TSU Faculty of Law

№2
2020

Journal of Law

Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№2, 2020

უნივერსიტეტის
გამომცემლობა

UDC(უაკ) 34(051.2)
ს-216

Published by the decision of Ivane Javakhishvili Tbilisi State University Publishing Board

ISSN 2233-3746

Table of Contents

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Consequences of Marriage Performed in Restrictive Circumstances

The article discusses the circumstances that arise in a marriage relationship established in violation of canon law. In real life marriages are frequently performed in disregard of the requirements of canon law. Due to the nature of canon law, compliance with such requirements is mandatory for all members of the Orthodox Church, and since a large part of the population of Georgia is Orthodox, the issue is quite topical. In a number of cases, lack of complete understanding of the matter in question leads to neglect of the requirements for starting a marriage, which can lead to disastrous results. Failure to follow the circumstances hindering the marriage will result in certain negative consequences, both the married couple and the priest who performed such marriage ceremony. The consequence may range from an ecclesiastical punishment to separation of the couple. The separation of the couple raises the issue of the canonical legal status enjoyed by their children and this matter deserves special interest. In this case, too, the issue of canonical oeconomy (pardon) should be considered which, if necessary, was applied by the clergy of the appropriate authority. The article explores all of the issues above based on relevant legal norms and existing practices.

Key words: *Marriage, divorce, monogamy, clergymen, oeconomy, church.*

1. Introduction

It is not that uncommon nowadays when a marriage ceremony is performed against the requirements of the canon law a member of the Orthodox Church has to comply with; and since a large part of the population in Georgia is Orthodox, it is quite a topical issue.

The canon law strictly defines the requirements and circumstances whose violation results in declaring a marriage illegal. These circumstances are called obstacles to marriage, which optionally can be classified as follows: positive and negative circumstances, universal and individual circumstances, separation and non-separation circumstances. Each of them leads to the consequent results that vary due to different circumstances. The result means a circumstance that arises during a marital relationship established despite the prohibition. Such a situation can be resolved or the relationship can be restored as a legal one in different ways, which determines the nature of the violation. For this purposes, the study shall focus on the requirements of the canonical norms that establish the conditions that prevent marriage, on the basis of which we must determine the legal solution to the created situation, which, to a large extent, are declared in the law itself. In some cases the law imposes ecclesiastical punishment without requiring divorce; In some cases, divorce is mandatory, after which the person is additionally sentenced to ecclesiastical punishment; and in other cases the law and ecclesiastical practice provide for the possibility of ecclesiastical oeconomy or

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pardon. "Canonical oeconomy" is a phenomenon when the impact of ecclesiastical legislative norms is mitigated, which aims to avoid possible obstacles caused by the strict application of the requirements of the law. In the event when close adherence to law may push the believer (especially a new convert) to deviate from the goal and be hindered, in some cases, mercy is shown to those who have strayed from the path and the punishment provided by the law is reduced.[1]

The consequence of a marriage performed in restrictive circumstances is associated with a sensitive issue such as the canonically legal status of children. The purpose of this article is to determine the canonical legislation related to legal rights of the children born as a result of a marriage performed and consummated against law, their status, and access to church benefits.

The topicality of the issues in question is also related to the activity of the World Patriarchate in recent years. In 2016, one of the issues on agenda of the Holy and Great Council was revision of obstacles to marriage, including the issue of granting the clergymen the right to remarry in case of widowhood and marriage between an orthodox and unorthodox, which has provoked mixed response among local churches. Some of them, including Georgia, refused to participate in the meeting with this agenda. [2]

The article discusses the obstructive circumstances for marriage and the most frequent cases of neglect. The reason for this is mostly the lack of knowledge about these obstructions**.**

2. Obstacles to Marriage

Different sex. In accordance with the Orthodox Christian teachings, same-sex sexual relations, including marriage, is considered a grave crime – the so-called sin of sodomy. The definition of marriage stipulates the following: "Marriage is a union of a man and a woman, a unity for entire life, a unity of divine and human laws" (Syntagma Letter Γ, Chapter 2)[3] – this clearly shows that the canon law labels concept "marriage" only relationship between people of the opposite sex. The canonical norm is given in the third canonical epistle of Archbishop Basil of Caesarea-Cappadocia (hereinafter referred to as the "Law of St. Basil the Great"), to Bishop *Amphilochius* of *Iconium: "Those who commit sin of mixing men shall atone in the same way as it is prescribed for adultery."*[4] Thus, homosexual intercourse, in any form, is viewed as equal to sin of adultery, and a canonical punishment assigned in the same capacity and same period. In this case, we are not dealing with marriage in general and it is illegal from the start.

Existing marriage. According to Orthodox teaching, a Christian family is strictly monogamous. A legally effective marriage excludes parallel marital relations. Canon 80 of St. Basil the Great calls polygamy 'a deed of an animal' – "It is an animalistic deed and is completely alien to

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1 For more extensive information on this issue see, *Bumis P.I.,* Canonic Law, G*arakanidze I. (Trans.),* Tbilisi, 2013, 46-47 (in Georgian).

2 <www.interfax.ru/world/627665> [27.10.2020]; <patriarchate.ge/news/1575> [27.10.2020].

3 *Vlastar M.,* Alphabetical Sintagma, *Ilyinskiy N.* (Trans.), Moscow, 1892, 56 (in Russian).

4 *Saint Basil the Great,* Canon 62 – Canon of Orthodox Church with commentary by Bishop Nikodim (Milaš), Vol. 2, Tbilisi, 2011, 386 (in Georgian).

men ...". According to Bishop Nikodim (Milash), "the law identifies as polygamy not only when one has multiple wives at the same time, but also when one marries multiple times."[5]

Third marriage. The Old Church sought to pursue the Orthodox Christian teaching on single marriage relations. The second and third marriages were viewed as a criminal weakness that were subject to punishment by church, and therefore, no permission (blessing) was issued for the second and subsequent marriages for an extensive period.[6] "According to the law, only the first marriage is considered sacred and blessed by God. The second marriage deserves a canonical punishment. The third marriage in the church is considered a filth and can only be accepted, for it is better than perverted fornication...", explains Bishop Nikodimos.[7] After some time, the church took more tolerant approach to this issue as a "concession to human weakness"[8] and the second marriage was no longer considered illegal; however, the church still viewed such marital relationships as unreliable which was reflected in the canon law. In particular, the following restrictions were agreed upon: 1. Second-time married persons are subject to ecclesiastical punishment or penance; 2. The wedding ceremony differs from the first marriage and is less festive (served without ceremonial crowns). 3. Clergymen are forbidden to join the festive table of the second married couple. 4. Second-time married persons are prohibited from becoming the clergy.[9] Considering the aforementioned rules, it becomes clear how strict the canon law is towards second marriages. Accordingly, extremely severe norms apply to the third marriage. Canon 4 of St. Basil the Great stipulates "... those who cross the line of the second marriage are no longer worthy to be called a husband or wife ..."[10] Guidance concerning the third marriage is provided in Canon 50 by St. Basil the Great, which states: "there is no law on the third marriage; thus, the third marriage is not blessed by law. We view such things as filth in the church, but we do not subject it to public judgment it is viewed to be better than perverted fornication." [11] According to Canon 50 by St. Basil the Great, "... every subsequent marriage is called polygamy" he calls it an inhuman act committed by an animal considers it a sin worse than fornication.[12] The fourth marriage is completely forbidden under the Orthodox Church law; even the third can be allowed only in exceptional cases and solely with the permission of the ruling bishop.[13]

The obstacles to marriage such as the existing and the fourth marriages are closely related to the so called religious engagement. Engagement is a pre-wedding event preceding the church wedding ceremony. According to Trull's Canon 98,[14] it is forbidden to marry a person engaged to someone else. The engaged ones equal to the married ones in status. Regardless of whether an engagement is

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5 Canon of Orthodox Church with commentary by *Bishop Nikodim (Milaš)*, Vol. 2, Tbilisi, 2011, 395 (in Georgian).

6 *Suvorov N. S.,* A Textbook in Canon Law, Moscow, 1908, 351 (in Russian).

7 *Bishop Nikodim (Milash),* mentioned work, Vol. 2, 295.

8 Ibid, 336.

9 *Nikodim Bishop of Dalmatia,* Canon of Orthodox Church, Saint Petersburg, 1897, 594 (in Russian).

10 *Bishop Nikodim (Milash),* mentioned work, Vol. 2, 335.

11 Ibid, 379.

12 Ibid, 395.

13 Ibid, 338.

14 Orthodox Canon Law, with comments by *Bishop Nikodimos (Milash*), Vol. 1, *Hegumen Dositheos (Bregvadze) (ed.),* Tbilisi, 2007, 553 (in Georgian).

followed by a marriage, the parties are considered to have been in marriage and this is counted in a number of marriages.

Clergymen status. According to the requirements of the canon law, marriage is prohibited for clergymen.[15] Persons who have been ordained to the ordination (deacon, priest[16]) are allowed to marry only before the ordination, and are no longer allowed to marry after this stage is reached, i.e. after their promotion to the clergy. After the blessing, the canon also puts a ban on marriage for those with ecclesiastical status such as subdeacons (same as assistant deacons)[17]. Law 60 of the Council of Trull commands: "since the law of the apostles states that only bible readers and psalm singers may marry among the unmarried members of the church, so we too share this and declare: from now on, after ordination, subdeacons, deacons, or priests are no longer allowed to marry. Those who follow their pride and violate this ruling, they shall be withdrawn from the church. If any of those who are ecclesiastical in law wish to marry lawfully, he must do so before he can be ordained a deacon, deacon, or priest."[18] For example, Acts 26 states, "We command that among the unmarried clergymen, only book readers and psalm singers are allowed to marry" According to these regulations, a person holding a clerical degree, after ordination, is prohibited from marrying in any circumstance, regardless of widowhood or divorce.

The law on second marriage is stricter with regard to the clergy. They are required to strictly adhere to orthodox teaching on marriage, and unlike secular persons, "human weaknesses" are not considered in this respect. The canon bans not only the second marriage for the clergy, but also the acquisition of the clerical rank by a person if he or his spouse is in the second marriage (before ordination). Acts 17 states that "a person who has been married twice after the Holy Epiphany or eats kharcha can not be consecrated a bishop, priest or deacon and, moreover, is entirely banned from being a member of the clergy"[19], as well as Acts 18 states: a person who marries a widow, an outcast, a prostitute, a servant or an actor loses the right to become a bishop, a priest, a deacon, and a member of the clergy in general."[20] Provisions of the same content are stipulated in the Canons 3, 12 of Trull and Canon 12 by St. Basil the Great.

Monasticism. It is a spiritual oath when a person, woman or man, in addition to another oath (vow), also makes a vowof chastity, which bans any sexual life, including legal marriage for life. Canon 16 of the 4th World Council of Chalcedon stipulates that "a virgin who has sacrificed herself to Lord, as well as a nun, shall not get wed... "[21] The norms of the same content are given in Law 44 of the World Council of Trull, Law 19 of the Local Council of Anciria and Laws 19 and 60 of St. Basil the Great. Monasticism is a way of life based on the biblical orthodox teaching of sacrificing oneself

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15 This means the so called "white clergy" or "married" clergy who have not made a vow of chastity.

16 The head of the priests, Bishop makes a vow of chastity.

17 Despite the fact that subdeacons do no belong to the clergy hierarchy, their work is highly regarded and thus they bear the same limitations. This restriction does not apply to the book readers and psalm singers. See the interpretation of Canon 6 of Trull, *Bishop Nikodimos (Milash),* mentioned work, Vol. 1, 416-421.

18 *Bishop Nikodimos (Milash),* mentioned work, Vol. 1, 416.

19 Ibid, 56.

20 Ibid, 58.

21 Ibid, 340.

to Lord. One of the fundamental requirements of this teaching is chastity and . A nun may be legally married before making a nun vow and have children, but after making a vow she terminates cohabitation with family members. The status of a "nun" is maintained for the rest of her life, it is impossible to change. Even if he leaves the monastery and violates all the covenants, he retains this status and is subject to all the obligations and prohibitions that accompany nunhood, including those related to marriage. Monasticism is a way of life, while priesthood is a spiritual quality. A nun, of course, can also hold a clerical degree. Deprivation of the clergy is one of the forms of ecclesiastical punishment.

Kinship. Canon law distinguishes five types of kinship: 1. *Blood kinship,* which is divided into three: ascending, descending, and lateral. Marriage is prohibited up to the seventh degree of blood relationship inclusive, and allowed for the eighth degree and further; 2. *Kinship through marriage;* in order to determine the degree of kinship by marriage, it is necessary to calculate the degree of kinship of the husband's relatives in relation to the husband, the degree of kinship of the wife's relatives in relation to the wife, and then to add. Under canon law, marriage for in-laws is allowed in the sixth degree of kinship and further; 3. *Double Affinity;* this kinship is the same as kinship through marriage, which refers to the affines of the affines; for example, the degree of kinship of the wife's parent with the relatives of the husband's brother's wife. Likewise, what needs to be calculated is the degree of kinship of the wife's relatives in relation to the wife and the degree of kinship of the husband's relatives in relation to the husband separately, and then they are added. In such cases, marriage is permitted in the fourth degree. 4. *Spiritual (baptismal) kinship;* spiritual, baptismal kinship is achieved through baptasing. A godfather becomes the father's brother and there is the same degree of kinship between them as between the brothers in blood; and a godson and a godfather become a father and a son.[22] According to Law 53 of the 6th Ecumenical assembly, relations through baptasing is considered as prevailing upon the blood relations[23]; 5. *Relationship through adoption (name-giving)*; the basis of such kind of kinship is adoption. There is the same degree of kinship between an adopter and an adoptee as there is between a parent and a child, and there is the degree of closeness between an adopted and children related in blood is of siblings. Another concept related to adoption is the so called stepchildren. The counting of degree of relation follows the same principle as between children related in blood, with one difference though: in ancestors a wife and a husband are counted separately.[24]

Free will. A fundamental element of marriage is consent by the parties. It is an expression of their free will. Generally, the issue of freedom of will bears crucial significance in Orthodoxy. It is impossible and inadmissible to exercise any sacrament or priesthood action without an individual's free will. Therefore, when the issue is related to marriage as one of the most important ecclesiastical and legal institutions, the issue of freedom is as important. In marriage, the parties express their

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22 For the detailed information on the family relations, see Ioan Crifilinos-Paputsashvili's work "Marriage for Clergy" *Dolidze I.*, Works in Georgian Law, Vol. 2, Tbilisi, 1965, 151-164 (in Georgian).

23 *Bishop Nikodimos (Milash),* mentioned work, Vol. 1, 500.

24 *Abesadze G.*, Legal Foundation for Marriage and Related Problems, *Chelidze E. (ed.),* Tbilisi, 2002, 36 (in Georgian).

consent, first in engagement, and then at the time of the marriage ceremony. Free expression of will may be hindered by several factors: an individual's health condition; enforcement or intimidation; deception or mistake.

Free expression of will may be restricted due to *an individual's health condition*. This implies mental illnesses interfering with the conscious and free expression of will, i.e. an individual's legal capacity and sanity. Those willing to wed should be able to understand what kind of obligations are affiliated to the marital relationship.[25] Such circumstances hinders the performance of marriage ceremony. Matthew Blastar's Syntagma Γ, Chapter 15 which specifies the obstacles to engagement, of the engagement, states that "madness hinders the engagement"; however, if it occurs after the engagement, the latter is not terminated by this."[26] The second case defines the circumstances when free will is restricted in the result of *enforcement*, which can manifest itself in both physical and psychological, and moral abuse: threats and intimidation. Canon law contains a number of provisions prohibiting abuse of women; thereof, a severe canonical punishment for kidnapping a woman for the purpose of marriage. Law 27 of the 4th Council of Chalcedon and Law 92 of the World Council of Trull include identical provisions: "the Holy Council defines the following for those who kidnap a woman for marriage, those assisting or serving advice in this deed: if they are clergy, they shall be dishonored; and if they are laymen, they shall receive damnation."[27] The law imposes the most severe punishment, both for the clergy in the form of withdrawal of the clerical degree, as well as excommunication for the laity, both of which are the highest measures of punishment under canon law. Interesting provisions regarding the abduction of a woman are given in the canonical epistle of Basil II, Archbishop of Caesarea-Cappadocia, to Amphilochus, Bishop of Iconium (Law 22 of St. Basil the Great). The Holy Father states that "... if an unengaged one is kidnapped with the intention to wed, then she shall be taken away from the kidnapper, returned to her family and the decision lies with them ... and if they choose to give her away, let them not force her. If a wife is kidnapped, if she has been acted upon in secret or in force, then the ecclesiastical punishment for fornication shall be effected."[28] St. Basil the Great has more tolerant approach in case of this law: if a woman wishes so, the marriage may take place for the couple in question. A comment is made in the same stipulation concerning the kidnapper, who is subject to the ecclesiastical punishment for fornication even in the case of marriage.

An issue closely related to expressing a will to wed is the rule of canon law which states that a minor, persons under the guardianship of a parent (or other legal representative) are prohibited from marrying without the permission of a parent or a guardian. Canon 38 of St. Basil the Great stipulates that "young women who marry without the father's permission commits adultery..."[29] If this rule is viewed from today's prospect, it applies only to a group of people who were "under the authority of another" such as a father or an owner. This refers to children, persons under guardianship, and slaves.

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25 *Bishop Nikodim of Dalmatia,* Orthodox Canon Law, Saint Petersburg, 1897, 591 (in Russian).
26 *Vlastar M.*, Alphabetical Sintagma, *Ilyinskiy N. (Trans.)*, Moscow, 1892, 74 (in Russian).
27 *Bishop Nikodimos (Milash),* mentioned work, Vol. 1, 360, 544.
28 *Bishop Nikodimos (Milash)* mentioned work, Vol. 2, 358.
29 Ibid, 371.

In today's reality, only minors with limited legal capacity (obviously not in the form and degree that took place when the relevant law was enacted) are under such "authority". The purpose of the law is to protect the interests of an inexperienced child. According to the Christian teaching, this also pays respect to parents (guardians), especially at such an important phase in life like starting a family. As we can see, Laws 38 by St. Basil the Great regards such liberties as sin of fornication and subjects to the respective punishment. However, the second part of the law establishes leniency if the couple reconciles with the parents: "but the situation with reconciliation with the parents, I think, is remedied."[30] The final part of the law, despite the legalization of reconciliation and marriage, provides for ecclesiastical punishment: "however, they are not allowed to make confession at that point, but are excommunicated for three years."[31]

In addition to the marriage restricting circumstances, canon law provides for various circumstances which limit marriage possibilities and which have been introduced into the ecclesiastical traditions from the Byzantine civil law. These include reaching the age of marriage, differing religions, performing marriages during the forbidden times of the year (including fasting, as well as mourning for the widow), physical incapability of cohabitation, and the fact that the couple fell into adultery before marriage. However, these are cases that do not creat a complete obstacle to marriage. In such cases, depending on a particular situation, it is possible to use the canonical oeconomy and overcome the existing obstacle as an exception. For example, a couple that has not yet reached the marital age are allowed to wed upon the consent from their parents or if they already have a child; according to Law 14[32] of the 4th World Council, marriage between a non-Orthodox person and an Orthodox person may be permitted if a non-Orthodox party vows to convert to Orthodoxy; in exceptional cases, the couple may be allowed to marry have a church ceremony during the fasting period; for example, if the couple is elderly or one of them is seriously ill, etc. Such cases can be considered only in individual cases, with exceptions and without violating the fundamental orthodox canonical norms or by following the principles of application of eoconomy.

3. Consequences of a Marriage Performed in the Obstructive Circumstances

The circumstances that were studied are the conditions which are Principally important to be followed in orthodox teaching. The fundamental principle of the monogamy of marriage includes the prohibition on the issues such inadmissibility of parallel marriages, as well as inadmissibility of multiple marriages. For centuries, the Church has followed the principle stated by Apostle Paul as reflected in the entire canon law, according to which the second marriage is a deviation from the Christian norm and is allowed only because of human weakness (I Cor. 7.9). The church strongly advocates a single marriage to be an ideal, and it is precisely this positive principle that is reflected in laws and god service, rather than just the negative legal principle of an "unbreakable" marriage until both parties are alive. Second marriages are allowed only as a departure from the ideal, as a surrender

30 Ibid.
31 Ibid, 372.
32 *Bishop Nikodimos (Milash),* mentioned work, Vol. 1, 335.

to human weakness, or as a new opportunity to remedy a mistake or atone for sin. The church's doctrinal "eoconomy" also allows for a third marriage but the fourth one is formally forbidden. The laws of St. Basil the Great makes no mentioning of the possibility for the fourth marriage. A well-known case involving the fourth marriage of Emperor Leo VI the Wise (886-912) that was followed by an extensive ecclesiastical dispute, resulted in publishing "Tomos of Unity"[33] (920), which banned the fourth marriage. Clearly, there is no theological reason for limiting the number of marriages to three: it is simply a disciplinary limit that the ecclesiastical "eoconomy" should not go beyond. The point of the whole ecclesiastical tradition is not in this formal limitation, but in adherence to the basic New Testament norm: Christian marriage is one in the form of Christ and the Church, and every repetition of marriage is linked to the needs of the "old man." These needs may be tolerated and even respected as lesser evil; however, it is impossible to relate it to the God's kingdom as such.[34]

The principle of single marriage was applied in full by the church in relation to the clergy. The issue of oeconomy is entirely inadmissible. As we have seen, a clergyman is not only forbidden to remarry while he is in the rank, but he must not have been in a marriage twice before the blessing. Another, equally important aspect is to consider that he is not allowed to remarry after being expelled from the clergy. The actual existence of a marriage cannot give it a legal appearance. The church's approach to priestly marriage is strict and uniform, as reflected in the norms of canon law. As for the marriage of monks and nuns, i.e. those who have vowed to remain unwed, the issue in this case is as clearcut. What deserves interest is the issue of marriage when clergy (both the ones with wives, as well as nuns) are stripped of their status. Does losing such status open way to legal marriage? Those who provide interpretations of the ecclesiastical canon, Bishop Nikodimos (Milash) and Balsamon leave no chance for alternative interpretation and state that ordained clergymen remain under the grace of the Holy Spirit, and shall abide to the single marriage principle: "what is sacred, shall remain pure".[35] Canon 6 of Trull states that "from now on, after the ordination, subdeacons, deacons or priests no longer have the right to marry..."[36] Since joining the clergy, which is performed by ordination, is one of the mysteries of the Church and is fulfilled by the transfiguration of the Holy Spirit into a person participating in the mystery, and it is impossible to limit his action in time or under any circumstances. As a result of violating the provisions in law (in this case the ones concerning marriage), clergymen face the threat of being withdrawn from the clergy. However, loss of a clerical degree does not place marriage within the legal framework. For a marriage committed in violation of the law, a clergyman is stripped of the rank, and in one case he becomes a layman, and in the other case, remains a monk/nun. However, separation from the clergy does not allow him to be in a marriage. The actually established marital relationship, for which he/she was removed from the church service, cannot be made a lawful act. Also, a person separated from the clergy cannot marry for the second time even if the status was withdrawn for other reasons. The issue is very complicated and

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33 *Vlastar M.,* Alphabetical Sintagma, *Ilyinskiy N. (Trans.)*, Moscow, 1892, 61 (in Russian).

34 *Meiendorf I.*, Marriage and the Eucharist, *Abashidze L. (Trans.),* "Journal Dialogue", № 1-2 (6-7), 2007, <www.orthodoxtheology.ge> [27.10.2020] (in Georgian).

35 *Bishop Nikodimos (Milash),* mentioned work, Vol. 2, 375.

36 *Bishop Nikodimos (Milash),* mentioned work, Vol. 1, 416.

sensitive towards monks/nuns, among other crimes, their condition is aggravated additionally for breaking their vows.

As for the consequences of marital relations without regard to kinship. In this case, too, the law is quite strict and provides for the annulment of such marriages and the separation of the couple. Laws 53 and 54 of the Council of Trull state in this case: "... (a couple) must refrain from illegitimate act and then be subject to the punishment imposed on prostitutes", as well as "... they must be subject to seven years of punishment, obviously after the annulment of an illegal marriage."[37]

Children born out of wedlock are, of course, full members of the church. Due to the philanthropic and tolerant nature of the Church, they are not named as illegitimate children and are not subject to any kind penance or restrictions. There is no norm in this matter regulated by canon law. The regulation of the relationship between parents and children is given in Laws 14, 15 and 16[38] of the Local Council of Gangri, where the law obliges both parties, regardless of their religious beliefs, to take care of each other.

4. Conclusion

When establishing marital relations, the couple should remain careful and observant in their deeds. Ignoring the obstacles limiting the marriage can lead to withdrawal from the church and a ban on approaching Lord's sanctuaries. Even a person such as St. John Chrysostom states: "after frequent deprivation from communion to you, I have become a prey for a wise wolf." [39] Therefore, for those who consider themselves members of the Orthodox Church, it is vital to consider these restrictions.

A much more difficult situation is created when the clergy is involved. They have more responsibilities and the law provides for more severe punishments. In this respect, the position of the World Patriarchate, which is making attempts to legalize the second marriage for the clergy, is interesting, though unclear. In 2016, the World Patriarchate initiated and organized the Holy and Great Council of the Orthodox Churches was held in Crete, and one of the issues discussed at the assembly was the obstacles to marriage, the most notable of which are: the second marriage of the clergy, same-sex marriage, and marriage between the orthodox and unorthodox ones. The Georgian Orthodox Church has refused to participate in the assembly for its views on last two issues had not been shared. [40] Regarding the issue of the second marriage of the clergy, it should be noted that during the preparatory stage of the World Patriarchate, it actively sought to revise the draft in order to include the stipulation for granting the right to remarry to the widowed clergy. However, due to the opposition of the majority of the Orthodox church representatives, this provision was not even included in the final draft of the assembly. In September 2018 though, the World Patriarchate, which exercises jurisdiction over the Ecumenical Patriarchate of Constantinople, granted the right to remarry to the clergy

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37 Ibid, 500, 502.

38 *Bishop Nikodim (Milash),* mentioned work, Vol.1, 40.

39 John Chrysostom's pray, Psalms and prayers, Tbilisi, 2009, 399 (in Georgian).

40 Minutes of the Session of the Holy Synod, May 25, 2016, <patriarchate.ge/news/1575> [27.10.2020].

belonging to its flock, secular clergy, priests and deacons, if they are widowed or abandoned by their spouses. [41]

The article discusses the aggravation of the situation and the routes the Orthodox teaching going deep into the Bible, derailing from these is not admissible.

As for children born out of wedlock, they are no different from other children and are not being discriminated in any capacity by the canon law.

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The Germ of the Conception of Legal Person in Roman Law

The history of commercial associations takes us back to the oldest periods of human history. The notion, that human beings could cooperate, amass assets and thereby conduct their business activities, was present even among the very earliest of societies. Simultaneously, there was, in reality, no theoretical underpinning for such associations, nor aნ established conception of legal entity. Roman law too, in spite of its inarguable complexity and progressive institutions, did not recognize the notion of legal person, even if during the multiple centuries of its existence it did come close to it. Universitas and societas publicanorum are particularly important institutions. The former is interesting as the pinnacle of Roman legal ruminations on associations and the latter as a large-scale entity, which several modern authors even consider to be a precursor to a modern joint-stock company.

Aside from aforementioned two entities, other associations also existed, review of which as well as division and classification in types is significant to emphasize the point, that while Romans did not enjoy the honor of establishing the conception of legal entity, they did contribute greatly to formulating this notion and research of this contribution is necessary not only from the viewpoint of legal history, but also to better understand modern legal entity.

Key words: *Ancient Roman Law, legal person, conception, corporation, societas, universitas, societas publicanorum.*

1. Introduction

The history of commercial associations takes us back to the oldest periods of human history. The notion, that human beings could cooperate, amass assets and thereby conduct their business activities, was present even among the very earliest of societies.[1] In most cases, the organization of such entities was quite simple and they represented partnerships of various flavors. Several persons, often relatives, would simply gather capital and invest. The number of such persons rarely exceeded few people, even if several interesting exceptions throughout history did occur.[2]

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1 *Seymour E. B.,* Jr., The Historical Development of the Common-Law Conception of a Corporation, The American Law Register (1898-1907), Vol. 51, № 9, Vol. 42 New Series, September, 1903, 530-531.

2 E.g. Assyrian *Naruqum* (see: *Hawk B.,* Law in Commerce in Pre-Industrial Societies, Brill – Nijhoff, Leiden, 2015, 230-231. *Aubet M. A.,* Commerce and Colonization in the Ancient Near East, Cambridge University Press, Cambridge, 2013, 339) or ancient Hindu *Sreni* (see: *Khanna V.,* Business Organizations in India Prior to the British East India, in: Research Handbook on the History of Corporate and Company Law, *Wells H. (Ed.)* Edward Elgar Publishing, Cheltenham, 2018, 33-64.)

Simultaneously, it is also self-evident, that such earliest associations did not hold any sort of separate corporate personality, as on that stage of historical development even the idea of legal entity, at best, existed only in its nascent phase. Therefore, it would be more appropriate not to draw direct parallels between the initial proto-forms of capital associations and modern economical and developed corporate legal institutions, as the correspondence between these two can be considered only approximate.[3]

In general, the development history of associations and corporations can be broken down into several phases. For example, in German legal literature, the associations have been divided into ones before 1807 (of which: ancient associations before 600 AD; medieval corporations during 600-1600 AD; and New Age corporations in AD 1600-1807, when first modern capital associations, including first joint stock companies, are formed); second phase from 1807 and 1884, when joint stock companies are given final shape and firmly entrench themselves; and finally, the third phase from 1884 till modern age when a new innovative legal form joined capital associations – the limited liability company.[4]

Despite some beginnings of capital associations in many ancient cultures, it can be boldly asserted, that not a single one of such societies had such a profound and lasting impact on the development of such entities as the ancient Rome. Although notions of limited liability and corporate personality were foreign to it, Roman legal practice and jurists have bequeathed us a few undoubtedly important institutions, which represent the basis of modern corporate law. The aim of this paper shall be to study contours of the notion of legal person as they were present in Roman law.

Numerous times dispute arose in literature as to why exactly did it took so long for the notions of contemporary corporations and separate legal personality to form, considering that already in Roman law and possibly even before, relevant institutions already existed, granting separate personality and limited liability to which required merely a single theoretical step forward. Multiple factors have been named as possible reasons therefor, such as primitiveness of ancient accounting, cultural and other ramifications, inimical attitude towards trade especially from aristocracy or possible bias towards claimants in the Roman Praetorian law and litigation.[5]

The objective of the present paper shall be to review associations in Roman law and core important preconditions necessary for the formulation of the notion of the legal person, that can be already discerned in several of such entities. It must be noted, that such associations include both commercial and non-commercial entities. The second Chapter of the Article will contain a general conversation on issues at hand, while Chapters III and IV shall discuss Roman commercial and non-

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3 For instance, several authors glimpse corporate personality and transferable shares already in Assyrian *Naruqum*, which would approximate it not only to modern partnerships, but even to joint stock companies, which, of course, seems quite improbable. For this opinion, see: *Hawk B.,* Law in Commerce in Pre-Industrial Societies, Brill – Nijhoff, Leiden, 2015, 231.

4 *Fleckner A. M.,* Antike Kapitalvereinungen, Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft, Böhlau Verlag GmbH & Cie, Köln, 2010, 35.

5 *Abatino B., Dari-Mattiacci G., Perotti E. C.,* Depersonalization of Business in Ancient Rome, Oxford Journal of Legal Studies, Vol. 31, № 2, 2011, 381-387.

commercial entities, even though such strict separation was alien to Romans themselves. In the end, a conclusion shall be given succinctly summarising issues touched upon in this Article.

2. Contours of a Legal Entity in Roman Law

It is hard to overstate the impact of Roman law on modern private law. In both common and civil law countries, the basis for core private law institutions should be sought precisely in Roman equivalents. On the other hand, the same can not be said about Roman corporate law, which, if it can even be said that it existed at all, only in very embryonic, nascent stage. In legal literature, it has been emphasized, that the link between modern capital associations (especially joint stock companies) and ancient Roman associations is not firm and continuous at all.[6] Therefore, before drawing any parallels, a discussion should take place, whether or not in ancient Rome any institutions and organizations close to legal entities were even present.

The term "corporation" itself originates from Latin *corporatio*, which means "assumption of a body", "manifestation". Three major types of associations may be distinguished in ancient Rome: the state itself (*populus Romanus,* or the Roman people)[7] and particularly, the state treasury (*Fiscus*),[8] town and community municipalities and finally commercial and non-commercial associations.[9] While the Roman law did, strictly speaking, recognize these subjects, it considered them not persons, but amalgamations of individuals, which in certain cases could hold property and be present at trials. In

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6 *Lehmann K.,* Die Geschichtliche Entwicklung des Aktienrechts bis zum Code de Commerce, Carl Heymanns Verlag, Berlin, 1895, 3-4.

7 In the eye of Roman law, Roman people (*populus Romanus*) were neither a private, nor a legal entity and what belonged to Roman people could never be under anyone's private property or an object of commercial transactions.

8 The issue of property ownership by State Treasury and its conflation with Emperor's private property is quite interesting. Despite the fact, that during the Early Empire the assets of the Treasury were considered to be the personal property of the Emperor and the word *fiscus* itself likewise directly meant "purse", "basket" (of the Emperor), later, during the Late Empire, this property was often mentioned as State property. Given that the Treasury could file a lawsuit at court and own property, some authors believe that the first real prototype of a legal person with its own separate existence could have been the Roman *fiscus*. See: *Buckland W. W.,* A Text-book of Roman law from Augustus to Justinian, Cambridge University Press, Cambridge, 1921, 176-177. *Brunt P. A.,* The 'Fiscus' and Its Development, The Journal of Roman Studies, Vol. 56, 1966, 85. However, this conclusion is rejected by others, who see *fiscus* foremost as the private property of the Emperor with the proviso, that he would spend it for state purposes. In this case, some overlap can be seen with another Roman institution – *Patrimonium Caesaris*, which undoubtedly was the private property of the Emperor. Others do not directly equate *Fiscus* with the private property of the Emperor, but do remark that, factually, it was so. See: *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 55-58. *Thomas J.,* Textbook of Roman Law, North Holland, Amsterdam, 1976, 470. Concerning disputations on the nature of Roman *Fiscus*, please also refer to: *Elyashevych V.,* Legal Person, Its Origin and Functions in Roman Private Law, Saint-Petersburg, Schredder Typolitogtaphy, 1910, 65-95 (in Russian).

9 *Buckland W. W.,* A Text-book of Roman law from Augustus to Justinian, Cambridge University Press, Cambridge, 1921, 176.

the eye of the law, only a physical person could be a *persona*, including, as paradoxical it may seem, even a slave.[10]

Roman personality, *persona*, was a multifaceted concept and laying down its uniform, comprehensive explication is wrought with difficulties.[11] It originated from an ancient Greek word, which meant "mask".[12] It should not be considered a coincidence, that, when one talks about piercing the corporate veil[13] today as the primary means for disregarding the legal personality of a corporate entity, such legal person is sometimes labelled a concealed instrument, behind which the constituents *mask* themselves and therefore, metaphor "pulling the mask off" is often used during such veil-piercing.[14]

In ancient Rome, aside from entrepreneurial partnerships, political clubs, burial associations and ancient Roman guilds also stood out from existing private legal entities, the rights and duties of which were determined by the permit issued by the Emperor himself.[15] Apart from burial associations, all other *collegia* and associations, especially during the Imperial age, required such permission to be established.[16]

Of Roman associations, several might be emphasized. Undoubtedly, the most interest is elicited by *universitas* which, as we will see later, stood closest to the modern notion of a legal entity. In addition to *universitas*, other *societas*, which may be considered as the Roman counterpart to modern partnerships created for business purposes, also existed. In general, it may be said that designations for entities were quite plentiful in Roman law and Roman jurists, who lacked commitment to systematization and categorization, so central to modern science and jurisprudence,[17]

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10 *Mousourakis G.,* Fundamentals of Roman Private Law, Springer Verlag, Berlin, 2012, 85. In spite of this, a slave had no rights at all and its legal personality was wholly subordinate to the will and command of his/her master.

11 On the term and definition of *persona* in general, see: *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 1-25. Aside from *persona*, the word *caput* also existed, which was similarly close to modern conception of legal personality: id. 25

12 *Mauss M.,* A Category of the Human Mind: The Notion of Person; The Notion of Self, *Halls W. D. (Trans.),* in: The Category of the Person: Anthropology, Philosophy, History, *Carrithers M., Collins S., Lukes S. (Eds.),* Cambridge University Press, Cambridge, 1985, 14-15.

13 Eng. *Piercing (lifting) the corporate veil*. Germ. *Durchgriffshaftung*.

14 *Littlewoods Mail Order Stores v. Inland Revenue Commissioners*, [1969] 1 W.L.R. 1241 (A.C.) at 1254. cited in: *Tomasic R., Bottomley S., McQueen R.,* Corporations Law in Australia, The Federation Press, Sydney, 2002, 44.

15 *Berman H. J.,* Law and Revolution: The Formation of the Western Legal Tradition, Harvard University Press, Cambridge, 1983, 215-216.

16 See. *Digesta* 3.4.1.

17 In reality not only there was no concept of a legal entity in the Code of Justinian, but not even a general notion of a contract. As one author points out: „*Roman law consisted of an intrinsic network of rules; yet these were not presented as an intellectual system but rather as an elaborate mosaic of practical solutions to specific legal questions. Thus one may say that, although there were concepts in Roman law, there was no concept of a concept*"). See: *Berman H. J.,* Law and Revolution: The Formation of the Western Legal Tradition, Harvard University Press, Cambridge, 1983, 149-150.

had made no attempts at classifying these entities. *Collegia*, *sodalitates*, *sodalicia*, *corpora*[18] make up only an incomplete list of names for those mainly non-commercial entities, which were not legal entities in modern sense, but were still deemed to be subjects as they could submit a claim to the court or own property. Determining similarities and differences among them is one of the biggest conundrums for modern legal historians.

As was already mentioned, a concept of a legal entity did not actually exist in ancient Rome and it was generally completely alien to Antiquity.[19] There was not a single Latin term which corresponds to "legal person", although *universitas* probably comes the closest.[20] In pre-industrial Roman society, where modern business instruments such as credits, securities and bank transactions were pretty much non-existent,[21] presence of such central institutions of corporate law as separate legal entity, was hardly conceivable and put it otherwise, was simply unnecessary.

Despite previous certain opinions expressed in legal literature, that these corporations, in essence, were not much different from modern corporations,[22] Roman legal system recognized only that associations made up of certain persons could own property or be participants in legal relations.[23] Situation was also in a way exacerbated by the fact, that the institution of personal representation, at least as recognized in law, was also alien to Roman law – the Roman citizen empowered with rights had to take up obligations himself in person.[24] Therefore, even the most ambitious Roman *universitas*, as will be shown later, was still essentially closer to a "group" or "gathering" than to modern legal entity or corporation.[25]

Roman jurists did not take interest in the issue of what specific interrelation existed between the association itself and its constituent members. From modern viewpoint, as was already noted, Roman law lacked systematization and judging from sources extant today, Roman jurists did not devote much

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18 *Kaser M.,* Roman Private Law, 4th Ed., *Dannenbring R. (Trans.),* University of South Pretoria, Pretoria, 1984, 95-96.

19 Ibid, 93. *Sohm R.,* Institutionen des Romisches Recht, 17. Aufl., Duncker & Humblot, Berlin, 1949, 196.

20 *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 50.

21 *Finley M. I.,* The Ancient Economy, University of California Press, Berkeley, 1999, 141.

22 For example, *Max Radin*, (1880 – 1950) remarked, that associations of musicians or firemen in ancient Rome were not much different from modern energy or railway companies, even if, of course, they did not regulate the minutest details regarding shares or rights. *Radin M.,* Fundamental Concepts of the Roman Law, California Law Review, Vol. 13, Issue 2, January 1925, 120. The main problem of this thesis is that, as we shall see later, these Roman associations, no matter how large and complex, were still considered to be collective entities made up of private individuals, while the association itself, unlike modern corporations, was never deemed to be a separate person and a legal subject. This was true even for the most organizationally complex Roman entities.

23 The fact itself that certain rights and obligations could be assigned to an organization, which, even if it was not seen as a "person", but was still considered to be as somewhat separate from its constituent members, is often thought to be an important step forward taken by Roman law. See: *Olivecrona K.,* Three Essays in Roman Law, Munksgaard, Copenhagen, 1949, 5.

24 *Kaser M.,* Das Römische Privatrecht, Erster Abschnitt, C.H. Beck'sche Verlagsbuchhandlung, München, 1971, 605.

25 *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 36. fn.1.

time and particular attention to the issue of corporations. Interestingly, such attitude in general is also apparent from the members of such associations themselves, who used different terms for their own entities (majority of which quite general), which, most likely, indicates that members too did not fully grasp the nature of such associations or in most cases, considered them as simple amalgamations of individual persons.[26]

Therefore, the notion that the honor of inventing the corporation as a set institution belongs to Romans,[27] is fundamentally wrong, as Roman partnerships, *collegia* and associations were in essence different from modern corporations. Corporate law too in Ancient Rome, in modern sense, as noted above, existed only at a very primitive level and even the contours of a conception of limited liability were present only in their nascent form.[28] When discussion took place about Roman "corporations", an organized system was meant (and not a separate person) via which the members could realize their own rights.[29]

Certain commentators do see a notion of legal entity adumbrated in one of the entries of Roman Digests, where it looks like it talks about the establishment of corporations.[30] Others rightly indicate that, if the aforementioned paragraph truly signifies a corporation as a subject *independent* from its constituents through its personality, it seems quite odd, that such salient progress in legal abstraction left no trace with the exception of this one sentence.[31]

Remaining civil law scholars are far more critical and describe the Roman approach towards corporate law as "*ambiguous and unfortunate phrases*", which sow much confusion in modern law.[32] Others note, however, that Romans did have their own, special vision towards legal entities. It did not conform neither to modern fiction theory, according to which entities are merely fictions recognized

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26 For instance, on tombstones of association and *collegia* members words, such as "gathering", "settlement" or even "people" are used to designate such entities. Such general terms convey, that even for the members themselves such organizations represented merely conglomerations of individual persons and some separate abstract notion of a legal entity was entirely foreign to them. See: *Harland P.,* Greco-Roman Associations: Texts, Translations, and Commentary, Vol. II: North Coast of the Black Sea, Asia Minor, De Gruyter, Berlin, 2014, 97.

27 Such opinion was expressed by a famous English jurist and commentator *Sir William Blackstone* (1723-1780): „*The honor of originally inventing these political constitutions entirely belongs to the Romans.*" See: *Blackstone W.,* Commentaries on the Laws of England, Book I: Of the Rights of Persons, *Prest W. (Ed.),* Oxford University Press, Oxford, 2016, 304. Here it must be underlined, that in Blackstone's times, under the term of "corporation," a certain entity was meant, which was considered to be not a separate person, but a unity of constituent individuals (regardless of their number). Therefore, back then such parallels with Roman institutions were indeed possible, even if Roman law did not really have any equivalent to joint stock companies, more or less already established by 17th century in England (however in certain aspects, comparisons with Roman *Societas publicanorum* are indeed viable, which shall be discussed below.

28 *Crook J.,* Law and Life of Rome, Cornel University Press, Ithaca, New York, 1967, 206.

29 *Olivecrona K.,* Three Essays in Roman Law, Munksgaard, Copenhagen, 1949, 17.

30 See *Digesta* Book 3, Chapter 4 ("*societas neque Collegium neque huiusmodi Corpus passim omnibus habere Conceditur"...*).

31 *H. F. J.,* Review of Personality in Roman Private Law by P. W. Duff, The Cambridge Law Journal, Vol. 7, № 1, 1939, 160.

32 *Machen A. W.,* Corporate Personality, Harvard Law Review, Vol. 24, № 4, February, 1911, 255.

by state, nor to the theories of those for whom Roman associations were merely amalgamations of private individuals and nothing more. Like, for example, the Roman family, such entities were considered to be subjects, in which every constituent part (in this case – a constituent member) retained its individuality (*species*), while also simultaneously still forming something *else* by being a part thereof.[33] In this way, associations really did "exist" to Roman jurists in literal sense of the word. They were neither fictions, nor merely collections of individuals, even if their vision was closer to the latter rather than to the former.

As a conclusion, it might be said, that Roman attitude towards associations was engendered more by pragmatism and practical propriety and was not buttressed by any kind of theoretical foundation.[34] In spite of this, it would be sensible to offer a succinct overview of associations as was provided in Roman law as to better perceive the inception of the fundamental institutions of modern corporate law.

3. Roman Commercial (Capital) Entities

According to Roman law, if a person wanted to conduct business activities, he had only two actual choices organization-wise: *societas*[35] and *peculium*.[36] *Societas* itself could have been several types, of which, *societas publicanorum* undoubtedly is the most interesting.[37] However, separate discussion on each of these types is still in order.

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33 *Olivecrona K.,* Three Essays in Roman Law, Munksgaard, Copenhagen, 1949, 26-27. One must take into account the provisional division of subjects (*corpora* – may also be translated as "body", "material", "essence") into classes in the Roman law. The first class included private individuals, the second encompassed parts in the larger whole, which were subsumed to it, even if potentially still retaining their own essence (house window, wood pole) and the third category included those amalgamated subjects, which, while keeping their essence and individuality, still, in some sense, created, established other "subject" or to put it better, a certain new, distinct being. Roman associations too belonged to this last, third class. See Id. 18-31.

34 *Thomas J.,* Textbook of Roman Law. North Holland,Amsterdam, 1976, 475.

35 Can be translated as "partnership".

36 In spite of few other semantic significations, in case of business activities, *peculium* in general denoted such business conducted with property transferred to slaves by Roman master. See: *Berger A.,* Encyclopedic Dictionary of Roman Law, The American Philosophical Society, Philadelphia, 1953, 624. Others, however, see the beginnings of Roman corporate law exactly in *peculium*. See below.

37 *Fleckner A. M.,* Antike Kapitalvereinungen, Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft, Böhlau Verlag GmbH & Cie, Köln, 2010, 117 ff. If one takes Societas *publicanorum* as separate, then three forms will be the outcome. However, according to prevailing notions, *Societas publicanorum* constituted not a separate distinct form, but a drastically modified *Societas* as noted by the author above. Similarly, *Societas publicanorum* was more of an exceptional case that existed only during later stages of the Republic and first centuries of the Empire, while a standard *Societas* functioned from the beginning of Rome till its fall and even throughout Middle ages in an altered state. Therefore, it would be more appropriate to categorize *Societas publicanorum as* a special subtype of *Societas.*

3.1. *Societas* and Its Subtypes

Of Roman associations the most wide-spread and studied is undoubtedly *Societas*. Roman *Societas*, in essence, was a contract, under which members took upon themselves to achieve set goals[38] together.[39] *Societas* most like originated from ancient *consortium*,[40] which meant collective management of an inherited property by inheritors till its division. It is probable that this was one of the earliest forms of joint ownership, when property was not divided by shares, but was held in common for all inheritors.[41]

In Roman Law, two primary types of *societas* were distinguishable: *societas universalis* and *societas particularis*.[42] Essentially the first included transmission of private property of partners into joint ownership and carried a more permanent character, while the second was oriented towards accomplishing a single business activity and in actuality had characteristics more that of a joint venture in limited capacity.[43]

Roman *societas* had no real legal capacity to purchase goods or to hold any property in possession – all of this was available to its members only.[44] Each member could individually act to accomplish the aims of association, although he was obligated to share the profits with other partners.[45] For obligations taken partners themselves were directly responsible,[46] though one partner could demand compensation proportionate to the owned share from other partners as well.[47]

Societas could have been created for different reasons in almost any field, starting from cultivation of agricultural land and ending with offering grammar lessons.[48] Such association finished its existence easily, not only through the death of a partner or by his personal desire to leave the

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38 Naturally, this goal should not have been physically impossible, illegal or immoral, otherwise the contract would be considered null and void. *Zimmermann R.,* The Law of Obligations: Roman Foundations of Civil Tradition, Oxford University Press, Oxford, 1996, 454, fn. 21.

39 *Sohm R.,* Institutionen des Romisches Recht, 17. Aufl., Duncker & Humblot, Berlin 1949, 208.

40 This idea was expressed by Ancient Roman jurist *Gaius*. See: G 3.154a, Also: *Birks P.,* The Roman Law of Obligations, Oxford University Press, Oxford, 2014, 118, 260. *Laube D.,* Societas as Consensual Contract, The Cambridge Law Journal, Vol. 6, № 3, 1938, 382-383.

41 *Zimmermann R.,* The Law of Obligations: Roman Foundations of Civil Tradition, Oxford University Press, Oxford, 1996, 452.

42 *Coing H.,* Europäisches Provatrecht, Band I: Älteres Gemeines Recht, C.H. Beck'sche Verlagsbuchhandlung, München, 1985, 465.

43 Ibid.

44 *Sohm R.,* Institutionen des Romisches Recht, 17. Aufl., Duncker & Humblot, Berlin, 1949, 208.

45 *Schwind F.,* Römisches Recht. Teil 1: Geschichte. Rechtsgang. System des Privatrechtes, Springer Verlag, Wien, 1950, 323.

46 *Wieacker F.,* Haftungsformen des römischen Gesellschaftsrechts, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung (SZ), Band 54, Heft 1, Weimar, 1934, 35-79. *Hansmann H., Kraakmann R., Squire R.,* Incomplete Organizations: Legal Entities and Asset Partitioning in Roman Commerce, ECGI Working Paper Series in Law, Paper № 271/2014, October, 2014, 6, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506334> [15.11.2020].

47 *Crook J.,* Law and Life of Rome, Cornel University Press, Ithaca, New York, 1967, 231.

48 *Fleckner A. M.,* Antike Kapitalvereinungen, Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft, Böhlau Verlag GmbH & Cie, Köln, 2010, 131.

association or partnership, but even in the case of simple alteration in the status of partners within such *societas*. "*No partnership can be formed for all time*" – as it is written in *Digest*.[49] Partnerships in general had an unstable character and was quite a risky endeavor – any partner could leave at any time. As *societas* was primarily thought of as a contract, Roman jurists were against automatic substitution when a partner died or left, as the old members had not concluded the contract with this new person. They had to draft a new contract. [50]

The issue of responsiblity should be also be accentuated – each partner's action, as long it was directed towards accomplishing objectives of the association, was extended to other partners as well and they were likewise liable for any responsibility. An exception was the case when the partner's action did not actually serve the purposes of the association and in such an instance, compensation of any loss could be demanded from other partners.[51]

Emphasized directly in literature is the fact, that in pre-industrial Roman society, *societas* was established mostly for non-financial purposes and much like modern partnerships, the stress was made not on contributions and other financial instruments and relations, but on collaboration and cooperation. [52] Here the temporary character of the partnerships must also be noted. With the exception of *societas publicanorum*, a normal *societas* could exist, at best, until the death of one of its partners. In actuality, it was far more probable, that after lapse of just a few years, the association (partnership) would cease to exist. However, even in spite of all this, these associations could achieve quite spectacular economic results when working together.[53] Simultaneously, certain instruments still existed, that allowed *societas* to have a more permanent footing and a continuous nature. In case of a family *societas*, the share could be transferred to a descendant of the passed-away partner and thereby, the establishment and continued operation of a legally new, but only slightly altered association was not excluded.[54]

Roman law recognized several types of *societas* without a strict classification and categorization thereof, complicating matters for modern civilists. Of other partnerships and associations, the Article shall temporarily touch upon the most wide-spread *societas omnium bonorum* and its subvarieties and probably the most distinctive and unique of them all – *societas publicanorum*.

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49 "*Nulla societatis in aeternum coitio est*". See: *Digesta* 17.2.70.

50 *Digesta* 17.2.65.11 (Paul. 32 ad ed.).

51 *Broekaert W.,* Joining Forces: Commercial Partnerships or Societates in the Early Roman Empire, Historia: Zeitschrift für Alte Geschichte, Band 61, Heft 2, Stuttgart, 2012, 228.

52 *Zwalve W. J.,* "Callistus's Case: Some Legal Aspects of Roman Business Activities, in: The Transformation of Economic Life under the Roman Empire, Proceedings of the Second Workshop of the International Network Impact of Empire (Roman Empire, c. 200 B.C. – A.D. 476), Nottingham, July 4-7, 2001, *Blois L., Rich J. (Eds.),* Amsterdam, 2001, 119.

53 A good example of this is *Monte Testaccio* ("pot montain" in Italian, *testae* was a kind of ancient Roman ceramics), an artificial mount consisting of discarded ancient Roman pottery. Judging from the names of the creators inscribed on the amphorae, majority were produced not by separate individuals, but by associations and partnerships. See: *Crook J.,* Law and Life of Rome, Cornel University Press, Ithaca, New York, 1967, 229.

54 *Broekaert W.,* Joining Forces: Commercial Partnerships or Societates in the Early Roman Empire, Historia: Zeitschrift für Alte Geschichte, Band 61, Heft 2, Stuttgart, 2012, 230.

A typical association in Roman law was *societas omnium bonorum.* It represented one of the foremost association types derived straight from the notion of *consortium*[55] and encompassed entire property of all constituent members at the moment of establishment.[56]

Other association types were essentially the same *societas omnium bonorum*, only their goals were different. For example, *societas negotiationis alicuius was* an entity created for a specific business sphere, while *societas rei unius* was intended for a single concrete business venture.[57] In the latter, after accomplishing the goal, the association ceased to exist automatically.[58]

Certain authors likewise distinguish between *societas omnium bonorum* and *societas universorum quae ex quaestu veniunt.* The latter did not include property conferred as a gift or inheritance. [59]

3.2. *Societas publicanorum* – Roman Joint Stock Company?

Among the subtypes of Roman *societas*, the *societas publicanorum,* which may be translated as an "association of public procurers",[60] elicits the most interest. Due to its drastically distinguishable properties, for some authors it constitutes one of the greatest accomplishments of Roman private law – a forerunner to a joint stock company. The truth, however, may be far more prosaic.

Societas publicanorum is still quite an intriguing institution in light of the fact, that it was intended to attract and manage wast sums of capital. The association was oriented towards participation in public procurement, encompassing mass-scale building projects (bridges, aqueducts, temples), collection and management of state receipts and taxes and other.[61] Certain authors here perceive a Roman prototype to a joint stock company, the capital of which was divided in shares, also representing a true legal entity, no less no more.[62]

In some respects such perception is understandable: much like 17th century joint stock companies, *societates publicanorum* were also established with state permission to further state

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55 *Thomas J.,* Textbook of Roman Law. North Holland, Amsterdam, 1976, 301. *Ankum H.,* Societas Omnium Bonorum and Dos in Classical Roman Law, Israel Law Review, Vol. 29, Issue 1-2, 1995, 106. *Laube D.,* Societas as Consensual Contract, The Cambridge Law Journal, Vol. 6, № 3, 1938, 390, fn 29.

56 *Buckland W. W.,* A Text-book of Roman law from Augustus to Justinian, Cambridge University Press, Cambridge, 1921, 504.

57 *Fleckner A. M.,* Antike Kapitalvereinungen, Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft, Böhlau Verlag GmbH & Cie, Köln, 2010, 127. In case of *societas rei unius* activities could be both commercial as well as non-commercial. See: *Buckland W. W.,* A Text-book of Roman law from Augustus to Justinian, Cambridge University Press, Cambridge, 1921, 505.

58 *Broekaert W.,* Joining Forces: Commercial Partnerships or Societates in the Early Roman Empire, Historia: Zeitschrift für Alte Geschichte, Band 61, Heft 2, Stuttgart, 2012, 230.

59 *Thomas J.,* Textbook of Roman Law. North Holland, Amsterdam, 1976, 301.

60 *Publicani* were public procurers, who belonged to Roman aristocracy, namely, the rank of Equites.

61 *Malmendier U.,* Societas Publicanorum: Staatliche Wirtschaftsaktivitäten in den Händen privater Unternehmer, Böhlau Verlag GmbH, Köln, 2002, 31.

62 *Malmendier U.,* Roman Shares, in: The Origins of Value: The Financial Innovations That Created Modern Capital Markets*, Goetzmann W. N., Rouwenhorts K. G. (Eds.),* Oxford University Press, Oxford, 2005, 36-40.

policies. This included public and administrative works, such as supplying Roman legions, aqueduct building and, probably the most important of them all – tax collection.[63] According to the supporters of this thesis, the *societas* had its stock divided into transferable shares,[64] had shareholders who held these shares,[65] had its very own manager,[66] limited liability[67] and even separate legal entity, even if the latter was theoretically inchoate and not fully thought-out.[68] Unlike other *societas*, the *societas publicanorum* did not cease to exist with the death of one of its members. Some authors even grant[69] it its own distinct board of directors[70] or bestow an ability to sell the "shares" to attract investments.[71] According to them, *societas publicanorum* is a veritable manifestation of what heights the Roman economy truly achieved at its apex and that already in the age of Early Empire it was oriented towards market economy, even more than the Middle Ages economy many centuries later.[72]

However, significant differences between *societas publicanorum* and modern joint stock companies must also be mentioned. First and foremost, *societas publicanorum* was intended for public procurement only[73] and existed only within a certain timeframe (3rd century BC-3rd century

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63 An association of tax and duty collectors was called *societas vectigalium* and was itself a variation on *societas publicanorum.*

64 In parts – *partes*. However, certain authors directly use the modern term "share". See: *Malmendier U.,* Societas Publicanorum: Staatliche Wirtschaftsaktivitäten in den Händen privater Unternehmer, Böhlau Verlag GmbH, Köln, 2002, 91-116.

65 The public procurers – *publicani*. They were considered members *(socii)* of the association.

66 *Manceps*. He was elected by members themselves and had the obligation to acquire rights to certain public projects at public "auctions" (in effect a precursor system to modern state tender).

67 Limited liability was a choice and was contingent on the member itself. It seems that, much like modern limited partnership (German *Kommanditgesselschaft*) today, the member could choose either unlimited liability and ability to participate in management or confine to only made contributions and refrain from managing the entity. See: *Malmendier U.,* Societas Publicanorum: Staatliche Wirtschaftsaktivitäten in den Händen Privater Unternehmer, Böhlau Verlag, Köln, 2002, 261-268.

68 For more details, see: *Hawk B.,* Law in Commerce in Pre-Industrial Societies, Brill – Nijhoff, Leiden, 2015, 231-233. *Malmendier U.,* Roman Shares, in: The Origins of Value: The Financial Innovations That Created Modern Capital Markets*, Goetzmann W. N., Rouwenhorts K. G. (Eds.),* Oxford University Press, Oxford, 2005, 36-40. *Malmendier U.,* Societas Publicanorum: Staatliche Wirtschaftsaktivitäten in den Händen privater Unternehmer, Böhlau Verlag GmbH, Köln, 2002, 251-259.

69 *Balsdon J.,* Roman History, 65-50 B.C.: Five Problems. Journal of Roman Studies, Vol. 52, Issue 1-2, November 1962, 135.

70 *Decumani*. Here most likely the collectors of a tithe *(decuma)* are meant. The purpose of these persons is contested. Some authors give them managerial, directorial or merely supervisory roles. See: *Badian E.,* Publicans and Sinners: Private Enterprise in the Service of the Roman Republic, Cornell University Press, Ithaca, New York, 1972, 73.

71 *Hollander D .B.,* Money in the Late Roman Republic, Brill, Leiden, 2007, 49.

72 *Malmendier U.,* Law and Finance "at the Origin", Journal of Economic Literature, Vol. 47, № 4, December, 2009, 1079.

73 According to commentators, the reason, as to why entities of such type were not established in private sphere must lie in the quite anti-commercial mentality of ancient Roman society, political climate or even in the simple fact that, majority of private enterprises in Rome did not require an organization as complex as *societas publicanorum*. *Hansmann H., Kraakman R., Squire R.,* Law and the Rise of the Firm, Harvard Law Review, Vol. 119, 2005, 1363-1364.

AD).[74] The death of *manceps* (manager) still meant the dissolution of the *societas* as getting access to public procurement contracts was still contingent on him.[75] As has already been noted even in the case of the more complex *societas publicanorum*, it was still not regarded as a separate legal entity, as this notion was simply foreign to Roman law.

The theory that *societas publicanorum* was a true Roman joint stock company, with its own shares and institutionalized limited liability, always occasioned healthy scepticism and today is subject to even more increasing criticism. For a myriad of authors, *societas publicanorum* was the forerunner not to modern joint stock company, but rather to open limited liability partnership.[76] The phrase uttered by Roman historians, that every citizen had a share (or, to put it better – parts) in such "companies" is labelled as, at the very least, as a "fantastic exaggeration" by some authors[77] and more likely, in spite of large-scale financial transactions at first glance, the number of partners did not much exceed those of a normal *societas*. [78] The only difference was that personal property and wealth of the members of *societas publicanorum* was disproportionately larger than those of members of standards associations. This is understandable – they had to undertake massive public projects and members themselves too were from the Roman aristocracy. Other critics indicate, that despite the usage of first-hand accounts, such bold statements are fundamentally predicated on controversial interpretation of texts, additionally exacerbated by dubious translation.[79]

To conclude, it can be said that such criticisms are not without merit and considering the ancient Roman social, cultural and most importantly economical conditions, it is more likely that even to Romans, *societas publicanorum* represented nothing more than a modified *societas* granted with specific properties due to its connection with the state. This was not a result of some cognized process, stemming from apprehension of the abstract concept of corporate legal personality.[80] Instead of drawing parallels with contemporary joint stock companies and corporations, certain writers deem it

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74 The precise timeframe of *Societas publicanorum*'s existence is unknown. In all likelihood, it began in third century BC (*Hansmann H., Kraakman R., Squire R.,* Law and the Rise of the Firm, Harvard Law Review, Vol. 119, 2005, 1360) and ceased to exist in third century AD, during or after the Crisis of the Third Century. By second century AD they were stripped of their right to collect taxes, but not completely and even then, they were a formidable force. See: *Crook J.,* Law and Life of Rome, Cornel University Press, Ithaca, New York, 1967, 234. *Malmendier U.,* Societas Publicanorum: Staatliche Wirtschaftsaktivitäten in den Händen privater Unternehmer, Böhlau Verlag GmbH, Köln, 2002, 61-64.

75 But in case of *societas publicanorum*, Roman government eventually allowed association members to replace their *manceps*.

76 *Hansmann H., Kraakman R., Squire R.,* Law and the Rise of the Firm, Harvard Law Review, Vol. 119, 2005, 1362, fn.72. Here these authors mean a limited partnership. In Georgian corporate law the closest, albeit not identical legal form of entrepreneurship would be the commandite society.

77 *Crook J.,* Law and Life of Rome, Cornel University Press, Ithaca, New York, 1967, 234-235.

78 *Fleckner A. M.,* Antike Kapitalvereinungen, Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft, Böhlau Verlag GmbH & Cie, Köln, 2010, 207-215.

79 *Poitras G., Geranio M.,* Trading of Shares in the Societates Publicanorum?, Explorations in Economic History, Vol. 61, July 2016, 97, 112-116.

80 *Thomas J.,* Textbook of Roman Law. North Holland, Amsterdam, 1976, 472.

more appropriate to present *societas publicanorum* mainly as an instrument for attracting capital,[81] with a mere appellation of a "capital association".[82]

3.3. *Peculium*

Peculium was property conveyed by Roman *pater familias* to someone else (usually to a slave, but it could have also been his son) for management purposes, as well as to conduct business.[83] As Roman *pater familias* in theory had absolute, near unrestricted power towards both his slaves and his children alike, in actuality we must consider both his son and the slave as mere instruments for furthering his own interests.

The function of *peculium* was quite simple. Due to antipathy towards trade from Romans (and especially the Roman aristocracy) as well as to generally ease workload through delegation, a Roman citizen could transfer his property to his slave,[84] who could have been quite competent and obtain large profits on behalf of the master.

From business standpoint, the importance of *peculium* should be considered as quite minor, as even in the case of richest Romans, it was not used to invest large sums of capital and the slave too, at best, represented his or her master in small or medium enterprises.[85] One might argue, whether or not it can even be considered as a *form* of entrepreneurship.

In spite of this, according to one of more interesting opinions in literature, it was through slaves that Roman law managed to depersonalize business ventures, as by delegating, via *peculium* to the slave, the latter could de-facto represent the master (direct representation, as was noted above was unknown to Roman law) and such activities could be continued even after the death of the owner or him leaving the association.

More importantly, the liability could be limited to the property given to the slave through *peculium* and creditors would have no claim the master's property. This is quite similar to the economical purposes of establishing modern corporations.[86] Of course, this should not be interpreted, as if though *peculium* was identical to modern corporate legal systems. It merely illustrates, that *de facto*, Roman citizens could resort to other, from modern perspective, wholly unethical and immoral

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81 Germ. *Kapitalvereinung*.

82 More in detail about *Societas publicanorum* see: *Fleckner A. M.,* Antike Kapitalvereinungen, Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft, Böhlau Verlag GmbH & Cie, Köln, 2010, 145-215.

83 *Kharaishvili A.,* Interrelation Between the Piercing the Corporate Veil and Limited Liability Principles in Corporate Law, Journal of Law, № 2, 2017, 123-128.

84 Hereinafter the paper shall limit discussion to slaves in particular, as a „classic" example of *peculium*. Conveying property to children (as a rule of thumb, to sons) for business purposes was more infrequent and generally, such property were amounts given out as expenses to children by fathers.

85 *Fleckner A. M.,* Antike Kapitalvereinungen, Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft, Böhlau Verlag GmbH & Cie, Köln, 2010, 235-237.

86 For more details, see: *Abatino B., Dari-Mattiacci G., Perotti E.C.,* Depersonalization of Business in Ancient Rome, Oxford Journal of Legal Studies, Vol. 31, № 2, 2011, 365-389.

methods to accomplish in essence same end goals, that today's capital associations with limited liability in modern corporate law are utilized for.

4. Roman Non-Capital (Non-Entrepreneurial) Entities

Apart from entrepreneurial activities, associations in Ancient Rome could also be created for non-business purposes as well. Discussing them here is important in light of the fact, that some of them (specifically the *universitas*) from institutional perspective were close to modern understanding of legal persons, but, of course, were not fully equivalent to it. There were a plethora of non-capital associations in Rome, of which several forms must be named here: *collegia*, *universitas* and *sodalitates (sodalicia).*

Here too, the issue of terminology must be underlined. In ancient Rome, a whole range of terms were applied to towns, communities and other municipalities in general, including *universitas*. Given that, oftentimes the town municipality represented one of the more complex organizations, acting on behalf of the town as a whole as well as owning property, for Roman jurists (or at least for those, whose works are extant), it represented a foremost example of a well-established *universitas*.[87] Others, such as *collegia* and *sodalitates (sodalicia)* were multiprofile non-business (non-entrepreneurial) entities.

4.1. *Collegia*

Roman *collegia*, evident from the very name itself, represented a collegial association of individuals, whether based on common professional grounds (approximating them with guilds of the Middle Ages) or simply to achieve common goals. *Collegia* could include quite a lot of people: several hundred or perhaps even thousands.[88]

Despite the fact that carrying out business was not an explicit goal of an association, sources do attest to trade done by *collegia*.[89] These *collegia* were such an everyday occurrence and wide-spread form of conducting business, that it had an unexpected adverse effect on modern legal science: as *collegia* were quite common and universally accepted for a long stretches of time, the Roman law

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87 Concerning the absence of "technical language" (*technologische Sprache*) and technical terminology in general in Roman law, see: *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 37, fn.4.

88 *Ausbüttel F. M.,* Untersuchungen zu den Vereinen im Westen des Römischen Reiches, M. Laßleben, Kallmünz, 1982, 35.

89 *Plutarch* in his *Parallel Lives* notes, how the Roman king *Numa Pompilius* extended rights for professional associations to form, gather and conduct their business. See: *Plutarch,* Plutarch's Lives, Vol. I: Theseus and Romulus. Lycurgus and Numa. Solon and Publicola (Loeb Classical Library № 46), *Perrin B. (Trans.),* Harvard University Press, Cambridge, 1967, 365-367. For a critical assessment, where existence of *collegia* during such an early period is put under question, see: *Gabba E.,* The Collegia of Numa: Problems of Method and Political Ideas, The Journal of Roman Studies, Vol. 74, 1984, 81-86.

simply ignored them and did not even consider it necessary to regulate them in much detail.[90] Therefore, the discussion must inevitably proceed from scant records still extant today.

Collegium could have been granted the *corpus habere* privilege, which would allow it to own property, be represented by a representative and file a lawsuit in court. They, as a rule, needed state permission to be registered. This did not mean recognition of their legal personality and separateness, but rather a mere permit for the persons associated within *collegia* to gather.[91]

Professional *collegia* in ancient Rome could be of different kinds: of poets,[92] weavers,[93] bakers,[94] burial ones[95] and other.[96] Aside from professional *collegia*, religious ones were quite abundant in ancient Rome as well,[97] dedicated to a specific god of pagan Roman pantheon.[98] In the eye of the law, they were practically identical and differed only perhaps by their respective sphere of activities.[99]

As noted in the literature, in reality only a small part of these *collegia* had the powers somewhat approximate to that of corporate personality, meaning the right to own property and be present at the court and the Roman law conferred such privilege only to those handful that were sufficiently strong financially for them to even request it.[100]

For the purposes of the present Article, Roman *collegia* is of less importance, as there is not even a hint in ancient literature, that they were ever considered to be anything more than (mainly) a non-entrepreneurial association of private natural persons.

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90 *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 107.

91 *Thomas J.,* Textbook of Roman Law. North Holland, Amsterdam, 1976, 473.

92 *Collegium poetarum*. See: *Crowther N. B.,* The Collegium Poetarum at Rome: Fact and Conjecture, Latomus, Vol. 32, Issue 3, 1973, 575-560.

93 *Collegia centonariorum*.

94 *Collegia pistorum.*

95 *Collegia funeraticia*. Concerning this in more detail, see: *Sano M.,* Collegia Through Their Funeral Activities: New Light on Sociability in the Early Roman Empire, Espacio Tiempo y Forma Serie II Historia Antigua, Issue 25, 2012, 393-414. What must also be mentioned here is, that there was no special form of a burial *collegia* and other associations took up such functions in general as well. *Liu J.,* The Guilds of Textile Dealers in the Roman West, Brill, Leiden, 2009, 265-266. *Perry J. S.,* The Roman Collegia: The Modern Evolution of Ancient Concept, Brill, Leiden, 2006, 23-60.

96 For an incomplete list, see: *Liu J.,* Professional Associations, in: The Cambridge Companion to Ancient Rome, *Erdkamp P. (Ed.),* Cambridge University Press, Cambridge, 2013, 356.

97 *Collegia sacerdotum*. See: *Rüpke J.,* Collegia sacerdotum – Religiose Vereine in der Oberschicht.' in: Antike Vereine: Studien und Texte zu Antike und Christentum*, Egelhaaf-Gaiser U., Schäfer A. (Eds.),* Mohr Siebeck, Tübingen, 2002, 41-68.

98 The activities of *collegia* can be roughly divided in four general areas: cult, religious and festive establishments; burial associations and state procurement; mutual assistance and probably the most important – political activity. See: *Ausbüttel F.M.,* Untersuchungen zu den Vereinen im Westen des Römischen Reiches, M. Laßleben, Kallmünz, 1982, 49-98.

99 *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 129.

100 Ibid, 149-150.

4.2. *Universitas*

Of ancient Roman institutions incontrovertibly the most thought-provoking was *universitas*. It stood the closest to modern conception of legal entity. With time, Roman jurists began to refer to recognized legal right-bearing groups as *universitas*, as collective persons.[101] As an organizational form, it was used for various, mostly non-commercial, but especially for religious and state entities.[102]

The precise translation of *universitas* is a thorny issue. It was never a strictly defined technical term and only loosely denoted both a specific organization as well as unity, a group as a whole. The most correct approach would be to define it as something "entire", "universal" which contrasts and is juxtaposed with its own very parts or a unity (entity) which is different from its own constituent members.[103]

As mentioned above, this entity elicits the most interest, as it forms the basis for certain opinions, that Romans had already developed the notion of corporate personality, even if in a non-organized and informal fashion. However, those legal scholars, who believe that Romans still managed to arrive at the concept of a legal person, mainly base their arguments on a single phrase[104] made by *Ulpianus* in Roman Digests (Pandects), which due to translation difficulties is problematic.[105]

This Paper already touched upon the very specific Roman approach towards the nature of associations and this manifested itself the strongest in relation to *universitas*. For Romans, a legal entity, so to speak, was not a fiction, but represented a valid, genuinely existing composite being different from its constituent members. This conception is very close to the modern understanding of legal personalities, even if it is obvious that such a concept was wholly alien to ancient Romans. Therefore a troubling question emerges. If a legal entity was neither a fiction, nor a mechanical amalgamation of constituent members, *what* exactly was it?[106]

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101 Ibid, 37.

102 *Fleckner A. M.,* Antike Kapitalvereinungen, Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft, Böhlau Verlag GmbH & Cie, Köln, 2010, 336.

103 *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 36-37.

104 Digesta 3, 4, 7.

105 "*Si quid universitati debetur, singulis non debetur, nec quod universitas singuli debet*". "*If something is owed to the whole, it is not owed each to each, nor do each individually owe what the whole owes."* See following English translation in: *Felmeth A. X., Horwitz M.,* Guide to Latin in International Law, Oxford University Press, Oxford, 2009, 262. In other translations, it does mention constituent members of an entity (*universitas*, as in German *Körperschaft*) not being held liable for its debts: *Hausmanniger H., Selb W.,* Römisches Privatrecht, 6. Aufl., Böhlau Verlag, Wien, 1991, 139. This last iteration leaves an impression as if Romans did indeed recognize limited liability, which, in turn, indicates that they arrived, even if indirectly and unsystematically, at a certain notion of a legal entity. Unfortunately, our inability to translate precisely impedes understanding of what exactly did *Ulpianus* meant in this sentence. The same *universitati* may be understood as "association" "corporation", but also as "collection", "unity". This formulation also does not say anything about internal relations and generally lacks details, See: *Fleckner A. M.,* Antike Kapitalvereinungen, Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft, Böhlau Verlag GmbH & Cie, Köln, 2010, 336.

106 *Spaak T.,* A Critical Appraisal of Karl Olivecrona's Legal Philosophy, Springer Verlag, Stockholm, 2014, 222.

Modern legal science does have an answer to this conundrum: a legal person is a genuine legal subject with its own distinct legal personality, separate of constituent individuals. Romans however, as it seems, did not formulate any ultimate answers to this question. As noted above, much like a Roman family, partnerships and entities were associated with a unity comprised of private individuals in a way that constituent individuals maintained their own "beingness". This, admittedly, does have similarities with the modern notion of a legal entity, but is still a different concept. It must be said, however, that *universitas* represented the pinnacle of existing (or rather spontaneously thought up in a highly non-systematic manner) theoretical ruminations (if any) concerning legal personality in ancient Roman law[107] and by this, of all ancient Roman associations it stood the closest to modern legal entity.

