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For the Legal Nature of Liming

The term "gaghma-gamoghma dakirva" (Liming one by one) is stated as a form of punishment in Catholicos Law article 22. Despite the various opinions on this form of punishment, the final picture has not been reconstructed. Reviewed sources allow us to conclude that administering the liming was similar to the stoning and meant stoning using stones, grit, and lime (limestone). Furthermore, the liming of criminals was not permitted together and had to be administered separately.

Keywords: *Catholicos Law, Death penalty, Stoning, Liming.*

Legal Nature of "Dakirva" (Liming)

The introduction and better exploration of each less-studied issue in the history of Georgian law is one of the significant and relevant current topics.

The purpose of this article is to explore the concept of the punishment "dakirva" in the history of Georgian law. This form of punishment only appears in one source of written law, Catholicos Law Article 22. Although the opinions on the subject somewhat coincide with each other, it still does not provide a complete picture. Within this work, existing opinions will be reconciled in order to better restore the full concept of liming.

The full content of Catholicos Law article 22 is formulated as follows:

"Whoever among noble men or peasants marries his sister-in-law will be cursed by God, All Saints, Seven Assemblies, and Holy Apostles. Both a man and a woman should be limed one by one and the performers should be blessed by us."[1]

The content of the article confirms that regardless of the rank (noble or peasant) one who marries a sister-in-law is cursed by God, All Saints, the Seven Assemblies[2,] and Holy Apostles. In the Christian world, marrying a sister-in-law[3] was considered the greatest sin[4] called misalliance. Misalliance is observed in the introduction of the selection as one of the crimes that led to the creation of the Catholicos Law.[5]

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1 The annals of Georgian Law, Vol. 1, The Collection of Law Books by Vakhtang VI, texts were published, research and dictionary were adhered by Prof. *I. Dolidze,* Tbilisi, 1963, 397 (in Georgian).

2 It means the Seven Ecumenical Councils (in Georgian).

3 Levirate – marriage to a deceased brother's wife – was a common bond among a number of peoples. It is mentioned in the Bible. see Bible, Deuteronomy, chapter 25, 5-6; see Encyclopedic dictionary, *Brockhaus F.A., I. A. Effron I.A. (Publishers),* St. Petersburg, 1896, vol. XVII (33), 436 (in Russian).

4 There is a second degree of kinship between the deceased brother's widow and brother-in-law, which precluded marriage between them (in Georgian).

5 See *Javakhishvili Iv.,* Works in Twelve Volumes, Volume VI, Chapter, 1982, 65 (in Georgian).

Isidore Dolidze believes that the Catholicos Law would gradually spread around Georgia, because the crimes (including misalliance) were also rampant in Eastern Georgia, and the punishments imposed for these crimes were used throughout the country.[6]

Illegitimate marriage (violation of kinship, a condition to prohibit marriage) and generally forbidden sexual intercourse were considered the most serious crimes. Georgian customary law provides clear ideas about it.[7] G. Davitashvili also discusses the issue of responsibility for violating the principle of affinal kinship and draws an analogy with Article 22 of the Catholicos Law.[8]

Therefore, according to Christian legislation and customary law, marrying a sister-in-law was considered the most serious crime in Georgia. The fact that the death penalty could have been used as a punishment also indicates the gravity of the crime.

Isidore Dolidze has interpreted the term "dakirva" as "putting in limestone".[9] Variations of the Russian translation of this term are also interesting. Dimitri Bakradze translates "Dakirva" as "да залюъ... известкою"(let me fill with lime)[10] which means pouring liquid lime. The mentioned term is explained in the same way in the translation of Marina Garishvili: "Пусть и мужчина и женщина будут залиты известью".[11] Thus, the term "Dakirva" is understood as a death penalty by pouring of the liquid lime.

Georgian scientists always assumed that "Dakirva" meant the death penalty. There have been various opinions expressed regarding this subject. Ivane Javakhishvili writes: "In the above-mentioned article, the punishment is very severe ("dakirva"), but we are talking about marrying a sister-in-law, which was considered equal to sexual deviation, and according to Georgian customs, it was harshly punished by stoning."[12] Aleksandre Vacheishvili also suggests that the death penalty "in a special way "dakirva" was prescribed if someone married his sister-in-law".[13] In relation to the same issue, Giorgi Nadareishvili notes: "The legislative sources of the 16th-century mention "dakirva" as a type of death penalty".[14]

Other legal sources do not provide information about this type of punishment but it is known that the death penalty was used for misalliance by Georgian customary law. The existence of such severe punishment is also explained by Iv. Javakhishvili: in particular, he believes that the death

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6 The annals of Georgian Law, Vol. 1, The Collection of Law Books by Vakhtang VI, texts were published, research and dictionary were adhered by Prof. *I. Dolidze,* Tbilisi, 1963, 607 (in Georgian).

7 See *Davitashvili G.,* Types of Crimes in Georgian Customary Law, Tbilisi, 2017, 547-557.

8 Ibid, 557.

9 The annals of Georgian Law, Vol. 1, The Collection of Law Books by Vakhtang VI, texts were published, research and dictionary were adhered by Prof. *I. Dolidze,* Tbilisi, 1963, 758 (in Georgian).

10 *Bakradze D. Z. (ed.),* Collection of laws of Georgian king Vakhtang VI, editor, Tbilisi, 1887, 133 (in Russian).

11 *Davitashvili G. (ed.), Garishvili M. (trans.),* Law of Catholicos, This translation was made within the framework of the university grant in 2017. The mentioned translation was not published and was provided in the form of a manuscript (electronic version) by *M. Garishvili.*

12 See *Javakhishvili Iv.,* Works in Twelve Volumes, Vol. VI, Chapter, Tbilisi, 1982, 65 (in Georgian).

13 *Vacheishvili Al.,* Essays from the History of Georgian Law, Vol. I, Tbilisi, 1946, 109 (in Georgian).

14 Nadareishvili G., Private and Public Punishments in Feudal Georgia, „Almanac of Young Lawyers of Georgia," No. 14, October 2000, 122 (in Georgian).

penalty for marrying a sister-in-law should be the influence of "folkways, mores and entitlement mindset".[15]

Thus, it is impossible to elucidate the issue presented in this paper without considering the information highlighted by Georgian customary law. Speaking about Illegitimate marriage, Giorgi Davitashvili notes that one of the forms of punishment was the death penalty, in the form of stoning.[16] In another work, he also confirms that the death penalty was used "for crimes committed for moral purposes[17] (for example, illegal sexual crimes, illegal marriages)." He writes: "According to the Catholicos law article 22, stoning ("dakirva") is provided for marrying a sister-in-law."[18] As stated by the Georgian customary law, "stoning" is also expressed by the terms "piercing", "chakirva" and "amokirva".[19] Moreover, the terms "stoning", "chakirva" and "amokirva" meant ignominious punishments executed by throwing stones, without death result.[20]

Therefore, "dakirva" as a punishment was enforced similarly to the stoning and it meant stoning using stones, grit, and lime (limestone). In the absence of proper sources, we can only assume the specific form of the lime application.

In order to create a complete idea of "dakirva" as a punishment, it is also necessary to correctly understand the term "gaghma-gamoghma". From this point of view, it is interesting what place was chosen for the execution of the stoning. Giorgi Davitashvili notes that "according to the scientific literature and ethnographic annals, such places are: crossroads ("gzata shesakari", " 'otkhi gzis shua"), a center of a village and a bridge cove."[21] Choosing such places had an essential preventive principle because everyone could see the stoned person and refrain from committing a crime out of fear.[22] However, this still does not make it possible to clarify what "gaghma-gamoghma" meant. According to customary law, "when stoning occurred because of sexual intercourse, the guilty man and woman might be stoned "gaghma-gamoghma" (on two sides of the road).[23] The example allows us to conclude that the term "gaghma-gamoghma" meant stoning a man and a woman separately. According to the Christian tradition, a husband and a wife are buried together, if it is possible. Having been punished for illegal marriage, stoned people were not buried and they were left at the place of stoning."[24] So, the place of stoning was also their graves.

overall it can be concluded that the crime specified in the Catholicos Law Article 22 – marrying a sister-in-law – was the most serious crime against morality in Georgia for which the death penalty was imposed. Execution of the punishment was carried out with stoning and involved stoning with

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15 See *Javakhishvili Iv.,* Works in Twelve Volumes, Volume VI, Chapter, Tbilisi, 1982, 65 (in Georgian).
16 See *Davitashvili G.,* Types of crimes in Georgian Customary Law, Tbilisi, 2017, 547-557 (in Georgian)
17 See, Ibid, 187 (in Georgian).
18 Ibid, 191.
19 Ibid.
20 Ibid, 338-339.
21 Ibid, 196.
22 Ibid.
23 *Davitashvili G.,* Crime and Punishment in Georgian Customary Law, Tbilisi, 2022, 197. See Citation: Zoidze O., Materials on customary law of Adjara, ethnographic notebook, 1991, 37-38 (in Georgian).
24 *Davitashvili G.,* Crime and Punishment in Georgian Customary Law, Tbilisi, 2022, 197 (in Georgian).

stones, grit, and lime (limestone). In addition, the perpetrators must not have been executed together – but separately.

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4. *Davitashvili G.,* Types of Crimes in Georgian Customary Law, Tbilisi, 2017, 547-557, 557 (in Georgian).
5. *Davitashvili G.,* Crime and Punishment in Georgian Customary Law, Tbilisi, 2022, p. 187, 191, 196, 197, 338-339 (in Georgian).
6. *Vacheishvili Al.,* Essays from the History of Georgian Law, Vol. I, Vol., Tbilisi, 1946, 109 (in Georgian).
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9. *Nadareishvili G.,* Private and public punishments in Feudal Georgia, Almanac of young lawyers of Georgia, No. 14, October 2000, 122 (in Georgian).
10. Monuments of Georgian Law, Vol. 1, The collection of law books of Vakhtang VI, texts were published, research and dictionary were attached by Prof. *I. Dolidze,* Tbilisi, 1963, p. 397, 607, 758 (in Georgian)
11. *Javakhishvili Iv.,* Works in Twelve Volumes, Volume VI, Chapter, 1982, 65 (in Georgian).

Lado Chanturia*

Right to an Effective Remedy in the European Convention on Human Rights

The article is dedicated to the right to an effective remedy in the European Convention on Human Rights (the Convention) which guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Article 13 of the Convention obliges the States to protect human rights within their legal system. The States' primary obligation deriving from Article 13 is to guarantee the availability of an effective remedy at the domestic level which must be "effective" in practice as well as in law. Moreover, the States have an obligation to demonstrate convincingly the existence of an effective remedy in the practice. At the same time, that provision obliges individuals to exhaust all effective remedies before they lodge their applications with the European Court of Human Rights (the Court). However, they are only obliged to exhaust the remedies that are effective and capable of redressing the alleged violation, accessible and offering reasonable prospects of success. Additionally, this provision creates a basis for the Court to examine the existence and effectiveness of the domestic remedies.

The article analyses the Court's case-law concerning the interplay of the parties' obligations corresponding to the right an effective remedy from the perspective the subsidiarity of the Convention system: the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is placed on the national authorities.

Keywords: *The European Convention on Human Rights. Right to an effective remedy in. The European Court of Human Rights. The procedural safeguards of the Convention. Exhaustion of all effective remedies. An arguable claim. Lex generalis and lex specialis.*

1. Introduction

Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order.[1] The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant

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1 Concerning the history of drafting of Article 13 and comparative analyses in respect of other international documents see *Schabas W.S.*, The European Convention on Human Rights. A Commentary. Oxford University Press, 2017, 546-550.

appropriate relief.[2] Together with Article 5 (2) to (4) and Article 6, that provision is considered part of **the procedural safeguards of the Convention**.[3]

In the case of *Kudła v. Poland*, which marks the renaissance of the autonomous importance and the 'upgrading' of Article 13,[4] the Court recognized the need "to examine the applicant's complaint under Article 13 taken separately, notwithstanding its earlier finding of a violation of Article 6 (1) for failure to try him within a reasonable time".[5] As rightly mentioned, that decision to reverse the jurisprudence of the Court's predecessor and recognise this new duty upon the states, is a fascinating example of a positive obligation being developed, in part, because of the practical needs of the Strasbourg Court.[6]

Article 13 occupies a particular place in the Convention system. On the one hand, it gives "**direct expression to the States' obligation** to protect human rights first and foremost within their legal system"[7] in conjunction with Article 1 of the Convention, and on the other hand, it **obliges individuals to exhaust all effective remedies** before they lodge their applications with the Court, in conjunction with Article 35 (1). Additionally, this provision creates a basis for the Court to examine the existence and effectiveness of the domestic remedies.

The interplay of those obligations corresponding to the right to an effective remedy under Article 13 reflects the subsidiary character of the Convention system: the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is placed on the national authorities.[8]

2. System and Content of Rights and Obligations Enshrined in Article 13

2.1. States' Obligations

A. Obligation to put in place an effective remedy

The States' primary obligation deriving from Article 13 is to guarantee the availability of **an effective remedy** at the domestic level. Where an applicant submits an arguable claim of a violation of a Convention right, the domestic legal order must afford an effective remedy.[9] The remedy must enable the applicants to raise their Convention rights in a timely manner, and to have them considered

2 ECtHR, *Kudła v. Poland* (GC), no. 30210/96, 26 October 2000, §157.

3 *Grabenwarter Ch.*, European Convention on Human Rights. Commentary. C.H.Beck, Hart, Nomos, Helbing Lichtenhahn Verlag, 2014, 328.

4 *Kuijer M.*, The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings, Human Rights Law Review, Vol. 13, 2013, 786.

5 *Kudła v. Poland*, §149.

6 *Mowbray A.R.*, Article 13: Right to an effective remedy, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, London: Hart Publishing, 2004, 211, <www.bloomsburycollections.com> [26.05.2023].

7 *Kudła v. Poland*, §152.

8 ECtHR, *Cocchiarella v. Italy* (GC), no. 664886/01, ECtHR 2006-V, §38.

9 ECtHR, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECtHR 2003-VIII, §138.

in the national proceedings.[10] An effective remedy required by Article 13 is one where the domestic authority or court dealing with the case has to consider **the substance of the Convention complaint**. For instance, in cases where complaints are under Articles 8, 9 and 10 of the Convention, this means that the domestic authority has to examine, inter alia, whether the interference with the applicant's rights was necessary in a democratic society for the attainment of a legitimate aim.[11]

Although the Contracting States are afforded some margin of appreciation as to the manner in which they provide the requisite remedy and conform to their Convention obligation under Article 13,[12] the **remedy must be "effective" in practice as well as in law**.[13] For instance, an applicant's complaint alleging that his or her removal to a third State would expose him or her to treatment prohibited under Article 3 of the Convention "must imperatively be subject to close scrutiny by a 'national authority'".[14] The notion of "effective remedy" within the meaning of Article 13 taken in conjunction with Article 3 requires, firstly, "independent and rigorous scrutiny" of any complaint made by a person in such a situation, where "there exist substantial grounds for fearing a real risk of treatment contrary to Article 3" and, secondly, "the possibility of suspending the implementation of the measure impugned".[15] In the case of *Hirsi Jamaa and Others v. Italy* (GC), the Court considered that the applicants were deprived of any remedy which would have enabled them to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.[16]

The scope of this obligation depends on the nature of the complaint under the Convention. With respect to Article 3 complaints concerning conditions of detention, two types of relief are possible: preventive – improvement in such conditions, and compensatory – compensation for damage caused by those conditions. For a person held in such conditions, a remedy capable of rapidly bringing the ongoing violation to an end is of the greatest value. Once such a person has been released or placed in conditions meeting the requirements of Article 3, he or she should have an enforceable right to compensation for any breach that has already occurred.[17] At the same time, the protection afforded by Article 13 does not go so far as to require any particular form of remedy, Contracting States being afforded a margin of discretion in conforming to their obligations under this provision.[18] Where

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10 *Jacobs, White, and Ovey*, The European Convention on Human Rights, *Sixth Edition*, Oxford University Press, 2014, p. 135.

