Article 313(2) and the right of challenging in German law as well.[205]

Article 313(2) of the CCG is problematic according to which it is considered to be the change of the basis of a deal when essential beliefs that formed the basis of a contract appeared to be wrong. This part of the provision refers to a mistake. [206]

In German legal literature[207] an idea is expressed about drawing the line between Articles 119 and 313 of the CCG that Article 119(2)[208] regulates just unilateral error, while in case of bilateral error when the error[209] of both parties formed the essential basis of a contract Article 313(2) is applicable.[210]

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[202] *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 404 (in Georgian).

[203] CCG (Translator and Ed. -*Tchetchelashvili Z.*), 2010, §313(2), "it is equalized to the change of circumstances when the beliefs that formed the basis of a contract appeared to be wrong" ("Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen", available at: <http://www.gesetze-im-internet.de/bgb/_313.html>).

[204] Article 398(2) of the Civil Code of Georgia: "it is equalized to the change of circumstances when the beliefs that formed the basis of a contract appeared to be wrong".

[205] *Joussen J.,* Schuldrecht (1) Allgemeiner Teil, 2008, Rn. 742.

[206] Ibid.

[207] Ibid., See also *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl., München, 2010, §119, Rn. 19.

[208] CCG (Translator and Ed. -*Tchetchelashvili Z.*), 2010 §119(2), "in the content of the demonstration of will a mistake in the features of a person or an article that are considered as essential in civic turnover are considered as mistake" ("(2) Als Irrtum über den Inhalt der Erklärung gilt auch der Irrtum über solche Eigenschaften der Person oder der Sache, die im Verkehr als wesentlich angesehen warden",<http://www.gesetze-im-internet.de/bgb/_119.html>)

[209] *Joussen J.*, Schuldrecht (1) Allgemeiner Teil, 2008, Rn. 742 ("...wen sich beide Parteien über eine verkehrswesentliche Eigenschaft irren, nicht §119 Abs. 2, sondern § 313 einschlägig ist".); See also *Chitashvili N.*, Hardship and Inability of Performance Due to Changed Circumstances (Comparative Legal Analysis of German and Georgian Law), "Journal of Law", №2, 2011, 147 (in Georgian).

The difference between P313 (II) of the CCG and P 119 of the CCG according to the circle of entities in German law may be highly justified despite the fact that Paragraph 313(II) does not make reference to bilateral error. But the mentioned conclusion cannot resolve the issue as to in which case wrong beliefs are equal to changed circumstances and in which case they give rise to the entitlement of contending in Georgian law. Neither Paragraph 313(II) of the CCG nor Article 398(2) of the Civil Code of Georgia content enables us to explicitly state that these parts of the provision make reference to a bilateral error. The mentioned approach cannot be used in Georgian law for drawing the line between Article 398 of the Civil Code of Georgia and Article 73(c) of the Civil Code of Georgia. For, according to Article 73(c) of the Civil Code of Georgia joint error of parties is determining "about the presence of the "basis of a deal" which absence renders the retention of a contract unacceptable for a party willing to exercise the right to contend."[211]

Therefore, on the basis of Article 73(c) of the Civil Code of Georgia the judgment that this provision stipulates a mistake of only one party, and Article 398(2) -- the error of both parties is unjustifiable.

It is absolutely possible that "parties – or just one of the parties – made a mistake in the motif of concluding a contract."[212] Whether it is an error of just one party or joint error of both parties cannot become differentiating criterion between Article 398(2) of the Civil Code of Georgia and Article 73(c) of the Civil Code of Georgia. The impression of bilateral error in Article 398(2) of the Civil Code of Georgia may be created at the first sight by the fact that this part of the provision refers to "beliefs" that formed the basis for a contract. Although it is unclear whether "beliefs' imply individual beliefs of each party of a contract and joint "beliefs" or whether the sum of several beliefs forms "beliefs" just one party of a contract may very easily have (i.e., one party of a contract may have not just one but several beliefs on the basis of which it concludes a deal) and this causes ambiguity.

Pursuant to Article 73(c) of the Civil Code of Georgia "it is decisive that the absence of the "basis of a deal" is unknown as of the instance of demonstration of will for the parties. Further, the legal outcome is not affected by whether these circumstances do not exist objectively, or they are subjectively unknown only to parties."[213] Similarly, in Article 398 (2) of the Civil Code of Georgia as well the basis of a deal does not exist from the very beginning.[214]

Pursuant to Article 73(c) of the Civil Code of Georgia those circumstances "do not exist" that are considered as the basis of a deal. While according to Article 398(2) of the Civil Code of Georgia the beliefs that formed the basis of a contract will appear "wrong". The difference between these two

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[210] It is possible to consider Paragraph 119 as superior to Paragraph 313(II) but even explicit priority is deemed unjustified. Further the following is also considered as the differentiating factor of these two provisions: on the basis of Paragraph 313(II) of the CCG adapting, while on the basis of Paragraph 119(II) even elimination of a flaw can be demanded. While the error of both parties is still listed as main differentiating factor. See *Joussen J.*, Schuldrecht (1) Allgemeiner Teil, 2008, Rn. 742.

[211] *Kereselidze D.*, Most General Systemic Concepts of Private Law, Tbilisi, 2009, 335 (in Georgian).

[212] *Tchetchelashvili Z.*, Contract Law, 2nd Edition, Tbilisi, 2010, 123 (in Georgian).

[213] *Kereselidze D.*, Most General Systemic Concepts of Private Law, Tbilisi, 2009, 335 (in Georgian).

[214] *Tchetchelashvili Z.*, Contract Law, 2nd Edition, Tbilisi, 2010, 122 (in Georgian).

is just in their wording, while in terms of content in specific cases both coincide. E.g.: legal outcome often cannot be affected by whether the circumstances will not exist at all, or will exist but not in a manner as the parties had imagined. If the parties are not concerned about what types of circumstances exist, or actually what formed the basis of a contract, neither will they challenge the deal or will demand the adapting. The result of wrong beliefs is that the parties did not want to conclude a deal on the basis of these circumstances.[215] I.e., often the erroneousness of circumstances, beliefs is equal to the absence of a circumstance.

Neither ignorance will equalize to changed circumstances for ignorance equalizes to error,[216] i.e., ignorance too, causes the result of a deal concluded erroneously.

The judgment about whether "misbeliefs" stipulated under Article 398 of the Civil Code of Georgia give rise to the right of contending and not adaptation is confirmed by the following argument as well, namely, the Supreme Court of Georgia defines that "the deficiency of the will at the time of a deal concluded based on an error is conditioned by misbelief of a party in relation to the essence or content of a deal to be concluded, as well as misbelief around those circumstances that formed the basis of a deal."[217]

Therefore, naturally, "misbeliefs" that formed the basis for a deal are treated by court in relation to arguable deals, while according to Article 398 of the Civil Code of Georgia misbeliefs that have formed the basis of a deal are equalized to changed circumstances and respectively, give rise to the right of adapting a contract or abandoning a contract.

3. Legal Result Due to Equalizing Misbeliefs to the Change of Circumstances

"Error in the basis of a deal" gives two absolutely different legal outcomes. In case of Article 73(c) lawmaker entitles a party to challenge, once this right is exercised the deal will be void, while in another case it grants the right of adapting a contract or rejecting a contract.

When a provision directed at regulating the same relation gives rise to different outcomes naturally, the wording of the provision does not match the goal of the lawmaker. If in the same factual circumstances "error in the basis of the deal" sometimes gives rise to the right to challenge, sometimes the right of adapting or rejecting a contract, this will result in non-uniformity, ambiguity and produce unfair results for the party.

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[215] For example, "A and B have agreed on that the latter would supply to A 5 million barrel high quality oil obtained from new quarries. Following the conclusion of a contract it appeared that the supply of oil did not exceed 2 million barrels and that was of poor quality." Naturally, in this case the belief that formed the basis of a deal is wrong, but for a party its erroneousness may mean the absence of a circumstance since the party related the conclusion of a contract to specific circumstances and in the absence of high quality oil it may not care about availability or non-availability of poor quality oil as long as the circumstance which it wished under such deal is not present. See *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 404 (in Georgian).

[216] *Kereselidze D.*, Most General Systemic Concepts of Private Law, Tbilisi, 2009, 335 (in Georgian).

[217] Ruling № as-1350-1275-2012, Supreme Court of Georgia the Civil Panel, 2013 (in Georgian).

The difference between Article 398(2) of the Civil Code of Georgia and Article 73(c) of the same Code is actually solely due to stipulation thereof in different articles. Therefore, it is advisable to remove Article 398(2) and have Article 73(c) of the Civil Code of Georgia govern "wrong assumptions" that form the basis of the deal. In order to avoid different legal outcomes on the basis of essentially one provision.

V. Imposing the Risk of Change of Circumstances

1. Imposing the Risk of Change of Circumstances and the Burden of Proof to a Disadvantaged Party

The matter of adapting a contract to changed circumstances significantly depends on the distribution of contractual risk. A party of a contract cannot enjoy the right of adapting even in case of essential change, provided the change falls within the scope of its risk.[218]

When discharging unchanged contract becomes unacceptable for one of the parties first it has to be established as to how the parties share the risk of emergence of a similar circumstance under the concluded contract,[219] namely, it has to always be determined whether a party disadvantaged as a result of the change of circumstance is the very bearer of this risk? Does the risk of the outcome of changed circumstance rest with a disadvantage party?[220] When determining the issue of subsequent fulfillment of an obligation the change of circumstance may be considered only in case if a party is not a bearer of contractual risk.[221] According to the principles of the European Law of Contracts and also the principles of International Commercial Contracts for modifying a contract "the disadvantaged party should not have undertaken the risk of events";[222] "according to a contract performing party should not be the bearer of the risk of change."[223] When one party undertakes the risk of future development of circumstance it cannot resort to the provision of the change of the basis of a deal in

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[218] BGH, Urteil vom 9. 3. 2010 - VI ZR 52/09 (OLG Stuttgart), "NJW" 2010, 1877 ("... ist für eine Berücksichtigung von Störungen der Geschäftsgrundlage grundsätzlich kein Raum, soweit es um Erwartungen und Umstände geht, die nach den vertraglichen Vereinbarungen in den Risikobereich einer der Parteien fallen sollen."); compare also *Tolstoy Y.K*., *Sergeeva A.P*., Civil Law Part 1, Saint Petersburg, 1996, 457 (in Russian); *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313 BGB, Risikobetrachtung, Rn.27; *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl, München, 2006, §313 BGB, Rn.25.

[219] *Zwiegert K*., *Kotz H*., Introduction of Comparative Law in Private Law, Volume II, Tbilisi, 2001, 213 (in Georgian).

[220] *Joussen J.*, Schuldrecht (1) Allgemeiner Teil, 2008, Rn. 749.

[221] Ibid., Rn. 750.

[222] UNIDROIT Principles of International Commercial Contracts, Article 6.2.2. – Definition of Hardship ("(d) the risk of the events was not assumed by the disadvantaged party."), available at: <http://www.cisg.law.pace.edu/cisg/principles.html#NR93>.

[223] The Principles of European Contract Law 2002, Article 6:111(Ex Art. 2.117), ("(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear"), available at: <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/6.111.html>.

case the circumstances develop in a different manner.[224] Since, if a contract stipulates the imposition of the risk of change of circumstances to a disadvantaged party "contract provision is applicable and Article 398 may not be used."[225] While the provision regulating changed circumstances should not be used for changing or elimination of contractual risk or risk at-law or its elimination.[226]

Risk may be assumed explicitly or be implicit.[227] According to the Civil Code of the Russian Federation a risk may be imposed on a party not only based on a contract but also due to the customs of business transactions.[228]

According to Paragraph 313(1) of the CCG adapting a contract to changed circumstances may be demanded within the frames "in which, considering the circumstances of an individual case – a party to a contract may not be demanded to adhere to unchanged contract." Article 398 of the Civil Code of Georgia is silent about the distribution of risk. Still, in judicial practice the issue of adapting a contract to changed circumstances is determined as a result of determining the scope of risk of parties and its evaluation.[229] Such approach is appropriate but for the improvement of the provision it is advisable to consider the resolution stipulated in the Civil Code of Germany and add to Article 398 of the Civil Code of Georgia the provision that would stipulate the scope of sharing contractual risk.

The burden of proof that the occurrence of an event rendered the performance of an obligation extremely hard (impossible to discharge) rests with the disadvantaged party. Further, the disadvantaged party has to allege that it had not considered the risk of occurrence of an event and concluded a contract based on the belief that the event would not occur.[230]

2. Imposing the Risk of Change of Circumstances to the Parties of a Specific Type of a Contract

In case of the emergence of changed circumstances in some types of contractual relations the Civil Code of Georgia stipulates legal outcome different from Article 398, which is primarily due to a specific nature of a contract. The regulation of specific cases by a lawmaker on the basis of special provisions is justified based on contractual justness.

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[224] *Kropholler J., Jacoby F., Hinden M.*, Studienkommentar, 12. Aufl., München, 2010, §313, Rn.2.

[225] Ruling № as-7-6-2010, Supreme Court of Georgia Civil Panel, 2010 (in Georgian).

[226] *Lettl T.,Weiden A.,* Die Anpassung von Verträgen des Privatrechts, "Jus", 2001, 248.

[227] *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001,403 (in Georgian).

[228] *Sukhanov E.A.* (Ed.), Civil Law, Vol. III, Moscow, 2006, 231 ("it does not emanate from the customs of business turnover or the essence of the contract that the risk of change of circumstances is borne by the interested party") (in Russian).

[229] See Ruling № as-7-6-2010, Supreme Court of Georgia Civil Panel, 2010; Ruling №as 1153-1173-2011, Supreme Court of Georgia Civil Panel, 2011 (in Georgian).

[230] See Ruling № as-7-6-2010, Supreme Court of Georgia Civil Panel, 2010 (in Georgian).

2.1. The Imposition of the Risk of Change of Circumstances in Case of the Death of a Borrower

According to Article 622 of the Civil Code of Georgia "in case a borrower dies, or a lender requires an article due to unforeseen circumstance it can dissolve a contract." In this specific case circumstance changes: a) by the death of a borrower and b) by the emergence of unforeseen circumstance which entitles a lender to demand the article. In the former case contract can be terminated for "there is no party to a contract".[231] While the subjects discharging the right granted under Article 398 of the Civil Code of Georgia are parties of a contract.

The case stipulated under Article 622 of the Civil Code of Georgia when a lender requires an article due to unforeseen circumstance at a glance may be associated with such change that is stipulated under Article 398 of the Civil Code of Georgia. In this case too, circumstance changes, it does not exist in the form to which the lender had related the lending contract to.[232]

In this Article 398 of the Civil Code of Georgia cannot be applicable because actually there is neither the change of circumstance in a manner that is stipulated by this provision and nor the contractual disbalance emerges for in case of the gratis contract it is unjustifiable to refer to the disbalance of the interests of parties which balancing is the purpose of Article 398 of the Civil Code of Georgia. The granting of the right to dissolve a contract to the lender under the law is justifiable given the gratis nature of lending. Although this is one of the preconditions for adapting – "unforeseen circumstance", but this specific case is a clear example that separately none of the preconditions give rise to the right of adapting.

2.2. The Imposition of the Risk of Change of Circumstances in Case of the Promise of the Loan

The contract of the promise of loan entitles the entity that has made a promise to refuse to extend a loan, in case the property status of another party deteriorates to the extent that the repayment of debt may be jeopardized (Article 628 of the Civil Code of Georgia). This provision stipulates a unilateral right of a party to refuse further continuation of contractual relation.

The deterioration of property status of a borrower may be due to numerous circumstances.[233] Majority of which may fall under unforeseen circumstances and their change in its essence considering

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[231] *Shengelia R.*, *Chanturia L.* (Eds.), *Zoidze B.*, *Ninidze T.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book Four, Vol. I, Tbilisi, 2001, 225 (in Georgian).

[232] For example, if the basis for concluding a lending contract for the borrower was the circumstance that it temporarily did not need its own article and expressed good will to lend it out, and later circumstance has changed, namely, due to unforeseen circumstance it needs its article (for example: due to the illness of a family member needs lent summerhouse) lender is authorized to dissolve a contract and claim the article back. See *Shengelia R.*, *Chanturia L.* (Eds.), *Zoidze B.*, *Ninidze T.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book Four, Vol. I, Tbilisi, 2001, 225 (in Georgian).

[233] For example: by enforcing court decision under which a borrower was imposed to reimburse high amount of damages, by the launch of insolvency proceedings, including such circumstances as well as natural disasters (for example: as a result of severe hail "borrower's" crops were destroyed, house was destroyed as a result of an earthquake, that it intended to sell in order to repay the debt), economic crisis, etc.

specific cases may represent apparent and unforeseen circumstances change emerged after the conclusion of the contract. Although Article 628 of the Civil Code of Georgia does not provide a listing of full preconditions necessary for adapting even if there was such a listing it would not be justified for the lawmaker to demand the person issuing a promise about a loan for example to lend less amount of money or adapt a contract to changed circumstances. For this party does not wish to run the risk and jeopardize the repayment of debt, therefore it is justifiable "to relieve it from contractual restraint."[234]

2.3. The Imposition of the Risk of Change of Circumstances in Case of Honorable Reasons when Terminating a Residential Housing Rental Contract

Pursuant to Article 562(1) and (2)(c) of the Civil Code of Georgia "in case a tenant refuses to pay the increased rental offered by rent-granter according to market rental prices on housing", then rent granter can "terminate" the housing rental agreement.

Article 562(c) of the Civil Code of Georgia stipulates a case when after the conclusion of a rental agreement circumstance changes within the term of the agreement – market value of apartment rental increases. The increase of rental may be due to many circumstances, including such ones which the parties could not have foreseen when concluding a contract. Its change may be essential and also breach the balance of parties' interests, i.e., in a specific case substantial change of circumstances stipulated under Article 398 of the Civil Code of Georgia may be present. Offer by the rent granter of payment of increased rental and the refusal of the tenant to pay such price is the negotiation of the parties about adapting a contract to increased market value of the rental. Refusal of a tenant to pay increased rental is effectively the refusal to adapt a contract but in such case law maker grants a rent granter whose interests has been violated by maintaining a contract at an unchanged price the right to dissolve a contract without regard to legal outcome stipulated under Article 398(3) of the Civil Code of Georgia – abandoning a contract.

The non-payment of increased rental by a tenant is the honorable basis that entitles rent granter to dissolve rental agreement, therefore in such case dissolution of rental agreement by rent granter is legitimate.[235]

2.4. Imposition of the Risk of Change of Circumstances in Case of the Increase of Insurance Contribution

In insurance relations the raise of insurance contribution by an insurance carrier may form the basis for dissolution of an insurance contract.[236] Namely, according to Article 807 of the Civil Code of

[234] *Chachava S.*, Competition of Demands and Grounds for a Demand in Private Law, Tbilisi, 2010, 77 (in Georgian).

[235] *Chikvashvili Sh.*, *Shengelia R.*, *Chanturia L.* (Eds.), *Zoidze B.*, *Ninidze T.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book Four, Vol. 1, Tbilisi, 2001, 134 (in Georgian).

[236] *Tsiskadze M.*, Legal Regulation of Voluntary Insurance, Tbilisi, 2001, 27 (in Georgian).

Georgia "in case an insurance carrier increases insurance contribution,[237] then the insured party may terminate a contract in compliance with the one month period of dissolution of a contract." Maintaining a contract without the increase of premium may place insurance company at a disadvantaged situation and it may not feasible for it to maintain contractual relation for the amount of insurance premium and insurance services to be provided may be disproportionate. Perhaps that is why it is not required to adapt a contract to changed circumstances and is granted the right to dissolve a contract. At the same time, insignificant increase of insurance contribution does not entitle an insured entity to dissolve a contract early.[238] The entitlement to dissolution a contract emerges based on significant increase of insurance contribution. It has to be established on a case by case basis based on the circumstances of the case as to what is considered as significant increase of insurance contribution.

Thus, change of circumstance during the insurance relations –increase of contractual contribution does not give rise to the outcome stipulated under Article 398 of the Civil Code of Georgia and entitles a party to dissolve a contract.

3. Interrelation of Changed Circumstances and the Principle of Nominalism

When discharging monetary obligation the principle of nominalism is applicable,[239] i.e., the principle that the debt has to be nominally replayed in the amount according to which a contract was concluded.[240]

"At the time of the discharging monetary obligation Article 389[241] of the Civil Code may be applied only in case when denomination[242], i.e. the increase or fall of the unit of money (rate) takes place, as well as in case of the change of currency and hyperinflation of the national currency."[243]

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[237] Increase of insurance contribution may be due to internal (e.g., losses) as well external factors (e.g., increase of the prices on medicines) of an insurance company. While the increase of prices may, in turn, be due to such circumstances which occurrence could not have reasonably be assumed at the time of conclusion of a contract.

[238] *Tsiskadze M.*, Legal Regulation of Voluntary Insurance, Tbilisi, 2001, 27 (in Georgian).

[239] Ruling №as-239-564-09, Supreme Court of Georgia Civil, Business and Bankruptcy Panel, 2009 (in Georgian).

[240] *Chantladze M.*, Definition of the Demonstration of Will, Decreasing Penalty, the Principle of Nominalism, "Georgian Law Review", 6/2002-1, 174 (in Georgian).

[241] According to Article 389 of the Civil Code of Georgia, "if prior to the deadline of repayment money unit (rate) increases or decreased, or currency changes, a debtor is bound to repay at the rate that corresponds to the time of emergence of an obligation. In case of the change of currency the exchange relations should be based on the rate in effect on the day of the change between these units of money."

[242] For example, "Soviet Ruble was denominated when the 10 ruble nominal was replaced by 1 ruble nominal. There was the change of currency when the Russian Ruble was replaced by coupons, later coupons were replaced by Laris." See *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 347 (in Georgian).

[243] See Ruling № bs-1387-962 (k-05), the Supreme Court of Georgia Administrative and other Category Cases Panel, 2006; Ruling № 3k/614-01, Supreme Court of Georgia Civil, Business and Bankruptcy Panel, 2000; Ruling №3k-411-200, Supreme Court of Georgia Civil, Business and Bankruptcy Panel, 2000; Decision №bs-1387-962(k-05), Supreme Court of Georgia Civil, Business and Bankruptcy Panel, 2001 (in Georgian).

In judicial practice Article 389 of the Civil Code of Georgia is interpreted in a way that the increase or decrease of money unit (rate) does not imply the relation of the national currency – Lari to foreign currencies,[244]Article 389 of the Civil Code of Georgia envisages the change of the rate of the money at the time of the change of nominal value of the money unit and not the change of the currency exchange rate of the money.[245] Respectively, this Article is not applicable in case of the fall of the nominal exchange rate, in cases of the difference between rates of money (Lari to Dollar or Lari to other currency), for in the setting of market economy the currency fluctuation is absolutely allowable.[246]

For such is the established practice and also considering that "the money rate means the value of the unit of money of one country in terms of another country's money unit[247] it would be advisable to make relevant reference in Article 389 of the Civil Code of Georgia about what is implied under "the increase or decrease of the rate of money", for the parties may relate the relation of Lari to foreign currencies to the scope of Article 389 for it is close to consumer approach to the "rate of money".[248]

The essence of the principle of nominalism lies in that the fluctuation of purchasing power of money is not the basis for revaluation of repayable amount.[249]

The cases that fall under the regulation of Article 389 may in a specific case be a substantial change of a circumstance stipulated under Article 398 but "the relation of Article 389 to the regulation under Article 398 is not identified. Article 389 of the Civil Code of Georgia in relation to Article 398 of the Civil Code of Georgia has to mainly be regarded as an exceptional provision for it regulates a different legal outcome in case of the change of money unit, exchange rate or the currency. Although, in case of the competition between Articles 289 and 398 of the Civil Code of Georgia it is unjustifiable to unconditionally recognize the superiority of Article 389 of the Civil Code of Georgia and recognize it as the regulation having the superseding power in relation to Article 398."[250]

One of the biggest drawbacks of the principle of nominalism is that it cannot ensure the insurance of security and risks of both parties in case of the currency rate change, inflation or devaluation.[251] In case of inflation the interest of just one party to a contract – of a debtor is protected,

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[244] *Tskepladze N.*, The Repayment of Cash Obligation in Case of the Change of the Money Unit Rate, "Georgian Law Review", 6/2003-1, 194; See also Decision № 3k/614-01, Supreme Court of Georgia Civil, Business and Bankruptcy Panel, 2001 (in Georgian).

[245] Ruling №3k/ 467-01, Supreme Court of Georgia Civil, Business and Bankruptcy Panel, 2001(in Georgian).

[246] *Chantladze M.*, Interpretation of the Demonstration of Will, Reduction of Penalty, Principle of Nominalism, "Georgian Law Review", 5/2002-1, 174 (in Georgian).

[247] Ruling № 3k/305-200, Supreme Court of Georgia Civil, Business and Bankruptcy Cases Board, 2000 (in Georgian).

[248] *Tskepladze N.*, Payment of Monetary Obligation at the Time of the Change of Money Unit, "Georgian Law Review", 6/2003-1, 194 (in Georgian).

[249] Ruling №as-239-564-09, Supreme Court of Georgia Civil, Business and Bankruptcy Cases Panel, 2009 (in Georgian).

[250] *Chachava S.*, The Competition of Demands and Grounds for Demands in Private Law, Tbilisi, 2010, 82 (in Georgian).

[251] *Janashia L.*, Discharging Monetary Obligations (Seminar Paper), Tbilisi, 2006, 38 (in Georgian).

while the objective of lawmaker is to protect legitimate interests of both parties.[252] Therefore, in case the cases stipulated under Article 389 occur it would be unjustifiable to unilaterally preclude the application of Article 398 of the Civil Code of Georgia. Since in specific cases Article 389 serves the protection of interests of just one party, in order not to have the interests of another party violated substantially priority should be given to Article 398, that is aimed at the restoration of contractual equilibrium and equal protection of the interests of both parties.

There is always the risk of the change of the currency rate, devaluation of money, while Article 389 is so imperfect[253] that it does not protect the interests of both parties. Although the variation of the money rate in monetary obligations falls under the field of a creditor's risk[254] but the risks also have their limits[255]. Therefore, when the parity between performance and reciprocal performance is distorted so strongly that it goes beyond the boundaries of the risk taken under a contract[256] it is just to apply Article 398 of the Civil Code of Georgia and adapt the payable amount.

Article 398 of the Civil Code of Georgia may have a narrower scope within the frames of the relations governed under Article 389 of the same Code as compared to that in other types of contracts for the contractual risk that has almost decisive importance for the application of Article 398[257] is imposed on the parties at highest degree in the very monetary obligations. But it has to be mentioned also that the application of Article 398 of the Civil Code of Georgia should not be excluded from the scope of performance of monetary obligation. In case of occurrence of a case stipulated under Article 389 examination as to how much a change is essential, how much its occurrence could have been foreseen, whether or not a change could have affected conclusion of a contract, does the change complicate performance of an obligation has to be made on a case by case basis. Namely, to determine how much a change is a circumstance in consideration of which parties or one of the parties would not have concluded a contract or would have concluded it at other conditions.

Therefore, it is advisable to examine the scope of Article 389 of the Civil Code of Georgia in relation to necessary preconditions of the provision governing changed circumstances.

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[252] *Janashia L.*, Discharging Monetary Obligations (Seminar Paper), Tbilisi, 2006, 38 (in Georgian).

[253] In detail about legal gaps of the provision see *Janashia L.*, Performing Monetary Obligations (Seminar Paper), Tbilisi, 2006 (in Georgian).

[254] *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313, Rn.35.

[255] *Zoidze B., Chanturia L.* (Eds.), *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 349 (in Georgian).

[256] *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl, München 2006, §313 BGB, Rn.27; *Unberath, Bamberger, Roth* (Hrsg.), Beck'scher Online-Kommentar BGB, 27. Aufl., 2011, §313, Rn.36.

[257] The analysis of judicial practice evidences that Article 398 (in the presence of relevant preconditions) stipulates the right of adapting in case when the changed circumstances do not fall within the sphere of the parties' risk.

VI. Conclusion

The emergence of changed circumstances in contractual relation sets forth the right of demand of the modification of contract terms and provisions, abandoning a contract and in a specific case even that of relieving from the obligation of performance.

The concept of adapting a contract to changed circumstances is aimed at the maintenance of contractual equilibrium and creates the possibility of performing a contract on the basis of good faith principle, even in a modified form, thereby reinforcing the "mandatory nature of a contract"[258]; but the content of Article 398 of the Civil Code of Georgia is formulated in a manner that on the one hand, it can be considered as a guarantor of stability of civil transactions, and secondly, as the threat to such stability, for on the basis of the same norm contractual relation is ended.

The results of the research of the topic can be formulated as the following principal statements:

- Adapting a contract in case of changed circumstances is a demand to be exercised predominantly by the party. While exercising such right depends on the presence of relevant preconditions. Although, Article 398 of the Civil Code of Georgia does not detail preconditions necessary for adapting which reduces its practical value for the failure of a party to immediately present the demand of adapting, imposing the risk of occurrence of events to such party, non-essential nature of the change of circumstances or the foreseeability of change forms the basis of refusal to adapt a contract to changed circumstances. In order to improve legal regulation of adapting a contract to changed circumstances it is advisable to reinforce under Article 398 of the Civil Code of Georgia the combination of the following preconditions which was identified as a result of the analysis of judicial practice and combination of various sources:

1. Circumstances should change after concluding a contract;

2. The change of circumstances has to be essential, obvious.

The change of circumstances is considered essential in case changed circumstances cause extreme hardship of performance, in case of consideration of a change a contract would not have been concluded or would have been concluded at significantly different conditions. Further, whether the circumstances have changed essentially, clearly has to be determined on a case by case basis, based on factual circumstances of the case;

3. The change of circumstances has to be unexpected, respectively, reasonably considering those at the time of entry of a contract into force – impossible.

In case consideration of the change of circumstance at the time of concluding a contract based on the assessment of current situation is possible it is not considered to be changed circumstance;

4. Adapting a contract to changed circumstances has to be demanded within a reasonable timeframe (immediately) from the emergence of changed circumstances;

5. Parties have to revisit a contract on the basis of the good faith principle;

6. Retaining an unchanged contract has to be unacceptable to one of the parties, namely, there should be significant disbalance between performance and mutual performance;

[258] "pacta sunt servanda".

7. A disadvantaged party should not have taken on the risk of the occurrence of an event.

Article 398 of the Civil Code of Georgia is silent about the distribution of such risk. Still, in judicial practice the matter of adapting a contract to changed circumstances is determined as a result of determining the field of risk of parties and its evaluation. In order to improve legal regulation of the given relationship it is advisable to have Article 398 make a reference to expected results of contractual risk;

8. There should be causal relation between changed circumstance and hardship of performance.

The absence of each condition excludes the presence of the remaining provision therefore it is necessary to have all mentioned preconditions in a cumulative manner and to assess them in relation to the hardship of performance. In case the change of circumstances does not cause complication of performance the right of adapting a contract does not emerge.

- The difference between the content of Article 398(2) of the Civil Code of Georgia and the content of Article 73(3) of the same Code is actually only due to the fact that they are stipulated in different articles. It is not clear as to in which case "wrong beliefs" give rise to the right of adapting a contract. According to the interpretation of the Supreme Court of Georgia as well misbelief about the circumstances that formed the basis of a deal is considered in relation to deals concluded in error (in relation to Article 73 of the Civil Code of Georgia). Based on the above-mentioned it is advisable to remove Article 398(2) of the Civil Code of Georgia and have Article 73(c) of the Civil Code govern "misbeliefs" that formed the basis of a deal in order to avoid different legal outcomes on the basis of legal provisions having essentially the same content.
- In order to avoid ambiguity it is advisable to remove the word "strictly" from Article 398(1) second sentence.
- In order not to simplify the right of refusal of a contract without basis and retain contractual stability, for such cases when the parties fail to reach agreement on the rule and conditions of adapting, applying to court has to be mandatory. The demand of abandoning a contract has to be allowable only after the court deems the adapting a contract to changed circumstances impossible. It is possible to have abandoning a contract without approaching court in case when none of the parties any longer wish to maintain contractual relation, for in such case it would be unfair for the court to "force" the parties to retain a contract.
- Because changed circumstances are mainly used in long-term contractual relations it is desirable to accept the approach of Paragraph 313 of the Civil Code of Germany and in case the issue of adapting is resolved negatively, entitle a party to the dissolution of a contract in long-term contractual relations under Article 398(3) of the Civil Code of Georgia, in case it is not within the interests of the parties to return received performance and benefit, or if the above-mentioned is not possible.
- Adapting a contract to changed circumstances is not used in legal obligatory relations and nor in unilateral deals.
- It is desirable to examine the scope of the nominalism principle in relation to the necessary preconditions of the provision regulating changed circumstances. In case of occurrence of cases envisaged under Article 389 of the Civil Code of Georgia the operation of Article 398 of the same

Code does not have to be excluded. In case the changes which emergence is stipulated under Article 389 of the Civil Code of Georgia meet the preconditions of adapting a contract to changed circumstances and the circumstance renders performance so hard that this change significantly affects another party of a contract and causes the disbalance of interests of parties, based on the principle of general justness priority should be given to Article 398 of the Civil Code of Georgia.

- Having a provision regulating changed circumstances in the Civil Code of Georgia at the same time gives rise to the necessity of having a unified provision regulating inability of performance to draw a line between these two concepts at the legislation level and have a proper legal outcome.
- Article 398 of the Civil Code of Georgia is a general provision and predominantly special provisions of the Code regulating specific contractual risks have to be considered. Although, on the basis of the principle of contractual freedom, for the emergence of changed circumstances the parties can regulate relation themselves, by means of including the provision on adapting in the contract. Therefore, in relation to Article 398 of the Civil Code priority should be given to special provisions regulating the basis of a deal, while in relation to these norms the superior is the contract itself. Therefore, having the provisions stipulating adapting in a contract, at the time of emergence of changed circumstances, may be a protective mechanism for the interests of parties.

Natalia Motsonelidze*

The Role of Modern Biomedicine in Insurance Law

1. Introduction

Human rights, as moral norms, concern and comprise everything regarding human merit. Protection of these rights is guaranteed by supreme law – the constitution along with the other legal norms. Regardless the solid guarantees of human rights law, with the global development the risk of their being violated increases and therefore it is getting more and more necessary so that the legal guarantees for the right protection of those are to be expanded. In global development first of all development of those themes are meant which may have a direct impact on individuals. Such sciences like medical one, human genetics and biology belong to the very spheres mentioned.