4.3. *Sodalitates (Sodalicia)*

Of all the ancient Roman associations, only the most scant information is available on *sodalitates* (i.e. *sodalicia*),[108] forcing us to reassemble the whole picture only based on these materials to draw necessary conclusions.

Due to lack of classification in Roman law, it is probable to think that much like *collegia* or *societas*, *sodalitates too* denoted a collection of persons working together towards a common goal. However, it should be emphasized, that unlike these aforementioned entities, *sodalitates* bore distinctively negative connotations and the government was definitely not disposed to it kindly. In any case, surviving texts certainly do allow for such an unfavorable conclusion.

In 55 BC, under the auspices of *Consul Marcus Licinius Crassus*,[109] Roman Senate adopted a law, that prohibited establishment of criminal groups for the avowed purpose of intimidating or bribing voters.[110] To designate such groups, precisely the term *sodalicia* was used and for the purposes of the Law, such *sodalicia* were named to be electoral combines,[111] bribing voters during elections.[112]

In the municipal law issued by Emperor Domitian[113] (*Lex Irnitana*), the *sodalicium* and *collegium* are distinguished from each other with the additional provision, that neither could be formed

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107 *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 37.

108 In the *Encyclopedic Dictionary of Roman Law*, the *sodalitates* and *sodalicia* are placed under the same entry. In general, it is hard to find any real distinction between these two and it would be appropriate to discuss them together. See: *Berger A.,* Encyclopedic Dictionary of Roman Law, The American Philosophical Society, Philadelphia, 1953, 709-710.

109 *Marcus Licinius Crassus* (115-53 BC).

110 *Lex Licinia de sodaliciis.* See: *Gruen E. S.,* The Last Generation of the Roman Republic, University of California Press, Berkeley, 1995, 230-231.

111 For electoral combines, see: *Bauman R. A.,* Lawyers in Roman Transitional Politics: A Study of Relations between the Roman Jurists and the Emperors from Augustus to Hadrian, C.H. Beck'sche Verlags-buchhandlung, München, 1985, 32.

112 *Mouritsen H.,* Plebs and Politics in the Late Roman Republic, Cambridge University Press, Cambridge, 2001, 149-150. Other indicate, that under *sodaliciis* we should understand *sodalitas* members meaning that the law was directed against the members. See: *Cohn M.,* Zum Römischen Vereinsrecht: Abhandlungen aus der Rechtsgeschichte, Habilitationsschrift, Weidmannsche Buchhanglung, Berlin, 1873, 66-67.

113 *Domitianus* (51 AD-96 AD).

for the purposes of conspiracy.[114] Otherwise the conspirators would have to pay an astronomical fine.[115] Some authors presume, that this Law reflected quite well the suspicious attitude towards human associations by Roman legislation – the former, while not directly prohibited, were still subject to certain preconditions and requirements by the legislator to ensure, than no anti-state conspiracy would brew within such groups.[116] Therefore, these laws were aimed at maintaining order and preventing the emergence of illegal or dangerous associations. [117]

Taking aforementioned circumstances into account, it would be appropriate to consider *sodalitates (*i.e. *sodalicia*) as a group or grouping of people, created with more political or social cause rather than entrepreneurial, which forced Roman government to pay closer attention to them than to *collegia* or other associations. Concurrently, as was noted above, there was significant issue of terminological confusion in Roman law and it is quite possible than the *sodalitates was* not wholly different from *collegium* function-wise. Some authors, in fact, do treat them factually identical and *collegia* and *Sodalicia* as just synonyms.[118]

5. Conclusion

As a conclusion to present Article, the conception of legal entity of Roman law can be summarised in that, such notion, from purely legal standpoint, was foreign to Romans. Even the organizationally and structurally complex *societas publicanorum* or, more importantly, the *universitas*, recognized as the "other" by Roman jurists, the legal theory in ancient Rome simply did not achieve the point to make one small, but still important step – to divorce the individuals and associations, in the abstract sense, from each other. Ancient Roman private law, albeit it is widely recognized today as the precursor to both continental civil and common law, simply lacked systematization and abstract concepts. As to why the full formulation and systematization of legal persons did not occur, can be explained by a plethora of reasons: economical, social, historical, etc.

In spite of the foregoing, the Paper showed quite a few interesting aspects of Roman law: associations which, while were not considered as separate persons or subjects of law (strictly speaking), sill were thought of as something *else*, which was, however, inseparable from its constituent members. As to what was this "something else", Roman jurists did not have a straightforward answer. Despite the aforementioned, *societas* and *universitas* originating in Roman law spread widely in Middle Ages and influenced the formation of a fully-fledged legal entity.

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114 *González J., Crawford M. H.,* The Lex Irnitana: A New Copy of the Flavian Municipal Law, The Journal of Roman Studies, Vol. 76, 1986, 172, 223-224.

115 Namely 10 000 Roman *sestercia*. For comparison, the annual income of a Roman Legionnaire during time of Emperor Domitian was only 1200 *sestercia*. See: *Speidel M. A.,* Roman Army Pay Scales, The Journal of Roman Studies, Vol. 82, November 1992, 87.

116 An example would be the refusal of *Emperor Trajan* to Asia Minor Governor *Plinius the Younger* to permit the establishment of firemen *collegia*. The Emperor saw the danger of conspiracy even here: *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 113-114.

117 *Venticinque P. F.,* Honor Among Thieves: Craftsmen, Merchants, and Associations in Roman and Late Roman Egypt, University of Michigan Press, Ann Harbor, 2016, 174-175.

118 *Duff P. W.,* Personality in Roman Private Law, Cambridge, Cambridge University Press, 1938, 112, 142.

Therefore, it is indisputable, that, certain, even if not direct parallels can be drawn between modern joint stock or limited liability companies, even if such comparisons can be accentuated due to general organizational and essential structural similarities rather than from theoretical underpinnings, with the literal meaning of the word.

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Nino Basiladze*

Property Rights and Duties of De Facto Spouses

According to the Article 1151 of the Civil Code of Georgia, the personal and property rights and duties of spouses arise only from a marriage registered in accordance with the legislation of Georgia. Nevertheless, there are frequent cases of de facto family cohabitation outside of marriage between men and women, which, due to the legal ignorance of its consequences, usually causes damage to the property interests of the parties to the relationship. The purpose of the present study is to identify and legally assess the problematic aspects of the property rights and duties of de facto spouses. In particular: the social/legal nature of expenses incurred during the de facto family cohabitation outside of marriage; Issues related to determination of ownership regime of the property acquired during the de facto relationship; Problems arising from de facto spouses' use of each other's property; Legal basis for material support of the parties from each other and inheritance tendencies.

Keywords: *De facto spouses, de facto family cohabitation outside of marriage, property rights and obligations, expenses incurred during the cohabitation, property acquired during the cohabitation, use of each other's property by de facto spouses, use of housing, legal basis for receiving material support, inheritance.*

1. Introduction

According to the first part of article 1158 of the Civil Code of Georgia (hereinafter referred to as – the CCG)[1], the property acquired by the spouses in marriage is their common property, unless otherwise is provided by the marriage contract between them. It should be noted that the law does not provide the same presumption regarding the property of de facto spouses, since according to article 1151 of the CCG, the rights and duties of spouses arise only from a marriage registered in accordance with the rules established by the legislation of Georgia.[2] Moreover, the fact of being in de facto family cohabitation outside of marriage has no qualifying significance at all in order for the property acquired during the relationship to be recognized as the common property of its participants. It turns out that the formal approach to the definition of family relations is not in line with the essence of these relations and the practice established by the European Court of Human Rights.[3] Accordingly, in respect of property acquired by de facto spouses, unless they have defined their common ownership regime in an

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

2 The Ruling of May 15, 2008 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia on the Case №As-968-1269-07, Motivational Part – rights and duties do not arise on the basis of crucifixion either. The crucifixion performed by the church will not have any legal consequences.

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

agreement performed in accordance with the law[4], the share of each should be determined based on the general principles of the CCG – according to the extent of their participation in the acquisition of common property.

The issue of real estate is less problematic as it is a subject to registration and both de facto spouse can register the property right when purchasing an item. With regard to movable items, the issue is relatively difficult. De facto spouses often do not keep a list of movable items purchased together. Consequently, neither the amount of their participation in the purchase of property is recorded.

It is important to note that in the case of de facto family relationships outside of marriage, when dividing common property, participating in the management of family affairs, as well as covering household expenses, will not be taken into account without the appropriate agreement of the parties.[5] Also, except the property that is not even considered the common property of the spouses according to article 1161 of the CCG, in case of de facto family cohabitation outside of marriage, neither the salary of de facto spouses nor income from entrepreneurial activities, income from intellectual activities, pensions/stipends and so on should be considered as common property.[6]

The practice of determining the shared ownership of the property of de facto spouses after the acquisition of the property, depends significantly on their ability to prove the existence of an agreement between them on the purchase of the said property under the relevant regime, which is usually done by expressive conclusive will,[7] or at best, orally.

The opposite approach to the above is provided, for example, by the Family Code of Ukraine. According to the first part of article 74 of this code, if a woman and a man live in the same family, but are not married, the property acquired by them during the cohabitation is their common joint property, unless otherwise is provided by a written agreement between them. According to this norm, the only object of proof is the fact of being in such a relationship and the moment of its origin. Part 2 of the same article stipulates that such property is subject to the rules provided for in chapter 8 of the code, which deals with the joint property of married spouses.

The constitutional claim №1351 submitted to the Constitutional Court of Georgia on September 12, 2018 appeals against the constitutionality of the normative content of Article 1151 of the CCG, which stipulates that "the rights and duties of the spouses arise only from a marriage registered in accordance with the rules established by the legislation of Georgia." The factual basis of the claim became the circumstance that the plaintiff was not considered as the legal heir of her deceased de facto spouse.

According to the rules established by the legislation of Georgia, a de facto spouse, unlike the spouses in marriage, has no right to apply to the court for declaring other de facto spouse missing or

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4 The CCG, Article 173, Part 1 – According to this norm, the participants of the de facto family cohabitation outside of marriage, on the basis of a transaction, can have both common (joint and shared) property.

5 Norway has a different approach to this issue. See. Paragraph 3 of this article.

6 Comp. *Belov V. A*., Civil Law, Special Part, Vol. III, Absolute Civil Legal Forms, Moscow, 2013, 235 (in Russian).

7 *Baghishvili E*., Commentary of the CCG, Book III, Tbilisi, 2019, Article 328, Field 3 (in Georgian).

dead. Recognition of a person as missing or dead is related to the following property relations: property management, alienation, inheritance, etc.[8]

The part 16 of article 8 of the Tax Code of Georgia does not consider a de facto spouse as a family member for the purposes of the tax legislation. Accordingly, the de facto spouse is not the subject to the benefits provided by the relevant legislation, that are provided for those spouses who are married. Also, in the event of the death of a breadwinner and a family member provided for in article 5 (1) (d) and (e) of the Law "On State Compensation and State Academic Stipends" of Georgia, the beneficiaries receiving compensation and the State stipend may not be de facto spouses.[9]

In light to the above mentioned problems, the purpose of the present study is to identify and legally assess the problematic aspects of the property rights and duties of de facto spouses based on the comparison of the named social institution with the marriage, as to the most similar legal institution, based on analysis of the general principles of law and the review of foreign practice. In particular: the social / legal nature of the expenses incurred during the de facto family cohabitation outside of marriage; Issues related to the determination of the ownership regime of the property acquired during the de facto relationship; Problems arising from the de facto spouses' use of each other's property; Legal basis for material support of the parties from each other and inheritance tendencies. This study will provide an important theoretical basis for the problematic aspects of the property rights and duties of de facto spouses, that will help to eliminate the negative legal consequences of the relationship, based on the understanding of the issues discussed in this article by the participants themselves. This, in turn, will help to identify possible mechanisms for the legal development of the institute.

2. Expenses Incurred During the Cohabitation

The first clause of article 8 of the European Convention on Human Rights protects the right of free development of a person, which includes the right to establish relations with other people.[10]

According to the Constitution of Georgia, "the people and the state are limited in the exercise of power ... with rights and freedoms as directly applicable law." It is true that people's freedom limits the government, but people often expect more from the state than to refrain from interfering in their freedom.[11]

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8 *Abramishvili L., Gugava A*., Unregistered Marriage and its Legal Regulation, Justice and Law Journal, № 3 (63), 2019, Field 10 (in Georgian).

9 The Law of Georgia "On State Compensation and State Academic Stipends", LHG, 56, 28/12/2005, Article 18, Clause 2; Article 22^1, Clause 3.

10 Niemietz v. Germany, [1992], ECHR, 29; Pretty v. the United Kingdom, [2002], ECHR, 61, 67; Oleksandr Volkov v. Ukraine, [2013], ECHR, 165-167.

11 *Lomtatidze E*., Constitution of Georgia and Freedom: Freedom from the State or Freedom in Society ?, The Constitution of Georgia 20 Years Later, Tbilisi, 2016, 175 (In Georgian).

In a number of decisions made since 2010, the Constitutional Court of Georgia has discussed freedom of personal development as freedom by nature.[12]

Regarding the right to free development of a person protected by article 12 of the Constitution of Georgia, the Constitutional Court of Georgia clarifies that it protects the freedom of a person to manage his own inner world at his own discretion and to establish and develop relations with the outside world by his own decisions.[13] Coercion of a person and interference with his freedom is allowed only to avoid harm to other people. In a behavior that only concerns him, his independence is unconditionally absolute.[14]

The approach of the Supreme Court of New York is interesting. In particular, it does not recognize implicit (conclusive) agreements between cohabitants about alimony as well as about property when it is based on a complainant who provided certain "services", e.g. managing family affairs. The Court notes that the fact that all this was done for free and without compensation makes this process natural. The Michigan court shares the same position.[15]

In conclusion, the costs incurred by a de facto spouse without the agreement of the parties should be understood as actions taken by him/her for the purpose of free development.[16] Consequently, such a de facto spouse has no legal basis to claim reimbursement of material or intangible expenses incurred by him / her, since its performance was a natural process, which was conditioned by his/her own internal needs. However, if a de facto spouse receiving the benefit will carry out a reciprocal performance, which will be the reason for his/her receipt of the benefit, he/she can no longer demand a refund, as his/her performance was based on moral duties.[17]

It should also be noted that the rule provided by the CCG, in certain cases, may still apply to a de facto spouse who is spending within the scope of natural freedom. In particular, the article 987 of the CCG deals with the payment of expenses on the property of another person and stipulates that the obligation to reimburse the expenses intentionally or by mistake incurred on the property of another person arises only if that person is enriched by it, and if the fact of enrichment is not visible, then only spending does not give an obligation to pay.[18] Also, under the article 163, part 2 of the CCG, a bona-fide possessor may claim from an authorized person compensation for the improvements and expenses

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12 Ibid, 179, see citation: The Judgment №2/4/532,533 of the Constitutional Court of Georgia of October 8, 2014 on the case "Citizens of Georgia – Irakli Kemoklidze and Davit Kharadze v. The Parliament of Georgia", II, 5; The Judgment №2/1/572 of the Constitutional Court of Georgia of July 31, 2015 on the case "The Public Defender of Georgia v. The Parliament of Georgia", II, 11.

13 The Judgment №2/4/532,533 of the Constitutional Court of Georgia of October 8, 2014 on the case "Citizens of Georgia – Irakli Kemoklidze and Davit Kharadze v. The Parliament of Georgia", II, 3.

14 *Lomtatidze E*., Constitution of Georgia and Freedom: Freedom from the State or Freedom in Society ?, The Constitution of Georgia 20 Years Later, Tbilisi, 2016, 181 (In Georgian).

15 *McCaffrey C.S*., The Property Rights of Unmarried Cohabitants in the USA, Trusts & Trustees, Vol. 24, №1, February 2018, 104.

16 *Duca R.,* Alimony in Divorce in the Italian Legal System, *Verschraegen B. (ed.),* Family Finances, Vienna, 2009, 447.

17 The CCG, Article 976, Part 2.

18 *Nachkebia A*., Definitions of Civil Law Norms in the Practice of the Supreme Court (2000-2014), Tbilisi, 2015, Case №As-711-666-2010 (in Georgian).

he has incurred during the bona-fide possession of the item and that is not compensated from the use of that item. Under the part 3 of the same article, a bona-fide possessor may refuse to return an item until its requirements have been met.

3. Property Acquired During the Cohabitation

Interesting are the similarities and differences between the legal mechanisms of protection of rights in relation to jointly acquired property in marriage and in de facto family relationships outside of marriage.

According to the CCG, a marriage contract defines the property rights and duties of spouses, both during the marriage and in case of divorce (the first part of article 1172). This agreement is made only between the future spouses or spouses. In case of future spouses, the contract enters into force upon registration of the marriage (article 1173).

In view of the above said, the participants of a de facto family cohabitation outside of marriage, intended to determine the property regime acquired during the relationship, can not enter into a marriage contract under the article 1172 of the CCG, although they can, within the scope of freedom of contract (article 319, part 1 of the CCG.), enter into a contract similar to this one.

Although contracts for the settlement of de facto family relations outside of marriage are often referred to as cohabitation or civil partnership contracts, they are mainly for the settlement of property issues. The study of the problems that accompany de facto family cohabitation outside of marriage revealed the expediency of concluding the above-mentioned agreement in writing in the following cases: 1) the relationship is likely to last a long time and they will have to run a common household; 2) either or both have significant financial assets; 3) joint financial investments are planned, for example: buying a house and/or running a joint business; 4) one cohabitant financially assists the other cohabitant; 5) one roommate moves into a house owned by another roommate. Also when they use other things belonging to each other; 6) They raise a child together and so on.

Regardless of whether de facto spouses enter into the above-mentioned agreement, when the couple buys real estate jointly during the cohabitation, it is better to have both co-owners in the written agreement on the purchase of the item in accordance with the law. Accordingly, the mode of jointly acquired ownership will be determined from the very beginning, and in the case of a share co-ownership, also the amount of each owner's share. It is desirable to indicate in the contract, if necessary, how the mentioned common property will be divided; whether parties will have the right of preferential purchase each other's share/ideal share, etc.

Adjusting the couple's daily expenses, which can also include buying movable items for common use, can be as follows – everything that de facto spouses buy should be recorded on their credit cards. Then, at the end of the month, they should review the completed transactions and assess what was consumed for their common needs and what for their individual needs were. In such a case, it is possible for the cohabitant, whose expenses for the common need are less, to reimburse the other cohabitant for the difference in expenses by paying the appropriate amount of money, which is better

to be done by bank transfer.[19] However, as practice shows, the longer relationship lasts, the more difficult it becomes to keep track of who spent how much for common needs.[20]

The French law recognizes a "Civil Covenant of Solidarity", that is concluded by two adults for cohabiting purposes.[21] The subject of this agreement may be the definition of a common property regime in respect of household items that persons acquire after the conclusion of a civil covenant of solidarity in exchange of a payment fee. According to the covenant, if the parties do not/can not prove that the acquired property is the property of any of them, or what share of this property belongs to each of them, it will be considered that they have a common joint ownership right over it.[22]

In Switzerland, de facto spouses can enter into an agreement to settle property issues, although it is unclear to what extent such agreements are free. If the couple does not have concluded the above mentioned agreement, the general provisions of the law of obligations or property law apply. It should also be noted that the Swiss Federal Supreme Court has rejected the analogous application of property related norms from family law in relation to informal relationships.[23]

The purpose of the Swedish Cohabitation Act 2003 is to protect the interests of the parties at the end of cohabitation with regard to shared housing and household items, regardless of who paid the fee for them and also if they did not have an agreement on common financial matters.[24] Cohabitants do not have the right to alienate or otherwise legally encumber dormitories and household items without each other's permission.[25] The cost of dormitory and household items may be split, although they must exist at the end of the relationship.[26] When a division of property occurs, the funds that will cover the total debts must be allocated first.[27] Then the value of the remaining asset should be divided equally between them.[28] In case of excess of shares during the division, the respective partner can choose – to transfer the property to the other, if he pays in return.[29] In addition, cohabitants can agree that property rules contained in the Swedish Cohabitation Act do not apply to their relationship. They may also agree that the designated property will not be subject to division. This agreement is in writing and is signed by both parties (registration and notarization is not required).[30]

Norway is the only Scandinavian country where co-ownership can be established by indirect contributions to the acquisition of property by cohabitants. E.g. Managing household chores, or covering other household expenses.[31] While cohabitants do not agree on who should be considered the

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19 *Solot D., Miller M.,* Unmarried to Each Other, NY, 2002, 134.
20 Ibid, 135.
21 The Civil Code of France, Article 515-1, 21/03/1804.
22 The Civil Code of France, Article 515-5, 21/03/1804.
23 *Schwenzer I., Keller T.,* Informal Relationships, National Report: Switzerland, February 2015, Section 3.
24 The Swedish Cohabitees Act (2003:376), Sections: 3, 5, 6.
25 Ibid, Section 23, Para.: 1-4.
26 Ibid, Section 3, 7.
27 Ibid, Section 13.
28 Ibid, Section 14.
29 Ibid, Section 22, Para.3.
30 Ibid, Section 9.
31 *Sverdrup T.*, An Ill-Fitting Garment: Why the Logic of Private Law Falls Short Between Cohabitants, *Verschraegen B. (ed.),* Family Finances, Vienna, 2009, 360.

owner of the purchased item, co-ownership is based on what the parties contributed to its purchase. If both cohabitants made a direct monetary contribution to the purchase of the item needed for common use, it is implied that they entered into a conclusive co-ownership agreement, even though in reality the buyer of the item may be only one. This view is counterbalanced by the position that in certain cases such a monetary contribution may have served to make a gift or to lend.[32] Also, not only direct but also indirect participation in the acquisition[33] is taken into account if one of them was in charge of the family affairs and in the division of property stated that he was thus helping the other party to make savings, work more and develop his career. The ex de facto spouse who will make the last claim will have to prove what achievements his partner would have made if he had not taken over the family affairs.[34]

According to the 2003 Albanian Family Code, cohabiting partners are only liable if they sign a cohabitation agreement in the presence of a notary, which sets out the consequences of cohabitation regarding the children and the property assets they acquire during their cohabitation.[35]

In New Zealand, the Property (Relationship) Act has been in force since 1 February 2002. This act applies to marriages as well as to civil unions and de facto couples. This legal act legally recognizes the property rights of unmarried cohabitants[36] and stipulates that property acquired by the parties during cohabitation is usually divided equally between them.[37] Prior to the enactment of this Act, property disputes between de facto spouses were settled in accordance with the general rules of the contract and the norms of fiduciary law.[38]

The California Supreme Court in 1976, in the case of Marvin v. Marvin, limited the scope of the Doctrine of Lawlessness, as extant of an act against public order about property agreements between de facto spouses and upheld several fair remedies to settle relevant property disputes.[39]

In the above case, plaintiff Triola and defendant Marvin lived together continuously for 6 years without marriage. Property acquired during this time was recorded only as the property of the defendant. After their relationship ended, Triola filed a claim that on the basis of an oral contract entered into with the defendant, he owned half of the acquired property and was entitled to the right of support. The court clarified that it would not reject similarly expressed agreements unless it was established that the agreement was based solely on sexual services. In the same judgment, the Court

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32 *Sverdrup T.*, An Ill-Fitting Garment: Why the Logic of Private Law Falls Short Between Cohabitants, *Verschraegen B. (ed.),* Family Finances, Vienna, 2009, 361.

33 Ibid, 365.

34 *Sverdrup T.*, An Ill-Fitting Garment: Why the Logic of Private Law Falls Short Between Cohabitants, *Verschraegen B. (ed.),* Family Finances, Vienna, 2009, 364.

35 The Family Code of Albania, 8/05/2003, Article 164.

36 The Property (Relationships) Act 1976 of New Zeland, 14/12/1976, 1C (1).

37 Ibid, 1C (4).

38 *Briggs M.*, The Formalization of Property Sharing Rights For De Facto Couples in New Zeland, *Verschraegen B. (ed.),* Family Finances, Vienna, 2009, 329.

39 Harvard Law Review Association, Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin, Vol. 90, №8 (Jun., 1977), 1708. <http://www.jstor.org/stable/1340491> [07.04.2020].

also held that the property acquired during the period of cohabitation should be divided between the parties even when the conclusive action of the parties attests to that purpose.[40]

The Supreme Court of Washington ruled in 1995, in a case against Connelly v. Francisco, that upon the dissolution of an unmarried couple, there is a presumption that the courts have the power to divide the property acquired during the cohabitation equally between them.[41] Default (conclusive) agreements are quasi-agreements. These agreements are obligations created by law to prevent unjust enrichment of one party at the expense of the other.[42] E.g. The Supreme Court of New Jersey ruled in 2002, in the Rocomonte case, that an implied promise of survival was enforceable from the heir's estate.[43]

It is important to discuss how de facto spouses should divide their common property if they desire. Generally, termination of common joint property occurs when such ownership changes regime and property becomes common shared. Shared common property arising in this way may, in turn, be changed or terminated upon separation of the share in kind from the object, if it allows separation. Also, joint common property may be terminated: at the death of the co-owner, if the right of co-ownership is not inherited; When the co-owner is declared missing or dead; When divorcing.[44]

Each co-owner has the right to request the separation of shares in kind from the common item, which must be done by an agreement of the parties. When the terms of the allocation cannot be agreed, the co-owner can apply to the court for the allocation of his share. The allocation of shares may be made in kind, or by its corresponding monetary compensation, if the allocation of shares in kind is not allowed by law, or such allocation will lead to a significant deterioration of the condition of the item. In this case, the co-owner who requests the allocation is entitled to receive the corresponding monetary compensation for his share. Instead of allocating the share in kind, the court may determine the compensation against the will of the owner wishing to allocate it, when his share is insignificant, or the share can not be actually allocated, and at the same time he has no significant interest in using the property. In case if separation in kind is possible, however, in case of separation, the co-owner wishing to separate will not be able to get the corresponding share of his share, or on the contrary will exceed his share, in such case the corresponding monetary or other compensation will be provided.[45]

In case when cohabitants have created a common business they can also split the business. If the parties fail to agree on the division, the case may be discussed by a court.[46]

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40 Ibid, 1709.

41 *McCaffrey C. S.*, The Property Rights of Unmarried Cohabitants in the USA, Trusts & Trustees, Vol. 24, №1, February 2018, 101.

42 Ibid, 103.

43 *McCaffrey C. S.*, The Property Rights of Unmarried Cohabitants in the USA, Trusts & Trustees, Vol. 24, №1, February 2018, 104-105.

44 *Belov V. A.*, Civil Law, Special Part, Volume III, Absolute Civil Legal Forms, Moscow, 2013, 236-237 (in Russian).

45 Ibid, 233-234.

46 *Agallopoulou P.*, Financial Consequences of Cohabitation Between Persons of the Opposite Sex According to Greek Law, *Verschraegen B.(ed.),* Family Finances, Vienna, 2009, 298.

The Civil Chamber of the Supreme Court of Georgia has stated in one of its most recent rulings that the provision of the third part of article 1109 of the CCG "reflects the established tradition that relatives of the couple wishing them happy future marriage, are providing special gifts for them as they think that after a certain period they will marry. However, the legislator, in accordance with the provision of article 1151 of the CCG, does not link the fact of engagement to any binding legal consequence and sets the procedure for returning the engagement gift (which is often expensive) to the parties. "Detecting of de facto 'family life' in other cases, such as detecting paternity or the relationship between parents and children, may have legal implications[47] (comp. The European Court of Human Rights Judgment №18535/91 of 27 October 1994 in Kroon and others v. The Netherlands) and not in an engagement dispute."[48]

4. Use of Each Other's Property by De Facto Spouses

The use of one de facto spouse's property by another de facto spouse can also be problematic. During the period of de facto cohabitation outside of marriage, the non-owner de facto spouse may invest labor or financial capital in this property. In this case, it is necessary to find out whether any rights arise for a de facto spouse in the same way as during the marriage a spouse acquires (see the article 1163 of the CCG. Also, article 987, part 1). In this case, the de facto spouses' shared common property regime arises only when there is a relevant agreement between them. As a rule, de facto spouses do not enter into an agreement on the use of each others' property and there is only bona fide possession.

Greek scholars have suggested that marriage norms may be extended to cohabitation by analogy. In particular, they believe that the rule relating to marriage, that one spouse's contribution to the improvement of another spouse's property gives him or her certain rights, should also apply to cohabitation. Of course, if such a de facto spouse can approve the made improvements.[49]

According to the analysis of article 62 of the Family Code of Ukraine, the legal regime of commom property also includes the property of de facto spouses, which they owned before cohabitation, if the value of such property during their cohabitation increases significantly.

One of the most important issues when using each other's property by de facto spouses is the issue of housing use. Living together usually means enjoying the same living space. If the dwelling is owned jointly or by shared common property regime, then de facto spouses have joint rights to use it. It is advisable to assess the legal basis for living in a home owned by one de facto spouse.

According to the first part of article 155 of the CCG, possession arises from the voluntary acquisition of de facto possession on an item. The will to own means not the will determined for the authenticity of the transaction, but only the natural will of the person as it relates to the actual

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47 Comp. The Ruling of February 8, 2019 of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №As-1251-2018, 19.

48 The Judgement of October 24, 2019 of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №As-205-2019, 15-16.

49 *Agallopoulou P.*, Financial Consequences of Cohabitation Between Persons of the Opposite Sex According to Greek Law, *Verschraegen B.(ed.),* Family Finances, Vienna, 2009, 295-296.

possession of the thing.[50] One method of gaining possession is when an original owner allows to the new owner to possess the item, which may involve their co-ownership of the item.[51]

The Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia did not share cassator's opinion in one of its rulings. In particular, according to cassator, since he had been in an unregistered marriage with one of the defendant since 1994 and lived with him in the disputed apartment belonging to the other defendant (the de facto spouse's father) as a family member of the defendants', therefore, according to articles 159-162 of CCG, he had to be considered a bona fide possessor and thus his claim for the use of the apartment had to be satisfied. The Court of Cassation pointed out that although the cassator had settled in the disputed apartment with the permission of the homeowner and thus he should have been considered a bona-fide possessor, article 168 of the CCG provides termination of ownership for a bona fide owner if the owner makes a reasoned claim. In the present case, the chamber considered that the disputed apartment owner's claims against the plaintiff for the termination of ownership were substantiated, since he, as the owner and a person with a better right to possession, could refuse to extend the possession by the plaintiff.[52]

In connection with the use of each other's housing by de facto spouses, it should also be mentioned about article 571 of the CCG, according to which, if a tenancy agreement is concluded for a dwelling place and the tenant manages his/her common household together with his/her family members, then in the case of tenant's death, his/her family members shall enter into the legal relation with the landlord. They may terminate the tenancy agreement within the term determined by law. In this case, a de facto spouse must be considered as a member of the tenant's family and be given the right to exercise the given right. A similar approach is taken under the Italian law, according to which a de facto spouse is not entitled to claim for using the deceased de facto spouse's house, although he or she can replace the deceased de facto spouse as the tenant in the tenancy agreement.[53]

5. Legal Basis for Receiving Material Support

In case of a marriage, the issue to provide material support by spouses for each other, is determined by the law or by an agreement (article 1182 of the CCG). The relevant norms of the CCG can not be applied to de facto spouses, as family law recognizes only the marriage as the basis for arising these powers between a woman and a man (article 1151 of the CCG).[54] In addition, articles of the CCG that set out the alimony obligations for other family members (articles 1223-1231) apply to specific subjects of the family and also can not be used in favor of de facto spouses. At the same time, an agreement similar to the one provided for in article 1182 of the CCG can be concluded on the basis

50 *Totladze L.*, Commentary of the CCG, Book II, Tbilisi, 2018, Article 155, Field 8 (in Georgian).
51 Comp. ibid, Field 9.
52 The Ruling of October 25, 2002 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia on the case 3K-731-02, motivational part.
53 *Panforti M.D.*, Informal Relationships, National Report: Italy, Section 49.
54 See: *Chikvashvili Sh.*, Family Law, Tbilisi, 2004, 26 – "One of the basic principles of family law is only the principle of recognition of a marriage registered in the relevant state body" (in Georgian).

of the principle of freedom of contract (the first part of article 319 of the CCG). With regard to such an agreement, it is important to assess which legal norms should apply to it.

The use of alimony norms by analogy is debatable, as the subjective composition of the said relationship is limited to those persons who are obliged under the family law norms to pay alimony in favor of their family members. In addition, the norms applying to alimony relations provided by the family law may even be considered as special (exceptional norms). Consequently, since it is not recomended to use the analogy of law, the relationship under the article 5 of the CCG should be regulated on the basis of general principles of law (analogy of justice).

A contract about material support is closest in its content to the contract of a gift, since as a gift, also the maintenance is carried out without compensation, and like gifts, the subject of material support during the maintenance is transferred to the de facto spouse's ownership. A promise to make a gift in the future, in accordance to article 525, part 3 of the CCG, obliges the person who made such a promise, if it was made in writing and notarized.[55] However, promising a gift does not actually mean making a gift, it gives rise to an obligation under the gift contract in the future. Accordingly, the gift obligation must be realized in the new gift contract, which must be in writing.[56] With regard to the maintenance agreement, concluding a new written gift contract on a monthly basis (to confirm that the promises have been fulfilled) will significantly complicate the process. However, applying the norms of gifts to the de facto spouse in relation to the issue under consideration may even put him or her in a better position than the spouse in the marriage. E.g. The obligation of the giver of the gift may be transferred to his heirs, if this is provided for in the contract of the promise of gifts, while the obligation to pay alimony is not transferred to the heirs of the defendant. Therefore, it is better to apply the general rules of the transaction provided for in the CCG to the maintenance agreement.

According to article 515-4 of the Civil Code of France, cohabitants must provide material assistance to each other in accordance with the terms of their civil covenant.

Under the Dutch law, in the event of separation, no alimony/maintenance duties are incurred by the partners towards each other, but these issues are usually covered by the cohabitation agreement.[57] In addition, in terms of the Dutch income taxes, couples enjoy the status of partners if their cohabitation agreement includes a mutual obligation of support and the partners are not relatives of each other's lateral (straight) line; none of the partners is a third party's partner.[58]

Under the article 1444, part 2 of the Greek Civil Code, in the event of separation, a party loses the right to alimony if he or she either marries another or cohabites permanently in a free union. It is also interesting to note that under the Greek Civil Code, cohabitation agreements are made within the framework of freedom of contract, which implies that they are not subject to the norms of Greek family law.[59]

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55 *Shengelia R.*, Commentary on the CCG, Book Four, Vol. I, Tbilisi, 2001, Article 525, 70 (in Georgian).

56 Ibid, Article 525, 71.

57 *Koele I.*, Property Rights of Unmarried Cohabitants in the Netherlands, Trusts & Trustees, Vol. 24, №1, February 2018, 118.

58 Ibid, 119.

59 *Agallopoulou P.*, Financial Consequences of Cohabitation Between Persons of the Opposite Sex According to Greek Law, *Verschraegen B.(ed.),* Family Finances, Vienna, 2009, 293-294.

Under the Italian law, de facto cohabitation, although it may be stable and long-lasting, does not give rise to rights and duties from an old/ended relationship.[60]

According to the first part of article 91 of the Family Code of Ukraine, a de facto spouse, like a spouse from a marriage, has the right to claim alimony under certain conditions, both as during the cohabitation and in case of its dissolution.

6. Inheritance Right

Pursuant to article 1336 of the CCG, the spouse is the first-degree heir of a deceased spouse, who has been granted by law the right to inherit, claim benefits, a pension for the loss of a breadwinner, and compensation, if appropriate circumstances. Also, unpaid salary, vacation money, hospital stay fees, etc.[61]

The Civil chamber of the Supreme Court of Georgia, in one of its rulings, failed to confirm cassator's marriage to deceased in accordance with the law and did not consider her as his first-degree heir. Therefore, the chamber did not consider her to have personal and property rights toward deceased's property.[62]

In view of the above said, there is an unjustified risk in the event of cohabitation if no will is drawn up by each de facto spouse, as the survived de facto spouse, in the absence of the will, will not receive a share of the deceased's inheritance.

De facto spouses may benefit from article 1385 of the CCG, according to which the testator has the right to charge the heir to whom the house, apartment or other dwelling devolves, to transfer the right of life tenancy to a person who lived with the testator for not less than one year prior to the opening of the estate.

It is interesting to note the interpretation of the European Court of Human Rights that a couple who are only in a religious "marriage" is treated under the article 8 of the European Convention on Human Rights, although this does not oblige a contracting state to recognize such a marriage in connection of inheritance rights, with respect to pension, etc.[63]

According to article 4:82 of the Dutch Civil Code, a testator is entitled to grant certain advantages compared with his or her heirs entitled to get compulsory portion from the inheritance. In addition, within 6 months after the death of a de facto spouse, the partner has the right to use the dormitory and household items if they had a common dormitory.[64] Couples also enjoy the status of

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60 *Panforti M.D.*, Informal Relationships, National Report: Italy, Section 47.

61 *Abramishvili L., Gugava A.*, Unregistered marriage and its legal regulation, "Justice and Law Journal", № 3 (63), 2019, field 8 (in Georgian).

62 The Ruling of November 22, 2019 of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №AS-1153-2019, 21, 15.13.

63 Şerife Yiğit v. Turkey [2010], [GC], ECHR, 97-98, 102.

64 *Koele I.*, Property Rights of Unmarried Cohabitants in the Netherlands, Trusts & Trustees, Vol. 24, №1, February 2018, 117-118.

partners for the purposes of gift and inheritance taxes if they are officially registered at one address and have a cohabitation agreement with a notary.[65]

According to the Greek model, the ability of a survived cohabitant to inherit a portion of the remaining property by will does not work only if the will harms the interest of the other heir with the right to receive compulsory portion of inheritance by significantly reducing his share. Also, a will will be void if the heir leaves a certain amount of money to the surviving partner due to the sexual relationship between them. In addition, the cohabitant is not obliged to cover the costs of treatment or funeral expenses. If he covers these costs and does not represent the heir by will, he can claim reimbursement of the costs from the inheritance in accordance with the norms related to volunteering[66], and if the partner is the heir, then he must reimburse the above costs according to his share from the inheritance.[67]

Under the Italian law, partners can not be each other's legal heirs and the only way to get each other's inheritance is to make a will.[68] However, in the latter case, the heirs at law receiving mandatory share should not be affected.[69]

7. Conclusion

In response to the set goals, the research conducted found that the expenses incurred during the de facto family cohabitation outside of marriage are usually covered within the free development of the parties. Accordingly, the de facto spouse has no a legal basis to claim for reimburcement of material or intangible expenses incurred by him/her, except in specific cases defined by the CCG (articles: 987; 163, parts 2-3), since its performance was a natural process, which was conditioned by his/her own internal needs and not by the agreement between the parties. However, if the beneficial spouse performs the reciprocal performance, which will be based for his/her receipt of the benefit, he/she can no longer claim for refund, as the compensation he/she provided was based on moral obligations (article 976, part 2, the CCG).

With regard to the determination of the legal regime of ownership of property acquired during the cohabitation, it was established that under the CCG, article 173, part 1, participants of a de facto family cohabitation outside of marriage, on the basis of a transaction, can have both common (joint and shared) property. The practice of determining the shared ownership of property of de facto spouses' after the acquisition of the property depends significantly on their ability to prove the existence of an agreement between them on the purchase of the said property under the relevant regime.

It's true that de facto spouses can not enter into a marriage contract under the article 1172 of the CCG, although they can, within the scope of freedom of contract (article 319, part 1 of the CCG.),

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65 Ibid, 119.

66 *Agallopoulou P.*, Financial Consequences of Cohabitation Between Persons of the Opposite Sex According to Greek Law, *Verschraegen B.* (*ed.*), Family Finances, Vienna, 2009, 299-300.

67 Ibid, 301-302.

68 *Panforti M.D.*, Informal Relationships, National Report: Italy, Section 47.

69 The Civil Code of Italy, 16/03/1942, Article 536.

enter into a contract similar to this one, that is preferable to be done in a written form. Based on the problems revealed in the study, it is recomended to conclude the above-mentioned agreement in writing in the following cases: 1) the relationship is likely to last a long time and parties will have to run a common household; 2) either or both de facto spouse have significant financial assets; 3) joint financial investments are planned, for example: buying a house and/or running a joint business; 4) one cohabitant financially assists the other cohabitant; 5) one cohabitant moves into a house owned by another cohabitant. Also when they use other items belonging to each other; 6) They raise a child together and so on.

When buying a real estate during the cohabitation, it is better to register it on the name of both de facto spouse, indicating the legal regime of ownership. And when buying movable items and covering other household expenses, it is best for de facto spouses to run an appropriate calculation at the end of each month. Disputes concerning the division of property between the parties shall be settled in accordance with the general principles and rules of law regarding the division of property. In case the cohabitants have created a common business they can split it too. If the parties fail to agree on the division of the common business, the case may be heared by a court.

If during the period of de facto family cohabitation outside of marriage, a non-owner de facto spouse invests labor or financial capital in the property of other de facto spouse, the de facto spouses' share ownership regime arises only if there was a relevant agreement between them.

According to the case law of the Supreme Court of Georgia, in case of actual use of each other's property (housing) by de facto spouses, the rules of the CCG related to the bona-fide possession are applied and, consequently, the rule of termination of such ownership due to the owner's claim.[70]

An agreement similar to the one provided for in article 1182 of the CCG can be concluded on the basis of the principle of freedom of contract (the first part of article 319 of the CCG). With regard to such an agreement, it should be applied the general rules of the transaction provided for in the CCG too.

Pursuant to article 1336 of the CCG, as de facto spouse is not the heir of deceased according the law[71], there is an unjustified risk that in the presence of a de facto family relationship, each de facto spouse will not make a will for each other's interests.

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[70] The Ruling of October 25, 2002 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia on the case 3K-731-02, motivational part.

[71] The Ruling of November 22, 2019 of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №AS-1153-2019, 21, 15.13.

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Miranda Matcharadze*

Rationality of Revising the Notion of Employee Taking into Account Technological Progress

Fast development of innovative technologies resulted in spread of new, non-standard forms of employment, which mainly is managed by self-regulation, in the framework of freedom of contract, without any special legislative regulation.[1] However, atypical employees have so much in common with standard employees, that the court hardly can differentiate them, and this fairly creates query to give this category labor and other social guarantees, and therefore requires revision of the definition of employee.

Key words: *Employee, independent contractor, self-employed persons, "quazi – salaried" persons, atypical forms of employment, Gig Worker, Remote Work.*

1. Introduction

Determining notion of the employee plays significant role in the application process of labor law. This is linked to the spread of guarantees and rights given by the law to those employed under labor contract. In light of technological progress, the notion of employee does not fall under and exceeds traditional definition.

However, there was always a misunderstanding around legislative notion of employee, which does not ensure resolution of difficulties corresponding to reality. Development of new technologies and new ways of business organization, along with increasing qualification and skills of employees, made ambiguous difference between employees and independent contractors, which triggers legislator to replace old categories with new ones.[2] Great part of employment market segment was left outside regulation because of existence of traditional notions of employee and independent contractor.[3]

During years, following market requirements, when incapability of labor agreement to satisfy new requirements was detected, alongside to labor agreement various atypical, alternative constructions were created, which were inexpensive and convenient for employer and less stable for employee.[4] With this scenario, fixed-term contracts, agency work, on-call work takes place as intermediate category between employees and independent contractors.

How much is subordination a criterion, which is crucial for identification of labor relations and whether it responds to substantial changes in the area of market and industry. Understanding the

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1 Some countries regulated similar categories of workers' rights, for instance Italy.

2 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 580.

3 Ibid, 579.

4 Ibid, 581.

notion of employee gets particular importance, and its interpretation is the subject of judicial practice, as far as in most cases it is necessary to analyze particular situation and evaluate circumstances.

The purpose of this article is to through analyzing notions of employee and independent contractor based on studying legislations and judicial practice of various countries, demonstrating the problem and planning ways of its solution, which exists on labor market by way of numerous workers, who have no status of employee under legislation and therefore, can not exercise respective guarantees and social security. Is the mentioned category included in ranks of employees or it explicitly is an independent contractor? For widening notion of employee which particular recommendations may be suggested.

2. Notion of Employee

2.1. Traditional Definition of the Notion of Employee

Subordinated employment is the "traditional model", based on which legislator regulates rights and obligations of employee. Employees exercise maximum protection in this legislative framework.[5] According to scientists, exhaustive definition of the notion of employee would result in stagnation of judicial practice, which would bring negative outcome in terms of protecting rights of employees.[6]

Despite the fact that identifying features are several, in certain circumstances it is a very difficult task to classify relations. Especially taking into consideration increasing technological progress. Comparing to Italy, in Germany there were no legal definitions of employee and labor contract for a long period.[7] It was always considered that labor contract was sub-category of service contract (Dienstvertag), the definition of which is reflected in the Civil Code of Germany paragraph 611 (1).[8] In 2017 the German legislator introduced to the Civil Code a provision, that defines essence of labor contract and not a notion of employee. Despite the fact that there is no labor law in Germany, the central concept of labor law was determined. However, this definition may cause big misunderstanding during application of the law.

It is interesting that Italian legislator, in comparison to other contracts, has defined the notion of one of the participants, instead of defining a contract. This underlines significance of the notion of employee in labor relations. According to article 2094 of the Civil Code of Italy, employee is a person who performs intellectual and physical work for entrepreneur for remuneration under his/her subordination and with his/her instructions.[9]

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5 Labor Code of Georgia Commentaries, *Boroni A. (ed.)*, Tbilisi, 2016, 114 (in Georgian).

6 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, Issue 3, 2018, 627-638, 633.

7 Ibid, 28.

8 *Kropholler I.,* Civil Code of Germany, *Darjania T., Tchetchelashvili Z.* (*trans.*), *Chachanidze E., Darjania T., Totladze L.* (*eds.*) 13th ed., Tbilisi, 2014, §611, 1 (in Georgian).

9 In Italy the Federal Supreme Court shows attempts to restrict formula envisaged in article 2094 of the Civil Code of Italy. Lawyers prove necessity to have full personal subordination towards employer while discussing subordination. See citation: Commentaries to the Labor Code of Georgia, *Boroni A. (ed.)*, Tbilisi, 2016, 116 (in Georgian).

2.2. Criteria Identifying Labor Relations Introduced by the ILO Recommendation №198

Based on analysis of legislations of various countries, criteria identifying labor relations are portrayed in Recommendation №198[10] of the International Labor Organization (ILO) (hereinafter – recommendation), which calls upon member states to elaborate national policy in a way, that effective protection of performers of work in the framework of labor relations is ensured, which will give interested parties possibility to effectively determine labor relations and differentiate employee and self-employed person.[11] For determining existence of labor relations it is necessary to study essence of relation and not how this relation is classified by one of the parties.[12] The court is not interested in the name of the contract.

According to recommendation, one of the important criteria for classifying labor relation is subordination. Moreover, whether the work is performed in line with instructions of employer and under his/her control.[13] However, for instance toward persons providing individual services, such as in case of general doctor, researcher and actors/actresses, there are no instructions given, as such types of workers define the substance of their work individually in each particular occasion).[14]

Integrating the performer of work into organization of employer[15] – for this criterion it is crucial how much is performer of the work involved in the activity of receiver of the work. Involvement may be determined through the fact how important is the work performed by an individual for the business of employer and whether organizational rules, procedures, work order and/or social benefit schemes that are used towards employees of the organization, are also applied to the performer of work.[16]

According to article 13 of the recommendation, indicator determining labor relation is periodically paying remuneration to the performer of work and this income represents major and only source for the performer of work. Paying in kind, such as providing food, living place and providing transportation is also considered in remuneration. During non-working hours and right to rest on holiday, as well as compensating transportation costs related to performance of work by the employer is one of the indicators of labor relations.[17]

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10 R198 – Employment Relationship Recommendation, 2006 (No.198), ILO.

11 Labor law of Georgia and International Labor Standards, *Bakakuri N., Todria T., Shvelidze Z. (eds.),* International Labor organization, 2017, 43 (in Georgian).

12 Ibid.

13 Regulating the employment relationship in Europe: A Guide to Recommendation No.198. ILO, 2013, 38, <https:// www.zora.uzh.ch/id/eprint/91131/1wcms_209280.pdf> [10.09.2020].

14 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 630.

15 Compare Commentaries to the Labor Code of Georgia, *Boroni A. (ed.),* Tbilisi, 2016, 115. "Collaboration is the stable and systemic inclusion of employee into companies' organizational structure."

16 Labor Law of Georgia and International Labor Standards, *Bakakuri N., Todria T., Shvelidze Z.* (*eds.*), International Labor organization, 2017, 44 (in Georgian).

17 Regulating the employment relationship in Europe: A Guide to Recommendation No.198. ILO, 2013, 65, <https:// www.zora.uzh.ch/id/eprint/91131/1wcms_209280.pdf> [10.09.2020].

Labor relation does not exist when remuneration is paid based on the invoice presented by the performer of work or after person has performed work.[18]

According to article 13(a), one of the indicators of existence of labor relation, when the performer of work does this work only for the benefit of one employer. The named criterion aims at defining economic dependence of person on the employer. "Limitation of part-time working is justified deriving from competition between employers and from the principle of maintaining loyalty by the employee."[19]

Obligation to perform work personally – is an important criterion, which distinguished employee from contractor, comparing to previous versions, article 19 of the Labor Code of Georgia (herein after referred as LCG) only prescribes obligation to perform work personally.[20]

Article 13(a) of the Recommendation envisages, as criterion classifying labor relation, the performance of work during precise working hours, when the workplace is defined by the employer or is agreed with him/her. Traditionally, employment is linked to workplace, hence previously it was relatively easy to define status of employees.[21]

The financial risk of the performer of work – is very useful criterion for identifying labor relation. The right of the performer of work to get part from profit gained by the employer, and, on the other hand, liability in case of financial damage, represents strong indicator for determining status of employee.[22] Financial failure of employer is not reflected on the employee and he/she is obliged to pay salary. The named criterion must be distinguished from such structures of financial stimulation as, for instance, bonus or compensating commissions, which are often used in labor relations.[23]

Despite the fact, that continuous character of relation is one of the identifying criteria of labor contract, it is less useful, as in Georgia, for instance, possibility to stipulate contract for definite period of time is admitted.[24] Among identifying criteria, there is provision of necessary tools, materials and equipment for the work purposes by the offeror of work.

Bilateral obligations – is the additional criterion for judiciary to evaluate labor relations in some cases.[25] The mentioned implies obligation of the employee to perform work and obligation of the employer – to provide employee with work.[26]

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18 Labor law of Georgia and international labor standards, *Bakakuri N., Todria T., Shvelidze Z. (eds.),* International Labor organization, 2017, 44. See citation: Regulating the Employment Relationship in Europe: A Guide to Recommendation No.198, ILO, 41 (in Georgian).

19 *Shvelidze Z.,* Characteristics of legal status of employee envisaged under the Labor code of Georgia, Labor law, Compilation of articles, Book I, Tbilisi, 2011, 112 (in Georgian).

20 Compare Labor Code of Georgia edition 15.07.2020 – "Employee is obliged to perform work personally. Parties may agree on performance of work by third party for definite period." (Article 10).

21 *Hirsch J.M.,* Future Work, University of Illinois Law Review, Vol., 2020, 924.

22 There is not only economic risk on employer, but also he/she bears technical risk – when employee cannot perform work because of the technical problems and he/she is obliged to pay salary to employee; Personal risk – liability of employer for the action of employee; Social risk – employer compensates expenses while absence of employee due to illness or other personal reasons.

23 Labor Law of Georgia and International Labour standards, *Bakakuri N., Todria T., Shvelidze Z. (eds.),* International Labor Organization, 2017, 47 (in Georgian).

24 Labor Code of Georgia, LHG, 75, 27.12.2010, Article 12.

25 Test of bilateral obligations is particularly relevant with atypical employees, such as: home workers. Agency workers, zero-hours contract workers and casual workers.

3. Status of Independent Contractor

Self-employment always caused big doubt among legislators and scientists, as well as unrecognized presumption that long-term relations, where independent contractor directly and personally performs certain work for other person, always covers in itself element of subordination and depending relation – carries character of labor contract, where there is a strong party – employer, however, voluntarily hidden, in order to avoid expenses and lawful obligations.[27]

In some European countries, such as, for instance, Great Britain, generally there are two categories of performers – employed with special labor guarantees and self-employed (independent contractor) – characterized by substantial economic dependence and existence of labor law guarantees. Difference between them is based on the following: in exchange to subordination of employee, the prerogative employer is to ensure economic stability, contracted guaranteed for indefinite period of time, whereas an independent contractor takes risks deriving from economic activity on himself/herself in exchange to full autonomy.[28]

In USA in the case *Radio City Music Hall Corp. v. United States*,[29] in 1943 the court determined that some categories of actors/actresses (stage show performers) are independent contractors, as far as actions of producer directed to organization of the event implies only minimal control and interference.[30] In this category the following stage show performers are included – acrobats, representatives of comedy genre, singers, dancers and jugglers. However, afterwards the same court in case *Ringling Bros. – Barnum & Bailey Combined Shows v. Higgins*,[31] has stated that clowns and famous actors will be considered as persons employed in circus corporation. Performers continued permanent relations with the employer during whole season despite the fact that each phase of their activity required individualism and huge dose of artistry, the function of circus director was right to give basic instructions and control, and that was why performers were considered as employed persons.[32]

In following cases the court continued searching for balance between independence of performer and level of control from employer, and with this criterion it decided whether employee was

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26 Regulating the employment relationship in Europe: A Guide to Recommendation No.198. ILO, 2013, 50, <https:// www.zora.uzh.ch/id/eprint/91131/1wcms_209280.pdf> [10.09.2020].

27 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 579.

28 Ibid, 580.

29 Radio City Music Hall Corp. v. United States, Circuit Court of Appeals, Second Circuit, 1943, <www. casetext.com> [07.09.2020].

30 *Attadgie S.,* Combating the Actors Sacrifice: How to Amend Federal Labour Law to Influence the Labour Practices of Theaters and Incentivize Actors to Fight for Their Rights, Cardozo Law Review, Vol. 40, 2018, 1071.

31 Ringling Bros. – Barnum & Bailey Combined Shows v. Higgins, United States Court of Appeals, Second Circuit, 1951, <www. casetext.com> [07.09.2020].

32 *Attadgie S.,* Combating the Actors Sacrifice: How to Amend Federal Labour Law to Influence the Labour Practices of Theaters and Incentivize Actors to Fight for their Rights, Cardozo Law Review, Vol. 40, 2018, 1071.

contractor or not. In the case *Club Hubba Hubba v. United States*, [33] the district court of Hawaii considered club dancers, who had 6 months contract and club provided them with living place and food, as employees. The decision was based on the fact, that activity of dancers was club's major and not secondary program. Moreover, the club provided dancers with flat and food, in addition to other types of security guarantees; The club controlled working hours and process of rehearsal during activities of dancers. They had no right to stop their performing activity in the period of contract term. Between these two activities there were similarities in terms of producers' obligations, but, in the case *Radio City Music Hall Corp. v. United States*, the court has stated earlier, that determining rehearsal hours, providing flat, defining number of performances by days – all these are insignificant factors for determining control right of the employer, however, in the case *Club Hubba Hubba v. United State,* the court took into consideration these factors when considering dancers as employees.[34]

In the case *Harrell v. Diamond A Entertainment, Inc*.,[35] the Appeals District Court of Florida ruled that exotic dancer was employee and not independent contractor, taking into account terms of contract, level of employer's control and evaluating full economic reality.[36] On this case the court stated that dancer has no important part of the business, in order to be considered as independent, separate economic object. From other criteria, contributions done by parties, dancer's qualification and initiative, possibility to receive and loose income, length of relation, were taken into consideration, as well as whether the program performed by dancer was major part of employer's business activity.[37] Each factor mentioned above indicates to economic dependence, which creates precondition for the court to consider dancer as employee.[38]

In Germany category of self-employees benefits from certain volume of labor guarantees. According to acting legislation, core protection guarantees are reflected in articles 134 and 138 of the Civil Code of Germany, according to which illegal and immoral agreements are void.[39] Some protection measure may derive from general principles. For instance, provisions, which contradict

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33 Club Hubba Hubba v. U.S, United States District Court, D. Hawai'i, 1965 <www. casetext.com> [07.09.2020].

34 *Attadgie S.,* Combating the Actors Sacrifice: How to Amend Federal Labour Law to Influence the Labour Practices of Theaters and Incentivize Actors to Fight for their Rights, Cardozo Law Review, Vol. 40, 2018, 1072.

35 Harrell v. Diamond A Entertainment, Inc., US District Court for the Middle District of Florida, 1997 <https://law.justia.com/cases/federal/district-courts/FSupp/992/1343/1456769/> [07.09.2020].

36 *Attadgie S.,* Combating the Actors Sacrifice: How to Amend Federal Labour Law to Influence the Labour Practices of Theaters and Incentivize Actors to Fight for their Rights, Cardozo Law Review, Vol. 40, 2018, 1072.

37 Ibid.

38 Ibid, 1075. As for the theaters, the management of theatre organized advertisement and ticket selling, and director and producer instruct actor/actress, determined schedule for rehearsal and defined repertoire of theatre. The director is practically interfering into activity of actor/actress, when during individual performance merges acting, choreographic and stage performance and in such a way leave to the actor less possibility to express individualism. Moreover the theatre is fully responsible for its income and takes on itself financial risks of failure.

39 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 636.

with principle of good faith, puts one party in unjustified non-convenient situation, are void. Similar unjustified non-convenient situation is in place when core conditions are incompatible with legal regulation or it restricts general contractual rights and obligations, in a way that reaching the purpose of contract is at risk. (CCG §307). Ensuring protection of health in workplace and creating conditions for labor safety by the employer are regulated with §618 (1) of CCG. Person giving a job is obliged to ensure and have equipment, storage rooms and installations, which he/she must purchase for providing service and in such way he/she must manage the process of service provision, which is done by his/her management or supervision, in order to protect obliged person from danger existing to life and health, as far as it is possible considering the nature of service.[40]

As far as paragraph 618 is applied on any type of service provision, despite the character of legal relation, it is also applied on self-employed persons.[41]

The issue relates to two directions: enhancing protection guarantees for economically dependent self-employed persons or reasonableness to apply labor protection guarantees to "solo" employees. Correcting notion of employee causes serious changes to applicable norms. Using template rules for every category cannot be an outcome. It is necessary to define what could be the volume of protection guarantees to be suggested to certain categories and including them into the scheme guaranteed by labor legislation, considering their own specifics. As a result, there is a risk that the difference between employee and self-employed person, who need social protection,[42] will be erased and ambiguity created. However, in any case, the task of legislator is to ensure adequate protection.

And at last, there is no significance to name a contract, the content of contract is of utmost importance. Identification of contract is done based on its content.[43]

4. Atypical Forms of Employment

4.1. Persons Employed in Gig Economy[44]

The most important modern transformation is digital labor platform, which includes web-platforms, where working is possible by the group being geographically far ("crowd work") and applications attached to a place, which offer work to individuals in particular geographic location, as a

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40 *Kropholler I.,* Civil Code of Germany, *Darjania T., Tchetchelashvili Z. (translators), Chachanidze E., Darjania T., Totladze L. (eds.),* 13th ed., Tbilisi, 2014, §618 (in Georgian).

41 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 636.

42 For ensuring pensions, it is important to classify gig economy workers as employees. See: *Secunda Paul M.,* Uber Retirement, University of Chicago, Legal Forum, 2017, 437.

43 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 631.

44 For avoiding misunderstand, some authors suggest to call interim type workers as "independent worker". See *Harris S. D., Krueger A. B.,* A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker", The Hamilton Project Discussion Paper, 2015, 27, <https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf> [16.10.2020].

rule, for implementing tasks focused on local service, such as transportation, delivery service or house cleaning service.

Gig workers are drivers, performers of delivery service, personal assistants, craftsmen, cleaners, cooks, nannies, as well as relatively more professional category such as nurse, doctor, teacher, programmer, journalist, marketing specialist and lawyer.[45]

Gig work includes risks that inadequate regulating system may appear.[46] Majority of this type employees depend of the good will of employer – level of their protection is low, they have no possibility to conduct negotiations and they are supervised and controlled without their permission.[47]

Such employees do not make use of protection from dismissal with the condition to prolong the contract stipulated for definite period, which may take place in unlimited number of cases; Working hours' restrictions do not apply on them; For instance, indefinite working hours of uber taxi drivers creates problem for their classification.[48] They do not have annual paid leave; collective contracts and rules on minimal remuneration do not apply to them.[49] According to existing test legislation does not give exact response to questions like, are drivers independent contractors for Uber business model or are they employees. The test is ineffective and each case must be evaluated individually.[50] For example, as far as in gig economy work performer or seasonally employed person are not economically dependent on the employer, using test of economic dependency towards them is dubious.[51]

Court decisions are also inconsistent. For instance, in case *Rajab Suliman v Rasier Pacific PTV LTD*, the court in Australia considered that Uber driver is an independent contractor, as far as employer does not exercise control over him/her in such a dose, which would be enough for considering him/her as an employee.[52] Contrary to the mentioned, in the case *Klooger v Foodora*

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45 *Lobel O.,* The Gig Economy and the Future of Employment and Labor Law, University of San Francisco Law Review, Forthcoming San Diego Legal Studies Paper No. 16-223, 2016, 8.

46 "In Georgia as well, employed in gig economy persons are in unclear situation. The most evident this situation is when these persons have to send notification to the company for vacation, or when they must receive work in a form, which is suggested by the company, in order to keep rating high or in case they receive salary." See citation: *Beilis R., Mikhelidze A.,* Legal Responses to the Rise of the On-Demand Economy in Georgia and the United States, Modern Law Journal, Book I, 1st ed., 2019, 97.

47 *Hirsch J. M.,* Future Work, University of Illinois Law Review, Vol. 2020, 924.

48 *Eisenbrey R., Mishel L.,* Uber Business Model Does not Justify a New "Independent Worker" Category, Economic Policy Institute, 2016, <https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category> [11.10. 2020].

49 Commentaries to the Labor Code of Georgia, *Boroni A. (ed.),* Tbilisi, 2016, 120 (in Georgian).

50 *Bales R.A., Woo C. P.,* The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors? Mercer Law Rev., 463, 2017.

51 *Cunningham-Parmeter K.,* From Amazon to Uber: Defining Employment in the Modern Economy, 96 Boston University Law Rev., 2016, 1696.

52 The driver was employed using the application and he/she could turn off application and do other work, or use car for other application and provision of other service. See: *Duvenhage J.,* Rajab Suliman v Rasier Pacific PTV LTD: Employee or Independent Contractor? 21. U. Notre Dame Aust. L. Rev., 1.2019, 12.

Australia Ply Ltd. the same court considered the delivery service provider as unlawfully dismissed employee, because of the significant control over him/her from the side of company.[53]

4.2. Remote Work – Modern Method of Work Performance

Spread of distance work[54] removed basis of the idea, that subordinance at the same time entails giving instructions related to the workplace. For instance, in Germany there is no legislation in this regard.[55] However, according to European Law, the solution in this case is to apply principle of equal treatment. According to the principle of equal treatment in Labor Law (contracts with set term, by-work and part-time work) in Italy the legislator considered modernization of labor law in light of digitalization, and in Germany modernization in this regard is considered in direction of crowd work. Remote work rules must be enhanced and protection guarantees mut be applied to self-employees of this category (crowd workers).[56]

With the influence of modern technologies more popular becomes substitution of subordinate employment with remote work. Inexpensive information technologies make it possible to organize remote employment model effective in terms of expenses. The named model gives possibility to employees to perform work from any place acceptable for themselves, however, it must be noted that due to specifics of some works, it is impossible to manage it remotely and remote work is mostly widespread in office type works. Advantages and benefit of such model are important,[57] in numerous European countries flexible organizational models of remote work were developed, which may be successfully adjusted to various activities, in Italy there was necessity to regulate remote work on legislative level, in order to give possibility to companies use that tool officially, as one of the types of employment and apply labor law regulation towards it. For this purpose, by adoption of the Law N81 on 22 May 2017, the Parliament of Italy stipulated special regulation on rational employment, i.e. on

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53 Ibid.

54 Telework – Framework Agreement on Telework (2002) defines remote work (telework) as "form if organizing or implementing labor contact/relations using information technologies, when the work is performed, as a rule, outside the office of the employer" – Article 2.

55 Comp. *Vasilieva Y.V, Shuraleva S.V.,* The Content of the Remote Work Employment Contract: Theoretical Aspects, Perm University Herald Juridical Sciences, Vol. 28, 2015, 89; Article 49 paragraph 1 of the Labor Code of Russian Federation envisages particularities of legal regulation of remote work. The core term of the contract of remote work is the job description of employee (functions) and remuneration.

56 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 635.

57 Significantly better outcomes of performance of work by employee, successful organization of working hours and family activities, saving the time and money for transportation to work, dealing with problem of absence at work, increasing productivity in terms of hourly work, decreasing expenses for office maintenance. The mentioned positively affects public life – traffic jams are decreased, pollution is decreased and expenses aimed at welfare of the society are used for vulnerable groups.

rational (flexible) work.[58] For the purpose of increasing competition and regulating employment and working hours, especially remarkable is the regulation of remuneration and insurance.

The abovementioned law defines rational employment as method of performing work in labor contract, which must be regulated by parties' agreement. For instance, the thing that differentiates rational from normal employment is the fact that time restrictions are not set (must be fitted in the time limit defined by the legislation), no obligation of having fixed working place, but rather duties may be performed outside the work. The law creates possibility to use modern technologies for employee to perform his/her work. It must be noted, that rational employment is not a new type of labor contract, but just a method of subordinated activity.[59]

The major characteristic of rational employment is the fact, which implies existence of regular labor contract, according to which employee is subordinated to employer, but performance of work is regulated based on terms defined by the agreement stipulated between parties, that must comply with the law.[60]

For rational work employer and employee must stipulate agreement in written form, which aims at regulating substantial issues. This agreement does not substitute labor contract, but represents its addition that envisages necessary particularities in the process of performing rational work.[61]

Article 18 of the Law N81 of 22 May 2017 envisages that at least minimal part of the work must be performed in company residence. The law does not require to determine the amount of this minimum and does not define any criteria in this regard, however, leaves possibility to parties to jointly define part of this activity.[62]

The law indicates that forms of performing work must be regulated by agreement (and not solely by the employer), when the mentioned is direct prerogative of the employer in classical labor contract, changing substantial term of the contract – element of subordination, which distinguishes it from self-employment.

Some scholars while interpreting this article state that there is a significant modification in traditional understanding of the notion of subordination in place, as far as it restricts employer to personally use right to give instructions in the working process.[63]

It may be said that the legislator approved specifics of rational work and "lessened" prerogative of the employer – to interfere in the working process in cases when part of the work is performed outside of company. The law recognizes necessity of having balance considering employer's primary

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58 "Agile work", see *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 594.

59 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 594.

60 Ibid.

61 Ibid, 595.

62 Ibid.

63 Ibid.

position and the fact, that when work is performed outside of workplace, this may cause interference into personal life of employee.[64]

The law went further when determined regulating right of employer to control as a term of agreement toward those employees who perform work outside the workplace and prescribed restrictions for employers in usage of remote-control tools towards employees (such as GPS, camera, PCs and e-mail).

Deriving from the essence of labor relations, employee may not be in such position that he/she may force employer to limit his/her prerogatives. The agreement basically regulates issues such as which obligations derive from performance of work and therefore, which action must be controlled or disciplined.

The subject to agreement is working equipment, which employee uses in the working process. As far as the employer is obliged to equip employee with safe tools and the latter must be strictly delimited with the things in the private ownership of the employee, which he/she may use in work process.

And at last, the main purpose of the agreement is to regulate issue of working hours. Working time is placed in the framework of maximum time of work defined by the law and collective agreement.

The purpose of the agreement is to determine holiday period for employee and must precisely define those technical and organizational means, which indicates that employee must switch off working equipment.[65]

By the act on rational employment, Italian legislator renewed social-typical model of subordinated employment, by which the mentioned form became convenient for companies.

4.3. Quasi-Salaried Persons

In Germany there is a category of quasi-salaried employees, which is characterized with the element of subordination, quasi-salaried person has economic dependence.[66] Category similar to employees according to the act on collective contracts (article 12(1)) is: economically dependent person, who, alike employee, requires social protection, works, as a rule, based on the service contract and is obliged to perform work personally, without collaboration. In average, more than a half of their remuneration is paid by one person.[67]

By the Federal Court of Germany, the characteristics of the status of quasi-salaried employees are determined:

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64 Ibid.

65 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 596.

66 "From legal perspective, subordination without considering fact of economic dependence is impossible and it derives exactly from this factual basis." See citation: Commentaries to the Labour Code of Georgia, *Boroni A. (ed.)*, Tbilisi, 2016, 133 (in Georgian).

67 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 631.

Quasi-salaried person is self-employed. The element of subordination, which is characteristic to labor relations, is substituted with economic dependency element. Economic dependency arises when making living money depends on the income, which the person receives from contracting party as a result of realization of his labor.[68] Person similar to employee may work for several; people and take salary mostly for the work done for one contractor. Social status of economically dependent person is mostly equivalent to employee's protection guarantees in terms of necessity.[69]

Person having similar status as employee has annual paid leave, regulations on safe labor terms and anti-discrimination legislation are applicable to him/her. The next issue is whether they exercise limited liability, as it is according to practice in employee-employer relation. It must be noted, that they may participate in collective agreements.[70] For them, giving right to participate in collective agreements raises issue related to restrictions prescribed by antimonopoly legislation.[71] However, they do not have protection guarantees from dismissal from work, and also may not have claim for most right of employee. It may be stated that persons similar to employees cannot make use of the majority of benefits, that labor legislations suggest to employees. It is desirable to spread minimum wage guarantee on persons of such category.

5. Reform in Italy Directed to Enhance Category of Employees

The reform initiated in 2014, known as Italian "Jobs Act" was enacted in 2015-2017. The first achievement of the reform is encouraging employers for stipulating life-long contracts, in return to which the social and economic expenses were reduced for them.[72] As a result of the reform, several social insurance norms were spread on the category existing outside employees and independent contractors. These are persons, who personally perform continuous work exclusively for one provider of work, which organizes methods of work performance, including workplace and working hours.[73] Therefore a person, whose work is organized by employer, is protected alike employee, despite the fact that he/she does not satisfy other necessary prerequisites of the definition of employee.

From the other hand, in May 2017 the Law N81 entered into force, according to which the regulation on self-employed persons was developed and for the first time Italian legislator attained certain rights and protection guarantees to independent contractors. The category which was not

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68 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 632.

69 Ibid.

70 Comp. *Fisk C.,* Hollywood Writers and the Gig Economy, 2017 U. Chi. Legal Forum, 2017, 178 – writers having career in Hollywood already for 80 years have collective agreement, despite the fact that they represent part of gig economy.

71 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 632.

72 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors Under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 582.

73 Ibid.

touched upon, excluding the topic of taxation, is the direct addressee of legislative package, which equips them with special status in the labor law system.[74]

In Italy during years the category of employees doing project work was regulated, who have an autonomy with regard to provider of work, and purpose of their activity is focused on one particular outcome, or income. Such "coordinated collaboration" is legitimate in so much as in the conditions of particular project, person is focused on result, acts autonomously. Parties are required to formalize such relation. "Project" must not coincide with economic activity of principal, but rather it must be different and delimited from one another. Non-existence of project or existence of such project which was wide, general and related to main activity of principal, caused annulment of the contract and the court gave classification of labor relation to such intercourse.[75]

The reform of "Jobs Act" aimed at fill in or reduce gaps existing between labor relation and self-employment. In this regard the first step was taken towards repealing regulation of "project work", which was in force for long period.

Article 2 paragraph 1 of the Law N81 from 2015 stipulates package of protection guarantees for employees, who continuously collaborate with the employer, who organizes process of their activity, including working hours and workplace.[76]

From the one hand, contract type (project work), which previously created third category between independent contractor and employee, disappeared from system. On the other hand, it is also obvious that purpose of this provision is to enhance scope of application of labor law without introducing changes to the notion of employee envisaged in article 2094 of the Civil Code of Italy.

Moreover, this law established term "Smart Working", in particular, method of organized and subordinated work, which does not necessarily imply only one workplace and fixed working hours, but it aims that technologies needed for performance of work shall not be outside the installations of employer and there should be flexible schedule. [77]

Deriving from judicial practice, it appeared that for identification of labor relations and for proper determination whether person is employee or individual contractor, the character of work has no meaning, but – the method of work. However, judicial practice initially has stated through methodological approach "sussuntivo" that only such relation can be considered as labor relation, where all preconditions prescribed by the law are in place.[78]

However, during years court practice established additional criteria for identifying labor relation, such methodological approach was called "typological" – some elements often de facto characterize typical model of subordinate employee and may be taken into consideration in the process of identifying relation, in conditions where these criteria are not defined in the lawful version of the

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74 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors Under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 583.

75 Ibid, 589.

76 Ibid, 590.

77 Ibid, 583.

78 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors Under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 584.

notion.[79] The mentioned does not exclude "metodo sussuntivo", which as stated above, implies existence of terms indicated only in law.[80]

6. Conclusion

Based on the analysis presented above, the notion of employee definitely needs reformation. While its description economic dependence, need for protection must be moved forward, instead of subordinate principle. Italian reform must be analyzed carefully. Criteria necessary for identification of labor relation: continuous collaboration, performance of work personally, implementing work obligations in organized way, which includes determination of workplace and working hours from the side of employer, definitely needs to be reviewed.

Despite the fact that in various countries they point out that problems do not exist, including in Georgia, similar to Italy, it is necessary to take particular steps to protect rights of interim, non-standard type workers. For this, the solution might be new, wider formulation of the notion of employee, which is less effective as it will cause equaling in rights between employee and work performer of non-standard type, and there might not be economic readiness in this regard, as far as it could be heavy obligation for business.[81]

Alternative suggestion is to introduce new regulations, where non-standard forms of employment will be defined and relatively modest protection guarantees will be suggested for the mentioned category, comparing to those existing for employees, however, considering specifics of their work, this amendment will significantly improve their legal condition.

The role of judicial practice shall be underlined in this regard. It must be noted, that in Georgia practically there is no judicial practice related to atypical employment, but in reality, such employment forms are wide spread, which will definitely cause wrecking of judicial practice in future. Courts must continue interpreting the notion of employee in light of the technological progress and must carefully ensure enhancement of this notion.

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80 Ibid, Interpretation according to typological method introduced numerous misunderstandings, as far as several additional criteria were referencing to independent contractor as well. It was unclear which and how many additional criteria was enough for giving to relation the labor character.

81 Comp. *Dau-Schmidt K. G.,* The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labour and Employment Law, University of Chicago, Legal Forum, 2018, 64 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1591&context=uclf>, [04.10.2020]; The author indicates, that it is time to abolish outdated notions of employee and independent contractor, and introduce common, universal notion for indicating performer of work.