11 ECtHR, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECtHR 1999-VI, §138; *Peck v. the United Kingdom*, no. 44647/98, ECHR 2003-I, §106; and *Hatton and Others v. the United Kingdom,* ECtHR 2003-VIII, §141; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, ECtHR 2000-XI, §100; *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, no. 14134/02, 11 October 2007, §§68-70; *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, 27 January 2015, §185.

12 ECtHR, *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, 20 March 2008, §190.

13 ECtHR, *Hirsi Jamaa and Others v. Italy* (GC), no. 27765/09, 23 February 2012, §197.

14 ECtHR, *Shamayev and Others v. Georgia and Russia*, no. 36378/02, ECtHR 2005-III, §448.

15 *Hirsi Jamaa and Others v. Italy* (GC), §198; ECtHR, *Jabari v. Turkey*, no. 40035/98, ECtHR 2000-VIII, §50; and *Shamayev and Others v. Georgia and Russia*, §460.

16 *Hirsi Jamaa and Others v. Italy* (GC), §205.

17 ECtHR, *Sukachov v. Ukraine*, no. 14057/17, 30 January 2020, §113.

18 *Budayeva and Others v. Russia*, §190.

violations of the rights enshrined in Article 2 are alleged, compensation for pecuniary and non-pecuniary damage should in principle be possible as part of the range of redress available.[19]

In relation to **fatal accidents** arising out of dangerous activities which fall within the responsibility of the State, the authorities are obliged under Article 2 to carry out of their own motion an investigation, satisfying certain minimum conditions, into the cause of the loss of life. Without such an investigation, the individual concerned may not be in a position to use any remedy available to him for obtaining relief, given that the knowledge necessary to elucidate facts of such fatal accidents is often in the sole hands of State officials or authorities.[20] The same obligation to carry out thorough and effective investigations capable of leading to the identification and punishment of those responsible arises for the State in cases of alleged torture or ill-treatment of detainees.[21]

In order to meet the requirements of Article 13, the remedy must be **accessible** to the person concerned. In the case of *Mozer v. Moldova and Russia*, the Court found that the applicant was entitled to an effective domestic remedy within the meaning of Article 13 in respect of his complaints under Articles 3, 8 and 9 of the Convention. The Court examined **whether such a remedy was available to the applicant**.[22] As far as the applicant's complaint against Moldova was concerned, the Court considered that the Republic of Moldova had made procedures available to the applicant commensurate with its limited ability to protect the applicant's rights. It has thus fulfilled its positive obligations. Accordingly, the Court found no violation of Article 13 of the Convention by that State.[23] As to the applicant's complaint against Russia, the Court reiterated that in certain circumstances applicants may be required to exhaust effective remedies available in an unrecognised territorial entity. However, there was no indication in the file, and the Russian Government have not claimed, that any effective remedies were available to the applicant in the self-proclaimed "Moldavian Republic of Transdniestria" (the "MRT") in respect of the above-mentioned complaints. The Court therefore concluded that the applicant did not have an effective remedy in respect of his complaints under Articles 3, 8 and 9 of the Convention and that this violation of Article 13 could be attributed to the responsibility of the Russian Government as it continued to exercise effective control over the "MRT"[24]

Accessibility is inevitably linked to the effectiveness of remedies. In the recent case of *D. v. Bulgaria*, concerning the arrest at the border between Bulgaria and Romania of a Turkish journalist claiming to be fleeing from a risk of political persecution in his own country, and his immediate removal to Turkey, the Court found a violation of Article 13.[25] It held that the hasty return to Turkey of a journalist twenty-four hours after his arrest at the border, **rendered the available remedies**

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19 *Budayeva and Others v. Russia,* §191 with further references to the following cases: *Paul and Audrey Edwards v. the United Kingdom,* no. 46477/99, ECtHR 2002-II, §97; *Z and Others v. the United Kingdom* [GC], no. 29392/95, ECtHR 2001-V, §109; and *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, ECtHR 2001-V, §107.

20 *Budayeva and Others v. Russia*, §192.

21 ECtHR, *Mehmet Emin Yuksel v. Turkey*, no. 40154/98, 29 July 2004, §36.

22 ECtHR, *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016, §209.

23 *Mozer v. the Republic of Moldova and Russia* [GC], §216.

24 *Mozer v. the Republic of Moldova and Russia* [GC], §§211, 212, 217.

25 ECtHR, *D v. Bulgaria*, no. 29447/17, 20 July 2021.

ineffective in practice and therefore inaccessible. The applicant had neither been provided with the assistance of an interpreter or translator, nor with information about his rights as an asylum seeker, including the relevant procedures. The Court was therefore unable to conclude that in the present case the Bulgarian authorities had fulfilled their requisite duty of cooperation in protection procedures. Likewise, the applicant had not been granted access to a lawyer or a representative of specialised organisations that would have helped him assess whether his circumstances entitled him to international protection. In relation to the possibility of challenging the removal order, the order had been implemented immediately without the applicant being given the chance to understand its contents, and that as a result, he had been deprived of the opportunity available under domestic law to apply to the courts for a stay of execution of the order.[26]

In cases concerning a complaint of ill-treatment, the decisive question in assessing the effectiveness of a remedy is whether the applicant was able to raise this complaint before domestic courts in order to obtain direct and timely redress.[27] An exclusively compensatory remedy cannot be regarded as a sufficient response to allegations of detention or confinement conditions in breach of Article 3, since it would have no "preventive" effect in the sense that it would not be capable of preventing the continuation of the alleged violation or of enabling prisoners to obtain an improvement in their material conditions of detention.[28]

A domestic remedy must present **minimum guarantees of promptness and diligence**.[29] For instance, when it comes to the prevention of violations resulting from inadequate conditions of detention, the States are obliged to ensure a **prompt and diligent handling of prisoners' complaints**, secure the prisoners' effective participation in the examination of their grievances, and provide a wide range of legal tools for the purpose of eradicating the identified breach of Convention requirements.[30] In the case of *Ananyev and Others v. Russia*, the Court considered that a complaint to a prosecutor did not satisfy the requirements of an effective remedy in so far as the process of its examination did not provide for the **participation of the prisoner in the proceedings**. The complainant must at least be provided with an opportunity to comment on factual submissions by the prison governor produced at the prosecutor's request, to put questions and to make additional submissions to the prosecutor. The treatment of the complaint does not have to be public or call for the institution of any kind of oral proceedings, but there should be a legal obligation on the prosecutor to issue a decision on the complaint within a reasonably short time-limit.[31]

The absence of an automatic suspensive effect can render the remedy ineffective. In the case of *Allanazarova v. Russia*, the Court found a violation of Article 13 in conjunction with Article 3, as an appeal against the extradition under Russian law did not have an automatic suspensive effect or

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26 *D v. Bulgaria*, §§131-135.
27 ECtHR, *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, 20 October 2011, §107.
28 ECtHR, *Norbert Sikorski v. Poland*, no. 17599/05, 22 October 2009, §116; *Mandić and Jović v. Slovenia*, §116.
29 ECtHR, *Kadiķis v. Latvia* (no. 2), no. 62393/00, 4 May 2006, §62.
30 ECtHR, *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012, §214.
31 *Ananyev and Others v. Russia*, §216.

entail stringent scrutiny of the risk of ill-treatment in the State, Turkmenistan, which had requested the extradition of a woman.[32]

The States have **an obligation to demonstrate convincingly the existence of an effective remedy** in the practice. The respondent State will be expected to identify the remedies available to the applicant and to show at least a prima facie case for their effectiveness.[33] It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one **available in theory and in practice at the relevant time**, that is to say, that it was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.[34] In the case of *Sürmeli v. Germany*, regarding an action for damages, the Court noted that **a single judicial decision**, such as the regional court decision relied on by the Government in support of their arguments – and given, moreover, at first instance – was not sufficient to satisfy it that there had been an effective remedy available in theory and in practice.[35]

The effectiveness of a remedy does not depend on **the certainty of a favourable outcome** for the person concerned.[36] For instance, neither Article 13 nor any other provision of the Convention guarantees an applicant a right to secure the prosecution and conviction of a third party.[37]

B. Obligation to determine a "national authority"

Article 13 obliges the States to determine at domestic level a "**national authority",** in order to have the individuals' **claim decided** and, if necessary, to **obtain redress**. The national authority before which a remedy will be effective may be a **judicial or non-judicial body**.[38] The authority referred to in Article 13 of the Convention does not always need to be a judicial one.[39] For instance, the remedies in respect of conditions of detention before an administrative authority can satisfy the requirement of Article 13.[40] However, **the powers and procedural guarantees** that a national authority possesses are relevant in determining whether the remedy before it is effective.[41]

In the case of *Ananyev and Others v. Russia* the Court stated that filing a complaint with an authority supervising detention facilities is normally a more reactive and speedy way of dealing with grievances than litigation before courts. However, the authority in question should have the mandate to monitor the violations of prisoners' rights. The title of such authority or its place within the administrative structures is not crucial as long as it is **independent** from the penitentiary system's

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32 ECtHR, *Allanazarova v. Russia*, no. 46721/15, 14 February 2017, §§100-115.

33 *Jacobs, White, and Ovey*, The European Convention on Human Rights, *Sixth Edition*, Oxford University Press, 2014, p. 133.

34 *Sejdovic v. Italy*, no. 56581/00, 1 March 2006, §46 with reference to the case of *Akdivar and Others*, no. 21893/93, 16 September 1996, §68.

35 ECtHR, *Sürmeli v. Germany* [GC], no. 75529/01, ECHR 2006-VII, §113.

36 *Hirsi Jamaa and Others v. Italy* (GC), §197.

37 *Budayeva and Others v. Russia*, §191.

38 Collected edition of the "*Travaux préparatoires"* of the European Court of Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651.

39 ECtHR, *Klass and Others v. Germany*, Series A no. 28, 6 September 1978, §67, and, more recently, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, 17 July 2014, §149.

40 *Sukachov v. Ukraine*, §114.

41 *Centre for Legal Resources on behalf of Valentin Câmpeanu*, §149.

bodies, such as for instance *Independent Monitoring Boards* in the United Kingdom (formerly Boards of Visitors) or the *Complaints Commission* (*beklagcommissie*) in the Netherlands. In the Russian legal system, this mandate is entrusted to prosecutors' offices that have independent standing and responsibility for overseeing compliance by the prison authorities with the Russian legislation.[42]

In order for an administrative authority to satisfy the requirements of effectiveness under Article 13, the Court's case-law developed certain criteria. Such an authority must: (a) be **independent** of the penal authorities; (b) guarantee **the detainee's effective participation** in the examination of his or her complaint; (c) ensure that **the complaint is handled speedily and diligently**; (d) have at its disposal a **wide range of legal tools** for eradicating the problems leading to the complaint; and (e) be capable of rendering **binding and enforceable decisions** within reasonably short time limits.[43]

In a number of cases, recently in the case of *Sukachov v. Ukraine*, the Court examined the effectiveness of lodging a complaint with a prosecutor in Ukraine and held that that cannot be considered an effective remedy, given that the prosecution's status under domestic law and its particular "accusatorial" role in the investigation of criminal cases did not offer adequate safeguards for an independent and impartial review of a complaint. Moreover, such a complaint could not lead to preventive or compensatory redress. The Court also held that the problems relating to conditions of detention did not concern an individual situation but were of a structural nature.[44] Such a complaint to a prosecutor was held falling short of the requirements of an effective remedy also because of the procedural shortcomings: it is not based on a detainee's personal right to obtain redress, and there is no requirement for such a complaint to be examined with his or her participation or for the prosecutor to ensure such participation.[45]

For a non-judicial body to be recognised as a "competent national authority" within the meaning of Article 13, it must normally have the **power to hand down a legally binding decision**. In the case of *Segerstedt-Wiberg and Others v. Sweden* concerning the storage in the Security Police files of the information in violation of Article 8 of the Convention, the Court held that the Parliamentary Ombudsperson and the Chancellor of Justice, apart from their competence to institute criminal proceedings and disciplinary proceedings, lacked the power to render a legally binding decision, although they had competence to receive individual complaints and had a duty to investigate them in order to ensure that the relevant laws have been properly applied. In addition, they exercised general supervision and did not have specific responsibility for inquiries into secret surveillance or into the entry and storage of information on the Security Police register. The Court found neither remedy, on its own, to be effective within the meaning of Article 13 of the Convention.[46]

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42 *Ananyev and Others v. Russia*, §215.

43 *Sukachov v. Ukraine*, §114; *Ananyev and Others v. Russia*, §§214-216, 219; *Neshkov and Others v. Bulgaria*, §§182-183.

44 Recently in *Sukachov v. Ukraine* with references to the relevant cases, §§119, 122.

45 *Sukachov v. Ukraine*, §120.

46 ECtHR, *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, ECHR 2006-VII, §118. The Court confirmed in this judgment its findings in earlier case law: *Silver and Others v. the United Kingdom*, no. 5947/72 and others, 25 March 1983, §§114-115; *Leander v. Sweden*, Series A no. 116, 26 March 1987, §82.

Whether **a Constitutional Court** could be seen as a "national authority" within the meaning of Article 13 will depend on the particular features of the respondent State's legal system and the scope of its Constitutional Court's jurisdiction. In the case *Liepajnieks v. Latvia* (dec), the Court addressing the competence of the Constitutional Court of Latvia, observed that the Constitutional Court's jurisdiction was limited to examine individual complaints lodged to challenge the constitutionality of a legal provision or its compliance with a provision of superior force. An individual constitutional complaint could only be lodged against a legal provision where an individual considers that the provision in question infringes his or her fundamental rights as enshrined in the Constitution. The Court concluded that the procedure of an individual constitutional complaint could not serve as an effective remedy if the alleged violation resulted only from erroneous application or interpretation of a legal provision which, in its content, was not unconstitutional.[47]

2.2. Applicants' obligations

A. Obligation to use the effective remedies

The provision of Article 35 (1) of the Convention that "the Court may only deal with the matter after all domestic remedies have been exhausted" puts **an obligation on the applicant to use the remedies** which are provided for in the domestic law. Thus, with Article 35 Article 13 is central to the cooperative relationship between the Convention and national legal systems.[48] The applicant has to demonstrate that he or she used the appropriate and relevant domestic remedies. In the case of *Slimani v. France*, the applicant called into question the authorities' responsibility in her partner's death and complained about his detention conditions. However, the applicant could have lodged a criminal complaint, alleging murder, with an investigating judge, along with an application to join the proceedings as a civil party. The Court concluded that a domestic remedy was accessible, capable of providing redress in respect of the complaints and offered reasonable prospects of success. She was therefore obliged to use it before applying to the Court. As she did not do so, the Court refused to examine the merits of the complaints.[49]

Applicants are only obliged to exhaust the remedies that are **effective and capable of redressing the alleged violation, accessible and offering reasonable prospects of success**.[50] For instance, in cases where the Constitutional Court is not considered an effective remedy, the applicants are obliged to avail themselves of a complaint to the Constitutional Court only if they are challenging a provision of a statute or regulation as being in itself contrary to the Convention.[51]

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47 ECtHR, *Liepajnieks v. Latvia* (dec), no. 37586/06, 2 November 2010, §73 with further references to the cases of *Sergey Smirnov v. Russia* (dec.), no. 14085/04, 6 July 2006, and *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003.

48 *Harris D., O'Boyle M., Bates E. and Buckley C.,* Law of the European Convention on Human Rights, 4th edition, Oxford University Press, 2018, Chapter 16, Article 13: The Right to an effective National Remedy.

49 ECtHR, *Slimani v. France*, no. 57671/00, ECHR 2004-IX, §§39-42.

50 ECtHR, *Paksas v. Lithuania* [GC], no. 34932/04, 6 January 2011, §75.

51 *Liepajnieks v. Latvia* (dec), §73.

