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Davit Tsulaia[*]

Sin, Crime and Criminality

In the twenty-first century, the phenomenon of crime and criminality is still unexplained. There are many biological, psychological and sociological theories on the problem of crime and criminality in criminology. Modern criminology has also applied an integrated method of theories and concepts. However, this approach has not yet yielded positive results, as the criminogenic situation in the world is becoming increasingly dangerous; new forms of crime are emerging and the scale of crime is increasing. Taking into consideration the given setup, the Hamartiology, the Christian doctrine of sin, is gaining importance as sin is considered to be the source of all negative events in general, including crime and criminality.

The present article expolres the transcendental nature and features of sin in the legislative and criminological concepts of crime and criminality. It turns out that both categories are conceptual forms of sin, which, from a scientific viewpoint, allows the concepts of crime and criminality to be shaped in a completely "new" manner.

Keywords: *sin, crime, crime, norm, law.*

1. Introduction

Nowadays, there is still no consensus in science about the essence of crime and criminality. Such situation can generally be explained by the profusion of cultures in the countries, as well as the geographical, social or psychological and other peculiarities of the countries. However, crime and criminality preserve everywhere and always common patterns.

Existing criminological theories also do not fully grasp the essence of crime and criminality. It can be said that science has fallen into a vicious circle and is facing a challenge. This is proved by the fact that in the most technocratically advanced era of the mankind history, 21st century, criminality not only is increased quantitatively, but also gets tendency of revealing itself in new qualitative forms, which pose a serious threat to humanity.

In order for criminology to cope with this challenge, we consider necessary that research on crime and criminality should use a new approach. Naturally, in this context, the use of transcendental, in particular, the knowledge of Orthodox Christianity gets urgency. The point is that sin is not only a violation of divine law, but it is also considered to be the source of all evil. The present article is another small step made to this direction, which will show us the transcendental boundaries of the essence of crime and criminality.

2. Sin and Crime

2.1 Conceptual and Linguistic Aspects of Sin and Crime

There are many explanations for sin. For example, sin is: 1. missing the target; 2. injustice; 4. passionate intention; 5. evil.[1] Sin can also be defined as the transgression of God's will, His

[*] PhD Student of Ivane Javakhishvili Tbilisi State University, Faculty of Law.

commandments and the moral laws recorded in man's conscience, which is also known as evil.[2] Surely, many other explanations can be cited, however, as *V. Panenberg* notes, "talking about sin can only have a sense, if it is attributed to the crime".[3]

Thus, it is interesting to see how identical the concepts of sin and crime are and how appropriate it is to use the word "sin" instead of "crime" and vice-versa. Analyzing this issue will also allow us to: a) determine whether "crime" is a transcendental or purely normative concept, and b) better understand the etymology of the term "crime".

The term "crime" and the words derived from it are abundant both in Georgian and English translations of the Bible. For example, in the Georgian translations of the contemporary Bible text, these terms are presented in the following manner: in the newly revised version of 2015, such terms are found 280 times, in the version prepared in 2013 (according to the text of the "Bible" published by the Georgian Patriarchate in 2009) 212 times, in the 2013 edition of the Georgian Bible Society 222 times and in the 2001 edition of the Stockholm Bible Society, 236 times.[4] In the Latin-English translation of the Douay-Rheims Bible,[5] the word "crime" and its derivatives are found 41 times, 36 times in the Old Testament and 5 times in the New Testament.

For the purposes of our research, it is sufficient to analyze even one version of the Georgian translations of the Bible. In the Bible text translated into modern Georgian language, the word "crime" occurs 212 times, in the Old Testament 207 times[6] and in the New Testament, 5 times.

In these verses, the words "sin" and "crime" appear 28 times in the same verse.[7] Let us now analyse a few concrete articles:

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1 For detailed information, see *Chan S.*, Man and Sin (second edition), Tbilisi, 2006, 104-106 (in Georgian).

2 *Pomazansky M., (Protopresbyter)*, Dogmatic Theology, (Third, revised and supplemented edition), Tbilisi, 2012, 97 (in Georgian).

3 *Panenberg V.*, Sin and First Sin (translated from German by *Rtskhiladze V.*), Tbilisi, 2014, 72 (in Georgian).

4 The Bible texts are uploaded electronically on the specified website and the number of terms counted by us, can be checked in the search box of the website by typing the word "crime" and pressing searchingbutton<http://holybible.ge/georgian> (in Georgian), [03.10. 2019].

5 The Holy Bible <http://triggs.djvu.org/djvu-editions.com/BIBLES/DRV/Download.pdf>[03.08.2014].

6 Gen. 44, 10; 50, 17 (2 times); Ex. 22, 8; 23, 7; 34, 7, 9 (4 times); Lev. 4, 3; 5, 7, 15, 17, 19; 6, 6-7, 17; 7, 1-2, 5, 7, 37; 14, 12-14, 17, 21, 24, 25, 28; 17, 16; 19, 20-22 (27 times); Numbers. 5, 6-8, 31; 6, 12; 14, 18-19, 34; 18, 1, 9 (13 times); Deut. 19, 15; 22, 26; 24, 16; 25, 2 (4 times); Josh. 22, 17, 20; 24, 19 (3 times); 1 Sam. 6, 3, 4, 8, 17; 25, 24, 28 (9 times); 2 Sam. 4, 11; 14, 9; 19, 20 (3 times); 1 Ki. 8, 47, 50 (1 time); 2 Ki. 12. 17; 14, 6 (2 times); 2 Chr. 24, 18; 25, 4; 28, 10, 13; 33, 23 (7 times); 1 Ezr. 9, 2, 4, 6, 7, 13; 10, 6, 10 (7 times); Neh. 5, 21 (1 times); Job. 4, 7; 7, 21; 8, 4; 10, 2, 6, 14; 13, 23; 14, 17; 20, 27; 27, 17; 31, 11, 28, 33; 34, 6, 37; 35, 6 (16 times); Psa. 9, 29; 14, 5; 31, 1, 5; 35, 3; 50, 3, 5; 58, 4, 5; 63, 5; 64, 4; 67, 22; 68, 6; 84, 3; 88, 33; 89, 8; 100, 3; 102, 12 (18 times); Prov. 1, 11; 14, 9; 17, 9; 29, 16, 22; 30, 10 (6 times); Song. 2, 12 (1 time); Zir. 10, 7 (1 time); Is. 5, 18; 13, 11; 22, 14; 27, 9; 30, 13; 33, 24; 40, 2; 43, 24; 44, 22; 50, 1; 58, 1; 59, 12 (13 times); Jer. 2, 3, 13, 19, 34; 3, 13, 22; 14, 20; 16, 10, 17, 18; 18, 23; 25, 12; 30, 14, 15; 31. 29, 33; 32. 18; 33. 8; 36, 3, 31 (21 times); Lam. 4, 22 (1 times); Ezek. 7, 23; 14, 10; 16, 49; 18, 17-20; 21, 28, 29, 30, 34; 22, 4; 24, 23; 28, 18; 29, 16; 33, 10; 36, 31, 33; 37, 23; 39, 23, 26; 40, 39; 42, 13; 44, 10, 29; 46, 20 (29 times); Dan. 1, 10; 6, 5 (2 times); Hos. 5, 15; 12, 9; 13, 1 (3 times); Amos. 1. 3, 6, 9, 11, 13; 2. 1, 4, 6; 3. 2; 5. 12 (10 times); Mic. 3. 8; 6. 7 (2 times); 1 Mac. 7. 25; 13. 39 (2 times); 2 Mac. 4. 36 (1 time); 3 Mac. 3. 9; 6.27; 7.7 (3 times); 4 Mac. 2.19; 11.3 (2 times), see at:<www.orthodoxy.ge/tsmidatserili.htm>, (in Georgian), [31.08.2014].

"*Tell Joseph: I beg you, forgive sin and crime to you brothers, for they did you wrong*." (Gen. 50, 17).

In this verse, "sin" and "crime" refer to one specific fact, namely, the sale of Joseph by his brothers. Thus, "sin" and "crime" are essentially equivalent notions and linguistic units, as they are used to express the same fact.

Moreover, in some verses, the word "sin" is used to describe the transgression of God's commandments before the Lord. For example, in "Leviticus" we read:

"This is the atonement for the crime for his crime before the Lord (Lev. 5, 19); "The priest will ask forgiveness for him from the Lord, and he will be forgiven for every crime he has committed" (Lev. 6, 17).

However, one can tell us - if *Al. Lopukhin's* commentary of the Bible says that if "the offering of crime is very close to the offering of sin,"[8] does not this mean that there is still a difference between sin and crime? It turns out that in chapter 14(13) of Leviticus which speaks of the offerings for sin and crime mentioned above, *Lopukhin* does not make any distinction between them. This approach is valid because, the Bible shows that "the same rule applies to both sin and crime offerings" (Lev. 7, 7).

In addition, it is noteworthy that in Georgian legal documents, "sin" is a term denoting a crime, for example:

G. Nadareishvili notes that: "in general, crime was considered a sin before the God. According to canon law, murder was not only strictly forbidden because it was a cruel act, violation of state peace by force, but also because it was a crime, a sin before the God."[9] *G. Nadareishvili* adds that according to *Aquinas*, crime is a violation of the divine order on earth and also a violation of the needs of the church.[10]

Following from the above said, it must be concluded that since in the Bible the violation of God's commandments is described by these two linguistic words, therefore "sin" and "crime" are notions and terms with equal meanings. This means that crime is a transcendental act and concept. Such a formula also derives from the concept of divine law, because "the law is spiritual" (Rom. 7:14), which means that the violation of such a law is transcendental act.

It is true that in the Bible, sin and crime are notions with equal meaning, but it is interesting to see how crime has evolved into positive law. Is the legal notion of crime one of the forms of sin? To find out this, we must examine the topic in detail.

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7 Gen. 50, 17; Ex. 34, 9; Num. 14, 18; 18, 9; Deut 19, 15; Josh 24, 19; 1 Kin. 8, 50; 2 Kin. 12, 17; 2 Chr. 28, 13; Job. 10, 6; 13, 23; 34, 37; Ps. 31, 1, 5; 50, 5; 58, 4; 64, 4; 84, 3; 88, 33; Is. 43, 24; 44, 22; Jer. 18, 23; 30, 14; Ezek. 21, 29; 33, 10; 40, 39; 44, 29; Mic. 3, 8. see:<www.orthodoxy.ge/tsmidatserili.htm>, (in Georgian) [31.08.2014].

8 *Lopukhin A*., Explanations of Bible II, (ed. Ed. *Deacon Dzindzibadze Z*.; translated by *Metreveli T*.), Tbilisi, 2000, 237 (in Georgian).

9 *Nadareishvili G*., Aims and Tasks of Punishment according to the Ecclesiastical Law, Herald of the Academy of Sciences of the Georgian, Series of Economics and Law, № 3, Tbilisi, 1983, 104-105 (in Georgian).

10 *Ibid*, 105.

2.2 The Concept of Sin in Criminal Law

Because there is still no unified approach to the essence of law in the positive sciences, there can be no objective consensus on the definition of crime either. For example, there are legal (*J. Michael*, *M. Adler*), sociological (*T. Celine*, *J. Wald*), radical (*W. Chamblis*), semiological (*E. Sutherland*) and various concepts and theories about crime.[11] Among them, the most common is the legal concept, which divides a criminal act into two main groups: 1. acts that are evil in themselves *malum in se*, and 2. acts that are a crime by virtue of a prohibition *malum in prohibitum*.[12]

2.2.1 Acts of Malum *In Se* and Sin

According to Fletcher, most criminal law has moral and theological roots. Crimes that are moral and theological wrongs are *malum in se*, - "wrong in themselves". These core wrongs of the criminal law are not wrong just because they are prohibited; they would stand for evil whether the legislature said so or not.[13] The English philosopher *Thomas Hobbes* pointed out that there are acts that are crimes without law, in themselves or by their nature. He attributed such crimes as treason, murder, robbery, theft and etc.[14]

Criminologists *Wilson* and *Harenstein* develop the notion that some acts are naturally bad and evil. For example, murder, incest, rape, theft and robbery are evil naturally and universal. Similar crimes are condemned in all societies and in all historical periods, in ancient traditions, by moral sentiments and formal law.[15] People instinctively know that *malum in se* crimes are evil. The public consensus says that such acts should be banned because it is immoral.[16]

The classic example of moral laws in the Bible is the Ten Commandments, which formed the basis of all morality, became the norm of human behavior in general and acquired universal[17] and legal significance.[18] For example, you shall not murder, commit adultery, steal and so on (see Ex. 20: 1-17), are recognized as a crime in the positive law of all countries.

Thus, if we agree that the act of *malum in se* is inherently evil, immoral and has theological foundations, then it is consistent with the concept of sin, and consequently, such a crime is one of the forms of sin.

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[11] 1. *James Treadwell*, Criminology the Essentials, second edition, SAGE Publications Ltd, London, UK, 2013, 10-15; 2. Encyclopedia of Criminology, (eds. *Wright R.A*., *Mitchell J*.), New York, USA, 2005, 273.

[12] See: 1. *Watts R., Bessant J., Hil R.*, International Criminology a Critical Introduction, New York, USA, 2008, 14; 2. *Fletcher G.P.*, Basic Concepts of Criminal Law, Oxford, 1998, 77-78; 3. *Briggs S*., *Friedman J*., Criminology, Indiana, USA, 2009, 26; 4. Encyclopedia of Criminology, (eds. *Wright R.A*., *Mitchell J*.), New York, USA, 2005, 274.

[13] *Fletcher G.P.*, Basic Concepts of Criminal Law, Oxford, 1998, 77-78.

[14] *Dyzenhaus D*., *Poole Th*., Hobbes and the Law, Cambridge, 2012, 100-101.

[15] *Watts R., Bessant J., Hil R.*, International Criminology a Critical Introduction, New York, USA, 2008, 14.

[16] *Briggs S.*, *Friedman J.*, Criminology, While Publishing Inc. 2009, 24.

[17] *Ekromaishvili V*., Philosophy (revised and supplemented edition), Tbilisi, 1998, 51 (in Georgian).

[18] *Lobzhanidze G*., Theory of State and Law, Kutaisi, 2000, 260 (in Georgian).

2.2.2 Acs of *Malum in Prohibitum* and Sin

Acts that are a crimes of *malum in prohibitum* that is by prohibition, [19] they make up today the largest percentage of the norms of criminal law.[20] On the sin and the crime of *malum in prohibitum*, an interesting nuance is the dichotomy that exists in the theory of law:

1. In terms of positive law, a law can be considered valid even if it is against morality;[21] The lawful may be immoral and the morally unlawful,[22] as law is determined by authority and not by truth (*T. Hobbes*).[23] In addition, it is well known that criminal law does not always reflect the values of society (*J. Waldis*)[24] and so on.

Thus, it turns out that the crimes of *malum in prohibitum* by its very nature cannot always be sin, since the element of moral violation for sin is always necessary. Violation of the norm of unlawful and immoral positive law is not considered to be a sin by Orthodox doctrine. Consequently, in this case, well-known formula of *Hobbes* that "all crime is sin"[25] loses its validity.

2. The norm of law sets a "minimum of morality"[26] and protects the "ethical minimum" (*Elinek*).[27] In judicial ethics we read that "any illegal[28] conduct is also immoral."[29] In the theory of law it is written that "if the law does not conform to the generally accepted moral notions, it is usually ignored by judges and other law enforcement agencies,"[30] and so on.

From this standpoint, all *malum in prohibitum* acts formally contain the element of morality and the action can be considered evil. Naturally, in this case, the crime of *malum in prohibitum* can be conditionally considered as a form of sin and the formula of *Hobbes* that "all crime is sin" can be shared conceptually.

Why conditionally and not unconditionally, it will be analised below. Before that, we want to find out what kind of transcendental elements are contained in the legislative notion of crime itself.

2.2.3 Transcendental Aspects in the Legislative Notion of Crime

Article 7 of the Criminal Code of Georgia reads that a crime is an unlawful and culpable act provided for by the Criminal Code.

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19 *George P. Fletcher*, Basic Concepts of Criminal Law, Oxford, 1998, 77.
20 *Briggs S., Friedman J.*, Criminology, Indiana, USA, 2009, 23.
21 *Burnside J.*, God, Justice, and Society, Aspects of Law and Legality in the Bible, USA, 2010, 68.
22 *Ekromaishvili V.*, Philosophy (revised and supplemented edition), Tbilisi, 1998, 258 (in Georgian).
23 1. Pluralism and Law: State, Nation, Community, Civil Society, Volume 2, (ed. *Soetemen A.*), Proceedings of the 20th World Congress, Amsterdam, Netherlands, 2001, 10; 2. *Khubua G.*, Theory of Law, Tbilisi, 2015, 65 (sc. 160), (in Georgian); 3. *Khubua G.*, Theory of Law, Tbilisi, 2004, 51 (sc. 134), (in Georgian).
24 *Treadwell J.*, Criminology the Essentials, second edition, London, UK, 2013, 12.
25 *Hobbes Th.*, Leviathan, (editor: *Gaskin J. C. A.*), NY, 1998, 193 (in Georgian).
26 *Khubua G.*, Theory of Law, Tbilisi, 2015, 65 (sc. 172) (in Georgian).
27 *Ibid*, 80 (sc. 205).
28 Note: It was better for the author to use the term "unlawful" instead of "illegal".
29 Judicial Ethics, (ed., by *Eriashvili N. D.*), Tbilisi, 2016, 54.
30 *Khubua G.*, Theory of Law, Tbilisi, 2015, 65 (sc. 209), (in Georgian).

An act: The composition of the action, as well as the unlawfulness and guilt, is one of the elements of the crime and consists of two parts, by the objective and subjective components of the act.[31]

Formally, the same can be said about sin. For example, *G. Kopadze*, with regard to the notion of sin, notes that we must consider sin in an objective and subjective context, that sin must consist of two components - subjective and objective sin.[32]

Unlawfulness: unlawfulness is a legislative expression of the principle of legality.[33] The principle of legality, as we know, is a biblical principle (Gen. 2:16; Rom. 3:15; 5:13). In addition, according to the criminal law of Georgia, unlawfulness is not a violation of legal imperatives in general (*L. Kutalia*),[34] or a narrowly understood criminal unlawfulness, but an action committed by a person against the norms of culture (*M. Turava*).[35] Culture, in its primary sense, means the cultivation and perfection of the spirit (*Cicero*),[36] which has a moral content (*Kant*).[37] And religion is an essential part of culture (*J. Biddle*).[38] At the same time, the development of laws depends on the characteristics of the wider cultural characteristics, while specific crimes are based on morality.[39]

Finally, it must also be said that such a meta-legal category as is an intent, the knowledge of unlawfulness, turns it into an evil intent.[40]

Thus, unlawfulness, in its essence, is a meta-legal category, because it is an expression of a Biblical principle and its central element is a violation of spiritual (cultural), moral norms. In other words, the crime of *malum in prohibitum*, as a sign of unrighteousness, is also immoral, or an evil act.

Guilt: Without guilt there is no crime.[41] It is impossible to speak about the guilt without a meta-legal element, which is well examined by *L. Kutalia*.[42] Therefore, under the classical system, all subjective-spiritual elements are considered as an integral part of the guilt.[43]

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31 *Turava M*., Criminal Law, Review of General Part, (Ninth Edition), Tbilisi, 2013, 83 (in Georgian).

32 *Kopadze G*., The Concept of Sin and the Ten Commandments, Tbilisi, 2006, 6 (in Georgian).

33 Fundamentals of Georgian Law (Collective of Authors, ed. *Shengelia R*., rev. *Tsulaia Z.*), Tbilisi, 2000, 355 (in Georgian).

34 *Turava M*., Criminal Law, Review of General Part, (Ninth Edition), Tbilisi, 2013, 5.

35 *Ibid*, 56 (in Georgian).

36 Introduction to Cultural Studies, M., 1995, 132 (in Russian), quoted from the article, *Tsulaia D*., on the Phenomenon of Culture in the Eradication of Crime. *Shengelia R.,* (ed), Current Problems of State and Law (Jubilee Collection, dedicated to the 80th Anniversary of TSU Faculty of Law), Tbilisi, 2003, 404 (in Georgian).

37 *Julikanishvili A*., Culturology, Open Society Foundation, Tbilisi, 2001, 131 (in Georgian).

38 *Chkhartishvili L*., The Devil has not yet finally taken over our world, see: Orthodox Magazine "Karibche", № 2, (323), January 26 - February 8, 2017, 47 (in Georgian).

39 *Durrant R.*, Evolutionary Theory and the Classification of Crime, 2020, 7, Number of article: 101449, e-journal "A Review Journal", Aggression and Violent Behavior (Editor-in-Chief: Vincent van Hasselt), Elsevier Ltd, https://www.journals.elsevier.com/aggression-and-violent-behavior, [01.07.2020].

40 *Dvalidze I*., *Tumanishvili G*., *Gvenetadze N*., Methodology of Solving the Case in Criminal Law, Tbilisi, 2015, 200 (in Georgian).

41 Fundamentals of Georgian Law (Collective of Authors, ed. *Shengelia R*., rev. *Tsulaia Z.*), Tbilisi, 2000, 357.

42 For detailed information on the theory of guilt, see: *Kutalia L*., Accused in Criminal Law, Tbilisi, 2000 (in Georgian).

43 *Turava M*., Criminal Law, Review of General Part, (Ninth Edition), Tbilisi, 2013, 61 (in Georgian).

For example, According to *J. Hall*, "a legal mandate provides for the establishment culpable intent of a *mens rea* to charge a person for a crime. The word intention *rea* has a meta-legal value and turns it into a legal standard."[44] German psychologist *V. Wundt* considers "volition" to be a genesis supernatural phenomena.[45] And, for the founder of normativism *H. Kelzen*, "will" is a meta-legal phenomenon,[46] while, for *B. Savaneli*, free will, like all other human qualities, is a meta-legal phenomenon.[47] As for the knowledge of unlawfulness, which is also an element of intention, it is established at the stage of guilt, and here the intention is already turned into an evil intention (*dolus malus*).[48]

As we know, according to the criminal law of Georgia, a guilt is a purely normative category in the form of censure.[49] Normativeness is a common sign of sin, crime and criminality. Censure as a socio-ethical and moral category is based on mental attitude (*G. Tkesheliadze*),[50] motive and estimation.[51]

T. Tsereteli, on the other hand, views the guilt as a (socially-) ethically, morally or morally-politically censurable mental attitude.[52]

Finally, *M. Ugrekhelidze* notes that in existential philosophical treatises, the guilt indicates a person "fallen into sin", which arouses the legitimate interest of lawyers.[53] He adds that "it would be almost impossible to explain the concept of guilt without a theological explanation".[54] The Danish philosopher *Soren Kierkegaard* refers to this very guilt when he says that guilt is first a religious, metaphysical notion and after an ethical one.[55]

3. Sin and Criminality

3.1 Concepts of Sin and Criminality

Like crime, there are many definitions on criminality in the scientific literature. They reflect the philosophical, sociological schools and directions, legal and religious views of authors.[56]

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44 *Gerhard M*., (1959) „Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory", *Indiana Law Journal*: Vol. 34: Iss. 2, Article 2. pp. 208, see:<http://www.repository.law.indiana.edu/ilj/vol34/iss2/2>, (08.09.2019).

45 *Imedadze I*., History of Psychology, Tbilisi, 2008, 204 (in Georgian).

46 *Savaneli B*., Theory of Law, Tbilisi, 1993, 61 (in Georgian).

47 *Ibid.*

48 *Turava M*., Criminal Law, Review of General Part, (Ninth Edition), Tbilisi, 2013, 398 (in Georgian).

49 *Ibid,* 65.

50 *Tkesheliadze G*., Guilt is an Evaluative Concept, cited from: Current Problems of State and Law (Jubilee Collection, Dedicated to the 80th Anniversary of TSU Faculty of Law), Tbilisi, 2003, 326 (in Georgian).

51 For detailed information see: *Dvalidze I*., Influence of Motive and Purpose on the Qualification of an Action and Criminal Liability (dissertation), Tbilisi, 2008, 29 (in Georgian).

52 *Kutalia L*., Guilt in Criminal Law, Tbilisi. 2000, 802 (in Georgian).

53 *Ugrekhelidze M*., Existentialism and Law, Proceedings of the Georgian University, Vol. 1, Tbilisi, 2015, 211 (in Georgian).

54 *Ibid.*

55 *Kierkegaard S*., Sickness unto Death, in work "Fear and Trembling", M., 1993, 128 (in Russian), see: *Ramishvili V*., Man and the Fate (Metaphysics of Time), 2002, 229 (in Georgian).

56 *Kudryavtsev V.N*., *Eminov V.E*. (ed.), Criminology M., 1997, 19 (in Russian).

Nevertheless, in all definitions, criminality is described as a social, legal and mass phenomenon.[57] From the perspective of sin, it is easy to analyze these signs of the notion of criminality, because sin is a concept denoting any negative event, including criminality. We will try to conceptualize each of the above three elements of the criminological notion of criminality in relation to sin. But before we start analyzing the issue, it is necessary to touch upon the linguistic aspect of sin and criminality. The Bible says:

"…Although this is a stiff-necked people, forgive our crime and our sin, …." (Ex. 34, 9).

In this verse, the words "sin" and "crime" are associated not with one action, but with an phenomenon, the sin of Israel, which manifests itself in the forgetfulness of God's law. We can quote a lot of verses with similar content from the Bible. Thus, "sin" and "crime" are essentially equivalent notions and linguistic units, as they are used to describe the same phenomenon.'

At the same time, it is interesting that *Il. Chavchavadze* also considers the term "sin" as a term denoting "criminality": "It is obligatory for everyone to stand on this minimum level of virtues. And one may go down and even go up this line. The one who goes down, he/she sins against the society and is punished by the society itself, because in this case "going down the line" is a criminality."[58]

In addition, it is necessary to mention very briefly examine the normative aspect of sin and criminality. The normative sign is a common sign of sin and criminality. Plus, a sin in its broad sence is associated with such criminological concept of criminality, as is „anomie". For example, according to *R. Wieland*, the well-known definition of sin is „lawlessness". In the original version, the word for lawlessness corresponds to the Greek word *anomia*, which refers to a condition of hostility with divine laws and not a mere act.[59] It is important to note that the normative sign belongs to both the legalistic and sociological concepts of criminality. In particular, for the generalization of the essence of criminality, the starting point of criminality for lawyers is the norm of law and for sociologists anomie, that is abnormality. Thus, by the sign of normality, criminality appears as one of the forms of sin.

Now let us consider separately the elements of the notion of criminality.

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[57] 1. Criminology, (ed. *Avanesov G. A*., *Eriashvili N. D*.), fourth edition, Tbilisi, 2007, 241 (in Georgian); 2. *Tsulaia Z*., Criminology, Tbilisi, 2005, 48-49; 3. Criminology (Scientific Editor *Glonti G*.), Tbilisi, 2008, 41-54 (in Georgian).

[58] 1. *Chavchavadze Il*., Complete Collection of Essays, Volume IV, Nation and History, Letters on Public Education Issues (ed. P. Ingorokva), Tbilisi, 1955, 224-225 (in Georgian); 2. Here we will want to underline the most important linguistic and conceptual issue for Georgian criminology. We have not found the term "criminality" in any Georgian source before *Il. Chavchavadze*. In addition, to date we have not found in any of the sources the concept of "criminality" as *Il. Chavchavadze* proposes. Thus, to declare the *St. Ilia the Righteous* (Chavcahvadze) as the author of the concept and term of "Criminality" is correct. Knowledge of the etymology of the term and concept of the "criminality" is essential for the history of Georgian criminology, as well as for a scientifically correct understanding of the notion of criminality and other criminological issues.

[59] 1. *Wieland R.*, The Golden Chain, Is there a Broken Link? *Some Insights into the Humanity of Christ*, 1999, 48; <http://www.4eange.com/anglais/LIV/KOR/PDF/ENG/WIE/The%20Golden%20Chain.pdf>, [10.10.2020]; 2. In the Georgian version of the Bible we read: 1 John 3,4. "Everyone who sins breaks the law; in fact, sin is lawlessness."

3.2 The Concept of Sin and the Criminological Notion of Criminality

3.2.1 Sin as a Social Phenomenon

The social phenomenon of criminality implies that criminality is a form of social behavior that is characteristic to all societies, which violates the interests of members of society. In addition, criminality is social in its origins, content and so on.[60]

On the social nature of sin it must be said that God, by granting rights to the firstcreated human beings, the life of human acquires the greatest social significance (Gen. 1:22). The laws of Moses, on the other hand, were socially oriented, the proper implementation of which was to ensure the formation of a socially just society.[61]

S. Chan, analyzes the social dimension of sin and emphasizes the fact that the whole world is „lying in evil" (1 John 5:19), that there is an evil system in the world,[62] which *Aristotle* also argued that „the state is a necessary evil",[63] because „he who seeks to dominate man, brings an animal origin in his demand."[64]

The social nature of sin is explained by *Mitr. H. Vlachos* too. He points out that sins separate man not only from God, but also from those who observe the Commandments of God and are parts of the body of Christ.[65]

In the Theological Encyclopedia Dictionary we read that the Chapter 6 of the Bible book of Genesis clearly describes the society existed before the Great Flood, which, apart from Noah's family, disobeys divine law and society falls into a total degradation and is diving into sin.[66]

The social nature of sin is well described in the Bible by the prophet *Isaiah*:

„*Woe to the sinful nation, a people whose guilt is great, a brood of evildoers, children given to corruption! They have forsaken the LORD; they have spurned the Holy One of Israel and turned their backs on him*." (Is. 1,4).[67]

In addition, the sin that encompasses all layers of society is also well conveyed to the prophet *Jeremiah*:

"*From the least to the greatest, all are greedy for gain; prophets and priests alike, all practice deceit" (Jer. 6, 13).*

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60 *Tsulaia Z*., Criminology, Tbilisi, 2005, 48-49 (in Georgian).

61 *Mikelashvili M*., Bible, Economic Categories, Tbilisi, 2013, 16 (in Georgian).

62 *Chan S*., Man and Sin, Second Edition, Tbilisi, 2006, 158-159 (in Georgian).

63 *Porchkhidze B*., The Problem of the Relationship between Law and Justice, see: Philosophical Research (Georgian Academy of Philosophical Sciences), Collection №23, Tbilisi, 2019, 340 (in Georgian).

64 *Savaneli B*., Theory of Law, Tbilisi, 1993, 118 (in Georgian).

65 *Mitr. Vlachos H.*, Science of Spiritual Medicine, (translated by *Dughashvili E*., and *Bukia L*.; ed. *Deacon. Chanturia M*.), Tbilisi, 2017, 162 (in Georgian).

66 "*The LORD saw how great the wickedness of the human race had become on the earth, and that every inclination of the thoughts of the human heart was only evil all the time*" (Gen. 6,5); „*Now the earth was corrupt in God's sight and was full of violence. God saw how corrupt the earth had become, for all the people on earth had corrupted their ways*" (Gen. 6. 11-12), see: Теологический Энцеклопедический Словарь (ред. *Элвелл У*.), М., 2003, 337.

67 Ibid.

The most classic example of the division of society into "strata", should be considered the episode of the construction of the Tower of Babel. The Bible tells us that after the Great Flood, the whole country was united and spoke one language. To the glorify the God, people decide to build a city, which is why God will scatter them all over the earth (Gen. 11, 1-10) and "People of all races and nations and languages" (Dan. 3, 4, 7) had set up.

According to *S. Chan*, sin is committed by the social class, the business corporation, the nation. In addition, sin is based on the organization of society and so on.[68]

Finally, According to the *High Priest L. Viono-Yasenetsky*, the Gospel teaches that sin itself is the root of sin lodged in human, in his/her strength and desires. But, since society is made up of people, so sin goes beyond the bounds of the human heart and it floods society and public life. The environment becomes sinful just because people make it so.[69]

3.2.2 Sin as a Legal Phenomenon

Criminality is a legal phenomenon because the circle of crimes is defined by the positive law that is most revealed in criminal legislation. The legal element of criminality distinguishes criminality from the same social phenomenon as immoral acts, while the degree of unlawfulness distinguishes it from offenses such as: administrative, disciplinary and civil.[70]

The assertion that sin is a violation of the norms of positive law is based on the Biblical teaching that the state is an institution established by God, which means that a violation of a law established by the state, including a violation of criminal law, is considered to be a sin.

According to *E. Durkheim*, if criminal law was originally religious law, we can be sure that the interest it served was social.[71]

Finally, according to the narrow sense of sin, the violation of a particular norm is the basis for a broad understanding of sin. This provision is based on the principle that one single sin caused sinfulness of mankind (Gen. 3, 16-17), because:

"He who has sinned in one has sinned in all" (James 2,10); "Therefore, just as sin entered the world through one man, and death through sin" (Rom. 5,12); "For if the many died by the trespass of the one man" (5,15); "Consequently, just as one trespass resulted in condemnation for all people" *(Rom. 5:18); "For just as through the disobedience of the one man the many were made sinners" (Rom. 5:19).*

This principle of the Bible is implemented in positive law too. For example, *G. Nachkebia* notes that „if an action is contrary to the norms of criminal law, then it is also contrary to the norms of other fields of law, because a crime is an extreme violation of the law."[72] Similarly discusses *A. Giddens* „Crime is a violation of any kind of law."[73]

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68 *Chan S.*, Man and Sin, Second Edition, Tbilisi, 2006, 163.

69 *Luka (Viono-Yasenetsky) High Priest*, Science and Religion, Spirit of the Soul and Body (Head of Publication, *Deacon Nasidze Il.*, Translator-Editor, *Mindiashvili A.*), Tbilisi, 2003, 50 (in Georgian).

70 1. *Tsulaia Z.*, Criminology, Tbilisi, 2005, 49 (in Georgian); 2. Criminology (Scientific Editor *Glonti G.*), Tbilisi, 2008, 46 (in Georgian).

71 *Durkheim E.*, Division of Labour in Society, (translated by *Halls W.D.*), London, 1984, 49-50.

72 *Nachkebia G.*, Subject of Criminal Law Science, Tbilisi, 1998, 101 (in Georgian).

73 *Anthony G.*, Sociology, M., 1999, 259 (in Russian), see. *Gakhokidze J.*, *Gabunia M.*, Criminology, Tbilisi, 2013, 14 (in Georgian).

3.2.3 Sin as a Mass Phenomenon

The mass sign of criminality refers not only to the sum of the crimes, but also to the organically summurized combination of a particular territory and a specific time.[74]

On the mass aspect of sin, it is important to note that the first sin turned man into a sinful and mortal being (Gen. 3,19), which added to the sin a mass charachter, since sin became hereditary phenomenon.

Apart from it, the mass nature of sin is discussed in other chapters of the very first book of the Bible, for example:

"*… the wickedness of the human race had become on the earth…*" (Gen. 6,5); "*Now the earth was corrupt in God's sight and was full of violence*" (Gen. 6, 11).

The Bible describes the mass nature of sin in connection with the Great Flood:

"*So God said to Noah, "I am going to put an end to all people, for the earth is filled with violence because of them. I am surely going to destroy both them and the earth*" (Gen. 6, 13).

A classic example of the mass nature of sin was also the curruption of the citizens of Sodom and Gomorrah: „Then the LORD said, "The outcry against Sodom and Gomorrah is so great and their sin so grievous" (Gen. 18:20) and other Bible passages such as:

"*Then the LORD said to Moses, "Go down, because your people, whom you brought up out of Egypt, have become corrupt*" (Ex. 32, 7); "*Then the LORD told me, "Go down from here at once, because your people whom you brought out of Egypt have become corrupt*" (Deut. 9, 12).[75]

S. Chan, who examines the prevalence and intensity of sin, states that sin pervades the earth because it affects every aspect of our lives.[76]

Thus, we can freely declare that criminality, as a form of sin, contains the hallmarks of a social, legal, and mass phenomenon.

3.2.4 Other Criminological Aspects of Sin

In addition to the main features of the notion of criminality described above, the criminological literature also speaks that criminality is a historically changing phenomenon,[77] related to the past, present, future,[78] characterized by quantitative and qualitative indicators,[79] and etc. It should be noted that all these elements of criminality are already analyzed by the concept of sin and are directly or indirectly considered in social, legal or mass signs, for example:

a) sin is historically changing because it began at a particular point in history of mankind, when Eve and Adam sinned. Since then, in all periods of mankind history, sin has revealed itself in various forms;

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[74] Criminology (Ed. *Avanesov G. A.*, *Eriashvili N. D.*), fourth edition, Tbilisi, 2007, 240-241 (in Georgian).

[75] see: Deutonormy: 9, 12; Ps.: 13, 1-3; 5, 9; 52, 1-3; 139, 3; Eccl: 7, 20.

[76] *Chan S.*, Man and Sin, Second Edition, Tbilisi, 2006, 138-139 (in Georgian).

[77] *Tsulaia Z.*, Criminology, Tbilisi, 2005, 47-48 (in Georgian).

[78] Criminology (Ed. *Avanesov G. A.*, *Eriashvili N. D.*), fourth edition, Tbilisi, 2007, 241-242 (in Georgian).

[79] *Tsulaia Z.*, Criminology, Tbilisi, 2005, 49 (in Georgian).

b) sin is naturally related to the past, present and future, because it is a historically changeable phenomenon and is conditioned by the sinful nature of man;

c) the describing sin in terms of quantitative and qualitative indicators is related to all the above elements of sin, because sin historically originates from the first sin, which subsequently changes quantitatively and qualitatively at all stages of mankind history. These indicators are also an element of the mass element of sin and allows it to be described as a mass phenomenon.

Finally, in criminology, the viewpoint that the dialectic law of the transformation of quantification into the quantitative, makes criminality an independent phenomenon is also expressed.[80] We believe that criminality is caused not so much by the dialectic law, but by the nature of sin itself. *S. Chan* notes correctly: „Every sin comes from the same sinful nature.“[81]

This law of the nature of sin has the ability to produce phenomenon from one particular sin, because „sin has an eternal consequence“ (*S. Chan*).[82] The most obvious example of this is the first sin. It is true that it was committed by one specific act, but it gave birth to a universal negative phenomenon. Such phenomenon can be called a criminality and is synonymous with a broader understanding of sin.

4. Conclusion

According to the Bible text, „sin“, „crime“ and „criminality“ are synonymous notions and terms, which means that crime and criminality are a transcendental acts and phenomenons. This formula is also logical, because if the „law is spiritual“, its violation is transcendental. This formula is also logical, because if the „law is spiritual“ and its violation is impossible without transcendental act. Sin and its normative aspect, involves, first of all, the violation of the inner law, the "law of conscience" and then the external, written divine law. Violation of internal law is first of all because conscience is a natural law of man, it precedes all other laws.[83] In the theory of law, as we know, the human conscience is described as a higher moral instance, which, like a law, is a normative hierarchical order for which not only external behavior is important, but also the motives that determine this behavior.[84]

As for the concept of sin in criminal law, all actions of *malum in se* are inherently immoral, evil, universal and conform to the theological concept of sin. Therefore, the crime of *malum in se* is a form of sin. Even the actions of *malum in prohibitum*, although there are a different attitudes on morality in positive law, crime is formally considered to be a form of sin. This is explained by the fact that according to the prevailing view in the theory of law, the law may exclude morality and the law may also be unjust. Orthodoxy surely does not consider such an offense, „crime“ to be a sin. On the other hand, it turns out that the criminal norm formally always includes the element of morality, which is well revealed by the analysis of the legislative notion of crime as well.

In general, the formula that crime violates morality is not new in philosophy, jurisprudence, or criminology. For example, according to *I. Kant*, crime is a violation of moral law. The same is

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80 *Inshakov S.M.*, *Simonenko A.V.* (ed.), Criminology (3rd edition), M., 2010, 21 (in Russian).
81 *Chan S.*, Man and Sin, Second Edition, Tbilisi, 2006, 111 (in Georgian).
82 Ibid, 113.
83 *Bumis P.I.*, Canon Law, Tbilisi, 2010, 10 (in Georgian).
84 *Khubua G.*, Theory of Judgment, Tbilisi, 2015, 79-80, (sc. 203, 204), (in Georgian).

proved by the *Situational Action Theory*.[85] *R. Durrant*, who studies the problem of classification of crimes, notes that the concept of crime is related to morality.[86] Criminologists *P. Wistrom* and *A. Botom* note that morality is central for criminological theories and studies, that all criminologists should be interested in morality [87] and so on.

If we derive from this standpoint, then it turns out that the crimes of *malum in prohibitum* are also in line with the concept of sin and all crimes in criminal law should be considered as forms of sin. But, the above formulation would have been given the shape of a conclusion if not a one circumstance. In particular, Orthodox Christian morality is not always identical with the morality of positive law. As we know, Christian morality is the divine law, uncahngable, eternal and faultless. The „conventional morality" recognized in positive law is based on the perceptions of the vast majority of society, which greatly determines the content of „individual morality" and is changable over time.[88] For example, *Weber*, *Simmel*, *Durkheim* and *Mars* viewed morality as a social phenomenon,[89] while according to *J. Wald*, criminal law does not always reflect the values of society,[90] and so on.

Therefore, we can speak about crime as the form of sin only formally and conditionally. For a crime to be considered unconditional form of sin, then the criminal norm must conform to Christian morality, law, commandments, principle, concept and so on.

Though *R. Frank* concludes that „every action provided for by criminal law necessarily coincides with the principles of religion and morality",[91] we must not forget that there are also different attitudes on morality in positive law. Thus, it is advisable to take steps to ensure that every act set by criminal law necessarily coincides with the principles of religion and/or morality.

As for criminality, it can be said that sin contains social, legal, mass and in general, all other features of criminological notion of criminality.

In the correlation and evolution of crime and criminality, we can distinguish at least the following 4 issues: 1) at a particular stage in history of mankind, by violating a socio-legal norm (God's warning) a single crime was committed by man (the first sin); 2) the mentioned crime acquired a mass character in the whole territory, time and space of the country; the crime was multiplied quantitatively and qualitatively; 3) the mentioned crime gave rise to phenomenon – „criminality", which turned into a universal problem; 4) God uses a normative tool to save humanity, to prevent crime, - establishes social, moral and legal norms. Taking into consideration

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85 *Wikström Per-Olof H.* and *Sampson R.J.*, The Explanation of Crime, Context, Mechanisms and Development, UK, 2006, 94-95.

86 *Durrant R.*, Evolutionary Theory and the Classification of Crime, 2020, 7, el-Jurnali "A Review Journal", Aggression and Violent Behavior (Editor-in-Chief: *Hasselt V.V.*), <https://doi.org/10.10-16/j.avb.2020.101449,> [01.07.2020].

87 *Wikström, P-O.*, Explaining Crime as Moral Action, ix. Handbook of the Sociology of Morality (eds.: *Hitlin S.*, *Vaisey S*), New York, 2010, 211.

88 *Khubua G.*, Theory of Law, Tbilisi, 2015, 77 (para. 168), (in Georgian).

89 *Powell C.,* Four Concepts of Morality, see: Handbook of the Sociology of Morality (eds.: *Hitlin S.*, *Vaisey S.*), New York, 2010, 35.

90 *Treadwell J.*, Criminology the Essentials, second edition, London, UK, 2013, 12.

91 *Frank R.*, Kommentar Uber das Grobherzolich Hessische StGB, I Teil, S. 550, quoted from the article: *Kutalia L.G*, Ignorance of the Norm in Criminal Law (the notion of the obligation to know the norm), Journal of the Herald of Justice, № 1-2, Tbilisi, 1999, 35 (in Georgian).

the fact that sin is a historically changing, socio-legal and mass phenomenon characterized by quantitative and qualitative indicators, we can conclude that criminality (and not a separate crime always) is one of the forms of sin.

Based on all the above, it can be said that like sin, both crime and criminality are transcendental act and phenomenon, because one specific criminal act always violates a entire normative order.

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Guliko Pheradze*

Breach of the Alliance Agreement, as a Precondition for the National-Liberation Movement (On the Example of Treaty of Georgievsky, 1783)

The legal events that developed in Georgia at the end of the XVII century vastly determined the political, social, or economic life in the following XIX-XX centuries. It had an impact not only on Georgia but also in the Caucasus region.

Even today the painful historical lessons learned by the Georgian State which were caused by the violation of the 1783 Alliance Treaty, are actual. Herewith, the complex geopolitical environment around us still exists. Enemies are in the neighborhood. After gaining independence, in the XXI century, we have been convinced many times in it. At the same time, the historical choice of the Georgian nation to join the big European family again is firm.

In the distant past of Georgia and at the beginning of the last century, Georgia as a democratic republic tried to achieve the desired goal, but in vain. At the end of the twentieth century, after gaining independence we were given such an opportunity again and we must make every effort, including remembering the legal history of our country to avoid the mistakes of the past.

Keywords: *Treaty of Alliance, Georgievsky Treaty, Internal Autonomy, Manifesto, Russian Government, National Liberation Movement, The Hague Conference, The restoration of Statehood.*

1. Introduction

The eighteenth century, especially the second half, became the beginning of great changes for Georgia and the Georgian nation. The alliance agreement between Russia and Georgia, known in history as a Georgievsky Treaty, helped stir up a national liberation ideology in the country and the formation of a political movement.

Therefore, the paper will primarily focus on the nature of the agreement between the two political entities. In particular, what legal burden it had, whether it was an agreement on subordination or an agreement on union and about patronage. In the historical context, we discuss the legal and factual consequences of the treaty concluded by Erekle II to maintain statehood, fulfillment of the obligations, or not by Russia.

Together with the alliance agreement, we analyze the legitimacy of the abolition of Kartl-Kakheti Kingdom and the legal opinions of the representatives of a powerful national-liberation movement. Such as Solomon Dodashvili, the leader of the 1832 conspiracy, young Georgians who appeared public in the 1960s under the name of "Tergdaleuli", the patriots who represented this issue for discussion at the International Conference in the Hague in 1907. And, of course, the idea of the autonomous Georgian state (before the restoration of independence) under the 1783 treaty. The idea passed through generations of Georgian patriots and was finally written down in the action plan formed by the National Democrat Ilia Chavchavadze.

* PhD student and Visiting Lecturer of Ivane Javakhishvili Tbilisi State University, Faculty of Law; Scientist at Tinatin Tsereteli Institute of State and Law, Visiting Lecturer at Georgian-American University.

2. Looking for an International Partner to Maintain Statehood

In order to maintain its political status and importance in the international arena, the support of a strong ally then, as now, was very important for the Georgian state. Erekle II was well aware of this. The Georgian monarch, who was surrounded by Muslim states, in order to receive financial aid (not to mention military support) – even in the form of a loan, first drew attention to the European states.

In the early 80s of the XVIII century, with the help of Catholic missionaries close to him,[1] he sent a letter to: Roman Emperor Joseph II,[2] the Senate of Venice,[3] Chiefs of Venice and Naples,[4] King Louis XVI of France (1754-1793) [5] and Emperor of Austria.[6] For example, to enhanced interest in the issue, the Georgia side even offered military assistance in the fight against the Ottomans to Emperor Joseph II (1765-1790) in exchange for a loan.[7] Unfortunately, Erekle II did not receive a reply letter from Europe.[8]

Accordingly, the accusation of King Erekle for failing to seek an ally in Europe before orienting himself towards the Russian Empire, would not be right. It would be correct to say that Europe had no time for Georgia even then. After the fall of Constantinople, the endeavor of the Georgian Kings – beginning with the last king of united Georgia, George VIII, who was the founder of the Kakhetian Bagration dynasty, continued with Teimuraz I, Vakhtang VI, and ended with Erekle II - to obtain military support from European states, did not lead to the desired result.

Alternately, a certain intersection of interests was revealed between the political goals of Erekle II and the Russian Emperor Catherine II. At that time, the latter was making every effort to strengthen her influence in the Transcaucasia. [9] In this sense, it is clear that the position of Erekle II was of great importance. After long deliberation, he made a choice in favor of a less reliable but at least co-believer Russian Empire. On a strong ally which in his estimation would be very useful for the Georgia people, especially in transforming state life into European order.[10] Foremost, we see the result of this judgment in the treaty signed by the representatives of King Erekle II of Kartli-Kakheti and the Russian Emperor Catherine II in the fortress of Georgievski on July 24, 1783.[11]

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1 *Tamarashvili M.,* History of Catholicism among Georgians, Tbilisi, 1902, 398-403 (in Georgian).
2 *Janashvili M.,* History of Georgia, Tbilisi, 1894, 455 (in Georgian).
3 *Tamarashvili M.,* History of Catholicism among Georgians, Tbilisi, 1902, 397-398 (in Georgian); *See also: Tsintsadze I.,* Protection Treaty of 1783 – Materials for the History of Russian-Georgian Relations, Tbilisi, 1960, 88 (in Georgian).
4 *Rachvelishvili Kr.,* Short History of Georgia – from the Beginning to 1917, Tbilisi, 1925, 180 (in Georgian).
5 *Dumbadze M.,* Essays on the History of Georgia, IV, Tbilisi, 1973, 685 (in Georgian).
6 *Javakhishvili I.,* Relations between Russia and Georgia in the XVIII Century, Tbilisi, 1919, 23 (in Georgian).
7 Ibid.
8 *Janashvili M.,* History of Georgia, Tbilisi, 1894, 455 (in Georgian).
9 *Rachvelishvili Kr.,* Short History of Georgia – from the Beginning to 1917, Tbilisi, 1925, 181 (in Georgian).
10 *Dumbadze M.,* Essays on the History of Georgia, IV, Tbilisi, 1973 688 (in Georgian).
11 *Janashvili M.,* History of Georgia, Tbilisi, 1894, 456 (in Georgian).

3. On the Legal Nature of the Alliance Agreement

Before examining the specific articles of the treaty, briefly discuss the content of the preamble. It focuses on centuries-old ties and good neighborly relations between co-believer states. The fact that the word homager was not found in this very important legal document must be conditioned in the same spirit (formally at least). For a diplomatic term, a synonym of which was full incorporation in the eighteenth century and which was so often used by Russian diplomats in dealing with empire-dependent international legal entities.[12]

Definitely, apart from the external side, there were other, more important reasons for not using it. Chiefly, it was the ratio of forces that existed in the region at that time and was also reflected in the Treaty of Alliance. "Georgia – as academician Levan Aleksidze correctly remarked – was not homager to Russia".[13] The desire of Erekle II was to receive protection from the Russian side and not homager. „Protection at the expense of limiting sovereignty, but in favor of the latter".[14]

The position of Erekle II is noticeable with regard to the both basic and secret (separate) articles of the treaty. We will focus on just a few of the 13 main and 4 separate articles. According to the first article, the king of Kartli-Kakheti was recognizing the sovereignty of the emperor and was refusing to negotiate with other states without the consent of Russia.[15] In return, according to the second article of the same treaty, Russian Emperor Catherine II, along with protecting the county's borders, pledged herself to assist the Georgian side in returning the lost territories. Furthermore, the agreement satisfied one of the main demands of the Georgian side – the ancient rule of King coronation remained in force. [16] In accord with the third article, the descendants of Erekle II had to retain the legitimate right to continue governance. However, the new king on the throne had to be approved by the Russian emperor by sending a proper deed and signs of investiture. After which, he solemnly took an oath of allegiance to the imperial throne.[17]

The opinion of one of the founders of the Georgian National-democratic Party, lawyer, diplomat, and public figure, professor Zurab Avalishvili (1874-1944) regarding the sending signs of investiture by the emperor, is noteworthy. The Georgian scientist saw a formal character in all this, which did not even determine the power of the empire in Georgia, but represented "the right of advantage and benefit granted by the treaty to the King of Kartli and Kakheti".[18]

We will also focus on the content of the article fourth of the agreement, according to which the Georgian side was banned from negotiating or establishing relations with other states without the consent of the Russian resident. The next fifth article foresaw the exchanging of represen-

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12 *Aleksidze L.,* Georgian-Russian International Legal Relations in the XV-XVIII Centuries, Tbilisi, 1983, 175 (in Georgian).

13 Ibid, 176.

14 Ibid.

15 *Paichadze G.,* Treaty of Georgievsk – Agreement of 1783 on the Entry of Eastern Georgia under the Protection of Russia, Tbilisi, 1983, 30 (in Georgian).

16 Treaty on the Recognition by the King of Kartalinsky and Kakhetian Heraclius II of Patronage and Supreme Power of Russia (Treaty of Georgievsky), 1-2, <http://www.amsi.ge/istoria/sab/georgievski.html> [04.03.2022] (in Georgian).

17 Ibid, 3.

18 *Aleksidze L.,* Georgian-Russian International Legal Relations in the XV-XVIII Centuries, Tbilisi, 1983, 179 (in Georgian).

tatives in the form of ministers (residents) at each other's kingdoms. It is noteworthy, that the Russian emperor promised to receive King Erekle's representatives with equal respect to other ministers. [19]

The mutual use of the Treaty of Alliance becomes even more apparent in the sixth and seventh articles. In particular, according to article sixth, if the enemy of Georgia was considered as an enemy of the Russian Empire and "the king Irakli Teimurazovich and the heirs of his house" retained the royal throne, which is very essential, the Russian side would not interfere in the internal affairs of the allied state. Besides, Russian military or civilian representatives were even forbidden to issue any order in Georgia. In return, according to the article seventh, the Georgian side and firstly, Erekle II, undertook the responsibility to assist the Russian side with military forces, as needed. [20]

As for the next eighth-eleventh articles of the agreement, they created favorable conditions for the Georgian Orthodox Church, nobility, merchants, or representatives of different social classes. In particular, the agreement aquated the Georgian nobility with the Russian nobility in "privileges and benefits", privileges were provided for Georgian and Russian traders for transporting-businesses on the territory of both Contracting Countries and so on. [21]

The last two articles of the treaty had clearly contractual content. In particular, article thirteen of the agreement set a six-month period for the document to enter into force. Specific significance had the article twelfth, according to which, Treaty of Georgievsky was signed for an "eternal" term and specified, that making the changes in it was possible only with the consent of both contracting parties. [22]

As for the separate (secret) articles, the first one[23] portrayed the Russian emperor as a "mediator" between the kings of Eastern and Western Georgia, Erekle II and Solomon II.[24] The last three articles referred to the military obligations of the parties. According to the second separate article, in order to defend Kartli-Kakheti, the Russian side took the responsibility to send two full infantry battalions with four cannons and in case of war other military forces would be added. The third article guarantees to fully inform Erekle II in case of war, for planning combat actions with the Russian side. [25] The fourth separate Article obliged the Russian side to defend the country with weapons during the war and moreover, to assist in the return of the lands seized by the enemy of Georgia. [26]

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19 Treaty on the Recognition by the King of Kartalinsky and Kakhetian Heraclius II of Patronage and Supreme Power of Russia (Treaty of Georgievsky), 4-5, <http://www.amsi.ge/istoria/sab/georgievski.html> [04.03.2022] (in Georgian).

20 Ibid, 6-7.

21 Ibid, 8-11.

22 Ibid, 12-13.

23 Ibid, 1.

24 Definitely, The Emperor's meditation primarily served the interests of the Russian side "to hold Firmly in the Transcaucasia" and not only in its eastern part. See: *Tsintsadze I.,* Protection Treaty of 1783 – Materials for the History of Russian-Georgian Relations, Tbilisi, 1960, 105-111 (in Georgian).

25 *Paichadze G.,* Treaty of Georgievsk – Agreement of 1783 on the entry of eastern Georgia under the Protection of Russia, Tbilisi, 1983, 55 (in Georgian).

26 Treaty on the Recognition by the King of Kartalinsky and Kakhetian Heraclius II of Patronage and Supreme Power of Russia (Treaty of Georgievsky), Separate Articles, 1-4, <http://www.amsi.ge/istoria/sab/georgievski.html> [04.03.2022]. *See also: Paichadze G.,* Treaty of Georgievsk – Agreement of 1783 on the entry of eastern Georgia under the Protection of Russia, Tbilisi, 1983, 55 (in Georgian).

We focused on specific articles of the Georgievski Treaty because in the XIX-XX centuries, before the overthrow of the Russian empire in 1917, many generations of Georgian patriots, including the Georgian National Democrats, based on this document during the definition of the rules of relations between the two states. Based on the only document signed by both parties which unequivocally stated (and still states today) that the abolition of the Kingdom of Kartli-Kakheti was not really conditioned by the agreement.

4. Legal and Actual Outcomes of the Alliance Agreement

Unfortunately, the agreement signed for the protection and preservation of Georgian statehood brought radically different results. The desire of the Muslim states to eliminate Russian influence in Eastern Georgia was so great that in 1793, Ottoman Sultan Selim III "invited" indomitable enemy in Georgia, Iran to bring back the old glory in the region.[27]

Kind Erekle was well aware of the threats from the Islamic world. He systematically reminded the articles of the treaty to Catherine II from the late 1980s, according to which the Russian side was obliged to assist the Georgia monarch with military forces.[28] The Georgian nobles with a joint statement also reminded the Russian emperor about the treaty obligations in 1793.[29] Erekle II with the help of his ambassador in Russia, Garsevan Chavchavadze asked for military assistance in early 1794 but still in vain.[30] On the contrary, instead of stepping up military aid, Catherine II recalled the military units that had been stationed in Georgia under the 1783 treaty.[31]

Meanwhile, the worse expectations of the Georgian side were met. In 1795, Iranian troops entered the Caucasus and his ruler, Agha-Mohammad-Khan Qajar demanded from Erekle II to renounce alliance with Russia and recognize Iran's supremacy. Little Kakhi, who was waiting for help, rejected the offer from the governor of Iran. Eventually, Erekle with seven times fewer forces was left without help and he fought with numerous enemies in Krtsanisi's field.[32] The results are well known – the Georgians were defeated. The enemy captured Tbilisi on September 11, 1795. The population was severely abused, King's palace, churches, and monasteries, governmental or cultural-educational institutions were burnt and sacked.[33]

It can be said Georgia made a huge sacrifice due to the non-fulfillment of the obligations assumed by the contracting side. And no one was responsible for this criminal inaction. As it turned out later, Catherine II, with great delay, only on September 4, 1795, signed a rescript to send two full battalions to assist Kartli-Kakheti.[34] Even later, on October first, Commander of the Caucasus Military line received the letter. Two weeks earlier the hordes of Agha-Mohammad-Khan had already left Georgia.[35]

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27 *Dumbadze M.,* Essays on the History of Georgia, IV, Tbilisi, 1973, 755 (in Georgian).
28 Ibid, 699.
29 *Bedianashvili A.,* National Issue in Georgia - 1801-1921, Tbilisi, 1980, 14 (in Georgian).
30 *Dumbadze M.,* Essays on the History of Georgia, IV, Tbilisi, 1973, 756 (in Georgian).
31 *Aleksidze L.*, Georgian-Russian International Legal Relations in the XV-XVIII Centuries, Tbilisi, 1983, 202 (in Georgian).
32 *Bedianashvili A.,* National Issue in Georgia - 1801-1921, Tbilisi, 1980, 14 (in Georgian).
33 *Javakhishvili I.,* Relations between Russia and Georgia in the XVIII Century, Tbilisi, 1919, 42 (in Georgian).
34 *Dumbadze M.,* Essays on the History of Georgia, IV, Tbilisi, 1973, 758 (in Georgian).
35 Accordingly, the position of Academician Iv. Javakhishvili is correct that the main contribution to the tragedy of 1795 was made by our northern ally – Russia, which failed to provide effective steps to assist the protégé in a timely manner. See: *Aleksidze L.*, Georgian-Russian International Legal Relations in the XV-XVIII Centuries, Tbilisi, 1983, 214 (in Georgian).