Scientific revolution contributed to fast development of biology and medical science. At the end of the twentieth century the deciphering of human genes became possible. As a result, now it is possible to learn any living being including its genetic structure. Before this period, biology was considered as an auxiliary part for medical science. It was thought that biology help medicine to spot and treat number of diseases. Though, in the last period, this trend changed. Today, biology tries not only to evaluate the human gene potential and improve health, but study the genetic potential. That is why in literature we often meet the concepts saying that life and health are genetic information, manipulated by humans,[1] and if we are informed about these in early stage, we are able to get rid of expected unfavorable results and thus protect our life. The science about human genes based on genetic tests gives possibility to preliminarily predict an individual's (or his successors') health condition and in case of reasonable ground declare yet a healthy person as a "sick" one. Acquiring information regarding the human genotype is possible by several ways. Human genotype corresponds to both genomes inherited by parents, particularly the chromosomes and the localized genes.[2] Making decision about disease propensity issue is easily diagnosed on bodily (organs, skin, tissues) observation. Besides, observation on family anamneses gives possibilities to diagnose whether the person's propensity towards particular disease exists. There are number of genetic tests. One of these is the molecular-genetic one by which it is possible to preliminarily define whether the person is a carrier of a changed, mutated gene. Preliminary symptomatic, clinical and pre-prognostic medical gene

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1 *Geisler*, Schamlose Schöpfer. Genmanipulation oder: die Endlosspirale zum Metamenschen, abgedr., in: Dokumentation der Frankfurter Rundschau v. 2. 1. 1999, 9 (in: *Tinnefeld M.T.*, Menschenwürde, Biomedizin und Datenschutz Zur Aufklärung neuer Risiken im Arbeits- und Versicherungswesen, München, 2000, 10).

2 Begleitbericht für ein Bundesgesetz über genetische Untersuchungen beim Menschen, 1998, Rn. 146.

diagnostics are based on the tests like these.[3] Researches like these made it possible the disease be identified in time, the emergence probability of which is high.[4]

Holding the preliminary information might contain the source for unprecedented threat and make a human life tragic. Not all the people (in most cases have no wishes) to have information whether they carry the mutated genes. Most people prefer not to own preliminary information about their health condition or own the one that might be part of this info. One of German land recognized this phenomenon as the negative presumption of informational self identification and noted that all the people have the right to decide themselves whether they need to acquire the information regarding their health.[5]

In some types of relationship maintaining this right is extremely difficult, especially in those cases when being healthy is one of the terms for establishing relationships. The mentioned concerns first of all labor and insurance. Today according to the well established practice the international organizations often apply to their employees' genetic tests and thus they have the right to dismiss[6] the ones who carry "bad gene pool" or refuse them to get employed.

One of the most vivid cases of genetic discrimination represents the 1999 case in the USA about Terry Sergenti. When visiting a doctor, Terry was spotted a genetic disease – metabolic disorder (Alpha 1),[7] which according to the medical definition could not represent any danger for both society and colleagues. Furthermore, the disease was developing without any exterior symptoms. Ms Sergenti was employed by one of the minor firms which took upon themselves the medical treatment costs of their employees. While getting familiar with the genetic test results, Mrs. Sergenti was dismissed from work.[8]

Any person of such "bad gene pool", potentially insured can be the victim of such discrimination who compared with other insured ones may find himself in less favorable position. In the case mentioned above Terry Sergenti's son was considered as a "bad gene pool" carrier and subsequently he was refused the average insurance package.[9] True, he was quite healthy at the time of insurance contract agreement, but according to preliminary contract term obligations, he was liable to provide information both for his current health condition and the disease that could be anyhow probable. Based on the test results carried out onto his parent, he was considered as the one having a "bad gene pool" and refused the package.

Regardless the fact that the science reached the highest level concerning the human gene development, to insist on the fact that spotting a mutational gene in a human body equals the true testimony for the disease diagnoses is not correct. Even in case of a positive rest results, it is extremely difficult to define in advance what the level of possible disease could be or whether the person is likely

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3 Begleitbericht für ein Bundesgesetz über genetische Untersuchungen beim Menschen, 1998, Rn. 147.

4 Ibid., Rn 146.

5 Oberlandesgericht Celle, Urteil vom 29. Oktober 2003, Aktenzeichen 15 UF 84/03, "NJW" 2004, 449–451.

6 Compare *Tinnefeld*, in: *Hamm*/*Möller* (Hrsg.), 1998, 78ff (in: *Tinnefeld M.T.*, Menschenwürde, Biomedizin und Datenschutz Zur Aufklärung neuer Risiken im Arbeits- und Versicherungswesen, 2000, 13).

7 <http://www.alpha1.org/newly-diagnosed/what-is-alpha-1>.

8 *Borger J.*, Who's Testing Our Genes - And Why? Health Warning: As DNA Screening Takes Hold, Americans Find It Can Leave Them Unemployed and Uninsured, The Guardian, Tuesday 19 September 2000.

9 Ibid.

to be exposed to the mentioned disease at all. This fact is determined by number of issues. For example, the German law about human gene tests declares that up to 500 gene related changes have been recorded, which cause the cyst fibroses. Though, during genetic research only up to ten of these five hundred genes are studied, which statistically go through the most frequent change in human organism and represent the main reason for the mentioned disease.[10] In case of the positive results, medical representatives find it hard prove the imminence of disease. The foundation of the accurate diagnoses cannot be the prerequisite of the tested person's ancestor. Therefore, based on genetic test results human differentiation causes hot arguments in legal circles. Thus, also in case of Terry Sergenti, discrimination of her son concerning the matter of insurance just because of his parent was sick is groundless. Therefore, preliminary gene tests and obligation for providing the preliminary information regarding health condition of the candidate on pre-contract stage, which became part of modern insurance regulations, may be considered as source of human discrimination.

2. Pre-agreement liabilities of the insured party

While making agreement regarding health, life, labor inability, incident or other type insurance, the party, now as insured, is liable to provide the information related their personal health condition to the insuring one – either initiated personally or by insurance representative.[11] This requirement aims at protection of the insuring party's rights. Namely, at the time of agreement making, the insurer should preliminarily evaluate the risks caused by agreement. In case of the risk increase due to the health condition of the insured, the insurer is interested to be informed in time, but in case of a doubt, specify and receive the information from the medical institution regarding the health condition of the insured.[12] Without receiving the information of the kind, the insurer won't be able to evaluate the insurance related risks and the probably outcomes. Therefore, everyone wishing to design the insurance agreement is liable to inform the insurer about those circumstances that concern the insurance related risks.

The liabilities mentioned above in judicial system are known as the terms of preliminary agreement and the special accent is primarily accentuated by the insurance law. These liabilities are determined by agreement for the parties or regulated by the legal norms,[13] which represent the prerequisite for negative - that is real rights. Under the real right we mean the right for insurance compensation for the insured at the insurance incidence due.

Of extremely high importance and the subject of debate are the preliminary contract liabilities, especially when it comes on the health insurance issue. At the time of agreement, the clients are liable

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[10] Begleitbericht für ein Bundesgesetz über genetische Untersuchungen beim Menschen, 1998,13.

[11] Civil Code of Georgia, Article 808, 1997, "Parliament Bulletin", #31, 1997; Law on Insurance of Germany, Para. 19, available at: <http://www.gesetze-im-internet.de/bundesrecht/vvg_2008/gesamt.pdf>.

[12] *Neuhaus KJ., Kloth A.,* Gesundheitsdaten(-schutz) im Versicherungsrecht – Der aktuelle Stand, "NJOZ", 2009, 1370.

[13] *Kläger und Berufungskläger v. American Express Travel Related Services Company*, Bundesgericht, 2004, "BGE" 130 III 417.

to provide the insurer party with the information regarding their health, ongoing diseases, treatments held and the medicines received.[14] Besides, they have to provide information enabling the diagnoses of their disease on the time specified by specific time period. This information is necessary so as the insurer makes possible the accurate evaluation of the risks related to agreement.[15] If by evaluating the risks it turns out to be the risk that would not fit to the insurer's (as of producer's) interests, then he has the right refuse the insurance service to the client in view and provide it to the one who has better premium installments. The insurer has the right to look for the private information of the client himself, which is directly related to the insurance issue and that is why the right for the insurer to look for the information should be widely interpreted. The information related to insurance issues means not only those data that is important for the insurance risk and outcome evaluation, but any other substantially important information, which regarding the agreement details, qualifies under legal importance; the information, which gives the insurer's party the right for quitting the contract agreement for the party to be insured once some specific circumstances take place.[16]

3. Agreement Designed for the Third Person and Liabilities Related to Preliminary Agreement

The issue about preliminary agreement is accrual for the insurance contract made for the third person party. These issues are regulated by paragraphs 836-843 of the law about insurance, but in Germany the same ones are regulated by those of 43-38 of the law. According to the general rule, the insurer enjoys the right to design agreement with the opposite party in his own person or for someone's favor.[17] Making agreement of the type is legally valid and poses no problem, though, problems occur when the issue comes on the third person's health ensured. While making this type of agreement, it is natural the rules for the normal one takes into legal power, also the liabilities applicable for the preliminary one. However, the issue of preliminary agreement for the third person to be insured is quite problematic and the ways for its solution are not offered by legislature. Namely, it is not clear how the liability of submitting the information on the preliminary agreement stage is to be provided in case of the third person insurance agreement and who is the one to be responsible for the one in case violated. The last sentence of paragraph 836 of the law about insurance poses special problem, according to which the agreement designed for the third party representative "naming of this person" is not necessary. This diminishes the ideal of the obligations mentioned about which a lot has been mentioned in legal literature. Paragraph 836 of the law about insurance neglects this liability and even without indicating a physical entity sees it possible to design the contract, along with the health, agreement. According to this ruling of the paragraph, we can assume that

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[14] *Simitis* (Hrsg.) Kommentar zum BDSG, 6. Aufl., Baden-Baden 2006 Rn 260 (in: *Eberhardt,* zum VVG, Münchener Kommentar, Erhebung personenbezogener Gesundheitsdaten bei Dritten, 1. Auflage, 2009, Rn. 23).

[15] *Neuhaus KJ., Kloth A.,* Gesundheitsdaten(-schutz) im Versicherungsrecht – Der aktuelle Stand, "NJOZ", 2009, 1370.

[16] Ibid. 1371.

[17] Civil Code of Georgia, Articles 836-843, 1997, "Parliament Bulletin", #31, 1997; Law on Insurance of Germany, Paras. 43-48, available at: <http://www.gesetze-im-internet.de/vvg_2008/index.html>.

the liability for the info provision on the preliminary stage of insurance agreement is possible to be easily rid of. A potential insured who has health problems and thinks that while making agreement the information she provides for the insurer may have substantial impact on the insurance contract issue (may get refused or terms might be changed[18]), may use the opportunity guaranteed by paragraph 836 and use other person so as the agreement be designed for the terms favoring to him. While making this kind of agreement, the interest of an insurer to acquire the information on preliminary stage is not secure or fully regulated by legal ground. Besides, the legislature represents the parties of the insurance or usual insurance agreement in unjust legal position favoring to the third party representative. For this one the legislature, resorting to paragraphs 808 – 811 strictly regulates the preliminary contract liabilities and the sanctions once they are violated.

4. The Legal Character of Preliminary Legal Agreement

Apart from the fault mentioned above, for better regulation of preliminary agreement terms, it would be better the law strictly specifies the liability distinguished from the liability related to agreement. As we have mentioned in the beginning of the article, the protection issue of preliminary agreement come upon the free will of an individual. In case of non fulfillment of the preliminary liability terms the court ruling does not foresees any sanctions of legal enforcement.[19] The protection preliminary agreement issue, first of all, serves the insured party's interests while in case these are violated, the subject of negative results is the mentioned insured person. These negative results are translated into the right loss for the insurance benefits. Though, due to the fact that fulfillment of preliminary agreement terms, unlike those of civil ones, depends on an individual, in some cases regarding the character of preliminary agreement, the claimant may possibly get misled and meet number of problems emerged. In civil law civil responsibility is defined as the creditor's right to ask the debtor to fulfill some of the duties.[20] The law does not recognize any legal enforcement for preliminary agreement implementation. However, as Georgian and German legal analyses shows, in case of preliminary agreement violation strict sanctions are introduced regarding the one as legally defined responsibility. Namely, in case violated, the insurer has the right to renounce the agreement or redraw it.[21] Besides, once give the insurers the right to gain the health related information of those to be insured and their liability to provide it, the legislature meanwhile limits the general rights of an individual. In case of preliminary agreement, it is about one of the most important pieces of information that both legally and justly represent part of the insured party's personal life. In this case the insured party is made to make a choice between two virtues – engage into insurance relationship and provide the insurer personal information or refuse to confide it and thus abstain from the insurance related relationships – and as a result lose the right guaranteed for her by constitution.[22]

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18 Article 808, Civil Code of Georgia, 1997, "Parliament Bulletin", #31, 1997.
19 RGZ (133, 122), also BGHZ (24, 378, 382).
20 Article 316, Part 1, Civil Code of Georgia, 1997, "Parliament Bulletin", #31, 1997.
21 Ibid., Article 316.
22 Article 37, Part 1, Constitution of Georgia, 1995.

5. Necessity and Limits of Information Acquirement

Another problem relates to the limits the insurer is authorize to acquire the insurance related information. I think this issue should be strictly regulated by law. True, it complicated to define the line between the data collection and maintaining the limits, but so as these limits are not overrun, it is highly important the awareness towards the specification of the info in view be objectively received. For example, in an insured individual claims the satisfaction due to the labor inability caused by disk degeneracy but, at the same time, the insurer wishes to receive the information of the claimant be confirmed by the psychiatrist, surely the terms of prime necessity are being violated while, from medical point of view, the link between disk degeneracy and psychiatric disorder is out of question. In this case the insured party will justly have the right to refuse the insurer the right for information acquirement.[23] Besides, data collection should always be connected with the contract agreement. The insurer, for example, does not have the right to collect the private data for statistical purposes.[24]

First of all while acquiring information the interests of potential insured party should be considered just as the general rights guaranteed by constitution. Confiding the personal information for the third party representatives should depend on the free will of the insured and in case this information is not provided, the cancelation of the contract from the insurer's side should not be the case.[25] Here we accentuate on the absolute right of the person that aims at the free development of hers and guarantees the possibilities proper so as no one is intruded into her private life.[26] Therefore, it is reasonable the insurer's responsibility is to be defined so as he takes in consideration the insured party's interest and not to be intruded into the private sphere while acquiring information from the medical representative or other institutions aimed at acquirement of potential, insurance related data. Every time this kind of information is acquired, the necessity of its acquirement should be individually evaluated. Besides, it should be clarified which interest is of larger importance and based on legal virtue comparison one should take the decision proper. In this case the straightforward unilateral obligation for providing the insurance related information is excluded.

6. Insurance – Dangers and Benefits

Regardless the dangers mentioned above, the human wishes and interest to be insured, to protect specific goods against unfavorable goods, is quite considerable today. The interest to be insured on health is especially high. The world health organization health is physical, spiritual and social condition of wellbeing [27] towards which each person strives. In developed countries the care paid to

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[23] *Neuhaus KJ., Kloth A.,* Gesundheitsdaten(-schutz) im Versicherungsrecht – Der aktuelle Stand, "NJOZ", 2009, 1375.

[24] Ibid.1375.

[25] Article 810, Civil Code of Georgia, 1997, "Parliament Bulletin", #31, 1997; German Law on Insurance, Para. 19, Part 2, available at: <http://www.gesetze-im-internet.de/vvg_2008/index.html>.

[26] Adolf Arndt "NJW" 1967, 1845, 1846 (in: *Frey A.M.,* die Romanfigur wider Willen, Frankfurt am Main, "International Verlag der Wissenschaften, Peter Lang", 2008, 86).

[27] "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The given health definition is given in the preamble of the Charter of the World Health Organization, 1948. The definition has not changed since 1948.

health issues is extremely high. For example in 2007 annual data it was noted that 10, 2 % of Austrian GDP (27, 9 billion euro that equals 3360 per person) was invested into the medical field.[28] The German statistics of 2011 is another example signifying the healthcare importance, according to which the average German family spends 10,751 euro annually for health insurance.[29] Regardless that good that is available by insurance organization, the risk for personal data distortion and violation of the right related to confidentiality issue is also high. These threats are represented by the insurer's right to receive any kind of the information related to the health condition, also the preliminary information that give possibilities to diagnose diseases at the earliest stage of their development.[30]

To find this information by the scientific sources available today – by genetic tests – is quite easy. Though, it is the subject of discussion how legally justifiable this action by the insurance providers is. The right attributed to the insurer to find out the full preliminary information related to the client's health condition contradicts both to Georgian and German constitutions, which recognize the right for independent development of an individual[31] it also contradicts with the European convention of human rights protection, paragraph 8 and the German federal court ruling that translates the right of a subject to "choose not to know about her health condition related details" into the right of self identification.[32] The supreme court of Niedersachsen additionally specified this right of an individual and by the 2003 ruling the right for "not familiarizing with the specific information" accepted as the representation of the negative right for information related self identification. The court noted that the purpose for information related self identification is to protect particular individuals from the information exposure the acquisition of which will cause negative influence on their lives.[33]

There is a specific medical conclusion saying that after the health condition information has been received, the patient's health condition substantially deteriorated, acute psychological problems emerged and even caused suicide. In German magazine "focus", according to the data used, 90% of suicide cases occur by mental disorder triggered by the information related to their physical health condition.[34]

It is just to argue that the finding of some health related kind of information might impede the free development of an individual. The practical importance for not acquiring the case specific information emerges in case of those kinds of diseases which according to the current development level of medical science are considered as incurable.

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[28] Bundesministerium für Finanzen, Das Österreichische Gesundheitssystem, Bundesministerium für Gesundheit, 1. Auflage, "ZVM", 2010, available at: <http://whocc.goeg.at/Literaturliste/Dokumente/BooksReports/ Kurzbro-schuere%20zum%20oesterr.%20Gesundheitswesen_2010_D_v2.pdf >.

[29] <http://de.statista.com/statistik/daten/studie/182264/umfrage/jaehrliche-versicherungskosten-einer-deutschen-familie/>.

[30] *Heyers J.*, Prädiktive Gesundheitsinformationen – Persönlichkeitsrechte und Drittinteressen, "MedR", 2009, 507−512.

[31] Article 16, Constitution of Georgia, 1995; Article 2, Constitution of Germany, 1949.

[32] Compare zur zivilrechtlichen Seite Taupitz, in: Festschr. f. Wiese, 1998, S. 583 – 602 (in: *Tinnefeld M.T.*, Menschenwürde, Biomedizin und Datenschutz Zur Aufklärung neuer Risiken im Arbeits- und Versicherungswesen, 2000, 24ff).

[33] Oberlandesgericht Celle, Urteil vom 29. Oktober 2003, Aktenzeichen 15 UF 84/03, "NJW", 2004, 449–451.

[34] <http://www.focus.de/gesundheit/ratgeber/psychologie/krankheitenstoerungen/tid-13033/suizid-therapierbar-aber-schwer-zu-erkennen_aid_360149.html>.

I think, by lawmaker insurer is entitled to, in pre-stage of a potential insured person, from his doctor, from hospital or other medical institution,[35] to obtain a person's health-related data, puts the potential insured person in a difficult situation. In responsibilities of conditions it is reason to believe that, in the future people, even in case of need, they refuse to take any of examination. According to common medical practice in Germany, in many cases, doctors while doing the genetic analysis share the information with patients that in case of a positive genetic test may have problems with the insurance contract.[36] Insurance providers often refute this claim, that they keep confidential the results of medical examination. The results not be accessible, not only for third persons, but in lack of knowledge desire of information, it will remain confidential even for the applicant.[37] However, this statement from insurance providers cannot be guaranteed, that the results of medical examination does not became known to the applicant. At increased risk , as a rule, the bonus increases, it is natural that this fact inspires applicant's doubts about, thet he/she potentially has some disease.[38] In such a case, hard to protect the basic human right of self-defense.

7. The Essence of Informational Self-determination and Importance

Recognized by the Constitution individual's right to self-determination, confronts the insurer's interest, before, signing the contract to assess the rick insured, to determine premium contribution and insurance amount and avoid excessive costs.

The development of normal relations between insurance, in many cases, it is impossible without the knowledge of people's health-related personal data.[39]

Health, life and in case of accident insurance, the required information includes the information about the patient's health status, owned by the applicant or the doctor can provide this information. However, this interest of the insurer opposes the fundamental right protected by the Constitution - general human rights, which includes protection of personal data and the right to self-determination. By the legal system granted the insurer's right to obtain information, rise to a conflict of legally protected two interests - on the one hand, insurer's legitimate interest about the information and, on the other hand, the insured's right to informational self-determination.

German Federal Constitutional Court given[40] the general personal rights developed the basic right of informational self-determination,[41] which provides the opportunity for individual, to determine

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35 Gesetz über den Versicherungsvertrag (hereinafter, VVG), 1949, Art. 213, last amended in 22.12.2011, available at: <http://www.gesetze-im-internet.de/bundesrecht/vvg_2008/gesamt.pdf>.

36 Prädiktive Gesundheitsinformationen beim Abschluss von Versicherungen, Nationaler Ethikrat, Berlin 2007, 31.

37 Ibid., 30.

38 Ibid., 32.

39 *Eberhardt,* zum VVG, Münchener Kommentar, Erhebung personenbezogener Gesundheitsdaten bei Dritten, 1. Auflage, 2009, Rn. 2.

40 Article 2, Constitution of Germany, 1949.

41 BVerfG Urteil vom 15. Dezember 1983 – 1 BvR 209/83 ua – 65, 1.

release of personal data and the use of them. Besides, during the informational self-determination, individual must decide for itself when their personal data will be open and public,[42] Individual has the right keep confidential the information[43] about their health condition. The German Federal Constitutional Court explains widely this right and also puts there each individual's right to know or not to know the information about genetic data.[44]

Informational self-determination has not only individual, subjective – legal, but also, public, objective - legal function.[45] These rights violation may harm not only person's individual development because individual's right to self-determination shows basic precondition for free, democratic society.

Constitutionally protected right of self-determination clearly reacts against those factors containing rude personal and social risks, which strongly reveal themselves when it comes to labor relations and insurance, especially when an employer or insurer wishes to communicate with worker or potential insured only the positive - genetic testing case. That's why, the convention gives special attention to protection of privacy, which include in addition to other rights, the right of privacy of health information. In this right is clearly expressed that the personal information of health can be recycled only with the consent of the person and only for medical purposes (diagnosis, therapy, prevention[46]). Human health legal protection of personal data and in order to strengthen the safeguards, along with the national regulations, there is also, international - legal acts, which seeks to create the high standards of human rights such as the European Convention on Human Rights.[47] According to the 8 article of the Convention, along with the right to self-determination, also is provided respect for private life: everyone has the right to respect for his private life. Infringed only provided by the law, when it is necessary in a democratic society in the interests of national security, public safety or the country's economic interests, disorder or the prevention of crime, protection of health or morals, and to protect other rights and freedoms.[48]

At present, the subject of heated discussion is , is there for insurer legal right in pre-stage inquire, collect and verify persons health-related personal information.

8. Conclusion

Insurance providers the right to refuse high-risk insurance contracts, might be reservations to the Convention on the economic well-being, however, the doctrine of the prevalent view is that health insurance contract, the insurer's management of genetic risk assessment is contrary to the ethical

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42 BVerfGE 65, 1 (43).

43 EuGH, Slg. I 1992, 2575 = EuZW 1992, 346 = "NJW" 1992, 1553 Tz. 23 - Kommission/Deutschland.

44 Oberlandesgericht Celle, Urteil vom 29. Oktober 2003, Aktenzeichen 15 UF 84/03, "NJW" 2004, 449–451.

45 BBVerfGE 65, 1, 43 (in: *Kilian W., Heussen B.,* Verfassungsrechtliche Grundlagen des Datenschutzes, 30. Ergänzungslieferung, 2011, Rn. 9).

46 Article 8 of the Interstate Agreement of EU on Personal Security Against the Personal Data Automatic Processing.

47 European Convention for the Protection of Human Rights and Fundamental Freedoms, available (in German) at: <http://conventions.coe.int/Treaty/ger/Treaties/Html/005.htm>.

48 Article 8, European Convention for the Protection of Human Rights and Fundamental Freedoms, available (in German) at: <http://conventions.coe.int/Treaty/ger/Treaties/Html/005.htm>.

norms and the principles of solidarity. In society each individual has the right to appropriate medical care.[49] The existence of this right should not depend on "genetic lottery" individual success – failure.[50] There is a type of insurance which in our society presents the basic needs of life. This can definitely be health, working and life insurance. This kind of insurance protects people from the financial hardship, which can be caused illness or accident. Risk allocation in insurance relations, might lead us to the sick or physically inferior person could not enter into contracts with private insurance or can only conclude with high premium subscription. In such cases, people remain completely vulnerable and unable to make financial provision for future risks.

"Discrimination" claims is based on the notion of fair concluding that a private insurance contract when insurance companies are carrying out risk assessments, according to the classes, rejected the principles of social justice and social solidarity.[51]

Social state principle obliges states to ensure social equity and ensure the establishment of a fair and public order. The preamble of the Constitution of Georgia contains direct reference to the principle of social state: firm will of the citizens of Georgia is to establish a democratic, public order, economic liberty, social and legal state.[52] Social states are striving to balance conflicting interests and needs of all people to create the necessary conditions for normal life. Rather than a means of providing is not the only social function of the state and are left to the private insurance system, potential insured's request is quite fair to be recognized his/her requirement to have access to cheap insurance and require contractual equality. Although the claim may be considered as a totally fair but at the same time could jeopardize the principle of freedom of contract and the principle of private autonomy, which is considered a cornerstone of the common law. Social state principle is not an absolute guarantee of the performance of each individual's needs and it allows the legislator about the relationship between regulations to impose different regulatory regime.[53]

Speaking of equality justly be considered the demand of private health insurance, be the insurance sector's profitability and ability to take into account. In particular, if the legislator at the pre-stage do not give the insurer, to verify of insurance risk and would make average the ricks based on assessment calculation of future costs, insurer failed to assess the risk actually. The only solution remains after total public risk assessment calculation based on the average of costs plus risks. However, this is not a guarantee that the insurer breached the risk will be the same with the average public risk. At the conclusion of a specific contract revocation of the right to verify the personal risks, may lead to the fact that the vast majority of people, not enter into an insurance contract at the time, when they are healthy, but only than when the specific problem will discovered. Theoretically insurer can calculate the costs during the premium installments. However, this will cause insurance product price hike, and finally it will be dysfunctional subject.[54]

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[49] Prädiktive Gesundheitsinformationen beim Abschluss von Versicherungen, Nationaler Ethikrat, Berlin 2007, 32.

[50] Ibid., 10.

[51] Ibid., 43.

[52] Preamble of the Constitution of Georgia, 1995.

[53] *Kreikebohm R*., *Spellbrink W*., Kommentar zum Sozialrecht, 2. Aufl., München, "Beck", 2011, Rn. 5-6.

[54] Prädiktive Gesundheitsinformationen beim Abschluss von Versicherungen, Nationaler Ethikrat, Berlin 2007, 44-45.

Ekaterine Kardava*

Labor Relationship Between Physical Persons

1. Introduction

Individual aspects of regulation of labor relationship are a subject of intensive discussion in society. Controversy of conceptual approaches concerns legislative and factual state of participants of labor relationship, legal regulation technique of their legal status, observing the balance of rights of an employee and employer, degree of the state interference and the influence of all the above mentioned on functioning of market economics.

Changeability of labor law and intensive dynamics are caused by emerging and establishing of new institutes on labor market. New economic reality and regulation introduce solid changes into labor relations. On the basis of it legal status of persons of labor agreement is also changed, which is connected with new forms of property, economic methods and issues of labor market formation.

Current socio-economic processes have affected all the spheres of social life and public law, of course including labor law. Changeability of property forms and global economic factors caused the necessity of changing labor law and interpreting labor relations in a new manner. Labor Code of Georgia of 1973[1] was replaced by Labor Code of Georgia of 2006[2] (it, in its turn, was replaced by Georgian organic law of 2010 "Labor Code of Georgia"[3]), which offered the population of Georgia completely different models of regulation of relations in certain aspects. The most important one among them was the establishment of a principle of a free agreement. It is striking to discuss obligations of labor relations in legal context and frequent pointing to Civil Code of Georgia. In spite of the fact that the free agreement principle is a basic legal instrument of exposing labor relations and free will of the parties, under no-existence conditions of legislative regulation and certain restrictions the above mentioned principle becomes a means of abusing of power for the employer.

Labor Code has really undergone changes, but under conditions of modern market economic it has been creating a certain legislative vacuum, because of which many issues have not been regulated yet, for example it is obscure a circle of persons of labor relations.[4]

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1 Labor Code of Georgia, 1973, "Bulletin of Supreme Council of Georgia", 1973, #6, Article 118.

2 Labor Code of Georgia, 2006, "Legislative Bulletin of Georgia", #23, 2006, Article 183.

3 Labor Code of Georgia, 2010, "Legislative Bulletin of Georgia", #75, 2010, Article 461.

4 *Berekashvili D.,* Conclusion of an Independent Expert, Judge on the Project "Labor Code of Georgia", Institute of Civil Law within the project "Civil Society in Law-building Process", 1, available at: <http://www.civilin. org/Project/d186.pdf>.

By considering the dynamic of the global labor market Labor Code established new institutes, there were emerged new forms characteristic for the diversity of modern labor relationship, which need additional comprehension, analysis, that are important for the right legal establishment and realization of these new forms in practice. To these new forms of labor relationship in Georgia belongs labor relation between physical persons. Scientific literature about this issue is rather scarce, so is legislative regulation, connected with it. It becomes necessary to study and analyze a model of legal regulation of the relationship by considering scientific and practical aspects. It should be emphasized that labor relations between an employer and an employee, as physical persons, raise lots of natural practical questions from the standpoint of social, economic and legal aspects, needing to be answered. So important is also to consider a factor of Euro-integration processes and study it in the point of view of approaching and harmonization with the legislation of European Union.

It should be noted that neither researches in scientific vision, nor judicial review have been existed in Georgia.[5] In juridical sphere of Georgia there is very scarce practice, which would connect the work of legislative authorities directly with social relations and would turn the research component into the foundation of legislative activities. Before establishing a new institute in 2006 according to labor code there had not been done its scientific comprehension, preliminary estimation of influence of norms of labor agreement between physical persons on social relations and working up proper recommendations. From the talk with some experts it became clear that the new institute was not comprehended and analyzed at a practical level either According to the Georgian law "about entrepreneurs' "under a physical person – employer" an entrepreneur was implicated. In the country there is no agency, which is obliged to control the execution labor code and monitoring, by this ground labor relations between physical persons are not/can't be exposed and estimated. The above mentioned problems need to be made clear. Hence it is very interesting to study and analyze an issue of the importance of the main point of labor relations between physical persons and legislative regulation and in addition to reveal those signs-qualities, because of which a certain agreement will be belonged to labor relations and not to obligations legal relationship.

2. Legislative Regulation of Labor Relations between Physical Persons According to Organic Law of Georgia "Labor Code of Georgia"

To wide extent labor relations implies an action carried out by one person for another one instead of compensation, regulated by both labor laws and civil law. Namely labor is a subject of labor agreement, as well as a subject of contractual agreement. By this reason relations are somehow similar to each other: according to the first paragraph of Article 2 of the Georgian organic law: "Labor Code of Georgia", "**Labor relationship is the performance of work by an employee for an employer instead of compensation under the organizationally regulated conditions of labor.**" According to the first paragraph of Article 629 of Civil Code of Georgia "**By the contractual agreement a contractor takes the responsibility to perform work, provided for by the agreement and a client is**

[5] On the basis of application to court it was ascertained that case had not been discussed grounding on labor dispute between the physical persons.

obliged to pay the contractor the agreed compensation." As a result of comparison of these norms it can be said that in both cases the compensatory work is an object of the agreement. Because of the scarce regulation and frequent referring to civil code the new Labor Code strengthened the problem of delimitation of labor relations even more. In such a case very actual and interesting is to research the essence of labor relations, which in its turn includes studying an issue of qualification and separation of labor relations and searching for ways of their regulation.

On the 12th of June, 2013 parliament of Georgia passed the organic law "about introduction of changes into "the organic law of Georgia" "Labor Code of Georgia", which to some extent improves and regulates labor relations between the parties, namely concretize forms and types of these relations and partly solves a problem of delimitation of them.

By the above mentioned changes paragraphs 1^1 and 1^2 were added to Article 6 of the law:

1^1. Labor agreement is concluded in written form by all means, if labor relations last more than 3 months.

1^2. Except for the case when the term of the labor agreement is 1 year or more, the labor agreement is concluded with a definite term only in case when:

a) A certain content of work is to be performed;

b) A seasonal work is to be performed;

c) Content of work is temporarily increased;

d) On the basis of suspension of the labor relation the substitution of the temporarily absent employee;

e) There is other objective circumstance justifying the conclusion of the agreement for a definite term.

By these enactments in 2013 types of labor relations became more detailed and at the same time the observance of a term and form of the agreement became imperative. The law directly points out that the relation lasted for more than 3 months will be qualified as the labor relation that will be reflected in the written agreement. Short-term agreements, which lasted for more than 3 months (for example, construction, seasonal work and etc.) and were mainly carried out on the basis of verbal agreement, were not qualified as labor relations. The employee engaged by the mentioned norm has more possibilities to argue and prove that he had concluded a labor agreement and not a contractual agreement.

Despite the fact that the law about the changes accepted in June 2013 is quite capacious and massive, a problem of labor relations between physical persons is still unsolved.

According to Labor Code of Georgia (1973), an employer is a person in administrative-structural form:

Article 16 Parties of labor agreement (contract) and content

Labor agreement (contract) is an agreement between the administration of an enterprise, institution or organization and a worker, whereby one party - the administration of an enterprise, institution or organization takes responsibility to provide a worker with suitable working conditions, to pay the worker a salary provided for by the labor agreement (contract)and the second party – the worker takes responsibility to perform certain work according to his profession, qualification and position, observe the conditions of the labor agreement, obey the inner labor regulations.[6]

[6] Labor Code of Georgia, 1973, "Bulletin of Supreme Council of Georgia", 1973, #6, Article 118.