In case of **plurality of remedies**, the applicant is only obliged to have used one of them and it is for the applicant to select the remedy that is most appropriate in his or her case.[52]

B. An arguable claim

In order to enjoy the right to an effective remedy, an applicant must have **an arguable claim** under the Convention.[53] There is no abstract definition of the notion of arguable claim.[54] In the case of *Boyle and Rice v. the United Kingdom*, 1988, the Court held that it should not give an abstract definition of the notion of arguability. Rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 was arguable and, if so, whether the requirements of Article 13 were met in relation thereto.[55]

Since Article 13 has no independent existence and it merely complements the other substantive clauses of the Convention and its Protocols,[56] it can only be applied in combination with, or in the light of, one or more Articles of the Convention of which a violation has been alleged. To rely on Article 13 **the applicant must also have an arguable claim or an "arguable complaint"** under another Convention provision.[57] In all cases where the Court finds that a complaint is admissible, the arguability threshold is met.[58]

2.3. Methodology of the Court's scrutiny

The starting point for the Court's scrutiny under Article 13 is to examine **the applicability** of the provision in question. For instance, where the arguability of a complaint on the merits is not in dispute, the Court finds Article 13 applicable.[59] In cases where the Court has found a violation of one of the Articles of the Convention or the Protocols in response to the complaint for which the right to a domestic remedy is invoked under Article 13, the Article 13 complaint is arguable.[60] In other cases the Court may also consider prima facie that the complaint is arguable.[61]

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52 ECtHR, *Karako v. Hungary*, no. 39311/05, 28 April 2009, §14.

53 ECtHR, *De Souza Ribeiro v. France* [GC], no. 22689/07, 13 December 2012, §78, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC]*, §148.

54 See *Peter Duff, Mark Findlay and Carla Howarth*, The Concept of an "Arguable Claim" under Article 13 of the European Convention on Human Rights, International and Comparative Law Quarterly, Vol. 39, October 1990, pp. 891-899.

55 ECtHR, *Boyle and Rice v. the United Kingdom*, Series A no. 131, 27 April 1988, §55.

56 ECtHR, *Zavoloka v. Latvia,* no. 58447/00, 7 July 2009, §35 (a).

57 *Paul and Audrey Edwards v. the United Kingdom*, §96 (the murder of a prisoner by his cellmate).

58 *Rainey B., Elizabeth Wicks E., Ovey C.,* Jacobs, White and Ovey: The European Convention on Human Rights, 6th ed., Oxford University Press, 2014, 132.

59 ECtHR, *Vilvarajah and Others v. the United Kingdom*, Series A no. 215, 30 October 1991, §121; *Chahal v. the United Kingdom [GC]*, no. 22414/93, 15 November 1996, §147.

60 *Hiernaux v. Belgium*, no. 28022/15, 24 January 2017, §44, concerning the findings of both the pre-trial investigation courts and the trial court about the length of the pre-trial stage; *Barbotin v. France*, no. 25338/16, 19 November 2020, §32, concerning the recognition by the domestic court of the poor conditions of detention endured by an applicant in a prison cell.

61 *Valada Matos das Neves v. Portugal*, no. 73798/13, 29 October 2015, §74, concerning civil proceedings lasting more than nine years; *Olivieri and Others v. Italy*, nos. 17708/12 and 3 others, 25 February 2016,

The main challenge for the Court deriving from Article 13 is **to assess the effectiveness of the remedy in *concreto*, in relation to each complaint.** In the case of *Hasan and Chaush v. Bulgaria*, the Court observed that the applicant attempted to obtain a remedy against the interference with the internal organisation of the religious community by challenging Decree R-12 before the Supreme Court. The Supreme Court accepted the case for examination. A representative of the religious community was thus provided access to a judicial remedy. However, the Supreme Court refused to study the substantive issues, considering that the Council of Ministers enjoyed full discretion whether or not to register the statute and leadership of a religious denomination, and only ruled on the formal question whether Decree R-12 was issued by the competent body. The Court concluded that the appeal to the Supreme Court against Decree R-12 was not, therefore, an effective remedy.[62]

In assessing the effectiveness of the remedy, **the Court must take realistic account** not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the particular circumstances of the applicant's case. In the case of *A.B. v. the Netherlands*, recalling the Court's finding concerning the lack of adequate implementation by the Netherlands Antilles authorities of judicial orders to repair the unacceptable shortcomings of penitentiary facilities, as well as noting their failure to implement the urgent recommendations of the European Committee for the Prevention of Torture and Inhuman Treatment (CPT), the Court found that the applicant did not have effective remedies for his Convention complaints.[63]

The Court normally adopts **a stricter approach** to the notion of "effective remedy" in the situations where the right to life (Article 2 of the Convention) or the prohibition of torture and inhuman or degrading treatment (Article 3 of the Convention) or the right to a lawful arrest or detention (Article 5 of the Convention) is at stake, and request a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.[64]

The Court has to distinguish between **the degrees of effectiveness of the remedies** required in relation to the violations of substantive rights by the State or its agents (negative obligations) and violations due to a failure by the State to protect individuals against acts of third parties (positive obligations).[65]

Doubts as to which courts – civil, criminal, administrative or others – have jurisdiction to examine a complaint can render a remedy ineffective. In the case of *Karpenko v. Ukraine*, the applicant, in relation to whom an individual sanction for breaching the ban on contacts with prisoners from other cells was imposed, tried, without success, to challenge that sanction before the domestic courts. However, two sets of courts – the administrative as well the civil courts – declined jurisdiction

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§48, concerning administrative proceedings lasting more than eighteen years; *Brudan v. Romania*, no. 75717/14, 10 April 2018, §70, concerning criminal proceedings lasting more than fourteen years.

62 ECtHR, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, ECHR 2000-XI, §100.

63 ECtHR, *A.B. v. the Netherlands*, no. 37328/97, 29 January 2002, §98.

64 ECtHR, *Kaya v. Turkey,* no. 158/1996/777/978, 19 February 1998, §107; *Yaşa v. Turkey*, no. 63/1997/847/1054, 2 September 1998, §114.

65 ECtHR, *Z and Others v. the United Kingdom* [GC], no. 29392/95, 10 May 2001, §109; *Keenan v. the United Kingdom*, no. 27229/95, 3 April 2001, §129.

over the matter. Furthermore, the applicant provided to the Court extensive domestic case-law showing the administrative courts' regular refusals to examine similar matters. The Court considered that the applicant had no effective domestic remedy available for him at the material time and found a violation of Article 13 relying on its case law, according to which, remedies may not be effective where there is doubt as to which courts – civil, criminal, administrative or others – have jurisdiction to examine a complaint, and there is no effective mechanism for the purpose of resolving such uncertainty.[66]

3. Scope of the application of Article 13

3.1. Acts covered by Article 13

Article 13 guarantees an effective remedy against a violation of rights and freedoms set forth in the Convention which has been produced by acts **emanating from the executive**[67] and **judiciary as well as from private parties**.

As regards the role of the **legislator,** Article 13 cannot be construed as allowing individuals to challenge domestic laws before a national authority on the ground of them being contrary to the Convention,[68] and it cannot be interpreted as requiring a remedy against the state of domestic law.[69] In the case of *Titarenko v. Ukraine*, the Court noted that the Ukrainian legal system entitled persons in pre-trial detention to family visits but did not offer any procedure that would make it possible to verify whether the discretionary powers of the investigator and the courts in this matter were exercised in good faith and whether the decisions to grant or refuse all family visits were well reasoned and justified. The Court held that this legislative gap was not enough to find a breach of Article 13.[70]

3.2. Interplay of Article 13 with other Articles of the Convention

Article 13 applies together with alleged violations of all rights set forth in the Convention. However, the scope of Article 13 may overlap with that of other Convention provisions which guarantee a specific remedy. The Court has developed a methodology in order to secure a separate or simultaneous application of the Convention Articles.

A. Lex generalis and lex specialis

The interplay between Article 13 and some other Convention Articles is characterised as relationship between *lex generalis* and *lex specialis*.[71] For example, in cases where the Article 13

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66 ECtHR, *Ivan Karpenko v. Ukraine*, no. 45397/13, 16 December 2021, §§72-74.

67 ECtHR, *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002, §137.

68 ECtHR, *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017, §180; *Maurice v. France* [GC], no. 11810/03, 6 October 2005, §107; *Paksas v. Lithuania* [GC], §114.

69 ECtHR, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, §113; *Ostrovar v. Moldova*, no. 35207/03, 13 September 2005, §113.

70 ECtHR, *Titarenko v. Ukraine*, no. 31720/02, 20 September 2012, §110.

71 *Grabenwarter Ch.*, European Convention on Human Rights. Commentary. C.H.Beck, Hart, Nomos, Helbing Lichtenhahn Verlag, 2014.

complaint is subsumed by a complaint alleging a violation of the positive procedural obligations under **Article 4** of the Convention, those obligations constitute *lex specialis* in relation to the general obligations under Article 13. In the case of *C.N. v. the United Kingdom*, the applicant complained that the absence of any specific criminal offence of domestic servitude or forced labour denied her an effective remedy in respect of her complaints under Article 4 of the Convention. Although the Court declared the applicant's complaints admissible, having regard to its findings under Article 4, it accordingly considered it unnecessary to examine separately the complaint concerning the alleged violation of Article 13.[72]

When it comes to the review of **lawfulness of detention**, according to the Court's established case-law, **Article 5 (1), (4) and (5)** of the Convention also constitutes *lex specialis* in relation to the more general requirements of Article 13. The less stringent requirements of Article 13 will thus be absorbed thereby. For instance, in cases where the Court finds a violation of Article 5 (1) of the Convention in the light of that *lex specialis*, there is no legal interest in re-examining the same subject matter of complaint under the *lex generalis* of Article 13.[73] The same applies to the finding of a violation of Article 5 (4) and/or (5) if the facts underlying the applicant's complaint under Article 13 are identical to those examined under Article 5 (4) and/or (5). There will be no need to examine the allegation of a violation of Article 13, since it has already found a violation of Article 5 (4) and/or (5).[74]

Article 6 (1) of the Convention also constitutes *lex specialis* in relation to Article 13. The safeguards of Article 6 (1) are stricter than those of Article 13. Therefore, in many cases where the Court has found a violation of Article 6 (1), it has not deemed it necessary to rule separately on an Article 13 complaint. In general, Article 13 is not applicable where the alleged violation of the Convention took place in the context of judicial proceedings.[75] Exceptionally, in the case of *Kudła v. Poland*, the Court examined an applicant's complaint of a failure to ensure a hearing within a reasonable time under Article 13 taken separately, notwithstanding an earlier finding of a violation of Article 6 (1) for failure to try the applicant within a reasonable time.[76]

B. Application of Article 13 in conjunction with other Convention Articles

In a number of cases the Court applied Article 13 in conjunction with other Convention Articles (of substantive nature) notwithstanding the fact of whether or not a violation was found with respect to the latter.[77]

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72 ECtHR, *C.N. v. the United Kingdom*, no. 4239/08, 13 November 2012, §§85, 86; The Court came to the similar conclusion in the case of *C.N. and V. v. France*, no. 67724/09, 11 October 2012, §§113, 114.

73 ECtHR, *Khadisov and Tsechoyev v. Russia*, no. 21519/02, 5 February 2009, §162.

74 ECtHR, *De Jong, Baljet and Van Den Brink v. the Netherlands*, no. 8805/79 and two others, 22 May 1984, §60; *Chahal v. the United Kingdom [GC]*, §126; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, 12 October 2006, §§110, 111; *A.B. and Others v. France*, no. 11593/12, 12 July 2016, §158.

75 ECtHR, *Menesheva v. Russia*, no. 59261/00, 9 March 2006, §105; *Ferre Gisbert v. Spain*, no. 39590/05, 13 October 2009, §39.

76 *Kudła v. Poland*, §149.

77 *Neshkov and Others v. Bulgaria*, §§192-213; *G.B. and Others v. Turkey*, no. 4633/15, 17 October 2019, §§125-137.

In the case of *Polgar v. Romania*, the Court accepted that an action in tort had been effective, from 13 January 2021 onwards, for the purpose of obtaining compensation for poor conditions of detention or transport that had now ended. However, the Court found a violation of Article 13 in conjunction with Article 3 because the applicant, having taken that action, had not secured a full acknowledgment of the violation of the Convention and had not received sufficient compensation. The final domestic decision was given on 13 February 2019, well before the date taken by the Court as the starting point for the effectiveness of the remedy in question.[78]

In the case of *Clasens v. Belgium*, which concerned the deterioration of the applicant's conditions of detention in a prison as a result of a strike by conducted prison wardens, the Court found a violation of Article 13 in conjunction with Article 3. The Court held that the Belgian system, as it functioned at the relevant time, had not provided an effective remedy in practice – a remedy capable of affording redress for the situation of which the applicant was a victim and preventing the continuation of the alleged violations. The Court noted that the applicant had – from the very beginning of the strike – applied to the urgent applications judge, who had instructed the State to ensure, subject to penalties, a minimum service in order to provide for the basic needs of the persons being detained inside the prison. However, it had proved impossible to improve the conditions of detention significantly and to restore lawfulness in the provision of basic services. The Court noted that the ineffectiveness of the urgent application during the prison wardens' strike complained of had in reality been largely the result of the structural nature of the problems resulting from such a strike. Although the urgent-applications judge had exercised his jurisdiction, this had not been effective.[79]

In the case of *E.H. v. France*, , concerning the return to Morocco of an applicant who claimed to be at risk of treatment contrary to Article 3 on account of his Sahrawi origins and his activism in support of the Sahrawi cause, the Court held that the evidence in the file did not provide substantial grounds for believing that the applicant's return to Morocco had placed him at real risk of treatment contrary to Article 3. Following the cases of *Gebremedhin [Gaberamadhien] v. France* and *I.M. v. France*, in which the Court had found a violation of Article 13 taken together with Article 3, the relevant legislative amendments had been introduced securing the existence of effective remedies, with suspensive effect, to challenge the return of an asylum seeker. The Court noted that the applicant had on four occasions exercised a remedy that suspended the enforcement of the order for his return to Morocco and concluded that the remedies exercised by the applicant, taken together, had been effective in the particular circumstances of this case.[80]

In addition to the situations discussed above, there may be other instances when the Court would prefer not to examine the complaints separately under Article 13. For instance, when examining an alleged violation of Article 2 under its procedural limb for shortcomings in the effectiveness of an investigation, the Court may consider that it has already examined the legal question and that it does not need to examine the complaints separately under Article 13.[81]

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78 ECtHR, *Polgar v. Romania*, no. 39412/19, 20 July 2021, §§75-99.

79 ECtHR, *Clasens v. Belgium*,no. 26564/16, 28 May 2019, §§44-47.

80 ECtHR, *E.H. v. France*,no. 39126/18, 22 July 2021, §§180-207.

81 ECtHR, *Makaratzis v. Greece* [GC], no. 50385/99, 20 December 2004, §86; *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, 15 May 2007, §363; *Karandja v. Bulgaria*, no. 69180/01, 7 October 2010,

In the case of *Budayeva and Others v. Russia*, the Court considered that it was not necessary to examine the applicant's complaint also under Article 13 of the Convention as regards the complaint under Article 2, as the Court addressed not only the absence of a criminal investigation following accidental deaths, but also the lack of further means available to the applicants by which they could secure redress for the authorities' alleged failure to discharge their positive obligations.[82] Subsequently, the State's failure to conduct a thorough and effective investigation in accordance with its procedural obligations under Article 2 will not necessarily violate Article 13, if the deceased's family has access to other available and effective remedies for establishing liability on the part of State agents or bodies in respect of acts or omissions entailing the breach of their rights under Article 2 and, as appropriate, obtaining compensation.[83]

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82 *Budayeva and Others v. Russia*, §195.

83 ECtHR, *Öneryıldız v. Turkey* [GC], no. 48939/99, 30 November 2004, §148; *Budayeva and Others v. Russia*, §191; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], §149.