Even after the death of Ekaterine II (November 6, 1796), the Russian side continued to operate only in accordance with their own interests. Exactly one month later, on December 6, Emperor Paul I issued an order to cease all military operations in the region[36] and in March 1797, the last units of the Russian army located in Georgia left the country one more time.[37]

The onerous political situation in Kartli-Kakheti was aggravated by the death of King Erekle on January 11, 1798, and George XII continued his negotiations with the Russian empire. The last king of Kartli-Kakheti, who – as Academician Ivane Javakhishvili mentioned- was like his father, neither in talent nor in personal generosity, „from such a difficult political situation, he should guide Georgia to peace with wise foresight and caution". [38] Moreover, in Georgian historiography, some scientists have expressed a well-founded thought that it was „George XII's irrational pro-Russian foreign policy that accelerated the end of the Kingdom of Kartli-Kakheti".[39]

It should be noted that the legacy of the king of Kartli-Kakheti George XII was certainly the hardest. It is correct that the homicide of Agha-Mohammad-Khan on June 1797 defuse tension somewhat,[40] but his nephew and successor, Baba-khan, an active opponent of Russian rule in the Caucasus, continued his uncle's strategy and posed no less of a threat to the country.[41]

On August 30, 1798, Paul I sent a letter to the new ruler of Kartli-Kakheti expressing his desire to restore international relations, congratulated the status of King, and reminded that a formal request for approval of the throne was expected from him under the Treaty of 1783.[42] After receiving a letter of this content from the Georgian monarch, granted his request and sent him a deed of approval as king and royal insignia. The investiture was accompanied by the Emperor's permanent resident in Kartli-Kakheti, Petre Ivan Kovalensky, as a minister, with one battalion of Russian troops, which was established as "a permanent residence" in Georgia.[43]

After receiving the deed of approval and investiture, George XII was crowned by Catholicos Anton II at the Church of Anchiskhati in Tbilisi on December first, 1799, and the King swore allegiance to the Russian Empire. [44] Supposably, after that, the kingdom should have calmed down

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36 *Javakhishvili I.,* Relations between Russia and Georgia in the XVIII Century, Tbilisi, 1919, 48 (in Georgian).

37 *Aleksidze L.,* Georgian-Russian International Legal Relations in the XV-XVIII Centuries, Tbilisi, 1983, 222 (in Georgian).

38 *Javakhishvili I.,* Relations between Russia and Georgia in the XVIII Century, Tbilisi, 1919, 57 (in Georgian). See also: *Aleksidze L.,* Georgian-Russian International Legal Relations in the XV-XVIII Centuries, Tbilisi, 1983, 225 (in Georgian). As academician Levan Aleksidze mentioned, the main concern of George XII was to preserve the royal throne for his heirs.

39 *Vachnadze M., Guruli V.,* Georgian-Russian Relations (1801-1921), Tbilisi, 2009, 5 (in Georgian).

40 Frightened by the cruelty of Shakh, the servants killed Agha-Mohammed-khan during his sleeping. According to Platon Ioseliani, one of the Servants named Sadigha was from Georgia. See: *Javakhishvili I.,* Relations between Russia and Georgia in the XVIII Century, Tbilisi, 1919, 49 (in Georgian).

41 *Bedianashvili A.,* National Issue in Georgia - 1801-1921, Tbilisi, 1980,16 (in Georgian).

42 Ibid, 17.

43 *Dubovin N. F.,* History of the War and Domination of Russians in the Caucasus, Vol. III, St. Peterburg, 1886, 244 (in Russian).

44 The Royal Crown which was worn by all successors of the Georgian throne was stolen during the invasion of Tbilisi (Georgia) by Agha-Mohammad-Khan. Therefore, the emperor Paul, by the hand of the resident Kovalensky, along with other signs of King George's investment (flag, sword, scepter, throne, mantle) also sent a new crown. See: *Dubovin N. F.,* History of the War and Domination of Russians in the Caucasus, Vol. III, St. Peterburg, 1886, 245 (in Russian).

but the opposite happened. As George ascended the throne the confrontation between him and other members of the royal family united around Queen Mother Darejani intensified. The conflict showed itself in Erekle's lifetime and the main reason for confrontation was the amendment of the rule of succession. As Plato Ioseliani wrote: "One unseemly will written by Osef Yorghanashvili caused disturbance between brothers". [45]

According to the will, the first who own the royal throne after the King's death was George, the eldest son of Erekle, then his next brother Yulon, and so on until Parnaoz Batonishvili, the youngest son of Erekle. Afterward, the right to the royal throne will pass to King Georges's sons: David, John, Bagrat and etc. [46] As soon as George XII became king, he began to take care of the recognition of his son David Batonishvili as the heir to the throne, which led his brothers to be offended. Yulon Batonishvili and his supporters accused King George of violating his father's will and pursuing his own interests. [47]

That's why King George was afflicted with "brothers or foreign enemies" and suffered from severe pain,[48] on June 24, 1800, signed a petition. A critical (can be said "decisive") document in Georgian-Russian relations. The petition consisted of 16 Articles and provided for a substantial amendment to the 1783 treaty, which had been a detriment for Georgian sovereignty. In particular, George XII, on behalf of nobility, the clergy, and the people, offered the Russian Emperor to declare the Kingdom of Kartli-Kakheti as a „belonging" to the Russian Empire.[49] It is the truth that under the new provisions the monarchy was not abolished (the royal throne should be retained by its inheritors too). However, this only applied to the executive branch of government. Legislative power transited to the Emperor. The King of Kartli-Kakheti and his heirs had to obey "the rules and order of the Russian Emperor".[50]

George XII had some conditions towards Emperor. Particularly, he demanded salary and villages in Russia[51]. Moreover, an immediate increase of Russian troops in Georgia[52] and tax relief for several years for the population exhausted by the invasions[53] and etc.

However, the most important issue was renouncing independence and declaring Kartli-Kakheti as a 'belonging" to the Russian Empire. Russian Emperor welcomed this initiative with great joy. The effect was tremendous that Paul I, who knew about the King's illness and the confrontation with royals in Tbilisi, he tried hard to ratify the new treaty during the lifetime of

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45 *Ioseliani P.,* Life of King XII and the Unification of Georgia with Russia, Second edition, Tfilisi, Printing House of Ekvtime Iv. Kheladze, 1893, 143 (in Georgian).

46 Ibid, 72.

47 *Bedianashvili A.,* National Issue in Georgia - 1801-1921, Tbilisi, 1980, 19 (in Georgian).

48 King George was so weakened by the illness that, as we can see from his letter to General Knorring in August 1800, state affairs were completely cut off at the time. Minister Kovalensky and his son, Prince Ioane were in charge of making decisions. See: Dubovin N. F., History of the War and Domination of Russians in the Caucasus, Vol. III, St. Peterburg, 1886, 236 (in Russian).

49 *Vachnadze M., Guruli V.,* Georgian-Russian Relations (1801-1921), Tbilisi, 2009, 4, <https://sangu.ge/images/vguruli/17geo.pdf> [07.03.2022] (in Georgian).

50 Ibid, 5.

51 Ibid.

52 It was implied the permanent deployment of a Russian corps of three thousand in the region and in case of an enemy attack, the obligation to bring an additional seven thousand troops. See: *Aleksidze L.,* Georgian-Russian International Legal Relations in the XV-XVIII Centuries, Tbilisi, 1983, 226 (in Georgian).

53 *Bedianashvili A.,* National Issue in Georgia - 1801-1921, Tbilisi, 1980, 18 (in Georgian).

King George. The signature of the Georgian monarch was legally essential. According to Article 12 of the 1783 treaty explicitly required it. Consequently, amendments to the treaty could only be made by mutual consent.[54]

Georgian ambassadors Giorgi Avalishvili and Revaz Palavandishvili were immediately sent back for signing the treaty. But the Emperor did not wait for the signature of the Georgian Monarch and had prepared the manifesto on the unification of Kartli-Kakheti with Russia by December 18, 1800. Moreover, a month earlier, on November 15, 1800, he had sent an order to the head of Caucasus Military Line, General Carl Knorring, in the event of the death of King George "should not have permitted the heir to be ascended the throne until he received the order from St. Petersburg". [55]

The death of King George (21.12.1800) could not hinder the fulfillment of the emperor's intention. In just 20 days after his death, on January 18, 1801, a manifesto was officially published by the order of Paul I in St. Petersburg, prepared on December 18, on the abolition of the Kartli-Kakheti Kingdom and its unification with the Russian Empire. [56] However, the work started by his mother Ekaterine II, could not finish Paul I either. On March 11, 1801, he was murdered by conspirators in his house. [57]

His successor, Alexander I, the so-called "sly Byzantine" by Napoleon Bonaparte, initially seemed to intent reconsidering his father's decision regarding Georgia. But, like his predecessors, he declared his long-standing decision to the public. On September 12, 1801, he signed the manifesto emphasizing that Georgia had already been annexed by the Russian Empire by the Manifesto of January 18, 1801. The ground of his decision was: not selfishness, not a desire to increase his power, not aspiration for expanding the borders of the largest empire, but begging and imploring of coreligionist Georgian people not the leave them against danger, to introduce a form of Government in Georgia that would be able to establish justice, provide them with personal and property security, and the rule of law in the country.[58]

That was nominal. Actually, Kartli-Kakheti was declared a Russian province. And the legal consequences of the September 12 manifesto were far from the conditions that Erekle II had signed. It was even further from the conditions set out in the "petition letter". Moreover, the agreed version as we have mentioned before was not signed by George XII.

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54 Treaty on the Recognition by the King of Kartalinsky and Kakhetian Heraclius II of Patronage and Supreme Power of Russia (Treaty of Georgievsky), <http://www.amsi.ge/istoria/sab/georgievski.html> [04.03.2022] (in Russian).

55 *Bedianashvili A.,* National Issue in Georgia - 1801-1921, Tbilisi, 1980, 20 (in Georgian).

56 Manifesto of January 18, 1801, On the Accession of the Georgian Kingdom to Russia. With the Application of the Form of the Imperial Title. <https://base.garant.ru/55003856/> [04.03.2022] (in Russian).

57 It should be noted that this murder did not take place without the participation of Georgians. One of the organizers and executors was a Georgian officer, Vladimir Iashvili. See: *Kutateladze Z.,* Georgian Genes in the Service of Foreigners: 100 Selected Biographies, Tbilisi, 2011, 79-81 (in Georgian).

58 Акты, собранные Кавказской археографической комиссией, т. 1, Типогр. гл. упр. Наместника Кавказского, Тифлис, 1866, 433 (in Russian).

5. The Demand for the Restoration of the Statehood on the basis of the Treaty of 1783 – from the Idea of Autonomy to Full Independence

As Elise Rek Liu, a secretary of the British Peace Society wrote "The Russians have forgotten that the Georgians are allied of the Russian Empire", who agreed to the protection of Russia only on the terms of the treaty. They forgot that they promised the country the rights to maintain their language, customs, religion, national police, printing their own money.[59] In fact, according to the famous scientist and politician: "The whole policy of Russian government toward Georgia was that it had been destroying the old Georgian culture and artificially created obstacles to prevent Western influence in Georgia".[60]

Alexander Asatiani, one of the founders of the Georgian National Democratic Party, a member of the Georgian National Council and the Constituent Assembly, should have borne in mind this ambiguity and harsh reality when he noted that the treaty had lost its legal force after 1783 due to unilateral decisions by the Russian party.[61] Moreover, according to his opinion, the Manifesto of 1801 finally relieved Georgia of the obligations mentioned in the treaty, which limited its sovereign rights.[62]

Now we do not consciously draw attention to the armed demonstrations that followed the proclamation of the Manifesto Sioni Cathedral and the introduction of the Russian government by Alexander I in Georgia. We mean revolts: In 1802 with the participation of Vakhtang (Almaskhani) and Teimuraz Batonishvili, who demanded the restoration of the royal throne and the proclamation of Julon Batonishvili as a King. Revolt of 1804 in Mtianeti of Eastern Georgia. Revolt of Kakheti in 1814, and in 1819-1820 revolts in the west of Georgia and etc.

Exactly, the rights under the Treaty were the basis of the project of Georgian autonomy, whose author was the ideological leader of the 1832 conspiracy, Solomon Dodashvili. He was aware that gaining full autonomy was unrealistic.[63] Based on the above-mentioned, he was one of the first among the conspirators, who wanted to restore Georgian statehood by "gaining political autonomy" for the country. [64] In the chart of rights of Solomon Dodashvili established for the autonomous unit, it is not difficult to perceive the conditions guaranteed for Georgia by the 1783 treaty: independent governance, non-interference in internal affairs, the independent justice system, getting an education in the Georgian language, and etc.

In the second half of the 19th century, the strengthening of the policy of Russification, banning of the term "Georgia" and calling it Tbilisi or Kutaisi province, was another challenge for the new generation of the National Liberation Movement, including the leader of "Tergdaleuli" Ilia Chavchavadze, Akaki Tsereteli, Niko Nikoladze, Iakob Gogebashvili, Alexander Kazbegi, and others. Based on their example, we see the authentic demonstration of the legacy of Georgian political and legal thought. Their demand and the rights recognized by the 1783 International treaty between Georgia and Russia are still relevant.

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59 *Вешапели Г.,* Единство грузии и русский протекторат, тип. Я. Сазанова, М., 1917, 34 (in Russian).

60 Ibid.

61 *Asatiani Al.,* Sovereign Rights of the Georgian Nation or Treaty, Newspaper "Georgia". 1917, 59, 4 (in Georgian).

62 Ibid.

63 *Putkaraia J.,* Political and Legal Views of Solomon Dodashvili, Tbilisi., 1997, 81 (in Georgian).

64 Ibid, 89.

In addition, at The Peace Conference in The Hague in 1907, Georgian patriots presented the "National Memorandum". And the Memorandum begins with their rights[65] and concrete facts of violation of them by the Russian Imperial Government.[66] Noteworthy that the conference was held by the initiative of the President of the USA.[67] Thousands of Georgians signed this magnificent document and like the great Kings of Georgia, they had their eyes fixed on Europe. They hoped that their case would be decided fairly and that Europe would force Russia to abide by the rules of International law. And, according to the treaty make them return our territory and restore our deprived national autonomy. [68]

Noteworthy that at the initial stage, the Georgian National Democrats were demanding autonomy within the Russian Empire based on their action plan. Ilia Chavchavadze started working on it in 1905-1906 and his ideological legacy in 1917, after the overthrow of Tsarism, formed the basis for the formation of the Georgian National Democratic Party. The party, whose contribution to the development of the National Liberation Movement in the right direction and the creation of an independent Georgian state in the early twentieth century, is enormous.

6. Conclusion

The violation of the 1783 treaty of the alliance by the Russian Empire resulted in the abolition of Georgian Statehood. And this fact turned into the decisive factor for the founding and development of the Georgian Liberation Movement in the XIX-XX century.

Based on the legal analysis of Georgievski Treat and envisaging the views of diligent Georgian Scientists, we conclude that the Kartli-Kakheti Kingdom should not have been subordinated to Russian Empire. By limiting its sovereignty, it must have been protected in the international arena and had independence in internal affairs.

It should be noted that the Georgievsky Treat is the only document defining the rights and obligations between Russia and Georgia. Besides, it is a piece of authentic evidence that the Russian Empire had no right to abolish the Kingdom of Kartli-Kakheti.

It explains the special interest of the leaders of the national liberation movement in the 1783 Treaty of Alliance. One of them was Solomon Dodashvili, the ideological leader of the conspiracy of 1832. His major demands were about the rights guaranteed by the Georgievsky Treat, such as independent government, non-interference in internal affairs, an independent justice system, and the opportunity of getting an education in the Georgian language.

Also, the treaty of alliance had great importance for the National-Liberation Movement in the 60s of the 19th century. Particularly for the generation of "Tergdaleuli" such as Ilia Chavchavadze, Akaki Tsereteli, Niko Nikoladze, Iakob Gogebashvili, and other prominent members. They all relied on the 1783 International Treaty to discuss the political rights of Georgia.

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65 University of Oxford, Bodleian Library, ms. Wardz. c.16.

66 Ibid.

67 *Scott B. J.,* The Work of the Second Hague Peace Conference, The American Journal of International Law, Jan., 1908, Vol. 2, No. 1, 13-14.

68 Memorandum of the People of Georgia Submitted in 1907 to the International Congress of Hague, University of Oxford, Bodleian Library MS. Wardrop c. 16.

At the beginning of the XX century, the agreement of alliance became a principal argument for Georgian patriots in the international diplomatic arena at the Hague international Conference - which was dedicated to the issues of peace between nations and the observance of the fundamental principles of international law[69] - Within the "National Memorandum" which was based on the 1783 treaty, they were calling more activity by the European States to make Russia under the rules of International law. In the end, the same rights were a guide for the National Democratic Party in the long and severe legal battle. A guideline that led the country to the restoration of independence in 1918.

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8. *Dubovin N. F.,* History of the War and Domination of Russians in the Caucasus, Vol. III, St. Peterburg, 1886, 244 (in Russian).
9. *Dumbadze M.,* Essays on the History of Georgia, IV, Tbilisi, 1973, 685, 688, 699, 755, 756, 758 (in Georgian).
10. *Ioseliani P.,* Life of King XII and the Unification of Georgia with Russia, 2nd ed., Tfilisi, Printing House of Ekvtime Iv. Kheladze, 1893, 72, 143 (in Georgian).
11. *Janashvili M.,* History of Georgia, Tbilisi, 1894, 455, 456 (in Georgian).
12. *Javakhishvili I.,* Relations between Russia and Georgia in the XVIII Century, Tbilisi, 1919, 23, 34, 42, 48, 49, 57 (in Georgian).
13. *Kutateladze Z.*, Georgian Genes in the Service of Foreigners: 100 Selected Biographies, Tbilisi., 2011, 79, 80, 81 (in Georgian).
14. *Paichadze G.,* Treaty of Georgievsk – Agreement of 1783 on the entry of eastern Georgia under the Protection of Russia, Tbilisi., 1983, 30, 55 (in Georgian).
15. *Putkaraia J.*, Political and Legal Views of Solomon Dodashvili, Tbilisi., 1997, 81, 89 (in Georgian).
16. *Rachvelishvili Kr.,* Short History of Georgia – from the Beginning to 1917, Tbilisi, 1925, 180, 181 (in Georgian).
17. *Tamarashvili M.,* History of Catholicism among Georgians, Tbilisi, 1902, 397, 398, 399, 400, 401, 402, 403 (in Georgian).

[69] *Scott B. J.,* The Work of the Second Hague Peace Conference, The American Journal of International Law, Jan., 1908, Vol. 2, No. 1, 4.

18. *Scott B. J.,* The Work of the Second Hague Peace Conference, The American Journal of International Law, Jan., 1908, Vol. 2, No. 1, 4, 13, 14.
19. *Tsintsadze I.,* Protection Treaty of 1783 – Materials for the History of Russian-Georgian Relations, Tbilisi, 1960, 105, 106, 107, 108, 109, 110, 111 (in Georgian).
20. *Vachnadze M., Guruli V.,* Georgian-Russian Relations (1801-1921), Tbilisi, 2009, 4, 5, <https://san-gu.ge/images/vguruli/17geo.pdf> [12.06.2022] (in Georgian).
21. *Veshapeli G.,* The Unity of Georgia and the Russian Protectorate, M., 1917, 34 (in Russian).

Tea Kavelidze *

The Constitutional Status of the Head of State and Government in the Field of Foreign Relations following the 1921 Constitution of Georgia and the "Transition Period"

The Constitution of Georgia of 1921 is an invaluable achievement of the history of Georgia, it emphasizes historical aspiration of the country towards democracy, European values and independence. During the so called transition period of the country's history following the above-mentioned period, in the fundamental law of the country, the constitution, the field of foreign relations and state-political officials considered as the Heads of State responsible for implementing foreign policy were formed differently throughout different years. Depending on the model of the Government in the country at that time, the role of the Head of State was played differently at different times by the first persons of the country. Accordingly, the scope and powers of the country's representation in the field of foreign relations had been varying. This paper will discuss the constitutional status of the Head of State and Government in the field of foreign relations pursuant to the 1921 Constitution of Georgia and the so-called constitutions of the "transition period".

Keywords: *The Constitution of Georgia of 1921, "transition period", the Head of State, the field of foreign relations.*

1. Introduction

"The adoption of the 1921 Constitution of Georgia was essential not only for the existence of the fundamental law for the Democratic Republic of Georgia, but for Europe and the civilized world as well, in order to declare democratic choice of Georgia."[1] It can be stated that the Constitution of 1921 represents a certain symbol of Georgia's aspirations towards the establishment of a united, democratic and independent country. Although the country had been under Russian Empire for more than a century, the authors of the Constitution managed to create a legal act that distinguished itself for its individuality and consistency among the constitutions of the post-World War I period.[2]

"The evolution of Georgian constitutional thought is directly related to the fact that the history of our country is essentially a history of fighting for the purpose of gaining or maintaining independence. If we analyze this history, it becomes clear that the issues of national, legal and state importance were given special significance in the past of the Georgian nation."[3]

With the "Georgian Independence Act" of May 26, 1918, it can be concluded that Georgia, acting in its capacity as an independent country, started a new life by adopting the first act in the history of constitutionalism and choosing a democratic republic as a form of political organization.

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* PhD Student of Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 *Demetrashvili A.,* Constitution of Georgia of February 21, 1921 From the 2011 revision, with the origins of Georgian constitutionalism - 90th anniversary of the Constitution of Georgia of 1921, Batumi, 2011, 10 (in Georgian).

2 *Papuashvili G*., 1921 Constitution of the Democratic Republic of Georgia, 2nd ed., Batumi, 2013, 3-4.

3 *Kverenchkhiladze G*., Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 166 (in Georgian), see citation: *Rukhadze Z*., Constitutional Law of Georgia, Batumi, 1999, 18 (in Georgian).

"The main value of the Georgian Independence Act is the message of the Georgian nation's centuries-old dream to the world."[4] According to the Independence Act, Georgia was established as an independent, full-fledged democratic republic. Georgia's peace goal was also stated through recognizing the principles of constant neutrality and good neighborly relations with all states, and most importantly, the state recognized its duties to ensure equal rights for its citizens.[5] "The next step was the adoption of the fundamental law of an independent Georgian state - the Constitution of Georgia - by the Constituent Assembly of Georgia on February 21, 1921, which opened the page of Georgian constitutionalism with the model of a parliamentary government."[6]

The main goal of the Government of that time was to create an exemplary democratic state in the South Caucasus. Karl Kautsky, a prominent European politician, spoke of the successful political, legal, and economic reforms initiated by the Georgian Social Democrats, noting that Georgia's democratic path in 1918-1920 was fundamentally different from the Bolshevik path of dictatorship and tyranny.[7]

In the so-called "transitional" Georgia, various forms of organization of the state authority were applied in 1990-1995, but in some of the stated forms the separation of powers existed only at the level of declaration (the Government of Zviad Gamsakhurdia, formally restored during the 1921 Constitution), in other forms of organization it did not exist at all (Military Council, State Council), and in the model of government established on the basis of the Law on State Authority, instead of the separation of powers, one person was simultaneously holding the legislative power (he was the Speaker of the Parliament of Georgia) whilst acting as the Head of State and being responsible for controlling the executive power.[8]

Therefore, it is interesting how the powers of the first persons of the country in the field of foreign relations were distributed in the above-mentioned periods of the Georgian history. As noted, the 1921 Constitution at the time represented a strong evidence of the aspiration for democracy and the civilized world within the constitutional legal scope, taking into account democratic values. On the basis on the above, the present paper will propose an analysis of the distribution of powers and the constitutional status of the Head of State in the foreign relations on the basis of the 1921 Constitution and the so-called transition period constitutions. It is noteworthy that the institution of the Head of State was established in a different way on the basis of the Constitution of 1921 and the constitutions of the later periods as well.

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4 *Kverenchkhiladze G.*, Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 166 (in Georgian), see citation: *Rukhadze Z.*, Constitutional Law of Georgia, Batumi, 1999, 18 (in Georgian).

5 Ibid, 166-167.

6 Ibid, 167, see citation: *Melkadze O.,* Georgian Constitutionalism, Book I, Tbilisi, 2009, 95 (in Georgian).

7 *Papuashvili G.,* A Retrospective on the 1921 Constitution of the Democratic Republic of Georgia, Vol.13, Issue 1, 2012; *Kautsky K.,* Georgia: A Social-Democratic Peasant Republic — Impressions and Observations, Chapter IX (H.J. Stenning Trans., International Bookshops Limited 1921), <http://www.marxists.org/archive/kautsky/1921/georgia/ch05.htm>, [17.02.2022].

8 *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tbilisi, 2010, 190 (in Georgian).

2. The Constitution of Georgia of 1921, its Role and Importance in the International Arena

The Constitution of Georgia[9] of 1921 took effect for only four days; on February 25 of the same year, Georgia was annexed by the Soviet Russia. Nevertheless, it can be said that the Constitution was a classic example of the fundamental law of the state and the experience of world constitutionalism was taken into account during its drafting process, especially in the field of human rights.[10]

The first feature that characterizes the 1921 Constitution as such, and in particular with regard to the executive authority, is the fact that the authors of the fundamental law rejected the fundamental principle of the separation of powers to certain extent. The reason behind this was that "the distribution of power ... would violate the unity of the state. It would always be a struggle between different state authorities."[11]

Although the 1921 Constitution did not enter into force in state life, it was intended to establish a number of important innovations in Georgian constitutionalism. The Constitution recognized the Democratic Republic as a permanent and constant form of state formation, as well as it enshrined a number of progressive ideas and norms, such as universal suffrage, freedom of speech, the abolition of the death penalty and etc.[12]

"The Constitution adopted by the Georgian legislators in 1921 can undoubtedly be considered as one of the most advanced and perfect human rights-oriented legislative acts in the world, reflecting the most advanced legal and political discourse and trends that were taking place in Western Europe or the USA at that time."[13] In the words of former German Foreign Minister Hans Dietrich Genscher: "At that time it [Georgia's 1921 Constitution] shared values such as freedom, democracy and the rule of law on which modern Europe is founded."[14]

The 1921 Constitution established a parliamentary government based on a parliamentary model, but did not provide for the position of the Head of State, whose duties were to be fulfilled in some respects by the Prime Minister.[15] "Such an argument is supported by the constitutional provisions, by virtue of which the Prime Minister was granted the highest representative power in

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9 Constitution of Georgia (February 21, 1921), Date of adoption 21/02/1921, Constituent Assembly of Georgia receiving the document, <https://matsne.gov.ge/ka/document/view/4801430?publication=0>, [17.02.2022] (in Georgian).

10 *Kverenchkhiladze G.*, Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 167 (in Georgian).

11 Ibid,173, see citation: *Matsaberidze M.,* The Concept of a Democratic Republic in the 1921 Constitution of Georgia, Tbilisi, 2009, 14 (in Georgian).

12 Ibid, 178 (in Georgian), see citation: *Papuashvili G.,* 1921 Constitution of the Democratic Republic of Georgia from the 21st Century Perspective, Constitution of the Democratic Republic of Georgia of February 21, 1921, Batumi, 2009, 4 (in Georgian).

13 *Papuashvili G.,* A Retrospective on the 1921 Constitution of the Democratic Republic of Georgia, Vol.13, Issue 1, 2012; *Genscher H.D.*, Introduction to Wolfgang Gaul, Adoption and Elaboration of the Constitution in Georgia (1993-1995), at 9 (IRIS Georgia 2002).

14 Ibid.

15 *Khetsuriani J.,* Forms of State Government and Prospects for the Restoration of Monarchy in Georgia, Research in Georgian Jurisprudence, Tbilisi, 2011, 36 (in Georgian), see citation: *Tsnobiladze P.*, Constitutional Law of Georgia, Vol. 1, Tbilisi, 2004, 104 (in Georgian).

the Republic and special powers in the field of foreign relations or declaring the state of emergency in the country."[16]

Hence, the role of the first Georgian Constitution in the process of preserving the state heritage is immeasurable and invaluable, which was reflected in the preamble of the current Constitution of August 24, 1995: "We, the citizens of Georgia ..relying on the historical-legal inheritance of the Constitution of Georgia of 1921 hereby declare this Constitution before the God and the Country"[17]

2.1. Status of the Head of State

The model of parliamentary government provided for in the 1921 Constitution can be attributed to a group of European-type parliamentary systems popular at the time, albeit with many peculiarities.[18] In particular, "we cannot say that the constitution was equally balanced in all three branches of authorities, because its construction did not include mechanisms for perfecting the influence of the executive authority on the parliament or, to the contrary, refining the impact of the parliament on the executive authority".[19] Another important circumstance is the fact that the Constitution did not set forth the institution of the President, which distinguishes the model of government set out in the 1921 Constitution from the classical form of the parliamentary government. Therefore, "among the peculiarities of the system of governance, which distinguished it from other parliamentary systems at the time, there may also be the absence of a neutral institution of the president (or monarch, in the case of a constitutional monarchy); establishment of only individual responsibilities of the government, etc."[20]

Due to the fact that the leaders of the then Democratic Republic were afraid to concentrate power in the hands of one person or group of persons, when discussing the model of governance, the choice was made in favor of a parliamentary republic, which completely ruled out the existence of the institution of the Head of State.[21] "The constitution has rejected an important institution of the republican model such as the elected Head of State, the president."[22] "We want a republic without a president" - concludes Rajden Arsenidze after analyzing the political-legal nature of the institution of the President and considers the latter as an unacceptable institution for the working class, for a democratic society.[23] "It seems that a significant part of the Social

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16 *Kverenchkhiladze G.,* Constitutional Law of Georgia, Tbilisi, 2017, 352 (in Georgian), see citation: *Tsnobiladze P.,* Constitutional Law of Georgia, Vol. 1, Tbilisi, 2004, 396 (in Georgian).

17 *Kverenchkhiladze G*., Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 179 (in Georgian)

18 *Papuashvili G.,* 1921 Constitution of the Democratic Republic of Georgia, 2nd ed., Batumi, 2013, 20 (in Georgian).

19 Ibid.

20 Ibid.

21 *Demetrashvili A.,* Constitution of Georgia of February 21, 1921 From the 2011 revision, with the origins of Georgian constitutionalism - 90th anniversary of the Constitution of Georgia of 1921, Batumi, 2011, 14 (in Georgian).

22 *Gonashvili V*., Constitutional Law of Georgia, Tbilisi, 2017, 113 (in Georgian).

23 *Arsenidze R*., Democratic Republic, *Gegenava D.(ed.),* 2nd ed., Tbilisi, 2014, 18 (in Georgian).

Democrats, considering the threats of one-man rule and under the influence of the Swiss model of governance, supported the establishment of a presidential republic."[24]

Conceptual views on the issue of the president were formed in the following two directions, particularly, the National Democrats were in favor, while the Social Democrats were against it (although the Social Democrats were in favor of the presidency of Noe Jordania and Pavle Sakvarelidze). As envisaged by the National Democrats, the introduction of the institution of the president would lead to the separation of powers, the implementation of the principle of non-interference between the authorities, since the parliamentary government together with the president was a guarantee of the existence of the strong authority.[25] It should be noted that in the parliamentary system, there is a great temptation for the Head of State to interfere with the competence of the government, the cabinet, if the president has had a political career in the past. Consequently, in order to reduce this risk, the president is not directly elected and in a parliamentary system, the president is usually elected by the parliament.[26] "Parliamentary systems owe their name to their founding principle, namely, that the parliament is sovereign."[27]

2.2 Status and Powers of the Government of Georgia in the Field of Foreign Relations Pursuant to the 1921 Constitution

For the Democratic Republic of that time, that established a parliamentary republic as a form of governance, the place of government was one of the major issues in the system of separation of powers.[28] In the 1921 Constitution, the executive branch was based on the "principle of government accountability and obedience", which is characteristic for the parliamentary system and which was derived from the system closest to Swiss democracy.[29] Superior Authority - the Government of the Republic represented a Board that was accountable before the Parliament.[30] The chairman of the government was elected for a term of one year, and he could be elected only for two consecutive terms. The remaining members of the government, and the ministers elected from the citizens eligible to run in the parliamentary elections, were appointed by the Prime Minister through extra-parliamentary means.[31]

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24 *Gonashvili V*., Constitutional Law of Georgia, Tbilisi, 2017, 113 (in Georgian).

25 *Gegenava D., Kantaria B., Tsanava L., Tsertsvadze T., Macharadze Z., Javakhishvili P., Erkvania T., Papashvili T.,* Constitutional Law of Georgia, Davit Batonishvili Institute of Law, Tbilisi, 2013, 59-60 (in Georgian).

26 *Lijphart A.,* Patterns of Democracy, Government Forms and Performance in Thirty-six Countries, 2nd ed., Yale University Press, New Haven and London, 2012, 128.

27 *Sartori G.,* Comparative Constitutional Engineering, An Inquiry into Structures, Incentives and Outcomes, second edition, New York, 1997, 101.

28 *Kverenchkhiladze G.,* The Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 168 (in Georgian).

29 Ibid. 169-170, see citation: *Matsaberidze M.,* Political Concept of the 1921 Constitution of Georgia, Tbilisi, 1996, 82 (in Georgian).

30 *Papuashvili G.*, The 1921 Constitution of the Democratic Republic of Georgia, 2nd ed., Batumi, 2013, 23-24 (in Georgian).

31 *Kverenchkhiladze G.,* Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 170 (in Georgian).

According to the 1921 Constitution, the head of Government was the chairman, who was elected by the Parliament and who at the same time held the position of the highest representative of the republic.[32] Chapter 5 of the Constitution was dedicated to the executive branch and Article 70 of the said Chapter defined the powers of the executive branch in the field of foreign relations. In particular, the Prime Minister was the highest representative of the Republic, he was authorized to appoint ambassadors to other states and foreign ambassadors were presented to him, and pertaining to Article 72, the common right and duty of the Government was to protect the foreign interests of the Republic. Under Article 73, the management of the remaining affairs of the Republic was distributed among the members of the Government.[33] At the same time, as mentioned earlier, the Constitution confers on the Prime Minister the competencies related to the "Highest Representation of the Republic" and the "Calling in the Armed Forces of the Republic" (Article 70), which confirms some of the powers of the Chairman of the Government, including granting the authorities of Commander-in-Chief.[34] Accordingly, pursuant to Article 70 of the Constitution, the Chairman of the Government was granted the powers characteristic to the Head of State (president). For example, appointment of ambassadors, state representation, and etc.[35]

It should be noted that the 1921 Constitution did not entail a direct record on the conclusion of international treaties and agreements. One might assume that this function would still be exercised by the executive branch and its head, given the absence of the institution of the President and the dominant role of the Government in the field of foreign relations. According to Article 54 (d) of the 1921 Constitution, the powers of parliament included the adoption of "peace, trade and similar agreements"[36] with foreign states. This record was presumably referring to the ratification of international treaties by the supreme legislative body. Therefore, on the basis of the review of these articles, it is possible to conclude that the adoption of international agreements was also carried out by the head of the Government or there was a possibility to delegate this function to other members of the Government. Such distribution contradicts the constitutional experience of countries having a parliamentary model of governance, deriving from the fact that the so-called "neutral arbitrator" is at least formally involved in foreign relations and exercises foreign powers with the consent and / or agreement of the government. Furthermore, there is another and important circumstance that "threatens" the concept of the parliamentary model of governance, particularly, "the 1921 Constitution cannot be considered as a classic parliamentary model, even given the fact that it did not entail a neutral figure - the Head of State as president, who "in the event of a crisis, would either dismiss the parliament or dismiss the government."[37] It is also important

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32 *Papuashvili G*., 1921 Constitution of the Democratic Republic of Georgia, Batumi, 2nd ed., 2013, 25 (in Georgian).

33 *Tevdorashvili G*., Constitutional Law of Georgia, Tbilisi, 2017, 353-354, 47-48 (in Georgian).

34 *Melkadze O*., Constitutional Law of Georgia, Tbilisi, 2011, 190-191 (in Georgian).

35 *Papuashvili G*., 1921 Constitution of the Democratic Republic of Georgia, Batumi, 2nd ed., 2013, 25 (in Georgian).

36 Constitution of Georgia (February 21, 1921), Date of adoption 21/02/1921, Constituent Assembly of Georgia receiving the document, <https://www.matsne.gov.ge/ka/document/view/4801430?publication=0>, [17.02.2022].

37 *Kverenchkhiladze G.,* The Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 175 (in Georgian).

to note that in a parliamentary system, if the Head of State was merely a decorative figure, it would make no sense to separate the roles of heads of state and government.[38]

According to the 1921 Constitution, " the executive branch of the highest governance" entailed the Government, and the Chairman of the Government was, in fact, the Head of State. "Such an argument is supported by the constitutional provisions, by virtue of which the Prime Minister was given the highest representative authority of the Republic and was granted special powers in the field of foreign relations or declaring a state of emergency in the country. It is likely that after the enactment of the Constitution, the relevant laws would regulate issues that were left open by the Constitution, however, it should be emphasized that in some cases the Constitution did not even contain blanket norms on this matter."[39]

In the model of parliamentary government established by the Constitution of the First Republic, the system of supreme bodies of state authority "ensures the primacy of the parliament, it clearly " oppresses" the government and the courts, practically nullifies the mechanism of restraint-balance" ... "the system wherein the chairman of the government can only be elected for one year and for two consecutive terms…" "would be less efficient and unstable to function"."[40] Montesquieu distinguished between the functions of the legislature, the executive and the judiciary branches, he developed a system of separation of powers and argued that if any of them fell into the same hands, there was a risk of tyranny. Montesquieu believed that in the so-called system of restraint and balance, three aspects were important, namely, first the functional aspect, then the separation of personnel and then the mechanism of control and balance.[41] Consequently, the branches of government had to restrain each other and their power.

3. "Transition Period" of Georgian History and its Reflection in the Constitutions of Georgia

On October 28, 1990, the first multiparty elections in the history of the Soviet Union were held in Georgia. The National Liberation Movement became member of the Supreme Council of Georgia with a majority, which, according to the results of the referendum held on March 31, 1991, was followed by the proclamation of the Act of Restoration of State Independence of Georgia on April 9.[42] Through the Resolution of April 9, 1991, in order to improve the state system of the Republic of Georgia, to strengthen the sovereignty of the country, the ensure the rights, freedoms and security of citizens, the official position of the President of the Republic of Georgia was established. The Supreme Council of Georgia was instructed to prepare the relevant legislative amendments.[43]

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38 *Linz J.,* Presidential or Parliamentary Democracy: Does It Make a Difference?, The Failure of Presidential Democracy, Vol. 1, Edited by *Linz J. and Valenzuela A.,* Baltimore and London, 1994, 46.

39 *Kverenchkhiladze G*., Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 174 (in Georgian), see citation: *Melkadze O.,* Georgian Constitutionalism, Book 1, Tbilisi, 2009, 107 (in Georgian).

40 *Demetrashvili A*., Constitution of Georgia of February 21, 1921 From the 2011 revision, at the origins of Georgian constitutionalism - 90th anniversary of the Constitution of Georgia of 1921, Batumi, 2011, 15-16 (in Georgian).

41 *Alder J.,* General Principles of Constitutional and Administrative Law, 4th ed., 2002, 108.

42 *Tevdorashvili G.,* Constitutional Law of Georgia, Tbilisi, 2017, 352 (in Georgian).

43 *Kantaria B.,* Constitutional Law of Georgia, 2nd ed., Tbilisi, 2014, 59 (in Georgian).

On April 14, 1991, at the extraordinary session of the Supreme Council, the Law on the Establishment of the President of the Republic of Georgia and Amendments to the Constitution of Georgia was adopted, which amended the 1978 Constitution."[44] It is true that the 1978 constitution was significantly "cleansed "and refined, but in essence it was still the Soviet constitution and no amendment could have fixed it entirely."[45] Also on April 14, at the hearing of the Supreme Council, the chairman of the Supreme Council of that time, Zviad Gamsakhurdia, was elected President of Georgia. Later, on May 26, the first general and direct presidential elections were held in Georgia and the vast majority of voters (87.03%) supported Zviad Gamsakhurdia's candidacy as the president of Georgia. "A president elected directly by the people, unlike the Soviet party nomenclature, was associated with the development of the country's freedom and independence."[46]

3.1 Foreign-Political Status of the President of Georgia

Pursuant to the constitutional amendments adopted on April 14, 1991, a citizen of Georgia (by birth) aged between 35 and 70, who had lived permanently in Georgia for at least the last five years, may have been elected President of the Republic of Georgia. The president was elected for a five-year term by universal, equal and direct suffrage by secret voting. Presidential elections would be considered valid if more than half of the voters had participated in it, whereas a candidate supported by more than half of the voters participating in the elections would be considered elected President.[47] The status of the President of the Republic of Georgia was determined in accordance with the new Chapter 13^1 named "President of the Republic of Georgia" added to the Constitution in force at that time. In particular, the Commander of the Republic of Georgia, the President of Georgia, represented the Republic of Georgia within the country and in international relations, and was the Supreme Commander-in-Chief of the Georgian military forces. The President was entitled to negotiate and sign international agreements of Georgia, receive credentials and conscription certificates of diplomatic representatives of accredited foreign states, appoint and summon diplomatic representatives of the Republic of Georgia in foreign states and international organizations, award the highest diplomatic ranks and other special ranks.[48]

The full list of powers of the President was prescribed by Article 121^4, whereunder the President of the Republic of Georgia, apart from representing the Republic of Georgia within the country and in international relations, headed the system of state governing bodies and ensured their interaction with the highest state authorities, nominated the Chairman of the Government for the purpose of appointing the Chairman to the Supreme Council and, formed the Government in agreement with the Chairman. The Supreme Council of Georgia approved the President of Geor-

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44 *Tevdorashvili G.,* Constitutional Law of Georgia, Tbilisi, 2017, 352 (in Georgian), see citation: *Tsnobiladze P.,* Constitutional Law of Georgia, Vol. 1, Tbilisi, 2004, 126 (in Georgian).

45 *Gegenava D.,* Introduction to the Constitutional Law of Georgia, Sulkhan-Saba Orbeliani University Press, 2019, 52 (in Georgian), see citation: *Khetsuriani J.,* From Independence to the Rule of Law, Publicist Letters, Interviews, Tbilisi, 2006, 311(in Georgian).

46 *Tevdorashvili G.,* Constitutional Law of Georgia, Tbilisi, 2017, 352 (in Georgian), see citation: *Tsnobiladze P.,* Constitutional Law of Georgia, Vol. 1, Tbilisi, 2004, 126 (in Georgian).

47 *Tevdorashvili G*., Constitutional Law of Georgia, Tbilisi, 2017, 353 (in Georgian).

48 *Kantaria B.,* Constitutional Law of Georgia, 2nd ed., Davit Batonishvili Institute of Law Publishing House, Tbilisi, 2014, 61-62 (in Georgian).

gia on the formation of the Government of the Republic of Georgia, changes in its composition, dismissal of the Chairman of the Government and members of the Government. The structure of government was determined by the Supreme Council on the basis of the recommendation submitted by the Council of the Republic. Furthermore, the President was authorized to repeal the resolutions and decrees of the Government of Georgia, to raise the issue of suspending the law of the Autonomous Republic and the resolutions of the Supreme Council before the Supreme Council, if they were contrary to the Constitution and the laws of the Republic of Georgia. The President of Georgia was authorized to sign the laws of the Republic and had the right to veto.[49]

"In terms of presenting the constitutional status of the President of Georgia at that time, several constitutional provisions related to the Government of the Republic can be considered interesting". Pursuant to the constitutional amendments, the Government, on the basis on the laws of Georgia and other decisions of the Supreme Council and the decrees of the President of Georgia, was authorized to issue resolutions and decrees for the purpose of implementing them. The government was accountable before the Supreme Council of the Republic of Georgia and the President. However, pertaining to the Constitution, the Government was under the authority of the President of the Republic. Nevertheless, if we take into account the fact that the President of the Republic of Georgia was authorized to dismiss the Supreme Council, the current form of Government of the Republic of Georgia can be attributed to the form of mixed government, wherein the President does not serve as the head of executive authority and sole executor, the Government, which was being formed by the President together with the participation of the Supreme Council and to whom the Supreme Council had the right to declare a vote of no confidence."[50]

At the end of 1991, the tense situation between the Government and the opposition escalated into the armed forces, resulting in the abolition of the institution of the President. The institution of the President of Georgia was re-introduced years later, deriving from the Constitution adopted on August 24, 1995.[51]

3.2 Constitutional Status of the Government of Georgia

On October 28, 1990, the first multi-party elections were held in Georgia, resulting in the victory of the national forces. However, as for the Government institution, no radical reforms had been implemented. Certain changes were made to the 1978 Constitution of Soviet Georgia, mainly in terms of being liberated from the Soviet appendix.[52] On February 28, 1991, the Supreme Council of Georgia introduced amendments to the Constitution in order to set forth the constitutional status and composition of the Government. The Council of Ministers of the Republic of Georgia was replaced by the wording "Government of the Republic of Georgia" in the Constitution, and it was also stated that "the Government of the Republic of Georgia was the highest executive and governing body of the state government of the Republic of Georgia." Prior to the

[49] *Tevdorashvili G.*, Constitutional Law of Georgia, Tbilisi, 2017, 353-354 (in Georgian).
[50] Ibid, 354.
[51] Ibid, 355.
[52] *Kverenchkhiladze G.*, Constitutional Law of Georgia, Tbilisi, 2017, 398-399 (in Georgian).

presidential election, the Government was solely formed by the Supreme Council of Georgia, before which the Government was accountable.[53]

On April 14, 1991, as noted, the Institute of the President of the Republic of Georgia commanding the system of state governing bodies and exercising the leadership of the government was introduced to Georgian constitutionalism.[54] The Government was the executive-governing body of the Republic, exercising its powers under the authority of the president.[55]

4. The "Minor Constitution" of Georgia of 1992 and its Peculiarities

The Parliament of Georgia, elected in October 1992, adopted the Law on State Government on November 6 of the same year. In the history of Georgian constitutionalism, this law is referred to as the "Minor Constitution" because it temporarily, before the adoption of the new constitution, undertook the regulation of the government, which, as a rule, is the subject of constitutional regulation in a democratic state. "Despite the shortcomings, the first "Minor Constitution" in the history of Georgian constitutionalism put an end to the era of the Soviet constitutions in Georgia."[56]

4.1 Foreign Political Status of the Head of State

The status of the Head of State was defined in Chapter Three of the law, which was titled as "Chairman of Parliament, Head of State." It was evident from the title that the highest state-political position of the country was united in the hands of one person, leading to the consideration that "the merger of these two highest positions into one instance was only a partial expression of the imperfection of the Georgian Government at that time."[57]

According to the Law on State Authority, the Head of State was the official of the Republic of Georgia of highest-ranking, representing Georgia within the country and in international relations, ensuring independence and territorial integrity of the state, protection of human rights and freedoms, coordinated activities of state bodies.[58]

The Chairman of Parliament - Head of State also conferred the highest diplomatic ranks and other special ranks on the basis of the recommendation of the relevant ministries, was responsible for conducting negotiations with foreign states and signing international treaties and agreements; was authorized to appoint and dismiss the Plenipotentiary and Extraordinary Ambassadors of the Republic of Georgia in agreement with the Parliament; Heads of diplomatic missions of foreign states, international organizations were accredited before the Head of State; The Parliament, headed by the Chairman of the Parliament - the Head of State, set forth the main directions of the domestic and foreign policy of the Republic of Georgia, state activities; was authorized to exercise

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53 *Kantaria B.,* Constitutional Law of Georgia, Second Edition, Davit Batonishvili Institute of Law Publishing House, Tbilisi, 2014, 62 (in Georgian).

54 *Kverenchkhiladze G.,* Constitutional Law of Georgia, Tbilisi, 2017, 398-399 (in Georgian).

55 *Kantaria B.*, Constitutional Law of Georgia, 2nd ed., Davit Batonishvili Institute of Law Publishing House, Tbilisi, 2014, 62 (in Georgian).

56 *Tevdorashvili G.*, Constitutional Law of Georgia, Tbilisi, 2017, 355 (in Georgian).

57 Ibid.

58 Article 17 of the Law of Georgia on State Government, <https://www.matsne.gov.ge/ka/document/view/5002871?publication=2>, [17.02.2022] (in Georgian).

control over the activities of the state authorities and governing bodies. Further, the Chairman was required to submit a report to the Parliament on the domestic and foreign situation of the country at least once a year or at the request of Parliament. The Chairman was entitled to appoint and dismiss the Deputy Prime Ministers, members of the Cabinet of Ministers and submitted to the Parliament for approval.[59]

Consequently, it can be stated that not only in the field of foreign relations, but also in the executive branch in general, the role of the Head of State was immeasurable and less consistent with the principle of separation of powers between the executive and the legislative authorities.

According to the model of governance in the country, the scope of competencies varies between the branches of the authoritative powers. "The constitution tries to regulate their powers and relations between each other as much as possible."[60] It is important to precisely separate the powers between the branches not only in the legal constitution, but in the de facto constitution as well, since "a society wherein the separation of powers is not defined has no constitution at all."[61]

4.2. Constitutional Status of the Government of Georgia

The next stage in the development of the institution of government is related to the Law on State Authority adopted on November 6, 1992, which served as the "Minor Constitution". "The main positive aspect of the "Minor Constitution" was referring to the fact that it put an end to the era of Soviet constitutions in Georgia, and for the next three years, until 1995, it served as the country's main law."[62]

Chapter 5 of the Law on State Authority entrusted the executive function in the country to the Cabinet of Ministers, which was accountable to the Head of State and the Parliament. In particular, pursuant to Article 22 of the stated law, the executive-regulatory activity in the Republic of Georgia was carried out by the Cabinet of Ministers of Georgia, consisting of the Prime Minister, his deputies and other members of the Cabinet of Ministers. The Cabinet of Ministers comprised of the Chairmen of the Councils of Ministers of the Autonomous Republics on the basis of their positions held. Interference with the competence of the Cabinet of Ministers was prohibited, unless explicitly provided by law.

The Cabinet of Ministers consisted of the Prime Minister, his deputies and other members of the Cabinet. Pursuant to Article 25 of the very same law, the Cabinet of Ministers was authorized to decide on any and all issues of state governance, which did not fall within the competence of the Parliament, the Chairman of the Parliament, the Head of State. The powers of the Cabinet of Ministers, its arrangement and rules of operation were set out by the above-mentioned law and the Law on the Cabinet of Ministers.[63]

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59 Article 17 of the Law of Georgia on State Government, <https://www.matsne.gov.ge/ka/document/view/5002871?publication=2>, [17.02.2022] (in Georgian).

60 *Gegenava D.*, Constitutional Law of Georgia, Second Edition, Davit Batonishvili Institute of Law Publishing House, Tbilisi, 2014, 23 (in Georgian).

61 Declaration of the Rights of Man – 1789, art. 16, <http://avalon.law.yale.edu/18th_century/rightsof.asp>, [17.02.2022].

62 *Kverenchkhiladze G.,* Constitutional Law of Georgia, Tbilisi, 2017, 399 (in Georgian).

63 Law of Georgia on State Government, <https://www.matsne.gov.ge/ka/document/view/5002871?publication=2>, [17.02.2022] (in Georgian).

Accordingly, the "Minor Constitution" entrusted the powers and rules of operation of the Cabinet of Ministers, their regulation, to the Law on the "Cabinet of Ministers", which was adopted on December 22, 1992. The law regulated the competence, structure and relations of the government with other state bodies.[64]

5. Conclusion

The Constitution of Georgia of 1921 did not provide for the institution of the President, therefore, in the field of foreign relations it did not recognize the principle of distribution of powers and gave the Prime Minister, the powers characteristic to the Head of State (the President). Therefore, it can be said that the Prime Minister was solely empowered to act in the field of foreign relations, to represent the country in the international field, to appoint the ambassadors, and etc. The latter implies that in the field of foreign relations, regardless of the model of governance, a one-man approach to the executive branch would be taken into account, which, among the other factors, in the absence of a "neutral arbitrator" would make the model and form of governance unclear.

Wolfgang Babek / Gaul in his book "Development and Adoption of the Constitution in Georgia" states that "the Constitution of 1921 was considered one of the most progressive constitutions at that time and entailed many social-democratic elements" ... These norms provided for the existence of a parliamentary republic."[65] Thus, "despite some shortcomings, the 1921 Constitution is still the most important legal document in the history of the development of Georgian statehood."[66]

Pursuant to the constitutional amendments adopted by the Supreme Council of Georgia on April 14, 1991, the President of the Republic of Georgia represented the Republic within the country and in international relations, headed the system of state governing bodies of the Republic of Georgia, negotiated and signed international agreements, received diplomatic representatives and Certificates of conscription, appointed and summoned the diplomatic representatives of the Republic of Georgia in foreign countries and international organizations, granted the highest diplomatic ranks and other special ranks and exercised these powers independently. Hence, the role of the President in the field of foreign relations can be considered to have been dominant and one-man. At the same time, the Government was under the authority of the President, therefore, there was no separation and distribution of powers with the executive branch.

As for the Law on State Authority adopted on November 6, 1992, the Head of State is the Chairman of Parliament, the highest official in the country in international relations, conferring the highest diplomatic ranks and other special ranks upon the submission of relevant ministries,

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64 *Kverenchkhiladze G.,* Constitutional Law of Georgia, Tbilisi, 2017, 399 (in Georgian).

65 *Gauli V.,* Development and Adoption of the Constitution in Georgia, Tbilisi, 2002, 10 (in Georgian), see citation: *Kverenchkhiladze G.,* Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 179-180 (in Georgian).

66 *Kverenchkhiladze G.,* Executive Power and the 1921 Constitution of Georgia, at the Origins of Georgian Constitutionalism - 90th Anniversary of the 1921 Constitution of Georgia, Batumi, 2011, 179 (in Georgian).

negotiating with foreign states and signing International treaties and agreements. The Parliament determined the main directions of domestic and foreign policy and state activities of the Republic of Georgia. Consequently, in this case as well, the balance between the executive and the legislature is disturbed.

On the basis of the above-mentioned, it can be concluded that following the constitutional past of Georgia, the powers in the field of foreign relations were solely exercised by the Head of State, appearing in the form of unification of various higher state-political positions. The latter itself indicates the lack of distribution of state authority and, thus, powers, given the model of governance.

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Amiran Dzabunidze[*]
Guliko Kazhashvili[*]

Legislative Regulation of Legal Goodwill Protected by Geographical Indication and Trademark (Comparative Analysis)

The current article is dedicated to the relationship between geographical indication da trademark issues.

The topicality of the study is caused by the fact that the development of free trade relations at the international level has necessitated the existence of appropriate means of protection of geographical indications.

For the first time the term – geographical indication is found in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Pre-existing international conventions were familiar with the terms appellation of origin and indication of source. TRIPS agreement broadened the legislative regulations, which ensures solid mechanisms for the protection of intellectual property. Also, geographical indication includes preciously established terms. Proper geographical indication protects consumers' rights and promotes economical development of the specific geographical area.

The article addresses the legal nature of trademark. Also, cases where the trademark is derived from the name of the geographical indication are discussed.

The current study represents an analysis of judicial practice in the view of registration of trademark. The registration and appellation procedures, the importance of manufacturer's good faith during the business activities are analyzed as well.

Keywords: *Intellectual property, Geographical indication (GI), Trademark, Consumers' Rights, Company name, Good Faith.*

1. Introduction

What makes unique a given good is its origin, its link with the *terroir* – a French word which stands for „soil''. This strict connection between the product and the *terroir* means a certain kind of quality, read through the eyes of the consumers. The stringer is the link between a good and its place if origin the more numerous are the details about it.[1]

Geographical indications are generally traditional products, produced by rural communities over generations that have gained a reputation on the markets for their specific qualities.[2]

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[*] Judge of the Civil Chamber of the Supreme Court of Georgia.

∗ Doctor of Law, Assistant Professor of Batumi Shota Rustaveli State University, Judge of the Civil Affairs Panel of Batumi City Court.

1 *Cavalieri A.,* The Recent Conflicts Between Geographical Indication and EU Trademarks in the Light of the Recent Developments in Community Law and Jurisprudence: A GIs' Overprotection? May 13, 2019, WIPO Academy, University of Turin and ITC-ILO - Master of Laws in IP - Research Papers Collection - 2017-2018, 2, <https://ssrn.com/abstract=3387401> [23.02.2022]; *MICARA*, The Geneva Act of the Lisbon Agreement for the protection of appellations of origin and their international registration: an assessment of a controversial agreement, in IIC, International Review of Industrial Property and Copyright Law, 2016.

2 *Thangaraja A.,* The Consumer Experience on Geographical Indicators and Its Impact on Purchase Decision: An Empirical Study, 2018, International Journal of Pure and Applied Mathematics, Vol.118, No. 20 2018, 2625-2630, 2625, <https://ssrn.com/abstract=3713469> [23.02.2022].

Although Article 22(1) does not provide what form indications can take, it is accepted that an indication is not expressly limited to the name of a place. A word or a phrase for example may serve as a geographical indication without necessarily being the name of a territory and so may "evoke" the territory. For example, "Basmati" is known as an indication for rice coming from the Indian sub-continent, although it is not a place name as such. In addition, while a word may be an indication, other types of symbols, such as pictorial images, icons or emblems (for example the symbol of the Eiffel Tower to designate French products) may also serve as identifiers.[3]

GIs are also a global issue, regulated in international law by the WTO and attracting increasing attention world-wide. Indeed, geographical indications have been said to be "the Sleeping Beauty of the intellectual property world" as although they have been around for a long time, there has been a widespread awakening in recent years, as to their business value.[4]

The determining factor of using a trademark is the individualization of the product, i.e. whether the consumer links the manufactured product to a specific company. The consumer has the opportunity to choose the desired product, which he knows and trusts, thus, the purpose of using the trademark is to provide the consumer with accurate information about the origin of a particular product, its manufacturer and other characteristic features, which is why he chooses the product.[5] Trademark despite its legal essence, has the great importance in everyday life.

While making a choice, for the customer it is enough to see a product of a familiar trademark on the counter. In a such case, the consumer no longer reads the composition of the product, production conditions and other related processes, because the consumer has confidence to the manufacturer who owns the trademark. Hence, the existence of proper legislation related to the trademark is a prerequisite for the protection of consumer rights and the development of the fair-trade environment.

2. Consumer's Right to the Information of the Product

According to the 4th paragraph of the article 26 of the Constitution of Georgia Freedom of enterprise shall be guaranteed. Monopolistic activities shall be prohibited, except in cases permitted by law. Consumer rights shall be protected by law.[6]

The aim of the Consumer Law is to protect natural persons – Consumers' autonomy, who participates in civil relationship without income interest. In such economic relations the subject of protection is the so-called „weak side", who are actively involved in civil relations without profit interests. Protection means the legal regulation of the consumer rights guaranteed by the law and ensuring its implementation in life.[7]

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[3] UNCTAD – ICTSD, Resource Book on TRIPS and Development, Cambridge University Press: Cambridge, 2005, 289.

[4] *Zografos D.,* Geographical Indications and Socio-Economic Development, December 2008, Insensate Working Paper No. 3 <https://ssrn.com/abstract=1628534> [23.02.2022]; WIPO Magazine, "Geographical Indications: From Darjeeling to Doha" July 2007.

[5] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-306-2020, dated 18 November 2020, §49 (in Georgian).

[6] Constitution of Georgia, 24 August 1995, #786-RS.

[7] *Lakerbaia T., Zaalishvili V., Zoidze T.,* Consumer Law, The Way Towards Harmonization with European Law, Tbilisi, 2018, 35 (in Georgian).