A new labor code brought the novelty concerning the persons of labor relations (Article 3):

"*1. Persons of labor relations are: an employer or employers' organization and an employee or employees' organization, set up by objectives and rules provided for by the law of Georgia "About Labor Union" and #87 and #98 conventions of the International Labor Organization (afterwards referred to as the employees' association).*

2. an employer is a physical or legal person or persons' association, for which on the basis of the labor agreement a certain work is performed.

3. An employee is a physical person who on the basis of the labor agreement performs a certain work for the employer."

As opposed to the old act in the current one a physical person has a status of employer. On the basis of it *a physical person as hired/employed by a physical* person finds himself in the sphere of regulation and protection of labor legislation, but *a physical person as an employer* - according to Labor Code is within the obligations that employers are generally charged with. Taking into account the aforesaid a subject of study is an employer physical person or a person having concrete full name. As in accordance with "M" subparagraph of paragraph I of Article 37 of "Labor Code of Georgia"[7] a basis of the termination of the labor agreement is considered the employer physical person's death, it becomes clear that the employer is just a person and not an individual entrepreneur.[8]

Only the above listed three articles are the basis of a new type and institute of labor relations established by Labor Code in 2006 – labor relations between physical persons.

3. Labor Relations between Physical Persons – a Subject of Regulation of Labor Laws or Civil Law?

Labor Code does not detail regulation of labor relations. Conditions and features of labor agreement between physical persons are obscure. It is not clear whether the rest of the statutes can be spread on labor relations between physical persons of the code, including logical connection and mutual relationship, namely:

a) Categorization of the agreements concluded between physical persons is not done; there is no list of agreements which will be included in the sphere of regulation of the labor code (e.g. a private teacher and pupil's parent? a babysitter and a lawful representative of a child? a gardener and an owner of the garden?).

b) There are not stated types of works, for performing of which agreements between physical persons will be counted as labor agreements (e.g. service sphere?).

c) There is not defined a term, which would have been one of the features so that a labor agreement concluded between physical persons would have been counted as a labor agreement.

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[7] "1.Grounds for termination of the employment relations are: "m") death of an employer as a natural person or of an employee." <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=1155567&_lang=ge>.

[8] Law of Georgia on Entrepreneurs, Article 2, official publication in "Legislative Bulletin of Georgia", 1994, 21-22.

d) It is not clear which norm involving social obligations must be spread on labor agreements concluded between physical persons. It is not clear either whether all the legislative demands spread on an employer or an employee within the agreement concluded between physical persons. Except all the above listed issues the following questions are to be answered: Why did it become necessary to include agreements concluded between physical persons into the regulation sphere of labor code? What was the basis of it: practice spread in Georgia? Was it legislation of developed countries and a desire for approaching them? Was there any concrete case? Were there risks? Was it a chance or deliberate policy?

As it was already mentioned to wide extent labor relations is a subject of regulation not only of the labor code, but of the civil code as well. To narrow extent labor relations is a subject of regulation of labor legislation, on which all the statutes of labor code and acts following it. Declarative regulation on one side makes doubtful practicality and worthiness of recordings (on labor relations of physical persons) and on the other side it deepens a qualification and delimitation problem of labor relations and the other civil legal relations.

In general labor market is full of secret labor relations so that the employers will avoid extra obligations and expenses. As a rule, labor inspections/service (universal practice) is engaged to reveal such cases. In the present situation without imperatively stated demands the statutes about labor relations between physical persons in labor code can be thought to be dead norms. Under the conditions of legislative vacuum it is unlikely supposed that physical persons will call the relation as labor relation and take all the lawful obligations stated by labor laws. The issue also needs social and economic estimations and orientation on the results. For example we can name an agreement about hiring a babysitter, which can be characterized as a labor relation between physical persons (between a parent and a babysitter). If this concrete agreement is a regulation sphere of labor laws, a regime requested by legislation will be spread on it:

- Norms about remuneration for overtime work;
- Statutes about conclusion and termination/changing of an agreement;
- Fixed tax liabilities;
- Norms about safe and healthy working environment (standardized demands);
- Statutes about night work;
- Norms about rest and holidays, and break during working time;
- Norms of assistance because of temporary or prolonged disability;
- About norms of remuneration for no less than a month in case of breaking the agreement by the employer's initiative;
- Statutes about pregnancy and maternity leave and child care leave, leave for adopting a newborn child and their remuneration;
- Norms about holiday remuneration and duration of holiday.

The analogous example can be a physical person hired for definite or indefinite term in charge of the household by a physical person living in the village. It might be that considering such factors and features, as: term of the agreement, economic dependence on the employer, strictly defined working hours, control and supervision, the relation can be qualified as a labor agreement. In such a

case an employer is obliged to perform all lawful demands and spread on the employee all obligations connected with social protection and work safety. It is clear that in connection with the above listed aspects labor relations there are not comprehended.

In the agreements concluded between physical persons there are obviously such elements of exploitation which naturally qualify the relation as a labor agreement: the amount of remuneration stated by the employer, agreement conditions stated by the employer, control of work performance by the employer, the certain working hours, personal subordination, the interest not to the result of labor, but to the work process, work place, obedience to the employer's directives and instructions and etc. Such features by obligation are not essential for legal relationship and are not often requested, for example by a contractual agreement. In case of a contractual agreement a client is interested in the result of labor, quality and not in a working process, a work place and so on. Besides a contractor or a receiver and performer of work defines himself price of work to be performed and enjoys the freedom and independence more than it is in labor relations. At the same time a performer of work has the right and the possibility to offer and sell his labor at the same time to several clients.

After analyzing the above mentioned moments and studying the features of relations between physical persons such relation among them, as employment in the family, not only at the declarative level, but also factually and legally can be found in the regulation sphere of labor relations. But if labor code statutes are not spread on them (and the question will be remained without studying and detailed regulation), they might become secret and go to black market. Of course the temptation to be such relations regulated by the civil code and not by the labor code is big.

In connection with a labor agreement concluded between physical persons a very interesting and important question is the pursuance of agreement form. According to paragraph I, of Article 6 of organic law of Georgia "Labor Code of Georgia", "*A labor agreement is concluded in a written or verbal form for a definite or indefinite term.*" On the 12th of June, 2013 by the decree of the Parliament of Georgia about making changes in organic law of Georgia "Labor Code of Georgia" it was defined imperatively a written form for relations lasting more than 3 months. According to the practice such relations in Georgia as hiring a babysitter for a child last long, months, years. Up to now the pursuance of the form has not been requested. Apart from it paragraph 1^3 was added to Article 6 of this law:

"*1^3. If a labor agreement is concluded by term of more than 30 months or the labor relation lasts after successive conclusion term labor agreements twice or more times and its duration exceeds 30 months, then it will be said that the agreement is of unlimited duration. Term labor agreements will be counted as successively concluded, if the existed labor agreement was continued as soon as its term expired or the following term agreement was concluded in 60 days after the expiring the term of the first agreement.*" According to this statute:

a) An agreement concluded with a babysitter can be counted as an open-ended agreement, as because of practice such agreements often last more than 30 months;

b) In order not to count an agreement as open-ended, it might become tendentious to terminate the agreement by the employer/hirer before 30 months.

A question arises again: what sphere agreement belongs to by its nature, labor or civil law? If it is in the sphere of labor legislation, then who (which agency, organization) and how will be revealed

labor relations in order to provide control characteristics (fulfillment of financial and social obligations by the employer). If these relations ate not exposed, we will have secret labor relations on black market and records of labor code will be inactive. If the relation does not belong to the sphere of labor laws, then the agreement nature and characteristics are obviously opposed to the norms of legal obligations, which cannot regulate it completely.

4. Legislative Practice of the EU Countries

4.1. Subordination Principle as Characteristic of Labor Agreement

It is very important to study legislative practice of the European Union and some kind of comparative review. Studying labor legislation of the countries of the European Union made it obvious that the main defining criterion of labor relations, labor agreements is the principle of subordinating to the employer (*subordination principle*).[9] For denoting one of the basic characteristics of labor relations or a labor agreement the following terms can be used: *supervision, subordinated relation, subordination, and control.* Just this criterion distinguishes labor relations from relations of legal obligation, where the equality of parties and the freedom of showing will are provided. Because of parties' equality and the freedom of showing will in such nuances as stating price by participating of both parties, laying down conditions of the agreement together and others, persons of agreement have equal rights-obligations, which of course do not occur in labor relations. From the essence of labor relations an employee personally, as well as economically is considerably depended on the employer. Neutralization of risk of abusing this dependence is the state's authority and obligation as well. Accordingly the objective of labor law considering its historical development is "protection" of the employer from groundless and disproportionate encroachments.[10] An issue of putting the existed relation between an employee and an employer into the equality regime, equalization of their statuses has been actively discussed since 80-90 years of the 19th century. Caring of the state for improving

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[9] Labor Code of Czech Republic, 2006, Part One, Chapter I, Section I, Subparagraph "a", "…regulates legal relations arising in connection with the performance of dependent work between employees and their employers; such relations are referred to as "labour relations", available at: <http://www.mpsv.cz/files/clanky/3221/Labour_Code_2012.pdf>; Employment Contract Act of Estonia, 2008, Chapter I, §1, Subparagraph 1, "On the basis of an employment contract a natural person (employee) does work for another person (employer) *in subordination* to the management and supervision of the employer. The employer remunerates the employee for such work", available at: <http://www.sm.ee/fileadmin/meedia/Dokumendid/ASO/TLS/TLS_ENG.pdf>; Employment Relationship Act of the Republic of Slovenia, 2002, Article 4, Paragraph 1, "An employment relationship is a relationship between the worker and the employer, whereby the worker is voluntarily included in the employer's organized working process, in which he in return for remuneration continuously carries out work in person according to the instructions and *under the control* of the employer", available at: <http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/zdr_an.pdf>.

[10] *Chachava S.,* Recommendations for Improvement of Judicial Law of the Current Legislation in Relation to the Denunciation of Term and Unlimited Agreements, Labor Law (Articles), "Meridiani", Tbilisi, 2011, 37 (in Georgian).

labor relations is thought to be caring for the establishment of common welfare. It was followed by turning labor law, as protection norms of the employee, into an independent line of law.[11] By this reason in the course of time labor relations separated from civil law and became an independent branch of law. A basic criterion of it was the above mentioned principle of subordination, which means itself legal and financial advantages of the employer over the employee:

- The employee is limited to determine amount of remuneration;
- The employee joins the preliminarily formulated standard conditions of agreement or this or that administration regulation;
- The employee cannot participate in stating procedural or substantial instructions;
- The employee joins the stated norm connected with the time of work performance;
- The employer controls not only the result of labor, but work process (discipline, daily labor norm, time, work performance culture and so on);
- The employer uses administrative responsibility;
- The employee is not titled to work in parallel and sell his labor to other employer and others.

Unlike the legislation of the EU countries in Labor Code of Georgia in the definition of labor relations there is not emphasized *a principle of subordination*,[12] while it is one of the most important factors in order to solve a problem of qualification and delimitation these relations at legal as well as at practical level. So in European countries the formulation of labor relations, labor agreement clarifies itself that such relations between physical persons belong to the sphere of labor relations regulation where there is subordination (supervision, control).

4.2. Review of Legislation Norms of Some Countries of the European Union

According to *Labor Code Czech Republic* an employer is as juridical, as well as *a physical person (individual person)*.[13] The information about labor agreement must comprise a full name and address of the employer physical person.[14] The capability of a physical person to carry out the rights and perform the obligations as an employer arises at the age of 18.[15] In order to secure safety and health protection trade unions are entitled to carry out on-site inspection of individual employer.[16] Upon the death of an employer physical person labor relations are terminated.[17]

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[11] *Chachava S.,* Recommendations for Improvement of Judicial Law of the Current Legislation in Relation to the Denunciation of Term and Unlimited Agreements, Labor Law (Articles), "Meridiani", Tbilisi, 2011, 37 (in Georgian)..

[12] Labor Code of Georgia, 2010, Part 1, Article 2: "Labor relationship is the performance of work by an employee for an employer instead of compensation under the organizationally regulated conditions of labor".

[13] Labor Code of Czech Republic, 2006, Part One, Chapter II, Section 7, Paragraph 1, available at: <http://www. mpsv. cz/files/clanky/3221/Labour_Code_2012.pdf>.

[14] Ibid., Part Two, Chapter II, Section 37, Paragraph 1, Subparagraph (a).

[15] Ibid., Part One, Chapter II, Section 10, Paragraph 1.

[16] Ibid., Part Thirteen, Chapter X, Section 322, Paragraph 1.

[17] Ibid., Part Thirteen, Chapter XV, Section 342, Paragraph 1.

According to Labor Code of Czech Republic labor relations between physical persons are acceptable, though a physical person as an employer is also thought to be in the management of an enterprise or organization, which means that a person of concrete position in the name of an enterprise/organization might be a subject and a signing party of an agreement and consequently an employer physical person. The main point is that such relations are also subjected to monitoring carried out by trade unions.

Employment Contract Act of Estonia like Labor Code of Georgia is scarce. There is only one note in it concerning the death of an employer physical person [18] According to Act of Estonia we should suppose that only those labor relations between physical persons will be qualified as a labor agreement, where there is supervision, control and subordination.

Employment Relationship Act of the Republic of Slovenia acknowledges labor relationship between physical persons.[19] For breaching the act there are set sanctions as for an employer legal entity, as well as for an employer physical person; though financial sanctions for physical persons are much less than for legal entity.[20] An employment agreement is terminated upon the death of the employer physical person.[21] According to the Act of Slovenia an employer physical person can be a management segment of an enterprise/organization, which as a manager and an employer is authorized to conclude a labor agreement with an employee. Unlike the Labor Code of Czech according to Act of Slovenia an employer physical person is only an individual person acting within the united management.

According to *Labor Code of Lithuania* an employer is only a person in organizational (administrational) form. If an employer is a physical person, relations are regulated not by Labor Code, but by Civil Code.[22] In such a case there is labor to wide extent (when it is even a subject of Civil Law regulation). Labor Code of Lithuania does not interpret labor relations between physical persons to narrow extent.

Several examples clarifies the fact that a labor agreement and labor relations between physical persons has scarcity of legal regulation and it is a new institute even for EU countries, also for a global labor market, which needs scientific research, court practice, risk assessment. Though the fact is that new forms of labor relations (atypical relations) caused description processes of new institutes and relations in labor legislation. If a short time ago an employer was seen only in an organizational-structural form, today he is seen as an individual physical person.

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[18] Employment Contract Act of Estonia, 2008, Chapter 5, Division 3, §111, 1, available at: <http://www.sm.ee/fileadmin/meedia/Dokumendid/ASO/TLS/TLS_ENG.pdf>.

[19] Employment Relationship Act of the Republic of Slovenia, 2002, Article5, Paragraph 2, available at: <http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/zdr_an.pdf>.

[20] Ibid., Article 230.

[21] Ibid., Article 75.

[22] Labor Code of the Republic of Lithuania, 2002, as last amended on 9 December 2010 – No XI-1219, Article 16.1, available at:<http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=391385>.

4.3. Classification of Labor Relations Subjects by the International Labor Organization

It is very interesting to discuss the International Labor Organization's approach to the classification of employment types, which is based on agreements nature, economical risk factors, duties and functions of subjects of relations and etc. Classifier includes the following groups of subjects of labor relations:[23]

- *Employee,* who accepts remuneration which does not directly depend on the employer's income. This employee has a stable agreement, mainly open-ended. In this case an employer might be a state department or an institution determined by the necessity of the country, organization and others;
- *Employer,* who creates *self-employment* jobs. At this time the employer's income directly depends on the profit, which he gets by producing goods/by serving. If while carrying out activities he uses labor of one or several persons, he calls them *employees.* Such employees have relation with the employer on the basis of continuity term agreements;
- *Own-account workers*, who create *self-employment* jobs, though they do not use the others' hired labor on the basis of continuity; as a matter of fact they are self-employed and create jobs by themselves and use only their own labor;
- *Members of producers'* cooperatives*,* who create *self-employment* jobs cooperatively by producing goods/by serving. Members of such cooperatives have equal rights to participate in their decisions.

Of course an individual case of labor relationship can't be belonged to any category of the presented groups, though a classifier offers sub-categories, which are important for the specifics of some countries. Relations might be often understood ambiguously in search of the difference between the employed and the self-employed from the agreement as well as from analytical point of view. For example a home worker can be understood as a self-employed or analyzing his authority or legal status, as the employed (the same can be said in connection with seasonal workers).

A physical person can be an employer in different situations by different variations. A physical person can carry out his activities under different names (for example, the owner of the house, hiring a gardener). As soon as the relation between an employer and an employee takes a name of labor relation the employer must perform norms connected with labor. In case of need he must use the methodology of risk assessment in order to create safe environment and take different measures.[24]

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[23] The 14th ICLS adopted the Resolution concerning the International Classification of Status in Employment (ICSE), known as ICSE-93, available at: <http://www.ilo.org/global/statistics-and-databases/statistics-overview-and-topics/status-in-employment/current-guidelines/lang--en/index.htm>.

[24] *Frostberg C.,* Companies and Natural Persons as Employers under the Work Environment Act, 5th Edition, 2005, 3, available at: <http://www.av.se/dokument/inenglish/books/h199eng.pdf>.

5. Principle of Primacy of Facts Labor Relationship

As it was mentioned above labor relations are complex consisting of lots of nuances. While qualifying them each detail should be paid attention to: e.g. whether was there a probation period used, which is specifics of labor agreements, is there done paper work (was there request for a diploma, certificate, work experience or other document confirming other activities of the employed, registration, request for medical examination and etc.); details about the remuneration system: does a person perform work/serve for one person or a company regularly, where the remuneration is calculated hourly, weekly, monthly; does the activity of the person serving different persons and a company influence on business, has various payers and meets many clients' demands.[25]

In the process of qualifying relations very important is to observe the principle of *primacy of facts*.[26] Disputes must be solved on the basis of analyzing a real situation. There are often cases when there is concluded a civil-law agreement (e.g. contractual), but in fact there are labor relations or a secret labor agreement. Labor legislation of some countries directly points out such cases emphasizing the priority of authenticity of the facts. According to the legislation of *Finland* if there is not a norm of remuneration, which is one of the most important elements, then this detail will not be considered, if the facts show that performance of work was not planned without remuneration. Some legal systems are fighting against deceitfully concluded agreements that by using the principle of primacy of facts provide protection of the interests of the employed and taxation and welfare agencies. In order to define labor relations each legal system is focusing on indicators such as: socio-economic inequality of parties, implementation of the employer's instructions, being at the employer's disposal, control rate from the employer, integration rate of the employed into the enterprise activity, responsibility for financial risks and others. In the countries of common law judges make their decisions on the basis of criteria, which are worked out within judiciary law. Labor legislation of some countries focuses on types of work the subjects of which have a status of the employed persons, for example, *in Spain* professional sportsmen are thought to be subjects of labor agreement, if they voluntarily are regularly carrying out sports activity in the name of sport institutions or clubs or under their direction instead of remuneration, but those sportsmen, which are carrying out their activities in sport clubs and are only getting compensation of expenses, are not included in the sphere of using labor legislation. The same approaches are in relation to actors. *In France* actors-performers, models, professional journalists, trade agents, commercial travelers have a status of the employed in cases defined by legislation. *In Mexico and Panama* subjects of labor agreement are the employed in public transport – drivers, operators, and conductors. *In Chile* work in a family will only be considered to be labor regulation, if it has a regular and intensive character. *In the Netherlands* if a person performs work for the benefit of the other person's interests, instead of compensation every day for three months or no less than 20

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[25] *Lamont S.J.B.*, Employment and Non-employment Services, 1994, 1-3, available at: <http://loki3.brandonu.ca/admin/policies/Administrative/EMPLOYMENT%20vs%20NON-EMPLOYMENT.pdf>.

[26] The Employment Relationship, International Labor Conference, 95th Session, 2006, Report V(1), International Labor Office, Geneva, 8, 24, 25, 51, 55, 58, available at: <www.ilo.org/public/english/ standards/ relm/ ilc/ilc95/pdf/rep-v-1.pdf>.

hours a month, it will mean that he is working on the basis of a labor agreement. *In Portuguese Republic* supposedly labor relations exist, when: the employed is a member of a collective of organizational structure; work is performed in the enterprise or in the place subordinated to this enterprise and controlled by it according to the stated schedule; work instruments are provided by a person, for whose profit this work is performed; service/work is performed continuously and it lasts 90 days. In Finland those agreements, which are concluded for short term and are often prolonged without argumentation and sufficient grounds, are thought to be term labor agreements.[27]

In factual differentiating process it is essential to discuss factors individually, as well as to analyze them jointly: to state person's status hiring organizations, labor inspections, departments and other state structures use special questionnaires and tests.[28] Answers to such questionnaires and tests are indicators of relations. In these tests the above mentioned criteria are emphasized: control and its quality from the employed person, participation level of the employee in working process, place, time and schedule of work performance, obligations, details of hardware, remuneration system, agreement duration, responsibility for the result, risk factors connected with losses of the enterprise, grade of economical dependence of employee on employer and others. There are widely spread two kinds of tests: "Right of Control" and "Economical reality".

For example it is interesting the following test consisting of 20 classifiers:

1. The employee is given instructions.
2. The employee is provided with trainings.
3. The employee's activity is integrated into business.
4. Activity is directly carried out by the employee and it can't be changed.
5. The employee is supervised and paid a salary by the company.
6. The employee and the company have the continuing relations.
7. The employee has the stated working time.
8. The employee is requested to work the whole working day.
9. Work is implemented in the location of the company.
10. For a person employed in the company are stated directions and instructions.
11. The employee is requested to submit reports.
12. The employee is paid hourly, weekly, monthly and not as a result of task performance.
13. The employee is given compensation of expenses.
14. The employer provides the employee with equipments and other things.
15. The employee has neither profit nor loss.
16. From the employee investments are not requested.
17. The employee is not entitled to work in other business.
18. The employee is restricted to perform the same type of work for other client.

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[27] The Employment Relationship, International Labor Conference, 95th Session, 2006, Report V(1), International Labor Office, Geneva, 3-87, available at: <http://loki3.brandonu.ca/admin/policies/ Administrative/ EMPLOYMENT%20vs%20NON-EMPLOYMENT.pdf>.

[28] *Pierce D.A.*, Classification of Workers: Independent Contractor versus Employee, Pierce Law Group, 3-6, available at: <http://www.piercelawgroupllp.com/articles/classification-of-workers.pdf>.

19. The company can dismiss the employee.
20. The employee has the right to terminate the agreement without responsibility.[29]

The above mentioned criteria play an important role in the process of qualifying relations. It should be taken into account that types of relations can often be stated only under the conditions of cumulative composition.

6. Conclusion

Consideration of changes of 2013 made to organic law of Georgia "Labor Code of Georgia" before passing this law initiated work of different circles (representatives of business, trade unions, NGO sector) on the issue, which is a good and necessary component for creating an effective legislative base, though labor relations remained beyond public discussion. Agreements between physical persons, which can be qualified as labor relations, need to be revealed and studied specifically (employment in a family and others).

Recordings of labor relations between physical persons within the regulation of today's legislation are "dead norms", action facts of which are not revealed because of the lack of institutionalism and administration norms. The Parliament adopted such a norm (law), whose executive subject (as administrative, as well as personnel resource and potential) had not been formed and will not be formed in the nearest future either.

The issue needs the further legislative regulation, namely:

- Define such types of work, which will be counted to be a sphere of labor relations between physical persons.
- To make a recording about the subordination principle in Labor Code, this will facilitate settling the problem of delimitation of relations.
- To adopt the norm about the primacy of facts, this will have a special meaning in settling labor disputes and qualifying labor relations.

Besides the law creating activity it is necessary to work out practical test with the inclusion such criteria, which will be an ancillary element for the realization of the principle of primacy of facts and also for defining certain relations.

Today the traditional doctrine of labor law has to be faced to new reality. As labor is a live process and hence – mobile, changeable and developable, labor legislation must become flexible and adaptable to global orders. The legislation base must be risen from that synthesis of practice, where the employer/hirer wants to work out not a labor, but a contractual agreement, to develop production, produce affluence and get more profit, but the employee/hired wants to conclude a labor agreement and get guaranteed mechanisms of social protection. Labor legislation relevant to these desires will maintain its purpose and function. At the same time the proper guarantees of physical, economical, social security and worthy existence of the employee, as the first priority, must be strengthened in labor legislation.

[29] National Employment Law Project, NELP Publications: Employment Relationship Checklists, available at: <http://www.nelp.org/page/-/Justice/Employment%20Relationship%20Checklists.pdf>.

Ketevan Japaridze*

News Institutes for Ensuring Fulfillment of Child Support Obligation

1. Introduction

Child support relationships between the parents and the children have always been the most important issue in the family law. But their role, in the currents conditions of the development of the society, has grown considerably. Rising of unemployment rate, deterioration of the quality of life, result in the situation where the persons unable to work, and especially children, face the danger of remaining without necessary means for existence. For this reason, two news institutes[1] are being established in the international legislative practice – a Contract on Child Support made between the parents, which is known to the Georgian legislation in a general form and the Child Support Fund, which is unknown for our country's legislative system. According to the court statistics, the disputes about the child support became more frequent. In 2011, 611 cases were introduced on child support in the First Instance Court of Georgia. Out of them 411 cases have already been heard at the court and the judgments have satisfied the complaints in 405 cases. Based on the data from 2012, the court satisfied 406[2] complaints out of 767 cases.

According to the Article 1213 of the Civil Code of Georgia, "the amount of child support for the underage or full age children which are unable to work is to be agreed between the parents." But the question is what will be the legal result of such an agreement, if the law does not consider neither its form nor its execution mechanism. This legislative deficiency is to be corrected and the second clause is to be added to the Article 1213 stating that: "if the parents are willing to give the power of an execution paper to the child support agreement, then the agreement should be made in a written form and be approved by a notary." It is also relevant to define the contents of the agreement and its compliance with a contract contents.

This is actually discussed in the legal literature and bring us to the conclusion that the contract on the child support, proceeding from its contents, which is to be defined by the law and assigns the responsibilities to the parties and defines certain conditions cannot be an agreement if its contents is established on the autonomy of the goodwill and there is no obligation between the parties prior to the agreement. The scientists also actively discuss the problem of involvement of the state institutions in

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1 See further on this topic *Blair M.D., Weiner M.H., Stark B., Maldonado S.*, Family Law in the World Community: Cases, Materials, and Problems in Comparative and International Family Law, 2nd Ed., Durham, "Academic Pres Law Casebook Series", 2009, 616-619; also see *Rijavec V., Krajic S.*, The Maintenance of Children: Alimony Fund as the Saving Grace?, in Collection of Articles: Family Finances, *Verschraegen B.* (Ed.), Vienna, "Jan Sramek Verlag", 2009, 649-663.

2 See website: <www.tcc.gov.ge/index.php/m=534> [10.09.13]

ensuring fulfillment of the child support obligation. In terms of this, Child Support Fund is already tested and common state body in many countries. It supports protection of the legal rights of the children and grown-up disabled offspring.

2. Agreement on Child Support

Agreement on child support between the parents is one of the institutes which helps to protect children's interests related to the child maintenance. The family legislation supports the relationships of a parent and a child, therefore the agreement of the parents related to the child support.[3] Introduction of the child support agreement institute in the Civil Code of Georgia is a legislative novelty. The contents of this of the agreement give possibility of defining the amount, conditions and payment rule.[4] Contract on child support can define the rule of payment – payment of child support personally, through the third person (grandmother, grandfather or other relatives), by post, through transferring to the bank account or any other credit institution, by means of saving certificate etc. It is also possible to define grounds for changing or terminating the contract, forms and conditions of liability in case of the delayed payment, duration of the contract.

Child support agreements are made for long period of time. As a rule, one party of the child support contract is underage children or a person with limited capacity in a poor economic who is unable to work and especially needs protection of his/her rights – the subject of these contract refers to the existential interests of the parties and these contracts regulate provision of survival means for the receiver of the child support.

Child support contract is made between a person (obligor) who is obliged to pay the child support and a person (obligee) who has the right to receive it. If the receiving person is disabled than his legal representative (custodian) will be the party. As for the persons with limited capacities (which put the family in a difficult situation due to using narcotics or alcohol abuse), their caregivers (based on their consent) act as the party in the contract.

Child support contract is made between the parents, however not with their names, but on behalf of children, with the statutes of a legal representative. For this reason, there may arise a situation, when they make a deal which is not favorable for child interests. E.g. a mother agrees to receive from a father a small amount of child support, if he agrees to give up his right of seeing the child refuse; or is one of the parents agrees to reduce the amount of child support, if his share from dividing the property as a result of the divorce will be increased. Divorce can be one of the most stressful evens in the life of a person. One of the judges says that: "during the divorce, many people act very unreasonably, makes something which we can hardy call reasonable, even after consulting a legal advisor".[5] It is also possible, that the parties do not confess about the actual expenses related to the

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[3] *Kovacek-Stanic G.*, Child in Single (Absent) Parent Family: Maintenance and Family Home, in Collection of Articles: Family Finances, *Verschraegen B*. (Ed.), Vienna, "Jan Sramek Verlag", 2009, 638.

[4] *Smolenskyi M.B*., Russian Family Law for Students of Higher Education Institutions, Rostov on Don, "Fenix", 2004, 83 (in Russian).

[5] Case *Richardson v. Richardson,* [1987] 1S.C.R. 857, 41 (La Forest, J., Opponent), Judgments of Supreme Court of Canada, SCC Case Information: 1987, see the mentioned case at the following link: <http://scc.lexum.org/ decisia-scc-csc/scc-csc/scc-csc/en/item/220/index.do> [23.09.13].

children, especially after the divorce. For this reason legislation should consider special norms, which will not allow the parents to violate the rights of the children with a child support agreement.

The receiver of the child support, and therefore one of the parties of the agreement, is the child himself. If the child is less than 7 years old, then a parent or a custodian makes an agreement on his behalf. If a child is 7-17 year old, he/she makes an agreement with the consent of their legal representative (a parent, a caregiver, a stepmother or a stepfather).[6]

Based on the agreement, the bodies authorized by the rule of the court to ask for the child support can require the payment only if the circumstances considered by the law happen (e.g. if the receiver of the child support has poor economic situation or is disabled, while the payer of the child support has sufficient financial means). Payment of child support can also be required even if such circumstanced do not occur because "making an agreement on the child support is the right of the parties and not the obligation".[7] Besides this, the conditions of the agreement are defined by the parties themselves and therefore they have the right to indicate those conditions which are not considered by the legislation (e.g. not being disabled or not having the need for child support). The exception is an agreement made by a custodian on behalf of a disabled person (who does not represent a obligor); it is impossible to make this kind of agreement, because the custodian has the right to make only those deals, which are in the interests of the person under the custody.[8]

It is interesting, if it is possible to make an agreement on child support between the persons which, based on the law, are not authorized to ask for payment of child support: factual spouses, custodians, caregivers, aunts and uncles etc. This kind of agreement is possible, because Family Law, despite its specifics, is a part of Private Law, therefore the parties have possibility to make an agreement which is considered or not considered by the law or any other legal norm. Thus, the parties have the right to make an agreement on providing the support even when Family Law does not consider making such an agreement between these individuals. In such cases, the relationships, which arise in relation to making and fulfilling the agreement, are not regulated by the law. In such cases the relationships are regulated by means of an analog of law. The issue regarding the legal nature of the obligations, which arise based on the mentioned agreement, remains open. I think, that the obligation should be considered as a child support obligation. It is also possible to consider it as a special type of continuous support agreement, but this kind of classification has only theoretical meaning, "because, in practice, nothing is changing - in the both cases the mentioned obligation will be regulated based on the existing legal norms on child support agreement." [9]

A child support agreement does not necessarily require a party to be capable. If the court considers that an underage person has limited capacity, than the mentioned agreement is made by means of legal representatives (parents, custodians).

7-17 year old persons and persons with limited capacities make agreements on payment of child support only based on the consent of their legal representatives.

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6 *Chikvashvili Sh*., Family Law, Tbilisi, "Meridiani", 2004, 355-358 (in Georgian).
7 *Muratova C.A*., Family Law, Moscow, "Eksmo", 2005, 220 (in Russian).
8 *Chefranova E.A*., Property Relationships in the Russian Family, Moscow, "Jurist",1997, 14 (in Russian).
9 *AnatolskayaM.V.*, Family Law, Moscow, "Jurist", 2004, 236(in Russian).

A child support agreement can be considered as void on the grounds which are legally sufficient to make void a civil agreement. Like some civil deals, a child support agreement can be considered as void or disputable.

In the rule for application of the civil legislation, there is no exception for considering void a child support agreement. Thus, it can be concluded that considering a disputable child agreement as void and using the results of voiding for the void agreement is possible only during the period for filing a notice of appeal.

An appeal can be made for a disputable child support agreement within one year from the moment when a person learnt or had to learn about the circumstances which became the reason for annulling the deal. If the agreement is made by force (by violence or threat), then one year period starts from the moment when the event of violence or threat is finished. If a disputable agreement affects negatively the interests of an incapable receiver, period for filing a notice of appeal should start from the moment when a legal representative or a custodian and a caregiver body was informed that the interests of the incapable receiver were affected.

If the parties agree to terminate or amend the payment of the child support, this has to be made in written form and approved by a notary. If an agreement (or its amendment) is not approved by a notary, then it has to be considered void.

If one of the parties refuses to fulfill the agreement or the agreement is to be changed for one party, the party whose interests where affected can appeal to the court with a request to make the second party to fulfill the agreement.

If an accord cannot be reach on termination or amendment of child support payment, the interested party is authorized appeal to the court for changing or terminating the agreement. The court will satisfy the claim only if it decides that since the day when the agreement was made, financial and familial situation of the party has changed significantly. When discussing the issue of amendment or termination, the court may take into account any notable interests of the parties e.g. disability of the obligor after making the agreement on the child support, new factual marital relationships of the spouse which has been receiving the child support etc. However, it should be mentioned that a child support agreement should be regarded as a stable and reliable contract. Otherwise "the mentioned agreement will have minor importance and any agreement will be only an intermediary stage prior to addressing the court."[10]

Additional protection is required for the underage persons and the full age persons with limited capacities receiving the child support based on the agreement made by their legal representatives on their behalf and (or) made based on the consent of their legal representatives. This necessity is caused by the fact that the parents of the child are strangers for each other and often, when making an agreement on child support, they follow their own interests which may not always coincide with the child's interests (benefiting from dividing the property etc.). In such cases, Family Law considers

[10] *Cohen Y.*, Issues Subject to Modification in Family Law: A New Model, Ono Academic College, Columbia Law School, 2013, 6. See his work on the website: <http://papers.ssrn.com/sol3/DisplayAbstractSearch.cfm> [10.09.13].

special grounds for annulling this kind of agreements. An agreement can be considered void if it substantially violates the interests of the mentioned persons. The interests of the underage persons and full age persons with limited capacities are considered as substantially violated if child support amount defined with the agreement is much less than the amount which they would have received if the court had made a decision about payment of the child support in their favor. The court may consider it reasonable not to annul the agreement but to change or terminate it following the legal procedure at the court. In other cases the parties of the child support agreement are free to define any amount for the child support. It should be mentioned that there is no maximum limit fixed for the child support amount.[11]

Child support agreement can consider combination of different rules of payment. At the same time, the parties are authorized to fix the method of payment independently.