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64. *Paksas v. Lithuania* [GC], no. 34932/04, 6 January 2011.
65. *Paul and Audrey Edwards v. the United Kingdom,* no. 46477/99, ECtHR 2002-II.
66. *Peck v. the United Kingdom*, no. 44647/98, ECHR 2003-I.
67. *Polgar v. Romania*, no. 39412/19, 20 July 2021.
68. *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, 15 May 2007.
69. *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, ECHR 2006-VII.
70. *Sejdovic v. Italy*, no. 56581/00, 1 March 2006.
71. *Sergey Smirnov v. Russia* (dec.), no. 14085/04, 6 July 2006.
72. *Shamayev and Others v. Georgia and Russia*, no. 36378/02, ECtHR 2005-III.
73. *Silver and Others v. the United Kingdom*, no. 5947/72 and others, 25 March 1983.
74. *Slimani v. France*, no. 57671/00, ECHR 2004-IX.
75. Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, ECtHR 1999-VI.
76. *Sukachov v. Ukraine*, no. 14057/17, 30 January 2020.
77. *Sürmeli v. Germany* [GC], no. 75529/01, ECHR 2006-VII.
78. *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003.
79. *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, ECtHR 2001-V.
80. *Tagayeva and Others v. Russia*, no. 26562/07 and 6 others, 13 April 2017.
81. *Titarenko v. Ukraine*, no. 31720/02, 20 September 2012.
82. *Valada Matos das Neves v. Portugal*, no. 73798/13, 29 October 2015.
83. *Vilvarajah and Others v. the United Kingdom*, Series A no. 215, 30 October 1991.
84. *Yaşa v. Turkey*, no. 63/1997/847/1054, 2 September 1998.
85. *Z and Others v. the United Kingdom* [GC], no. 29392/95, ECtHR 2001-V.
86. *Zavoloka v. Latvia,* no. 58447/00, 7 July 2009.

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Realization of Vindication Claim on Immovable Property and Some Counterclaims

The article is devoted to the problems of realizing the Vindication claim as a means of protecting the right to property in the Georgian legal order, in the form of researching the procedural and material legal features of this kind of lawsuits and presenting recommendations to overcome the delay in their consideration.

Keywords: *property claim, property, ownership, unlawful possessor, Vindication claim, Vindication counterclaim.*

1. Introduction

A great wish to possess desirable property has always been one of the widespread and common characteristics of a human. However, in a legal state, it is impossible to let individuals fulfill the desires[1] that threaten the rights of others and civil turnover. The main task of the legal state[2] is to bring into the legal framework and subject to the law important relations for the society, establish fair rules[3] related to the allocation of property. In order to ensure the right to property, the state must create an appropriate legal system, including a private legal order.[4] The state has a positive obligation to create a legal system based on which individual property disputes can be resolved efficiently and fairly.[5] In 2015, part 3 of Article 172 of the Civil Code of Georgia (later the Civil Code), which formed the legal basis for the institution of police eviction from real estate, was declared invalid. A heated debate followed the change.[6] According to critics of the amendment, Section 3 of Article 172 of the Civil

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1 *Zarandia T.,* Property Law, Tbilisi, 2019, 28-29 (in Georgian).

2 Article 4 of the Constitution of Georgia (rule of law), Constitution of Georgia, Legislative Herald of Georgia, 31-33, 24/08/1995 <https://matsne.gov.ge/ka/document/view/30346?publication=36> [12.01.2023].

3 *Zarandia T.,* Property Law, Tbilisi, 2019, 27 (in Georgian).

4 *Mikava L.,* Vindication Lawsuit as a Legal Means of Protection of the Right of Sale, the legal magazine of the Supreme Court of Georgia and the Association of Judges of Georgia "Justice and the Law", #1(28)'11, 2011, 73 (in Georgian).

5 *Zarandia T.,* Property Law, Tbilisi, 2019, 189 (in Georgian).

6 For more information on expected risks and negative consequences, see "Transparency International – Georgia" opinions and comments on legislative changes related to the eviction of illegal owners of immovable property, June 4, 2015, (in Georgian) <https://www.transparency.ge/sites/default/files/

Code was an important tool to protect the right of an owner to property recognized by the Constitution. It did not deprive a person of the right to assert the fact of lawful ownership and demand compensation for damages through the court.[7] The current version of Article 172 of the Civil Code is still considered by a part of society and lawyers to be an ineffective mechanism to protect property due to the long-term limitation of the owner's right to property, which is caused by resolving the dispute in the court. The second part appreciated the change. The amendment was necessary and inevitable because in a developed democratic society, only the judicial body, the court, should have the right to decide such a controversial issue.[8] As legal doctrine and judicial precedents develop law, they acquire the meaning of the source of law.[9] In the present work is discussed the effect of the law provision of the Vindication claim on examples of judicial practice, accordingly, the implementation of the norm, its doctrinal definitions in practice, and the scope of realizing the goal of the legislator.

2. The Nature and Scope of the Vindication Claim

The right to demand the return of the property (*rei vindicatio*) based on the absoluteness[10] of ownership has a general property legal nature.[11] It is not subject to concession, since it is aimed at the exercise of the right to ownership and is inseparably connected with it.[12] The main right of the owner is a negative authority to exclude the use of his property by other persons.[13] A Vindication claim is a claim by a non-possessing owner or other legal possessor against an illegal possessor for the return of a property identified by an individual characteristic and existing as a material.[14] The claim applies to both movable and immovable property. It always includes only a particular property, and not the other properties that are in the place of the original property.[15] On the basis of the right to reclaim the property, a legally binding relationship arises between the owner and the possessor.[16] The purpose of Article 172 of the Civil Code is for the owner to regain ownership of the property that he has lost,[17] and the legal result is to restore the original condition[18] and the ownership of the property.[19]

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post_attachments/shenishvnebi_da_mosazrebebi_udzravi_nivtis_aramartlzomieri_mplobelis_gamosaxlebaze.pdf>[12.0 1.2023].

7 Ibid.

8 *Totladze L.,* Commentary on the Civil Code, Book II, 2018, 80 (in Georgian).

9 *Zarandia T.,* Property Law, Tbilisi, 2019, 31 (in Georgian).

10 *Totladze L.,* Commentary on the Civil Code, Book II, Chapter, 2018, 79 (in Georgian).

11 Cf. §985 of the German Civil Code. "The right to request the return of the property- the owner can request the owner to return the property" .

12 *Kropholler I.,* German Civil Code, Study Comment the 13th revised ed., 2014, 731-732 (in Georgian).

13 *Zarandia T.,* Property Law, Tbilisi, 2019, 43 (in Georgian).

14 *Kochashvili K.,* Possession as the Basis of Presumption of Ownership (comparative legal research) Dissertation for Obtaining the Academic Degree of Doctor of Law, Faculty of Law of Ivane Javakhishvili Tbilisi State University, Tbilisi, 2012, 115 (in Georgian).

15 *Zarandia T.,* Property Law, Tbilisi, 2019, 249 (in Georgian).

16 Ibid, 254.

17 *Totladze L.,* Commentary on the Civil Code, Book II, Tbilisi, 2018, 79 (in Georgian).

18 *Kvernadze T.,*The Relationship between the Owner and the Unlawful Possessor, Master's Thesis, Ivane Javakhishvili Tbilisi State University Faculty of Law, Tbilisi, 2019, 41 (in Georgian).

The freedom of ownership is limited only by the law. In Georgian law, this scope is established by Article 170 of the Civil Code.[20] In addition, although possession, as the actual possession of a property, is not a right, it provides defensive rights that protects the actual situation against any person. Article 172 of the Civil Code ensures rights to complete ownership of property. According to Article 168 of the Civil Code, the ownership of the property is terminated due to the claim of the owner, if the owner submits a substantiated claim to the possessor. A person who does not want another person to appropriate allegedly illegal property, he/she must make the request through the courts without acting on his/her own, independently. It makes no difference to the fault of the person acting arbitrarily. In contrast, the termination of possession based on the enforcement of a judgment does not constitute prohibited arbitrariness and, therefore, does not give rise to the possessor's defense claims.[21]

To claim a property from illegal possession by non-possessing owner, all the prerequisites following Articles 170-172 of the Civil Code must be provided: a) the plaintiff must be the owner, b) the defendant must be the possessor of the property, and c) the defendant must not have the right to possess this property.[22] The plaintiff has the burden of proving these circumstances. The defendant must prove that he has a legal basis[23] to possess the property. These preconditions have to exist cumulatively.[24] Their simultaneous existence is the basis for a Vindication claim.[25] The owner, who has to prove his right of ownership and possession of another person, will be satisfied with his claim, if the possessor, in turn, cannot justify his right to possession.[26] The burden of proof rests with the one who disputes the ownership of the possessor.[27] If the subject of the dispute is an immovable property, the right to ownership is determined by an entry of public registry. A registered right to real estate is considered legal until the authorized person can freely dispose this property, as long as the basis for registration (civil transaction, administrative act, legally binding court decision, etc.) is not canceled, i.e. register entries are considered correct until their inaccuracies are proven. The presumption of correctness and completeness of public register entries is valid until the inaccuracy of the presumed fact is proven. This is reached by invalidating the transaction which was the basis of the registered right. The court must establish the fact of the existence of circumstances excluding the validity of the right but before that it is assumed that the record made as a result of registration is correct and, therefore, the right is genuine.[28] The exercise of the owner's authority is independent of whether he/she

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19 *Mikava L.,* Vindication Lawsuit as a Legal Means of Protecting the Right to Sale, the Legal Magazine of the Supreme Court of Georgia and the Association of Judges of Georgia "Justice and the Law", #1(28)'11, 2011, 73 (in Georgian).

20 *Zarandia T.,* Property Law, Tbilisi, 2019, 229 (in Georgian).

21 Ibid, 174.

22 Cf. The decision of the Great Chamber of the Supreme Court of Georgia of September 9, 2002 on case No. 3k/624-02 (in Georgian).

23 Among many others, see. Decision of the Supreme Court of Georgia of March 31, 2021 on case No. As-102-2021; Judgment of the Supreme Court of Georgia on April 15, 2022 on case No. AS-110-2022.

24 *Zarandia T.,* Property Law, Tbilisi, 2019, 247 (in Georgian).

25 Ibid, 247.

26 Ibid.

27 Ibid, 13.

28 Cf. Decision of the Supreme Court of Georgia of February 18, 2021 on case No. AS-320-2020.

wants to use the property or not.[29] Non-use of the property, or only seasonal use, does not deprive the owner of the right not to allow another person to use this property.[30] The subjection of the mentioned right of the owner to the statute of limitations contradicts to the function of ownership, its absolute nature, the norms of the Constitution and the Civil Code of Georgia, and the interests of civil turnover.[31] Ownership is not lost by failing the exercise of the right, instead, it is acquired by possession (acquired ownership by statute of limitations). The right of an owner to property is hindered not due to the failure of exercising the right or the expiry of the period for exercising his right, but by the recognition of the right of an possessor to property, which has replaced owner's right.[32]

3. Procedural Legal Arrangement of the Vindication Claim

Effective implementation of the Vindication claim is impossible without proper procedural and legal arrangements. In this regard, it is important what guarantees the procedural legislation provides.

a) Case review form

Submission of a Vindication claim to the court and its consideration is provided following the general rules. The court starts considering the case with the statement of the person who applies to it to protect his right or interests stipulated by the law.[33] It is the same in the case of a counterclaim, when the defendant arises the counterclaim against the Vindication claim. In the appellate instance, as an exception, the Vindication case can be considered in by one judge (as a case adjudicated by a magistrate judge) and/or without an oral hearing[34], for which the parties must be informed in advance.[35]

b) Duration of the review

According to the Code of Civil Procedure, Vindication claim of immovable property are considered no later than 1 month from the date of receipt of the claim.[36] The mentioned rule should be applied to the appeal instance because no other special rule is provided by the law. The total time for receiving a cassation complaint and making a decision on Vindication claim of immovable property is 2 months.[37] In the first instance, the issue of accepting a claim for consideration is decided within 5 days from the registration of the case. A 10-day period of admissibility applies to the appeal.[38] The issue of admissibility of a cassation appeal must be decided by the cassation instance within 1 month.[39]

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29 *Zarandia T.,* Property Law, Tbilisi, 2019, 213 (in Georgian).
30 Ibid, 213.
31 Ibid, 253.
32 Ibid, 220.
33 Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, Article 2, <https://matsne.gov.ge/ka/document/view/29962?publication=149> [12.01.2023].
34 Ibid, Articles 14, 25 and 41.
35 Ibid, Article 376^1.
36 Ibid, Article 59.
37 Ibid, Article 391(6).
38 Ibid, Articles 186 and 274.
39 Ibid, Articles 401 (3) .

In relation to the procedural terms, the plaintiff is obligated to provide the defendant with a court message by post, through a court courier or by a different method of delivery on the agreement of the parties, or to send it by e-mail in compliance with the rules established by Articles 70-78 of the Code of Civil Procedure within 2 months[40] from delivery. After receiving a claim statement and copies of the attached documents, the defendant is obliged to submit to the court within the period determined by the court (which should not exceed 21 days), his reply (relevant) to the lawsuit and the issues raised in, as well as a document confirming the sending of the reply and copies of the attached documents[41] to the plaintiff. A similar rule applies to submission of appeal and cassation arguments in appeal and cassation instances. It is true that the submission of the objection is not mandatory for the defendant in the higher instances, however, the court is still obliged to set a reasonable deadline for the party to act so.

The defendant with a Vindication claim has the right to file a counterclaim against the plaintiff from the date of delivery of the copy of a claim statement to the end of the preliminary preparation for the oral hearing of the case, with the original claim. After passing this period, the defendant may file a counterclaim before the trial if it could not be submitted before the end of the preliminary preparation for the oral hearing for good reason.[42] The opposing party can submit a counter-appeal within 10 days after the reception of the appeal, regardless of whether it has declared or not the refusal to file the appeal. If the appeal is rejected or left unconsidered, the contested appeal will not be considered.[43]

c) State Duty

According to procedural legislation, the price of the subject to the dispute is determined by 4,000 GEL, if in a property-legal dispute (property encroachment or other interference, neighborhood dispute, etc.) it is impossible to accurately define the price of the subject to the dispute. Magistrate judges consider property disputes in the first instance, if the cost of the claim does not exceed 5000 GEL; The amount of the State Duty considered by the magistrate judge, is halved in the courts of all instances. In accordance with the established court practice, in the first instance, as a State Duty for a Vindication claim is paid half of the amount of 3% of 4000 GEL, in the appeal instance – half of 4% of 4000 GEL, in the court of cassation – half of 5% of 4000 GEL.[44] The law also establishes additional special benefits for Vindication lawsuits, if there is no reason for exemption from the payment of the State Duty, it is postponed for the plaintiff trying to requite the immovable property from illegal possession until the end of the case review. This rule also applies to the defendant if he initiates a counterclaim.[45]

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40 Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, <https://matsne.gov.ge/ka/document/view/29962?publication=149> [12.01.2023], Article 2.

41 Ibid, Article 201.

42 Ibid, Article 188.

43 Ibid, Article 379.

44 Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, Article 25, 39, 41 <https://matsne.gov.ge/ka/document/view/29962?publication=149> [12.01.2023].

45 Ibid, Article 48 (2) (in Georgian).

d) Provision of a claim

The plaintiff with a counterclaim (the Vindication defendant) as security for the claim, usually requests the owner to be prohibited from alienating the disputed property/encumbrance (Articles 191-192, 198 of the Civil Code). It is in the interest of a plaintiff not to let other new persons into his property because he has arisen a claim against a particular defendant, however, this cannot be controlled within the scope of the claims provision institution. The defendant is allowed, at any time, accommodate other persons in the real estate in his actual possession. In fact, the practice of using a provision measure in Vindication claims is not common.

e) Appeal of court decision

Vindication claims are generally reviewed by three instances. According to the CPC, the deadline for filing an appeal is 14 days, for a cassation complaint – 21 days. The extension/restoration of this period is not allowed and it starts from the moment of transferring a copy of the substantiated decision to the party. Such a moment is considered to be the delivery of a copy of the reasoned decision to the party in accordance with Articles 70-78 or Article 2591 of the Civil Code.[46] If a person with the right to file an appeal/cassation complaint attends the announcement of a reasoned decision, the term for filing an appeal/cassation complaint starts from the moment of its announcement.[47]

f) Enforcement of court decision

The writ of an execution is issued upon a legally binding decision.[48] At the request of the parties, the court can provide the decisions on requiring the immovable property from illegal possession for immediate execution in whole or in part. While allowing the immediate execution of the decision, the court may demand the plaintiff to ensure the reversal of the execution of the decision in case of annulling the court decision. The immediate enforcement of the judgment shall not be permitted if it is impossible to calculate the loss accurately an opposing party may suffer, due to which the other party cannot guarantee[49] it. Because of this rule immediate enforcement is rarely established in practice for Vindication disputes.