The customer experience has a positive impact on customer experience, this relationship is mediated by the GI. When the customer is having positive experience, he is about to make positive purchase decision. This is favorably influenced by the mediator GI.[8]

Consumer Rights is a collective concept and combines the right of an individual involved in economic relations to receive quality, safe goods or services, complete information related to it, and in case if the manufacturer neglects the aforementioned obligations, he should be able to receive the reimbursement for the damages.[9] In early 30s of twentieth century, precedential law established the principle of „care for consumers''. In the case of Donoghue v. Stevenson (1932) the plaintiff asserted that he became ill after drinking soft drinks. After drinking the entire bottle of a soft drink, he found remains of a snail in it. The plaintiff demanded damages from the manufacturer of the drink. With respect to this case, the House of Lords introduced the so-called principle „care for consumers". According to this principle, a manufacturer must realize that his negligence during the process of manufacturing drinks may cause damage to those, who drink them. The principle of care for customers was applied not only with respect to many manufacturers and was not limited to the protection of customers against snails remaining in drinks, but was also applied in the case concerning the negligence of a producer of linen. For linen cleaning he used some new substances (which had been a step forward in production) but due to some negligence, they were not fully removed from the cloth. As a result of this negligence one of the customers suffered from skin diseases. In the case Crant v. Australian Knitting Mills LTD (1938), a British Privy Council on Australian matters applied the principle developed in Donoghue v. Stevenson, and the manufacturer was found liable for damage caused to the buyer.[10]

Nowadays, the global competitive environment deals with the quality products so they can attract their consumers and also, they can differentiate their products from others.[11]

Subparagraph „c" of article 27 of paragraph 2 of „Trademark Law" of Georgia is one of the case of Consumers' Rights protection on legislative level, and in case of infringement of the protected good the court is responsible for the response. Analyzing the abovementioned article, gives us ability to conclude, that the article on one hand has imperative characteristic and as a legal result, defines that misleading trademark registration shall be canceled, but on the other hand possibility of the registered misleading trademark underlines the strict legislative policy towards the protection of consumers' rights.[12]

According to the 10bis article of the „Paris Convention for the Protection of Industrial Property'' the countries of the Union are bound to assure to nationals of such countries effective

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[8] *Thangaraja A*., The Consumer Experience on Geographical Indicators and Its Impact on Purchase Decision: An Empirical Study, International Journal of Pure and Applied Mathematics Vol.118, No. 20, 2018, 2625-2630, 2626 <https://ssrn.com/abstract=3713469> [23.02.2022].

[9] *Lakerbaia T., Zaalishvili V., Zoidze T.,* Consumer Law, The Way Towards Harmonization with European Law, Tbilisi, 2018, 35 (in Georgian).

[10] *Gogiashvili G.,* Judge Made Law, Tbilisi, 2020, 133 (in Georgian).

[11] *Thangaraja A*., The Consumer Experience on Geographical Indicators and Its Impact on Purchase Decision: An Empirical Study, International Journal of Pure and Applied Mathematics, Vol. 118, No. 20 2018, 2625-2630, 2625, <https://ssrn.com/abstract=3713469>, [23.02.2022].

[12] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-307-2021, dated 30 June 2021, §19 (in Georgian).

protection against unfair competition.[13] Legal acts existing on both international and domestic level, obligates manufacturers and dealers, before selling goods, to reflect the information of goods' origin, composition and other essential characteristics, for the consumers to make the rational choice. Otherwise consumer has right to defend violated right through the court.

3. Place Geographical Indication and Trademark in Legal Space

3.1 General Classification of Intellectual Property Rights

The multilayered legal nature of intellectual property caused multiplicity of the terms denoting the concept of an object and its scientific meaning.[14] Although, a modern western doctrine (in contrast to the Russian doctrine that uses the term – Интеллектуальные Права) definitely corresponds the term – intellectual property and intellectual property rights. This is very important, insofar as it clearly describes the immanent features of the legal nature of the object.[15]

The World Intellectual Property Organization was created by the WIPO convention on July 14, 1967, came into force in 1970, and was made a specialized agency of the United Nations (UN) in December 1974. WIPO has two main objectives: to promote the protection of intellectual property rights by encouraging new treaties and the modernization of domestic laws and by collecting and providing information and technical assistance; and to ensure cooperation among intellectual property unions by centralizing their administration.[16]

Article 2 (VIII) of establishing convention of World Intellectual Property Organization of 1967 defines intellectual property right by the objects. According to the mentioned article objects of the Intellectual property rights are:

– literary, artistic and scientific works;
– performances of performing artists, phonograms, and broadcasts;
– inventions in all fields of human endeavor;
– scientific discoveries;
– industrial designs;
– trademarks, service marks, and commercial names and designations

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[13] Paris Convention for the Protection of Industrial Property, 29 March 1883, <https://www.sakpatenti.gov.ge/media/page_files/Paris_Convention_1.pdf> [23.02.2021], Georgia became the part of the Paris Convention for the Protection of Industrial Property during USSR in 1965, the obligation was prolonged based on the declaration on 18 January 1994, <http://www.wipo.int/treaties/en/notifications/paris/treaty_paris_147.html> [23.02.2022].

[14] Prof. *T. Zarandia* points out that "there is no such unified concept as property, instead, there are completely different concepts and definitions famous for the most of continental Europe codifications that depended on historical and political circumstances within which the codification took place". See, *Zarandia T.,* Property Law, 2nd revised ed., Tbilisi, 2019, 206 (in Georgian); *Taliashvili T., Shamatava I.,* New Legal Regulation of Intellectual Property Protection and Enforcement, Journal of Law, No.2, 2019, 14 (in Georgian).

[15] *Taliashvili T.,* Foundations of Legal Protection of Geographic Indication of the Goods, Doctoral Dissertation, TSU, Tbilisi, 2003, 8 (in Georgian); *Taliashvili T., Shamatava I.,* New Legal Regulation of Intellectual Property Protection and Enforcement, Journal of Law, No.2, 2019, 15.

[16] *Benko R.*, Protecting Intellectual Property Rights, Washington D.C., American Enterprise Institute, 1987, 4.

– protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.[17]

According to the paragraph 6 of article 5 of the Constitution of Georgia „the State shall take care of the protection of national values, identity and cultural heritage, and of the development of education, science and culture.'' Paragraph 1st of article 20 of the Constitution of Georgia defines that „Freedom of creativity shall be guaranteed. The right to intellectual property shall be protected.'' Based on the named provisions of the Constitution of Georgia, it is obvious that the protection of intellectual property and the fruits of creative work, the development of education, science and culture is an important interest recognized by the Constitution of Georgia.[18]

Thus, Intellectual Property Law is designed to stimulate innovation and invention. Intellectual property rights, such as patents, trademarks, copyrights and designs give the right holder exception and sometimes exclusive right to use the fruits of human intellect to his behalf.[19]

Intellectual Property Rights can be broadly divided into two categories in the form of industrial property rights and copyright, depending upon the case of understanding and type of use. Industrial Property Rights refer to the testing of right over matters that will be useful for industries and commerce.[20]

The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.[21] Hence, the latter category of rights include both trademark and geographical indication.

3.2 Legal Nature of Appellation of Origin and Geographical Indication

Paris Convention for the Protection of Industrial Property, which was adopted in 1883 is the oldest and the broadest international document on Industrial Property, it does not include the term – Geographical Indication. Paris Convention uses terms – *appellation of origin*[22] and *indication of source.*[23] We can find the term - *appellation of origin* in the international act - Lisbon Agreement for the Protection of Appellations of Origin and their International Registration[24] and in Geneva

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[17] Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967 and as amended on September 28, 1979, art. 2(VIII) <https://www.wipo.int/edocs/pubdocs/-en/wipo_pub_250.pdf> [23.02.2022].

[18] Judgement of the Constitutional Court of Georgia on the case №2/1/877 „LTD Alta", "LTD Okay", "LTD Zoommer Georgia", "LTD Georgian Mobile Import" and "LTD Smile" v. the Parliament of Georgia, dated 25 December, 2020 § 39 (in Georgian), <https://matsne.gov.ge/ka/document/view/50-71127?publication=0> [23.01.2022].

[19] *Menabdishvili S.,* Collision of Competition Law with the Intellectual Property Law, Student Law Journal, 2014, 165 <https://dspace.nplg.gov.ge/bitstream/1234/278910/1/Studenturi_Samartlebrivi_-Jurnali_2014.pdf> [23.01.2022] (in Georgian).

[20] *Parwar A.*, Importance of Geographical Indication in the Growing IPR World, August 5, 2009, 1 <https://ssrn.com/abstract=1444419> [23.02.2022].

[21] Paris Convention for the Protection of Industrial Rights, par. 2, article 1st, <https://www.sakpatenti.gov.ge/media/page_files/Paris_Convention_1.pdf> [23.02.2022].

[22] Appellation of origin.

[23] Indication of source.

[24] Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1957, Ratified by the parliament of Georgia on February 17, 2004 act №3343 – RS, <https://www.sakpatenti.gov.ge/media/page_files/trt_lisbon_001en.pdf> [23.02.2022].

Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications.[25] Article 2 of Lisbon Agreement defines the appellation of Origin with the following content: „In this Agreement, "appellation of origin" means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.''[26] Consequently, it can be said that the „appellation of Origin'' is the narrowest term in this field, because the product which has the sign of „appellation of origin'' must be produced from the good cultivated in specific geographical area, and the production process must be done in locally established technology.

For the first time in international law TRIPS agreement gave the term - „geographical indication''. This term was defined like the product is from the WTO[27] member state, region or location.[28] Article 22 of Agreement on Trade-Related Aspects of Intellectual Property Rights adopted in 1994, gives the following content of „geographical indication'': „Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.''[29]

Regardless of the common object of legal regulation, there is distinction between geographical indication and appellation of origin in the doctrine. As we mentioned, according to the TRIPS agreement, geographical indication is the indication, which gives information on specific country, region or location. This definition is different from the content of appellation of origin of Lisbon agreement, which states that appellation of origin must be „geographical name'' of country, region or community.

It should also be noted that when we talk about geographical indications, except geographical indication and appellation of source the term geographical indication includes indication of source, which might be referred like: „made in Georgia''. „Indication of Source'' like the Geographical indication is the broad term and includes as geographical indications as well as appellation of origins. „Indication of Source'' creates consumers' expression about the indication of geographical area of goods.[30]

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[25] Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, May 20, 2015, <https://wipolex.wipo.int/en/text/370115> [23.02.2022].

[26] <https://www.sakpatenti.gov.ge/media/page files/trt lisbon 001en.pdf> [23.02.2022]; *Cavalieri A.,* The Recent Conflicts Between Geographical Indication and EU Trademarks in the Light of the Recent Developments in Community Law and Jurisprudence: A GIs' Overprotection? May 13, 2019, WIPO Academy, University of Turin and ITC-ILO - Master of Laws in IP - Research Papers Collection - 2017-2018, <https://ssrn.com/abstract=3387401> [23.02.2022].

[27] World Trade Organization.

[28] *Dzamukashvili D.,* Intellectual Property Law, Intellect, 2006, 496 (in Georgian).

[29] Agreement on Trade-Related Aspects of Intellectual Property Rights, <https://www.sakpatenti.gov.-ge/media/page_files/27-trips_Vnr9Cmd.pdf> [23.02.2022].

[30] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-307-2021, dated 30 June 2021 §21.2. *also see* Model Law for Developing Countries on Marks, Trade Names and Acts of Unfair Competition, WIPO, Geneva, WIPO, <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_-805.pdf> [25.02.2022]; Introduction to Georgraphical and Recent developments in the World Property Intellectual Property Organization (WIPO), Worldwide Symposium on Georgraphcal Indications, organized by the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO) San Francisco, California, 2003, <https://www.wipo.int/edocs/mdocs/-geoind/en/wipo_geo_sfo_03/wipo_geo_sfo_03_1- main1.pdf> [25.02.2022].

GIs signifies that a specific product is being produced in a particular geographical origin and its qualities are, in total, attributed to that particular origin.[31]

3.3 Dual Legal Nature of the Registration of Trademark

According to the precedential law of European Court of Human Rights, trademark from the registration moment falls within the scope of the term 'possessions' in Article 1 of Protocol No. 1.[32] In some cases, not only the registration of trademark, but also the application for the registration itself, and even the legal status of a trademark holder may rise property rights, which falls within the scope of the term 'possessions' in Article 1 of Protocol No. 1.[33]

In the light of the dominant opinion in the economic doctrine of the United States of America, trademark is private good, which has four values derived from property right – administrative, rentability, enforcement and the last prohibition values.[34] However, this is disputed by the competing opinion, that trademark is public good. Trademark distinguishes the good and the service from the competitor's goods and services.[35]

According to the paragraph 1st of article 3 of Georgian law on Trademarks, a trademark is a sign or any combination thereof represented graphically that is capable of distinguishing the goods and/or services of one company from those of another.[36] The main characteristic of a trademark is that it should not be the identical to other company's trademark.[37]

Industrial property similarly to real estate protection regime is the subject of registration in special public registry. Consequently, after the registration the right will be protected by the presumption. Thus, it can be concluded, that the special right to design, (protected by the Georgian law on „Copyright and Related rights'', if it is not registered in „sakpatent''), appellation of origin, geographical indication, integral microchip topography; trademark; inventions of animal breeds and/or plant varieties are protected by the presumption. The fact of registration in the framework of trademark has special importance in the world.[38]

Analysis of the concept of GIs and trademarks, clarifies that trademark has broader concept than GIs. In permitted occasions, GIs might be included in trademark, also direct or indirect indication of geographical area should underline the goods origin.[39]

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[31] *Parwar A.,* Importance of Geographical Indication in the Growing IPR World, August 5, 2009, 1, <https://ssrn.com/abstract=1444419> [23.02.2022].

[32] Anheuser-Busch Inc. v. Portugal [GC], no. 73049/01, §§66-72, ECHR 2007-I/, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Anheuser-Busch%22],%22itemid%22:[%22001-78981%22]}

[33] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-1285-1223-2014, dated 01 December, 2015 (in Georgian).

[34] *Buadze K., Shekiladze N., Zhorzhoiani G.,* The Economic Importance of Protection of Trademark, Georgian-German Journal of Comparative Law, Publication of State and Law Institute, 10/2020, 2 (in Georgian), <http://lawjournal.ge/index.php/10-2020/> [18.02.2022].

[35] *Resinek N.,* Geographical indications and trademarks: Coexistence or ,"First in Time, First in Right Principle", European Intellectual Property Review, Vol. 29(11), 2007, 448.

[36] Georgian Law on Trademarks №1795-IIS, Parliament of Georgia 05/02/1999, article 3, <https://matsne.gov.ge/document/view/11482?publication=8> [23.02.2022].

[37] Ruling of Civil Chamber of Tbilisi City Court in the Case N2/3925-15, dated 25 February 2016 (in Georgian).

[38] *Ruseishvili N.,* The Burden of Proof in Litigation Related to Intellectual Property Law, Articles on Current Issues of Evidence Law, David Batonishvili Law Institute Publications Tbilisi, 2016, 79 (in Georgian).

[39] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-307-2021, dated 30 June 2021 §21.3 (in Georgian).

Acquisition of right to trademark starts from selecting the desired symbol of trademark and submission the application to „Sakpatenti". The real substantive scope of the object of protection is fixed through the registration. At the same time, the registration indicates the list of good for which the trademark is intended to be used. One of the important function of registration is that the information about all registered trademarks are published by „Sakpatenti", which is a warning to the competitors of the trademark owner.[40]

The purpose of trademark registration is not only to protect individuals' rights to property, but also in the scope of public interests to protect potential consumers from misleading information on the characteristic, quality, geographical origin or other specifications of goods.[41]

Right to trademark falls in the scope of right to property, only if it does not infringes bona fide third parties' rights.[42] Otherwise, court nulls and voids the registered trademark on the basis of the lawsuit of the interested person.

3.4 Trademark and Geographical Indication in Company Name

According to the paragraph 1st article 16 of Georgian Law on Entrepreneurs: The brand name of an entrepreneur is a name which is registered as such with the Registry and under which the entrepreneur operates. New redaction of the Georgian Law on Entrepreneurs entered into force from the 1st of January, 2022. Different from the previous redaction of the law, current law states that A brand name of an entrepreneur (except for an individual entrepreneur) shall be different from a brand name of an already registered entrepreneur. The brand name of an entrepreneur shall be changed or an additional indication shall be added to it, if it is necessary to differentiate it from the brand name of another entrepreneur.[43]

Due to the function of the name of legal entity, it should contain the identity markings which differentiates one legal entity to another. Also, the brand name of the entrepreneur shall not overlap the existing name of other existing non-commercial legal entity name.[44]

Article 8 of the partis convention requests the countries that a trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark. Thus, the trade name/brand name shall be protected in all members states without submission of application or registration, whether it is the part of trademark or not.[45]

As a rule, trademark is a registered sign, referring the origin of goods or services.[46] The registration of solely geographical names as trademarks, designating specified geographical

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[40] *Dzamukashvili D.,* Law of Intellectual Rights, Tbilisi 2012, 393-394 (in Georgian).

[41] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-100-2021, dated 27 May 2021, §47; *See also* Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-1330-2018, dated 15 October 2020 § 20. See also, Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-62-52-2015, dated 28 July 2016, §29.

[42] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-970-919-2015, dated 16 March 2016 § 1.8.

[43] Article 16, paragraph 5, of Georgian Law on Entrepreneurs, dated 2 August 2021, № 875-VRS-XMP.

[44] For the definition of legal person see: *Burduli I., Egnatashvili D.,* Commentaries of Civil Code of Georgia, Vol 1, art. 24, 2017, 186 (in Georgian).

[45] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-306-2020, dated 18 November 2020 § 37 (in Georgian).

[46] *Schnitger H.,* Credit Law, *Lutringhause P.,* Delict Law*, Shushcke v.* Enforcement Law*, Tolkmit I.,* Intellectual Property Law, Tbilisi, 2011, 86 (in Georgian).

locations which are already famous, or which are known for the category of goods or services concerned, and which are therefore associated with those goods or services in the mind of the relevant class of persons, is excluded.[47]

In contrast to the Lisbon agreement, the EU regulations, almost completely apply the „first in time, first in right'' principle while protection GIs. Article 14(1) Regulation 2081/92 explains that if an application of a trademark was submitted before the date of the publication of the application for the PDO or PGI in the Official Journal of the European Communities, it has priority. The exception to the 'first in time, first in right' principle is that where the application of trademark and PDO/PGI[48] were at the same time, the latter takes priority.[49] Same provision is in the Georgian Law on „Appellations of Origin of Goods and Geographical Indications''.[50] Article 14 is regulating the relationship between an Appellation of Origin or Geographical Indication and a Trademark. During the registration process Appellation of Origin and GI has advantages to Trademark. If the application for registration of trademark and application for registration of Appellation of Origin and GI is submitted at the same time, application for registration of trademark shall be retained until the decision on registration of the appellation of origin or geographical indication is taken. Paragraph 5 of the mentioned article states that If violation of one of the conditions provided for in Article 11 takes place by using of the trademark registered before the registration of the appellation of origin or geographical indication, the interested party may bring action claiming to cease the use of such a trademark within 5 years from the day of recognition of the infringement of the appellation of origin or geographical indication. The duration of time for the submission of claim and the starting point of the time indicates the protection of consumers' rights.

Some authors considers problematic addressing „first in time, first in right'' principle, because it seems not to be adequate applying the general „first in time'' principle in case of conflict between GIs and TMs, because they are intrinsically different in nature, whereas the principle requires in theory a comparison conducted at the same level.[51]

The Chamber of Civil Cases of the Supreme Court of Georgia defined that the existence of GI in trademark is not a necessary precondition for a trademark to be considered misleading in relation to the geographical origin of the goods.[52] The trademark which includes GI, should be accompanied by the proper indication of goods' origin in order not to mislead consumers.

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[47] T-197/13, MONACO, EU:T:2015:16, § 48; 25/10/2005, T-379/03, Cloppenburg, EU:T:2005:373, § 34, 15/01/2015,

[48] protected designations of origin (PDOs) and protected geographical indications (PGIs) in EU regulations are the same to Geographical Indication (GI).

[49] *Friedmann D.,* TPP's Coup de Grâce: How the Trademark System Prevailed as Geographical Indication 2017 in: *Chaisse J., Gao H., Chang-fa Lo (eds.),* Paradigm Shift in International Economic Law Rule-Making, TPP as a new Model for Trade Agreements,? New York: Springer, Series, Economics, Law, and Institutions in Asia Pacific, 2017, 273-291, 278, <https://ssrn.com/abstract=3090172> [25.02.2022].

[50] Georgian Law on Appellations of Origin of Goods and Geographical Indications, dated 22 June 1999, №2108-IIS.

[51] *Cavalieri A.,* The Recent Conflicts Between Geographical Indication and EU Trademarks in the Light of the Recent Developments in Community Law and Jurisprudence: A GIs' Overprotection? May 13, 2019, WIPO Academy, University of Turin and ITC-ILO - Master of Laws in IP - Research Papers Collection - 2017-2018, <https://ssrn.com/abstract=3387401> [23.02.2022].

[52] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-307-2021, dated 30 June 2021 §22.6 (in Georgian).

4. The Special Importance of Geographical Indication for Wines and Spirts

The TRIPS Agreement was the first multilateral text dealing with geographical indications. It is perhaps the most important international treaty in that field, due to its broad membership, the application of minimum standards and its detailed rules on enforcement through a strong dispute settlement mechanism. Indeed, even though some previous international treaties such as the Paris Convention, the Madrid Agreement and the Lisbon Agreement dealt with the protection of indications of source or appellations of origin, the protection provided was often inadequate because on the one hand, the provision of the Paris Convention was too general on this matter and on the other, the Madrid Agreement and Lisbon Agreement only had limited membership.[53]

Changes were adopted in the „Paris Convention for the Protection of Industrial Property" by the Hague Act 1925, but the member states had total freedom to define the legislative means for the protection, which in its hand was ineffective.

The French AOC system, with its roots in the Middle Ages, gained momentum at the end of the 19th Century. The increased Trans-Atlantic contact brought some vine diseases such as *Phylloxera* from the U.S., which killed around seventy percent of all vines in France. This catastrophe led to an enormous deficit of genuine French wine and a concomitant supply of counterfeit French wine. Increasingly, vintners became the driving force behind the protection of geographical designations linked to a delineated terroir, specialized grape types and production techniques.[54]

TRIPS agreement has special article for the regulation of wines and spirits issues. Article 23rd states that Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.[55] In other words, the additional protection of article 23 ensures a much more effective protection than that provided under article 22 of the TRIPS agreement, since it protects GIs identifying a product where used on another product of the same product category from all illegitimate use, regardless of whether the public is being misled or whether is an act of unfair competition present.[56]

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[53] *Zografos D.,* Geographical Indications and Socio-Economic Development (December 2008), IQ sensato Working Paper No. 3, 1 < https://ssrn.com/abstract=1628534> [21.02.2022].

[54] *Friedmann D.,* TPP's Coup de Grâce: How the Trademark System Prevailed as Geographical Indication 2017 in: *Chaisse J., Gao H., Chang-fa Lo (eds.),* Paradigm Shift in International Economic Law Rule-Making, TPP as a new Model for Trade Agreements,? New York: Springer, Series, Economics, Law, and Institutions in Asia Pacific, 2017, 273-291, 274, <https://ssrn.com/abstract=-3090172> [25.02.2022].

[55] Agreement on Trade-Related Aspects of Intellectual Property Rights. <https://www.sakpatenti.gov.-ge/media/page_files/27-trips_Vnr9Cmd.pdf> [21.02.2022].

[56] *Addor F., Grazioli A.,* Geographical Indications beyond Wines and Spirits, The Journal of World Intellectual Property, Geneva, 2002, Vol.5, No.6, 882, <https://www.researchgate.net/publication/-240268885_Geographical_Indications_Beyond_Wines_and_Spirits-A_Roadmap_for_a_Better_Protection_for_Geographical_Indications_in_the_WTO_TRIPS_Agreement> [25.01.2022].

5. Regulating Rules of Protection of Trademark

Property may be tangible or intangible, but the simple fact that a thins is property in name (i.e. „intellectual property“) does not make it a legal private property interest. In normative terms, property is often referred to as a bundle of rights“. The „rights to exclude“ is widely considered the most important right in the bundle.[57]

10ter article of „Paris Convention for the Protection of Industrial Property'' defines: (1) the countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10bis. Aslo, they undertake, further, to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, with a view to the repression of the acts referred to in Articles 9, 10, and 10bis, in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.[58]

Around the world, practices of Trademark protection established two methods of obtaining special rights. According to the first method, the acquisition of a special right does not require any special procedure and is achieved through the actual use of the trademark, and according to the second method, in order to obtain a special right to a trademark, it is necessary to register the trademark in the relevant institution.[59] Upon completion of the registration, the trademark may be applied to goods for which the mark is registered.[60] According to paragraph 3 of article 3 of Georgian Law on „Trademarks'': A trademark is protected by means of its registration at "Sakpatenti" or on the basis of an international agreement, but the right to trademark might be existed without registration. In the late case the right is granted based on the Paris Convention for the Protection of Industrial Property'', March 29, 1889. Trademarks and the repression of unfair competition are the objects of the convention (article 1.2) as well.[61]

Charter II of Georgian Law on „Trademarks“ regulates the acquisition and maintenance of an exclusive right on a trademark. Article 16 defines appellation rules: a) An applicant can appeal against a decision of examination as to form at the Chamber of Appeals[62] within 3 months from

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[57] *Marlan D.,* Trademark Takings: Trademarks as Constitutional Property under the Fifth Amendment Takings Clause, University of Pennsylvania Journal of Constitutional Law, Vol. 15, no. 5, May 2013, 1581-1632, 1592.

[58] Ruling of the Civil Chamber of Tbilisi Court of Appeale in the Case N2B/3269-17, dated 10 June 2018 (in Georgian).

[59] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1285-1223-2014, dated 1 December 2015 § 70, 71 (in Georgian).

[60] *Kerly D. M., Underhay F.G.,* Law of Trade-Marks, Trade-Name, and Merchandise Marks. London, Sweet & Maxwell (2), 538, <https://heinonline.org/HOL/Page?handle=hein.beal/ltmtnmm0001&id=-602&collection=beal&index=> [31.01.2022].

[61] Ruling of the Civil Chamber of Tbilisi Court of Appeale in the Case №2B/3269-17, dated 10 June 2018 (in Georgian).

[62] The Chamber of Appeals is established on the basis of Article 9 of the Georgian Law on Patents as a dispute resolution authority operating at Sakpatenti and hearing disputes related to Sakpatenti decisions on intellectual property objects, criteria for protection of objects, granting patents and registration of other objects of industrial property <https://www.sakpatenti.gov.ge/media/page_files/appeal_statute_1_N5rZTT6.pdf> [31.01.2022]

taking the decision; b) An applicant can appeal against a decision of substantive examination to refuse the registration of the trademark in respect of the entire list of the goods or its part at the Chamber of Appeals within 3 months from taking the decision; c) Within 3 months from the date of publication of the application data in the Bulletin, any interested party is entitled to bring an action before the Chamber of Appeals against the decision on trademark registration only on the grounds that the requirements of Article 4 or 5 of this Law is violated. In addition, it is not admissible to appeal against a decision concerning the trademark registration on the basis of an enacted court decision at the Chamber of Appeals on the same grounds. The decision of the Chamber of Appeals may be appealed in the court.

The decision of the Chamber of Appeals may be appealed in administrative chamber of court. In this case, court shall verify the compliance of the administrative act to the Georgian legislation. According to the article 60^1 of General Administrative Code of Georgia an administrative act shall be null and void if it contradicts the law or if other requirements determined by law for drafting or issuing it have been substantially violated.[63] Thus, we have special terms for the appellation, which are regulated by the administrative legislation. As soon as the appellation terms are gone, the trademark might be registered and after the registration of the trademark in the Register[64], "Sakpatenti" shall issue a trademark certificate.

The intangible nature of intellectual property and the particular intersection with the consumers' rights necessitates the existence of various mechanisms for the protection of intellectual property in both international and domestic legislation. In accordance with the 10bis article of ,,Paris Convention for the Protection of Industrial Property'': the countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor must fall in the scope of unfair competition.[65]

Civil chamber of the court may be annul a trademark registration at the request of a third party on the bases of „b" and „c" subparagraphs of article 28 of Georgian Law on „Trademarks".

On some practicing lawyers' mind, after the expiration of the 3 months period set for an administrative appeal, it should no longer be possible to appeal a registered trademark in a civil manner, as this would harm the entrepreneurial activity. However, on the contrary, it should be noted that the mentioned articles have their legitimate basis. According to subparagraph „b" of paragraph 1st of article 28 of Georgian Law on ,,Trademark'' a trademark registration may be annulled by the court at the request of a third party, if the trademark has been registered with a dishonest intent; and the subparagraph „d" defines that a trademark registration may be annulled by the court at the request of a third party, if the trademark contains the brand name for which the

[63] Ruling of the Civil Chamber of District Court of Mtskheta in the Case №180310014555877, dated 24 December 2014, § 7.20. (in Georgian)

[64] Paragraph 1 of article 17 of Georgian Law on ,,Trademarks'' defines that: ,,If within the period prescribed in Article 16 (4) of this Law an appeal is not filed with the Chamber of Appeals, or if on the basis of the appeal filed in accordance with Article 16 (4) the Chamber of Appeals takes a decision to register a trademark, "Sakpatenti" shall register the trademark in the Trademark Register (hereinafter - the Register) and publish the data on the registered trademark in the Bulletin."

[65] Ruling of the Civil Chamber of Tbilisi Court of Appeale in the Case №2B/3269-17, dated 10 June 2018 (in Georgian).

rights are originated before the filing of the application for the trademark registration, as a result of which a likelihood of confusion arises. In both cases the respondent is not „Sakpatenti'', but the entrepreneur who holds the trademark.[66]

The principle of good faith is the lever by which the interests of the parties must be balanced. This principle applies to those participants for whom the autonomy of the will has become a mean of obtaining an unjustified (unfounded) advantage in the free market.[67] In civil relationship a good will principle has dual nature: *firstly*, good faith as the most important principle of law, implies good faith in an objective sense. The solidity and stability of civil turnover depends on good faith of its participants. Good faith expresses the notion of natural or legal person formed in the society about the moral action during the acquisition, realization, protection of rights, as well as fulfillment of the obligation. Every person must act in good faith during the exercise of his rights or obligations. *Secondly,* good faith is the situation when the person does not know, that his/her action is unlawful and violates others' rights.[68]

When analyzing the persons' action in accordance with the good faith principle, the peculiarities of specific relation and the process of formation/development of the relation must be taken in consideration.

Thus, the legislature regulates the legal consequences in respect of the trademark in case of indicating geographical origin, the consequence might be the invalidation of trademark, or cancellation the registration of trademark, although each of these legal consequences has different preconditions. In one occasion the trademark is presented in such way that the misleading circumstances are revealed during the registration process, while in another case, the cancellation of registered trademark is condition by the use in such way, that misleads consumer about the origin of marked goods. For example, if a trademark of vodka, which is made in Latvia gives the consumer an allusion to its Russian origin, such exploitation of trademark may mislead the consumer, if the trademark is commercialized in such way that the geographical origin of the goods implied by the individual does not correspond to the actual origin of the goods.[69]

6. Conclusion

Based on the topics discussed in the article, the compliance of Georgian legislation with the regulations established by international acts is obvious. Disputes over trademark and geographical indications have increased in courts. Court takes in consideration of both entrepreneur's and consumer's interests in decision making process.

The best practice of appellation in civil chamber is established by the court, because of purpose and importance of consumers' rights. It should be noted that the court uses best European practice in its decisions related to trademarks and GIs.

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[66] Ruling of the Civil Chamber of District Court of Mtskheta in the Case №180310014555877, dated 24 December 2014, § 7.16. (in Georgian).

[67] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №NAS-541-513-2015, dated 22 July 2015 (in Georgian).

[68] Ruling of the Civil Chamber of Tbilisi Court of Appeale in the Case №2B/3269-17, dated 10 June 2018. (in Georgian).

[69] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-307-2021, dated 30 June 2021 §22.5 (in Georgian).

There are demands at the international level for extending the protection under TRIPS beyond wire and sprits. The purpose is to confer more effective level of protection to geographical indication of all products with the increased internationalization of foods and product market; GIs have become a key source to niche marketing.[70]

GI is a descriptive sign and any entrepreneur from the geographical area can use it.[71] However, in some cases the name of a geographical region or location merely indicates a particular style of product, but not its real place of origin. For example, the terms "Chicago Pizza", "Greek Salad" and "Turkish Coffee" respectively denote a style of pizza, salad and coffee, but not the origin.[72]

Geographical Indications are not exclusively commercial or legal instruments, they are multi-functional.[73] We can conclude that GI also has social, cultural and economic importance. In social and cultural terms, GI promotes the specific geographical area on international market, which raises awareness and all these creates economic benefits.

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[70] *Parwar A.,* Importance of Geographical Indication in the Growing IPR World, 2009, 11 <https://ssrn.-com/abstract=1444419> [23.02.2022].

[71] Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №AS-307-2021, dated 30 June 2021 §21.1. (in Georgian).

[72] *Khoury H. A.,* Intellectual Property & You, Washington: U.S. Patent and Trademark Office, 2010, 18.

[73] *Nishidh P.,* Geographical Indications: Pros and Cons, September 4, 2011, 13, <https://ssrn.com/abstract=1922347> [23.02.2022].

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Giorgi Makharoblishvili*

Functionalization of Conflict of Interest Construction in the Context of Corporate Governance of the JSC

The article analyzes the core of the corporate law, the main vector of the principal dilemma of corporate governance, which leads to a conflict of interests and obligations. The specific purpose of corporate law is to create a controlled legal area of conflict of interest between members of an affiliated corporate community or those associated with it. Preventing imbalances between entities with incompatible interests is a systemic part of corporate governance and is called the "owner-proprietor" problem.

The separation of ownership and control creates a conflict between rights, duties and interests. A conflict of interest is a potentially feasible threat that implies the possibility of giving an unlawful, personal motive advantage to one party to the transaction at the expense of the other party to the transaction. In corporate law, a potential risk is "translated" as the risk of investing or invested capital, and the risk is "the probability of losing something, expressed as a percentage". The economic consequence of an unlawful advantage is the acquisition of material, financial or other benefits.

The construction of a conflict of interest will be transformed into a corporate defense strategy in the context of a normatively regulated nature. The use of its content as a corporate strategy guarantees the purposeful functioning of the JSC, and in the event of a dispute, it enables the court to correctly determine the orientation of the judicial analysis. As a result, the regulatory structure of the conflict of interest at the legislative level creates a JSC-controlled buffer of conflict of interest.

***Keywords**: conflict of interest, fiduciary duty, corporate governance, self-dealing, interested person, related person, openness of information.*

1. Introduction

In a capitalist society, the paradigm of corporate governance goes beyond the separation of ownership and control, as a result of which the "principal-agent"[1] relationship[2] creates the potential for opportunistic[3] action and, consequently, the need to regulate its Ex Ante. Corporate law, in its broadest sense, on the one hand, forms the system of mechanisms for managing invested capital and on the other hand, it creates a network of indirect regulatory control of managerialism by legal category, which forms the legitimate foundation of balanced management and control of the entrepreneurial society. In the corporate legal dimension, the system of capital management mechanisms benefits protection in the spectrum of fiduciary duty, while in the legal category,

* Doctor of Law, Associate Professor Faculty of Law, Ivane Javakhishvili Tbilisi State University, Member of Institute for Corporate, Banking and Economic Law.

1 *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 110-111.

2 *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 26-29.

3 *Williamson E.O.,* The Modern Corporation: Origin, Evolution, Attributes, Journal of Economic Literature, Vol. XIX, 1981, 1537-1546.

indirect control of capital is embodied in the form of shareholder democracy[4] and activism.[5] In turn, the field protected by fiduciary duty is characterized by a variety of directional interactions,[6] from which it is important to be loyal[7] to the interests of the corporation by management, which includes, among other things, managerial behavior free from conflict of interest.[8] The scope of action of a managerial *homo economicus* [9] is regulated by corporate law[10] governing conflicts of interest[11] and provides the basis for the transformation of action from *homo economicus to conventional behavior*.[12] As a result, conflict of interest is an immanent manifestation[13] of corporate governance, which manifests itself in static (factual) and dynamic (transactional) forms containing manageable potential hazards. In corporate law, a potential risk is "translated" as the risk of investing or invested capital, and the risk is "the probability of losing something[14], expressed as a percentage."[15] One of the goals [16] of corporate governance is to identify risks and optimize costs in the direction of minimization. The question arises: a) How should the problem be iden-

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4 *Gantchev N., Giannetti M.,* The Cost and Benefits of Shareholder Democracy: Gadflies and Low-Cost Activism, finance Working Paper №586/2018, 2020, 1-6.

5 *Bainbridge M. S.,* Shareholder Activism and Institutional Investors, Law and Economics Research Paper No. 05-20, 2005, 4-10.

6 In the event of a breach of fiduciary duty, including on the basis of a conflict of interest, some references to the New Testament are even obtained in certain literature. In particular, "No servant can slave for two masters: for either he will hate the one and love the other, or else he will hold to the one and despise the other." Luke 16:13. For an example, see*Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 242.

7 *French D., Mayson S., Ryan C.,* Company Law, 26th ed., Oxford University Press, 2010, 469.

8 *JugheliG.,* Capital Protection in a Joint Stock Company, Tbilisi*,* 2016, 249 (in Georgian).

9 *Compare: Kiria A.,* Corporate Law System in Georgia, in Collection: Collection of Corporate Law I, *Burduli I. (ed.),* Tbilisi, 2011, 29-31 (in Georgian).

10 Law of Georgia on Entrepreneurs, Legislative Herald, 04/08/2021, Law of Georgia on the Securities Market, Departments of Parliament 1 (8), 24/12/1998 (in Georgian).

11 In a managerial position homo economicus is better than an emotional homo sapiens, who makes rational decisions based on awareness but with his own interests in mind. However, with regard to financial matters, the followers of behaviorism prefer a person with realistic behavior. See *Bloomfield J.r.,* Traditional vs. Behavioral Finance, Jonson School Research Paper Series No. 22-2010, 2010, 2-10.

12 There is a scientific view that applying the *homo economicus* model to a corporate executive is a fundamental mistake, as the corporation's governing body has positive expectations about the director and his or her experience. Also, on altruism, that because of their commitment to the corporation and shareholders, they will act in good faith, taking into account their interests. Accordingly, the content of the phenomenon of altruism must be taken into account in assessing the actions of the supervisor. See *Stout A.L.,* On the Proper Motives of Corporate Directors (or, Why You Don't Want to Invite Homo Economicus to Join Your Board), UCLA School of Law, Research Paper No. 04-7, 2004, 1-3.

13 *Compare:* Order of the President of the National Bank of Georgia of September 26, 2018 215/04 "On the Approval of the Corporate Governance Code of Commercial Banks", Article 3, Paragraph 4, Legislative Herald, 27/09/2018 (in Georgian).

14 In turn, "loss" refers to an expense that is personally borne by another person (meaning the manager, the governing body), and the benefit is received at the expense of reducing the shareholder's property good. See *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 241.

15 *Klein A.W., Coffee C.J. JR.,* Business Organization and Finance, 11th ed., Foundation Press, 2011, 45-47, 243-245.

16 As well as, in general, the purpose of corporate law is to define the forms of JSC-s and to settle conflicts between the participants of an enterprise. See *Armory J., Hansman H., Krackman R., Pargendler M.,* What is corporate justice? In the collection: Anatomy of Corporate Law: Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D. (ed.) Gabelia T.,* 3rd Ed., Tbilisi, 2019, 35 (In Georgian).

tified? B) Once the problem has been identified, what legal framework should be used to reduce the optimal cost? The answers to the questions will be found in the legal analysis of the fiduciary duty "substandard" [17], and the results obtained should be used to reduce administrative costs.

In order to reduce the costs of managerial functional activities and risk management, mechanism for managing and overseeing asymmetric information on a conflict of interest transaction is used as a preventive corporate legal construction.[18] According to the new version of the Law of Georgia on Entrepreneurs (hereinafter - the LGE), the construction of the conflict of interest was applied to the joint stock company (hereinafter - the JSC[19]), where a separate article was dedicated to it.[20] Therefore, a conflict of interest that arises when a person with a fiduciary duty or related person has a conflict of interest with the corporation and there is a likelihood that personal interest may take precedence over the corporation's interest,[21] should be analyzed in a unified legal dimension, for the source of which as *De Lege Lata* will be used the Law of Georgia on Entrepreneurs and the Law on the Securities Market, [22] the "Code of Corporate Governance of Commercial Banks" approved by the President of the National Bank [23], and the so-called Soft Law [24] as a Source of Law "Corporate Governance Code for Commercial Banks." [25]

2. Grounds for the Origin of the Conflict of Interest

2.1. Corporate-Legal Basis

Conceptually, the origins of the conflict of interest stem from the content of the corporate governance formation of the JSC. Corporate governance is the result of a separation of ownership and control, where a centralized management and a general meeting of shareholders are formed, thus, governing and "key strategies" defining bodies are established.[26]

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17 Accordingly, the conflict of interest is considered in direct connection with the part of the duty of loyalty of the manager as a fiduciary I. See *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 269-281.

18 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 184.

19 The word "corporation" may be used as a synonym for a joint stock company.

20 Law of Georgia on Entrepreneurs, Article 208, Legislative Herald, 04/08/2021 (in Georgian).

21 *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 241.

22 For sources on corporate law, see *Armory J., Hansman H., Krackman R., Pargendler M.,* What is corporate justice? In the collection: Anatomy of Corporate Law: Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D., (Ed.) Gabelia T.,* 3rd ed., Tbilisi, 2019, 22-26 (in Georgian).

23 Order of the President of the National Bank of Georgia of September 26, 2018 215/04 "On the Approval of the Corporate Governance Code of Commercial Banks", Legislative Herald, 27/09/2018 (in Georgian).

24 The so-called Soft law is the principles of corporate governance that are largely based on best corporate governance practices. The set of principles mentioned in the document is called the "Code", which is usually of a recommendatory nature. See *Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 181; *Makharoblishvili G.,* General Analysis of Corporate Governance, Tbilisi, 2015, 304-307 (in Georgian); *Beridze T., Burduli I., Makharoblishvili G., Kharaishvili A., Sikharulidze D., Kikutadze V., Lobzhanidze N.,* The Impact of Soft Law on the Effectiveness of Corporate Governance, Tbilisi, 2018, 53-61 (in Georgian).

25 Corporate Governance Code for Commercial Banks, SBA, IFC, 2009 (in Georgian).

26 *Bratton W., Watcher L. M.,* Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation, 34 J. Corp. L. 99, 2008, 118-122.

Centralized management is a body with delegated authority to exercise control, which, on the basis of the corporate trust of the levers of management of the entrepreneurial society,[27] appears in a fiduciary relationship with the JSC and the shareholders.[28] This duty is much more complete and specific than the institution of power of attorney defined by general private law. The fiduciary duty catalog implies the co-operation of obligations and interests in such a way, that the recipient of the fiduciary and its outcomes, when the issue of preference[29] of interests between the beneficiary is on the agenda, *the obligation*,[30] in favor of the JSC and the shareholders, will put the *interest* at the forefront of the ordinate of priority. The management should act on the basis of full awareness, in good faith, in the best interests of the corporation[31] and the shareholder,[32] and exclude asymmetries of the information provided to the JSC bodies.[33]

The systematic analysis of corporate governance should be based on the management control of property (investment) and the supervisory process of such control. Transfer of control over the invested property to a third party[34] puts the right of direct control over the ownership of the JSCin the hands of management, while leaving the ability of shareholders to oversee[35] the management of the governing body forms the two main classifying bases of corporate governance, that is called the functional and substantive separation of ownership and control. [36]

Giving management the competence to dispose the investment[37] in the interests of the entrepreneur community puts *Bona Fide* management in question. As a result, a logical circle is formed between corporate governance, separation of ownership and control, delegated authority, competition of interests of management and JSC, [38] which gives rise to the obligation of corporate

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27 *Burduli I.,* Fundamentals of Share Law, Vol. II, Tbilisi, 2013, 371 (in Georgian).

28 *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 335-337.

29 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 321.

30 The obligation of a person with fiduciary duty is implied.

31 In UK court decisions, the interest of the company is conceived as an aggregate of the interests of the shareholders. See *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 335.

32 G20/OECD Principles of Corporate Governance, VI. The Responsibilities of the Board, 2015, 45-46.

33 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 184.

34 The governing body of the JSC is implied.

35 The term "control" used by shareholders refers to the authority to appoint / dismiss members of the governing body, which is exercised by voting rights based on share ownership. This is valid in modern corporate legal systems. For example, see Revised Model Business Corporation Act, 2021, § 8.60 ("Control" (including the term "controlled by") means (i) having the power, directly or indirectly, to elect or remove a majority of the members of the board of directors or other governing body of an entity, whether through the ownership of voting shares or interests, by contract, or otherwise, or (ii) being subject to a majority of the risk of loss from the entity's activities or entitled to receive a majority of the entity's residual returns).

36 *Makharoblishvili G.,* General Analysis of Corporate Governance, Tbilisi, 2015, 58-59, 68-76 (in Georgian).

37 Subject to normative or statutory restrictions.

38 According to a separate definition, a conflict of interest refers to a conflict of interests and obligations and a conflict between obligations. See *Tsertsvadze L.,* Duties of the Director in Merging the Company and Selling the Controlling Stake (Comparative-Legal Analysis on the Example of US, Predominantly Delaware, EU and Georgian Law), Tbilisi, 2015, 125 (in Georgian), see quote: *Mortimore S. (ed.),*Company Directors Duties, Liabilities and Remedies, 2nd ed., Oxford University Press, 2013, 236.

legal regulation of the legal catalog of the governing body (person), as well as the need to regulate a particular opportunistic action[39] by such a standard as a conflict of interest.

The scale of authority[40] given to a manager by organic theory[41] creates the risk of fraudulent, opportunistic action,[42] which is balanced by defined legal strategies[43] and the general standard of conduct established by corporate law as a fiduciary duty. [44]

The standard of conduct of a manager, which should resolve the conflict between obligations and interests, is combined under the systemic concept of "duty of loyalty"[45] to minimize the risk of misallocation of property and information.[46] Risk practice goes beyond the standard of good faith. *The form and content of a breach of the standard of good faith are shaped by actions*

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39 For one explanation of opportunistic action, see *Makharoblishvili G.,* General Analysis of Corporate Governance, Tbilisi, 2015, 80-81 (in Georgian).

40 On the governing body as a representative body, see *Burduli I.,* Fundamentals of Share Law, Vol. II, Tbilisi, 2013, 360-370 (in Georgian).

41 *Chanturia L.,* Introduction to the General Part of Georgian Civil Law, Tbilisi, 2000, 238-241 (in Georgian).

42 A somewhat different perception of the conflict of interests is presented in the Corporate Governance Code approved by the order of the President of the National Bank of Georgia, which states in the basic principles of corporate governance that the bank should ensure the establishment of an organizational and governance structure where conflicts of interest are ruled out and no one enjoys indefinite decision-making authority. See Order of the President of the National Bank of Georgia of September 26, 2018 215/04 "On the Approval of the Corporate Governance Code of Commercial Banks", Article 3, Paragraph 4, Legislative Herald, 27/09/2018 (in Georgian). Forming an "organizational and governance structure" that excludes conflicts of interest is unattainable in terms of the fundamental grounds of corporate governance, because there will always be two different interests and only in rare cases will there be an altruistic manifestation, so the use of the word "exclusion" is appropriate in this context. Consequently, a conflict of interest does not require the re-establishment of an organizational and governance structure (which the bank cannot provide), but rather the existence of "internal policies and procedures that rule out a conflict of interest in the work of governing bodies." See Code of Corporate Governance for Commercial Banks, SBA, Conflict of Interest, IFC, 2009 (in Georgian). Ensuring the existence of internal policy and procedure is the main task that can be done even by a bank, which should be established in the legal form of the JSC (see Law of Georgia on Commercial Banks, Article 2, Paragraph 1, Parliamentary Agencies 003, 23 / 03/1996 (in Georgian), to determine at the internal organizational level. In this regard, it is possible to see a substantial difference between "establishing the organizational and governance structure of the JSC" and "the existence of internal policies and procedures". Compare: *Armory J., Hansman H., Krackman R., Pargendler M.,* What is corporate justice? In the collection: Anatomy of Corporate Law: Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D.* (ed.) *Gabelia T.,* 3rd ed., Tbilisi, 2019, 35 (in Georgian).

43 Legal strategies consider the conditions of affiliation, the incentive circumstances of the representative, the decision-making power and the limitation of the representative power. See *Enrique L., Hertig J., Kanda H., Pargendler M.,* Related party transactions, in the collection: Anatomy of Corporate Law: Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D. (ed.), Gabelia T.,* 3rd ed., Tbilisi, 2019, 223 (in Georgian).

44 *Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 199-206 (in Georgian).

45 *Burduli I.,* Fundamentals of Share Law, Volume II, Tbilisi, 2013, 432-441 (in Georgian).

46 *Enrique L., Hertig J., Kanda H., Pargendler M.,* Related party transactions, in the collection: Anatomy of Corporate Law: Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D. (ed.), Gabelia T.,* 3rd Edition, Tbilisi, 2019, 248 (in Georgian).

such as conflicts of interest, these include dealing with oneself,[47] *dealing with related parties, seizing corporate (business) opportunity, and trading insider*[48] *information.*[49]

The last two cases constitute a management person in conflict with the interests of the JSC, but it doesn't have a sign of conflict of interest in classical understanding - a necessary party to the transaction must be a joint stock company,[50] which will enter into a legally binding relationship through the governing body and will be the beneficiary of the results obtained.[51]

2.2. Legal Basis of the Transaction

Conflict of interest, as an established standard of conduct for a person governing by corporate law, has historical,[52] factual, and transactional underpinnings. The original record used more elements of forbidding competition[53] as descriptive content of the conflict of interest content, while technically calling it a conflict of interest.[54] The new edition of the LGE,[55] in contrast to its invalid version, sets the norm of regulating conflict of interest as a separate article for the private sector and specifies its area of operation with respect to the legal form of the joint stock company.[56]

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47 *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 231.

48 Regarding the misuse of insider information, see *Robakidze S.,* Transactions and Private-Legal Consequences of Misuse of Insider Information, in Collection: Collection of Corporate Law I, *Burduli I. (ed.),* Tbilisi, 2011, 159-260 (in Georgian).; *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 454-463.

49 Compare: *Tsertsvadze L.,* Duties of a Director in Merger and Alienation of a Company (Comparative Legal Analysis on the Example of US, Predominantly Delaware, EU and Georgian Law), Tbilisi, 2015, 119-124 (in Georgian).

50 *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 342.

51 Revised Model Business Corporation Act, 2021, § 8.60, Official Comment No. 1.

52 For the first time, such a terminological record appears with the 2005 amendment. See Law of Georgia on Entrepreneurs, SSM, 40, 18/07/2005 (repealed, 01/01/2022).

53 It is interesting to compare the rule of prohibition of competition with the director's duty not to receive benefits from a third party related to his presence as director or acting or inaction as a director. See *French D., Mayson S., Ryan C.,* Company Law, 26th ed., Oxford University Press, 2010, 498.

54 *Jugheli G.,* Capital Protection in a Joint Stock Company, Tbilisi, 2016, 249 (in Georgian).

55 Law of Georgia on Entrepreneurs, Article 208, Legislative Herald, 04/08/2021 (in Georgian).

56 It is noteworthy that other manifestations of breach of duty, such as prohibition of competition, misappropriation of business opportunity, are presented in the general part of the new version of the LGE, while in the draft law (Registration Code: 000000000.00.00.016578, Legislative Herald, 13/08/2020) conflict of interest was presented with them in the form of Article 56. A substantive and functional explanation can be found for the transfer of the conflict of interest from the general part to the private part and only to the regulatory norms of the JSC. In particular, the above-mentioned corporate legal basis for the conflict of interest relates substantively to the JSC when, among other things, a transaction with a related person is to be made public by a disinterested director. See *Enrique L., Hertig J., Kanda H., Pargendler M.,* Related party transactions, in the collection: Anatomy of Corporate Law: Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D., (Ed.) Gabelia T.,* 3rd ed., Tbilisi, 2019, 249 (in Georgian). The so-called The issue of an uninterested (invited) director is a positive manifestation of the separation of ownership and control and is usually related to the functioning of the corporate governance of an open (public) JSC. This distin-

The regulation of conflicts of interest, in its classical sense, was first reflected in the Law of Georgia on the Securities Market.[57] However, this law identifies the target subject of the conflict of interest as an accountable enterprise.[58] The accountable enterprise is defined by the Law of Georgia on the Securities Market, according to which, an issuer of public securities is considered an accountable enterprise, which is based on the Law of Georgia on Entrepreneurs.[59] A public security is a class of securities that has been placed on a public offering and / or admitted to trading on a stock exchange. [60] It is natural, that the content of securities trading provided for the specificity of the target entity, and it did happen so. However, the content of the capital market,[61] it can be said, is an even more specific direction of corporate law (in its broadest sense) and it does not cover all types of JSCs - it includes (and included) only accountable JSCs.[62] Accordingly, the

guishes it (JSC) from all other legal forms, which are considered to be so-called closed business enterprises, where the formation of the governing body takes place, predominantly, from the structure of partners. See*Makharoblishvili G.,* Implementation of fundamental changes in the structure of capital societies on the basis of corporate-legal actions (acquisition-merger), Tbilisi, 2014, 33 (in Georgian). In such a case, the identity of the partner and the member of the governing body makes it possible to enforce such a standard of corporate legal protection as (partner) loyalty, abuse of a dominant position, significant transaction and its conclusion, and other (e.g., additional protection provided by the statute) standards. Adding to the above-mentioned reasoning is the fact that, in accordance with the principle of disposition declared in the first article of the new version of the LGE, the substantive regulation of conflicts of interest may be provided for in the statutes of other legal forms. See *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Magradze G., Egnatashvili D.,* Corporate Law, Tbilisi, 2021, 186 (in Georgian). This assumption, together with the principle of disposition, falls within the scope of private autonomy of the will, which is a principle reinforced by general private law. See *Chanturia L*., Commentary on the Civil Code, Book I, *Chanturia L. (ed.),* Tbilisi, 2017, Article 1, Vol. 5, 8, 20 (in Georgian). In summary, the legislature has imperatively set a high standard of conflict of interest for the JSC as a legal form of organized management of large capital, thus confirming its special legal and economic content (encumbrance), including in this form.

57 Law of Georgia on the Securities Market, Article 161, Departments of the Parliament of Georgia, 1 (8) 14/01/1999.

58 For the content of the accountable enterprise, see *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Societies on the Basis of Corporate-Legal Actions (Acquisition-Merger), Tbilisi, 2014, 34-42 (in Georgian).

59 Law of Georgia on the Securities Market, Article 9, Paragraph 1, Departments of the Parliament of Georgia, 1 (8) 14/01/1999.

60 Law of Georgia on the Securities Market, Article 2, Paragraph 36, Departments of the Parliament of Georgia, 1 (8) 14/01/1999.

61 *Burduli I., Makharoblishvili G., Egnatashvili D., Ebanoidze T.,* Capital Market Functionality: The Existing Reality and the Necessity of Reform, *Burduli I.* (*ed*.), Tbilisi, 2017, 19-67 (in Georgian).

62 When conducting an analysis on this issue, an interesting observation should be made: the regulation of the Law of Georgia on the Securities Market does not cover all types of joint stock companies, as the content of the "accountable enterprise" is presented as a prescription. Accordingly, the new version of the Law of Georgia on Entrepreneurs has established a regulation regulating the conflict of interests, imperatively, only for the JSC, however, we should not consider an accountable enterprise among them, because the securities market legislation is even more specific and in such cases its regulation should be applied. However, the reasoning is gets complicated by the interpretation of the definition established by the Law of Georgia on the Securities Market of the accountable enterprise itself (see Article 9, paragraph 1), insofar as it focuses on any enterprise based on the LGE that issues public securities, ie places the security on the basis of a public offering or admits to trading on the stock exchange. Theoretically, this definition can apply to all legal forms, of course, taking into account the specific requirements of the secondary capital market. However, also theoretically, if the

new edition of the Law of Georgia on Entrepreneurs incorporated the norm of regulating conflict of interest in the part of the JSCand, in substantive and qualitative agreement, "shared" the spirit of regulating the securities market legislation.[63] The regulation of both laws is united by three sub-directions of one pathos: A) regulates the conflict between the interests of the entrepreneur community and the member of the governing body and prevents its consequences; B) refers directly to the transaction in which the interested person is involved; C) requires disclosure of information on a transaction involving a conflict of interest. As a result, both the existing Georgian legislation on conflicts of interest and the newly established regulation of the LGE regulate conflicts of interest in practice, which defined the transaction as an unconditional basis.[64]

3. Categorization of Conflict of Interest

The corporate law system provides the necessary components for the functioning of an entrepreneurial society in the form of various institutions and strategies. Such institutional manifestations can be considered fiduciary duty and its subtype duty of loyalty, and as a strategy of conscientious protection of the duty of loyalty - a conflict of interest.[65] Its content is based on the motivated behavior of generating the personal benefit of the individual as a *homo economicus*. The functional purpose of corporate law regulation defined at the normative level is the preventive control of the motive of tangible or intangible property gain in *homo economicus*, which should consequently lead to an increase in its behavior to the conventional-rational level. Of course, this is only a regulatory area governed by positive law, which fails to cover the motive formed in the psycho-nervous part of an individual's behavior, an aspect of Inter Alia behavioral economics such as the doctrine of limited rationality, [66] but fully manages to prevent the threat of fraudulent activity and its economic-legal consequences. Therefore, it is important to analyze the direction that allows the classification of types of conflicts of interest.

LLC meets the criteria for qualification as an accountable enterprise, the requirements of Article 161 of the Law of Georgia on the Securities Market will apply directly to it and the effect of the above principle of disposition will be nullified and weighed (Based on the private autonomy of the will, the conflict of interest is regulated in the charter of the LLC similar to the JSC (Article 208 of the LGE)) in favor of the securities market legislation.

63 It is logical that there is some differentiation between the purposes of two different laws.

64 However, it should be noted that in Georgian law, the definition of a conflict of interest only at the transaction level is related to its relatively narrow understanding. The practical manifestation of a conflict of interest is not just about making a deal with "oneself", but it also deals with conflicts of interest in bidding, conflicts of interest in insider trading, and (potential) conflicts of interest in the acquisition of a business opportunity by an JSC. See *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 241-242. An example of a so-called self-tender is analyzed in the case, Unocal Corp. v. Mesa Petroleum Co, 493 A.2d. 946 (Del. 1985), where the authenticity of the self-tender announced by the corporation for its own shares was discussed, which ruled out the possibility of the shareholder participating in a hostile tender offer.

65 *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 341.

66 *Djibouti S.,* Modern Legal Problems of Protecting the Interests of Small Investors in the Capital Market and Ways to Solve Them, Tbilisi, 2016, 42-45 (in Georgian).

The classification of types of conflicts of interest is based on the form and content of the relationship between persons with different interests. Depending on the form, the construction of a conflict of interest may have two or more participating entities (its interest).

In the case of the first and all alternative modeling, one of the subjects of the relationship is JSC and its interest or potential interest as of an organizational entity.

Second, the person with the managerial authority of the JSC and its direct or indirect interest.

Third, the interaction of a related person with an interested person whose personal motive for the JSC could pose a potential economic threat.

In terms of content, all constructions are placed in the three above mentioned categories, which, in a narrow and broad sense, represent the subjects in it in the dimension of conflict of interest. In a broad sense and institutionally, a conflict of interest arises A) The so-called an attempt to seize[67] a business opportunity by corporation. [68] B) when trading insider information, [69] and in a narrow sense[70] - when making a deal with oneself[71] or a related person.[72]

It should be noted that the presence of JSC interest in any construct of conflict of interest does not imply the participation of JSC as a party to all probable transactions. For example, in case of misappropriation of a corporate opportunity,[73] the damage is done to the entrepreneur community,[74] although the person in charge of the transaction may act independently for personal gain and not on behalf of the JSC and in its favor.[75] A similar legal cause exists in the case of

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67 *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 342.

68 *Zubitashvili N.,* The Doctrine of Corporate Opportunity in American and Georgian Law, Journal of Law, №2, 2013, 44-56 (in Georgian); *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Magradze G., Egnatashvili D.,* Corporate Law, Tbilisi, 2021, 180-184 (in Georgian); *Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 341-350 (in Georgian).