If the child support is defined from the part of income of the payer, the parties independently calculate such part and identify the types of incomes that should be considered. Based on the agreement, the parties are authorized to evaluate the property, which will be presented as a child support. It should be mentioned that income from the property and from the stable financial support can be used by the receiver for himself. Payment of child support in foreign currency is possible only based on the legislative regulations of the foreign currency. The periods for payment the child support are fixed independently. Child support can be paid monthly or regularly every other time intervals or at once as an entire amount.

The conditions are interesting in terms of maintaining the actual value of the child support amount. With this regard, indexing is an actual the issue. Indexing of the child support amount is considered for protection of the child support from inflation and is made on regular basis. The parties can use any methods of indexing, among them a comparison of the child support amount with a foreign currency or several foreign currencies (the amount of the child support is defined in Georgian Laris, which is equivalent of a certain amount in foreign currency).[12] If the child support indexing methods which is mentioned in the agreement is not effective, then the receiver of the child support has the right to address the court for changing the agreement.

2.1. The Legal Nature of the Child Support Accord and Its Compatibility with the Contract

In literature, there is an opinion that a child support accord by its nature is a Civil Law agreement.[13] This attitude is incorrect, because the agreement is an accord of two or more persons about establishing, changing or terminating the civil rights and responsibilities. The agreement is always an accord of parties, which is based on the obligations created by the accord itself. Therefore, in this case, there is not only an accord. An accord can be reach before making an agreement and at the

[11] *AnatolskayaM.V.*, Family Law, Moscow, "Jurist", 2004, 238 (in Russian).

[12] *Pchelintseva L.M.,* Comments to the Family Code of Russian Federation, 3rdEdition, Moscow, "Norma", 2004, 416 (in Russian).

[13] *AnatolskayaM.V.*, Family Law, Moscow, "Jurist", 2004, 252 (in Russian).

pre-agreement stage it can define the conditions of the agreement or specify the rules for fulfilling the responsibilities (pre-agreement accord, memorandum, protocol etc.). As for the agreement, it is an accord which creates an obligation.[14] Attention is to be paid to the free will of the parties in legal relationships about establishing, changing or terminating the civil rights and responsibilities. Freedom of will for creating connections with an agreement should be considered as a precondition for defining the contents of the agreement, i.e. from the moment of reaching an accord on any clause of the agreement, the parties start having certain rights and responsibilities. They have no right and responsibilities towards each other prior to the agreement. If the parties fail to reach an accord, there will be no agreement and the persons which are trying to reach an accord will have no rights and responsibilities. "The specifics of an agreement are based on its nature of establishing justice and on the legal nature of the parties' rights and responsibilities arising from the agreement. For the parties it is a means for organizing coordinated activities through establishing their rights and responsibilities towards each other".[15]

In the literature of the law, the problem with legal nature of an agreement remains actual. A part of the scientists believe that an agreement, as a basis for creation of rights and responsibilities, must contain legal fact's characteristics; "an agreement belongs to those types of the legal facts, which are called deals. Therefore it represents an action of citizens and legal bodies directed towards creation, changing or termination of civil rights and responsibilities".[16] This type of agreement is called an "agreement-deal".[17] It is different from an "agreement-legal relationship", which requires "different contents of the accord – compilation of those conditions, which make the basis for the rights and responsibilities of the parties".[18] Scientist Puginski has a different position regarding the contents of an agreement and its legal nature. He believes, and I also agree with his opinion, that it is not correct to view an agreement solely as a deal. A deal is an action which is directed towards establishing, changing or terminating rights and responsibilities. An agreement not only establishes rights and responsibilities, but also takes into account certain actions implemented by the party. Their contents is documented in the accord. An agreement defines concrete actions to be made and the legal requirements of the parties towards implementation of these actions. "Therefore, an agreement has much wider role and functions compared to a traditionally interpreted deal."[19] It should be mentioned that a bilateral (multilateral) deal is not always an agreement. Anson writes that a contractual responsibility means "consent of a debtor to become responsible towards the party presenting the

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14 *Puginskii B.I.*, Theory and Practice of Contract Regulation, Moscow, "Zertsalo", 2008, 6 (in Russian).

15 *Puginskii B.I.*, Civil Law Means in Family Relationships, Moscow, "Jurid. Lit", 1984, 107 (in Russian).

16 *Beklenischeva I.V.*, Civil Legal Contract: Classical Tradition and Modern Trends, Moscow, "Statut", 2006, 64 (in Russian).

17 *Braginskii M.I.*, *Vitryanskii V.V.*, Contract Law, Book One: General Situation, Moscow, 1998, Para. 1, Chapt. 1,3,4 (in: *Beklenischeva I.V.*, Civil Legal Contract: Classical Tradition and Modern Trends, Moscow, "Statut", 2006, 64 (in Russian)).

18 *Beklenischeva I.V.*, Civil Legal Contract: Classical Tradition and Modern Trends, Moscow, "Statut", 2006, 65 (in Russian).

19 *Puginskii B.I.,* Legal Civil Contract, Journal "Vetsnik Moskovskogo Universiteta, Law", #2, Ser.11, 2002, 40-41 (in Russian).

notice. The intention of the parties should be establishment of obligation – making the debtor responsible to fulfill his/her obligation and giving to the creditor the right to request fulfillment of the obligation."[20] If the deal does not have such purpose, then it does not establish contractual responsibilities. Therefore, it does not make a contract. Thus, if the goal of the deal is to define (change, terminate) parties' rights or responsibilities, then defining the rights and responsibilities towards each other is a means for creating a contractual responsibility directed towards achieving the common goal of the parties. Proceeding from these circumstances, it can be proved that not all bilateral (multilateral) deals establish contractual responsibilities between the parties and therefore they cannot be considered as agreements.

As for reviewing an agreement as a legal fact, Puginski considers it absolutely impossible and says that "legal fact provides extrapolation of generally established legal norm in a concrete model of legal relationships. Therefore, in the obligation, which is based on the legal fact, there cannot be something which is not considered in the legal norm."[21] This position is shared by Krasavchikov: "if the contents of an agreement is developed based on mutual agreement of the parties and not based on the law, then the agreement cannot be defined as a legal fact. As the conditions of the agreement, which define legal rights and obligations, as a rule, are established by the parties and not by the law, the agreement cannot be considered as a legal fact, according to its widely recognized meaning."[22]

The conceptual scheme of "legal norm - legal fact – legal relationships" creates the picture of those "dozing" norms, which will get activated only upon establishment of a legal fact. This scheme turned out to be absolutely useless for a very big and important sphere – Contract Law where the applied norms are realized based on entirely different origins. The main moment in an agreement is establishment of rights and responsibilities of the parties based on the mutual agreement of their free wills and not definition of the rules for implementing the legal norms. The norms about the agreement have mainly supplementary and additional role in this process. For this reason, the given sphere is subject to contractual and not to the normative regulation.

The Roman Law's perception about an agreement made it possible to review it from three different standpoint: as a basis for establishing legal relationships; as legal relationship itself, which was created based on it; and finally, as a form taken by the legal relationships. A reasonable suggestion was made by Puginski regarding this. He explains that "the category of "legal relationship" cannot explain the essence of an agreement, because an agreement is an instrument for legal regulation of the activities of the parties, even when it is not legal relationship. Recognition of an agreement as a legal relationship inevitably makes it impossible to use the regulatory potential of the agreement and means refusal of revealing its main characteristics. Specialist of Contract Law cannot use regulatory role of an agreement not because they do not want to do it, but because brining an agreement to the level of legal relationships excludes such possibility."[23] It should be mentioned this are the

[20] *Anson V*., Contract Law. Moscow, "Jurid. Lit",1984, 14 (in Russian).
[21] *Puginskii B.I..,* Theory and Practice of Contract Regulation, Moscow, "Zertsalo", 2008, 20 (in Russian).
[22] *Krasavchikov O.A*., Legal Facts in Soviet Civil Law, "SoiuzIzdat", 1958, 51 (in Russian).
[23] *Puginskii B.I..,* Theory and Practice of Contract Regulation, Moscow, "Zertsalo", 2008, 40 (in Russian).

circumstances when the category of "legal relationship" is used for relationships regulated by the legal norms which, based on general theory, are common obligatory norms made or sanctioned by the state. "According to the opinion of the theoreticians of the law, a private agreement has never been a part of the legal contents. This is one more reason why the construction of legal relationships cannot be used for explaining the essence of an agreement; it cannot provide expression and realization of the principles of freedom that are characteristic for a normal agreement, commonly circulated in the market; and it cannot provide establishment of rights and legal obligations by the parties with their free will and for their own interests."[24]

Yofe considered an agreement as an accord of two or more persons about establishing, changing or terminating legal civil relationships. He mentioned that "sometimes an agreement implies the obligation itself, which is created from this accord, while in other cases this term means a document presenting an act of creating obligations of all parties made through revealing their free wills."[25] One more interesting opinion on this issue was expressed by Khalfina, who was against proving that an agreement is a deal and who was also against the explanation of an agreement as an accord of the parties directed towards establishing, changing or terminating legal civil relationships. In the scientist's opinion, the notion of an agreement, "must include also civil rights and responsibilities" apart from the voluntary accord of two or more persons. Additionally, it was underlined that "the rights and responsibilities of each of the parties, as a rule, are different from each other, but they must be agreed and they jointly should give a common legal result."[26]

An agreement, as a basis for establishing rights and responsibilities, has different places in the Civil Codes of different countries depending on which legal family country's Civil Code belongs – to the German (Pandect Model) or Roman (Institutional Model). In some of them, the norms regulating an agreement from one side and the basis of its creation – "agreement-deal" from another side are given in those parts of the Civil Code which refer to the agreement as it is. In the codes of the other countries, the general norms of the deal code are also covering the agreements so that all agreements and obligations proceed generally from an accord (an example of the code of the fist type can be the Civil Code of France, Italy or the Netherlands, while German Civil Code is of the second type).[27]

The contents of the child support agreement is completely different from the contents of the legal contents of the civil agreement notion. When child support is to be paid the obligation of the parent to support and educate the child proceeds from the law, while "the child support agreement is based on consanguinity."[28] The Parents are obliged to support their children. "This obligations come from that continuous legal fact, which is called condition and which creates, changes or terminates the

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[24] *Puginskii B.I..,* Theory and Practice of Contract Regulation, Moscow, "Zertsalo", 2008, 40 (in Russian).

[25] *Yofe O.S.*, Soviet Civil Law, Leningrad, "Leningrad University",1958, 385 (in Russian).

[26] *Khalifona R.O.*, Meaning and Essence of the Contract in Soviet Socialist Civil Law. Moscow, 1952 (in: *Puginskii B.I.,* Legal Civil Contract, Journal "Vetsnik Moskovskogo Universiteta, "Law", #2, Ser.11, 2002, 38-57 (in Russian)).

[27] *Beklenishcheva I,V.*, Civil Law Contract: Classical Tradition and Modern Trends, Moscow, "Statut", 2006, 64-65 (in Russian).

[28] *Krasavchikov O.A.*, Categories of the Civil Law Science, Selected Works, Vol. II, Moscow, "Statut", 2005, 240 (in Russian).

rights and responsibilities for the participants of the Family Law (consanguinity, marriage, adoption, custody, care)."[29] So called legal relationship, usually means the kind of the legal connections which move based on the law. A part of the scientists argue regarding this issue and say that "in the system of creating obligations, the child support obligation belongs to the category of obligations created directly by law."[30] But there is also a thesis which contradicts this theory. According it, the child support obligation is not a "legal obligation", "obligations between the children and parents are based on the consanguinity."[31] But what is consanguinity? "Consanguinity is the persons' connection with blood, which is based on one person giving birth to another or several descendants coming from a common ancestor."[32] "As a legal fact this is a relative legal event. Therefore, there are special grounds for creating child support responsibility - a legal event. Proceeding from this, the mentioned obligation should be called not "a legal obligation", but "an obligation established on consanguinity."[33] Exactly the level of consanguinity existing between parents and children creates the parents' child support obligation towards their underage children or full age children with disabilities; while afterwards a full age children are obliged to support their disabled parents, which needs assistance. This obligation towards the under age children comes from the following factual circumstances: 1. the first level descending consanguinity; 2. children who have not reach the full age. In case of the full age children, the following is necessary: 1. the first level descending consanguinity; 2. limited capacity of the child and absence of livelihood." [34]

"The law is not the direct basis for the dynamics of a concrete legal relationships. The law is above any legal relationship. It recognizes a fact as a ground for moving the legal relationship. The law is the general and necessary precondition for the legal relationships; it is not relationships' basis like e.g. an agreement or delict."[35] In the concrete case, the law recognizes the existing consanguinity, as a legal fact which is the basis for creation of the child support obligation. It is the parents' responsibility to support the child from the birth. And this responsibility does not depend or require an agreement between the children and the parents.

This kind of agreements, as a rule, are made for the guaranty of the child support payment. Proceeding from all above mentioned, child support obligation should be called a legal obligation, because only the fact of consanguinity can not make legal result unless the law recognizes it as a basis for child support obligation; it differs from the other legal obligation with its basis of creation (which for the law is connected to the consanguinity between the children and parents), but all other child support related relationships are defined by the law.

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29 *Muratova S.A.,*Family Law, Moscow. "Eksmo", 2005, 49 (in Russian).

30 *Baru I.M.*, Contractual Obligation on Contents, Edition III,"Scientific Notes Kharkov Law Institute", 1946, 25 (in: *Krasavchikov O.A.*, Categories of the Civil Law Science, Vol. II, Moscow, "Statut", 2005, 240 (in Russian)).

31 *Krasavchikov O.A.*, Categories of the Civil Law Science, Vol. II, Moscow, "Statut", 2005, 240 (in Russian).

32 *Muratova S.A.,*Family Law, Moscow."Eksmo", 2005, 51 (in Russian).

33 *Krasavchikov O.A.*, Categories of the Civil Law Science, Vol. II, Moscow, "Statut", 2005, 240 (in Russian).

34 *Agarkov M.M.*, Obligation According the Soviet Civil Law, Moscow, "Legal Publishing of the People's Commissariat of Justice of USSR", 1940, 163-165 (in Russian).

35 *Krasavchikov O.A.*, Categories of the Civil Law Science, Vol. II, Moscow, "Statut", 2005, 240 (in Russian).

In the legal science, there is an opinion that responsibilities coming from an agreement are factually also legal obligations; and that the law is the sole regulator of the contents of the agreement connections. E.g. Ivanov thinks that the contents of an agreement is entirely perceived from the standpoint of the normative legal acts and is regulated by the legal norms; "the conditions of an agreement jointly create the rules which are based on the legal norms and regulate the activities of the parties of the agreement."[36] Koretsky thinks that "from the moment of making an agreement, the abstract rules of the behavior reflected in the normative legal acts become full with concrete contents: to implement a certain action in a given time period or refrain from an action. In this case, an agreement has the role of "a launching mechanism", which will activate positional legal norms for regulating the relationships of the parties."[37] Recognizing the theory of the priority of the law, Tikhomirov mentioned in the definition of an agreement that the law is "the father of an agreement." If we continue this comparison, we can say that an accord is "the mother of an agreement."[38]

Analysis of the legislation on agreements gives us the possibility to have an entirely opposing position. There is no contractual agreement on the rule of fulfilling legal norms. The parties voluntarily and from their own interests define the conditions of an agreement, which will have the legal importance and which can become implemented by means of the state compulsion. The conditions of an agreement should not contradict the law. In the cases when the law regulates the concrete requirements to the contents of the certain conditions of an agreement, the parties should be guided by the texts of the law.

Legal norms, related to the definition of the conditions of a contact by the parties, reflect the methods of legal regulation and correspond to the principle of the Freedom of Contract. According to A. N. Tanaga, the Freedom of Contract Principle "is a part of "the general normative carcass" of the Contract Law."[39] An important demonstration of the approved method is that when defining the conditions of a contract, the legal norms give opportunities to the parties to divert from the normative rules within certain limits and also enable them take a decision against the dispositional norms if they consider it needed. Based on the agreement, the parties can exclude the possibility of influencing the contract, which can be caused by the introduction of new laws or amendments to the existing laws. Consolidation of the agreed conditions in the law forces the parties to agree the necessary statements for certain types of the agreements and at the time enables them maintain the independence when defining the specific contents of these statements. As for so called *dispositional rules,* which are common in the Contract Law and which consider a predefined model for the actions of the parties of a contract, they become obligatory when, intentionally or unintentionally, the parties do not specify the relevant conditions in the contract.

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[36] *Ivanov V.V*., General Issues of Contract Theory, Moscow, 2000, 116 (in: *Puginskii B.I.,* Theory and Practice of Contract Regulation, Moscow, "Zertsalo", 2008, 66 (in Russian)).

[37] *Koretskii A.D*., Contract Law of Russia, Basics of Theory and Practice of Implementation, Moscow, "IKTs Mart", 2004, 132(in Russian).

[38] *Tikhomirov J.A*., Contract in Economics, Moscow, 1993 (in: *Puginskii B.I.,* Legal Civil Contract, Journal "Vetsnik Moskovskogo Universiteta, "Law", #2, Ser.11, 2002, 38-57 (in Russian)).

[39] *Tanaga A.H*., Principle of Freedom of Contract in the Civil Law of Russia, St. Petersburg, "Legal Center Press", 2003, 10 (in Russian).

"The conditions of the contract differ from the legal norm mainly with two principal characteristics. The first is related to the creation of the rules of conduct: a contract expresses the wills of the parties, while the legal act expresses the wills of the institution which has made it. The second difference is related to the limits of their influence: the contract conditions refer to the parties of the contract and for the third parties they may create only the rights and not the responsibilities. The law or any other nomadic act regulates the relationships, which generally refer to everyone or to a certain group of the people (also defined by the law)."[40]

As for the law, it mainly forces us to recognize the legal importance of the parties' agreement and its obligatory power. The purposeful actions of the parties, expression of their agreed wills is the real source for creation of contractual responsibility. "Those obligations which are predefined by the law in terms of their contents and which are fixed independently from the will of the responsible parties, have quite limited character and mainly originate from the decision of the court, decree or other non-contractual relationships (obligation to pay the child support; obligations of the custodian or manager of other person's property etc.)."[41] Proceeding from this, the created responsibilities are not legal responsibilities. This is their main difference from an agreement on child support.

Let us say that in the child support contract the parties agreed on the following: the party which will pay the child support will make monthly payment of ¼ of his salary or of his income. In this case, what a contract or an agreement can give us? The obligation to support the child was created on the day when the child was born – therefore, before the contract was made. The law defines the rule for calculating the amount of the child support. The limited timing for paying the child support is also defined by the law. Thus, the contents of the mentioned agreement entirely proceeds from the law. At the same time, "an agreement, which is expression of the parties' wills, considers the decision of the parties and the options for their conduct."[42] Additionally, it should be mentioned that the agreement is not only an act expressing the wills of the parties, but also the agreement of the parties which is based on the principle of freedom of expression. If a civil legal agreement is impossible without counteragents, then what will be the importance of the wills of the parties of the child support agreement? In any case, their wills are not directed towards establishing, changing or terminating civil rights and responsibilities. In the contract, the wills of the parties are defining. Generally, how the parents' specific responsibility to support the child be qualified as a legal civil obligation? Is there a basis for considering a child support contract as a legal civil contract? This is impossible.

In the mentioned situation, the contract for the receiver of the child support represents a guaranty and if needed it can be presented for immediate fulfillment without discussing this issue through long procedures at the court. In this case, we have means for realization of already existing rights and responsibilities.

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[40] *Puginskii B.I.,* Legal Civil Contract, Journal "Vetsnik Moskovskogo Universiteta, Law", #2, Ser.11, 2002, 56 (in Russian).

[41] *Puginskii B.I..,* Theory and Practice of Contract Regulation, Moscow, "Zertsalo", 2008, 68 (in Russian).

[42] *Jacovlev V.F.,* Legal Civil Contract and the Ways for Increasing Its Effectiveness, in Collection of Articles: Development of the Civil Law at the Modern Stage *Mozolin V.P.* (Ed.), Moscow, "Nauka", 1986, 139 (in Russian).

If in child support contract, the child support amount will be fixed and it will be agreed that the amount will be paid at once or periodically, then in this case we will be discussing and specifying not establishment or changing the rights and responsibilities, but the forms for paying the child support.

For fulfilling, breaching or annulling the child support contract, we have to use the norms of the Civil Code, which regulate the legal civil contracts, their fulfillment, breach or annulations.[43] Proceeding from this, at the first look, we may thing that child support contract is a legal civil contract. If a child support contract is a legal civil contract, then according to the Civil Code, the contract is made when the parties reach all the agreements about all essential conditions of this contract; especially regarding the subject of the contract and the contract is having the relevant formulation. But when making a contract on the child support, the parties do not define the subject of the contract – the child support, because it is already fixed by the law.

In this case, the amount of the child support, like the rule of the payment etc. is defined. If we assume that a child support contract is a legal civil contract, then proceeding from this assumption, the rights and responsibilities of the parties of the child support contract will be legal and civil ones. But this kind of approach will not be correct, because we give legal civil qualification to the child support contract due to its external resemblance. And for this reason, there appears the basis to consider the rights and responsibilities of the parties of the child support contract as legal civil rights and responsibilities. As a result, the specific responsibility of the parents to support their children, which is based on consanguinity and legal family relationships becomes legal civil relationship. And it is already a usual legal civil property responsibility, which is not different from the obligation of the debtor to return the amount to the creditor. This kind of approach will be wrong, from purely methodological position. The nature of the parents' responsibility towards the children is defined by the obligations of the parents and the rights of the children, connection of the parents and children and specifics of the child support relationship. In these relationships, the private and property relationships are interrelated. The property relationships between the parents and the children are based on the personal rights and obligation. With this regards, in case of this relationships, application of the civil contract contradicts the essence of the family relationships.

From all above mentioned, it is confirmed that the child support contract is not a legal civil contract. This is a bilateral legal family act (accord). If the party refuses to fulfill his responsibility, this act should give a guaranty for forcing to make payment without addressing the court. As for using some of the norms of the Civil Code for regulating the child support contract, this is a legal technical approach; it is the means for deciding the child support contract according to the model of a legal civil contract.

The child support agreement should be made in a written form and be approved by the notary. Legislations of some countries (Russia) directly indicate the legal form for making child support agreement: "the agreement should be made in a written form and be approved by the notary; if the legally established form is not complied, the agreement is null; the child support agreement, which

[43] *Pchelintseva L.M.,* Comments to the Family Code of Russian Federation, 3rd Edition, Moscow, "Norma", 2004, 408 (in Russian).

was approved by the notary takes the power of the execution paper for forcing to make the payment."[44] Some of the scientists, consider it necessary to have a child support agreement made in the form corresponding to the notary form, because "the subject of this agreement is the essential interests of the parties and it has to be made in the form which excludes the grounds for any doubts or inaccuracy."[45]

According to the existing information, in the Georgian notarial practice, there are no examples of notarial affirmation of child support agreement; during the agreement notary affirmation is made only for the signatures of the parents, which is not correct and factually creates no additional instrument for protection of the child's rights. Notarial form of the child support agreement enables to have the responsibilities fulfilled without any additional procedural complications, because with its legal power it is equal to the execution paper issued by the court. But the question which arises here is what will be the results, if the contract is annulled due to its incompliance to the notarial form? Certainly, the results of the agreement will be annulled and the initial situation restored. But it will be impossible to recover the amount, which has been paid as child support, because the means received from the child support are targeted to satisfy the needs for the receiver of the child support and this limits the possibility of returning back the child support.

The child support agreement has to be terminated if: one of the parties dies, the duration of the agreement finishes or other conditions which were considered by the agreement arrive. But is it not allowed that this circumstances put the child in the worse conditions compared to the period when the child support amount was recovered by the court. For this reason, compared to the child support amount recovered by the court, the grounds for terminating the child support agreement, if they deteriorate the conditions of the child, can be considered null, e.g. the reason for termination of the child support agreement cannot be omitting the music classes or sports activities without a faire reason.[46]

It is quite difficult to establish the degree of affecting the interests of the child in every concrete case: are their essentially affected or not. Apart from this, what should be considered as child's interests in every concrete situation? "The best interests" is a notion, which is influenced by cultural, economic and religious norms."[47] The basis should be the requirements of the law, which define conditions of payment, amount etc. by means of the court. The child support agreement should not include the conditions which contradict the legislation, which is makes basis for forcing to make payment of the child support by means of the court. The conditions of the child, which is receiving the child support based on an agreement, should not be worse then the conditions of the child which is receiving the child support based on the court decision, if their conditions are relatively the same. The

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[44] *Pchelintseva L.M.,* Comments to the Family Code of Russian Federation, 3rd Edition, Moscow, "Norma", 2004, 407 (in Russian).

[45] *Anatolskaya M.V.*, Family Law, Moscow, "Jurist", 2004, 239 (in Russian).

[46] *Muratova S.A.*, Family Law, Moscow, "Eksmo", 2005, 224 (in Russian).

[47] *Blair M.D., Weiner M.H., Stark B., Maldonado S.*, Family Law in the World Community: Cases, Materials, and Problems in Comparative and International Family Law, 2nd Ed., Durham, "Academic Pres Law Casebook Series", 2009, 394.

legislation should be indicating, that the conditions of the child support agreement will be null if: they do not correspond to the requirement of the court about forcing to make child support payment; if they deteriorate the living conditions of the child. In such case, there is no need to appeal to the court and prove the own requirements etc. If some of the conditions is null, the interested authorized body can address the court with complaint about the contract or a part of the contract (e.g. paying the child support entirely, paying the child support in the period of time defined by the law). If the conditions of the agreement do not put the receiving party in the worse situation compared to the one which they would have had if the court had taken the decision, but anyway the interests of the child are significantly affected, it is possible to appeal to the court for changing the relevant conditions.

The child support contract can be changed or annulled in the following way: the party which is interested in changing or annulling the agreement should inform the other party in a written form about the decision. If the other party refused to change or annul the agreement or if it does not reply within the time period mentioned in the agreement (if this time limited was not mentioned in the agreement, it will be defined by the law – approximately 30 days), the interested party is authorized to address the court about changing or annulling the child support agreement. In this case, the court will verify the grounds for changing or annulling the agreement. If the court decides that the changes will abase the child's interests, it will not satisfy the complaint. In this case the court is guided by the same criteria as when the child support is paid based on the decision of the court.

The child support agreement is an instrument for appealing to the court for forcing to make the payment. Therefore, payment of the child support by two ways – the court decision and child support agreement – cannot coexisting at the same time. This means that in case of an agreement, the parties should voluntarily or by means of the court break this agreement, wait for the court decision to enter into force and only after this address the court with the claim about payment the child support. This would be a long and complex process, while the financial means for supporting the child are always needed. The authorized person has the right to address the court after the obligor does not fulfill the agreement and only with the request to force the party fulfill the agreement. The complaint for receiving the child support will not be satisfied in this case. If the agreement abases the interests of one of the parties, it is possible to appeal to the court for changing it, revoking or annulling it. But the court will not satisfy the complaint until the agreement on receiving the child support is not annulled or revoked.

The interested party is authorized to appeal to the court with a complaint on changing or annulling the agreement, if the financial or family conditions of the parties have changed significantly and they could not reach an agreement without the court. But even in this case, changing or annulling the agreement should not be abasing child's conditions compare to the conditions would be established if the child support was paid based on the court decision.

For stimulating the responsibilities of the payer toward the child, the child support agreement may consider sanctions for the arrears, if they appear because of the payer.

The complainant should prove the fact of arrears, its amount and the total amount of the loss. The fault of the payer should be presumed in creation of the arrears. In the legal relationships, the party receiving the child support is a weak party and it is not permissible to burden them with proving

the fault of the payer. The payer should prove himself that arrears did not arise because of him. Any kind of guilt is enough for making the payer responsible – an intention or a negligence. If the payer of the child support cannot prove that he is not guilty, then the court will take the decision on recovering the compensation in favor of the receiver of the child support.

When introducing a complaint for the compensation of the loss, the complainant must prove the amount of loss and confirm it with corresponding proofs. According to the legislation, the loss are the expenses of the party, whose rights were violated. The following belongs to the costs of the loss: already existing and the future costs for recovering the violated rights; the cost related to the loss or the damage of property (actual loss); the income that he would have had if the child support had been paid in the proper way. Certainly, the loss will be compensated in case of the actual loss, but it is also possible to obtain the compensation for the profit that was missed; e.g. the receiver may put a part of the child support in the bank on his/her account and get the interest rate. Due to the arrears in child support, the receiver of the child support could not increase his/her amount to be introduced in the bank and lost a certain amount equal to the potential interest rate. This amount can be recovered as a compensation of the lost profit. The opponents of this approach think that the child support has its own purpose – to support the child. But this does not mean that the receiver should entirely spend the received amount and not use it according to his considerations – depositing, saving etc.

For compensating the loss the complainant must prove the link between the child support arrears and the loss. The guilt of the payer of the child support cannot be proved, it does not require presumption. The payer of the child support has to prove that he is not guilty. If there are all the conditions for the liability, the part of the loss which is not covered by the compensation will be reimbursed.

The international legal practice on child support is quite interesting. In Sweden, the parents, in the process of the divorce, are allowed to define the amount of the child support and "if they agree on it, the courts will simply confirm the statement of the parents." The parents also have the right to change the amount of the child support based on anew agreement "even when the initial amount of the child support was defined by the decision of the court." This does not mean that the court does not supervise the agreements made between the parents in Sweden. "The court has the right to change any unreasonable contract in the process of making it or generally, considering other circumstances."[48]

In England, unlike Sweden, the written agreements are less followed, as a rule. The contract on the child support agreement, which was not made effective by the decision of the court, cannot prevent "a party of the contract, or any other party, to appeal to the court for defining the child support." This is due to the fact that in the UK everyone approves the new approach to the confidentiality of the child support amount. e.g. the Minster of Labor named several reasons why the fathers prefer voluntarily to have confidential aspects in the child support agreement: "they think that they will reach a better agreement; they will pay less amount; they think that there will be less pressure on them in terms of

[48] *Blair M.D., WeinerM.H., Stark B., Maldonado S.*, Family Law in the World Community: Cases, Materials, and Problems in Comparative and International Family Law, 2nd Ed., Durham, "Academic Pres Law Casebook Series", 2009, 617.

taxation; and that they will be able to obtain the information, that the parent in charge of the child care will not have and this will give them a possibility to control that they pay."[49]

In the US, the amount of the child support mentioned in the agreement, as a rule is less, than the amount of the child support fixed by the court decision. "Many parents, who agree the amount of the child support, are not well aware of the relevant legal norms…In the court cases, and their number is obviously increasing, the advocate can be presented only from one side – or for one of the parents. In this circumstances, the resources of each of the parents and the attitude to the divorce can pay an important role in the results of defining the child support, which has very little in common with the results considered by the legislation."[50]

Based on the studies made in different countries, it can be concluded that child support contract increases fulfillment of the child support obligation. e.g. in Canada, the cases when the child support has not been paid for the last 6 month are more frequent when the decision between the parents paying the child support is made by a court decision between the parents compared to the parents who have made an agreement on the child support. Anne Corden and Daniel R. Meyer in their research made for 11 different countries, concluded that "the Scandinavian countries (which give priority the child support agreement) reach the highest level in terms of payment of the child support."[51]

Based on all above mentioned, it should be said that as the main objective of the Family Law is protection of the legal interests of the underage children, a child support agreement made between the parents is one of the legal mechanisms, which facilitates the use of the right for the child support by the children. For this reason, the norms that regulate the child support agreement have be precisely considered by the Georgian Family Law. This will assist settlement of the legal relationships among the parents and the children from the financial standpoint.

3. Child Support Fund

Establishment of the Child Support Fund signifies achieving though activities of the Fund awareness about the fundamental right a child (who is not living with his/her parents) to receive a child support. The state, by means of the Fund, directly assists the children to use compensations related to the child support with the help of their legal representatives and gives advice on the decisions about using this right. The persons having this type of responsibility are motivated to pay child support or arrange relationship with a legal representative of the child. The right to receive money from the Child Support Fund have underage children, which were entitled by the court to

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[49] *Blair M.D., WeinerM.H., Stark B., Maldonado S.*, Family Law in the World Community: Cases, Materials, and Problems in Comparative and International Family Law, 2nd Ed., Durham, "Academic Pres Law Casebook Series", 2009, 616.

[50] *Garrison M.*, The Goals and Limits of Child Support Policy, in Collection of Articles: Child Support: The Next Frontier', *Oldham J.T., Melli M.S.* (Eds.), "University of Michigan Press", 2000, 16.

[51] *Corden A., Meyer D. R.,* Child Support Policy Regimes in the United States, United Kingdom, and other Countries: Similar Issues, Different Approaches, University of Wisconsin–Madison Institute for Research on Poverty, Journal "Focus", Vol. 21, Number 1, 2000, 77, see webpage: <http://www.irp.wisc.edu/publications/focus/pdfs/foc211.pdf> [24.09.13].

receive the support, but it became impossible to get the payment. The mentioned type of the Funds are already created in different countries (Germany, Spain, Poland, Latvia, Republic of Slovenia) to strengthen care for the children (and the citizens of other categories). The draft laws are being prepared by other countries (e.g. Russia) on establishing Child Support Funds. Establishment of the Child Support Fund should be one of the most important priorities in Georgia, because it will be a strong supporting guaranty for protection of the children's rights and financial interest by the state. Proceeding from all above mentioned, the main concepts of the Child Support Fund should be elaborated. Based on them the draft law on "Child Support Fund" can be prepared.