4. Common Futile Counterclaims

After the amendment which canceled the institution of "police eviction", several "popular" arguments of the defendant appeared in court practice, which contribute to delaying the realization of the Vindication claim and the consideration of the case. There are several modes of counterclaims: the counterclaim against fraud dealing, socio-economic counterclaims and the counterclaims against the interests of juveniles.

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46 Ibid, Article $259^{1,}$ 369 (in Georgian).

47 Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, <https://matsne.gov.ge/ka/document/view/29962?publication=149> [12.01.2023], Article 259^{1}, 397 (in Georgian).

48 Ibid, Article 264, 267 (in Georgian).

49 Ibid, Article 268 (in Georgian).

4.1. The Counterclaim based on Fraud Agreement

A plaintiff, bringing a Vindication claim, has acquired a right to real property under a contract of sale with a right of redemption. Defendants indicate that in its essence, this sort of contract is a loan and mortgage transaction, which is not indicated by the parties, since based on Article 286 of the Civil Code it is prohibited to enter into such an agreement, and defendants often require making it annulled with a counterclaim for its hypocrisy (Article 56 of the Civil Code).

Discussing one of the cases, the appellate court explained that to prove hypocrite agreement, it is essential to indicate the desire for entering into another contract and the existence of all prerequisites necessary for this hidden agreement.[50] On this occasion, various applications are utilized to figure out fraud agreements. The Appeals Chamber explained that only the purchase price, even if it is lower than the market price, cannot be the basis for making a purchase agreement void, if there are no other compelling evidences. The law provides taking into consideration the right of redemption but the redemption period (even if it is short in the opinion of the party) does not create a reason to doubt the authenticity of the agreement. As for the issue of leaving the property of purchase in the possession of the seller, as a rule, the right to its use also extends to the redemption period by the agreement of the parties. And after the expiration of this term, if the seller does not buy back the property, he already owns the property without a reasonable basis. Thus, this argument cannot serve for making an agreement invalid. The court also explained that any restriction which a law imposes means that addressees must obey it without seeking the ways to evade it.[51] The "temporary" nature of the contract indicates that the seller has to redeem the property of purchase within a specific period, in this case, within 5 months. Regarding the reference to the fact that the buyer has not got the property of purchase, the court noted that the parties enjoy the right to freely enter into the contract and determine its content. Following the agreement of the parties, the seller is granted the right to use the property of purchase. This is derived from the nature of the legal relationship of purchase with the right of redemption as the seller is provided with the right to redeem the property of purchase within a specific period. Accordingly, the right of seller to use the property is limited to the period in which he is granted the right of redemption.[52]

4.2. Counterclaim with Social-economic Factors

The defendant of the Vindication claim often mentions his/her difficult economic and/or health condition, the status of a socially vulnerable person and/or pensioner, lack of other housing. The court has repeatedly explained that a serious health and/or serious financial condition does not constitute a basis for lawful possession of another's property. They may give a rise to the right of certain demands towards the state, however, not the obligation for any individual or legal entity of private law to have a

[50] cf. Decision of the Supreme Court of Georgia, June 17, 2015 on case No. AS-487-461-2015 and Decision of the Supreme Court of Georgia of January 23, 2015 on case No. AS-1142-1088-2014 (in Georgian).

[51] Decision of the Supreme Court of Georgia of May 14, 2015 on case No. AS-167-155-2015 (in Georgian).

[52] Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of November 30, 2022 on case No. 2b/783-22.

person in need use his/her property, especially for free.[53] Obviously, the court cannot consider the status of a displaced defendant or the duration of using the disputed property to determine the legality of ownership. The appellants indicated that they had no other residence and they owned the disputed real estate for 25 years, the court clarified that it is not an obstacle for the owner to requisite his real estate from the unlawful owner. The argument that the owners have no other residence apart from the disputed real estate, even if such a fact is confirmed, cannot be taken into account.[54]

4.3. Counterclaim against the interests of juveniles

There is often met the interests of a child in Vindication lawsuits. In one of the cases, a juvenile claimant requested being granted the right to use the real estate owned by his grandmother from his father's side until he reaches adult age. The claim was based on the factual circumstances that the child's father and grandmother, who did not take moral and financial responsibility for the plaintiff, filed a claim to the court to evict the plaintiff's (child) mother from the apartment, which led to turning out the juvenile plaintiff of the apartment where he was adapted. Changing the living place was against the best interests of the child. In addition, mother could not afford to create other appropriate housing conditions. The documents of the case proved that after having the decision of the court entered into legal force, the immovable property belonging to the grandmother and the defendant in the given case, was requested from the illegal possession of the juvenile's mother. The Appeals Chamber agreed with the reasoning of the court that the grandparents' alimony payment is based on close family ties, but their alimony payment has an additional, subsidized nature compared to the primary obligations of the first-line family members. According to the explanation of the court: it must be determined that it is impossible for the parents to create necessary living conditions[55] for the child and the grandparents have sufficient financial support. Simultaneously, the law envisages the alimony duty of grandparents of both sides, and even in case of filing a lawsuit against one of the parties, the court must define the amount of alimony to be paid to the grandchild taking into account the duties of the grandparents from another parent's side (regardless of the existence of a lawsuit against them).[56] In this case, arising a claim by juvenile occurred on the grounds of the motivation that the enforcement of the legally effective decision to satisfy the Vindication lawsuit would create obstacles. In this regard, it is also important the explanation of the Court of First Instance that filing a lawsuit should not be done with the expectation that the decision will stop the enforcement of a legally binding decision made within another dispute. The legal force of the decision implies that its annulment or modification is allowed only in the manner established by law, and that the parties, as well as their successors cannot

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53 Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of August 16, 2022 on case No. 2b/2938-22.

54 Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of July 6, 2017 on case No. 2b/685-17.

55 Decision of the Supreme Court of Georgia May 5, 2017 on case No. ac-454-426-2017.

56 Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of November 30, 2022 on case No. 2b/2650-22.

reapply to the court for the same claims or dispute the facts and legal relations established by the decision in another process.[57]

In another case, a person filed a Vindication claim against a daughter-in-law (son's wife) who lived in the plaintiff's apartment with her young son, the plaintiff's grandson. The defendant did not acknowledge the claim and indicated that she had no other residence or any income. The Court of First Instance satisfied the claim but the result was changed by the Court of Appeals with this explanation: In the conditions when the interest of the owner did not overlap with the interest of the defendant and the juvenile living with her, the plaintiff applied the right of the owner in an illicit manner; This is not only the relationship between the owner and the illegal possessor, but it is also the relationship between the grandmother and the grandson, that is why the best interests of the child "precede" the right to ownership.

The Court of Cassation pointed out: the defendant does not have another residential apartment and she lives with her son in the contested apartment, which the owner does not use; raising and maintaining a child means not only taking the alimony obligations of grandmother, but also creating a healthy living environment for the grandson; the purpose of regulating Article 1225 of the Civil Code is not only supplying the juvenile with material support, but providing him with housing, while the child cannot receive this benefit from his parents.[58]

In one of the cases, the Court of Cassation pointed out: taking into account the established factual circumstances, on one side of the dispute there is a legitimate interest in protecting the property of the plaintiff (on the legal basis of Article 19 of the Constitution and Article 1 of the First Additional Protocol to the European Convention, Articles 170-172 of the Civil Code) while on another side is presented the urgent need of the owner's juvenile grandchildren for a residence (shelter) where they will be able to live and grow up in a family environment with their mother; the starting point when making decision is the best interests of the child (Article 81 of the Code of Children's Rights). Accordingly, in the residential house of the plaintiff, there is an acute social need to temporarily limit the constitutional right to property which is caused by the commitment to provide housing for the owner's grandchildren; Considering that the third floor of the disputed house is used for living, the second floor can be rented out, and the first floor is not used for living, it is possible that both the plaintiff and the defendant with their juvenile children live separately from each other in the disputed house.[59]

5. Conclusion

The Constitution of Georgia affirms ownership as a basic human right, which at the same time obliges the owner. Thus, the right to property has a moderate and necessary social function.[60] The relationship between the social and public legal necessity of restricting right and freedom of property

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57 Cf. Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of November 30, 2022 on case No. 2b/2650-22.

58 *Berulava N.,* Vindication lawsuit against a juvenile, Georgian-German Journal of Comparative Law, 1/2022, Tbilisi, 2021, 48; (in Georgian); Cf. Judgment of the Supreme Court of Georgia of May 5, 2017 on case No. AS-454-426-2017

59 Decision of the Supreme Court of Georgia of June 16, 2022 on case No. As-1375-2021 (in Georgian).

60 *Zarandia T.,* Property Law, Tbilisi, 2019, 180-181 (in Georgian).

should not be understood that at the expense of limiting the right of each owner to individual property can be achieved social well-being, the fulfillment of social obligation of the state and large-scale protection of the rights of people with social needs. The social goals of the state will not be achieved by limiting and reducing the protection of the owner's rights.

The owner has the right to use the legal means of protection of the right to return the property, but it should be Vindication and not arbitrariness.[61] The legal dispute arising between the formal owner and the actual possessor is considered and decided by judicial authority, based on the principles of disposition of proceedings, competition and equality of the parties. The inadmissibility of extrajudicial eviction applies to a dispute arising within the framework of private legal relations, when the alleged violation of the right to property does not go beyond the scope of a civil delict, and if the right to property is violated by means of a public (administrative or criminal) delict, the law enforcement authorities, in the form of the public function to prevent crime, are obliged to evict from the property the person who illegally invaded it and avert criminal infringement of the right to property.[62]

The analysis of court practice revealed that an owner, setting a request for Vindication to protect the right to property, faces a number of difficulties, including delays in the review time. For example, it is true that a court decision on handover of immovable property from illegal possession or prevention of other interference belongs to the category of immediately enforceable decisions, which makes it possible to evict a person before the court decision enters into legal force, immediately (after the completion of the first instance case), however, in the mentioned practice It is an exceptional case.

Due to overloaded court system it is impossible to comply with the procedural deadlines established by the procedural legislation. The period of the pandemic also had a negative impact on the interests of the owners. Judicial consideration of the case by three instances often works in favor of the illegal possessor. It was revealed that the legislator is clearly inclined to enhance the protection of the possessor's rights, at least in the procedural provisions. This is evidenced by the actual cancellation of the State Duty barrier at the stage of accepting the counterclaim to the Vindication claim (Article 48.2 of the Civil Code).[63] If the possessor of the disputed property has any claim against the owner, he can always file a lawsuit, and his activeness only after filing the Vindication lawsuit against him leaves the impression that arising counterclaim only serves to delay the consideration of the Vindication case, which is supported by the opportunity to postpone paying the State Duty for the counterclaim.

It would be better if the Vindication lawsuits were procedurally considered in a more simplified manner: it is conceivable how necessary it is to extend the rule of three instances to such disputes; examining and shortening the review and appeals deadlines can be a kind of solution. Along with the appeals deadline, the target dates for preparing a reasoned decision are also important for the court.[64] It

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61 See <Explanatory card of the draft https://factcheck.ge/wp-content/uploads/2015/10/file003.pdf> [16.01.2023] (in Georgian).

62 See, Ibid.

63 "If there is no reason for exemption from paying the State Duty, in the case of requisitioning the immovable property from illegal possession, the payment by the plaintiff will be postponed until the decision is made. This rule applies to the defendant as well if he initiates a counterclaim".

64 Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, <https://matsne.gov.ge/ka/document/view/29962?publication=149> [12.01.2023]; 257 Section 2 of the

is also taken into account that the court is obliged to send the decision to the parties as a result of considering the case without an oral hearing, and the countdown to the appeal period starts from the delivery of the decision. In such disputes, the problem of handing over the text message to the party is relevant (often the defendant avoids handing over the court message). This ultimately leads to a delay of considering the case and entering the decision into legal force. Accordingly, it should be appropriate for the legislator to define a shorter time limit for the parties to appear in court to receive the decision made as a result of an oral hearing of the case. In addition, the obligation to appear in court should apply regardless of whether the party is exempted from paying the State Duty or not, which, following the general rule, obliges the court to send a reasoned decision to the party.

The possibility of filing counterclaims and counterappeals is also often used to delay the consideration of the case. The stage of preparing the case (including admissibility) is often much longer than the deadlines for the full consideration of the case. Especially, in the appellate instance, on appeal and cross-appeal due to the existence of an institute of flaw.

On the basis of judicial practice, it is also worth noting that the realization of the protection of property rights within the civil legal framework within the framework of Vindication lawsuits creates obstacles and is delayed by the frequency of futile counterclaims. Futile counterclaims include fraud dealing, socio-economic factors and the interests of juveniles. In relation to appealing fraud agreements, the civil proceedings are based on the principle of competition, the court is deprived the opportunity to determine the objective truth of the case. The defendant, as a rule, does not have any evidences except for the own oral explanation. It is supposed that the legislative change regarding the restriction of providing loans with the property financed as collateral for the repayment of the debt between individuals, has significantly led to the abundance of Vindication lawsuits.

It is also worth noting the attempts of the owners, in order to avoid court proceedings, they change the door/lock of the property or vacate the space in another way which is sometimes done by violent means and increases the risk of physical confrontation between citizens.

It is also a common practice to use and manipulate juveniles by unlawful possessors, which violates the best interests of the child. There are met a number of delays when the decision of the court is executed in favor of the possessor. Participation in the case of a juvenile should not be understood in such a way that "all owners" are bound by a relational obligation to "all children". A part of the aforementioned cases including the element of a child referred to the occurrences when, in addition to the possessor-owner relationship, the parties were connected by other family legal/alimony relationships. In those particular cases, the best interest of a child outweighed the interests of the owner. Even the need to manage such affairs through judicial proceedings justifies the abolition of the institution of police eviction. Unlawful violation of "temporary" possession may lead to irreparable consequences and cannot be compensated for damages by a claim. In the way of prohibiting arbitrariness and protecting the owner, the law prevents violence and guarantees peaceful relations. Therefore, protection of possession is provided regardless of whether an owner or a possessor has a right to possess the property.[65]

Article: Within 14 days from the introduction of the resolution part of the decision, the court prepares a reasoned decision for the parties.

65 *Zarandia T.,* Property Law, Tbilisi, 2019, 174 (in Georgian).

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3. Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, <https://matsne.gov.ge/ka/document/view/29962?publication=149> [12.01.2023].
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A Shareholder Activity: Types of Control, Gaining and Using it

The article analyzes control as a methodical mean of practical implementation of shareholder activism, the ways of obtaining it and forms of use in the corporate-legal dimension.

In corporate law, control is understood in several directions. Its corporate sense leads to the mutual separation of ownership and control, management and holding a controlling stake by a shareholder under the authority of the JSC.

The three-level classification of control is based on positive corporate law, which is developed by the best international practices of corporate management and the requirements of capital market law. The research thesis is centered on the legal, and in certain cases, economic categories of a shareholder controlling stake.

In the article, the term "control" is analyzed with regard to its accession and use by a person (a shareholder) inclined to take control over the main material and procedural transactions and the control premium. The method of comparative legal research, systematic and teleological definition of the norm makes it possible to cover the basic scientific range of control in the JSC.

Keywords: *a shareholder activism, control, controlling stake, controlling premium, controlling shareholder, private benefit of control.*

1. Introduction

A subjective characteristic element of corporate law is that it is always possible to make a change in the legal or financial functional aspect of a joint-stock company (and not only) – dismissing a head person from the position and replacing with another person, adjusting capital structure, altering the brand name and the subject of activity, making a decision to implement a fundamental corporate change, amending the statute, reorganizing or even abrogating, etc. According to the positive law, decisions related to the essential functionality of the JSC must be made by the shareholders, which is formally called a decision of the general meeting.[1] In the JSC the fundamental corporate change is based on the practically realized result of the control. In corporate law, control is perceived in several dimensions. The main vector of the corporate concept of control is directed towards the separation of ownership and control, management and possession of a controlling stake by a shareholder under the authority of the JSC.[2]

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1 *French D., Mayson S., Ryan C.,* Company Law, 26th ed., Oxford University Press, 2010, 376.