69 For the purpose of this paper, the so-called broad understanding of conflict of interest is not subject to further analysis.

70 It could otherwise be called the classical understanding of conflict of interest.

71 Among the types of "transaction", in relation to the JSC, the concept of the so-called significant transaction and the rule of its conclusion were distinguished, which, in theory, may contain signs of conflict of interest. However, in the presence of signs of conflict of interest, a special norm on conflict of interest should be applied. SeeLaw of Georgia on Entrepreneurs, Articles 223, 224, Legislative Herald, 04/08/2021.

72 Compare: *Tsertsvadze L.,* Duties of the Director in Merging the Company and Selling the Controlling Stake (Comparative Legal Analysis on the Example of US, Predominantly Delaware, EU and Georgian Law), Tbilisi 2015, 132-133 (in Georgian); *Gevurtz F. A.,* Corporation Law, West Group, 2000, 321.

73 *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 162.

74 When seizing the opportunity of the corporation, there is also a so-called No Profit Rule. See *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 177-182.

75 Conflicts of interest naturally occur in the case of misappropriation of corporate opportunity, however, in contrast to the conflict of interest in the classical sense, for example, a claim for the invalidity of a transaction gets more complicated, if the owner of the property is no longer the corporation itself. However, if the director seizes the opportunity of the corporation in such a way that he enters into a transaction with a corporation represented by him, then the corporation can claim the interest due to it without canceling the transaction. See *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 241.

insider trading.[76] As for the so-called classical conflict of interest in concluding a transaction with oneself or a related person, one of the parties to the transaction is always the JSC, which will have a direct legal and economic result from the concluded or to be concluded transaction.[77]

4. The Essence of the Conflict of Interest and Modeled Variations of its Manifestation

4.1. The Basic Eelements that Define the Essence of a Conflict of Interest

The motive for breach of fiduciary duty is personal economic gain, which is the result of a conflict of interest and obligation. One is to regard the conflict of interest as a ground for breach of fiduciary duty, and the other is its content. There are defining elements of the concept of conflict of interest and there are different cases of its practical manifestation.

The essence of the conflict of interest regulated at the legislative level in the JSCis based on several elements of a formal and material nature.[78] These elements are:

A) transaction or conclusion of a transaction;

B) manager;

C) the grounds for inclusion of the manager as interested person;

D) the notion of a person related to the interested person;[79]

E) the decision-making body on the approval of the transaction, the procedure and content of the decision;

F) openness of information about the transaction;

G) legal consequences of the transaction;

H) Economic consequences of the transaction. [80]

A conflict of interest can be defined as a situation in which a person or corporation is in a position to obtain personal or corporate benefits, which differs from the remuneration arising from the contractual relationship of the person with the JSC.[81] The content of the conflict of interest is also presented in the principles of the Organization for Economic Co-operation and Development of Europe (hereinafter - OECD): conflict of interest is a qualitatively characteristic element of a

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[76] For transactions involving the use of insider information and their private legal consequences, see *Robakidze S.,* Transactions with Abuse of Insider Information and Private-Legal Consequences, in Collection: Collection of Corporate Law I, *Burduli I. (ed.),* Tbilisi, 2011, 226-255 (in Georgian).

[77] A relatively high standard is established by the Law of Georgia on the Securities Market, which not only concerns the conclusion of a transaction by an accountable JSC submitted by an interested person, but also includes a subsidiary of the Accountable JSC in which it owns more than 50%. See Law of Georgia on the Securities Market, Article 161, Paragraph 2, Departments of Parliament1(8), 24/12/1998.

[78] *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 338.

[79] For explanation of a related person, seeLaw of Georgia on the Securities Market, Article 2, Paragraph 11, Departments of Parliament 1 (8), 24/12/1998.

[80] Law of Georgia on Entrepreneurs, Article 208, Legislative Herald, 04/08/2021. Compare: Delaware General Corporation Law, § 144.

[81] Corporate Governance Code for Commercial Banks, Conflict of Interest, SBA, IFC, 2009 (in Georgian).

related transaction, which, instead of being prohibited,[82] should be properly managed in the interests of the corporation and shareholders.[83] Effective monitoring and openness of information should be used as its management mechanism.[84]

4.2. Modeled Variations of Conflict of Interest

4.2.1. "Direct" Conflict of Interest

The so-called classical form of conflict of interest involves a transaction between an JSC and its manager[85] when both parties are the same person. It is also called a "direct"[86] conflict of interest.[87] In other words, the appearance of the mentioned conflict of interest is also called concluding a deal with the interested director, where it receives a type of income which, at the same time, is not shared and distributed in proportion to the shares of the shareholders,[88] Ie the generation of benefits by the interested management person[89] is completed at the expense of the interests of the shareholders and the corporation.[90] Potential damage to the transaction arises from

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82 *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 276.

83 G20/OECD Principles of Corporate Governance, II. The Rights and Equitable Treatment of Shareholders and Key Ownership Function, 2015, 25-26. Compare: Order of the President of the National Bank of Georgia of September 26, 2018 215/04 "On the Approval of the Corporate Governance Code of Commercial Banks", Article 3, Paragraph 4, Legislative Herald, 27/09/2018.

84 G20/OECD Principles of Corporate Governance, II. The Rights and Equitable Treatment of Shareholders and Key Ownership Function, 2015, 25-26. Compare: Order of the President of the National Bank of Georgia of September 26, 2018 215/04 "On the Approval of the Corporate Governance Code of Commercial Banks", Article 4, Paragraph 4, Legislative Herald, 27/09/2018.

85 *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 232. See also, *Bakakuri N., Gelter M., Tsertsvadze L., Jugheli G.,* Corporate Law, Handbook for Lawyers, Tbilisi, 2019, 103-106 (in Georgian).

86 Revised Model Business Corporation Act, 2021, § 8.60, Official Comment No. 4.

87 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 351. See Law of Georgia on Entrepreneurs, Article 208, Paragraph 2, Subparagraph a), Legislative Herald, 04/08/2021.

88 *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 243.

89 Unlike the Law of Georgia on Entrepreneurs, the securities market legislation also considers a shareholder who holds 20% or more of the total number of votes of the accountable JSC as an interested person. See Law of Georgia on the Securities Market, Article 161, Paragraph 1, Departments of Parliament 1 (8), 24/12/1998. Accordingly, additional emphasis is placed on the possibility of influencing the decision of the General Meeting of Shareholders and on the subject of the shareholder as an interested person. See *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 295-300.

90 There are many discussed versions of potential conflict of interest in foreign court practice. In the case of Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971) The basis for the litigation became the decision on the distribution of the dividend. Sinclair Corporation has decided to distribute a dividend to its wholly owned subsidiary Sinclair Venezuelan Oil Company (Sinven), the result was a situation where the decision to distribute the dividend was made in a corporation where the managing director owns shares in the same corporation and the director would receive the money as a shareholder. The shareholders of Sinven Corporation ¬ filed a diversion lawsuit against Sinclair, alleging breach of duty. In particular, Sinclair Corporation used its "power" and decided to distribute excessive dividends to Sinven Corporation because it needed additional funding. The main point of the question on the subject matter was why such a transaction should not be regarded as a conflict of interest

the presence of one person on both sides of it: In the presence of the same person on both sides of the transaction, negotiation and / or trade are excluded.[91]

A common variant of a conflict of interest transaction with oneself is the issue of remuneration[92] when the corporation agrees with its supervisor on the issue of compensation.[93] This creates the basis for an expensive pay package to be agreed with the manager, which is achieved at the expense of the shareholders.[94] Without a defined set of remuneration, a person representing an JSC will not agree to a corporate position unless there is an exceptional case. For example, in a so-called closed joint stock company, a shareholder with a controlling stake aspires to the position of director in order to protect the invested capital without[95] additional remuneration.[96] However, in an open (public) JSC[97] where the shareholder structure is dispersed[98] and there is no shareholder with a controlling stake,[99] the motivational feeling of being the head of a small shareholder of JSC will be minimal.[100] The described data is directly regulated by the new edition of the LGE, which qualifies as a conflict of interest transaction the type of interest on the part of the manager when he, on the one hand, represents an JSC and, on the other hand, himself is

transaction or a transaction entered into with oneself. The court should have answered the question "Did the parent corporation receive anything by excluding minority shareholders and at their expense?" The court held that the decision on the dividend by Sinclair Corporation was not a deal with oneself, as the parent corporation received nothing at the expense of the minority shareholder of the subsidiary corporation - all shareholders were entitled to a proportional dividend. Another interesting fact is that in the present case, a fairness test of the dividend distribution decision would have subject all cases of dividend issuance to a similarly high standard of examination, leading to a utopian outcome in court.

91 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 190.

92 *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 338.

93 The issue of director remuneration is a determinant of good corporate governance effectiveness. See *Bazghadze T.,* Remuneration of the Director as a Prerequisite for Effective Corporate Governance on the Example of Experience from the Global Economic Crisis, in Collection: Collection of Corporate Law III, *Burduli I. (ed),* Tbilisi, 2015, 119-151 (in Georgian).

94 It is considered that the content of the conflict of interest in such a transaction falls within the scope of ordinary business activities, which is why it is still separated from the content of the transaction by an interested director different from the ordinary business line. See*Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 255.

95 The content of the Georgian norm, according to which, if the employment contract does not contain information on the remuneration of the manager's activities, then it is assumed that he / she performs his / her activities free of charge. SeeLaw of Georgia on Entrepreneurs, Article 45, Paragraph 3, Legislative Herald, 04/08/2021.

96 This is where the legal situation is considered, when the interests of the JSC, the shareholder and the manager are in relation to each other and / or fully coincide.

97 *Burduli I.,* Fundamentals of Share Law, Vol. I, Tbilisi, 2010, 126-127 (in Georgian).

98 "Dispersed Shareholder." See *Brudney V., Chirelstein M. A.,* Cases and Materials on Corporate Finance, Foundation Press, 1979, 708-710.

99 The benefit of a shareholder with a controlling stake differs from the benefit of a minority shareholder: a controlling shareholder derives a so-called monetary and non-monetary private benefit. See *Kikvadze G.,* Mandatory Tender Offer, in Collection: Collection of Corporate Law III, *Burduli I. (ed.),* Tbilisi, 2015, 60-66 (in Georgian).

100 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 357.

other party to the transaction.[101] The nature of the parties to the transaction poses a threat of increased conflict of interest, but its prevention has been achieved through Georgian corporate law. In particular, it was directly and imperatively determined that the transaction entered into / concluded by the manager[102] is subject to the supervisory board, or in its absence - prior approval by the general meeting of shareholders, where a person with such interest is prohibited from voting.[103] Imperative regulation neutralizes the potential threat of conflict of interest in its source. In practice, the record that an interested party must disclose information about a "concluded" transaction to the JSC will not work, as such a transaction is open at the stage of conclusion - the Chairman of the Supervisory Board or the Chairman of the General Meeting of Shareholders[104] enters into an employment contract with the JSC.[105] It should be emphasized that during the renewal / amendment of the employment contract, further approval of the transaction with the interested manager is excluded even theoretically. In any other case, for example, in a transaction of a manager selling or purchasing property from his own JSC,[106] taking[107] or lending a loan,[108] and other theoretically permissible transactions, the regulation of the said article shall apply in full to the period before and after the transaction.

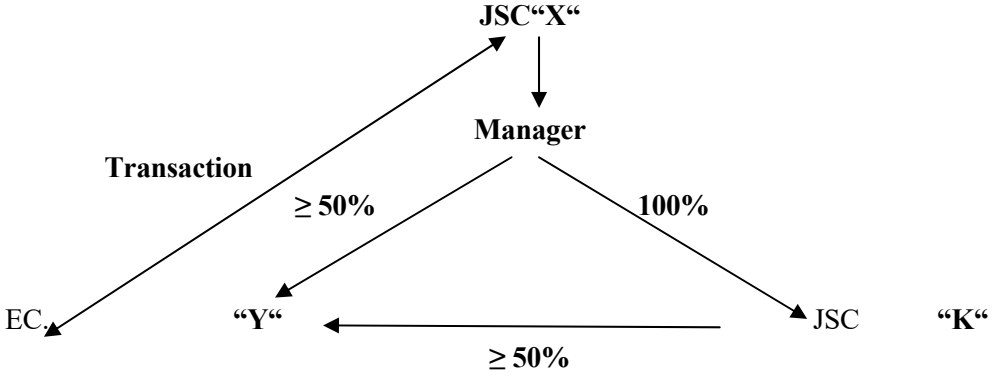

Figure №1.

[101] Law of Georgia on Entrepreneurs, Article 208, Paragraph 2, Subparagraph a), Legislative Herald, 04/08/2021 (in Georgian).

[102] It is noteworthy that the issue concerns only the revision of the concluded transaction, as the first invitation or appointment of the subject to a leadership position does not give rise to a conflict of interest in the described construction.

[103] Law of Georgia on Entrepreneurs, Article 208, Paragraph 4, Legislative Herald, 04/08/2021. It is similarly regulated in the securities market legislation. See Law of Georgia on the Securities Market, Article 161, Paragraph 5, Departments of Parliament 1 (8), 24/12/1998.

[104] In a general meeting of shareholders or, in a two-tier management system, the approval of a transaction to be entered into by the supervisory board is recognized as a so-called strong protection mechanism for a transaction involving a conflict of interest. See *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 252-254.

[105] Law of Georgia on Entrepreneurs, Article 45, Paragraph 2, Legislative Herald, 04/08/2021.

[106] *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 244.

[107] In the United States, the Sarbanes-Oxley Act, passed in 2002, effectively prohibited the lending of personal loans to executives. See *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 204-205.

[108] *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 343.

4.2.2. Fundamentals of Enrollment as Interested Person

In order for a manager's action or alleged action to be subject to a normative settlement of a conflict of interest,[109] it is necessary to shift the vector of attention to the substantive elements of his interest. The transaction[110] was analyzed as a "direct" conflict of interest with the JSC represented by its competence. As for the other grounds for charging a manager as interested person, their construction is even more complicated.[111]

In contrast to the "direct" conflict of interest, there is an "indirect" conflict of interest,[112] when the head of the corporation represented in the transaction has some interest in the other party to the contract, for example, the other party to the transaction directly or indirectly owns[113] 50 per cent or more than 50 per cent of the shares of that corporation.[114] A different version of an "indirect" conflict of interest is the fact of a person related[115] to the manager involved in the transaction.[116]

Another form of actual manifestation of a conflict of interest is a transaction between two or more corporations in which the managing director has an interest,[117] for example, being the head of a JSC that is the other party to the transaction.[118] There is not a conflict between the interests of

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109 For a comparative analysis, see UK Companies Act 2006, sections 175-231.

110 Securities market legislation also focuses on the substance of the transaction, such as its value. In particular, if 10% or more of the assets of the accountable enterprise are the value of the transaction in which the interested party participates, then it must be audited by an external auditor / certified accountant and approved by the Supervisory Board or the general meeting, and if the value exceeds 50% - the general meeting. See Law of Georgia on the Securities Market, Article 161, Paragraphs 51, 6, 7, Departments of Parliament 1 (8), 24/12/1998.

111 *French D., Mayson S., Ryan C.,* Company Law, 26th ed., Oxford University Press, 2010, 491.

112 Revised Model Business Corporation Act, 2021, § 8.60, Official Comment No. 4.

113 "JSC" means all legal forms defined by the Law of Georgia on Entrepreneurs, except for individual entrepreneur. See Law of Georgia on Entrepreneurs, Article 2, Paragraph 3; Article 208, paragraph 2, sub-paragraph b), Legislative Herald, 04/08/2021. Compare: Delaware General Corporation Law, § 144 (a).

114 Law of Georgia on Entrepreneurs, Article 208, Paragraph 2, Subparagraph b), Legislative Herald, 04/08/2021. See Scheme № 1. A different percentage is set by securities market legislation, which specifies the share and determines its content not only by the ownership of the share in general, but also 20% or more of the total number of votes. See Law of Georgia on the Securities Market, Article 161, Paragraph 2, Subparagraph b), Departments of Parliament 1 (8), 24/12/1998.

115 *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 232.

116 *Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 321 (in Georgian).

117 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 351.

118 Law of Georgia on Entrepreneurs, Article 208, Paragraph 2, Subparagraph d), Legislative Herald, 04/08/2021(in Georgian). A different regulation is proposed by the securities market legislation, according to which a person will be considered interested if he / she is appointed / elected as a member of the governing body of this accountable enterprise nominated by the other party to the transaction or by the holder of 20% or more of the total votes of the other party to the transaction. See

the corporation and the management, but a competition between the responsibilities of the person[119] holding the position of management in both contracting corporations.[120]

For a transactional relationship to qualify as a conflict of interest, in order for an interested person to be the subject of its results, he must be involved in the negotiation and transaction process,[121] otherwise the absence of a conflict of interest is emphasized.[122] Echoing this aspect of the analysis is that any personal interest[123] cannot be the basis for qualifying as a conflict of interest of a transaction. If the managing director or shareholder with a controlling stake (if any) has substantially the same interests as the minority shareholders, then this should not be interpreted as a conflict of interest.[124] It is a logical consequence as long as the moral basis[125] of the conflict between interests goes beyond their different content and consequences. When the interests of the parties involved in a transactional relationship are consequently different from each other,[126] then a conflict of interests arises.

The more conflict of interests is lost in a multilevel relationship, the higher the risk carrier. The complex schematic expression of the managing person of the transaction as an interested person is the following: A person will be considered as interested if he / she directly or indirectly owns 50 percent or more than 50 percent of the shares of that JSC, the 50 per cent stake of which is in the ownership of other party to the transaction.[127] This content of the interested person consists of several interrelated elements.[128] In particular, a) direct (indirect) ownership by the management of a share with a percentage of 50% or more; B) an JSC independent of the transaction, in which the managing director owns a share; C) the other party to the transaction, D)

Law of Georgia on the Securities Market, Article 161, Paragraph 2, Subparagraph d), Departments of Parliament 1 (8), 24/12/1998 (in Georgian).

119 They are also called "Interlocking Directors". It is an interesting fact that in the case of a public joint stock company, where the persons invited to the governing body are also represented, the existence of interconnected, joint directors must be favorable to both corporations. See *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 244.

120 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 352.

121 However, a fair transaction requires information disclosure at the relevant time, regardless of whether the manager is directly involved in the process of agreeing the terms of the transaction. See Revised Model Business Corporation Act, 2021, § 8.60, Official Comment No. 7.

122 A.L.I. Corporate Governance Project, §5.07.

123 Emotional involvement in the transaction can not be qualified as a conflict of interest, there must be material-financial or other interest involved. See Revised Model Business Corporation Act, 2021, § 8.60, Official Comment No. 4. See *Bakakuri N., Gelter M., Tsertsvadze L., Jugheli G*., Corporate Law, Handbook for Lawyers, Tbilisi, 2019, 102-103 (in Georgian).

124 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 353.

125 The duty of loyalty is a highly moral category of behavior. See *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 184.

126 The term "foreign interest to the corporation" is also used in the legal literature. See *Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 324 (in Georgian).

127 Law of Georgia on Entrepreneurs, Article 208, Paragraph 2, Subparagraph c), Legislative Herald, 04/08/2021

128 Under Delaware General Corporate Law, a transaction entered into or to be entered into with an interested director, without a percentage, if the transaction is approved by the general meeting of shareholders or approved by the disinterested directors, is considered valid unless otherwise specified. See Delaware General Corporation Law, § 144.

the holding of a share by the other party to the transaction with a percentage of 50% or more in the JSC in which the manager holds a share. For a complete understanding of the described corporate relationship, it is advisable to express it in a schematic form (see Figure №2).

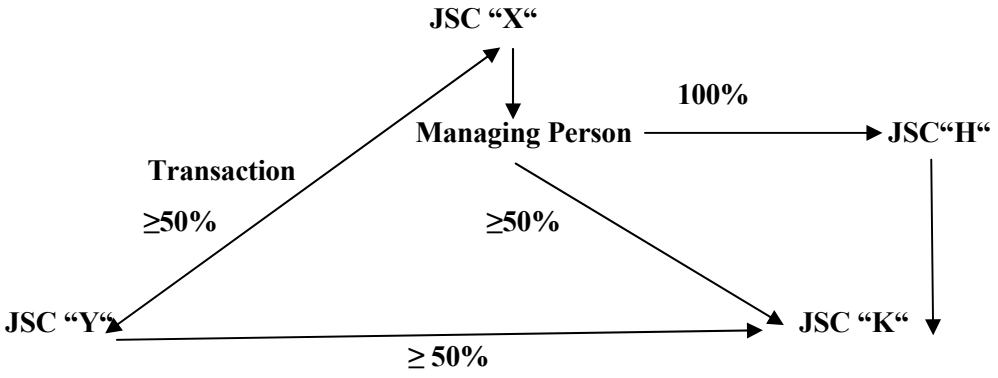

Figure №2.

Another element in shaping the content of an interested person is the postulate of conflict of interest where the manager receives a benefit as a result of the transaction, which is not related to owning a stake in the company or membership in a governing body.[129] Separate from the disposition of the norm are the legally recognized and permissible forms of receiving benefits. The manager may receive benefits in the form of remuneration on the basis of membership in the governing body and on the basis of an employment contract, but this relationship is usually free from conflict of interest[130] as long as the transaction is approved by one of the bodies defined by the law of the JSC.[131]

The distribution of the proportionate share in the net income of the JSC in the form of dividends, if the interests of all shareholders are equally considered, does not constitute a construction of a conflict of interest.[132] Both types of benefits are defined as legally foreseeable. The legislator's goal is related to the multiplicity of relationships and such range of permissibility of the action, where multiple interactions and at least a few intermediate links may exist. The cornerstone of the discussion is the word "benefit" and the entities involved in the transaction, between which the transaction generates a benefit.

The first part of the transaction construction is as follows: The subject party to the transaction is the JSC of the manager (representative) and the third party, rather than the manager himself or a person related to him. Typically, the legal and economic consequences of the transaction benefit the JSC, but independently or in parallel, the managing person may receive the benefit as well.

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129 Law of Georgia on Entrepreneurs, Article 208, Paragraph 2, Subparagraph e), Legislative Herald, 04/08/2021

130 Different legal data are available for JSCs operating in the secondary capital market. See *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 419-427.

131 *French D., Mayson S., Ryan C.,* Company Law, 26th ed., Oxford University Press, 2010, 499.

132 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 187, 194.

The second, basically, in corporate-legal "benefit" financial[133] or other interest is considered,[134] the realization of which may result in some material, economic income. The benefit, in terms of content, can also be legal and imply a legal advantage.

For theoretical demonstration, a transaction in favor of a third party[135] can be used.[136] As a rule, an agreement concluded between two or more parties creates rights and obligations for their participants.[137] However, the JSC may enter into a purchase agreement with the car dealer, under which the car will be transferred directly into the ownership of the manager.[138] A tripartite relationship (rather than a tripartite agreement) with a conflict of interest protection strategy emerges,[139] the information about which should be disclosed to the JSC as soon as it is understood and be subject to its ratification / approval procedure.[140]

In addition to the above, the benefit may be the result of fraud, embezzlement or abuse of power.[141]

The last aspect of the normative provision of the interested person is the possibility to define new content for him / her, which the Law of Georgia on Entrepreneurs recognizes as permissible due to the principle of disposition.[142] In addition to the normatively defined definition of the interested person, within the scope of statutory autonomy,[143] additional legal construction may be

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133 But not always. See *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 161.

134 Thus, for example, the norm of conflict of interest and disclosure of information of the Law of Georgia on the Securities Market refers to cash benefits as one type of interest. See Law of Georgia on the Securities Market, Article 161, Paragraph 2, Subparagraph e), Departments of Parliament 1 (8), 24/12/1998.

135 Some jurisdictions impose on the director the obligation not to receive benefits from a third party. See *French D., Mayson S., Ryan C.,* Company Law, 26th ed., Oxford University Press, 2010, 498.

136 Civil Code of Georgia, Article 349, Departments of Parliament, 31, 24/07/1997.

137 In the notion of "benefit", the consequences of such an operational transaction as the result of a merger between two JSCs are permissible. If, given the consequences of the merger transaction, the head of the JSC receives certain remuneration from a third party for the dismissal or the success of the merger transaction, then the relationship may qualify as a conflict of interest. A precondition for such compensation is that the merger transaction approved by the General Meeting of Shareholders of the JSC should not take into account the issue of remuneration of the manager, otherwise there will be a formal and material conflict of interest transaction. See *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 338, 343.

138 *Rusiashvili G., Aladashvili A.,* Commentary on the Civil Code, Book III, *Chanturia L. (ed.),* Tbilisi, 2019, Article 349, V. 1. (in Georgian).

139 Ibid., F. 8, 19, 20, 21.

140 Law of Georgia on Entrepreneurs, Article 208, Paragraph 4, Legislative Herald, 04/08/2021. See also, Revised Model Business Corporation Act, 2021, § 8.62.

141 Illegality or abuse of office for personal gain is a ground for breach of duty of loyalty and can be considered in the category of (acceptable) benefits received in a conflict of interest. See *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 182. However, a transaction involving this type of conflict of interest, if the party is a JSC, with the approval of the general meeting of shareholders can not be converted into a real transaction. See *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 210-213.

142 Law of Georgia on Entrepreneurs, Article 208, Paragraph 2, Subparagraph f), Legislative Herald, 04/08/2021.

143 *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Magradze G., Egnatashvili D., Corporate Law,* Tbilisi, 2021, 47-48 (in Georgian).

established. Thus, for example, an interested person may be a person who directly or indirectly owns the "lock" minority[144] of the JSC that is the other party to the transaction, and the "lock" minority to agree on a minimum threshold of 30 percent.[145] Given the principle of disposition and the fact that no restriction on imposing a higher or lower demand is prescribed, the consideration of any similar model by the JSC charter will fall within the regulatory area of the norm.

4.2.3. Related Person to a Manager - "Indirect" Conflict of Interest

The positive legal basis of a conflict of interest is a normatively regulated transaction-legal relationship, where the participating entity is, on the one hand, the JSC, which acts as the governing body of the relationship, and the other, the contracting party, is represented by either an interested person or a person related to him. The content of the interest in the transaction determines the substance of the conflict of interest. However, there is a "third party" called a related person. In other words, the related person has a direct interest in the transaction, while the manager only indirectly generates an interest and, consequently, a conflict of interest arises, as far as the person related to him is the other party to the transaction [146] and because of this, he himself becomes the interested person. The manager does not appear to be the other party to the transaction. The existence of a related person to him transforms him into an interested person. As a result, a different entity but with similar content as interested person is formed.[147]

The notion of a related person is used by both the Law of Georgia on Entrepreneurs and the Law on the Securities Market to define the substance of a conflict of interest.[148] Moreover, the first does not directly interprets and redirect it to the second law.[149]

The related person reveals the functional purpose only in conjunction with the manager.[150] It can be said that the manager is a kind of mediator to the involvement of the related person, to classify a transaction as a carrier of a conflict of interest. The grounds for qualifying a manager as an interested person are applied in direct proportion to the related person.[151] But, conflict of

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144 Blocking Minority. It should be noted that the "locked" minority is a characteristic of a JSC with a segregated shareholder structure, as no shareholder with a controlling stake is represented in such an JSC. See *Gilson R.,* Controling Shareholders and Corporate Governance: Complication the Comparative Taxonomy, Law Working Paper №49/2005, 2005, 5-6.

145 Without a percentage limit, but a similar construct is normatively defined in the definition of a related person. See Law of Georgia on the Securities Market, Article 2, Paragraph 11, Subparagraph b), Departments of Parliament 1 (8), 24/12/1998.

146 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 356-357.

147 Revised Model Business Corporation Act, 2021, § 8.60.

148 Law of Georgia on Entrepreneurs, Article 208, Legislative Herald, 04/08/2021; Law of Georgia on the Securities Market, Article 161, Departments of Parliament 1 (8), 24/12/1998 (in Georgian).

149 Law of Georgia on Entrepreneurs, Article 208, Paragraph 3, Legislative Herald, 04/08/2021 (in Georgian).

150 *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 172-173.

151 Basics for qualification of the manager into interested person -being on the other side of the transaction, directly or indirectly owning 50 per cent or more than 50 per cent of the JSCon the other side of the transaction, directly or indirectly owning 50 per cent or more than 50 per cent of an JSC where at least 50 per cent of the ownership belongs to the other party to the transaction, membership of the Supervisory Board of the other party to the transaction or being a manager, receiving a benefit as a result of a transaction, which is not related to the ownership of a share or membership in a governing body, other cases defined by the charter - is fully applied to the related person.

interest prevention is more complicated as another link is added in schematic modeling, which enriches the multi-layered conflict of interest with a multidimensional construction. This complicates its detection and prevention.

Related persons are classified by the Law of Georgia on the Securities Market. In particular, the related person is:

A) a person related to a physical person who, according to the Civil Code of Georgia, is included in the first and second ranks of the circle of legal heirs;

B) an enterprise in which a person directly or indirectly owns a stake that enables him or her to influence the decisions of that enterprise;

C) a member of the governing body of an enterprise in which a person directly or indirectly owns a share which enables him / her a practical opportunity to influence the decisions of that enterprise;

D) in case of a legal entity:

D. A) a member of a person's governing body and / or a person authorized to represent;

D. B) the person's partner or founder, who has a practical means, to influence the decisions of this legal entity.[152]

The Georgian normative design of the definition of "related person"[153] is mainly linked to owning a share in the enterprise, being a member of the governing body and being a partner of a legal entity.[154]

The defining elements of a related person are separated at the level of physical and legal entities. Situational modeling and identification of participating subjects is essential for a proper understanding of the norm construction. In the case of a physical person, it could be a child, a spouse, a parent and a sibling.[155] The head of the JSC will be considered an interested person if the head of the JSC enters into a transaction with its parent, or sibling.[156] Also, a manager will be considered interested person if the other party to the transaction is an enterprise in which he or she directly or indirectly owns a stake that enables him or her to influence the decisions of that enterprise.[157] For example, an enterprise decision may be influenced by a so-called locked-in minority shareholder. According to another construction, the head of the JSC will be considered interested person if he or she is the member of the governing body of the enterprise to the other party of the transaction, in which he or she directly or indirectly holds a stake that allows him or her to influence the decision of that enterprise.[158]

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[152] Law of Georgia on the Securities Market, Article 2, Paragraph 11, Departments of Parliament 1 (8), 24/12/1998.

[153] The definition of a related person is presented with almost the same content in the Company Law, 2006, Section 252. See*French D., Mayson S., Ryan C.,* Company Law, 26th ed., Oxford University Press, 2010, 505.

[154] A more detailed definition is contained in the Model Law on Business Corporations. SeeRevised Model Business Corporation Act, 2021, § 8.60.

[155] Civil Code of Georgia, Article 1336, Departments of Parliament, 31, 24/07/1997.

[156] Law of Georgia on the Securities Market, Article 2, Paragraph 11, Subparagraph a), Departments of Parliament 1 (8), 24/12/1998.

[157] Ibid., B) Subparagraph.

[158] It is possible to influence the decision of the enterprise in the form mentioned in the previous construction. See. Law of Georgia on the Securities Market, Article 2, Paragraph 11, Subparagraph c), Departments of Parliament 1 (8), 24/12/1998.

In parallel with a physical person, the definition of a related person also includes the case of a legal entity. The authority of the head of the JSC is vested in a legal entity. The head of the JSC legal entity will be considered as an interested person, if the other party to the transaction is a member of the governing body of the same legal entity and / or the person authorized to represent it, the partner or the founder, who has the practical means to influence the decision of the legal entity.[159] In turn, depicting legal entity in the general dimension needs to be explained. The issue concerns the division of a legal entity into a legal entity of public and private law, and as a legal entity of private law - non-entrepreneurial (non-commercial) and entrepreneurial legal entities.[160] Despite the reference to a legal entity without specification, it can still be argued that the concept of "related person" relates only to legal entities under private law, because the norm of conflict of interest concerns the legal form of a JSC and the Law of Georgia on the Securities Market, in fact, links all vectors of relations to the accountable enterprise. Naturally, given the teleological explanation of the law and its purposes,

an accountable enterprise is an JSC defined by the Law of Georgia on Entrepreneurs and the observance of the *Numerus Clausus* principle.[161]

5. Openness of Information

The existence of a transaction involving a conflict of interest or the preparation of such a transaction does not in itself mean either its prohibition,[162] or its unconditional invalidity,[163] or its voidable.[164] The conclusion of a contract with a problem of conflict of interest is regulated at the legislative level, which implies its admissibility under certain circumstances. Legal regulation transforms it from a complex and problematic construction to a corporate strategy. There are two general mandatory prerequisites: A) Disclosure of information on conflicts of interest,[165] B) Approval of the transaction by the so-called superior[166] body of the JSC.[167]

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159 Ibid, d) Subparagraph.

160 *Chanturia L.,* Commentary on the Civil Code, Book I, Chanturia L., (ed.), Tbilisi, 2017, Article 8, v. 3, 4, 8, 9 (in Georgian).

161 Entrepreneurial society is: a society of solidary responsibility, Limited Partnership, Limited liability company, Joint Stock Company and Cooperative. SeeLaw of Georgia on Entrepreneurs, Article 2, Paragraph 3, Legislative Herald, 04/08/2021. See *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Magradze G., Egnatashvili D.,* Corporate Law, Tbilisi, 2021, 78-81 (in Georgian).

162 Compare: *Enrique L., Hertig J., Kanda H., Pargendler M.,* Related party transactions, in: Anatomy of Corporate Law: A Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D. (ed.), Gabelia T.,* 3rd ed., Tbilisi, 2019, 243-247 (in Georgian).

163 The invalidity of the transaction becomes even more complicated if the third party involved in the transaction was in good faith. See *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 166.

164 Historically, in U.S. reality, in the 1800s, the court had a specific attitude toward a conflict of interest transaction: any contract in which there was a director's conflict of interest, in the event of termination by any shareholder, would be void. See *Gevurtz F. A.,* Corporation Law, West Group, 2000, 322; *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 282-283; *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 189.

165 Revised Model Business Corporation Act, 2021, § 8.60, Official Comment No. 7.

166 *Burduli I.,* Fundamentals of Share Law, Vol.II, Tbilisi, 2013, 195-247 (in Georgian).

167 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 341-346.

According to the systematic understanding[168] of corporate governance formed as a result of fragmented ownership,[169] balanced risk management through corporate-financial-marketing mechanisms is a utopia without the openness, openness or transparency of relevant information.[170]

The obligation to disclose information[171] is imposed by the normative legislation of the corporate law of this or that country, as well as by the so-called Soft Law Exhibitor under the Corporate Governance Code.[172]

Disclosure of JSC related information is a multifunctional load as the information is diverse. Information openness of JSC data implies regular disclosure of information of legal and economic status,

verification of inaccurate information, shareholder structure, audit reports, management, organizational management system, charter and related content and scope of transactions.[173]

Disclosure of information on conflicts of interest has internal and external legal aspects. In the domestic legal dimension, the manager interested person should submit to the Supervisory Board of the JSC or the General Meeting of Shareholders the nature of the interest, volume and other consequences of the transaction. This is an internal organizational regulation of the conflict of interest, hence the purely corporate legal regulation. However, the openness of information also has an external legal aspect. For a public JSC investor, it is essential to know that the JSC is functioning properly. This requires disclosing to the market participant all the circumstances surrounding the transaction involving a conflict of interest.[174] Although this section relates only to the "soft" legal obligation of the JSC operating in the open, public, capital market, but it clearly emphasizes the content of the transaction with the interested person - the purpose of resolving the conflict of interests is to create a buffer zone with the legal and economic protection of the JSC and its shareholder, i.e. the investor.[175]

The circumstance to declare conflict of interest at the internal organizational level is divided into several directions. In the first stage, the subjective cognition and analysis of the nature of their

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168 *Coffee Jr. J., C.,* The Rise of Dispersed Ownership: The Role of in the Separation of Ownership and Control, Columbia Law School, Working Paper No. 182, 2001, 24-37.

169 *Makharoblishvili G.,* General Analysis of Corporate Governance, Tbilisi, 2015, 54-90 (in Georgian).

170 G20/OECD Principles of Corporate Governance, V. Disclosure and Transparency, 2015, 37 (The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company).

171 Mandatory disclosure of information is also called an affiliation strategy. See *Enrique L., Hertig J., Kanda H., Pargendler M.,* Related party transactions, in the collection: Anatomy of Corporate Law: Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D. (ed.), Gabelia T., 3rd ed.,* Tbilisi, 2019, 223-232 (in Georgian).

172 *Beridze T., Burduli I., Makharoblishvili G., Kharaishvili A., Sikharulidze D., Kikutadze V., Lobzhanidze N.,* Impact of soft law on the effectiveness of corporate governance, Tbilisi, 2018, 91-92 (in Georgian).

173 Corporate Governance Code for Commercial Banks, Information Disclosure and Transparency, SBA, IFC, 2009, 19-22 (in Georgian).

174 G20/OECD Principles of Corporate Governance, V. Disclosure and Transparency, 2015, 40.

175 The statutory settlement of conflicts of interest should be simple and different and should function in such a way that any such transaction does not reach a court dispute. See *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 276.

own interest by an essentially important manager. Perception of the fact of interest at the stage of preparation of the transaction, gives rise to his fiduciary duty to immediately notify the JSC. The same requirement applies to the notification of a fact after the conclusion of the transaction. The conclusion is simple: the binding norms of conflict of interest, after knowing and analyzing the information about it, comes into force, more precisely, it activates the fiduciary obligation of the interested person, which focuses on the subjective side of the behavior.[176]

It can be said, that the openness of information is the intermediate link that connects the stage of recognizing the conflict between interests or obligations [177] to the stage of transforming[178] it into a legally real relationship.[179] The latter involves a decision by the JSC Supervisory Board or the General Meeting of Shareholders.[180]

In practice, openness of information has also been used as a criterion for assessing the fairness of a transaction. It is true that the transaction fairness test is related to the fair determination of conclusion and the price of transaction, but concealing information about a transaction involving a conflict of interest is, in itself, unfair.[181] In the case of State Ex Rel. Hayes Oyster Co. v. Keypoint Oyster Co.[182] The court found the concealment of information on the conclusion of a conflict of interest transaction to be a failure to meet the criteria of fairness and therefore unfair. Such an understanding of the concept of fairness by the court begs the question, why should not the criterion of fair value of the contract alone be sufficient for a fair qualification of a transaction without full disclosure of information?! The answer to the rhetorical question is simple: If the fair value, taken separately, without disclosure of information, was sufficient for the transaction to be fairly accounted for, then the right of decision making by the corporation would be transferred to the jurisdiction of the court and any such transaction would be subject to judicial review.[183] The result of a kind of analysis of the court decision is logically reflected in the modern regulations: If the contractor was aware of the conflict of interest and the absence of a JSC permit, the JSC has the right to terminate such an agreement,[184] or if the obligation to comply with the conflict of interest rules were violated, the JSC may claim damages from the infringer.[185] The

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176 It should be noted that the securities market legislation defines written notification as a form of disclosure of disclosed information. See Law of Georgia on the Securities Market, Article 161, Paragraph 3, Departments of Parliament 1 (8), 24/12/1998 (in Georgian).

177 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 186.

178 *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 277.

179 *Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 328 (in Georgian).

180 Law of Georgia on Entrepreneurs, Article 208, Paragraphs 1 and 4, Legislative Herald, 04/08/2021(in Georgian).

181 *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 278. Concealment of information about a transaction with a conflict of interest should be considered a procedural violation of the transaction.

182 State Ex Rel. Hayes Oyster Co. v. Keypoint Oyster Co. 391 P.2d 979 (Wash. 1964).

183 *Eisenberg M.,* Self-Interested Transaction in Corporate Law, Journal of Corporate Law №13, 1988, 997-1008.

184 Law of Georgia on Entrepreneurs, Article 208, Paragraph 8, Legislative Herald, 04/08/2021 (in Georgian).

185 Ibid. Paragraph 9.

result is the same: the fairness test protects both the procedural rules for making a transaction decision[186] and the price fairness criterion set by the transaction.[187] A similar explanation was made by the Delaware court in the case of Weinberger v. UOP Inc.[188] that justice is based on two fundamental aspects: concluding the transaction in accordance with the procedural rules and the fair price of the transaction.[189]

A special part of disclosing information about conflicts of interest is the content of the information to be disclosed. General information on conflict of interest, is only a formal part of the self-deal.[190] Disclosed information on conflicts of interest should include data on all significant factual circumstances, which is called full disclosure.[191]

The decision to approve the transaction by the JSC must indicate the nature, scope[192] and other important conditions of the interest.[193] This relates to the nature of the interest, i.e. direct or indirect conflict of interest categories; this is related to the quantitative interest rate, which can be the value of the transaction. Although the explanatory content of the information disclosure is the decision-making process of the JSC and the specific criteria of the interested person, but it should likewise be shared by the interested manager in terms of the type and content of the information to be submitted to the JSC for the first time. Such information should become the basis for the approval of the transaction by the General Meeting of Shareholders or the Supervisory Board of the JSC.

The last part of the normative provision is even more interesting because it includes "other important conditions", which must take into account any relevant factual circumstances that will have a practical impact on the decision-making body when approving the transaction. But the question is: should the information disclosure include, for example, the future intention of its use by the interested person after the acquisition of property by JSC. This record of Georgian corporate law, naturally, has a wide range. The record can be understood in much the same way as it was explained in the case of Rosenblatt v. Getty Oil Co.[194] In particular, a director with a conflict of interest must disclose "all material information" related to the transaction.

The reasoning and the result of the analysis reveal the legal significance of disclosing information on conflicts of interest at the intra-organizational level.

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186 *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 164.

187 Interestingly, the official commentary on the Business Corporation Model Law states that the fair value of a transaction and the disclosure of information about a conflict of interest may not be sufficient to protect and approve the transaction. See Revised Model Business Corporation Act, 2021, § 8.60, Official Comment No. 6.

188 Weinberger v. UOP Inc., 457 A. 2d. 701, 711 (Del. 1983).

189 *Eisenberg M.,* Self-Interested Transaction in Corporate Law, Journal of Corporate Law №13, 1988, 1001.

190 *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 280-281.

191 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 201.

192 There is a separate regulation regarding the loan agreement, for example, in the Company Law, 2006. See *French D., Mayson S., Ryan C.,* Company Law, 26th ed., Oxford University Press, 2010, 503.

193 Law of Georgia on Entrepreneurs, Article 208, Paragraph 6, Legislative Herald, 04/08/2021 (in Georgian).

194 Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985).

6. Approval of a Transaction Containing a Conflict of Interest

A fundamental principle of corporate law is that it is inadmissible to approve by a majority vote the embezzlement, fraud and ultra vires action of a corporation.[195]

The desire to control the process of managing[196] the invested property is called shareholder activism,[197] the first manifestation of which is the "exclusive" decision-making power in the form of a general meeting. The shareholder is interested in maintaining the value of the corporation.

Approving a conflict of interest transaction at a general meeting is a strong strategy[198] to protect against opportunistic consequences and a corporate form of control.[199]

Most of jurisdiction of corporate law for a transaction involving a conflict of interest requires the approval of a majority of the disinterested directors and / or the support of the shareholders.[200] In Georgian corporate law, a transaction in the presence of a two-tier corporate governance system[201] is approved in advance by the Supervisory Board, and in the case of a monistic[202] corporate governance system - by the General Meeting of Shareholders.[203] Such a protection mechanism is due to the special powers of the general meeting of shareholders and the high standard of investment protection, although there are criticisms[204] that it will be difficult to obtain consent, especially in a JSC with corporate groups. The main shortcoming of the consent of the general meeting of shareholders is the participation of the interested shareholder in the conflict of interest when the consent of the majority of the minority[205] shareholders is not additionally defined.[206] However, additional levels of protection under Georgian corporate law are provided: If the majority of the members of the Supervisory Board in a two-tier management system are interested persons, then the transaction, instead of the Supervisory Board, must be approved by the

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195 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 210.

196 Governing process of JSC by management.

197 *Makharoblishvili G.,* General Analysis of Corporate Governance, Tbilisi, 2015, 72 (in Georgian).

198 *Enrique L., Hertig J., Kanda H., Pargendler M.,* Related party transactions, in the collection: Anatomy of Corporate Law: Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D. (ed.) Gabelia T.,* 3rd ed., Tbilisi, 2019, 239 (in Georgian).

199 *Makharoblishvili G.,* General Analysis of Corporate Governance, Tbilisi, 2015, 73-75 (in Georgian).

200 For example, see Revised Model Business Corporation Act, 2021, § 8.62, §8.63 (a).

201 *Hopt K. J.*, The German Two-Tier Board: Experience, Theories, Reforms, in: Comparative Corporate Governance: The State of the Art and Emerging Research, (*Edit.*) *Hopt K. J., Hideki K., Wymeersch* R., *Prigge* S., Clarendon Press, 1998, 228.

202 *Hopt K. J.,* The German Law and Experience with the Supervisory Board, Working Paper №305/2016, 2-3.

203 Law of Georgia on Entrepreneurs, Article 208, Paragraph 4, Legislative Herald, 04/08/2021(in Georgian).

204 Lewis v. Vogelstein, 699 A.2d 327 (Del. Ch. 1977). See *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 292-294.

205 Shareholders with no interest.

206 However, the approval of the deal by a majority of the minority is also considered in a negative context. See *Enrique L., Hertig J., Kanda H., Pargendler M.,* Related party transactions, in the collection: Anatomy of Corporate Law: Comparative and Functional Approach, (Translators) *Kochiashvili A., Maisuradze D. (ed.), Gabelia T.*, 3rd ed., Tbilisi, 2019, 239-240 (in Georgian).

General Meeting of Shareholders.[207] Additionally, when approving a transaction in any body, the interested person is prohibited from voting.[208]

Determining the time of transaction approval is a strategic part of resolving a conflict of interest.

The issue concerns the preliminary approval of the transaction.[209] The structure of the norm is formed in such a way that it mainly deals with the case of pre-approval and does not provide for further approval. The only indirect appeal is the right of withdrawal by the JSC, which requires two preconditions: A) The contractor must be aware of the conflict of interest when concluding the contract, and B) also, the absence of permission from the JSC should be known.[210] Targeted definition of the norm establishes the discretionary power of the JSC, insofar as it can exercise the right of withdrawal or leave it unused. Positively legally, the discretion of the JSC may be interpreted further as indirectly approved, if it does not exercise its right of withdrawal within the period of appeal.[211] As a result, expiration of the withdrawal period[212] can, in fact, be seen as an endorsement of a conflict of interest transaction.[213]

The corporate strategy for approving transaction by general meeting of shareholders,[214] in corporate law, is considered to be a strategy for creating a safe zone[215] for the management.[216] In turn, shareholders must act in good faith in the approval process.[217] Historically, the creation of a "safe harbor" has been achieved by fully disclosing information about a conflict of interest

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[207] Law of Georgia on Entrepreneurs, Article 208, Paragraph 5, Legislative Herald, 04/08/2021.

[208] Ibid, 4th point. This protection strategy imposes an objectively high standard of assurance on the well-being of the shareholders, to the extent that it excludes the participation of a manager who may at the same time hold the status of a shareholder. See *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 292.

[209] The same is governed by the UK Companies Act 2006, which requires information to be disclosed prior to a transaction. See Company Act, S. 177 (4).

[210] Law of Georgia on Entrepreneurs, Article 208, Paragraph 8, Legislative Herald, 04/08/2021 (in Georgian).

[211] The Law of Georgia on Entrepreneurs separates limitation and revocation. Limitation is mainly related to the legal category, claim, fact, and part of the appeal is related to the right of revocation defined by the charter or the lawThe general statute of limitations is 5 years, and the general term of revocation is 6 months. See Law of Georgia on Entrepreneurs, Article 92, Legislative Herald, 04/08/2021. The Law of Georgia on the Securities Market establishes the right to request the invalidity and compensation of different and special 18-month transactions. Also, in general, the JSCdoes not determine the entity authorized to request, but specifies it and determines whether the enterprise is a joint stock company, a) a shareholder or a group of shareholders holding 5% or more of the accountable enterprise, and in the case of another legal form, b) each partner. See Law of Georgia on the Securities Market, Article 161, Paragraph 9, Departments of Parliament 1 (8), 24/12/1998.

[212] The partner, the supervisory board, as well as another manager have the right to appeal the decision of the manager. See Law of Georgia on Entrepreneurs, Article 93, Paragraph 4, Legislative Herald, 04/08/2021.

[213] *Compare: Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 329 (in Georgian).

[214] *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 197-198.

[215] The so-called "Safe Harbor". By the way, it is directly explained by the commentary on the US model law. See Revised Model Business Corporation Act, 2021, § 8.63 (a), Official Comment, No. 1.

[216] *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 281-282.

[217] *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 199.

transaction and complying with its approval requirements, [218] making it a real transaction.[219] However, this approach, due to its wide coverage area, with minority, still is criticized and pushes the court to analyze additional substantive elements (For example, is the fact of embezzlement of the corporation's property in the face of the purpose, nature, future plan of interest[220]).[221]

The final aspect of approving a transaction is the number of votes required for a decision to be taken by the Supervisory Board, or the General Meeting of Shareholders.[222] The General Meeting of Shareholders makes its decision in accordance with the principle of a majority of votes,[223] in particular by a majority vote of the participants in the voting,[224] unless the charter provides for a larger number of votes to make a decision.[225] From the point of view of the JSC's business and long-term strategic perspective, when ratifying a conflict of interest transaction, it is possible to determine a qualified majority decision, which will further strengthen the transaction approval strategy in the context of protecting the interests of the shareholder [226] and the corporation.

7. Legal Consequences of a Transaction Involving a Conflict of Interest

The legal cause of a conflict of interest is such that it cannot always be considered as a basis for a priori receipt of certain benefits at the expense of the corporation. The niche for its settlement is in potential danger. According to court law,[227] if a transaction is "fair", it should not be annulled.[228] A transaction, including economically, is fair,[229] if a) the decision-making procedure was followed and b) the price specified in the contract is fair.[230] But these criteria are not the evaluation criteria defined at the legislative level of a conflict of interest transaction. They are used in litigation.[231] Based on the criteria set by the court, the formal [232] and material side of the

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218 *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 239-240.

219 *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 284.

220 *Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 325 (in Georgian).

221 Cookies Food Product v. Lakes Warehouse, 430 N.W. 2d 447 (Iowa 1988).

222 *French D., Mayson S., Ryan C.,* Company Law, 26th ed., Oxford University Press, 2010, 491-492.

223 Regarding shareholder governance rights, see *Burduli I.,* Fundamentals of Share Law, Vol. I, Tbilisi, 2010, 355-365 (in Georgian).

224 Compare: Revised Model Business Corporation Act, 2021, § 8.62 (a).

225 Law of Georgia on Entrepreneurs, Article 195, Paragraph 1, Legislative Herald, 04/08/2021 (in Georgian). A similar decision-making capacity and the number of votes required for decision-making and statutory autonomy are imposed on the Supervisory Board. See Ibid., Article 46, paragraph 3.

226 So-called Shareholder Wealth. See *Sharfman B. S.,* Shareholder Wealth Maximization and its Implementation Under Corporate Law, Florida Law Review, Vol. 66, 2014, 393-399.

227 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 325-331.

228 *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 276.

229 *Cahn A., Donald D. C.,* Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2011, 346.

230 Weinberger v. UOP, Inc., 457 A.2d. 701 (Del. 1983).

231 *Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 325-326 (in Georgian).

transaction is examined, and in general, in the event of a conflict of interest, the manager should consider the corporation's interest as his own, personal interest.[233] The formal side includes the procedural part of the transaction, and the material side - the content of the transaction. In the material part, the ratio between the economic goodness[234] given and received by the JSC is checked.[235] However, value category analysis[236] alone is not helpful for fair justice and it is also criticized. In particular, if the court discusses the amount of interest received by the plaintiff (for example, a shareholder), it is entirely permissible for the plaintiff to receive benefits from a transaction involving a conflict of interest, but the transaction to be not fair.[237] At the same time, a transaction cannot be unfair only if the interested person receives a substantial income from the transaction. This means that the benefits received from the transaction cannot be used as an absolute standard for the judicial evaluation of a transaction taken separately.[238] For a transaction to be fair, it must be in the interest of the corporation, and the ratio of that interest expressed in the entity to the benefit received by the manager should not be used as a unit of fair qualification for the transaction.[239] If the transaction is not beneficial to the corporation in either dimension,[240] it may be considered unfair.[241]

The legal Ex Post status of the transaction in Georgian corporate law is regulated, which must meet specific preconditions.[242] The established conflict of interest rule must be violated in order for the JSC to be able to exercise its right to claim (and not to withdraw).[243] It would be a violation of the rule if the relevant and complete information[244] on the conflict of interest is not disclosed and the relevant body of the JSC does not approve it in accordance with the rules established for the decision. But, just breaking the established rule is not enough to impose liability and the fact of harming the JSC is cumulatively necessary.[245] This rule provides a logical exception to the reservation that the JSC will not be compensated for the damage if the transaction

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[232] The mere presence of the director as a party to the transaction is not sufficient to invalidate the transaction. See *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 235.

[233] *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 196.

[234] The transaction must be of specific (economic) value to the JSC. See *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 236.

[235] Lewis v. S.L. & E., Inc., 629 F.2d. 764 (2d Cir. 1980).

[236] In a situation where there is a market value for the substance of the transaction, then the transaction entered into by the manager is easily assessed as to whether the transaction was entered into for better or worse terms. See *Gevurtz F. A.,* Corporation Law, West Group, 2000, 328.

[237] For fairness assessment criteria relating to a transaction involving a controlling shareholder conflict of interest, See *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 295-308.

[238] *Gevurtz F. A.,* Corporation Law, West Group, 2000, 326.

[239] Fliegler v. Lawrence 361 A.2d. 218 (Del. 1976).

[240] Revised Model Business Corporation Act, 2021, § 8.60, Official Comment No. 6.

[241] *Gevurtz F. A.,* Corporation Law, West Group, 2000, 327.

[242] Law of Georgia on Entrepreneurs, Article 208, Paragraph 9, Legislative Herald, 04/08/2021 (in Georgian).

[243] Compare: *Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 329 (in Georgian).

[244] *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 217-222.

[245] For a similar regulation, see: Law of Georgia on the Securities Market, Article 161, Paragraph 8, Departments of Parliament 1 (8), 24/12/1998 (in Georgian).

were concluded on the same terms as in the case of a conflict of interest. Naturally, this circumstance is not subject to internal scrutiny of the JSC and it must be considered by the adjudicating court. The Georgian court has the opportunity to use foreign, including the above examples, to correctly determine the orientation of the judicial analysis.[246]

The last part of the legal result of the transaction is aimed at the return of the interest received by the interested or related person to the JSC. Specifically, in return for damages, the JSC may request the infringer (or a person related to it) to transfer the benefit received[247] from the transaction or to waive[248] the right to receive such benefit, which is, in essence, a specific form of compensation.[249] Additional legal sanctions against the manager will be at the discretion of the JSC. For example, the General Meeting of Shareholders of the JSC, or, if any, the Supervisory Board, may dismiss the governing body.[250]

8. Conclusion

The content of a systematic understanding of corporate governance lies in the separation of investor ownership and the ability to exercise direct control over it. Separation of ownership and control gives rise to a "principal-agent" relationship and, consequently, a conflict of interest. As a result, conflict of interest is an immanent legal construct of corporate governance, separation of ownership and control. Preventing or eliminating conflicts of interest is one of the goals of corporate law. Its absolute neutrality is completely contrary to the concept of corporate governance of the JSC, the corporate structure of property trust, and the content of the individual as a *homo economicus*. Therefore, conflict of interest is a qualitatively consistent and characteristic element of centralized, delegated management, and the purpose of corporate law is not to prevent it completely, but to create a controlled corporate structure, which will bring any of its situational manifestations into the supervisory area. Normally regulated conflict of interest acquires the importance of a corporate-legal strategy. This strategy puts the risk arising from the management of invested capital with "unknown hand" under de facto corporate and judicial control.

As a result of the structure and analysis of the article, it is possible to present a summary view: Using the content of the conflict of interest as a corporate strategy guarantees the purposeful functioning of the JSC, which allows the court to correctly determine the orientation of the judicial analysis in the event of a dispute.

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246 Concluding a conflict of interest transaction by a manager, under U.S. model law, may not always be subject to litigation, damages, or other sanction, and lists specific circumstances. See Revised Model Business Corporation Act, 2021, § 8.61.

247 Similar content is provided by securities market legislation. See Law of Georgia on the Securities Market, Article 161, Paragraph 9, Departments of Parliament 1 (8), 24/12/1998 (in Georgian).

248 *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 166-167.

249 *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 241. *Compare: Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 329-330 (in Georgian).

250 Law of Georgia on Entrepreneurs, Article 44, Paragraph 3, Legislative Herald, 04/08/2021. *Compare: Chanturia L.,* Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 330 (in Georgian).

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Tamar Bazghadze[*]

Relationship between Contract of Carriage of Goods and Bill of Lading

International commercial transaction, in particular, several legal relationships that create entire net of this transaction, include numerous parties and documents. One of the main documents of this transaction is bill of lading. Bill of lading, on the one hand, includes the provisions of contract of carriage and serves as main evidence of this contract; on the other hand, bill of lading grants third party (the consignee) with the right over the cargo.

First stage of international commercial transaction is contract for the international sale of goods, parties of which are seller and buyer. United Nations Convention on Contracts for the International Sale of Goods (CISG) refers to the obligations of the seller that include to deliver the goods to the buyer. The obligations of the seller might also include conclusion of the contract of carriage, if the parties agree on such through the contract of sale of goods. For this purposes the seller has to provide carriage of the goods, in handing the goods over to the first carrier for transmission to the buyer. Accordingly, CISG, beyond the general obligations of the seller, refers to the transport documents and imposes the obligations upon the seller for the purposes of the contract of carriage.

Subject of research of this article is bill of lading, used in international carriage of goods by sea. Legal relationships related to this transaction are regulated through International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as amended by the Brussels Protocol (the Hague-Visby Rules), and by the United Nations Convention on the Carriage of Goods by Sea of 1978 (the Hamburg Rules). The article also refers to United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter – the Rotterdam Rules), that is not yet in force because of unsufficient number of ratifications.

Parties of contract for international sale of goods are the seller and the buyer. As for the contract of carriage, parties of it are the shipper and the carrier. Transport documents are initial part of international carriage of goods and issuing of them, usually, takes place after conclusion of contract for international sale of goods and contract of carriage.

Commercial transaction depends on accuracy of the transport documents that are used in international carriage of goods. Bill of lading evidences provisions of contract of carriage and also, does include some of them. Contracts preceding the bill of lading might be concluded in verbal form, through electronic communications or by conduct, without clear acceptance and signature. In such cases the bill of lading might have contractual nature and serve as a contract. Also, bill of lading, as the document of title, transfers contractual rights to the third party – the consignee, creating grounds for legal relationship between the consignee and the carrier. Whereas the contract of carriage does not exist or the bill of lading does not comply to it, the bill of lading is the only document to determine the rights of the consignee and obligations of the carrier before him.

All of the abovementioned issues make clear functional diversity of the bill of lading that are beyond being only receipt of goods and prima facie evidence of the contract of carriage. Accordingly, accuracy of the information contained in bill of lading shall be provided by the parties, especially during the development of it as far as this is the main source to indicate the following: will of the parties involved in commercial transaction, provisions of

[*] Ph.D Student of Ivane Javakhishvili Tbilisi State University, Faculty of Law.

contract of carriage, agreement of the parties on allocation of the rights and obligations between them, liable parties and liability/limitation of liability.