3.1. Legal Status of Child Support Fund

Child Support Fund should be established as a Legal Entity of Public Law (LEPL), which will be subordinate of the Ministry of Justice and have an independent budget. The Fund must have a Supervisory Board. The members of the Supervisory Board will be representatives from the state institutions and local self government units. The sources of the financing of the Child Support Fund can be: a) the amounts allocated from the state budget; b) the money obtained from the obligors of child supports (when the Fund takes the place of a creditor after paying the compensation to the person authorized to receive the child support); and c) Voluntary donations, subsidies and grants, which have to be approved by the Supervisory Board or the Ministry of Justice, if the grant originates from a foreign country. The state should support and if needed, financially assist the Child Support Fund for two years after its establishment.

3.2. Preconditions Related to Receiving Child Support Compensation

The Law on the Activity of Child Support Fund should define the conditions that should be met for paying the compensation. The main objective of the Child Support Fund is to do good to children, which have been ignored because of unpaid child support and sometimes are left without minimum financial means. To avoid such attitude, the conditions for having the right to receive the compensations should be clearly defined.

The legal basis for paying the child support compensation is the judgment of the court, which entered into force and which is not fulfilled because the obligor does not pay or pays irregularly the amount of the child support. It should be mentioned that the compensation is not a new responsibility of the obligor, but the one which replaces the responsibility defined by the court judgment.

3.2.1. Citizenship or a Permanent Residence

The children which are Georgian citizens and permanently live in Georgia have the right to receive the compensation of the child support. This right can have also the children of other citizenships, if this is mentioned so in the bilateral agreement of the countries.

3.2.2. Age Limit

The right for child support compensation last until the child gets 18 year old adult. If the child is the person with limited capacities, then he/she will have this right even after reaching this age.

3.3. Child Support Compensation Record Register

The Child Support Fund should keep a Child Support Compensation Record Register for the its obligations and also for the statistical and the scientific purposes. Child Support Compensation Record Register contains the personal information of the legal representative of the child and the obligor of the child support.

Child Information Record Register includes: child's first name, last name; information about the birth; national registration number of the citizen; citizenship; general information about the family; the amount of the child support; employment; the information about educative institution where the child was allocated; the information about the payments of the child support during the last months, prior to application; the child support which was paid upon recognizing the right to receive the child support.

The Register of the Legal Representative includes: first name, last name; information about the birth; bank account number; saving account number or account of the non-resident foreign citizen; and mailing address.

The Register of the Child Support Obligor contains the following: the first name, last name; date of the birth; individual registration number of the citizen; address of the permanent residence; citizenship; general information about the family; employment; information about the income and the property.

The information needed for approving the application for the child support compensation– information about the child, legal representative of the applicant and the person obliged to pay the child support – is received directly from the applicant. The applicant should send the following data: the first name, last name, information about the birth; temporary or permanent place of residence and employment of the persons which is obliged to pay the child support. The collection of the other information is provided by the Child Support Fund based on the information given by the relevant institutions.

3.4. The Process of Receiving Child Support Compensation

The Process of Receiving Child Support Compensation starts based on an application. At the first level the Child Support Fund makes a decision about the right of receiving the compensation of the child support. The Child Support Fund independently carries out the court proceedings against the obligors to recover the money from the very beginning with the help of the advocates, which lead the case on behalf of the Child Support Fund and with its financing. The process of the recovering the money requires an economic approach to the means of the Child Support Fund, because the court hearings are related to the very big expenses. Child Support Fund presents a statement related to the

execution and claims with the assistance of the Child Support Fund staff. The representatives of the Child Support Fund quickly and effectively, through investigation, obtain the information related to the execution, which is needed for the statement.

By recovering the money through the court proceedings, the Child Support Fund is trying to recover the past amount and to reach the obligor so that he starts to pay. This mainly refers to the measures taken prior to the court proceedings for money recovery. These measures are: informing the obligors about the situation of their debts to make them aware about their obligation; and to force them start paying the debts and the child support.[52]

From the day of payment of the child support compensation, the Child Support Fund becomes a creditor of the obligor of the child support. The amount will be approximately equal to the paid compensation, which was increased by calculating the interest rate and also by adding the expenses of the court proceedings. The Child Support Fund should inform about this the obligor and present him the relevant documents as a proof.

When defining the amount of the child support compensation, they take into consideration the age of the child and the amount of the child support which was defined by the decision of the court. The amount of the child support compensations, as minimum, should satisfy the basic needs of the child. The child should obtain the right for the child support compensation according to the law - on the first day of the next month from the day of presenting the statement. The Child Support Fund should pay the compensation to the legal representative of the child before the 15th of the month.

The right for the child support compensation is terminated based on: the request of the legal representative of the child; the request of the person obliged to pay the child support, if he proves that all child supports were paid and that the child support was paid two month in advance or the financial means were deposited at the court in the favor of the child; the circumstances, which terminate the responsibility to pay the child support; not satisfying any more the conditions for having the right to receive the child support compensation.

4. Conclusion

As a conclusion, it can be said that the aim of new legal institutions – Child Support Agreement and Child Support Fund – is to minimize the impact of the damage made by the parent (with whom the child is not living) to the child by not paying the child support. The objective of the Child Support Fund is to influence the persons that are obliged to pay the child support, but are not paying pay it and are still trying to avoid payment of the agreed and defined support to their children. The purpose of the Child Support Fund is ensure that the children, who suffer the most from unpaid supports, receive the assistance.[53] Considering the responsibilities under UN Convention on the Rights of the Children and also recognizing the fact that as the children suffer the most in poverty and it violates their human

[52] *Rijavec V., Krajic S.*, The Maintenance of Children: Alimony Fund as the Saving Grace?, in Collection of Articles: Family Finances, *Verschraegen B*. (Ed.), Vienna, "Jan Sramek Verlag", 2009, 653.

[53] Ibid.,655.

rights, supporting the children should be a priority in the countries where the state budget can finance numerous projects and solve the problem. The countries may face a dilemma and make an unpopular choice between the state and the child's best interests. But this should be reviewed more like an additional measure; and by making a choice only in child's favor the state can effectively recognize its entire responsibility of fulfilling the obligation to support.[54] Proceeding from all above mentioned, the discussed legal institutes of Child Support Accord and Child Support Fund may become very importance protection mechanisms for ensuring payment of child support and facilitate protection of the children rights and legal interests in Georgia.

[54] *Farrugia R.,* State Responsibility in Enforcing Maintenance Obligations toward Children, in Collection of Articles: Family Finances, *Verschraegen B*.(Ed.), Vienna, "Jan Sramek Verlag", 2009,84.

Guram Nachkepia*

Methodological Problem of Grounding Accessorial Guilt of Participators to the Crime

1. Introduction

Participation in the crime is a complex, comprehensive problem requiring a multilateral scientific approach. At this time we intend to focus on the problem of accessorial guilt of participators in the crime. The point is that responsibility philosophically first of all is positive, when a person's attends to his normative duties with responsibility, i.e. with inner readiness to perform his duties. Unfortunately criminalists understand responsibility with a negative aspect as a negative reaction of the state in relation to the crime that has already been committed, so the ground of responsibility understood in such a way has been vague up to now. It is natural, because how will we know the purpose and ground of a negative aspect, when we don't know the purpose and ground of a positive aspect? As it is seen here arises **a rule of dialectical thinking, according to which a negative aspect, as a second side of a positive one, requires ascertainment of a positive aspect and coming out from it.**

In Russian juridical literature, as a rule, a basis of a negative responsibility is thought to be a crime or component elements of the crime. According to first part of Article 7 of criminal code of Georgia the basis of criminal responsibility is a crime. It is true that Article 7 of criminal code of Georgia envisages the German model of the concept of crime (by unifying of the composition of the act, unlawfulness of this act and the committer's guilt), but in the question of criminal responsibility basis it shares the Russian tradition.

In paragraph 29 of criminal code of Federal Republic of Germany it is said that in case of several participators in the crime each committer is punished by their own guilt. On the basis of this fact in German juridical literature there is acknowledged so called accessorial guilt of participators in the crime, according to which a participant in the act is punished according to his/her own guilt without considering other participator's guilt**. Being logically consequent guilt must be considered to be the basis of criminal responsibility and then so logically arises a problem of accessorial guilt of participators to the crime**. Though limited accessory is sometimes confined when saying that this principle does not exempt us from demand of the "intended" act, as "punishable by the rule of criminal law is only the intended participation in the unlawful act".[1] According to some German

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criminalists the precondition of the attitude to punish ability of participators for the main act is the fact that there are crime excluding and mitigating circumstances.[2]

According to Klaus Roxin the practical importance of the limited accessory principle is not big, as in the process of acting without guilt there can be occurred criminal insanity or other circumstances which exclude participation in the crime and create only the possibility of execution of the crime.[3] Though it is seen that a concept of limited accessory in German legislation and theory has a different meaning, namely it might be that a special actor, who by his position can only be an executor of the given composition of the crime, is acting without guilt, but a person inducing or helping him to fulfill the crime, must not be left unpunished.[4]

2. Problem Setting

In Georgian juridical literature there is a common idea that the foundation of punishment of participators in the crime is the integrated wrongness (or unity of the constituent elements of the crime and unlawfulness of the act), but in the sphere of guiltiness one participator's guilt is not shared with the other participator's guilt (it means that there is no accessorial guilt).[5] This idea is also peculiarly grounded by Doctor of law Merab Turava. According to him in discussing the participation in the crime the wrongness must be united, though sometimes constituent elements of the crime might be different. For example, mother killing her newborn child immediately after delivery, must answer for her action as an actor of the act composition according to Article 112 of criminal code of Georgia, while sister, inciting intention in mother to kill her child must answer for her action according to subparagraph "B" of part 2 of Article 109 of criminal code of Georgia (i.e. murder of an under age or a helpless being with preliminary intention).[6]M

This example with the author's comment on it is very interesting from several points of view. First of all, it is right that on this example the wrongness of the murder is carried out, but the constituent elements of murder are different. Second, by viewpoint of the problem set in our article **it is obvious that in this case there is unity of guilt (intention) of the inciter of the murder of the newborn child and the actor, however with different grade. In this case the inciter's guilt is more than the actor's.** It is surprising why this elementary fact becomes such a tangled problem.

Of course there is not excluded a case, when, as Roxin says, a personal defect excluding the actor's guilt was not known from the very start.[7] But here the inciter's mistake appears, when she thought that she was encouraging the sane person to commit a crime, but the latter turned out to be

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1 *Vesels I*., *Boilke V*., General Part of Criminal Law, Guilt and Its Composition, TSU, 2010, 317 (Translation into Georgian by *Arsenishvili Z*., scientific editor of the Georgian edition by *Dvalidze Ir*.)

2 *Iescheck H.H*., Lehrbuch des Strafechts, Allgemeiner Teil, Berlin, 1998, 598.

3 *Roxin C*., Strafrecht, Allgemeiner Teil, Band 2, Munchen, 2003, 138.

4 For more details about it see *Mchedlishvili*– Hedrich *K*., Criminal Law, General Part, Individual Forms of Revealing a Crime, Tbilisi, 2011, 206 (in Georgian).

5 *Gamkrelidze O*., Criminal Wrongness and Basis of Punish Ability of Participators, Tbilisi,1989 (in Georgian).

6 *Turava M*., Criminal Law, Review of General Part, Edition II, Tbilisi, 2010, 179 (in Georgian).

7 *Roxin K*., the Mentioned Work, 138.

insane. If having been encouraged by this mistake the insane really committed any constituent element of the act, then there is direct execution of crime by her, but in case of a special actor such execution can't be taken into account and it is necessary to use limited accessory. For this reason limited accessory can't be denied or neglected but very big importance can't be given to it either. Hence we can't deny co-accusation of participators in the crime and as in this matter mixing of guilt and negative responsibility appears, we shall discuss this question a little later.

3. Legislative Concept of Participation in a Crime

According to Article 23 of criminal code of Georgia participation in a crime means intentional joint partaking of two or more people in committing an intentional crime. As it is seen the term "intention" is twice used here. In our opinion it is not accidental. First, intention is one of the forms of guilt, while most of our German colleagues seriously doubt about it (even more – finalism and its successors); second, careless participation in the crime is impossible, because the essential peculiarity of carelessness, as a form of guilt, is that the committer's attitude to a carefulness norm is strictly personal; third, participation in the careless crime isn't possible either.

In our opinion **in case of intention, as a form of guilt, the term "accomplice" is quite logic, but "accomplice" is the synonym of "co-accusation" though guilt and its form are not the same**.

4. Problem of Mixing of Guilt and Negative Responsibility

A question is: Is co-accusation of participators denied or neglected because of being confused guilt with negative responsibility? In criminal literature it is often proved that guilt is personal blaming Responsibility for the already committed criminal action is strictly personal. It comes out that negative responsibility and guilt is one and the same thing! That's probably a reason of considering guilt to be an abstract blame or is blameworthy, while guilt is really a basis of negative responsibility. Though a careful guilt is strictly personal, it does not exclude interrelation here between a guilt and negative responsibility, as here guilt is again a basis of negative responsibility. Moreover court is obliged to state whether the act was committed by self-assertion or by reckless participation.

So intention as a form of guilt is not strictly personal, but it is a basis of accessorial guilt. Each participator in the accessorial guilt answers not for the other participator's guilt, but for the character and degree of his/her own guilt. Hence the following question is to be stated: is joint guilt of participators in the crime a basis of the personal responsibility of each of them? A final answer to this question will be given in the main part of the work.

5. Problem of Participators' Intention Unity in a Crime

A famous Russian criminalist N. Tagantsev acknowledged the intention unity of participators in a crime, which according to him is based on the agreement, as a joint participation condition.[8] Of

[8] *Tagantsev N.S.*, Russian Criminal Law, General Part, Vol. 1, Tula, 2001, 578 (in Russian).

course there might be an agreement between the participators, but joint participation can be carried out without a preliminary agreement, when one person joins the other person's criminal act before the latter's act has been finished.

But in the author's conception the main thing is the principle of joint responsibility established by the unity of guilt of participators. The author emphasized that the joint responsibility of participators in a crime is established from the objective point of view by causation between participators' acts and a culpable result and from the subjective point of view by joint guiltiness in kind of intention unity, i.e. responsibility of all participators for one of them and on the contrary one's responsibility for all the others.[9] On the basis of it the author concludes that "each participator must be guilty and joint guilty at the same time".[10]

But Tagantsev is not confined to this general reasoning, namely according to him, although the joint responsibility is established by the unity of criminal action and guilt, it does not exclude the individual difference existed between the participators. A very interesting is that Tagantsev is discussing this question rather an aesthetician (art critic) than a lawyer. Namely it is clear that in the participation there should be noted "life criminal drama as expressing life on the stage that demands a proper performance, acting of all the personnel with differences between the main and support roles". On this basis the author concluded that questions concerning the types of participators, their characteristic features, responsibility conditions and others make up "the most important part of the theory of the participation".[11]G

So N. Tagantsev on one side acknowledges joint guiltiness of participators in a crime, which according to him is the basis of the joint responsibility, but on the other side he does not deny at all the different forms of participation in the crime, main or minor character of the role performed by each participator and other individual features of the participators, which make up preconditions of their personal responsibility. Hence principle of joint responsibility of participators in a crime is only external and does not express a strict personal nature of negative responsibility.

Professor T. Tsereteli recognized the unity of intention in a crime; denied as reckless participation as well as participation in a reckless crime and was asserting "that joint participation is not admissible when there are different forms of guiltiness."[12]

6. Idea of Criminal Relation because of Avoiding a Crime and Its Methodological Importance

The idea of criminal relation because of committing a crime, as a rule, dominated in the former Soviet Union and is dominating in contemporary Russian Federation too. Here it is often proved that "criminal norms are oriented on a person, who committed a crime."[13] Hence it follows logically that:

[9] *Tagantsev N.S.*, Russian Criminal Law, General Part, Vol. 1, Tula, 2001, 573 (in Russian).
[10] Ibid., 577.
[11] Ibid., 583.
[12] *Tsereteli T.*, Problems of Criminal Law, Tbilisi, Vol. 2, 2007, 37(in Georgian).
[13] Criminal Law, General Part, Moscow, 1997, 65 (in Russian).

first, responsibility in criminal law is only negative, i.e. it is possible because of committing a crime; second, it appears that the basis of criminal responsibility is a crime and third, from this position an idea of positive responsibility is excluded.

The same conclusion is coming out from the German tradition, because here, as a rule, it is admitted that a crime is already committed, if there is carried out crime composition provided for by criminal code and at the same time there are not circumstances excluding wrongfulness and guiltiness of the crime committer. As a crime here is counted to be committed because of the above mentioned circumstances, **the idea of unity of criminal relation and positive responsibility to this tradition is essentially inconsistent because of avoiding crimes**.

We have been thinking for a long time and often in this or that context we have to repeat that a criminal norm request are directed to the criminal offender, who is obliged to act lawfully and take this lawful obligation with responsibility, i.e. with inner readiness to perform this obligation. The correctness of this regulation is confirmed by the III part of Article I of criminal code of Georgia, according to which the objective of criminal code of Georgia is "to avoid criminal encroachment and to observe legal rules." So criminality is established not because of committing a crime, but on the contrary, because of avoiding crimes. From the moment that criminal law enters into force a person of criminal law is imposed responsibility of lawful action, expressing objective, normative relation of the person with the state but the person's responsiveness in relation to the lawful obligation is a sign of subjective connection of the person with the state.

Committing a crime by its origin takes its start by breaking a subjective connection with the state, or when a person is irresponsive to the obligation of legal act, breaches this obligation and finally carries out the act composition provided for by criminal law. The qualification of the committed act is begun in reverse: at the first stage the act composition must be established, at the second stage - wrongfulness of this act and at the third stage - person's guilt.

It is obvious that at the moment of establishing the person's guilt, a negative responsibility will be inevitably emerged and the basis of this responsibility is guilt.

7. Guilt as a Connection Form between Positive and Negative Aspects of Responsibility

Traditional theories of guilt are built by isolating them from a philosophical category of responsibility. By reason of it there has not been recognized yet the fact that guilt is not a psychic relation of the person to his/her act and its results (psychological theory of crime) or abstract blaming of the person or blameworthy (normative theory of guilt**), but it is a form of connection between positive and negative aspects of responsibility**. It's true that a negative responsibility is not created, while a person is attending to his/her duties with responsibility. Such responsibility will only be created when a person attends to his/her duties irresponsibly, which is a synonym to guilt and therefore a basis of a negative responsibility. As positive and negative aspects are both answerable, they are not excluding each other; on the contrary, they are implying each other. However a question is: how are they connected with each other? **We think that connection between them must be**

created by a "third" party, which because of denying or neglecting positive responsibility does not represent responsibility by itself; on the contrary it implies irresponsibility of the person and this irresponsibility establishes a negative responsibility in its turn.

So the term "irresponsibility" implies a form of connection between positive and negative aspects of responsibility and denotes a category of guilt. Here it is obvious a categorical nature of guilt, **as guilt is a synonym of the person's irresponsibility, as a subjective cause of committing an amoral, illegal act.** Instead of being responsible for his duties the person behaved irresponsibly, when a person consciously is either denying positive responsibility charged him/her with and so is acting with an intended form of guilt, or is neglecting this positive responsibility and so is acting recklessly.[14]

Guilt as a synonym of irresponsibility of a person is a category of social philosophy and is specifically exposed in accordance with normative systems of society (morality, religion, justice and others). In short we can say that **guilt in criminal law is an irresponsible attitude of a person to his/her obligation of legal act stated by a norm of criminal law or carefulness, which is expressed by carrying out illegally an act composition provided for by criminal code**.

8. Comparison Analysis of Positive and Negative Aspects of Responsibility

A positive aspect of responsibility, as it expresses a person's responsive attitude to the normatively stated obligation, can be not only personal, but collective too, when two or more persons are acting jointly in consent responsibly. Negative responsibility with objective circumstances of the act is established by the character and degree of the person's guilt and hence it is strictly personal.

To strengthen this discussion we intend to discuss literature about social responsibility in short. Here we purposely are naming the work, published even in 1981 and so Soviet criminalists could also use the ideas developed in it. Here is meant an interesting work by A. Plokhotni, in which the idea of positive responsibility was quite convincingly expressed. The author quite correctly was noting that a specific of social responsibility was being absolutized in accordance with the specifics of morality or law. It means that more general problematic of responsibility was not interpreted properly, but the author, on the contrary, was correctly emphasizing the importance of philosophical analysis of responsibility.[15]

According to the author a new category has the right to exist independently when it expresses a social reality in a new and essential aspect and "social responsibility is one of the expressions of interrelation and dependence of a person and society. Responsibility is established because these relations have contradictory character."[16] It is clarified that in these circumstances persons' acts can be "socially responsible and socially irresponsible."[17] GG

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[14] *Nachkepia G*., Guilt as a Category of Social Philosophy, Tbilisi, 2001; by him also: Criminal Law, General Part, Textbook, Tbilisi, 2011, 426 (in Georgian).

[15] *Plokhotni A.F*., Problem of Social Responsibility, Kharkov, 1981, 5 (in Russian).

[16] Ibid., 6.

[17] Ibid., 9.

So persons' acts can be responsible as well as irresponsible. There is a following question: is group irresponsibility possible?

According to the author group consciousness is occurred on the basis of direct joining this group, common interests and goals; "collective mind, collective will, collective emotions are characterrized by group responsibility, group members should perceive each other adequately."[18]

Very interesting is the author's assertion, that "collective responsibility includes identification ability in oneself, stating own equality with the whole group, which is the necessary condition for self-consciousness."[19] Even more interesting is the author's assertion that making a responsible decision is always connected with emotional experience and is characterized by psychical condition with all its peculiarities. Responsibility is reflected in such emotional condition, as: restlessness, worrying, alarm, inquietude, doubt and etc.[20]

And finally from the viewpoint of our problem we should mention the author's following statement: "One might be responsible, when one acts in the group according to the rules adopted in the group and might be irresponsible being in consent with the group."[21]

It is obvious that on one side there is a talk about positive responsibility, when every member of the group in consent with each other is acting according to the rules of behavior accepted in the society, but on the other side the group with joint agreement, consciousness and decision might be irresponsible, or blameful. But in spite of the fact that two or more persons might be acting collectively on purpose or there might be a collective blame, yet negative responsibility is strictly personal.

So the term "collective responsibility" with its positive aspect is establishing the term "collective responsibility", which is a sign of collective guilt, however here intention is meant as a form of guilt. **So intention, as a form of guilt, is a sign of joint guiltiness of participators in the crime**.

So responsibility is one independent category, a phenomenon having positive and negative aspects. These aspects are not contrary to each other, as it is at a glance, they are implying each other, as both of them are responsibility. **Here contradicting are not responsibility aspects, but responsibility with its positive aspect and irresponsibility, as conscious denial of positive responsibility, which as it was already mentioned, is a sign of intention, as a form of guilt, or neglecting of it, expressed by reckless form of guilt.**

The difference between these two aspects of responsibility: positive responsibility is meant for the future, as the person's responsible attitude to the obligations normatively stated in the present excludes his negative responsibility in the future; negative responsibility is a negative reaction on the irresponsible act committed in the past, so that to return the person to positive responsibility; positive responsibility might be collective even when negative responsibility is strictly personal; the basis of positive responsibility is freedom, but of negative – guilt. The objective of punishment is overcoming gradually the results of guilt, as a synonym of irresponsibility, and restoration of the person's positive responsibility (II part of Article 39 of Criminal Code of Georgia).

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[18] *Plokhotni A.F.*, Problem of Social Responsibility, Kharkov, 1981, 139 (in Russian).
[19] Ibid., 141.
[20] Ibid., 135.
[21] Ibid., 141.

Unfortunately in the Soviet criminal literature it was not correctly understood an issue that responsibility is a philosophical problem and not a problem of juridical science. For example F. Fatkulin wrote, that "criminal responsibility is one of the basic problems of juridical science."[22] "Responsibility" is really a category of social philosophy, which in criminal law is a methodological ground for research of specific exposure of responsibility. Unfortunately the result of neglecting such methodology is that there is not an idea of positive responsibility in this sphere, responsibility is only negative and positive responsibility does not exist in this sphere.[23]

Unfortunately the author proves cardinally different thing, contrasting to reality. According to him "at the moment of committing a crime and as soon as the crime is committed, a special psychological state arises – responsibility state of guilty, comprising intellectual, emotional characteristics."[24]

In our opinion because of committing a crime there is established a certain state of **irresponsibility**, because a guilt is an irresponsibility act of the person, which will be ceased by an act of bringing the person to justice and be confirmed by verdict of guilty.

So without an idea of positive responsibility a problem of blaming will not be solved correctly and in such circumstances a problem of joint participation in a crime will not be solved either. For example Professor O. Gamkrelidze in making comment concerning Article 25 of Criminal Code of Georgia is correctly emphasizing the effect of subjective moment (e.g. mercenary motive) on the grade of guilt,[25] but somehow is not putting a question: is there guilt-sharing or not? Though the author in one of his works gave a negative answer to this question, when he said that if wrongfulness is objective, "guilt is personal, a private category."[26]

If guilt is really a personal, private category, the gilt between the participators in the crime is not shared and therefore there is not joint-guiltiness.

It appears from the above that guilt is so personal as negative responsibility. The same idea belongs to M.Turava. According to him "guilt is individual and not collective blaming."[27]

The circumstance that in the committed illegal act guilt is stated by judge (court) does not cause argument, but quite often the impression is that guilt is created by judge. This issue has been repeatedly discussed in criticizing "finalism", when intention and recklessness were considered to be psychic elements of the act, instead of considering them as forms of guilt. If there is not a guilt form, as Lasha-Giorgi Kutalia was noting correctly, we will have to confess a formless content and a form without content.[28]

So judge does no create a guilt, he states a guilt in subjective and objective structure of illegal act provided for by criminal law. From the objective point of view united wrongfulness (composition of the

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22 *Fatkulin F.*, Accusation and Court Sentence, Kazan, 1965, 9 (in Russian).

23 *Banin V.F.*, Gnosiological and Legal Nature of Ultimate Fact in the Soviet Criminal Law, Ufa, 1975, 87 (in Russian).

24 Ibid., 91.

25 *Gamkrelidze O.*, Explanation of Criminal Code of Georgia, Tbilisi, 2005, 199 (in Georgian).

26 *Gamkrelidze O.*, For the Issue of Subjective Signs of Wrongfulness, Journal "Matsne", Series of Economics and Law, #2, 1983, 83(in Georgian).

27 *Turava M.*, General Part of Criminal Law, 405(in Georgian).

28 *Kutalia L.G.*, Guilt in Criminal Law, Tbilisi, 2000, 529 (in Georgian).

act and its wrongfulness) does not cause argument, but we think that for subjective element of wrongfulness it is not enough to consider only intention. For example, according to Criminal Code of Georgia wrongfulness of murder (Articles 108-114) is carried out only purposely. Hence wrongfulness of murder without intention, as a specific form of guilt will not be carried out. On the basis of it participation of two or more persons in carrying out any composition of murder means that **here the unity of intention must not cause dispute. It is natural, because from the subjective side the united intention corresponds to the united objective wrongfulness of murder committed by participation. As intention is a form of guilt, it is natural to conclude that wrongfulness is carried out in the circumstance of joint guilt.** If carrying out the united wrongfulness in participation in a crime means that all the participators breach their legal obligation, therefore they breach an objective, normative connection with the state, established between the state and addresses of criminal law norm from the moment of entering the criminal law into force. But a question is: is there a subjective connection of addresses of criminal law norm with the state? Those denying joint guilt in participation in a crime will give a negative answer to this question, but quite hard is to imagine a society, in which people are only charged with obligations, but they are not responsible for these obligations (or do not have subjective connection with the state). If it were so, firstly we must have said that a person does not have a feeling of responsibility, when on the contrary, man of proper age and normal psychic cannot be imagined without the proper feeling of responsibility; secondly we would have known what wrongfulness is, but would not have known guilt as a synonym of irresponsibility, **as irresponsible attitude of a person to the obligation of lawful act, exposed in a form of intention or recklessness**.

Considering that every person participating in a crime on one side recognizes that he/she is participating in committing a crime with the others and also recognizes his/her own, as personal call to be responsible to the obligation of lawful act and on the other side being a person of sound mind (on the opposite of Articles 33-34 of Criminal Code of Georgia) is able to manage his/her own action or to be responsible to this obligation, **then a conscious irresponsibility of each one in the joint unlawful act must not cause a dispute. In a different way there is also the unity of intention, as a form of guilt.** As intention is one of the forms of guilt, it is a basis of proving joint guilt of participators in a crime. A different question is personal responsibility of each participator, which depends on many circumstances of the crime and persons committing the crime.

According to I part of Article 25 of Criminal Code of Georgia each participator answers for his/her own guilt on the basis of the united unlawful act considering nature and degree of each participator's crime. It is natural to point to various degrees of guilt, but how will we talk of more or less guilt of participators without joint guilt? Degree of guilt, as a certain singularity, is a quantitative side of a crime, but the concept of degree of guilt will not exhaust a problem of participators' guilt, namely **we should take into account nature of the guilt too,** more over the nature of guilt in an individual act differs from the nature of guilt in participation in a crime. Particular social danger of participation will not only be exhausted by carrying out the united wrongfulness, but the united irresponsibility of participators in the crime also draws attention.

9. Conclusion

So the nature and degree of participation in a crime, which from the objective point of view express each participant's different role and activity, from the subjective point of view are revealed in the nature and degree of guilt. The degree of guilt expresses the extent of the person's irresponsibility to the crime, as to the obligation of lawful act.[29] It's clear that without joint guilt of participators or without the united guilt it is impossible to say that one participator has more guilt than the other one. If guilt is strictly personal, moreover it is expressed in the form of intention, one participator's guilt cannot be compared with the other participator's guilt and so the concept of guilt degree loses its basis.

On this basis it is reasonable to talk also about the extent of irresponsible attitude of the person to the obligatory of lawful act, when participators in a crime answer not only for carrying out wrongfulness according to their different roles and intensity, but according to different character and degree of individual crime.

[29] *Nachkepia G*., Criminal Law, Textbook, General Part, Tbilisi, 2011, 414 (in Georgian).

Joseph Vardzelashvili*

Interrelation Problem of Qualification of an Act as a Crime and Objectives of the Punishment

1. Introduction

Qualification of an act as a crime and objectives of the punishment can be comprehended in the institute of punishment. Despite the difference existed between the qualification of an act as a crime and the objectives of the punishment there is a close connection between them. In order to use a punishment an act must be qualified as a crime. One of the pre-conditions for imposing a just punishment is a right qualification of the act as a crime. For the fulfillment of the punishment objectives really it is necessary to give the right criminal judgment to the act. It is logical that first of all the acts is qualified and then the punishment is imposed. The qualification of the act as a crime is done first at the investigation stage and afterwards when passing sentence by court, but the imposition of the punishment is only a prerogative of a justice organ – court. In case of giving the wrong criminal judgment to the act, the imposed punishment will not be fair and the objectives of the punishment will be left unfulfilled. So there is a logical connection between the qualification of the act as a crime and the objectives of the punishment.

2. Analysis of Court Practice

Before talking of the interrelation of the qualification of the act as a crime and the objectives of the punishment directly I would like to focus upon a concept of the qualification of the act as a crime. In the criminal law literature there can be found a concept of a crime qualification, as well as a concept of qualification of an act as a crime. For example, Professor Guram Nachkepia thinks, that the qualification of a crime is not right and instead of it we should use the qualification of an act. He writes: "The term "the qualification of a crime" is senseless, because if the act is a crime, it does not need the qualification once again. It is clear that from this traditional term it is impossible to derive a concept of the qualification of the action as a crime, namely it means that "the qualification of a crime" will be the qualification of a crime, i.e the qualification of the act qualified as a crime.[1]

One of the most important regulations of criminal law is that the act committed by a person must be qualified precisely. In juridical literature there are different definitions of the concept of the

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1 *Nachkepia G.*, General Theory of Qualification of an Act as a Crime, Tbilisi, 2010, 11 (in Georgian).

qualification of a crime. The main point of this concept is that the qualification of a crime is to state the accordance of a certain act with the signs of offence provided by criminal law.[2]

The purpose of the work is to discuss the qualification of the act as a crime only in connection with the objectives of the punishment, but for the discussion of the mentioned problem an extensive judgment is needed.

As it was already noted, the qualification of the act as a crime is carried out first at the investigation stage and afterwards when passing a sentence of guilty by court. As for the restoration of justice, as one of the objectives of the punishment, it is performed after stating of sentence. The restoration of justice means that the imposed punishment must be corresponding to the personality of a convict and the gravity of the crime committed by him/her. The restoration of justice, as one of the objectives of the punishment, can be achieved by the imposition of a fair punishment, but the precondition for imposing the fair punishment is the right qualification of the act as a crime. As it is seen there is a logical connection between the qualification of the act as a crime and the restoration of justice. For example, if a person committed the action of stealing and this action was qualified as robbery and the punishment was imposed for the mentioned crime, the restoration of justice, as one of the objectives of the punishment, will not be achieved, because the punishment is unfair.

Professor Guram Nachkepia says: "It is impossible to state a lawful, fair and thoroughly justified sentence of guilty without the right assessment of the committed criminal act and ascertainment of the truth on this criminal case. But for this very important practical activity it is necessary to perform the theoretical-methodological study of this issue, in other words to develop a general theory of qualification of the act as a crime."[3]

The wrong qualification of the crime breaks not only the principle of legality, but principles of justice, personal and blaming responsibilities as well. The objectives of the punishment, its individualization and justice can be reached only when the right qualification is given to the punishment.[4]

Studying of court practice shows that judges sometimes make mistakes when qualifying an action as a crime that has an influence on imposing a punishment.

By sentence of regional court of Mtskheta dated on the 20th of April, 2010, K.E. was found guilty according to subparagraph "B" of part 2 of Article 180 of criminal code of Georgia and subparagraph "C" of part 3 of the same Article (swindling that caused considerable damages and many times) and the kind and size of his punishment was defined the deprivation of liberty for 7 years.[5]

By materials of the case it is stated that K.E. had been serving his sentence for a grave offence and was released conditionally before his time on the 6th of September, 2002. According to subparagraph "D" of part 3 of Article 79 of criminal code of Georgia the conviction for a grave offence will be annulled after six years from serving a sentence and according to part 4 of the same Article if a convict is released before finishing his term according to the rule stated by law, the

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2 A Private Part of Criminal Law, Book I, *Mamulashvili G.* (Ed.), 2011, 16-17 (in Georgian).

3 *Nachkepia G.,* Criminal Law, General Part, Tbilisi, 2011, 157 (in Georgian).