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The Legal Mechanisms for Protection of Minority Shareholders in Cross-border Mergers under European Union Law

Minority shareholders protection in cross-border mergers is one of the EU's major concerns, which its leaders are trying to solve gradually and in stages. The evolutionary development of the regulation on cross-border merger transactions at the EU level shows that ensuring appropriate protection for minority shareholders laid on Member States' shoulders at first in 2005, while the EU has already undertaken a commitment to assure adequate and proportionate safeguard of minority shareholders since 2019 and regulates through a directive main specific mechanism for protection of minority shareholders in cross-border mergers directly at the EU level.

The article deals with the legal mechanisms for the protection of minority shareholders in the process of implementing cross-border mergers, which are provided by EU law for the protection of minority shareholders. The article also discusses and analyses the traditional mechanisms for the protection of minority shareholders, along with adequate cash compensation as the principal specific mechanism for the protection of minority shareholders, which the minority shareholders can use to protect their interests in the process of cross-border merger.

To better understand the functioning of legal mechanisms for the protection of minority shareholders, the legal nature of cross-border merger transaction has been observed, which has been determined by examining issues such as the essence of cross-border merger, its parties, methods of merger, and process of making the deal and only then the article discusses the legal mechanisms for the protection of minority shareholders.

Key words: *Minority Shareholders, Cross-border Merger, Legal Mechanism for Protection, Ensuring Appropriate Protection, Adequate Cash Compensation.*

1. Introduction

The appropriate and adequate protection for minority shareholders is one of the underlying principles of EU regulation on cross-border mergers and, at the same time, a key direction of such control, the meaning of which is growing as the number of cross-border mergers between companies from Member States of the EU have increased. Minority shareholders Protection is a legitimate public interest, as providing them with adequate and proportionate safeguard is one of the main components of creating a healthy, fair, and conducive legal environment, which together with other elements, aims to create an environment within the EU that enables companies to operate easily and smoothly.[1]

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1 In addition to the protection for minority shareholders, there is considerable importance to the safeguard of creditors and employees. See in detail: Proposal for a Directive of the European Parliament and of the

The necessity of protection for minority shareholders in a cross-border merger is determined, on the one hand, by the character and motive of the transaction and, on the other hand, by the direct nature of its implementation, which together can significantly worsen legal and property status of minority shareholders. A minority shareholder is an immediate participant in the process of a cross-border merger and a person who has a direct property interest, which is why the cross-border merger transaction has a significant impact on him. Cross-border mergers between companies from Member States of the EU can grossly infringe on minority shareholder rights and cause significant property damage, which has ultimately a negative impact on the success of the transaction as a whole, which is why legal mechanisms that should ensure timely and due protection for minority shareholders in a cross-border merger, take on special significance and purpose. The urgency of study on the legal mechanisms for the protection of minority shareholders should also define by the fact that Georgia, as a country having stood upon the path to EU membership, has not undertaken commitment for an objective reason to approximate its national legislation to cross-border merger directive at the time of concluding the Association Agreement, nevertheless, the country will have to transpose the provisions of the Directive into domestic law in case of joining the European Union that will create entirely new opportunities for Georgian companies, the realization of which would arise a necessity for protection of minority shareholders, which, in turn, will increase the importance of legal mechanisms for their safeguard doubly.[2]

Given of all the above, the purpose of this article is to study and analyze only those legal mechanisms for the protection of minority shareholders by which EU legislation provides for minority shareholders in the process of cross-border merger, for that there will be a systematic analysis of certain norms of one of the main EU directives in the field of corporate law, which deal with the regulation of cross-border merger transactions. To achieve the set goal, the structure of the research and, consequently, the article was defined, which consists of an introduction, three paragraphs, and a conclusion. An examination of the European legal mechanisms for the protection of minority shareholders will begin with a brief overview of the evolutionary development of the regulation of cross-border merger transactions at the EU level, which historically aims to show the path that the regulation has taken up to date. The second paragraph of the article deals directly with the regulation of cross-border merger transactions at the EU level, which, on the one hand, includes the characterization of cross-border merger transactions of limited liability companies, and, on the other

Council Amending Directive (EU) 2017/1132 as regards Cross-border Conversions, Mergers and Divisions, COM/2018/241 final, 2018/0114 (COD), Brussels, 25.4.2018, 1.

[2] Cross-border mergers were regulated at the EU level by Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, which acquired legal force on 15 December of the same year. According to Article 319 of Chapter 6 of the Association Agreement between the European Union and Georgia, Georgia has not committed itself to approximation national law to the directive on the cross-border merger, insofar as directive 26/2005/56 / EC of 26 October 2005 is not sought among EU legal acts referred to in Annex XXVIII to the Agreement. The cross-border merger directive was repealed in 2017, but its norms were codified in Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law. See: Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 27/06/2014, Art. 319.

hand, integrates the study of its implementation process which allows determining the legal nature of cross-border merger. The study and analysis of the process implementing cross-border merger and its stages will be conducted only from a point of view regarding corporate law and from an angle of protection for minority shareholders. The last paragraph of the article is devoted to the discussion of the principle of ensuring appropriate and adequate protection and the examination of specific legal mechanisms for the protection of minority shareholders. The concluding part of the article summarizes the results of the research, which were shaped in the form of conclusions and recommendations.

2. The Historical Evolution of the Regulation of Cross-border Mergers of Limited Liability Companies

The regulation of cross-border merger transactions between limited liability companies from the EU Member States has a long and controversial history at the EU level. It is evidenced by the fact that the creation of a legal environment conducive to their implementation has not been possible for several decades. Throughout the history of the EU, there have been several attempts to regulate cross-border merger transactions, most of which failed for economic and legal reasons. Among the reasons for the failure of regulatory efforts to regulate cross-border merger transactions can be named the lack of harmonized rules on domestic mergers in the Member States, tax policies, barriers to employee participation, and a distinct feature characteristic for the development of European business.[3]

The idea of legal regulation of cross-border merger transactions started from the moment of the creation of the European Union. The principles of legal regulation of cross-border mergers were established by the Treaty establishing the European Economic Community, in which for the first time stated the intention to regulate cross-border merger transactions through an international agreement.[4] Nevertheless, the importance of cross-border merger and its conducive legal environment for economic growth and integration could not be conceived in its time to such an extent and a certain degree that the EU and its Member States would overcome existing obstacles from the very beginning of the European Economic Community to establish a european framework for regulating transactions as far back as the 1950s and 1960s

The first attempt to regulate cross-border merger transactions at the EU level was linked to an initiative of regulation with the Convention, which preceded the idea of regulation through the directive. In early 1965, negotiations for the adoption of an international convention to regulate cross-

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3 *Vermeylen J.,* The Cross-Border Merger Directive, In Book: *Vermeylen J., Velde I. V. (eds.),* European Cross-Border Mergers and Reorganisations, Oxford Univ. Press, New York, 2012, 1.01.

4 See: Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft, Rom, den 25. März 1957, EUR-Lex Document (CELEX number) 11957E/TXT, Art. 220, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:11957E/TXT&from=EN [24.09.2020]. The original wording of Article 220 of the Treaty establishing the European Economic Community is no longer in force at this time, and the normative content that this article once had is not sought in the Treaty on the Functioning of the European Union. When the title of the Treaty establishing the European Economic Community was amended under the Maastricht Treaty in 1993, Article 220 was retained unchanged in the Treaty Establishing the European Community, but the numbering was changed according to Treaty of Amsterdam in 1999 and became Article 293 of the Treaty establishing the European Community, Which was finally repealed under the Treaty of Lisbon in the Treaty on the Functioning of the European Union in 2009.

border mergers between the member states of the European Economic Community began that lasted seven years and ended in 1973 with the publication of the draft Convention and the report on the draft.[5] The draft Convention on international merger, prepared by a working group set up by the Commission under the direction of Professor Berthold Goldman, caused a great deal of controversy, and its adoption was ultimately rejected.

On 14 January 1985, the Commission presented the first draft of the Directive on cross-border merger, which was largely based on the draft Convention.[6] The tenth directive could not be adopted even though the third Council directive on domestic mergers was already in force at that time. In 2001, the Commission withdrew the old draft Directive on cross-border mergers and introduced an updated draft on 18 November 2003, which differed from the former in terms of scope of application and ways of resolving the issue of employee participation.[7] On 26 October 2005, after overcoming all existing obstacles, the EU finally adopted directive on cross-border merger of limited liability companies.[8]

In June 2017, cross-border merger directive was repealed and its norms became part of the codification, the last amendment of which was made in November 2019 at this time.[9] The amendments to the Directive on Certain Aspects of company law from 1 January 2020 on cross-border mergers are significant and interesting in the sense that the purpose of the new regulations is, on the one hand, to simplify the process of cross-border merger and to provide greater legal certainty, and, on the other hand, to adequately and proportionately protect the interests of all interested parties to cross-border mergers.[10]

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5 The draft of the Convention and Report on the draft in English see: Draft of the Convention on International Merger of Sociétés Anonymes and Report on the draft Convention on the International Merger of Sociétés Anonymes, Submitted to the Council by the Commission on 29 June 1973, The Bulletin of the European Communities, 7/8, Vol. 6, 1973, Supplement 13/73, 2-123, <http://aei.pitt.edu/5613/1/5613.pdf> [24.09.2020].

6 Commission of the European Communities, Proposal for Tenth Council Directive based on Article 54 (3) (g) of the EEC Treaty concerning Cross-border Mergers of Public Limited Companies, Bulletin of the European Communities Supplement 3/85, 1985, 1-23, <http://aei.pitt.edu/8561/1/8561.pdf> [24.09.2020].

7 Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on Cross-border Mergers of Companies with Share Capital, COM(2003) 703 final 2003/0277 (COD) Brussels, 18.11.2003, 3.

8 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on Cross-border Mergers of Limited Liability Companies, (Text with EEA relevance), OJ L 310, 25.11.2005, 1-9 (Hereinafter – Directive 2005/56/EC on Cross-border Mergers of Limited Liability Companies).

9 See: Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to Certain Aspects of Company Law (Codification), (Text with EEA relevance) OJ L 169, 30.6.2017, 46-127. (Hereinafter –Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text)). Consolidated text of the 2017 Directive, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02017L1132-20200101&from=EN> [22.09.2020]. See also: Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards Cross-border Conversions, Mergers and Divisions (Text with EEA relevance), O J L 321, 12.12.2019, 1-44. (Hereinafter – Directive (EU) 2019/2121 as regards Cross-border Conversions, Mergers and Divisions).

10 Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2017/1132 as regards Cross-border Conversions, Mergers and Divisions, COM/2018/241 final, 2018/0114 (COD), Brussels, 25.4.2018, 2.

3. Regulation of Cross-border Mergers of Limited Liability Companies

3.1. Transactional Characterisation of Cross-border Merger of Limited Liability Companies

3.1.1. The Essence of Cross-border Merger

The legal definition of the substance of cross-border merger is provided for in article 118 of the Directive relating to Certain Aspects of Company Law, on the basis of which each Member State formulates the notion of cross-border merger individually and independently in its domestic law, which is why its definitions in the national laws of the Member States are almost identical to each other and fit direct nature of the international transaction.[11]

Cross-border mergers, as the structural measure between companies,[12] are carried out between limited liability companies formed in accordance with the law of a Member State and having their registered office,[13] central administration or principal place of business within the Union.[14] In addition, a merger is considered as cross-border merger transaction only if at least two of the participating companies are governed by the legislation of different Member States.[15] Such a definition of the cross-border merger transaction indicates that cross-border merger takes place only between limited liability companies which have their domicile in different EU Member States. From this definition it is possible to distinguish four main features of cross-border merger transaction. In particular, according to the first sign, only limited liability companies should be parties to cross-border merger; The second sign indicates that the companies participating in the transaction must be established under the law of the Member States; The third sign requires participating companies to have a registered office, central administration or principal place of business within the EU, and last, the fourth sign implies that the

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11 The article 118 of the Directive relating to Certain Aspects of Company Law defines the scope of the norms governing cross-border mergers for the expansion of which there are more than one recommendation, nevertheless, recent changes have not affected this article at all. For more information on the scope of the norms governing cross-border mergers, see: *Papadopoulos Th.,* Reviewing the Implementation of the Cross-Border Mergers Directive, in: *Papadopoulos Th. (ed.),* Cross-Border Mergers: EU Perspectives and National Experiences, Studies in European Economic Law and Regulation, Vol. 17, Springer, Cham, 2019, 7-8.

12 There are two types of structural measures. The first type includes structural measures implemented within the company, such as establishment of a branch or transfer of registered office, while the second type of structural measures includes external structural measures implemented between companies, in particular, such as mergers, acquisitions and takeovers. See: *Grundmann S.,* European Company Law: Organization, Finance and Capital Markets, 2nd ed., Intersentia, Antwerpen, 2012, 487-488.

13 The term "Registered Office" refers to the official legal address of the company at which the company was registered. In addition, its function is that the correspondence received on it is considered as an officially delivered message. The official legal address of the company is usually indicated in the charter and its declaration is usually made for registration purposes. The official legal address of the company may differ from the legal address of the company's central administration or head office. Thus, it can be said that the term "registered office" refers to the criteria for determining the nationality of a company such as place of incorporation.

14 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 118.

15 Ibid.

merger transaction must necessarily include an international element, which usually assumes that at least two of the companies participating in the transaction are governed by the laws of different Member States.[16] The simultaneous coexistence of all the listed signs is necessary for the merger transaction to be considered as cross-border merger transaction.[17]

3.1.2. Legal Forms of the Parties to Cross-border Merger

Only limited liability companies from the Member States have the right to participate in cross-border merger between the companies from Member States of the EU. The term "limited liability company" usually refers to a company with a share capital and having legal personality possessing separate assets, the existence of which can only serve to cover debts of the company.[18] Thus, members of a limited liability company are not personally liable for the debts and liabilities of the company.[19] In addition, the company is required by the national law of the Member State to which it is subject to comply with the conditions concerning guarantees for the protection of the interests of its members and third parties which are directly related to the cancellation of company registration and the publicity of the register.[20]

In connection with the definition of the legal forms of the parties participating in the cross-border merger, the laws governing cross-border merger have a broad and comprehensive so-called personal (subjective) scope of application.[21] The party to cross-border merger between companies from Member States of the EU can become a limited liability company of all types, regardless of its legal form,[22] which has allowed small and medium-sized enterprises operating in the EU to merge

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16 Comp.: *Lazíková J., Belková L., lková Z., Ďurkovičová J.,* Cross–border Mergers – the Concept and its Implementation into the Legal Order of the Slovak Republic, EU Agrarian Law, Vol. 2, Iss. 2, 2013, 55. In a particular case, only three characteristics of cross-border merger are distinguished, as long as the second and third signs are united in one sign, which may be due to their interrelationships, but in the presence of different indicators determining nationalilty, their close connection is broken. That is why it is more justified to separate the second and third marks and discuss them separately, because the rules on the connecting factor have not been harmonized in the EU at this stage and determination of the national law applicable to a company falls, in accordance with Article 54 of the TFEU, within the competence of each Member State. Directive (EU) 2019/2121 as regards Cross-border Conversions, Mergers and Divisions, rec. (3).

17 *Lazíková J., Belková L., lková Z., Ďurkovičová J.,* Cross–border Mergers – the Concept and its Implementation into the Legal Order of the Slovak Republic, EU Agrarian Law, Vol. 2, Iss. 2, 2013, 55.

18 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 119, para. 1, point (b).

19 *Gerven D.,* Community Rules Applicable to Cross-border Mergers, In Book: *Gerven D. (ed.),* Cross-border Mergers in Europe, Vol. 1, Cambridge Univ. Press, New York, 2010, 6.

20 The terms of the safeguards for the interests of the members of the company and of third parties were provided for in First Council Directive at the time, which were reflected in Section 2 of Chapter 2 and Section 1 of Chapter 3 at this stage. See: Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 119, para. 1, point (b).

21 *Grundmann S.,* European Company Law: Organization, Finance and Capital Markets, 2nd ed., Intersentia, Antwerpen, 2012, 576.

22 *Gerven D.,* Community Rules Applicable to Cross-border Mergers, In Book: *Gerven D. (ed.),* Cross-border Mergers in Europe, Vol. 1, Cambridge Univ. Press, New York, 2010, 4.

internationally. The legal forms of limited liability companies participating in cross-border mergers are concretized according to the member states, among which are usually the joint stock company and the limited liability company, or their hybrid forms.[23]

3.1.3. The Methods and Consequences of Cross-border Merger

Cross-border mergers between limited liability companies from the Member States of the EU take place in two main forms, which are consequently identical to each other, and the only difference between them is revealed only in terms of maintaining the status of the entity. The naming of methods implementing cross-border mergers doesn't usually occur at the directive level, however, if we do not take into account the international component, their essence coincides exactly with the methods of domestic mergers, the name of which is provided for in the Directive.[24]

The material scope of application of the provisions of the directive regulationg cross-border merger applies to such forms of cross-border mergers as Merger by Acquisition, which essentially means merging by joining, and through the founding of a new company (Merger by the Formation of a New Company), during which a wholly new third company is formed, which may be established as in one of the Member States, which is the home country of one of the companies participating in the transaction, also in a third Member State that has nothing to do with the deal. Both forms implementing cross-border mergers are, in terms of their legal nature, a direct (legal) merger, as the name suggests,[25] which, in turn, means that companies from different Member States are involved in the transaction of which at least one loses the status and ceases to exist as independent subject of law.

The consequences of cross-border mergers are determined by the methods of implementation. Cross-border merger by acquisition or alternatively by joining involves transaction in the course of which all the assets and liabilities belonging to the other participating companies are transferred to one of the companies participating in the transaction, which is the acquiring company for the purposes of the transaction, in exchange for securities and shares of the acquiring company. The securities and shares that are transferred are eligible to participate in the acquirer's share capital and are distributed ultimately to the shareholders of acquired companies. In the process of cross-border merger, the acquired companies are dissolved after the completion of the acts of reciprocity, so that their

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[23] An exhaustive list of legal forms of limited liability companies by Member States was provided for in the 2005 cross-border merger directive by redirecting to the Council First Directive, Article 1 of which listed specific types of companies. See: Directive 2005/56/EC on Cross-border Mergers of Limited Liability Companies, Art. 2, para.1, point (a). The First Council Directive was replaced in 2009 by a new directive, which was to be codified in 2017, and the list of legal forms was included in the Directive relating to Certain Aspects of Company Law as an appendix, Annex 2 of which, as already mentioned, identifies specific legal forms from Member States that may participate in cross-border mergers. See: Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), Official Journal of the European Union, 30.6.2017, L 169/117, ANNEX II.

[24] See Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Arts. 89-90, 119.

[25] *Siems M. M.,* The European Directive on Cross-Border Mergers: An International Model?, Colum. J. Eur. L., Vol. 11, 2005, 169.

liquidation does not begin, therefore, the liquidation-related processes do not take place during the merger.[26] Cross-border merger by the formation of a new company envisages the development of qualitatively similar processes, which is characterized to cross-border merger by acquisition, with the only difference being that the acquiring company is a newly established company to which the assets and liabilities of all companies involved in the transaction were transferred, that will be followed by the dissolution of the merged companies.[27]

3.2. The Process of Cross-border Mergers of Limited Liability Companies

3.2.1. The Preparation and Publication of Common Draft Terms of Cross-border Mergers

Implementing cross-border merger between limited liability companies is a complex process that consists of several sequential stages and ends with the execution of the merger decision. In the first stage of cross-border merger, after the merger is initiated, common draft terms of merger is prepared and its publicity and availability are ensured. The accessibility of common draft terms of cross-border merger must be provided to all at least one month prior to general meeting, at the same time, shareholders, including minority shareholders, have the right to express their views and comments on common draft terms at least five working days before general meeting.[28]

The administrative organs of the companies participating in the transaction are responsible for preparing common draft terms of cross-border merger. The management or administrative body of each company participating in cross-border merger is responsible for drawing up common draft reflecting the terms of the merger, in which the obligatory and necessary conditions for the implementation of the merger will be written.[29] The most important and essential points, among the terms of cross-border merger to be included in common draft terms of merger are exchange ratio of securities and shares and the amount of cash payments.[30]

The common draft terms of merger in the process of cross-border mergers between limited liability companies, has a special role and importance in terms of protection of minority shareholders, which is reflected in the fact that in addition to general information to shareholders and other stakeholders, it contains the necessary information directly to minority shareholders, from which, as the primary source minority shareholders are informed of detailed information on the monetary compensation offer and its terms, which they can benefit from if they do not support common draft terms of merger at the general meeting.[31]

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[26] Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 119, para. 2, point (a).

[27] Ibid, Art. 119, para. 2, point (b).

[28] Ibid, Art. 123, para. 1, point (a), (b).

[29] The directive relating to Certain Aspects of company law provides a broad and exhaustive list of conditions that must be taken into account in Common draft terms of cross-border mergers. See in its entirety: Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 122.

[30] Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 122, point (b).

[31] Ibid, Art. 122, point (m).

3.2.2. Report of the Administrative Body

The process of cross-border merger between limited liability companies will move to the second stage after the preparation of common draft terms of merger and ensuring its availability, on which the governing bodies of the companies participating in the transaction are responsible for preparing a report on cross-border merger. In contrast to common draft terms of merger, report of administrative body directly serves to inform the shareholders and employees of the companies participating in the transaction. The report of administrative body is essentially a report on cross-border mergers that explains and clarifies the economic and legal aspects of cross-border mergers. The report of administrative body also includes an explanation of the consequences of cross-border mergers, which directly and indirectly apply only to employees and may have a material impact on their interests.[32]

The report of administrative body on cross-border merger has a special purpose for both the shareholders and the employees, as well as for minority shareholders, as the report provides clarity of the information on common draft terms of merger. The report of administrative body contains explanations on issues important to minority shareholders, such as, on the one hand, the methods of determining monetary compensation and calculating share exchange ratio, and, on the other hand, the use of a special mechanism to protect minority shareholders.[33] The report of administrative body on cross-border mergers, in contrast to common draft terms of merger, which only provides information disclosure and accessibility, ensures that the information provided is explanatory and understandable to its recipients, thus striving to meet criteria for access and adequacy of information, such as comprehensibility of the content of the information, which has special importance for the minority shareholder. The minority shareholder, due to its status and the nature of the investment, has little insight into the internal affairs of the company and lacks the professional skills to evaluate them, which prevents him from making an informed decision on the merger.

3.2.3. Independent Expert Report

In the third stage of the process of cross-border merger of limited liability companies, it is necessary to invite an independent expert with special knowledge, which studies and evaluates common draft terms of merger from a professional point of view, on the basis of which a written report is prepared, which combines the expert opinions on the essential terms of the merger. An invited expert may be an individual with relevant education and qualifications, who conducts his / her activities independently and individually, as well as an employee of a special institution having the status of a legal person, whose summons and appointment are made separately for each company participating in the transaction, separately or on a joint request, by the competent authority of the Member State.[34] The main characteristic of the appointed expert is his independence, which, first of

[32] Ibid, Art. 124, para. 1.
[33] Ibid, Art. 124, para. 3, point (a), (b), (d).
[34] Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 125, para. 2.

all, implies independence from the companies participating in cross-border merger and their governing bodies, which is a kind of guarantee of the objectivity of his conclusion.

The report prepared by an independent expert is essentially and qualitatively a document similar to an audit report in which the terms of cross-border merger are assessed in terms of fairness, validity and adequacy.[35] The report of the independent expert, unlike the report of the administrative body, is only a document intended for the shareholders of the companies participating in the transaction, which is submitted at least one month before the date of the general meeting.[36] The report submitted by independent expert are expressed and substantiated opinions, on the one hand, on share exchange ratio and monetary compensation and, on the other hand, on the adequacy of their calculation methods, in the process of which, the expert must take into account the market price of the shares and the value of the company before announcement of merger, which are usually determined based on commonly accepted valuation methods.[37] The importance of independent expert report and, in particular, of the opinions expressed in it, is immeasurably great for minority shareholders, who, as a rule, do not have the special knowledge required to assess the terms of the merger, so the conclusions presented in the report, that are given by an expert who acts independently from the management, are objectively qualified and professional for them, which is why it is more credible and reliable than the explanations contained in the report of administrative body.

3.2.4. Approval by the General Meeting

The prerequisite for cross-border merger of limited liability companies is the approval of the transaction by the General Meeting, which is reflected in the approval of common draft terms of merger and its consent to its implementation. The decision-making stage for cross-border merger takes place only after the preparatory stage has been successfully completed and all the authorized persons participating in the transaction will complete the submission of their opinions and remarks on all reports in writing. The decision on cross-border merger is made individually by the general meeting of each company participating in the transaction.[38] The approval of the transaction by the General Meeting is by nature a mandatory requirement, although it may be waived if certain conditions are met that will only be allowed by the general meeting of the acquiring company in connection with the approval of common draft terms of merger.[39]

The formalities related to cross-border merger decision-making process are not defined in detail at EU level. The rules for convening and holding a general meeting by each company participating in cross-border merger, as well as the decision-making process, shall be governed by the domestic law of

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35 *Gerven D.,* Community Rules Applicable to Cross-border Mergers, In Book: *Gerven D. (ed.),* Cross-border Mergers in Europe, Vol. 1, Cambridge Univ. Press, New York, 2010, 15.

36 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 125, para. 1.

37 Ibid, Art. 125, para. 3, point (a), (b), (c).

38 Ibid, Art. 126, para. 1.

39 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 126, para. 3.

the Member State to which the company participating in the transaction belongs.[40] In addition, it should be emphasized that the convening of and decision-making process on general meeting for the approval of cross-border merger shall be governed by the principles and provisions of the national law of the Member State applicable to domestic mergers.[41] Domestic legislation governing domestic mergers was harmonized thanks to the Third Council Directive in the 1970s, and therefore the norms governing cross-border mergers, which currently exist at EU level do not pay much attention to these issues, as their solution is entrusted to the norms governing domestic mergers. According to the norms governing the merger of public limited liability companies, the decision to approve the merger at the general meeting shall be taken by a majority of votes, but not less than two-thirds of the votes, which shall be calculated according to the number of shareholders are presented at the meeting. Moreover, a decision can be made by a simple majority of votes, but in such a case the majority is calculated from the data when at least half of the issued voting shares are represented at the meeting.[42] From the perspective of protecting minority shareholders, such a number of votes needed to make a decision can be considered as average or slightly below average, as the law or the charter may require qualified majority or supermajority voting, which is not a rare practice that seeks to protect minority shareholders. With a higher turnout required for decision to be taken at the general meeting increases likelihood that the participation of minority shareholders in the voting will become more important than their voting normally would and, in some cases, will even have a decisive influence on the merger approval process. However, EU policies aimed at adequate and proportionate protection for minority shareholders may not fully share this, but do not rule it out, as it tends to set minimum, sufficient and necessary requirements, leaving more choice to member states and companies participating in the transaction.

4. Ensuring A*ppropriate Protection* and Legal Mechanisms for the Protection of Minority Shareholders

4.1. The Essence of Minority Shareholder

The protection of a minority shareholder requires the identification of a specific minority shareholder who must use the protection mechanisms granted to him and protect his property interests. The issue of minority shareholder identification, as noted, has remained somewhat unresolved by European regulation of cross-border merger transactions,[43] that is why the issue should be clarified based on certain provisions of Directive and in accordance with the general rules, which can offer a completely satisfactory solution.

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40 Ibid, Art. 121, para. 1, point (b).

41 *Gerven D.,* Community Rules Applicable to Cross-border Mergers, In Book: *Gerven D. (ed.),* Cross-border Mergers in Europe, Vol. 1, Cambridge Univ. Press, New York, 2010, 16-17.

42 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 93, para. 1.

43 *Wyckaert M., Geens K.,* Cross-border Mergers and Minority Protection: An Open-Ended Harmonization, Utrecht L. Rev., Vol. 4, Iss. 1, 2008, 48-49.

The norms governing cross-border merger transactions, which provide for Directive relating to Certain Aspects of Company Law, do not place emphasis on minority shareholder status and focus only on protecting the company's shareholders. Accordingly, Article 119 of the Directive, which contains definitions of two key terms, such as limited liability company and merger, does not define the term "minority shareholder". In addition, the article of the Directive, which directly deals with the protection of shareholders, as well as other norms governing international transactions, does not use the term "minority shareholder" at all.[44] However, it should also be noted that cross-border merger directive of 2005 treated the issue slightly differently and used the term "Minority Members" in the text, which also referred to minority shareholders.[45]

The general approach to the issue of protection of minority shareholders in the process of cross-border merger of limited liability companies, which puts their protection under shareholder protection, is determined by the comprehensive nature of the latter, which does not differentiate and envisages the shareholders of both companies participating in the merger transaction, as well as the two groups of minority shareholders of each company, which may arise in connection with the approval of the merger. Based on the above, the definition of a minority shareholder to be protected consists of two interrelated points, which separate, on the one hand, the companies participating in the transaction and, on the other hand, groups of minority shareholders in each of them. Such setting of the issue is largely determined by the scant and far-fetched regulation provided by the EU directive, which is responsible for regulating cross-border merger transactions.

Determining the essence of a minority shareholder is usually related to the quantitative indicator of shares, which is determined by the general and specific context, according to which, in turn, the use of ex-ante and ex-post mechanisms is defined. Determining the essence of a minority shareholder according to the quantitative indicator of shares in the process of cross-border merger usually depends on the number of votes required to approve the transaction at the general meeting, which, as already mentioned, is determined by national legislation applicable to domestic mergers. Therefore, the remaining shareholders, who did not support the approval of the merger, are minority shareholders, whose quantitative share of voting shares owned by them may fluctuate within one share to minus one share from percentage of the total amount, which is no longer required for approval of the transaction under a specific regulation. In other words, minority shareholder is a shareholder who holds less than the number of votes required to make a decision at the meeting, which in the context of a merger equates him with a group of shareholders who use their vote against the merger.[46] Furthermore, defining the essence of a minority shareholder in the context of cross-border merger as a specific context should be considered in the light of the above two points, thus creating a more complete picture of quiddity of minority shareholder and the main categories of his mechanisms for protection.

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44 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 126a.

45 Directive 2005/56/EC on Cross-border Mergers of Limited Liability Companies, Art. 4, para. 2; Art. 6, para. 2, point (c); Art. 10, para. 3.

46 *Alavi H., Khamichonak T.,* To Be or not to Be; the EU Cross-border Mergers Framework and Harmonization of Dissenting Shareholder's Rights, Hungarian Journal of Legal Studies, Vol. 58, Iss. 3, 2017, 314.

The issue referred to in points one in the process of cross-border merger between limited liability companies of the EU Member States requires, on the one hand, to determine whether there is a need to protect minority shareholders of one or both parties to the transaction and, on the other hand, to determine whether there is a need to protect minority shareholders on both sides that, in most cases, is related to the presence or absence of a request for approval of the transaction by the general meeting.

In the process of direct transactions of cross-border mergers of limited liability companies, both of these issues are relatively easy to resolve and, most importantly, positive for both parties, whereas directive requires the approval of a merger by the shareholders' meetings of both parties to the transaction, which allows minority shareholders to enjoy all the proposed mechanisms for protection, which are usually used in direct merger transactions.[47] Thus, the issue of protection for minority shareholders of both companies participating in cross-border merger is on the agenda as after the approval of the transaction in both companies may remain shareholders who did not support the transaction.As for the necessity of protection for minority shareholders, the need to protect them may arise from both a reduction in the percentage of shares and change in the applicable law.[48]

The second point of the definition of a minority shareholder is to differentiate the minority shareholders of each company participating in the merger and to determine the need for their protection, which includes the categorization of protection mechanisms. In cross-border mergers of limited liability companies, there are usually two main groups of minority shareholders, the first of which includes minority shareholders, which in both merging companies may have existed by themselves before the merger was approved, while the other group includes minority shareholders who did not support the approval of the merger. The overlap of both groups of minority shareholders is quite possible, which often happens in the process of cross-border merger, since and because the categorization of minority shareholders into two groups is conditional and is actually related to a specific stage of the merger. The norms governing cross-border merger transactions do not leave both groups of minority shareholders in the spotlight, although direct safeguards apply only to minority shareholders of the second group after the changes in late 2019, while providing for the first group minority shareholders with ex ante mechanisms within process of the merger. Furthermore, it is self-evident that minority shareholders of the first group or a certain part of them will have the full right to use the ex post mechanisms in compliance with the requirements set by the Directive after the approval of the transaction by the general meeting, since the division into groups and the

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47 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 126, para. 1. However, as already mentioned, bypassing the requirement for approval by the general meeting may be allowed in individual cases. See: Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 126, para. 3.

48 It should also be noted that justifying the need to protect minority shareholders by change of applicable corporate law is only of additional importance. See details: *Ventoruzzo M.,* Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law, European Company and Financial L. Rev., 2007, Vol. 4, Iss. 1, 47-75. See also: *Wyckaert M., Geens K.,* Cross-border Mergers and Minority Protection: An Open-Ended Harmonization, Utrecht L. Rev., Vol. 4, Iss. 1, 2008, 49-50.

categorization of mechanisms for protection are greatly formal and conditional, what partially explains and justifies the issue of protection of minority shareholders within the broader topic of shareholder protection. However, it is more appropriate to protect minority shareholders in a more explicit manner which would be much better even if it was reflected in the title of the article, especially when article 126a of the directive actually deals only with the protection of minority shareholders.

4.2. Ensuring Appropriate and Adequate Protection

Ensuring appropriate and adequate protection for minority shareholders in the process of cross-border mergers of limited liability companies is a result of the evolutionary development of regulation on cross-border transactions at EU level and of understanding of the need to protect minority shareholders, which is, in fact, the demonstration of the way in which the need to take into account the interests of minority shareholders has gone from ensuring appropriate protection to providing adequate and proportionate protection. The path of slow progression of the protection of the interests of minority shareholders can be conditionally divided into two periods from 2005 to 2019 and after 2019. In 2005, the EU adopted cross-border merger directive, which outlined the need for appropriate protection for minority shareholders, although this was mandated by the legislation of the Member States at that time.[49] Such an approach to the protection of minority shareholders has received well-founded criticism, in which a number of recommendations have been made regarding the harmonization of a special mechanism for the protection of minority shareholders.[50]

In 2019, the EU unanimously recognized that a harmonized legal framework is crucial for ensuring adequate and proportionate protection for minority shareholders, [51] on the basis of which Article 121 of the Directive relating to certain aspects of company law was amended and the proposal concerning the provision of ensuring appropriate protection was withdrawn, while the harmonization of the special mechanism for protection was imposed under Article 126a of the Directive. [52] Thus, a kind of obligation to ensure appropriate protection, which gave Member States a wide range of discretion, has been replaced by the principle of adequate and proportionate protection, which is directly or indirectly reflected in the provisions of the Directive relating to Certain Aspects of Company law, which regulate the process implementing cross-border merger and the mechanisms for the protection of minority shareholders in this process.

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49 Directive 2005/56/EC on Cross-border Mergers of Limited Liability Companies, Art, 4, para. 2.

50 For more on the need to harmonize the rights and mechanisms for protection of minority shareholders in order to increase the level of protection, see: *Wyckaert M., Geens K.,* Cross-border Mergers and Minority Protection: An Open-Ended Harmonization, Utrecht L. Rev., Vol. 4, Iss. 1, 2008, 40-52; *Alavi H., Khamichonak T.,* Protection of dissenting shareholders in the EU Cross-border Mergers Framework: A Call for further Harmonization?, Trames Journal of the Humanities and Social Sciences Vol. 21, Iss. 3, 2017, 215-232.

51 Directive (EU) 2019/2121 as regards Cross-border Conversions, Mergers and Divisions, rec. 6.

52 Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2017/1132 as regards Cross-border Conversions, Mergers and Divisions, COM/2018/241 final, 2018/0114 (COD), Brussels, 25.4.2018, 26.

4.3. Mechanism for Disclosure of Information

Disclosure of information is a traditional mechanism for the protection of minority shareholders, which focuses on the transparency of process of cross-border merger within the general format of shareholder protection and serves to inform shareholders, including minority shareholders. Disclosure of information belongs to the category of ex-ante mechanisms for the protection of minority shareholders, which can be used by any minority shareholder before the merger is approved at the general meeting, regardless of what decision it plans to make in this regard as far as information disclosure mechanism forms the basis for the informed decision on the merger transaction and of the use special mechanisms for protection. Article 123 of the Directive relating to Certain Aspects of Company Law is devoted to regulating the disclosure of information as, on the one hand, the guiding principle of process implementing cross-border merger and, on the other hand, the mechanism for the protection of minority shareholders.[53]

Disclosure of information, first and foremost, means the publicity of the merger process, which means the publication of information related to the implementation of cross-border merger, or more precisely, the documentation containing this information. Documents to be submitted by both companies participating in the transaction should include common draft terms of merger, a notice sent to the shareholders and an independent expert report, which must be accessed by submitting to the registry at least one month prior to the general meeting or it must be done through the official website of the company.[54] In order to provide access to information on cross-border mergers to the general public, the legislation of the Member States may allow the publication of common draft terms of

[53] Directive (EU) 2017/1132 relating to Certain Aspects of Company Law, (Codification), (Consolidated Text), Art. 123. Article 6 of the cross-border merger directive was devoted to the disclosure of information. See: Directive 2005/56/EC on Cross-border Mergers of Limited Liability Companies, Art. 6. The Codified Directive of Company Law adopted in 2017 changed the numbering and Article 6 took the place of Article 123. After some time, along with the change in the numbering of the article regulating the disclosure of information, its title has also changed. The original title of the article was “Publication", and according to the change that came into force on January 1, 2020, which was included in the codified directive, the article changed its title and was re-edited. See: Directive (EU) 2019/2121 as regards Cross-border Conversions, Mergers and Divisions, Art. 1, para. (10). The current title of article 123 of the Directive relating to Certain Aspects of Company Law is “Disclosure".

[54] Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 123, para. 1. If the documents are published on the official website, if certain deadlines are met, the companies participating in the transaction may be exempted from the requirement to disclose information related to the submission of documents to the register, which is a very favorable condition, although the submission of documents to the register may be done entirely electronically. See: Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 123, para. 1; 4. Nevertheless, companies participating in the merger are still required to submit certain types of minimum information to their local registry, the scope and content of which are set out in detail in the Directive. See: Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 123, para. 3.

merger in national gazette, which is spread across the country, for which the transfer of information is directly responsible to the registry.[55]

The role of disclosure of information as a mechanism for protection of minority shareholders in the process of cross-border merger, regardless of its general nature, is special, as it ensures the actual exercise of the right of minority shareholders to receive information, which is reflected in providing to them information about the terms of the merger and the mechanisms for their protection.[56] The practical realization of the right to receive information is carried out by getting acquainted with and understanding the information given and explained in the corporate-legal documentation within the framework of the mechanism for information disclosure, the access of which is the responsibility of the companies participating in cross-border merger.

4.4. Mechanism for Obtaining Adequate Cash Compensation

Obtaining cash compensation is a special mechanism for the protection of a minority shareholder, which is granted to minority shareholder only on the basis of his or her status.[57] Furthermore, the specific nature of the mechanism for obtaining cash compensation is due to the fact that through it the minority shareholder has the opportunity to leave the company, which creates optimal conditions for the protection of his interests in case of impasse.[58] In addition, when characterizing the legal nature of the mechanism, it should be taken into account that the mechanism for obtaining cash compensation falls into the category of ex-post mechanisms for the protection of minority shareholders, which is determined by the moment of its entry into force. The minority shareholder has the right to use mechanism for obtaining cash compensation after the approval of the merger transaction at the general meeting and only under the condition that the right to vote against the approval of common draft terms of merger will be fixed.[59]

The cross-border merger directive of 2005 did not provide mechanism for obtaining cash compensation to minority shareholders, although the reference to ensuring appropriate protection meant the introduction of a special mechanism for protection,[60] which was already been somewhat

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55 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 123, para. 6.

56 Ibid, Art. 123, para. 3, point (c), (d).

57 *Wyckaert M., Geens K.,* Cross-border Mergers and Minority Protection: An Open-Ended Harmonization, Utrecht L. Rev., Vol. 4, Iss. 1, 2008, 45.

58 *Papadopoulos Th.,* Reviewing the Implementation of the Cross-Border Mergers Directive, in: *Papadopoulos Th.* (ed.), Cross-Border Mergers: EU Perspectives and National Experiences, Studies in European Economic Law and Regulation, Vol. 17, Springer, Cham, 2019, 14.

59 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 126a, para. 1.

60 The assumption of mechanism for receiving cash compensation derives directly from paragraph 3 of Article 10 of the cross-border merger directive, which allowed an agreement on the use of the monetary compensation mechanism only if the law of one of the Member State in which the company participiating in merger is established, provided for such mechanism. See: Directive 2005/56/EC on Cross-border Mergers of Limited Liability Companies, Art. 10, para. 3.

familiar with the legislation of the Member States thanks to the Third Council Directive.[61] The cash compensation mechanism essentially assumes the receipt of monetary compensation in exchange for the transfer of own shares. The Directive relating to Certain Aspects of Company Law provides a mechanism for obtaining cash compensation, at least for the minority shareholders of the mergering company, and only if they are threatened to become shareholders of the company in another Member State, while the use of this mechanism for minority shareholders of the acquiring company depending, on the one hand, the existence of a requirement for approval of the merger by the general meeting, and, on the other hand, the legislation of the Member States governing matters relating to the application of the mechanism.[62]

The application of mechanism for obtaining cash compensation requires compliance with certain preconditions and the completion of certain procedures, after which minority shareholder will be able to transfer his/her shares in exchange for monetary compensation. The preconditions and procedures for the use of mechanism for obtaining cash compensation are set out in the Directive relating to certain aspects of company law which is limited to regulating only the minimum necessary issues, and the regulation of other details related to the use of the mechanism is entrusted to the legislation of the Member States.[63] Such an approach to regulating the mechanism for obtaining cash compensation, as well as the whole process of cross-border merger, to what extent will be justified only the practice ultimately shows which can demonstrate all the shortcomings that can be identified in the absence of harmonization on minor issues. This can have a significant impact on the implementation of a single transaction of merger in different Member States and create problems for its coordinated management.

The main requirement for cash compensation to be met is its adequacy, which in simple terms, means that the monetary compensation should be neither more nor less than the value of the shares owned by the minority shareholder. The amount of cash compensation and information on its methods of calculation are indicated in common draft terms of merger. In case of a claim for the proposed amount of cash compensation, minority shareholder has the right to file a request for additional monetary compensation before an authorized organ or body the concretization of which is the prerogative of the Member State, which usually designates the body administering justice as the body before which the claim can be brought.[64] At the same time, only this request can not be set grounds for appealing the decision of the general meeting to approve common draft terms of cross-border merger,[65] as far as minority shareholder can only benefit from specific mechanisms for protection

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61 *Seretakis A.,* Appraisal Rights in the US and the EU In Book: Papadopoulos Th. (Ed.), Cross-Border Mergers: EU Perspectives and National Experiences, Studies in European Economic Law and Regulation, Vol. 17, Springer, Cham, 2019, 70-71.

62 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 126a, para. 1.

63 Ibid Art. 126a, para. 2-6.

64 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 126a, para. 4-5.

65 Ibid, Art. 126, para. 4, point (b).

specifically established for it, which are provided for in the Directive relating to certain aspects of company law.[66]

4.5. Mechanism for Changing the Share Exchange Ratio

The mechanism for changing share exchange ratio is an additional special mechanism for the protection of minority shareholders, which, unlike the mechanism for receiving adequate cash compensation, does not require strict procedural requirements. The relative simplicity of use of mechanism for changing share exchange ratio is determined by its optional and voluntary nature, which over time has led to its development as an alternative mechanism for protection of minority shareholder, which includes the right to get additional payments.[67] Minority shareholder has the right to use mechanism for changing share exchange ratio only if he has not used mechanism for obtaining adequate cash compensation.[68] Minority shareholder usually uses the mechanism for changing share exchange ratio when he does not want to transfer shares and leave the company, but at the same time does not consider share exchange ratio to be adequate.

The share exchange ratio and the information on its methods of calculation shall be indicated in common draft terms of merger. In the event of a claim arising out of the proposed share exchange ratio, the minority shareholder has the right to dispute the ratio and request additional monetary payment before the authorized organ or body, which are usually the body that administers justice, which is a court of the Member State of the merging company whose minority shareholder makes the claim.[69] It should also be noted that the litigation to change share exchange ratio is not an obstacle to the registration of cross-border merger. At the same time, only this request can not be set grounds like mechanism for obtaining cash compensation for appealing the decision of the general meeting to approve common draft terms of cross-border merger.[70] The decision of the court on changing the exchange share ratio is of an extension nature, which means that it applies to all shareholders who do not benefit from the mechanism for obtaining adequate cash compensation.[71] Moreover, it is possible to receive shares or other compensation instead of cash,[72] which is especially important when there are difficulties with free cash or liquidity in the company. [73] Thus, the mechanism for changing the

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66 *Knapp V.,* Cross Border Mobility: What do We Need in Practice?, ERA Forum: Journal of the Academy of European Law, Vol. 19, Iss. 1, 2018, 68.

67 *Papadopoulos Th.,* Reviewing the Implementation of the Cross-Border Mergers Directive, in: *Papadopoulos Th. (ed.),* Cross-Border Mergers: EU Perspectives and National Experiences, Studies in European Economic Law and Regulation, Vol. 17, Springer, Cham, 2019, 13.

68 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 126a, para. 6.

69 Ibid, Art. 126a, para. 6.

70 Ibid, Art. 126, para. 4, point (a).

71 Ibid, Art. 126a, para. 6.

72 Directive (EU) 2017/1132 relating to Certain Aspects of Company Law (Codification), (Consolidated Text), Art. 126a, para. 7.

73 *Papadopoulos Th.,* Reviewing the Implementation of the Cross-Border Mergers Directive, in: *Papadopoulos Th. (ed.),* Cross-Border Mergers: EU Perspectives and National Experiences, Studies in European Economic Law and Regulation, Vol. 17, Springer, Cham, 2019, 13-14.

exchange share ratio is a kind of insurance for the minority shareholder who does not oppose to the implementation of the merger, but, at the same time, wants to adequately protect his property interest.

5. Conclusion

The protection of a minority shareholder is the leitmotif of the whole process of implementation of the cross-border merger and each of its stages, which determines the necessity of the legal mechanisms of its protection and their proper functioning. The importance of legal mechanisms for the protection of minority shareholders is growing with the increase in number of cross-border merger transactions. Cross-border merger as the transaction of consolidation of limited liability companies form different member states of the EU, despite its complex nature and ambiguous impact on the relatively weak participants in the transaction, it plays a special role in the formation and development of the EU single internal market, which has a direct impact on the economic growth of the EU and leads to a significant acceleration of the growth rate of European business.

With the realization of the necessity of legal mechanisms for the protection of minority shareholders and their importance, the approach to their protection in the process of cross-border merger has changed, which has led to the replacement of the general obligation to ensure appropriate protection with the principle of adequate and proportionate protection. The EU has gradually begun to recognize that the reliance on the introduction of mechanisms for the protection of minority shareholders in cross-border mergers could not, for a long time, be based on the good will and discretion of the Member States alone to achieve the goals of modern corporate law, on the basis of which the legal regulation of mechanisms for protection of minority shareholder has become an integral part of the regulation on cross-border merger transactions at EU level. The effect of the principle of ensuring adequate and proportionate protection for minority shareholders in the process of cross-border merger is reflected in the special mechanisms of their protection, which were consolidated by a directive at EU level, which created important preconditions for their effective use. Nevertheless, it is advisable to be acquired by minority shareholders protection a more pronounced and outlined character in cross-border merger. Furthermore, it would be much better to increase the level of harmonization for implementing process of cross-border merger in a coordinated manner in different Member States, which would be reflected in the full harmonization of a separate issue related to both the process of merger and the use of special mechanisms for protection of minority shareholders.

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8. Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2017/1132 as regards Cross-border Conversions, Mergers and Divisions, COM/2018/241 final, 2018/0114 (COD), Brussels, 25.4.2018, 2.
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19. *Ventoruzzo M.,* Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law, European Company and Financial L. Rev., 2007, Vol. 4, Iss. 1, 47-75.
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Besik Teteloshvili*

Lifelong Maintenance Contract as One of the Types of Transfer of Property, its Legal Nature and Collateral Risks

Less than two decades have passed since the enactment of the Civil Code of Georgia. However, citizens are still merely informed with regard to the legal nature of the contracts transferring property ownership. Hence, instead of lifelong maintenance contract, they often are using deed of gift or sales and purchase agreements. The latter does not provide achievement of the set purpose by participants of the contractual relationship and creates less guarantees of legal protection for grantor or seller.

In the current article the freedom of contract is discussed as an important achievement of private law relations, compliance of principles of freedom of contract with principles of the European Law of Obligations, aleatory nature of the contract, its particular legal nature, legal characteristics of the contract, for of the contract, fiduciary and long term obligatory character of the contract, etc.

Key words: *Contract, lifelong maintenance, dependent, bread-winner, property, risk.*

1. Introduction

The fact that every human strives for ensuring stability and economic condition of his/her future life, is one of the initial statements of the hypothesis of lifecycle[1] of Franco Modigliani,[2] laureate of the noble prize. The modern interpretation of the lifecycle hypothesis was presented by Franco Modigliani in 1985 during the lecture held at the ceremony of assignation of the noble prize "Lifecycle, savings of citizens and wealth of the nation." The strive towards retaining of economic stability of future life was never a strange thing for human society in any societal-economic formation. Such mechanism is the lifelong annuity. More precisely, according to words of famous French lawyer Alain Bénabent, the lifelong annuity – this is a tool, to leave your heritage to yourself for old age – "*La rente viagere est, dit-on, le moyen, d' heriter de soi-meme.*"[3]

In the modern world civil law there are contracts, which are aimed at risk,[4] also contracts already including risk, as aleatory[5] or euphemistic (embellished), as loyal contracts bringing welfare.[6]

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1 Franco Modigliani received noble prize in 1985 for this study.

2 American Economist of the Italian origin (1918-2003), <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=14&t=142896> [25.09.2020].

3 *Bénabent A.,* Droit civil, Les contrats spéciaux civils et commerciaux, 8. Auflage, Paris, 2008, 643.

4 *Henssler M.,* Risiko als Vertragsgegenstand, Tübingen, 1994, 366, 733.

5 Aleator – gambler; aleatory, occasiaonal, depending on probability and risk (for instance regarding contracts; aleatory agreement – risky agreement, depending on casualty, bet, etc.). <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=48&t=1481> [25.09.2020]. (in Georgian)

6 Contracts bringing welfare / loyal contracts: ABGB (Zweiter Teil, Zweite Abteilung, Neunundzwanzigstes Hauptstück: "Von den Glücksverträgen", §§ 1267-1292) im dritten Teil.

Henssler describes this risk as more illegal, as far as other element of the risk, which is in relation with the risk of the event, is also related to the length of contract, etc.[7]

2. Freedom of Contract as an Important Achievement of Private Law Relations

2.1. Role of Market Economy and its Importance in the Freedom of Contract

Concluding contract is the expression of free will. Free conclusion of a contract entails the fact that nobody is obliged to enter into agreement.[8] Conclusion of a contract is based on the will of parties to enter into particular legal relationship, which is ground for contract law that is formed on principle of freedom of parties' relation and freedom of contract.[9] It is a precondition for development of legal nature, economic life and private initiative.[10] The will to conduct legal relations must be agreed between parties.[11] A contract is a result of agreement of desires expressed by parties, i.e. expression of will – offer, which is addressed towards conclusion of contract, must be accepted by the addressee.[12]

Within the framework of the agreement the party obtains possibility to exercise civil rights.[13] In general, conclusion of the agreement is based on the need of parties to conduct such legal relation, which in future will facilitate raise of conscious demand in response to necessary condition, demand in the psychological science for performing activity on particular thing or action, indication to provoking desire for action, which forces human to perform some kind of action.[14] The important principle which is a basis for the Law of Obligations is the principle of freedom of contract.[15,16] The freedom of contract took form which is called free implementation of action in contractual relations, within the legal framework and regulation of which on normative level is one of the fundamental legal preconditions for economic development of the country.[17] There is an opinion that the birth of the principle of freedom of contract was facilitated by the market economy.[18] As a result of developing principle of the freedom of contract, participants of the civil relations, in accordance to their own will, are entitled to conclude contracts acceptable for them , the content of which does not infringe rights of

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7 *Henssler M.,* Risiko als Vertragsgegenstand, Tübingen, 1994, 395.

8 *Zoidze B*., Reception of the European Private Law in Georgia, Tbilisi, 2005, 270 (in Georgian).

9 Ordinance of the Civil Law Chamber of the Supreme Court of Georgia from 22 March 2011 №as-1359-1197-2010. Descriptive part – Decision of the Appellate Court of Georgia from 27 April 2009 (in Georgian).

10 *Chanturia L.*, General Part of the Civil Law, Tbilisi, 2011, 31 (in Georgian).

11 Ibid. 317.

12 *Baghishvili E*., Evocation of the will (offer) in the unified private law, Georgian Law Review, Special Edition, 2007, 76 (in Georgian).

13 *Kobakhidze A*., General Part of the Civil Law, Tbilisi, 2001, 325 (in Georgian).

14 *Kakabadze V*., Psychology of necessity, Tbilisi, 1988, 21 (in Georgian).

15 Decision of the Civil Law Chamber of the Supreme Court of Georgia from 8 November 2011 №as-839-890-2011 (in Georgian).

16 Decision of the Civil Law Chamber of the Supreme Court of Georgia from 27 March 2012 №as-1300-1320-2011 (in Georgian).

17 Commentaries to the Civil Code of Georgia, Vol. 3, General part of the Law of Obligations, Tbilisi, 2001, 60-61, Article 319 (in Georgian).

18 *Bernitz U.,* Market as a Legal Discipline, Scandinawian Studies in Law, Vol. 23, 1979, 58.

third persons.[19] As wide the framework of the contract formation will be, the more possibilities will exist for market economy participants to freely conclude contracts.[20] Contractual lawfulness is the limitation of contractual liberty from one perspective and entails equivalence of implementation, however we shall not consider this as identity of values of implementation.[21] Existence of equal rights indicated to contractual lawfulness (formal, non-factual equality is implied).[22]

2.2. Harmonization of the Principle of Freedom of Contract with the Principle of the European Law of Obligations

Freedom is the right to do what is permitted under the law.[23] A person may perform any action not forbidden by the law and he/she is responsible for that action personally.[24] Therefore, freedom of content of the contract represents possibility of its parties to choose personally, in accordance to their own will, prescribe any lawful term permitted under the law in the contract.[25] Exercise of freedom is important in private, as well as in public-law relations. For achieving freedom, it is necessary for person to share the law and preconditions of its application.[26] In both cases, the interests of those people, who participate in the respective legal relations, must be necessarily protected, as far as otherwise it is impossible to implement freedom by the person.[27] Freedom of contract cannot exist if the people holding this right are not capable to implement their right.[28]

The serious achievement of the Georgian Law Reform is the freedom of contract. The notion of the contractual freedom defined by the Civil Code of Georgia corresponds to the process of unification-harmonization of the European Law of Obligations.[29] According to the principle of freedom of contract, parties have right to conclude or not to conclude contract, within the framework of the law unlimitedly define its form, content and legal outcomes.[30] The freedom of contract, first of all, must be understood as the right, as the determination of the right represents a title attaining to and depending on the area of person's freedom.[31] As far as the authenticity of a contract depends on whether the second party has understood correctly the thing which the person expressing the will

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19 *Shengelia I.*, Contractual liberty as the principle, essence and significance of the Civil Law, Justice and Law, 2009, №4 (23), 45 (in Georgian).

20 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, The Contract Law, Tbilisi, 2014, 107 (in Georgian).

21 *Zoidze B.*, Reception of the Private Law in Georgia, Tbilisi, 2005, 295 (in Georgian).

22 *Khubua G.*, Theory of Law, Tbilisi, 2004, 76 (in Georgian).

23 *Montesquieu S.L.*, The Spirit of Laws, translation of D. *Labuchidze-Khoperia, Natadze N., Jioevi O. (ed.),* The Caucasus Institute for Peace, Democracy and Development, Tbilisi, 1994, 180 (in Georgian).

24 *Chanturia L.*, General part of the Civil Law, Tbilisi, 2011, 92 (in Georgian).

25 *Chechelashvili Z.*, Contract Law, second edition, Tbilisi, 2010, 61 (in Georgian).

26 *Zoidze B.*, Attempt to understand practical existence of the law, primarily in the context of human rights, Essays, Tbilisi, 2013, 58 (in Georgian).

27 *David R.*, Major legal systems in the World today, *Ninidze T., Sumbatashvili E.* (*trans.*), *Ninidze T. (ed.),* Tbilisi, 2010, 80 (in Georgian).

28 *Jorbenadze S.*, Limits of the freedom of contract in the Civil Law, Dissertation, 2016, 46 (in Georgian).

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

30 Decision of the Civil Law Chamber of the Supreme Court of Georgia from 9 November 2005 №as-382-691-05 (in Georgian).

31 *Chachava S.*, Competition of needs and grounds of needs, Tbilisi, 2011, 3 (in Georgian).

wanted to say, it becomes clear what is the importance of understanding the will of second party properly.[32] The freedom to conclude contract and respectively determine its content mainly aims at protecting interests of subjects of the legal relation. This gives possibility to every person, by means regulated by the law and by using own material possibilities, to receive all those services from other person, which are not possible for him/her arbitrarily. Therefore, in this regard the best tool is the lifelong maintenance contract.

3. Aleatory Nature of the Lifelong Maintenance Contract

3.1. Impact of the Term of a Contract on the Scale of Obligations and Unknown Time of its Exhaustion

The principle of freedom of the contract for lifelong maintenance consists of two parts: on the one hand it entails freedom to conclude contract, and on the other hand – possibility to freely determine the content of a contract.[33] However, it should be taken into account that "contractual freedom is possible in the framework of contractual order and if it drops out from the order, it will cause anarchy and arbitrariness in the business."[34]

The important legal particularity of the lifelong maintenance contract is the fact that it is equipped with aleatory characteristics. The word "aleatory" derives from French, "alea" means throwing dice.[35] In the lifelong maintenance contract the unknown fact is the expiry of term, termination of performing obligation by one party. Therefore, "the term impacts the volume of obligation, but never destroys it entirely; This is the condition of byer in return to lifelong maintenance, who pays more or less expensive for the item, depending on the length of the life of seller, whether he/she lives longer or passes out surprisingly. Moreover, the buyer knows that he/she cannot receive the property free of charge."[36]

In the doctrinal sentences, according to which for both parties of contract the reciprocal implementation and economic results depend on unknown event, Bénabent has suggested the following formulation: the contract is aleatory according to which remuneration (reciprocal implementation) for everyone or for one party is related to unknown event.[37] To say in other words, aleatory contract may bring benefit or loss to any party, which depends on the unknown event that is related to performing at least one service.[38]

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32 *Sukhitashvili T.*, Interpreting contract in the modern Georgian Civil Law, Journal "Justice", 2007, №3, 126 (in Georgian).

33 *Dzlierishvili Z.*, Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 426 (in Georgian).

34 *Zoidze B.*, Reception of the European Civil Law in Georgia, Tbilisi, 2005, 273 (in Georgian).

35 *Garner B. A. (ed.),* Black's Law Dictionary, Eight Edition, Thomson West, 2004, 342.

36 *Planiol M.*, The Course on the Civil Law, part 1, theory of obligations. Petrokov: editing house of S. Panski, 1911, 345 (in Russian).

37 *Ferid M., Sonnenberger H. J.,* Das Französische Zivilrecht, Heidelberg, II, Rn. 2 M 101, 1994, 387.

38 Aleatory contract necessarily gives chance for getting benefit and lost as well for each party; however, it depends on causality, unknown event, related to service provision from both sides, or on contract from only one side, Savaux, Defrénois 2007, Art. 38697, №76, 1737 (1739).

The French Civil Code is silent with regard to the lifelong maintenance contract, however in practice it is used and described by French law-scientists. M. Plianioli wrote: "Instead of selling property, in return to the lifelong maintenance some people preferred to enter into legal obligatory relations for their own benefit. Future counteragents agreed that one side would transfer flat or table to other signatory, in a word, would transfer maintenance prepared in all ways for lifelong period. Such promise determines obligation to do something and such agreement is called lifelong maintenance contract."[39]

Conclusion of the lifelong maintenance contract may be caused by several circumstances, mostly it is concluded in cases when the dependent is disable to work, or suffers from material hardship and requires care. He/she concludes contract with bread-winner, who gets property (immovable property or movable things in the ownership of the dependent) prescribed under the contract in return to this care and assistance.[40]

Hence, the lifelong maintenance contract carries aleatory character, as its result becomes clear only after the termination of contract, after which it may appear that the contract was beneficial for one party and causing damage for other one. The fact whether a contract is risky or not is determined deriving from the purpose of the contract, i.e. parties consciously and intentionally make a risk, the economic outcome of which depends on undefined event.

3.2. Legal Nature of the Lifelong Maintenance Contract

For showing legal nature of any contract the juridical qualification is important. How can we legally classify the contract of lifelong maintenance? Is it legally independent contract or mixed contract? The mixed contract represents combination of various types of contract regulated under the law, that must be subject to respective regime, if it does not give incorrect impression on its characteristic.[41] However, this definition supposes that the lifelong maintenance relationship has legal independence.[42]

With regard to the lifelong maintenance contract legal classification represents particular difficulty. The aleatory contract is a mutual, reciprocal contract the equivalent of which lies within possibility of each party to get benefit or damage in case of unknown event.[43] The adequacy of received and given is the best fact in the legal relationship, however, there is a risk of the opposite as well, which must not exceed the legal basis. The risk of inadequacy is more in case of lifelong maintenance contract. It shall not exceed the limits of contract terms by its results. The benefit

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39 *Planiol M*., Course of French Language, Vol. 2, contracts. *Petrokov*: editing house of *S. Panskii*, 1911, 818 (in Russian).

40 Ordinance of the Civil Law Chamber of the Supreme Court of Georgia from 17 October 2019 №as-1043-2019 (in Georgian).

41 BGH, NJW 2005, 2008 (2010).

42 On the other hand, Lafrentz considers that right to lifelong maintenance represents mixed contract, which does not have legal independence from lifelong maintenance, analogically, *Lafrentz K.,* Die Leibrente: Inhalt und Rechtsfolgen, Hamburg, Univ., Diss., 1994, 158.

43 French Civil Code, *Pereterski I.S. (trans.)* M., 1941, 408 (in Russian).

received in this manner is subject to return and relationship deriving from it is regulated with special norms of unjust enrichment, along with general norms.[44] The claim to receive benefit may be used in any case, which contradicts with the essence of such contracts (such as the lifelong maintenance contract and insurance), that requires indication of fixed, previously agreed implementation.[45]

The volume of reciprocal satisfaction under the risky contract, which is assigned to one party for implementation, will be left unknown, until the time when the condition emerges which finally makes it clear. In the lifelong maintenance contract, the risky term is the fact of death of the dependent, but the time of the death as well. It is unclear when the death of the dependent takes place. Therefore, it is impossible to calculate the exact amount of lifelong maintenance to be received under the lifelong maintenance contract. Hence, the maintenance contract is related to the risk, as far as the volume of property may appear more or less with respect to the value of given property. First of all, the risk is taken by the dependent, as far as the income received from transfer of property is calculated within the long period of payment. Within this period, by virtue of various circumstances, for instance unsustainability of economy, political and social conditions, inflation, devaluation of currency, unexpected fluctuation of prices, the amount of property must change.[46] However, the bread-winner takes risk, as the total amount of money for maintenance may appear more that the property received for the maintenance. The risk is also expressed in the fact that each party may appear in the condition of early termination of the contract of lifelong maintenance by the requirement of the receiver of property.

Therefore, the risk is taken by each party to the contract. But, by concluding lifelong maintenance contract parties understand that circumstance and agree thereto. That is why it would have been controversial to insert in the essence of the contract itself that the total amount of property, which must be paid to dependent, is limited to the volume of the transferred property.

3.3. Legal Definition of Risky Contract and its Interpretation

The risky contract represents bilateral agreement, by virtue of which the benefit, as well as loss in the relationship depends on improper circumstances for everyone, one or several participants. "If the equivalent (which is given and received from each person) is laid down in relation to improper circumstances for each party in the chances of profit or losses."[47] This definition is very convincing, as far as the contract may be risky for one party, or for both of them.

The reason of unsatisfactory doctrine of risky contracts must be seen in fidelity towards traditional legal formulation, especially fidelity towards roman law, which is often noticed in case of concluding risky, gameplay and aleatory contracts. According to this formulation, it is an unequivocal fact that each legal agreement which is under risk finishes with the same result as gambling, with complaints, whimpering and unjustified win characteristic thereto.

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44 *Chitoshvili T.*, Disposing Property Free of Charge, as the Basis for Groundless Enrichment, Justice, №2, 2008, 92 (in Georgian).

45 J.-Cl. Civil/ *Bénabent A., Rakotovahiny M.-A.,* Art. 1964, fasc. 10, Nr. 3, 4.

46 Civil Law part 2: Law of obligations, *Zaleski V. V. (ed.)*, Moscow., 1998, 142 (in Russian).

47 *Morandiere L. J.*, The Civil Law of France k.2. M, 1961, 330 (in Russian).

The characteristic of risky contract is determined for each contractual relationship based on its purpose and legal consequences are determined respectively, i.e. guarantee complains and protested based on mistakes is excepted with the ratio, that it is related to taking risk by yourself. Moreover, it is excepted as mean of legal protection because of reducing value in half.

Articles 4:103 and 4:109 of the principles of the European Contract Law, which indirectly are related to aleatory contract, and several normative acts were adopted as obtaining specific risk. The party has a right to challenge the contract because of the mistake in relation to the fact or law existing in the moment of conclusion of a contract, if: the mistake is caused by the information provided by the second party; or the second party knew or had to know about the mistake and did not notify about this the other party in contradiction with principles of good faith and fairness; or the second party made the same mistake and the other party knew or had to know, that in case of knowledge of the truth he/she would not conclude contract, with substantially different term. The part loses right to challenge, if deriving from the case circumstances: his/her mistake was unpardonable, or he/she took risk of mistake on himself/herself.[48] In any case, doubt about insufficiency cannot be approved by the norms of the European Contract Law, because there are circumstances, however is not directly related to aleatory or risky contracts, but makes assumption of respective legal results. Yves-Marie Laithier discusses the second hypothesis in more details, and as for the aleatory contract, it considers undefined in French Law, as far as there are reciprocal contracts, which may accidentally become aleatory[49] and aleatory contracts without risk.[50] It is motivated to protect more precisely the specificity of aleatory contracts, in order to maintain opinion related to their qualification.[51] That is why there is a sense to think about essence of aleatory contract: the desirable disbalance from parties is justified in indexes, if every party has chance to receive benefit and takes risk of damage related to unidentified event taking place as a result of conclusion of a contract, the event which could not have been determined by both parties.

4. Legal Characteristics of Lifelong Maintenance Contract

4.1. Procuring Nature of the Contract of Lifelong Maintenance Contract

Parties to the lifelong maintenance relationship of procuring nature have realized the aleatory character of the contract, i.e. uncertainty of receiving benefit or suffering damage, which depends on the length of life of the dependent. According to article 941 of the Civil Code of Georgia, person who decides to pay lifelong maintenance (bread-winner) is obliged to pay it to receiver of property (dependent) during entire life, if the contract does not provide otherwise. Lifelong maintenance may

48 Institute of Davit Batonishvili, Principles of European Contract Law, Tbilisi, 2014, <http://www.library.court.ge/upload/PECL-Georgian%20Translation-PDIL.pdf> [25.09.2020] (in Georgian).

49 Vente à forfeit: *Bénabent/Rakotovahiny,* J.-Cl. Civil, Art. 1964, fasc. 10, №7; 90- 124.

50 As an example the lifelong maintenance contract without risk is named, which is addressed by the claim on terminating contract by the legal defense tool, that practically exists for the group – „contrats commutatifs“, Association Henri Capitant des Amis de la Culture Juridique Française, L'aléa, Paris 2011, 11.

51 Association Henri Capitant des Amis de la Culture Juridique Française, L'aléa, Paris 2011, 21.

be defined as monetary or in kind (flat, meals, care and other necessary help). The discussed contract, similarly to sale and purchase, exchange and gift agreements by its essence is a contract of transferring property, however, it differs from the named contracts by particularities characteristic only thereto. It is distinguished from sale-purchase agreement by the subjective content. If parties to the sale-purchase agreement – seller and buyer – may be physical persons, as well as legal persons separately, and also together, parties to the lifelong maintenance contract – bread-winner and dependent – entail only physical persons. According to article 477 I of the Civil Code of Georgia the seller is obliged to transfer to purchaser the ownership right of property, i.e. right to property on the purchased item derives immediately and purchaser may dispose it unlimitedly, which cannot be said with regard to lifelong maintenance contract. It is unequivocal fact that bread-winner obtains property right on the property transferred by the dependent, but this property right is somehow limited. According to article 945 of the Civil Code of Georgia, bread-winner has no right to alienate, to put under pledge or to restrict right to property in some other way without written consent of the dependent. It is inadmissible to pay debts of bread-winner from this property.

As it was mentioned above the lifelong maintenance contract, similar to the deed of gift, is a contract transferring property, which alike sale-purchase agreement differs from it by certain particularities. According to article 524 of the Civil Code of Georgia, the grantor gives property to the granted free of charge with his/her consent. Therefore, the latter contract is gratis, and the lifelong maintenance contract involves payment. As for the price of the contract, it is expressed in the maintenance paid to the dependent by the bread-winner, which is paid in return for the transferred property.

The Appellate Chamber of Tbilisi has mentioned in the ordinance on one of the disputable cases, that the main particularity of the lifelong maintenance contract is its procuring nature, as it entails transfer of the property of dependent to bread-winner in exchange to payment of counter compensation. In this regard the lifelong maintenance differs from the deed of gift.[52]

In the relationship of counteragents in line with the existence of criteria of satisfying counter interests, the contract is divided into contracts involving payment and gratis contracts. The contract involving payment, by virtue of which one party receives reciprocal satisfaction (compensation) from other party for his/her performed action. The contract is gratis when one party does not receive reciprocal satisfaction (compensation) for his/her action.[53] Attaining the lifelong maintenance contract to contracts involving payment essentially was always and still remains as arguable issue. As it was noted by O.S. Ioffe "in the general legal description of the contract, which derives from the definition of this contract itself, does not cause any doubt regarding its procuring nature, as far as each party receives reciprocal fulfilment from another party: receiver in the form of house or its part, and the alienator – in the form of maintenance."[54] In some countries the discussed contract may be involving

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52 Decision of the Civil Law Chamber of the Supreme Court of Georgia from 17 October 2019 #as-1043-2019. Appealed ordinance – The ordinance of the Civil Law Chamber of the Tbilisi Appellate Court from 16 May 2019 (in Georgian).

53 *Akhvlediani Z.*, Law of Obligations, Tbilisi, 1999, 29 (in Georgian).

54 *Ioffe O. S.*, Law of Obligations, Moscow, 1975, 292 (in Russian).

payment, or being gratis, i.e. entailing or not entailing reciprocal fulfilment. By the contract determining free of charge maintenance, the dependent does not give anything to the bread-winner in return to the promised care. Therefore, dependent does not take any risk. The maintenance involving payment is determined by transfer of money, movable or immovable property.[55] Differentiation of contract in respect of whether it is involving payment or not, has no practical significance, especially for deciding the issue of material responsibility of a person. In some cases, the responsibility of person which does not take any material benefit by the contract, is less severe, comparing to the contract involving payment.[56]

According to the Georgian legislation lifelong maintenance contract represents a contract involving payment, as far as in return to transfer of property into ownership the reciprocal fulfillment is required in the form of paying lifelong maintenance. Based on the definition of the subject of lifelong maintenance agreement made by the Supreme Court of Georgia, the particularity of the lifelong maintenance contract is that it involves payment and aims at transferring property of the dependent in the ownership of bread-winner by paying certain reciprocal compensation, which is not characterized as equivalent to the transferred property. The amount of maintenance which is received by the dependent from bread-winner based on lifelong maintenance contract, may represent only insignificant part of the value of property to be transferred to the bread-winner, and in some cases it may significantly exceed the value of the property (that is explained by the fact that maintenance in determined for the period of life, but parties may agree on a specific period).[57]

The contract involves payment despite the fact whether the dependent received any other benefit except the maintenance in the limits of the transferred property. If the property is transferred in return to receive the maintenance (without paying the value of property), the lifelong maintenance contract still is considered as involving payment, as there is a reciprocal fulfillment in place in the form of paying lifelong maintenance, which may bear monetary or in kind character (fulfillment of work, providing service, housing, meals, clothes, care, or paying funeral expenses, etc.).[58]

Counteragents participating in the legal relationship of lifelong maintenance realize that the party cannot receive benefit before the undefined event takes place – i.e. the death of dependent. Hence, parties enter into contractual relationship, where performance and reciprocal fulfillment would be disproportionate. The lifelong maintenance contract involves payment and transfer of property to bread-winner takes place for certain payment, however, it does not entirely imply such term as price and comparing to the sale-purchase agreement (Civil Code of Georgia 477 II), it does not differ by equivalence of opposing material benefit.

Payment for the fulfillment must be entailed in possibility for each party to obtain benefit or loss depending on undefined event. Legislation excludes authenticity of disproportionality between

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55 French Civil Code, *Pereterski I. S.* (*trans.*), Moscow, 1941, 408 (in Russian).

56 *Akhvlediani Z.*, Law of Obligations, Tbilisi, 1999, 29 (in Georgian).

57 Interpretation of the Supreme Court of Georgia, the subject of interpretation: Article 941 of the Civil Code of Georgia, №as-1009-1268-04, 24.03.2005, *Nachkebia A.*, Interpretations of civil law norms in the practice of the Supreme Court (2000-2013), Tbilisi, 2014, 243 (in Georgian).

58 Civil Law, part 2, Guidebook under common editing, *Kalpina* M., 1998, 88 (in Russian).

performance and reciprocal fulfillment. Comparing performance and responding fulfillment may cause between the individual maintenance and payment for responding fulfillment the fact that the bread-winner will not be obliged to take typical risk by the contract, if the income appears to be higher than the promised lifelong maintenance, as he/she can provide maintenance from responding fulfillment.

Since the judicial practice discusses legal relationship of lifelong maintenance as reciprocal relationship, for which parties provide equivalent performance and responding fulfillment, it deliberates equivalence of the lifelong maintenance by indicating towards yet undefined total value, so that there was no further examination of dividing risk, which was taken into account by parties proposing the question whether parties have consciously agreed to the disbalance in response to exchanging equivalent service. Parties enter into contractual relations, which is directed towards preservation of objective disbalance, and exactly this conscious disproportion may be arguable issue in the court without additional justification. It must be taken into account that parties to the lifelong maintenance contract agree on the risk of benefit and loss in light of the life term of the person.