2 The scientific analysis will mainly be devoted to the corporate content of the acquisition-use of the controlling stake.

With the three-level classification of control, positive corporate law is based on the best international practices of corporate governance and the law requirements of capital market. The research thesis is focused on the legal, economic, and in certain cases – financial categories of a shareholder's controlling stake. In the article, the term "control" is analyzed with regard to its accession and use by a person (a shareholder) inclined to take control over the main material and procedural transactions and the premium of controlling stake. The method of comparative legal research, systematic and teleological definition of the norm makes it possible to cover the basic scientific range of control in the JSC. As a whole, the activism realized through the use of a shareholder 's controlling stake can contradict the concept of separation of ownership and control and the basic thesis[3] of making decision by the authorities, losing the demarcation line between the managerial control of the corporation and an investor's ownership[4], the characteristic of a public joint-stock company. A risk is always a threat to an investment, and shareholder activism is an immanent attribute of being a partner and controlling the JSC. The function of balancing the results of the practical implementation of investment risk and control is assigned to the corporate law within the scope of its positive legal manifestation or the principles of the best corporate management. Dogmatic-theoretical analysis is an appropriate method of forming research results.

2. The Definition of Corporate Control

The basis of modern special private law is property and the private autonomy of the will[5]. In a private legal relationship, the result of free will "to dispose" property for the benefit of the entrepreneurial society is called an investment. The investment can be classified into direct and portfolio investments. In the national space of different countries, the so-called direct investment[6], which has an advantage, is in fairly consistent with the concept of disposal of property in favor of the entrepreneurial society. The organized management of the entrepreneurial society in the legal form is apriority for an investor that creates many corporate mechanisms of control of the JSC's capital, and considering the functionality and needs of the JSC, leads to their activation.[7]

The dilemma of taking control over the JSC capital is the result of realizing the issue with the same characteristic by two different bodies. The control mechanisms are differentiated according to the bodies of the JSC. Traditionally, the control is considered by the general assembly of shareholders and the governing body/management which means using some control mechanisms by shareholders, while the management ensures other forms of control.[8] As a result, a dual perception of control creates a dilemma over its concept.

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3 *Bainbridge S.,* Shareholder Activism and Institutional Investors, Research Paper No. 05-20, 2005, 4-10.

4 *Armour J., Hansmann H., Kraakman R., Pargendler M.,* What is Corporate Law? In the collection: The anatomy of corporate law: comparative and functional approach, translators: K*ochiashvili A., Maisuradze D., (ed.) Gabelia T.,* 3rd ed., Tbilisi, 2019, 19-22 (in Georgian).

5 *Chanturia L.,* Commentary on the Civil Code, Book I, *Chanturia L. (ed.),* Tbilisi, 2017, first article, Rn. 5, 8, 21, 22 (in Georgian).

6 OECD, International Investment Law: Understanding Concepts and Tracking Innovations, 2008, 46-48.

7 *Fairfax M. L.,* Shareholder Democracy, Carolina Academic Press, 2011, 29-52.

8 *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 447.

Regulating control mechanisms at the normative level is a facilitator of a shareholder activism. The shareholder's desire and venture to gain and have a special functional and strategic role in the corporate management process of the JSC is called shareholder activism.[9] The controlling stake creates a corporate foundation for the full realization of a shareholder activism, which converts it into a source of generating private benefit (Private Benefit of Control)[10]. The practical modeling to separate control from ownership reveals how the managing authority of the invested property is given to a legal entity, the JSC, whose leading process creates the risk of opportunistic behavior of management.[11] The balancing function of the mentioned risk, in fact, is based on two standards of corporate legal behavior: fiduciary liability and the so-called strategic and exclusive authority and a form of general assembly.

To classify the forms of control, it is necessary to analyze the levers of investment supervision. There are direct and indirect forms of intra-organizational monitoring of JSC capital. The indirect mechanism is conceptually inevitable due to the centralized management[12] and combines the supervision and monitoring of the management activities and corporate management strategy. The beneficiary of both forms of the indirect mechanism is a shareholder: the shareholder receives the result of the management behavior in the JSC. On the other hand, the direct mechanism of capital supervision is within the competence of the general assembly. The strategic and exclusive competence of the superior body designs the decisive elements[13] of control taken by an investor. In other words, the term "control" is related to both the indirect control of the management and the strategic model of corporate governance of the JSC, and the direct control of an investment.[14]

The full realization of shareholder activism depends on the extent of the shareholder's right to control: if the JSC shareholder structure is fragmented, which means there is no a single shareholder or group of shareholders managing a controlling stake, then shareholder activism, as a rule, cannot be practically achieved. But if a shareholder or a group of shareholders acting on the basis of an agreement owns controlling stake, then their relationship with the JSC falls within the regulatory area of the fiduciary liability standard. The capacity of a shareholder to exercise direct control is balanced by the loyalty liability[15] just as the opportunistic action of management is "insured" by the fiduciary liability standard.[16]

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9 *Fairfax M. L.,* Shareholder Democracy, 2011, 146-149.

10 *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 417.

11 *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies Based on Corporate-legal Actions (acquisition-merger), Tbilisi, 2014, 72-75 (in Georgian).

12 *Armour J., Hansmann H., Kraakman R., Pargendler M.,* What is Corporate Equity? In the Collection: Anatomy of Corporate Law: Comparative and Functional Approach, translators: *Kochiashvili A. Maisuradze D. (ed.) Gabelia T.,* 3rd ed., Tbilisi, 2019, 16-19 (in Georgian).

13 *Hansmann H.,* Ownership of the Firm, in: Corporate Law and Economic Analysis, *Bebchuk A. L.*, (*Edit*.) Cambridge University Press, 1991, 290.

14 *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, Society and Economy Working Papers 08/2010, 2010, 2-3.

15 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 332-339.

16 *Palmiter A. R.,* Corporations, Examples and Explanations, 5th ed., Aspen Publisher, 2006, 289.

The right of a shareholder to control is diversified in different directions. The shareholder takes control over the charter of the JSC, which he can change. As a rule, the corporate power is divided and balanced between shareholders and management by the charter. Management is selected by a shareholder, and the scope of power is determined by the charter and the employment contract. A classic manifestation of formal shareholder control over management is the right to dismiss[17] them which is compounded by such a high level construct of control over management corporate behavior as the corporate control over market. The corporate logic limits any behavior of the management related to the JSC by the standard of fiduciary liability that requires optimally managing the JSC which ensures the welfare[18] of a shareholder and increases his economic or financial benefits[19] from the JSC. Beyond the scope of the shareholder's ability to keep control, it is important to clarify the authority for an approval of the transaction containing the conflict of interest[20] which can be considered as a type of control over the management.[21]

Analyzing control can result in turning out several interrelated issues that need to be clarified: a controlling shareholder, the method of acquiring controlling stake in a joint-stock company, specific transactions aimed at obtaining control (LBO/MBO), the benefit of private control, categorization of the forms to use it, selling control stock, purchasing premium control.

3. Controlling Shareholder

The corporate foundation for realizing strategic direct control of JSC is created by the presence of controlling stake[22] in the possession of a shareholder or a group of shareholders. The terms control and controlling stake, under changes of actual circumstances, acquire a different meaning. A classic example of influencing the decision of the general meeting of shareholders is the De Jure control of an decision made by holding a controlling stake[23], but there is also a hypothetical possibility of actual control, depending on the structure of the JSC shareholders: If the shareholder structure is fragmented/dispersed, even a significantly smaller share of ownership can provide taking control over

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17 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 339-342. According to the legislation of Georgia, the general meeting of shareholders has the right to withdraw a member of the governing body before the deadline, without specifying the basis. see Law of Georgia "On Entrepreneurs", Article 44, Clause 3, Article 184, Clause 1, Sub-Clause h), the Legislative Herald, 04/08/2021.

18 The head should act for the benefit of the shareholder. see Zahn v. Transamerica Corporation, 162 F.2d 36 (3d Cir. 1947) (in Georgian).

19 *Davies P.,* Introduction to Company Law, 2nd ed., Oxford University Press, 2010, 265.

20 *Makharoblishvili G.,* Functionalization of the Conflict of Interest Construction in the Context of JSC Corporate Management, Journal of Law, No. 1, 2022, 78-86 (in Georgian).

21 *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. In turn, a controlling shareholder can appear to be in a conflict of interest when entering into an agreement with his own corporation, as the existence of minority shareholders requires that the transaction containing the conflict of interest meet the test of fairness. see Sinclair Oil Corporation v. Levien, 280 A.2d 717 (Del. 1971).

22 *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 277.

23 In general, the controlling stake is equal to "50% of voting shares + 1 vote."

the decision of the general meeting.[24] The concept of "locking minority" corresponds to the mentioned reality. Appropriately, a controlling shareholder exercises in two capacities. The first is the ownership of a controlling stake, which is directly related to the percentage rate, and the second is control[25] that depends on the actual state of the shareholder structure.[26] The controlling stake and the form of control over a controlling shareholder are not only distinguished by actual status and percentage amount, but they are also differentiated considering corporate benefits and value categories. Using the controlling stake or the actual control has its monetary and non-monetary[27] benefits that are immanent results of keeping control.[28] A controlling shareholder gains the capital arising in the way of taking control and it is generated by its premium value. In contrast, the share owned by the minority shareholder is actually subject to the same amount of discount which is the capital gain of the controlling shareholder in the context of the premium value of the share.[29] In other words, the private benefit of controlling shareholder and its volume which includes the premium value[30] of controlling stake, is formed at the cost of discounting minority shareholder's share.[31]

An additional component of the deal is that control kept by a "locking minority"[32] or owning a controlling stake, has a control premium, which is calculated while determining its value in case of

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24 For example, to decide who will be elected as a member of the governing body. See *Gevurtz F. A.,* Corporation Law, West Group, 2000, 630 (in Georgian).

25 The definition of control is included in the legislation on securities of Georgia, according to which, "control (significant share) is a situation when a person or a group of related persons owns more than 10% of the company's votes or can otherwise control the company." See Law of Georgia "On the Securities Market", Article 2, Clause 20, Parliamentary Office 1(8), 24/12/1998. However, this definition of control serves the actual purpose of trading in the securities of an accountable enterprise and has little to do with the content of control in the corporate-legal category. Unlike Georgia, US Securities and Exchange Commission Rule 405 defines control without specifying the percentage of votes (in Georgian): "The term control (including the terms *controlling, controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." ob. SEC Rule 501 (b), 17 C.F.R. §230.501(b), 2008. The concept of control defined by the legislative record of US securities trading is more factually consistent with the concept of "control" of the Georgian corporate law than the definition of control presented by the "Securities Trading" law of Georgia.

26 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 326.

27 *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, Society and Economy Working Papers 08/2010, 2010, 15.

28 *Sepe S.,* Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 8-13.

29 The amount of the premium value of the control share is equal to the amount of the discounted value of the minority shareholder.

30 Regarding the theoretical connection between the premium value and the private benefit of control, see *Dyck A., Zingales L.,* Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 543-544.

31 *Sepe S.,* Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 6-10.

32 *Gilson R.,* Controling Shareholders and Corporate Governance: Complication the Comparative Taxonomy, Law Working Paper №49/2005, 2005, 6.

selling control stock.[33] But, there arises a question, if the controlling premium is equal to the amount of the discounted value of the minority shareholder's share, then how the share providing the actual control of the minority shareholder can have a control premium. The question is rhetorical and the answer can be furnished by analyzing the monetary and non-monetary private benefits provided by the control stock or the actual state.

The concept of a controlling shareholder determines the form and method of operating. Exercising control is ensured by positive law, which includes both making internal organizational decisions of the JSC (a change in the charter, approval of a transaction containing a conflict of interest, etc.), and external legal decisions (transaction with a holding company, sale of the JSC or purchase by the controlling shareholder[34], etc.).

4. Gaining Control and its Types

Gaining De Facto control can be ensured through the majority of votes or in the following two main types of forms: purchasing outstanding shares and unifying votes by agreement of shareholders.[35] The formal way to gain control is making an agreement between shareholders. Its main characteristic is converting the interests of minority into a majority and zero economic value[36]: the formation of shareholders group does not require any payment[37],however, shareholders can be charged of private monetary and non-monetary costs, as it is in case of owning controlling stake by one person. It is necessary to consider that by the shareholders' agreement the rights and liabilities are transferred to the purchaser.[38] Gaining control through the purchase of shares takes several distinct forms. The purchase of shares is a broad conceptual category and can be realized at the stage of setting up JSC with the premise of such a proportional distribution of shares that a controlling stake can be obtained while establishing JSC.

Gaining control in the process of functioning JSC is different from the stage of its establishment, which is derived from one of the characteristic elements of JSC, a free circulation of

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33 Cf. *Kikvadze G.,* Mandatory Tender Offer, in the collection: Collection of Corporate Law, Book III, *Burduli I. (ed.),* 2015, 69 (in Georgian).

34 It means the institution of compulsory sale of shares and the expulsion of the minority shareholder based on it. For the example of Georgia, see Law of Georgia "On Entrepreneurs", Article 225, Legislative Gazette, 04/08/2021 (in Georgian).

35 Law of Georgia "On Entrepreneurs", Article 177, Legislative Herald, 04/08/2021 (in Georgian).

36 The mentioned circumstance follows an exception: gaining a control stock gives rise to a large shareholder. Increased volume of investment is less diversified that contributes to the growth of capital expenditure. see *Dyck A., Zingales L.,* Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 541.

37 Unifying common interests of voting if we hypothetically assume that voting rights can be alienated in exchange for compensation, there will be a separation of ownership and control provided by the share, which would be contrary to public policy. See *Gevurtz F. A.,* Corporation Law, West Group, 2000, 486-488 (in Georgian).

38 Law of Georgia "On Entrepreneurs", Paragraph 2 of Article 177, Legislative Gazette, 04/08/2021 (in Georgian).

shares.[39] The free circulation of shares is the main corporate mechanism for JSC functioning and capital raising. The share can be purchased either over private negotiation with a shareholder outside the stock exchange or through a tender offer.[40] The target of the last two forms of gaining control is a shareholder.[41]

Soliciting a tender offer[42] to shareholders is effective when the shareholder structure is fragmented, while private negotiation facilitates the acquiring of control in case of taking it by a single shareholder.[43] The mentioned forms of obtaining control have an economic value that determines its cost.

Gaining control by purchasing shares is also possible through specific corporate transactions. In a wide sense, while taking targeting audience, the focus is made on buying shares but in a classic perception, the merger is not considered as a form of purchase of shares.[44] The fundamental corporate combination process of the merger is initiated and carried out with the consent and involvement of the management of the JSC. The inclusion of the target audience is a type of a statutory reorganization, which is essentially different from the private negotiations or tender offers.[45] There are two fundamental differences between the merger acquisition of the target JSC and the purchase of shares: the realization of the merger requires the general involvement and consent of the JSC as a legal entity, and during the purchase of a share the trade transaction is made individually with a shareholder and not with a corporation, which does not require the consent of the board.[46]

A JSC, as a legal entity, owns assets, and it belongs to shareholders. A simple method of taking control over the property is to gain control by purchasing shares.[47]

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39 *Armor J., Hansman H., Kraakman R., Pargendler M.,* What is Corporate Equity? In the selection: Anatomy of Corporate Law: Comparative and Functional Approach, (translators) *Kochiashvili A., Maisuradze D. (ed.), Gabelia T.,* 3rd ed., Tbilisi, 2019, 14-16 (in Georgian).

40 *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, Society and Economy Working Papers 08/2010, 2010, 3.

41 A tender offer is a "public offer" made to shareholders to purchase all or nearly all of the securities with the goal of acquiring control of the target company. 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, 755-756.

42 *Schuster E. P.,* Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 4-7. Cf. Law of Georgia "On the Securities Market", Article 15, Parliamentary Office 1(8), 24/12/1998.

43 *Sepe S.,* Private Sale of Control: Why the Europe Mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 6-7.