***Keywords**: International sale of goods, international carriage of goods, charterparty, bill of lading, shipper, carrier, consignee, freight, transport document*

1. Introduction

International commercial transaction, in particular, several legal relationships that create entire net of this transaction, require involvement of not only seller and buyer of the goods, but also involvement of forwarders, carriers, bankers, lenders, insurers and various regulatory authorities – as a sum, fifty different parties might take part in such transaction.[1] Accordingly, international commercial transaction consists of several contracts and documents, namely: contract of sale of goods, contract of carriage of goods, bill of lading, invoice, insurance contract and letter of credit.[2]

One of the main documents of this transaction is bill of lading. Bill of lading, on the one hand, includes the provisions of contract of carriage and serves as main evidence of this contract; on the other hand, bill of lading grants third party with the right over the cargo, though this third party might not be on face for the moment of conclusion of contract of carriage. Due to these functions, bill of lading might serve not only as the evidence of the contract of carriage but also as the contract itself, taking into consideration that it might duplicate substantial conditions of it.

This article aims to analyse the bill of lading as a contract as well as document of title, according to the case law and English and German legislation, through comparative research method.

2. Contract for the International Sale of Goods

First stage of international commercial transaction is contract for the international sale of goods, parties of which are seller and buyer. According to the United Nations Convention on Contracts for the International Sale of Goods (hereinafter – CISG), the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. Obligations related to international sale of goods might also include organizing of carriage of this goods. Such obligation might be imposed upon the seller or the buyer, according to the contract concluded between them. Taking into consideration that CISG applies to contracts of sale of goods between parties whose places of business are in different States, the seller may have to conclude contract of carriage in order to meet all the requirements of Article 30 of CISG. According to Article 31, subparagraph (a) of CISG, if the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists if the contract of sale involves carriage of the goods, in handing the goods over to the first carrier for transmission to the buyer.[3] In order to perform this obligation, conclusion of

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1 *Dubovec M.*, The Problems and Possibilities for Using Electronic Bills of Lading as Collateral, Arizona Journal of International and Comparative Law, Vol.23, #2, 2006, 438.

2 *Todd P.*, Bills of Lading and Bankers' Documentary Credits, 4th edition, Informa Law, 2007, 22.

3 United Nations Convention on Contracts for the International Sale of Goods, Article 31, subparagraph (a) <https://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980> [22.06.2022].

contract of carriage between the seller and the carrier is inevitable. Obligations that are determined through this contract, the party shall provide performance of the third party to this contract – the carrier.

CISG, beyond the general obligations of the seller, refers to the transport documents. According to the Article 32, paragraph 1 of the CISG, if the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods[4]; paragraph 2 of the same article sets the obligations of the seller for the purposes of the contract of carriage, in particular, if the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.[5] This clause of the CISG extends to the legal relationship related to the sale of goods, and imposes the obligations upon the seller for the purposes of the contract of carriage. The seller, according to the contract of carriage, is the party of it - a shipper.

3. International Carriage of Goods

3.1. Contract of Affreightment/Charter

When a shipowner, either directly or through an agent, undertakes to carry goods by sea or to provide a vessel for that purpose, the arrangement is known as a contract of affreightment[6]. Traditionally, two main types of such arrangement might be indicated: contract of affreightment, embodied in the charterparty and the one - evidenced by the bill of lading. When the shipowner concludes the contract in order to give the entire space of the ship in exchange of freight, for particular route or period of time, such arrangement shall be embodied, usually, in the charterparty. On the other hand, if the shipowner offers services related to the carriage to anyone, who would like to organize international carriage of goods, such contract, in most cases, shall be evidenced by the bill of lading.[7]

A charterparty is a contract which is negotiated in a free market, subject only to the laws that regulate supply and demand.[8] There are essentially two basic forms of charter (voyage charter and time charter), depending upon whether the vessel is chartered for a period of time or for one or more voyages.[9]

4 Ibid, Article 31, paragraph 1.
5 Ibid, Article 31, paragraph 2.
6 *Wilson J.*, Carriage of Goods by Sea, Pearson Education Limited, 7th ed., 2010, 3.
7 Ibid.
8 Ibid.
9 Ibid, 4. Another type of charter is bareboat-charter when the ship is leased without the crew. See <https://www.bimco.org/contracts-and-clauses/bimco-contracts/barecon-2017> [22.06.2022].

3.2. Contract of Carriage

Parties of contract for international sale of goods are the seller and the buyer. As for the contract of carriage, parties of it are the shipper and the carrier. It is important to figure out which party of the contract for international sale of goods does represent the shipper for the purposes of the contract of carriage; according to this indication, it shall be easier to determine the moment of shifting the risk of loss or damage of the cargo, as well as other circumstaces that might be crucial for the performance of the obligations according to the contract of sale of goods.

Generally, contract of carriage differs from the contract of sale of goods by the parties, their rights and obligations and documents issued due to it. It must be noted that in case of international contract on sale of goods the parties are entitled to determine and agree upon their rights and obligations. Unlike this, in case of contract of carriage, free will of the parties is limited as far as most issues related to it are comprehensively regulated through the international conventions.

Several national legislations and international conventions provide different definition of the contract of carriage. According to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as amended by the Brussels Protocol (hereinafter – the Hague-Visby Rules), "contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.[10] Carriage of Goods by Sea Act 1992, UK, contains similar references.

United Nations Convention on the Carriage of Goods by Sea of 1978 (hereinafter – the Hamburg Rules) defines the contract of carriage as any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea[11]. According to the definitions of Carriage of Goods by Sea Act of 1979, UK, contract of carriage meant a contract for the carriage of goods [12].

According to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter – the Rotterdam Rules), which is not yet in force because of unsuficient number of ratification, define the contract of carriage as a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.[13]

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[10] Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as amended by the Brussels Protocol, Article I, (b) <https://ca.practicallaw.thomsonreuters.com/9-570-7606?transitionType=Default&contextData=(sc.Default)&firstPage=true> [22.06.2022].

[11] United Nations Convention on the Carriage of Goods by Sea of 1978 (the Hamburg Rules), Article 1, paragraph 6, <https://unctad.org/system/files/official-document/aconf89d13_en.pdf> [22.06.2022].

[12] Carriage of Goods by Sea Act of 1979, UK, Section 2. <https://www.legislation.govt.nz/act/public/1979/0043/latest/DLM34000.html> [22.06.2022].

[13] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) Art. 1, paragraph 1. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rotterdam-rules-e.pdf> [21/06/20202].

According to the Maritime Code of Georgia, Art.15, subparagraph "j", "rights and obligations of the parties of contract of carriage by sea… shall be determined according to the law of the place of conclusion unless the parties agree otherwise".[14] Accordingly, contract of carriage, concluded in georgia, shall be regulated through the Civil Code of Georgia. According to Art. 668 of the Civil Code of Georgia, under a contract of carriage, the carrier shall be obliged to transport goods or passengers to the place of destination for an agreed fee.[15]

All of the abovementioned relieves that international conventions as well as Laws of Georgia and other national legislations, states of which have ratified international conventions listed above, share more or less similar definitions of contract of carriage. The Hague-Visby Rules is an exception from this approach, as far as it applies only in case of issuing bill of lading according to the contract of carriage. As for the regulations that determine liability of the carrier, moment of passing of risk of loss or damage of the cargo from the shipper to the carrier, indicators of the performance of the carrier, they differ from each other much more than the definitions of the contract of carriage and legal consequences vary as well.

3.3. Relationship between the Contract of Carriage and Charterparty

In order to analyse the legal nature of the charterparty and bill of lading it is important to draw clear line between them, indicating the following:

For the purposes of international carriage of goods, charterparty is an agreement through which the ship is being leased. Parties of such agreement are the shipowner and the charterer that agree on lease of the whole capacity of the ship or only the part of it. The charterer pays the freight to the shipowner.

Parties of the contract of carriage are shipper and carrier. According to this contract the carrier undertakes to deliver the cargo from the port of loading to the port of discharge in order to deliver the cargo to the consignee. The shipper shall pay agreed fee to the carrier for this service unless the parties of international contract for sale of goods agree otherwise.

The Maritime Code of Georgia does not clearly distinguish the charterparty from the contract of carriage. According to the Article 114, paragraph 1 of the Maritime Code of Georgia, a contract of carriage of goods by sea is a written agreement according to which the carrier or shipowner undertakes to carry and deliver the cargo to the consignee, and the consignor or charterer undertakes to pay the shipping cost (freight).[16] According to the paragraph 2 of the same Article, persons who have entered into a written agreement on affreightment (a charterparty) shall be considered to be the charterer and the shipowner.[17] According to the paragraph 6 of the Annex of the Maritime Code of Georgia, freight [is] rent for the carriage of cargo by a ship;[18] according to the paragraph 7, chartering [is] leasing a ship for a certain period of time[19]; according to the pa-

[14] Maritime Code of Georgia, Parliamentary Gazette, 25-26, 14/06/1997, Article 15, subparagraph "j".
[15] Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997, Article 668.
[16] Maritime Code of Georgia, Parliamentary Gazette, 25-26, 14/06/1997, Article 114, paragraph 1.
[17] Ibid. paragraph 2.
[18] Maritime Code of Georgia, Parliamentary Gazette, 25-26, 14/06/1997, Annex, paragraph 6.
[19] Ibid, paragraph 7

ragraph 8, charterer [is] a person or organisation taking a ship on charter[20], according to the paragraph 9, shipowner [is] a person or organisation who rents out a ship[21]. Despite the fact that the Maritime Code of Georgia refers to the carrier for several times, does not define the meaning of it.

According to the definitions listed above, Maritime Code of Georgia puts an equal sign between the charterparty and contract of carriage. That means that Maritime Code of Georgia shall apply to the contractual relationship where the shipowner is the carrier himself/itself. However, the shipper is not the only party that might enter into the conractual relationship with the shipowner. The carrier, who is interested in affreightment in order to perform his contractual obligations, is also able to conclude charterparty with the shipowner. Such arrangement is out of the scope of the Maritime Code of Georgia.

It must be noted that the Hamburg Rules refers to the freight in Article 15, subparagraph (k), namely, "the freight to the extent payable by the consignee or other indication that freight is payable by him"[22] but does not refer to charterparty as far as it applies only to the contracts of carriage.

4. Bill of Lading

4.1 Definition of Bill of Lading

Transport documents are initial part of international carriage of goods and issuing of them, usually, takes place after conclusion of contract for international sale of goods and contract of carriage.

Universal definition of the transport document does hardly exist. Generally, transport document might be defined as the document that is evidence of receipt of goods by the carrier, is document of title and evidence of the contract of carriage. All of these functions are united into the bill of lading – transport document that is used in the process of international carriage of goods by sea.

For shippers with only a small quantity of cargo, chartering of the whole capacity of vessel is hardly a practical proposition[23]. In such case they are able to apply for loading and carriage services that are offered through liner traces by the expedition/carriage companies, for scheduled routes. If the cargo is packed individually, it must be loaded on board as it is packed into the containers, boxes or other means agreed beforehand by the parties of the contract of carriage. If the carrier rents the whole capacity of the ship, he shall conclude the charter with the shipowner. In either case, once the cargo is loaded, a bill of lading will be issued which will act, not only as a receipt for the cargo shipped, but also as prima facie evidence of the terms of the contract of carriage.[24]

Hague-Visby Rules does not define bill of lading but Article III, Rule 3 refers to the content of bill of lading such as initial marks of the cargo, number of units/parcels, weight and other

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[20] Ibid, paragraph 8

[21] Ibid, paragraph 9

[22] United Nations Convention on the Carriage of Goods by Sea of 1978 (the Hamburg Rules), Article 15, subparagraph (k).

[23] *Wilson J.*, Carriage of Goods by Sea, Pearson Education Limited, 7th ed., 2010, 5.

[24] Ibid.

information regarding the condition of the goods[25]; according to the Rule 4 of the same article, bill of lading is prima facie evidence of receipt of the goods by the carrier[26]. Contract of carriage is concluded before issuance of the bill of lading. Bill of lading itself evidences the clauses of the contract that is already partially performed. Carriage of Goods by Sea Act of 1992, UK, does not contain the definition of bill of lading but it sets that a bill of lading which (a)represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and (b)has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading, shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.[27]

4.2. Issuing the Bill of Lading

Traditionally, after the goods are loaded on board, on the grounds of contract of affreightment, the carrier or his agent signs the bill of lading and transfers it to the shipper.[28] The practice of issuing a "set" of three original bills of lading is very ancient.[29] Each of these three copies have equal content and legal force and are dated samely. If the carrier delivers the cargo to the consignee in exchange of one copy of the bill of lading, other copies are null and void[30]. According to the common practice, one of the copies remains in the hand of the shipper, another one shall be carried with the cargo and the last one shall be sent to the consignee. It is necessary the consignee to hold one of the copies before or for the moment of delivery, as far as the carrier is not obliged to deliver the cargo without the representation of the bill of lading.

4.3. Content of the Bill of Lading

According to the Article 1, paragraph 7 of the Hamburg rules, bill of lading means a document which evidences a contract of carriage by sea and the takin over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking[31]. Article III, Rule 4 of Hague-Visby Rules similarly refers to the bill of lading as prima facie evidence of receipt of the goods by the carrier;[32] Rule 3 of the same article, as mentioned above, refers to the content of the bill of

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25 Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as amended by the Brussels Protocol, Article III, Rule 3.

26 Ibid, Rule 4.

27 Carriage of Goods by Sea Act 1992, Section 4, <https://www.legislation.gov.uk/ukpga/1992/-50/section/4> [12/06.2022].

28 Scrutton on Charterparties and Bills of Lading, Sweet and Maxwell, 24th ed, London, 2021, Article 48, 5-001.

29 Ibid, 5-003.

30 Maritime Code of Georgia, Parliamentary Gazette, 25-26, 14/06/1997, Article 122.

31 United Nations Convention on the Carriage of Goods by Sea of 1978 (the Hamburg Rules), Article 1, paragraph 7.

32 Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as that Convention was amended by the Protocol signed at Brussels on 23 February 1968 and as furthermore amended by the Protocol signed at Brussels on 21 December 1979, Art III, Rule 4.

lading such as initial marks of the goods, weight and condition[33]. Article 15 of the Hamburg Rules contains much more comprehensive list of the clauses that must be contained into the bill of lading, including not only factual conditions of the goods (number of units/parcels, conditions, weight), the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading; (Article 15, subparagraph (f)), the port of discharge under the contract of carriage by sea (Article 15, subparagraph (g)), the freight to the extent payable by the consignee or other indication that freight is payable by him (Article 15, subparagraph (k)), any increased limit or limits of liability where agreed in accordance with paragraph 4 ofArticle 6 (Article 15, subparagraph (o))[34].

Article 1, pagragraph 14 of the Rotterdam Rules contains common definition, accrording to which "transport document" means a document issued under a contract of carriage by the carrier that: (a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and (b) Evidences or contains a contract of carriage.[35]

4.4. Bill of Lading as Document of Title

Bill of lading not only evidences the legal relationship between the shipper and the carrier but also gives the third party – the consignee the right over the cargo. For the general purposes of the contract of sale of goods and contract of carriage, indicator of the carriers performance is the fact of delivery of the cargo to the consignee.

Courts, as well as other competent authorities, have different opinions regarding the legal nature of the bill of lading – whether it is the contract itself or only evidence of it.[36] In the legal relationships that shall be regulated by the private law, both in continental European and Common Law countries, the basis for such relationships might be the contract as well as other legal grounds, determined by the applicable law. As a result of the latter, tort or other quasi-contractual relationship shall be on face that is not based upon the free will and agreement of the parties.

Quasi-contractual relationships are common also for the process of international carriage of goods by sea. The consignee does not intend to conclude contract with the carrier. However, he is entitled to introduce the bill of lading and claim for delivery of the cargo. Accordingly, the relationship between the carrier and the consignee is the quasi-contractual relationship: they did not conclude the contract based upon their free will, did not agree substantive conditions of it but they do have rights and obligations before each other. Similar relationship exists between non-contractual shipper (person who transfers the goods to the carrier due to the order of the actual shipper) and the carrier. Court stated on case *Glyn Mills Currie and Co v The East and West India Dock Company*[37] that main purpose of using the bill of lading not only the instrument of lex mer-

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33 Ibid, Rule 3.

34 United Nations Convention on the Carriage of Goods by Sea of 1978 (the Hamburg Rules), Article 15.

35 UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, (the Rotterdam Rules), Article.1, paragraph 14.

36 *Dubovec M.*, The Problems and Possibilities for Using Electronic Bills of Lading as Collateral, „Arizona Journal of International and Comparative Law", Vol.23, #2, 2006, 441.

37 Glyn Mills Currie and Co v The East and West India Dock Company: CA 1880.

catoria but also as symbol of property is to reveal the agreement between the shipper and the carrier.

According to the doctrine that dominated in Common Law for a long time, a person who is not a party to a contract cannot claim the benefit of it although the contract was entered into with the object of benefiting that third party (privity doctrine).[38] In the circumstances of the privity doctrine, generally, where the shipper agrees with the carrier to deliver the cargo to the third party, the latter is not entitled to claim before the carrier on the grounds of the contract he is not the party of. On the other hand, according to this doctrine, neither the shipper is entitled to claim to the consignee. Parties of a dispute, for the obligations agreed through this contract, shall be only the shipper and the carrier. It must be also mentioned that the shipper is entitled to claim for the carrier to perform his obligations but if he is already paid and the right of ownership upon the goods has been transferred to the buyer, he, according to the same doctrine, is not entitled to sue because the breach did not occure to him. Such situation is not in favor of the buyer even if he is able to find another ground for dispute, for instance, the tort.

Contracts (Rights of third parties) Act of 1999 of UK shall be considered as official end of the privity doctrine dominance. According to Article 1 of, paragraph 1 of this Act, subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if (a)the contract expressly provides that he may, or (b)subject to subsection (2), the term purports to confer a benefit on him.[39] On the other hand, according to the Article 6, paragraph 1 of the same Act, which states that Section 1 confers no rights on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument[40], it does not apply to the contracts of carriage, as far as contract of carriage is covered by the bill of lading that is negotiable instrument itself. Accordingly, in the process of international carriage of goods, in order to indicate third parties rights, case law shall prevail.

In Common Law countries, at the beginning of 19th century, transfer of the bill of lading meant transfer of the right over the cargo but it does not include contractrual rights. Accordingly, the consignee, i.e. the owner of the cargo, was not entitle to claim the carrier.[41] To react on this, courts accepted so-called "implied contract" doctrine.

This problem had been solved through the judgment on case *Dunlop v Lambert*[42], stating that the shipper as the party of the contract concluded with the carrier but the breach did not occur to him, was still entitled to claim on behalf of the owner/buyer. This principle had been shared later on the case *The Albazero, Albacruz v Albazero* [43]. However, later, according to the further development of case law, these judgments had been considered as exceptional cases rather than judgements that set general rules[44]. If not such exceptions, if the party is not entitle to claim for

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38 *Suff M.*, Essential Contract Law, Cavendish Publishing, London, 1994, 167.

39 Contracts (Rights of Third Parties) Act 1999, Section 1, <https://www.legislation.gov.uk/ukpga/-1999/31/contents> [12.06.2022].

40 Ibid, Section 6.

41 *Stevens F.*, The Bill of Lading: Holder Rights and Liabilities, Routledge, 1st ed, Abingdon, December 14, 2019, 155.

42 *Dunlop v. Lambert* [1839] 6 Cl. & F. 600.

43 The Albazero, Albacruz v Albazero [1976] 3 All ER 129.

44 Compare, *Panatown Ltd v McAlpine Construction Ltd* [*2000*] 4 All ER 97.

the breach that did not occur to him, responsibility of carrier would be exempted in any case, even in case of non-performance of the contract of carriage.

The first legislative attempt to deal with the problems caused by the privity doctrine was Bill of Lading Act 1855, UK[45], that aimed to balance the rights and obligations of the parties of contract of carriage and made third parties entitled to the rights agreed upon by the parties of contract of carriage. According to this Act, all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property to the consignee or endorsee[46].

Bill of lading Act 1855 underlined two crucial issues: First of all, transfer of contractual rights and obligations linked with the transfer of property; on the other hand, directly emphasized that, without prejudice of privity doctrine, third party to the contract might have rights and obligations according to this contract. According to the Article 1 of this Act, every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same riabilities in respect of such goods as if the rontract contained in the bill of lading had been made with himself.[47] This Article applied only to the bill of lading to order but this rule had been recognized also in favor of the bill of lading to bearer.[48] If the person becomes the holder of the bill of lading, and, accordingly, all the rights over the cargo transfers to him, all of the rights and obligations through the bill of lading shall be imposed upon him.[49] Meanwhile, despite the fact that the bill of lading includes or evidences the contract of carriage, it shall transfer the rights and obligations given therein and not the rights and obligations agreed upon by the parties.[50]

According to the practice that have been developed throughout the years, Bill of Lading Act 1855 did not apply to all consignees. According to Article 17, paragraph 1 of Sale of Goods Act 1979, where there is a contract for the sale of specific or property ascertained goods the property in them is transferred to the passes when buyer at such time as the parties to the contract intend it to be intended transferred.[51] This regulation means that property shall be transferred without endorsement of the bill of lading. The parties of the contract of sale may agree on transfer of the property only after the payment rather than through transfer of the bill of lading; parties are also entitled to agree

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45 Despite the fact that this Act had been replaced by the Carriage of Goods by Sea Act 1992, it still is considered as important step forward and are still applicable law, for instance, in Canada.

46 „Every consignee of goods named in the bill of lading, and every endorsee of a bill of lading, to whom property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." Bill of Lading Act of 1855, Section 1, <https://www.legislation.gov.uk/ukpga/Vict/-18-19/111/enacted> [22.06.2022].

47 Ibid, Article 1.

48 *Stevens F.*, The Bill of Lading: Holder Rights and Liabilities, Routledge, 1st ed., Abingdon, December 14, 2019, 156.

49 Ibid.

50 *Stevens F.*, The Bill of Lading: Holder Rights and Liabilities, Routledge, 1st ed., Abingdon, December 14, 2019, 157.

51 Sale of Goods Act, 1979, <http://www.legislation.gov.uk/ukpga/1979/54/pdfs/ukpga_19790054_-en.pdf> [8.06.2022].

on particular date, not related to the endorsement of the bill of lading. In such case the consignee is not supposed to have any contractual right towards the carrier even after the bill of lading had been transferred to him without being an owner of the cargo. If the right over the cargo/property transferred through the bill of lading shall be dealt differently than the same right transferred on the other grounds, the party shall not be entitled to claim for performance, that would not be the best option for the owner. Case law tried to solve this problem, in particular, judgment on the case "The Delfini" states that it is not necessary property to be transferred through delivery or endorsement of the bill of lading for application of the Article 1 of the Bill of Lading Act 1855[52]. This judgment declined the approach according to which endorsement of the bill of lading and transfer of property should take place simultaneously. Before this judgment that was not clearly recognized the link between exercising the property right and contractual rights transferred through the bill of lading.

Endorsement of the bill of lading symbolizes possession of the goods but not necessarily transfer of property as far as this latter is the result of contract rather than transfer of any kind of document. Transfer of property might need any precondition such as payment.[53] Bill of lading is document of title only in case of transfer to the bona fide holder. Exception from this rule might be the case when the goods arrive to the port of destination earlier than the documents.[54] In this case the carrier is entitled to deliver the cargo in exchange of the letter of indemnity, issued by the bank and introduced by the consignee.[55] In such case document of title transforms into the evidence of the contract of carriage and rights and obligations determines through it.

This case did not solve the problem for the case when property has been already transferred through the contract, independently from endorsement of the bill of lading, usually, in case of bulk cargo. According to Article 16 of the Sale of Goods Act 1979, where there is a contract for the sale of unascertained goods is transferred to the buyer unless and until the goods are ascertained[56]. Bulk cargo shall be ascertained only at the port of destination, in order to deliver to the different consignees. Such case had been considered on the case *Brandt v Liverpool*[57] and the court considered presumption of contract and implied rights.[58] Since this case "Brandt and Liverpool doctrine" had been recognized widely.

In 1985 the Court of Rotterdam, using English Law as applicable law, took decision on the case (The Gosforth), as a result of which the buyer was found responsible before the seller; on the other hands, trading associations applied to Law Commission[59] asking for legal reforms to protect

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52 Enichem Anic S.p.A. and Others v. Ampelos Shipping Co. Ltd. (The "Delfini") [1990] 1 Lloyd's Rep. 252.

53 *Dubovec M.*, The Problems and Possibilities for Using Electronic Bills of Lading as Collateral, Arizona Journal of International and Comparative Law, Vol. 23, #2, 2006, 442.

54 Ibid.

55 Ibid*, Kerashvili S.,* Liability of the Carrier for Delivery of the Goods without Representation of the Bill of Lading, Journal of Law, №1, 2015, 264.

56 *Stevens F.*, The Bill of Lading: Holder Rights and Liabilities, Routledge, 1st ed., Abingdon, December 14, 2019, 157.

57 *Brandt v Liverpool,* Brazil & River Plate Navigation Co Ltd [1924] SJV. Co.35.

58 *Dockray M.*, Cases and Materials on Carriage of Goods by Sea, 3rd ed., Cavendish Publishing Limited, Great Britain, 2004, 122.

59 *Stevens F.*, The Bill of Lading: Holder Rights and Liabilities, Routledge, 1st ed., Abingdon, December 14, 2019, 157.

the rights of the bulk cargo buyers. During the process of this reform it become clear that the problem was much broader and drafting of new sale of goods act had beginning. Finally, in 1992, Carriage of Goods by Sea Act had been adopted. This act clearly distinguished transfer of rights through the bill of lading and transfer of property. According to Section 2, paragraph 1, lawful holder of bill of lading has right on cargo;[60] lawful holder is defined through Section 5, paragraph 2;[61] Section 2, paragraph 5 of this Act makes difference between the rights of shipper and previous holders of the bill of lading and rights of the current lawful holder[62]; Section 3, paragraph 1 states that after claiming on cargo lawful holder of the bill of lading becomes the subject of the contract of carriage and rights and obligations determined through it[63].

In order to compare Bill of Lading Act of 1855 and Carriage of Goods by Sea Act 1992, it must be mentioned that Bill of Lading Act of 1855 referred to the contract of carriage contained in the bill of lading; Carriage of Goods by Sea Act 1992 mentions the contract that makes the lawful holder its party. According to some scholars, such difference makes sense only in case of voidance of the contract of carriage,[64] according to which if the contract of carriage had been found null and void, lawful holder of the bill of lading has not legal grounds for claimant. According to Section 5, paragraph 1 of Carriage of Goods by Sea Act 1992, in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill[65]. In this case it is debatable whether bill of lading is still in force if the contract, on the grounds of which it had been issued, is void. According to the principle established in German Law, bill of lading remains in force even after annulment of the contract of carriage.

It must be taken into consideration that Brandt and Liverpool Doctrine, widely used while the Bill of Lading Act 1855 was in force, has lost its relevance since Carriage of Goods by Sea Act 1992 had been entered into force.[66] According to this latter Act, on the case *The Aramis*[67] court clearly stated that "implied contract" shall be only in compliance with the will of the parties if they intended to conclude exactly this contract.

4.5. Contractual Nature of the Bill of Lading

As mentioned above, bill of lading evidences contract of carriage concluded by the parties and also, might contain clauses of this contract.[68] According to the traditional analysis, contract of carriage shall be concluded prior of issuance of the bill of lading.[69] Currently, when organizing

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60 Carriage of Goods By Sea Act 1992, Section 2, paragraph 1, <https://www.legislation.gov.uk/ukpga/1992/50/contents> [12.06.2022].

61 Ibid, Section 5, paragraph 2.

62 Ibid, Section 2, paragraph 5.

63 Ibid, Section 3, paragraph 1.

64 *Stevens F*, The Bill of Lading: Holder Rights and Liabilities, Routledge, 1st ed., Abingdon, December 14, 2019, 160.

65 Ibid.

66 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 173.

67 The Aramis [1989] 1 Lloyd's Rep 213.

68 *Stevens F.*, The Bill of Lading: Holder Rights and Liabilities, Routledge, 1st ed, Abingdon, December 14, 2019, 14; *Compare*: United Nations Convention on the Carriage of Goods by Sea of 1978 (hereinafter – the Hamburg Rules), Article 15.

69 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 166.

international carriage of goods is provided by more than two parties and, similarly, contract of carriage might be performed by several parties, prior issuance of the bill of lading might be concluded/issued not only the contract of carriage but also charterparty, booking note or other kind of contract/document, in order to book space on board.[70]

Book of lading (predecessor of the bill of lading)[71] which contained information regarding the cargo on board, did evidence only receipt of the goods by the carrier/loading on board. In the beginning bill of lading shared the same function but later, due to the development, additional functions of the bill of lading had been recognized by the merchants and other parties, involved in international carriage of goods. However, the bill of lading was not considered as contract of carriage for a long time, unlike the charter that was definitely considered as the contract of carriage.[72] Due to development of international trading, as far as booking the part of the ship rather than whole capacity of it had become common practice, carriage of goods shall be performed only through bill of lading rather than contract of carriage. However, bill of lading does not represent itself the contract of carriage concluded between the shipper and the carrier.[73]

Bill of lading evidence not only receipt of goods by the carrier but also rights and obligations of the parties according to the contract of carriage. Accordingly, bill of lading has to comply with the contract of carriage. As court stated through the judgment on the case *Pyrene v Scyndia* [74] it would be nonsense to suppose that the parties intended to change the contract of carriage through bill of lading. This approach is more important in case of verbal contract of carriage that might take place also today, like it was in case of *Mayhew Foods Limited v Overseas Containers* Ltd[75]. It must be also noted that the consignee is not aware about the content of the contract of carriage, accordingly, bill of lading is the only document he is able to indicate the carrier and claim to him for delivery.

In order to conclude the contract, intention and agreement of the parties shall be clear. This issue was discussed through the judgment on *The "Barranduna" and "Tarrago"* [76] where the parties discussed only conditions of carriage and freight through the telex communication, accordingly, court did not recognized such communication as a contract.[77] Accordingly, bill of lading shall contain the will of the parties similarly to the contract of carriage. If the predecessor contract is only operational contract, like charterparty, the bill of lading shall not be dealt like a contract of carriage.[78]

The court may indicate all the contracts that had been concluded prior to issuance of the bill of lading and figure out which of them is contained in/evidenced by the bill of lading. For

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70 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 167.

71 *Stevens F.*, The Bill of Lading: Holder Rights and Liabilities, Routledge, 1st ed, Abingdon, December 14, 2019, 9.

72 Ibid*,* 17.

73 Ibid.

74 Pyrene Company, Ltd v. Scindia Steam Navigation Company, Ltd. [1954] 1 Lloyd's Rep. 321.

75 Mayhew Foods Limited v Overseas Containers Ltd. [1984] 1 Lloyd's Rep. 317.

76 Scancarriers A/S v. Aotearoa International Ltd. (The "Barranduna" and "Tarrago") [1985] 2 Lloyd's Rep. 419.

77 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 167.

78 Ibid.

instance, on case *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd*[79] the court stated that three independent contract were on face. On the other hand, there might be no grounds for indication any prior contract.[80] If the party accepts bill of lading, it is supposed that the contract has been concluded even without clear offer and acceptance.[81] This approach had been confirmed on the case *Watkins v. Rymill* [82].

Case law has established approach to allocate rights and obligations that are determined through bill of lading and contract of carriage as well as general rules of their interpretation, including the cases when bill of lading does not comply to the contract of carriage. UK case law is especially important from this point of view as far as it has put an equal sign between bill of lading and the contract of carriage in some cases. In 1888 on the case *Leduc v Ward*[83] the court stated that the clauses determined through bill of lading are conclusive and deviation from them is inadmissible. The court applied the parol evidence rule ("extrinsic evidence is inadmissible to vary a written contract") and stated that if the carrier deviated from the route agreed through the bill of lading, he is responsible for damage or loss occurred as a result of such deviation.

However, about one century later, outcome of non-compliance between the bill of lading and the contract of carriage had been interpreted differently. According to the facts of *The Ardennes*[84], shipper and the shipowner concluded verbal contract on carriage of goods to London, without deviation form the agreed route; on the other hand, the bill of lading contained approval of such deviation. The court stated that if contract of carriage, even the verbal one, precedes issuance of the bill of lading, bill of lading shall not be considered as a contract. In the given case, the shipper relied upon the information provided by the carrier, according to which he was certain that his cargo (Spanish oranges) would be carried from London to Cartagena without deviation. Bill of lading had been delivered to him only after loading the cargo on board. Accordingly, the court state that the bill of lading did not prevail over the substantive provision of the contract of carriage. The shipper, having sufficient time, would inevitably demand to switch the bill of lading in order to exempt deviation. On the other hand, he was not obliged to do so, because he was not involved in formation of the bill of lading and did not even sign it. Accordingly, the court clearly established that the bill of lading is not a contract itself but only evidence of it and in case of non-compliance, contract of carriage shall prevail. Similar approach had been used on the case *Evans v Andrea Merzario* [85], where the court refused the carrier o reliance upon written agreement (not the bill of lading) that contradicted to the verbal agreement on carriage below deck[86]. Also, in *The Green Island* the court stated that contract of carriage that was evidenced through the booking note and was concluded before issuane of the bill of lading, containing agreement on carriage below deck, prohibited the carrier to rely upon the clauses of the bill of lading allowing carriage

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79 Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd, 2002] EWHC 1993.

80 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 170.

81 Ibid.

82 Watkins v. Rymill (1883) 10 Q.B.D. 178, 183, 189.

83 Leduc & Co v Ward, [1888] 20 QBD 475.

84 The Ardennes (Cargo Owners) vs Ardennes (Owners) [1951] I KB 55; *Dockray M.*, Cases and Materials on Carriage of Goods by Sea, 3rd ed., Cavendish Publishing Limited, Great Britain, 2004, 77.

85 Evans v Andrea Merzario ltd 1976.

86 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 175.

on deck.[87] Same approach had been shared by the commercial arbitration, recognizing prevalence of the verbal agreement, which preceded issuance of the bill of lading.[88]

In some cases, bill of lading might be the only document on face, which determines right and obligations of the parties. However, it is important to distinguish it from the contract of carriage. Mostly, bill of lading does not contain all the clause of the contract of carriage but does evidence all the substantive provisions of the contract of carriage. In case of verbal contract of carriage, the bill of lading shall be the most important evidence for the purposes of the commercial dispute; accordingly, in the framework of this particular dispute, the bill of lading might be fictionally considered as contract of carriage. Such approach is in favor of the consignee, as far as rights and obligations of the consignee are revealed through the bill of lading. The courts, according to particular conditions and facts, try to assess the contract of carriage beyond the bill of lading, at least, in case where the dispute are risen between the carrier and the shipper.[89] For the purpose of such assessment the bill of lading shall be considered not as concluded contract of carriage but just evidence of it and this approach is clearly illustrated in the judgment of *The Ardennes*. This approach seems more logical taking into account that the buyer/consignee is not involved in formation of the contract of carriage and determination of its provisions.

To sum up, taking into consideration that the parties – the shipper and the carrier, concluded contract of carriage through which the substantive provisions of carriage had been agreed, contract of carriage prevails over the bill of lading, if this latter does not comply to contract of carriage. However, other provisions of the bill of lading shall be still in force.[90] On the other hand, taking into considering judgement on *Leduc v Ward*, it is becoming clear that in some cases, especially towards the consignee, bill of lading may also prevail. In this judgment the court clearly stated that the consignee shall in any case get his goods in terms given in the bill of lading and different agreement between the shipper and the carrier does not matter for the consignee. On the other hand, it must be noted that currently parol evidence rule is rarely used in development of commercial documents; verbal agreement and "factual matrix" that changes or replaces written agreement, are more widely recognized.[91] In order to assess relevance of *Leduc v Ward* for current commercial transactions it must be noted that before Bill of Lading Act 1855, due to privity doctrine, there did not exist any legal grounds for transfer any right to the consignee.[92] The doctrine established on this case had been modified through Carriage of Goods by Sea Act 1992, which refers to contract of carriage as the contract which is evidenced or approved through bill of lading.[93]

For the purposes of assessment interrelation between the agreement preceding issuance of the bill of lading and the agreement evidenced by the bill of lading (bill of lading contract), it is important to indicate, which obligations had been agreed upon by the parties and which of them had been evidenced by the bill of lading. Subject of the contract evidenced by the bill of lading is

87 Ibid, The Green Island, [2010] 2 Lloyd's Rep, 1.
88 Ibid.
89 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 175.
90 *Murray C.*, Schmitthoff's Export Trade, The Law and Practice of International Export Trade, London, 2008, 289.
91 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 177.
92 Ibid.
93 Ibid.

carriage of loaded goods. If the carrier received defective cargo under his custody, commercial dispute may be arisen on the grounds of predecessor contract through which the conditions of the goods had been agreed rather then bill of lading contract. If the parties agree on carriage of 20 containers but the carrier received only 19 of them, the obligation determined in the bill of lading is carriage of these 19 containers, despite the fact that the bill of lading indicates 20 containers.[94]

Unlike the general approach of the Common Law, German Law does not recognize the bill of lading as instrument of performance of the contract of carriage and considers it as an agreement between the carrier and the person that delivered the goods for carriage. This person may also be the carrier or even the consignee, if the bill of lading is delivered directly to him. Accordingly, bill of lading issued in such case is neither contract of carriage nor evidence of it, not being issued on the grounds of this contract of carriage.[95]

4.6. Implied Contract

If carriage of goods is organized not as independent transaction but as part of more broad international transaction, it shall be supposed that carriage of good shall be performed according to standard provisions of the carrier that are agreed by the shipper through signing the bill of lading issued by the carrier. This practice complies with common merchant practice and common understandings[96] of regulation commercial relations between the parties of this commercial transactions unless the parties clearly agree otherwise or the standard provisions of the carrier does not contain any "extreme" clause.[97] In such implied contract this "extreme" clause shall be in force if, according to the "red hand" principle, the party had been aware of it.[98]

7. Conclusion

Commercial transaction depends on accuracy of the transport documents that are used in international carriage of goods. Bill of lading evidences provisions of contract of carriage and also, does include some of them. Despite the contractual provisions included in it, the bill of lading does not itself represent the contract of carriage, concluded on free will of the parties, according to their agreement, On the other hand, the bill of lading evidences and adopts substantial provisions of the contract of carriage which precedes issuance of it. Contracts preceding the bill of lading might be concluded in verbal form, through electronic communications or by conduct, without clear acceptance and signature. In such cases the court shall indicate, what kind of agreement precedes the bill of lading and accordingly, does bill of lading have contractual nature or not.

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94 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 168.

95 *Stevens F.*, The Bill of Lading: Holder Rights and Liabilities, Routledge, 1st ed., Abingdon, December 14, 2019, 18.

96 On such "common understanding" English court referred in the judgment on case *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* [1973] EWCA Civ 6.

97 *Aikens R. S.,* Bills of Lading, Informa Law from Routledge, Abingdon, December 24, 2020, 174.

98 Ibid, 175.

Reference on „bill of lading contract", in some sources, mean not the bill of lading as a contract but the contract of carriage, evidenced or revealed by the bill of lading.[99] If the bill of lading is discussed as a contract, it means that issue of discussion is contractual provisions included in the bill of lading, that had been agreed before its issuance between the parties of the contract of carriage.

Bill of lading, as the document of title, transfers contractual rights to the third party – the consignee, that creates grounds for legal relationship between the consignee and the carrier. If contract of carriage is not concluded between the shipper and the carrier, bill of lading is the only document that includes rights and obligations of the mentioned parties.

When several documents are used in legal relationship, even linked ones, risk of non-compliance shall always exist. In this case any institution that resolves the dispute, shall indicate the provisions of the agreement preceding the bill of lading. For such cases indication of the parties will is the issue of crucial importance. According to the case law, in case of non-compliance between the contract of carriage and bill of lading, the contract of carriage shall prevail, with some exceptions. One of such exceptions is determination of rights of the consignee. Also, obligations due the contract of carriage shall be clearly distinguished from the obligations due to the bill of lading: if the seller provided the defective goods, the buyer has the right of claim towards the seller; if the carrier delivered defective goods, as provided by the seller, neither seller nor the buyer have the right to claim towards the carrier, without prejudice of content of the bill of lading. If the carrier did not act due diligence for development of the bill of lading and did not indicate defects of the goods or about not having the opportunity to check that, he shall argue that the seller provided defective goods.

Also, the bill of lading indicates the contract concluded before issuance of it. If the carrier provided the goods to the consignee as agreed through the contract of carriage, on time, at agreed destination, etc., this means that both the seller and the carrier performed their obligations, if the contract of carriage complies with the contract on sale of goods.

All of the abovementioned issues make clear functional diversity of the bill of lading that are beyond being only receipt of goods and prima facie evidence of the contract of carriage. Accordingly, accuracy of the information contained in bill of lading shall be provided, especially during the development of it as far as this is the main source to indicate the following: will of the parties involved in commercial transaction, provisions of contract of carriage, agreement of the parties on allocation of the rights and obligations between them, liable parties and liability/limitation of liability.

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Giorgi Zarnadze*

Investment Law Dimension of Non-fungible Tokens (NFTs)

Nowadays non-fungible tokens (hereafter - NFTs) are one of the most popular subjects globally. This is supported by the fact that the total market value of NFTs is "about 31.4 billion USD."[1]*It started at 85.7 million USD in 2020, reaching 19.6 billion USD in 2021.*[2] *This Article concentrates on the investment law dimension of so called NFT projects within the scope of which NFT collections consisting of many individual NFTs are offered for sale to general public.*

The reason for concentrating on investment law is that this is the field which contains the most legal clarity regarding digital assets (although NFTs themselves are not regulated in any jurisdiction). The Unites States Securities and Exchange Commission (hereafter - SEC) has held that digital assets, publicly offered by a digital corporation, constituted investment contracts.[3]*However, NFT projects do not constitute corporations. Holding an NFT certifies holding a piece of an NFT collection, not a share in a company. This creates ambiguity whether an NFT project constitutes an investment contract since SEC has not yet issued any guidance regarding NFTs.*

This Article discusses whether NFT projects can constitute investment contracts in the context of the USA law. It also analyzes NFTs and NFT projects in the context of the law of Georgia which currently contains no guidelines on digital assets. In this respect this Article will constitute one of the first pieces of research dedicated to analyzing NFTs within the scope of the law of Georgia.

Keywords: *NFT, NFT projects, investment contract.*

1. Introduction

Firstly, it is necessary to briefly explain what are blockchain, digital asset, token and NFT. A good definition of blockchain is prescribed by Arizona Electronic Transactions Act, according to which blockchain is a "distributed ledger technology that uses a distributed, decentralized, shared and replicated ledger."[4] It is also clarified that blockchain data "is protected with cryptography, is immutable and auditable", providing "an uncensored truth."[5]

As regards digital assets, The United States Securities and Exchange Commission (hereafter – SEC) in its statement defined them as assets "issued and transferred using distributed ledger (…)

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* PhD Student of Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 *Melinek J.,* Open Sea Polygon NFT Sales On Track to Hit 2.2M by End of January, Blockworks, 2022, <https://blockworks.co/opensea-polygon-nft-sales-on-track-to-hit-2-2m-by-end-of-january/#:~:text=The%20total%20market%20capitalization%20of,from%201confirmation%20and%20CoinMarketCap%2C%20respectively.> [06.01.2022].

2 Ibid.

3 *The United States Securities and Exchange Commission,* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Rel. No. 81207, 2017, 15, <https://www.sec.gov/litigation/investreport/34-81207.pdf> [12.06.2022].

4 Article 5, §44-7061, Point E, Sub-point 1 of Arizona Revised Statutes, Title 44 – Trade and Commerce, Chapter 26 - Electronic Transactions Act, Thomson Reuters, < https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/44/07061.htm> [01.06.2022].

5 Ibid.

technology."[6] Tokens, in turn, are "unique subsets of digital assets that utilise cryptography to assure the authenticity of digital assets by creating a secure, distributed network for transactions."[7] The legal definition of token is prescribed by the legislation of Liechtenstein, which defines a token as an information on a trustworthy technology (in most cases - blockchain), representing "claims or rights of memberships against a person, rights to property or other absolute or relative rights."[8] Moreover, a token has no "intrinsic value" but, as was mentioned, "it is linked to an underlying asset, which could be anything of value."[9]

As regards NFTs, currently their universal definition does not exist. Neither are NFTs regulated in any jurisdiction. However, essentially NFTs are "certificates of ownership stored on a blockchain that are typically associated with a digital asset."[10] In this regard NFT constitutes "an evolution of the physical ownership of a specific asset."[11] The central characteristic of NFT is its non-fungibility: it cannot be split into identical parts or exchanged for similar token, creating a "verifiable digital scarcity" which is the "main goal" of NFTs.[12] NFTs can also be linked to physical assets.[13]

A proper attention should be paid to the notion of NFT collections as one of the central points of this Article. Such a collection is actually put on a trading platform by a single account, profile, the name of which mostly coincides with the name of the collection. NFT collection is offered for sale to general public via such an account. Any user, after registration on the trading platform, can buy either the whole collection or individual NFTs. The users are then free to retain their NFTs or resell them and make profit. Consequently, at a glance it can be said that NFT

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6 *The United States Securities and Exchange Commission,* Statement on Digital Asset Securities Issuance and Trading, 2018, <https://www.sec.gov/news/public-statement/digital-asset-securites-issuance-and-trading> [12.06.2022].

7 *Levin R. B., Tran K.,* The Regulation of Non-Fungible Tokens in the United States, Fintech Laws and Regulations, *Beauchamp T., Wink S., Valdez Y.* (*eds.*), Global Legal Insights, 3rd Edition, New York, 2021, <https://www.globallegalinsights.com/practice-areas/fintech-laws-and-regulations/2-the-regulation-of-non-fungible-tokens-in-the-united-states> [11.06.2022], see citation: *Levin R. B., O'Brien A. A., Zuberi M. M.,* Real Regulation of Virtual Currencies, *Lee Kuo Chuen D.* (*ed.*), Handbook of Digital Currency: Bitcoin, Innovation, Financial Instruments, and Big Data, Academic Press, Amsterdam, 2015, 331-332.

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10 *Bine P., Robertson E., Toms S., Koenigsberg S., Kari N., Reeves A. B., Vianesi G.,* Regulatory Approaches to Nonfungible Tokens in the EU and UK, Skadden, Arps, Slate, Meagher & Flom LLP, 2021, 1, <https://www.skadden.com/insights/publications/2021/06/regulatory-approaches-to-nonfungible-tokens> [12.06.2022].

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12 *Ibáñez L., Hoffman M. R., Choudhry T.,* Blockchains and Digital Assets, University of Southampton, EU Blockchain Observatory and Forum, 2021, 3, < https://www.eublockchainforum.eu/knowledge> [09.06.2022].

13 *Di Bernardino C., Chomczyk Penedo A., Ellul J., Ferreira A., Von Goldbeck A., Herian R., Siadat A., Siedler N.,* NFT – Legal Token Classification, EU Blockchain Observatory and Forum, 2021, 2, <https://www.eublockchainforum.eu/research-paper/nft-legal-token-classification> [10.06.2022].

holders own NFTs like shareholders own stocks in a company but there are no dividends paid. More importantly, the team standing behind the "issuing" account, takes all the measures to promote and market the project in order to increase the price of both the entire collection and separate NFTs. In practice such NFT collections are referred to as NFT projects. Large NFT projects practically have a complete business structure. The Bored Ape Yacht Club (hereafter - BAYC), one of the most popular and expensive NFT project developed by Yuga Labs LLC, is an exact example of the situation discussed hereby.

2. NFT Projects from the Perspective of the USA Securities Law

2.1. The Concept of an Investment Contract

Considering the purpose of the research it is important to assess whether an NFT project is an investment contract. The definition of securities in general, according to the US Securities Act of 1933 (Hereafter – Securities Act), is very broad and encompasses "any interest or instrument commonly known as a security."[14] It also specifically mentions investment contracts among other assets. Investment contract itself, however, is not defined under the Securities Act. SEC's broad interpretation approach enables it to disseminate its powers over any asset aiming to bring profit to its holders.[15]

The USA Courts also share this broad approach.[16] The USA case law has established that the term "investment contract" implies "a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates."[17] In turn, the test for determining whether a legal relationship constitutes an investment contract was developed in the case of *SEC v. W.J. Howey Co* (hereafter - *Howey*) and is known as the *Howey* Test: the USA Supreme Court held that there is an investment contract if "the scheme involves an investment of money in a common enterprise with a reasonable expectation of profits to come solely from the efforts of others. If that test be satisfied, it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value."[18]

Each prerequisite of the *Howey* Test will be discussed in a consecutive order in light of NFT projects.

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[14] Subparagraph 1 of Paragraph "a" of Section 2 of The United States Code, Title 15 – Commerce and Trade, Chapter 2A – Securities and Trust Indentures, Securities Act of 1933, Sub-chapter I – Domestic Securities, Statute №48, 74, 27/05/1933, <https://www.govinfo.gov/content/pkg/COMPS-1884/-pdf/COMPS-1884.pdf> [10.06.2022].

[15] *Levin R. B., Waltz P., LaCount H.,* Betting Blockchain Will Change Everything – SEC and CFTC Regulation of Blockchain Technology, *Lee Kuo Chuen D., Deng R.* (*eds.*), Handbook of Blockchain, Digital Finance, and Inclusion, Vol. 2, Academic Press, Singapore, 2017, 200.

[16] The United States Securities and Exchange Commission v. Edwards, (2004), 540 US 389. See also: Reves v. Ernst & Young, (1990), 494 US 56.

[17] The United States Securities and Exchange Commission v. W.J. Howey Co., (1946), 328 US 293, 298-299.

[18] Ibid, 301.

2.2. NFT Projects and the Howey Test

2.2.1. Investment of Money

SEC in its Framework for "Investment Contract" Analysis of Digital Assets (hereafter – Digital Asset Framework) clarified that the sale of digital assets satisfies the *Howey* prerequisite of money investment.[19] However, digital assets, including NFTs, are usually transferred to buyers not in exchange for money but for cryptocurrency. Notwithstanding this argument, SEC clarified in its another report (hereafter - DAO Report; abbreviation DAO stands for Decentralized Autonomous Organization) that the term "investment" should be construed broadly to include not only money but other forms of investment as well.[20] The USA case law directly indicates that besides money an investment "may take the form of (…) some other exchange of value."[21] The Court in *Howey* held that the definition of securities contained in the Securities Act "is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[22] Logically, such an adaptation also applies to technological progress. Consequently, the USA Courts focus on a "substance" and "economic reality" of an investment rather than its particular form or name.[23] Accordingly, relying on the mentioned cases, SEC in the DAO Report held that the investors invested money into the DAO venture when they transferred Ethereum cryptocurrency in exchange for DAO tokens.[24]

Another interesting case is an investigation conducted by SEC against Tomahawk Exploration LLC (hereafter – *Tomahawk*) which directly involved the issuance of tokens on a blockchain. In the investigation SEC, relying on *Howey,* held that tokens issued by Tomahawk Exploration LLC within the scope of the so called "Bounty program" constituted securities because the investors receiving those tokens performed "online promotional and marketing services" in exchange which was aimed at increasing the value of the token.[25] Similarly to this situation, SEC in its Digital Asset Framework clarified that the so called token "airdrops", which involve a free giveaway of tokens to any interested party in exchange for performing simple

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19 The United States Securities and Exchange Commission, Framework for "Investment Contract" Analysis of Digital Assets, 2019, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [12.06.2022].

20 The United States Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Rel. No. 81207, 2017, 11, <https://www.sec.gov/litigation/investreport/34-81207.pdf> [12.06.2022]. See also: Uselton v. Commercial Lovelace Motor Freight, Inc., 940 F.2d 564, 574 (10th Cir. 1991).

21 Uselton v. Commercial Lovelace Motor Freight, Inc., 940 F.2d 564, 574 (10th Cir. 1991).

22 The United States Securities and Exchange Commission v. W.J. Howey Co., (1946), 328 US 293, 299.

23 *Tcherepnin v. Knight,* (1967), 389 US 332, 336. See also: *United Housing Found., Inc. v. Forman,* (1975), 421 US 837, 849.

24 *The United States Securities and Exchange Commission,* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Rel. No. 81207, 2017, 11, <https://www.sec.gov/litigation/investreport/34-81207.pdf> [12.06.2022].

25 *The United States Securities and Exchange Commission,* In re Tomahawk Exploration LLC, Securities Act Rel. No. 10530, 2018, 2, <https://www.sec.gov/litigation/admin/2018/33-10530.pdf> [10.06.2022].

promotional or marketing activities, "constitute a sale or distribution of securities."[26] Nowadays practically all NFT projects use airdrops to promote the respective NFTs.

To sum up, it can be said that NFT projects satisfy the first prerequisite of the *Howey* Test.

2.2.2. A Common Enterprise

Currently there is no direct guidance indicating whether an NFT project constitutes a common enterprise. There is only the above-mentioned case of DAO where SEC held that DAO, essentially being a digital, automated corporation, constituted a common enterprise[27] because its developers had raised the capital by conducting a token offering, thereby pooling the investors' present assets and "future profits" (both expressed in Ethereum) and holding them "in the DAO's Ethereum Blockchain address."[28] Generally, SEC does not make a special emphasis on the "common enterprise" component.[29] SEC does not separate it from the "investment of money" component and usually holds that the "common enterprise" exists in case of digital asset offerings in the context of the *Howey* Test.[30]

The US Courts, on the contrary, pay more attention to the "common enterprise" component. The USA case law divides commonality in two sorts – horizontal and vertical. In case of horizontal commonality all investors' assets are pooled and tied to each other, profits are distributed pro-rata and the prospects of profit for each investor depend on "the success of the overall venture."[31] The case of DAO is an illustration of horizontal commonality. However, horizontal commonality does not apply to NFT projects: firstly, NFT collections are created and put on a trading platform using the resources of the NFT project team, not using a capital raised in advance. Secondly, although the value of each NFT depends on the value of the entire collection, NFT is not a stock or other kind of share. Nowadays NFTs are held as collectible items rather stocks and they certify the fact of holding a part of an NFT collection, not the fact of holding a share in a company. Thirdly, NFT holders do not receive profits consistently and pro-rata.

As regards vertical commonality, it focuses only on "the relationship between the promoter and (…) investors"[32] while "pro-rata sharing of profits and losses is not required" and includes

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[26] *The United States Securities and Exchange Commission,* Framework for "Investment Contract" Analysis of Digital Assets, 2019, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [12.06.2022].

[27] *The United States Securities and Exchange Commission,* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Rel. No. 81207, 2017, 11, <https://www.sec.gov/litigation/investreport/34-81207.pdf> [12.06.2022].

[28] Ibid, 6.

[29] *The United States Securities and Exchange Commission,* In re Barkate, (2004), Exchange Act Rel. No. 49542, 57 S.E.C. 488, 496 n. 13, <https://www.sec.gov/litigation/opinions/34-49542.htm> [12.06.2022].

[30] *The United States Securities and Exchange Commission,* Framework for "Investment Contract" Analysis of Digital Assets, 2019, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [12.06.2022].

[31] *Revak v. SEC Realty Corp.,* 18 F.3d 81, 87 (2d Cir. 1994), see citation: *Hart v. Pulte Homes of Michigan Corp.,* 735 F.2d 1001, 1004 (6th Cir. 1984).

[32] Ibid, see citation: *The United States Securities and Exchange Commission v. Koscot Interplanetary, Inc.,* 497 F.2d 473, 479 (5th Cir. 1974).

two sub-categories – broad and strict.[33] The issue to ascertain here is whether NFT projects can satisfy the broad vertical commonality model whereby the profitability of the investors' assets are "linked only to the efforts of the promoter."[34] The US Courts' consider that the "common enterprise" prerequisite of the *Howey* Test cannot be satisfied by the broad vertical commonality,[35] unless there is an additional agreement concerning the management of investors' assets whereby the investors receive profits and this is directly related to managerial and similar efforts made by the team operating the business.[36] As was mentioned, in case of NFTs, the team behind the project usually promotes the NFT project and its value directly depends on such promotion and marketing. However, as regards the mentioned "additional arrangement", its existence in case of NFT projects should be determined in accordance with the facts and circumstances surrounding a particular NFT project, simultaneously considering the terms and conditions of the relevant trading platform.

The issue whether an NFT project constitutes a common enterprise is made even more ambiguous because of the different approaches of SEC and the USA Courts. Although SEC categorized the above-mentioned DAO tokens as securities, it cannot be predicted whether SEC will take the same approach regarding NFTs because NFT projects are not exactly characterized by the traits of joint stock companies. Eventually it can be said that currently it is unclear whether NFT projects constitute a common enterprise in the sense of the *Howey* Test.

2.2.3. Generating Profits Solely by the Efforts of Others

In order for the profit to "come solely from the efforts of others", such efforts must be "the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."[37] SEC in its Digital Asset Framework provided excellent guidelines for determining whether efforts made by digital asset developers (or of the third parties designated by them) constitute the "efforts of others" in the context of the *Howey* Test.[38]

It is necessary to hereby list the most relevant criteria in light of NFT projects: the creators have a "central role" in planning the directions of the project's future development; this totally applies to NFT projects where creators first devise business roadmaps for their projects and then create or support "the price of the asset" – this can include, for example, having control over "the creation and issuance of the digital asset" and "limiting the supply" of the asset to ensure its scarcity; this point is totally compatible with NFT projects, especially controlling the scarcity of NFTs since the concept of NFT primarily focuses on scarcity and uniqueness; the team behind the venture "has a continuing managerial role in making decisions about (…) the characteristics or

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33 Ibid.

34 Ibid, see citation: *Long v. Shultz Cattle Co., Inc.,* 881 F.2d 129, 140-141 (5th Cir. 1989).

35 Ibid, 88.

36 Ibid, 89.

37 *The United States Securities and Exchange Commission,* Framework for "Investment Contract" Analysis of Digital Assets, 2019, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [12.06.2022], see citation: *The United States Securities and Exchange Commission v. Glenn W. Turner Enter., Inc.,* 474 F.2d 476, 482 (9th Cir.), certiorari denied, 414 U.S. 821, 94 S. Ct. 117, 38 L. Ed. 2d 53 (1973).

38 Ibid.

rights the digital asset represents", for example, "determining (…) where the digital asset will trade" and "making other managerial (…) decisions that will directly or indirectly impact the success (…) or the value of the digital asset"; this means that "there are essential tasks or responsibilities performed and expected to be performed by" the project team "rather than" an unorganized group of third parties; this point also applies to NFT projects; the team behind the overall venture "owns or controls ownership of intellectual property rights" related to the digital assets; this is not always the case for NFT projects as project teams usually disclose who performed the artworks which were minted as NFTs; the latter two components, if present, usually indicate that investors "reasonably expect" from project developers "to undertake efforts to promote (…) and enhance the value of the (…) digital asset."[39]

The above-mentioned story of the DAO, although not being an NFT project, is a good practical example in relation to the SEC guidelines, discussed in the previous paragraph of this Article. Namely, the developers of the DAO performed complex managerial activities, including creation of separate websites for promoting and marketing the project, answering the investors' questions at dedicated forums and informing the investors "about how to vote and perform other tasks related to their investments."[40] Thus, it can be said that NFT projects satisfy the component of managerial efforts of others in the context of the *Howey* Test since, as was mentioned, teams behind NFT projects, for example BAYC, use intensive and complex methods to promote and market their assets.

2.2.4. Reasonable Expectation of Profits

One of the most important components of the *Howey* Test is assessing whether investors had a reasonable expectation of profits at the stage of investing their assets into the project. SEC in its Digital Asset Framework construed the term "profits" broadly and clarified that it also includes "other financial returns (…) derived from the efforts of others."[41] Furthermore, according to the USA case law, "profits" include not only dividends and "other periodic payments" but also "the increased value of the investment."[42]

The latter point is particularly relevant for NFT projects. As was mentioned, each investor holds individual NFTs basically as collectibles but other types of investors who seek to resell their NFTs at a later date usually expect that their NFTs will increase in value due to the efforts of the team standing behind the NFT project. BAYC is a good illustration of such a situation. Ability to resell the digital assets in secondary markets should especially be emphasized because this is one of the main characteristics of NFT projects. In *Tomahawk* SEC held that representations made by the team of Tomahawk Exploration LLC regarding TOM tokens during online communication

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39 Ibid.