According to article 941 of the Civil Code of Georgia, the Appellate chamber shared the reasoning of the Civil Court, that the lifelong maintenance contract belongs to the category of relations where special importance is given to subjective attitude of parties towards obligations taken in the framework of contractual bond. In one case, this is the desire of dependent to dispose his/her property (in this case house) in a way that to provide possibility of respectful life for himself/herself; to be ensured with proper conditions of living, healthy and necessary products, medicaments needed for sustaining health condition, proper human care, etc. In a word, conclusion of the lifelong maintenance contract, mostly, are caused by expectation of dependent, that as a result of giving certain material advantage to bread-winner, he/she will be provided with respectful condition for living until the end of life. Practically, this aim causes the possibility of dependent to dispose the property in his/her life. On the one hand, such contractual bond for bread-winner incites positive legal outcome. In parallel with the obligations that are taken by him/her before the dependent by taking obligation to maintain, overall the bread-winner in the circumstances of normal relations, in compensation to the expenses or other human resources provided, after the death of the dependent receives full right, unlimited right to property of the dependent.[59]

The lifelong maintenance contract involving payment in the context of legal relations does not represent a risk for one party, if he/she would have been confident from the beginning that he/she would receive something without providing any significant contribution from his/her side. In particular, the bread-winner does not take any risk, if payment of maintenance derives from the income of reciprocal fulfillment or by partial modelling of reciprocal agreement. Two particular cases – mistake in the calculation of lifelong maintenance and faulty accounting of responding fulfillment, could lead to disproportion.

[59] Ordinance of the Civil Law Chamber of the Supreme Court of Georgia from 24 November 2017 on the case №as-1205-1125-2017 (in Georgian).

The lifelong maintenance is oriented to prolong the life, i.e. the lifelong maintenance depends on the term of person's life.[60] The procuring nature of lifelong maintenance contract is express in payment, which is just similar to the interest in case of loan contract. In the named case the property transferred to bread-winner from the dependent is transformed into interest, the payment of which is done within the framework of contract during the entire life of the dependent. Moreover, it must be noted that maintenance, as such, disregarding how it is paid, in which form, must not be misunderstood and mistaken for an interest.[61]

4.2. Real-Consensual and Unilateral-Bilateral Contractual Construction of the Lifelong Maintenance Agreement

It is much more difficult to attribute the lifelong maintenance agreement to real or consensual, unilateral or bilateral agreements. Depending on from which moment the contract should be considered concluded, the contracts are divided into consensual and real contracts. A contract is consensual, when it is considered concluded from the moment of reaching an agreement in the prescribed form between the parties. A contract is real, when an agreement between the parties is not enough, but it is also necessary to transfer the subject of the contract from one party to the other. [62] The division of contracts into real and consensual contracts and the difference caused by this, is based on the nature of the contract and the moment of their perfection. Accordingly, a contract is considered concluded if the parties reach a mutual agreement and impose certain obligations on each other and acquire certain rights of claim against each other. [63] This contractual consensus is reached by one party offering a contract to the other party and receiving agreement to the offer; In this case, in theory, the so-called Separation of offer and acceptance. In theory, in this case, it is advisable to single out the so-called offer and acceptance. [64]

The model of consensual agreement is very typical for a civil law contract. This is explained by the fact that a contract is an agreement from which directly arise the rights and obligations constituting the content of the contract.

The Chamber of Civil Cases of the Supreme Court of Georgia, in its decision in one of the disputed cases, emphasized that the criterion for the actual and consensual division of contracts is the moment from which the contract is considered concluded. A lifelong maintenance contract is consensual because it is deemed to have been concluded after the parties have agreed on all its essential terms in the form provided for. [65]

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60 *Welter R.,* Wiederkehrende Leistungen im Zivilrecht und im Steuerrecht, Frankfurt, Univ., Diss., Berlin 1984, 179; 185.

61 *Dernburg G*., Digests: Law of Obligations, Moscow, 1900, 99 (in Russian).

62 *Akhvlediani Z.,* Obligatory Law, Tbilisi, 1999, 29 (in Georgian).

63 *Kötz,* Contract Law*,* 2009, 17. *References: Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 107 (in Georgian).

64 *Chanturia L. (Ed.),* Commentary on the Civil Code of Georgia, Book III, General Part of Law of Obligations, Tbilisi, 2001, 92 (in Georgian).

65 Decision N178-167-2017 of 14 July 2017 of the Chamber of Civil Cases of the Supreme Court of Georgia (in Georgian).

According to the consensual model, the qualification of a particular contract is usually provided at the expense of reference to the obligations in its definition. In a consensual agreement, one party undertakes to perform the necessary actions in favor of the other party, which can be performed both by the fulfillment of the agreement itself and at a much later period.

O.S. Ioffe believed that consensual agreements provide the greatest legal protection. That is why its existence is paramount. Contrary to the nature of the consensual contract, the only dissenting opinion may be based not on the text of the law, but on the fact that in such a case after registration of the contract the acquirer would have the right to enforce it, including before the transfer by the alienator. However, it is unclear why the alienator should retain the ability to withdraw from the contract and rely only on the fact that the house has not yet been transferred to the acquirer after its registration? However, it is possible that after registration interest will be lost not for the alienator, but for the acquirer. Then, despite the unconcluded transfer, the right of enforcement may be exercised by the alienator himself. This means that, in accordance with the law, the consensual construction does not limit the interests of either party and, in the event of inaccuracies allowed by any other counterparty, ensures increased protection of the interests of the alienator. [66] O.S. Jofe noted that the right of ownership of the home arises from the moment the contract is registered. Until the lifelong maintenance agreement is not expressed in the proper form, there would be no contract itself. If the registration was made but the house had not actually been transferred yet, the acquirer would already have become its owner, and therefore be liable to support the alienator. If the house was transferred but not registered, the contract would not have been concluded and no obligations related to it would have been imposed on the acquirer. All this gave O.S. Ioffe grounds to prove that the conclusion of the lifelong maintenance contract referred to the moment of its registration and not to the moment of the transfer of the house. Consequently, the contract is consensual.

M.I. Braginski believes that the need in the construction of a real contract arises when the legislator deems it necessary to protect the party who has to transfer an item to the other party. This is due to the fact that during a consensual contract, the party may force the contractor to fulfill the obligation imposed on him in kind (transfer of the item). [67]

All of the above makes us doubt the correctness of some formulations of the concept of a real contract. According to one of them, a real contract is a contract according to which "rights and obligations arise only from the moment of transfer of items or for the origin of which, in addition to the agreement of the parties, the transfer of items is required." [68]

Using the conjunction "or" in this definition may lead to the erroneous conclusion that only one condition may be sufficient to conclude a contract – the transfer of property without reaching an agreement. Other inaccurate formulations are also found. E.g., E. A. Jargina notes that the division of

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66 *Ioffe O. S.,* Law of Obligations, Moscow, 1975, 294 (in Russian).

67 *Braginsky M. I., Vitryansky V.V.,* Contract law, book -. Property transfer agreements. Moscow., 2000, 632 (in Russian).

68 Civil law of Russia, textbook, part 1, ed. *Tsybulenko M*., 1998, 363 (in Russian).

contracts into real and consensual contracts is based on influence of the actual transfer of property on the validity of the contract relating to it. [69]

There is a confusion in the legislation of the distinction between legal categories, such as non-contract and invalidity of the contract. We cannot agree with the circumstance, that concluding consensual and real contract is linked to the moment when the contract enters into force. [70] A consensual agreement enters into force from the moment of its conclusion, however, by the agreement the contract may enter into force by a certain date or be related to other circumstances. The real contract in most cases also enters into force from the moment of its conclusion.

However, it should be noted that the division of a contract into consensual and real contracts is a classification of contracts that does not have common characteristics. It does not cover all types of contracts, leaving out some parts of the contracts that do not belong to either the consensual or the actual contract. The legislator separates the contracts by consensual and real agreements that are subject to state registration and are considered concluded from that moment, unless something else is established by law. This rule, which reinforces a fundamentally different moment of contract perfection, is a sufficient basis to distinguish the third, special category of contract, which O.N. Sadykov calls formal contracts. [71]

Closely related to above classification is the division of contracts into unilateral and bilateral contracts. A unilateral agreement is one in which one of its parties acquires only a right, i.e. is only a creditor, the other party has only the duty, i.e. only a debtor. A bilateral agreement is one in which each party has both a right and an obligation, i.e. Each party is both a creditor and a debtor. [72]

Such division of contracts takes place due to the nature of the distribution of rights and obligations between the parties to the contract. There was also no consensus among scholars on the issue of qualifying a lifelong maintenance contract on the given grounds. In their opinion, it is divided according to who holds which position on the issue of attribution of the lifelong maintenance agreement to the real or consensual agreement. A uniform solution to this issue is of paramount importance at both theoretical and practical levels, as it will automatically put an end to the debate over whether the treaty under consideration is unilateral or bilateral. A bilateral agreement, in turn, may be fully or imperfectly bilateral. A perfectly bilateral contract is always redemptive and synagmatic, as evidenced by the exchange of mutually beneficial performances (do ut des). [73]

The Chamber of Cassation notes that contracts are classified unilaterally and bilaterally according to if the contractual obligations are imposed on both parties, or on only one of them. In the first case, there is a mutually binding contract, and in the second case, a unilaterally binding contract.

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69 *Yargina E.A.,* Rent agreement. Actual problems of civil law: Sat. articles *Vitryansky V.V. (ed.)*, Moscow, 2002 issue. 5, 216 (in Russian).

70 Civil law of Russia, general part, otv. *Sadykov O. N. (ed.)*, Moscow, 2001, 727 (in Russian).

71 Commentary on the Civil Code of the Russian Federation, Part 1, Resp. ed. O. N. Sadykov, M., 1997, 703 (in Russian).

72 *Akhvlediani Z.,* Law of Obligations, Tbilisi, 1999, 28 (in Georgian).

73 *Todua M., Willems H.,* Law of Obligations, Tbilisi, 2006, 106 (in Georgian).

A lifelong maintenance agreement is a syntagmatic or mutually binding agreement, because each party has both rights and obligations at the same time. [74]

If we follow the real model of a lifelong maintenance agreement approved by the legislator, then the dependent can refuse the property transfer agreement after signing it and registering it in the public register. That would be tantamount to unconcluded contract. If the real estate is subject to a gratuitous transfer, then the interests of the breadwinner are not particularly affected, as he has not yet paid his own funds, but only calculated on the purchase of this property. And if the real estate was to be transferred for payment, then the right of the breadwinner may be violated, for in this case the breadwinner suffers a substantial loss which was spent on the purchase of the items as well as the unreceived income he would receive from the use of the items if those items were in his ownership. Is it necessary to further protect the rights of the dependent by violating the rights of the breadwinner? Such provisions of the property testify to the unrealistic nature of the lifelong maintenance contract, of which O.S. Ioffe wrote. His view of it was quoted by us in the text above. In addition, the perfection of the contract at the time of its registration in the public registry is more in line with the interests of the dependent, as the obligation of the breadwinner to assume a lifelong maintenance arises from the moment of registration of the contract. And, we inquired that the registration of the transfer of ownership of the property or the transfer of property always takes place after the registration of the contract.

5. Contract Form

According to Article 942 of the Criminal Code of Georgia, contract of lifelong maintenance must be formed in writing. In case of transferring a real estate, contract must be notarized. Lifelong maintenance contract is attributed to a number of formal binding agreements. If dependent transfers real estate to a breadwinner, in such case, lifelong maintenance contract must be concluded in writing and notarized.[75] The form binding obligation on real estate clearly demonstrates legislators' goal – to promote the stability of civil turnover by bringing real estate under a special legal regime.[76] According to Article 59 I of the Criminal Code of Georgia, a transaction concluded without observing the necessary form is void. Accordingly, the disputed transaction is void and does not produce the legal consequences provided by the transaction.[77] In case the invalidity is due to non-compliance with the contract form, there will be a need for mutual restitution, which means the breadwinner will have to return the transferred property and demand compensation on the basis of unfounded enrichment.[78]

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74 Ordinance of the Chamber of Civil Cases of the Supreme Court of Georgia of March 10, 2011 in the case №AS-1120-1071-2010 (in Georgian).

75 Ordinance of the Chamber of Civil Cases of the Supreme Court of Georgia №AS-185-178-2012 of June 19, 2012 (in Georgian).

76 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia №AS-221-213-2012 of July 24, 2012 (in Georgian).

77 Decision N2b / 2002-12 of the Chamber of Civil Cases of the Tbilisi Court of Appeal of September 11, 2012 (in Georgian).

78 *Dzlierishvili Z.*, The Legal Nature of Property Transfer Agreements, Tbilisi, 2010, 437 (in Georgian).

The conclusion of an agreement in writing has the function of (1) warning, i.e. protection against hasty (reckless) expression of will; (2) the function of clarity and proof; (3) the function of identification and authenticity; (4) The function of providing information and consulting. [79] Obligation to provide information and consultation derives from Article 38 III of the Law of Georgia on Notaries – "The notary provides legal advice to persons and drafts documents at their request." The obligation to consult in this case should be interpreted in such a way that the notary is obliged to read the contract to the parties (especially the inexperienced party) and explain their rights and obligations and indicate the legal consequences.[80] The form of notarization, which offers a high degree of legal protection to private law entities, still underscores the high degree of confidence of the parties to the transaction in this form of certification. [81]

The notary confirms the compliance of the transaction with the legislation by agreement of the parties and / or verifies the authenticity of the signature on the transaction. By the first paragraph of Article 13 of the "Instruction on the Rules of Execution of Notarial Acts" approved by the order of the Minister of Justice of Georgia, the notarial act is performed by a notary in the form of notarial confirmation or certification. The main function of notarization is to properly formulate the will of the parties and to prevent a transaction with a lack of will.[82] The provision "Case provided by law" referred to in Article 69 V of the Criminal Code of Georgia can be found in relation to the lifelong maintenance contract, when the dependent transfers real estate to the breadwinner in exchange for the maintenance. [83]

The transfer of ownership of real estate provided for in Article 942 of the Criminal Code of Georgia shall be carried out in conjunction with the rules provided for in Article 183 of the same Code, according to which, in order to purchase a real estate, it is necessary to have a notarized document and register the purchaser in the public registry. The public registry is one of the types of state register. The Public Registry is a combination of rights to immovable property, legal restrictions, tax liens / mortgages, movable property and intangible property, entrepreneurs and non-profit legal entities, and an address registry. The procedure for maintaining the public register shall be determined by the relevant legislative and sub-legislative normative acts.[84] The fact of registration in the public registry confirms the origin of the right to property and makes the authenticity of the right guaranteed

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79 Commentary on the Civil Code of Georgia, Book One, General Provisions of the Civil Code, 2017, 394 (in Georgian).

80 Law of Georgia on Notaries, 04/12/2009, (in Georgian). <https://www.matsne.gov.ge/document/view/90928?publication=21> [21.10.2020].

81 *Chanturia L*., Real Estate Property, Tbilisi, 2001, 195-197 (in Georgian).

82 Decision №AS-950-1256-07 of the Civil Chamber of the Supreme Court of Georgia of September 5, 2008 (in Georgian).

83 *Dzlierishvili Z.,* The Legal Nature of the Property Transfer Agreement, Tbilisi, 2010, 435 (in Georgian).

84 Law of Georgia on Public Registry, 19.12.2008, (in Georgian). <https://matsne.gov.ge/document/view/20560?publication=26> [20.10.2020].
On Approval of the Instruction on Public Registry approved by the Order №4 of the Minister of Justice of Georgia, 15.01.2010, (in Georgian). <https://matsne.gov.ge/ka/document/view/88882?publication=0,> [20.10.2020].

by the state through a public deed. [85] The agreement of the parties is not sufficient for the origin of the right subjugated by registration, but it is necessary that the fact of expression of the will of individuals be confirmed by a public act. [86] The fact of registration in the public register confirms not only the origin of the right to property, but also the transactions concluded on the item and intangible property come into force from the moment of registration of the rights defined by these transactions in the public registry. It can be said that the origin of the right and the entry into force of the transaction occur simultaneously with the completion of registration.

By notarizing the lifelong maintenance agreement by registering in the public registry, the state does not interfere in private legal relations in any way, but this fact of registration publicity records the full protection of the rights of the participants of legal relations. It can be said that by registering in the public register the state only brings order to private legal relations. The public registry, on the one hand, acts as a guarantor of civil turnover, and, on the other hand, it is in full consensus with the principle of trust and good faith established in civil turnover. [87]

In one of the cases, the court clarified that the transfer of real estate under Article 942 of the Criminal Code should be interpreted as the transfer of ownership of a property right, which is subject to certain legal restrictions due to the peculiarities of the same contractual relationship, but for the rise of legal force of the transfer of this right, certain preconditions exist. [88] Article 183 of the Criminal Code of Georgia imperatively stipulates that a legal result, which is called the origin of the right to property, can be achieved only by the implementation of appropriate preconditions. The subject of the transaction is the transfer of ownership of the immovable property, while the motive of the transaction and the form of the obligation relationship have no essential significance.[89]

Pursuant to Article 942 of the Criminal Code of Georgia, the Court of Cassation explained that the specificity of the lifelong maintenance agreement is reflected in the fact that the breadwinner becomes the owner of the property transferred to him by the dependent from the moment of the dependent's death or from the termination of the maintenance. [90]

For the purpose of the present research, it is important to determine what the transfer of property means. In our view, the legal significance of the transfer of property depends on the nature of the contract under which the transfer takes place. If we are talking about a contract aimed at the transfer of ownership of property, then the transfer must also mean the transfer of right of ownership from one party to the other. However, the transfer time itself is determined in accordance with the law. This

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85 Commentary on the Civil Code of Georgia, Book Two, Commodity Law, 2018, 598 (in Georgian).

86 *Chanturia L.,* Real Estate Property, Tbilisi, 2001, 171-179 (in Georgian).

87 Decision №189-182-2013 of the Chamber of Civil Cases of the Supreme Court of Georgia of February 17, 2011 (in Georgian).

88 Ordinance №as-185-178-2012 of the Chamber of Civil Cases of the Supreme Court of Georgia of June 19, 2012 (in Georgian).

89 Decision №221-213-2012 of the Chamber of Civil Cases of the Supreme Court of Georgia of July 24, 2012 (in Georgian).

90 Ordinance of the Chamber of Civil Cases of the Supreme Court of Georgia №as-185-178-2012 of June 19, 2012 (in Georgian).

time should be considered the moment of registration in case of transfer of ownership, when the law deems it necessary for the alienation of property and the actual transfer – in all other cases.

In the first case, the situation at the time of registration of the transfer of ownership is considered to be a legal transfer, even if the transfer of property has not actually taken place yet. Thus, by registering a lifelong maintenance contract in the public registry, the property transferred to the breadwinner is not already transferred with rights of ownership, however, the rights and obligations arising from the contract become both binding for the parties and acquire public nature for third parties. This is a guarantee of solid protection of their rights.

6. The Fiduciary Nature of the Lifelong Maintenance Agreement

With regard to the lifelong maintenance contract, it is undeniable that the contract under consideration is reciprocal, long-term and carries fiduciary character. Usually, the parties are constantly interacting with each other. By imposing duties on breadwinner like accommodation, food, clothing etc. The dependent usually knows the person well, trusts him/her, and has psychological connection with him/her. By forming the contract, the dependent hopes for help, care and material support from a particular person to whom he or she has certain sympathies. Therefore, replacing the breadwinner with another person may lead to absolute inadmissibility for the dependent. The law stipulates that alienation, mortgaging or otherwise encumbrance of property transferred to ensure a lifelong maintenance is allowed only with the prior consent of the dependent. This makes it possible to classify the lifelong maintenance as a contract of a fiduciary nature.

It is noteworthy that in addition to material well-being, a lifelong maintenance is also associated with human values between contractors such as trust, respect, a sense of gratitude, a desire for a relationship, kindness, and so on. The normal development of such a contractual relationship largely depends on the correct selection of the contractor's personality, the spiritual connection with him/her. Therefore, the risk that accompanies a lifelong maintenance relationship is manifested simultaneously in two aspects: improper or non-fulfillment of the obligation and human incompatibility. [91]

However, the fiduciary nature of the lifelong maintenance contract raises problems, which make it difficult to imagine the contract being a civil status, when it may rise to a conflict of a personal rather than a legal nature in the process of its performance. The case law of lifelong maintenance contract termination shows that the first reason for requesting termination of a contract is often not the breach of obligations by the payer, but rather conflicts and divisions in personal relationships. [92]

7. The Long-Term Obligation Nature of the Lifelong Maintenance

According to Article 941 of the Criminal Code of Georgia, a lifelong maintenance contract is considered a long-term contract. Moreover, it may be the life longevity of the dependent. However,

[91] Decision №2b / 6290-16 of the Chamber of Civil Cases of the Tbilisi Court of Appeal of July 11, 2017 (in Georgian).

[92] *Pakhomov A*., Purchase and sale with the condition of lifelong maintenance, Law, Moscow, 1998, No. 7, 120 (in Russian).

due to the disposition of the norm, an agreement may be reached at another time by agreement of the parties. Therefore, the substantive content of the contract is formed not by the price determined by the transfer of property, but by the rights and obligations arising from the transfer of property. The latter also contributes to other features of this agreement, such as, for example, the issue of settling the relationship between the parties in the event of a change in circumstances. According to Article 949 I of the Criminal Code of Georgia, both the breadwinner and the dependent can withdraw from the lifelong maintenance contract if the relationship between the parties has become unbearable as a result of breach of contractual obligations, or other substantial reasons make it extremely difficult or impossible to extend it. The existence of such circumstances, naturally, cannot be used to terminate the purchase agreement. A lifelong maintenance contract is a long-term contract because it not only retains its validity until the death of the dependent, but also requires the payer to perform his or her duties systematically. Even in the modern period, many authors point out that the lifelong maintenance contract is a continuing contract. As noted by M.I. Braginski, the duration of a lifelong maintenance contract is reflected in the fact that the property will be transferred at the present time and its equivalent value will be paid in the future, namely in dependents lifetime. [93] A liability relationship is a long-term legal relationship that constantly generates new obligations in terms of its performance and protection over a long period of time. [94] A lifelong maintenance contract is a term, but the term is not determined by a calendar date, but by the life expectancy of the dependent.

However, the contract may provide for other things, i.e. the breadwinner and the dependent may agree on a specific time period during which the breadwinner undertakes to pay the dependent. [95] The absence of a long-term liability is based mainly on the fact that the dependent has already fulfilled its obligation – e.g., has transferred ownership of its property. The payment of the lifelong maintenance allowance should be distinguished according to the fulfillment of the targeted obligation. Within the proceedings of the insolvency case, the status of insolvency of the breadwinner is not used in the long-term exchange contracts.

The German Imperial Court first described a long-term obligation in its judgment of 26 April 1933.[96] It naturally already had its dogmatic idea of a lifelong maintenance. To the extent that several theories of long-term liability were developed to justify the purpose of terminating a causal contract concluded for an indefinite period without legal regulation, its unilateral early termination could not be considered as independent.

If the dependent has already received full repayment before the opening of insolvency proceedings, then his claim for lifelong maintenance is substantiated and depends only on the subsequent passage of time. In the context of long-term commitment relationships, despite the capitalization of the lifelong maintenance, the problems are typical: the following imbalance between

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93 *Braginsky M. I., Vitryansky V.V.,* Contract law, book -. Property transfer agreements, Moscow, 2000, 632 (in Russian).

94 *Canaris, C. -W., Law of Obligations Reform 2002, Munich, 2002, 187.*

95 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, October 17, 2019, №AS-1043-2019 (in Georgian).

96 *Oetker H.,* The Permanent Obligation and its Termination, Tübingen, 1994, 53.

performance and reciprocal performance, much later performance, and the question of whether termination is possible or according to which rules we should apply for termination.

Otto von Girke, in his article "Long-Term Obligations-Legal Agreements" published in 1914, compares liability relationships in which the obligation is concentrated at a certain point in time, to a long-term obligation in which the obligation lasts for a certain period of time (so called long term liability) and are constantly fulfilled during its existence. Thus, the basis of long-term commitment is the "constant of efficiency" (Constanta). [97] Girke's commitment to long-term service is based on the dogmatic notion that the requirement to fulfill a long-term obligation as a whole is a single right from which independent but timely written requirements can arise. [98]

However, Girke also agrees that the notion of duration is relative,[99] the differentiation between time periods in terms of performance and reciprocal performance is important in assigning the importance of a legal relationship to a long-term obligation. Girke's view of the lifelong maintenance contract as a long-term contract is based on the fact that it established the basic right as a single claim, which focuses at long-term response performance in the form of periodically recurring separate services. [100] The promise of payment for lifelong maintenance on the basis of the right to a single claim throughout a person's life forms a term debt relationship from which separate claims arise and its validity does not expire after their fulfillment. [101]

8. Conclusion

A lifelong maintenance contract is an aleatory and bilaterally syntagmatic contract, which manifests itself in the ability of each party to make a corresponding profit or loss in case of an unknown event. However, it should be noted that this profit or loss can be suffered by either party to the contract. The extent of the satisfaction provided for in the contract remains unknown until the death of the dependent. Therefore, when concluding a contract, it is impossible to calculate the exact amount of future payment in advance. The contract is aleatory to the extent that the payment always turns out to be more or less relative to the value of the property transferred. Therefore, the risk element in the contract is well understood by each party. Nevertheless, in the end, if the contract is inevitably beneficial to one party and unprofitable to the other, it will only be known as contract expires.

A lifelong maintenance contract falls into the category of a long-term commitment relationship. It maintains power not only until the moment of death of the dependent, but also focuses on the systematic fulfillment of its obligations by the breadwinner. Important is the fact that in addition to material well-being, the contract under consideration is also linked to human values. Therefore, such an obligation-legal relationship depends on the correct selection of the contractor, i.e. the risk is not only improper or non-fulfillment of the obligation, but also human incompatibility.

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97 *Gierke O. von*, Permanent Obligations, JherJb 64 [1914], 355 (359).
98 Ibid., 355 (360; 366; 374-377).
99 Ibid., 355 (393).
100 Ibid 355 (402).
101 *Gierke O. von,* German Private Law, Volume 3: Law of Obligations, Munich, Leipzig, 1917, 302.

The procuring feature of a lifelong maintenance contract leaves no doubt as each counterparty receives a satisfaction from the other, the breadwinner – the housing or part thereof, and the dependent – a lifelong maintenance allowance. The procuring of the contract is not characterized by the equivalence of the property to be transferred. It can sometimes be a small part of the transferred property, and sometimes – significantly exceed the value of the transferred property. Payment of maintenance is focused on the life expectancy of the dependent.

The issue of attribution of a lifelong maintenance contract to consensual contracts and its separation from real contracts is conditioned by the nature of concluding the contract and the moment of perfection. The contract is considered concluded after the parties agree on all its essential terms in the form provided for. A lifelong maintenance agreement is one of a number of formal binding agreements. In case of transfer of real estate by the dependent to the breadwinner, it is obligatory to put it in writing and notarize it. The transfer of real estate must be carried out in conjunction with the rules provided for in Article 183 of the Criminal Code. The latter makes the registration of the acquirer in the public registry a necessary condition. The fact of registration confirms the origin of the right to the given property and makes the authenticity of this right guaranteed. It is true that by registering a lifelong maintenance agreement in the public registry, the breadwinner, like the parties to a purchase, exchange or gift agreement, does not become the owner of the transferred real estate instantly, but the rights and obligations arising from the contract are binding on the contractors and at the same time are public to third parties. All this guarantees the irreversible protection of the rights of the breadwinner and the dependent.

Based on the generalization of notarial and court practice, the parties to the contract and notaries should be recommended to include a clause on the indexation of the amount of the fee in the text of the contract; on the possibility or impossibility of periodically paying cash payments or payment in kind; on the need for the prior consent of the dependent on the alienation, pledge and otherwise encumbrance of the property by the maintenance payer; on acquisition of a lien by the dependent on the said property; also on the inadmissibility of reducing the value of the mentioned property.

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Some Significant Issues Related to Conduct of Due Diligence on the Example of Georgian and German Law

Mergers and Acquisitions are very important part of business transactions for many companies. Besides, transactions are unavoidable due to economic changes. There are plenty of methods to ensure successfulness of transactions, but among the Due Diligence Investigation has significant place. Due Diligence is an instrument, which gives possibility to buyer to analyze targeted company fully, to discover strengths and weaknesses of the company, to set real price and etc. As a result, interested company can make decision based on objective and real facts.

Due Diligence, as an instrument to analyze companies is broadly used all over the world. Although, despite of frequency of conducting different types of Due Diligence, there is always a dispute if interested party has a legal obligation to conduct Due Diligence before merging or acquiring a company, or on the other side, is Target Company obliged to let them conduct Due Diligence, as most sensitive information's are subject of analyzing. It's important to look at Due Diligence also as well-known commercial custom, as in some countries Due Diligence is considered to be commercial custom There are lot of issues regarding legal or procedural conduct of Due Diligence, but in the given paper will be discussed legal on non-legal obligation of conduction Due Diligence on behalf of Georgian and German Law.

Key words: *Due Diligence, legal obligation, commercial custom.*

1. Introduction

Due to the accelerated speed of modern world economic development, advancement of internationalized and globalized markets, one of the major activities of transnational companies became implementation of Mergers and Acquisitions (M&A).[1]

Along with the increase of the amount of M&A transactions, such transactions increase, which cannot achieve set target, synergy effect and fall into amount of so-called wrecked transactions.[2] Nonachievement of synergy effect may have various economic justifications, however, the reason of increase of wrecked transactions remains to be non-conduct or improper conduct of Due Diligence.[3]

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1 *Hagen Ch.,* Die Due Diligence bei Unternehmenstransaktionen, Studienarbeit, München, 2013, 1.

2 *Davis W. B. E.,* The Importance of Due Diligence Investigations: Failed Mergers and Acquisitions of the United States' Companies, ankarabarreview, 2009/1, 5, <https://edisciplinas.usp.br/pluginfile.php/302226/mod_resource/content/1/the%20importance%20of%20due%20diligence.pdf> [12.10.2020].

3 *Perry J. S., Herd T.*, Mergers and acquisitions: Reducing M&A risk through improved due diligence, Strategy and Leadership, Vol. 32, № 2 2004, 12, <https://imaa-institute.org/docs/m&a/atkearney_02_Mergers_and_acquisitions-Reducing_M&A_risk_through_improved_due_diligence.pdf> [12.10.2020].

Despite the internationally recognized huge role of Due Diligence in the M&A process, on the legislative level the obligation of its direct conduct is regulated almost nowhere. The mentioned issue is discussed among scientific society, as well as practicing lawyers. The article discusses the attitude of German legislation towards obligation of conduct of Due Diligence and what possible outcomes we may have in Georgia. The capital market is less developed in Georgia and our reality is not remarkable with the amount of transactions, however taking into account that there are regular ongoing talks about incoming investments and development of economy, sooner or later it will become necessary to improve discussion in practice and literature with regard to Due Diligence, as legal institute necessary for success of transactions. Hence, the purpose of article is to put forward some issues of practical essence and discussing perspectives of Georgian legislation in light of the obligations of conducting Due Diligence and considering as trade custom, using comparative legal research method.

2. General Overview of Due Diligence, as of Legal Institute

Due Diligence as standard for evaluating subject of sale-purchase is rooted in American Law.[4] Initial development of Due Diligence was facilitated by the Security Act[5] adopted in 1933, which included provisions regarding the emission of securities and imposed obligation for emissions improperly placed on the market on natural, as well as legal persons,[6] and the mentioned direction developed more by the adoption of Security Exchange Act in 1934, which regulated secondary relations of securities market.[7] In American Law there were no legislative guaranties during the purchase of defected item by the buyer, therefore buyer had to have more caution and circumspection. Despite American origin and roots, the practice of examining Due Diligence during implementation of M&A transactions was developed in Europe in short time.[8] Despite existence of codified legislations and certain legislative guaranties also in countries of continental Europe, while performing important transactions, the buyer (mostly investor) felt himself/herself more protected, if he/she could examine target, had comprehensive information and could realistically evaluate expectations.[9]

Experience gathered deriving from practice and discussion of Due Diligence as legal institute on a scientific level, resulted in development and extension of that function, that is imposed on Due Diligence. These are: functions of discovering risks[10] and their insurance, defining real price and value, and proving function.[11]

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4 *Beisel D.,* Beck'sches MandatsHandbuch Due Diligence, *Beisel D., Andreas F. E. (Hrsg.*), 3. Aufl., München, 2017, 2.

5 *Kavtaradze S.,* On Due Diligence, as Issue of Legal Notion, Journal of Law, № 2, 2016, 131.

6 *Picot G.,* Handbuch Mergers & Acquisitions, Stuttgart, 2000, 223.

7 *Robakidze S*., Contracts concluded with the abuse of insider information and private legal consequences, compilation: Corporate Law Compilation I, *Burduli I. (Ed.),* Tbilisi, 2011, 168 (in Georgian).

8 *Fatemi A.*, Die Obligenheit zur Due Diligence beim Unternehmenskauf, Eine Rekapitulation der Fahrlässigkeit, Düsseldorf, 2009, 16.

9 *Beisel D.,* Beck'sches MandatsHandbuch Due Diligence, *Beisel D., Andreas F. E. (Hrsg.*), 3. Aufl., München, 2017, 2.

10 *Klie M. A.,* Die Zulässigkeit einer Due Diligence im Rahmen des Erwerbs von börsennotierten Gesellschaften nach Inkrafttrete des Anlegerschutzverbesserungsgesetzes (AnSVG), Frankfurt am Main, 2008, 19.

11 *Berens W., Schmitting W., Stauch J.,* Due Diligence bei Unternehmensakquisitionen, *Berens W., Brauner H. U., Strauch J., Krauner T. (Hrsg.),* 7. Aufl., Stuttgart, 63 ff.

Moreover, its types are important, which developed and continue to grow constantly, as far as types in most part depend on the kind of target company, its activity, on which market it acts, etc. The variety of types[12] does not mean that all of them are using during each examination. The choice is made by the interested company based on what it wants to know and what is its aim. The most widespread types are: legal, financial, commercial, fiscal, environmental, technical, personnel management, information technologies, cultural and other types of Due Diligence.[13]

No matter how perfectly determined is the purpose to be achieved during conduct of Due Diligence, what kind of examination must be carried out, the central significance has the issue of obtaining information, as far as, for the interested party, the most sensitive and not publicly available information is interesting. Therefore, no matter which type of Due Diligence is planned to be conducted, it is important to ensure accessibility[14] to reliable information, otherwise it is impossible to talk about ideal Due Diligence.

3. On the General Obligation of Conducting Due Diligence

There are diverse opinions on the issues related to essence of Due Diligence, however, there is almost cohesion regarding the fact that there is no legislative obligation to conduct Due Diligence in the German legislation.[15] The mentioned is justified with arguments presented below. There are no specific legislative norms with regard to the sale and purchase of enterprise, hence, classical sale and purchase agreement norms are used in that case.[16] As a result of amendments introduces to the Civil Code of Germany in 2002[17] (obligations law reform), in the first paragraph of article 453 of the Civil Code of Germany the provision appeared, that respective articles of sale and purchase are also applied in case of sale-purchase of rights, as well as other objects („sonstige Gegenstände“).[18] By the mentioned definition and approach, provision of the named article puts sale and purchase of enterprise under the norms presented in the Civil Code,[19] this was intention of legislator, as far as it was impossible to reject problems and divergency related to the sale and purchase of enterprise.[20]

In case of purchase of object, in Georgian, as well as in German law, in pre-contractual relations seller has an obligation to provide and introduce to potential buyer information related to sale and

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12 *Ogonyants K.*, Der Unternehmenskauf und kartellrechtliche Probleme, Norderstedt, 2012, 17.

13 *Beisel D.,* Beck’sches MandatsHandbuch Due Diligence, *Beisel D., Andreas F. E. (Hrsg.*), 3. Aufl., München, 2017, 2.

14 *Volks M. –A.,* Haftungsrisiken beim Unternehmenskauf, Nordenstedt, 2009, 1.

15 *Töpperwien M., Henkel S.,* Der Effiziente M&A Prozess, *Klamar N., Sommer U., Weber I. (Hrsg.)*, Freiburg – München, 2013, 47.

16 *Möller J.,* Offenlegungen und Aufklärungspflichten beim Unternehmenskauf, NZG, Heft 22, 2012, 843.

17 *Lorenz S.*, Shuldrechtsreform 2002: problemschwerpunkte dre Jahre danach, München, NJW, Heft 27, 2005, 1889.

18 *Büdenbender U.,* BGB – Schuldrecht, *Dauner-Lieb B., Langen W. (Hrsg.),* 3. Aufl., BGB Anhang II, §§ 433–480: Unternehmenskauf – BGB, Baden-Baden, Berlin, 2016, Rn. 13.

19 *Faust F.,* BeckOK BGB, *Hau W., Poseck R. (Hrsg.)*, 55. Aufl., München, 2020, §453, Rn 1.

20 *Büdenbender U.,* BGB – Schuldrecht, *Dauner-Lieb B., Langen W. (Hrsg.),* 3. Aufl., BGB Anhang II, §§ 433–480: Unternehmenskauf – BGB, Baden-Baden, Berlin, 2016, Rn. 13.

purchase subject available to him/her.[21] However, deriving from particularities of issues related to enterprise as to specific object, it is arguable whether the seller is expected to disclose complete information on his/her own initiative.

Diverse types of purchase, except property and shared purchase, in particular in circumstances of bidding, the hostile and friendly takeovers are differentiated in literature.[22] The main difference between these two types mainly derives from the motive of acquirer.[23] In case of friendly takeover the purpose of acquirer is justification of positive expectations, he/she wants to attain more profit, effect of "synergy", and in case of "hostile" takeover this purpose changes radically and has negative basis.[24]

In case of friendly takeover, condition may be easier, as far as there is an agreement between managing bodies of enterprise and shareholders/partners on the reorganization of the company. In case of hostile takeover, as a rule, managing bodies do not participate in negotiations or classification of bids.[25] Acquirer is interested in absorbing target company and this is the easiest to perform, if the company is divided in such way that there is no well-defined majority shareholder. The scenario of hostile takeover is mostly implemented by bypassing classical management through direct contact with shareholders or without the contact.[26] It is noteworthy, that there is an increasing tendency of hostile takeover of companies.[27] In addition it is important, who is the potential acquirer and what is his/her purpose. It may be related to operative or purely financial interest from the side of investor. Investor having operative interest usually performs activity similar to the target enterprise, hence, he/she is interested to increase his/her share on the market, reach synergy effect, obtain access to particular raw material or learn/master particular manufacturing process, get license or expelling competitor from the market. Whereas the financial investor mostly is interested in increasing his/her own capital though short-term acquisition of the enterprise and selling it profitably in favorable time.[28] Along with the increase of hostile takeover tendency, the corporate legal measures of defense

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21 *Pfeifer E. Ch.,* Rücktritt wegen Schlechtleistung beim Unternehmenskauf, Frankfurt am Main, 2014, 56 ff.

22 *Schlitt M.,* Münchener Kommentar zum Aktiengesetz, *Goette W., Habersack M., Kalss S. (Hrsg.),* 4. Aufl., München, 2017, WpÜG §33, rn. 10-11.

23 In details see *Makharoblishvili G.,* Carrying out fundamental changes in the structure of capital companies based on the corporate-legal actions (Acquisition, Merger), dissertation, TSU, Tbilisi, 2014, 130 <http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/giorgi_maxaroblishvili.pdf> [12.10.2020] (in Georgian).

24 If acquirer is competitor of target company, the purpose could be expulsion of competitor from market, or its capturing and the existing management hinders that. Therefore, initial purpose is to change management and also expelling of major shareholders may be added. Finally, the unity of purposes and circumstances may show elements of "hostile" takeover.

25 *Maisuradze D*., The Implementation of Additional Rights of Shareholders (Poison Pills) as Defensive Measures within the Scopes of the Best Interests of the Corporation (Critical Analysis), Journal of Law, № 1, 2017, 60.

26 *Maisuradze D*., Corporate Legal Defensive Measures in the Process of Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Dissertation, TSU, Tbilisi, 2014, 26-30 (in Georgian).

27 *Kusche M. S.,* Die aktienrechtliche Zulässigkeit der Durchführung einer Due Diligence anlässlich eines Unternehmenskaufs, Mit Due Diligence-Checkliste für die Zielgesellschaft, Studien zum deutschen und europäischen Gesellschafts- und Wirtschaftsrecht, Band 2, Frankfurt am Main, 2005, 69.

28 Ibid. 70.

developed. Similar transaction, as mentioned above, often takes place while evading directors and through establishing direct contact with shareholders.[29] In order to avoid mentioned, directors often use diverse defense mechanisms, for instance such tactics as "Poison Pill",[30] "Shark Repellant", "Golden Parachute" and "Greenmail".[31]

Because of the existence of certain agreement and communication with director during the friendly takeover, there are less problems evolving in the process of conducting Due Diligence, however, there is no guarantee of receiving comprehensive information in that case as well, because shareholders may apply serious resistance for interrupting this process. Moreover, it is important who is the person interested in receiving information and what relations he/she has with the target company, its managing bodies or shareholders.

As far as the hostile takeover may proceed in very unpredictable way and it is hard to talk about using Due Diligence tool in that framework, cases presented in the article mostly are used in time of friendly takeover, when interested person has to "fight" less for receiving proper information. However, because of non-existence of direct norms with regard to merger and acquisition of enterprises, receiving information does not become easier in case of friendly takeover as well. "Hostile" takeover based on its nature and purposes is less oriented on creation of common "better" future for the acquired and own enterprise, therefore in-depth analysis with regard to the target object mostly is no necessary for the acquirer.

We must divide obligation of Due Diligence into several directions. The first, whether the interested person is obliged to examine target object. In this direction it is interesting whether non-performance will violate his/her obligations, as of manager acting in bona fide. As in Germany, also in Georgia there is a requirement of acting in bona fide for managing persons in the Joint Stock Company and Limited Liability Company, in particular, the Director of the company has fiduciary duties before the company and along with other content, it implies that directors must care about company, as normal reasonable person would care in similar circumstances being on same position and must act with the belief that their actions are more beneficial for the company (duty of care).[32] The second, not less important, is whether respective responsible person or persons of the target company

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29 *Maisuradze D*., The Implementation of Additional Rights of Shareholders (Poison Pills) as Defensive Measures within the Scopes of the Best Interests of the Corporation (Critical Analysis), Journal of Law, № 1, 2017, 60.

30 Using "Poison Pills" means that Board gives to shareholders such right, "which at a time of appearance of specific circumstances of acquisition rejected by the board, gives special economic value to the important positions of company's owners, hence it is a defense tactics, which makes takeover transaction costly. Its expensiveness is in the high value of overcoming process of named tactics from executors of takeover." In details see *Maisuradze D*., The Implementation of Additional Rights of Shareholders (Poison Pills) as Defensive Measures within the Scopes of the Best Interests of the Corporation (Critical Analysis), Journal of Law, № 1, 2017, 61.

31 *Makharoblishvili G.*, Carrying out Fundamental Changes in the structure of capital companies based on the corporate-legal actions (Acquisition, Merger), Dissertation, TSU, Tbilisi, 2014, 130. <http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/giorgi_maxaroblishvili.pdf> [12.10.2020] (in Georgian).

32 Rulings of the Chamber of Civil Cases of the Supreme Court of Georgia № AS-1158-1104-2014 from 25 December 2014 and № AS-1307-1245-2014 from 6 May 2015.

are obliged to permit conduct of Due Diligence and provide information, who are connected to their own company with same obligations, as directors of interested company.

Despite the fact that in countries of Continental Law there is no direct legislative obligation of conducting Due Diligence, most part of opinions expressed in literature and practice share the approach that non conduct of Due Diligence may result in responsibility of Director (or other responsible person) from the side of purchaser.[33] In countries having codified legislation and firm legislative traditions, as it is in Germany, Due Diligence, as inorganic seedling, creates not only certain misunderstandings, but also problems, as far as the main dilemma while conducting Due Diligence is the issue of provision/non-provision of information. Without obtaining information, Due Diligence would be unity of actions lacking content and essence, which will have nothing in common with aims of Due Diligence to assess risks and after identification possibly avoiding or minimizing them. Therefore, the battle of interests related to its conduct and issues with regard to access to information.[34] The mentioned "misunderstandings" are expected in the Georgian Legal framework as well, as similar to Germany, this institute is not genuine and organic for Georgia as well, anyway at this stage.

4. Obligation to Conduct Due Diligence from the Perspective of German Legislation

In the German Law conduct of Due Diligence may become subject to dilemma not only because of the issue of possible responsibility of the director. But, if, as a result of conduct of Due Diligence, the risks are not discovered, acquirer loses possibilities envisaged in the article 442[35] of the Civil Code of Germany. In practice the mentioned issue is regulated relatively easily, the volumetric Disclosure Letter is drafted, where the responsibility for knowable defect and risks is taken by the seller or distribution of responsibilities among seller and purchaser takes place. In addition, in case of the agreement, responsibility is taken for potential defect, if it has significant impact on rights and interests of interested person.[36] Therefore, exclusion of possibilities envisaged in article 442 of the Civil Code of Germany, as a rule, does not put purchaser in worse situation, he/she practically is equipped with more possibilities and may negotiate individual guarantee terms with regard to every detail of his/her interest. However, it is important to have full information on all existing instruments,

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33 *Töpperwien M., Henkel S.,* Der Effiziente M&A Prozess, *Klamar N., Sommer U., Weber I. (Hrsg.)*, Freiburg – München, 2013, 47.

34 *Kresin T.,* Rechtliche Grenzen der Informationsweitergabe im Rahmen der Due diligence einer Aktiengesellschaft, Duisburg-Köln, 2008, 18.

35 § Knowledge of the buyer (1) The rights of the buyer due to a defect are excluded if he has knowledge of the defect at the time when the contract is entered into. If the buyer has no knowledge of a defect due to gross negligence, the buyer may assert rights in relation to this defect only if the seller fraudulently concealed the defect or gave a guarantee of the quality of the thing. (2) A right registered in the Land Register must be removed by the seller even if the buyer is aware of it. See *Kropholler J.,* Civil Code of Germany, Learning Commentaries, *Darjania T., Chechelashvili Z., (Trans.), Chachanidze E., Darjania T., Totladze L. (Eds.),* 13 Ed., Tbilisi, 2014, §442, para. 1 (in Georgian).

36 *Böttcher L.,* Verpflichtung des Vorstandes einer Aktiengesellschaft zur Durchführung einer Due Diligence beim Beteiligungserwerb, Zur Due Diligence als Verkehrssitte, 1. Aufl., Baden-Baden, 2005, 140.

in order to plan transactions reasonably. Deriving from this context, based on paragraph 1 of article 93 of the Stock Corporation Act of Germany, there is an opinion in literature that discretion of directorate of interested party, whether to conduct Due Diligence ot not, is decreased to zero taking into account increased risks.[37]

Except Civil Code, other legal acts may also include some direct or indirect provisions related to conduct of Due Diligence. In this regard, the Commercial Code of Germany is noteworthy. In comparison to Georgian law, the German law recognizes different legislative regulation of corporate law. In particular, first important legislative act is the Commercial Code of Germany (Handelsgesetzbuch).[38] The Commercial Code includes a lot of important regulations in light of the company relations. According to some opinions expressed in literature,[39] article 377 of the Commercial Code of Germany may be considered as legal basis for conducting Due Diligence. According to the mentioned article, if in the sale and purchase agreement both parties are entrepreneurs, the purchaser is obliged, upon receipt of goods, to examine it considering reasonable time and in case of discovering defect, notify seller immediately. The opinion of considering this article as basis for Due Diligence is rejected by the majority for several reasons. Firstly, article 377 of the Commercial Code applies only to the delivery of such goods, which falls into the scope of entrepreneurs' everyday activity,[40] moreover his/her actions start after delivery of goods, and purpose of Due Diligence is to identify risks before concluding agreement and envisage respective contractual guarantee obligations in the agreement, also it is impossible to equal enterprise with classical understanding of goods.[41] Hence, usage of article 377 of the Commercial Code as grounds for Due Diligence did not receive support. In addition, particularly problematic is nonexistence of special norms in the German legislation for withdrawal from the agreement related to enterprise.[42] In case, there would be need in practice to return purchased goods, enterprise, not only legal, but also practical misunderstandings and problems will appear. First of all, if the merger takes place, the enterprise does not exist with the same form as it was sold, maybe numerous other structural changes were implemented, which make it impossible to return enterprise in the same form, as it was before conclusion of the agreement. Besides, after complicated process of separation and return, the

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37 *Hörmann J.*, Due Diligence beim Unternehmenskauf, Transaktionen, Vermögen, Pro Bono: Festschrift zum zehnjährigen Bestehen von P+P Pöllath + Partners, *Birk D. (Hrsg.),* München, 2018, 147.

38 The Commercial Code of Germany (Handelsgesetzbuch) was adopted by the legislative body of Germany on 21 May of 1897. However, it was enacted along with the enactment of the Civil Code of Germany, in particular from 1st January 1990. From the day of its enactment, there were numerous changes introduced to the Commercial Code, some parts were separated from it, for example Stock Corporation Act, etc. But the idea that it should have regulated commercial relations, remained the same. In details see *Oetker H.,* HGB Handelsgesetzbuch Kommentar, *Oetker H. (Hrsg.),* 4. Aufl., Müunchen, 2015, 3-7.

39 *Beisel W.,* Der Unternehmenskauf, *Beisel W., Klumpp H. -H. (Hrsg.),* 7. Aufl., München, 2016, §2 Due Diligence, Rn. 8-10.

40 *Koch R.,* HGB Handelsgesetzbuch Kommentar, *Oetker H. (Hrsg.),* 6. Aufl, München, 2019, §377, rn. 7 ff.

41 *Hörmann J.*, Due Diligence beim Unternehmenskauf, Transaktionen, Vermögen, Pro Bono: Festschrift zum zehnjährigen Bestehen von P+P Pöllath + Partners, *Birk D. (Hrsg.),* München Beck, 139.

42 Ibid.

substance of the enterprise may destroy entirely and it can be threat not only to its position on the market,[43] but also to its existence.

Based on the legislative formulation discussed above, German legislation does not recognize explicit obligation of conducting Due Diligence, however deriving from complexity and difficulty of transactions it practically is conducted during each one, which is the best representation of how important is information obtained in the framework of Due Diligence and, mainly, its proper assessment. Moreover, the issue of possible responsibility of the Director, person entitled for management and representation in case of non-conduct of Due Diligence, should not be disregarded.[44] As a result, it may be noted that by conducting Due Diligence directorate insures not only chance of successful execution of transactions, but also risk deriving from his/her position. Despite non-existence of legislative obligation all these creates such factual condition, that conduct of Due Diligence is quasi obligatory, its admission brings more benefit for the interested company than harm. As it was mentioned above, while conducting Due Diligence huge importance is given to the issue of Director's responsibility. On the one hand, the behavior of director of target object becomes subject to assessment in light of the information that was provided by him/her to the interested party, whether the secret information was disclosed, and on the other hand how correctly the Director of interested party carried out the Due Diligence process. Therefore, there is a collision of interests of directorates of two companies that are worthy to be protected and practically there is no clear answer whose interest will be prioritized in critical moment.[45] Only one thing is clear, similar as Director has huge role in the functioning of the company in general and has respective responsibility, this responsibility is at least doubled when planning merger/acquisition transaction, he/she must protect company, as well as shareholder and himself/herself. Based on the abovesaid, obligation to conduct Due Diligence lies on the responsibility of Director and is issue to be considered case by case.

5. Possible Outcomes of Legislation of Georgia in Light of the Conduct of Due Diligence

Even though Georgian law is not widely discussing Sue diligence at this stage, it is possible to make some conclusions based on the analysis of the existing legislation. The Civil Code of Georgia (hereinafter referred as CCG) enforces obligation of seller to transfer a thing free of material and legal defects to the buyer (CCG 487-489). According to paragraph two of article 494 of the CCG, no rights shall accrue to the buyer on the grounds of a defect of the thing if at the time of execution of the contract he/she had the knowledge of the defect. In such case the doubt is casted on the fact of existence of defect, as far as the agreement was concluded on defected thing and it was defined as the

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43 *Hörmann J.*, Due Diligence beim Unternehmenskauf, Transaktionen, Vermögen, Pro Bono: Festschrift zum zehnjährigen Bestehen von P+P Pöllath + Partners, *Birk D. (Hrsg.),* München, 139.

44 *Ehring P.,* Die Due Diligence im Spannungsverhältnis zwischen kaufrechtlichem Haftungssystem und vertraglicher Gestaltung, Frankfurt am Main, 2010, 19.

45 Director's liability is one of the key issues in relation to the conduct of Due Diligence, but its study does not represent the purpose of this paper.

subject of agreement.[46] Due to the fact that based on Georgian legal regulation enterprise is also regarded as thing and relevant articles of sale and purchase agreement are applied, if Due Diligence is conducted and no defect will be found, after concluding the agreement it would be impossible to notify about defect, as far as the agreement will be reached on "defected" enterprise. This rule does not apply if it is confirmed that the buyer provided false information and hided defect intentionally.

It was mentioned in the Paper, that there is less discussion on necessity, essence and purpose of Due Diligence in the Georgian legal sphere. However, Partner of one of the leading Georgian law firms touched upon legal or business/ethical problems related to merger/acquisition agreements of enterprises in details.[47] In the mentioned monography there is a discussion on the necessity of conduct of Due Diligence, its benefit and functions, as well as, in general, on nuances related to merger/acquisition transactions. In the Georgian reality the customer of Due Diligence, as a rule, is buyer, and seller almost never uses such possibility, the reason of which is stated in the paper, that the Georgian companies lack or inexistence of experience. Also, attention is stressed on difficulty to adjust provisions of sale and purchase envisages in Civil Code, or provisions of general obligation law with the acquisition/merger of enterprise and in most cases non-existence of theoretical, as well as practical discourse (judicial).

Comparing to German legislation, Georgian legislation recognizes legislative act similar to Commercial Code. Issues related to legal persons are gathered in Law of Georgia "on Entrepreneurs." The named law does not include special reservation with regard to Due Diligence, which is absolutely understandable, but article 9 paragraph 6 of the law "on Entrepreneurs" determines standard of Directors' behavior. The mentioned implies that the Director must act in bona fide, care about enterprise based on its best interests. If we discuss fiduciary duties in the context of making decision of conduct of Due Diligence, in Georgian reality we can receive answer, that Director must act so cautiously in order to make transaction successful without conduct of Due Diligence, without prior examination of enterprise. Otherwise, his action, as of Director acting in bona fide, will be questioned. Moreover, ruling of the Chamber of Civil Cases of the Supreme Court of Georgia №as-1307-1245-2014 of 6 May 2015 is important. By the mentioned decision, the Court stated that Company Director, who at the same time was company's Partner, though tax evasion violated duty of care before the company, which caused putting question of his/her personal liability. This does not directly invoke Director's responsibility for non-conduct of Due Diligence, but it is important, as it defined grounds for Director's personal liability and has put a line between Director's personal liability and company's responsibility with the reasoning, that the regression of Company, unsuccessfulness, was essentially caused by the decision of Director, and such decisions exceeded those to be made in the framework of corporate freedom. As in judicial practice, as well as in literature it is necessary to have constant

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46 *Chachava S.,* Commentaries on Georgian Civil Code, *Chanturia L. (ed.),* §494, field 29, <http://www.gccc.ge> [28.10.2020] (in Georgian).

47 *Kipiani V*., Short Overview of Certain Legal Risks Related to Acquisition of Georgian Company by the Buyer and Ways of its Reflection in the Agreement, Tbilisi, 2009, <http://www.mkd.ge/geo/comp_shedzenis_samartlebrivi_riskebi.pdf> [12.10.2020] (in Georgian).

discussion on Director's liability and scale of behavior. This develops culture of corporate governance, which finally will increase the possibility of success of Georgian companies not only on Georgian, but also international market.

6. Due Diligence as a Commercial Custom

It is impossible to talk about obligation to conduct Due Diligence, without discussing principle of Caveat Emptor. In the Anglo-American law by influence of the mentioned principle it became important to conduct Due Diligence. Because of non-existence of legal guarantee norms in the American law, only purchaser was liable to care about searching for information on the item or to convince seller to give any kind of guarantee.[48] Therefore, we encounter fewer complex agreements, where guarantee norms are not defined.[49] Correct formulation of guarantee obligations is very difficult without full examination of the object, as far as exactly with the Due Diligence tool it is possible to manifest possible defects and positive side.[50] Consequently, it is not surprising that in USA potential buyer saw conduct of Due Diligence as important measure for protecting his/her interests. That is why, in USA process of conducting Due Diligence is part of natural process of acquisition and merger of enterprise for years and is not considered as special event. Hence, it will be completely fair if we consider conduct of Due Diligence as a commercial custom in USA.[51]

In German literature there is dispute on whether obligation to conduct Due Diligence is considered as commercial custom or tradition. This question is current for the reason that, according to empirical studies, during majority of enterprise acquisition and merger transactions, Due Diligence is conducted.[52] Therefore it must be though through whether we have already established tradition. If there is a positive answer to the question if this is a developed commercial custom, deriving from article 442 of the Civil Code of Germany, non-conduct of Due Diligence will be considered as gross negligence of purchaser and he/she will lose right to claim correction of item's defect.

Existence of commercial customs and traditions, and their usage in law is widely recognized in countries of continental Europe.[53] Commercial custom is not developed in normative form and does not substitute imperative norm of the law, however, as a rule, stands above the dispositive norm and is preferable used,[54] and if parties do not regulate certain circumstances by the agreement, in case of

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48 *Töpperwien M., Henkel S.,* Der Effiziente M&A Prozess, *Klamar N., Sommer U., Weber I. (Hrsg.)*, Freiburg – München, 2013, 48.

49 *Knöfler K.,* Rechtliche Auswirkungen der Due Diligence bei Unternehmensakquisitionen, Frankfurt am Main, 2001, 72.

50 Ibid.

51 Ibid, 73.

52 *Böttcher L.,* Verpflichtung des Vorstandes einer Aktiengesellschaft zur Durchführung einer Due Diligence beim Beteiligungserwerb, Zur Due Diligence als Verkehrssitte, 1. Aufl., Baden-Baden, 2005, 157.

53 *Kereselidze D.,* Der Allgemeine Teil des Georgischen Zivilgesetzbuches von 1997, Eine rechtsvergleichende Untersuchung, Frankfurt am Main, 2005, 79.

54 *Chanturia L*., Commentaries to the Civil Code of Georgia, Book Third, Tbilisi, 2001, 168 (in Georgian).

dispute the commercial custom and tradition is used in first place, and then dispositive norm of the law.[55]

For considering particular action as commercial custom and tradition, it is necessary to satisfy several criteria, in particular it must be practically carried out by representatives or any field of Corporate activity with more or less priorly determined pattern, in mutual agreement and during long period.[56] Besides, it must be recognized by all participants.[57]

As it was mentioned above, according to conducted studies, absolute majority of enterprises considers it necessary to conduct Due Diligence and implements that in practice during enterprise acquisition and merger transactions.[58] The role of commercial customs and traditions is definitely immense in international commercial relations,[59] and Due Diligence is mainly used in the aspect of international trade. Number of enterprise acquisition and merger transactions increases for various reasons and one of the most important of them, is market globalization.[60] However, part of authors considers that despite of big number and importance of conducted Due Diligence, this may not be deemed as ground for confirmation of commercial custom and tradition.[61]

Part of authors goes further and for qualifying particular action as commercial custom, applies article 276 of the Commercial Code of Germany, according to which, enterprises are divided to small, medium and large enterprises.[62] According to some opinions, when acquiring large enterprise, conduct of Due Diligence is ordinary event. Large companies may conduct thorough Due Diligence, in order to protect themselves, but we cannot say the same on small and medium enterprises.[63]

Majority of opinions directed against Due Diligence, as of commercial custom, are based on the viewpoint, that despite frequency of its conduct in practice, there is no established, determined flow and general, minimal part of the necessary standard for its conduct.[64] Besides that, for considering particular action as a commercial custom and tradition, the consent of all representatives of the field or business circle is necessary on the fact that the rule will be protected and applied unconditionally.[65]

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55 Ibid.

56 *Chanturia L. (ed.),* Commentaries to the Civil Code of Georgia, Book First, Tbilisi, 2017, article 52, area 16, 307 (in Georgian).

57 *Chanturia L.*, Commentaries to the Civil Code of Georgia, Book Third, Tbilisi, 2001, 168 (in Georgian).

58 *Fatemi A.*, Die Obligenheit zur Due Diligence beim Unternehmenskauf, Eine Rekapitulation der Fahrlässigkeit, Düsseldorf, 2009, 170.

59 *Chanturia L. (ed.),* Commentaries to the Civil Code of Georgia, Book First, Tbilisi, 2017, article 52, area 15, 307 (in Georgian).

60 *Büdenbender U.,* BGB – Schuldrecht, *Dauner-Lieb B., Langen W. (Hrsg.),* 3. Aufl., BGB Anhang II zu §§ 433–480: Unternehmenskauf – BGB, Baden-Baden, Berlin, 2016, Rn. 13.

61 *Fatemi A.*, Die Obligenheit zur Due Diligence beim Unternehmenskauf, Eine Rekapitulation der Fahrlässigkeit, Düsseldorf, 2009, 171-172.

62 *Böttcher L.,* Verpflichtung des Vorstandes einer Aktiengesellschaft zur Durchführung einer Due Diligence beim Beteiligungserwerb, Zur Due Diligence als Verkehrssitte, 1. Aufl., Baden-Baden, 2005, 157.

63 Ibid, 158.

64 Ibid.

65 *Chanturia L.*, Commentaries to the Civil Code of Georgia, Book Third, Tbilisi, 2001, 166 (in Georgian).

It must be noted that agreement concluded during modern acquisition and merger transactions rarely fall under the scope of legal regulation of one country. Parties upon starting pre-contractual relations agree on the law of country that will be used in case of dispute. Also, they exclude such norms form particular law, which in their opinion will damage the agreement (naturally, it is related to dispositive and not imperative norms). Parties also can exclude, by the agreement, validity of particular or generally all commercial customs and traditions.[66] Article 442 of the Civil Code of Germany, already discussed above, plays relatively modest role in the process of acquiring enterprises, as far as during such agreements validity of article 442 is excluded (at least implicatively).[67] The international nature of acquisition and merge transactions and diversity of the law to be used in relation thereto, makes it more difficult to consider Due Diligence as commercial custom and tradition, as in most cases validity of commercial customs and traditions is limited to certain territory,[68] and international character of Due Diligence excludes such reservation.

Once again it is important to notice, that comparing to USA, German entrepreneur has no urgent necessity for conducting Due Diligence research, as there is threat that without conduct of Due Diligence it will remain without aby guarantee norms.[69]

Moreover, according to German law, conduct of Due Diligence may have negative impacts instead of positive one, in case when Due Diligence will not be conducted with special sensitivity.[70] Such cases happen when target of interested person is just one direction of the enterprise (part), and for other directions he/she is forced by buy them. Hence, he/she does not show special sensitivity towards parts that are not interesting to him/her. Similar case may be qualified as gross negligence and party will be deprived of possibility to use legislative guarantee norms.[71] It is natural that similar occasions may happen during acquisition of large enterprises, however it may happen while purchase of small (family type) enterprises as well. Despite the risk, as it was mentioned above, percentage of conduct of Due diligence in Germany increases during acquisition/merger of enterprises and not on the contrary.[72] This also results from the fact, that pure German transactions are fewer and foreign element is in place during acquisition/merger of enterprise, especially when the issue relates to large enterprises.[73] Although, searching for investors is not unfamiliar for small or medium enterprises.[74] Here it

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66 Ibid. 167.

67 *Fatemi A.*, Die Obligenheit zur Due Diligence beim Unternehmenskauf, Eine Rekapitulation der Fahrlässigkeit, Düsseldorf, 2009, 45.

68 *Chanturia L*., Commentaries to the Civil Code of Georgia, Book Third, Tbilisi, 2001, 167 (in Georgian).

69 *Knöfler K.,* Rechtliche Auswirkungen der Due Diligence bei Unternehmensakquisitionen, Frankfurt am Main, 2001, 73.

70 Ibid.

71 Ibid, 74.

72 Ibid. 75.

73 *Böttcher L.,* Verpflichtung des Vorstandes einer Aktiengesellschaft zur Durchführung einer Due Diligence beim Beteiligungserwerb, Zur Due Diligence als Verkehrssitte, 1. Aufl., Baden-Baden, 2005, 32.

74 *Büdenbender U.,* BGB – Schuldrecht, *Dauner-Lieb B., Langen W. (Hrsg.),* 3. Aufl., BGB Anhang II zu §§ 433-480: Unternehmenskauf – BGB, Baden-Baden, Berlin, 2016, Rn. 13.

must be mentioned that genuine Due Diligence with its individual particularities was not established, but it's almost all characteristics are transposed from Anglo-American law.[75]

There is a significant difference among German and American law, which is expressed by the fact that in US further rights of byer depend only on the conduct or non-conduct of Due Diligence, which is differently in Germany. Besides, existence of possible negative effect in the German law significantly reduces necessity for declaring Due Diligence as commercial custom.[76]

As a summary it must be said that, nowadays, there is no ground and solid evidence, that in countries of continental Europe Due Diligence is considered as developed commercial custom and tradition. Besides, it is hard to consider satisfied elements necessary for commercial custom and tradition, as well as it is practically incredible to attain conduct Due Diligence to any business circle or any particular field, as it is equally used in acquisition/merger transactions carried out in any field.

It is natural, especially deriving from the Georgian reality, we cannot talk on consideration of Due Diligence as commercial custom and tradition. Nowadays existing practice does not give possibility to generalize and conduct proper analysis for considering it as commercial custom and tradition. There is no proper study for discussion on this particular topic, however, hopefully, this paper will somehow contribute to opening and development of the mentioned discussion.

7. Conclusion

In this paper issues related to the obligation of conducting Due Diligence, as well as short description of Due Diligence as a important tool for M&A transactions were discussed in accordance with Georgian and German law. Due to research can be said, that Due Diligence is common practice while conducting M&A transactions, but by the time rate of unsuccessful transactions is also increasing. Main purpose of Due Diligence is discovering risks and avoiding them, which minimizes possibilities of unsuccessful transactions. Meanwhile, during the years many arts of Due Diligence were formed and this gives to parties chance to analyze Target Company in a desirable manner. Even though, even very well planned Due Diligence could go wrong, if access to necessary information won't be guaranteed. Getting information is linked to different challenges whether its hostile or friendly takeover. Friendly takeover gives more chances to get parties interests closer, while during hostile takeover it's almost impossible. Despite the great importance of analyzing different scenarios how to get information, it's not a main topic of this paper.

Agreement of buying a company can be closed only within the given law regulations according to both, German and Georgian legislation, but however, only the law regulations give very little chance to ensure all the risks. Therefore, parties always prefer to put forward their interests via Due Diligence investigation. As there is no strict obligation to conduct Due Diligence according to German and Georgian legislation before transaction, into consideration should be taken duties of directors, as

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75 *Böttcher L.,* Verpflichtung des Vorstandes einer Aktiengesellschaft zur Durchführung einer Due Diligence beim Beteiligungserwerb, Zur Due Diligence als Verkehrssitte, 1. Aufl., Baden-Baden, 2005, 32.

76 *Knöfler K.,* Rechtliche Auswirkungen der Due Diligence bei Unternehmensakquisitionen, Frankfurt am Main, 2001, 75.

they are obliged to act always in the best interest of company. Best interest of company is almost in each and every case to conduct Due Diligence, especially from buyer's side.

Despite several differences between Georgian and German regulations, based on legislative analysis, almost similar outcomes may be received. In particular, Due Diligence does not represent legal institute established through law, but because of its immense international importance in light of the acquisition/merger transactions, it became strong instrument in hands of companies in order to achieve purposes of the transaction. Because of sustainable increase of M&A transactions, there is high possibility that Due Diligence will be announced as a trade custom and tradition is some legal areas, as done in the US. Nowadays, Due Diligence is not supported as a trade custom, because there is always law regulations standing behind the parties, but this doesn't mean time can't change gives situation. As there is very minor discussions and also practice on Due Diligence in Georgia, acknowledging Due Diligence as a trade custom comes not even in consideration.

Despite the fact that at this stage legal environment is not loaded with discussions on similar issues in Georgia, it is necessary to start talking about the mentioned topics and certain framework must exist at least in the legal literature, which later on will ease its practical application.

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Distinguishing Public Law and Private Law Delicts

An article below reviews similarities and differences between public law and private law delicts. Also, it demonstrates a result preconditioned by differences.

To better show such differences, Georgian regulations for illegal performance of compensation of damages is compared to that of German.

The key difference between public law and private law delicts expresses only in case of one of them, i.e. in case of legal relations preceding the delict; and the article intends to discuss this matter in greater details.

***Key words**: Compensation of damages/loss, responsibility of the state, delict, jurisdiction.*

1. Introduction

Defining legal proceedings for the purpose of verification[1] of compensation of damages due to illegal actions of state authority, represents one of the most difficult matters of legal debates. For instance, in Germany claims deriving from official capacity are decided by civil courts[2], since illegal actions causing damages are imputed not to the state but personally to the private subject (public servant), whose obligation to compensation originates in accordance with general delict standards and provisions (just like in case of any private subject)[3]. One difference is that financial responsibility is shifted to the state[4], i.e. instead of a servant, financial responsibilities are imposed on the state[5]. Such regulations create variety of guarantees, since one subject – state – commits that a debtor – its servant, will fulfill financial responsibilities before the creditor – the victim.

Unlike Germany, in Georgia the established court practice shows that administrative proceedings are applied in order to certify and verify claims for damages caused by illegal actions of the state authority[6]. Indeed, at one glance, this category of damage is pertinent to the private law delict since grounds for claims are envisaged by the Article 1005 of the Civil Code of Georgia; however, on the other hand, if a case like that was considered as a "usual" private law delict, it would not be possible to view the case from the point of view of administrative law. Because of the above-mentioned controversial opinion it becomes necessary to define the nature of delict caused by illegal actions of the state authority and separate it from the private law delict. Therefore, arises a question

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1 Based on Article 142.1 of the Georgian Civil Code, the courts verify claims by their decisions.

2 *Detterbeck S.,* Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht, 12. Aufl., München, 2014, Rn. 1099, 436.

3 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 3, 709.

4 Ibid, Rn. 1, 708.

5 Ibid, Rn. 7, 710.

6 Case № BS-233-224(G-10), Ruling of the Administrative Chamber of the Supreme Court of Georgia from April 8, 2010.

whether the claim establishing provisions for damages caused by public law delict has a basis at all to be envisaged with Georgian Civil Code that concerns relations of private nature. These are the boundaries of the studied topic in the present article.

The relevancy of the researched topic (defining the nature of delict caused by illegal actions of the state authority and separating it from the private law delict) is caused by the topic related main practical problem. Namely, cumulative usage of claim establishing provisions such as articles 992, 997 and 1005 of Georgian Civil Code by judicial practice without separating clearly them from each other. In order to show the distinction between the legal nature of public and private delicts, the present article studies and separates the delicts envisaged by articles 997 and 1005 of Georgian Civil Code, because both of them concern compensation of damages caused while acting on duty. Discussing on studied topics could facilitate the elimination of ambiguity related to claim establishing provisions that concern compensation of damages caused by illegal actions of state authority.

The article below has a following structure: The introduction of the article describes the researched topic, it's relevancy, the boundaries of the research and the legal importance of the results (discussion), the next chapter defines the term delict, the following chapter lists similarities between the private and public law delicts, the next chapter underlines the differences between them and the conclusion indicates findings of the research.

2. Definition of Delict

For definition of delict we need to refer to the Article 317.1 of the Civil Code of Georgia, according to which "for origination of obligation it is necessary to have a contract between participants, except instances where an obligation originates due to caused damages (delict), undue enrichment or other grounds prescribed by law". At the legislative level, delict is linked to the fact of incurred damages. In addition, in case of damages the infringement of law plays a vital role[7]. Therefore, the term "delict" shall be defined as damages incurred due to violation of law.

3. Correlation between Public Law Delict and Private Law Delict

Correlation between public law and private law delicts is evident, as the violation may take place in both, in public and private, areas. Moreover, it is inevitable for the state not to have separate facts of violation, which is preconditioned by broad tasks and multiplicity of legal actions required for their fulfillment[8]. Private as well as Public law infringements may lead to damaging an individual, and that creates the delict construct: a) violation of law; b) damages due to violation of law. Considering that in case of delict, a method of defense of rights depends on a legal nature of the dispute,[9] it becomes necessary to identify differences between the private and public law delicts.

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7 *Chikvashvili Sh.,* Commentary to the Civil Law, Book 4, Private part of the Law of Obligations, Vol. II, Tbilisi, 2001, Article 992, 379 (in Georgian).

8 *Ipsen J.,* Allgemeines Verwaltungsrecht, 10. Aufl., Sinzheim, 2017, Rn. 1238, 325.

9 *Muthorst O., transl. Maisuradze D.,* Fundamentals of Law, Tbilisi, 2019, f.n. 71, 292 (in Georgian).

4. Difference between Public and Private Law Delicts

For purposes of demonstration of public and private law delicts' differences, let us review delicts envisaged by Articles 997 and 1005 of the Civil Code of Georgia; they are caused while acting in official capacity. Both concern compensation of damages caused in the limits of labour relations between an employer and an employee. Difference, though, between these delicts lays in nature of legal obligations of official functions of an employee. Generally, for purposes of official duties, first, we need to determine labour relations between the state and the public servant. Legal nature of functions imposed on a servant obtains public law features, and it is causally related to performance of positive obligations of the state. Thus, we can say that the state fulfills its positive obligations through its servants. However, it shall be said that in the process of fulfilling such functions the state my violate its negative obligation. It does not matter which obligation the state violates – positive or negative – as in both cases the delict will belong to that of the public law.

Positive obligation of the state represents an idea, that the state shall positively/actively act to protect human rights. In 1968 at European Court of Human Rights, in one of cases, the claimant used the term "an obligation of doing something", which later turned into the term "positive obligation of the state"[10]. The latter presumes "the state obligation to protect [an individual] from interference of other persons and act for protection of freedoms, restoration in rights and compensation of damages. If the state couldn't or didn't ensure legal procedures for reinstatement in rights or refused to investigate the case, or is incapable of introducing relevant freedom guarantees because of low standards for judicial independence or faulty judicial system, it violates the positive obligation of the state". Not punishing those guilty of crimes does represent violation of the positive obligation of the state[11]. "Positive obligation of the state is similar to "Obligation of compassion to the party". Namely, pursuant to article 316.2 of the Civil Code of Georgia: "depending on its meaning and nature, an obligation of extreme compassion towards the other party, may be imposed on a party". An obligation of compassion is perceived as an obligation of caring about others' rights and interests. In certain cases, a party is also obliged to care about others' rights and interests, as if they were his/hers, although such an obligation is not universal[12]. The party violating the obligation to compassion, may be sanctioned to compensate damages[13] just like the state is imposed an obligation of compensation of damages in case of violation of the positive obligation of the state.

Difference between an obligation to compassion and the positive obligation of the state is evident and distinct. Unlike positive obligation of the state, it is impossible to identify the content of

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10 *Schlagel O.,* Positive and negative obligations in Georgia: "only semantics and nothing else?" Impact of human rights standards on Georgian legislation and practice (collection of articles), Tbilisi, 2015, 213 (in Georgian).