44 The so-called Acquisition is used in a broad sense and includes "share acquisition" and "asset acquisition", which may include money (cash-for-asset-acquisition, cash-for-stock-acquisition) or shares (stock-for-asset-acquisition, stock-for-stock-acquisition). See *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies Based on Corporate-legal Actions (acquisition-merger), Tbilisi, 2014, 115-128 (in Georgian).

45 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 671.

46 It is logical that the issue concerns an "open", "public" joint-stock company, whose shares are admitted to public trading on the secondary capital market and cannot be vinculated (in Georgian).

47 *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, 627.

The subjectively atypical types of share purchase transactions are the Leveraged Buy Out and buying back the shares by the management (Management Buy Out)[48]. Both forms of share purchase compound common strategic elements: a loan is a money source for share transaction. While making a "leveraged" acquisition, JSC is sold to a small group of investors[49] including the executive bodies of the company, as a rule. According to the main trade term, the capital required for financing the transaction is a minimum equity share of own capital, and a maximum amount of credit. The property of the target audience (LBO) is used to secure the loan taken from the borrower.[50]

A slightly modified version of a "leveraged" buyout is a management stock buyout (MBO).[51] Its activation drives the target JSC for a defense against a hostile takeover bid. A hostile takeover bid can also be presented through a "leveraged" cash offer.[52] While the management regains a company's shares, the board performs the process of buying out[53] instead of investors. Atypical transactions designed for taking control through the purchase of the shares cause problems of representation[54]: there arises a conflict of interests between management and shareholders, and controlling persons impose additional credit obligations on the company, which poses a threat to creditors and employees.[55]

The purchase of shares is a simple method of taking control over a joint-stock company, which also considers specific cases in the sub-structural dimension. Their further detailed analysis is beyond the scope of the work.

5. The Use of Control in the Context of Decision Making

The presence of a controlling shareholder or a group of shareholders in a JSC means taking De Jure control over the decisions of the general meeting of shareholders. The liability of loyalty protects shareholders against dishonest actions because they can use their power of control and the positions

48 *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies Based on Corporate-legal Actions (acquisition-merger), Tbilisi, 2014, 141-151 (in Georgian).

49 A group of investors usually creates a fictitious JSC, whose partnership structure may include members of the management of the target company.

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, 844-876.

51 *Haas J. J.,* Corporate Finance, 2nd ed., Thomson Reuters, 2011, 610.

52 The so-called Hostile LBO-type cash-tender-offer. The line of demarcation between the sale of a JSC and a MBO transaction as a strategy to protect against a hostile takeover by management is often not clear. see *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 545. Cf. *Bradley M.,* Interfirm Tender Offer and the Market for Corporate Control, The Journal of Business, Vol. 53, No. 4, 1980, 370-371.

53 The offeror for the purchase of shares can be a JSC organized by the management of the target company, whose capital structure is essentially formed by the amount raised in the form of credit. See *Gevurtz F. A.,* Corporation Law, West Group, 2000, 678.

54 Regarding control transactions, see *Davies P., Hopti K., Ringe V. G.,* Control Transactions, in the Collection: Anatomy of Corporate Law: Comparative and Functional Spproach, translators: *Kochiashvili A., Maisuradze D., (ed.) Gabelia T.,* 3rd ed., 2019, 321- 383 (in Georgian).

55 *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, 844-846, 849.

for their own purposes[56] at the expense of interests[57] of the entrepreneurial community and minority shareholders. The springboard for the use of control is being a shareholder[58] at the general meeting of shareholders when it is possible to determine the main orientation of extrajudicial actions along with making usual business or strategic decisions of the internal organization[59].

Whether at the internal or extrajudicial level, the control target corporate issues are explicated by positive law at the normative level, and it is, in fact, equal to the competence[60] of the general meeting and the rights derived from the rights[61] of the shareholder's member. The area of competences includes making fundamental corporate decisions (amendment of the charter, reorganization, dissolution), fixing the amount of invested capital and the number of the members of the governing body, their election, early withdrawal, selecting corporate management system, defining the amount and structure of remuneration, making an appointment of a special representative in court, purchasing, selling the property to provide a mean[62] of security, giving consent to transactions by the statute, establishing a subsidiary company and distributing dividends[63]. The owner of the controlling stake resolves all issues by the principle of the majority of votes in case of making a decision. His influence is essential even if the charter establishes a qualified majority of votes.[64] But when the decision is made by a qualified majority, the share of minority shareholders acquires an additional value, which is called quasi control in corporate law.[65]

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56 *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 278. According to Georgian legislation, the interest of the minority shareholder is protected not only by the actions of the controlling shareholder, but also with the consequences of abuse of the dominant position by the dominant shareholder. see Law of Georgia "On Entrepreneurs", Article 176, Legislative Gazette, 04/08/2021. Regarding the dominant situation, see *Burduli I.,* Foundations of the Stock Law, Volume II, 2013, 166-187 (in Georgian).

57 *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, Society and Economy Working Papers 08/2010, 2010, 17.

58 About the rights of an individual, a quota-dependent and an independent shareholder, see *Burduli I.,* Foundations of the Stock Law, Volume II, 2013, 41-87 (in Georgian).

59 But, in some jurisdictions, the decision-making power of shareholders is limited as a result of the balanced regulation of the competences of the governing body (for example, in Delaware's corporate law). See *Bainbridge S.,* Shareholder Activism and Institutional Investors, Research Paper no. 05-20, 2005, 2-3.

60 Except for the situation when the governing bodies apply to the general assembly with a request to resolve an issue within their competence. see Law of Georgia "On Entrepreneurs", Article 184, Clause 3, Legislative Gazette, 04/08/2021.

61 Such rights include special right of access to information, a special right to control, exercise of right through court, right to appeal, right to receive dividend and others. See *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Maghradze G., Egnatashvili D.,* Corporate Law, 2nd ed., Tbilisi, 2021, 574-595 (in Georgian).

62 The transaction for alienation of JSC property by the controlling shareholder can be concluded with a condition tailored to the interests of the person exercising control and not giving a chance to consider another, alternative transaction, that is why the minority shareholder must either agree to the transaction or use the right to withdraw. See *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 282-283 (in Georgian).

63 See Law of Georgia "On Entrepreneurs", first paragraph of Article 184, Legislative Gazette, 04/08/2021.

64 See Law of Georgia "On Entrepreneurs", first paragraph of Article 195, Legislative Gazette, 04/08/2021.

65 *Booth A. R.,* Financing the Corporation, Thomson Reuters/West, 2010, 130.

The extent to use control is consistent with the principle of calculus but also demonstrates the possibility in an additional dimension of competence. In particular, the control owner can influence the agreement/approval[66] of a transaction containing a conflict of interest, or exercise control over a minority shareholder[67], justify the synergistic effect[68] of buying out a share and expeling a minority shareholder[69], support an agreement on a significant transaction[70] considering a relevant direct or indirect economic interest, and alienate the part of property (assets)) that makes the main business line of JSC.

The legal and economic model results of using control are to be performed at the next stage of the analysis.

6. Sale of Control and its Premium Value

The sale of corporate control is a private arrangement to transfer a controlling stake in a JSC. Unlike a hostile bid, control sale transaction is the result of a direct negotiation between a control owner and a potential buyer, so a privately negotiated sale of control is perceived[71] as a "friendly" takeover, but it is actually far from corporate-friendly. The acquisition of control through a tender offer and private negotiation differ both in terms of the negotiation process and cost. During the tender offer, the control premium is higher than the market value, it is publicly promulgated and at least, it applies to all shareholders depending on the target group of the offer. On contrast, when purchasing a controlling stake through private negotiation, the amount of the premium value, as a form of private benefit[72], is stated after arranging with one person and is unknown until the deal is concluded, and most importantly, it belongs only to the controlling shareholder[73].

A principle of corporate law is the principle of equal treatment. By law, shares of the same class must have equal gain in the valuation process. On the other hand, it is clear that the ownership of shares by different entities creates an imbalance of values. The minority shareholder is able to sell the share only at a discounted price, and the controlling shareholder at a premium price. Discounting is

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66 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 188. See Law of Georgia "On Entrepreneurs", Article 208, Legislative Gazette, 04/08/2021.

67 In order to accumulate the percentage required for the compulsory sale of the minority shareholder's shares, the controlling shareholder may, at the first stage, make a tender offer to the rest of the shareholders, receive the required number of votes, and then make a decision either to alienate the JSC's property, or to merge with another entrepreneurial society and then create a minority entity. A prerequisite for the redemption of the shareholder's shares by the JSC, or the grounds for the expulsion of the minority shareholder from the JSC. See *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 297.

68 *Alchian A.A., Demsetz H.,* Production, Information Costs and Economic Organization, 62 Am.Econ.Rev., 1972, 783-785.

69 See Law of Georgia "On Entrepreneurs", Article 225, Legislative Herald, 04/08/2021.

70 See Law of Georgia "On Entrepreneurs", Article 223, Legislative Herald, 04/08/2021.

71 *Sepe S.,* Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 6.

72 *Dyck A., Zingales L.,* Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 537.

73 *Sepe S.,* Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 7.

determined in relation to the value of each share when evaluating the JSC as an aggregate. Typically, the discount is defined as the market[74] turnover discount or the minority shareholder's discount. A variable discount range typically fluctuates from 20% to 25% of the pro rata value of each share. According to the theory, the share price does not proportionally reflect the value of the company. The minority shareholder's discount is the market value of a non-controlling stake that does not influence corporate governance and can be easily captured under competitive conditions. Based on the theory, the share price does not proportionally reflect the value of the company. The minority shareholder's discount is the market value of a non-controlling share as such type of share cannot influence corporate governance and can be easily captured under competitive conditions.[75] In order to calculate the premium paid for the controlling stake, two variables are required: the market value of the share and the premium amount, overpayment. The cost of control premium is a type of cash flow[76] from the acquirer's perspective, while the price premium for the controlling shareholder is generated according to the classification of private benefits. As a result of teleological analysis, a hypothetical assumption can be made that the control premium paid by an acquirer is equal to the private benefit of a controlling shareholder, from which the amount of private benefit can be equal to the minority shareholder's discount.[77] In this context, the controlling stake is followed by the monetary and non-monetary private benefits of control.[78] But there arises a question, if the control premium is detrimental[79] to the minority shareholder or it is a simply control advantage. Rhetorically, the answer to both parts of the question is more positive than negative.

The perspective of an acquirer is based on[80] the possibility of realizing a synergistic effect and considering its measurements, the target community is undervalued[81] and has the potential to function more effectively[82].The hypothetical possibility for an acquirer to gain control is to pay the controller a higher value than the market price, and the control premium is only the cash flow of the controlling shareholder[83], however, as a result of effective corporate management, the value of the target audience will increase (in case of actual growth), which will affect all shareholders, including minority ones.[84] The surplus value received from selling the controlling stake to the minority shareholder will not be

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74 It means the secondary capital market.

75 *Booth A. R.,* Financing the Corporation, Thomson Reuters/West, 2010, 112-114.

76 *Dyck A., Zingales L.,* Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 538.

77 *Prescott Group Small Cap , L.P. v. Coleman Co., Inc.,* 2004 WL 2059515 (Del. Ch. 2004).

78 *Sepe S.,* Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 10.

79 Comp. *Booth A. R.,* Financing the Corporation, Thomson Reuters/West, 2010, 119-120.

80 *Kode G., Ford J. C., Sutherland M. M.,* A conceptual model for evaluation of synergies in mergers and acquisitions: A critical review of the literature, South African Journal of Business Management, 34 (1), 2003, 27.

81 So called „*Undervaluation".*

82 *Haspeslagh P. C., Jemison D. B.,* Managing Acquisitions: Creating Value through Corporate Renewal, The Free Press, New York, 1991, 22.

83 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 330.

84 *Pinto R.A.,* Understanding Corporate Law, 3rd ed., Lexisnexis, 2009, 302-303.

shared[85], because the premium value of the controlling stake is a private, personal benefit of the controlling shareholder, simultaneously the alienation does not give rise to the redemption of shares by the JSC.[86] An exception can be considered a mandatory tender offer, when the acquirer makes a tender offer[87] to the minority shareholders at that premium price he had to pay for obtaining control.[88]

The optimal theory to support the existence of premium value refers to the classification of types of private benefits. But the accepted theoretical view is that the creation of controlling stake is costly, therefore, the sale[89] of an already formed/gained controlling stake requires a higher premium price compared to the market price[90]. Selling a controlling stake at a premium price is reasonable. The controlling shareholder is not required to share[91] it with the minority and is free[92] to make a decision, as long as there is no reason to presume that the alienation of the controlling stake will harm the JSC or its shareholders, or prevent other (minority) shareholders from exercising the right to alienate[93].

Naturally, sale of control is not a panacea, and it is applied by the constructions of corporate-legal restriction[94]. In particular, the alienation of control must not be performed dishonestly or in violation of loyalty liability to the detriment of the JSC. It should not lead to the appropriation of business opportunity of JSC, should not involve the alienation of an office[95] (Sale of Office)[96] and must not be aimed at appropriating the company's property or selling it to an appropriator.[97]

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85 According to one of the US court decisions, a minority shareholder cannot enjoy the "right to equal share" in the premium value of the controlling stake, unless the controlling shareholder has abused the power, and further indicated that participation in the minority shareholder's control premium would be against the existing legal regulation and it is better to have such a radical The regulation should be written at the normative level. see Zetlin v. Hanson Holding, INC., 397 N.E.2d 387 (N.Y. 1979).

86 See Law of Georgia "On Entrepreneurs", Article 179, Legislative Gazette, 04/08/2021.

87 *Booth R. A.,* Financing the Corporation, Thomson Reuters/West, USA, 2010, 115. For another exception established by judicial law, see Perlman v. Feldmann, 219 F.2d 173 (2d Cir. 1955), cert. denied, 349 U.S. 952 (1955).

88 See Law of Georgia "On the Stock Market", Article 151, Parliamentary Office 1(8), 24/12/1998.

89 Along with the sale of the controlling stake, due to the similarity, in the legal doctrine, the sale of the office is understood as the sale of control (Sale of Office, or Sale of Directorships). The acquisition of a controlling stake allows the member of the governing body to be immediately relieved of his position. Despite owning a small package of shares from the executive, these shares will be redeemed at a premium price, in exchange for which the executive pledges to resign as soon as the purchase agreement becomes effective. In doing so, he is selling the managerial control of the JSC, rather than the controlling stake held directly by the shareholder. It cannot, in the classical sense, qualify as a sale of control by a controlling shareholder. As a result, the premium received from the sale of the relatively small (the judgment below covers only 4% of the shares), non-controlling stake, must be returned to the company because the premium paid for the small stake is "against public policy and illegal." see Brecher v. Gregg, 392 N.Y.S.2d 776 (1975).

90 *Allen T. W., Kraakman R., Subramanian G.,* Commentaries and Cases on the Law of Business Organization, 4th ed., Wolter Kluwer Law & Business, 2012, 417.

91 *Easterbrook H. F., Fischel R. D.*, Corporate Control Transactions, The Yale Law Journal, Vol. 91, No. 4, 1982, 715-719.

92 *Zetlin v. Hanson Holding, INC.,* 397 N.E.2d 387 (N.Y. 1979).

93 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 330-331.

94 *Gevurtz F. A.,* Corporation Law, West Group, 2000, 631-639

95 *Cox J. D., Hazen T. L.,* The Law of Corporations, Vol. 2, 3rd ed., St. Paul, 2010, 342-344.

The next stage of the deductive analysis includes the classification of the bases for generating the premium value of the controlling stake and their research.