40 *The United States Securities and Exchange Commission,* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Rel. No. 81207, 2017, 12, <https://www.sec.gov/litigation/investreport/34-81207.pdf> [25.07.2017].

41 *The United States Securities and Exchange Commission,* Framework for "Investment Contract" Analysis of Digital Assets, 2019, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [12.06.2022].

42 *The United States Securities and Exchange Commission v. Edwards,* (2004), 540 US 389, 394.

with the investors led the latter to expect "profits derived from the efforts of others", including profits "from the opportunity to trade TOM on (…) secondary trading platforms."[43]

Since SEC established that when crypto project developers provide "essential managerial efforts that affect the success of the enterprise, and investors reasonably expect to derive profit from those efforts, then … the prerequisite of reasonable expectation of profits" is satisfied,[44] thus it can be said that NFT project investors have reasonable expectation of profits.

Based on the research it can be said that NFT projects are not capable of satisfying all of the prerequisites of the *Howey* Test. However, only time will demonstrate what approach the SEC will take particularly in respect of NFT projects. Despite the current uncertainty, SEC will most likely hold the companies behind large NFT projects as securities issuers and NFT projects as investment contracts despite the non-fungibility of NFTs. There are two practical reasons for this: first, to establish legal clarity in respect of protecting investors' interest and, second, the Government's desire to facilitate the growth of the State Budget by taxing the income generated by implementing solid NFT projects.

3. NFTs from the Perspective of the Georgian Law

3.1. Regulation of Crypto Assets in Georgia

Currently crypto assets as well as NFTs practically are not regulated in Georgia. Public Decision №201 of the Ministry of Finance of Georgia (hereafter – Public Decision №201) contains the definition of a crypto asset, according to which "a crypto asset is a digital asset which is stored and exchanged electronically using a decentralized, peer-to-peer network, not needing a trusted intermediary and functioning with the programming support of a distributed ledger technology."[45] However, Public Decision №201 clarifies that the mentioned definition only serves the purposes of this normative act and the legislation of Georgia does not provide a definition of a crypto asset.[46] This can be considered as a significant legal drawback, taking into account the increasing role of NFTs in the global economy.

3.2. NFT as an Object of Private Law

At first glance it can be said that crypto assets, including NFTs, can constitute objects of private law as defined by the Civil Code of Georgia (hereafter – GCC): "a tangible or intangible good having tangible or intangible value, which has not been removed from circulation by

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43 *The United States Securities and Exchange Commission,* In re Tomahawk Exploration LLC, Securities Act Rel. No. 10530, 2018, 7, <https://www.sec.gov/litigation/admin/2018/33-10530.pdf> [10.06.2022].

44 *The United States Securities and Exchange Commission,* Framework for "Investment Contract" Analysis of Digital Assets, 2019, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [12.06.2022].

45 Paragraph 2 of Article 1 of the Public Decision №201 of 28 June 2019 of the Ministry of Finance of Georgia "on the Taxation of a Crypto Asset and Transactions for the Delivery of Computing Speed (Capacity) Required for its Mining", Website, 01/07/2019.

46 Ibid, Subparagraph "a" of Paragraph 2 of Article 1.

law."[47] NFTs can undoubtedly satisfy only the prerequisite of not being "removed from circulation". Other components are controversial.

It can be argued that NFTs can constitute "intangible property" under GCC because NFTs can be "possessed, used and administered by natural and legal persons (…) without restriction" via their virtual accounts, this is not prohibited by law and does not contravene moral standards[48] (albeit the latter prerequisite depends on whether an NFT is linked to a sensitive content). However, the property dimension of NFTs remains controversial until the legislator officially recognizes NFTs as a kind of property but this is in turn even more controversial because generally a token, as was mentioned, does not have an intrinsic value. Creating, trading and other activities related to NFTs are permissible in Georgia since such activities are not prohibited by law despite the fact that they are not directly regulated.[49]

It is ambiguous what status NFTs will be granted if regulated in Georgia considering the Tax Code of Georgia (hereafter – Tax Code) which expressly excludes the status of a commodity for crypto assets.[50] The official reason for this is the fact that crypto assets, especially cryptocurrencies, "in some circumstances can be used as an alternative to money",[51] for example, in certain "virtual societies"[52] and money is not a commodity under the Tax Code.[53] However, this argument does not apply to NFTs because they are non-fungible and cannot be used as a medium of exchange. Consequently, it is not clear whether an NFT will be deemed a commodity under the Tax Code.

At first glance there is no need to further analyze NFTs in the context of Georgian law since NFT does not yet constitute an object of private law but, taking into account the purpose of the research, essential characteristics of NFT projects can be focused on, under the condition of hypothetically considering NFTs as the objects of Georgian private law.

3.3. NFTs in the Context of Georgian Investment Law

Unlike the law of the USA, the law of Georgia does not contain any official statement by a government authority as to whether digital assets can be securities, shares or investment products. Nevertheless it should be discussed, firstly, an NFT project can constitute an investment contract and, secondly, whether an NFT project can be considered as an investment fund.

47 Article 7 of the Civil Code of Georgia, Georgian Parliamentary Gazette, 31, 24/07/1997.
48 Ibid, Article 147.
49 Ibid, Section 2 of Article 10.
50 Section 2 of Article 160 of the Tax Code of Georgia, Legislative Herald of Georgia, 54, 17/09/2010.
51 Subparagraph "a" of Paragraph 2 of Article 1 of the Public Decision №201 of 28 June 2019 of the Ministry of Finance of Georgia "on the Taxation of a Crypto Asset and Transactions for the Delivery of Computing Speed (Capacity) Required for its Mining", Website, 01/07/2019, see citation: *European Central Bank*, Virtual Currency Schemes – A Further Analysis, 2015, 4, <https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemesen.pdf> [10.06.2022].
52 Ibid, Subparagraph "b" of Paragraph 2 of Article 1.
53 Section 2 of Article 160 of the Tax Code of Georgia, Legislative Herald of Georgia, 54, 17/09/2010.

3.2.1. NFT Project as an Investment Contract

The Georgian case law, unlike the American one, contains no guidance that would discuss the characteristics of an investment contract in detail or develop a test for determining whether this legal phenomenon constitutes an investment contract. Only the Law of Georgia on "Securities Market" (hereafter – Law on Securities) defines an investment contract as "a contract under which an investor grants to a third person money or other right on a property to invest in an economic activity, in order to generate possible income."[54]

In the context of NFT projects several prerequisites of granting "other right on a property" to a third party is satisfied. Firstly: an NFT purchaser (investor) pays cryptocurrency (which is not money under the legislation of Georgia)[55] to an NFT project team (a third party) in return for an NFT or NFTs.

As regards the second prerequisite, the Tax Code treats "any activity (…) performed to gain income or compensation, irrespective of the result of the activity" as an economic activity.[56] Conducting an NFT project fits into this definition.

The third prerequisite is the purpose of obtaining an income. Buying an NFT within the scope of an NFT project cannot completely satisfy this prerequisite. NFT holders do not always plan to obtain an income. As was mentioned, often NFTs are held as collectible items without intending to resell them. Here the literal definition must be decisive: if the Tax Code had contained the word "profit" instead of "income", similar to the USA law, it could be argued that increase in the value of NFTs would have satisfied the said prerequisite.

Considering the above-mentioned, an NFT project cannot be interpreted as an investment contract under Georgian law.

3.2.2. NFT Project as an Investment Fund

The Law of Georgia on "Investment Funds" (hereafter – Law on Investment Funds) defines an investment fund as "a collective investment scheme which pools capital from investors to invest the said capital in accordance with a determined investment policy and in favour of the investors."[57]

The first point is to ascertain whether an NFT project can constitute a collective investment scheme. The Law on "Investment Funds" defines the collective investment scheme as "a legal person or a contractual scheme"[58] which in turn must at least one prerequisite prescribed by this law. The first one is the lack of "a general commercial or industrial" purposes.[59] NFT projects

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54 Paragraph 34 of Article 2 of the Law of Georgia on "Securities Market", Legislative Herald of Georgia, 1(8), 14/01/1999.

55 Paragraph 2 of Article 1 of the Public Decision №201 of 28 June 2019 of the Ministry of Finance of Georgia "on the Taxation of a Crypto Asset and Transactions for the Delivery of Computing Speed (Capacity) Required for its Mining", Website, 01/07/2019.

56 Section 1 of Article 9 of the Tax Code of Georgia, Legislative Herald of Georgia, 54, 17/09/2010.

57 Paragraph 1 of Article 4 of the Law of Georgia on "Investment Funds", Legislative Herald of Georgia, 22/07/2020.

58 Ibid, Paragraph 2 of Article 4.

59 Ibid, Subparagraph "a" of Paragraph 2 of Article 4.

meet this prerequisite: they basically refer to the fields of art, music and culture in general. NFT project teams intend not merely to acquire capital by selling their NFTs. They wish to create a culturally valuable collection items in the form of NFTs with legitimate emotional and historical backgrounds. The second prerequisite involves pooling together the "capital raised from (…) investors" in order to invest it with the purpose of "generating a pooled return."[60] This prerequisite is not met. Firstly, as was mentioned, NFT project teams create and put the NFT collections for trade not using a pre-raised, pooled capital but using their own resources. Secondly, NFT project teams do not need to seek new investment opportunities as NFT collections themselves are ready-made projects. Thirdly, as was mentioned, no pooled return is distributed to NFT holders. The third prerequisite is that the "unit-holders (…), as a collective group, have no day-to-day discretion or control" within the scope of the collective investment scheme.[61] It is also clarified that even if a part of the investors "are granted day-to-day discretion", the collective investment scheme will still be considered as an investment fund.[62] The third prerequisite can be met. Although usually most of the managerial decisions are made by the NFT project team, in some cases they might consult with NFT holders when making significant business decisions, for example launching a new line of NFT collection. Hence, considering the above discussion, even though two prerequisites (the lack of general commercial or industrial purpose and everyday control) can potentially be met, an NFT project is highly unlikely to constitute a collective investment scheme in practice because other more important prerequisite like capitalization is not met.

The second prerequisite, pooling of capital, cannot be met by NFT projects, as was discussed above.

Part of the third prerequisite, investing a capital, was also discussed above. As was mentioned, NFT project teams do not raise a capital in advance to invest in other projects. Consequently, the second aspect - "a determined investment policy" need not be further analyzed but still this aspect would be inapplicable because although NFT project teams usually publish their business roadmaps, it is hard to classify them as investment policies.

Consequently, based on the research it can be said that NFT projects cannot be considered as investment funds.

4. Conclusion

To conclude, it can be said that at the current stage the perspective of officially pronouncing NFT projects as investment contracts or investment funds is still unclear. Due to the current regulatory uncertainty and legal unpredictability, it is important for NFT project developers to be aware of potential legal and regulatory issues and initiatives in order to quickly respond to legislative changes.

Appropriate regulations should be introduced only after consultations with the persons practically engaged in NFT projects. Moreover, legal regulation should be different, taking into

60 Ibid, Subparagraph "b" of Paragraph 2 of Article 4.
61 Ibid, Subparagraph "c" of Paragraph 2 of Article 4.
62 Ibid.

account what type of asset is represented by a particular NFT. For example, regulators should have different approach to NFTs that represent, for example, real property etc.

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22. *The United States Securities and Exchange Commission,* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Rel. No. 81207, 2017, 6, 11, 12, 15 <https://www.sec.gov/litigation/investreport/34-81207.pdf> [12.06.2022].
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24. The United States Securities and Exchange Commission v. Edwards, (2004), 540 US 389, 394.
25. Revak v. SEC Realty Corp., 18 F.3d 81, 87, 88, 89 (2d Cir. 1994).
26. Uselton v. Commercial Lovelace Motor Freight, Inc., 940 F.2d 564, 574 (10th Cir. 1991).
27. Reves v. Ernst & Young, (1990), 494 US 56.
28. Long v. Shultz Cattle Co., Inc., 881 F.2d 129, 140-141 (5th Cir. 1989).
29. Hart v. Pulte Homes of Michigan Corp., 735 F.2d 1001, 1004 (6th Cir. 1984).
30. United Housing Found., Inc. v. Forman, (1975), 421 US 837, 849.
31. The United States Securities and Exchange Commission v. Koscot Interplanetary, Inc., 497 F.2d 473, 479 (5th Cir. 1974).
32. The United States Securities and Exchange Commission v. Glenn W. Turner Enter., Inc., 474 F.2d 476, 482 (9th Cir.), certiorari denied, 414 U.S. 821, 94 S. Ct. 117, 38 L. Ed. 2d 53 (1973).
33. Tcherepnin v. Knight, (1967), 389 US 332, 336.
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Ketevan Kvetenadze*

Dual-Class Share Structure: A Challenge for Contemporary Corporate Law

A share is a security of a joint-stock company. It confirms the contribution of a partner (shareholder) in the capital of a joint-stock company and legally establishes its holder's positions and rights. There are different classes of shares that differ from each other in terms of legal status. One of them entitles a shareholder to managerial control (i.e. common share) and the other does not and is limited to provide property rights only (i.e. preferred share).

According to the existing trend in the present world, large corporations are distinguished by a diverse capital structure i.e. they issue two (or more) classes of shares simultaneously: both common and preferred, as well as several classes of common shares with different voting rights. This is especially true for high-tech companies like Google, Facebook, Snap Inc., etc. They are called Dual-Class Companies. When a company issues shares of two or more classes, it is accompanied by great risks and difficulties. It causes differences of opinion among scholars and investors whether the issuance of different classes of shares is harmful or beneficial for a company. In general, why do corporations resort to this path? What positive or negative impact can classes of shares have on corporate governance? Also, what is the role of a shareholder in the management of a company? In the present paper, the named issues will be discussed; What approaches exist in countries with developed economies and what methods do they use to improve corporate governance.

Keywords: *Classes of shares, single-class share structure, dual-class share structure, "one share, one vote", corporate governance, "Sunset Provision", stock exchanges.*

1. Introduction

A dual-class share structure as a corporate governance mechanism has taken root in the present world, leading to differences of opinion among scholars and investors.

As of December 2021, 31.7% of the initial public offerings made on the leading US stock exchanges belonged to companies with a dual-class structure.[1]

Given the current trend, large corporations, especially well-known high-tech companies such as Facebook[2], Google[3], LinkedIn, Zoom, etc. choose the dual-class share structure. In addition to high-tech companies, a similar structure is popular with media companies (such as The New York Times Co., The Washington Post Co., Dow Jones & Co., News Corp.), and family-ow-

* Master of Law, Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 *Ritter J. R.*, IPO Statistics for 2021 and Earlier Years, Table 23: Dual Class IPOs, by Tech and Non-tech,1980-2021, University of Florida Warrington College of Business, 67, <https://site.warrington.ufl.edu/ritter/files/IPO-Statistics.pdf> [02.02.2022].

2 Following the company's rebranding in October, 2021 Facebook CEO Mark Zuckerberg announced that the company's new name would be "Meta". However, for more clarity, in the present paper, the company will be referred to as "Facebook", <https://about.fb.com/news/2021/10/facebook-company-is-now-meta/> [09.03.2022].

3 Following a reorganization in 2015, the company was renamed Alphabet Inc. However, for more clarity, in the present paper, the company will be referred to as Google. See *Sharma R.*, Why "Google" Became Alphabet, Investopedia, <https://www.investopedia.com/articles/investing/081115/why-google-became-alphabet.asp> [02.02.2022].

ned companies (such as Ford Motor Co., one of the largest automaker companies in the world, led by the Ford family). Warren Buffett's Berkshire Hathaway is also known for its dual-class structure.[4]

A dual-class structure involves the issuance of two (or more) classes of shares in which corporations place low voting or non-voting shares for public trade on stock exchanges. And, the shares with voting rights (be it superior voting or one voting) are not intended for public offerings and are owned only by the corporation's insiders (founders, executives).

Dual-class share structure develops a wedge between the voting and economic rights. Minority shareholders (usually the founders), even though they own a minority of the shares in the company and therefore their participation in the equity is small, retain the control of the company as they hold a majority of the votes. Thus, the voting right is not proportional to the cash-flow rights. This contradicts the universally accepted principle in corporate law – "one share = one vote".

Dual class share structure is the result of flexible legislation. It is an issue of the day and can be considered as one of the major challenges in the contemporary corporate law. The Georgian reality is interesting against the background of this world trend.

On January 1, 2022, the new Law of Georgia on Entrepreneurs came into force. The adoption of the new law was aimed at improving the Georgian entrepreneurial legislation and bringing it closer to international standards. At the stage of development of entrepreneurial law, Georgia took the path to American law, as a result of which, according to national law, corporations enjoy freedom in terms of defining the capital structure.

National law recognizes two classes of shares – common shares and preferred shares, which can be considered as basic classes. However, the provision is of *dispositivum* nature in relation to the classes of shares and a company can otherwise determine the control or economic rights related to the classes of shares by the statute.[5] However, in this respect Georgia is not distinguished by diverse practices. It is therefore interesting to consider examples from experienced countries.

The purpose of this paper is to discuss the matter of issuing shares of different classes, its significance and the reason why corporations apply this method. Also to consider the positive and negative impacts of the dual-class share structure on corporate governance; What benefits or difficulties can deviate from the basic rule bring?

It should be noted that the object of the research of this paper is a joint-stock company (a public company or corporation), which has a large number of shareholders, publicly trades its shares in the securities market and is responsible for transparency, accountability and disclosure.[6]

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4 See *Kang S. Y.*, Taking Voting Leverage and Anti-Director Rights More Seriously: A Critical Analysis of the Law and Finance Theory, Peking University School of Transnational Law Research Paper No. 15-3, 2015, 20, <https://ssrn.com/abstract=2669420> [02.02.2022].

5 According to the first sentence of Article 158 (1) of the Law of Georgia on Entrepreneurs "Unless otherwise provided for by the statute, shares may be common or preferred." And according to Article 158 (4) of the given law "A joint-stock company may issue classes of shares other than those determined by this article." Law of Georgia on Entrepreneurs, the official website of Legislative Herald of Georgia, 04/08/2021 (in Georgian).

6 *Chanturia L.*, Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 79 (in Georgian).

In Georgia, corporate governance is based on international experience. It is important to research and analyze current issues, experiences, trends, practices or dogmatic problems in the world in order to increase their practical relevance. The experience of corporate governance in the present world and the search for better models gives great hope for the introduction of sound corporate governance practices in the Georgian reality, for the improvement of the corporate governance culture, for the development of the securities market and for the further development of entrepreneurship.

2. First Dual-Class Companies

Dual-class share structure has recently become particularly popular with high-tech companies. However, it should be noted that the structure of this type is not new. The history of dual-class shares dates back to the 1920s. And, the first non-voting shares are found in the late 19th century.

In 1898, the International Silver Company was the first company to issue non-voting shares in the United States.[7] It was this fact that laid the groundwork for the allocation of voting rights and cash flow rights by companies between common and preferred shares in the United States.[8] Previously, both classes provided for voting rights.[9]

In the 1920s, companies began to successfully implement such a structure to attract additional investment. In 1925, the Dodge Brothers publicly traded non-voting common shares, bonds, and preferred shares on the New York Stock Exchange. [10] The controlling shareholder in the company owned a majority of voting rights, despite a small portion of participation in the capital.[11] The practice of Dodge Brothers had been shared by other companies. The main reason why they implemented this mechanism, the companies named the following: the application of unequal voting rights helped them reduce agency costs and control the management in an era where there was no leverage to demand disclosure and the protection of the rights of small investors.[12] This was followed by criticism from Harvard University Professor William Z. Ripley.[13] He believed that the rights of shareholders were being violated, while the management, despite the increase in capital and the increase in the number of investors, invariably retained control, without diluting

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7 *Howell J. W.,* The Dual Class Stock Structure in the United States: A New Dataset and an Examination of Firms Who Leave the Structure, Ph.D. Dissertation, The University of Georgia, Athens, Georgia, 2010, 2, <https://getd.libs.uga.edu/pdfs/howell_jason_w_201005_phd.pdf> [03.02.2022].

8 Ibid.

9 Ibid.

10 See *Seligman J.,* Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy, George Washington Law Review, Vol. 54, No. 5, 1986, 694-697, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/gwlr54&div=36&id=&page=> [03.02.2022].

11 See ibid.

12 *Lund D. S.*, *Pollman E.*, The Corporate Governance Machine, Columbia Law Review, Vol. 121, 2021, University of Pennsylvania, Institute for Law & Economics Research Paper No. 21-05, European Corporate Governance Institute - Law Working Paper No. 564/2021, USC CLASS Research Paper No. CLASS21-15, USC Law Legal Studies Research Paper Series No. 21-15, 2624, <https://ssrn.com/abstract=3775846> [05.02.2022].

13 See *Ripley W. Z.*, Main Street and Wall Street, 1927, <https://archive.org/stream/mainstreetandwal00riplrich/mainstreetandwal00riplrich_djvu.txt> [05.02.2022].

their voting rights.[14] The New York Stock Exchange banned the listing of companies that offered non-voting common shares or more than one class of common shares, although exceptions were made for few companies (one of which was the Ford Motor Company).[15] Since the 1980s, the New York Stock Exchange and the NASDAQ as well have again allowed the listing of shares by companies with a dual-class share structure. [16]

3. The Relevance of Dual-Class Shares

Since 2004, dual-class shares have become even more relevant when Google, in its initial public offering, offered common shares, which provided for one vote, while the shares that were held by the founders had superior voting rights (meaning that one share of the founders provided for ten votes). Technology companies tended to use less of a dual-class share structure. However, since Google, it has become conventional for other similar companies.[17] Therefore, the revival of the dual-class shares and the establishment of a new trend for technology companies is associated with the name of Google.

When referred to dual-class shares, it is usually implicated the coexistence of two different classes of common share (e.g., shares with superior voting and standard (one) voting rights). However, in practice, we also encounter companies that issue more than two classes of common shares (i.e. Multi-Class Shares). For example, Snap Inc. was the first corporation to list only non-voting shares in the US stock market in March 2017 for public trading.[18] Before Snap Inc. would become a reporting company i.e. before it became a public company, it had provided its shareholders with two classes of common shares. Earlier investors and executives owned common shares (one share = one vote), while the founders owned common shares with a superior voting rights (one share = ten votes). [19] As mentioned above, until 2017, Snap Inc. was a private company. And in 2017, when it became a public company and listed its shares on the stock exchange, it offered its new, outside investors only common shares that did not provide for voting rights.

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[14] See *Lel U.*, *Netter J. M.*, *Poulsen A. B.*, *Qin Zh.*, Dual Class Shares and Firm Valuation: Evidence from SEC Rule 19c-4, June 1, 2020, European Corporate Governance Institute – Finance Working Paper No. 807/2021, 7, <https://ssrn.com/abstract=3729297> [05.02.2022].

[15] See *Gilson R. J.,* Evaluating Dual Class Common Stock: The Relevance of Substitutes, Virginia Law Review, Vol. 73, 1987, 807, <https://scholarship.law.columbia.edu/faculty_scholarship/987> [05.02.2022].

[16] Committee On Capital Markets Regulation (CCMR), The Rise of Dual Class Shares: Regulation and Implications, Report, April 2020, 2, <https://www.capmktsreg.org/wp-content/uploads/2020/04/The-Rise-of-Dual-Class-Shares-04.08.20-1.pdf> [05.02.2022].

[17] See *Fisch J. E.*, *Davidoff-Solomon S.*, The Problem of Sunsets, Boston University Law Review, Vol. 99, 2019, University of Pennsylvania, Institute for Law & Economic Research Paper No. 19-04, 1067-1068, <https://ssrn.com/abstract=3305319> [05.02.2022].

[18] See *Sharfman B. S*., A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs, Villanova Law Review, Vol. 63, No. 1, 2018, 19-21, <https://ssrn.com/abstract=2986164> [05.02.2022].

[19] *Descovich K.*, *Conroy M. A., Dixon C., Odoner E.*, Voting Rights Gone in a Snap – Unequal Voting Rights Back in the Spotlight, Public Company Advisory Group of Weil, Gotshal & Manges LLP, Governance and Securities Alert, April 3, 2017, <https://governance.weil.com/insights/voting-rights-gone-in-a-snap-unequal-shareholder-voting-rights-back-in-the-spotlight/> [05.02.2022].

It is true that before Snap Inc., Google listed non-voting shares for public trade on the stock exchange in 2004.[20] However, the difference between these two cases is that Google did it during the secondary public offering, while Snap Inc. did it during the initial public offering. Despite all this, investors were very enthusiastic about Snap Inc.'s shares. [21]

Therefore, following the example of Snap Inc., it is also possible for a dual-class share structure to involve the issuance of three different classes of common shares[22] - a) one share provides for one vote; b) one share provides for multiple votes; c) a share that does not provide for voting rights at all. However, it should be noted that this is a relatively new phenomenon.

4. The Right to Vote as a Mechanism of Control

There are two main aspects to corporate governance: investor ownership and delegated governance. [23]

According to popular opinion expressed in the legal literature[24], the term "equity ownership" has two characteristics: 1. The right to a share in the income received from the entrepreneurial activity of the company; 2. The right to have a control over the company. The right of control basically means "the right of investors (shareholders) to elect directors and to vote to confirm major transactions." [25] The control right, as well as the right to receive a share of the company's income or profits - the cash flow right, is proportional to the contribution in the capital of the company. It should be noted, however, that such allocation (based on the principle of proportionality) of control and share of profits is mainly regulated by provisions of laws governing corporations that have the character of *jus dispositivum*. [26]

The highest body of a joint-stock company is the General Meeting of Shareholders. That is why it is entrusted to solve the main issues of the company's activities. [27]

Voting right is one of the means of exercising management control by shareholders. Control over the management can be achieved through various combinations of voting rights, e.g. classification of common shares as voting and non-voting shares from which voting shares (or a major part of them) are held by company insiders. [28]

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20 Ibid.

21 See *Sharfman B. S.*, A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs, Villanova Law Review, Vol. 63, No. 1, 2018, 19, <https://ssrn.com/abstract=2986164> [05.02.2022].

22 In the legal literature, this case, even though we are no longer dealing with two classes of shares but with three classes, is still referred to as a dual-class share structure, or possibly a multi-class share structure.

23 See *Kraakman R., Armour J., Davies P., Enriques L., Hansmann H., Hertig G., Hopt K., Kanda H., Pargendler M., Ringe W.-G., Rock E.*, The Anatomy of Corporate Law: A Comparative and Functional Approach, 3rd ed., *Kochiashvili A., Maisuradze D. (Translators)*, Tbilisi, 2019, 74 (in Georgian) <http://lawlibrary.info/ge/books/2019giz-ge_anatomy_of_corporate_law.pdf> [05.02.2022].

24 Ibid., 19.

25 Ibid.

26 Ibid.

27 *Chanturia L., Ninidze T.*, Commentary on the Law on Entrepreneurs, Tbilisi, 2002, 348 (in Georgian).

28 Ibid., 123.

The right of a shareholder to control is a powerful incentive for the existence of conscientious management. The duty of constant accountability of management deprives the director and other executives of the ability to express their arbitrariness. [29]

Within a dual-class structure, the shareholder gains influence not at the expense of owning a majority of the shares but at the expense of owning a majority of the votes. Consequently, it is possible for a shareholder to hold a majority of the votes, despite a small portion of participation in the capital. Those who hold majority of votes impose a financial burden on those who do not. Financial risk for those who own a minority of votes are higher. This is what causes a negative attitude towards the dual-class share structure.

The main reason why companies apply a dual class share structure is to maintain control in a narrow circle as the company expands.

The original owners of companies want to raise capital, expand, but are reluctant to cede control. When a private company becomes a public company, that is, it becomes a "reporting company"[30], it means that it has to place the shares for public trading on the stock exchange i.e. new co-owners are entering the company, with whom both control and ownership must be allocated. The company, wants to expand and increase capital i.e. agrees to split ownership but disagrees to split control rights. That is why it offers non-voting shares or common shares (one share = one vote) to outside investors and retains multi-vote shares (usually one share = ten votes) for its insiders. Such an approach is typical for media companies to maintain their editorial independence, as well as for high-tech companies and family-owned companies. Also important is the following: A dual-class share structure is particularly prevalent in founder-led companies, when the company is associated with their founder.

However, different cases have also been observed in practice: it should be noted that not all dual-class companies are the same. Although the legal literature views dual-class companies primarily as a single monolithic "type" in which control is concentrated in a narrow circle of founders, in reality, the nature of control varies in different dual-class companies.[31] In particular, the controlling shareholders may also be directors or managers who are not the founders of the company;[32] Also, the controlling shareholder may be a parent company or a holding company that

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[29] *Lazarashvili L.*, Shareholders' rights to control the receipt of information and the duty of care, in Collected Articles: Duty of care and responsibility in the joint-stock company under Georgian and German law: Symposium Materials, II German-Georgian Symposium in Corporate Law, Tbilisi, 2003, 263-264 (in Georgian), <http://www.library.court.ge/upload/giz2003-ge-de-symposium-company-law.pdf> [05.02.2022].

[30] According to Article 9 (1) of the Law of Georgia on Securities Market, "A reporting company (issuer of publicly held securities) is a legal person established under the Law of Georgia on Entrepreneurs, which has issued publicly held securities (except for covered bonds)." Law of Georgia on Securities Market, Legislative Herald of Georgia, 1(8), 14/01/1999 (in Georgian).

[31] *Aggarwal D., Eldar O.*, *Hochberg Y. V.*, *Litov L. P.*, The Rise of Dual-Class Stock IPOs (November 23, 2021), NBER Working Paper 28609; Duke Law School Public Law & Legal Theory Series No. 2020-78, European Corporate Governance Institute – Finance Working Paper No. 806/2021, 3, <https://ssrn.com/abstract=3690670> [06.02.2022].

[32] For example, in Skysat Communications Network, which became a public company in 1994, the controlling stake was owned by directors and managers who were not the company's founders. See ibid., 11.

has issued shares in its subsidiary; [33] The family that headed the company for generations, or even Private Equity Investors, who chose this structure to retain control of the company even after the initial public offering (IPO). In addition, sometimes a dual class structure is chosen not for the maintenance of control but for regulatory and tax purposes. [34]

5. Peculiarities of Dual-Class Share Structure

The class and number of securities issued by the corporation determines the formation of the capital.[35]

Whether the corporation decides to issue only preferred shares, only common shares or different classes of common shares, it affects not only the capital structure, but also the corporate governance.[36]

Under German law, dual-class shares are not allowed for listed companies.[37] That is why when discussing the issuance of shares of different classes by a corporation under German law, the simultaneous issuance of common and preferred shares is meant.[38] Georgian corporate law, similar to American corporate law, is not aware of such a prohibition, and therefore, the resolution of this issue is entrusted to the company itself. Therefore, the second case mentioned above (division of common shares into separate classes) is found in countries whose law does not prohibit the issuance of multi-vote shares. The dispositive (discretionary) norm of the Law of Georgia on Entrepreneurs regarding the legal definition of classes of shares allows for the establishment of a different rule. It is possible to issue both multi-vote shares and shares with restricted voting rights.

However, some scholars believe that dual-class share structure is different from that of the capital structure, which provides for both the common shares and the preferred shares.[39] The reason is the different economic rights of the common share compared to the preferred one, as well as different control rights (one provides for voting right, the other – does not). Holders of preferred share typically have limited or no voting rights, but in return enjoy economic benefits in

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33 For example, when the fast food chain Chipotle became a reporting company in 2006 (that is, a public company that publicly traded its shares on a stock exchange), the controlling stake was not owned by Steve Ells, its founder, but by McDonald's subsidiary company. McDonald's owned a multi vote shares: it owned 87% of the vote while there was a 22% wedge between the voting rights and the stake in the capital. See ibid.

34 Ibid.

35 *Burduli I.*, Foundations of the Corporate Law, Vol. I, Tbilisi, 2010, 341 (in Georgian).

36 *Ashton D. C.,* Revisiting Dual Class Stock, Saint John's Law Review, Vol. 68, 1994, 866, <https://scholarship.law.stjohns.edu/lawreview/vol68/iss4/2/> [06.02.2022].

37 *Burduli I.*, Foundations of the Corporate Law, Vol. I, Tbilisi, 2010, 336 (in Georgian).

38 See *Rydqvist K.*, Dual-Class Shares: A Review, Oxford Review of Economic Policy, Vol. 8, No. 3, 1992, 46, <www.jstor.org/stable/23606245> [06.02.2022].

39 Compare *Kang S. Y.*, Taking Voting Leverage and Anti-Director Rights More Seriously: A Critical Analysis of the Law and Finance Theory, Peking University School of Transnational Law Research Paper No. 15-3, 2015, 21, <https://ssrn.com/abstract=2669420>. see also, *Fisch J. E.*, *Davidoff-Solomon S.*, The Problem of Sunsets, Boston University Law Review, Vol. 99, 2019, University of Pennsylvania, Institute for Law & Economic Research Paper No. 19-04, 1064, <https://ssrn.-com/abstract=3305319> and *Rydqvist K.*, Dual-Class Shares: A Review, Oxford Review of Economic Policy, Vol. 8, No. 3, 1992, 46, <www.jstor.org/stable/23606245>.

the form of dividends and liquidation. A preferred share is considered a hybrid of share and bond. In addition, if the preferred shares are rarely issued by companies (rarely sold to investors), then it cannot be used by insiders who want to gain a superior position by voting rights. [40]

In the United States, under §6.01 (a) - (c) of the MBCA (Model Business Corporation Act)[41], as well as Title 8, §151 (a), §212 (a) of the Delaware Code[42] and also if we take into account the practice of public companies, it is possible to differentiate common shares according to the scope of voting and economic rights. Common shares can be further divided into separate "classes" e.g. one share of Class A provides one vote, while one share of Class B provides ten votes. There may also be a third class of common share (Class C) that does not provide voting rights at all, even though it is a common share.

Dual-class structure is permitted by the laws of many countries. These include Canada, Denmark, Finland, the Netherlands, Sweden and Switzerland. [43] At the same time, the laws of some countries restrict or prohibit the use of a dual-class structure by public companies. Belgium, Germany, Luxembourg, Poland and Spain restrict the use of a dual-class structure. [44] It should be noted that in Germany, a division of common shares into multi-voting and non-voting shares is generally prohibited. Therefore, the structure of dual-class shares in this sense is not only limited but also inadmissible in Germany.

6. The Positive Impact of Dual-Class Share Structure

Proponents of the dual-class share structure believe that this structure enables company insiders to focus on their long-term vision for the company. The founders (or executives) know better the purpose and the aim of the company. Therefore, they know the means of accomplishing the goals. Their focus is not solely on making a profit, but they also want to expand the company. It is important for them that the company withstands time and is able to cope with present-day challenges. This requires special knowledge. That is why the proponents of a dual-class share structure believe that entrusting the founders to manage the company and protecting them from the investors with short-term incentives, as well as protecting them from the capital market pressure, will bring the most optimal results.

Often, the vision of the founder is incomprehensible and unacceptable to investors, although it is beneficial for the company. A dual-class structure is a kind of a tool to isolate (insulate) the

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40 *Kang S. Y.*, Taking Voting Leverage and Anti-Director Rights More Seriously: A Critical Analysis of the Law and Finance Theory, Peking University School of Transnational Law Research Paper No. 15-3, 2015, 21, <https://ssrn.com/abstract=2669420> [02.02.2022].

41 Model Business Corporation Act, 2016 Revision, December 9, 2017, American Bar Association, <https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf> [10.03.2022].

42 The Delaware Code, Title 8: Corporations, Legislative Council, General Assembly State of Delaware, the Delaware Code Online, <https://delcode.delaware.gov/title8/title8.pdf> [10.03.2022].

43 See *Bebchuk L. A.*, *Kastiel K.,* The Untenable Case for Perpetual Dual-Class Stock (April 18, 2017), Virginia Law Review, Vol. 103, 2017; Harvard Law School John M. Olin Center Discussion Paper No. 905, Harvard Law School Program on Corporate Governance Discussion Paper 2017-6, 599, <https://ssrn.com/abstract=2954630> [06.02.2022].

44 Ibid.

founder and the management from the people (the investors) who question the founder's vision. [45] In this regard, it is interesting to note the initial public offering letter from the founders of Google to investors, which explains why they decided to adopt a dual-class share structure when their company became public. [46] In addition to focusing on their long-term plans, innovative approach, technology and business environment specifics, they emphasize that "Google has prospered as a private company. We believe a dual class voting structure will enable Google, as a public company, to retain many of the positive aspects of being private." [47] Indeed, when a public company uses a dual-class share structure, it does take the characteristics of a private company as most of the voting rights that can have influence, or in other words the control rights, are concentrated in a narrow circle of shareholders.

Dual-class share structure ensures the protection of "Idiosyncratic Vision"[48] the Entrepreneur has for the development of the company. Typically, founders have their own goals and plans. They may have long-term plans and developed mechanisms to implement those plans, and that is why they need to be protected from the pressure from investors who have only economic interests and want short-term returns.

Professors Zohar Goshen and Assaf Hamdani point out in their paper[49] that the purpose of using a dual-class structure is for the entrepreneur to maintain unrestricted and inevitable control over the corporation. In their view, investors and entrepreneurs both value (consider of great importance) the right to control, however, for different reasons. An entrepreneur must maintain control in order to carry out her/his plan, follow her/his vision, and investors want to reduce agency costs. [50]

The information asymmetry between the ordinary market participant (meaning outside investor) and the company insider, can have a negative impact on the value of the share. [51] It is expected that someone will take advantage of it and come to the head of the company at unreasonably low costs. [52] It is a case of the hostile takeover of the enterprise, against which a dual-class share structure is considered to be one of the most effective mechanisms. Hostile takeover is a

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45 See *Fisch J. E.*, *Davidoff-Solomon S.*, The Problem of Sunsets, Boston University Law Review, Vol. 99, 2019, University of Pennsylvania, Institute for Law & Economic Research Paper No. 19-04, 1069, <https://ssrn.com/abstract=3305319> [05.02.2022].

46 See *Page L., Brin S.*, 2004 Founders' IPO Letter <https://abc.xyz/investor/founders-letters/2004/ipo-letter.html> [05.02.2022].

47 See ibid.

48 The term "Idiosyncratic Vision", used by professors Zohar Goshen and Assaf Hamdani, is interesting to point out. Idiosyncratic means peculiar or individual. The professors, as they explain themselves, do not consider the entrepreneur's vision to be innovative or any new discovery, the main thing is for her/him to have a business plan and the belief that this plan will bring success to her/his company. This is what is meant by this word. See *Goshen Z., Hamdani A.*, Corporate Control and Idiosyncratic Vision, Yale Law Journal, Vol. 125, 2016, 567, <https://www.yalelawjournal.org/article/corporate-control-and-idiosyncratic-vision> [04.02.2022].

49 See *Goshen Z., Hamdani A.*, Corporate Control and Idiosyncratic Vision, Yale Law Journal, Vol. 125, 2016, <https://www.yalelawjournal.org/article/corporate-control-and-idiosyncratic-vision> [04.02.2022].

50 See ibid., 566.

51 See *Dimitrov V., Jain P. C.*, Recapitalization of One Class of Common Stock into Dual-Class: Growth and Long-Run Stock Returns, September 1, 2004, 2, <https://ssrn.com/abstract=422080> [04.02.2022].

52 Ibid.

case where one company (the acquiring company) acquires the other company (the target company) by negotiating directly with the shareholders, bypassing the management (board of directors).[53] During hostile takeovers, such a transaction is against the will of the management of the target company. This is why the acquiring company is trying to achieve its goal by convincing shareholders. The purpose of hostile takeover is to establish control over the target company by the acquiring company, which can only be achieved by obtaining an adequate number of voting shares. Dual-class structure is an effective mechanism for protecting a company from hostile takeover. At a time like this, the company has publicly traded common shares (one share, one vote) or non-voting shares, and the multi-voting shares or controlling shares are owned by a narrow circle of the company and therefore the acquiring company will not be able to establish control over the target company.

In the legal literature, regarding the advantages and disadvantages of issuing shares of different classes by corporations, whether it is a discussion of dual-class or multi-class share structures, there are more or less similar views with both proponents and opponents. In this respect, the paper[54] by Professor Dorothy S. Lund is different, offering a novel perspective on the above-mentioned debate. It is also important to note that the professor discusses the issue in the light of US experience and the legal and business environment.

In her paper, Professor Lund discusses specifically the benefits of a non-voting share and how it can be used to improve corporate governance of a company. According to Professor Lund, the key is in the shareholders themselves: who owns the share and what interest does she/he have. Shareholders are different and not everyone has the same motive. Non-voting share allows companies to allocate voting rights between informed shareholders (to whom their voting rights are of great importance) and uninformed, "weakly motivated" shareholders (who do not give much importance to their voting rights), and when such sorting occurs, agency and transaction costs are reduced.[55] In the legal literature, the prevailing view is that dual-class share structure increases agency costs. However, Professor Lund argues that by issuing non-voting shares, a company will reduce its agency costs. She believes that informed investors will pay more in voting shares that will not be diluted by the voting rights of uninformed, weakly motivated investors.[56] A company can persuade informed investors to make an investment by offering them two classes of shares, and weakly motivated investors will seek out shares that do not impose on them the costs associated with voting.[57] Moreover, non-voting shares can be purchased at a discount, unlike voting shares.

Voting rights are not equally important for all shareholders. Some of them do not appreciate it to the extent that they do not use it at all. Professor Lund considers such to be retail or individual investors. Voting right is important for informed investors who are motivated to maximize the

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53 See *Chanturia L.*, Corporate Governance and the Responsibility of Managers in Corporate Law, Tbilisi, 2006, 231 (in Georgian).

54 See *Lund D. S.*, Nonvoting Shares and Efficient Corporate Governance, Stanford Law Review, Vol. 71, 2019, <https://www.stanfordlawreview.org/print/article/nonvoting-shares-and-efficient-corporate-governance/> [04.02.2022].

55 Ibid., 695-697.

56 Ibid.

57 Ibid.

value of the company. [58] Non-voting shares should be issued by the company precisely because those who value voting should have the relevant share, and those who do not value it should have the non-voting one.[59]

When potential investors are convinced that management is accountable to informed investors, who hold voting shares, they are more likely to want to invest in such a company. [60] The issuance of non-voting shares, for the reason that voting power is divided between informed and weakly motivated investors (the informed have the voting shares and the others do not) has not yet taken place and the professor hopes that it will happen soon in the future. [61]

By giving the non-voting shares to weakly motivated voters, the company will give more power to the voice of informed investors and, to some extent, management will be more accountable to them.[62]

Professor Lund believes that the potential for non-voting shares has not yet been fully explored, even though the non-voting shares have been in use for more than a century. Innovation (meaning high-tech companies) is a novelty for a dual-class structure. Recent corporate governance trends and financial market changes have made the non-voting shares more attractive.[63] Shareholder activity has increased significantly: they have the opportunity and desire to intervene directly and discuss various corporate issues; The number of institutional investors as shareholders of a company has also increased. [64] Weakly motivated shareholders vote and exercise their voting rights, and their lack of information suggests that their contributions may not necessarily be beneficial for the company. Thus, Professor Lund believes that non-voting shares are a good way to avoid suboptimal decisions. [65]

7. The Negative Impact of Dual-Class Share Structure

The ISS (Institutional Shareholder Services group of companies)[66] described dual-class share structure as an "autocratic model of corporate governance".[67]

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58 See *Lund D. S.*, Nonvoting Shares and Efficient Corporate Governance, Stanford Law Review, Vol. 71, 2019, <https://www.stanfordlawreview.org/print/article/nonvoting-shares-and-efficient-corporate-governance/> [04.02.2022].

59 Ibid.

60 See ibid., 698.

61 See ibid.

62 In this regard, it is interesting to note the example discussed by Professor Lund. She compared the specifics of the operation of companies with a single-class share structure and a dual-class share structure. See *Lund D. S.*, Nonvoting Shares and Efficient Corporate Governance, Stanford Law Review, Vol. 71, 2019, 719-723, <https://www.stanfordlawreview.org/print/article/nonvoting-shares-and-efficient-corporate-governance/> [04.02.2022].

63 See ibid., 737.

64 Ibid.

65 Ibid.

66 Institutional Shareholder Services group of companies (ISS) - Institutional Shareholder Services Group is one of the leading shareholder advisory groups in the world. Provides consulting services in areas such as: corporate governance, investment solutions, capital market analysis, etc. It is also a "Proxy Firm" which means that it is authorized by companies and participates in general meetings of shareholders as their representative (proxy voting). See <https://www.issgovernance.com/about/about-iss/> [30.04.2020].

Institutional investors do not support a dual-class structure. They argue that the concentration of control within a small group of shareholders reduces the value of the company. The majority of shareholders at this time are unable to exercise proper supervision and control over those accountable to them. Dual-class structure stimulates managers, directors to breach their fiduciary duties to shareholders and act not in the interests of the company but for their private benefits. [68]

Dual-class share structure may be accompanied by a weakening of accountability of the management of the company to shareholders, an increase in agency costs[69], arbitrariness on the part of controlling (holding majority of voting shares) shareholders - these are the most frequently discussed issues in the legal literature.

In general, the separation of ownership and control entails agency costs between shareholders and management, even within the single-class structure (where the "one share, one vote" principle is followed). But, within the dual-class share structure, since the right of control is concentrated in a narrow circle of shareholders, the accountability of the management to other, outside shareholders is also weakened. In addition, this may also result in agency costs between insider and outsider or majority and minority shareholders. This is why it is noted in the legal literature that the dual-class share structure leads to an increase in agency costs.

The main negative feature that characterizes a dual-class share structure is the powerlessness of the outside shareholders. When insiders fail to turn out to be good managers and their decisions fail, outside shareholders cannot use coercive and disciplinary mechanisms because they do not have adequate voting rights. In addition, the risk bearers of wrong decisions are the outside shareholders, because from an economic point of view, their equity shareholding is larger, and the insiders, in this case, do not suffer much because of the small share in the capital.

"Management Entrenchment" - as the majority of votes in the corporation are in the hands of insiders, minority shareholders or outside investors, are deprived of the opportunity to monitor the management. Consequently, it becomes difficult for them to demand accountability (e.g. impose disciplinary liability) from management. This in turn weakens management's accountability to shareholders. On the one hand, management is committed to implementing its long-term plan. On the other hand, there is an increased risk of arbitrariness on their part.

In general, shareholders, including controlling shareholders, always try to protect themselves from the arbitrariness of managers, which manifests itself in the abuse of their position. [70]

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67 See *Bebchuk L. A.*, *Kastiel K.,* The Untenable Case for Perpetual Dual-Class Stock, April 18, 2017, Virginia Law Review, Vol. 103, 2017; Harvard Law School John M. Olin Center Discussion Paper No. 905; Harvard Law School Program on Corporate Governance Discussion Paper 2017-6, 599, <https://ssrn.com/abstract=2954630> [06.02.2022].

68 See *Lund D. S.*, Nonvoting Shares and Efficient Corporate Governance, Stanford Law Review, Vol. 71, 2019, 714, <https://www.stanfordlawreview.org/print/article/nonvoting-shares-and-efficient-corporate-governance/> [04.02.2022].

69 Agency Costs are the internal costs of the company, which provides for the remuneration of the representation made by the agent to the principal. These types of costs occur when a conflict of interest or disagreement arises between the shareholders and the management.

70 *Jibuti M.*, State control over the protection of the interests of shareholders (investors) by the governing bodies of corporations, in Collected Articles: Duty of care and responsibility in the joint-stock company under Georgian and German law: Symposium Materials, II German-Georgian Symposium in Corporate Law, Tbilisi, 2003, 207 (in Georgian), <http://www.library.court.ge/upload/giz2003-ge-de-symposium-company-law.pdf> [05.02.2022].

On the other hand, it is important for minority shareholders to avoid embezzlement from controlling shareholders and to protect themselves from situations where management can align its own interests with those of controlling shareholders, which would be detrimental to the corporation and minority shareholders.[71]

The right of a shareholder to control is incentive for managers to fulfill their obligations to the company in good faith. Shareholders may not support the decisions made by management. For shareholders who are not insiders of the corporation (and they are quite a lot because the right of control is concentrated in a narrow circle), exercising this right is difficult or almost impossible within the dual-class share structure.

Over time, dual-class share structure becomes inefficient for the company. If it plays a positive role in the initial stage of a company's operation, in the maturing stage it may lead to an increase in agency costs, as well as a decrease in labor productivity, innovation, the number of employees, etc.[72]

Some scholars believe that a dual-class structure is effective over a period of time rather than for an indefinite period. With time, a dual-class structure loses its effectiveness and only creates problems. If it is effective during the initial public offering period, there is a great risk that it will not be so for years to come.[73] Nevertheless, controlling shareholders have a desire to keep the management in their hands perpetually, thus maintaining a dual-class share structure even when it is no longer effective.[74] This could turn out to be harmful for a company.

8. Mechanisms for Regulation

In most of the jurisdictions of the world, the matter of classes of shares is regulated by the provisions of the law that have the character of *jus dispositivum*. The laws do not explicitly prohibit deviations from the "one share, one vote" rule, thus, self-regulatory organizations have undertaken upon themselves to address the risks associated with a dual-class structure.

Institutional investors, leading stock exchanges, and other influential institutions strongly support a single-class share structure (where the principle of "one share = one vote" is maintained) and oppose the violation of shareholder equality (democracy) within a dual-class share structure. However, they do not have the power to completely ban this structure. That is why they have developed mechanisms to ensure the balancing of risks arising from dual-class share structure.

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71 *Jibuti M.*, State control over the protection of the interests of shareholders (investors) by the governing bodies of corporations, in Collected Articles: Duty of care and responsibility in the joint-stock company under Georgian and German law: Symposium Materials, II German-Georgian Symposium in Corporate Law, Tbilisi, 2003, 207 (in Georgian), <http://www.library.court.ge/upload/giz2003-ge-de-symposium-company-law.pdf> [05.02.2022].

72 See *Kim H., Michaely R.*, Sticking around Too Long? Dynamics of the Benefits of Dual-Class Voting, European Corporate Governance Institute (ECGI) - Finance Working Paper No. 590/2019, Swiss Finance Institute Research Paper No. 19-09, 2019, 4, <https://ssrn.com/abstract=3145209> [05.02.2022].

73 See *Bebchuk L. A.*, *Kastiel K.,* The Untenable Case for Perpetual Dual-Class Stock (April 18, 2017), Virginia Law Review, Vol. 103, 2017; Harvard Law School John M. Olin Center Discussion Paper No. 905; Harvard Law School Program on Corporate Governance Discussion Paper 2017-6, 590, <https://ssrn.com/abstract=2954630> [06.02.2022].

74 Ibid.

The Council of Institutional Investors (CII)[75] has been calling on US stock exchanges and indices since 2012 to introduce the "one share, one vote" principle.[76] Moreover, the CII went beyond the United States and called on the stock exchanges of London, Hong Kong and Singapore not to allow companies with a dual-class structure for listing. [77] The CII also addressed the SEC Investor Advisory Committee. [78] SEC representative Robert Jackson supports a dual-class structure only if it is to be limited in time.[79] In his February 2018 speech[80], he noted that he hopes stock exchanges will oblige dual-class companies to include a special clause - Sunset Provision – in their statutes and regulate unequal voting rights over time.[81] The SEC Investor Advisory Committee has issued a recommendation[82] according to which the Division of Corporation Finance[83] shall require from dual-class companies to strictly follow the disclosure obligation and to provide detailed information about risks.[84]

In 1988, the Securities and Exchange Commission (SEC) enacted Rule 19c-4 in its Securities Regulatory Rules, which required U.S. stock exchanges to refuse to list corporations that used dual-class recapitalizations which nullified, restricted or disparately reduced the voting rights of existing shareholders.[85] The SEC's action was challenged by the influential U.S. business

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75 Council of Institutional Investors (CII) - an association of nonprofit, pension, charitable, and other foundations that protects the interests of institutional investors in the United States. CII supports effective corporate governance, shareholder protection, and sensible financial regulation that promotes a fair, vibrant capital markets. See <https://www.cii.org/about> [06.02.2022].

76 *Lund D. S.*, Nonvoting Shares and Efficient Corporate Governance, Stanford Law Review, Vol. 71, 2019, 708, <https://www.stanfordlawreview.org/print/article/nonvoting-shares-and-efficient-corporate-governance/> [04.02.2022].

77 Ibid., 708.

78 Ibid., 709.

79 Ibid., 711.

80 *Commissioner Robert J. Jackson Jr.*, Perpetual Dual-Class Stock: The Case Against Corporate Royalty, Speech, San Francisco, California, February 15, 2018 <https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty> [04.02.2022].

81 *Lund D. S.*, Nonvoting Shares and Efficient Corporate Governance, Stanford Law Review, Vol. 71, 2019, 711, <https://www.stanfordlawreview.org/print/article/nonvoting-shares-and-efficient-corporate-governance/> [04.02.2022].

82 Recommendation of the Investor Advisory Committee Dual Class and Other Entrenching Governance Structures in Public Companies <https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-on-dual-class-shares.pdf> [04.02.2022].

83 The Division of Corporation Finance shares the mission of the Securities and Exchange Commission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation. The Division of Corporation Finance strives to provide investors with accurate and complete information to help them make informed investment decisions. When a company initially offers its securities to the public and also on an ongoing basis as it continues to provide information to the market. The Division also advises companies on the rules and forms established by the SEC. For its part, makes recommendations to the SEC regarding both for the adoption of new rules and for the revision of existing rules. See <https://www.sec.gov/divisions/corpfin/cfabout.shtml> [04.02.2022].

84 *Lund D. S.*, Nonvoting Shares and Efficient Corporate Governance, Stanford Law Review, Vol. 71, 2019, 711, <https://www.stanfordlawreview.org/print/article/nonvoting-shares-and-efficient-corporate-governance/> [04.02.2022].

85 See *Bainbridge S. M.*, The Short Life and Resurrection of SEC Rule 19C-4, Washington University Law Quarterly, Vol. 69, 1991, 566, <http://openscholarship.wustl.edu/law_lawreview/vol69/iss2/6> [06.02.2022].

association Business Roundtable, which argued that regulating corporate governance issues, including the determination of shareholder rights, was the responsibility of the state and the company itself, not the SEC. [86] In 1990, the United States Court of Appeals for the District of Columbia ruled that the SEC had exceeded its authority and therefore invalidated Rule 19c-4.[87]

In the United States, the Securities Exchange Act does not give the Securities and Exchange Commission (SEC) the power to regulate corporate governance issues. [88] The SEC is entitled to regulate trade and pricing. [89] It is the authority of the state legislature and the company itself to regulate corporate governance issues. [90]

The New York Stock Exchange and NASDAQ impose a restriction that dual-class companies are not allowed to significantly reduce the voting rights of already issued shares (e.g., by issuing a new class of shares that includes superior voting rights). [91] In other words, recapitalization that reduces the voting rights of already issued shares is prohibited. According to the New York Stock Exchange listing rules, a company shall have a dual-class capital structure from the outset when making its initial public offering. It is not allowed to recapitalize a company listed on a stock exchange with a single-class share structure, i.e. to transform it into a dual-class company, thus nullifying, restricting or reducing the voting rights of existing shareholders. It should be noted, however, that the above rules are of discretionary nature and, in exceptional cases, may be regulated differently. The New York Stock Exchange has chosen to develop flexible rules given that the capital market as well as the circumstances and needs of companies are volatile over time.[92]

"One share, one vote" is a universally recognized principle for stock exchanges as well. However, due to the high level of competition, stock exchanges have to make certain concessions.[93] In 2016, for example, Alibaba, a Chinese e-commerce company, listed its shares on the New York Stock Exchange after the Hong Kong Stock Exchange refused to list its shares because it strongly adhered to the "one share, one vote" principle. [94] From April 2018, Hong Kong has made an

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86 See *Bainbridge S. M.*, The Short Life and Resurrection of SEC Rule 19C-4, Washington University Law Quarterly, Vol. 69, 1991, 567, <http://openscholarship.wustl.edu/law_lawreview/vol69/iss2/6> [06.02.2022].

87 See The Business Roundtable v. S.E.C, 905 F.2d 406 (D.C. Cir. 1990)

88 *Bainbridge S. M.*, The Scope of the SEC's Authority Over Shareholder Voting Rights, UCLA School of Law Research Paper No. 07-16, 2007, 14, <https://ssrn.com/abstract=985707> [06.02.2022].

89 Ibid.

90 Ibid.

91 *Committee On Capital Markets Regulation (CCMR)*, The Rise of Dual Class Shares: Regulation and Implications, Report, April 2020, 12, <https://www.capmktsreg.org/wp-content/uploads/2020/-04/The-Rise-of-Dual-Class-Shares-04.08.20-1.pdf> [05.02.2022].

92 See NYSE, Voting Rights Interpretations Under Listed Company Manual Section 313 (01.15.13) <https://www.nyse.com/publicdocs/nyse/regulation/nyse/voting_right_interpretations_under_listed_company_manual_section_313.pdf> [05.02.2022].

93 See *Committee On Capital Markets Regulation (CCMR)*, The Rise of Dual Class Shares: Regulation and Implications, Report, April 2020, 12, <https://www.capmktsreg.org/wp-content/uploads/2020/-04/The-Rise-of-Dual-Class-Shares-04.08.20-1.pdf> [05.02.2022].

94 See *Kraakman R., Armour J., Davies P., Enriques L., Hansmann H., Hertig G., Hopt K., Kanda H., Pargendler M., Ringe W.-G., Rock E.*, The Anatomy of Corporate Law: A Comparative and Functional Approach, Third Edition, *Kochiashvili A., Maisuradze D. (Translators)*, Tbilisi, 2019, 126 (in Georgian) <http://lawlibrary.info/ge/books/2019giz-ge_anatomy_of_corporate_law.pdf> [05.02.2022].

exception under which it will allow a company with a dual-class structure to trade publicly only if that company meets certain criteria: it must be innovative, high-profile, etc. [95] Like Hong Kong, the Singapore Stock Exchange has allowed listing of companies with a dual-class share structure since 2018. In 2012, Manchester United PLC did not list its shares on the Singapore Stock Exchange and it was after that that the Singapore Stock Exchange changed its listing rules and from 2018 has already allowed listing of dual-class companies, although, like Hong Kong, with some restrictions. [96]

At the London Stock Exchange, companies with a dual-class share structure could only place their shares under the standard listing regime, whereas, under the premium listing regime[97], it was not allowed. In February 2017, the FCA (Financial Conduct Authority) [98] issued a Discussion Paper[99] proposing admission to a premium listing of companies with a dual-class share structure in the field of science and technology, with the main purpose of maintaining the attractiveness and competitiveness of the London Stock Exchange. Under the amendment of December 3, 2021, companies with a dual-class structure are allowed on the premium segment of the London Stock Exchange, although with certain restrictions, namely the dual-class structure may be valid for up to 5 years after the initial placement of shares on the stock exchange. Extension or otherwise restoration of this period is not allowed. [100]

Companies with a dual-class structure are also allowed on the Silicon Valley's Long-Term Stock Exchange. [101] Long-Term Stock Exchange (LTSE) - A new, innovative stock exchange in

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95 See *Baker McKenzie Lawyers*, The Revival of Dual Class Shares, Publication, 19 March 2020, 3, <https://www.bakermckenzie.com/en/insight/publications/2020/03/the-revival-of-dual-class-shares> [05.02.2022].

96 Restrictions imposed by the Singapore and Hong Kong stock exchanges can be found here: *CFA Institute*, Dual-Class Shares: The Good, the Bad, and the Ugly, A Review of the Debate Surrounding Dual-Class Shares and Their Emergence in Asia Pacific, Survey Report, 2018, 50-51, <https://www.cfainstitute.org/-/media/documents/survey/apac-dual-class-shares-survey-report.ashx> [06.02.2022].