11 *Gotsiridze E.,* Commentaries to the Constitution of Georgia, Chapter Two, Georgian Citizenship, Fundamental Human Right and Freedoms, Tbilisi, 2013, Article 14, 55 (in Georgian).

12 *Batlidze G.,* Responsibility caused by guilty acts in delict law, Georgia Business Law Edition, Tbilisi, 2015, IV, 18 (in Georgian).

13 *Chanturia L.,* Commentary to the Civil Law, Book III, Law of Obligations, General Part, Tbilisi, 2001, Article 317, 35 (in Georgian).

the obligation to compassion at the outset of relations between the parties. It may become mor explicit only in the process of such a relationship[14]. It shall be said that the positive obligation of the state is defined in advance and is linked to specific human rights, i.e. it is always established for a state what goal it shall achieve. For instance, the state shall protect individuals from a third-party interference with his/her rights and the state shall also pay relevant compensation if a person the person lost freedom due to illegal acts of the state[15].

The state, for purposes of fulfilling positive obligations, is granted an authority of discharging certain public law related actions. For instance, an administrative body can apply various public-administrative forms like issuance of individual and normative administrative-legal acts, real action; it also may perform criminal law actions: investigation of crimes, inditing individuals, etc. There are other legal actions, like, for instance, dispute resolution by the court.

The state may have an obligation of compensating damages due to violation of its positive obligation; Namely, for non-fulfillment of the obligation to investigate[16]:

Case materials demonstrate that a landmine exploded in hands of a child, as a result of which the child has been severely injured; in fact, injuries would be life-threatening. The state started an investigation under the premise of intentionally inflicting minor bodily injuries despite rather severe injuries; investigation has never been completed despite statute of limitation, i.e. deadlines, in the limits of which an individual could have been held responsible. As a result of investigation that lasted years, no person responsible for compensation of damages – offender – has been identified. The victim requested compensation of non-property (intangible) damages based on the positive obligation of the state.

Civil and Appellate Courts rejected a claim in the part of property loss compensation since health injuries were not related to non-fulfillment of state obligations; the state could not avoid such damages by preventive measures.

On the other hand, the Courts admitted claims concerning non-property damages compensation. According to Courts, the state has an obligation to identify a person, responsible for compensation of incurred damages; however, in this case that had never been done.

In addition, despite risks to life, the investigation was commenced under the article of minor injuries. It is one thing to avoid factors leading to losses, and another thing is the positive obligation of the state to conduct the effective investigation into the case. According to the Court, based on existing bodily injuries, conducting investigation for many years where reasonable as well as maximally allowable deadline prescribed by the Criminal Procedures Code of Georgia to hold an offender accountable, has expired (under both – current and abolished provisions)[17]; the state created an

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14 Ibid, 34.

15 *Gotsiridze E.,* Commentaries tot eh Constitution of Georgia, Chapter Two, Georgian Citizenship, Fundamental Rights and Freedoms, Tbilisi, 2013, Article 14, 58-59 (in Georgian).

16 Case №BS-252-250(K-17), Ruling of the Administrative Chamber of the Supreme Court of Georgia from May 25, 2017.

17 Investigation shall be conducted within reasonable timeframes, but it should not exceed the statute of limitation established by the Criminal Code of Georgia. Article 103, Criminal Procedure Code of Georgia, LHG, 31, 03/11/2009.

impression (for the victim) that the law is not applied fairly and adequately to him/her; also, the state created a feeling of hopelessness and frustration, and that represents violation of the principle of human dignity. Therefore, an obligation of compensating for moral damages was imposed on the state for failure to fulfill its positive obligation to conduct effective investigation[18].

The state appealed the Decision to the Supreme Court of Georgia and requested abolishment of the Decision of the Court of Appeals based on the argument that Administrative Chamber of the Court exceeded limits of its competence and exercised oversight over investigation. Also, the state indicated that damages shall be compensated by the infringing party (identity of whom was not established despite expiration of all legal deadlines).

Administrative Chamber of the Supreme Court of Georgia did not admit/rejected the complaint, although explained that "the state shall effectively respond to facts of threats to health or life as the state is not only prohibited from violating rights (negative obligation), but also it shall provide for effective protection mechanisms in case such rights are violated, and to fulfill its positive obligations"[19]. Besides, it shall be noted that "the Administrative Court reviewing the case may assess an issue of relevant fulfillment of the positive obligation by the state[20].

In the process of discharging the positive obligation of the state in a form of public law actions, the state shall also refrain from violation[21] of human rights and from unjustly interference with such without relevant grounds for doing so[22]. This is called a negative obligation of the state. This obligation concerns cases where the state is a potential violator as its actions naturally contain threats of breaching this or that public good and it prohibits the state to unjustly interfere/intervene with protected areas of right of private subjects[23].

Relationship where the state via its servants fulfills obligations imposed on it towards the private person, is called an external relationship (Außenverhältnis)[24].

Negative obligation of the state is identical to negative obligation of the private person (subject). Public law indicates at that, according to which "imperative provisions of civil laws protect others from abuse of rights. Actions, which contradict such provisions, shall be considered as null and void, except cases where the law directly prescribes otherwise"[25]. In addition, "parties to legal relations shall duly exercise their rights and obligations"[26]. Both provisions serve the purpose of protecting others' rights by establishing restrictions and obligations". [27]

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18 Case №3B/604-16, Decision of the Administrative Chamber of the Tbilisi Court of Appeals from September 27, 2016.

19 Case №BS-252-250(k-17), Decision of the Supreme Court of Georgia from May 25, 2017.

20 Ibid.

21 *Korkelia K.,* Towards integration of European Standards: European Convention of Human Rights and Experience of Georgia, Tbilisi, 2007, 14 (in Georgian).

22 *Gotsiridze E.,* Commnetaries to the Constitution of Georgia, Chapter Two, Georgian Citizenship, Fundamental Human Rights and Freedoms, Tbilisi, 2013, Article 14, 55 (in Georgian).

23 *Demetrashvili A., Gogiashvili G.,* Constitutional Law, Tbilisi, 2016, 99-100 (in Georgian).

24 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 16, 715.

25 Article 10.3 Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997.

26 Ibid, Article 8.3.

27 *Chanturia L.,* Commentary to the Civil Code of Georgia, Book I, Tbilisi, 2017, Artilce 10, field 20, 59 (in Georgian).

Considering the above, Article 997 of the Civil Code of Georgia envisages the result, which is received when an employer, by means of an employee, i.e. in discharging his/her official capacity, violates an obligation of compassion (positive obligation) as well as a negative obligation – negative obligation of the private law subject. Similarly, Article 1005 of the Civil Code of Georgia envisages the outcome which takes place when an employer, via the employee discharging his/her official functions, violates positive or negative obligation of the state. Thus, Article 1005 of the Civil Code of Georgia, unlike Article 997, is applied only when the employer, notwithstanding the area of law of the subject, violates positive or negative obligations of the state. Therefore, an issue arose: how to establish existence of a positive or a negative obligation in case of incurring damages when discharging official functions by the employee?

The best method of establishing existence of either positive or negative obligation of the state in case of incurring damages by an employee discharging official functions may be a theory of special law (modified subject), number of proponents of which increases steadily[28]. According to the theory, based on the provision of the law, a right or an obligation belongs to the area of public law if it is assigned or imposed only to one single subject[29]. For instance, the right to issue a construction permit or an obligation to oversee construction activities. Contrary to that, the right or the obligation belongs to the area of private law if it is assigned or imposed on all, i.e. any individual. Therefore, a party to the private law relations may be any person indeed[30]. There are contradicting opinions regarding appropriation rights (cases when the state has a right to demand registration of a claim on property which is not in private ownership). According to one opinion, the right to appropriate property represents the right under the public law, since only the state is authorized to request registration of the right to property, which is not in private ownership; and, according to the opposing opinion, it belongs to the area of private law since in case of such a claim the state represents not the one discharging authorities, but a property owner and is a subject to civil circulation/transactions[31]. One aspect requires attention in deciding this matter: according to explanations offered by the special theory, a provision is considered as a public law if it – in any form of its application – assigns a right or imposes an obligation only to a person with public authorities[32]. The right to appropriation – if the prerequisite of its use is removed (movable property is not in private ownership) and if we leave it in a form of a pure right – then we will have a situation, where the state may register the right to claim and any person may have that right; because of that the right of the state to appropriate shall represent a right under the private law. Therefore, the above-mentioned contradicting opinions come to consensus. Thus, in case of correct application of the special theory, i.e. when legal nature of pure (without consideration of factual composition of the provision) right or an obligation, then the above-mentioned theory gives an opportunity of receiving an outcome even in most complicated cases.

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28 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 14, 47.

29 *Ipsen J.,* Allgemeines Verwaltungsrecht, 10. Aufl., Sinzheim, 2017, Rn. 29, 8.

30 *Chanturia L.,* Commentaries to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 8, field 3, 48 (in Georgian).

31 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 13, 47.

32 *Detterbeck S.,* Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht, 12. Aufl., München, 2014, Rn. 27, 12.

Based on the theory of special law, an obligation which may be imposed on one person and which serves the purpose of protecting rights of a person from third party interferences, shall be considered as a positive obligation of the state. For instance, obligations like investigation of a crime, construction activities' oversight and other similar obligations.

As mentioned, negative obligation of the state is identical to that of the private law subject since both imply that an acting subject shall not violate rights of other persons in carrying out such an action. The only difference between the public and private law subject's negative obligations lays in legal nature of an action causing a violation. Negative obligation of the state may be violated only by public law actions, and the negative obligation of the subject to private law – by actions under the private law. Therefore, if a delict is caused by the action under the public law, then violated is the negative obligation of the state, and in case of actions under the private law – the negative obligation of the subject to private law is violated. In order to establish legal nature of an action we can apply the theory of special law and define whether any person or only one (for purposes of fulfilling positive obligation of the state) had a right to carry out an action leading to violation since for achieving other goals fulfillment of public law actions is inadmissible and impossible.

Considering all said above, Article 1005 of the Civil Code of Georgia shall be applied in case of a delict where a positive or negative obligation of the state is violated due to discharge of official functions; that predetermines public law nature of the delict. In this regard, the latter Article differs from responsibilities envisaged by the Article 997 of the Civil Code of Georgia and, moreover, it is the only delict in entire private law area, which is directly linked to compensation of damages caused by violation of the positive or negative obligation of the state. Thus, it is questionable whether such different issues and public law delicts shall be regulated by the private law.

The causing reason is a condition that, as known, Civil Code of Georgia was designed based on the German Civil Law, which, in its turn, regulates an obligation of the state to compensate for damages incurred by the state due illegal actions. Mentioned obligation, according to the Article 839 of the German Civil Code, unlike Georgian Civil Code, is assigned to the public servant and not the state. There are two reasons for that: one – "theory of mandate" was used as a basis for the obligation to compensate damages. The theory implies that the state transfers the mandate to its servant to carry out legal actions only. Illegal action goes beyond the limits of the mandate and that is why the actions leading to damages are imposed on a servant and the state[33]. Therefore, actions causing a delict represented private law and not public law actions; thus public law may not even regulate it; secondly – due to territorial arrangement, federal and lands' competences of Germany, it was impossible to regulate this issue by the federal law[34]. In case of Georgia, such obstacles do not exist.

Public law delict features differ from the private law delict. In case of the latter, as of the day of the Civil Code adoption it is recognized that before the private delict there is no any legal relation between the person incurring damage and a victim[35]. On the contrary, in case of public law delict,

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33 *Ahrens M.,* Staatshaftungsrecht, 2. Aufl., Köln, 2013, Rn. 8, 5.

34 *Dörr C.,* BGB Staatshaftung, Grosskommentar, Altustried-Krugzell, 2019, Rn. 7, 12.

35 *Chikvashvili Sh.,* Commentary to the Civil Code of Georgi, Book IV, Law of Obligations, private part, Vol. II, Tbilisi, 2001, Article 992, 379 (in Georgian).

even prior to damages, there is always legal relation between the person incurring damage and a victim it may be called a pre-delict legal relation. Existence of a pre-delict legal relation is preconditioned by legal regulations, which defines relations between the state and a private subject in an abstract and general manner[36]. Without such general relations, it is impossible for the state to exist and in the limits of the abstract and general relations violation of obligations (positive or negative) towards the private subject is included into the construct of claiming compensation of damages from the state; it is prescribed by the provision of the Article 1005.1 of the Civil Code of Georgia, which reads: "…violates… obligation towards another person…". Therefore, unlike private law delict, there is always a pre-delict legal relation in case of a public law delict.

Pre-delict legal relations between the person incurring damages and a victim may exist in a form of administrative act, real act or virtually.

Example I: Individual Administrative act originates a pre-delict legal relation, when an administrative body deems a construction performed by an individual, as illegal due to which it may take a decision on fines/penalties and dismantling of the building; based on such decision an "illegal" site may be destroyed/dismantled. Later is becomes evident that a decision on dismantling contradicted provisions of the Georgian law and, therefore, an individual incurred loss due to illegal actions of an administrative body. As we can see from an example, before the delict, i.e. before the illegal actions leading to losses, the specific legal relation existed between an individual incurring the damage and a victim of such damage a in a form of an administrative act.

Example II: During technical inspection of a vehicle and administrative body failed to identify its faults and was considered that a vehicle passed technical inspection/evaluation. In several days after inspection, the vehicle creates an accident due to it faults; as a result of an accident the car damages/breaks as well as a pedestrian. Obligation of compensating damages originates only in case of a pedestrian and not the owner of the vehicle, since due to legal relations between the state and a private subject, i.e. virtual legal relations, the state shall have a safety obligation towards participants of traffic and not towards insuring financial interests of a private subject[37].

We shall specifically and separately mention that general relationship between the state and a private subject, which at the same time serves the state as in establishment, as well as in restriction[38], may not fall under relations listed in the Article 1 of the Civil Code of Georgia. Pursuant to Article 1 of the Civil Code of Georgia "this Code regulates private property, family and personal relations based on equality of individuals".

Private nature of relations is determined by the private autonomy of a subject, i.e. by "freedom of expression of will and willingness to establish relations with other persons"[39]. Therefore, general relations between the state and the private subject may not bear private character since – as said above

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36 *Erbguth W., Guckelberger A.,* Allgemeines Verwaltungsrecht, 9. Aufl., Baden-Baden, 2018, Rn. 6, 143.

37 *Toradze D.,* Obligation towards other persons in case of discharge of public authorities (based on examples of the German and Georgian Administrative Law), Tbilisi, 2018, 15 (in Georgian).

38 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 8, 45.

39 *Chanturia L.,* Commentary to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 1, field 5, 2 (in Georgian).

– it serves the purpose of establishment and restriction of the state and not assignment of private autonomy to it. Thus, pursuant to the Civil Code of Georgia, regulating relations of private nature, imposition of an obligation to compensate damages does not fit limits established by the same Code.

5. Conclusion

This article reviewed similarities, differences between public and private law delicts as well as results deriving from such differences.

For purposes of demonstrating differences, we compared delicts under Article 997 and 1005 of the Civil Code of Georgia, since both concern compensation of damages incurred in the limits of labour relations.

Both – private and public delicts – have one thing in common: they concern damages caused by violation of law.

Public law delict differs from the private law delict in following legal aspects:

1. An issue of pre-delict legal relations between the parties. In case of the public delict, legal relations between the person incurring damage and a victim always exist prior to incurrence of loss (pre-delict legal relations). This derives from construct of requesting compensation of damages from state for the losses incurred. According to it the claim originates only when an obligation "towards another person" is violated. Pre-delict legal relations may be expressed in a form of administrative act, real act or virtually.
2. The nature of delict relations. In case of public delict, positive or negative obligations of the state are directly violated, and that gives it public nature. During public delict private relations exist, which derives from Article 1 of the Civil Code of Georgia.
3. Legal nature of performed official functions. In case of public law delict, labour relations between an employer and an employee and deriving official capacity thereto, which is a precondition of compensation of loss as prescribed by Article 1005 of the Civil Code, has public law features/nature. It is regulated by the public legislation.
4. Legal nature of actions leading to damages/losses. In case of the public law delict, actions, or forms of actions of an incurring damages administrative body, fall under the public law and rules for their implementation are provided by the public law; at the same time, their application serves the only purpose – fulfillment of the positive obligation of the state;

Based on listed aspects, positive obligations of the state and actions thereto (external relations), labour relations between the state and the public servant as well as his/her official responsibilities (internal relations), pre-delict legal relations – all these issues are regulated by the public law; because of that damages caused by illegal actions of the state, i.e. delict, is public in nature.

Based on said above, since the delict is public in nature, compensation of loss caused by illegal actions of the state shall be regulated bot by private, but by public legislation.

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5. *Chanturia L.,* Commentary to the Civil Code of Georgia, Book I, Tbilisi, 2017, Artilce 10, field 20, 59, Article 8, field 3, 48, Article 1, field 5, 2 (in Georgian).
6. *Chanturia L.,* Commentary to the Civil Law, Book III, Law of Obligations, General Part, Tbilisi, 2001, Article 317, 35, 34 (in Georgian).
7. *Chikvashvili Sh.,* Commentary to the Civil Code of Georgi, Book IV, Law of Obligations, private part, Vol. II, Tbilisi, 2001, Article 992, 379 (in Georgian).
8. *Demetrashvili A., Gogiashvili G.,* Constitutional Law, Tbilisi, 2016, 99-100 (in Georgian).
9. *Dörr C.,* BGB Staatshaftung, Grosskommentar, Altustried-Krugzell, 2019, Rn. 7, 12.
10. *Detterbeck S.*, Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht, 12. Aufl., München, 2014, Rn. 1099, 436, Rn. 27, 12.
11. *Erbguth W., Guckelberger A.,* Allgemeines Verwaltungsrecht, 9. Aufl., Baden-Baden, 2018, Rn. 6, 143.
12. *Gotsiridze E.* Commentaries to the Constitution of Georgia, Chapter Two, Georgian Citizenship, Fundamental Rights and Freedoms, Tbilisi, 2013, Article 14, 55, 58-59 (in Georgian).
13. *Ipsen J.,* Allgemeines Verwaltungsrecht, 10. Aufl., Sinzheim, 2017, Rn. 1238, 325, Rn. 29, 8.
14. *Korkelia K.,* Towards integration of European Standards: European Convention of Human Rights and Experience of Georgia, Tbilisi, 2007, 14 (in Georgian).
15. *Maurer H., Waldhoff C.*, Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 3, 709, Rn. 1, 708, Rn. 7, 710, Rn. 16, 715, Rn. 14, 47, Rn. 13, 47, Rn. 8, 45.
16. *Muthorst O.,* Fundamentals of Law, *Maisuradze D. (Trans.)*, Tbilisi, 2019, f. n. 71, 292 (in Georgian).
17. *Schlagel O.,* Positive and negative obligations in Georgia: "Only semantics and nothing else?" Impact of human rights standards on Georgian legislation and practice (collection of articles), Tbilisi, 2015, 213 (in Georgian).
18. *Toradze D.,* Obligation towards other persons in case of discharge of public authorities (based on examples of the German and Georgian Administrative Law), Tbilisi, 2018, 15 (in Georgian).
19. Case №BS-252-250(K-17), Ruling of the Administrative Chamber of the Supreme Court of Georgia from May 25, 2017.
20. Case №BS-233-224(G-10), Ruling of the Administrative Chamber of the Supreme Court of Georgia from April 8, 2010.
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Tamar Gvaramadze*

The Ombudsman Institution – as an Alternative Grievance Mechanism in Relation to Matters of Public Administration

In a democracy, human rights are guaranteed by the constitution of a state and protected by the judiciary. At the same time, alternative and/or quasi-judicial systems have an important role in the protection of human rights. The ombudsman institution is considered to be one of such alternative mechanisms in public law.

This article is the first attempt in the Georgian scientific literature to discuss, in the context of the practices of other countries and the Public Defender of Georgia, the characteristics of the mandate of the ombudsman as an alternative institution for the restoration of rights and its authority to examine the legality of the decisions made by the public institutions in relation to matters of public administration.

***Keywords**: Public Defender of Georgia, ombudsman, public administration, alternative rights protection mechanism, public institutions, oversight of the protection of rights.*

1. Introduction

A legitimate public interest in the lawful and effective implementation of public administration has been growing in Georgia since the 90s of the 20th century when Georgia gained independence and bureaucratic mechanisms started to gradually develop in the country. At the same time, a judicial system based on the rule of law and democratic values is even more demanding in terms of transparent, effective and law-abiding public administration.

In a democracy, human rights are guaranteed by the constitution of a state and protected by the judiciary. However, in new democracies, it is vital to have a non- or quasi-judicial system of human rights supervision.[1] The ombudsman institution is considered to be such an alternative mechanism with constitutional legitimacy, independence, easy accessibility, "soft" power and high reputation, which today represents an integral part of the rule of law and democracy and is directly linked to the oversight of public administration in the country.[2]

The ombudsman has been regarded as an alternative mechanism for the protection of human rights in the field of public administration in the documents of international organizations since the 1970s. In the summer of 1977, the Committee of Ministers of the Council of Europe discussed the text

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1 *Manatt Ch., Manatt K.,* The Institution of the Ombudsman in the Former Communist Countries, International Foundation for Election Systems, 2005, 10, <https://ifes.org/sites/default/files/08_08_02_manatt_ulzzibayar_vangansuren.pdf> [28.09.2020].

2 *Batalli B.,* Role of Ombudsman Institution Over the Administration, SSRN Electronic Journal, 10.2139/ssrn.2699061, 235, <https://www.researchgate.net/publication/314539863_Role_of_Ombudsman_Institution_Over_the_Administration> [08.10.2020].

of the first and most important resolution of that time. By adopting the resolution, the Council set out five key principles that shall be observed and taken into account in the relations between administrations and citizens during the exercise of public administration in the member states of the Council of Europe.[3] These five principles addressed the important and fundamental issues that are still of particular importance in the exercise of public administration. In particular, these principles are the right to be heard, access to information, assistance and representation, statement of reasons and indication of remedies.[4] The explanatory note of this important resolution clarifies the importance of granting the persons concerned the right to appeal, but it also states that, given the different models in different countries, the right to appeal implies the protection of the right through traditional mechanisms, be it judicial or administrative appeal, while the non-traditional, alternative mechanisms, such as constitutional court or parliamentary ombudsman, are not implied in this principle.[5]

Restriction of and interference with the field protected by human rights is a characteristic consequence of public administration, considering its development, diversity and complexity. Given this, it is clear that over time, the role of the ombudsman institution as an alternative mechanism for the protection of human rights has been growing significantly.

Interestingly, the problem of objectivity and impartiality of public administrators in the transitional systems, as well as less trust in state institutions and less access to legal aid, is considered to be one of the preconditions for the rapid development of the ombudsman institution in the former Soviet Union countries. Accordingly, a demand for an independent, impartial and easily accessible institution that would have high legitimacy has emerged.[6]

Poland was the first country in the bloc of former Soviet Union countries to establish the ombudsman institution. Later such institutions started to emerge in other countries as well. It is noteworthy that in most of the former Soviet countries, the ombudsman institutions also have the status of the national human rights institution.[7] This status gives the ombudsman an additional function and mandate to promote the rule of law, human rights and democratic development.

In the parliamentary democracies, the ombudsman is seen as a parliamentary oversight mechanism, through which the legislature creates an additional tool for limiting and controlling

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3 Council of Europe, Committee of Ministriters, Final Activity Report, Submitted to the Committee of Ministers, Strasbourg, 3 August, 1977, 12-19, <https://rm.coe.int/native/090000168051651e> [15.10.2020].

4 Resolution (77) 31, On the Protection of the Individual in Relation to the Acts of Administrative Authorities, Council of Europe, Committee of Ministriters, 1977, <https://rm.coe.int/09000016804dec56> [15.10.2020].

5 Council of Europe, Committee of Ministriters, Final activity Report, Submitted to the Committee of Ministers, Strasbourg, 3 August, 1977, 12-19, <https://rm.coe.int/native/090000168051651e> [15.10.2020].

6 *Manatt Ch., Manatt K.,* The Institution of the Ombudsman in the Former Communist Countries, International Foundation for Election Systems, 2005, 17, <https://ifes.org/sites/default/ files/08_08_02_ manatt_ulzzibayar_vangansuren.pdf> [28.09.2020].

7 The status of the National Human Rights Institutions and the core principles for their activities are established by the UN Resolution, adopted 20 December, 1993, see Principles relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly Resolution, #48/134, 20 December, 1993, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ StatusOfNational Institutions. aspx> [20.10.2020].

administrations.[8] Therefore, as already mentioned, such institutions are considered in the scientific literature as an external mechanism overseeing the implementation of public administration.[9]

Because of the above reasoning, given the very high public interest in the lawful, effective and transparent public administration, it is valuable and important to consider and evaluate not only the traditional human rights mechanisms but also alternatives. The Public Defender of Georgia, as an ombudsman institution, is considered to be one of such alternatives in Georgia, which has been existed for only about three decades.

Unlike the administrative justice and administrative grievance mechanisms, this article is the first attempt in the Georgian scientific literature to discuss the characteristics of the ombudsman's mandate, which are related to the authority to examine the legality of the decisions made by the institutions, in the context of the examples of other countries and the Public Defender of Georgia. This is a model outside the justice system that is one of the alternatives and means of protecting human rights concerning matters of public administration.

The status, rules of the establishment and general authority of the Public Defender of Georgia as a constitutional body have been repeatedly discussed in the context of the constitutional law in Georgian scientific literature, although no research can be found in the publicly available Georgian sources about the Public Defender of Georgia as an alternative to the administrative grievance and administrative justice, which increases the scientific value of the present article. At the same time, this research will allow interested researchers to study this issue in-depth in the future, which may be done within the framework of the theme of their thesis.

The article initially presents a general overview of the ombudsman institution, its general characteristics and variety. It also offers a general description of the multi-mandate ombudsman institutions, although it is not the aim of this research to study the issue in-depth in this direction. The first chapter also reviews international standards relating to the ombudsman and presents a general description of the institution of the Public Defender of Georgia.

The next chapter discusses issues related to the oversight of public service delivery considering the practices the Public Defender of Georgia and other countries. The scope of the mandate, the powers relating to the examination of the issue and the forms of response are discussed as well. Certain problematic issues relating to the implementation of the mandate of the Public Defender of Georgia as the ombudsman are also identified. Given the aims and format of the article, the research does not evaluate in depth the results of statistical or empirical observations relating to the practical work of the Public Defender of Georgia, nor does it discuss some specific mandates of the institution, which, as already mentioned, maybe a matter of more in-depth and extensive research. Both general scientific (historical) and special research methods – normative, dogmatic, systemic and comparative-legal methods – are used as a methodological basis for the research.

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8 *Batalli M.*, Role of Ombudsman Institution Over the Administration, SSRN Electronic Journal, 10.2139/ssrn.2699061, 235, <https://www.researchgate.net/publication/314539863_Role_of_Ombudsman_Institution_Over_the_Administration> [10.10.2020].

9 Ibid.

The models of various European countries are discussed by using a comparative law method. Apart from European countries, the example of New Zealand is also interesting. New Zealand is a republic with a governance system based on the Westminster parliamentary democracy model, which was the first country outside Scandinavia to adopt the modern ombudsman institution in 1962. The institution has many years of diverse expertise.[10]

2. Ombudsman – an Important Element of Modern Democracy

2.1. International Standards

The word "Ombudsman" is of Swedish origin and means a representative.[11] Today, there are about 140 ombudsman institutions around the world, and as mentioned in the introduction to this article, they are an integral part of modern democratic system and society. In a state that recognizes the rule of law, in which the government not only creates the law but is itself subject to it, the existence of the ombudsman institution carries special importance.[12] Such an institution is one of the major obstacles to the abuse of power in the states.[13]

Interestingly, ombudsmen have special importance in the former Soviet countries, where in some cases they are more often applied to with a request to review the legality of decisions made by the state agencies than in some Western democracies.[14] A prerequisite for high public confidence in such institutions is usually the observance of principles of transparency, independence and impartiality in their activities.[15]

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10 *Elwood B.,* The Ombudsman and Good Governance, Occasional Paper, International Ombudsman Institute, №74, 2000, 2, <https://www.theioi.org/downloads/1249h/IOI%20Canada_Occasional%20paper%2074_Brian%20Elwood_The%20Ombudsman%20and%20Good%20Governance%20_2000.pdf> [12.09.2020].

11 *Batalli M.*, Role of Ombudsman Institution Over the Administration, SSRN Electronic Journal, 10.2139/ssrn.2699061, 235, <https://www.researchgate.net/publication/314539863_ Role_of_Ombudsman _Institution_Over_the_Administration> [10.10.2020].

12 *Oosting M.,* The Concept and Role of the Ombudsman Throughout the World, Occasional Paper, International Ombudsman Institute, №70, May, 1999, 2, <https://www.theioi.org/downloads/32c8h/IOI%20Canada_Occasional%20paper%2070_Marten%20Oosting_The%20Concept%20and%20Role%20of%20the%20Ombudsman%20Throughout%20the%20World_1999.pdf> [12.09.2020].

13 Ibid.

14 The increasing number of received and resolved complaints by Ombudsman of Slovenia in 1995-2000 was higher than in Ireland. This can be considered as an indicator of the high demand for the activities of these institutions in the emerging democracies and the need for a link between the administrations and the citizen in these countries. See: *Manatt Ch., Manatt K.,* The Institution of the Ombudsman in the Former Communist Countries, International Foundation for Election Systems, 2005, 19, <https://ifes.org/sites/default/files/08_08_02_manatt_ulzzibayar_vangansuren.pdf> [26.09.2020].

15 *Oosting M.,* The Concept and Role of the Ombudsman Throughout the World, Occasional Paper, International Ombudsman Institute, №70, May, 1999, 3, <https://www.theioi.org/downloads/32c8h/IOI%20Canada_Occasional%20paper%2070_Marten%20Oosting_The%20Concept%20and%20Role%20of%20the%20Ombudsman%20Throughout%20the%20World_1999.pdf> [12.09.2020].

Numerous international documents deal with the role and importance of the ombudsman in a democratic society, as well as its creation and characteristics of activities.[16] For this article, several of them are interesting: In 1985, the Committee of Ministers of the Council of Europe adopted the first Recommendation NR (85) 13 on the Institution of the Ombudsman.[17] The Committee of Ministers indicated in its recommendation that considering the complexities of modern administration, it was desirable to supplement the usual procedures of judicial control with additional alternative mechanisms. In particular, the document recommended considering the possibility of appointing the ombudsmen or empowering them in countries that already had such an institution.[18] 35 years later, the Committee of Ministers adopted a new recommendation[19] that replaced the 1985 document. An analysis of the text of the updated recommendation shows how significantly the ombudsman institution had evolved over the 35 years, how its role had grown in a democratic society in terms of protection of human rights and the rule of law. Compared to the previous recommendation, the Council of Ministers covered much more issues in Recommendation CM/Rec(2019)6 and defined the

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16 Various international documents identify activities, principles and peculiarities of ombudsmen. See Recommendations of the Committee of Ministers of the Council of Europe R (85) 13 on the institution of the Ombudsman; R (97)14 on the establishment of independent national institutions for the promotion and protection of human rights; R (2000)10 on codes of conduct for public officials, CM/Rec(2007)7 on good administration, CM/Rec(2014)7 on the protection of whistle-blowers and CM/Rec(2016)3 on human rights and business <https://www.coe.int/en/web/cm/adopted-texts> [21.10.2020]; Recommendations of the Parliamentary Assembly of the Council of Europe 757 (1975) and 1615 (2003) and in particular its Resolution 1959 (2013), <http://semantic-pace.net/?search=KjoqfGNhdGVnb3J5X3N0cl9lbjoiQWRvcHRlZCB0ZXh0Ig==&lang=en> [21.10.2020]; as well as Recommendations 61(1999), 159 (2004), 309(2011) and Resolution 327 (2011) of the Congress of Local and Regional Authorities of the Council of Europe, <https://www.coe.int/en/web/congress/adopted-texts-by-type-of-documents> [21.10.2020]; ECRI General Policy Recommendation No. 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.2> [21.10.2020]; United Nations General Assembly Resolution 48/134 on the principles relating to the status of national institutions for the promotion and protection of human rights ("the Paris Principles") of 20 December 1993, Resolution 69/168 of 18 December 2014 and Resolution 72/186 of 19 December 2017 on the role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, Resolution 72/181 of 19 December 2017 on National institutions for the promotion and protection of human rights, the Optional Protocol to the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 18 December 2002, the Convention on the Rights of Persons with Disabilities adopted by the General Assembly on 13 December 2006, <https://www.un.org/en/sections/general/documents/> [21.10.2020].

17 Recommendation of the Committee of Ministers to Member States on the Institution of the Ombudsman, Adopted by the Committee of Ministers, 23 September, 1985, at the 388th meeting of the Ministers' Deputies, (Recommendation replaced by CM/Rec (2019) 6), <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680506bee> [17.10.2020].

18 Ibid.

19 Recommendation CM/Rec(2019)6 of the Committee of Ministers to Member States on the Development of the Ombudsman institution, Adopted by the Committee of Ministers, 16 October, 2019 at the 1357th meeting of the Ministers' Deputies, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168098392f> [17.10.2020].

important principles that should serve as the basis for the activities of such institutions, namely: 1) independence, 2) impartiality, objectivity and fairness; 3) high moral authority; 4) comprehensive mandate; 5) accessibility 6) effectiveness.[20] The main message of the Recommendation of the Council of Europe to its member states was to support the ombudsmen and their work by adhering to the above principles.

Obviously, during the 35 years, the Council of Europe had adopted a number of other important documents that directly addressed the role of the ombudsman and the promotion of their work. For example, Resolution N1959 of the Parliamentary Assembly of the Council of Europe (2013) on the strengthening of the institution of ombudsman in Europe,[21] which reiterates the need of establishing an institution based on a constitutional or other act of high legal hierarchy, as well as the need for ensuring its independence and strong powers.

The recommendations made over the years by the European Commission for Democracy through Law (Venice Commission) relating to the ombudsman institution are also particularly important.[22] The most important of these numerous documents is the Principles on the Protection and Promotion of the Ombudsman Institution (Venice Principles).[23] The Venice Commission emphasizes in this document that the ombudsman is an important element in a state based on democracy, the rule of law, respect for human rights and fundamental freedoms and good administration.[24] The Venice Commission also points out that the ombudsman is an institution taking action independently against maladministration and alleged violations of human rights and fundamental freedoms and an addition to the right of access to justice through the courts.[25]

It is noteworthy that in general the competence and mandate of the ombudsman is linked to the history of the establishment and further development of this institution, although it is important to understand that the modern democratic states not only create but also promote the existence of such institutions since an objective and critical assessment of public administration by independent institutions helps to increase public confidence towards bureaucracy and public authorities.[26]

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20 Ibid.

21 Resolution 1959 (2013), Strengthening the Institution of Ombudsman in Europe, Adopted by Parliamentary Assembly, 4 October, 2013, <https://pace.coe.int/en/files/20232/html> [17.10.2020].

22 See detailed list of the recommendations and conclusions adopted by the European Commission for Democracy through Law since 1991 regarding the ombudsman institutions, <https://www.venice.coe.int/webforms/documents/?topic=24&year=all> [17.10.2020].

23 CDL-AD(2019)005-e, Principles on the Protection and Promotion of the Ombudsman Institution (The Venice Principles), Adopted by the Venice Commission at its 118th Plenary Session, Venice, 15-16 March, 2019, <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e> [17.10.2020].

24 Ibid.

25 Ibid.

26 *Jamieson O.C. R.,* Ombudsman Institutions Around the World: Analysis and Comparison of a Plurality and Practice, International Ombudsman Institute, №59, January, 1997, 2, <https://www.theioi.org/downloads/cbhdl/ioi-canada_occasional-paper-59_roberta-jamieson_om-institutions-around-the-world-analysis-and-comparision_1997-1.pdf> [26.09.2020].

2.2. Development of the Ombudsman Institution and its Variety

The creation of the ombudsman institution in the literature is linked to the idea, according to which, the transfer of power by people to state institutions in democratic systems always creates the danger of abuse of power, and one of the protective mechanisms against the above is considered to be the ombudsman.[27] The above became the basis for the establishment of this institution in the Scandinavian countries and later it spread throughout the world, including New Zealand in 1962.[28] The development of this institution continued in Asia in the 80s of the last century and later in Latin America in the 90s, as well as on the African continent. The development of the ombudsman institution in Central and Eastern European countries is related to the 90s.[29]

According to the periods of foundation, the researchers differentiate between two categories of ombudsmen. Initially, the Scandinavian model was established, which was considered to be an institution overseeing public administration carried out by public institutions, the so-called classic ombudsman. Later, after World War II, new institutions were created with additional powers to respond to the historical context and human rights challenges, such as the Spanish model, in which the ombudsman was given the right to apply to the court on behalf of people relating the constitutionality of the regulations established by the governing bodies, etc.[30]

Due to a number of international standards and broad discretion of states, ombudsman institutions differ not only according to the periods of their creation. For example, researches differentiate between ombudsman institutions that function in old, traditional democracies and the ombudsman institutions that function in young democracies; institutions that exist in economically developed countries and those operating in countries with weak economies.[31]

The level of democratic development, economic strength and stability of the countries affect the activities of the ombudsman and significantly differentiate the challenges that such institutions have to overcome in countries with different systems. The frequency and nature of human rights abuses in developed and strong economies, as well as the implementation of public administration and the

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27 *Elwood B.,* The Classical Ombudsman – an Effective Reviewer of Administrative Decisions by Government Agencies – A New Zeland Perspective, International Ombudsman Institute, #76, 2001, 2, <https://www.theioi.org/downloads/72sah/IOI%20Canada_Occasional%20paper%2076_Brian%20Elwood_The%20Classical%20Ombudsman%20-%20An%20Effective%20Reviewer%20of%20Administrative%20Decisions%20By%20Government%20Agencies%20-%20A%20New%20Zealand%20Perspective_2001.pdf > [13.09.2020].

28 Ibid.

29 The Role of Ombudsman Institutions in Open Government, OECD Working Paper on Public Governance, No. 29, 2018, 6, <http://www.oecd.org/gov/the-role-of-ombudsman-institutions-in-open-government.htm> [07.10.2020].

30 *Abedin N.*, Conceptual and Functional Diversity of the Ombudsman Institution: A Classification, Administration and Society, №43 (8), SAGE Publications, 2011, 899-903, <http://aas.sagepub.com> [11.10.2020].

31 *Oosting M.*, The Concept and Role of the Ombudsman Throughout the World, Occasional Paper, International Ombudsman Institute, №70, May, 1999, 3, <https://www.theioi.org/downloads/32c8h/IOI%20Canada_Occasional%20paper%2070_Marten%20Oosting_The%20Concept%20and%20Role%20of%20the%20Ombudsman%20Throughout%20the%20World_1999.pdf> [12.09.2020].

effectiveness of administrations, differ significantly from those in developing countries.[32] Such a different reality also changes the environment of the ombudsman's activities and researchers consider different types of ombudsman institutions according to the above as well.[33]

The ombudsman institutions also differ from each other according to their legal regulation, organization, functions, procedures and enforcement mechanisms. The ombudsman may have a fairly broad mandate and functions in many areas or may oversee the exercise of public authority only in one area. In some countries, the ombudsman has quite powerful mechanisms when examining a case, although the implementation of the ombudsman's recommendations may be quite weak. Some systems have ombudsman with stronger enforcement and response mechanisms. As relatively young democracies, Central and Eastern Europe have stronger ombudsman institutions, which also serve as national human rights institutions, giving them even more leverage to oversee public administration.[34]

In literature, models of the ombudsman are distinguished from each other according to the forms of response. For example, the Swedish and Finnish ombudsman models are characterized by punitive-disciplinary functions, while the Danish and Norwegian models have quasi-judicial functions. In the first case, the ombudsman may apply to the court with charges against officials or demand criminal persecution, while in the second case, the ombudsman aims to oversee and control the lawfulness of administration.[35]

Scholars distinguish between the public and private sector ombudsman. The latter may function within the framework of certain directions of the private sector. There are also executive and parliamentary ombudsman. The main difference between them is the source of legitimacy and degree of independence. Typically, an executive ombudsman is appointed by a representative of the executive branch and he/she does not have the high legitimacy granted by the legislature to oversee the administration.[36] Only the parliamentary ombudsman and his/her oversight function are discussed in the present research.

As already mentioned, the researchers link the classical model of ombudsman to the Swedish and Finnish models, where the ombudsman oversees public institutions as well as the administration of the courts and the protection of procedural rights, while the Danish model only assesses the legitimacy of public administration and does not cover judicial issues.[37]

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32 Ibid.

33 Ibid, 3-6.

34 *Batalli M.*, Role of Ombudsman Institution Over the Administration, SSRN Electronic Journal, 10.2139/ssrn.2699061, 236, <https://www.researchgate.net/publication/314539863_Role_of_Ombudsman_Institution_Over_the_Administration> [10.10.2020].

35 *Langen S. M.*, The Global Ombudsman, Presented at the 12th Winelands Conference on Public Leadership for Added Citizen Value, Stellenbosch, South Africa, 15-19 March, 2010, 7, <https://ssrn.com/abstract=2926147> [07.10.2020].

36 *Abedin N.*, Conceptual and Functional Diversity of the Ombudsman Institution: A Classification, Administration and Society, №43(8), SAGE Publications, 2011, 918-922, <http://aas.sagepub.com> [11.10.2020].

37 *Manatt Ch., Manatt K.,* The Institution of the Ombudsman in the Former Communist Countries, International Foundation for Election Systems, 2005, 6-7, <https://ifes.org/sites/default/files/08_08_02_manatt_ulzzibayar_vangansuren.pdf> [26.09.2020].

There is also the so-called French model -Francophone (also common in some countries in Africa and Asia), in which the ombudsman institution acts as a mediator between public administration and citizens and helps them solve problems.[38]

In some countries, ombudsmen function at different levels according to the territorial arrangement of the country, and in certain cases, their activities are of a specialized nature.[39]

Thus, in the modern world, the word "ombudsman" has a much broader meaning than the one it had when it was first created and is used to denote institutions with different functions and purposes around the world.

According to the study of the International Organization for Economic Co-operation and Development (OECD), the practices of 94 countries studied by them shows that in most cases (96%) ombudsmen examine the legitimacy of decisions made by public authorities and administrative agencies, although the same institutions have special, additional mandates in the direction of child's rights, equality mechanism, oversight of the prohibition of torture, control of access to information, protection of the rights of whistleblowers, etc.[40] They may also act as a special commissioner.

It is noteworthy that in the direction of public governance and administration, the role of the ombudsman, as a support institution as well as one of the addressees, is being more and more actively considered in the process of establishment of open government and open state, which includes the enhancement of the transparency of its activities, the degree of its accountability and the promotion of stakeholder participation in its activities.[41]

It should also be noted that despite meeting the international requirements of the parliamentary ombudsman, such institutions are not referred to as ombudsmen in some systems. For example, they are called mediators, people's representatives, parliamentary or human rights commissioners, chancellors of justice, etc.[42] The case of Georgia is an example of this. The institution that meets the

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38 *Diaw M. Ch.,* The Ombudsman Story: A Case Study in Public Oversight, Natural Justice and State Transformation, 2007, 13, <https://www.researchgate.net/publication/312341186_The_Ombudsman_story_A_case_study_in_public_oversight_natural_justice_and_State_transformation> [11.10.2020].

39 *Manatt Ch., Manatt K.,* The Institution of the Ombudsman in the Former Communist Countries, International Foundation for Election Systems, 2005, 8, <https://ifes.org/sites/default/files/08_08_02_manatt_ulzzibayar_vangansuren.pdf> [26.09.2020].

40 The Role of Ombudsman Institutions in Open Government, OECD Working Paper on Public Governance №29, 2018, 7-9, <http://www.oecd.org/gov/the-role-of-ombudsman-institutions-in-open-government.htm> [07.10.2020], Additionally see, *Elwood B.,* The Classical Ombudsman – an Effective Reviewer of Administrative Decisions by Government Agencies – A New Zeland Perspective, International Ombudsman Institute, #76, 2001, 12, <https://www.theioi.org/downloads/72sah/IOI%20Canada_Occasional%20paper%2076_Brian%20Elwood_The%20Classical%20Ombudsman%20-%20An%20Effective%20Reviewer%20of%20Administrative%20Decisions%20By%20Government%20Agencies%20-%20A%20New%20Zealand%20Perspective_2001.pdf > [13.09.2020].

41 The Role of Ombudsman Institutions in Open Government, OECD Working Paper on Public Governance No. 29, 2018, 7-9, <http://www.oecd.org/gov/the-role-of-ombudsman-institutions-in-open-government.htm> [07.10.2020].

42 *Jamieson O.C. R.,* Ombudsman Institutions Around the World: Analysis and Comparison of a Plurality and Practice, International Ombudsman Institute, №59, January, 1997, 5, <https://www.theioi.org/downloads/

international standards established for the ombudsman is the Public Defender of Georgia, the name of which does not mention the ombudsman at all. At the same time, there is only a business ombudsman in Georgia[43] and according to the classification discussed in the article, he/she may belong to the category of executive ombudsman and not to the Parliamentary control mechanism.

It should also be noted that there are no legal restrictions on the use of the term "ombudsman" in Georgia, unlike the United Kingdom and Ireland, which set out certain criteria to be met by an institution to be referred to as an ombudsman. Relevant procedures are also in place in New Zealand, where prior written consent is required from the New Zealand ombudsman relating to the name of a newly established institution.[44]

2.3. Public Defender of Georgia

The modern human rights mechanisms of Georgia, the embryo of which can be considered in the context of the Constitution of February 21, 1921,[45] are diverse, but given that the purpose of the article is to discuss the ombudsman as an alternative mechanism for overseeing the legality of public administration, these various issues are not discussed in depth.

In 1992, the Presidium of the State Council of the Republic of Georgia adopted a resolution on the establishment of the State Committee for Interethnic Relations and Human Rights of the Republic of Georgia. Later its name was changed to the Committee for Human Rights and Interethnic Relations of the Republic of Georgia. Under the legislation of the Republic, the Committee, within its competence, had been making decisions and developing regulations, instructions, methodological recommendations and other normative acts, the implementation of which was mandatory for the ministries, committees, departments, agencies, as well as enterprises and organizations, regardless of their legal-organizational form. The currently operating Georgian ombudsman institution was established based on this Committee.[46]

The Public Defender of Georgia is a constitutional institution that oversees the protection of human rights and freedoms on the territory of Georgia. The Public Defender of Georgia is independent in his/her activities and does not belong to any branch of government.[47]

On December 12, 1996, the Organic Law of Georgia on the Public Defender was adopted, which defines the powers and mandate of the Public Defender.[48]

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cbhdl/ioi-canada_occasional-paper-59_roberta-jamieson_om-institutions-around-the-world-analysis-and-comparision_1997-1.pdf> [26.09.2020].

43 Law of Georgia, "On Business Ombudsman of Georgia", Website of LEPL Legislative Herald of Georgia, 28.05.2015.

44 *Gottehrer M., Hostina M*., Essential Characteristics of a Classical Ombudsman, <https://www.usombudsman.org/essential-characteristics-of-a-classical-ombudsman/> [21.10.2020].

45 Constitution of Georgia, adopted by the Constituent Assembly of Georgia, 21 February, 1921.

46 *Jibghashvili Z.,* Ombudsman – Legal-Institutional Guarantor of Human Rights Protection, Journal: Almanac №6 Human Rights Law (I), *Sesiashvili Ir. (ed.),* Georgian Young Lawyers Association, Tbilisi, 1998.

47 Constitution of Georgia, Article 35, Departments of the Parliament of Georgia, 31-33, 24/08/1995.

48 Organic Law of Georgia "On the Public Defender of Georgia", Departments of the Parliament of Georgia, 13, 07.06.1996.

According to the systemic analysis of the law of Georgia on the constitutional norm and the organic law, the Public Defender of Georgia can be assessed as an ombudsman institution acting following the standards set by the Council of Europe and the Venice Commission. However, the analysis also shows that the Public Defender of Georgia does not only has the status of an alternative mechanism overseeing public administration but is also an example of a multifaceted institution. In particular, the Public Defender of Georgia has been performing the functions of the National Preventive Mechanism under the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since 2009. Within the framework of this authority, the Public Defender of Georgia regularly inspects the situation and treatment of detainees, prisoners and other persons deprived of their liberty, as well as persons placed in psychiatric institutions, old people's homes and children's homes, and this is the special mandate of the Public Defender.[49]

After the adoption of the Law of Georgia on the Elimination of All Forms of Discrimination[50] on May 2, 2014, the Public Defender was designated as a body overseeing the elimination of discrimination and ensuring equality. The above is the second special mandate of the institution, which has a number of characteristics. For example, the extension of powers to private individuals and a completely different mechanism for enforcing decisions, which is not characteristic of the typical ombudsman institution.

The United Nations Convention on the Rights of Persons with Disabilities of 31 December 2006 has been ratified by Georgia since 26 December 2013. The Convention obliges States Parties to establish or strengthen one or more independent mechanisms for promoting, protecting and monitoring the implementation of the Convention. Since October 2014, the Public Defender of Georgia has been designated as a structure promoting, protecting and monitoring the implementation of the UN Convention on the Rights of Persons with Disabilities, which is also another special mandate of the Public Defender.[51]

In 2019, the Law of Georgia on the Code of the Rights of the Child was adopted, which additionally designated the Public Defender as a body monitoring and evaluating the protection of children's rights and freedoms in Georgia.[52]

One of the important functions of the Public Defender of Georgia is also educational activities in the field of human rights and freedoms.[53]

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49 Ibid, Article 19.

50 Law of Georgia "on the Elimination of All Forms of Discrimination", Website of LEPL Legislative Herald of Georgia, 07.05.2014.

51 See Information on the Monitoring Mechanism, On October 27, 2014, at the №6 meeting of the Coordination Council for the Disabled under the Prime Minister of Georgia, the Public Defender of Georgia was nominated as the structure to monitor the promotion, protection and implementation of the UN Convention on the Rights of Persons with Disabilities, <http://www.ombudsman.ge/geo/mekanizmis-shesakheb> [21.10.2020].

52 The Code "On The Rights of the Child", Article 83, paragraph 2, article 97, Website of LEPL Legislative Herald of Georgia, 27.09.2019.

53 Organic Law of Georgia "On the Public Defender of Georgia", article 3 paragraph 3, Departments of the Parliament of Georgia, 13, 07.06.1996.

Along with the ombudsman's general mandate and the above-mentioned specific authorities, the ombudsman of Georgia is the national human rights institution, which has been granted "A" status,[54] which implies full compliance of the Public Defender of Georgia with principles set by the United Nations (hereinafter UN). As a result, the Public Defender of Georgia may participate in the work of national human rights institutions with the right to vote at international and regional levels, hold a position in the Bureau/Subcommittee of the International Coordinating Committee and participate in the UN Human Rights Council sessions. Thus, the Public Defender of Georgia represents the so-called hybrid model, which along with exercising the typical powers of the ombudsman and several special mandates, is also responsible for performing the functions of the national human rights institution, like the models of many Eastern European countries.

Although the Public Defender of Georgia performs several mandates and each of them is extremely interesting and important, each of them is a subject of independent research. Accordingly, for this article, when discussing the Public Defender in the next chapter, only the specifics of the oversight of public administration by an ombudsman will be considered and reviewed.

3. Peculiarities of Consideration of Complaints Relating to Public Administration

3.1. The Scope of the Ombudsman's Mandate Concerning Public Administration

One of the key issues in terms of the oversight of public administration by the ombudsman is which activities and what categories of entities this mandate covers.

As a rule, the purpose of the ombudsman, along with the restoration of the violated right, is to facilitate the effective, transparent and responsible exercise of public administration. Any person who considers that any action or decision of the central or local authorities, or a person empowered to exercise public administration, violated his or her rights, may apply to the ombudsman. However, the definition of public administration is not uniform for all systems and the scope of the ombudsman's mandate also varies.[55]

For example, the mandate of the Ombudsman of the European Union is to review the complaints of citizens or companies relating to the legitimacy of the decisions and actions of various bodies of the European Council, the European Parliament and the European Commission.[56]

In New Zealand, a special legislative act sets out a list of institutions, the decisions of which can be reviewed by the ombudsman. This list includes institutions that carry out public administration.[57]

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54 See information regarding "A" Status of the Public Defender of Georgia, <http://www.ombudsman.ge/geo/mandati> [21.10.2020].

55 *Batalli M.,* Role of Ombudsman Institution Over the Administration. SSRN Electronic Journal, 10.2139/ssrn.2699061, 237, <https://www.researchgate.net/publication/314539863_Role_of_Ombudsman_Institution_Over_the_Administration> [10.10.2020].

56 Ibid.

57 *Elwood B.,* The Classical Ombudsman – an Effective Reviewer of Administrative Decisions by Government Agencies – A New Zeland Perspective, International Ombudsman Institute, №76, 2001, 9, <https://www.theioi.org/downloads/72sah/IOI%20Canada_Occasional%20paper%2076_Brian%20Elwood_The%20Classical%20Ombudsman%20%20An%20Effective%20Reviewer%20of%20Administrative%20Decis

Moreover, there are some limits established for the jurisdiction of the ombudsman. These are: where the merits of the complaint are subject to a statutory appeal right to a court, actions of the police, in respect of which a separate statutory body exists, any matters relating to the terms and conditions of service or any operational matters of the military.[58] Interestingly, should any questions about an ombudsman's jurisdiction arise, the ombudsman may seek a declaratory order about the matter from the court.[59] The mandate of New Zealand's ombudsman is to examine the issues of public administration and does not involve evaluating the performance of the legislature or overseeing the judiciary.[60]

Resolution N1959 of the Parliamentary Assembly of the Council of Europe (2013) indicates that the mandate of the ombudsman shall be extended to the activities of entities carrying out public administration, shall have access to information and shall have broad powers to examine an issue.[61]

According to the principles approved by the Venice Commission, the institutional competence of the ombudsman includes all levels of government. The mandate of the ombudsman covers all public interests, as well as the public services provided to the public by the state, municipalities, state agencies and private organizations.[62]

According to the Council of Europe Recommendation CM/Rec (2019) 6, the ombudsman has the power to review and evaluate the decisions relating to public administration.[63]

The Supreme Court of Canada clarifies that "the ombudsman represents society's response to problems of potential [administrative] abuse.[64] Ombudsman is entitled to address many of the concerns left untouched by the traditional bureaucratic control mechanisms.[65]

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ions%20By%20Government%20Agencies%20-%20A%20New%20Zealand%20Perspective_2001.pdf> [13.09.2020].

58 *Elwood B.,* The Classical Ombudsman – an Effective Reviewer of Administrative Decisions by Government Agencies – A New Zeland Perspective, International Ombudsman Institute, №76, 2001, 9, <https://www.theioi.org/downloads/72sah/IOI%20Canada_Occasional%20paper%2076_Brian%20Elwood_The%20Classical%20Ombudsman%20-%20An%20Effective%20Reviewer%20of%20Administrative%20Decisions%20By%20Government%20Agencies%20-%20A%20New%20Zealand%20Perspective_2001.pdf > [13.09.2020].

59 Ibid.

60 Ibid.

61 Resolution 1959 (2013), Strengthening the institution of ombudsman in Europe, Adopted by Parliamentary Assembly, Assembly debate on 4 October 2013 (36th Sitting), <https://pace.coe.int/en/files/20232/html> [17.10.2020].

62 CDL-AD(2019)005-e, Principles on the Protection and Promotion of the Ombudsman Institution (The Venice Principles), Adopted by the Venice Commission at its 118th Plenary Session, Venice, 15-16 March, 2019, <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e> [17.10.2020].

63 Recommendation CM/Rec(2019)6 of the Committee of Ministers to Member States on the Development of the Ombudsman Institution, Adopted by the Committee of Ministers, 16 October, 2019 at the 1357th meeting of the Ministers' Deputies, <https://search.coe.int/cm/Pages/result_details.aspx? ObjectId=090000168098392f> [17.10.2020].

64 *Elwood B.,* The Classical Ombudsman – an Effective Reviewer of Administrative Decisions by Government Agencies – A New Zeland Perspective, International Ombudsman Institute, №76, 2001, 2, <https://www.theioi.org/downloads/72sah/IOI%20Canada_Occasional%20paper%2076_Brian%20Elwood_The%20Classical%20Ombudsman%20%20An%20Effective%20Reviewer%20of%20Administrative%20Decisions%20By%20Government%20Agencies%20-%20A%20New%20Zealand%20Perspective_2001.pdf> [13.09.2020].

65 Ibid, 4.

Systemic analysis of various legal acts[66] shows that the mandate of the Public Defender of Georgia as an ombudsman involves the assessment of the activities of state agencies and local self-government bodies, as well as legal entities of public law. The mandate also applies to individuals (natural persons and legal entities of private law) who may perform public functions.

In contrast to the above-mentioned systems where it is important to define the functions of public administration to determine the scope of the mandate, the legal framework of the Georgian model focuses on institutions. As mentioned, it is possible to define the institution and the appropriate framework for these purposes based on the definition of the norms of public law, however, a question arises whether the Public Defender's mandate should be extended to the cases where the relevant entities do not perform public functions but participate in the private law relations, or private law entities or individuals exercise public power. This is one of the problematic issues in the administrative law,[67] which is usually the subject of evaluation by the court, which leads to additional ambiguity in terms of establishing the scope of the ombudsman's mandate.

3.2. The Launch of Examination of Complaints and the Scope of Responses

To protect the rights related to matters of public administration, it is important how the ombudsman starts to examine an issue and what powers he/she has in this process.

The Venice Principles indicate that the ombudsman shall have discretionary power to investigate cases on his or her own initiative or as a result of a complaint. The Venice Commission also indicates that the ombudsman shall be entitled to request the cooperation of any individuals or organisations who may be able to assist in his or her investigations. The ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, including those deprived of their liberty. The ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistleblowers within the public sector.[68] Article 19 of the same Principles states that the official filing of a request to the ombudsman may have suspensive effect on time-limits to apply to the court, according to the law.[69]

The Council of Europe states in Recommendation CM/Rec (2019) 6 that the ombudsmen should be empowered to take action upon complaints received or on their initiative, against maladmi-

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66 See Organic Law of Georgia "On the Public Defender of Georgia", article 3 paragraph 1, Departments of the Parliament of Georgia, 13, 07.06.1996; Law of Georgia, "General Administartive Code of Georgia", Article 2 paragraph 1, sub-paragraph "a", article 27 paragraph "a", LHG, 32(39), 15/07/1999.

67 *Turava P., Tskepladze N.,* Textbook of General Administrative Law, Tbilisi, 2010, 170-222 (in Georgian).

68 CDL-AD(2019)005-e, Principles on the Protection and Promotion of the Ombudsman Institution (The Venice Principles), Adopted by the Venice Commission at its 118th Plenary Session, Venice, 15-16 March, 2019, <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e> [17.10.2020].

69 Ibid.

nistration, unfairness, abuse, corruption or any injustice caused by providers of public services, regardless of their organizational form.[70]

Even though there are different models in different countries, most ombudsmen receive reports of alleged violations from individuals. They first decide whether there is substantiated ground to justify an intervention. If so, they have then to decide whether to conduct a full investigation or to choose another form of intervention.[71] In certain systems, the ombudsmen have the right to intervene only if there is a written appeal and compliance with formal criteria, but there are models where the institution can investigate the infringement on its initiative or the basis of an oral application. There are also examples of stronger mandates where the ombudsman inspects/audits agencies on his or her initiative and begins to examine the violations detected as a result of the inspection/audit.[72]

In New Zealand, for example, the case is considered by the ombudsman on his/her initiative or based on a complaint, as well as at the request of the relevant parliamentary committee or the Prime Minister.[73] However, cases are examined by the ombudsman on his/her initiative mainly in exceptional cases, when the issue is of special importance, high sensitivity or high public interest.[74]

The Public Defender of Georgia examines alleged human rights violations based on a complaint or his/her initiative.[75] In both cases, he/she has fairly wide discretion. In case of a complaint, the institution decides whether to start the consideration of the case on its merits after the initial examination of the complaint. The institution is also completely independent when examining a case on its initiative. To meet the standard of transparent conduct of activities and the high expectations towards the Public Defender, more foresight in this direction might be more appropriate. The Public Defender also has discretion in considering a complaint on which he/she has already made a decision.[76]

It is also interesting to review the authority of the Public Defender in starting an examination of a case when administrative or civil proceedings relating to that case are pending in common courts.

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70 Recommendation CM/Rec(2019)6 of the Committee of Ministers to Member States on the Development of the Ombudsman institution, Adopted by the Committee of Ministers, 16 October, 2019, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168098392f> [17.10.2020].

71 *Diaw M. Ch.,* The Ombudsman story: A Case Study in Public Oversight, Natural Justice and State Transformation, 2007, 17, <https://www.researchgate.net/publication/312341186_The_Ombudsman_story_A_case_study_in_public_oversight_natural_justice_and_State_transformation> [11.10.2020].

72 *Diaw M. Ch.,* The Ombudsman story: A Case Study in Public Oversight, Natural Justice and State Transformation, 2007, 22, <https://www.researchgate.net/publication/312341186_The_Ombudsman_story_A_case_study_in_public_oversight_natural_justice_and_State_transformation> [11.10.2020].

73 *Elwood B.,* The Classical Ombudsman- an Effective Reviewer of Administrative Decisions by Government Agencies – A New Zeland Perspective, International Ombudsman Institute, №76, 2001, 8, <https://www.theioi.org/downloads/72sah/IOI%20Canada_Occasional%20paper%2076_Brian%20Elwood_The%20Classical%20Ombudsman%20-%20An%20Effective%20Reviewer%20of%20Administrative%20Decisions%20By%20Government%20Agencies%20-%20A%20New%20Zealand% 20Perspective_2001.pdf> [13.09.2020].

74 Ibid.

75 Organic Law of Georgia "On the Public Defender of Georgia", Article 12, Departments of the Parliament of Georgia 13, 07.06.1996.

76 Ibid, Article 14, paragraph 2.

The main issue, in this case, is whether the ombudsman should continue to examine the case or how he/she can respond when the case has already been considered by the court and the decision has entered into force. Neither the legislation nor the regulations defining the activities of the Public Defender indicate anything in this regard.[77] With this approach, the effectiveness of the Public Defender as an alternative rights protection mechanism may be questioned.

Limitation periods are also problematic. For example in New Zealand, simply because a complaint may be within an ombudsman's jurisdiction, an ombudsman is not obliged to investigate it if the complainant has known about it for more than 12 months.[78] No such regulations or limitation periods are set for the Public Defender of Georgia. As a result, persons concerned may apply to the Public Defender several years after the violation of their rights and request a review of the legality of certain decisions or actions. Such a model calls into question the effectiveness of the ombudsman's response, as it is complicated to examine a case and establish the circumstances of the case that took place years ago, and it is also questionable how realistic it is to restore the right, which was violated several years or possibly decades ago, within the mandate granted to the ombudsman.

In the process of examining and evaluating a case, the powers of the ombudsman vary widely from country to country. In some systems, when examining an issue, the ombudsman enjoys unrestricted entry into various institutions and the right to conduct on-site inspections.[79] Some ombudsmen have wide discretion and decide themselves, without the involvement of the parties, how and when to respond. In certain systems, the ombudsman is subject to a relatively high standard of transparency and stakeholders are actively involved in the examination of a case and their opinions are important.[80]

For example, the Canadian parliamentary ombudsman has the power to question people and to enter and inspect all public facilities.[81] The ombudsman of New Zealand has wide powers to require anyone holding the information that may relate to the investigation to be disclosed to him/her. The power extends to all persons holding such information, whether or not they are themselves subject to

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77 Organic Law of Georgia "On the Public Defender of Georgia", Departments of the Parliament of Georgia 13, 07.06.1996, Additionally Order #82 of the Public Defender of Georgia, "On the Unified Rules of Procedure of the Office of the Public Defender of Georgia", 19 February, 2016 <http://www.ombudsman.ge/res/docs/2020091012450956360.pdf> [19.10.2020].

78 *Elwood B.,* The Classical Ombudsman-an Effective Reviewer of Administrative Decisions by Government Agencies – A New Zeland Perspective, International Ombudsman Institute, №76, 2001, 8, <https://www.theioi.org/downloads/72sah/IOI%20Canada_Occasional%20paper%2076_Brian%20Elwood_The%20Classical%20Ombudsman%20-%20An%20Effective%20Reviewer%20of%20Administrative%20Decisions%20By%20Government%20Agencies%20-%20A%20New%20Zealand%20Perspective_2001.pdf> [13.09.2020].

79 Ibid, 11.

80 *Diaw M. Ch.,* The Ombudsman Story: A Case Study in Public Oversight, Natural Justice and State Transformation, 2007, 22, <https://www.researchgate.net/publication/312341186_The_Ombudsman_story_A_case_study_in_public_oversight_natural_justice_and_State_transformation> [11.10.2020].

81 *Jamieson, O.C. R.,* Ombudsman Institutions Around the World: Analysis and Comparison of a Plurality and Practice, International Ombudsman Institute, №59, January, 1997, 4, <https://www.theioi.org/downloads/cbhdl/ioi-canada_occasional-paper-59_roberta-jamieson_om-institutions-around-the-world-analysis-and-comparision_1997-1.pdf> [26.09.2020].

the ombudsman's mandate. The power overrides statutory secrecy requirements and is subject only to such privilege as witnesses would have in court.[82]

The Public Defender of Georgia enjoys a wide range of legislative guarantees in the process of examining a case, in particular, he/she has the right to freely enter any state or local self-government body, enterprise, organisation, institution; request and receive, immediately or no later than 10 days, from state and local self-government authorities or from officials all certificates, documents and materials necessary for conducting an inspection; request and receive written explanations from any official, officer, or equivalent person on the matters to be examined by the Public Defender; conduct expert examinations and/or prepare conclusions employing state and/or non-state institutions; invite specialists/experts in order to perform expert and/or consultation works.[83]

At the same time, according to the legislation of Georgia, non-fulfilment of the legal request of the Public Defender in the process of examining a case is considered an offence and the relevant responsibility is provided for by the Administrative Offences Code.[84]

According to the Information provided by the office of the Public Defender, no protocol on violations has been drawn up in connection with the cases related to public administration in 2019 and 2020.[85] However, beyond the statistical data, it is a matter of more in-depth research and discussion to establish what exactly this data shows, how effective this enforcement leverage is and whether it can ensure the achievement of the goal of establishing the objective circumstances of the case and effective implementation of the mandate by the institution.

3.3. Decisions Made by the Ombudsman

One of the important characteristics of the ombudsman institution is the recommendatory nature of its final assessments. When the ombudsman concludes that the complaint is substantiated, he/she makes a recommendation, or appeals to the executive or legislative body, although this appeal is not binding.[86] Precisely due to the recommendatory nature, the ombudsman belongs to a peculiar oversight

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82 *Elwood B.,* The Classical Ombudsman-an Effective Reviewer of Administrative Decisions by Government Agencies – A New Zeland Perspective, International Ombudsman Institute, №76, 2001, 11, <https://www.theioi.org/downloads/72sah/IOI%20Canada_Occasional%20paper%2076_Brian%20Elwood_The%20Classical%20Ombudsman%20%20An%20Effective%20Reviewer%20of%20Administrative%20Decisions%20By%20Government%20Agencies%20-%20A%20New%20Zealand%20Perspective_2001.pdf> [13.09.2020].

83 Organic Law of Georgia "On the Public Defender of Georgia", Article 18, Departments of the Parliament of Georgia, 13, 07.06.1996.

84 Law of Georgia, "Administrative Offences Code of Georgia", Article 173^4, Departments of the High Council of the Georgian SSR, Appendix 12, 31.12.1984.

85 Official letter from the Office of the Public Defender of Georgia, №24/10758, 29.10.2020, <https://drive.google.com/file/d/1wakyHmsQhYbxr7pWYWfm7PA3-C7G8nPK/view?usp=sharing> [29.10.2020].

86 *Satyanand A.,* The Ombudsman Concept and Human Rights Protection, International Ombudsman Institute, #68, January, 1999, 4, <https://www.theioi.org/downloads/d1k7g/IOI%20Canada_Occasional%20paper%

institution, which, as already mentioned, promotes the protection of human rights and the development of democracy and the rule of law with the so-called “soft power".

According to the Venice Principles, the ombudsman shall have the power to address individual recommendations to any bodies or institutions within the competence of the institution. The ombudsman shall have the legally enforceable right to demand that officials and authorities respond within a reasonable time set by the ombudsman.[87]

The recommendation of the Committee of Ministers of the Council of Europe indicates that the ombudsman should be empowered to make recommendations to prevent or remedy any misconduct and that the addressees of recommendations by the ombudsman institutions should have a legal obligation to provide a reasoned reply within an appropriate time.[88]

Based on the study of different systems, several models of responses carried out by the ombudsmen are differentiated in the scientific literature. In particular, as a result of communication with the ombudsman at the very first stage of the examination of a case, the addressee/respondent agency acknowledges a mistake and remedies it; the ombudsman may negotiate and facilitate the agreement between the administration and the citizen; submit a recommendation to the agency as a result of the examination of the case on its merits; discuss systemic problems in the reports; in case of unconstitutional or defective regulation, apply to the Constitutional Court or the legislature with a proposal.[89]

As a rule, the ombudsman’s investigation is not like court proceedings. He/she requests information from the relevant persons in accordance with the principle of inquisition and evaluates the issue within his/her authority and in the context of expediency, and finally issues the relevant recommendation. His/her assessment is not binding, nor can he/she compensate for the damage or replace the grievance/suit institutions.[90]

2068_Anand%20Satyanand_The%20Ombudsman%20Concept%20and%20Human%20Rights%20Protection_1999.pdf> [26.09.2020].

87 CDL-AD(2019)005-e, Principles on the Protection and Promotion of the Ombudsman Institution (The Venice Principles), Adopted by the Venice Commission at its 118th Plenary Session, Venice, 15-16 March, 2019, <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e> [17.10.2020].

88 Recommendation CM/Rec(2019)6 of the Committee of Ministers to Member States on the Development of the Ombudsman institution, Adopted by the Committee of Ministers on 16 October 2019 at the 1357th Meeting of the Ministers' Deputies, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168098392f> [17.10.2020].

89 *Diaw M. Ch*., The Ombudsman story: A Case Study in Public Oversight, Natural Justice and State Transformation, 2007, 18, <https://www.researchgate.net/publication/312341186_The_Ombudsman_story_A_case_study_in_public_oversight_natural_justice_and_State_transformation> [11.10.2020].

90 *Elwood B.,* The Classical Ombudsman – an Effective Reviewer of Administrative Decisions by Government Agencies-A New Zeland Perspective, International Ombudsman Institute, №76, 2001, 4-6, <https://www.theioi.org/downloads/72sah/IOI%20Canada_Occasional%20paper%2076_Brian%20Elwood_The%20Classical%20Ombudsman%20-%20An%20Effective%20Reviewer%20of%20Administrative%20Decisions%20By%20Government%20Agencies%20-%20A%20New%20Zealand%20Perspective_2001.pdf > [13.09.2020].

The main and important issue is that when assessing the flawed public governance, the ombudsman aims to promote lawful and effective public governance,[91] so this approach is reflected in his/her responses as well. As a result of examination and evaluation, the ombudsman may identify sectoral directions of public administration and make relevant recommendations for the elimination of systemic problems.[92]

According to scholars, the purpose of the ombudsman institution is not only to assess the legitimacy or relevance of specific actions or decisions made during the implementation of public administration or to promote the restoration of violated individual rights but also to consider the public interest in general, evaluate private and public interests and make recommendations from the perspective of human rights and administrative justice.[93]

In case of the Public Defender of Georgia, the ombudsman responds to individual violations within the scope of his/her mandate; at the same time, he/she may make proposals to the institutions relating to systemic improvements. To this end, he/she, as the ombudsman overseeing public bodies, has the right to make a recommendation or proposal to the state authorities, municipal bodies, public institutions and officials, whose actions resulted in a violation of human rights and freedoms protected by the state; the recommendation/proposal may be aimed at restoring the violated right or maybe a general recommendation. The Public Defender may submit proposals to the relevant bodies on disciplinary or administrative liabilities of persons whose actions led to violations of human rights and freedoms; and in case of finding signs of a crime, he/she may apply to the relevant investigative bodies with a request to launch an investigation and/or criminal prosecution. It is also important that the Public Defender may in certain cases perform the function of the friend of the court (Amicus Curiae) in the common courts and the Constitutional Court of Georgia concerning matters of public administration; as well as inform the media of the results of the examination of violations of human rights and freedoms.[94]

Thus, the Public Defender of Georgia may respond to a case not only in one but in several directions, which is why he/she belongs to relatively strong ombudsman institutions. However, the effectiveness of each of them, as well as the rate and reasons for implementation or non-implementation, and the problems identified in this process, require further in-depth study.

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91 *Batalli M.*, Role of Ombudsman Institution Over the Administration. SSRN Electronic Journal. 10.2139/ssrn.2699061, 237, <https://www.researchgate.net/publication/314539863_Role_of_Ombudsman_Institution_Over_the_Administration> [10.10.2020].

92 Ibid, 239.

93 *Diaw M. Ch.,* The Ombudsman story: A Case Study in Public Oversight, Natural Justice and State Transformation, 2007, 35-36, <https://www.researchgate.net/publication/312341186_The_Ombudsman_story_A_case_study_in_public_oversight_natural_justice_and_State_transformation> [11.10.2020].

94 Organic Law of Georgia "On the Public Defender of Georgia", Article 21, Departments of the Parliament of Georgia, 13, 07.06.1996.

4. Conclusion

In the Georgian scientific literature, the Georgian Public Defender has repeatedly been the subject of research as a constitutional guarantor of human rights. However, the present article, considering the international standards and practices of other countries, considers the Public Defender as an alternative mechanism for restoring the rights violated during the exercise of public administration. Despite the lack of relevant research in Georgia, the international scientific community actively considers the ombudsman as an alternative administrative justice and administrative grievance mechanism.

The diversity and constant progress of modern public governance and administration, as well as the interrelationship between the public and private law elements in this process, create more challenges for the ombudsman institution, which, inter alia, raises the need of improving its performance and its mechanisms.

The issues discussed in this article make it clear that the direction of the mandate of the Public Defender of Georgia, which is related to the oversight of public administration, its legislative regulation and practices, require further in-depth study and evaluation. It should be noted that the statistical data on the activities of the Public Defender's Office is produced in total for all its activities, and unfortunately, the data within the competence in the field of public administration oversight are not available without additional in-depth study. Based on such empirical, in-depth study and relevant recommendations, it will be important to review issues such as the further specification of preconditions for the launch of examination of a case by the institution, including the limitation period for applying to the Public Defender, parallel consideration of cases in other formal institutions, etc. Given the constitutional status of the institution and the high legitimate interest in its activities, it is also necessary to assess the adequacy of the guarantees and mechanisms related to the examination of a case on the one hand and the implementation of recommendations and proposals issued after the examination of a case on the other hand, and whether it is necessary to change the existing regulation to increase the effectiveness of the institution.