4 A Private Part of Criminal Law, Book I, *Mamulashvili G.* (Ed.), 2011, 20 (in Georgian).

5 The sentence is available in the court archive.

conviction annulment time will be defined from the factually served term by the convict for the offence. So a six-year term of conviction for a grave offence expired on the 6th of September, 2008. According to the materials of the case K.E. committed a crime again on the 14th of September, 2009. At the time of committing a new crime E.K. had his conviction annulled. According to part 6 of Article 79 of criminal code of Georgia when an action is qualified as a crime the annulled conviction is not taken into consideration. Hence K.E.'s action was not correctly qualified by court as swindling committed many times according to "C" subparagraph of part 3 of Article 180 of criminal code of Georgia, because for the previous offence he had his conviction annulled. So this act was not correctly qualified as swindling committed many times and the punishment was not also correctly set within the sanction envisaged by subparagraph "C" of part 3 of Article 180 of criminal code of Georgia. On the basis of the above mentioned K.E.'s act must have been qualified by subparagraph "B" of part 2 of Article 180 of criminal code of Georgia as swindling having caused significant damage, which is punished by imprisonment for from four to seven years, but by subparagraph "C" of part 3 of the same Article – swindling committed many times is punished by imprisonment for from six to nine years. Accordingly within the sanction envisaged by subparagraph "C" of part 3 of Article 180 of criminal code of Georgia the punishment by deprivation of freedom for 7 years passed by court must not be fair. So the incorrect qualification of the act as a crime was followed by passing an unfair punishment that, as I think, impedes the real fulfillment of the objectives of the punishment. If the imposed punishment is not fair, the objectives such as the restoration of justice and re-socialization of the criminal can't be carried out.

How to qualify an act committed by a person and how to determine a penalty, when there are different aggravating circumstances in one Article? In connection with the above mentioned there is not a common approach in criminal theory, as well as in court practice. For example, Professor Guram Nachkepia says: "If a person committed stealing simultaneously with considerable damages and at the same time by breaking-in into a flat, a premise or a store-house, his act must be qualified in accordance with parts two and three of Article 177. It means that there is the whole complex of crimes, but what about the fact that stealing is one crime?"[6]

Part 1 of Article 137 of criminal code of Georgia is a general composition of the act and by this reason it must not be qualified by combining it with the compositions described by parts 2, 3, 4 or 5 of the same Article. Only compositions described by parts 2, 3, 4 or 5 of Article 137 can be qualified by the complex. In spite of this fact there are mistakes in court practice, for example by the verdict of the board of criminal cases of Tbilisi district court, dated on the 27th of May, 2002, U. N. was sentenced to five-year imprisonment according to part 1 and subparagraph "B" of part 3 of Article 137. This verdict remained unchanged by the decision of the Supreme Court Chamber of criminal cases, dated on the 22nd of July, 2002. Court had qualified I. N's action incorrectly by part I of Article 137, because it includes a general composition of the act and it must not be combined with a special composition.[7]

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6 *Nachkepia G*., Introduction to General Theory of Qualification of an Act as a Crime, Part I, Tbilisi, 2000, 84 (in Georgian).

7 *Gamkrelidze O*., Comments on Court Practice of Criminal Law, Crime Against Man, Tbilisi, 2008, 30 (in Georgian).

In connection with the above mentioned question Professor Merab Turava is reasoning correctly. He writes: "In connection with imposing a punishment there must be noted one circumstance. If an action committed by a person is qualified by parts 2 and 3 of Article 178 of criminal code of Georgia, one punishment must be imposed on the person and not separate punishments by part 2 and part 3. In such a case there must not be used either a principle of collection of punishments stated by Article 59, because the following principle is functioning here – one punishment for one act!"[8]

By verdict of regional court of Gurjaani dated on the 13th of June, 2006 G. Tevdorashvili was found guilty and was sentenced: by subparagraph "B" of part 2 of Article 177 of criminal code of Georgia (theft by breaking-in into the premise or other store-house) to five-year imprisonment, by subparagraph "C" of part 4 of Article 177 (theft committed by him, who was accused two or more times for misappropriation of somebody else's things or for extortion) - eight-year imprisonment and the punishment was determined by summation of the crimes.[9]

I think that court qualified G. Tevdorashvili's act incorrectly by subparagraph "B" of part 2 of Article 177 of criminal code and subparagraph "C" of part 4 of the same Article and accordingly the punishment was imposed incorrectly. Court should have imposed a punishment on G.Tevdorashvili only by subparagraph "C" of part 4 of Article 177 of criminal code, because part 4 of Article 177 includes parts 2 and 3 of the same Article. Every part of Article 177 of criminal code, including also part 4, starts with the following words: "The same act committed". Accordingly every next part includes the previous part.

Part I of Article 177 is a general norm, which includes all cases of theft. As for acts envisaged by parts 2 and 3 of this Article they are special cases. Hence the question must be solved according to the rule of relation of "general and special norms."[10]

Every next aggravating circumstance absorbs the previous one and not only part one, as a main composition. For this reason it is not necessary qualification of the act by combining parts, though in formulating an accusation all the qualifying circumstances must be fixed.[11]

The committed act, which includes a crime envisaged by several parts of Article 177 of criminal code of Georgia, must be qualified and a punishment must be determined by the gravest part of Article 177.[12]

In the discussed case because of the wrong qualification of the act the punishment was imposed on G. Tevdorashvili incorrectly by combining of the crimes. So the punishment by court can't be fair and the unfair punishment cannot provide restoration of justice and re-socialization process of the condemned.

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8 *Turava M*., Comments on Court Practice of Criminal Law (Economical Offence), Tbilisi, 2004, 38 (in Georgian).

9 Verdict is accessible in the court archive.

10 *Gamkrelidze O*., Definition of Criminal Code of Georgia, Tbilisi, 2005, 140 (in Georgian).

11 *Todua N*., Analysis of Court Practice in Trafficking, in the Book: Problems of Criminalization of Modern Exposure of Organized Crime and Application of Sanctions in Georgian Criminal Law, Tbilisi, 2012, 329 (in Georgian).

12 Guiding Recommendations and Suggestions on Problematic Issues of Court Practice of Criminal Law, 2007, 15 (in Georgian).

In spite of the fact that by the current criminal code it is envisaged a principle of unconditional absorption of punishments in case of a set of crimes, this issue is still problematic, because there might be recidivism of a crime and court might partly or wholly summarize the crimes.

We should approach to Article 236 of criminal code of Georgia in the same way (illegal acquisition, keeping, carrying, making, transferring or selling of fire arms, with the exception of sporting gun, ammunition, explosive materials and explosive devices).

By the verdict of the board of criminal cases of Tbilisi court, dated on the 20th of January, 2011 N. Q. was found guilty according to part I of Article 236 of criminal code of Georgia (acquisition and keeping of fire arms), by part 2 of the same article (carrying of fire arms) and was sentenced to 2 (two) year and six (6) month imprisonment by I part of Article 236 of criminal code of Georgia and by part 2 of Article 236 of criminal code of Georgia - to four (4) year and six (6) month imprisonment. By Article 59 of criminal code of Georgia N.Q. was sentenced to seven (7) year imprisonment.[13] In my opinion N.Q.'s act should have been qualified and the punishment should have been imposed on him only by part 2 of Article 236, as part 2 includes part 1.

In spite of the fact part 2 of Article 236 (carrying of fire arms) is not started with the words: "The same act", it still absorbs the act envisaged by part I – illegal acquisition or keeping of fire arms. So when it is proved that a person was carrying fire arm illegally, this act includes in itself the illegal acquisition of this arm, also keeping (part I of Article 236). Thus in this case the act must be qualified by part 2 of Article 236 of criminal code of Georgia, (and not combining parts 1 and 2).[14]

The opposite position is fixed in guiding recommendations and suggestions made up for judges of common courts of Georgia. Part 2 of Article 236 of criminal code of Georgia does not comprise part 1 of the same article and part 3 of Article 236 does not comprise part one or/and part 2.[15] Though in these recommendations there is not grounded the reason of such qualification. Illegal carrying of fire arms comprises acquiring and keeping of fire arms at the same time, as there is one offence with different acts. Accordingly N.Q.'s act was incorrectly qualified by court through combining offences. I think in this case it will be reasonable if court qualifies and imposes a punishment by the gravest part. In the discussed case a principle of justice is breached and summarizing offences does not serve to objectives of the punishment.

By the verdict of the board of criminal cases of Tbilisi city court dated on the 24th of July, 2006 M. Bokuchava was found guilty and was sentenced: by subparagraphs "A", "B", "C" and "D" of part 2 of Article 180 of criminal code of Georgia (swindling committed by preliminary agreement by a group; many times; causing significant damage, abuse of official position) – to three-year imprisonment, by subparagraph "B" of part 3 of the same article (lots of swindling) – to five-year

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13 The verdict is accessible in the court archive.

14 *Todua N.*, Analysis of Court Practice in Trafficking, in the Book: Problems of Criminalization of Modern Exposure of Organized Crime and Application of Sanctions in Georgian Criminal Law, Tbilisi, 2012, 336 (in Georgian).

15 Guiding Recommendations and Suggestions on Problematic Issues of Court Practice of Criminal Law, 2007, 175 (in Georgian).

imprisonment, by subparagraph "A" of part 3 of Article 332 (abuse of official position many times) – to four-year imprisonment.[16]

From the materials of the case it is clear that M. Bokuchava who was working as a notary and according to the current legislation of Georgia represented a public official, abused his official position many times and in November 2000 through the preliminary agreement with M. Abzianidze illegally in a swindling way took possession of the citizens' property in order to make profit and privileges for himself and for others.

According to part 2 of criminal law of Georgia if an act is provided with general and special norms, a combination of crimes does not exist and the person will be charged with a penal responsibility by a special norm.

The qualification of a crime by a combination of competitive laws is inadmissible, as it will cause artificially the creation of a set of crimes where it does not exist and ungrounded burdening of a penal responsibility.[17]

In the case under discussion M. Bokuchava's act was qualified according to subparagraph "D" of part 2 of Article 180 of criminal code of Georgia (swindling by using of official position) and also according to Article 332 of criminal code (abusing of official position). I think that court incorrectly qualified the act committed by M. Bokuchava according to Articles 180 and 332, because in the present case paragraph "D" of part 2 of Article 180 of criminal code envisages commitment of swindling by abusing of official position and the act committed by M.Bokuchava does not need to be qualified additionally by a general norm – subparagraph "A" of part 3 of Article 332. Subparagraph "D" of part 2 of Article 180 (swindling by using official position) is a special norm and Article 332 (abusing of official position) is a general norm. In case of competition between general and special norms according to part 2 of Article 16 of criminal code of Georgia a special norm has an advantage. Hence court incorrectly qualified M. Bokuchava's act and accordingly determined the punishment incorrectly by the set of crimes.

By the verdict of the Board of criminal cases of Tbilisi city court dated on the 29th of September 2010 Z. K. was found guilty and was sentenced to two years' imprisonment according to subparagraph "A" of part 2 Article 239 of criminal code of Georgia, to one-year imprisonment according to Article 376 and finally an amount of penalty was defined three-years' imprisonment. By the same verdict Z. P. was found guilty and was sentenced to four years' imprisonment according to subparagraph "A" of part 2 of Article 239 of criminal code of Georgia, two years' imprisonment according to Article 376 and finally an amount of penalty was defined six years' imprisonment.[18] The mentioned verdict remained unchanged by the verdict of the Board of criminal cases of appeal court of Tbilisi, dated on the 15th of February of 2011.

After studying the materials of the case it was stated that P. S., Z. K. and Z. P. had committed a crime envisaged by subparagraph "A" of part 2 of Article 239 of criminal code of Georgia (hooliganism

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16 The verdict is accessible in the court archive.

17 General Part of Criminal Law, Manual, *Nachkepia G*., *Dvalidze I*. (Ed.), Tbilisi, 2007, 341 (in Georgian).

18 Verdict is accessible in court archive.

by preliminary agreement of a group). In the process of fighting P. S. purposely killed R. K. In spite of the fact that Z. K. and Z. P. had seen P. S. in the process of making a fatal wounds to R. K. by knife, hid the fact of committing a specially grave crime and did not let the law-enforcement agencies know about this crime, as they were sorry for P. S. and were afraid of having problems with the police. Because of not informing the appropriate bodies about the mentioned crime, acts of Z. K. and Z. P. were qualified additionally by Article 376 of criminal code of Georgia (not informing about a crime). The qualification of the act of the convicts according to Article 376 by courts of the first and appeal instances is not right, because the criminals did not inform the appropriate bodies about the crime factually committed by them. So the acts of the convicts were incorrectly qualified by Article 376 of criminal code of Georgia (not informing about a crime). Accordingly the determined punishments must be unfair, which means that one of the objectives of punishment – restoration of justice was not carried out. Z. K. unnecessarily was sentenced to 1 year and Z. P. to two years' imprisonment, though it should be noted that this mistake was corrected by the decision of the Board of criminal cases of Supreme Court of Georgia dated on the 7th of June, 2011. The sentence envisaged by Article 376 of criminal code was excluded from the disputed decision of the accused criminals Z. K. and Z. P. and in this episode of the accusation their criminal prosecution was ceased.

By the verdict of regional court of Dmanisi on the 17th of December, 2008 J. O. was found guilty committing a crime envisaged by part III of Article 239 of criminal code of Georgia and was sentenced to four years' imprisonment.[19]

J. O. was accused of hooliganism or disorderly conduct expressing obvious disrespect for society by the committed violence and threatening with some instrument.

The mentioned guilty act was the following:

On the 30th of October, 2008, at about 12.30 drunken J. O. came to the house of his parents, who lived as a separate family in the same village and were in conflict with him. From the street he spotted his father chopping wood. J. O. had feeling of revenge upon his father and began to curse him with obscene words threatening that he would destroy him physically. At the same time he picked up big stones and with the purpose of physical injury began to throw them at him, his father had to shelter from him in the house, but J. O. went on throwing stones in the direction of the house and broke the windows of the house. At the noise caused by J. O. neighbors came out and they suppressed J. O.'s criminal act and drove him out.

The accused J. O. in his testimony as in advance, as well as in judicial investigation admitted and repented having committed the crime. He said that he had been in conflict with his father that was caused by the fact that when his father wounded him in the chest by knife in 2003 and he was in hospital, his father did not come to hospital to see him and did not pay attention to him at all. According to the convict's testimony having been hurt by this fact he began to drink hard. He often blasted his father, insulted him by word or act, threatened him to kill, and broke the windows of his house and on the 30th of October, 2008, when he blind drunk came to his father's house, threw stones and threatened his patents to kill them, he was stopped by his neighbors.

[19] The verdict is accessible in the court archive.

In order to qualify an act, committed by a person as hooliganism there must be three components at the same time: 1. **gross violation** of public order; 2. the **obvious disrespect** for society; 3. the violence or threatening violence. In case of lack of any of these components we have no composition of hooliganism.

Starting fighting with a personal motive against the members of the family, followed by violence or threatening violence, breaking calmness of the family, as well as the neighbors' and a normal rhythm of life, cannot be considered as hooliganism. In such a case the person is acting with the personal motive and not with a desire to contrast himself to the society, to prove his almightiness. It means that this person does not express disrespect to the society.[20] In the case under discussion it is proved that J. O. breached the public order, but disrespect to the society from him was not expressed, as he was expressing his discontent in relation to his father. He was acting with his personal motive and was not showing the obvious disrespect in relation to the society. In order to qualify an act as hooliganism a person must be expressing an obvious disrespect for the society. So court of the first instance incorrectly qualified J. O.'s act as hooliganism (part 3 of Article 239 of criminal code of Georgia). For the mentioned act the kind and amount of penalty was four years' imprisonment, but later by court of appeals instance this mistake was corrected.

By the verdict of the Board of criminal cases of Tbilisi appeals court dated on the 3rd of April, 2009 the verdict of Dmanisi regional court of the 17th December, 2008 was changed in the following way: J. O.'s act from part III of Article 239 of criminal code of Georgia was re-qualified to Article 151 of criminal code of Georgia and the punishment was one year imprisonment. Accordingly the punishment determined by court of the first instance cannot be fair.

I. G was living with his wife S. G. and three little children in a hired flat. The couple got acquainted with D. S. at different time, which used to come and stay with them when he was drunk. Later gradually there was developed intimate relationship between D. S. and S. G. that became known for I. G. and the reason of the conflict between spouses and turning S. G. out of the house. Though I. G. forgave his wife the treason and continued to live with her. On the 30th of September, 2003n in the afternoon S.G. and D. S. were together. At about 23 o'clock drunken D. S. wanted to see S. G. again. He stopped the car at their house in front of the window and was trying to call S. G. I. G. by deafening roar of the engine. I. G. asked D. S. to stop and not to interfere in his family life. Then D. S. abused him using bad language, came out of the car and struck I. G. with a blow. I. G. and his wife returned home, but D. S. went on abusing and began banging on the door continuously. I. G. told his wife to open the door and ask D. S. to leave them alone. When S. G. opened the door, D. S. gave her a push, ran into the house and with a knife in his hand was already standing in front of I. G., who with a purpose of self-defense grabbed his hand preventing him from using the knife. In the process of struggling they both fell down. I. G. was seizing D. S.'s hand that was holding the knife firmly. Suddenly I. G. saw a kitchen knife on the floor having been fallen from the table. He picked up the knife and struck D. S. The latter did not drop the knife and the excited I. G. wounded D. S. twice. D. S. was taken to clinical hospital but it was impossible to save his life.

[20] A Private Part of Criminal Law, Book I, *Mamulashvili G.* (Ed.), 2011, 610 (in Georgian).

By the verdict of Isani-Samgori district court I. G. was found guilty according to Article 113 of criminal code of Georgia and was sentenced to three years' imprisonment. By the verdict of the Board of criminal cases of Tbilisi Appeals Court an amount of his punishment was five years' imprisonment.

Cassation court considered that L. G. was acting rightly within self-defense. The verdict of court of appeals instance was nullified and a case was dismissed because there was not contradicting evidence.[21] A

The punishment imposed by courts of the first and appeals instances (three and five years' imprisonment) must not be counted, because I. G. he was acting in self-defense that excludes contradicting evidence. So by the punishment inflicted by courts of the first and appeals instances can't be reached restoration of justice and re-socialization of the convicted person.

By the verdict of regional court of Khelvachauri dated on the 25th of December G. G. was found guilty according to Articles 19 and 108 for a crime (attempted murder): on the 10th of August, 2008, in the process of a violent argument and quarrel started because of the conflict G. G. decided to murder his brother-in-law M. J. He took him by car to the bank of the river. During the long quarrel G. G. took a knife out of his car in order to realize his intention wounded him in chest twice, the wounds were dangerous for life. For the above mentioned act G. G. was sentenced 7 years' imprisonment.[22]

By the verdict of appeals court of Kutaisi, dated on the 26th of February 2009, the verdict of regional court of Khelvachauri, dated on the 25th of December, 2008, remained unchanged.

By studying the materials of the case it is clear that there were no witnesses when this incident happened between them, though by their identical and sequential testimonies there are obviously stated factual circumstances. According to the convict he struck his brother-in-law with a knife two times, which was caused by unreasonable acts of the victim himself. After that G. G. placed him in his car and took him to hospital. The similar is the victim's testimony. In court M. J. said that at the Chorokhi River he had abused his brother-in-law by word and act and just this partly incited G. G. to crime. M. J. also said that G. G. had taken him to hospital where he had been operated on. As it is seen after attempting murder G. G. took the injured brother-in-law to hospital where due to the timely medical help M. J.'s life was saved. According to part I of Article 21 of criminal code a person will not be charged with criminal responsibility, if he/she voluntarily and finally did not finish the intended crime, which takes place in this case. After committing the crime just by his active action it was avoided M. J.'s death. According to part 2 of Article 21 of criminal code of Georgia a person which voluntarily does not finish a crime will be charged with criminal responsibility, only if a factually committed crime represents another crime. So in the case under discussion G. G. should be charged for the other factually committed crime, namely for the intentional severe injury. By the conclusion of expertise M. J. received severe injury. Hence courts of the first and appeals instances qualified G. G.'s act incorrectly and the inflicted punishment was unfair for a crime envisaged by Articles 19 and 108. Though later this mistake was corrected by the decision of the Supreme Court of Georgia dated on the 11th of June, 2009 G. G.'s act was re-qualified from Articles 19, 108 to part I of Article 117 and the

[21] <www. freeuni.edu.ge/sites/default/files/aucilebeli%20mogerieba.pdf>.

[22] The verdict is accessible in the court archive.

amount of punishment was determined 4 years' imprisonment. So the punishment, seven years' imprisonment, imposed by courts of the first and appeals instances is not fair and in case of imposing unfair punishment, the objectives of the punishment will not be carried out.

3. Conclusion

We have discussed a problem of interrelation of the qualification of an act as a crime and the objectives of the punishment by studying court practice. As we have seen the wrong qualification is followed by imposing an unfair punishment that hinders achieving objectives of the punishment. By studying court practice it was proved that there are often mistakes made in the qualification of an action as a crime and imposition of penalty. It must be noted that the precondition of imposing a fair punishment is the correct qualification of the act as a crime. If the act is not given the right criminal assessment, it will have an effect on the imposition of the punishment, which is proved by the analysis of the above mentioned court practice. By imposing an unfair punishment objectives of the punishment can't be reached, such as first of all restoration of justice and then re-socialization of the convict.

I think working on the issue of interrelation between the qualification of an act as a crime and objectives of punishment should be continued again, which will promote the development of criminal law science and court practice.

David Tsulaia*

The Genesis of Genocide

1. Introduction

The genocide has been a central problem of the humanity since the twentieth century until now. Because of its large magnitude and the seriousness of crime, Genocide has been rated as high, supreme and crime of crimes. Because of that, the international community has unanimously acknowledged that fight against genocide requires joint efforts. In the 20th century, which is known as "the century of genocide", several scientific research centers were created, many international legal acts adopted, international criminal justice courts established whose activities were directed towards sentencing persons committing genocide, many activities were carried out to prevent genocide, etc. However, the problem of genocide still remains a challenge in the 21st century.

The difficulty of the fight against genocide, as surprising as it may be, is linked to different understandings of genocide as a criminal act. It raises certain problems concerning proper qualification of an act as genocide. In the history of mankind there were many attempts to label other international crimes as genocide and vice versa that directly relates to the concept of genocide and its misinterpretation. Based on these factors, certain key issue related to genocide, such as the genesis of genocide, is discussed in the present paper. Research is focused on such issues as: the etymology of the term "genocide"; the UN concept under international acts; identification and analysis of the basic terms of genocide; alternative definitions of genocide; definitions of genocide by sociologists and historians; nature of common, legal and generalized definitions of genocide.

The concluding part of this paper highlights the shortcomings related to the conventional concept of genocide. It provides the assumption that the conventional concept of genocide is to be limited by consideration of the definitive criteria of the groups protected within the genocide composition. There are some proposals concerning religious groups in terms of legislative amendments. Certain proposals are provided with a view of applying the conventional concept of genocide and analyzing in-depth the issues stipulated in the concluding part.

Three main methodological approaches have been used while working on the paper: 1. the etymology of the term; 2. fixing the formal definition of the term, and 3. identification and analysis of basic concepts and alternative definitions of genocide. At the same time, the literature of lawyers, sociologists and representatives of other professionals dealing with the issue of genocide, published in Georgian as well as foreign languages, relevant international legal acts, legal database of foreign countries and online resources were used.

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2. Etymology of the Term "Genocide"

2.1. Concept of Genocide by Raphael Lemkin

For the international community, the term "Genocide" was demonstrated as a neologism in the first half of the twentieth century during the Second World War. In its etymological sense, the "genocide" comes from the Greek words "*γένος*génos" (family, tribe, race) and the Latin words "*cide, cidium, caedere*:" (kill, murder) and generally means killing or destruction of the nation, ethnos, race or religious group in whole or in part.[1] *Raphael Lemkin* is regarded as an author of the term "genocide" (1900-1959) who first used the term in his book published in 1944 "Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress"[2] to describe atrocities of the Jewish people by the Nazi. R. Lemkin defined genocide as follows:

"By genocide we mean the destruction of a nation or ... ethnic group. ... Genocide does not necessarily mean the immediate destruction of a nation.... It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."[3]

At the same time, *R. Lemkin* noted:

"Genocide has two phases: one, the destruction of the national pattern of the oppressed group, the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain or upon the territory alone, after removal of the population and the colonization by the oppressor's own nationals "[4] (see Annex 1).

Introduction of the term "genocide" was preceded by proposing definitions of "barbarity" and "vandalism" at the International *Conference* for the *Unification* of the *Criminal Law* (ICUCL) by R. Lemkin in 1933 in the city of Madrid (ICUCL). By using these definitions in international context R. Lemkin wanted the 37 countries of the conference to acknowledge "barbarity" and "vandalism" as crime and punishable acts.[5] According to R. Lemkin's definition, "barbarity" means physical destruction against individuals as members of a national, religious or racial group, and "vandalism" means attack on the culture of these groups (see Annex 2).

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1 See at: <http://oxforddictionaries.com/definition/genocide?region=us&q=genocide>; <http://dictionary. cambridge.org / dictionary/british/genocide?q=genocide> [01.05.2012].

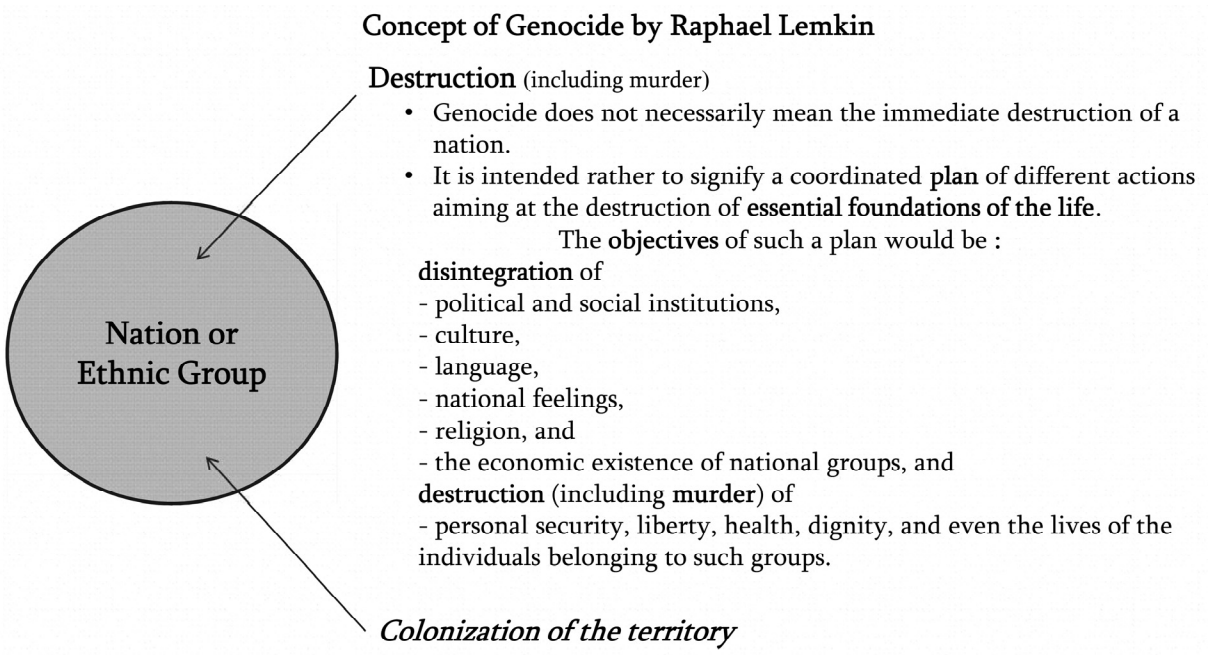
2 *Lemkin R.*, Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress, Washington, Carnegie Endowment for International Peace, 1944, 79.

3 See *Smith E.,* Genocide and the Europeans, Cambridge, "Cambridge University Press", 2010, 10-11; *Lemkin R.*, Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress, Washington, Carnegie Endowment for International Peace, 1944, 79.

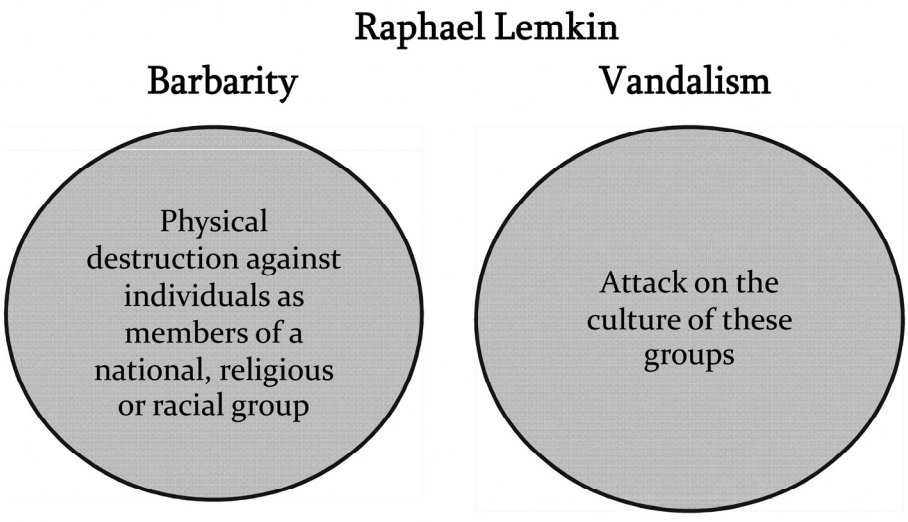
4 *Lemkin R.*, Mentioned Work, 79.

5 Ibid., 79.

Annex 1



Annex 2



Unsuccessful attempt was followed by replacing of R. Lemkin's concepts of barbarity and vandalism by the Greek word used by Plato –"genos" (race, stock, kind, tribe). This idea naturally prompted R. Lemkin to add the Latin word "cidium" - which means killing - to the Greek word. Thus, in the twentieth century the term "genocide" was emerged,[6] that gained international recognition through the United Nations General Assembly Resolution 1946 96 (I) "the Crime of Genocide".[7]

It should be noted that the term "Genocide", before its recognition under international law, first emerged in the official records in 1945, in particular, in the judgment of the International Military Tribunal at Nuremberg. However, the term "genocide" in the judgment is more descriptive rather than of legal nature.[8]

Prior to the adoption of Resolution "The Crime of Genocide" 96 (I), acts of genocide were legally considered as crimes against humanity, war crimes, ethnic cleansing, mass murders and so forth.

2.2. Prehistory of the Term "Genocide"

Leo Kuper, the sociologist, well points outhat the term "genocide is a new one, while its conception is ancient."[9] In history of mankind, starting from the ancient times, there are specific forms of detecting genocide, a number of aggressive wars, mass murders committed with the intent of destruction, in whole or in part, of a national, ethnical, racial or religious group and by considering the characteristics of the crime that today represents a composition of genocide. Such actions, prior to the Second World War, simply did not have the appropriate name. That's why the British Prime Minister called such acts as "a crime without a name,"[10] while *Ben Keirnan* called the destruction of Carthage in 149-146 as the First Genocide.[11] The Bible contains many episodes which refer to the mass destruction of groups of people that would have unconditionally be qualified today as genocide. The killing of children in Bethlehem, according to Matthew's Gospel that was ordered by Herod may be considered as such example.

In the middle ages, Mongols and Turks have killed thousands of people in the deserts and steppes of Central Asia. In Europe, after theological differentiation in Christianity, the apostates from the Roman Catholic Church were subject to physical destruction. Various methods of killing, such as gallows, stone throwing, stabbing, etc. were used. Colonization processes caused physical destruction of millions of people on every continent. Such massacre that was revealed in different forms of

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6 See <http://www.hawaii.edu/powerkills/GENOCIDE.ENCY.HTM> [03.05.2012].

7 See UN General Assembly Resolution 96 (I), 1946, available at: <http://www.un.org/documents/ ga/res/ 1/ares1.htmt> [01.06.2012].

8 See<www.ushmm.org/wlc/en/article, at: php%3FModuleId%3D10007043+genocide&cd=8&hl=en&ct=clnk& gl=ge> [01.06.2012]; *Henman R., Behres P.,*The Criminal Law of Genocide – International, Comparative and Contextual Aspects, Bodmin, "MPG Books Ltd", 2007, 227.

9 *Kuper L*., Genocide: Its Political Use in Twentieth Century, Harmondsworth, "Penguin", 1981, 9; *Jones A.,* Genocide: A Comprehensive Introduction, New York, "Taylor and Francis Group", 2011, 3.

10 A Crime Without a Name, see: <http://www.preventgenocide.org/genocide/ crimewithoutaname.htm> [03. 05.2012].

11 *Jones A*., Mentioned Work, 5.

genocide,was culminated in the twentieth century that acquired a name of "the century of genocide". The mass killings happened almost in every decade on the continents of Africa, Asia, Europe and South America, while genocide without killings often took place in Australia.

Among the genocides committed in the twentieth century following facts could be singled out: genocide carried out by the Germans in Herero, South-West Africa, in 1904; the Greek and Assyrian genocide perpetrated by the Ottoman Turks in 1915-1923, the Holocaust in 1933-1945; genocide in Bangladesh in 1971, genocide in Cambodia in 1975-1975, genocide against the Kurdish people by Iraqis in 1988, genocide in Rwanda in 1994, genocide of Muslims in Bosnia in 1992-1995.[12]

Leo Kuper notes that there are numerous facts of genocide in the history of mankind.[13] This idea is also shared in the *Convention* on the *Prevention and Punishment* of the Crime of *Genocide* of 1948 in its preamble and makes a reservation on the existence of genocide in human history since the ancient times.[14]

2.3. Etymological Analysis of the Term Genocide

With respect to the term genocide, it should be noted that the concept of genocide obviously goes beyond the scope of the etymological meaning of genocide. As analysis shows, the first part of the term genocide – "*génos*", which means "race, family, tribe, kind", has a hereditary basis, i.e. biological elements of an organism.

Nationality and ethnicity differs from the concept of race, the characteristics of race pass down by inheritance, race cannot be "chosen", as well as the inherited characteristics cannot be changed. There is a different situation in the case of an ethnic minority. A newborn child within the ethnic minority may become a member of the majority through assimilation or if one of his/her parents is a representative of the majority.[15]

"Nationality refers to the group of people which has a homeland where it forms the majority, while ethnicity of group implies the group of people who do not have a homeland outside the state where it is a minority. Existence of common "racial" characteristics is not necessary for ethnicity."[16]

However, there are different approaches as well. For example, according to the Georgian Soviet Encyclopedia, a "**nation**" is identified with "people". In addition, historiographers and historians used to identify nation with human biological-racial unity and natural necessity directly associated with such forms of social cohesion, as the stock and tribe. **Ethnic unity** is a particular type of historically formed social groups, which are known as tribe, nationality or any other form of entity,[17]while race is the term

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12 *Totten S., Bartrop P.R.*, Dictionary of Genocide, "Greenwood Publishing Group", 2008, 167.