97 The London Stock Exchange Premium Listing is a prestigious segment that sets high standards for corporate governance, transparency and disclosure.
See *Baker McKenzie Lawyers*, The Revival of Dual Class Shares, Publication, 19 March 2020, 4, <https://www.bakermckenzie.com/en/insight/publications/2020/03/the-revival-of-dual-class-shares> [05.02.2022].

98 FCA (Financial Conduct Authority) – Financial Regulatory Authority in the United Kingdom. Acts independently of the government. It regulates the financial services industry in Great Britain and its main function is to protect consumers, maintain industry stability and effective competition between financial service providers. See <https://www.fca.org.uk/about/the-fca> [05.02.2022].

99 See Financial Conduct Authority, Review of the Effectiveness of Primary Markets: The UK Primary Markets Landscape, Discussion Paper: DP17/2, 8, <https://www.fca.org.uk/publication/discussion/dp17-02.pdf> [05.02.2022].

100 *Morland C.*, *Norton Ph.*, *Hoffman K.*, *Marshal A.*, New Rules for Listing on the London Stock Exchange Could Ease the Path to IPO, 2021 <https://humancapital.aon.com/insights/articles/2021/new-rules-for-listing-on-the-london-stock-exchange-could-ease-the-path-to-ipo> [05.02.2022].

101 *Wang E.*, *DiNapoli J.*, Long-Term Stock Exchange CEO says dual-class stock critics "lost the argument", Reuters, 2021 <https://www.reuters.com/business/long-term-stock-exchange-ceo-says-dual-class-stock-critics-lost-argument-2021-07-02/> [05.02.2022]. Also, *Doherty K.*, Silicon Valley Exchange Lists First Two Companies in ESG Push, Bloomberg, 2021 <https://www.bloom-

the US, launched in 2020. It is noteworthy that the first companies to list their shares on this stock exchange (Asana Inc. and Twilio Inc.) were dual-class companies. [102]

In Sweden, dual-class companies are not only allowed on the stock exchanges, but it has been around for about 100 years, making up a significant part of the capital market. [103]

Dual-class companies are also allowed on the Toronto Stock Exchange (TSX) and many European stock exchanges, such as e.g. Euronext (European New Exchange Technology). [104]

One of the most common and recognized mechanism for balancing the risks arising from the dual-class share structure is the inclusion of a special clause in a statute/registration application, known as Sunset Provision[105]. A company can include a special clause in the charter / registration statement, according to which a company will use a dual-class structure for a certain period of time (mainly such a period is considered 10 or 15 years, some scholars believe that this period should be less, e.g. 5-7 years). And then transform, usually to a single-class share structure, where the "one share = one vote" principle will be followed. When this clause is entered into force, the multi-voting shares will automatically be converted into common shares and the second class of common shares will cease to exist.

In 2011, Groupon[106], an American e-commerce company, included the clause in its statute that stated that the company would use a dual-class structure for a period of 5 years from the initial public offering, and in 2016, it transformed into a single-class structure company. [107]

The clause may be based on time or a specific event (e.g., the founder becoming incapacitated, her/his death or her/him reaching retirement age, etc.). [108] Such a clause prevents the founder from having the control over the company for an indefinite period of time, and also prevents the founder from passing on this authority to her/his successor, who may not necessarily be a good manager. [109]

"Sunset Provision" does not explicitly prohibit a dual-class share structure, nor does it allow its perpetual use. [110]

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berg.com/news/articles/2021-08-26/silicon-valley-exchange-lists-first-two-companies-in-esg-push> [05.02.2022].

102 Ibid.

103 See *Lidman E., Skog R. R.*, London Allowing Dual Class Premium Listings: A Swedish Commentary (April 14, 2021). European Corporate Governance Institute - Law Working Paper 580/2021, Nordic Journal of Company Law (NTS), Forthcoming, 2, <https://ssrn.com/abstract=3826174> [05.02.2022].

104 Ibid., 4.

105 Sunset Provision or Sunset Clause - "Part of a law or contract that states when it will end, or the conditions under which it will end." Cambridge Business English Dictionary © Cambridge University Press.

106 Groupon is an American, global e-commerce marketplace that connects subscribers to local merchants. It offers its customers the following services: travel, purchase of goods and services, etc. See <https://www.groupon.com/> [06.02.2022].

107 *Bebchuk L. A.*, *Kastiel K.,* The Untenable Case for Perpetual Dual-Class Stock (April 18, 2017), Virginia Law Review, Vol. 103, 2017, Harvard Law School John M. Olin Center Discussion Paper No. 905, Harvard Law School Program on Corporate Governance Discussion Paper 2017-6, 619, <https://ssrn.com/abstract=2954630> [06.02.2022].

108 See ibid., 620.

109 See ibid.

110 See *Fisch J. E.*, *Davidoff-Solomon S.*, The Problem of Sunsets, Boston University Law Review, Vol. 99, 2019, University of Pennsylvania, Institute for Law & Economic Research Paper No. 19-04, 1062, <https://ssrn.com/abstract=3305319> [05.02.2022].

There are differences of opinion regarding the mandatory nature of Sunset Provision. Professors Lucian A. Bebchuk and Kobi Castiel advocate the mandatory nature of time-based Sunset Provision as an effective safeguard against the risks posed by a dual class structure.[111] Professors Jill E. Fisch and Steven Davidoff Solomon offer contrary view in their paper[112]. They point out that it is true that "Sunset Provision" can be considered as a kind of insurance mechanism against the founder's crooked, wrong intentions, however, a tool that ensures the replacement of such a founder after 7 or 10 years is a rather unsuitable and potentially cost-effective mechanism (Professors, in this case, pay particular attention to innovative, "new economy" companies (meaning high-tech companies) and point out that this is a long period for such companies). [113]

Professors Fisch and Davidoff-Solomon believe that the main problem with Sunset Provision is the pre-determination of accurate time (according to the practice of existing public companies, this time is a minimum of 3 years and a maximum of 20 years). [114] Professors argue that the period specified in the Sunset Provision is random and has nothing to do with the fact that this time is required for the founder to carry out and run a company according to her/his own plan. [115] Professors believe that Sunset Provision should not be mandatory and that there is no one-size-fits-all approach to it, as the timeframe for achieving the company's goals is likely to vary according to a number of characteristics of a company (e.g. the maturity of a company for the initial public offering phase, the duration of its business model, the time it takes to develop its products or services and bring them to market). [116]

Nowadays, it is not mandatory for companies with a dual-class share structure to include Sunset Provision in their statutes in the United States (nor in any other jurisdiction). US stock exchanges do not oblige dual-class companies to include Sunset Provision in their registration statements. It depends on the will of companies. Some of them include it, some of them do not. However, it should be noted that most of the scholars, as well as influential institutions that represent the interests of investors, support the mandatory nature of "Sunset Provision", because in terms of protecting the rights of investors, as well as to prevent the arbitrariness of founders and for the prosperity of a company and the capital market, it is considered to be one of the most effective mechanisms, in a reality where a dual-class stock structure is permitted.

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111 See *Bebchuk L. A.*, *Kastiel K.,* The Untenable Case for Perpetual Dual-Class Stock (April 18, 2017), Virginia Law Review, Vol. 103, 2017; Harvard Law School John M. Olin Center Discussion Paper No. 905; Harvard Law School Program on Corporate Governance Discussion Paper 2017-6, <https://ssrn.com/abstract=2954630> [06.02.2022].

112 See *Fisch J. E.*, *Davidoff-Solomon S.*, The Problem of Sunsets, Boston University Law Review, Vol. 99, 2019, University of Pennsylvania, Institute for Law & Economic Research Paper No. 19-04, <https://ssrn.com/abstract=3305319> [05.02.2022].

113 See ibid., 1063.

114 See ibid., 1080.

115 For example, professors discuss the case of the company Workday. Workday Inc. is an American cloud-based, on-demand, financial and human resource management software company. See <https://www.workday.com/>. Workday, which became a public company in 2012, has included a 20-year Sunset Provision in its registration application. At the time of initial public offering, its founders were 71 and 46 years old, which means that by the time this clause will come into force they will be 91 and 66 years old. In addition, professors discuss examples of Facebook and Google. The founders still manage the company well and bring benefits to it. See ibid., 1081.

116 See ibid., 1082.

9. Conclusion

Dual-class share structure is a challenge of present times and is "the most important issue in corporate governance today" [117], around which the debate continues. Most of the scholars, institutional investors and other influential institutions believe that protecting the rights of investtors is important. It is true that business development should be encouraged, but it is important to maintain high standards of corporate governance. That is why it is necessary to maintain a certain balance and find a golden mean.

The Georgian legal reality is interesting in this regard. In the present paper, we have discussed that Georgian legislation theoretically allows for a deviation from the general principle - one share, one vote. It does not prohibit multi-voting shares. Consequently, the existence of a dual-class share structure in the Georgian reality is possible. However, the Georgian reality is unfamiliar with dual-class share structures.

There is no ideal corporate governance system. Each system has its weaknesses and strengths, and it is difficult to identify which governance method is more successful and efficient. There are both theoretical and empirical studies that prove the positive impact of dual-class share structure and consequently the increase in the value of a company, as well as the opposite - the negative impact and the decrease in the value of a company. [118]

Dual-class share structure should be used in companies that have appropriate mechanisms in place to monitor management. For companies where effective controlling mechanisms are not implemented, a dual-class share structure can be harmful.[119]

Professor Aurelio Gurrea-Martínez believes that the appropriateness of each regulation model for a dual-class share structure depends on a number of factors, especially on factors of local importance, in particular the level of development of the capital market in a country, the level of protection of minority investors, the level of development of regulatory bodies and the judiciary in specific jurisdictions. [120]

In countries with developed markets and regulatory bodies, where minority investors are guaranteed strong legal protections and the possibility of abuse of control is minimized, regulators should allow companies to adopt a dual-class share structure without restrictions. Also, minor interference by the regulator is allowed (e.g. setting an event-based "Sunset Provision"). In contrast, in countries where the capital market is underdeveloped, where the legal protections of minority investors are weak, and the potential for abuse of control is high, regulators should not

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[117] *Coffee J. C. Jr.*, Dual Class Stock: The Shades of Sunset, November 19, 2018, The CLS Blue Sky Blog <https://clsbluesky.law.columbia.edu/2018/11/19/dual-class-stock-the-shades-of-sunset/> [06.02.2022].

[118] See *Lidman E., Skog R. R.*, London Allowing Dual Class Premium Listings: A Swedish Commentary (April 14, 2021). European Corporate Governance Institute - Law Working Paper 580/2021, Nordic Journal of Company Law (NTS), Forthcoming, 2, <https://ssrn.com/abstract=3826174> [05.02.2022].

[119] See *Lel U.*, *Netter J. M.*, *Poulsen A. B.*, *Qin Zh.*, Dual Class Shares and Firm Valuation: Evidence from SEC Rule 19c-4 (June 1, 2020), European Corporate Governance Institute – Finance Working Paper No. 807/2021, 29, <https://ssrn.com/abstract=3729297> [05.02.2022].

[120] See *Gurrea-Martínez A.*, Theory, Evidence, and Policy on Dual-Class Shares: A Country-Specific Response to a Global Debate, Harvard Law School Forum on Corporate Governance, 2019 <https://corpgov.law.harvard.edu/2019/07/15/theory-evidence-and-policy-on-dual-class-shares-a-country-specific-response-to-a-global-debate/> [05.02.2022].

allow companies to adopt a dual-class share structure. It should be prohibited or if not, relatively strict restrictions may apply (e.g. setting a time-based "Sunset Provision", developing strict corporate governance rules). [121]

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[121] See *Gurrea-Martínez A.*, Theory, Evidence, and Policy on Dual-Class Shares: A Country-Specific Response to a Global Debate, Harvard Law School Forum on Corporate Governance, 2019 <https://corpgov.law.harvard.edu/2019/07/15/theory-evidence-and-policy-on-dual-class-shares-a-country-specific-response-to-a-global-debate/> [05.02.2022].

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Sesili Kadaria*

Historical Development of the Rehabilitation Process

On April 1, 2021, Law of Georgia "Rehabilitation and the collective satisfaction of creditors claims" came into force, which made the rehabilitation process a priority. In the history of independent Georgia, the process of insolvency has had many legislative barriers, and for a developing country, flexible legislation is of great importance. The aim of the paper is to study the origin of insolvency law, to see it as an institutional development in international and local context. The paper also analyzes the 2019 directive 2019/1023, which offers flexible mechanisms for debt restructuring to member states.

***Keywords**: rehabilitation practitioner, restructuring, bankruptcy, rehabilitation plan, absolute and comparative priority rule ("APR", "RPR"), preventive restructuring and more.*

1. Introduction

The origin of insolvency law is based on the development of trade, which created a mechanism for overcoming financial difficulties. The law of insolvency has its roots in 18th century England, which, in fact, was formed by the liberalization of the bankruptcy regime. The aim of the paper is to study of origin of insolvency law, to see it as an international development in international and local context. The paper reviews the measures to strengthen the rehabilitation process in the EU, which was first reflected in council regulation NO 1346/2000 of 2002. At that time, In Europe, rehabilitation was seen as an aid to liquidation, and there was no real way to save the enterprise. By Directive # 2019/1023 of 2019, the EU offered flexible mechanisms for the restructuring of liabilities to member states. As it is clear from scientific sources, the present version of the directive is a revised version published in 2014, The UNCINTRAL insolvency legislative guide. Therefore, the recommendations of the rehabilitation process are also discussed.

The paper also offers the basis of the insolvency process in Georgia from the 30s of the XX century and an analysis of the laws in force in independent Georgia. Scarce scientific papers have complicated the development of this highly interesting field. I would like to inform you that on April 1, 2021, Law of Georgia "Rehabilitation and the collective satisfaction of creditors claims" was enacted, which named the rehabilitation process as a priority of the law. The new law is based on the principles of this Directive and meets modern insolvency standards. It is interesting to discuss the laws on "bankruptcy proceedings" and "insolvency proceedings" in the context of the fiduciary responsibilities of the rehabilitation practitioner.

In the context of historical analysis, the paper examines the origins of insolvency law, models of its development and liberalization, as well as the previous version of Georgian law on bankruptcy proceedings, Georgian law on insolvency proceedings and court practice.

* PhD Student, Ivane Javakhishvili Tbilisi State University Faculty of Law, Invited Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law, Invited Lecturer at Georgian National University Faculty of Law, Invited Lecturer at Grigol Robakidze University Law School.

2. The Origin of Insolvency Law

2.1. Law of Rome

Bankruptcy is derived from the Latin word "concursus", which means concourse. The origins of bankruptcy law are rooted in Roman law. At the meeting against the debtor, the common creditors would gather and impose a punishment by a joint decision. Roman law did not differrentiate between individual and collective gatherings. This is the period when object of the creditor's execution was the debtor's personality, namely his dignity, freedom, body and even life itself.

Roman law provided variety ways of satisfaction of a creditor's claim: to cut off a part of a debtor's body and divide it in proportion, or sell him as a slave[1]. The property of the debtor as an object of enforcement was seldom mentioned. Thus, person's personal values had to be enforced in favor of the creditors. For example, according to the Table XII (451 BC), the creditors had the right to beat the debtor to death or sell him as a slave. The execution of the person was a rather harsh measure for the debtor. [2]

2.2. The Origin of Bankruptcy Law in England

Insolvency law has arised as a result of bankruptcy reforms. The term "bankruptcy" comes from the Italian words "banca" ("tanco") and "rota" (or "roto"). A direct translation of these words means "a broken chair". This is probably a reference to Italian money-lenders, who ran businesses in Florence on the banks of the Arno River and used small chairs to place paperwork.[3] If the debtor failed to perform his duties, the angry money-lender would break a chair on his head. [4] The term "bankruptcy" first appears in the Anglo-American legal system, namely in the English Act, which is referred to as "An act against such persons as do make bankrupt".[5] This was the first bankruptcy law promulgated in 1542 during the reign of Henry VIII. A legal remedy- designed solely for the benefit of the creditor and directed against artisans and merchants. 34&35 Hen. VIII, P. 4 (1542). Preamble and Part I of the Law of 1542 inform the reader as to whether the object of the request was satisfied. The debtor was not only liable with the property, but it was also possible to arrest him or cut his body. Declaring bankruptcy was a heavy burden for the debtors.[6]

WHERE divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditor, their duties, but at their own wills and pleasures consume debts and the substance obtained by credit of other men, for their own pleasure and delicate living, against

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1 *Shaiman S. L.,* The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law, The American Journal of Legal History Vol. 4, No. 3, Oxford University Press, 1960, 205.

2 *Migriauli R.,* A Brief History of the Development of Bankruptcy Law, Introduction to Bankruptcy Law, Tbilisi, 2006, 165-166 (in Georgian).

3 *Quilter G.,* The Quality of Mercy-The Merchant of Venice in the Context of the Contemporary Debt and Bankruptcy Law of England, Insolvency Law Journal, Vol. 6, 1998, 43, 49.

4 *Hayek M.,* Principles of Bankruptcy in Australia, University of Queensland Press, 1962, 5.

5 An Act Against Such Persons As Do Make Bankrupt (1542) 34 & 35 Henry VIII, c 4. 1542: 34 & 35 Henry 8 c.4: Statute of Bankrupts.

6 *Demarco R.,* Bankruptcy Laws of England – Elizabethan Era, 2013, History of Bankruptcy, part 6. <https://www.abi.org/feed-item/history-of-bankruptcy-%E2%80%93-part-6> [11/06/2021].

all reason, equity, and good conscience: Be it therefore enacted by the authority of this present parliament, That the Lord Chancellor of England, or Keeper of the Great Seal, the Lord Treasurer, the Lord President, Lord Privy Seal, and other of the King's most honorable Privy Council, the Chief Justices of either Bench for the time being, or three of them at the least, whereof the Lord Chancellor or Keeper of the Great Seal, Lord Treasurer, Lord President, or the Lord Privy Seal,". [7]

The international community unanimously agrees that the term bankruptcy was first used in England to impose a measure of individual liability. Louis Eduard Levinhall, a professor at the Pennsylvania school of law, agrees with this idea. According to his opinion, in complaints and commission bankruptcy, "decoctor" was a word used to refer to the bankruptcy trustee before the act of 1970 of George II. [8]

The act of 1542 itself was not perfect, the act of 1542 did not release the debtor and his future income or purchase from debt enforcement. [9] In an act issued by Elizabeth I in 1671, bankruptcy procures were developed and refined. Although the general practice under the 1542 act was to restrict the use of their property by merchants and artisans, the act of 1570 codified the practice. The act of 1570 differs from the act of 1542 in two very important respects. First, the act of 1570 strengthened the provision on fraudulent transfers. The commissioner will no longer have to turn over fraudulently transferred assets. The commissioner was entitled to double the property damage. 13 Eliz. C. 7, sec. VI (1570). Second, the act of 1570 created permanent bankruptcy property. If there was a liability left after the liquidation of all assets of the bankrupt, not only were these balances not discharged, but the commissioner retained the authority to seize and sell (by any means) the property acquired by the debtor until the creditors were fully satisfied. 13 Eliz. . 7, St. X (1570). [10] After the growth of international trade and commerce in the sixteenth century, the need arose for a better system of administration and overcoming financial difficulties. [11] By the second half of the seventeenth century, attitudes toward bankruptcy and risk had changed in the commercial context. Taxes were not always enough to fund scientific discoveries or war, therefore credit was vital to both the public and private economies. In his statements, Blackstone reflected the widespread and long-held view that "trade is impossible without mutual credit on both sides: a commitment agreement is not only justified but also necessary". [12] This changing attitude has been reflected in the slow liberalization of bankruptcy laws. In 1705, English law first introduced the institution of release of a person and property from continuing liability for past debts. This decision required the consent of 4, 5 creditors. [13]

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7 An Act Against Such Persons as Do Make Bankrupt (1542) 34 & 35 Henry VIII, c 4. 1542: 34 & 35 Henry 8 c.4: Statute of Bankrupts, preamble.

8 *Levinthal L.,* The Early History of English Bankruptcy, University of Pennsylvania Law Review, Published by the University of Pensilvania Law School, Philadelphia, Vol. 67, Number I, 1919, 2.

9 *Jordan CH.,* The Historical Evolution of the Bankruptcy Discharge, 65 Am. Bankr. L. J., 331-2 (1991). P.325.

10 *Demarco R.,*Bankruptcy Laws of England – Elizabethan Era, DATED: July 6, 2013, History of Bankruptcy, part 6. P.1

11 *Allsop J., Dargan L.,* The History of Bankruptcy and Insolvency Law in England and Australia" [2013] ELECD 111; in *Gleeson J.T., Watson J A., Higgins Ruth C. A. (eds.),* Historical Foundations of Australian Law – Vol. II, Commercial Common Law, The Federation Press, 2013, 424.

12 Ibid., 425.

13 *Edelman J., Meehant H., Cheung G.,* The Evolution of Bankruptcy and Insolvency Laws and the Case of the Deed of Company Arrangement, Lloyd's Maritime and Commercial Law Quarterly, Nº 4, 2019, 574.

Despite the lack of regulation, the process of bankruptcy liberalization continued. the debtor's personal claim for bankruptcy procedure ended with the creation of new field of law, that laid groundwork for balancing the bankruptcy and insolvency processes.

2.3. The Roots of Insolvency Law in England

In the sixteenth century in England, legal merchants gave the insolvent debtor a chance to be released from liability. With the consent of the creditors a provision on the redistribution of liabilities was written with them, which allowed the debtor to make new deals. It was these distribution agreements that were probably the oldest form of rehabilitation, the genesis of ancient trade traditions and practices. It consisted of a clause in the contract between the debtor and the creditors, which included the consent of the creditors to receive less than the amount they were entitled to claim. [14]

Significant reforms were made in 1831 under the leadership of lord Broham, who established the bankruptcy court under the jurisdiction of the former legislative court. [15] Liberalization of the bankruptcy process led to the emergence of insolvency law and its legislative establishment as a process. All of this was reflected in the general English Act of 1861, "amending the bankruptcy and insolvency act in England", which extended the law not only to traders, but also to society as a whole as well. This law led to an increase in the powers of creditors in insolvency proceedings, they were no longer mere observers, as manifested in their initiation of litigation, which had not previously been regulated. With the consent of three-quarters of the creditors, the obligation could be redistributed to the debtor, who would be binding on the minority creditors, and the agreement reached by them would be verified by the bankruptcy court of England. [16] This mechanism was the approved of the rehabilitation plan and it was on the basis of this act that the law of insolvency took on modern significance. [17]

The given act was not perfect, it demanded more involvement from the state, as there were many cases of fraud and concealment of information. Therefore, the amendment of the act 1883 created a new form of regulation called the "official recipient", which was responsible for the investigation and the trustee who was in charge of administering the property.

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[14] *Shaiman S. L.,* The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common LawThe American Journal of Legal History Vol. 4, No. 3, Oxford University Press, 1960, 205.

[15] An Act to establish a Court in Bankruptcy, 1 & 2 Will IV c 56, 1; *Holdsworth W.,* A History of English Law, 7th edn., Methuen & Co, vol. l, 1965, 470-473; Lester M., Victorian Insolvency, Clarendon Press, 1995, 45.

[16] *Allsop J., Dargan L.*, The History of Bankruptcy and Insolvency Law in England and Australia, 2013, ELECD 111, in: *Gleeson J.T., Watson J A., Higgins, Ruth C.A. (eds.),* Historical Foundations of Australian Law – Vol. II: Commercial Common Law, The Federation Press, 2013, 444.

[17] An Act to Amend the Law Relating to Bankruptcy and Insolvency in England, 1861, 24 & 25 Vic, 134.

3. The Origin of Insolvency in EU Law

3.1. Origin of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings

At the end of the 20th century, companies in financial difficulties in many EU countries had very few informal alternatives other than liquidation. [18] Therefore insolvency proceedings were designed primarily for liquidation, with the sale of assets to meet the requirements of creditors by rating. [19] In EU member states, insolvency law still had a punitive function with less focus on debtor rehabilitation and reorganization. The need of new regulations was obvious, which is why the council of the European Union drafted the first insolvency law in council regulation 1346/2000 ("Regulation 1346"), which entered into force on 31 May, 2002. [20] The regulation had a controlling effect on all three pillars of the conflict of law rules: jurisdiction, choice of law and enforcement. [21] According to this regulation, it was possible to file two types of insolvency proceedings-main and territorial (secondary) proceedings. This territorial litigation is conducted through secondary and independent litigation. [22]

The regulation has solved several important problems. The first and most important exception was the power granted to states to institute secondary proceedings, taking into account the debtor's "place of establishment", with a territorial effect and with view to liquidation.[23] Secondary production exclusively obeys the insolvency rules and the priorities of the creditors of such member state. This mechanism is commonly known as "modified universalism" – a pragmatic solution to the main obstacle to universalism, namely, full acceptance of the priorities of creditors of different jurisdictions. [24] Legislative innovation has led to delays in the main case of insolvency in practice, the distribution of assets according to the priority of creditors in different states, was really a dilemma.

In the UK case of Collins & Aikman, [25] holding's administrator, who had subsidiaries in other member states, was obliged to respect the creditors' rights of other states that had contributed to the development of the subsidiaries. This approach has partially neglected the UK's priorities. However, the courts of other member states didn't enjoy a similar degree of flexibility. The European Commission's proposal #5 about the insolvency regulation explicitly codifies the

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18 *Manganelli P.,* The Evolution of the Italian and U.S. Bankruptcy Systems - A Comparative Analysis, 5 J. Bus. & Tech L., 2010, 238.

19 Ibid., 239.

20 Council Regulation 1346/2000, 2000 O.J. (L 160) 1, 13.

21 *Eyal Z. Geva E.Z.*, Implementing the European Insolvency Regulation UK Perspective European Business Organization Law Review, Vol. 8, 2007, 606.

22 *Virgos M., Garcimartin F.,* The European Insolvency Regulation: Law and Practice. Hague: Kluwer Law International, 2004, 157; *Bělohlávek A.J.,* Evropské insolvenční parvo, Bulletin advokacie, No. 11, 2007, 40.

23 *McCormack G.,* Jurisdictional Competition and Forum Shopping in Insolvency Proceedings, Cambridge Law Journal, Vol. 68, 2009, 174-175.

24 *Garrido J.,* No Two Snowflakes the Same: The Distributional Question in International Bankruptcies, Texas International Law Journal, Vol. 46, 2011, 470.

25 *Moss G.,* Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism, Brooklyn Journal of International Law, Vol. 32, 2008, 1017-1018.

rule of given decision, as it allows the liquidators to take into account the claims and contributions of local creditors in the event of the opening of secondary production. [26] This solution is flexible and pragmatic, but there is further limitation to the principle of universality that underscores how member states adhere to their creditors' priorities. [27]

It is true that the given regulation solved the problem of territoriality, but it was difficult to contain the mechanisms of rehabilitation assistance. Until 2019, the European Parliament made a number of amendments to it, but finally with the current directive 2019/1023, its shortcomings were eliminated.

3.2. Restructuring and Insolvency Directive 2019/1023

3.2.1. Purpose and Scope

On 16 July, 2019, the restructuring and insolvency directive (EU) 2019/1023 entitled into force. [28] The next was the result of long and difficult negotiations based on a legislative proposal submitted in 2016. The proposal was preceded by recommendation 2014/135/EU, which addressed substantive insolvency issues. The recommendation addressed two main issues: A)the need for a "second chance" for individual entrepreneurs across the EU, as evidenced by the "entrepreneurship deficit" survey in Europe; and B)framework ideas for restructuring in all member states, outside of formal insolvency proceedings (I.E. in formal and "hybrid" restructuring, combining procedures of informal and formal aspects). [29]

In modern EU law, the term rehabilitation has been replaced by "restructuring", which actually reflects its purpose better. The overall aim of the directive is to reduce the most important barrier to capital flows arising from differences within the framework of restructuring and insolvency of member states and to strengthen a second-chance rescue culture in the EU. The new rules also aim to reduce the amount of inactive loans (NPLs) on banks' balance sheets and prevent the accumulation of such NPLs in the future. The directive thus aims to strike the right balance between the interests of debtors and creditors. [30]

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[26] 5 Reform Proposal, Article 28(a), amending Article 18(1) of the Insolvency Regulation, 2015.

[27] *Mucciarelli F.,* Insolvency Law in the EU and Its Political Dimension, European Business Organization Law Review, Vol. 14, 2013, 187.

[28] Directive EU, 2019/1023 of the European Parliamenrt and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

[29] The European commission has recommended informal or hybrid restructuring for several reasons: first, it was considered at the time that the pursuit of harmonizing formal insolvency proceedings would be extremely difficult and politically impossible. Second, the English arrangement scheme, widely regarded as a tool for hybrid restructuring, was used by companies in other European countries and this created competition with insolvency systems in continental Europe. Third, the crisis in several European countries has shown that the judiciary has not had sufficient capacity to handle large numbers of insolvency cases.

[30] *Gil-Robles J., Sánchez-Navajas P.,* Directive 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 ("Directive on restructuring and insolvency"), 2/07/2019, 6.

One of the critical points of the directive is the introduction of a restricting framework, which is a forced way to approve a restructuring plan for different classes of creditors. This means that even if one of the classes of creditors does not vote for the restructuring plan, the court may still implement it. In order to protect different creditors the directive allows member states to choose which rule of national courts to apply when approving a plan. [31]

The directive introduced the rule of absolute and comparative priority ("APR", "RPR"). The comparative priority rule means that different voting classes are treated at least as positively as other classes of the same rank if a normal ranking of liquidation priorities was used under national law. Absolute class means absolute satisfaction of eligible creditors if lesser class creditors are given the minimum satisfaction. Priority rules are intended to protect different creditors in the event of a class collision. Such protection rules will inevitably become a problem between shareholders, and creditors during restructuring. [32]

In summary, we present the main issues that the Directive names as a priority.:

A) Early warning and access to information to help debtors identify circumstances that could lead to the likelihood of insolvency and indicate to them the need of prompt action.

B) Preventive restructuring frameworks: debtors will have access to a preventive restructuring framework that enables them to implement insolvency and ensure their viability, thus protecting jobs and businesses. These frameworks may also be available upon request from lenders and staff representatives.

C) Facilitate negotiation of preventive restructuring plans, in some cases by appointing a restructuring practitioner to assist in drawing up the plan.

D) Restructuring plans: the new rules include a number of elements that should be part of the plan, including a description of the economic situation, the affected parties and their classes, the terms of the plans, and so on.

E) Suspension of individual enforcement actions: debtors can take advantage of the suspension of individual enforcement actions to support restructuring plan negotiations within a preventive restructuring framework. The initial duration of the suspension of individual enforcement actions is limited to a maximum of four months.

F) Debt settlement: over-indebted entrepreneurs will have access to at least one procedure that can result in their debt being repaid in full, maximum within 3 years, under the terms of the directive.

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[31] DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Article 55

[32] *Goncharov N.,* Priority Rules Under the Directive (EU) 2019/1023 and the Shareholder-Creditor Agency Problem - A Comparative Legal Research, 2019, 4.

3.2.2. Simplify Process Access for the Debtor

Member states should ensure that debtors have access to a preventive restructuring frame work or procedure. [33] The framework aims to enable them to restructure to prevent insolvency and ensure debtors viability. The result is job protection and business continuity. Member states may introduce a viability test, but this test is for the sole purpose of assessing viability and the test should not have a detrimental effect on the debtor's assets.

The general rule under the directive is to make preventive restructuring available only on the basis of the debtor's application. [34] Member states may also provide referrals from creditors and associates. Member states may also go in the opposite direction and restrict the debtor's requirement to reach an agreement in cases where the debtors are small and medium-sized enterprises-micro, small and medium-sized enterprises.

3.2.3. Debtor in the Possesion (DIP)

The directive has a norm- debtor in the process of governance, which is a general principle according to which the assets and day-to-day operations of the company remain under the control of the debtor. This principle is acceptable to the member states, since the mandatory appointment of a practitioner in each case would have a negative impact on the day-to-day operations of the company, the appointment of a practitioner should be based on an independent, objective reason, and the directive includes a mandatory appointment of a practitioner, [35] If enforcement is initiated by state authorities, the debtor himself submits a claim or a majority of creditors request the appointment of a practitioner, in such case the management and representation authority, according to the directive, will be exercised by a licensed practitioner.[36]

3.2.4. Powers of the Restructuring Practitioner

A restructuring practitioner is a state-licensed entity with special knowledge and experience in company's management . The practitioner is the main subject of the rehabilitation process, whose mandatory appointment, as we have already seen, is no longer carried out under the new directive 2019/1023. If mandatory appointment is provided, the restructuring practitioner is

[33] Directive (EU) 2019/1023 of the European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), article 4.

[34] Directive (EU) 2019/1023 of the European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Article 4 (1).

[35] *Eidenmüller H.,* The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union, European Business Organization Law Review, Vol. 20, 2019, 547, 559-600.

[36] Directive (EU) 2019/1023 of The European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Article 5.

limited to assist the debtor and creditors to negotiate and develop a restructuring plan. According to the general provision of the directive, the practitioner supervises the activities of the debtor during the mandatory appointments, submits reports to the court and during working, partially controls it. [37] Therefore, there is no single concept of restructuring. It is up to the member states to determine the powers of the practitioner, who may be a manager or a supervisor. [38]

The directive also does not provide a direct record of whether practitioner can change management staff , where the scope of his or her decision extends and what he or she needs the consent of the court. All these issues are subject to the free regulation of the member states. The analysis of individual cases of debt management and restructuring planning will be possible in the process of implementation of the Directive by the Member State. Thus, it cannot be explored in the present study.

3.2.5. Attracting New Finance in the Process of Restructuring

The European Parliament has very clearly and emphatically banned member states from imposing any barriers to attracting new funding for restructuring process. A clear example of this is the transfer of liability of the financing creditor (new creditor) in a civil, administrative manner if the debtor is unable to fulfill the obligation during the restructuring process. Member states may determine that, in the event of further insolvency the new creditors shall have priority over other creditors which shall be reflected in the overriding satisfaction of the demand or in any other matter which is to be settled by states. [39] This provision is the standard for the protection of new, which is provided for in the restructuring plan itself. The goal is obvious- attracting new finances is a source to save business. As we have seen, the latest EU directive includes bold texts, which turns the national legislative framework of the member states upside down and calls on the states to be more courageous, to take effective steps to save enterprises. It is interesting to look at the American model, whose source is UNCINTRAL rule itself.[40] Most of the text of the directive is based on it.

4. UNCINTRAL - Insolvency Legislative Leader in Rehabilitation Process

UNCINTRAL is the branch of the United Nations (UN) that has produced the most comprehensive text-the 2014 legislative guide on insolvency. The purpose of the legislative framework is to set international standards for insolvency and restructuring and to assist states in

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[37] Directive (EU) 2019/1023 of The European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Article 2 (1) (12).

[38] *Goncharov N.,* Priority Rules Under the Directive (EU) 2019/1023 and the Shareholder-Creditor Agency Problem- A Comparative Legal Research, 2019, 6.

[39] Directive (EU) 2019/1023 OF The European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Article 17 (4).

[40] UNCINTRAL Legislative Guide on Insolvency Law, United Nations, 2005, 2.

integrating into the international financial system. Such laws and institutions should facilitate the restructuring of viable businesses and the closure of failed businesses. [41]

Legislative guide uses sophisticated and flexible repertoire from state bankruptcy code. [42] The guide, which now comes in four parts, consists of more than 200 recommendations, is divided into more than 20 topics, as well as detailed comments. The commentary offers a comparative analysis of situations where there is significant variability in a particular topic, the presentation, discussion of alternative approaches, and the evaluation of such achievements. The commentary also serves an important function of validation, namely recording the fact on which the different opinions of the delegates are presented.

The role of the legislative guide in the restructuring- rehabilitation process is crucial. The flexibility of the UNCITRAL guideline is demonstrated in leaving the debtor free to manage and bringing in a rehabilitation practitioner. The guide states that different approaches to this issue may be selected, including:

1)Maintaining full control by the debtor, i.e. appropriate guarantees of leaving the debtor in possession.

2)Execution of limited authority by the director, where the debtor conducts business under the supervision of an insolvency representative, which involves the division of responsibilities between them

3)Complete replacement of the director by an insolvency representative. [43] It should be noted that in the comments, leaving the debtor in the management of rehabilitation process, are not supported.

The recommendations in the guide can be grouped from a wide range to narrow specifies that are ready for implementation. Detailed explanation problems of alleged use in practice even help the business model to function better. [44] Recommendations can be substantive, practical or really conditional. Conditional recommendations are based on a specific procedure and specify that if anyone has this provision, that should have a specific content. For example, according to recommendation 151, where the insolvency act does not require the approval of a plan by all classes, it should indicate the actions taken to those classes who do not vote to approve the plan. Conditional recommendations enable UNCINTRAL to recognize local regulations within the relevant legal framework. [45]

In the end, the UNCINTRAL guidelines have played a huge role in supporting the insolvency reform and rehabilitation process worldwide. The EU directive has also been developed based on it and continues to refine the norms.

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41 UNCINTRAL Legislative Guide on Insolvency Law, United Nations, 2005, 10.

42 *Block-Lieb S., Halliday Terece.,* Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, 42 Texas Int'l LJ., 2007, 475.

43 United Nations Commission on International Trade Law, Legislative Guide on Insolvency, United Nations Publication, 2005, Sales No. E.05.V.10 ISBN 92-1-133736-4 Law article 112, 173.

44 *Block-Lieb S., Terece H.,* Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, Texas Int'l LJ, Vol. 42, 2007, 475.

45 United Nations Commission on International Trade Law, Legislative Guide on Insolvency, United Nations Publication, Sales No. E.05.V.10 ISBN 92-1-133736-4 Law article 112, 2005, 503.

5. Establishment of Insolvency System in Georgia

5.1. History

Bankruptcy law in Georgia and pre-revolutionary Russia has its own development history and roots. Bankruptcy law in Georgia was founded in the 30s of the XX century, namely in 1931 in the civil procedure code of the Georgian Soviet Union, we see the codification of bankruptcy as an institution. The second appendix to the code provided for the "rules on the disability physical and juridical persons", which included 7 sections and 46 articles. In its legal content, "incapacity" was completely comparative with today's bankruptcy, so it can be said that the introduction of bankruptcy law in Georgia law was based on the introduction of the institution "incapacity". [46]

20th century juridical procedure in bankruptcy law is very similar to the current system for example, if several cases were brought in different courts to recognize a person as "incapable", all cases would be transferred to the court that first opened the case and recognized the debtor as "incapable". Cases were heard only the people's courts, and the circle of persons authorized to open proceedings was limited, in particular a creditor with a writ of execution, a debtor, the state and a prosecutor could request the opening of a case.

The court used to declare the person "incapable" according to its ruling. The decree was to be published in a newspaper and sent to the appropriate state registration authority. The basis of "incapability" was the impossibility to repay the debt and its external evidence was the debtor's termination of payment of debts. [47] After declaring the debtor "incapable" the court applied only to the state body with a proposal to appoint one or more liquidators, who would be given the right to dispose of the debtor's property. The court would determine the liquidation period, which was mainly 1 year. The court appealed to the same institution to appoint a "special person" to protect the property of the enterprise before the liquidators took up their duties. [48]

The code is largely devoted to the consideration of liquidation procedures. Since the subject of our research is the development of the rehabilitation process, the code does not address these issues. Therefore, we move on to the law of Georgia on bankruptcy proceedings, created during the period of independent Georgia.

5.2. Institutional Development of Rehabilitation Practitioner in 1996-2018 Years

The first law in the history of independent Georgia that defined the significance of the rehabilitation process was the law of Georgia on bankruptcy. [49] The same law wrote down the powers of the ruler, his fiduciary duties and boundaries. This law covered the responsibilities and activities of the practitioner in more detail than the law of Georgia on insolvency proceedings

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46 *Rukhadze A.,* A Historical Review of the Development of Bankruptcy Law, Review of Georgian Law, 7/2004-4, 784 (in Georgian).

47 *Migriauli R.,* Introduction to Bankruptcy and Insolvency Law, Tbilisi, 2017, 276 (in Georgian).

48 United Nations Commission on International Trade Law, Legislative Guide on Insolvency, United Nations Publication, 2005, Sales No. E.05.V.10 ISBN 92-1-133736-4 Law article 112, 503, 290.

49 Law of Georgia on Bankruptcy Proceedings, date of promulgation: 25/061996; Source of promulgation, date: Parliament Herald, 19-20, 30/07/1996.

adopted in 2007. [50] The rehabilitation practitioner represents the debtor from the moment of the start of the rehabilitation regime with the specificity that he/she already has fiduciary duties towards the debtor's creditors, instead of the debtor's partners. [51]

Under both laws, the rehabilitation practitioner could have been both a physical and a juridical person. Both laws prohibited the appointment of a personal rehabilitation practitioner to perform similar activities. It is interesting that, under the 1996 act, creditors are nominated by the debtor to be elected to the rehabilitation practitioner during the rehabilitation process, while creditors are selected by the creditors through a competition in a bankruptcy settlement. [52] This approach was changed by the 2007 law and left the choice/approval of the practitioner entirely to creditors. [53] In addition, the creditors' meeting could elect a rehabilitation practitioner within 2 weeks of being invited. If the rehabilitation practitioner was not elected within that period, he/she would be appointed by the court. [54]

Bankruptcy law gave the rehabilitation practitioner immeasurable authority to act at his own discretion, with the rehabilitation plan and the rule of law acting to save the enterprise. In addition, the law contained a restrictive provision, according to which the practitioner has the authority to enter into a contact negotiation only with the consent of the creditors' committee, which provides for a 20% increase in the debtor's liabilities after the opening of the rehabilitation process.[55] The practitioner was responsible for submitting a report on his actions to the creditors once a month. This provision was amended by a law passed in 2007, removing the restrictive norm for creditors to a decision made by a practitioner that required their consent. Moreover, the practitioner's accountability became mandatory only to creditors. If, in the previous law, the breach of the fiduciary obligation of the practitioner was in breach of the interests of both the debtor and the creditors, the new law only made the interests of the creditors a priority. It is obvious that in the process of rehabilitation, the circle of powers of the rehabilitation practitioner and the director of the enterprise was also determined by the creditors' meeting. [56]

According to the prevailing view, breach of fiduciary duties of the practitioner leads to a review or termination of the rehabilitation process by the debtor/creditors. If the ruler has violated the rights of either party his activities will be terminated. The 2007 law does not say anything about this issue. In the end, both pieces of legislation were very general, containing complex norms that actually constituted a barrier to the conduct of the rehabilitation process. In 2014 (GIZ) the existing insolvency system was assessed with the support of international experts. According to this assessment, the law included ambiguities and contradictions. The rule of setting priorities is

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[50] Law of Georgia on Insolvency Proceedings, date of promulgation: 28/03/2007; Source of promulgation, date: SSM, 9, 31/03/2007.

[51] Explanatory Card on the Draft law of Georgia on Rehabilitation and Collective Satisfaction of Creditors Claim, <https://info.parliament.ge/file/1/BillReviewContent/245931> [05.03.2022].

[52] Law of Georgia on Bankruptcy Proceedings, date of promulgatiom: 25/061996; Source of promulgation, date: Parliament of Herald, 19-20, 30/07/1996, Article 25^4.

[53] Law of Georgia on Insolvency Proceedings, date of promulgation: 28/03/2007; Source of promulgation, date: SSM, 9, 31/03/2007, article 44 (2).

[54] Ibid., Article 3, (3^2).

[55] Law of Georgia on Bankruptcy Proceedings, date of promulgation: 25/061996; Source of promulgation, date: Parliament Herald, 19-20, 30/07/1996, article 25^5 (3).

[56] Law of Georgia on Bankruptcy Proceedings, date of promulgation: 25/061996; Source of promulgation, date: Parliament Herald, 19-20, 30/07/1996, article 44 (4).

controversial namely the pursuit of the interests of creditors and the debtor in the rehabilitation process and the definition of the powers of the practitioner, which is so problematic. In 2015, at the request of the Ministry of Justice, the Georgian insolvency system was assessed by the United States Agency for international development (USAID) "governance for development" project. The study found that the Georgian law on insolvency proceedings in Georgia is not often used to solve financial problems, which is generally caused by the stigma that still haunts the institution of insolvency. [57] The country needed a flexible legislation in line with EU standards that would clearly set the priorities for the rehabilitation process. On April 21, 2021, Law of Georgia " Rehabilitation and the Collective Satisfaction of Creditors Claims" came into force, which in essence requires a detailed analysis of the rehabilitation process. Ongoing processes about amendment of New legilisation still continues. Consequently, there is no relevant case law for this stage. Therefore, the analysis of the new law will not be presented in this study. We hope that very soon the Law of Georgia on "Rehabilitation and Collective Satisfaction of of creditors claims" will be finalized.

5.3. Court Practice

It is noteworthy that within the framework of the enactment of the Georgian law on bankruptcy, the opening of the rehabilitation process did not actually take place in Georgia. Moreover, it took the public a long time to see the benefits of this process and to assimilate legislative innovations. The rehabilitation process, not only due to the legislation, but also due to the long procedural deadlines, introduces distrust in legal community. Under the 2007 legislation, full authority to approve the rehabilitation plan passed into the hands of creditors.

The process of rehabilitation of "Orion" Ltd is interesting which was carried out by the current legislation of 2012. [58] It is noteworthy that the debtor was not involved in the procedure for approving the rehabilitation plan. The creditors' meeting was fully competent to approve the rehabilitation plan. This circumstance, of course, undermined the essence of rehabilitation. The debtor did not participate in the appointment of the rehabilitation practitioner either. It is interesting, the case of "Black sea invest" Ltd, where the issue of appointing a rehabilitation practitioner was not even formally considered by the court. [59] The study of his competence, education and experience was entrusted to the creditors' assembly, which did not involve the debtor in this process. As it is clear from the practice, all this did not serve to overcome the financial difficulties of the debtor, on the contrary, it was aimed at destroying the property. The rehabilitation case that started in 2011 could not be completed even in 2018, due to the change in the rehabilitation plan and a number of actions, the case continued again. [60]

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[57] Explanatory card on the draft law of Georgia on Rehabilitation and Collective Satisfaction of Creditors Claim, (in Georgian), <https://info.parliament.ge/file/1/BillReviewContent/245931> [05.03.2022].

[58] Ruling of Tbilisi City Court of October 26, 2012 on the approval of the rehabilitation plan of "Orion" Ltd, 2/12584-11.

[59] Ruling of Kutaisi City Court of September 28, 2011 on the appointment of Vladimer Saladze as the Rehabilitation practitioner of "Black Sea invest" Ltd and the Approval of the Creditors' Secision on the Seadline for Preparation of the Rehabilitation Plan, 2/647-11.

[60] Ruling of Kutaisi City Court of July 25, 2018 on Extending the Term of Preparation of the Draft Rehabilitation Plan of "Black Sea invest" Ltd, case #2/61.

An exceptional case is the case of the rehabilitation of "Caucasus digital network" Ltd, where it is noteworthy that the debtor, together with the rehabilitation practitioner, actively uses procedural rights, including monitoring the implementation of the rehabilitation plan. [61] The problem of delayed hearings is also appeared in this case, were in 2013 opened rehabilitation process is not still finished in 2022.

Legislative difficulties, complete exclusion from the debtor's rehabilitation process, incomplete court proceeding necessitated the creation of new legislation. In 2022, the number of rehabilitated companies is very small in Georgia. Historical analysis has shown that previous legislation was not aimed at the survival of the company. The difficulty of opening the rehabilitation process, the delayed deadlines, the limited powers of the practitioner created a difficult barrier to the development of insolvency law. Democratic state must have transparent legislation for opening, closing and business restructuring procedures.

6. Conclusion

As we have seen from the paper, the liberalization of the debtor's bankruptcy regime led to the introduction of "insolvency" systems in England. Beginning with the personal execution ending with the liquidation of the debtor's property, we saw the need to introduce a legal mechanism that precluded the death of the debtor's property, The inability of the debtor to set up a new enterprise.

With the adoption of EU Regulation 1346/2000, a mechanism for overcoming the financial difficulties of the enterprise was proposed, which started the process of development. The roots of the regulation can be seen in Directive 2019/1023, which made the rehabilitation process even more accessible to Member States. At present, member states can introduce a number of innovations in the insolvency system, including "debtor in possesion", "ease of approval of the rehabilitation plan" and other circumstances, which are reflected in directive 2019/1023.

As we have seen, the 1996 and 2007 legislation contained obstacles to the rehabilitation process, including the ability of creditors to approve the rehabilitation plan themselves, to determine the manager, and to make individual decisions about the rehabilitation process. The case law has clearly shown the problem of procedural deadlines, which ultimately led to distrust of the insolvency system.

The historical study of Georgian law presented the perspective of legislative perfection. The simplicity of starting the rehabilitation process, increasing the powers of the practitioners, leading the process in a reasonable time and attracting new assets ensure the rapid development of the rehabilitation process. By overcoming the existing challenges, real support mechanisms for the companies will be introduced.

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[61] Tbilisi City Court Ruling on January 13, 2017 in the case: Amendments to the Rehabilitation Plan of "Causasus Digital Network" Ltd, Case № 2/5795-13.

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3. Companies Act (1862) 25 & 26 Vic, c 89, ss 79, 81 and 205.
4. Joint Stock Companies Act (1844) 7 & 8 Vic, c 110 (1844 Act).
5. An Act to establish a Court in Bankruptcy (1 & 2 Will IV c 56), s 1; Sir William Holdsworth, A History of English Law, 7th edn. (Methuen & Co, 1956), Vol.l, 470-473; V Markham Lester, Victorian Insolvency (Clarendon Press, 1995), 45.
6. Council Regulation 1346/2000, 2000 O.J. (L 160) 1, 13.
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41. Ruling of Kutaisi city court of September 28, 2011 on the appointment of Vladimer Saladze as the rehabilitation practitioner of "Black Sea invest" Ltd and the approval of the creditors' decision on the deadline for preparation of the rehabilitation plan, 2/647-11.

Giorgi Kapanadze*

Hidden Cruelty – Criminal Law Trends in Domestic Violence

Hidden domestic violence and cruelty is one of the most serious problems in the modern world, which is deeply rooted in society and carries the stereotypical attitude of reprimand from others and / or an irresistible fear of the abuser towards the victim. Hidden cruelty in the family belongs to the circle of issues that mostly oppress the society and an appropriate research level of which and relevant measures' implementation should be considered in urgent matters.

The relevance of the issue is also conditioned by the fact that according to the research of the Georgian case law, in almost every third-fourth court cases of domestic violence, which is of a hidden nature, a verdict of acquittal is rendered not on the grounds that the accused is not guilty, but on the grounds that the victim, who once dared and reported to law enforcement because of an extremely intolerable situation, no longer (or could no longer!) testified against the abuser at court because of established stereotypical beliefs and public influence, and again became the object of his oppression due to the continuing nature of the violence.

The goal of the presented research is to study the modern criminal law aspects of domestic violence and hidden cruelty in above mentioned regard. This paper will review the history of this issue, types of violence, theories of hidden cruelty, and a generalization of case law on hidden domestic violence. The paper aims to answer what the legislation should be like, not only materially, but also procedurally, so that the hidden or subsequently concealed cruelty committed by any abuser in the family will not go unanswered.

Keywords: *Domestic violence, hidden cruelty, respect, dignity, abuser, victim, gender equality, demonstration of force, cycle of violence, escalation of tension.*

1. Introduction

The human will, his inviolability and dignity are inalienable human rights. They represent an important criminal law institution, within of which the realization of such a right has become an integral element of daily life.[1] The world of the 21st century claiming to be at the highest stage of social development, the question is relevant: are the human will, his inviolability and dignity protected in the family, which are the highest value of a civilized society? Hidden violence is one of the most painful and relevant issues in the modern world. The modern trends of hidden domestic violence, current legislation, challenges related to domestic violence, and the catastrophic rise of court statistics clearly reveal the problematic nature of the issue, which requires an appropriate scientific analysis.

The family is an important institution where the one should feel himself most protected[2]. The hidden domestic violence is a global phenomenon, which is characteristic for people of

* PhD Student of Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 *Ivanidze M.,* Family Crime, Iv. Javakhishvili Tbilisi State University, "Guram Nachkebia-75", 2016, 53.

2 *Sharapov R.D.,* Physical Violence in Criminal Law, St. Petersburg, 2001, 24 (in Russian).

different races, ethnicities, social, cultural, economic, political or religious backgrounds. It has no cultural, social, economic, religious or territorial boundaries. The relevance of the problem is also due to the fact that violence takes place in the family, between family members, and in most cases, it is hidden from the general public. The cruelty and violence shown by one member of the family to another are reflected on the fate of people in different ways[3].

The objective of the article is to critically review the problems existing today towards the issues' resolution in terms of hidden domestic cruelty. The goal of the research is to identify the practices that have been established in terms of covering up domestic violence. The relevance of the topic is heightened by the alarming statistics of hidden cruelty. The article will discuss the reality and assessment of Georgian court practice, and will implement the searching activities for legal ways to overcome the hidden cruelty.

2. History of the Domestic Violence Issue

Determining the issue where and when the history of domestic violence has began is difficult, because this phenomenon is common to all generations and nations, and in some countries male violence against family members was even allowed by law (in Asian and African countries). Until 1895 in America, a woman was not even allowed to divorce her husband on the grounds of violence.[4] The history of Georgian law is interesting in this regard.

Important sources of traditional custom that have existed in Georgia for centuries are the foreign or Georgian written monuments and the works of art of Georgian writers that have reached to us.

According to Georgian law (as well as literary) monuments, deviations from the customs established by one family member towards another were manifested in different ways in different eras. "The Passion of Saint Shushanik" by Iakob Tsurtaveli (Elder – "Khutsesi" in Georgian) stands out in this respect, which reflects the attitude of the abusive husband, Varsken Pityakhshi, towards the queen-wife, Shushanik, on whom he tried to execute his will violently (physically and psychologically). It is also interesting to justify the violence in this regard: "Mothers' nature is narrow".[5]

The law of Beka and Aghbugha - "The book of law on men's sin" as an embryo of Georgian law refers to the sharp attitude towards the hidden cruelty in the family, where the word "domestic violence" appears, which is a law prohibited by law ("When the husband violates on his wife and helpless child ...").[6]

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[3] Report of the Prosecutor General of Georgia, Tbilisi, 2020, (in Georgian), <https://bit.ly/2Mf4hln> [29.01.2021].

[4] *Goodman L., Leidholdt D.,* Lawyer's Manual on Domestic Violence Representing the Victim, 5th ed., Supreme Court of the State of New York, appellate Division, First Department, Hon. John T Buckley, Presiding Justice, 2006, 45-47.

[5] *Tsurtaveli I.,* Torture of Shushanik, Georgian Prose , „Merani" Publishing House, 1987, 27 (in Georgian).

[6] Beka and Agbugha Law, a monument of old Georgian legislation. Compiled in XIII-XIV centuries. Included in the Collection of Law Books of Vakhtang VI as Part 6 (in Georgian). See also, *Dolidze I.,* Ordinary Law of Georgia, Publishing House of the Academy of Sciences of the Georgian SSR, Tbilisi, 1960 (in Georgian); *Surguladze Iv.,* For the History of the State and Law of Georgia, Tbilisi State University Publishing House, Tbilisi, 1952 (in Georgian); *Davitashvili G.,* Basic Aspects of

According to the book of Laws of Vakhtang VI "Kodiko", a court of "men of the law" fined a husband to pay a solid fine of "Dram" to his wife for violence against her. The attitude of the law towards the hidden cruelty in the family is also interesting: if the wife concealed the violence (threats, beatings, intimidation, etc.) expressed by the husband, the wife's relatives were instructed by the "men of the law" to pay a "Dram" (a certain fee) to the husband's relatives.[7] It should be noted that despite such a legacy of the old Georgian law, there was no separate legal norm in the criminal law of the Soviet era regarding the hidden domestic cruelty and violence; Actually, there was a problem, but due to Soviet ideology, this topic was taboo.

Silence over hidden violence against women has been broken since the 1970s, after the second wave of the feminist movement intensified in the West. From this period, the legislation was appeared prepared at the international or national level, and also a state policy for protecting women from violence. At the same time, the European Court of Human Rights has declared on family life, according to which marriage is not limited to a formal relationship: today, family life is not a relationship based only on marriage, but also a factual (without registration of marriage) relationship is considered such as.[8]

At the threshold of the 21st century, a wave of protests against domestic violence as a hidden crime has intensified around the world. Wokring on domestic violence in Georgia was started by women's NGOs in the late 1990s with the support of various donor organizations. A draft law **on the protection of domestic violence, protection and assistance for victims of domestic violence** has been prepared, which was adopted by the Parliament of Georgia on **May 25, 2006** with the assistance of the Gender Equality Council under the Chairman of the Parliament of Georgia.[9] The law defined the concept of domestic violence and state protection mechanisms against the abuser, in particular a restraining and protection order was introduced, which allows the police and the court to respond quickly to domestic violence, provide protection for the victim and restrict certain actions of the abuser. The Law of Georgia on the **„Protection of Domestic Violence, Protection and Assistance for Victims of Domestic Violence"** states that a "restraining order is an act issued by an authorized police officer that defines temporary measures to protect a victim of domestic violence. It will be submitted to the court for approval within 24 hours after its issuance". The fight against domestic violence has been a priority for Georgia for the last decade. In terms of legislation, **in May 2012**, **an amendment was made to the Criminal Code of Georgia**, according to which domestic violence was criminalized. By $11^{th\ 1}$ Article of the Criminal Code of Georgia was defined the circle of family members, the list of crimes provided by the Code was indicated, in case of which the relevant reference to the mentioned article should be made. Under the same amendment, Article $126^{th\ 1}$ was added to the private part of the Criminal Code, which clarified the criminal nature of domestic violence and the responsibility for the act committed.

Judicial Organization and the Process in Georgian Customary Law, cited in History of Georgian Law, compiled by *Kantaria B.,* World of Lawyers, 2014 (in Georgian).

7 Beka and Agbugha Law, a Monument of Old Georgian Legislation. Compiled in XIII-XIV Centuries. Included in the Collection of Law Books of Vakhtang VI as Part 6 (in Georgian).

8 Judgment of the European Court of Human Rights, Johnston and Others v. Ireland, 18 December, 2016 (in Georgian).

9 The Law of Georgia on the Protection of Domestic Violence, Protection and Assistance for Victims of Domestic Violence", 25/05/2006, # N3143-Iს (in Georgian).

Also, according to the amendment made to the Criminal Code in this regard (Law of June 22, 2016 №5452 - website, 12.07.2016) when recording a fact of violence, the police officer was given the authority to issue a restraining order, in case of violation of the conditions defined of which, the liability defined by Article $175^{th\ 1}$ of the Code of Administrative Offenses and Article $381^{th\ 1}$ of the Criminal Code was envisaged.

It should be noted that the Parliament of Georgia signed the Istanbul Convention on Domestic Violence in 2014, which is the first mandatory document that emphasizes violence against women as a form of discrimination against women and human rights. The document was adopted on May 7, 2011 in Istanbul. The Convention includes norms that is related to the achievement of real results and reflect all forms of violence, including psychological, social and physical violence that is motivated by sexual orientation.

When categorizing a crime from a legal point of view, domestic violence ($126^{th\ 1}$ Article of the Criminal Code) is a nonfatal crime. It should be noted that the category of crime includes not only the logical form of theoretical thought, but also public practice. The crime categorization essentially depends on which object of criminal protection the legislator prioritizes. [10] I consider that if the legislator has given priority to domestic violence, it has been separated from violence separately under $126^{th\ 1}$ Article of the Criminal Code. In case of revealed heightened domestic violence, is it time to shift the punishment to a more serious category and help to prevent the crime in this regard? I think the issue requires immediate consideration at the legislative level.