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Nino Kilasonia*

Electronic Form of People's Participation in Administrative Rulemaking in the United State and Georgia

In the United States and Georgia, in order to increase the role of the people in the administrative decision-making process, the administrative organs use the electronic means of people's participation in administrative rulemaking.

Accordingly, in the United States and Georgia the notice concerning administrative rulemaking is published in a documentary form as well as on the website of the administrative organ. However, unlike the United States, the General Administrative Code of Georgia does not provide for the possibility of submitting an opinion on administrative rulemaking electronically.

The present article analyzes the importance and peculiarities of the electronic publication of the notice and electronic submission of opinions – electronic rulemaking, examines the advantages and disadvantages of electronic rulemaking and proposes the ways to improve it.

Key words: *Electronic publication of the notice, electronic submission of opinions, electronic rulemaking, administrative rulemaking, electronic record.*

1. Introduction

It is worth mentioning that in addition to the documentary form of publishing the notice and submitting the comment, administrative authorities utilize electronic means to improve public participation in administrative rulemaking. Exploring electronic means[1] for publication of the notice and submission of the opinions concerning administrative rulemaking is one of the most important achievements of modern electronic government, which is enshrined in both the United States and Georgian legislation.

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1 *Johnson S. M.,* Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking, Administrative Law Review, Vol. 65, Winter, 2013, 91, Electronic rulemaking in the United States dates back to the Clinton presidency. In 2003, a special website *regulatiuons.gov* was launched, which provides access to administrative rulemaking records via the Internet. After the launch of this website, individual websites have been developed by several agencies, *Coglianese C., Kilmartin H., Mendelson E.,* Transparency and Public participation in the Federal Rulemaking Process: Recommendations for the New Administration, Annual Review of Administrative Law Report, George Washington Law Review, Vol. 77, June, 2009, 939-940, information inflation indicates that civilization has entered a new phase of development. A person can write a letter to millions of people... Accordingly, this type of correspondence has influenced cultural evolution, *Paul G. L., Baron J. R.,* Information Inflation: Can the Legal System Adapt? Richmond Journal of Law and Technology, Spring, Vol. 13, 2007, 67.

In the United States in 2000 the federal government created a new website, *Regulations.gov,* and set up a federal electronic record management system to store data concerning rulemaking on a single central online address. As a result of the reform, individuals no longer have to go to the agency and get acquainted with the records there. Simultaneously, people have more confidence that the submitted comments will be included in the rulemaking record.[2] It should be noted that, like in the United States, the General Administrative Code of Georgia was amended in 2009, according to which the administrative organ can publish a draft of normative administrative-legal act electronically.[3] However, unlike the United States, the General Administrative Code of Georgia does not provide for the possibility of submitting an opinion electronically. However, in practice the opinion can be submitted electronically through the website of the Legislative Herald of Georgia – matsne.gov.ge or through the website of the administrative organ.

The first two chapters of this article analyzes the electronic publication of the notice in the United States and in Georgia, also peculiarities of electronic submission of opinions in the United States and Georgia. The next two chapters highlight the advantages and disadvantages of electronic rulemaking[4] followed by the discussion about the ways of improving electronic rulemaking. Conclusion summarizes the results of the research and proposes recommendations.

2. Electronic Publication of the Notice

The United States Electronic Government Act of 2002 stipulates that regulatory governance should be "citizen-centered" as well as "transparent," making it accountable to administrative agencies. Consequently, people need to be allowed[5] to access the agency's records via the Internet.[6]

Therefore, in order to place the draft regulations on the website and to facilitate the acceptance of people's comments, a central system[7] of federal data[8] has been created[9] in the United States, in the

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2 *Field A. B.,* Comments on a truly "Top Task:" Rulemaking and its Accessibility on Agency Websites, Environmental Law Institute and Vanderbilt University Law School Environmental Law and Policy Annual Review Article and Response, Environmental Law Reporter News and Analysis, Vol. 44, August, 2014, 10668.

3 General Administrative Code of Georgia, 25/06/19, article 106^2, Section 1, Legislative Herald of Georgia, № 33, 09/11/2009.

4 The electronic publication of the notice and the electronic submission of opinions is meant.

5 In the United States, eelectronic rulemaking includes three interrelated elements: the electronic record of the federal record management system, which is an electronic repository of rulemaking documents; "the space protected by the password, on which the agencies have access and the website: *Regulations.gov.* through which the persons outside the agency have access to the materials and can provide their comments on the proposed project, *Farina C.R.,* Achieving the Potential: The Future of Federal Rulemaking (2009) Report of the Committee on the Status and Future of Federal E-Rulemaking, Administrative Law Review, Vol. 62, Winter, 2010, 282.

6 *Farina C., Cardie C., Bruce T. R., Wagner E.,* Better Inputs for Better Outcomes: using the interference to improve e-Rulemaking, eRulemakings Federal Docket Management System, eRulemaking at Crossroads, A collection of White Papers prepared for Dg.O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 13-15, <http://people.umass.edu/stu/eRulemaking/Crossroads.pdf> [12.10.2011].

form of *Regulations.gov,* on which the agencies will publish information about the proposed project. This website simultaneously is a forum where people can submit comments and familiarize themselves with the comments provided by others. 90% of the agencies[10] will post information about the regulations on this website.[11]

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7 Initially, federal e-rulemaking was an *ad hoc* process. Individual agencies have developed systems for their own purposes. They had an independent server with their own website. The revolution in e-rulemaking began during the Bush administration, when e-rulemaking was incorporated into the 2002 e-Government Strategy. Later that year, Congress passed the e-Government Act, according to which the Office of the Management and Budget selected the Environmental Protection Agency as the leading agency for the Bush Administration's e-governance initiative. Since then the system has developed rapidly and in 2003 the website *Regulations.gov* was formed. The Management and Budget Office requested that all documents related to the administrative rulemaking of all agencies be uploaded on this website in the Electronic System of Federal Records and that the individual website be removed in favor of a centralized system, *Jones G. D.,* Electronic Rulemaking in the New Age of Openness: Proposing a Voluntary Two-Tier Registration System for Regulations.Gov, Administrative Law Review, fall, 2010, Vol. 62, 1270.

8 Federal data management system, which is available on the website: *www.regulations.gov* allows citizens to search for materials and provide their views on regulation… the federal management system represents safe and reliable platform which gives departments and agencies right to post all documents related to administrative rulemaking on the website for public discussion and in order to receive comments. *www.regulations.gov* allows people to quickly search for materials, for example: to find all the regulations published on a particular day, or the regulations according to the subject matter or find documents by the keyword. One of the most innovative features of the Federal Data Management System is that each agency can transform the system so that it adapts the system to its regulatory procedures, maintains its own procedures, and controls the information contained in the system, *Morales O., Moses J.*, Environmental Agency eRulemaking Initiative, eRulemakings Federal Docket Management System, eRulemaking at Crossroads, A collection of White Papers prepared for Dg.O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 2, <http://people.umass.edu/stu/eRulemaking/Crossroads.pdf> [12.10.2011].

9 *Law H. K., Lau G. T.,* E-Rulemaking: Needs from ICT Perspectives, eRulemakings Federal Docket Management System, eRulemaking at Crossroads, A collection of White Papers prepared for Dg. O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 11, <http://people.umass.edu/stu/eRulemaking/Crossroads.pdf> [12.10.2011].

10 The decision (which was against the creation of a unified centralized system) enacted because it was impossible for all agencies to reach an agreement on information standards and practices, *Farina C. R.,* Achieving the Potential: The Future of Federal Rulemaking (2009) Report of the Committee on the status and Future of Federal E-Rulemaking, Administrative Law Review, Vol. 62, Winter, 2010, 283.

11 The decision to create a single centralized system made it necessary to establish a database and a website that would serve all agencies. As a result, all agreed on the general system and the introduction of new, different applications has been severely restricted by the Office of the Management and Budget, which does not allow agencies to have individual electronic systems, as well as introduce a new electronic means for administrative rulemaking (defined as "duplicated and support system"), Ibid 283, Some scientists believe that it is very difficult, if not impossible, for a unified centralized model to adapt to the activities of all agencies involved in rulemaking. Therefore, one universal website, no matter how well organized, cannot fully convey the activities of the agency and the specific information concerning regulation ...Accordingly, the current closed, exclusive, and single-template "Technical Architecture" with standards set by the Office of Management and Budget which contradicts "duplicate and auxiliary systems," prevents the creation of additional components and web presentations by agencies or interested individuals or groups. However, agencies that are characterized by rulemaking and want to develop in this direction do not have the necessary funds to do so, because they pay the necessary funds for the functioning of the unified system.

In addition to the website, an important place is occupied by the federal records management system, which is accessible only to employees of the agency, and where agencies are responsible for conducting electronic recording of materials related to the rulemaking.[12]

The functioning of the website established for electronic rulemaking in the United States has been gradually improved, which was facilitated by the Executive Order №13563, adopted by the President Obama's administration. Order instructs agencies to provide timely electronic access to the rulemaking record on *Regulations.gov.,* including scientific and technical information, which should be made public and easily downloaded from the website.[13] Along with the government website, several non-governmental websites should be singled out. Website "Regulation Room"[14] is an electronic rulemaking pilot program funded by the Department of Transportation and Cornell University and aims to strengthen *Regulations.gov*.[15]

It should be noted that there is no unified database[16]in Georgia similar to the central database operating in the United States, where administrative-legal acts adopted by administrative organs of

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Consequently, the needs of neither consumers nor many agencies are adequately addressed, which hinders innovation, Ibid 285., Agencies involved in rulemaking should provide detailed information on their website and use the web tools to enhance the quality of people's participation. Such an innovative approach to administrative rulemaking by agencies should be encouraged and not prohibited, Ibid 287-288.

12 *Johnson S. M.,* Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking, Administrative Law Review, Vol. 65, Winter, 2013, 91.

13 *Dooling B. C. E.,* Legal Issues in E-Rulemaking, Administrative Law Review, Vol. 63, Fall, 2011, 896-897.

14 The regulation room was used in the Transportation Department's rulemaking which was related to the Department's proposal on the rights of aircraft users. For this rulemaking the Department of Transportation submitted a preliminary notice on administrative rulemaking to the Cornell University electronic rulemaking initiative group. Prior to the official publication of the notice, students and faculty members of the Cornell University e-rulemaking initiative group shared various topics of the proposed project and published a brief description of each topic on the Regulation Room website. Members of the Cornell University Initiative Group also published additional hyperlinks and other secondary sources that were used during the regulation making. The members of the group then got involved in the search for individuals who would be interested in rulemaking and called on them through social media and other means to engage in the rulemaking. When, the notice of administrative rulemaking was published in the Federal Register and it was also possible to see it on *Regulations.gov* and on the website of the Department of Transportation, the notice mentioned that Cornell University's e-rulemaking initiative group was organizing a pilot program to address the rulemaking, *Johnson S. M.,* Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking, Administrative Law Review, Vol. 65, Winter, 2013, 107.

15 *Coglianese C.,* Enhancing Public Access to Online Information, Michigan Journal of Environmental and Administrative Law, Vol. 2, Fall, 2012, 22-23.

16 A central database similar to the US's central system operates in Europe. In particular, the website of the European Commission, "Your Voice" functions in the same way as the American *Regulations.gov.* It was created for the same purposes as the American website. The main page of the European Commission's website contains current regulatory offers (so-called "consultations"), on which people can submit opinions. A separate page on the same website sorts these offers by regulatory field so that they are easy to find. After clicking on the specific consultation, the user will be taken to a page that contains basic information about the offer, as well as links and instructions on how to submit feedback (known as a "contribution"). While other consultations require contributions using e-mail ... or filling out detailed questionnaires. These questionnaires contain important information about the individual aspects of the proposed regulation and

Georgia would be posted. Nor is any NGO involved in promoting electronic rulemaking. However, it should be noted that the General Administrative Code of Georgia provides for an interesting form of dissemination of information on administrative rulemaking by electronic means.

The first paragraph of Article 106^2 of the General Administrative Code establishes the rules for publishing the draft of normative administrative-legal act in an electronic form, according to which the draft of normative administrative-legal act may be posted on the website of the collegial administrative organ. In addition, in accordance with Article 106^2 (2) of the General Administrative Code, the notice of the commencement of administrative proceedings shall be published together with the draft normative administrative-legal act.[17]

Therefore, the General Administrative Code provides for the publication of a notice on administrative rulemaking via the Internet, however, nothing is said about the submission of the opinions on the draft normative administrative-legal act in electronic form. However, in practice drafts of normative acts are published on the website of the Legislative Herald (where it is possible to leave comments), which does not preclude the publication of these acts on the website of the administrative organ itself. The rules for electronic submission of opinions in Georgia and the United States will be discussed in detail in the forthcoming chapter.

3. Electronic Submission of Opinions

Unlike the United States[18] there is no special law in Georgia that would in detail regulate the use of the Internet in administrative rulemaking, including the electronic submission of opinions. However, there is a practice in Georgia of submitting opinions electronically through the Legislative Herald and the website of the administrative organ.

To facilitate the process of submitting opinions in the United States, agencies have been using the Internet since the 1990s. Some agencies have introduced such a system[19] that it is possible to

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then present a series of questions on each aspect. However, unlike *Regulation.gov,* a special feature of "Your Voice" is that it distinguishes between individuals who represent themselves and organizations that defend special interests. Individuals cannot register in the system, although they can leave personal information about themselves. A different rule applies to lobbyists and other organizations where they have to register their organizations in the register of interests. They must register the organization in one of the following ways: "Professional Consultations" or a law firm, corporate lobbying associations or trade unions, non-governmental organizations, or other general categories. Registration requires the submission of detailed information about the organization ... The procedure is voluntary and a person who does not wish to register can choose a contribution on behalf of a private person, *Jones G. D.,* Electronic Rulemaking in the New Age of Openness: Proposing a Voluntary Two-Tier Registration System for Regulations.Gov, Administrative Law Review, Vol. 62, Fall, 2010, 1275-1277.

17 General Administrative Code of Georgia, 25/06/19, article 106^2, Section 2, Legislative Herald of Georgia, № 33, 09/11/2009.

18 To the extent practicable, agencies shall accept submissions under section 553(c) of administrative procedure act, title 5, by electronic means, e-government act of 2002, Sec. 206 (c).

19 Agencies run the data record system and organize it in a way that citizens can search for general issues, special norms, and then submit opinions that are directly included in the comment book, *Schlosberg D., Zavestoski S., Shulman S. W.,* Democracy and E-Rulemaking: Web-Based Technologies, Participation, and

submit all kinds of opinions through the Internet, to publish the received comments,[20] and then to submit additional opinions, through which the citizens will respond to the initial opinions.[21]

In the United States, the process of annulment of opinions is used electronically, which allows all participants in the administrative rulemaking to respond to comments made by other participants.[22] However, the opinions submitted in electronic form are immediately available to those interested. Search for comments is not related to costs and they are prepared for analysis.[23]

In addition, within the framework of the project rulemaking 2.0,[24] submission of comments is improved with the help of particular non-governmental organizations. The Regulation Room, which is a pilot program of rulemaking and was implemented within the framework of the Cornell University Electronic Regulation Initiative (in coordination with the United States Department of Transportation), is a clear example of this.[25]

The regulation room website[26] is not a government website and the project is not overseen by the federal government.[27] Through the "Regulation Room," persons who enter the website of the Regulatory Room can provide comments on the part or on the whole regulation.[28]

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the Potential for Deliberation, Journal of Information Technology and Politics, Vol. 4 (1), 2007, 39, <http://people.umass.edu/stu/eRulemaking/JITP4-1_Democracy.pdf> [10.09.2010].

20 For example, the website *regulations.gov* that has been actively used since 2003, have links attached, where the documents intended for the submission of opinions are placed according to the issue and date, *Benjamin S. M.,* Evaluating Rulemaking Public Participation and Political Institutions, Duke Law Journal, Vol. 55, March, 2006, 899.

21 *O' Looney J.,* Electronic Policy and Rule Making, Draft 7/2000, <http://www.law.upenn.edu/academics/institutes/regulation/erulemaking/papersandreports.html> [10.09.2010].

22 *Herz M.,* "Rulemaking," Developments in Administrative Law and Regulatory Practice, *Lubbers J. S. (ed.),* 2002-2003, (copyright 2004, ABA section of administrative law and regulatory practice) <https://www.law.upenn.edu/institutes/regulation/erulemaking/papers_reports/Herz_E_Rulemaking.pdf> [10.09.2010].

23 *Coglianese C.,* The Internet and Public Participation in Rulemaking, Paper prepared for conference on Democracy in Digital Age, Yale Law School, April, 2003, 6 <http://www.hks.harvard.edu/m-rcbg/research/rpp/RPP-2003-05.pdf> [30.10.2012].

24 After the inauguration, President Obama issued a memorandum urging federal agencies to use Web 2.0 and other information technologies ... In December 2009, the Office of Management and Budget developed a directive that gave agencies four months to develop an "open government plan." Accordingly, the Department of Transport introduced a project called the Regulation Room, for which it received the White House Award for leadership in such projects. The aim of this project is to create an experimental electronic platform for public participation and people's education, *Farina C. R., Newhart M. J., Cardie C., Cosley D.,* Rulemaking 2.0, Symposium: What Change Will Come: The Obama Administration and the Future of the Administrative State Articles, University of Miami Law Review, Vol. 65, Winter, 2011, 396.

25 *Johnson S. M.,* Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking, Administrative Law Review, № 65, Winter, 2013, 108.

26 The platform envisages the use of social media and other modern means in the research process to ensure the "live" participation of the people in federal rulemaking… The regulation room is a system that combines human and auxiliary computer tools… connecting a website with a private university allows to experiment with website design and free choice of methods, which would be difficult on an official state website, *Farina C. R., Newhart M. J., Cardie C., Cosley D.,* Rulemaking 2.0, Symposium: What Change Will Come: The Obama Administration and the Future of the Administrative State Articles, University of Miami Law Review, Vol. 65, Winter, 2011, 397.

In addition to providing a document, in which the rule of writing an effective comment is explained to the persons who want to submit the opinions, the Cornell Electronic-rulemaking Initiative Group sets out the opinions that constitute the "recommended" opinions presented during the rulemaking process ... As a rule, comments that are substantiated are recommended. Those comments are recommended comments that formulate the reasons for the study of the issue at hand, contain information, provide alternatives, and show that the author of the opinion has analyzed all the aspects of the research topic.[29]

Despite the fact that in Georgia the possibility of submitting opinions electronically is not regulated by law, in practice there is a website of the Legislative Herald, *matsne.gov.ge,* where users can leave comments on the draft normative act.

After entering the website of the Legislative Herald and clicking on the column "new normative documents," the classification of normative acts according to color is displayed. In green color are the acts in force, the blue color is used for the acts that have to enter into force and the red color is used for invalid acts. Customers can search by blue color for the acts which have to enter into force to leave comment on the draft normative acts.

It should be noted that the normative acts that have to enter into force are often draft resolutions of the municipal councils of different municipalities and decrees of the ministers. When the normative act is opened, a hint is provided for leaving a comment, which, if clicked, will require the person to log in and become a registered user in order to leave the comment.

After registration, the user can leave a comment about the draft normative act. In addition, in the upper left corner of the opened page there is a hint about the ability of users to read previously left comments called "comments on the document." Clicking on this box opens a window where you can see sorted comments submitted with regard to the document. Comments are classified by number, most recent comments, and ratings. However, it should be noted that in most cases the document is not accompanied by comments. It is obvious that users are passive when leaving comments because they do not have information about this possibility.

In addition to the website of the Legislative Herald, it is possible to leave electronic comments on the website of the administrative organ itself. However, there is no legislative act that regulates this issue in detail and it is up to the decision of the administrative organ to determine whether the procedure for submitting opinions will be in electronic form on its website.

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[27] *Johnson S. M.,* Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking, Administrative Law Review, Vol. 65, Winter, 2013, 108.

[28] As part of the pilot e-rulemaking, the Cornell University Electronic Rulemaking Initiative Group has been acting as a moderator on the website, checking for inappropriate content, as well as asking questions and answering comments from authors, Ibid*,* 107. The members of the Cornell University Electronic Rulemaking Initiative Group also tried to attract interested parties to participate in the process of opinion submission. This process took a lot of time. Accordingly, students and professors from the Cornell University have been actively working on this. In the end of the comments submission period, the members of the Cornell University E-rulemaking Initiative Group presented a brief description of the submitted opinions. Once the description has been verified, it has been included as an opinion in the rulemaking record, Ibid*,* 108-109.

[29] Ibid*,* 108.

Therefore, it would be desirable for the legislature to define a centralized model for the electronic submission of opinions in Georgia. The experience of the United States and Europe[30] proves that the focus should be on a centralized website that is more productive and less costly.

It should be noted that along with the establishment of an electronic form for publishing the notice and submitting an opinion there is controversy among scientists how productive is to publish notice electronically and submit opinions electronically. Some scholars believe that submitting opinions electronically will allow citizens to participate in the process of rulemaking. The process of administrative rulemaking becomes interactive and the interested persons respond appropriately to the opinions submitted by both the agency and other interested persons.[31] However, below I will discuss how to use information technology in the regulatory process or how to change the process of administrative rulemaking as a result of the use of new technologies.[32]

4. Advantages of Electronic Publication of the Notice and Electronic Submission of Opinions

Administrative law scholars and supporters of the reforming of government activities argue that the use of information technology can significantly increase people's participation in the development of regulatory policy,[33] because the e-governance, is such activity[34] which is aimed at increasing the efficiency and effectiveness of public administration based on the use of information and communication technologies.[35]

Scientists point out that electronic rulemaking[36] or the use of new electronic technologies makes it possible to transform the previously separate process into a process in which citizens can participate regularly.[37]

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30 See, supra note, 16.

31 *Benjamin S. M.,* Evaluating Rulemaking Public Participation and Political Institutions, Duke Law Journal, Vol. 55, March, 2006, 902.

32 *Coglianese C.,* Citizen Participation in Rulemaking: Past, Present and Future, Thirty-Fifth Annual Administrative Law Issue The Role of the Internet in Agency Decision making, Duke Law Journal, Vol. 55, March, 2006, 968.

33 The alleged users of the Internet are both members of the Congress who want to check the implementation of the legislation, as well as the agency's managers and ordinary employees, *Otis R. D., Miles-McLean S. C.,* Federal Government Inter-Branch Integrated Regulatory Information System, eRulemakings Federal Docket Management System, eRulemaking at Crossroads, A collection of White Papers prepared for Dg.O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 5, <http://people.umass.edu/stu/eRulemaking/Crossroads.pdf > [10.09.2010].

34 Internet technology can improve the process of management in terms of providing information to citizens and receiving information from them, *Adler M.,* Administrative Justice in Context, Hart Publishing, Oxford and Portland, Oregon, 2010, 55.

35 *Milosz M., Tykwinska-Rutkowska D.,* The Concept of "E-Administration" and the Regulatory Framework for Electronic Administration in Polish Law, Computer and Telecommunications Law Review, Vol. 14 (4), 2008, 100.

36 The purpose of e-rulemaking is to provide access to information processed by the government electronically, which will facilitate the control of standing and proposed regulations, *Kartz B., Hurwitz R., Lin J. J., Uzuner O.,* Better Policy Through Natural Language Information Acess, <http://www.law.upenn.

Electronic rulemaking focuses not only on the right of the people to participate in administrative rulemaking, but also on its practical implementation. The computer program sets the agenda for people's participation, particularly, who, when, and how many times can express their opinion and what rules are used to conduct the dialogue.[38]

A survey of agency representatives in the United States revealed what agency officials think about electronic rulemaking. Part of the respondents positively assessed electronic rulemaking and noted that electronic rulemaking is a real opportunity for people to enhance the submission of comments and to ensure easy access to the record.[39]

The only problem the agency representatives identified was the inability to fully use electronic means and the continuation of the parallel procedure of documenting administrative proceedings along with electronic rulemaking.[40]

Representatives of the agency also noted that the existence of an electronic record will help to easily manage the received opinions, because instead of handing copies of the opinions to the interested persons, agency representatives are instructing interested parties to read the opinions on the website: *Regulation.gov*.[41]

Representatives of the agency, who are supporters of electronic rulemaking, indicate that in addition to the older generation, the Internet will involve the Millennium Generation in administrative rulemaking. It is true that the electronic rulemaking's record is not a blog, because a person needs to open a link called: a notice of the proposed rulemaking.... in order to transfer to the main theme. However, according to the statement of agency's representatives, it is possible to post a blog on the website, which will be linked to the electronic rulemaking record, and will be presented in the form of a "podcast file" for further download.[42]

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edu/academics/institutes/regulation/erulemaking/papersandreports.html> [10.09.2010], the goals of e-rulemaking are the same for all agencies. The first goal of e-rulemaking is to reduce document production and agency costs. The second goal is to increase the quality of participatory democracy. The third goal of e-rulemaking is to increase "deliberation,"which not only promotes a democratic discussion of the issue, but also improves the quality of political decision-making, *Figueiredo J. H.,* E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission, Duke Law Journal, Thirty-Fifth Annual Administrative Law Issue, The Role of the Internet in Agency Decision-making Articles, Vol. 55, March, 2006, 974-975.

37 *Coglianese C.,* Citizen Participation in Rulemaking: Past, Present and Future, Thirty-Fifth Annual Administrative Law Issue The Role of the Internet in Agency Decision-making, Duke Law Journal, Vol. 55, March, 2006, 943.

38 *Noveck B. S.,* Public Participation in Electronic Rulemaking: Electronic Democracy or Notice-and-Spam? Administrative and Regulatory Law News, Vol. 30, Fall, 2004, 8.

39 *Lubbers J. S.,* A Survey of Federal Agency Rulemakers' Attitudes about E-Rulemaking, Administrative Law Review, Vol. 62, Spring, 2010, 471.

40 Ibid.

41 Ibid.

42 Ibid, 472.

Along with the other positive aspects listed above, it should also be noted that the use of information technology will not only make the process of citizen participation real, but will also help citizens to realize their potential to participate.[43]

In addition, according to the researchers who support the electronic form of publication of the notice and submission of comments, electronic rulemaking is a revolutionary achievement on the path to citizen-centered governance and ensures the transformation of the regulation development process, which improves regulatory governance as well as enhances public participation in administrative rulemaking.[44]

Therefore, people's involvement in administrative rulemaking through the Internet can ensure better public participation in the process of rule development[45] as publication of the notice and submission of comments through the Internet will increase the civic responsibility of the public.[46] At the same time, electronic rulemaking will allow citizens to get acquainted with the position submitted by various persons,[47] including those with whom they disagree.[48]

In addition, electronic rulemaking can facilitate the relationship between the citizen and the administration and ensure the storage of information reflecting the communication with the agency, which will be much easier for people to access.[49]

It is true that there is little empirical evidence to evaluate the effectiveness of electronic rulemaking today.[50] However, some researchers believe that the active involvement of citizens in the

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43 *Noveck B. S.,* The Electronic Revolution in Rulemaking, Emory Law Journal, Vol. 53, Spring, 2004, 516.

44 *Law H. K., Lau G. T.,* E-Rulemaking: Needs from ICT Perspectives, eRulemakings Federal Docket Management System, eRulemaking at Crossroads, A collection of White Papers prepared for Dg.O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 11, <http://people.umass.edu/stu/eRulemaking/Crossroads.pdf> [10.09.2010].

45 Electronic rulemaking provides, not only the active participation of stakeholders in the process of administrative rulemaking, but also makes it available for everyone…Ten years ago, a person had to hire one of Washington's law firms to obtain full information about administrative rulemaking. It is easy to assume that the written opinions submitted to the agency after ten years will be a rare form of public-agency relations, *Lubbers J. S.,* The Transformation of the U.S. Rulemaking Process-For Better or Worse, Ohio Northern University Law Review, Vol. 34, 2008, 479.

46 *Carlitz R. D., Gunn R. W.,* Once in a Lifetime: Opportunities for Civic Engagement, Pittsburgh, PA 15219, February, 2003, <http://www.info-ren.org/publications/cof/cof_0210.html> [10.09.2010].

47 Online dialogue in terms of improving people's participation in administrative rulemaking can be much more productive than public hearings, *Brandon B. H., Carlitz R. D.,* Online Rulemaking and Other Tools for Strengthening our Civil Infrastructure, Administrative Law Review, Vol. 54, Fall, 2002, 1470.

48 A study found that three-quarters of respondents surveyed mentioned they had read other people's comments and then changed their position. This indicates that the conversion of the administrative rulemaking process in an online regime has made it more deliberate…the study also found that citizens participating in administrative rulemaking expressed a desire to enhance people's participation and influence in administrative rulemaking, *Schlosberg D., Zavestoski S., Shulman S. W.,* Democracy and E-Rulemaking: Web-Based Technologies, Participation, and the Potential for Deliberation, Journal of Information Technology and Politics, Vol. 4 (1), 2007, 39, <http://people.umass.edu/stu/eRulemaking/JITP4-1_Democracy.pdf> [10.09.2010].

49 *Coglianese C.,* Information Technology and Regulatory Policy: New Directions for Digital Government Research, Social Science Computer Review, Vol. 22 (1), Spring, 2004, 85-91.

government decision-making process through the Internet may be of particular importance for the development of administrative rulemaking.[51]

Consequently, researchers supporting electronic rulemaking point out that the effective use of information technology ensures the achievement of important goals such as: improving the quality of regulatory decisions and increasing the legitimacy of administrative rulemaking.[52]

Simultaneously, some scientists do not consider that the main achievement of electronic rulemaking is the transparency of administrative rulemaking or increase in the volume of information obtained. According to them, the purpose of introducing the publication of the notice and submission of opinions via the Internet, is to provide the scientists and policy makers with a clear idea about the process of administrative rulemaking.[53]

Before the current regulatory process can be transformed, it is important to consider the goals that can lead to such a transformation. Therefore, the study of electronic rulemaking should take into account the disadvantages that accompany the electronic form of publishing a notice and submitting an opinion.

5. Disadvantages of Electronic Publication of the Notice and Electronic Submission of Opinions

There are many disadvantages to using the Internet.[54] It is true that agencies can use the Internet for publishing notice and submitting opinions, but dependence on it creates problems. Technology increases people's participation in administrative rulemaking, but at the same time, opponents of the agency are given a better opportunity to use a strategy that will hinder the decision-making process of the agency.[55]

In addition, because there is no universal access to the Internet, agencies that are overly dependent on the Internet as a key tool in increasing the role of people's participation in the

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[50] In particular, to what extent does this kind of administrative rulemaking ensures the participation of the people and the increase in the quality of the regulation, as well as how the citizens evaluate the efficiency of electronic rulemaking compared to the traditional administrative rulemaking, *Fountain J. E.,* Prospects for improving the Regulatory Process Using E-Rulemaking, Communications of the ACM, Vol. 46, № 1, January, 2003, 63.

[51] *Coglianese C.,* The Internet and Citizen Participation in Rulemaking, I/S: A Journal of Law and Policy for the Information Society, Vol. 1, Winter, 2005, 33.

[52] *Coglianese C.,* Information Technology and Regulatory Policy: New Directions for Digital Government Research, Social Science Computer Review, Vol. 22 (1), Spring, 2004, 85-91.

[53] *Benjamin S. M.,* Evaluating Rulemaking Public Participation and Political Institutions, Duke Law Journal, Vol. 55, March, 2006, 936.

[54] There is a danger that the development of technology will lead to a weakening of documentary (especially manuscript) opinions. However, some believe that the failure of electronic comment procedure will prolong the benefits of documentary commenting, *Shulman S. W.,* the Internet Still Might (But Probably Won't Change everything), I/S: A Journal of Law and Policy for the Information Society, Vol. 1, Winter, 2004/2005, 128.

[55] *Johnson S. M.,* The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet, Administrative Law Review, Vol. 50, Spring, 1998, 329-330.

rulemaking are violating the participatory right of individuals who do not have access to the Internet. For example, women, minorities and the poor.[56]

Also, the introduction of electronic rulemaking will result in the active involvement of the people in the process of administrative rulemaking. This may be reflected only in the quantitative increase in the number of persons involved in administrative rulemaking, thus, in the increase in the number of opinions provided by the people on the draft act rather than in the increase of opinion quality.[57]

It is true, that submitting identical opinions, reduces the agency's costs as the computer program automatically finds similar opinions and blocks them in such a way that the agency employee no longer needs to read the opinion, however, the situation changes when the opinions are identical, but are not completed in accordance with the form presented on the website (for example, a person did not fill the form provided, but composed the text himself and sent it by e-mail). In such a case, it is expected that the computer program does not consider these views to be identical despite the absolute similarity of their content; the agency will then have to hire a person[58] who will separate different and identical comments from each other. This, of course, is associated with additional[59] costs.[60] In addition to the increase in the volume of submitted opinions, the lack of a flexible data retrieval system reduces the effectiveness of electronic rulemaking. A more complex and less researched issue is how to separate the opinions of experts and stakeholders.[61]

However, the representatives of agency mention that as a result of the comments received, there is no increase in useful information or arguments.[62] It is true that electronic rulemaking brings better

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56 Ibid*,* 329-330.

57 *Benjamin S. M.,* Evaluating Rulemaking Public Participation and Political Institutions, Duke Law Journal, Vol. 55, March, 2006, 904.

58 In order to study the submitted information regarding the draft regulation, the agency needs a person who will read and process the received materials. Therefore, the agency should in detail study the opinions that the computer program does not record as similar opinions, even though their content is identical and they develop the same idea. Opinions presented in this way only increase the volume of information already submitted and nothing changes in terms of receiving new information. Therefore, the costs associated with processing of the submitted opinions increase, ibid, 909.

59 It is difficult to separate the result of electronic rulemaking from the process of rulemaking, because the use of more means delays the decision-making process. However, the electronic and documentary production of records makes the process of administrative rulemaking more expensive, *Lubbers J. S.,* A Survey of Federal Agency Rulemakers' Attitudes about E-Rulemaking, Administrative Law Review, Vol. 62, Spring, 2010, 473-474.

60 *Benjamin S. M.,* Evaluating Rulemaking Public Participation and Political Institutions, Duke Law Journal, Vol. 55, March, 2006, 904.

61 *Parker R. W.,* The Next Generation of e-Rulemaking: A User's Perspective, eRulemakings Federal Docket Management System, eRulemaking at Crossroads, A collection of White Papers prepared for Dg.O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 17, <http://people.umass.edu/stu/eRulemaking/Crossroads.pdf> [10.09.2010].

62 Official records and people's comments submitted for posting on the website require approval from the agency before it becomes available electronically. Consequently, opinions are filtered without any explanation ... So the agencies maintain control over the information submitted, *Shkabatur J.,* Transparency

coordination, but the problem is to place specific information in an electronic record in a place accessible to all, as this can jeopardize the disclosure of other people's secrets.[63]

They also point out that many of the issues that initially raised doubts concerning the effectiveness of electronic rulemaking, such as the problem of the authenticity of comments, the spread of viruses, have not been eliminated and are of constant concern. In addition, because there is a danger *Regulation.gov* will be disconnected, opinions in a parallel regime are submitted in a documentary form. Consequently, until the electronic rulemaking system is strengthened and the production of materials continues in a documented manner, it will be impossible to assess the full potential of electronic rulemaking.[64]

6. The Ways of Improving Electronic Publication of the Notice and Electronic Submission of Opinions

Researchers believe that in order to increase people's involvement in administrative rulemaking as a result of the use of information technology, it is necessary to develop a guide-book[65] to administrative rulemaking, as well as the improvement of the performance of the website on which information about administrative rulemaking should be placed.[66]

In addition, as the submission of opinions via electronic means will increase the amount of information received, replacement of traditional administrative rulemaking with electronic rulemaking requires the commencement of the use of appropriate electronic tools, through which the systematization of opinions presented by the people, collecting and evaluating of various documents,[67] as well as the discovery of duplication and inconsistency will be possible.[68]

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with (out) Accountability: Open Government in the United States, Yale Law and Policy Review, Vol. 31, Fall, 2012, 97.

63 *Lubbers J. S.,* A Survey of Federal Agency Rulemakers' Attitudes about E-Rulemaking, Administrative Law Review, Vol. 62, Spring, 2010, 473-474.

64 Ibid*,* 472.

65 Scientists believe that it is desirable to indicate the specific issues on which the agency wants to receive opinions in the notice of administrative rulemaking, also in the notice or on the training website, which will be attached to the main page, should be given the standard text on effective ways of compiling opinions to avoid restriction of freedom of expression of particular individuals, *Reitz J. C.,* E-Government*,* American Journal of Comparative Law, Vol. 54, Fall, 2006, 747.

66 *Farina C., Cardie C., Bruce T. R., Wagner E.,* Better Inputs for Better Outcomes: using the interference to improve e-Rulemaking, eRulemakings Federal Docket Management System, eRulemaking at Crossroads, A collection of White Papers prepared for Dg.O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 13, <http://people.umass.edu/stu/ eRulemaking/Crossroads.pdf> [10.09.2010].

67 To better manage websites, many agencies have set up a Web Council or similar workgroup. They also developed various internal standards and created guidelines for websites design, *Coglianese C.,* Enhancing Public Access to Online Information, Michigan Journal of Environmental and Administrative Law, Vol. 2, Fall, 2012, 39.

68 A methodology is currently being sought to improve the systematization of opinion submitted by the people. New technological methods are being developed to ensure the recovery of information, the discovery of the similar comments, the summing up of texts and the solution of other tasks, *Law K. H., Lau*

It will be desirable for the administrative organ to hire a person who will study the submitted comments[69] and compile a table of issues to be discussed.[70] In addition, to improve electronic rulemaking[71] citizens need to be given access to the materials on the website of the administrative organ. Also it would be good to find a way[72]to enable stakeholders to start participate in administrative rulemaking from the beginning of the regulation making until its appeal to the court.[73]

In addition, some scientists believe that with the improvement of information technology, it is necessary to transform electronic rulemaking through regulatory elections, which involves conducting

G. T., E-Rulemaking: Needs from ICT Perspectives, eRulemakings Federal Docket Management System, eRulemaking at Crossroads, A collection of White Papers prepared for Dg.O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 11, <http://people.umass.edu/stu/eRulemaking/Crossroads.pdf> [10.09.2010].

69 In some cases, agencies may delegate the authority to analyze opinions to private contractors, *Coglianese C.,* E-Rulemaking: Information Technology and the Regulatory Process, Administrative Law Review, Vol. 56, Spring, 2004, 377.

70 The table presents a graphical representation of the information in the electronic data management system concerning the dynamics of administrative rulemaking, *Carlitz R. D.,* Information Renaissance, eRulemaking at Crossroads, A collection of White Papers prepared for Dg.O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 10, <http://people.umass.edu/stu/eRulemaking/Crossroads.pdf> [10.09.2010], It would be desirable if a similar table is published for public review… in any case, it is clear that comment management is the next step in the research of electronic rulemaking, *Parker R. W.,* The Next Generation of e-Rulemaking: A User's Perspective, eRulemakings Federal Docket Management System, eRulemaking at Crossroads, A collection of White Papers prepared for Dg.O 2006, The 7th Annual International Conference on Digital Government Research, San-Diego, California, May 24, 2006, 17, <http://people.umass.edu/stu/eRulemaking/Crossroads.pdf> [10.09.2010].

71 Shane has come up with the idea of creating "deliberative groups" across the country that will have access to the software to negotiate online.These groups will then be invited to make recommendations on the Agency's agenda. In 2001, the Environmental Protection Agency adopted a method proposed by Shane and announced a ten-day national public online dialogue across the country to demonstrate the involvement of the population in policy development. For each day of the dialogue session, the Environmental Protection Agency posted a new key issue on the website, where several participants were appointed who would serve as a discussion leaders. It is true that the method was successful, but the experiment showed that the participants in the dialogue were public servants, and only 10 messages a day were received from users, among which ordinary citizens were a small number, *Coglianese C.,* Citizen Participation in Rulemaking: Past, Present and Future, Thirty-Fifth Annual Administrative Law Issue The Role of the Internet in Agency Decisionmaking, Duke Law Journal, Vol. 55, March, 2006, 960-962, a study by Thomas Bairley and Stuart Schulman found that electronic rulemaking is a good way to reduce the barrier of public participation, but it cannot improve the quality of information exchange, *Brandon B. H.,* An Update on the E-Government Act and Electronic Rulemaking, Administrative and Regulatory Law News, 29, Fall, 2003, 8.

72 Proper visualization of electronic tools will improve the process of submitting opinions on the website. Such tools include tools that help to map public interests, compile diagrams of people's views, quantitatively analyze the materials submitted, *Noveck B. S.,* Public Participation in Electronic Rulemaking: Electronic Democracy or Notice-and-Spam? Administrative and Regulatory Law News, Vol. 30, Fall, 2004, 9.

73 *Lubbers J. S.,* The Transformation of the U.S. Rulemaking Process-For Better or Worse, Ohio Northern University Law Review, Vol. 34, 2008, 479.

electronic elections[74] to explore the views of the people on the proposed project. It may also be used simulations[75] for submitting the opinions, but because electronic rulemaking today is in its embryonic stage of development, in both the United States and Georgia, more will be learned[76] about this process in the future.[77]

For now, it is clear that the active participation of people through the electronic means is valuable for a particular category of rulemaking although, for most of the cases of rulemaking, on the contrary, it is ineffective and unsatisfactory. Therefore, it is important to identify the areas of rulemaking, where people's participation in electronic form will result in positive outcome.[78]

The results of electronic rulemaking depend on how it is realized and used. In order to achieve a positive result from electronic rulemaking ... the authors of rulemaking must carefully introduce any new technology in the process administrative rule making.[79] Therefore, it will be interesting to see how by the use of electronic means the process of administrative rulemaking transforms[80] in the United States[81] and Georgia.

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74 *Coglianese C.,* the Internet and Citizen Participation in Rulemaking, I/S: A Journal of Law and Policy for the Information Society, Vol. 1, Winter, 2005, 44.

75 Agencies can offer public access to a simulation program based on the agency's model. Members of the public will be able to change the settings and then engage in various simulations to develop regulation. Such an approach will allow agencies to receive public opinion on an important issues when developing a new regulation, Ibid*,* 33.

76 However, it is the future perspective how online communication will improve the decision-making process, *Furlong S. R., Kerwin M. C.,* Interest Group Participation in Rule Making: A Decade of Change, Economics of Administrative Law, *Rose-Ackerman S. (ed.),* Edward Elgar Publishing, Inc., An Elgar Reference Collection, Chentelham, UK, Northhampton, MA, USA, 2007, 332.

77 Internet technology, which is used to collect and synthesize public comments, must be systematically tested to achieve results, *Shulman S.,* Citizen Agenda –Setting: The Electronic Collection and Synthesis of Public Commentary in the Regulatory Rulemaking Process, Environmental Science and Policy Program, University-Olin Hall, <http://www.digitalgovernment.org/library/library/dgo2001/MEDIA/DRAKE.PDF> [10.09.2010].

78 In this sense, the rulemaking conducted in the framework of 2.0. which aims to improve electronic rulemaking, can be a successful initiative, *Herz M.,* Chair's Message, Administrative and Regulatory Law News, Vol. 37, Summer, 2012, 2.

79 *Coglianese C., Shapiro S., Balla S. J.,* Unifying Rulemaking Information: Recommendations for the New Federal Docket Management System, Administrative Law Review, Vol. 57, Spring, 2005, 629.

80 Because the original electronic rulemaking was limited to provide people's more, efficient and transparent participation in administrative rulemaking federal agencies and the United States Administrative Conference have developed a reform plan to improve electronic rulemaking. The United States Administrative Conference has issued "recommendations about the comments regarding rulemaking" to highlight the best practices available for improving people's participation. For the effectiveness of public opinion, the United States Administrative Conference has determined that the federal government should publish a document on the *Regulations.gov* website that explains what kind of comments are most useful and should provide examples of the best comments. The United States Administrative Conference has also indicated that the period for submitting opinions on significant rulemaking should be at least 60 days. In addition, agencies must publish on the website all opinions submitted electronically or in a documentary form in a timely manner and make full use of the period set for replying to comments, or utilize other means to strengthen the response of the people to the comments submitted, *Johnson S. M.,* Beyond the Usual

7. Conclusion

The study showed that the electronic publication of the notice and the electronic submission of opinion on a normative administrative-legal act is developed in the United States while in Georgia it is at the embryonic stage of development. It is true that the possibility of leaving a comment on the draft normative act on the website of the Legislative Herald is a step forward, but the passivity of users in terms of leaving comments indicates that it is necessary to carry out a number of reforms in Georgia.

It is desirable to pass a law on e-government in Georgia, which will define in detail the forms and methods of internet communication between administrative organs and the public.

In addition to electronic publication of the notice, it is necessary to enshrine in the relevant articles of the General Administrative Code of Georgia the procedure of electronic submission of opinions by interested persons. Also to ensure people's efficient electronic participation in administrative rulemaking, it is necessary to establish a centralized electronic system, which will be accessible to all administrative organs. Administrative organs will be able to post a notice of administrative rulemaking on this website, publish the draft normative administrative-legal act, as well as the results of the research conducted in connection with the rulemaking.

It is necessary to equip the centralized electronic system with all possible electronic means, which will ensure the identification of the submitted opinions and the administrative organ's easy access to the opinions for their further processing.

At the same time, in order to enable access to administrative rulemaking, it is necessary to maintain the procedure of publication of the notice and submision of the opinion in a documentary form before the full transition to electronic rulemaking.

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[81] *Coglianese C.,* The Internet and Public Participation in Rulemaking, Paper prepared for conference on Democracy in Digital Age, Yale Law School, April, 2003, 6, <http://www.hks.harvard.edu/m-rcbg/research/rpp/RPP-2003-05.pdf> [30.10.2012].

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Construction Permit Administrative Proceedings as a Mechanism for Implementing Construction Safety

The article reviews one of the most important institutes of construction law – construction permit, and construction safety issues arising within permit issuing administrative proceedings. According to the article construction permit issuing proceeding is considered as basic mechanism and way of ensuring construction safety. There is underlined that permit issuing administrative proceeding is the best stage for achieving construction safety because of its functions and instruments. For this purpose, we discuss functions of administrative proceeding and the problems and characteristics of participation of interested parties in the proceedings. The article also refers to an unsolved problem of qualification of the persons submitting the construction documents and the officers authorized to examine these documents. We provide the best examples of foreign countries herein and offer some ways of solving the problems. Another issue discussed in the article is protection of neighbors' interests for the purpose of achieving construction safety and the importance of their involvement in administrative proceedings. Also, we argue that accelerated proceedings and formal character of examination of submitted documents are significant threats in the process of issuing a construction permit. Finally, we mention exceptional and simplified permits and the "ugly" practice of their issuance in Georgia which also lead to increasing risks.

We used comparative-law method and analysis and offered concrete recommendations and ways of improving legislation for the purpose of solving the above problem.

We hope the present article will contribute to improving construction safety issue and generally, to the construction law science.

***Key words**: Construction, construction permitc administrative proceeding, construction safety.*

1. Introduction

The importance of the issue of construction safety in Georgia has grown due to the speed up of construction process on the one hand, and the necessity of protecting health and safety of the people involved, on the other hand. Besides, construction safety has direct impact on the health and safety of those people who are indirectly related to the construction and may suffer irreparable damages caused by unsafe construction. Accordingly, studying the issue of construction safety has become even more relevant. The goal of the present article is to highlight the problem of considering construction safety

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issues in construction permit issuing process; analyzing applicable legislation and practical problems and finding possible solutions. The article aims to emphasize the administrative procedures of permit issuance as the main instrument of ensuring construction safety and prove that the stage of the proceedings can effectively prevent the risks and danger caused by construction.

For this purpose, the best solutions should be found in adequate understanding and implementation of the functions of administrative proceeding; also, the essence of permit issuance procedures and its characteristics and instruments. In the course of the administrative procedures there should be checked whether the planned activities are in compliance with the general and specific construction legislation requirements and especially, with the safety concept. Permit issuance procedures shall become a tool for ensuring construction safety, which will contribute to protecting the rights of all persons directly or indirectly related to the process provided that it will not contradict the principles and rules of free construction and entrepreneurship.

2. Functions of Administrative Proceeding

Administrative proceeding is the activity of an administrative body aimed at drafting, issuing and executing administrative legal act, solving administrative claims and drafting, concluding and cancelling administrative agreements.[1] Administrative proceeding is the activity of an administrative body, which is focused on making a decision. Legal regulation of the procedures contributes to simplifying governance. Going through the preliminarily determined standard steps excludes (or minimizes) the possibility of a mistake in decision-making process.[2] Broad understanding of administrative proceeding includes the activities of an administrative body conducted for exercising public law authorities. For the GACG purposes the legislator offers narrow understanding of administrative proceeding, which is based on two criteria: 1) it comprises administrative body activities which have external impact i.e. internal organizational activities are not conducted within the scopes of the administrative proceedings and 2) it is used for issuing administrative legal act or concluding an administrative agreement i.e. administrative real act, private law agreement and informal government do not fall within the narrow understanding of administrative proceeding.[3]

Administrative proceeding comprises only those areas of the administrative body's activities which are related to making specific decisions (issuing administrative acts; concluding agreements) on the basis of public (administrative) law and have so-called "external impact" (Außenwirkung). Accordingly, the internal organization activities of and administrative body which are not related to establishing any rights and obligations of citizens or regulating any legal relationship, are not considered as administrative proceedings (Articles 16-26 and other provisions of GACG are not

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1 General Administrative Code of Georgia (GACG), paragraph "j", clause 1, article 2, Georgian Legislative Herald 32 (39) 15/07/1999.

2 *Turava P.,* Fair Administrative Proceeding as a Basic Constitutional Right and its Institutional Guarantee, Compilation of Articles, Human rights Protection: Legislation and Practice, *Korkelia K. (Ed.),* Tbilisi, 2018, 250 (in Georgian).

3 *Turava P., Pirtskhalaishvili A; Kardava E.*, Administrative Porceedings in Public Service, Tbilisi, 2020, 135 (in Georgian).

applied in such case). Nevertheless, broad understanding of administrative procedures includes all areas of administrative body's activities (administrative proceedings in narrow understanding; informal governing; conclusion of private-law agreements; internal organizational relationships, etc.).[4] Administrative proceeding is only a part of public administration which is conducted by a public law or a private law organization using public administration instruments and the product of which is delivered in the form of an administrative-legal act or an administrative agreement.[5]

While discussing administrative proceeding as a function – one of the most strictly prescribed activity of public administration, it is important to have a clear understanding of its principles. Principles of administrative proceedings are the ideas, which have to be considered in the process of public administration by all administrative bodies/officials, and their contents expressed in various norms should be adequately observed and followed. Whereas the principles of administrative law are the guidelines which have to be absorbed in the whole governing process, they have to be applied not only to the activities within the scopes of administrative proceedings in an administrative body, but also their contents have to be reflected in all administrative activities which are conducted within the scopes of public administration in the form of an activity either by the persons with the public officer's status or private-law entities.[6] The central point in administrative proceedings is to ensure the truth. The concept of the "truth" is broader that compliance with law and also includes the aspects of demands and interests which were not consolidated with the legal standards. The above wider goal corresponds with the ideal-typical doubtless character of the proceeding from the point of view of the decision made by the administrative body and with the important structuring authority of an administrative body that conducts the proceeding. The functions of the administrative proceedings are: gathering and processing the information related with the proceedings which serves as basis for ensuring accuracy; transparency as a general requirement for procedure configuration and effectiveness as a link between the goal and the ways of achieving it, which is mainly focused on decreasing the procedure costs. Besides effectiveness of a decision is a function which stands as another issue to ensure accuracy. The effectiveness and acceptability of a decision is stressed from the point of view of the decision compliance. And finally, the administrative proceedings are aimed at legal protection.[7]

The variety of the functions and their implementation defines the effectiveness, accuracy and lawfulness of the decisions to be made as a result of administrative proceedings.

2.1. Ensuring Function of Administrative Proceedings

Lawfulness, fairness and subjective accuracy of administrative decision requires that the essence of the presented case be completely researched, appropriate legal norms be found and adequately

4 *Maurer H.,* Allgemeines Verwaltungsrecht*,* Munchen, 2011, § 19, Rn. 1 f.

5 *Turava P., Pirtskhalaishvili A; Kardava E.,* Administrative Porceedings in Public Service, Tbilisi, 2020, 36 (in Georgian).

6 Ibid, 39

7 *Siegel T.*, Rechtschutz vor Gericht und im Verwatlungsverfahren–wechselseitige Kompensationsmöglichkeiten? Zeitschrift für Umweltrecht, № 9, 2017, 451.

interpreted and the case be correctly subsumed. Accordingly, the administrative body's decision will be complete (satisfactory) after all the substantial interests are proportionally balanced.[8]

Also, we should mention regulations of administrative procedures which contribute to making lawful and objective decisions. This is the main essence and function of administrative proceedings. It is a result of comprehensive research of the decision to be made.[9]

According to the theories set forth in German legal literature administrative proceedings have material law function when a decision is made within the scopes of final program or whenever the public administration conditions itself in the framework of general legal provisions. The proceedings have material-law function especially in the cases when a decision needs democratic legitimation or if it is made within the discretion. The inherent function of administrative proceedings is "service function". It serves correct application of material law provisions in administrative proceedings. Whereas the German administrative law dogmatics was (and is still) based on the principle of material law accuracy, while the competence of making final decision was vested in court, the administrative proceedings had secondary role. Effectiveness of requiring legal protection is essentially related to material law in the framework of strict and accurate law. If there is a procedural mistake, it does not play any role when administrative body is unable to make another decision on that case. It has different impact in the areas where administrative body has more space to act, especially in discretion, free space of evaluation and planning decision. Usually in such cases it is possible that different decision would have been made if there had not been procedural mistake, e.g. if a party had been heard incorrectly, the third party had not been appropriately involved or a decision had not been adequately justified. In the decisions with a space of evaluation the administrative proceedings show the function of ensuring accuracy. [10]

2.2. Proceedings to Serve Fairness

The key point of the concept of "proceedings to serve fairness" is deriving fairness from material value. The basic model of "material fairness theories" a priori comprehends this value and administrative proceedings' service function becomes its founder (service proceedings). The idea of fairness of "external", "ensuring", "instrumental" or "serving" proceedings is based on the understanding of material fairness. Classifying the fairness of the proceedings as an aspect was unsuccessful. According to this approach, fairness and legitimation were not applied directly within the proceedings; it was driven from essential goal which was beyond the proceedings.[11]

From the perspective of decision-making administration, first of all it comprehends exercising of a material right, based on a law, which becomes a standard for fair decision. It does not matter whether it comes directly from legislative process because legislative process does not have any specific function in the fairness system of service proceedings. Thus, material right, arising from a law

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8 *Held J.,* Der Grundrechtsbezug des Verwaltungsverfahrens, Berlin,1984, (Schriften zum Öffentlichen Recht, Bd. 462), 37.

9 Ibid.

10 *Kopp F.O., Ramsauer U.,* VwVfG Verwaltungsverfahrensgestz Kommentar 16. Aufl., Munchen, 2015, 21.

11 *Quabeck C*., Dienende Funktion des Verwaltungsverfahrens und Prozeduralisierung, Osnabrück, 2010, 26.

is a result of administrative proceedings and provides concrete definition of the scopes of material fairness which already exists.[12]

A condition for such understanding of fairness of proceedings is that difference has to be made between the contents of a decision and its adoption. The task of the proceedings is to ensure that material fairness is structurally provided in the product of the proceedings. Accordingly, the decision maker has to be adequately informed; be impartial against factual circumstances and also be able to justify the administrative decision. Despite that, the above structures do not have fundamental impact on fairness. They are only "formal assistants" on the way of reaching "*res judicata"* material fairness by normative requirements.[13]

2.3. Other Functions of Administrative Proceedings

Along with the pure "service" function the administrative proceedings have other functions too which are independent from the material law accuracy and play important role in practice. At this stage they are still considered in the legal policy discussions but enough attention is not paid to them in the dogmatics of legal proceedings. Administrative proceedings also contribute to acceptability of administrative decisions with the help of interested person. A person who participated in the proceedings, heard the proceedings, was able to follow the decision-making process and receive clear justification, even if the decision is not made in his/her favor, has more confidence and acceptability to the proceedings than the one who sees that the decision lacks transparency and participation and causes doubts that it contradicts law. Besides, through the right process an administrative body can ensure fulfillment of important integrative obligations: the persons involved in the administrative proceedings should have the possibility to see fair functioning of administrative proceedings conducted by an administrative body and participate in implementation of the applicable legal norms.[14]

3. Construction Permit as the Institute of Construction Order Law

Before we start discussing the essence of construction permit as the main institute of Construction order, we should clarify some issues of construction order law itself. Construction order law is an important part of law and order, which regulates the issues of preventing the threats caused by construction activities for protecting the interests under law and order. Construction order law regulates the legal relationships at construction site. The general principles of law and order are also used in construction order.[15]

The interest protected by the construction order law is the legal order ensured by construction law norms, which contributes to protecting both a subject's rights (person interested in construction; third party) and public safety.

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12 Ibid, 27.

13 Ibid.

14 *Kopp F.O., Ramsauer U.*, VwVfG Verwaltungsverfahrensgestz Kommentar 16. Aufl., Munchen, 2015, 22.

15 *Turava P.,* in*: Turava P., Kalichava K.,* Construction Law, Tbilisi, 2020, 160 (in Georgian).

Construction order law is divided into preventive (construction permit law and supervision of construction) and repressive (finding violations and reacting) construction order laws. The interest to be protected by construction order law is safe urban construction. [16]

As it was already mentioned above, construction order aims to provide appropriate mechanisms for preventing danger i.e. ensuring safety. It includes provisions determining administrative procedures and restrictions in construction area to ensure public order and safety.[17] Its key point is the danger. Danger is a central concept of law and order. Only if there is some danger the administrative body reposible for the order may take the measures for protecting the order and restrict some freedoms. Only if there is a danger it may determine the obligations of responsible persons in connection with some actions or inactions.[18]

Construction permit is the preventive tool for avoiding threats. By going through certain procedures it contributes to preventing the harm caused by construction activities.[19]

It is also interesting in which part of construction order law should construction permit be included because the construction order law itself is also divided into formal and material order laws. Formal construction order law comprises organizational structure and authority of the entities executing law and order, also the decision-making procedures (types of administrative proceedings and rules of conducting the procedures). The subject of its regulation is the criteria of formal lawfulness of the decisions made in construction order area. The material construction law comprises material legal norms regulating construction activities, which are the basis for issuing individual administrative legal act.[20]

Construction is subject to obligatory permit and preventive restriction of construction contributes to creating mechanisms for preventing threats. By issuing construction permit those restrictions are removed when correspondence with the construction law requirements is determined as a result of comprehensive examination of the intended construction activities. If the intended construction activities comply with the construction Code requirements the administrative body has to issue a construction permit. Such compliance is checked within the administrative proceedings. Construction permit is a legal document reflecting a specific case of the right to construction guaranteed by the Constitution of Georgia and construction legislation. It is not the initial source of the right to construction but it is based on existence of such right and is consequently issued.[21]

The direct definition of construction permit – the main concept of construction order law, is not given in any of the legislative acts. Generally, it is conceived to be a legal basis for conducting construction activities; it is an individual legal act issued for this purpose.

According to the opinions expressed in legal literature construction permit consists of recognizing and regulatory parts. The recognizing part of the act determines material lawfulness of the

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16 Ibid, 160.
17 *Turava P.,* The Basic Concpts and Institutes of Construction Law, "Law Journal", №2, 2009, 122.
18 *Turava P., in: Turava P., Kalichava K,* Construction Law, Tbilisi, 2020, 161 (in Georgian).
19 Ibid, 163.
20 Ibid, 165.
21 Ibid, 165-166.

intended construction activities while the regulatory part provides for removing restriction and the contents of the allowed activities.[22]

There is shared the same notion in the German scientific literature which states that construction permit is an administrative-legal act as defined in paragraph 35 of the Law on Administrative Procedures (VwVfG). It consists of recognizing (determining) and regulatory, consent parts. Recognizing part comprises determining the material lawfulness of construction project. The regulatory part includes the consent of the supervisory organ on implementing the construction project. Accordingly, construction activities may not be launched before receiving the permit.[23] The regulatory part of the construction permit is the main basis for conducting the construction and it removes all obstacles related to the construction restriction purposes.[24]

It should be mentioned that defining the legal form of construction permit has legal importance:

– The material law function of the construction permit as an individual administrative-legal act is that it is an instrument for concretizing and individualizing general abstract regulation. The material right of construction cannot be used without this legal form. Using such form creates grounds for legal reliance of the addressee on the construction permit (stabilization function)

– processing a construction permit is a legal function; it becomes basis for beginning administrative proceedings. The rights determined against the addressee (active role) is related to this form of activity in administrative proceedings (principle of cooperation).

– Construction permit is included in the regulations of executing individual administrative-legal act provided in GACG and APCG. In the privilege of self-execution of the permit issuing body is expressed its legal executive function;

– procedural legal function of construction permit is that the legal instruments of protecting rights set forth in GACG and APCG are applied to it.[25]

4. Form of Construction Permit and its Types

Construction permit shall be issued in written form. It is based on the character of construction activities. Legislation of Georgia, namely the GACG[26] states that individual-legal act may be issued both in writing and verbally. In the process of determining formal lawfulness of individual administrative-legal act its justification is especially important. Each individual administrative-legal act issued in writing should include written justification. It has to include legal and factual preconditions based on which the individual administrative-legal act was issued. If the administrative body exercises its discretion it is obligated to provide the conditions on which the decision was made, in the substantiation.[27] There is an interesting opinion expressed in regard with substantiation in

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22 Ibid, 172.

23 *Brenner M.,* Öffentliches Baurecht, 3. Aufl.,, Heidelberg, 2009, 192.

24 *Hermes G.,* The German Law and Planning: An Overview, Journal European Public Law, Vol. 8, Issue 3, 2002, 379.

25 See *Turava P.,* in: *Turava P., Kalichava K.,* Construction Law, Tbilisi, 2020, 172 (in Georgian).

26 GACG, Article 51.

27 *Kalichava K., in: Turava P., Kalichava K.,* Construction Law, Tbilisi, 2020, 76 (in Georgian).

German practice, according to which construction permit needs substantiation only when a consent depends on the provisions protecting a neighbor and the neighbor does not agree with it.[28] It should also be mentioned that construction permit is issued without any harm to third party's private rights which means that the construction permit determines only compliance of a project with public law while it leaves private-law rights untouched. The permit issuing administrative body does not have to consider property or obligation or other private-law rights of any third party.[29] Construction permit should also include reference to legal means of protecting one's rights. It enters into force in the moment of delivering it to the permit seeker in accordance with law.[30] Construction permit is issued for a reasonable term defined in construction organization project. It contributes both to protecting the interested party's rights, who should be given enough time to accomplish what he/she has intended to do and to public interest which comprehends that the process should not last too long in order to avoid conflict with social interests (noise caused by construction works, pollution, facades).[31] Along with the typical construction permit the legislation provides for other types of permits too. They have specific characteristics. In Georgian legislation we have typical construction permit; preliminary permit, so called fictitious permit and construction notification.

5. Types and Functions of Administrative Proceedings on Issuing Construction Permit

Construction permit is a hierarchical permit and consists of consecutive stages. There are separate administrative proceedings for each stage. Simple administrative proceeding is used for issuing a construction permit.

Simple administrative proceeding is one of the most important types of administrative proceedings. According to paragraph 2 of Article 72 of GACG if there is no necessity of other type of administrative proceedings determined in a law administrative body shall draft an individual administrative-legal act through simple administrative procedures. Simple administrative proceeding serves as the basis for other types of proceedings set forth in General Administrative Code of Georgia. Simple administrative proceeding is conducted in accordance with Chapter VI of GACG.[32]

Administrative proceeding is designed for making a decision. It is a process of making a decision. It should be mentioned that before making a decision there should necessarily be defined the problem to be solved by it and the goal of the decision i.e. legal and non-legal scopes of the decision; also, possible alternatives of the decision should be researched and the legal and factual restrictions should be identified.[33]

Importance of administrative proceedings and right use of its instruments is the basis for issuing fair and lawful final decision. For better understanding of this issue administrative procedure

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28 *Brenner M.,* Öffentliches Baurecht, 3. Aufl., Heidelberg, 2009, 191.

29 Ibid.

30 Law of Georgia "Spatial Planning and Architectural and Construction Activities Code", LHG 313, 11, 20/07/2018.

31 See *Turava P.,* in: *Turava P., Kalichava K.,* Construction Law, Tbilisi, 2020, 177 (in Georgian).

32 *Turava P., Tskepladze N.,* Handbook of General Administrative Code, Tbilisi, 2013, 178-179 (in Georgian).

33 *Turava P., Kharshiladze I.,* Administrative Proceedings, Tbilisi, 2006, 10-11 (in Georgian).

characteristics of permit issuing stages will be shortly discussed below. Besides, it is important to discuss the characteristics of administrative proceedings which shall be used for decreasing the risks arising from construction works.

6. Participation of Other Administrative Bodies as an Instrument for Decreasing Threats

Legislation of Georgia provides for the possibility of other administration organs' participation in the process of construction permit issuing. In some cases, it is related to construction works on special sites or buildings under special regulations.

Participation of other competent administrative bodies is another mechanism for ensuring lawful and substantially correct decision. Making a complex decision in which many social demands should be considered can be ensured by different administrative bodies. Accordingly, compliance of a project with public requirements can be determined with the help of several administrative organs with sectoral expertise. Cooperation of several specialized administrative organs is also important for "pluralistic administration" in order to use unified administrative expertise and come up with a right decision.[34]

Along with the administrative organ authorized to issue the permit, other administrative organ is involved in the administrative proceeding on issuing construction permit in the terms set forth by article 84 of General Administrative Code of Georgia, on the basis of permit issuing agency's decision, for the purpose of participating in the procedures related to approving the conditions for using a piece of land for construction or/and agreeing architectural project (including but not limited to two-stage procedures)[35]

The issue of the sites which are subject to ecological expertise and are related to decreasing the environmental harm, should be underlined herein. Current legislation determines the constructions on which construction permit may be issued only after conducting ecological expertise.[36] It should be mentioned that legal literature includes multiple interesting opinions in regard with ecological expertise.[37] There is stated that "in Georgian law the conclusion of ecological expertise has the meaning of "negative votum". Namely, a positive conclusion of an ecological expert is an obligatory precondition for receiving construction permit, otherwise a permit will not be issued. On the other hand, whereas the legislator does not determine the conditional (anticipatory) requirements, drafting an ecological expert conclusion is a result of broad discretion powers because of which construction permit automatically gains repressive character."[38] That is why there is a point of view that like some

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34 *Held J.,* Der Grundrechtsbezug des Verwaltungsverfahrens, Berlin,1984, (Schriften zum Öffentlichen Recht, Bd. 462), 39-40.

35 *Turava P.,* in: *Turava P., Kalichava K.,* Construction Law, Tbilisi, 2020, 182 (in Georgian).

36 The list of premises which are subject to ecological expertise and the rules of conducting the expertise are regulated by the Code of environmental Evaluation of Georgia.

37 *Kalichava K*., Environmental Law, Tbilisi, 2018, 186-197 (in Georgian).

38 *Kalichava K.,* Controle of Permissibility of Costruction Activities in Georgia (Necessity of Reform and Perspecytives), "Administrative Law Journal", № 2, 2016, 96 (in Georgian).

developed countries (e.g. Germany) the role of ecological expertise first of all has to be procedural and related to the aspects of evaluating the impact on environment, rather than have the function of negative votum.[39]

Of course, the above innovation contributes to minimizing negative ecological consequences but it is also important that such procedures be implemented by permit issuing agencies on the basis of comprehensive research of the issue when the presented documents are studied and evaluated by appropriate experts and the procedure is not only formally carried out. The first stage of permit issuing procedures was chosen as the best stage for ensuring prevention of ecological harm caused by construction and minimizing the risks.

Another issue which refers to involvement of other administrative body is fire safety. For the purpose of obtaining an assessment of the fire safety and ensuring observance of fire safety requirements in the premises under state fire safety supervision a permit issuing agency consults Emergency Management Service, a legal person of public law under the management of the Ministry of Internal Affairs of Georgia. It is a significant advancement of construction legislation. The practice showed that failure to observe the fire safety rules threatens not only those premises where fire may start but also it can become a source of increased threat for the lives and health of neighboring property owners. Participation of an authorized agency in the permit issuing process should be considered as an important measure of prevention.

Except the organs mentioned herein the legislation provides for the list of other agencies which participate in the construction permit issuing procedures.[40] Their involvement depends on the specific characteristics of a construction permit to be issued and the construction type. For example, if the permit issuing proceeding is conducted on protected territories the Agency of Protected Territories should be involved in the proceedings; if the permit issuing proceeding is conducted on the state water reserves' territory, water line or zone, the Ministry of Environment Protection and Agriculture should participate, etc. The above measure are designed to ensure involvement of appropriate authorized agencies and prevention of danger which may be caused by construction works.

7. Participation of Interested Parties in the Administrative Proceedings through the Prism of Danger Prevention

The General Administrative Code of Georgia defines the interested party as any physical or legal person or administrative organ to which the administrative act refers and whose legitimate interest is directly and immediately affected by administrative-legal act or an administrative body's action.[41] The GACG provides for the party's right to be involved in administrative proceedings and in some cases determined by law, administrative body is obligated to ensure its participation in the administrative procedures. This obligation mostly refers to the cases when and individual

[39] Ibid, 96.

[40] Resolution of the Government of Georgia № 255 on "the Rules and Conditions of Issuing Construction Permit and Approving Validity of Building", Article 3.

[41] GACG, Article 2, HLG, 32(39), 15/07/1999, 1

administrative-legal act may have negative impact on legal condition of an interested party. The right of an interested party to participate in administrative proceedings is especially important for exercising the rights of accessing proceeding materials and expressing his/her opinion which are set forth in GACG. The GACG provides for the possibility to restrict this important procedural right on the basis of administrative organ's substantiated decision if conducting the proceedings without interested party's participation is justified by protecting public and private interests. The justified decision of an administrative body should include explanation why certain private of public interest was given priority based on the proportionality principle.[42]

Article 96 of GACG sets forth an administrative body's obligation to research all important circumstances of the case during the administrative proceedings and according to Article 97 any evidence and decision should be accepted based on their evaluation and correlation. This obligation of an administrative body underlines important procedural right of an interested party. Such procedural rights of an interested party guaranteed by GACG are important from the point of view of legal protection because it should be provided not only in the court but also in the process of decision-making by an administrative body.

At the stage of researching important case circumstances and obtaining evidence there can be provided better protection of an interested party's interests than in the process of correcting mistakes within the scopes of court hearing because the court has limited scopes for reviewing the decision made within administrative discretion (undefined concepts; free space of evaluation).[43]

Considering that the decision is mostly related with citizen's behavior the essence of the case often depends on the circumstances which can be explained only by the citizen himself/herself. In most case the interested party is a "carrier of important knowledge". Accordingly, hearing the interested party is an essential tool to ensure that a decision is made on the basis of the true story and consequently be lawful.[44]

Clearly the interested party's rights are important from the point of view of legal protection in order to prevent damages. Thus, in construction law immediate impact is directly related with the process of issuing a permit and participation of an interested party. Probability of causing danger should be determined with a high standard of proof. Besides the interested parties should be able to express their opinion before the real threat of violation of their rights occurs. Participation of an interested party in the permit issuing proceeding is an important factor for increasing legitimacy of the proceedings. Accordingly, it should be clear how difficult is the challenge for the administrative organ which has to ensure protection of the rights of all persons participating in the proceedings. The problems arising in practice and the great number of court disputes evidence that the construction legislation needs essential reforms in connection with the above issues.[45]

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42 *Turava P., Pirtskhalashvili A., Kardava E.,* Administrative Proceedings in Pulic Service, Tbilisi, 2020, 144 (in Georgian).

43 Ibid, 145.

44 *Held J.,* Der Grundrechtsbezug des Verwaltungsverfahrens, Berlin,1984, (Schriften zum Öffentlichen Recht, Bd. 462) 38.

45 Statistics of the claims and disputes reviewed by Cassation Chamber in 2012-2017, See compilation: Homogenous practice of the Supreme Court of Georgia regarding disputes arising out of construction relations (2012-2017), *Jorbenadze S. (Ed.),* Tbilisi, 2018, 17-19 (in Georgian).

7.1. The Problem of Lack of Information for Interested Party

Because of the potential threats arising from construction it is considered to be an activity in which accessibility of information for an interested party has essential importance. How can one get information about the construction which can cause great damages for him/her? The current legislation offers only the information board. However, the information board which is mandatory for the permit seeker to place at the first stage of permit-issuing proceedings[46] includes notification only about the fact that construction is planned on the piece of land and the permit-issuing administrative proceedings are conducted. At the first sight the information provided on the board may seem comprehensive but the applicable legislation does not set forth any limitations for the owner to correct the building included in the project, change its function, sizes or/ and exterior before or after starting the construction works while the interested party may not be able to find such information. The legislation which regulated this issue before the new Code entered into force, could not ensure appropriate measures of protection. Unfortunately, the new Construction Code does not provide for any effective instrument either. It does not include the obligation of keeping the information on the board accurate. Thus, the interested party is deprived the ability to use his/her protection instruments appropriately. There are still significant defects in respective provisions of the applicable legislation.[47]

7.2. Importance of Neighbor's Participation in Construction Permit-Issuing Administrative Proceedings

One of the most important instruments for legitimation of the process of obtaining construction permit and avoiding disputes is participation of a neighbor in the permit-issuing administrative proceedings. Neighbor is a conditional concept, especially in Georgian reality. For the purposes of construction law neighbor should be defined as the owner of the piece of land bordering the construction site because the planned construction works may have some impact on the property of the bordering landowner or imply such risks.

The practice of some foreign countries in this area is interesting. The German literature includes clear reference that there is no general definition of neighbor, it depends on each specific case. For clarifications, the spatial and normative approaches and accordingly personal approaches may be used. According to the spatial approach a neighbor can be not only the person directly bordering the site but also any other person protected by law. The notion of a neighbor is based on material understanding rather than formal basis.[48] For example, if the spatial distance regulations are not observed in the construction process it usually has negative impact on bordering piece of land. On the other hand if the construction project implies emissions it will affect not only the bordering pieces of land but also some

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46 SPACACG, Article 110.

47 Crtisizm of information board in details, see *Churgulia D.*, The Ways of Solving the Legislative and Practical Problems of Construction Permit in the Light of New Construction Code, "Law Journal", №1, 2019, 294-296.

48 *Brohm W.*, Öffentliches Baurecht, §30 Rn. 9, § 31 Rn. 3, *Rieger W.,* in*: Schrödter H.*, BauGB, Munchen, 2008, § 31 Rn. 45.

remote ones.[49] According to the personal approach the public construction law does not have personal character and it is focused on the piece of land. Thus, the neighbor should be defined only as a person who has subjective rights on the piece of land. It can be an owner in most cases. A neighbor should have the right to demand interference of a supervisory organ only if the public-law provisions of neighbor protection are violated by the project and at the same time the neighbor's interest to be protected is significant.[50]

8. Formal Character of Examining Presented Documents as an Obstacle for Protecting Construction Safety

At the stage of construction permit-issuing administrative proceedings, for the purpose of protecting construction safety, special attention should be paid to determining accuracy of the documents submitted for getting construction permit and regulation of behavior of the persons responsible for the examination and their qualification requirements.