13 *Kuper L.*, Genocide: Its Political Use in Twentieth Century, Harmondsworth, "Penguin", 1981, 9; *Jones A.*, Mentioned Work, 5.

14 *Convention on the Prevention and the Punishment of the Crime of Genocide,*United Nations, 1948.

15 *Werle G.,* Volkestrafrecht, 2007, 276 (in: *Tskitishvili T.*, Concept and Composition of Genocide, Journal "Justice and Law", # 3 (26), 2010, 136 (in Georgian)).

16 Ibid., 273-275.

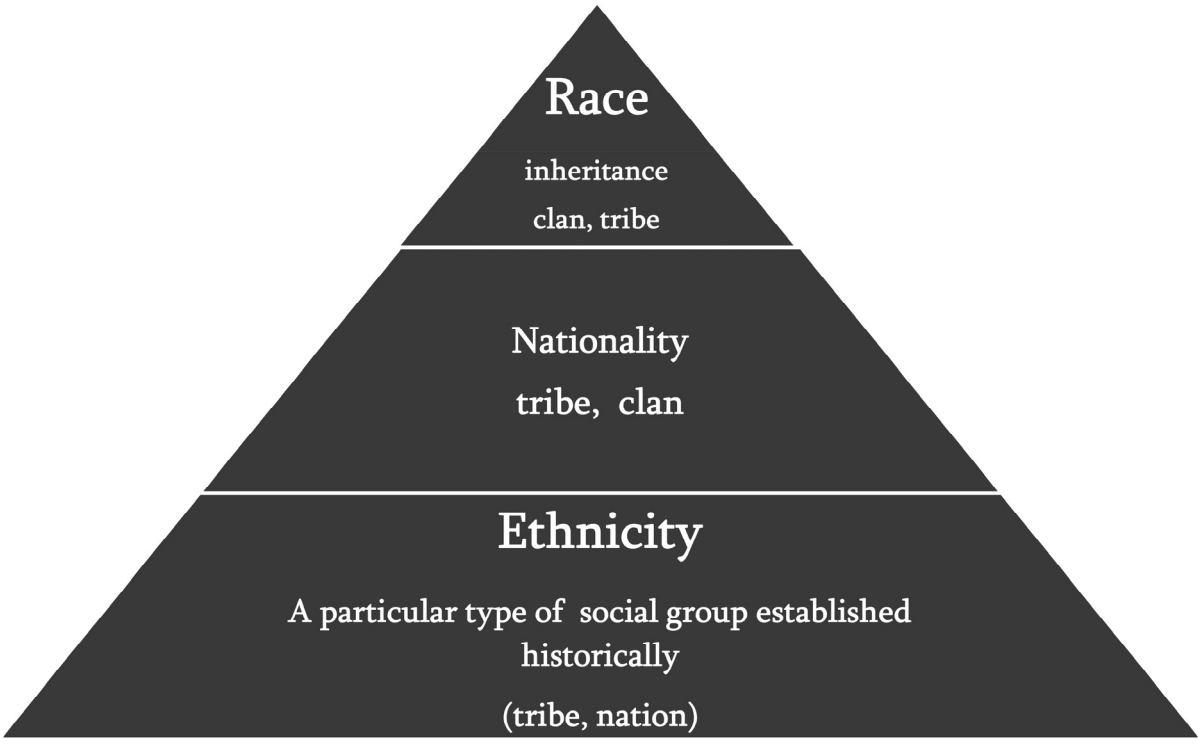
17 See *Abashidze I.,* (Editor-in-chief), Georgian Soviet Encyclobedia, 1979, Volume 4, pp. 54, 189; Volume 8, 1984, 4 (in Georgian).

of French origin – "*race*" meaning kind, breed. Dictionaries of foreign words identify *ethnos* with people, explaining that it also has some inherited common characteristics.[18]

As it turns out, it can be said that, more or less, nation, ethnos and race has the common characteristics of unity of people that is implied within the general context of the Greek term "*génos*", however, this cannot be said with regard to religion (see Annex 3).

Annex 3

Pyramid of Groups Protected by the Genocide Convention by Biological Features



If we are guided by the generally accepted rules and consider the biological element in the Greek word "*génos*" of the term genocide as a necessary criterion defining genocide, then it is impossible to present national, ethnical, racial or religious groups in identical way. Putting national and ethnic groups together with racial groups in the conventional definition of genocide could be worth arguing but not for religious groups.

It can be assumed that the genocide etymology should be based not on the Greek word "*génos*", but the Latin "*genesis*", which implies genesis, origin, or, in other words, identity of a group. In this case it will be justified a reference not only to all four protected groups, but other groups in the

[18] <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=3&t=12448>, [28.05.2012]; *Chabashvili M.* (Compiler), Dictionary of Foreign Terms, "Ganatleba", Tbilisi, 1989, 424 (in Georgian).

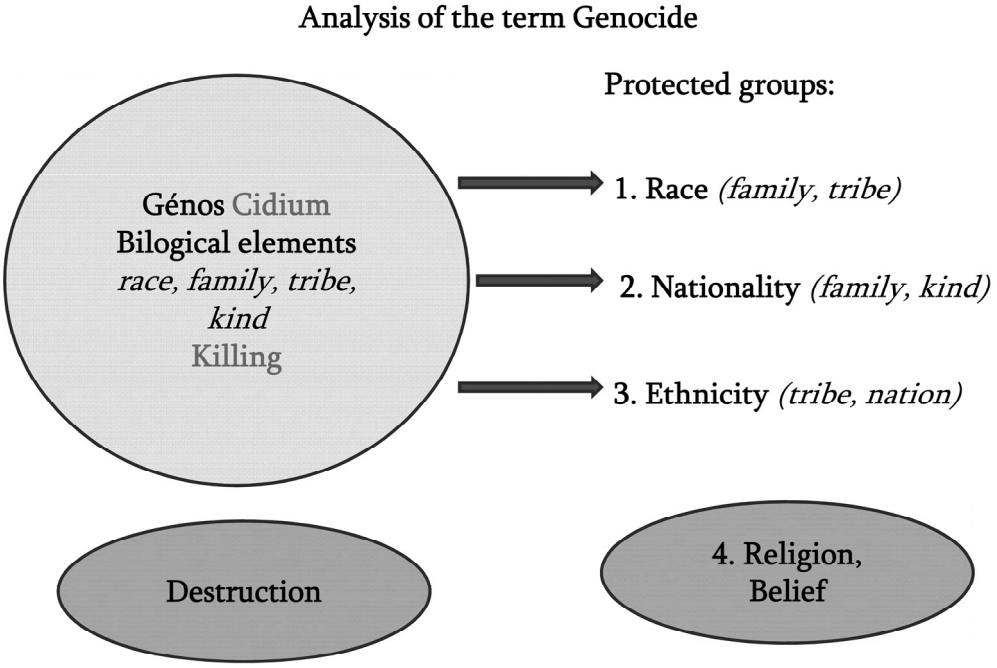
conventional definition of the genocide that was first recognized by the United Nations Resolution 1946, 96 (I).

Someone may assume that the genocide convention should define the genocide as destruction of certain groups of population on national, ethnic, racial and religious grounds,[19] however, such approach can not decide the compliance of concept of genocide with the conventional conception.

The second Latin word of the term genocide should be considered as a shortcoming of the term related to the etymology of the term genocide since it definitely means killing, murder of a person or people. Under the UN Resolution 1946, 96 (I) and 1948 Genocide Convention, genocide means not only killing but also "causing serious bodily or mental harm to members of the group".[20] If to go beyond the conventional definition of genocide, which includes the destruction as well as the fact that murder of a person is not the only element in the composition of genocide, then it becomes clear that the concept of genocide goes far beyond the limits of the composition of the Genocide Convention in this part too (see Annex 4).

Therefore, the accurate interpretation of the concept of genocide is required for proper consideration of the genocide as a criminal act. This necessity, at least, implies an analysis of the legal acts concerning genocide, identification and study of basic terms and alternative definitions of genocide, determination of common and distinctive features and their comparison that ultimately means determination of the genesis of genocide.

Annex 4



[19] *Chabashvili M.,* Mentioned Work, 102.

[20] *Convention on the Prevention and the Punishment of the Crime of Genocide,* United Nations, 1948.

3. Genocide in International Acts

3.1. United Nations Resolution, 1946 96 (I) The Crime of Genocide

Since 1933, R. Lemkin's great efforts and lobbying produced results in 1946 when the UN General Assembly adopted Resolution 96 (I) "The Crime of Genocide".

The resolution affirms that genocide, as a criminal act, falls within the scope of international interest and defines genocide as:

"*Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions... and is contrary to moral law and to the spirit and aims of the United Nations.*"[21]

As it is obvious, one of the main goals of the United Nations is to maintain international peace and security.[22]

According to the resolution, composition of crime of genocide is in place when racial, religious, political, and other groups, in whole or in part, have been destroyed.[23]

The resolution underlines the fact that:

"*Genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds are punishable.*"[24]

The analysis allows us to say that the resolution is not a declarative act only but it also provides subjective and objective features of the composition of crime of genocide.

In conclusion, it could be said that the resolution is important based on following considerations: 1. The resolution is the first document that recognized genocide as an international crime; 2. The resolution provides for a general definition of genocide; 3. The resolution contains an object of genocide: a denial of the right of existence of entire human group and denial of right to life of individuals; destruction, in whole or in part, of racial, religious, political and other groups, as well as international peace and security of people; 4. The resolution also envisages the necessity of taking preventive measures. With a view of facilitating the speedy prevention and punishment of the crime of genocide, it recommends to the UN member states to create an appropriate legal framework and organize international cooperation;[25] 5. The resolution defines the subject of genocide. It was mentioned that accomplices and principals of genocide - whether private individuals, public officials

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[21] UN General Assembly Resolution 96 (I), 1946, available at: <http://www.un.org/documents/ ga/res/1/ares1. htmt> [28.05.2012].

[22] Charter of the United Nations, 1945.

[23] See UN General Assembly Resolution 96 (I), 1946, available at: <http://www.un.org/en/documents/charter/ index.shtml> [28.05.2012].

[24] Ibid.

[25] Charter of the United Nations, 1945.

or statesmen - are punishable. By this, the United Nations highlighted that an official status is in no way an obstacle to bring criminal charges for commission of genocide.

It should be noted that the resolution covers political and other groups under the protected groups that is not restated in the 1948 UN Genocide Convention or other acts.

By the Resolution, the Economic and Social Council was requested to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.[26] This initiative laid a foundation for adopting a *Convention*on the *Prevention and Punishment* of the Crime of *Genocide* in 1948.

3.2. The United Nations *Convention* on the *Prevention and Punishment* of the Crime of *Genocide* of 1948

Based on recommendation under the UN Resolution 96 (1) The Crime of Genocide, drafting the Convention was carried out in three stages. First, the UN Secretariat developed a draft text through assistance of three experts - Raphael Lemkin, Vespasian Pella and Donnedieu de Vabres. In the first draft of the Convention, R. Lemkin's position greatly influenced elaboration of the definition of genocide. Subsequently, the draft was submitted to the Special Committee authorized by the Economic and Social Council which discussed almost all the controversial issues in detail. The final wording of the definition of genocide and provisions of the Genocide Convention had been agreed on the basis of debates and accepted compromises between the representatives of member states. The draft developed by the Committee became a basis of negotiations before the General Assembly's Sixth Committee.[27]

In 1948, the final draft of the Convention text was sent to the General Assembly for approval.[28] The Convention was adopted by the Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, which came into force in 1951. The Convention consists of a Preamble and 19 Articles. It envisages the composition of genocide,[29] all grounds for criminal responsibility, objective and subjective components of crime, criminal law institutions, etc.[30]

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[26] Charter of the United Nations, 1945.

[27] See *Lemkin R.*, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress,* Washington, Carnegie Endowment for International Peace, 1944, 79-95.

[28] *Schabas W.A.,* Convention for the Prevention and Punishment of the Crime of Genocide, 2000, 1, available at: <http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf> [28.05.2012].

[29] See *Convention on the Prevention and the Punishment of the Crime of Genocide*, United Nations, 1948, Article 1: "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

[30] Ibid., The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

The conventional definition of genocide is of legal nature. Although the definition allegedly comprehensively provides components of crime composition, there are still some difficulties with regard to perfection of the definition of genocide.

The list of protected groups covering four groups only and not political and other groups, e.g. social groups, as provided by the Resolution 96 (1) 1946, certainly is a controversial issue among the researchers dealing with genocide-related issues. Political groups in the convention are not considered because of Russia and the Eastern bloc, while the inclusion of social groups was resisted by the western European governments.[31] Due to the narrow definition of genocide convention, in 1986 the journal "Wall Street" reported that since the Holocaust, the genocide had not been qualified in accordance with UN criteria. In addition, the genocide, which is "committed with intent to", creates big difficultie as it is hard to prove the intent absolutely.[32]

In order to support the protected groups defined in the Convention, the special committee drafting the Convention was focused on the argument that permanent and sustainable features are inherent to them (see Annex 5).[33] However, these features are not characteristic to the non-political groups, which are hardly identifiable and in addition to that, can cause international intervention into the domestic political affairs.[34] This rationale cannot be accepted since an individual is not restricted in changing his/her religious belief and, therefore, attaching permanent and sustainable features to religious groups is losing its urgency.

Nevertheless, scholars who study genocide and use its conventional definition do not deny its shortcomings and consider it as an internationally recognized definition of this odious crime.[35]

With respect to the conventional definition of genocide it should be noted that it is a politically and legally compromised version based on the scientific concept of genocide and interests of representatives of the UN member states in the special committee, whose main postulates are three fundamental aspects: etymological (*genos*- name, tribe), historical (two of the most familiaracts of genocide in the 20th century - Armenians in 1915, and Jews people during the World War II) and political (Nazi ideology and racist theories).

Therefore, it should be concluded that the conventional understanding of genocide, at the time of its adoption, could not ensure consideration of all essential aspects, since development of the draft convention was based on fact that had taken place in recent past and not its criminological study. We believe that this is one of the main reasons of problem related to the definition of genocide.

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[31] Ratifying Genocide, The *Wall Street Journal,* February 24, 1986, 12, available at: <http://www.arts.monash.edu.au/publications/eras/edition-1/harris.php> [28.05.2012].

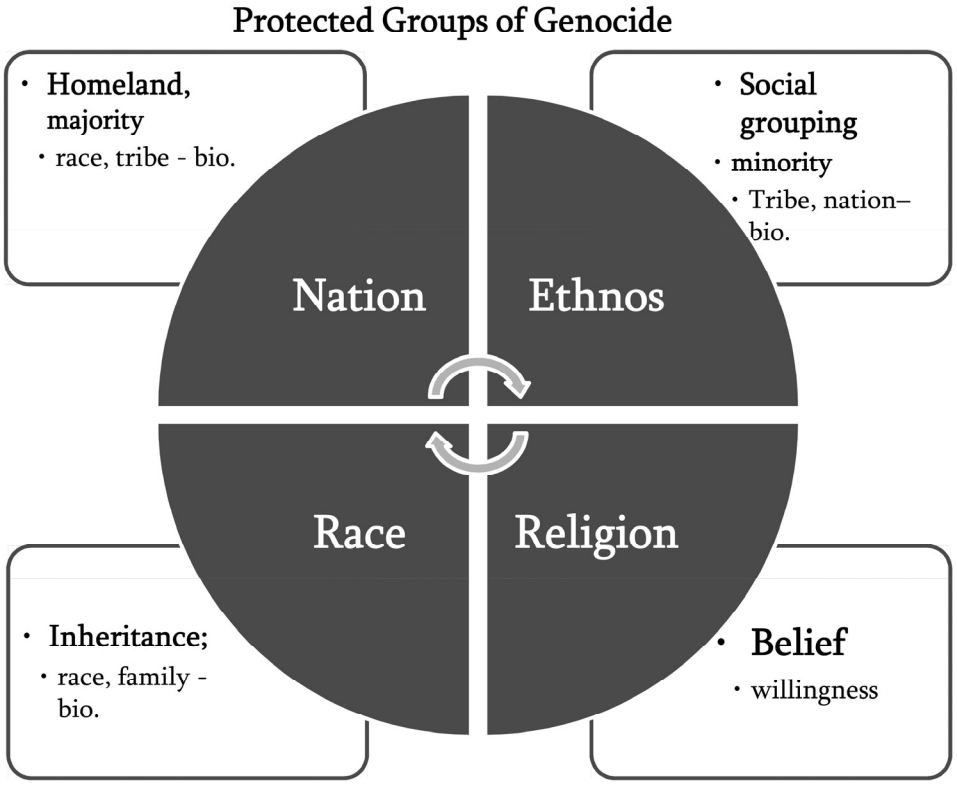
[32] Convention on the Prevention and the Punishment of the Crime of Genocide*,* United Nations, 1948.

[33] *Slye R.C., Schaack B.V.*, International Criminal Law (Essentials), New York, "Aspen Publishers", 2009, 225.

[34] *Bassiouni M.C.,* International Criminal Law - A Draft International Criminal Law, the Netherlands, "Sijthoff and Noordhoff International Publishers", 1980, 72.

[35] *Kuper L.*, Genocide*: Its Political Use in the Twentieth Century,* New Haven, "Yale University Press", 1981; *Hawk D.,* Pol Pot's Cambodia: Was it Genocide?, in: *Charny I.W.* (Ed.), *Towards the Understanding and Prevention of Genocide: Proceedings of the International Conference on the Holocaust and Genocide,* Boulder, "Westview Press", 1984.

Annex 5



Categories were defined by considering permanent and sustainable features.

3.3. Genocide According to the Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on 17 July 1998.

The purpose of adopting the Statute was establishment of the International Criminal Court.[36] Georgia has also signed the Rome Statute, which was ratified by the Parliament of Georgia on July 16, 2003.[37] This is a permanent International Court of Justice and the Statute extends its jurisdiction over genocide, together with other most serious crimes for the entire international community.[38]

Article 6 of the Rome Statute, in fact, echoed the definition of genocide provided in Article 2 of the UN *Convention* on the *Preventionand Punishment* of the Crime of *Genocide* of 1948.

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[36] *Turava M.*, International Criminal Court, Tbilisi, 2005, 3 (in Georgian).

[37] See Resolution of the Parliament of Georgia #2479-rs, 2003, available (in Georgian) in search system "Codex 2007".

[38] Rome Statute of International Criminal Court, 2000.

Inclusion of genocide in the Rome Statute was intended from the very beginning. A draft Statute that was prepared by the International Law Commission provided the term genocide, however did not offer its definition.[39]

Along with genocide, Article 5 of the Rome Statute defines crimes under jurisdiction of the Court: crimes against humanity; war crimes and the crime of aggression.

Under Article 9 of the Rome Statute ("elements of crimes"), composition of crime (elements) shall assist the Court in the interpretation and application of Articles 6-8 and elements of crimes and amendments thereto shall be consistent with this Statute.

Special element of genocide, which distinguishes it from other international crimes defined in the Rome Statute, when committing murder as part of the objective composition of crime is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. A special intent of a perpetrator to destroy the group was considered as a starting point in defining the genocide, while working on war crimes it was an existence of an armed conflict (see Annex 6).[40]

Annex 6

Common and Distinguishing Features of Genocide and other International Crimes

#	Acts	Defined victim	Special intent	Group Organization	Territory (annexation, control)
1	Genocide	Yes	Yes	Yes	No
2	Crime against humanity	Yes	No	Yes	Yes
3	War crime	Yes	No	No	Yes
4	Ethnic cleansing	Yes	No	Yes	Yes
5	Aggression	Yes	No	Yes	Yes

[39] Report of the International Law Commission on its Work of the Forty-Sixth Session, 2 May – 2 July, 1994, U.N. GAOR, U.N. Doc. A/49/10 (1994); *Khutsishvili K.,*Competitive and Complementary Competences of the UN Security Council and the International Criminal Court, PhD Thesis, Tbilisi, 2010, 37 (in Georgian).

[40] *Khutsishvili K.,* Mentioned Work, 40.

3.4. Advantages and Disadvantages of the Legal Definition of Genocide

By adopting international legal acts, genocide is primarily a legal category defined as a specific crime and not as a historical or social process or phenomenon. However, a number of controversial issues in theory and practice are dominated the legal definition of genocide.

According to Lambrecht, the conventional definition of genocide was often subject to criticism. Criticism referred to such issues as the existence of shortcomings in international law, vagueness of provisions of the Convention, and inadequacy of the response to genocide.[41]

With respect to the first aspect of criticism concerning the protected groups, some scholars believe that international law allegedly does not prohibit committing acts of intentional destruction of political and social groups. In fact, such acts are criminalized in such other acts as crimes against humanity, war crimes and serious offenses under the Geneva Convention.[42] Crimes against humanity imply acts if they are part of a widespread or systematic attack against civilian population, such as murder, extermination, enslavement, deportation and any other inhuman act against civil population, as well as persecution against any identifiable group or collectivity on national, racial, religious or political grounds."[43]Although the list provided in Article 7 of the Rome Statute also includes more number of the identified groups, such as the "cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court",[44] however they are subject to persecution and not murder. According to Article 7(2(g)) of the Rome Statute, "Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".[45] Prohibition of crimes against humanity goes beyond the scope of legal protection under the Genocide Convention. It criminalizes a wider range of acts and requires that acts be directed against civil society but does not require an intent of destruction of civilian population. In this case, the mass murder committed with the intent of destruction of a political and social group, according to the customary international law, shall be considered a crime against humanity.[46] The Geneva Convention prohibits certain acts committed by military personnel against "persons taking no active part in the hostilities", while destruction of political and social groups by military personnel shall be regarded as war crimes, which are committed during war time within or between the member state(s) of the Geneva Convention.[47]

The second aspect of criticism with respect to the vagueness of articles is exaggerated. It was discussed whether killing "in whole or part" under Article 2 of the Convention was related or not to

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41 *Chalk F.*, *Jonasson K.*, The History and Sociology of Genocide: Analyses and Case Studies, New Haven, "Yale University Press", 1990, 11; see *Lambrecht C.W.,* Grappling with the Concept of Genocide, Working Paper, 1999, 1.

42 *Chalk F.*, *Jonasson K.*, Mentioned Work, 1-2.

43 Ibid.

44 Rome Statute of International Criminal Court, 2000.

45 Ibid.

46 *Lambrecht C.W.,* Mentioned Work, 2-3.

47 Ibid., 3.

particular magnitude, which is necessary to qualify an act as genocide and what was meant under the destruction of the group.[48] It should be taken into consideration that during interpretation of crime, the value is attached not to the fact how large is the magnitude of victim actually, but whether the perpetrator intended to destroy a significant part of the group, i.e., whether the offender has intended to commit genocide. It is the most essential that the existence of special intent is essential in establishing the fact of genocide.[49] It is noteworthy that the report of July 6, 2000, of the International Criminal Law Preparatory Commission considers killing one person as genocide.[50]

The third aspect – inadequacy of response to genocide – describes the cause for inaction inaccurately that, in fact, is a problem of application of law. Some scholars link a lack of international intervention during the mass murder to the inadequacy of the definition. This leads a problem to the deadlock. Inaction is a problem related to criminalization and creation of legislation and not of an official statement. It is related to the political will, says *Lambrecht*.[51]

With a view of practical application of the definition of genocide, it is probably impossible to find an answer on critical considerations only through the legal approach. Knowledge of these issues, both theoretical and practical, is important, especially when it comes to proper evaluation of a concrete act as genocide that is a prerogative of the court which has jurisdiction over this act.

Thus, in order to evaluate genocide as a criminal act adequately, it is necessary to understand genocide in terms of conceptual approach that is only possible through realizing its origins as well as comparing opposite conceptions.

4. Basic Concepts of Genocide

4.1. Identification and Analysis of the Basic Concepts of Genocide

The history of mankind should be considered in order to define the basic concepts of genocide describing facts and actions that directly or indirectly envisages the composition of the crime of genocide.

In the history of mankind the acts committed in the form revealing genocide were named accordingly. Cannibalism, colonialism, politicide, ethnocide, etc. can probably be belonged to those acts that describe destruction of groups of people, mass killings, etc.[52] This is an incomplete list of acts that today would be qualified as genocide by many.

To study the origins of genocide, first of all, it is necessary to identify and then analyze these concepts from the conceptual point of view.

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48 *Lambrecht C.W.,* Mentioned Work, 3.
49 *Khutsishvili K.,* Mentioned Work, 39-40 (in Georgian).
50 <http://www.preventgenocide.org/genocide/elements.htm>.
51 *Chalk F.*, *Jonasson K.*, Mentioned Work, 4.
52 E.g., Democide and Omnicide (see annexes 8 and 9).

4.1.1. Cannibalism

Cannibalism, in its figurative sense means barbarism, however, first and foremost, it means flesh-eating.[53]

There are "household" and "religious" cannibalism. Originally, cannibalism was linked to a lack of food. Later it became connected with religion, magic, ritual warfare, crimes and punishment. If a combatant killed the brave and courageous enemy in the fight, then, according to the ritual, the murderer would eat the killed, which meant transfer of the courage and strength of the enemy to the perpetrator. Such practice was called endocannibalism.[54]

Facts of mass cannibalism were also observed in the starving army of Napoleon.[55] Nevertheless, the cannibalism having elements of barbarism cannot be considered as a primary source of genocide but R. Lemkin's attempt to make barbarism,[56] which is also used in a figurative sense of cannibalism, recognized as international crime by the international community, is noteworthy from the view point of exploring the origins of genocide.

4.1.2. Colonialism

According to historian *Philip Curtin*, colonialism is "the domination of people of other culture."[57] Although this formula reveals two important elements - *domination* and *cultural difference* - it should be more accurate, adds *Jurgen Osterhhamel*.[58] The *Collins* dictionary describes the term "colonialism' as "the policy and practice of a power in extending control over weaker peoples or areas"[59] while Stanford Encyclopedia of Philosophy under the term colonialism defines "the process of European settlement and political control over the rest of the world, including the America, Australia, and parts of Africa and Asia".[60]

It can be said that it is possible to find the common elements between colonialism and genocide, because the colonizer, - might be an invader or exiled - carried out its own policy mainly through violence, towards people living on the occupied territories. The destruction of the local population in Australia, New Zealand and South America could be cited as an example. If we take into account R. Lemkin's concept of genocide, under which genocide phases imply "*the destruction of the national identity of the oppressed group, the imposition of the national identity of the oppressed population, which is allowed to remain or upon the territory alone, after removal of the population and the*

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53 *Chabashvili M.*, Mentioned Work, 215 (in Georgian).

54 *Dzhuan S.*, The Strangeness of Our Body (Translation into Russian), "RIPOL Classic", 2009, 354.

55 Ibid., 355.

56 Raphael Lemkin defines barbarism as destruction of individuals on the grounds of membership of national, religious and racial groups, see: <http://www.hawaii. edu/powerkills/ GENOCIDE.ENCY.HTM>, [01.05.2012].

57 *Osterhammel J.,* Colonialism, Munich, "Markus Wiener Publishers", 1997, 15.

58 Ibid., 15.

59 *Collins H.*, Collins English Dictionary, 2011.

60 *Kohn M.*, "Colonialism", Stanford Encyclopedia of Philosophy, 2006.

colonization by the oppressor's own nationals",[61] then it is evident the existence of origins of genocide together with the colonialism. In such cases, it is the element of conquer of the territory that primarily distinguishes the conventional definition of the crime of genocide and colonialism and makes us think about the special objective of genocide. In addition, the development of the issue in such direction may go too far and demonstrate compatibility of the concepts of imperialism and hegemony with the genocide.

4.1.3. Politicide

The term "politicide" consists of Greek Πολιτικ (politik) and, respectively, *polit* that is a short version of "political", and Latin *cide* – killing. Human Rights Dictionary defines the term "politicide" as "a mass killing targeted not against any ethnic or other kinds of entity, but against a political group".[62] It is known, there is no separate crime and convention for politicide. Politicide is evident when the government, or those who have an independent power, give authorization to such crimes such as kidnapping, torture, murder and other serious crimes that infringe human rights of those who have or in respect of whom it may be assumed as having a different opinion or whose economic and social status is considered as anathema, or whose lifestyle for some reasons is considered not to live a consecrated life and when such identification cannot be proven.[63] In this reasoning, a group of individuals with the religious aspect is demonstrated against which it is possible to carry out persecution and violence. Politicide, as *Harff* and *Gurr* define is, refers to the killing of groups of people who are targeted not because of shared ethnic or communal traits, but because of their hierarchical position or politicial opposition to the regime and dominant groups.[64] They also identified four types of politicide: punitive politicide, repressive politicide, revolutionary politicide and repressive/hegemonic politicide.[65]

The goal of genocide is to destroy a racial, ethnic, national or religious group. However, genocide is not the only form of violent, which includes murder. Countries may target other types of groups, like political groups or social classes, for murder as well. Researchers *Barbara Harff* and *Ted Robert Gurr* call these latter types of group killingsas mass murders of politicide.[66] *Rammul* defines politicide as the murder of any person or people by a government because of their politics or for political purposes.[67]

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61 *Lemkin R.,* Mentioned Work, 79.

62 *Sakvarelidze F.,* Human Rights Dictionary, Publishing House "Dasi", 1999, 128, available (in Georgian) at: <http://www.nplg.gov.ge/ gwdict/index.php?a=term&d=6&t=5860> [03.06.2012].

63 Marchak P., Reigns of Terror, Montreal, "McGill-Queen's University Press", 2003, 30.

64 <http://science.jrank.org/pages/9496/Genocide-Origins-Evolution-Concept.html> [01.06.2012].

65 These definitions are available at: <http://clg.portalxm.com/library/keytext. cfm?keytext_id=193> [03.06.2012].

66 <http://clg.portalxm.com/library/keytext.cfm?keytext_id=193> [03.06.2012].

67 <http://www.hawaii.edu/powerkills/DBG.CHAP2.HTM> [03.06.2012].

If we take into account Marchak's opinion that there exists a political victim of genocide,[68] then it is possible to consider the existence of a political group under the protected groups within the definition of genocide, especially when the definition of politicide describes the existence of a political group.[69] According to this principle, and in case of its positive decision, consideration of other groups in the list under the protected groups within the genocide is justified. Although *Fein* (1990), *Kuper* (1981), *Harff* and *Gurr* (1988) and *Ezel* (1989) had established more than nineteen cases of interrelation between genocide and politicide,[70] even in case of negative decision concerning a political group in the genocide composition, it cannot have an impact on the identity aspects of concepts and conception of genocide and politicide.

4.1.4. Ethnocide

The term ethnocide is composed of the Greek word "*ethnos*" (race) and Latin word "*cide*" (killing). Initially, ethnocide was used as a term to denote the destruction of culture of individuals who were carriers of this culture.[71] The concept of ethnocide, together with the concept of genocide, was developed by R. Lemkin to denote persecution of the Jewish people by the Nazis in the World War II in USA in 1944.[72] Given the fact that R. Lemkin considered ethnocide as the second term for genocide,[73] it can be assumed that R. Lemkin had a choice between ethnocide and genocide whether which term would unite concepts of barbarism and vandalism, which he offered to the international community at the ICUCL Conference in 1933. It is also noteworthy that Lemkin called vandalism as "cultural genocide" as a component of genocide.[74] Though the UN draft Declarationon Local Population of 1994 provides terms "ethnocide" and "cultural genocide", but the draft does not describe their definitions.[75] The Declaration that finally was adopted at the 62-th plenary session of the UN General Assembly on September 13, 2007, in New York, only uses term of genocide instead of "ethnocide" and "cultural genocide", while the wording of the Article remained unchanged.[76] According to *Sautman*, "elements, which some consider as synonyms for "cultural genocide" and "ethnocide", is based on the understanding that refers to "ethnocide" - the destruction of culture that

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68 Marchak P.,Mentioned Work, 31.

69 Sakvarelidze F., Mentioned Work, 128, available (in Georgian) at: <http://www.nplg.gov.ge/ gwdict/index. php?a=term&d=6&t=5860> [03.06.2012].

70 Marchak P., Mentioned Work, 31.

71 Ibid., 32.

72 *Lukunka B.,* Etnocide, Online Encyclopedia of Mass Violance, 2007, 2, available at: <http://www.massvio-lence.org> [03.06.2012].

73 Ibid.

74 < http://jughaculturalgenocide.blogspot.com/2010/12/about-cultural-genocide-what-is-it.html> [01.05.2012].

75 Draft United Nations Declaration on the Rights of Indigenous Peoples, available at: <https://www1.umn. edu/humanrts/instree/declra.htm> [03.06.2012].

76 United Nations Declaration on the Rights of Indigenous Peoples, Articles: 7-8, available at: <www.un.org /esa/ socdev/unpfii/ documents/DRIPS_en.pdf> [03.06.2012].

has nothing to do with the physical destruction of those people who are carriers of this culture."[77] The famous French ethnologist *Robert Jaulin* in his book "the White Peace, Introduction to the Genocide" says that "concept of ethnocide means acts of devastation of civilization, decivilization, uncivilization. It is built on the model of the concept of genocide."[78] He also mentions that the ethnocide also means physical destruction of individuals, that culture is a rule of human existence.[79] *Sautman* notes that, according to some scholars, the difference between cultural genocide and ethnocide is based on the assumption that "cultural genocide" is linked to ethnic murder, while ethnocide does not. He says that the term "ethnocide" is not mentioned in the Convention, as well as in the UN Declaration of Human Rights.[80]

We might share the opinion that the ethnocide is akin to the concept of genocide, however, we cannot agree that ethnocide implies destruction of the culture only and not killing of people. Lukunka's opinion might be shared when she envisages physical, biological and cultural elements of genocide within the ethnocide concept. R. Lemkin's concept is almost identical to the conception of R. Jaulin, according to which "*ethnocide* has been used to describe the concept of ethnocentrism exerted by one group and the feelings of superiority that can lead to the destruction of the culture of others. It also addresses more profoundly the consequences of colonialism of one culture by another".[81]

Based of identification of four basic concepts of genocide[82] and analysis of their conceptual aspects, it can be concluded that in all above-mentioned concepts of genocide, in spite of the variety of opinions, there are a lot of common and directly related linguistic or conceptual categories, whose knowledge is necessary for proper understanding of the meaning of genocide (see Annex 7). In fact, the concept of genocide is an idea of destruction of groups of person(s) in any form. In itself, the destruction means killing of groups of people and anindividual (if the latter is connected to this group). These concepts are similar to genocide by their descriptions and certainly do not constitute a crime of a new composition in whole. Nevertheless, they are separately more or less reflected in the conventional definition of genocide and can be granted status of subterms of the term genocide, based on which a new concept of genocide has been originated.