3. Modern Trends of Domestic Violence Regulation

A fundamental requirement of the Istanbul Convention (the **Council of Europe Convention on preventing and combating violence against women and domestic violence)** is to protect one family member from violence against another and to establish a gender policy in the family. According to Article 3, paragraph "b" of the Convention, "domestic violence" means all types of physical, sexual, psychological and economic violence that occurs in the family, or in the family circle, between former or current spouses and partners. The following sub-chapters will be devoted to the analysis and problematization of the types of violence, trends of hidden cruelty in the family, theories and the contemporary reality of domestic violence from a legal point of view.

3.1. Types of Violence

Violence is a demonstration of force, expressed in overt or covert form, against a person or persons to achieve something to which they willingly disagree. Synonyms of violence are: aggression, cruel treatment, abuse, coercion, encroachment, torture, threats. Violence is any action or word that can offend, harm or violate the rights of a person. Violence suppresses the human will, violates his inviolability, dignity, and freedom. All these are inseparable human rights, a manifestation of power. There exist direct and indirect (i.e. structural) violence.[11]

[10] *Lekveishvili M.,* Categories of Crime, Criminal Law (Manual), 4th ed., General Part, Tbilisi, 2019, 127-128 (in Georgia).

[11] *Sharapov R.D.,* Physical Violence in Criminal Law, St. Petersburg, 2001, 40-41 (in Russian).

Direct violence means physical violence, the premeditated use of physical force or power against oneself, another person or society that results in (or is likely to result in) death, bodily injury, psychological trauma, abnormal development or various types of injury.[12]

Indirect violence means poverty, exploitation, social injustice, lack of democracy, etc.

Physical violence - beating, torture, damage to health, unlawful deprivation of liberty or any other act that causes physical pain or suffering; Failure to meet the health requirements, resulting in damage or death to a family member;

Psychological violence - abuse, blackmail, humiliation, threats or other acts that cause damage to human dignity and honor;

Coercion - the physical or psychological coercion of a person to perform or not to perform an action for which he or she has the right to abstain or to refrain, or to have an unintentional influence on himself / herself;

Sexual violence - sexual intercourse through violence, threats of violence or the use of victim helplessness; Sexual intercourse or any other act of a sexual nature or fornication towards a minor;

Economic violence - an act that results in the restriction of the right to food, housing and other conditions of normal development, the exercise of property and labor rights, as well as the use of co-owned property and the right to dispose of one's share;

Emotional violence - addiction and attachment to one's partner. It is noteworthy that emotional violence has always existed, but today it has become widespread.[13]

Gender-Based Violence - Violence committed on the basis of gender, male hegemony and female neglect with reference to the "traditional role".[14]

It is noteworthy that as far back as the 80s of the last century, it was widely believed that domestic violence was a fairly safe marital dispute in which it is desirable for outsiders not to interfere.[15]

3.2. Hidden Domestic Cruelty

Hidden domestic cruelty is one of the most serious and widespread forms of domestic violence. It exists in every country of the world and covers all strata of society. It refers to the violation of the constitutional rights and freedoms of one family member by another through physical, psychological, economic, sexual violence or coercion, during which the victim finds it difficult to expose the abuser due to fear of the abuser or misbehavior in society.

According to the Law of Georgia on "Prevention of Domestic Violence, Protection and Assistance for Victims of Domestic Violence" and 11$^{th\ 1}$ Article of the Criminal Code of Georgia, family members are: mother, father, grandfather, grandmother, wife, child (stepchild), adoptive,

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12 *Kazachenko I. Ya., Sabirov R. D.,* Criminal Law Concept of Violence, Sverdlovsk, 1981, 26 (in Russian).

13 *Sharapov R.D.,* Physical Violence in Criminal Law, St. Petersburg, 2001, 49-50 (in Russian).

14 *Kazachenko I. Ya., Sabirov R. D.,* Criminal Law Concept of Violence, Sverdlovsk, 1981, 29.

15 *Kherkheulidze I.,* Responsibility for Domestic Crime and Review of Relevant Georgian Legislation - Criminal Law (Manual), 4th ed., General Part, Tbilisi, 2019, 500 (in Georgian).

foster family (foster-mother, foster-father), granddaughter, sister, brother, spouse's parents, son-in-law, daughter-in-law, as well as ex-spouse, persons in unregistered marriage, guardian.

Domestic violence is characterized as covert and persistent in nature, as it is perpetrated by a family member or members against another family member / s. It is a mistake to think that violence arises only on the basis of a conflict between a married couple. Domestic violence is considered to be committed against any member of the family by: physical violence, psychological violence, economic violence, sexual violence, coercion. In other relationships, people are more likely to hide their personal vicious sides. And in a family where its members live under one roof, there is more opportunity for a person to satisfy his personal and unhealthy ambitions, as well as to unload from aggression - to "let off steam".[16]

Domestic violence often leads to serious health problems, physical and emotional disorders, which can be fatally finished. Domestic violence can be reflected in the development of the adolescent's personality in such a way that the adolescent becomes more interesting from a criminological and criminal point of view, ie he or she becomes a criminal.[17]

Violence consists of three components: the victim, the abuser, and the act itself (violence). Taking into consideration its character and consequences, the violence is often regarded as a criminal.

Under Georgian law, **a victim** is a family member who has suffered physical, psychological, sexual violence or coercion.

An abuser is a family member who commits physical, psychological, economic, sexual violence or coercion against another family member.[18]

Violence includes all forms of unlawful acts, expressed by threats or acts resulting in damage or destruction of property, or the insult or death of a person.

One of the tendencies of domestic violence is due to its hidden nature: the subjects of violence are usually dependent on each other, so in most cases family members hide this fact.[19]

Judgment №1c / 79-17 of the Investigative Panel of the Tbilisi Court of Appeals of 18 January 2017 states that "domestic violence, which was traditionally considered to be a "domestic affair" of the family, has gone beyond this narrow understanding and it is now considered as a crime that threatens not only the marital relationship, but also the development of young children in a normal mental environment."[20]

Hidden cruelty often occurs in front of a juvenile, or violence is addressed directly at him. According to Article 19 of the Convention on the Rights of the Child, "a child must be protected from all forms of violence, abuse, ill-treatment and exploitation committed by parents or family members."[21]

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16 *Todua N.,* Report at the Conference on Violence Against Women, May, 2019 (in Georgian).

17 *Shalikashvili M.,* Criminology of Violence, Tbilisi, 2012, 96 (in Georgian).

18 *Ivashchenko A.V.* Violence and Criminal Law, Omsk, 1999, 29-30 (in Russian).

19 *Ivanidze M.,* Family Crime, Iv. Javakhishvili University, "Guram Nachkebia-75", 2016, 51 (in Georgian).

20 Judgment of the Investigative Panel of the Tbilisi Court of Appeals 181c / 79-17 of January 18, 2017.

21 Convention on the Rights of the Child, 20/11/1989 Adopted by the United Nations General Assembly. Georgia joined the mentioned agreement in 2020. Recipient of the document - Minister of Foreign Affairs, type of document - International Treaty and Agreement of Georgia, website of the Ministry of Foreign Affairs, 25/05/2000.

Paragraphs "a" and "b" of the second part of $126^{th\ 1}$ Article of the Criminal Code consider aggravating circumstances as domestic violence committed with the prior knowledge of a juvenile and a juvenile in the presence of his / her family member; From the legislative point of view, the amendment to Article $53^{th\ 1}$ of the Criminal Code of Georgia made on November 30, 2018 was noteworthy, according to which the commission of a crime by one family member against another family member was considered as an aggravating circumstance of responsibility.

Hidden domestic cruelty and violence by one member of the family against another is a complex phenomenon that is deeply rooted in society - in cultural beliefs and unequal distribution of power between the genders. Gender-based violence is perpetrated in all societies and is aimed at the social, psychological and economic subordination of one gender (mostly women) to the other gender.

According to intercultural studies of violence, the victims of domestic violence are mostly women, and the abusers are men. As it is well known, the form of violence is more severe if a woman is economically dependent on the abuser. Violence is encouraged and sanctioned by gender stereotypes and gender-based hierarchies of power (the husband is the wife's ruler), making it doubly difficult for law enforcement to fight against.

The German scientist Busmann has been researching domestic violence for many years, and according to his conclusion, the most dangerous place in modern civilized society is the family. For those who want to be a victim or abuser and to gain an experience of violence, creating a family for them will be the best way to achieve the mentioned goal.[22]

According to world statistics, one of the most spread forms of domestic violence is a honor killing. Victims of this type of violence are mostly women, who are considered to be ashamed of the family and are killed in order to restore family dignity. [23]

Subjects of the violence are usually interdependent, in most cases, the family hides this fact, which is conditioned by several factors: the victim's fear of the abuser, economic dependence on the abuser, and the latter's prohibition on disclosure to the victim. As a result, exposing the abuser by the victim during the trial becomes tantamount to heroism.[24]

Based on the analysis of Georgian court practice, I believe that in addition to economic and social moments, the victim often finds it difficult to perceive himself as a victim and to break the stereotypes established in society, which complicates his rational decision to be done. There are also cases when both the victim of violence and other family members are ashamed that they or their family member is being abused.[25]

3.3. Theories of Domestic Violence

There are a number of theories (Lenore Walker, Landerberg, Duluth, etc.) regarding domestic violence:

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22 *Siegmund-Schultze N.,* Suddeutsche Zeitung, August 8, 2005, 36.

23 *Pope N.,* Honor Killings in the Twenty-First Century, Palgrave Macmillan, Official Journal of the South Asian Society of Criminology and Victimology (SASCV), 2014, 41-43.

24 *Schramm E*., Ehe und Familie im Strafrecht, Iena, 2018, 58-60.

25 *Shalikashvili M.,* Victimology-Science about Victims of Crime, Tbilisi, 2011, 123 (in Georgian).

A special place among the theories is taken by the so-called the theory of **"Studied Behavior"**. Researchers believe that violence against one another by a family member is a behavior learned in childhood that was perpetrated on him.[26]

The second theory is called the **"theory of loss of control"** and is manifested under the influence of alcohol or narcotic and psychotropic substances. Opinion on this issue is divided: the second group of scientists argues that violence is the result of an inability to control anger and frustration.[27]

Among the theories popular is the theory known as "**Learned Helplessness**", developed by the American psychologist Lenore Walker.[28]

According to this theory, the decision of women to continue living with abusive husbands lies in the fact that due to constant abuse, living independently of the abuser has taken away the necessary willpower and she will not be able to live without him.

The "**cycle of violence**" is the next theory (Lenore Walker's theory), which has gained increasing popularity in the United States. It consists of three stages:

1. **Escalation of tension** (verbal confrontation and insults, clashes before the incident);

2. **Serious incident** (at intervals from 2 to 24 hours);

3. **Post-incident effective repentance** (attempting to reconcile with the victim after analyzing the abuser's behavior).[29]

These theories are united by the various forms and species of violence expressed against another person (the victim, in our case a family member).[30]

Recent case law analysis has also shown that due to the worldwide pandemic (Covid-19), family members gathered together at home, which further complicated their intolerance and, consequently, increased the crime of domestic violence. I believe that in terms of working with the abusers, only the imposition of an obligation under a restraining order by the police before a serious incident of escalation of tension is of a formal nature. The country should have programs that will enable early intervention of the abuser, ie "prevention of violence before violence".[31]

3.4. The modern reality of domestic violence in terms of legislation

The catastrophic increase in statistics on domestic violence has been reflected in criminal law legislation. By an amendment to the Criminal Code of Georgia made in May 2012, $11^{th\ 1}$ Article of the Criminal Code of Georgia defined a circle of family members and indicated a list of crimes

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[26] *Uorker L.*, Handbook of Psychology, The London School of Economics and Political Science, 1992, 211-235.

[27] *Kaqegehiro D.K., Laufer W.S.*, Handbook of Psychology and Law, Wharton School University of Pennsylvania, Philadelphia, USA, 1992, 23-24.

[28] *Uorker L.,* Handbook of Psychology, The London School of Economics and Political Science, 1992, 211-235. See also *Bochorishvili K., Meskhi M., Khutsishvili K., Feradze M., Saakashvili N., Arghanashvili A., Shavlakadze N., Zazashvili N.,* Handbook for Police Officers on Issues of Domestic Violence, Tbilisi, 2010, 24-43 (in Georgian).

[29] Ibid.

[30] *Ivanidze M.,* Family Crime, Iv. Javakhishvili University, "Guram Nachkebia-75", 2016, 51 (in Georgian).

[31] *Mchedlishvili-Hedrikhi St.,* Report at the Conference on Violence Against Women, May, 2019 (in Georgian).

under the Code, in case of which the relevant reference to this article should be made. Under the same amendment, 126th 1 Article was added to the private part of the Criminal Code, which clarified the criminal nature of domestic violence and the responsibility for the act committed.

Although the amendment to the Criminal Code does not fully prevent the threats posed by the nature of this action, so **I believe** that the legislative **amendment** to the 11th 1 Article of the Criminal Code of Georgia is **timely.** This article exhaustively defines the responsibility for the list of crimes for domestic crime, in case of which the relevant reference should be made to the mentioned article, as well as the note in terms of defining the circle of family members, the responsibility for the list of crimes for domestic crime in terms of defining the circle of members, will facilitate the investigation and the court in terms of correctly defining the subject and object of the crime;

Accordingly, the legislative marking out of a separate article in the Criminal Code (126th 1 Article of the Criminal Code) on violence by one member of the family against another, I believe, indicates the excessive diligence of the legislator. The existence of this crime is possible in the 126th 1 Article of the Criminal Code. With reference to 11th 1 Article, even if it separated as an aggravating circumstance.

4. Public Attitudes Towards Hidden Cruelty

Despite legislative changes, facts of violence against women remains a major problem. The Public Defender's 2021 Parliamentary Report is also focused on public attitudes towards hidden cruelty. "Hidden facts of domestic violence is remaining as a big problem in the country. The scale of domestic violence and the public's unemotional attitude towards this problem are worrying" – is mentioned in the report.[32]

Part of the society believes that the cruelty hidden from one member of the family towards another should be exposed as much as possible, while another part of the society evaluates this opinion negatively and believes that their exposure firstly insults the family, after which the victim feels humiliated in society and this negatively affects his health. There is also the opinion that what happens in someone else's family does not relate to anyone else and the person standing on the side prefers to stay on the side again.[33]

The opinion of the German scholar Eduard Schramm is interesting in this regard: in court practice there are sometimes the cases discussed when the wives or family members can no longer protect themselves from the dominant husband or father and secretly mention them as a "family tyrant" or "domestic tyrant", however, even in case of injury or severe consequences, they often refuse not only to testify but also to seek reasons for justifying it. In every such virtual case, a simple forgiveness is used. In such a case, we are not dealing with a specific attack, but with a generally dangerous situation that needs to be addressed at the legislative level.[34]

The practice of the Georgian court in this regard is also noteworthy. The generalization of case law has shown that due to the nonhomogenous response of the public on the "splurging" of

[32] 2021 Parliamentary Report of the Public Defender of Georgia. April 1, 2021.
[33] Guidelines for Responding to Domestic Violence, UN Women, 2014, Tbilisi, 2014, 10.
[34] *Schramm E.,* Ehe und Familie im Strafrecht, Iena, 2018, 78.

the domestic violence, during the interrogation of the abuser family member, the victim often exposed abuser not only for the fact on which the investigation was launched, but also for the psychological and physical violence against them over the years, and the victims refused to testify against the accused at the court hearing,[35] which is the basis for the latter's acquittal and justification, and in my opinion, in a way, this fact weakens the force of prevention in relation to 126[th] [1] Article of the Criminal Code of Georgia.

According to a German scientist, Eduard Schramm, not testifying against a close relative puts the abuser in a privileged position. In most cases, when it comes to kinship, there is the privilege of the offender, which in terms of legal policy, is motivated by a variety of reasons. The issue is related to the assistance of a relative with whom he or she finds himself or herself in a certain conflict situation, which the abuser seeks to eliminate or resolve by committing an offense. In such a case, relative is protected from a possible danger and punishment and obstruction of the law while exposing the offender.[36]

According to the Georgian court practice, in relation to domestic violence, when imposing a measure of restraint on the accused, the victim often appeals to the court and categorically requests that the most severe form of restraint be applied to the abuser. Due to the nature of the violence, the court in such a case imposes a non-custodial measure as a measure of restraint. In such a case, during the substantive hearing of the case, as a rule, the injured (victim) refuses to testify against the accused (abuser) in accordance with subsection of Article 49 (d) of the Criminal Code of Georgia. I think it is worth considering at the legislative level that, given the position of the victim, where it is undeniable from the outset that the victim will not testify in court, the first case of violence should be considered as an administrative offense and criminalized only if repeated.

4.1. Increase the Statistics of Domestic Violence in the World and in Georgia

According to a USA study, a gender imbalance in **intimate violence** is conspicuous. Nine out of ten victims of similar violence are women. The US has the highest rate of rape, domestic violence, and spousal murder in the industrial world. Here, every year, 4 million women become victims of domestic violence. Statistically, one woman is raped every 6 minutes, and one woman is beaten every 18 seconds, and 4 women are killed by rapists every day. It is noteworthy that every year 2-3 million women in America become victims of violence by a male partner; Two times more women are sexually abused by their husbands than by a stranger; At least one in four women has been a victim of some form of violence in their lifetime.[37] The term "violence" used to refer to violence against women and children, but now it also refers to violence against another family member. According to world statistics, the most common type of domestic violence is beating a wife, the causes of which are: 1. Jealousy; 2. Disrespect to the husband; 3. Showing the predominant role of

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35 *Kvatchadze M., Melashvili L., Jugheli N., Gvinjilia E.,* Reflection of International Standards in Cases of Domestic Violence, Supreme Court of Georgia, Research and Analysis Center, Journal "Justice and Law", #3'18, 2017, 7-8 (in Georgian).

36 *Schramm E.,* Ehe und Familie im Strafrecht, Iena, 2018, 108.

37 *Goodman L., Leidholdt D*., Lawyer's Manual on Domestic Violence Representing the Victim, 5[th] ed., Supreme Court of the State of New York, appellate Division, First Department, Hon. John T Buckley, Presiding Justice, 2006, 45-47.

men on the basis of gender; 4. Addiction to alcohol or drugs. In addition to physical violence, there are frequent cases of psychological violence, such as: constant control of the wife, isolation from her own parents and friends; Threats, intimidation, verbal abuse, humiliation, etc.[38]

These statistical indicators only cover the cases where the fact of violence has been followed by a legal response. Other cases of violence are not included in the final statistics. According to the official website of the Ministry of Internal Affairs, in 2020, law enforcement issued 10,266 restraining orders to protect victims of domestic violence, which is by 34% more than the indicator in 2019. What is the situation in Georgia in this regard? In March 2021, according to the National Statistics Office of Georgia, in 2020, the highest rate of violence against women was recorded - 6564 cases. [39]

5. Comparative-legal Analysis of Domestic Violence Compared to other Countries

Despite the severity of the issue, in a number of countries, domestic violence was limited to criminological measures and the problem is still unresolved in criminal terms (Russia, France, Turkey).

According to the Criminal Code of **Russia and France**, violence against one family member by another, including even against a juvenile, is not even considered as an aggravating circumstance in the form of violent crimes.[40]

The **French** Criminal Code considers **murder of a spouse** as an aggravating circumstance and envisages life imprisonment for it or imprisonment for twenty years for violence that resulted in the death of the victim if the victim was a spouse or a person living with the abuser.[41]

France adopted a law in 2010 "on violence against women and among spouses and its impact on children". The law protects both genders from violence, especially women and children in relationships with different statuses, will it be marriage, civil relations or just cohabitation. The law consists of civil and criminal norms.[42]

Italy adopted a law on violence against women in August 2013. The law envisages mandatory detention if a person has been witnessed for violence or persecution, and also provides for a mandatory investigation if a complaint is lodged with the police. The law provides for police eviction of the abuser from the home / apartment even if the home / apartment is in his or her ownership and provides free legal aid to all female victims who file an appeal against the abuser.

The law simplifies anonymous reporting on domestic violence. A neighbor, co-worker, friend or family member can report the incident to the police.[43]

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38 *Kimmel M*., The Gendered Society, 4th ed., Oxford University, Oxford, 2011, 381.

39 Report of the Ministry of Internal Affairs of Georgia, 13.02.2021 (in Georgian).

40 *Kozochkina I.D.* (ed.), Criminal Legislation of Foreign Countries (England, USA, France, Germany, Japan), Collection of Legislative Materials, Moscow, 1998, 193-205 (in Russian); see also, Criminal Code of the Russian Federation" dated 06/13/1996, # 63-FZ, Moscow, 2021 (as amended on 07/01/2021) (as amended and supplemented, effective from 08/22/2021) (in Russian).

41 *Kozochkina I.D.* (ed.), Criminal Legislation of Foreign Countries (England, USA, France, Germany, Japan), Collection of Legislative Materials, Moscow, 1998, 197 (in Russian).

42 *Krilova N.E.,* Serebrennikova A.V., Criminal Law of Modern Foreign Countries (England, USA, France, Germany), Moscow, 1997, 142-145 (in Russian).

43 Criminal Procedure Code of the Republic of Italy, Part I, 2011, https://legislationline.org/sites/default/files/documents/83/Italy_CPC_updated_till_2012_Part_1_it.pdf [20.08.2022].

The new law makes it almost impossible to withdraw a complaint about domestic violence. It often happens when the victim woman refuses to help with the investigation, which is usually caused by fear of the abuser. Under the new law, police must continue to investigate, even when the victim no longer cooperates with them. The law aggravates the punishment if the victim is a pregnant woman or if the violence took place in the presence of a child.

Turkey has taken a relatively different approach to this issue. The Convention adopted in Istanbul on May 7, 2011 (the so-called Istanbul Convention) identified a violence against women as a form of discrimination, but there is currently no form of domestic violence in Turkish criminal law, where, according to tradition, there is a view - husband is the wife's ruler.[44]

It is noteworthy that the movement against domestic violence in the **USA** began in the 60s of last century. Violence against women, both in the family and at the community level, has been recognized as a national problem. In 1990, the "Basic Federal Act on Violence Against Women" was adopted, which allowed victims to receive compensation.

The Inter-American Convention on human rights for the prevention, punishment and elimination of violence against women entered into force in 1995, in which violence is discussed as "physical, sexual or psychological violence" committed within the family or by a partner, regardless of whether the woman lives with the abuser. Due to the particularly high rate of violence, American countries (**Chile, Argentina, Peru, El Salvador, Guatemala, Costa Rica, Colombia, Honduras, Nicaragua, Bolivia, Mexico**) have adopted special laws which criminalize femicide (Law of Access for Women to a Life Free of Violence).[45]

A special part of the **German** Criminal Code contains a separate department entitled "Criminal offenses committed against civil status, marriage and family", which clearly reveals that these two institutions are objects of criminal protection, although under their law, the offense commited under domestic violence is not separated independently.[46]

Until the end of the 19th century, there were no laws in the **UK** banning domestic violence. Nowadays, although harsh domestic violence against women is still widespread, victims of domestic violence are the best protected in the UK in terms of legality, and not only the abusers are protected with British law protecting but also the outsider who provides information to law enforcement.[47]

6. Generalization of Georgian Court Practice on Hidden Domestic Cruelty

Domestic violence is a sensitive event for all people, because it happens between people who are emotionally connected to each other, so it is difficult to talk about it, which makes it difficult for the victim to find help, and the perpetrator is even more afraid of the syndrome of impunity.[48]

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[44] *Semyonovich D.,* Report on Violence Against Women, Outcomes and Consequences of Violence, Human Rights Council, 2016.

[45] *Kozochkina I.D.* (ed.), Criminal Legislation of Foreign Countries (England, USA, France, Germany, Japan), Collection of Legislative Materials, Moscow, 1998, 97 (in Russian);

[46] *Schramm E.,* Ehe und Familie im Strafrecht, Iena, 2018, 38.

[47] *Kimmel M.,* The Gendered Society, Oxford University, 4th ed., 2011, 123.

[48] *Khatiashvili G.,* Guidelines for Combating Violence Against Women and Children and Domestic Violence, Tbilisi, 2021, 51 (in Georgian).

The regularity and continuity of the cruelty hidden by one member of the family towards the other is well reflected in the case law. Currently, research was done on the case law in the Kvemo Kartli region, where the most common case of hidden cruelty is violence against a wife by her husband.

6.1. Violence against a Wife Committed by her Husband

On January 22, 2020, at approximately 16:00, in one of the villages of Gardabani district, P. S. in his own house, without no reason, hit the right hand to his wife – R.Ts. to her head and overturned the index finger of his left hand, at which time R. Ts. suffered physical pain.[49]

In this case, the court acquitted him. The victim, despite the fact that during the investigation, during the interrogation, explained in detail each fact of escalation of tension on the part of her husband until the last incident, at the court hearing, did not testify against her husband. In my opinion, due to the old stereotypical views that a woman had no right to speak publicly about what happened in the family ("dirty linen was exposed"), the psychological and physical cruelty suffered by her husband over the years remained hidden and unpunished.

By the **judgment 30.11.2020 №1-286-20** of Rustavi City Court, D.B. was acquitted against his wife D.S. of the charges of violence and threats (under the first part of 126$^{th\ 1}$ Article of the Criminal Code of Georgia (in two episodes) and 11$^{th\ 1}$ and 151th of the Criminal Code of Georgia under the second part of Article (d)); D.B. was charged with multiple counts of gender-based violence against his wife, DS, over the years, resulting in the victim suffering physical pain and psychological suffering. During the next physical violence, there was a reasonable fear of being threatened, which is why she turned to law enforcement. During the investigation, during the survey, a detailed description of what she had suffered over the years due to physical and mental injuries inflicted on her by her husband, however, during the substantive hearing of the case, the court did not give testimony against her spouse;

At the investigation stage, interrogation protocol of D.S. failed to form the basis for a conviction. There was no other direct evidence that would unequivocally confirm the reality of the violence and threats committed by D.B. against the addressee of threaten, due to the same hidden nature of the violence that led to the acquittal of D.B.[50]

A study of practice in only one region revealed that there are not so few such cases, when the victim refuses to testify against the abuser in accordance with 49th Article's part 1, clause "d" of the Criminal Procedure Code of Georgia, due to poor representation in the eyes of the affected society, economic dependence on her husband, lack of a home or various other reasons, she continues to live with him.

6.2. Violence Against Men Committed by Women

It is noteworthy that over the years, the victimized nature of cruelty concealed in the family by the husband (unlawful violence, severe abuse or other serious immoral acts against victim, as

[49] Rustavi City Court Judgment 04.02.2021. №1-186-20 (in Georgian).
[50] Judgment of Rustavi City Court 30.11.2020 №1-286-20 (in Georgian).

well as repeated unlawful or immoral behavior of the victim is the result of strong mental trauma) has resulted in the worst consequences for the victim due to strong, sudden spiritual excitement. The following example stands out in this regard.

In the village of T., Marneuli Municipality, T.K., who lives with her three young children, was systematically, verbally and physically abused by her husband R.K., while drinking alcohol, and threatened by killing both her and her children. He committed various acts of sexual violence against T.K. (forcing her to have sexual intercourse with him in a perverted manner, including in the presence of young children);

On the night of December 25-26, 2016, while trying to carry out another similar action, T.K., who was in a state of strong spiritual excitement - a state of physiological affect, intentionally killed her husband by hitting him an ax several times in the face.[51]

In the present case, I believe that it was precisely because of the hidden cruelty perpetrated by the spouse and public fears that the group where the victim lived with the abuser was found to be more harmful.

6.3. Violence against Parents Committed by a Child

According to statistics, the most hidden form of domestic violence is a violence committed by against his or her mother; The non-disclosure of the hidden cruelty, it is clear, is explained by the maternal nature, but such cases could be found in the practice of Kvemo Kartli courts.

An example of hidden cruelty by mother is the criminal case against G.G. G.G. was charged with committing the crimes under 126$^{th\ 1}$Article, Part 1 of the Criminal Code of Georgia and under 11$^{th\ 1}$ and 151th Article, Part 2, Subparagraph “d” of the Criminal Code of Georgia.

G.G. systematically cursed his mother T.G., almost daily, and addressed her with insulting words, for which the latter suffered; During the next fight, she was threatened with death, and due to G.G.'s drunkenness and inadequacy, T.G perceived this fear as real and developed a reasonable fear of being threatened.

Despite the systematic psychological violence and threats commited by G.G. towards T.G., at the substantive hearing, T.G. did not testify against her son in court, which in given case, as in the other examples described above, became the basis for the acquittal.[52]

S.M. verbally abused his mother, V.M., in his own apartment, during a domestic dispute; Offended by a remark from his father, S.M., physically assaulted his father, I.M., as a result of which the latter suffered physical pain.[53]

In this case, despite the fact that S.M. was convicted on the basis of physical violence against parents in the past, at the court hearing, the parents V.M. and I.M. refused to testify against their child in accordance with Article 49, Part 1, Subparagraph "d" of the Criminal Code of Georgia.

[51] Rustavi City Court 05.04.17. Judgment, Case №1-65-17 (in Georgian).
[52] Rustavi City Court judgment 2021, 11.03.2021 № 1-579-20 (in Georgian).
[53] Rustavi City Court judgment 13.01, 2020, Case № 1-499-20 (in Georgian).

6.4. Violence against a Sister Committed by a Brother

T.D. carried out violence against his sister, E.D., punched her in the eye with her right fist, and threatened to kill her by demonstrating a knife. E.D. suffered physical pain, perceived the threat in real and developed a reasonable fear of being suffered.[54]

In this case, despite the fact that the victim herself called the police, during the investigation, during the interrogation, as in the cases described above, she voluntarily explained the details of the incident, did not testify her brother in court and one more abuser remained unpunished due to the acquittal, which detracts the importance of prevention to expose the abuser under these articles.

6.5. Violence against Children Committed by Parents

Also interesting is the hidden side of parental violence against a child: A.L., in his home, by gender discrimination motive, because he was the head of the family and everything only had to be believed to him by the female members of the family, he systematically verbally abused and offensed his child, T. L.. A.L., for failing to comply with his request, pulled T.L. into his hair, during which T.L. suffered physical pain. On the same day, T.L. was struck in the face with an outstretched hand, at which time T.L. suffered physical pain and psychological suffering.

During the court hearing, the adult victim T.L., and the mother of T.L., who witnessed this fact in the family, did not testify against her husband A.L. on the court. In this case, as in the other cases described above, in the absence of other evidences, the court acquitted A.L.[55]

Tendencies of hidden domestic cruelty that in almost every third case of the courts, where the basis for acquittal of abusers become the reason of not testifying them by victims in court, indicate a publicly unacceptable topic in terms of exposing a domestic abuser. Despite the legal framework for combating violence, it is clear from practice studies that a victim who tries to save himself from the abuser becomes the object of public reprimand and, because of his mentality, often wrong advice or fear, still lives with the abuser, sometimes with fatal consequences. It should also be noted that state-funded shelters for victims of violence, as well as rehabilitation and psychological centers for the temporary accommodation of abusers, have not yet been established in the districts, also the issue of social services for the problem of domestic violence has not been resolved, which in my opinion will not create irreparable problems for the victim when exposing a violent family member.

6.6. Regarding the Qualification of Gender-based Violence:

On January 25, 2020, M.I. physically assaulted his wife, E.I., during a dispute over household issues in his apartment, causing the latter suffered physical pain. During the investigation, M.I.-'s actions were qualified under the first part of 126$^{th\ 1}$ Article of the Criminal Code of Georgia, on the grounds of gender intolerance.[56]

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54 Rustavi City Court judgment 25.08.2020, Case №1-34-20 (in Georgian).
55 Rustavi City Court judgment 16.10.2020, Case № 1-961-19 (in Georgian).
56 Rustavi City Court 15.09.2020, Judgment, Case №1-118-20 (in Georgian).

In such case, the qualification of the action as a sign of gender intolerance is very interesting. The court ruled out gender-based violence on the basis of the evidence in the case and indicated that it should be corroborated by solid evidence and not presumptions. According to the victim, the testimony was not even explicit, but there was not even a general reference to demonstrating the predominant role of men in the family on the basis of gender in the case of violence by the accused. Moreover, the testimony of the victim at the court hearing, as well as the protocol of his interrogation during the investigation, confirm that the victim points out the cruelty committed against him by his wife on domestic grounds and generally denies gender-based humiliation, unlawful and unlawful Networking and being considered her property because of her gender. Investigations often use gender-based qualifications unreasonably, which, in my opinion, requires separate study and analysis. It is necessary to understand that the dominant motive in domestic violence by men is not a woman's gender.[57]

I believe that the victim's (injured) refusal to testify against the abuser in court (to hide the cruelty), which is often the result not only of financial and social background, but also of environmental pressure, taking society to a dangerous situation, which will lead the death of justice", as the German scientist Eduard Schramm explains, it[58], which in turn, in my opinion, as mentioned above, requires consideration at the legislative level from a procedural point of view.

7. Conclusion

Hidden cruelty in the family is one of the most serious and common forms and unfortunately has remained a problem for years. The reality is that the most dangerous place for millions of people in any country in the world is often their own family. Hidden violence is a complex phenomenon that is deeply rooted in cultural beliefs and the unequal distribution of power between the sexes. Gender-based violence and cruelty take place in all societies and aim at the social, psychological and economic subordination of one gender (mostly women) to the other gender. The way to solve this problem is to verify (assure) the privileges established in the society and the family, which are benefited today by the dominant members of the family (often men) and the hidden cruelty is usually perceived as a problem in everyday life. In addition to refining the procedural legal framework, I also consider the development of a special program for abusers at the initial stage, from the escalation of tension to a serious incident, as a way to alleviate the problem, also, the establishment of state-funded shelters not only in the capital, but also in the regions, including social services for victims of violence, which will allow a member of the family who is abused to realize his or her will.

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Tornike Khidesheli*

Production Order in Georgian Legislation and its compliance with the Convention on Cybercrime

The letter addresses a topical issue such as Production Order in Georgian legislation and its compliance with the Convention on Cybercrime. The investigative action is considerable for obtaining content or traffic data, including subscriber data, etc. A well-established national legal framework that is in line with International Law is crucial. Thus, the paper aims to consider the compliance of Article 136 of GECPC with the Budapest Convention, to expose any inaccuracies and thoroughly analyze them.

Keywords: *Computer system, computer data, digital evidence, electronic evidence.*

1. Introduction

In the modern world, cybercrime poses a real threat to individuals, businesses, and government agencies.[1] The development of technology has given rise to different forms of crime and has had an impact on traditional crime too. Given the existing reality, it's obvious that digital evidence is everywhere. The world is becoming increasingly interconnected and hard to imagine daily lives without a device. In parallel, the value of digital evidence increases for any criminal investigation[2] whether it is petty crimes, cybercrime, or even organized crime.[3]

Due to the volume, dynamic and volatile nature of electronic evidence the availability of appropriate tools are required. Cybercrime makes clear the need for their existence. Especially, when cybercriminals conduct sophisticated attacks on a computer, resulting in the disclosure of a vast amount of personal data, including usernames, date of birth, addresses, etc.[4] Under such cases, the major challenge is in identifying the perpetrator and assessing the extent and impact of the criminal act. Therefore, immediate and sometimes covert investigations are vital.[5]

Fortunately, through the Convention on Cybercrime, the Council of Europe is successfully tackling the challenges[6] and offering a range of procedural powers including Production Order. It promotes the state to ensure its positive obligation to protect individuals from crime and conduct the investigation with respect to human rights and fundamental freedoms.

Respectively, Convention covers substantive and procedural criminal law as well conditions and safeguards. The state must take these requirements into account while implementing the special procedural power in national legislation. Whereas article 136 of GECPC, the so-called "Request for document or information" is corresponding to article 18 of the Convention and at the same time it's an effective domestic measure for obtaining stored electronic data, its compliance with international

* Phd Student, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 *Schwerha J.J,* Law Enforcement Challenges in Transborder Acquisition of Electronic Evidence from "Cloud Computing Providers" France, 2010, 4.

2 *Kerr S.O.,* Searches and Seizures in Digital World, Harvard Law Review, Vol. 119, USA, 2006, 1.

3 *Arnes A. (ed.),* Forensic Science, Digital Forensics, Norway, 2018, 1.

4 *Flaglien O. A.,* The Digital Forensics Process, Digital Forensics, *Arnes A. (eds.),* Norway, 2018, 13.

5 Explanatory Report to the Convention on Cybercrime, European Treaty Series – No.185, 23/11/2001, 21.

6 *Schwerha J.J,* Law Enforcement Challenges in Transborder Acquisition of Electronic Evidence from "Cloud Computing Providers" France, 2010, 4.

law is meaningful. That's why this article will focus on the requirements of the Convention on Cybercrime itself and as well as on the compliance of article 136 of GECPC with them.

2. Conditions of Convention on Cybercrime

2.1. Implementing the Procedural Power

The purpose of Production Order is to empower law enforcement agencies to collect any type of computer data, including subscriber data. Looking from the perspective of Article 15, this is an alternative investigative power among coercive measures that provide a less intrusive means of obtaining digital evidence relevant to criminal investigations.[7] In particular, when data holders are prepared to cooperate with law enforcement agencies and they need to operate based on clear legal duties and within the foreseeable legal framework.[8] Therefore, several requirements should be taken into account before implementing a "Production Order" in national legislation. In particular: **1. Whether "Production Order" is implemented as standalone procedural power; 2. Whether national law is precise and foreseeable; 3. Whether national law contains safeguards against the arbitrary application**.[9]

Besides, the production of privileged data may be excluded. For example, privileged communication between lawyers and clients, etc.[10] And, judicial or other independent supervision is appropriate for the exercise of power, but this should be decided individually for each type of data.

2.2. Scope of Procedural Provisions

The scope of investigative methods, including the production order, is specified in article 14 of the Cybercrime Convention. The powers can be applied a) to criminal offences established under the Convention itself; b) to criminal offences committed by the means of a computer system, and c) to the collection of evidence in electronic form of any criminal offence. [11] Such a broad definition of the scope is an attempt to ensure the competent authorities with an equivalent capability for obtaining digital evidence as exists under traditional powers and procedures. Herewith, it is proof that electronic data can be used as evidence before a court in criminal proceedings, irrespective of the nature of the offence is prosecuted.[12]

Despite the general and wide interpretation of scope, the Convention still limits it. For example, interception of content data should be limited to a range of "serious offences". This is conditioned by its covert nature and high intrusiveness into privacy. Regarding the definition of

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7 Explanatory Report to the Convention on Cybercrime, European Treaty Series – No.185, 23/11/2001, 29.

8 Ibid.

9 Conditions and Safeguards under Article 15 of the Convention on Cybercrime in the Eastern Partnership, Council of Europe, 2018, 9, <https://rm.coe.int/conditions-and-safeguards-under-article-15-of-the-convention-on-cyberc/16808f1e39> [08.03.22].

10 Explanatory Report to the Convention on Cybercrime, European Treaty Series – No.185, 23/11/2001, 30.

11 General Report on mapping the current strengths, weaknesses, opportunities and risks of public/private cooperation on cybercrime in the Eastern Partnership, Council of Europe, Cybercrime EAP, 2017, 7, <https://rm.coe.int/general-report-on-mapping-the-current-strengths-weaknesses-opportuniti/16808f1e1b> [08.03.2022].

12 Explanatory Report to the Convention on Cybercrime, European Treaty Series – No.185, 23/11/2001, 22.

"serious crime" the Convention maintains a neutral position and the states are eligible to determine it as it is defined in their domestic law.[13] However, this does not preclude the possibility of states to determine the list of crimes and the scope of measure on their own.

The requirement to limit the scope of interception of content data is imperative, but not in the case of traffic data. Signatory states are independent in imposing restrictions with an interception of traffic data. We may not obtain the content of the communication during the collection of traffic data and it may not be equivalent in terms of privacy and degree of intrusiveness, but it can help trace the source and destination of communication, thus identifying the person. So the state has the discretion whether limit the scope of the real-time collection of traffic data or not. However, when restricting, an imperative requirement should be considered that the range of offences will not be more restricted than to offences to which "real-time collection of content data" applies.[14]

To sum up, litra "a" of article 14(2) specifies a list of criminal offences, but litra "b" and "c" are more broadly construed that the investigative measures can be applied to every criminal offence.[15] The only imperative request to limit the scope of procedural powers with the range of serious offences is in case of real-time collection of content data, but not with an interception of traffic data or production order. Besides, according to the explanatory report to the Convention on Cybercrime, to facilitate tracing the source or destination of electronic communication, limiting the scope collection of traffic data is not recommended.[16] Except for the interception of content data, a broad definition of the scope of procedural provisions is appropriate. The existence of an offence has limited deterrent effects if there is no means to identify the actual offender and bring him to justice.[17] Herewith, the convention does not limit the investigation methods to any phases, as long as the probable cause is fulfilled.[18]

2.3. Conditions and Safeguards

Production Order, an adapted traditional "search and seizure" to the new technological environment, expedited preservation of stored computer data, real-time collection of content and traffic data, each of them is coercive investigation methods. So the coercive measures often interfere with the right to private life, liberty, freedom of expression, property rights, and can be applied without the consent of the person who is subject to it.[19] Therefore, article 15 of the Convention stipulates the obligation to protect fundamental human rights while making use of the investigation methods. To ensure adequate protection of human rights, it is essential: a) to respect for obligations undertaken under international human rights instruments; b) reliance on grounds justifying application; c) adherence to the principle of proportionality; d) limitation of the duration

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13 Explanatory Report to the Convention on Cybercrime, European Treaty Series – No.185, 23/11/2001, 22.
14 Ibid., 23.
15 *Sunde M. I.,* Cybercrime Law, Digital Forensics, *Arnes A. (ed.)*, Norway, 2018, 100.
16 Explanatory Report to the Convention on Cybercrime, European Treaty Series – No.185, 23/11/2001, 22-23.
17 K. U. v. Finland, [2009], ECHR, №2872/02. §46.
18 *Sunde M. I.,* Cybercrime Law, Digital Forensics, *Arnes A. (eds.)*, Norway, 2018, 100.
19 Ibid., 61.

and scope of the powers; e) judicial or other independent supervision;[20] f) considerations relating to third parties.[21] Let's consider each of them:

a)Respect for obligations undertaken under international human rights instruments – It is hard to imagine a human rights system being strengthened without proper respect for international treaties. As a rule, they had a great impact on national legislation and case law. In the case of Georgia, such are the European Convention on Human Rights 1950 and ECHR judgements. Accordingly, the Convention calls on the signatory parties to comply with their obligations under international instruments. Particularly, rights to liberty and security (article 5), fair trial right (article 6), the principle of no punishment without law ((nulla poena sine lege) (article 7), and the right to privacy (article 8).[22]

b) Reliance on grounds justifying application - As we mentioned above, the application of any of the procedural methods available under the Cybercrime Convention represents, to one degree or another, interference into the private life of persons. Therefore, the use of such powers should be sufficiently justified by applicable facts and based on some external findings. Moreover, such grounds must be presented and available before the actual exercise of procedural powers.[23] To some extent, it precludes an arbitrary interference into the right and misuse of state resources.[24] Herewith, "ongoing investigation" is another precondition for the application of an investigative measure.

c)The principle of proportionality – if we look at the sequence of investigative measures we will see that they are arranged in a certain order. And the criterion is the intensity of intrusiveness of human rights. The procedural provisions begin with "expedited preservation of computer data, which is a less intrusive investigative measure and ends with very intrusive means such as a real-time collection of content data. We may say, that this is a kind of indicator to protect the principle of proportionality. If it is possible to achieve the goal with the application of less intrusive procedural powers, using the "heavier" options are not allowed. The choice of procedural powers should be proportional to the nature of the offence and the circumstances of the case.[25] Herewith, article 21(1) indicates to proportionality that the interception of content data should be used only for investigation and prosecution of a limited number of criminal offences. [26]

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[20] General Report on mapping the current strengths, weaknesses, opportunities and risks of public/private cooperation on cybercrime in the Eastern Partnership, Council of Europe, Cybercrime EAP, 2017, 7, <https://rm.coe.int/general-report-on-mapping-the-current-strengths-weaknesses-opportuniti/16808f1e1b> [08.03.2022].

[21] Convention on Cybercrime, Budapest, 23.11.2001, Article 15(3).

[22] *Dragicevic D., Juric M.,* Article-15 – Safeguards in the Eastern Partnership region, Council of Europe, 2013, 11.

[23] General Report on mapping the current strengths, weaknesses, opportunities and risks of public/private cooperation on cybercrime in the Eastern Partnership, Council of Europe, Cybercrime EAP, 2017, 8, <https://rm.coe.int/general-report-on-mapping-the-current-strengths-weaknesses-opportuniti/16808f1e1b> [08.03.2022].

[24] *Sunde M. I.,* Cybercrime Law, Digital Forensics, *Arnes A. (eds.)*, Norway, 2018, 99.

[25] General Report on mapping the current strengths, weaknesses, opportunities and risks of public/private cooperation on cybercrime in the Eastern Partnership, Council of Europe, Cybercrime EAP, 2017, 13, <https://rm.coe.int/general-report-on-mapping-the-current-strengths-weaknesses-opportuniti/16808f1e1b> [08.03.2022].

[26] *Dragicevic D., Juric M.,* Article-15 – Safeguards in the Eastern Partnership region, Council of Europe, 2013, 11.

d) Limitation of the duration and scope of the powers – this safeguard has a big impact on in case of interception of content data. Except for the fact that the scope of the real-time collection of content data (imperative) and traffic data should be limited with "serious crimes", the limitation of the duration of their application is essential too. But after the expiration of the warrant, it can be reviewed and prolonged.[27]

e) Judicial or other independent supervision[28] **–** one of the major safeguards against violations of a right to privacy and a fair trial. When discussing supervision, we assume an individual must be functionally independent and not formally from parties to the criminal proceedings. Except for the judge, such may be the data protection authorities, parliamentary or ad hoc commissions, etc.[29]

f) Considerations relating to third parties – According to article 15(3) of the Convention, in the interests of the administration of justice states must consider the impact of the powers and procedures upon the rights and legitimate interests of third parties. The individuals who are not related to the crime, but may be affected by the investigation. It is noteworthy that the Convention only requests the parties to be aware of it, without prescribing a concrete solution.[30] The legal interests of third parties are practical. For example, in January 2012, the website www.megaupload.com was seized and shut down by the US Department of Justice, charged with criminal copyright infringement and racketeering. The web had more than 66 million users, whose accounts thus became inaccessible.[31] Even though the investigation was directed against only some people, still, millions of users were affected by the measure.

Production order serves to strengthen the legitimate interests of third parties. Except for the fact that it is a less intrusive means of obtaining relevant information to the criminal investigation, the implementation of such measure will be beneficial to third parties, especially for ISP. It provides them with a legal basis to assist law enforcement agencies and as a result excludes their possibility to provide competent authorities with personal data voluntarily.[32] Especially when, the subscriber data and content of communication are confidential.[33]

To summarize, the above-mentioned conditions and safeguards are a non-exhaustive list for the complete protection of human rights and fundamental freedoms. However, they are basic prerequisites for implementing the procedural provisions into the national legislation. In addition, the protection of other safeguards is crucial. For instance, the presumption of innocence, right to liberty and security of a person, right to a fair trial, freedom of expression, double jeopardy clause,

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27 General Report on mapping the current strengths, weaknesses, opportunities and risks of public/private cooperation on cybercrime in the Eastern Partnership, Council of Europe, Cybercrime EAP, 2017, 8, <https://rm.coe.int/general-report-on-mapping-the-current-strengths-weaknesses-opportuniti/16808f1e1b> [08.03.2022].

28 *Sunde M. I.,* Cybercrime Law, Digital Forensics, *Arnes A. (eds.)*, Norway, 2018, 101.

29 General Report on mapping the current strengths, weaknesses, opportunities and risks of public/private cooperation on cybercrime in the Eastern Partnership, Council of Europe, Cybercrime EAP, 2017, 8, <https://rm.coe.int/general-report-on-mapping-the-current-strengths-weaknesses-opportuniti/16808f1e1b> [08.03.2022].

30 *Sunde M. I.,* Cybercrime Law, Digital Forensics, *Arnes A. (eds.)*, Norway, 2018, 102.

31 United States of America v. Kim Dotcom, (2012*),* US, №1:12CR3.

32 Explanatory Report to the Convention on Cybercrime, European Treaty Series – No.185, 23/11/2001, 29.

33 Law of Georgia on Electronic Communications, LHG, 02/06/2005, 8(2).

etc.[34] Maintaining a balance between the application of powers and respect for the rights of individuals is decisive for the admissibility of evidence before the court.[35]

3. Obtaining Computer Data in Georgian Criminal Procedure

According to the Criminal Procedure Code of Georgia, production order, an investigative measure provided for in article 18 of the Convention on Cybercrime, is known as the "request for a document or information".[36] Of course, the words "information and document" in the provision cover not every type of data, but only digital.

Under the first paragraph of 136 of the GECPC, "if there is a probable cause that the information or document important for the criminal case is stored in a computer system or on a computer data carrier, the prosecutor (a defence lawyer)[37] is authorized to file a motion with a court having jurisdiction over the investigative place, to issue an order requesting relevant information or document". The first part of this article deals with the production order for computer data in general. Herewith, it does not differentiate the types of data, which means the scope of the article is wide too. Therefore, the prosecutor and the defence attorney are eligible to order an individual in its territory to submit specified computer data stored in a computer system or data carrier that is in that person's possession or under the control.[38]

Regarding article 136(2), the computer data belongs to the service provider[39] and for a prosecutor to file a motion with a court, there must be probable cause that a person committed a crime through a computer system. As it seems, the second paragraph of the article is more specific and its scope limited. Particularly, the only authorized person to obtain subscriber data[40] is the prosecutor, but if he does not prove before the court that an individual uses a computer to commit a crime, he is not eligible to file a motion with a court for obtaining data.

The fourth paragraph of article 136 is critical. It specifies that the request for a document or information is subject to the same procedures that apply to covert investigative actions. First and foremost, it implies the limitation of its scope. To carry out the covert investigative actions an investigation should be initiated or criminal prosecution conducted due to an intentionally serious and/or particularly serious offence or to any of the offences defined in some articles of the

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34 General Report on mapping the current strengths, weaknesses, opportunities and risks of public/private cooperation on cybercrime in the Eastern Partnership, Council of Europe, Cybercrime EAP, 2017, 8, <https://rm.coe.int/general-report-on-mapping-the-current-strengths-weaknesses-opportuniti/16808f1e1b> [08.03.2022].

35 Ibid.

36 Criminal Procedure Code of Georgia, LHG, 09/10/2009.

37 The decision of the Constitutional Court of Georgia of January 27, 2017, on the case of Nadia Khurtsidze and Dimitri Lomidze v. Parliament of Georgia, №1/1/650,699 (in Georgian).

38 Explanatory report to the Convention on Cybercrime, European Treaty Series – No.185, 23/11/2001, 29.

39 The term "service provider" encompasses a broad category of persons. It covers public and private entities which provide users the ability to communicate with one another. Also, the entities, who store or otherwise process data on behalf of the persons. It is not relevant whether the service is public or not, whether free of charge or for a fee. The term also includes closed communication systems.

40 Subscriber data - means any information, other than traffic or content data, by which can be established the type of communication service used, the technical provisions related thereto, and the period of time during which the person subscribed to the service, the identity of a user, mail or residential address, phone numbers, information on accounts and taxes, the location of the installed communications equipment, which is available based on a service contract or agreement.

Criminal Code of Georgia.[41] It is a different issue whether the production order is a covert investtigative action or not and if it has any sudden effect for the person,[42] but this notion of legislation is not in line with either the Convention on Cybercrime or international experience.[43]

To sum up, a production order has two dimensions. The first paragraph of article 136 enables both parties to compel a person in its territory to provide specified stored computer data, whereas the second paragraph of the article, enables the prosecutor to compel the service provider to submit subscriber data. Except for the fact that ongoing investigation and prosecution are essential conditions to use the investigative power, for obtaining subscriber data, the prosecutor must prove before the court that an individual uses a computer for committing a crime, otherwise he is not eligible to file a motion with a court for obtaining data.

Accordingly, it further limits the scope of article 136 of GECPC. So later we discuss the compliance issue of Georgian legislation to the Convention on Cybercrime based on its conditions and safeguards.

4. Compliance of Article 136 of GECPC with the Requirements of the Convention

We have discussed on requirements of the Convention and the legislation of Georgian criminal procedure. So now it is important to summarize some major issues. Primarily, if article 136 of GECPC is in-line with the Convention on Cybercrime, in particular with the scope of investigative measures and the conditions and safeguards necessary for the protection of fundamental human rights and freedoms. Article 14(2) of the Convention is formulated in such a way that the procedural powers, including production order, can be applied in the investigation of any crime. The only imperative request to limit the scope of procedural powers with the range of serious offences is in the case of real-time collection of content data, which presents the covert investigative action and highly interferes with the right to privacy. And regarding the production order which creates a legal basis for cooperation between LEA and individuals or service providers and represents an alternative and viable measure to lengthy or even disruptive search and seizure, limiting its scope with the range of offences is unjustified.

According to the above-mentioned limiting the scope of article 136 of GECPC is not only inconsistent with the requirements of the Convention, but also differs from the legislation of other states.[44] The scope of the provision is further limited by the reservation of an article of 136(2) "which can be applied only to crimes committed through a computer system". That's why, the Eastern Partnership recommended Georgia broaden the scope of article 136(2) to enable the collection of electronic evidence, including Subscriber data of any crime.[45] However, no relevant changes have been made in the legislation so far.

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41 Criminal Procedure Code of Georgia, LHG, 143^3 (2a), 09/10/2009.

42 The Decision of the Investigative Collegium of the Tbilisi Court of Appeals of May 6, 2020, №1g/633-20, 3 (in Georgian).

43 Rules on Obtaining Subscriber Information, Adopted by T-CY at its 12th Plenary, 2014, France, 16-18, <https://rm.coe.int/16802e7ad1> [08.03.22].

44 *Marion L., Degani M.,* Making the Most of Your Statutory Electronic Evidence Toolbox, *Donovan J. (eds.),* Cyber Misbehavior, USA, 2016, 58-60. Criminal Procedure Code of Austria, 30.12.1975, Art. 76a, 90(7); Telecommunications Act 2003, 19.08.2003, Art. 92(3); German Code of Criminal Procedure, 07/04/1987, Art. 100j; Telecommunications Act (TKG), 06/22/2004, Art. 113(3).

45 *Dragicevic D., Juric M.,* Article 15 – Safeguards in the Eastern Partnership Region Prepared under the Cybercrime EAP, 2013, 44.

Also, it is important if national legislation, including article 136 of GECPC provides essential safeguards to protect individuals against arbitrary interference into the right and is consistent with the requirements of the Convention on Cybercrime. Under the national legislation, such safeguards are meeting formal and substantive prerequisites for obtaining stored computer data.[46] In particular, ongoing investigation of a criminal case, to file a motion under the probable cause,[47] Ex ante and Ex post (in case of the prosecutor) judicial supervision,[48] and the supervision of Personal Data Protection Service.[49] All of the above mentioned provide a solid guarantee for the proper protection of human rights.

Based on examining different issues, it became clear that in terms of protection of human rights, article 136 of GECPC is absolutely in compliance with the imperatives of international law. We find inconsistency in the scope of its operation, which evokes a significant barrier in practice.[50] Particularly with subscriber information, which plays a decisive role in crime detection worldwide, and should be subject to a wider scope than the interception of traffic and content data.[51] At the same time, it will be expedient to differentiate the types of data[52] for Article 136 and apply a distinct legal regime to them and determine the authorized persons for each of them. Moreover, the motions should be considered by the court by the procedure established by Article 112 of the present Code.

5. Conclusion

In the modern age, it is hard to imagine a crime that does not have a digital dimension.[53] Criminals often use technology and computer systems to commit crimes, communicate, launder money, attack criminal infrastructure, etc.[54] Traditional crime has also moved into the online. Illegal products are traded on the online black market. Sexual offences happen in front of a camera and then spread on the internet.[55]

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46 The Decision of the Investigative Collegium of the Tbilisi Court of Appeals of May 6, 2020, №1g/633-20, 3 (in Georgian).

47 *Dragicevic D., Juric M.,* Article 15 – Safeguards in the Eastern Partnership Region Prepared under the Cybercrime EAP, Council of Europe, 2013, 38.

48 Conditions and Safeguards under Article 15 of the Convention on Cybercrime in the Eastern Partnership, Council of Europe, 2018, 44 <https://rm.coe.int/conditions-and-safeguards-under-article-15-of-the-convention-on-cyberc/16808f1e39> [08.03.22].

49 By the Decision of the Parliament of Georgia, the State Inspector's Service has been abolished from March 1, 2022. Instead, two agencies – The Special Investigation Service and The Personal Data Protection Service will be available.

50 The Decision of the Investigative Collegium of the Tbilisi Court of Appeals of October 20, 2016, №1g/1614-16, 9 (in Georgian). See also, The decision of the Investigative collegium of the Tbilisi Court of Appeals of December 25, 2019, №1g/2110-19, 4-5 (in Georgian); The Decision of the Investigative Collegium of the Tbilisi Court of Appeals of December 26, 2019, №1g/2133-19 (in Georgian).

51 Cybercrime Strategies, Procedural Powers and Specialized institutions in the Eastern Partnership Region – State of Play, Council of Europe, Bucharest, 2017, 18.

52 Electronically stored data can be: stored content data, traffic data, subscriber data, privileged data and etc.

53 *Casey E*., Foundations of Digital Forensics, Digital Evidence and Computer Crime, 3rd ed., USA, 2011, 3.

54 Ibid., 3-4.

55 The Internet Organised Crime Threat Assessment (IOCTA), Europol, 2015, 29. <https://www.europol.europa.eu/iocta/2015/resources/iocta-2015.pdf> [08.03.2022].

There is a positive aspect to the increasing use of technology by criminals, the involvement of computers in crime has resulted in an abundance of digital evidence that can be used to apprehend and prosecute offenders.[56] And since the main activity performed in the investigation is the collection of evidence to identify the suspect,[57] without effective, adapted, and developed procedural powers is impossible. So such kind of procedural measure for obtaining electronically stored data on a computer system, data storage medium, or cloud storage, is "Production Order", provided in Article 136 of GECPC. Therefore, to ensure its effectiveness, it is vital to bring the legal framework in line with International Law. An analysis of provisions of the Convention, domestic legislation, and their comparative analysis showed us that adequate protection of human rights is ensured while using the Production Order. Article 18 of the Convention is adequately implemented in national law. For example, it is implemented as a standalone procedural power, the national is law is precise and foreseeable and it contains safeguards against the arbitrary application.

However, the only requirement which Article 136 of GECPC does not meet is its scope, whereas Article 14(2) of the Convention is formulated in such a way that electronically stored data can be obtained in the investigation of any crime. And, under national law, its scope is limited by the range of offences.[58] Access to Subscriber Data is also limited, whereas, under the Convention for obtaining such data, a person doesn't need to commit a crime using a computer system.

According to the above-mentioned, to provide full compliance with the Convention on Cybercrime, it is essential to amend the law. In particular, to abolish procedures of covert investigative actions. And the court should consider the motion by the procedure established by Article 112 of GECPC. It will automatically expand its scope and electronically stored data will be available in the investigation of any crime. Moreover, the content of Article 136(2) should be broadened too and Subscriber Data must become available despite the fact a person commits the crime through a computer system or not. Except for the compliance with the requirements of International Law, it will improve the sound administration of Justice too.

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[57] *Sunde M. I.,* Cybercrime Law, Digital Forensics, *Arnes A. (ed.)*, Norway, 2018, 95.

[58] Criminal Procedure Code of Georgia, LHG, 143^3 (2a), 09/10/2009.

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