Nowadays permit issuing bodies are local municipal agencies, legal persons of public law founded by municipalities and in case of issuing V class construction permit, the authorized structural unit of the Ministry of Economy and Sustainable Development of Georgia. The persons employed in those agencies are appointed based on a competitive examination result. The Law of Georgia on Public Service regulates the special requirements and additional qualification requirements, also certification and qualified participation conditions. It should be mentioned that unlike the basic requirements determined for public officers which are defined by formal criteria, special requirements are focused on specific education and experience needed for professional activities. Special requirements are set forth for each hierarchic level of public officer's position. They specify and complete the general requirements.[51] The officers to be appointed to fill vacant positions are selected in accordance with those regulations. However, the architectural- construction and other technical areas have special characteristics and accordingly, selection of the officers whose job activities are related to issuing construction permit and examination of architectural projects, schematic drawings, also construction evaluation and other technical documents drafted under various regulations, should be based on special rules and instructions. Drafting such regulations is an essential problem and still remains a big challenge for the construction sector.

Current practice is grounded on weak legislation in this direction and respectively, it is inconsistent. Actually, the documents submitted for getting construction permit are examined only for determining compliance with legislation, which means comparison of the documents with the provisions of law. Of course, it is a necessary procedure and helps to define whether the permit-seeker has submitted all required documents but examination and detailed analysis of the quality of the

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49 *Stollmann F.*, Öffentliches Baurecht § 20 Rn. 19, *Rieger* W., in: *Schrödter H.*, BauGB, Munchen, 2017, § 31 Rn. 45.

50 *Muckel S., Ogorek* M., Öffentliches Baurecht, 2. Aufl., Munchen, 2014, 223.

51 *Turava P.*, Comments to the Law on Public Service of Georgia, group of authors, *Kardava E. (Ed.),* Tbilisi, 2018, 125 (in Georgian).

submitted documents still remains an issue. Despite the fact that some provisions about drafting the rules of certification of architects and engineers/project makers have been included in the Construction Code no actual steps have been made for their implementation. Thus, only the person submitting the documents can be held responsible for accuracy of the documents and examination of those documents is still a formal procedure.

Examination and evaluation of submitted documents by qualified experts is necessary for each project or other technical documents at any stage of the proceedings but its importance is especially evident when the project documents for proving construction safety are presented. We should mention that in the technical regulation of safety approved by the Decree № 41 of the Government of Georgia there is not provided enough mechanisms for examining conclusions submitted to the permit issuing agency.[52] Consequently there was determined that permit issuing agency does not examine the submitted documents in details and the responsibility lies upon the person who submits the documents. Simultaneously, the technical regulation of safety comprises codified systematization and its examination is pointless because of lack of information about construction materials and characteristics in the project documents. That is why the permit issuing agency's role in examination process is formal.

Another important issue is the expert assessments. According to the applicable legislation for some constructions appropriate expert assessment are mandatory and in case reasonable doubt arises against a positive expert assessment, a permit issuing agency can apply to agency/person which carried out the expertise or an alternative agency/person for clarifications. In case the expert conclusion is incorrect, the expert will be imposed responsibility in accordance with respective agreements and legislation of Georgia.[53]

9. Certification of Architects and Engineer-Project Makers as a Mechanism for Ensuring Construction Safety

According to the current legislation of Georgia only an architect and engineer-constructor may draft and architectural sketch and project, construction or/and technological scheme or its part for II, III and IV class buildings. The person authorized to prepare permit documents is responsible for compliance of the documents drafted by him/her with the technical regulations.[54] These persons are also subject to mandatory certification. According to Article 140 of the Spatial Planning and Architectural and Construction Activities Code of Georgia (SPACACG) certification is mandatory for the following persons: the architect authorized to approve the architectural project; engineer constructor who is responsible for conducting construction works and approves construction project; expert of architectural project and construction project. Along with the certification provisions the

[52] In Reference to Resolution 41, see the opinion of Koba Kalichava, Law Faculty Professor of Tbilisi State University and Academic Directors od the Institute of Administrative Sciences, <https://bm.ge/ka/article/41-e-dadgenileba---reglamenti-romelic-msheneblobis-nebartvis-migebas-aferxebs/48160> [03.02.2020]; <https://bm.ge/ka/video/ratom-aferxebs-41-e-dadgenileba-msheneblobis-nebartebs/16826> [06.02.2020].

[53] SPACACG, Article 107.

[54] SPACACG, Article 98.

obligation of adopting a subordinate normative act determining the rules of certification was also included in the Construction Code.

Before adopting the Code there was an essential lack of regulation of this issue in the legislation of Georgia. Any person had the right to draft both urban planning or permit documents.[55] Naturally, project and permit documents drafted by certified architect and engineer project maker, ensure quality of the planned construction and increase the responsibility of the authors of the documents, which is still not appropriately observed in construction sector yet. Unlike the case of Georgia in most European countries and the USA the persons responsible for drafting project documents at each stage are regulated by applicable legislation. The obligations are determined in laws.

Some influence of European, namely, German legislation can be noticed in the new Construction Code of Georgia. There is offered the German model of regulating the issues related to the qualification of applicant and the authors and executors of a project.[56]

According to the German construction order the author of the project is the person who is able to make the construction project based on his/her sectoral knowledge and experience. He/she is responsible for validity and completeness of the project, which is his/her main obligation. It is also the obligation of the project author to ensure compliance of the project with public law regulations. Authors of the projects are architects and engineers. The responsibility on lawful comprehensive project lays upon the author.[57] Moreover, directives on ensuring specific features of the construction under project including steadiness and protection from fire, noise, heat and vibration should be fulfilled only by the engineer constructor or the architect who has at least 3 years professional experience.[58]

Participation of architects and project makers may be divided into phases and only the person with appropriate certificate may participate in the process of drafting projects for different works (e.g. works connected with the piece of land, engineer communication, design, etc.). The responsibility of architects is not limited to making a project only, they also advise the construction owner through the whole process of construction works and are actively involved in selecting constriction methods and implementation of technological procedures.[59]

In the USA there are even more detailed regulations for this issue. In the process of drafting an architectural process together with the architect different consultants are involved, including but not limited to consultant expert of construction codes; safety expert, technological equipment expert, project maker and consultant of communication; landscape and interior project maker and designer; heating and ventilation system project maker; consultant of fire resistance of the building; consultant of protection from noise, etc. Their participation and certification are mandatory. Function of a

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55 *Kalichava K.,* The Impact of Construction Law Reform on Freedom of Business, Forum Materials of The Institute of Administrative Sciences of Tbilisi State University, Book 2, Tbilisi, 2016 38-39 (in Georgian).

56 *Hoppe W., Bönker C., Grotefls S.,* Öffentliches Baurecht, 4. Aufl., Munchen, 2010, 456-457.

57 *Brenner M.,* Öffentliches Baurecht, 3. Aufl., Heidelberg, 2009, 198.

58 Ibid, 208.

59 *Altman R. J.*, Participants in the design and construction process, Construction Law, *Allensworth W., Altman R. J., Overcash A., Patterson C. J. (Ed.),* Forum on Construction Law, American Bar Association, Chicago, Illinois, 2009, 20-21.

building is another important point based on which the number of people to be involved in the project drafting process is defined.[60] Of course, participation of all above mentioned persons and involvement of the experts with specialized knowledge and qualification ensure more safety of the project and the construction. Participation of a certified specialist in in each part of project-making significantly increases quality and safety of the construction.

Certification of architects and engineer-project makers is especially important for construction safety. At the stage of issuing construction permit the permit issuing agency relies on the submitted project documents and examines their compliance with applicable legislation but still it is not guaranteed that the drafted documents correspond with safety standards.

Except the general legislation there are also special technical regulations but determining compliance of the project documents with those regulations is also limited to the process of submitting the documents approved by private law persons.

It should also be mentioned that the act of permit includes a note that the person submitting the documents carries responsibility on the accuracy of the documents. The permit act unanimously implies that responsibility on the accuracy of the construction documents lays on the customer and the person who drafted the documents. The agency approving the project takes responsibility on compliance of the documents approved by it, with the applicable legislation only.[61]

The reference in the permit act that the agency approving the project takes no responsibility on accuracy of the submitted documents is caused by the fact that there is no rule of certifying architects and engineer-project makers adopted yet. Before the above normative regulation is adopted the accuracy of the project documents completely depends on the good faith of the authors of the documents. Accuracy of project documents is one of the most important components for ensuring construction safety and lack of regulations for this issue implies high risks.

The qualification of the persons examining the documents drafted by the architects and engineer project makers is another issue. There is no mechanism of checking the qualification and special knowledge of the staff in the permit issuing agency offered by the law. The architectural construction activities require special knowledge and accordingly, the issue of examining the submitted documents has to be clarified in the legislation.

In summary we should mention that there are some favorable changes in legislation with regard to certification of architects and engineer-project makers and their qualification because the construction code introduced the necessity of regulating this issue but the delay of adopting subordinate normative acts prevents the progress. Along with the fact that the author of the project will have to undertake more responsibility on the document drafted by him/her, another valuable achievement will be the improvement of quality and safety of the construction project documents. Thus, mandatory certification of project makers and other regulations related to approving their qualification will significantly increase construction safety.

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60 *Hess S. A., Melton L. C.,* The Design Undertaking, Construction Law, *Allensworth W., Altman R. J., Overcash A., Patterson C. J. (Ed.),* Forum on Construction Law, American Bar Association, Chicago, Illinois, 2009, 131-135.

61 For example, see: <http://tas.ge/?p=publicpage&documentId=742273> [22.05.2020].

10. Accelerated Proceeding and its Problems in Relation to Construction Safety

Construction permit is and individual administrative-legal act and it is issued in written form. The General Administrative Code determines the rules of drafting and issuing the act. The construction permit seeker shall apply to the authorized permit issuing agency. The administrative body shall make a decision on issuing or rejecting an individual administrative-legal act within a month after receiving the application.[62] Whereas construction permit is a hierarchical document and usually it is not issued as one document, the stages and terms of its issuance are regulated by special legislation. According to SPACACG the first stage of permit issuing procedures – approving the conditions of using a piece of land as a construction site, should be completed within 10 working days. If there is a project to be approved another 20 working days are needed for receiving a construction permit. In the last decades the construction sector investments and construction volumes have had significant role in total investments and domestic products of the country.[63] Accordingly, consideration of the investors' interests became an important challenge especially in the capital and other big cities. For the purpose for providing quick and effective services by the companies operating in construction sector there were introduced accelerated service rules and respective prices for the municipality of Tbilisi.[64] It contributed to the interests of construction permit seekers and the activities of the administrative organs seemed to become more effective on the one hand but on the other hand there appeared a risk that the construction permit issued within one or three days might not be based on comprehensive examination of all important circumstances of the case, especially when it referred to III and IV class buildings of high risk.

Through the prism of the key concept of this article, when all issues related to the construction permit-issuing administrative proceedings and construction safety are reviewed in details, it is impossible to prove that in the cases of determining the conditions of using piece of land within one day and issuing a construction permit within the same term there can be ensured appropriate examination of project documents; providing information to all interested parties; analysis of expert and engineer documents and minimizing all risks. Accordingly, the existing regulation of accelerated proceeding which is established for the capital city implies significant risks because the threats related with construction safety can barely be revealed and removed through such procedures at the permit-issuing stage.

11. Simplified and Exceptional Permits as the Basis for Risks

According to the current legislation of Georgia construction permit can also be issued through simplified proceedings. Such procedure is used to allow an authorized state agency or municipality to

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62 GACG, Article 100.

63 About the number of invetments made in construction sector, see the data of the National Bureau of Statistics: <https://www.geostat.ge/ka/modules/categories/80/mshenebloba> [22.05.2020].

64 See Resolution №17.01.580 of the Government of the City of Tbilisi on "Approving the Rules of Accelerated Services provided by the Architecture Service of the City of Tbilisi and Paying the Service Price".

conduct construction works before receiving a permit in the cases of extreme necessity (natural disasters; technological or/and other force-majeur situations). Those administrative agencies should submit substantiated applications to the permit issuing administrative body during the construction works or after its completion and request issuing a construction permit. The legislation also provides for similar proceeding when a permit is issued in free economical, industrial and touristic zones. Such procedure may also be allowed in case of approving architectural sketch when the permit seeker needs a consent only on the exterior of the construction (sketch drawing).[65] Another type of the simplified proceeding is the process of issuing a permit for I class buildings when the works to be conducted are approved but no construction permit certificate is issued. Simplified proceeding is also applied for the construction sites, which are subject to detailed notification. However, unlike other cases above, for the I class buildings and the constructions which are subject to detailed notification a construction permit is not issued after completing the construction works.

The institute of simplified permit issuing proceeding originates from German legislation. So-called simplified proceeding aims to make the administrative procedures simpler. It is used for example for the houses which do not have more than 2 flats and the height does not exceed 7 meters. A supervisory body examines only legal permissibility of planning and requested incompliances with construction order and other public-law provisions, because it is impossible to solve the issue by issuing a construction permit in accordance with the public-law regulations. Unlike the regular proceeding, the scopes of examination are decreased in simplified proceedings. Firmness and protection from heat and noise are beyond the supervision. The results of simplified proceeding and the respective refusal of the supervisory administrative body to conduct examination is finally expressed in the construction supervisory and condition examination procedure (Bauzustandbesichtinung) which does not imply checking firmness and protection from noise and heat. Also, unlike regular proceeding there are no unidentified projects subjected to mandatory permit. It means that legal planning permissibility of the projects, which are directed to simplified proceedings, are released from undefined examination.[66] It is presumed that the simplified construction permit-issuing proceeding does not lead to incompliances with public-law regulations (Unbedenklichkeitserklärung) while the scopes of the construction owner's responsibility are increased. Despite the requirement of the simplified proceeding to increase the construction owner's responsibility supervisory authority is still exercised by an administrative body, especially with regard to the powers based on the comprehensive clause (Generalklausel) of construction law. Thus, despite the narrowed examination scopes of administrative body the above powers remain untouchable.[67]

The risk of simplified permit issuing proceeding in relation to construction safety is especially obvious when a permit is issued on a completed construction. In such cases there is no possibility of using any of the construction safety check instruments which are created by administrative functions. The persons directly or indirectly related to such constructions can apply to the expertise as the only remaining instrument for ensuring protection of their health safety. In the situation when there are no

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65 SPACACG, Articles 32-34.

66 *Brenner M.,* Öffentliches Baurecht, 3. Aufl., Heidelberg, 2009, 208.

67 Ibid, 209.

regulations in Georgian legislation for determining the experts' qualification and appropriate knowledge one can easily guess that reliability and quality of such expert assessments are also doubtful.

As refers to exceptional permits they are issued based on the territory use and urban planning regulations. The planning documents include the preconditions that may later become the basis for conducting exceptional construction activities, which differ from allowed types or have increased parameters. Exceptional construction shall be allowed if its location, spatial planning, volume and function is in compliance with the sub-zone characteristics, existing urban planning or/and the principle of protecting neighbors' interests.[68] The construction legislation provides for exceptional cases of so-called "privileged constructions" (Article 68 of SPACACG). Namely, "on the piece of land which is located beyond the developed construction planning system and which is not included in the detailed plan of urban construction, a construction permit may be issued only for the purpose of constructing a building conditioned with the territory function, in accordance with the applicable spatial planning, urban construction planning (if it exists) and general provisions, provided that it does not contradict social interests". Thus, in order to have a permit issued for a privileged construction there must exist the following preconditions 1) unplanned territory without constructions; 2) so called privileged construction with functional condition; 3) the planned construction should not contradict the current spatial planning and urban construction plans; 4) the planned construction should not contradict the fundamental provisions (i.e. the requirements of the Decree #261); 5) the planned construction should not contradict public interests. [69]

Naturally, all determined preconditions are important but the principle of compliance with public interest is worth mentioning separately. Observance of this principle is greatly important for construction safety. Public interest is main governing factor for exceptional permits. This factor is also underlined in German federal legislation. If there are no preconditions for issuing a construction permit an administrative body may allow deviations, exceptions and releases. The above terminology is not unified in construction regulations of Lands. Some of the Lands use the concepts of exceptions and releases in their construction orders in accordance with the construction code systematics[70] and refers to each difference between construction order and concrete project as a deviation. The authorized organs of the Lands may allow exceptions and releases in accordance with the construction order provisions. A consent on deviations, exceptions and releases has to be issued in written form and be substantiated respectively. Exception is allowed when it complies with social demands and this is a provision that provides for allowing deviation (Sollvorschrift). Social demands comprise all the goals determined by construction order provided that it does not threat life and health. Making a decision is the administrative body's discretion. Exceptions are allowed when such deviation is necessary for

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[68] Resolution № 261 of the Government of Georgia on "the Fundamental Provisions of Using Territories and Regulating Urban Construction" Article 20, Clause 22.

[69] *Kalichava K.,* See in *Turava P., Kalichava K*., Construction Law, Tbilisi, 2020, 150-151 (in Georgian).

[70] *Brenner M.,* Öffentliches Baurecht, 3. Aufl., Heidelberg, 2009, 203-204.

social favor or if implementation is difficult in concrete case and the deviation complies with social demands.[71]

Before adoption of a new Construction Code a bad example of compliance of exceptions and deviations with social demands was known as so called special zonal institute in Georgian construction legislation. This "ugly" practice served as basis for many disputable decisions especially in the capital of Georgia. Such understanding of exceptional permit caused a situation when excessively increased construction intensity coefficients were allowed and permits were issued on constructions with incompatible function height. Finally, the number of construction permits issued on the basis of special (zonal) agreements was reflected on disproportionate, chaotic construction in the capital of Georgia. There proportionally increased the number of claims of the citizens demanding review of lawfulness of such permits and they applied to court for protection of their rights. The court practice on the cases where the special (zonal) agreement used as a basis for issuing a permit were disputed, clarified that using special zonal agreement is justified only if special social need exists.

In this direction, the court practice unambiguously supports high standard of proving the necessity of exceeding the coefficients and appropriate compensation. The court ruled that exceeding the maximum coefficients should be allowed only provided that appropriate conditions exist and they are clearly determined in the legislative/subordinated acts regulating the specific institute or construction activities in general. Thus, when discussing the issue of exceeding the coefficients, an administrative body shall research whether such changes are needed for spatial-territorial planning of a certain district or its architectural development or other particular reasons related to the territorial development. The administrative body should also consider if the changes could be compensated and balanced with any other measures which could be taken to ensure prevention of affecting healthy living, working conditions and environment, also, transportation and engineering infrastructure and if there was any other conflict with public interests.[72] The court decision states that individual construction parameters should be based on consideration of possibility of effective use of the territory and should not contradict the interests of owners and society.[73]

It should also be mentioned that the Georgian model of special (zone) agreement implies monetary compensation.[74] Naturally, it cannot counterbalance the architectural, construction and planning compensation that consequently causes imperfect, unequal living and working conditions.

Allowing the exceptional permits has threatened consideration of construction safety in the construction permit issuing process. That was the reason of increasing court disputes because along with the violation of property and other rights of bordering landowners, the risk of depriving the rights of health and life protection became an issue. The need for breaking changes in this incorrect practice led to introducing appropriate provisions in the new Construction Code. We hope the future practice will show that the steps taken in this direction were justified.

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71 Ibid, 203-204.

72 Decision of April 20, 2017 № BS-930-922 (2k-16), The Supreme Court of Georgia.

73 Decision of November 1, 2016 №BS-289-287 (2k-16), The Supreme Court of Georgia.

74 Details on the issue, see. *Kalichava K.,* Control of Permissibility of Costruction Activities in Georgia (Necessity of Reform and Perspecytives), "Administrative Law Journal", *Kopaleishvili M. (Ed.),* Tbilisi, 2016, 101 (in Georgian).

12. Conclusion

The article reviewed the issue of construction safety at the stage of construction permit-issuing proceeding. It was concluded that based on analyzing the multilateral character of the administrative proceeding, creation of construction safety mechanisms is achievable at the stage of permit-issuing administrative proceeding. Moreover, it is the stage when the threats arising from a construction can be significantly decreased with the help of the persons participating in administrative proceedings and the information provided by them; also, by evaluation of the documents and facts obtained and examined during the proceeding. There was underlined that the permit-issuing proceeding itself provides actual mechanisms for ensuring construction safety preconditions at the permit issuing stage. This conclusion was grounded on the summarization of characteristics of construction permit-issuing administrative proceedings; deficiencies in legislation and the respective practice.

The issues discussed in the article proved that the goal of the article to contribute to creating fundamental instruments and mechanisms of ensuring construction safety at the stage of permit-issuing administrative proceeding, is achievable. We hope after improving construction legislation and adopting appropriate regulations based on sharing the experience of European countries there will be no need for repeated research of this issue.

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Fine – as a Rule of Execution of a Sentence

Pursuant to the Georgian Criminal Code, fine is one of non-custodial penalties, which – based on the Court decision – may be awarded as the primary or additional penalty. Enforcement of the fine bears importance not only for the purpose of enforcing penalty but for achieving substantial goals of the punishment as such.

Key words: *Sentence, penalty, enforce (enforcements), solve (solving) a legal issue, interpretation of a legal provision.*

1. Introduction

Criminal Code of Georgia establishes and regulates responsibility for committing an illegal and guilty act. "Goal of criminal justice is to combat socially dangerous acts thus protecting peaceful coexistence of people"[1], and for commitment of illegal act it is necessary to establish relevant responsibility as well as kpunishment. "Punishment (penalty) is a compulsory measure of the state imposed on behalf of the state of Georgia as a guilty verdict for commitment of an offence, and it is always linked to restriction of human rights and leads to criminal history"[2].

Punishment (sentence) is applied for purposes of achieving various goals and the sentence imposed for the crime committed shall be a remedy for achieving such a goal; the Court defines the punishment in consideration of the goal to be achieved[3].

One of penalties under the Criminal Code of Georgia is a fine, which may be imposed as a primary, as well as a supplementary, penalty. LEPL National Enforcement Bureau is assigned a function of oversight over payment and enforcement of imposed fines. The Enforcement Law regulates matters like enforcement procedure, statute of limitation as well as termination of enforcement.

Purpose of the article below is to review a fine as one of types of penalties and its enforcement. The article reviews matters like meaning and goal of the fine, its history and practice of the European Court for Human Rights (ECHR). The last part of the article speaks about pressing issues in the area and contains specific recommendations on use of fines as a punishment and optimization of provisions regulating enforcement of such. Concluding part is meant to identify legislative gaps and solutions.

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1 *Mchedlishvili-Hedrich K.*, General Part of Criminal Law, Part I, Tbilisi, 2014, 7, Field 5 (in Georgian).

2 *Dvalidze I.,* General Part of Criminal Law, Punishment and other Criminal Outcomes, Tbilisi, 2013, 14 (in Georgian).

3 *Tskitishvili T.,* Proportionality of Punishment, Criminal Law Liberalization Trends in Georgia, Tbilisi, 2016, 187 (in Georgian).

2. Fine as One of Penalties as per Ancient Georgian Law

Offence, punishment and matters pertinent to their correlation are issues reviewed in the monuments of the Georgian Law "….that should have happened to the offender for the crime committed or accomplice actions by the decision of the court was known as "punishment" (penalty)"[4]. In addition to "punishment" the ancient Georgian law knew other terms like "blood" and "retribution". "Blood" represented property (material) requital, which an offender paid to the victim or his/her family; and "retribution" had a meaning of deserved punishment (the bad received deserved punishment)[5]

From early ages of the development of law any act considered as an offence was subject to punishment. The more public relations developed, the more was the number of offenders and offences, which, of course, led to change of types of punishment. Various types of punishment (criminal or property) were known not only to laws created by states, but to customary law as well[6].

In the old Georgian criminal law Ivane Javakhishvili defines various types of punishment; according to the classification of the author, one group of punishment was more material (property) in nature and he explained it as follows: for certain types of offences, the state would impose payment of compensation to the victim (or his/her relations), court, feudal lord and/or state.

Before Moguls invasion in Georgia, united Feudal Georgia had a concept of property compensation in favour of state, feudal lord or court; the story of "seven" is interesting in this regard; according to it, the stolen subject would be returned to the victim, or its cost would be compensated, and the thief would additionally pay in favour of the state a sevenfold cost of the stolen thing.

In addition of the rule of "seven" we also see the rules of "three" or "five". Thus, in Georgia of the 12th century the proprietary was considered as a public punishment for commitment of the property crime. However, after Moguls invasion the main punishment became "redemption" or property compensation[7].

Article 117 of the Book of Law of Bagrat Kurapalat, establishes punishment for intentional murder in amount of the cost of one house and 12 000 Tetris, and Article 107 envisages an apology and payment of 20 000 Tetri in case the landlord curses and uses foul language with regard to bishop[8].

"Dzeglisdeba" of Giorgi Brtskinvale broadly applies compensation by property for murder offences, but that punishment is paid not in favour of the state but is used for victim's needs[9]. In such a case proprietary is private in nature.

As of 16th century, the punishment becomes more severe; the fine becomes a public payment at that time and is paid by an offender in favour of the state. Law of Vakhtang VI envisaged various offences, including those which did not allow redemption; such offences included disclosure of

4 *Javakhishvili Iv.,* History of Georgian Law, B. 2, Section 2, Tbilisi, 1929, 503 (in Georgian).
5 *Vardzelashvili I.,* Goals of Punishment, Tbilisi, 2016, 9 (in Georgian).
6 *Abramishvili L.,* Punishment prescribed for Bribery according to Old Books of Law of Georgia, "Journal of Law", № 1, 2011, 5.
7 *Metreveli V.,* History of the Georgian State and Law, Tbilisi, 2003, 257-158 (in Georgian).
8 Ibid, 273-275.
9 Ibid.

military secrets (article 221); however, article 173 envisaged the following: "…if anybody steals or misappropriates anything, then he shall pay 6 tenners as a public fine and return a stolen thing to its owner". Article 242 of the Law of Vakhtang VI envisages a fine for blanket snatcher, but a fine here is not a public penalty, as it is given to the victim[10]. As we see, at that time, a fine is as public as well as private remedy and the offender had an obligation of repairing damages, returning of stolen things or compensating their cost; at the same time reparations/retributions were paid to the state as well.

"Torment by fines" (same as fine) was caused by: arbitrariness, false accusation, slander, violation of articles of war, baring sword in the fist-fight. Together with public, private (ownership) fines existed, too. King, as well as courts and landlords and masters defined and imposed fines on "ignominious men". Fines paid in favour of the state (i.e. King or Queen) was left to care of a special person or "plant" (i.e. warehouse). Payment of fine was ensured (enforced) by feudal lords' bailiffs (estate managers) or other servants, who were entitled to a share of the paid fine – for being "mean men"[11].

Georgian customary law contained the most common proprietary punishment for private offences. Payment of property fine – retribution – was possible in kind, or money had to be paid. Namely, in mountainous regions of Eastern Georgia cattle was used for payment of fines, in Svaneti – it was land; commodities, which were common in those areas. Cattle and land were used as equivalent to payment of fine. In Svaneti, Pshav-Khevsureti and Tusheti a fine for murder was pre-defined. In Pshav-Khevsureti it was called "tavsiskhli" and in Svaneti – "Tsori". In Mtianeti and Svaneti they had a whole system of proprietary retributions for wounding and injuring, as well as for other felonies. Fine was quite a common type of retribution. It was mainly imposed in case of public/societal offences, but it could have been imposed in case of private (proprietary) violations, too; such fines were paid either in favour of the state or a private person. "Darbeva" (ravaging) is one of the forms of fines. This term is used to indicate the form of recovering the payment. During "darbeva" people (or their representatives) would withhold cattle, wine or other products from the house of the fined person without permission of an owner and then the whole community would feast on it. Other proprietary types of retribution are seen in various corners of the country and used in separate cases"[12].

Soviet Criminal Law envisaged not only requital, but correction of an offender and prevention of an offence. Well-known Russian scientist Tagantsev clearly indicated at the fact that in its content and meaning an offence is like Roman Pantheon God – two-faced Janus: with one face looking back to the past – already committed crime and its subject; and with the other looking forward – to correction of the offender for him/her to not reoffend in the future after discharging the punishment.

"Historic-legal analysis allows to say that the fine in criminal law has established itself as an alternative to classical punishment (deprivation of liberty, capital punishment, etc.). Application of the

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10 Ibid, 264.

11 *Putkaradze I.,* Georgian Soviet Encyclopedia, V. 11, 541-542, Tbilisi, 1987, 541-542 (in Georgian).

12 *Davitashvili G.,* Crime and Punishment in the Georgian Customary Law, "Journal of Law", № 2, 2011, 290-291.

fine as an alternative sanction is associated with certain proprietary (monetary) losses, which is considered as sufficient and adequate by the state".[13]

3. Fine as a Primary and Supplemental Punishment and its Goals

For every specific offence, a legislator defines not only a sanction or criminal responsibility but limits of the sanction as well; for sentencing purposes the judge usually uses the established boundaries; therefore, it is impossible to impose a sentence which is not prescribed by law; there is no punishment without the law – "*nulla poena sine lege*"[14]. Obligation of legal determination applies to criminal sanctions, too.

Punishment, as the negative response of the state to guilty criminal injustice, as well as its type and measures, shall be determined by legislation, and in case of violation of the law, the established sanction shall be predictable for the addressee[15].

System of punishment with specific types of punishments is exhaustively described in Article 40 of the Criminal Code. Namely, the types of crimes are: fine, removal from position or restriction of activities, community work, correctional labour, restriction of military service, deprivation of liberty, term or life-time imprisonment, property confiscation.

It shall be noted that criminal legislation distinguishes between primary and supplemental/additional punishment. Pursuant to Article 41 of the Criminal Code, a fine is attributed to both, primary and supplemental, categories of punishment.

As to limits of criminal responsibility, it represents the discretionary limits for judges to assess guilt and crime.[16] Legislative limits of punishment represent the foundation on which specific punishment is built[17]. At sentencing the judge first of all takes into consideration punishments prescribed by law, then limits of such a punishment, and, in addition, circumstances under the Article 53 of the Criminal Code of Georgia, like gravity of the act, personality of the offender, etc. Punishment imposed by the judge shall ensure goals of punishment as prescribed by the Article 39 of the Criminal Code (restoration of justice, prevention of re-offence and resocialization of the offender). "In the process of sentence individualization, and in order to ensure fair punishment it is crucial to apply correct principle of selecting relevant punishment, which is an important guarantor of principle of fairness"[18].

"Fine is explained as an ideal criminal sanction from liberal point of view. It is given a priority among other sanctions since its enforcement is possible by means of saving state resources and by

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13 Decision № 3/2/416 of July 11 2011, The Constitutional Court of Georgia, "Public Defender of Georgia vs. Parliament of Georgia", para 49.

14 *Turava M.*, Overview of the general part of the Criminal Law, 9th ed., Tbilisi, 2013, 353 (in Georgian).

15 See, BverfGe 105, 135.

16 *Viktor A.,* Geburt der Strafe. Klostermann, Frankfurt am Main, 1951, 81.

17 Zipf/Dölling, in: *Maurach R. V., Gössel K. H., Zipf H.,* Strafrecht, AT, Teilband 2, 8. Aufl., Heidelberg, 2014, 762, §62 Rn. 60.

18 *Lekveishvili M.,* Goals of punishment and criminal and criminological aspects of sentencing, "Justice and Law", № 4(43) 14, 2014, 22 (in Georgian).

imposing less damage and burden on law enforcement authorities. For purposes of criminal justice, the fine has a punishing effect and it is individualized with the focus on individual offence/charges. Fines are used individually for the offender by means of restriction of rights, and recovery of property (money)"[19].

According to Article 42 of the Criminal Code of Georgia, the fine is a monetary sum minimal amount of which constitutes GEL 2 000. However, if the sanction under the relevant provision of the Criminal Code envisaged a punishment of liberty deprivation for up to three years, then the minimal amount of the fine would constitute GEL 500. Generally, a problem of Georgian Criminal law is that it establishes only a threshold – minimum amount. Law does not establish ceiling and it may contradict the principle of predictability of punishment.[20] German criminal law also establishes the maximum amount of the fine and the court defines its exact amount by taking into consideration gravity of the offence and financial conditions of the offender. It is interesting to know that this type of punishment may be used by the judge as a primary or supplemental punishment. In addition, such a punishment can be used in cases where the relevant provision of the Criminal Law does not envisage the fine, except for some exceptions[21]. As indicated in legal literature, the fine historically was considered as an expression of the principle of composition and it has been called "retribution"[22].

Fine as an effective type of punishment that fully responds to the principle of inevitability of punishment, since based on the gravity of committed crime, the offender shall be given a sentence/verdict proportionate to his/her crime and it should be fair[23]. Minimum UN standard (Tokio rules) speaks about meaning of fixed fines since their application will help avoid difficult questions regarding the amount of fine to be applied in a specific case. [24] However, at the same time the document indicates that such fixed (flat-rate) fines are more complex and are a heavier burden on poor people rather than rich. Therefore, equality requires the Court to study income of the offender. This ensures rough equivalency between offenders with different financial conditions.[25]

Pursuant to Article 39 of the Criminal Code purpose of punishment is restoration of justice, prevention of re-offence and resocialization of an offender. Almost no country in the world has a criminal law requiring affirmation of punishment goals at the legislative level. For instance, the law of Germany does not contain a similar record.[26] Considering all that it could be said that the goal of punishment is not to torment an individual, neither it is to damage dignity of the person. By using the

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19 Decision № 3/2/416 of July 11 2011, The Constitutional Court of Georgia, "Public Defender of Georgia vs. Parliament of Georgia", para. 50.

20 *Adrian L.,* Speichern und Strafen. Die Gesellschaft im Datengefängnis, C. H. Beck, München, 2019, 5.

21 For instance, this principle does not apply to domestic violence cases.

22 *Tkesheladze G.,* General Part of the Criminal Justice, Text-book*, Nachkebia G. (ed.),* Tbilisi, 200, 358 (in Georgian).

23 *Ivanidze M.,* Trends of Criminal Law liberalization in Georgi, *Todua N. (ed.)*, Tbilisi, 2016, 322 (in Georgian).

24 *Winfried H.,* Warum Strafe sein muss. Ein Plädoyer. Ullstein, Berlin, 2009, 15.

25 United Nations Office On Drugs and Crime, Handbook of basic principles and promising practices on Alternatives to Imprisonment, Vienna, 2007, 29-30.

26 *Friedrich K.,* Etymologisches Wörterbuch der Deutschen Sprache. Walter de Gruyter Verlag, Berlin, 1963, 31.

punishment, the state protects an individual, society and their rights from criminal breach[27]. Constitutional Court of Georgia indicates that in a democratic society the basis and the goal of which is a free man, torture, inhuman, violent or degrading treatment of an individual is impermissible. Therefore, authorities or a law that allows for torture, inhuman and degrading treatment, may not create, protect or ensure democracy in the country.

Application of punishment requires certain resources and because of that the state costs are high.[28] It is especially visible in countries which do not have economic stability and thus, have high crime rates. For instance, custodial sentences require high expenditures by the state, as their execution require construction and relevant arrangement of prisons and other correctional facilities. In addition, such facilities are serviced by personnel whose remuneration is also an additional cost[29].

4. Decisions of the European Court for Human Rights on Use of Fines as a Measure of Punishment

In the case *Mamadakis v. Greece* a Greek national was an applicant; he was a Director of the Oil company Mamidoil-Jetoil SA. In 1997 the Court imposed on him a fine in amount of EURO 3,008,216 for contraband of oil products and violation of customs regulations; total of EURO 4, 946, 145. The applicant appealed to the amount of the fine; the Supreme Court did not uphold the appeal. The applicant stated to the European Court for Human Rights (hereinafter ECHR) that this excess amount of fine violates Article 6 of the European Convention (the right to fair trial) and 1st Additional Protocol to the Convention (protection of property).

The Court stated that goal pursued and the imposed measure shall be proportionate. The restriction in the case under review was envisaged by law and was justified by public interest, namely, by combating smuggling. As to interference with the Applicant's right and protection of common interest and proportionality thereto, the Court decided that the imposed fine was disproportionately high. Despite the fact that the state has a freedom in assessing such issues, considering financial stands of an applicant, the imposed fine was deemed as disproportionate for achieving the goal. Therefore, the Court unanimously decided on violation of provisions of the 1st Additional Protocol[30].

In the case *Grifhorst v. France* the applicant stated that at the border crossing from France to Andorra he did not declare to Customs Officers the amount that he had on him as requested (EURO 233,056). The applicant was found guilty for failure to abide by requirements of the Customs Law and based on the same Law he was deprived of this amount (which he did not present to the Customs); in addition, the Court imposed a fine in amount of half of the seized sum of money as well as imprisonment. The applicant argued before the Court that Art. 1 of the 1t Additional Protocol of the Convention has been violated. The Court indicated at the standards established in many prior decisions that fair balance shall be kept between restricted rights and the achievable goal. In addition, the Court

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27 *Gamkrelidze O.,* Explanation of the Criminal Code of Georgia, Tbilisi, 2008, 49 (in Georgian).
28 *Janusz K.,* Wie man ein Kind lieben soll, Göttingen, 1978, 111.
29 *Gamkrelidze O.,* Problems of Criminal Law, Vol. III, Tbilisi, 2013, 11 (in Georgian).
30 Case of Mamidakis v. Greece [11.01.2007], ECHR, App. №35533/04.

underlined that the State has a freedom to assess, define types of fines and decide whether the imposed sanction serves public interest and achievement of the goal determined by the law.

ECHR noted that the fine was prescribed by the Law, which met requirements of the Convention. However, the Court focused on proportionality of sanctions imposed by State and deemed that fair balance was not achieved – fine and other sanctions were disproportionate to committed act. Thus, the Court established violation of the Art.1 of the 1st Additional Protocol to Convention[31].

Unlike cases described above in case of *Konstantin Stefanov v. Bulgaria* the Court did not establish violation of the Art. 1 of the 1st Additional Protocol to the Convention.

The Applicant was a Bulgarian lawyer who was to pay a fine of EURO 260 for refusing the client his legal services. The Applicant stated that this fine violated Art. 1 of the 1st Additional Protocol of the Convention. The Court found that amount the Applicant was to pay as fine is a property, therefore Art. 1 of the 1st Additional Protocol to Convention shall apply. It falls under the part 2 of the named article, which gives the state a right to restrict use of property to ensure payment of a fine. As to legality of restriction, the Court noted that the national court fined an applicant based on the national legal provision, which was a part of the Criminal Procedural Code. ECHR deemed that the law met requirements of the Convention and that the fine was not arbitrary. Also, the applicant had procedural guarantees to appeal to the decision of the fine. In the end it was found that the fine was not strict or disproportionate, but served public interests. Considering all these aspects the Court established that there was no violation of the Art. 1 of the 1st Protocol to Convention[32].

Analysis of above cases shows that by hearing possible violation of guaranteed by the Convention rights to imposition of fines, the Court takes into account proportionality of the imposed fine for achieving the relevant goal; it also pays attention to issues like fair balance between the achievable goal and the imposed sanction. As mentioned above, the ECHR holds that the matter under question falls under the field of free assessment; however, it constitutes a violation anyhow if and when the restriction fails to meet requirements of the Convention, despite the fact that at one glance, the ECHR recognizes discretion of states in defining amount of the fine, but it also states that the imposed monetary liability shall be proportionate.

On March 9 2005 citizens of Georgia Amiran Natsvlishvili and Rusudan Togonidze filed an application with the ECHR against Georgia on violation of Article 34 of the Convention on Human Rights and Fundamental Freedoms. Applicants stated that by using the plea bargain for them, the Article 6.1 of the Convention and Art. 2 of the 7th Additional Protocol were violated. In addition, applicants claimed that presumption of innocence and Art. 1 of the 1st Additional Protocol were violated in case of the 1st Applicant. Applicants claimed that the state had violated provisions of the Article 34 of the Convention.

Both applicants claimed that by forceful compensation of damages and, in lieu of the fine, termination of the criminal case, Art. 1 of the 1st Additional Protocol to the Convention was violated.[33]

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31 Grifhorst v. France [26.02.2009], ECHR, App. №283362.

32 Konstantin Stefanov v. Bulgaria [27.10.2015], ECHR, App. №353399/05.

33 "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law

The Court explained that based on the plea agreement, compensation of damages and other monetary payments derived from criminal responsibility of the first applicant; such monetary payments may not be separated from fairness of the plea agreement. Thus, the Court held that there was no violation of the Art. 1 of the 1st Additional Protocol to the Convention.[34]

5. Fine Enforcement

Law of Georgia "On Enforcement" regulates fines enforcement procedures, related statute of limitation and termination of enforcement. Article 2.b of the Law states that the Law applies to judicial decisions in force with regard to natural and/or legal persons prescribing payment of the fine as a form of punishment"[35]

In the process of enforcement of cases under this category, the bailiff uses coercive mechanisms provided by this Law, including proposals to debtors on voluntary compliance, inquiries into property of the debtor and application of lien, registration of the debtor in the debtors' database, requests the debtor for submission of the comprehensive property list. If the debtor fails to voluntarily comply, i.e., pay the imposed fine, the Bailiff may sell the property of the debtor through the auction and transfer the recovered amount in favour of the state budget.

It shall be noted that provisions of the Law "On Enforcement" envisages transfer of the bail of the offender to the state budget, namely, in accordance with the Article 28^1, the National Enforcement Bureau shall execute the writ within 10 days upon its submission based on the consent of the offender and written agreement on payment of the bail (and if the payer of the bail is the offender him/herself or bail is paid in the name of the offender – without his/her consent) and the amount of the fine shall be deposited to the deposit account as prescribed by this Law.

It shall also be noted that below is given statistical data on information requested from the National Enforcement Bureau, containing the list of pending and completed cases by types of payments between 2014 and July 1, 2018:[36]

Year	Number of received cases	Number of completed cases
2014	8355	6807
2015	8182	9047
2016	8426	7429
2017	7389	6252
2018 (till July 1)	2890	2629

and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

34 Natsvlishvili and Togonidze v. Georgia [25.06.2013], ECHR, App. 9043/05.

35 See, Law of Georgia on Enforcement, Legislative Herald of Georgia, 14/04/1999.

36 Letter of National Bureau of Enforcement of Georgia № 81781 of November 26, 2018 – the request for public information on criminal cases.

Given figures do not indicate grounds for enforcement in specific criminal cases – in accordance with provisions of the Article 28[1] of the Law on Enforcement cases were subject to enforcement.

Termination of enforcement of pending cases is regulated by Article 34 of the Law on Enforcement. Namely, in accordance with the named article's paragraph 1.e, enforcement may terminate for a reason of statute of limitation on enforcement; or if 10 years have passed after commencement of enforcement, except alimonies, labour related disability or other injuries, claims on compensation based criminal or administrative offences, as well as enforcement of cases in favour of the state, autonomous republics or local budgets.

Thus, mentioned provisions are established for possible termination of enforcement in case of expiration of established deadlines (article 34.1.e), and, on the other hand, for termination of cases requiring proceedings in favour of the state budget or budgets of autonomous republics or local self-governance institutions after passage of 10 years as established by law.

It shall be noted that there was an instance at the National Enforcement Bureau, when the Debtor requested termination of the case based on Article 34.1.e of the Law on Enforcement, due to statute of limitation for enforcement of the offence under the Article 76.1 of the Criminal Code of Georgia.[37]

Bailiff filed a motion with the Tbilisi City Court and requested exemption of the offender under the Article 76.1.c of the Criminal Code of Georgia from additional penalty.

Tbilisi City Court rejected motion of the bailiff. Decision of the City Court was appealed to the Tbilisi Court of Appeals, which admitted the appeal and the debtor (offender) was exempted of the fine payment. The Court of Appeals indicated at the circumstance that the 6 years period established for enforcement of the lawful judicial decision under the Article 76.1.b of the Criminal Code of Georgia has expired and therefore, the defendant shall be released of an obligation to pay a fine as an additional punishment. This aspect became a basis for termination of the enforcement case as prescribed by the Article 34.1.e of the Law on Enforcement[38].

The Court of Appeals took into consideration provisions of the Article 34.1.e of the Enforcement Law of Georgia.[39] The Court indicates that although definition under the mentioned provision somewhat contradicts provisions of the Article 76.1.b but despite such a contradiction, the Chamber held that for making a decision it should have been guided by the Criminal Code of Georgia, which is more humane and which does not contain any reservations, thus the right of a defendant shall not be restricted as guaranteed by this Law.[40]

In analyzing a fine from the point of view of punishment and enforcement, it would be interesting to get acquainted with interpretations provided on April 14, 2014 by the Supreme Court of

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37 Enforcement shall be terminated, if the statute of limitations for enforcement of the enforceable decision has expired.

38 In the case of expiration of the enforcement deadline.

39 According to which enforcement shall be terminated if 10 years elapsed after commencement of enforcement except for cases concerning alimonies, labor related disability or other injuries, claims on compensation based criminal or administrative offences, as well as enforcement of cases in favor of the state, autonomous republics or local budgets.

40 Ruling № 1b/531-17 of August 1, 2017, Tbilisi Court of Appeals.

Georgia. The above-mentioned interpretation of the Supreme Court of Georgia concerns addition of the additional penalty to the previous penalty awarded by the court in case of unity of judgments[41]. By decision of the Tbilisi City Court from October 28 2009, accused was sentenced to 3 months of imprisonment (as a provisional sentence, with 1 year of probation) and a fine in amount of GEL 2000 was used as an additional penalty.

The same Court adopted a decision on April 29 2019 with regard to the same accused and sentenced a defendant to 1 year of imprisonment for the crime committed under the article 273 of Criminal Code of Georgia. According to the court decision accused had to spend 3 months in the penitentiary facility and the remaining 9 months were to be served as a provisional sentence with 1 year and 9 months as probation. In addition, pursuant to Art. 67.5 of the Criminal Code of Georgia, the Court abolished part of the previous sentence – provisional sentence – and the unserved part of 3 months were added to the new penalty; as a result of unity of judgments, accused was sentenced to 1 year and 3 months of imprisonment. Out of this term, the defendant had to spend 6 months in a penitentiary facility and remaining 9 months were considered as provisional punishment with 1 year and 9 months of probation.

Neither the Tbilisi City Court (February 21, 2014) nor the Tbilisi Appellate Court (March 18 2014) approved the plea agreement between accused and the Prosecutor's Office.

Chamber of Cassations of the Supreme Court of Georgia explained that according to provisions of the Article 59.2 of the Criminal Code of Georgia, in deciding on a final verdict based on unity of cases, in this particular instance the Tbilisi City Court should have applied not only the primary punishment but also the additional penalty – the fine. Certainly, in this case D.K. never paid the fine since only unpaid fine could have become a subject to interpretation by the Supreme Court. The Supreme Court of Georgia also clarifies that according to Article 59.3 of the Criminal Code of Georgia, the 1st instance court should have added the fine of GEL 2000 from the previous sentence, which was not the case. Namely, the Court abolished the previous decision only the part of provisional sentence and never discussed an additional penalty of the unpaid fine. Thus, the judgement of the Criminal Chamber of the Tbilisi City Court from October 28 2009 is not enforced in the part of the fine. In opinion of the Chamber of Cassations, if the Criminal Collegium of the Tbilisi City Court in a new judgment from April 29 2010 took into account the fine from the previous decision (which would have been enforced by now) then the Court would have been authorized to approve a plea agreement between the Defendant D.K. and the Prosecutor's Office in a presented form. Therefore, the Supreme Court did not admit the cassation petition of the Prosecutor's Office, thus not approving the plea agreement between the defendant and prosecution.

In addition, the Cassations Chamber explained that if the defendant was sentenced to imprisonment in case of the guilty verdict in a new case, based on the motion of the Chair of the Penitentiary Department and the place of the sentence service, the 1st instance Court would review all unexecuted judicial decisions based on Article 286 of the CPC of Georgia. Even if the person is sentenced to non-custodial penalty, all un-executed non-custodial decisions under this or previous

[41] Decision № 2K-100AP-14 of April 14, 2014, The Criminal Chamber of the Supreme Court of Georgia.

judgments were to be enforced by the Enforcement Bureau or the National Bureau for Probation as prescribed by the Law on Enforcement and the Law of Enforcement of Non-Custodial Penalties and Probation.[42]

6. Conclusion

Fine is penalty prescribed by Law, which may be used as a primary penalty against a person infringing the law. In using this type of punishment, various aspects and factors shall be taken into consideration. The Judge, as a person deciding the case takes into consideration all relevant circumstances as well as proportionality of the penalty.

The fine may be imposed as an additional/supplemental or as a primary penalty; however, it is not indicated that in case of application of the fine as a primary penalty, a fine as an additional penalty may not be used – which is a legislative gap – because if the fine is a primary penalty, then it may not play a role of an additional penalty.

According to the Criminal Code of Georgia, imposition of several additional penalties is possible, but the law does not indicate what other additional punishment it can be combined with. It is not advisable to use a fine and a community service together because the community service – as a rule – is imposed on those unable to pay a fine. Also, as a rule, the fine shall not be imposed if imprisonment is used as the primary penalty; clearly, in such a case exists a risk of imposing a disproportionate penalty. There is an exception, however, and that concerns unlawful enrichment or an attempt of such.

Fine, as a rule, is imposed in misdemeanor cases, where compensation of damages is impossible. The fine shall not be used as a primary penalty in grave crimes. This is why an approach of the law – for instance, Article 180.3 of the Criminal Code of Georgia – is unacceptable as the law prescribes imprisonment for a term of 6-9 years. It is unacceptable to use a fine as an alternative to imprisonment. Criminal Code of Germany distinguishes between misdemeanor and a criminal offence and the fine is used only in misdemeanor cases.

When a person fails to pay a fine, it is then replaced by other penalty and the Criminal Code offers a calculation rule for cases like that; but the law does not offer any solution for cases where the fine is replaced with imprisonment. Quite problematic are cases there the fine is replaced with imprisonment in cases (articles) which do not envisage imprisonment as a form of punishment. It may contradict the principle of lawfulness. If the fine is not paid, an individual's criminal history may not be erased since no record is made to start a criminal history countdown.

It shall also be noted that imposition of penalty only is not sufficient for its enforcement; imposition of the fine is just one part accompanied by the other – enforcement, and that requires additional procedures.

As a conclusion it may be said that the statute of limitations for enforcement of fines imposed in the area of criminal law and termination of enforcement, therefore, is not clearly regulated by the Law

[42] Decision № 2K-100AP-14 of April 14, 2014, The Criminal Chamber of the Supreme Court of Georgia, see <http://www.supremecourt.ge/files/upload-file/pdf/n63-mnishvnelovani-ganmarteba.pdf> [02.06.2020].

of Georgia on Enforcement and in this regard, this Law is rather vague. Therefore, we believe that the given matter requires legislative corrections and improvements to ensure that the debtor's as well as defendant's rights are duly protected if the reason for termination of enforcement – statute of limitation – exists; on the other hand, the enforcement legislation establishes a possibility of infinite enforcement procedures.

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25. Zipf/Dölling, in: *Maurach R. V., Gössel K. H., Zipf H.,* Strafrecht, AT, Teilband 2, 8. Aufl., Heidelberg, 2014, S. 762, §62 Rn. 60.
26. BverfGE 105, 135.
27. Decision № 2K-100AP-14 of April 14, 2014, The Criminal Chamber of the Supreme Court of Georgia.
28. Decision № 3/2/416 of July 11 2011, The Constitutional Court of Georgia, "Public Defender of Georgia vs. Parliament of Georgia", para 49, 50.
29. Konstantin Stefanov v. Bulgaria [27.10.2015], ECHR, App. №353399/05.
30. Mamidakis v. Greece [11.01.2007], ECHR, App. №35533/04.
31. Natsvlishvili and Togonidze v. Georgia [25.06.2013], ECHR, App. 9043/05.
32. Grifhorst v. France [26.02.2009], ECHR, App. №283362.
33. Ruling № 1b/531-17 of August 1, 2017, Tbilisi Court of Appeals.
34. Letter of National Bureau of Enforcement of Georgia № 81781 of November 26, 2018 – the request for public information on criminal cases.

Khatia Shekiladze*

Criminal Aspects of Minor Significance of an Act

Legislation of Georgia does not provide for the definition of minor significance of an act and neither establishes the criteria of its assessment that gives the opportunity of the broad interpretation and in each concrete case the decision of the issue of the criminal punishability of the act significantly becomes depending on the individual assessment of the adjudicator. It can be said that the 2nd part of the 7th article of the criminal code of Georgia does not appertain to that part of the criminal norms which with a proper precision are defined by the judicial practice. On the assumption of the norm content, the bounds of assessment are so broad, that, during decision of the issue of the criminal punishability of one and the same act, it is possible different courts come to different conclusions. The mentioned more presents the necessity of the legal analysis of the norm.

In this thesis are analyzed the essence of the 2nd part of the 7th article of the criminal code of Georgia, its central objective and purpose, legal consequences of its application, is presented the influence of harm/danger of harm caused by the act upon application of the mentioned norm. Are also examined the circumstances to be taken into consideration during definition of minor significance of the act, that to some extent reduces equivocation of the concept.

Key words: *Crime, Act, Harm, Minor Significance.*

1. Introduction

According to the 2nd part of the 7th article of the Criminal Code of Georgia (hereinafter "CCG"), An act that, although formally containing the signs of an act provided for by this Code, has not caused, due to its insignificance, such harm or has not created the risk of such harm that would require criminal prosecution of its perpetrator shall not be deemed a crime. Mentioned norm is the constituent part of the concept of the crime provided for by the 1st part of the same article. During determination of the concrete act as the crime it is necessary to establish the identity between the signs of the act provided for by the criminal law and the signs of the committed act.[1] Though, such identity alone, itself, does not condition the criminal responsibility. The goal of legislation is not punishability of any formal conformity towards the composition of the act described in the special part of the criminal code. Only the criminally significant, relevant act can become the grounds for the criminal responsibility that is clearly expressed in the 2nd part of the 7th article of CCG. It can be said that the acts of minor significance cannot achieve the level of criminal relevancy.[2] Non-existence of

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1 *Natchkebia G.,* Concept of a Crime, in: Criminal Law, Genaral Part, *Natchkebia G., Todua N. (Eds.),* 2nd Vol., Tbilisi, 2016, 105 (in Georgian).

2 *Turava M.,* Criminal Law, General Part I, Doctrine of Crime, Tbilisi, 2011, 58 (in Georgian).

harm/danger of harm caused by minor significance of the act conditions putting of the 2nd part of the 7th article of CCG into motion.

Legislation of Georgia does not provide for the definition of minor significance of an act and neither establishes the proper criteria determining it, due to this, the mentioned issue repeatedly became the matter of dispute in the course of adjudication. Besides, application of the 2nd part of the 7th article of CCG only with indication to insignificant harm/danger of harm is problem-causing. With consideration of the practical purpose of the mentioned norm, a particular significance is conferred to its correct and uniform interpretation. For ensuring of achievement of this goal, this thesis serves to presentation of the fundamental essence of the 2nd part of the 7th article of CCG, its objectives and purpose, legal consequences, preconditions of determination of noncriminal nature of the act, also the circumstances to be taken into consideration during assessment of minor significance of the act and analysis of their content, that, to some extent, will reduce equivocation of the concept and the difficulties existing from the standpoint of definition and application of the norm.

2. Objective of Exclusion of the Criminal Nature of the Act Due to Minor Significance

2.1. Criminal Law as *Ultima Ratio*

Ultima Ratio principle historically is related to the so called "fragmentary" nature of the criminal law that implies the necessity of limitation of the punishable acts.[3] The principle also has a so called "preventive" interpretation and for the purpose of prevention of the crime implies application of the criminal law as the last resort.[4] Criminal law is the last resort of observation of the social order. Priority of application of other more lenient means by the state ensues from the principle of proportionality,[5] which prohibits achievement of the legitimate objective at the expense of superfluous limitation of human right.[6] Task of the criminal law is only the struggle against the socially dangerous acts. Superfluous social danger of the act is the grounds for its criminalization.[7] Mainly which value must be observed by the criminal law is defined by the official policy of the state.[8] "In the state based on Rule of Law criminalisation of acts and setting punishment for it is successful only if it is used as *Ultima Ratio*."[9] One of the important conditions of ensuring success in this process is qualifying by the law as the crime only an act which entails serious risks neutralisation of which and protection of

3 *Melander S.,* Ultima Ratio in European Criminal Law, Onati Sicio-Legal Series, Vol. 3, № 1, 2013, 49.

4 *Husak D.,* Applying Ultima Ratio: A Skeptical Assessment, Ohio State Journal of Criminal Law, Vol. 2, №2, 2005, 536.

5 *Turava M.,* Criminal Law, Review of General Part, 9th Vol., Tbilisi, 2013, 17 (in Georgian).

6 Decision № 3 /1/512 of 26 June, 2012 of the Constitutional Court of Georgia – „The Citizen of Denmark Heike Cronqvist versus the Parlament of Georgia", II-60.

7 *Turava M.,* Criminal Law, Review of General Part, 9th Vol., Tbilisi, 2013, 17 (in Georgian); Decision № 1/13/732 of 30 November, 2017 of the Constitutional Court of Georgia – „The Citizen of Georgia Givi Shanidze versus the Parlament of Georgia", II-46.

8 *Natchkebia G.,* General Part of Criminal Law, Tbilisi, 2015, 111 (in Georgian).

9 Decision № 1/1/592 of 13 February, 2015 of the Constitutional Court of Georgia – „The Citizen of Georgia Beka Tsikarishvili versus the Parlament of Georgia", II-37.

society and people from which are objectively within the scope of criminal law.[10] Definition of condemnation of the act on the one part depends whether which values and interests were abased or endangered and on the other part did or not the act cause harm or did or not create danger of such harm[11].

If the act, the signs of which are proportionate to the signs of the act provided for by the criminal law, has minor significance, then, according to the 2nd part of the 7th article of CCG, this proportion is formal and accordingly the act will not be considered as the crime.[12] On the assumption of the above mentioned discussion, in this case, the degree of the social danger of the act is so low that putting of the criminal repressive mechanism for the similar act into motion contradicts *Ultima Ratio* principle. During recognition of any act as the crime the legislator takes into consideration the nature determining danger of such acts, though, it is impossible the degree of danger of such act, in the given concrete case, not to achieve that minimum that is required for the criminal responsibility of its committer.[13] Humans must be protected against the criminal condemnation, except the case when they committed such act, the responsibility for which is inevitable.[14] The 2nd part of the 7th article of CCG serves to this objective and protects a person against the criminal prosecution when the necessity of this does not exist.

2.2. Economic Analysis of Law

Economic analysis of law is too important for economic conduction of the criminal policy[15] and it is the constituent part of the state's criminal policy.[16] Resource of the state is not sufficient for implementation of the criminal prosecution on the fact of all crimes. For the purpose of the effective use of the limited resources are defined the priority directions of the criminal policy which on the part of investigation and prosecution authorities require a particular attention and response.[17] Besides the expense required for implementation of the prosecution, the economic analysis of the law is also interested in the expense incurred for execution of the legal sanctions.[18] It costs a lot for the state to apply the punishment.[19] Correct and intelligent use of the state resources is a necessary condition of the country's development.[20]

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10 Ibid.

11 *Nils J.,* Criminalization as Last Resort (Ultima Ratio), Ohio State Journal of Criminal Law, Vol. 2, № 2, 2005, 527.

12 *Natchkebia G.,* Concept of a Crime, in: Criminal Law, Genaral Part, *Natchkebia G., Todua N. (Eds.),* 2nd Vol., Tbilisi, 2016, 105 (in Georgian).

13 *Natchkebia G.,* General Part of Criminal Law, Tbilisi, 2007, 56 (in Georgian).

14 *Feinberg J.,* The Moral Limits of the Criminal Law, Vol. 3: Harm to Self, Oxford University Press, 1989, 54.

15 *Shalikashvili M., Mikanadze G., Khasia M.,* Law of Corrections, Tbilisi, 2014, 34 (in Georgian).

16 *Shalikashvili M.,* Criminology, 3rd Vol., Tbilisi, 2017, 207 (in Georgian).

17 Decree № 181 of 8 October, 2010 of the Minister of Justice of Georgia about the Adoption of General Guiding Principles of Criminal Law policy, LHG, 130, 11/10/2010.

18 *Khubua G.,* Theory of Law, Tbilisi, 2004, 111 (in Georgian).

19 *Gamkrelidze O.,* Problems of Criminal Law, 3rd Vol., Tbilisi, 2013, 111 (in Georgian).

20 *Shalikashvili M.,* Criminology, 2nd Vol., Tbilisi, 2011, 254 (in Georgian).

Exclusion of the crime due to minor significance of the act is justified criminally and politically and sets as the purpose the use of limited resources of the state only for struggle against the socially dangerous acts.

3. Minor Significance of an Act as the Opportunity to Implement Decriminalization by the Common Court

Decriminalization of the act, as a rule, appertains only to the exclusive authority of the legislative authority. Though, sometimes this function is successfully combined by the constitutional court as well, which presents itself in the role of so called "negative legislator".[21] As the example of this we can examine the decision by which imposition of the criminal responsibility for illegal use of marijuana was declared unconstitutional.[22] As concerns the opportunity of implementation of decriminalization of an act by the common courts, the mentioned, as opposed to the constitutional court, of course does not ensue from the jurisdiction of the common court. Though, on the assumption of the 2nd part of the 7th article of CCG, the legislator gives the judge the right of decriminalization of the act.[23] Mentioned norm, with consideration of its legal nature and legal consequences, is that rare, it can be said the only exceptional case when the legislator implements delegation of his own exclusive authorities to the adjudicator and confers the opportunity of implementation of decriminalization of the act on him. It must be taken into consideration that the court is authorized to make the act, not generally provided for by the special part of CCG, lose the criminal significance, but only the act committed by the concrete person towards the same person.[24] Thus, we can call the case provided for by the 2nd part of the 7th article of CCG, the factual decriminalization at the individual level. It is decriminalization of a one-time nature only as concerns the concrete act and is related to the challenge of the appropriate legal consequences only towards the concrete individually defined person.

4. Legal Consequences of Application of the 2nd Part of the 7th Article of CCG

The 2nd part of the 7th article of CCG is not the material legal circumstance excluding the criminal responsibility or the procedural legal circumstance impeding the prosecution, but excludes the composition of the act, that is to say, the act provided for by the criminal code does not exist. It should be noted that in Germany a minor significance of the act excludes not the composition of the

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21 *Todua N.,* Issues of Criminalization-Decriminalization in Georgian Criminal Legislation, in: Liberalization Trends of Criminal Law Legislation in Georgia, *Todua N. (Ed.),* Tbilisi, 2016, 105 (in Georgian).

22 Decision № 1/13/732 of 30 November, 2017 of the Constitutional Court of Georgia – „The Citizen of Georgia Givi Shanidze versus the Parlament of Georgia".

23 *Todua N.,* Issues of Criminalization-Decriminalization in Georgian Criminal Legislation, in: Liberalization Trends of Criminal Law Legislation in Georgia, *Todua N. (Ed.),* Tbilisi, 2016, 105 (in Georgian); *Mtchedlishvili-Herdikh K.,* Criminal Law, General Part II, Certain Forms of Criminal Conduct (Preparation and Attempt of a crime, Complicity in a crime, Competition), Tbilisi, 2011, 26-27 (in Georgian).

24 *Todua N.,* Issues of Criminalization-Decriminalization in Georgian Criminal Legislation, in: Liberalization Trends of Criminal Law Legislation in Georgia, *Todua N. (Ed.),* Tbilisi, 2016, 106 (in Georgian).

act, but is the grounds for refusal of initiation or termination of prosecution.[25] Minor significance of the act in the legislation of Georgia is not the procedural legal, but is the material legal problem.[26] Consequently, during existence of the conditions provided for by the 2nd part of the 7th article, according to the subparagraph "A" of the first clause of the article 105 of the code of criminal procedure of Georgia (hereinafter "CCPG"), at the stage of investigation, the public prosecutor is obliged to terminate/not to initiate the criminal prosecution.[27] At the stage of examination of the case at the court CCPG does not provide for the opportunity to terminate the prosecution by the judge on the mentioned grounds. Accordingly, despite existence of the act provided for by the criminal law, examination of the case must be continued and must be passed the verdict of not guilty. Though, there also exists the different consideration that is related to expediency of termination of the accused person's criminal prosecution by the motive that passing of the verdict of not guilty might exert a negative influence upon the society's feeling for law and order and similar acts be perceived as permitted.[28]

It must be taken into consideration that termination of prosecution at the stage of investigation due to the minor significance of the act the court sometimes examines [29] in the way of discretionary authority of the public prosecutor that presents the minor significance of the act as the procedural legal problem and does not conform to the content of the 2nd part of the 7th article, neither ensues from the criminal procedure legislation. In particular the necessary precondition of application of the discretionary authority is existence of the criminal action when the public prosecutor with consideration of evidential and public interest test (so called "full test") makes decision on initiation or termination of the prosecution.[30] Minor significance of the act excludes composition of the act that in its turn means non-existence of the criminal act; in time of this, the public prosecutor will not be able to act within the frames of the discretionary authority.

5. Preconditions of Determination of Non-Criminal Nature of the Act

The 2nd part of the 7th article of CCG determines two main cumulative preconditions for exclusion of the criminal nature of the act. The first is insignificant nature of harm or danger of harm and the second is minor significance of the act itself. By the adjudicator in the first place must be assessed the inflicted harm or danger of harm. In case the harm/danger of harm caused by the act is significant, then discussion of minor significance of the act is legally irrelevant, as harm itself justifies

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25 *Turava M.,* Criminal Law, Review of General Part, 9th Vol., Tbilisi, 2013, 72 (in Georgian).

26 Ibid.

27 *Goradze G. (Ed.),* Comments on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 337 (in Georgian).

28 Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 1 August, 2018, № 154AP-18, Different Opinion of Judge Nino Gvenetadze.

29 Criminal Cases Panel of Tbilisi City Court, Judgment of 21 November, 2014, № 1/5537-14; Criminal Cases Panel of Tbilisi City Court, Judgment of 30 December, 2015, № 1/5598-15.

30 See Decree № 181 of 8 October, 2010 of the Minister of Justice of Georgia about the Adoption of General Guiding Principles of Criminal Law policy, LHG, 130, 11/10/2010; *Goradze G. (Ed.),* Comments on the Criminal Procedure Code of Georgia, Tb., 2015,346; *Tumanishvili, G.,* Criminal Procedure law, General Part, Tbilisi, 2014, 70-71 (in Georgian).

imposition of the criminal responsibility with consideration that the act inflicting a significant harm cannot be assessed as the act of minor significance. Accordingly, assessment of minor significance becomes required only in case the inflicted harm or danger of harm is of insignificant nature, though, the latter of course does not condition a minor significance of the act. Existence of harm excludes the opportunity of application of the 2nd part of the 7th article of CCG, though its non-existence does not indicate the necessity of application of the norm. Difficulties existing in the course of adjudication are related to the mentioned issue. For illustration, the sentence passed by Tbilisi city court on one of the cases, which concerned the fact of seizing the sum of money in the amount of 3 GEL from quick payment machine by the minor, secretly, using the metal item, for the purpose of misappropriation, will suit. In the examinable case the first instance court, without assessing the nature of the committed act, considered it as minor significance with consideration that it did not inflict any significant harm or did not create danger of such harm.[31] Insignificant nature of the inflicted harm is one of the grounds[32] for inexpediency of the criminal prosecution within the frames of the discretionary authority and not a self-sufficient circumstance defining a non-criminal nature of the act.

5.1. Harm

Traditional starting point of discussion of criminalization is the "harm Principle".[33] John Stuart Mill, as the only purpose for which it is possible to apply by the state of the power towards this or that member of the society against his wish, examines[34] avoiding of harm for others. Here is considered harm or danger of harm inflicted as to private individuals, so to the state.[35] Principle of harm gives advantage to the individual freedom and for justification of application of compulsion on the state's part it does not consider cases of inflicting harm to itself.[36] Though, as opposed to this position, some philosophers also consider the prevention of inflicting harm to itself as the legitimate reason of criminalization that more broadens Mill's principle of harm and also contains the idea of paternalism.[37] For justifying the criminalization of this or that act the legislator stands in front of the significant task in order to substantiate the nature of the act harmful for the society, though, harm of any kind and amount cannot justify the purposes of criminalization. Harm, in its turn, can be different:

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31 Criminal Cases Panel of Tbilisi City Court, Judgment of 30 December, 2015, № 1/5598-15.

32 See Decree № 181 of 8 October, 2010 of the Minister of Justice of Georgia about the Adoption of General Guiding Principles of Criminal Law policy, LHG, 130, 11/10/2010.

33 *Ashworth A., Horder J.,* Criminalization, Principles of Criminal Law, 7thed., Oxford University Press, 2013, 6 of 22;*Tadros V.,* Wrongdoing and Motivation, in: Philosophical Foundations of Criminal Law, *Duff R. A., Green S. P. (Eds.)*, Oxford University Press, Oxford, 207.

34 *Mill J. S.,* On Liberty, Utilitarianism and Other Essays, *Philp M., Rosen F. (Eds),* Oxford University Press, Oxford, 2015, 106; *Ohlin J. D.,* Criminal Law: Doctrine, Application, and Practice, New York, 2016, 22; *Petersen Th. S.,* Why Criminalize? New Perspectives on Normative Principles of Criminalization, Roskilde, 2020, 17.

35 *Wilson W.,* Criminal Law, 6th ed., Pearson Education Limited, 2017, 36.

36 Ibid, 35.

37 *Petersen Th. S.,* Why Criminalize? New Perspectives on Normative Principles of Criminalization, Roskilde, 2020, 18.

direct, far and secondary.[38] In some cases the legislator himself determines the amount of the initial harm for the criminal responsibility. For example, damage or destruction of somebody else's thing provided for by the article 187 of CCG is a crime only in case the cost of the thing exceeds 150 GEL. In this case the legislator excludes the composition of the act only with consideration of the amount of harm, without assessing the significance of the act. In particular, it is possible harm does not exceed 150 GEL, but the act itself, with consideration of its nature at all is not insignificant. As opposed to the consideration expressed in the legal literature,[39] this example is not a minor significance of the act given in the text of composition provided for by the special part of the code.

Does or not the inflicted harm achieve the limit required for imposition of the criminal responsibility must be assessed in each concrete case, with consideration of the circumstances of the case, including, the position of the injured person himself also should be mentioned, how significant is damage inflicted to him.[40] With consideration of the injured person and economic conditions existing by that time, the Supreme Court of Georgia on one of the cases did not consider the material damage in the amount of 13 GEL and 20 tetri to be insignificant.[41] Also, based on the the injured person's explanation the court considered that damage inflicted in the amount of 7 GEL could not justify imposition of the criminal responsibility.[42]

It must be taken into consideration that in the concept of harm provided for by the 2nd part of the 7th article is not implied the material damage alone and it can be expressed as in material, so in non-material form.[43] Only the material explanation of "harm" would groundlessly restrict the limits of application of this norm, besides to the detriment of the accused persons.[44] Besides, it must be taken into consideration that mentioned norm, as opposed to the principle of harm, does not consider only harm/danger of harm inflicted to others.

5.2. Minor Significance of the Act

According to the Soviet criminal legislation the minor significance of the act conditioned exclusion of the social danger.[45] Socially dangerous nature is the principal criterion for decision of the issue whether is or not necessary to declare the act as the crime. Accordingly, if the judge is convinced that the act provided for by the criminal law in the concrete conditions does not contain a social

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38 *Simester S. P., Hirsch VonA.,* Crimes, Harms and Wrongs, On the Principles of Criminalization, Oxford, Portland, Oregon, 2011, 44-47.

39 Comp. *Turava M.,* Criminal Law, General Part I, Doctrine of Crime, Tbilisi, 2011, 61 (in Georgian).

40 Criminal Cases Chamber of Tbilisi Appeal Court, Judgment of 23 March, 2016, № 1/B-165-16.

41 Criminal Cases Chamber of the Supreme Court of Georgia, Judgment of 16 March, 2009, № 867AP.

42 Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 8 February, 2005 № 425-1P.

43 Criminal Cases Chamber of Tbilisi Appeal Court, Judgment of 23 March, 2016, № 1/B-165-16; Criminal Cases Chamber of the Supreme Court of Georgia, Judgment of 7 March, 2017 № 556AP-16; Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 22 February, 2018, № 510AP-17.

44 Criminal Cases Chamber of Tbilisi Appeal Court, Judgment of 23 March, 2016, № 1/B-165-16.

45 *Turava M.,* Criminal Law, General Part I, Doctrine of Crime, Tbilisi, 2011, 62 (in Georgian); *Tsereteli T.,* Problems of Criminal Law, 4th Vol., Tbilsi, 2010, 62 (in Georgian).

danger, he has no right to consider such act as the crime.[46] Social danger is the objective social and political quality of every crime.[47] It is a material sign of the crime and is a broader concept than a crime.[48]

Harm considerably conditions the exclusion of the criminal nature of the act, though it should be noted that it is possible the harm, directly inflicted in the issue of the crime, does not exceed 1 tetri, though, the act still will not be considered as having a minor significance. From this standpoint, attention must be paid to the nature of the act and unlawful will expressed in it, and not only to the mathematical representation of harm.[49] Though, as opposed to the harm that is comparatively easy to determine, assessment of minor significance of the act is a problem-causing issue and the court practice as well makes it obvious.

6. Circumstances to be Taken into Consideration when Determining the Minor Significance of an Act

6.1. Intention of Infliction of Insignificant Harm

Assessment of minor significance of the act to the great extent depends on the intention of the person committing the act. In particular, infliction of what harm he set as the purpose at the moment of committing the act. The court of appeal, on the case which concerned the fact of misappropriation of 3 GEL from the quick payment machine, explained that the convict person was subjectively driven generally by the intention of seizing somebody else's thing and not concretely of 3 GEL. By explanation of the chamber, during application of the 2nd part of the 7th article of CCG it must be established whether was or not the intention of the guilty person directed to committing the act of such minor significance which inflicts insignificant harm (or creates danger of such harm) to good observed by the law.[50] Also interesting is one of the decisions of the Supreme Court, which clarifies that the accused person, for the purpose of misappropriation, secretly seized by the injured person's purse at the cost of 25 GEL, which contained the sum in the amount of 10 GEL.[51] As opposed to the first instance court the Court of Appeal did not consider enough only the assessment of the actually inflicted damage, as intention of the accused person was not only seizing 10 GEL. He did not know and even could not know what sum was placed in the purse of the injured person. He was driven by the intention of seizing somebody else's thing and not concretely the definite sum that does not present the act as having a minor significance. Thus, existence of wish to inflict a minor harm has the decisive importance from the very beginning.[52] As an example of the mentioned we can examine the case from the practice of the Supreme Court. The person was adjudged guilty for misappropriation of three

46 *Tsereteli T.,* Problems of Criminal Law, 1st Vol., Tbilisi, 2007, 49-50 (in Georgian).
47 *Gamkrelidze O.,* Problems of Criminal Law, 1st Vol., Tbilisi, 2011, 66 (in Georgian).
48 *Surguladze L.,* Criminal Law (Crime), Tbilisi, 1997, 48 (in Georgian).
49 Criminal Cases Chamber of Tbilisi Appeal Court, Judgment of 23 March, 2016, № 1/B-165-16.
50 Ibid.
51 Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 17 July, 2017, № 164AP-17.
52 *Tsereteli T.,* Problems of Criminal Law, 4th Vol., Tbilisi, 2010, 75 (in Georgian).

aluminium pans from the yard of the neighbour's dwelling house, which he sold on the market for 3 GEL. With consideration of the cost of the seized things the Cassation Chamber assessed the act as having a minor significance.[53] As it is obvious from the circumstances of the case the accused person from the very beginning was driven by the intention of infliction of insignificant harm to the injured person that is one of the grounds for assessment of the act as having a minor significance. As opposed to this, there was the case in the court practice when misappropriation of 5 litres of petrol from the luggage boot was not considered by the court as having a minor significance,[54] despite the fact that the person was driven by intention of inflicting such insignificant harm and his act did not establish any danger on the other part.