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77 *Sautman B.,* Cultural Genocide and Tibet, "Texas International Law Journal", 2003, 38: 177; *Lukunka B.,* Etnocide, Online Encyclopedia of Mass Violance, 2007, 2, available at: <http://www.massviolence.org> [03.06.2012].

78 <http://kakurii.blogspot.com/2011/12/blog-post.html> [02.05.2012].

79 *Jaulin R.,* La Paix Blanche: l'Introduction a l'Ethnocide, Paris, "Seuil", 1972, 14, in: *Lukunka B.,* Mentioned Work, 2.

80 *Sautman B.,* Mentioned Work, 189-190.

81 *Jaulin R.,* De l'Ethnocide: Recueil de Textes, Paris, "Union Générale d'Editions", 1972, 408, 376-377, in: *Lukunka B*., Mentioned Work, 3.

82 Considering that there are many basic concepts of genocide, e.g. imperialism, hegemony, democide, gendercide, barbarism, vandalism, etc., and while the for concepts presented in this paper more or less covers their characteristics, we decided to be focused on these four concepts.

Annex 7

#	Acts	Definitions	Source/Author	Comment	Elements of Genocide
1	**Cannibalism**	Flesh-eating, barbarism	Dictionary; *R. Lemkin*		Yes/no
2	**Colonialism**	1. Domination of people of other culture; 2. extending control over the annexed territory	1. Dictionary; *P. Curtin;* 2. *R. Lemkin*	Annexation, control of territory	Yes/no
3	**Politicide**	1. Mass killing of a politicial group because of oppozition 2. Killing of a persons or people for the Governmnet of politicis or political basis	1. Dictionary; *Barbara Harff;* *Teds Robert* 2. *R. Rummel*	Political victim of genocide (*Marchak*)	Yes/no
4	**Ethnocide**	1. Destruction of people's culture; 2. Destruction of culture and not phisical destruction; 3. Acts of devastation of civilization, decivilization, uncivilization; it is built on the model of the concept of genocide and also implies physical destruction of peoples, that culture is the rule of existence of people; 4. Concept of ethnocide implies physical, biological and cultural elements of genocide. 5. Ethnocentrism exerted by one group leading to consequences of colonialism of one culture by another	1. Dictionary 2. *B. Sautman* 3. *R. Jaulin* 4. *B. Likunka* 5. *R. Lemnkin*	2. *R. Lemkin* considered ethnocide as the second term for genocide; And called vandalizm as „cultural genocicie" as a component of genocide	Yes

5. Alternative Definitions of Genocide

5.1. Origins of Alternative Definitions of Genocide

There are two main reasons for definition of the crime of genocide, practical and theoretical. The practical side is that the Convention defines genocide as a crime in order to carry out criminal proceedings against it and promote taking preventive measures. The theoretical aspect is to assist the

social scientists to categorize various types of occurrences of mass killings and to do comparative analysis by their causes and outcomes.[83] If the definition does not provide a theoretically useful concept, then the researchers have to use alternative conceptual structures.[84]

The lawyers who developed the definition in the Convention on the *Prevention and Punishment* of *the Crime of Genocide* of 1948, in fact were focused on one particular cruelact already happened by that time, which should be declared as a crime, punishable act and prosecute genocide. However, in the 70's of the 20th century the research of genocide as a topic started. Sociology scholars announced that the Convention has failed to define its most important objective - prevention of genocide.

Sociologists, unlike the lawyers, do not consider the genocide as a specific case but as an ongoing process. In such cases, when an event is to be declared as crime, criminal proceedings should be instituted and the perpetrators be punished, the process, as well as its prerequisites be examined and the reasons that lead to the escalation and prevention of process be determined. Another problem, which according to the sociology scholars is related to the conventional definition of genocide, is that political or other groups are not categorized within the protected groups of Genocide and, therefore, remain unprotected. Through attempts to reflect these issues in the definition of genocide, historians and sociologists have developed a number of alternative definitions.[85]

5.2. Definitions of Genocide by Sociologists and Historians

The conventional definition of genocide could at least be compared with alternative definitions by *Frank Chalk, Kurt Jonassohn, Israel Charny, Hellen Fein, Steven Katz, Barbara Harff, Ted Gurr and R. Rummel*.

Frank Chalk and *Kurt Jonassohn*[86] pay particular attention to active participation of a state in the commission of the crime of genocide that aims at the destruction of the target group. *Deborah Harris* properly observes that the definition of *Chalk* and *Jonassohn*, "is a good example which can be used as an alternative concept of genocide, but Harris insists that criminal intent should be proven"[87] what we cannot agree with, because proving the intent is a procedural issue and its consideration in the definition is not advisable.

Similarly to *Frank Chalk* and *Kurt Jonassohn*, *Israel Charny*[88] links genocide to mass killing of a significant number of vulnerable people, while *Ellen Fein*[89] focuses on continuous and deliberate act

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83 See *Lumbrecht C.,* Grappling with the Concept of Genocide, Working Paper, 1999, 1.

84 Ibid.

85 <www.jewishworldwatch.org/.../Genocide-Definitions-Fact-Sheet.doc> [02.06.2012].

86 *Chalk F., Jonassohn K.,* The History and Sociology of Genocide, 1990, 23: "Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator."

87 *Harris D.,* Defining Genocide: Defining History, "Eras Journal", Edition 1, available at: <http://arts.monash.edu.au/publications/eras/edition-1/harris.php>[02.06.2012].

88 *Charny I.,* Towards Generic Definition of Genocide, in: *Andreopoulos G.J.,* Genocide: Conceptual and Historical Dimensions, "University of Pennsylvania Press", 1997, 75, "Genocide in the generic sense means the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defencelessness of the victim."

of the perpetrator for collective physical obstruction through preventing biological or social reproduction of group members. *Steven Katz*[90] links the existence of genocide in the concept of genocide to implemented intent targeted at the destruction of the entire group. In the definitions by scholars, irrespective of different accents, one fact is obvious, which is related to the extent of the conventional definition of genocide, which is once more confirmed in the definitions by *Hurff* and *Gurr*.[91] Their definition of genocide is slightly different from the UN Convention definition. According to them, killings are carried out by the state or the regime. The Genocide Convention does not make any reservation in this regard. It only refers to the devastating campaign against racial, ethnic, national and religious groups. The list does not mention the destruction of political groups. They consider "killing members of the group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" as identifiable criteria of the genocide and do not consider the criterion relating to "causing serious bodily or mental harm to members of the group" as a part of the definition of the Genocide Convention".[92]

Rudolf Rummel says that genocide has 3 different meanings: legal, common and generalized.[93]

"Common meaning of genocide is equivalent with the killings by government of people due to their national, ethnical, racial or religious group membership.

Genocide is of legal meaning which is defined by the Convention on the Prevention and Punishment of the Crime of Genocide. It also includes non lethal acts targeted at the destruction of the group, such as the prevention of birth or forcibly transferring children of the group to another group.

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89 *Fein H.,* Genocide: A Sociological Perspective, 1993/1990, available at: <www.jewishworldwatch.org /.../Genocide-Definitions-Fact-Sheet.doc> [02.06.2012], "Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim."

90 *Katz S.,* The Holocaust in Historical Perspective, Vol. 1, 1994, available at: <www.instituteforthestudy ofgenocide.org> [02.06.2012], "The concept of Genocide is the actualization of the intent, however successfully carried out, to murder in its totality any national, ethnic, racial, religious, political, social, gender or economic group, as these groups are defined by the perpetrator, by whatever means)."

91 *Harff B., Gurr T.,* Toward Empirical Theory of Genocides and Politicides, "International Studies Quarterly", (37) 3, 1988, pp. 359-371, available at: <http://clg.portalxm.com/library/keytext.cfm?keytext_id=193> [03.06.2012]. *Harff* and *Gurr* categorized two types of genocide. In both types of genocide the target groups are defined by their race, ethnicity, nationality or religion. **Hegemonial genocide:** the racial, ethnic, national or religious groups are being forced to submit to the authority of the state. This may happen when a new state is formed or when a state expands. Examples of this type of genocide include actions of the USSR against various ethnic groups of the North Caucasus region between 1943 and 1957 and the campaign of the People's Republic of China against Tibetan nationalists in 1959. **Xenophobic genocide:** Murder campaigns are part of a state policy of national protection or social purification where victims are defined as alien or threatening. Examples of this kind of genocidal campaign between 1945 and 1988 include the campaigns against the Ache Indians in Paraguay (1962-72), against the Ibo in Nigeria in 1966 and against Muslims in the border region of Burma in 1978.

92 <http://clg.portalxm.com/library/keytext.cfm?keytext_id=193> [03.06.2012].

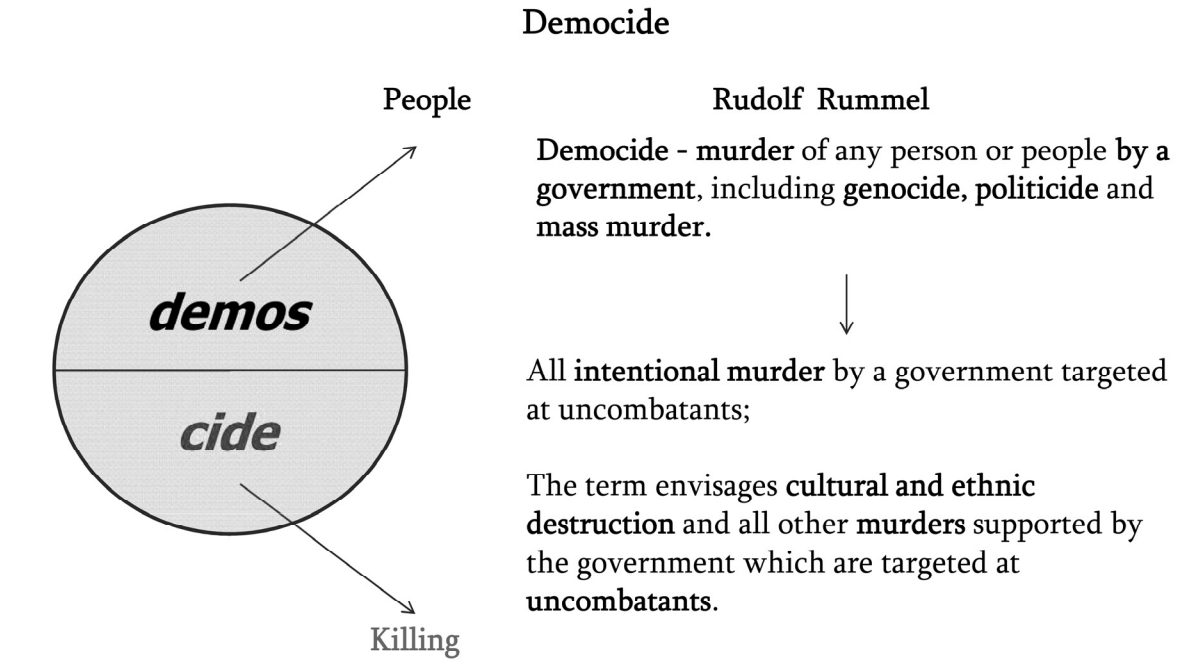
93 Ibid.

A generalized meaning of genocide is similar to the ordinary meaning, but also includes government killings of political opponents or otherwise intentional murder."

In order to avoid confusion over which meaning is intended, *Rummel* created the term democide for the third meaning, which consists of the Greek word *demos*, *dimos* – "people" and the Latin word *cide* – "killing".[94]

Rudolf Rummel describes democide as the murder of any person or people by a government, including genocide, politicide and mass murder.[95] He also believed that democide could imply all intentional murder by a government targeted against uncombatants, that term envisages cultural and ethnic destruction, extermination of politically marginalized groups and all other murders supported by the government which are targeting noncombatants. *Rummel's* concept has come under criticism for being too amorphous. Although democide widely used by researchers, the term democide in respect with the term genocide does not receive approval (see Annex 8).[96]

Annex 8



94 <http://www.hawaii.edu/powerkills/GENOCIDE.HTM> [01.06.2012].

95 *Harff B., Gurr T.,* Toward Empirical Theory of Genocides and Politicides, "International Studies Quarterly", (37) 3, 1988, 359-371, available at: <http://clg.portalxm.com/library/keytext.cfm?keytext_id=193> [03.06.2012].

96 Genocide - Origins And Evolution of the Concept, see: <http://science.jrank.org/pages/9496/Genocide-Origins-Evolution-Concept.html> [03.06.2012]; in order to better reflect the interrelation of legal definition of genocide with its neighboring concepts, we considered it reasonable to define the term omnicide and present respective schemes (see Annexes 9 and 10).

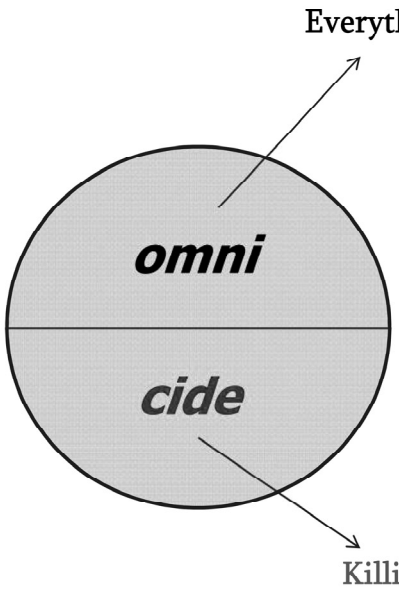
Alternative definitions of genocide, the abundance of their definitions allow us to see the important differences and contradictions; help us overcome the difficulties; allow us to define the phenomenon of genocide more laconically and accurately and make typology of genocide, for example, hegemonic and xenophobic genocide (*Harff* and *Gurr*), which can be added to a cultural genocide (*Lemkin*), as well as biological genocide (*Lemkin's* concept, which defines protected groups on the biological basis) and so on.

Definition of genocide used by researches of scientists in different fields, lawyers, historians, sociologists, psychologists, anthropologists and others performs certain filter function in which facts are explained and interpreted. For example, the definition which recognizes a particular action as a "genocidal" act, along with history may lead to the result that by focusing on similar acts other acts will be excluded, while definition of genocide relating to such a comprehensive study on the subject, such as the exploring the genocide phenomenon, the definition of genocide might be crucial for examining and analyzing events, processes and facts.

Annex 9

Omnicide

John Somerville



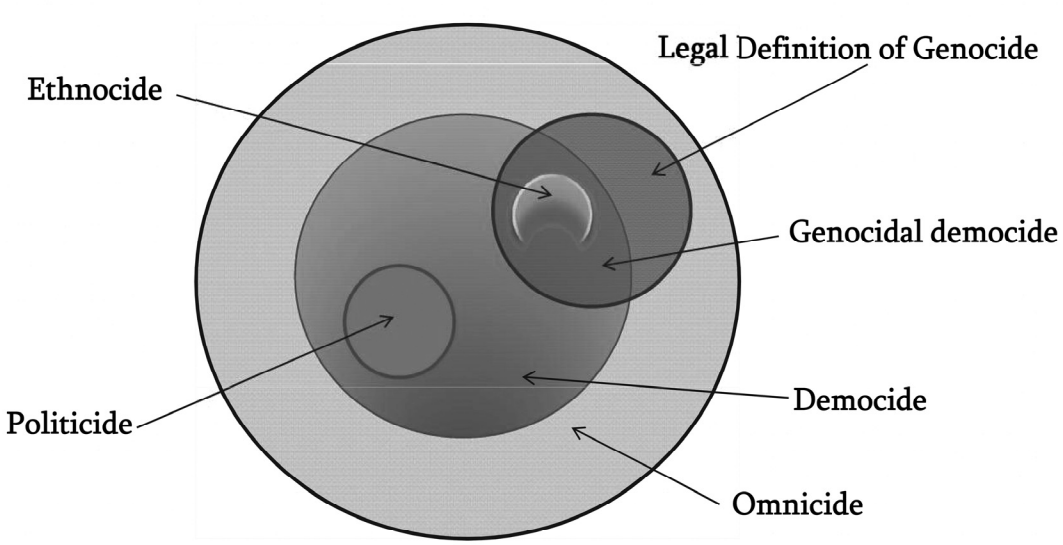
Omnicide - 1. Extinction of the human species as a result of human action; human extinction through nuclear warfare; 2. Death of all, the total negation and destruction of all life; 3. Suicide of all.

Omnicide is an extension of the concepts of suicide and genocide.

Omnicide can be considered a *sub-category* of genocide (Adam Jones (2006): A Seminal Work on Genocide". *Security Dialogue*, 37 (1): 143–144.).

Annex 10

The Position of Legal Definition of Genocide among the Adjoining Concepts



6. Conclusion

The paper describes the etymology of the term genocide, conceptual characteristics of the concept of genocide and analyzes its statutory definition in international acts.

As the research demonstrates, the borders of the concept of genocide go far beyond the borders of the Genocide Convention, as in the etymology "*génos*" is of biological determinant.

Inclusion of genocide within the legal framework has functionally expanded the scope of protected groups to such extent that caused a fair criticism among the researchers, which is mainly associated with the expediency of inclusion of religious groups under the protected groups and expansion of the meaning of the term killing, destruction.

The research showed that the concepts of nation, ethnicity and race, despite the fact that they have different functions, have biological elements that cannot be claimed with respect to religious groups. Accordingly, a decisive criterion for the members of the protected group within the composition of the crime of genocide should be a condition, which will be impossible for the mankind to rebuild after its destruction.

Hence, the concept of genocide should not be expanded too much and the protected groups within the concept of genocide should be limited only to determinative biological criterion - genes. The research showed that groups united with the national, ethnical and racial elements meet this requirement.

With respect to the issue of religious groups, legislators should criminalize the composition of an independent act. Otherwise, requirement to envisage other groups in the conventional composition of genocide will be logical and fair. The failure in this regard will objectively lead to confusion of the

conventional concept of genocide with policide, democide, etnocide and other concepts with each other that is absolutely unacceptable.

Failure to decide an issue of religious groups under the protected groups of genocide makes us think logically the reasonability of identification of other protected groups in the Convention. When identifying such protected groups, it should be a starting point that groups, voilating values recognized by the international community, such as maintaining international peace and security (one of the main goals of the *Charter* of the *United Nations*) as well as the country's sovereignty universally recognized human rights, etc., are not considered as protected groups.

In such cases, it is possible to formulate a new article. Conditionally, it could be named as "genocide and infringment of protected groups under the convention". *Genocide* would be extended only to the groups united by biological characteristics (race, nation, ethnic group), while *infringment of protected groups under the Convention* would be limited to the groups (e.g. religious, political, etc.) identified under the Convention and the composition of the article would take into account all original provisions of the Genocide Convention.

In order to fundamentally explore the above-mentioned issues, it is necessary to carry out criminological research through in-depth study of specific facts and other empirical materials.

Rusudan Jobava*

Peculiarities of Translation of a Juridical Text from French into Georgian

1. Introduction

Translation of a juridical text in the contemporary era acquires a significant importance from the point of view that in the process of legal and international events one wants to get this or that information from a certain language. From this aspect a special role is played by the use of the principles of the technical translation theory. Translation is one of the ways of an inter-language communication. The objectives of studying this aspect of translation are the following: to define a concept of translation, to reveal linguistic and extra linguistic factors and finally to study a problem of equivalence. In the present article we will discuss main problems of translating juridical texts from French into English.

A juridical (French) language is particularly a specific language, which in most cases needs a direct (word-to-word) translation and in exceptional cases an equivalent translation too. Specificity of the juridical language is not only created by its lexis, but it is the whole textual organization, as a result of it the translation is complex, as the difficulties are mainly caused by the strict nature of the juridical text given by its legal norm. To translate a juridical text means to understand juridical and linguistic elements, which have formed a juridical norm and then transfer it into the other language and other culture. As for the choice of linguistic ways, it is a question leaving the interpreter very few ways of maneuvering.[1]

2. Main Characteristics of Technical Translation

In the course of translation very important are different types of lexical transformations, which are subjected to the logic-semantic principle and envisage stylistic-expressive factors.[2]

In the process of translation there can be distinguished three main categories of word combinations:

1. Equivalents;
2. Alternative and contextual word combinations;
3. Translating transformations.

There is a principal difference between the first and the two last categories. The first one belongs to a language sphere and the rest two ones – to a speech sphere.

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* Doctoral Student of the TSU Law Faculty.

1 *Monin G.*, les problèmes théotiques de la traduction, "Gallimard",1963, 122-123.

2 *Ledereri M.*, Translation-Interpretation Model (Tranlation by *Jashi Q.*), Tbilisi, 2011, 53-54 (in Georgian).

As for a scientific-technical text, in a specific case a juridical text, it is distinguished with its distinctness, logicality, exactness, laconism, impersonal type of description, the usage of terminological and normative speech clichés; there are used simple sentences, nominalization, abstract nouns by the principle of maximal economy of language means. From the persons of the verb the II person is not used, the singular of I person is seldom used, interjection and imperative are not used, passive voice is more often used, so often are narrative sentences, exclamatory and elliptic sentences are not used. Very frequent is substantive infinitive, as the process is preferred and not a performer of the action; we have cause-effect couple connections; vocabulary is emotionally neutral. The sense must be complete, perfect, exhaustive, logical and objective.[3]

As Klod Bocke[4] mentions, jurisprudence in every language, culture, country has formed its own terminology and phraseology. How to translate a juridical text from one language into other language when there are not the same concepts or a notion existed in one language does not correspond to the notion in other language? In general a phenomenon of translation can be found in interrelation of a language and thinking; if there was not the unity of a language and thinking, if a language was not able to express every thought, translation would not exist. It's true that there are differences between two languages: different semantic capacity of a word in different languages, various combinative changes of a word, peculiar rules of word matching, different meta-semiotic basis of phraseological units, creating certain difficulties in translating; besides the knowledge of the language of the original, a translator is able to comprehend a real situation or reality given in a certain text.[5]

3. Border between Direct and Equivalent Translations

There is a general opinion that translators working in jurisprudence are obliged to translate directly.

Discussion about direct (word-to-word) and free translations takes its start from the ancient time. These two approaches separated linguists and translators, as the separation of these two spheres was caused by the attitude to the problem itself. Nowadays it seems as if the problem is solved and the notions, such as word-to-word, are replaced by other notions, for example equivalency between the original and the translation.

As for the juridical translation, translators encounter with juridical and language concepts of their own. It's a natural question: How will a translator be able to carry out the word-to-word translation?

Here a question is between the equivalence and the correspondence; it means that equivalence is a means of general translation.[6] It does not exclude those correspondences, which confirm the existence of the elements that correspond in every case to the text or beyond it, but correspondences are established between: language elements, words, syntagmas, syntax forms or idioms.

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3 *Penformis J.L.*, Le français du droit, "CLE International", 1998, 8- 9.

4 *Bocquet C.*, Traduction Specialisée, choix théorique et choix pratique dans l'exemple de la traduction juridique dans l'aire fracophone, Genève, "Parallèle", #18, 1996, 156-189.

5 Ibid., 211-212.

6 *Ledereri M.*, Translation-Interpretation Model (Tranlation by *Jashi Q.*), Tbilisi, 2011, 106-107 (in Georgian).

In order to translate successfully the translator should attempt to establish generally an equivalent connection between the original and the translation.[7] All the researches having been performed in Esit[8] prove that the equivalent translation is generally reliable regardless a type of the text, literary or technical. Equivalent is reached by combination of text semantics and the cognitive complement found by the translator. Let's take for example an extract from the article of the newspaper "Le Monde":

"Dans ses motivations, le Conseil d'Etat estime que "l'existence d'un pays tiers d'accueil ne peut pas à elle seule permettre de juger une demande d'asile comme manifestement infondée". Les résolutions de Londres invoquées par l'administration? "Dépourvues de valeur normative", tranche le Conseil d'Etat, rappelant qu'une simple résolution n'a aucune valeur tant qu'elle n'est pas transcrite dans le droit national. Et les magistrats de conclure qu'en refoulant M. Rogers, le ministre de l'Intérieur a commis une erreur de droit."

"By this motive, Council of State thinks that "only one receiving country that is a non-member of the European Union cannot admit the demand of a refuge as groundless". What kind of decisions are London decisions? "They are without normative meaning"- definitely says Council of State remembering that simple decisions have no importance, as they are not written in the international law. However judges conclude that by returning M. Rojer the Ministry of Home Affairs made a juridical mistake."[9]

In the above presented extract equivalents were formed by considering the situation. In the first sentence "pay tiers", which in word-to-word translation means the third country, in the international jurisprudence non-member countries of the European Union are called so, in this case we just have the situational knowledge. Attention must be paid to the word "l'existence", which means existence and it was translated in Georgian by a passive form – existed, giving even more refinement to the idea. In the second sentence a question word is omitted, which at first sight makes the idea unclear; we filled it up with a question word. In other words we have sufficient verbal context in the sentence to reveal actualized meanings of the words. In the last sentence "les magistrats de conclure" in word-to-word translation means judges of conclusion which for a Georgian is absolutely unclear; we translated it as judges are concluding. It can be said that not only by searching for certain equivalents, but by a number of grammar transformations the translation became perfect.

In which case can it be said that the translation is equivalent to the original? In his book "Introduction to the science of translation" Verner Koller made an effort to bring a little clearness in equivalence criteria and names a list of epithets:[10] a pithy equivalent, called also invariant content, forming equivalent, functional equivalent, textual equivalent, communicative equivalent, pragmatic equivalent, equivalent of effect.

When translating a juridical text the following principles should be observed:

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7 *Ledereri M*., Translation-Interpretation Model (Tranlation by *Jashi Q*.), Tbilisi, 2011, 79-80 (in Georgian).

8 High school of Translators-Interpreters of Paris.

9 Translation by *Jobava R*.

10 *Ledereri M*., Translation-Interpretation Model (Tranlation by *Jashi Q*.), Tbilisi, 2011, 112-113 (in Georgian).

1. The translation must convey the information given in the original. It is so called denotation equivalent;

2. A style must be maintained in the translation: language register, social dialect, geographic dissemination of phrases, i.e. connotative equivalent;

3. Juridical and legal terms in the translation must be functionally precisely given.

It can be really said, that in juridical texts, notarial acts, contracts and agreements words are not only the means, through which the idea is understood, but they have also their own weight, their unchangeable meaning regardless of the context; they were chosen and are not a result of a spontaneous contact between the word and the idea. The meaning of this word is just translated and not the referent, to which it points. When general De Gaulle was in USSR and was talking about Russia, the term "Russie" should have been understood and translated with its corresponding term "Russia", while in other circumstances it might have been translated with the word "USSR".[11]

The term by its purpose is a mono-semantic, conceptual marker, though it is represented by a language feature, word or syntagmas; it has lack of connotation changes, which is dominating in the ordinary vocabulary. The meaning of a technical term in languages, as well as in texts points to a definite object. The term can be translated by its correspondence, opposite to an ordinary lexical unit.[12] It must be noted that juridical terms should be translated directly, but finding equivalents will not be excluded, though it's not always easy to find them, e.g. "appel" means – appeal, call, apply, appeal-complain, which must be exactly corresponding to the semantic meaning of the term existed in the certain document.

4. Juridical Terms and Categories

In every juridical translation we might encounter three types of term: 1. terms, which have semantic equivalents; 2. terms, which do not have semantic equivalents in other language, but their functional equivalents can be found and 3. untranslatable words.[13]

In the first category a translator is far from translation problems, as he/she applies directly to specific terminology or the concepts scheme. In the second category there is a question of equivalency The found equivalent is a conceptual equivalent and at the intended level it is canonical name among conditional synonyms, generally a concept given in one system must be corresponded by the equivalent existed in the second system; this is a case of the ideal equivalent. Problems will be arisen in case of partial equivalency or in case of non-existence of equivalency. From linguistic point of view partial equivalency is when we have a problem of concept or naming. The third problem - lexical vacuum is pairs of elements, which are called "untranslatable words". In one as well as in the second case when transferring from one language to the other language a problem is caused by the lack of the

[11] *Ledereri M*., Translation-interpretation Model (Tranlation by *Jashi Q*.), Tbilisi, 2011, 98-99.

[12] *Bocquet C*., Traduction Specialisée, choix théorique et choix pratique dans l'exemple de la traduction juridique dans l'aire fracophone, Genève, "Parallèle", #18, 1996, 125-126

[13] <http://ec.europa.eu/index.fr.htm>.

direct equivalence that is a peculiarity almost of the whole vocabulary and so it's not surprising the lack of any equivalence.[14]

In French juridical nomenclature consists of exclusively juridical and terms of two-sided belonging. They can be divided in the following way:

1. Exclusively juridical terms, which have only legal meaning and are not used in spoken language; these are: cassation – cassation, litige - argument, emhyteose - long-term agreement, greffier – clerk of the court, pourvoi – appeal, greffe – office of the clerk, testateur – testator;

2. Juridical terms which entered into the ordinary spoken language, (e.g. hypothèque-mortgage);

3. Terms of spoken language which entered into jurisprudence and acquired radically different meaning: parquet (in spoken language – parquet, in jurisprudence – public prosecutor's office; grosse - in spoken language _ fat, thick, in jurisprudence – copy; siège- in spoken language -residence, in jurisprudence _jurisdiction; barreau- in spoken language _ stick, in jurisprudence –the Bar.)

The above listed categories can be divided in two main categories:[15]

1. The main juridical terms by themselves comprising so called "treasury" in legal sphere and are mostly used; they are: aliénation-alienation, arbitrer-member of arbitration commission, arbitrage-arbitration, audience-court session, autorité- authority, avocat-advocate, caution - caution, clause-clause, competence-competence, contestation-contestation, contract-contract, convention-condition, débat-debate, délit-delict, gage-gage, garantie-guarantee, interdiction- interdiction, héritage-heritage, héritier-heir, justice-justice, juge-judge, juger-adjudicate, jugement-judgement, jurisdiction-jurisdiction, juste-just, légitime-legitimate, loi-law, magistrat-magistrate, magistrature-magistrate's court, procedure-procedure, procès-process, plaider-defend, prérogative-prerogative, règle-canon, rente-income, requête-request, révocation-revocation, sanction-sanction, sentence-sentence, sursis-conditional sentence, témoignage-witnessing, témoin-witness, testament-testament, tribunal-tribunal, tutelle-tutorship, usufruit - usufruct, valable-available and others;

2. Secondary juridical terms: these terms acquired the main meaning in a spoken language and special meaning in the juridical language. Some terms have the same meaning in both languages. They are the main instruments of thinking and reasoning and are pointing to the existence of facts. These are: admettre-admit, argumenter-argumentation, certitude-certainty, constatation - constate, constater-ascertain, contradiction-contradiction, conviction-evidence, contredire-contest, document- document, doute-doubt, énoncer-announce, établir-establish, expose- expose, exposer-submit, negation-deny, prouver-prove, refutation-revoke, rejecter-rejection, supposer-supposition and others.

Other terms entering into this category have acquired a specific meaning in juridical language. They are universal means of thinking: abus-abuse, acte-act, aptitude-aptitude, avantage-advantage, besoin-need, bien-property, bienfait-profit, capacité-capacity, cause-cause, défaut-default, essence-essence, forme-form, jouissance-use, motif-motive, mobile-movable property, objet-object, ordre-order, origine-origin, profit-profit, protection-protection, puissance- puissance, resources-resources, usage-usage, vice-vice, volonté-voluntary and others.

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[14] *Ledereri M*., Translation-interpretation Model (Tranlation by *Jashi Q*.), Tbilisi, 2011, 169.

[15] <http://ec.europa.eu/index.fr.htm>.

Juridical vocabulary is very excessively observed in a general language that represents one of the difficulties of the strictly specialized language. Juridical terms can have other meanings in certain contexts. This diversity is a great difficulty and here arises a problem of polysemy of a juridical language.[16] Juridical language is one of the most polysemic languages because most of the juridical terms have lots of meanings. In such a case a translator has a difficulty of finding the precise meaning in the given context so that to choose a proper equivalent in the other language; let's take the term "droit", which according to French-French dictionary by Robert has several meanings:

1) right (droit naturel-natural right, droit de l'homme-human right);
2) law (droit public-public law, droit international-international law, droit des privés-private law);
3) law (science) (faculté de droit, étudiant en droit – a juridical faculty, faire son droit – a student of juridical faculty);
4) privilege, prerogative (avoir des droits à la reconnaissance de qqn-);
5) customs, tax (droits légaux-court expenses, droits de douane – customs duty.

In translating a juridical text there are used some means of transferring of foreign reality. One of them is adaptation that is a main obstacle for trans-coding existed in juridical systems;[17] the translator is overcoming this problem by considering the context and the final objective, e.g. "Il travail dans les cabinets juridiques" – in word-to-word translation it means juridical offices, but we must translate it into Georgian as a solicitors' office.[18] Originality of the translation is to attempt to give some color to it. Here I can quote Cicero's words said by him when he was translating the works of Attic orators Aeschines and Demosthenes: "I was translating as an orator rather than as a translator, maintaining the main idea and form or as it is said "figures of thinking", but conveying them by the admissible for us language. So I did not have the necessity of word-to-word translation, though I observed the common style and the importance of the language."[19]

5. Conclusion

In the bustle of events in the modern world the translation acquires more and more importance. For today the world is distinguished for particular achievements of civilization, information technology and mass-media and for starting global-integration processes as well. Historic and other factors are in close connection with language policy, which in its turn sharpens the interest to traduction as to science and practical activities. It is also one of the means of exchange cultures between peoples. On the basis of all the above mentioned it can be concluded that for development of technical translation it is very important to analyze and reveal peculiarities of theoretical and practical ways of translation of juridical texts. It will promote rapprochement of national cultures and information exchange at international level.

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16 <http://www.wipo.int/portal/index.html.fr>.
17 *MoninG.*,les problèmes théotiques de la traduction, "Gallimard",1963, 234-145.
18 *Ledereri M.*, Translation-interpretation Model (Tranlation by *Jashi Q.*), Tbilisi, 2011, 243 (in Georgian).
19 <http://www.wipo.int/portal/index.html.fr>.

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