It is clear that the 2nd part of the 7th article of CCG cannot be applied if the guilty person's intention was directed to inflicting of large amount of harm, but this goal failed to be achieved owing to reasons beyond the guilty person's control.[55] Harm only in that case defines a minor significance of the act when the person had intention of infliction of such insignificant harm from the very beginning.

6.2. The Modus Operandi and the Means of the Act

Under one of the criteria defining the minor significance of the act are examined the modus operandi and means of its committing that in its turn presents illegal will revealed in the act. It is important to assess the firmness of the expressed will. In particular, which obstacles a human overcame during fulfilment of the volitional act and what results did he receive.[56] The modus operandi of committing the act can also help us to establish the person's real intention.[57]

In the above examined example which concerned seizing the sum in the amount of 3 GEL from quick payment machine, the Court of Appeal explained that the convict in advance created the conditions appropriate for seizing the sum. In particular, he used a piece of paper and a thin iron stick. Also, after driving the paper into the section for transferring the coins, he for several minutes moved away from that place in order the citizens would transfer the sum and only after a certain period he returned to seize it. By explanation of the chamber, the act by means of the special subject, by in advance considered intention, is not the act of minor significance.[58] During discussion of the way and means of committing the act, the sentence of Tbilisi city court is also interesting, which clarifies that the accused person, for the purpose of seizing the alcoholic beverage, by means of the asphalt piece broke the shop pane and seized from the counter a bottle of vodka at the cost of 15 GEL. In the examinable case the first instance court assessed the act as having a minor significance with consideration that the accused person from the very beginning did not have the intention of causing

53 Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 13 January, 2005, № 386-AP.
54 Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 24 March, 2008, № 1848-AP.
55 *Natchkebia G.,* General Part of Criminal Law, Tbilisi, 2007, 56 (in Georgian).
56 *Dvalidze I.,* General Part of Criminal Law, Punishment and Other Criminal Effects of Crime, Tbilisi, 2013, 89-90 (in Georgian).
57 Ibid, 95.
58 Criminal Cases Chamber of Tbilisi Appeal Court, Judgment of 23 March, 2016, № 1/B-165-16.

more harm[59]. Despite this, shall be taken into consideration the nature of the act itself, the way of its implementation that was expressed in breaking the shop pane by the asphalt piece. Such act is characterized by the superfluous social danger, as the person, for seizing the desired thing, is ready to overcome any resistance. In this case, during assessment of the criminal nature of the act, a minor cost of the seized thing and intention of inflicting the insignificant harm become irrelevant. The issue would have been decided in a different way if the person would not have to overcome resistance and had taken the desired thing from the open shop window. The nature of the act and the way of its committing was the crucial factor for the Court of Appeal and explained that penetration by the person, being under alcoholic beverage influence, in the storage by the way of breaking the pane with the asphalt piece and seizing vodka, is not the act having minor significance.[60] Discussion of the Court of Appeal was also shared by the Supreme Court.[61] The nature of the act, danger, the way of its committing and the person's firm illegal will, must be having a minor significance.[62]

As opposed to the abovementioned example, as having a minor significance was assessed the attempt of secret seizing of a box of cigarettes, for the purpose of misappropriation, out of the injured person's motor car, who had the panes down. By explanation of the court, the criminal responsibility is conditioned by the fact that its ground is the crime and not any condemnable act. In the given case the court, having assessed the evidences submitted on the case, danger of the act, the object of encroachment, the stage of implementation of encroachment, the cost of the thing to be seized and came to the conclusion that the act committed by the accused person did not create such danger due to which it would be necessary to impose a criminal responsibility on him. Accordingly, the accused person was adjudged not guilty.[63] In the given case the circumstance that the accused person practically did not overcome any obstacle and he attempted to seize a thing of a small cost placed in the available space, is one of the most important circumstances that excludes a socially dangerous nature of the act.

6.3. Place of Commission of the Act

Place of committing the act independently does not condition a minor significance of the act, but might be taken into consideration during assessment of the intention of inflicting insignificant harm and nature of the act. As the example of this we can examine seizing of the bag at the cost 15 GEL left at the place of public gathering without attention, which contained only 7 GEL and mobile telephone charger at the cost of 15 GEL.[64] The fact of leaving the things at the unprotected place without attention enables to foresee that the bag would not contain the sum of a large amount. Accordingly, it is possible the accused person did not have the intention to inflict a significant harm. Besides, the seized thing was easily available for the accused person and any additional effort to seize

[59] Criminal Cases Panel of Tbilisi City Court, Judgment of 18 November, 2015, № 1/4597-15.
[60] Criminal Cases Chamber of Tbilisi Appeal Court, Judgment of 22 August, 2016, № 1/B-66-16.
[61] Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 1 August, 2018, № 154AP-18.
[62] Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 24 April, 2020, № 844AP-19.
[63] Criminal Cases Panel of Tbilisi City Court, Judgment of 21 November, 2014, № 1/5537-14.
[64] Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 8 February, 2005 № 425-1P.

it was not necessary for him. In case the person commits the act in the protected territory, the extent of danger of the act also grows. For example, if thieving took place by illegal penetration to the apartment, storage or parking, such act will not be able to be assessed as having a minor significance, though, it is committed for the purpose of misappropriation of the thing with insignificant cost. Penetration to the protected territory is related to certain efforts, the person has to overcome certain kind of resistance to achieve the desired purpose that increases the extent of illegal will revealed in the act. One of the decisions of the Supreme Court of Georgia clarifies that the Court of Appeal considered to be the act a minor significance a penetration to the basement with in advance prepared keys and relied on the circumstance that the accused person had time to seize only three jars[65] that with consideration of the above mentioned discussion does not deserve support.

6.4. Behaviour Revealed in the Act

For assessment of minor significance of the act, one of the factors is the nature of behaviour revealed in the act itself, extent of its danger. From this standpoint, is interesting the case from the court practice which clarifies that the accused person, being drunk, demanded from the shop assistant to give him beer for free, after being refused, he threatened her and as a result of breaking the pane captured beer at the cost of 2 GEL and 30 tetri.[66] By the Court of Appeal was passed the condemnatory sentence, which was left changeless by the Supreme Court. In the examinable case a minor significance of the inflicted harm is not the matter of dispute, though the nature of the act itself, behaviour revealed in it, must be taken into consideration. Mentioned is important as far as it is the outward form of revelation of the human's free volitional act. Cassation court focused its attention on the social danger of the act that was expressed in the evident seizing of the thing, psychological influence and threatening of the injured person. With consideration of the behaviour revealed by the accused person it is impossible to affirm that the act has a minor significance. In such time the amount of the actually inflicted harm will not be able to exert influence upon the issue of considering the act to be crime, despite that the guilty person's intention from the very beginning was directed to infliction of harm of a minor significance. When behaviour revealed in the act contains danger, the intention to inflict harm of minor significance becomes irrelevant.

6.5. Jointly Committed Act

Special part of CCG, as concerns not one criminal action, provides for jointly committed acts as the aggravating circumstance. Commitment of the act by two or more perpetrators contains much more danger, as creates a high probability of carrying the crime into effect. Besides, from the part of the potential injured person the possibility of suppression of encroachment reduces. Accordingly, in case of a joint act the risk of encroachment of legal good is considerably high. Cassation court in one

[65] Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 20 March, 2006 № 329-AP.
[66] Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 11 October, 2005 №339-AP.

of the decisions, during assessment of minor significance of the act focuses its attention on a joint nature of the act.[67]

6.6. Object of Encroachment

The object of encroachment in rare cases can turn out to be one of the criteria of assessment of minor significance. On one of the cases existing in practice of the Supreme Court of Georgia which concerned secret seizing of coffee at the cost of 19 GEL in the shop by the persons in the past convicted for thieving, the Cassation Chamber focused its attention on the purpose of the captured thing and explained that one jar of coffee could not be considered as the necessary product for vital conditions of a human. By taking into consideration of this and other circumstances, the act was not considered as having a minor significance.[68] Priority of protection of this or that legal good for the state must be also taken into consideration. In general, the changeability of the society's development also exerts influence upon explanation of the norm.[69] For example, on the assumption of the increased interest of proper ensuring of justice, the actions directed against the judicial authority might not be assessed as having a minor significance. The more is the social value of the object, the less opportunity of criminal result is enough for substantiation of the social danger of the act.[70]

6.7. Motive of Committing the Act

The motive of committing the crime, when it certainly establishes the danger of the act and increases the extent of injustice, might exert influence upon assessment of insignificance of the act. For example, having minor significance cannot be assessed the act committed by discriminative motive. Determination of motive also has a decisive meaning in such cases when the object of encroachment exerts influence upon assessment of minor significance of the act. For example, if a person, having grave economic conditions, seizes an insignificant amount of foodstuff, only the fact of seizing the product required for vital conditions of a human, will not be able to be decisive for assessment of minor significance of the act, if it is not confirmed that intention of committing thieving was conditioned exactly by the grave economic conditions.[71]

6.8. Personal Features, Prior History, Record of Conviction

Criminal law is the law of act and not the law of person.[72] As a rule, the circumstances which define the extent of danger of the subject's social danger are taken into consideration during

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67 Criminal Cases Chamber of the Supreme Court of Georgia, Judgment of 7 March, 2017 № 556AP-16.
68 Ibid.
69 *Bohlander M.,* Principles of German Criminal Law, Oxford, Portland, Oregon, 2009, 18.
69 *Tsereteli T.,* Problems of Criminal Law, Vol. IV, Tbilisi, 2010, 78 (in Georgian).
70 Ibid, 78.
71 *Dvalidze I.,* General Part of Criminal Law, Punishment and Other Criminal Effects of Crime, Tbilisi, 2013, 83 (in Georgian).
72 *Turava M.,* Criminal Law, Review of General Part, 9th Vol., Tbilisi, 2013, 350 (in Georgian).

exemption from responsibility and punishment.[73] Social danger is the objective quality of the act and its existence or non-existence cannot depend on negative or positive qualities of the act.[74] Though, in separate cases, personality features as well might exert influence upon assessment of minor significance of the act. Together with danger of the act, large importance is also conferred to the social danger of the person committing it.[75] Accordingly, conviction of the person must be taken into consideration.[76] In the above examined example, which concerned the fact of seizing coffee at the cost of 19 GEL by the persons convicted in the past for thieving, the Supreme Court during discussion of the expediency of application of the 2nd part of the7th article of CCG, significantly relied on the personalities of the offenders and their prior history, convictions. In particular, by explanation of the Cassation chamber, despite preferential terms spread in the past and application of the conditional sentence, the convicts failed to draw appropriate conclusions, were not pierced by the proper respect before the law and again committed crime in the aggravating circumstances,[77] due to which the act committed by them was not considered as having a minor significance.

7. Conclusion

Issues examined in the thesis clearly present the difficulties existing from the standpoint of explanation and application of the 2nd part of the 7th article of CCG. On the assumption that exclusion of the criminal nature of the act due to minor significance, on the one part protects the person against unjustified intervention in his right and on the other part serves to the rational use of the state resources, a correct and uniform interpretation of the mentioned norm has a particular meaning in the course of adjudication. As the existing practice brings to light, equivocation of minor significance of the act is examined as one of the important problems. Besides, application of the 2nd part of the 7th article of CCG is a problem-causing only with indication to insignificant harm/danger of harm. In the issue of research it can be said that existence of significant harm/danger of harm excludes opportunity to apply the 2nd part of the 7th article of CCG. Though, its insignificant nature of course does not condition a minor significance of the act and does not indicate the necessity of application of the norm. Insignificant harm, together with other circumstances, defines a minor significance of the act only in case the person from the very beginning set as the purpose infliction of such minor harm. In the issue of analysis of the court practice, in the thesis are singled out several circumstances to be taken into consideration which might exert influence upon determination of minor significance of the act. In particular, are taken into consideration the committer's intention of infliction of harm, the way, means, motive and place of committing the act, nature of behaviour revealed in the act, extent of its danger, group nature of the act, the object of encroachment, personality features and past life. Necessity to take each of them into consideration depends on the individual circumstances of the case. Besides, it is

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73 *Tsereteli T.,* Problems of Criminal Law, 4th Vol., Tbilisi, 2010, 78 (in Georgian).

74 *Gamkrelidze O.,* Problems of Criminal Law, 1st Vol., Tbilisi, 2011, 81 (in Georgian).

75 Criminal Cases Chamber of the Supreme Court of Georgia, Ruling of 1 August, 2018, № 154AP-18, Different Opinion of Judge Nino Gvenetadze.

76 *Goradze G. (Ed.),* Comments on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 337 (in Georgian).

77 Criminal Cases Chamber of the Supreme Court of Georgia, Judgment of 7 March, 2017 № 556AP-16.

important to assess them in totality, in the united context and not independently. For determination of minor significance of the act the identification of circumstances to be taken into consideration and analysis of their content confers more objectivity on the concept of minor significance and reduces the problem of equivocation that in its turn ensures a uniform explanation and application of the norm and serves to fulfilment of requirements of the principle of legal safety.

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Tsotne Tsertsvadze*

Fraud Prevention According to *Tore Bjorgo* Model

Fraud related crimes are rather common in Georgia. The proof of this is the official statistics of the Ministry of Internal Affairs of Georgia.[1] Thus, it is a priority for the state and society to combat and prevent fraud. This article studies fraud prevention according to Tore Bjorgo crime prevention model. This model is holistic and looks at crime prevention actions from different angles. Along with the theoretical materials this work studies court decisions in force and determines practical actions based on them. In the process of fighting fraud an active involvement of law enforcement agencies, society and individuals is essential. Fraud being a crime based on deception is a threat which citizens need to be better informed of. In line with the economic development of a country criminal law policy and action plan have to be established to ensure the desired result, crime prevention and control.

Key words: *Fraud, crime prevention, fraud prevention, crime control, crime, Criminal Code of Georgia, potential criminal, punishments, re-socialization, rehabilitation, crime victim.*

1. Introduction

Fraud crime has become rather commonplace recently[2] Many citizens have suffered material and non-material harm. Natural and legal persons usually try to defend themselves and demand to punish offenders. Being an important issue, it has to be widely discussed in criminological literature as well as on the state and public level to achieve theoretical and practical goals. Fraud is different from any other type of crime in that it may have tens or hundreds of victims. For example, in a publically known case Tbilisi City Court found G. G. guilty of a crime under article 180 of the Criminal Code of Georgia. This fraud crime involved more than one hundred victims.[3] The authorities and the society have always focused their attention on fraud crimes due to its specific nature.

The term "prevention" originates from Latin and in Georgian it is defined as to stop something from happening.[4] Criminological literature offers different strategies and models of crime prevention.[5] There are three common types of prevention: primary, secondary and tertiary.

In relation to fraud crime they imply following: in general, primary prevention should focus on the society, i. e. they have to be informed, they should be aware of their right and obligations when

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1 See: Official statistics of Ministry of Internal Affairs, <https://info.police.ge/page?id=115> [26.10.2020].

2 Ibid.

3 Judgement of the criminal cases investigative, Pretrial, Merits panel of Tbilisi City Court № 1/39-15 21 December 2018.

4 *Chabashvili M.,* Dictionary of Foreign Words, Tbilisi, 1989, 275 (in Georgian).

5 *Schneider S.,* Crime Prevention, Theory and Practice, 2nd ed., USA, Philadelphia, 2020, 5-8.

interacting with public institutions and be offered free legal counseling in public institutions such as public service halls. The secondary prevention based on the above mentioned, factors focuses on people and places that bear potentially high risks of committing a crime. The tertiary prevention implies to set up counseling services for crime victims. It also involves the rehabilitation of people prone to committing frauds and those who have been convicted of committing a fraud. The above mentioned, prevention types will be further broken down and discussed in this article.

Tore Bjorgo, a Norwegian police science professor in his book 'Crime Prevention – A Holistic Approach' offers a comprehensive model of crime prevention, which consists of nine preventive mechanisms.[6] These mechanisms regarding fraud crime will be discussed in detail bellow.

In a line with crime prevention, we often use the term crime control. The purpose of this piece of writing is to discuss crime control mechanisms together with crime prevention to help to reduce crime. Crime prevention and control, are often used as synonyms but they are different.[7] Control involves state and public institutions and their strategies towards already existing crimes. But prevention implies stopping crimes from happening. Along with the theoretical materials, this article will discuss court decisions based on article 180 of the Criminal Code of Georgia with special attention to methods and reasons for committing crimes.

This work consists of a preface, three chapters and a summary. The preface defines the concept of crime prevention and discusses its importance. It also refers to the fraud prevention models which will be further discussed in the article. The second chapter gives the definition of the concept of fraud. The third chapter focuses on the crime prevention models. While the fourth chapter studies fraud prevention according to *Tore Bjorgo* method. The conclusion summarizes the actions and procedures related to fraud prevention.

2. The Essence and Concept of Fraud

Criminology views crime as a complex social phenomenon. It is a specific subtype of a deviant behavior which is characterized by high social risk and violates legal rules of behavior as well as social traditions and customs.[8]

One of the common types of crime in Georgia is fraud. The official statistics of the Ministry of Internal Affairs of Georgia is a proof of this. The data suggest that several hundred cases of fraud are reported each year.[9] According to criminal code there are two types of crime categories – formal and material. In order for a crime to be qualified as formal it has to have a result. While material crimes are a combination of acts from the very moment of posing a risk of harm.[10] Fraud is a material crime and

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6 *Bjorgo T.,* Crime Prevention. Holistic Approach, *Bakhtadze U. (trans.), Giorgadze G., Shalikashvili M. (eds.),* Tbilisi, 2016, 24-25 (in Georgian).

7 *Shalikashvili M.,* Criminology, 3rd Ed., Tbilisi, 2017, 181-182 (in Georgian).

8 *Akers R. L., Sellers C. S., Jennings W. G,* Criminological Theories, Introduction, Evaluation, and Application, USA, New York, 2017, 2-6.

9 See: Official Statistics of the Ministry of Internal Affairs of Georgia, <https://info.police.ge/page?id=115> [26.10.2020].

10 *Khuroshvili G.,* General Part of Criminal Law, Collective Authors, Tbilisi, 2007, 120-121 (in Georgian).

is deemed to be completed from the moment when a criminal misappropriates another person's property or a property right. Preparation and attempt of fraud is also punishable. Fraud is an economic crime against property and is tried under article 180 of the Criminal Code of Georgia.

Fraud aims to cause property damage to a victim. According to the disposition of the above mentioned article fraud is to obtain another person's property or a property right with the intention to illegally misappropriate it. Deception is a main sign of fraud crime. Deception distinguishes fraud from other crimes. Because of deception it is not a civil law case. In order to establish criminal liability it is necessary to prove the intent of deception.[11]

Criminologists define crime as a negative social phenomenon which requires to be studied and analyzed.[12] Fraud is one of the complex crimes and the understanding of its essence will help to prevent crime.

Fraud is different from other crimes against property as it has an informational character. It means that a criminal is trying to deceive a victim and misappropriate his or her property right deceptively providing them with false information or withholding truthful information.

The threat of fraud is expressed through deception. Deception is a method of fraud. A victim of fraud usually voluntarily transfers his property or property right to a criminal because he was given misleading information.[13]

3. Crime Prevention Models

Combating crime and crime prevention are two sides of the coin the purpose of which is to prevent crime or recommission of a crime.[14]

In legal literature there are different models and strategies to prevent crime.[15] One of the most commonly used strategies is a three-step model which consists of primary, secondary and tertiary prevention.[16] The primary prevention is of general character and aims at eliminating causes of crime. The secondary prevention focuses on the social groups that may become the victims of a crime. For this purpose practical actions are taken to prevent new crimes. Whereas the tertiary prevention implies a rehabilitation and re-socialization of a criminal.[17] There are following models of crime prevention, which can be used to prevent and reduce frau.[18] Criminal justice model, social model of crime

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11 *Albrecht W. S., Albrecht C. O., Albrecht C. C., Zimbelman M. F.,* Fraud Examination, 4th ed., USA, Mason OH, 2012, 13-14.

12 *Gabunia M.,* Introduction to Criminology, Tbilisi, 2011, 13-17 (in Georgian).

13 *Lekveishvili M.,* Private Criminal Law Part I (Commentary), Author Collective, Tbilisi, 2012, 382-383 (in Georgian).

14 *Bjorgo T.,* Crime Prevention. Holistic Approach, *Bakhtadze U. (trans.), Giorgadze G., Shalikashvili M. (eds.),* Tbilisi, 2016, 23 (in Georgian).

15 *Schneider S.,* Crime Prevention, Theory and Practice, 2nd ed., USA, Philadelphia, 2020, 5-8.

16 *Ghlonti G. and Collective authors,* Criminology and Legal System in Georgia, Tbilisi, 2008, 107-110 (in Georgian).

17 Ibid.

18 *Bjorgo T.,* Crime Prevention. Holistic Approach, *Bakhtadze U. (trans.), Giorgadze G., Shalikashvili M. (eds.),* Tbilisi, 2016, 34-40 (in Georgian).

prevention, universal, selective and indicative models.[19] also, other common models such as situational, corporate and territorial planning crime prevention models.[20]

The criminal model of fraud prevention is based on the preventive effect of punishment which implies not to commit a crime because of the fear of punishment. According to the Georgian legislation the punishment for fraud is rather severe. So it can act as a sort of deterrent for potential criminals. In addition, we can divide the preventive effect of punishment into two categories: an individual and general prevention of punishment. An individual prevention implies to sentence a criminal to imprisonment or non-custodial type of punishment which will deter a convict from reoffending. General prevention involves a fear of punishment which will act as a deterrent for unstable individuals of the society not to commit unlawful acts. Regarding this it will be effective to inform the public about sanctions for fraud. For example to announce publically through television, social media or printed media that the fraud crime causing substantial damage is tried by imprisonment for 4-7 years.

The social model of fraud prevention implies the reduction or elimination of those factors and conditions that cause a person to become a criminal. It involves such issues as negative social events, standard of living, social marginalization, difficult childhood, lack of or no education and so on.[21] The social control model is a combination of targeted actions taken by the authorities, society, natural and legal persons against crime, identifying its reasons, contributing factors and particular steps to be taken to control fraud crime effectively.[22]

Firstly, it is important to toughen criminal policy towards such crimes. It is of great importance to establish crime prediction criminological policy as authorities must have a strategy and tactics to combat any type of crime.[23]

Crime control by the authorities involves criminal policy which defines a series of actions needed to reduce crime in relation to a particular place time and space.[24]

The universal fraud prevention combines actions aimed at the whole population. It will help to change the public attitude towards crime. In this respect, special attention should be focused on schools and universities. Through mass and social media the society should be actively informed about the prevailing types of fraud in the country to be aware of threats. Also, several other actions can be taken: first – to set an organizational group consisting of people from different professions. The purpose of this group will be to design and issue the recommendations for the society to protect them from being victimized. The group should study court judgements and present a summarizing report about the activity areas with most cases of fraud and the factors to be taken into consideration. Of course, it is difficult to identify a perfect framework but it will definitely reduce the intention of

19 Ibid.
20 *Hughes G.,* Understanding Crime Prevention, UK, Oxford, 2002, 8-10.
21 Ibid.
22 *Gakhokidze J., Gabunia M.,* Criminology, Tbilisi, 2012, 93-95 (in Georgian).
23 *Ivanidze M. and Collective of Authors,* General Part of Criminal Law, Tbilisi, 2007, 38 (in Georgian).
24 *Barkan S. E.,* Criminology, A Social Understanding, USA New, Jersey, 2009, 462-463.

criminals to mislead citizens. After studying court judgements and interviewing fraud victims the organizational group can set several ways of preventive actions.

The selective model of fraud prevention involves actions aimed at particular groups. For example, entrepreneurs who have to make tens of agreements every day. This model focuses on those groups that bear potential risks of fraud. Such potential offenders may be people who are under investigation, are involved in a lawsuit or there are individual or collective complaints against them. For example a construction company bears risks if it has a bad reputation, etc.

The indicative fraud prevention implies helping and assisting those people who have behavioral problems. This model is aimed at problem groups. The indicative prevention is also called tertiary prevention in criminological literature.[25] There is a viewpoint that indicative prevention model actions are result-oriented and reduce crime. They are aimed at crime victims and crime results.[26]

The situational fraud prevention model changes the circumstances and conditions in which a crime is committed. The principles of this prevention model were introduced by Ronald Clarke.[27]

Ronald Clarke's situational prevention model mainly studies those factors and circumstances that encourage crime. It also refers to the actions which deprive a criminal of the opportunity to commit a criminal act.

Besides the above mentioned prevention models, *Tore Bjorgo* offers a nine-step system of crime prevention. This system in relation to fraud will be discussed in detail in chapter four. The nine-step system has some advantages compared to other models. First, it is comprehensive, second, it focuses on both criminals and victims and third, it is oriented on the causes of crime.

4. Fraud Prevention Holistic Model

Combating crime is a demanding and complex process which requires a series of actions consisting of multiple components to reduce and eliminate crime.

The cooperation of authorities, the society and individuals is essential to prevent fraud crime. Based on these principles *Professor Tore Bjorgo* in his book 'crime prevention – holistic approach' designed a comprehensive crime prevention model which consists of nine preventive mechanisms. They are as follows: establishing normative barriers against crime, reducing the involvement of people in criminal activities and criminal environment, deterring potential criminals through the fear of punishment, disrupting criminal acts before they are committed, protecting vulnerable target groups better, decreasing the harmful effects of crime, reducing reward from criminal acts, encouraging refraining from crime commitment and rehabilitation of former criminals.[28]

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25 *Lab S. P.,* Crime Prevention, Lexisnexis, 2010, 271.

26 *Daigle L. E.,* Victimology, 2nd ed., USA, California, 2020, 32-33.

27 *Clarke V. R.,* Situational Crime Prevention, Theory and Practice. British Journal of Criminology, 1980, 20/2, 136-147.

28 *Bjorgo T.,* Crime Prevention. Holistic Approach, *Bakhtadze U. (trans.), Giorgadze G., Shalikashvili M. (eds.),* Tbilisi, 2016, 24-25 (in Georgian).

4.1. Establishing Normative Barriers to Prevent Fraud Crime

Special attention has to be paid to fraud prevention. In this respect the responsibility of authorities is multifaceted. First, there should not be economic barriers discouraging free economic relations and slowing down the development of a country. Second, the authorities should protect the society from dishonest people trying to bend the rules. Criminal law is rather severe as compared to other types of law. It requires more precision and specificity. For example, to find somebody guilty of a crime 'the standard beyond reasonable doubt' is necessary which is a collection of incontrovertible proofs to secure a guilty verdict.[29]

Apparently, we need to have precise and unambiguous legislation. Legislative system should draw a dividing line between fraud crime and civil legal relationship (which is a serious problem nowadays). Batumi City Court found a person not guilty of a crime under article 180 of the Criminal Code of Georgia and the judge implicitly suggested that the relations might have been civil legal relations.[30] Nowadays many people report of being the victims of fraud at law enforcement agencies. But, in fact, it is difficult to differentiate between fraud or civil legal relations.

Most people do not commit crimes not because they are afraid of being revealed or punished, but because it contradicts their fundamental moral values and conscience.[31] And this has to be the basis for eliminating or minimizing crime. Proper upbringing of children has to be a priority for a country. In Georgia we have Juvenile Justice Code and instead of traditional justice restorative justice is used in the form of diversion and mediation. The purpose of this is to give a miner a chance and help him to become a law-abiding citizen.[32] Upbringing of children taking into consideration their interests involves the establishment of moral, legal and criminal barriers for them. This will minimize crime as a negative social phenomenon. Children learn how to behave in the society from their families, nurseries, schools and universities. The two vitally important institutions are schools and universities that ensure crime prevention at an early stage.[33]

In this respect we ought to acknowledge the importance of Edict of the President of Georgia № 235 of 22 March 2012 on juvenile crime prevention strategy.[34] It combines fundamental strategy principles and the issues related to early detection of risk groups and the prevention of crime recommitment.

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29 *Brightman H. J.,* Today's White Collar Crime, Legal, Investigative, and Theoretical Perspectives, USA, New York, 2009, 265.

30 Judgement of the Criminal Cases Panel of Batumi City Court of 15 September 2017 № 1/1510/14.

31 *Bjorgo T.,* Crime Prevention. Holistic Approach, *Bakhtadze U. (trans.), Giorgadze G., Shalikashvili M. (eds.),* Tbilisi, 2016, 72-75 (in Georgian).

32 *Shalikashvili M.,* Criminal, Criminological and Psychological Aspects of Juvenile Diversion and Mediation, Tbilisi, 2010, 3-6 (in Georgian).

33 *Mackey D. A., Levan K.,* Crime Prevention, USA, Burlington, Massachusetts, 2013, 31, 166-167.

34 Edict of the President of Georgia of 22 March 2012 № 235.

4.2. To Reduce the Involvement in a Fraudulent Environment

One of the types of crime prevention is to deter a person from involving in a crime. In this respect it is important to identify crime causes and take effective actions against them on an individual or collective basis.[35] Crime prevention is defined as the intervention into crime causes to reduce the risks of committing a crime and potential negative effects.[36]

Proactive actions are needed to achieve fraud prevention goals. This requires young people to be employed and to have an opportunity to develop their skills and abilities in a proper way. Recently, there have been a number of internet fraud cases in Tbilisi. They involved the following steps: getting to know people online, gaining their trust and then using their personal data to mislead a bank. Twenty-five-year old G. T. was convicted of fraud by Tbilisi City Court judgement of 23 October, 2018.[37] In fact, with the help of his acquaintance's personal data he inflicted a serious pecuniary loss on a financial organization. In order to prevent such types of crime, first of all, young people have to be employed and second – regulations are required to make it impossible to get a loan in such an easy way with just presenting personal data. Additional data should be requested or a person willing to take out a loan should be required to visit an on-site facility.

The fraud crime statistics show that this type of crime is committed mainly by two categories of people: more frequently they are the poor and less frequently – the rich. The existing social situation in the country is directly linked to the causes of this type of crimes.

4.3. Deterrence of People from Committing a Fraud Crime

People who have no moral barriers or there are not other external restraining factors to stop them from committing a crime, may be deterred by the fear of a severe or inevitable punishment for the crime or a strict enforcement of the letter.[38] As it was previously mentioned, fraud is the type of crime where the existence of moral and legal barriers plays a vital role. On the one hand, the first barrier for a person not to commit a crime is the morality, but if this barrier is destroyed (which is very bad), we need a powerful legal mechanism to serve as a deterrent. It will try to affect potential offender's intent and aim and create the situation where the possible consequences of the act will outweigh the potential gain from committing a crime.[39]

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35 *Bjorgo T.,* Crime Prevention. Holistic Approach, *Bakhtadze U. (trans.), Giorgadze G., Shalikashvili M. (eds.),* Tbilisi, 2016, 76-79 (in Georgian).

36 *Lab S. P.,* Crime Prevention, LexisNexis, 2010, 26.

37 Judgement of the Criminal Cases, Investigative, Pretrial and Merit Panel of Tbilisi City Court of October 23, 2018 № 1/4607-18.

38 *Krancher M., Riley R. A. (Dick), Wells J. T.,* Forensic Accounting and Fraud Examination, USA, Hoboken, New Jersey, 2011, 58-59.

39 *Bjorgo T.,* Crime Prevention. Holistic Approach, *Bakhtadze U. (trans.), Giorgadze G., Shalikashvili M. (eds.),* Tbilisi, 2016, 81 (in Georgian).

4.3.1. The Risk of Being Revealed

The risk of being revealed for offenders comes from law enforcement agencies.[40] While potential and acting criminals are a target group to be deterred. As a rule, people committing fraud crimes have average or above average intellectual abilities. Before offending most of them consider the risk of being revealed.

Along with the development of countries criminals also become more skillful and so do their methods as well. Therefore, it is important that the authorities, the police, the prosecutor's office have to be one step ahead of criminals. There have been several recent cases of internet fraud where a criminal tries to contact a victim online and deceitfully obtains money from them.[41] As cyber space and technologies have advanced and besides they are intangible, battling such crimes requires non-traditional methods.[42] The authorities often appeal to foreign countries for legal assistance to request information from social networks and e-mail providers in order to identify criminals. When such crimes are solved the authorities and the prosecutor's office ought to inform the society through mass media about how they solved the crime. Undoubtedly, such information will help to prevent fraud because of the fear of being revealed. People will realize that it is possible to request information from other countries and identify the computer and the IP address from where the criminal act was committed. The existence of clear and precise laws will considerably reduce the risks of fraud.[43]

4.3.2. The Severity of Punishment

Determining the severity of the sentence is the prerogative of the legislator. The legislator determines criminal policy within its competence. With regard to the crime of fraud, it should be noted that Article 180 of the Criminal Code of Georgia prescribes two types of punishment: a detention as well as a fine. The legislator allows the court to choose the appropriate punishment for a particular case. In the literature there are theories about the purposes of punishment that try to explain what the purpose of punishment is and why it is used.[44] The theory of general prevention, known as psychological coercion, was developed by the German scientist Anselm Feuerbach.[45] The essence of this theory is that the fear of punishment psychologically forces the offender not to commit an unlawful act. There is an opinion in the legal literature that the use of severe punishment is one of the ways of punishment prevention. The purpose of punishment is the integration of an individual back into the society again[46] The goal of the punishment prescribed by Article 39 of the Criminal Code of Georgia is not the severity of the punishment, but its inevitability.

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40 Ibid.

41 *Singh D. J.,* Internet Scams and Fraud, USA, Utah, 2014, 1-6.

42 *Mackey D. A., Levan K.,* Crime Prevention, USA, Burlington, Massachusetts, 2013, 166-167.

43 *Bragg S. M.,* Fraud Examination, Prevention, Detection, and Investigation, 2nd ed., USA, Colorado, 2019, 94-96.

44 *Dvalidze I.,* General Part of Criminal Law, Sentence and Other Criminal Consequences of Crime, Tbilisi, 2013, 14-25 (in Georgian).

45 *Shalikashvili M.,* Criminology, 3rd ed., Tbilisi, 2011, 185 (in Georgian).

46 *Boilke V., Wessels I.,* General Part of Criminal Law, *Dvalidze I. (ed.),* Tbilisi, 2010, 48 (in Georgian).

The main idea is not to punish a criminal severely, but to ensure that the case of the crime is not left without a proper response.[47]

4.4. Hindrance of Committing Fraud

Fraud is a multifaceted crime. As a rule, a criminal tries to persuade and mislead a victim, gain his trust and voluntarily obtain material or intangible assets from him. Fraud prevention is possible at both stages: the preparation and the attempt. while preparing a fraud crime the offender tries to make a plan and take some actions. For example, he forges documents, registers legal entities fictitiously at the public register, creates fake tax documents, makes bank statements, etc. at this stage the offender tries to create a business image in the eyes of the victim. Any suspicious activity and a transaction should be carefully studied and the information reported to the law enforcement agencies. For example, a person who deposits a large amount of money in a bank account for just a few hours and receives a bank statement should be scrutinized. Of course, no one can be forbidden of doing what is not banned by law, however we must study all suspicious actions to avoid disastrous consequences. Fraud prevention is also possible at the stage of attempt. For example, if the victim has already transferred some money to a potential offender, but he or she has some doubts about the person they should immediately report at the law enforcement agency and they will determine what measures to take to prevent the crime. A good example of fraud prevention is the actions of law enforcement officers described in the judgement of the criminal panel of Tbilisi City Court dated 18 April 2018.[48] In particular, D. G. was convicted of a crime under Article 180 of the Criminal Code of Georgia. With the active involvement of law enforcement agencies, the offender failed to sell a 1,500,000 GEL worth of real estate. The actions of the convict involved the following:

D. G. and K. G. a citizen of the Russian Federation. G. with the help of forged documents intended to fraudulently obtain E. M's land plot located in Tbilisi. They aimed to receive a large amount of income. In order to achieve the goal, they forged a power of attorney stating that, E. M. granted K. G. the right to sell, donate, gage, mortgage and even take title to the property. On July 14, 2016 they submitted the forged documents to the public registry and requested the registration.

K. G. was registered as the owner of the property on 14 July 2016. After a few hours the property right was registered in the name of D. G. D. G. tried to sell the property. First he requested a mortgage loan in the amount of 120 000 dollars from a financial organization. The organization collected the information about the original owner of the property who denied acquaintance with the above mentioned people and the fact of granting a power of attorney. So the organization reported the case to the police. The property was seized urgently and returned to its lawful owner after the enforcement of the judgement.

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47 *Bjorgo T.,* Crime Prevention. Holistic Approach, *Bakhtadze U. (trans.), Giorgadze G., Shalikashvili M. (eds.),* Tbilisi, 2016, 52-53 (in Georgian).

48 Judgement of the Criminal Cases Panel of Tbilisi City Court № 1/4178-16 of 18 April 2017.

4.5. To Deprive a Potential Criminal of the Opportunity to Commit Fraud

In the process of fraud prevention the deprivation of the opportunity for a criminal implies their neutralization. The neutralization means to decrease or deprive a criminal of the opportunity to commit a new crime. In the foreign literature it is recognized that depriving a criminal of the opportunity to commit fraud and minimizing the environment significantly reduce the risks of committing a crime.[49] It is a recognized fact that most crimes are committed by a small number of active criminals. This is also true about Georgia as the fraud crimes are often committed by the same persons. It appears that criminals frequently recommit the same type of fraud. But a potential victim knows nothing about such offenders who attempt to mislead them by using tried or new methods. It is the police, the prosecutor's office, the courts and the penitentiary facilities whose function is to deprive a criminal of the opportunity to commit a crime. Whereas the target group for this strategy are the people who recommit crime.[50]

The deprivation of the opportunity to commit fraud means to create an environment in which a potential offender will not be able to commit a planned crime. It is a well-known fact, that committing fraud is often related to notary bureaus and their activities. For example, K. S. and R. G. were convicted of a crime under article 180 of the Criminal Code of Georgia by the judgement of Tbilisi City Court 2 August, 2016.[51] The criminal act involved the following: R. G. used K. S. s brother's identity card as his own and signed a mortgage agreement on the land plot at the notary office as if it was his own. As a result the offenders deceitfully obtained a large amount of money. This fraud crime demonstrates a possible systemic problem at notary bureaus.

There should be a better system of protection and it should not be possible to alienate real estate property by just presenting an identity card to a notary (despite physical resemblance in the photo). In the given case, apparently, there is the liability of the notary. But here we are discussing the opportunities which potential criminals should be deprived of. When performing similar types of actions, there should be a fingerprint signing method that is unique and minimizes the risk of crime. Simply speaking, fingerprint signing method should be a means of identifying a person willing to sell or purchase a flat, etc. at a notary office.

4.5.1. The Police, The Prosecutor's Office

The police and the prosecutor's office have a special role in fighting fraud crime. The developed societies have full confidence in the police and the prosecutor's office. The legal literature refers to the two types of confidence: social and political. The first implies the cooperation among people, while the second is the manifestation of external or objective conditions. Lack of public confidence indicates

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49 *Bragg S. M.,* Fraud Examination, Prevention, Detection, and Investigation, 2nd ed., USA, Colorado, 2019, 85-88.

50 *Bjorgo T.,* Crime Prevention. Holistic Approach, *Bakhtadze U. (trans.), Giorgadze G., Shalikashvili M. (eds.),* Tbilisi, 2016, 93 (in Georgian).

51 Judgement of the Criminal Cases Panel of Tbilisi City Court of August 2, 2016 № 1-56-16.

that politicians or institutions in the political system are malfunctioning.[52] Public confidence in the police in relation to the crime of fraud plays a crucial role. Citizens should have hope and confidence that the police and prosecution will respond instantly and act objectively. A delayed appeal to the police often becomes the reason for the alienation of illegally obtained property. Citizens should trust the law enforcement agencies and should not try to restore justice themselves. The prosecutor's office and the police have a double function in terms of prevention. The first is to take pre-emptive measures to prevent crime and the second is to take prompt and effective measures to investigate crimes that have already been committed and bring the offenders to justice.

According to the judgement of Tbilisi City Court of April 7, 2020 S. A. Was found guilty of a crime under Article 180 of the Criminal Code of Georgia and sentenced to 6 years in prison.[53] The case involved the following actions: S. A. and his accomplices submitted a forged letter of consent dated 21June 2017 and a forged acceptance-delivery act dated 15 August 1992 to prove the legal rights on real estate property and took the title of the land plot at the Public Registry. In total, the organized group was able to register three plots of land, two of which had been alienated and one plot of land was seized with the timely involvement of law enforcement agencies. The mentioned land plot was worth about 120 000 GEL. This verdict is a good illustration of how big the responsibility of law enforcement agencies is.

4.6. The Reduction of Benefits Gained Fraudulently

As it was already mentioned in the article, a person may obtain tangible or intangible goodness.[54]

First of all we need to clarify that 'benefit' here stands for monetary goodness. Potential criminals should be aware of the fact that if they are found guilty the court has the right to confiscate the property obtained through fraud and in case they have already sold the property the victim has the right to claim damages at the civil court and receive equivalent property from the accused. As for the real estate property and the relations arising from the alienation of the letter, the regulations have to be strict.

For example if a person is not an entrepreneur he should not have the right to alienate the purchased property or the property in trust in a few days. Also, the consent of the previous owner or the trustor should be required.

It has to be admitted that the interest of the state to reduce the fraud crime is very high. In our reality, it is the state that often becomes the victim of a crime (when state property is illegally

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52 *Newton K.,* Trust, Social Capital, Civil Society, and Democracy, International Political Science Review, Vol. 22, 2, 2001, 201-214.

53 Judgement of the Criminal Cases, Investigative, Pretrial and merit Panel of the Tbilisi City Court of April 7, 2020 № 1/1230-18.

54 *Lekveishvili M. and Collective authors,* Private of Criminal Law Part I, Tbilisi, 2012, 382-384 (in Georgian).

alienated) and even if it is not a victim of a crime, it still suffers moral and political damage.[55] The society holds the state accountable for not being able to protect them.

4.7. Protecting Vulnerable Groups, Making Fraud Difficult to Commit

One of the preventive mechanisms of fraud is to identify vulnerable groups and make fraud difficult to commit. In the criminological literature, this strategy is also called situational crime prevention.[56] Most preventive mechanisms are aimed at influencing the criminals. Whereas for the situational prevention it is important to change the environment or the situation in which a criminal act is likely to take place. Protecting vulnerable groups against fraud is possible at different stages. For this purpose the victim should be questioned in detail to identify a potential victim and a criminal.[57] The scale of fraud and the area of activity is quite large and can permeate every class or type of relationship. However, in theory, it is possible to list the institutions where fraud is most common. For example, National Public Registry Agencies, Notary Offices, Banking Institutions. There is a classification of victims in the victimology literature that defines the reasons for being victimized.[58] Accordingly, potential victims may be old people, people with mental disabilities and young people. There have to be protective mechanisms of them when entering into a civil legal relationship. For example, when a person over the age of 70 is willing to enter into a purchase and sale agreement at a notary office or the public registry agency, he or she should be able to obtain legal counseling free of charge on the validity of such a contract to exclude the possibility of fraud. According to the judgement of Tbilisi City Court 14 December, 2018 T. G. and I. M. were found guilty of a fraud crime committed jointly with prior agreement.[59]

The criminals took advantage of the victims' trust (they had a long time acquaintance) and the infirm age of one of the victims. They acted as if they were the employees of JSC Bank of Georgia and offered the victims to buy the confiscated apartments of mortgagors (due to non-payment of the loans) at a minimum price. The victims were shown several fake photos of the apartments on sale. As a result the criminals received 50 000 US dollars from the victims in advance to buy the property but they misappropriated the sum of money.

Elderly people and people with disabilities are usually at a higher risk of being victimized. Therefore, the state institutions should offer them free legal counseling to examine the validity of legal relations in question.

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55 *Nachkebia G.,* On the issue of a person's criminal relation with the state, Journal "Person and the Constitution", № 4, 2004, 116 (in Georgian).

56 *Lab S. P.,* Crime Prevention, LexisNexis, 2010, 192-195.

57 *Reid. M. J.,* The Psychology Of Stalking, Clinical and Forensic Perspectives, USA, California, 1998, 114-117.

58 *Shalikashvili M.,* Victimology, Tbilisi, 2011, 37 (in Georgian).

59 Judgment of Tbilisi City Court, Criminal Cases, Investigative, Pretrial, Merits Panel 14 № 1/5353-16 of December 14, 2018.

4.8. Reducing Damage from Fraud Crimes

Fraud prevention measures may be considered in relation to potential victims. Fraud victims are usually individuals, legal entities or the state. There are cases when criminals try to sell state-owned land. For this purpose they forge certificates of acceptance and delivery of the land plots and try to take title to the property at a relevant regional public registry office.[60] To prevent such cases it is essential to strengthen protection at the public registry agency and improve the electronic databases of state-owned lands. Regarding individuals and legal entities, free legal counseling would protect them from being victimized when entering into legal relations. To this end, there should be counseling groups that would have access to certain closed database to receive the information about the persons accused, convicted or suspected of fraud. The source of such data may be the Ministry of Internal Affairs of Georgia, which would provide general information to the interested parties. However, it is important that personal data and privacy are protected in this process.

Fraud damage reduction is also possible through property insurance. In this case, the insurance company has the obligation to compensate for the damage if the latter is a result of crime. As stated above, internet fraud has become widespread lately. The banking sector also has the ability to insure deposits and bank accounts for better protection and security. Moreover, it is in the best interests of banks because any damage whether it is direct or indirect is detrimental to the bank.

4.9. The Rehabilitation of Fraudster Criminals

The rehabilitation and re-socialization of people committing fraud should be conducted in two stages.

First – at the penitentiary facility and second – after leaving the penitentiary institution. Prompt execution of the sentence is one of the important elements of crime prevention. An effective execution of an enforced court decision is a fundamental element of the rule of law. According to the Criminal Code of Georgia, the purpose of the punishment is to restore justice, prevent a new crime and re-socialize the offender.[61] According to the Code of Imprisonment of Georgia, the purpose of the legislation of Georgia on the enforcement of detention and imprisonment is to enforce detention and imprisonment, prevent new crimes and re-socialize convicted persons. Prompt and timely execution of a sentence usually serves to prevent a new crime. Crime prevention can be short-term and long-term. In the short run, a new crime will be avoided because the person is imprisoned, but for long-term purposes, the person should be rehabilitated and re-socialized.[62]

An imprisoned person is subject to Penitentiary law. Penitentiary law ensures the stability of social relations.[63] In penitentiary facilities as well as those arising after leaving such institutions. The

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60 *Mamulashvili G. and Collective Authors,* Private Criminal Law Part II, Commentary, Tbilisi, 2012, 195 (in Georgian).

61 *Dvalidze I.,* General Part of Criminal Law, Sentence and Other Criminal Consequences of Crime, Tbilisi, 2013, 26-29 (in Georgian).

62 *Shalikashvili M., Mikanadze G., Khasia M.,* Penitentiary Law, Tbilisi, 2014, 9 (in Georgian).

63 *Khubua G.,* Theory of Law, Tbilisi, 2004, 46 (in Georgian).

sentence imposed on a criminal has two goals. On the one hand, it serves as a punishment and on the other it is a means of re-socialization for a convict to return to the society with a healthy attitude.

The purpose of imprisonment is to re-socialize a criminal and not to encourage him to become a member of some criminal subculture. Educational training should be provided to persons convicted of fraud to raise their general awareness and legal consciousness. The state should also help convicts committing such crimes to become employed or to develop vocational skills. The penitentiary institutions should do their best to protect them from marginalization and ensure their safe integration into the society.

5. Conclusion

Investigating and analyzing any crime is a challenging and exciting process. French sociologist Emile Durkheim noted that crime is an appalling action, incompatible with a normal society, though not pathological. It has existed in the societies of all times as a natural and inevitable social phenomenon.[64]

Fraud as a crime committed on the basis of deception has probably existed in the society of all times and has been fought in different ways. There has always been a question in the society why a person commits a crime when the law is strict and the offender knows it the best.[65]

We can summarize the fraud prevention measures presented in the article. The crime of fraud was discussed focusing on its concept, forms of committing and methods. We have paid close attention to fraud prevention models and reviewed some of them in relation to fraud crimes. The main part of the paper was devoted to the prevention of fraud, according to crime prevention model by *Tore Bjorg*o. The recommendations that can be implemented were also considered.

It is recognized in the criminological literature that most crimes are committed by people with low level of intelligence. Although this alone cannot explain the criminal behavior of the offender. The issue is interesting in that we ought to seek the genesis of any crime in its underlying causes.[66] The aim of the paper is to select the measures that ensure the effective prevention of fraud according to a comprehensive model of crime prevention. In this regard, it has been suggested to update the legislative database against fraud, which would enable to differentiate fraud from civil legal relations. A lot of crimes will be prevented by reducing the involvement in the fraudulent environment. The priority of the state should be to inform the society and set high standards of public awareness. The crime of fraud is often committed by the same person, therefore a liability and punishment measures will serve as deterrents. In addition, the paper focuses on the ways to identify potential offenders and seize the opportunities for them.

The crime of fraud is more or less foreseeable, which in turn obliges authorities to take measures to prevent it. Government agencies should take special care to protect potential victims of

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64 *Walsh A., Ellis L.,* Criminology, an Interdisciplinary Approach, USA, Thousand Oaks California, 2007, 82.

65 *Bekaria Ch.,* For Crime and Punishment, Tbilisi, 2003, 197-200 (in Georgian).

66 *Walsh A., Ellis L.,* Criminology, An Interdisciplinary Approach, USA, Thousand Oaks California, 2007, 174-175.

fraud. The situational prevention measures which prevent criminals from committing crimes were also discussed. The rehabilitation of persons convicted of fraud should be one of the top priorities. It has been admitted in the paper that people committing fraud usually have high level of intelligence which distinguishes them from other criminals. Therefore, such people should be given a chance to develop their abilities in a rightly way to be integrated back into the society.

The crime of fraud as a negative social phenomenon is based on social, economic, subjective and political factors. As fraud crime is a serious issue it is vitally important to plan and implement prevention measures. The crime of fraud is a specific type of crime that a person with low level of intelligence is not capable of committing. Fraud crime is rather frequent so the criminal policy has to be stricter. Specific measures need to be taken to reduce the growing trend of crime.

In conclusion, it is worth noting that political, economic and legislative factors together with the active involvement of the society, maximizing the use of mass media, encouraging healthy, moral principles and psychological directions in the society play an important role in the fight against fraud crime.

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36. Judgment of the Tbilisi City Court, Criminal Cases, Investigative, Pretrial and Merit Panel of December 14, 2018 № 1/5353-16.
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Nana Mchedlidze*

Application of Standards of the European Court of Human Rights by Common Courts of Georgia When Imposing Remand Detention

Justification of preventive measures by common courts of Georgia remains problematic to this day. Considering the degree of restriction of an accused person's rights, justification of remand detention is the most acute problem at stake. This article, through a prism of standards established by the European Court of Human Rights, analyses the shortcomings of decisions of common courts of Georgia in terms of substantiating risks of absconding, reoffending and interfering in proceedings with relevant and sufficient circumstances. Due to the problem of accessibility of decisions on application of preventive measures, the article makes a particular emphasis on the published rulings of the Tbilisi Court of Appeals. Furthermore, since many decisions of the Tbilisi Court of Appeals discussed in the article are considered to be exemplary, it is important to compare and analyse the standards established in these rulings with the relevant standards of the European Court of Human Rights.

Key words: *Justification of detention, sufficient and relevant circumstances, case-law of the European Court of Human Rights.*

1. Introduction

The right to liberty and security safeguarded under Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "ECHR") is ranked among fundamental rights.[1] It is a precondition for the exercise of many other rights[2] and lays down the foundation of the relationship between an individual and the state.[3] Article 5 is based on the presumption of liberty.[4] It is connected intrinsically to the principles of foreseeability and rule of law.[5] This right is concerned with the physical freedom of a person and not the freedom to act freely.[6]

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1 Selahattin Demirtaş v. Turkey (№ 2) [22.12.2020], ECHR, para. 311.

2 *Korkelia K., Kurdadze I.*, International Human Rights Law according to the European Convention on Human Rights, Council of Europe, Tbilisi, 2004, 142 (in Georgian).

3 *Smith R. K. M., Anker van den C.,* The Essentials of Human Rights, Hodder Arnold Publishing, London, 2005, 231.

4 *Macovei M.,* The Right to Liberty and Security of the Person, *Mchedlidze N. (ed., comm.)*, Council of Europe, Tbilisi, 2004, 16 (in Georgian).

5 *Harris D. J., O'Boyle M., Bates E. P., Buckley C. M.,* Law of the European Convention on Human Rights, 4th ed., Oxford, 2018, 291.

6 *Van Dijk P., Hoof v. F., Rijn van A., Zwaak L.*, Theory and Practice of the European Convention on Human Rights, 4th ed., Antwerp-Oxford, Intersentia, 2006, 458.

Out of the guarantees of Article 5 of the ECHR, the present article discusses the most relevant problem in the Georgian context, which is the reasoning of remand detention. In the 2019 Parliamentary Report, the Ombudsperson of Georgia noted again that the lack of reasoning of application of preventive measures remains problematic and remand detention is given a priority over non-custodial preventive measures.[7] Furthermore, remand detention is the gravest form limiting an accused person's rights permitted under the Criminal Procedure Code.[8] Accordingly, it is important to study how domestic courts reason this grave and frequently used preventive measure in Georgia and how the case-law of the European Court of Human Rights (hereinafter the "European Court") is applied in this regard.

2. The Reasoning of Remand Detention

2.1. General Principles

The European Court examines the application of remand detention as a preventive measure under Article 5.3[9] of the ECHR.[10] Article 5.3 provides procedural safeguards for an accused person at the stage of his/her first appearance before the court and during trial. A person has the right to appear before the court and the legality of his/her arrest/detention to be examined automatically.[11]

Under the established case-law of the European Court, in accordance with Article 5.3 of the ECHR, a reasonable suspicion that a person committed a crime is a *conditio sine qua non* for the validity of continued detention. However, it no longer suffices after a certain lapse of time. In such cases, the Court must establish 1) whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty; and 2) where such grounds are relevant and sufficient. The Court must also ascertain whether the competent national authorities displayed special diligence in the conduct of the proceedings.[12]

The Court has also established that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his/her appearance at trial.[13]

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7 <http://www.supremecourt.ge/files/upload-file/pdf/2019w-statistic-7.pdf> [15.01.2021].

8 *Trechsel S.,* Human Rights in Criminal Proceedings, the Constitutional Court of Georgia, Tbilisi, 2009, 452 (in Georgian).

9 Article 5 – Right to liberty and security: "3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

10 Kosenko v. Russia [17.09.2020], ECHR, Appl. № 15669/13 and № 76140/13, para. 45.

11 *Leach P.*, Taking a Case to the European Court of Human Rights, 3rd ed., GBA, Tbilisi, 2013, 503 (in Georgian).

12 Idalov v. Russia [22.05.2012], ECHR, Appl. № 5826/03, para. 140; I. E. v. Moldova [26.05.2020], ECHR, Appl. № 45422/13, para. 73.

13 Buzadji v. Republic of Moldova [05.08.2016], Grand Chamber of the ECHR, Appl. № 23755/07, para. 87.

The requirement for a judicial officer to give relevant and sufficient reasons for detention – in addition to the persistence of reasonable suspicion – already applies at the time of the first decision ordering detention on remand.[14]

In the context of examining the compatibility of decisions of domestic courts with the case-law of the European Court of Human Rights, it should be borne in mind that the European Court assesses reasoning by domestic courts and not facts before them. In those cases, where there are several co-accused persons in a case, domestic courts are expected to identify personal circumstances that concern each accused and assess individually the necessity of imposing remand detention as a preventive measure in each case.[15]

2.2. Sufficient Reasoning with Relevant Arguments

2.2.1. Reference to the Gravity of a Crime and Severity of Sentence When Substantiating the Risk of Absconding

At present, common courts in Georgia usually cite the case-law of the European Court of Human Rights, which states that the gravity of the crime and, consequently, the severity of the sentence should not be used as the only circumstance to justify the risk of absconding. Georgian courts note that the gravity of the offence charged and the severity of the punishment provided for that offence under the Criminal Code are relevant but insufficient circumstances. In some cases, this theoretical standard is also used in practice and does not remain merely a citation.

A person brought before the Batumi City Court was charged with theft that resulted in significant damages.[16] The court did not uphold the prosecution's motion to impose detention as a preventive measure on the accused. The motion relied on the category of the offense, the severity of the expected sentence and the consequent risk of absconding.[17]

This decision of the domestic court is fully in line with the established case-law of the European Court of Human Rights, according to which, although the severity of the possible sentence is relevant when assessing the risk of absconding, the need to use detention cannot be considered only *in abstracto*, with the mere reference to the gravity of the crime allegedly committed.[18]

In this line of reasoning, the domestic court has not cited any of the judgments of the European Court of Human Rights. It does not matter whether the national court refers to a particular case decided by the European Court. It is important that the domestic court applies the standard set by the European Court of Human Rights, focuses on the circumstances relevant to the case before the European Court of Human Rights and has relied on sufficient circumstances when addressing a particular issue. These requirements are fully met in this case by the domestic court.

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14 I. E. v. Moldova [26.05.2020], ECHR, Appl. № 45422/13, para. 74.
15 Kosenko v. Russia [17.03.2020], ECHR, Appl. № 15669/13 and № 76140/13, para. 50.
16 Decision of January 12, 2015, Case № 10/a-11/15, Batumi City Court, 2.
17 Ibid, 5.
18 Ramkovski v. The Former Yugoslav Republic of Macedonia [08.02.2018], ECHR, Appl. № 33566/11, para. 59.

It is important to note that during the first appearance of an accused before the court, the characterisation in the law of the facts – and thus the sentence faced by the applicant – is determined by the prosecution without judicial review of whether the evidence collected supported a reasonable suspicion that the applicant had committed the offences he/she was charged with.[19]

In the context of the gravity of the crime, a domestic court's reasoning is noteworthy regarding the prosecution's following argument: "Although the incriminated crime is of a less serious category, attention should be paid to public opinion and attitudes towards drug-related crime."[20] The Ozurgeti Court did not base its decision on the application of detention on this argument. While the national court did not cite the relevant ruling of the European Court of Human Rights, the national court's disregard for the prosecution's argument is fully consistent with the European Court of Human Rights.

In particular, in the case of *Ignatenco v. Moldova*,[21] an investigating judge ordered the accused's remand as the court took "into consideration the character and the degree of the alleged offence ... its seriousness, the necessity to protect public order and the sense of shock which may be caused to society by the applicant's release."[22]

The European Court of Human Rights certainly found that remand detention was not based on relevant and sufficient circumstances and therefore Article 5.3 of the European Convention had been violated.[23]

In this case, the reasoning of the Ozurgeti District Prosecutor's Office is very similar to the argument of the decision made at the domestic level against Mr Ignatenco. The difference is that, in the case of Georgia, this argument does not appear in the reasoning of the domestic court; it is an argument of the motion of the Prosecutor's Office and the Government is responsible for the decisions of the domestic court justifying a preventive measure. Still, it should be noted that, under national procedural law, it is inadmissible for the prosecution to adduce such illegal arguments in a motion for the application of a preventive measure.

In its decision adopted in 2015,[24] the Batumi City Court took into account that the accused persons in a hooliganism case themselves had received injuries and, according to medical records, they were being treated at a medical facility. Due to this fact, the Batumi City Court did not consider the risk of absconding to be justified, despite the fact that the accused were foreign nationals, they had no connection with Georgia, and the act charged against them was punishable by imprisonment. The city court rejected the prosecutor's motion to apply detention as a preventive measure.[25] This reasoning is fully consistent with the judgment of the European Court of Human Rights against Russia, where the European Court considered the risk of absconding was unjustified, as the national courts did not take into account an accused person's health condition and that he was receiving inpatient treatment.[26]

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19 Andrey Smirnov v. Russia [13.02.2018], ECHR, Appl. № 43149/10, para. 27.
20 Decision of February 25, 2015, Ozurgeti District Court, 2.
21 For instance, Ignatenco v. Moldova [08.02.2011], ECHR, Appl. № 36988/07.
22 Ibid, para. 28.
23 Ibid, para. 85.
24 Decision of June 16, 2015, Batumi City Court.
25 Ibid, 2-3, 5-6, 8.
26 Arutyunyan v. Russia [10.01.2012], ECHR, Appl. № 48977/09, para. 106.

A decision adopted by the Senaki District Court in 2015[27] is also noteworthy. In this case, the court did not share the prosecutor's opinion that the accused would abscond in fear of the potential punishment. The court noted that a mere formal indication of the risk of absconding could not serve as a ground for the use of detention.[28] The Senaki District Court rightly referred to Article 5 of the Convention, noting that the use of detention as a preventive measure expecting conviction also violates the principle of the presumption of innocence under Article 6 of the Convention.[29] This fully complies with the approach of the European Court considering the presumption of innocence and presumption of liberty to be interrelated.[30]

Furthermore, the Senaki District Court did not share the argument of the Senaki Deputy District Prosecutor that "given the nature of the crime committed, it is easy for the accused to re-offend as the crime is widespread in the region".[31]

This argument about public opinion is similar to the one adduced by the Government in the *Sulaoja v. Estonia* case.[32] The government justified the use of remand detention against the accused due to the fact that, at the material time, thefts from various individuals increased in the city where the applicant lived.[33] This argument was certainly not shared by the European Court of Human Rights.[34]

Similarly, the Senaki District Court ruled that the prosecutor's request, citing the fact that the alleged crime was widespread in the region, lacked any grounds. The court rightly refused to use detention and pointed to the positive obligation of the state to prevent the spread of crime, identify and punish the perpetrator. It was inadmissible simply because the offences allegedly committed by the accused were widespread in an administrative unit the person had to be placed in remand detention for that reason alone. Furthermore, the prosecutor had no evidence of the alleged involvement of the accused in any other offence.[35]

However, in addition to the above positive examples, there is also a tendency in the case-law of the common courts that, although the European Court of Human Rights refers to the inadmissibility of justifying the risk of absconding only with the severity of the charge or the severity of the sentence, in reality, it is the only ground on which the risk of absconding is based. In such cases, too, the courts cite the European Court of Human Rights standard, stating that the gravity of the offense charged and the severity of the sentence under the Criminal Code are relevant but insufficient. However, other circumstances indicated to substantiate the risk of absconding are irrelevant and, therefore, the gravity of charges and severity of punishment remain the only grounds on which the risk of absconding is based. In such cases, the approach of the European Court of Human Rights and that of domestic courts

27 Decision of January 21, 2015, Case № 10/a-1, Senaki District Court.
28 Ibid*,* 4.
29 Ibid*,* 5.
30 *Macovei M.,* The Right to Liberty and Security of the Person, *Mchedlidze N. (ed., comm.)*, Council of Europe, Tbilisi, 2004, 107 (in Georgian).
31 Decision of January 21, 2015, Case № 10/a-1, Senaki District Court, 2.
32 Sulaoja v. Estonia [15.02.2005], ECHR, Appl. № 55939/00.
33 Ibid*,* para. 59.
34 Ibid*,* para. 64.
35 Ibid*,* 3-4.

is categorically different.[36] Examples such as these are discussed below where, for instance, the use of the right to remain silent by the accused, or the need to carry out investigative actions are indicated as relevant circumstances that justify the risk of absconding.[37]

2.2.2. Reliance on the Interests of Investigation When Substantiating the risk of Interfering with Proceedings

The European Court of Human Rights maintains that an abstract reference to the need that an accused must take part in investigative activities cannot justify detention, since it is usually possible to conduct investigative activities without the accused being necessarily detained.[38]

The Rustavi City Court's decision rendered in 2015[39] contradicts the above approach of the European Court. The domestic court noted in abstract terms, without specifying any circumstances, that there were investigative actions to be carried out to establish the source of drugs. Therefore, the Rustavi City Court concluded that the accused could destroy important information unless detained.[40]

The exercise of the privilege against self-incrimination often features in the jurisprudence of the European Court of Human Rights as an argument of domestic courts for justifying the imposition of detention. Unfortunately, this argument is often adduced in motions for detention and sometimes accepted by domestic courts in Georgia. For instance, a decision of the Rustavi City Court[41] is to be mentioned. It concerns the exercise of the privilege against self-incrimination. When providing reasoning for formal grounds of a preventive measure, the Rustavi City Court noted that the court had taken into account the fact that the accused failed to cooperate concerning the origin of drugs and the identity of those who sold them. "The court believes that the adequate behaviour of the accused will be ensured if a preventive measure is imposed."

Such reasoning cannot be more distanced from the case-law of the European Court of Human Rights.[42] It is completely unacceptable to resort to preventive measures to discourage accused persons from availing themselves of procedural safeguards. Such a practice also contradicts the right to a fair trial under Article 6 of the European Convention on Human Rights.[43] It is categorically unacceptable to compel an accused person who does not wish to cooperate with investigative authorities to give a statement to the body in charge of proceedings.[44]

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36 See *Mchedlidze N.,* Application by Common Courts of Georgia of the Standards under the European Convention on Human Rights, Council of Europe, Tbilisi, 2017, 58 (in Georgian).

37 *Vide infra*, Reliance on the Interests of Investigation When Substantiating the risk of Interfering with Proceedings.

38 Miminoshvili v. Russia [28.06.2011], ECHR, Appl. № 20197/03, para. 86.

39 Decision of November 21, 2015, Case № 10a-236-15, Rustavi City Court.

40 Ibid*,* 3.

41 Decision of November 13, 2015, Rustavi City Court.

42 Ramkovski v. The Former Yugoslav Republic of Macedonia [08.02.2018], ECHR, Appl. № 33566/11.

43 See, *Maglakelidze L.,* Information Obtained through Misguiding the Accused and the Privilege Against Self-Incrimination According to the Practice of the Georgian Courts and the European Court of Human Rights, "German-Georgian Law of Criminal Law", № 3/2018, 60-65 (in Georgian).

44 Ibid*,* 60.

In the case-law of the European Court of Human Rights, not only the fact that an accused person appears before the body in charge of proceedings but also the fact that he/she did not change a place of residence should be taken into account by domestic courts when assessing the risks of absconding.[45]

Such an approach was not taken by the Tbilisi Court of Appeals in its decision adopted in 2014.[46] The Investigative Section noted that the risk of absconding could not be ruled out completely only because an accused showed up regularly before investigative authorities and the court. According to the appellate court, the suggestion – based on this fact only – that the accused would not flee from justice in the future "was a groundless presumption". The Investigative Section considered that it was a logical question to ask as to what the body in charge of proceedings was supposed to do "though less likely, but still, should the accused decide to abscond from investigation and trial." The court's answer to its own question was that a court should not "depend naively" on the goodwill of an accused and should at least have some legal leverage to "ensure in advance" an accused person's proper behaviour.[47]

It is also noteworthy that the Court of Appeals developed this reasoning in a case where the accused had connections abroad and an obligation to pay a large amount of damages could arise later if convicted.[48] In this regard, it should be noted that it is not illegal to have connections abroad. According to the accused's lawyers, their client regularly went abroad. The decision in the case of *Stögmüller v. Austria* is noteworthy. In this case, the European Court of Human Rights pointed out that the danger of an accused absconding did not result just because it was possible or easy for him to cross the border, considering that the applicant always returned to Austria.[49] While, in addition to crossing the border, connections abroad are also an important factor, the European Court stated that the applicant's action was a direct indication that the danger of absconding was ruled out.[50]

Furthermore, the reference – at the stage of application of the preventive measure – to the obligation to pay damages that may arise in case of conviction contradicts the principle of presumption of innocence. In view of this, and in those conditions, where the accused cooperates with both the investigation and the court and there are no circumstances other than the gravity of the charge and the severity of the expected sentence, the application of remand detention is unjustified. The argument that the court must have some leverage to secure the defendant's appropriate behaviour in advance implies that the authority of proceedings at the present moment has no real reason to presuppose the existence of any danger of absconding. This reasoning of the Tbilisi Court of Appeals contradicts the principle of the presumption of liberty.

Conversely, the arguments of the Senaki District Court in its decision adopted in 2015[51] are in full compliance with the case-law of the European Court. The domestic court observed that a

45 Dirdizov v. Russia [27.22.2012], ECHR, Appl. № 41461/10, para. 109.
46 Decision of December 5, 2014, Case № 1g/1234, Tbilisi Court of Appeal.
47 Ibid*,* 5.
48 Idem.
49 Stögmüller v. Austria [10.11.1969], ECHR, Appl. № 1602/62, para. 15.
50 Idem.
51 Decision of January 21, 2015, Case № 10/a-1, Senaki District Court.

preventive measure must be imposed to ensure the appearance of the accused before the court and not to secure the payment of damages.[52] This example demonstrates that the compatibility of reasoning with the standards of the European Court does not depend on the hierarchical position of the court within the judiciary.

2.2.3. Reliance on the Gravity of Charges and Severity of Sentence to Justify the Risks of Reoffending and Interference in the Administration of Justice

The study of the case-law of the European Court shows that the gravity of charges is often invoked by domestic authorities to substantiate other grounds of detention as well. The European Court has established in its case-law that detention cannot be justified with a mere citation of the relevant domestic legal principles and a reference to the gravity of the offence without addressing the specific facts of a case or providing any details as to why the risks of absconding, obstructing justice or reoffending are justified.[53]

A decision[54] rendered by the Senaki District Court is fully compliant with this approach of the European Court. According to the decision, the prosecution in their motion indicated in abstract terms the risks for reoffending, absconding and destruction of important information. This suggestion was only based on the charges brought. There were no such circumstances established in the case that are relevant to substantiate these risks; for example, if the accused had committed similar crimes in the past or even had violated the law in any form or fashion, whether he failed to appear before the investigative authorities or attempted to destroy evidence. Accordingly, the court found that the grounds for the application of a preventive measure were not substantiated and refused to impose a preventive measure altogether.[55]

On the other hand, a decision adopted by the Tbilisi Court of Appeals in 2014[56] does not correspond to the approach of the European Court. According to the Investigative Section of the court, there are risks for reoffending and exerting pressure on participants of proceedings when an accused commits an alleged crime "by using intellectual capacities" and when an accused uses the "ability to knowingly misguide a victim". In such cases, the court does not exclude the possibility that unless a preventive measure is applied the accused person will again use these capacities and skills.[57]

In this case, as in the cases discussed above, the reasoning of the risk of absconding based on the charges is abstract in its nature. The risks for reoffending and interference in the administration of justice cannot be substantiated by the charges only. A reasonable suspicion that a person committed a crime is only sufficient for the fact that criminal proceedings are instituted against a person but it is not enough for the application of a preventive measure.

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52 Ibid, 5.
53 Arzumanyan v. Armenia [11.01.2018], ECHR, Appl. № 25935/08, para. 36.
54 Decision of November 2, 2015, Case № 10/d-47, Senaki District Court.
55 Ibid, 3-4.
56 Decision of December 5, 2014, Case № 1g/1234, Tbilisi Court of Appeals.
57 Ibid, 4.

2.2.4. Reliance on Criminal Record When Substantiating the Risk of Reoffending

A criminal record is usually used by domestic courts to substantiate the risk of reoffending. However, sometimes, past criminal record is not compared to present charges brought against an accused to identify the risk of reoffending that would justify the use of a preventive measure. This shortcoming in the reasoning leads to the violation of Article 5.3 of the Convention.

In this regard, the Tbilisi Court of Appeals rendered an exemplary decision in 2017.[58] The court pointed out the fact that the accused had a criminal record did not necessarily entail the risk of reoffending. The appellate court highlighted the homogenous nature of crimes that alludes to such a risk.[59]

In a decision rendered by the Tbilisi Court of Appeals in 2015,[60] the imputed crime is also compared to a crime committed in the past and it is pointed out that an accused was on probation.[61]

The reference to the past of an accused by the Rustavi City Court in its decision of 2015[62] is insufficient. The decision does elaborate whether the accused had a criminal record at all let alone compare it with the present charges in terms of its seriousness and nature. Such meaningless references to a person's past are abstract in nature and do not meet the requirement set by the European Court for domestics courts to indicate specific relevant circumstances.

The reasoning of the Rustavi City Court came down eventually to the specific nature of the alleged crime (the accused was charged with illegal purchase and storing of the drug heroin) and based on its nature the court justified the imposition of remand detention. This reasoning of the Rustavi City Court is similar to the reference of a Russian court to "the nature of the crime committed" in a 2005 case.[63] In this case, the applicant had been charged with the illegal purchase and storing of drugs. However, the European Court did not agree with the domestic courts that the reference to the specific nature of the imputed crime justified the imposition of remand detention.[64]

3. Conclusion

The study of acts delivered by the domestic courts demonstrates that there is indeed certain progress in terms of the use of case-law of the European Court of Human Rights when applying preventive measure. In some instances, even without citing a specific case of the European Court, the domestic courts' reasoning is in full compliance with the standards established by the European Court. However, there are still problems in terms of the application of remand detention. Among others, it is problematic that the arguments used by the domestic courts do not comply with the test of "relevant

58 Decision of October 4, 2017 Case № 1g/1199-17, Tbilisi Court of Appeals.
59 Ibid, 4.
60 Decision of August 27, 2015, Case № 1g/1272-15, Tbilisi Court of Appeals.
61 Ibid, 2.
62 Decision of November 21, 2015, Case № 10a-236-15, Rustavi City Court, 3.
63 Romanov v. Russia [20.01.2005], ECHR, Appl. № 63993/00, para. 92.
64 Ibid, para. 93.

and sufficient circumstances" and the risks posed by the accused are assessed in light of the circumstances that are unacceptable for the European Court.

The present article demonstrated, using the examples of national courts' acts, how the use of remand detention complies with the standards established under Article 5.3 of the European Convention. Specific shortcomings in this regard were identified based on the relevant judgments of the European Court of Human Rights. Accordingly, the article could be of practical use in terms of the further improvement of the jurisprudence of the domestic courts.

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Cover Designer Mariam Ebralidze

Compositor Nino Vacheishvili

Printed in Ivane Javakhishvili Tbilisi State University Press

14 Ilia Tchavtchavadze Avenue, Tbilisi 0179
Tel 995 (32) 225 04 84, 6284, 6278
www.press.tsu.edu.ge