7. Private Benefits of Control

A controlling stake is worth more than its fair market value[98] for the simple reason: the controlling shareholder has the power[99] to make strategic business changes. The potential buyer thinks that he will pay a premium amount for the controlling stake, gain control of the JSC, make strategic business decisions and increase income.[100] In other words, the premium value of control or controlling stake is based on a shareholder's individual private benefit of control and its two subcategories – monetary and non-monetary private benefit. There is a difference between "shared benefit of control"[101] and "private benefit of control".[102]The first of them occurs when the overall value of the business community increases as a result of effective management monitoring and all categories shareholders can share it. The second is the benefit of control, which is attributable only to a controlling shareholder and may include "monetary private" or "non-monetary private benefits".[103]

Control includes the legal or economic motive for paying a higher price, different from the market value that belongs to the classification of the types of private benefits. It is taken by the controlling shareholder at the expense of discounting the minority shareholder.[104] The private benefit of control is closely related to the synergy generated by corporate-legal combinations between companies. Joining two or more companies creates synergy, and synergy increases the equity value of a controlling shareholder, which is found an example of the private benefit of control.[105]

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96 *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, Society and Economy Working Papers 08/2010, 2010, 11.

97 So called *Looting. See Harris v. Carter,* 582 A.2d 222 (Del. Ch. 1990).

98 It is worth noting that the actual market value is allowed to be lower than the fair market value if there is a market discount, when the market does not show readiness/receptivity to the stock, or if there is a threat that the controlling shareholder will use the control right to receive more than the due value from the corporation (which minority shareholder will be equal to the discount). See *Booth A. R.,* Financing the Corporation, Thomson Reuters/West, 2010, 118. In the context of the use of the right of protest (withdrawal) of the shareholder in connection with the determination of the fair value of the share, See *Makharoblishvili G.,* Implementation of Fundamental Changes in the Structure of Capital Companies Based on Corporate-legal Actions (acquisition-merger), Tbilisi, 2014, 255-262 (in Georgian).

99 *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, Society and Economy Working Papers 08/2010, 2010, 14.

100 *Booth A. R.,* Financing the Corporation, Thomson Reuters/West, 2010, 116.

101 So called *Shared benefit of control.*

102 So called *Private benefit of control.*

103 So-called Non-dissipative private benefits and Dissipative private benefits. For the analysis of the Georgian-language matching, See *Kikvadze G.,* Mandatory tender offer, in the collection: Collection of Corporate Law III, *Burduli I. (ed.),* Vol., 2015, 64. Add. *Schuster E. P.,* Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 14-19 (In Georgian).

104 *Sepe S.,* Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 8.

105 *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, Society and Economy Working Papers 08/2010, 2010, 18.

The monetary private benefit of a controlling shareholder is manifested in receiving[106] additional income by appointing to an official position, in the possibility to use the business opportunity of the corporation for personal purposes, in getting financial benefits from a transaction containing a conflict of interest, in the unequal distribution of profits in the form of dividends, in gaining a premium amount in excess of the fair market value for the controlling stake, etc. It is related to the possibility of holding a preferred position in the liquidation dividend, etc. The controlling shareholder's monetary private benefit is the result of a different distribution of the JSC's cash flows. In the sale of control, a private monetary benefit is attached to the controlling stake. Accordingly, the increased value of the controlling stake consists of the expected increased value of the company under the buyer's managerial control and its monetary private benefits. As a result of incomplete bidding, the monetary private benefit is calculated in the same way as the premium value, so far as it is equal to the difference between the price paid for the share and the market value.[107] But, if the calculation of the controlling shareholder's private benefit were easy, the non-controlling shareholder would always prevent from receiving the benefit through the courts. However, the premium value generated by private benefits is high when the investor in the acquiring country takes advantage of weak corporate protection and expects to greatly increase the amount of monetary private benefits.[108] In any case, the monetary private benefit depends on having influence on the strategic and functional decisions of the JSC and transforming the obtained results into economic value. And this encourages a potential acquirer of the controlling stake to pay higher price than the fair market value, to gain control in the joint-stock company and to try to obtain private benefits at the expense of the entrepreneurial community and the minority shareholder. The value of private benefit of control is often considered the "psychological" cost[109] of being a controlling shareholder. It is also considered the pleasure of a "commandeer", which means paying multi-million premium by the acquirer to the controlling shareholder.[110]

The non-monetary private benefit of the controlling shareholder has a specific meaning. A non-monetary private benefit is an advantage generated from the controlling shareholder's privileged reputation, fundamentally underpinned by the corporate power to exercise practical and substantive influence over the decisions of the JSC. If the monetary private benefit is manifested in financial right and possibility of differentiated distribution of the company's free cash (the so-called willful act), the non-monetary private benefit is a theoretical, an unrealized value of private benefit, not highly liquid and directly convertible[111] in the monetary category (for example, by selling, by exchange). If the

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106 *Jensen C. M.*, *Meckling H. W.*, The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, Journal of Financial Economics, 1976, Vol. 3, No. 4, 315-318.

107 *Sepe S.,* Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 9-11.

108 *Dyck A., Zingales L.,* Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 538.

109 *Sepe S.,* Private Sale of Control: Why the Europe mandatory Bid Rule is Inefficient, Arizona Legal Studies, Discussion Paper No.10-29, 2010, 8.

110 *Dyck A., Zingales L.,* Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 540.

111 *Schuster E.P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, Society and Economy Working Papers 08/2010, 2010, 16-18.

monetary private benefit is largely equal to the minority shareholder's discount and is achieved at his expense, the non-monetary private benefit is the result of the position in the shareholder structure that does not harm[112] the interests of the minority. Based on the results of the deductive analysis, an intermediate summary thesis can be formulated that means getting non-monetary private benefits dependent on the principle of competent enumerability of the general meeting of the controlling shareholder. That is why the non-monetary private benefit is an important, but not essential factor of paying premium value for purchasing a controlling stake by a buyer.

The decisions of the controlling shareholder, which are not directly related to his monetary private gain, are usually linked to the interests and wellbeing property of the JSC, which in the context of the theoretical economic value also applies to the minority shareholder as a lender of last resort.[113]

When defining the concept of the monetary and non-monetary private benefits of control, the authority to make a decision should be emphasized as a common characteristic element that leads[114] to determine the private benefit of control. Due to the mentioned fact, transforming the private benefits of control into two subcategories is considered an ineffective method[115] in transaction of selling control stake.

8. Conclusion

The article analyzed several fundamental dogmatic-theoretical aspects of control in the context of its acquisition and use, which can be summarized in several priority theses below.

A methodical mean of practical realization of shareholder activism is the acquisition and use of corporate control. Gaining control is possible in the way of using different forms. Basically, these forms are a purchase of shares and unification of votes by agreement of shareholders.

The use of a controlling stake or an actual control has its own, i.e., private benefit of control, which is an immanent outcome of the controlling stake and actual control. The controlling shareholder, an owner of the controlling stake benefits from the capital gained by the control. The control premium is a cash from the acquirer's perspective. The premium value of control or controlling stake is based on the shareholder's individual private benefit of control and its two subcategories – monetary and non-monetary private benefit.

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112 It is possible to determine the efficiency of the private benefit generated by the sale of control using the Pareto ratio and the Kaldor-Hicks ratio. According to the Pareto efficiency test, a change is efficient if someone benefits from it without making anyone worse off. In contrast to Pareto efficiency, according to Kaldor-Hicks efficiency, a change is effective if as a result of it the union receives a benefit that is greater than the same union's loss. See *Schuster E. P.,* Efficiency in Private Control Sales – The Case for Mandatory Bids, Society and Economy Working Papers 08/2010, 2010, 21-22 (in Georgian).

113 For example, when receiving a liquidation dividend in the form of participation in the asset (property) of the JSC in proportion to the share.

114 Along with decision-making power, the controlling shareholder may be considered to have access to information that a minority shareholder may not have. See *Dyck A., Zingales L.,* Private Benefits of Control: An International Comparison, The Journal of Finance, Vol. 59, No. 2, 2004, 545-546 (in Georgian).

115 *Schuster E. P.*, Efficiency in Private Control Sales – The Case for Mandatiry Bids, Society and Economy Working Papers 08/2010, 2010, 21.

The vision of an acquirer of count on the possibility of realizing the synergistic effect as in his appraisal, the target community is undervalued and has the potential to function more effectively. The hypothetical eligibility for an acquirer to gain control is paying a controller higher price than the market value. Therefore, the control premium is only the controlling shareholder's cash flow.

As a result of the performed analysis, it is acceptable to conclude that control is the basis for realizing shareholder activism; the types of its acquisition and use are comprehended and classified, and the legal advantage of control can be transformed into corporate and economic benefits, which in turn, is called private benefit of control. In accordance to the analysis, it can also be mentioned that the demarcation of private benefits of control into monetary and non-monetary private benefits during a transaction selling of controlling stake or control does not justify the purpose of classification.

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40. *Zahn v. Transamerica Corporation,* 162 F.2d 36 (3d Cir. 1947).
41. *Zetlin v. Hanson* Holding, INC., 397 N.E.2d 387 (N.Y. 1979).

Tamta Margvelashvili*

Enforcement of Competition Law on Digital Platforms – Responsive Modelling for Digitization Challenges under the EU Law

The law of the European Union (hereinafter the "EU") is a complex legal system that builds supranational law on the basis of comparative studies.[1] For the EU the harmonization of law is one of the instruments that ensures the proper functioning of the EU internal market and achieves the idea of perfecting European integration, which has long gone beyond its current geographical boundaries to include the "Third World".[2] Accordingly, the harmonization of competition law is not only an endeavor for EU member states to develop a unified system to ensure effective competition, but it is also a basic tool for countries on the path to EU membership.

This particular paper is focused on these important issues. It by directing its attention on the root of harmonization of EU competition law enforcement, presents the possibilities of competition enforcement mechanisms legal transfer for digital platforms from one jurisdiction to another based on a comparative method. Therefore, the first research object of the article is the normative and case law trends of the European Union, that ensure the enforcement of fair competition for digital platforms in the continuous process of digitization. On the other hand, the focus is shifted towards the prospects of harmonization of competition law enforcement tools for digital platforms in Georgia.

Keywords: *Competition, Europeanization, enforcement, digital platform, market power, European Union.*

1. Introduction

Comparative legal research has become an integral part of the modern legal agenda. Today, terms such as "transplantation of law", "transposition of law", "imitation", "approximation", "approximation", "Europeanization" are often used to denote the accompanying processes of legal development. These and other definitions are seen as a cornerstone of the harmonization process and as a means of increasing interdependence at the regional or global level.[3] Nonetheless, research or direct transfer of the normative base alone does not lead to successful legal harmonization. It is necessary to assess to what extent, limits and principles the process of legal "approximation" in the

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1 *Vranken M*., Fundamentals of European civil law. Blackstone Press, London, 1997, 14.

2 The term is used to refer to a country that is not a member of the European Union. Citizens do not enjoy free movement within the EU according to Article 2(5) of EU Regulation 2016/399 (Schengen Code).

3 *Malinauskaite J.,* Harmonisation of EU Competition Law Enforcement, Springer International Publishing AG, 2019, 11.

wake of European integration should be implemented, so that one normative context withstands the practical transformation of "travel" between jurisdictions.

The trends of recent years have aroused great interest in the direction of harmonization of competition enforcement mechanisms. The competition law enforcement model of the EU countries benefits from the largest export potential in the region. This has its own economic and legal explanation.

One of the factors is the need for globalization of competition law in the context of the transition to the digital age and platform economy.[4] Today, business operates without any national borders. In this process, the society aspires to get full benefits from the digital era, for which it is important that the digital market is healthy, competitive, inclined to create innovative products and services. This aim can be assured through competition law and its enforcement mechanisms basing themselves on time-adjusted solutions for digitalization.

2. Digital Market Specifications and EU Competition Law Enforcement Challenges

The platform economy has revolutionized the behavioral patterns of consumer and business integration. Both the forms of communication and trade became different. Digitization has made many business activities viable in a short period of time, however, the idea that the Internet structure could eliminate market imperfections has been proven wrong.[5] Moreover, technology has given the special market power to vendors such as Google, Apple, Facebook, Amazon,[6] that based on the openings of the economics, leads to a violation of the allocative efficiency of the market, an increase in prices from monopolists, and results in less productivity and innovation.[7]

Notwithstanding the fact the European Commission and national agencies are quite actively engaged in the process of investigating digital platforms, the enforcement mechanisms cannot keep pace with the ever-changing technological markets for several reasons: 1. competition norms are characterized by "ex-post" action; 2. research and investigative activities are proceeding slowly; 3. the normative base is proscriptive, which emphasizes on its prohibitive nature and represents a short-term solution for the market; 4. the narrowness of the market and product definition makes it less possible to intervene in digital markets.[8]

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4 The platform economy refers to trends in doing business related to digital platforms and development, and includes activities performed by "independent contractors". See *Inozemtsev M.I., Sidorenko E.L., Khisamova Z.I.,* The Platform Economy Designing a Supranational Legal Framework, Palgrave Macmillan, 2022.

5 *Cavanagh E.,* Antitrust Remedies Revisited, Oregon Law Review, Vol. 84, 2015, 185, <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/4643/841cavanagh.pdf?sequence=1&isAllowed=y> [09.02.2023].

6 *Geradina D., Katsifisd D.,* Strengthening effective antitrust enforcement in digital platform markets, European Competition Journal Vol. 18, No. 2, 2022, 357, <https://doi.org/10.1080/17441056.2021.2002589> [09.02.2023].

7 *Baker J.B.,* The Antitrust Paradigm, Harvard University Press, 2019, 26-31.

8 *Geradina D., Katsifisd D.,* Strengthening Effective Antitrust Enforcement in Digital Platform Markets, European Competition Journal, Vol. 18, No. 2, 2022, 359, <https://doi.org/10.1080/17441056.2021.2002589> [09.02.2023].

2.1. Digital Market Characteristics

To define the proper enforcement pattern for digital platforms, firstly, it is necessary to determine what distinguishes the digital market from the traditional market. According to the definition, a digital market is a market in which businesses are connected to end consumers through technology.[9] It has several key economic characteristics, including economies of scale,[10] network effect, economy of scope[11] and the versatility and magnitude of the data. Although other markets may have similar characteristics, their combination creates a unique and enduring market power.[12]

Economies of scale are a significant competitive advantage for an operating platform. If the fixed costs of developing the platform are high at the beginning, the cost of each subsequent new user of the digital product or service decreases.[13] Upon building a certain customer base, digital businesses have the opportunity to eventually offer free services to the public. This makes it difficult for new market entrants to emerge and survive if the initial investment and services do not achieve identical or similar economies of scale.[14]

The network effect creates competition between different platforms, however, it is not competition in the market, it is competition for the market. When one platform reaches a threshold number of users and consolidates its position, only then will it give place to other platforms.[15] The potential competitor in the market has to convince the customer of the advantages of migration. Loyal users are less willing to switch to another platform, except in cases of mass migration. In the absence of network effects, both innovation is lost, and the market becomes operated by dominants.[16]

Data is the driver of the digital platform. In seconds, the digital platform collects, analyzes, stores and transmits a lot of data that allows it to develop personalized offers. Ultimately this will be reflected in increased income. In digital markets access to a large and quality database is an advantage that makes it difficult for competitors to enter the market. Even if a newcomer manages to collect some data, the scope and quality will be much less.

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9 Competition and Markets Authority, The CMA's Digital Markets Strategy, 2019, 5, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cm_digital_strategy_2019.pdf> [09.02.2023].

10 Economies of scale are achieved when more units of a good or service are produced at a lower input cost.

11 Economies of scope allow companies to expand their product catalog.

12 Stigler Committee on Digital Platforms, Policy brief summarising the main concerns of digital platforms and provides a viable path to address the identified concerns, Final Report, 2019, 34-35, <shorturl.at/gjsP0> [09.02.2023].

13 European Commission, Directorate-General for Competition, *Montjoye, Y., Schweitzer, H., Crémer, J.,* Competition policy for the digital era, Publications Office, 2019, 20 <https://data.europa.eu/doi/10.2763/407537> [09.02.2023].

14 Stigler Committee on Digital Platforms, Policy brief summarising the main concerns of digital platforms and provides a viable path to address the identified concerns, Final Report, 2019, 37 <shorturl.at/gjsP0> [09.02.2023].

15 Ibid, 39.

16 European Commission, Directorate-General for Competition, *Montjoye, Y., Schweitzer, H., Crémer, J.,* Competition policy for the digital era, Publications Office, 2019, 22-26 <https://data.europa.eu/doi/10.2763/407537> [09.02.2023].

The digital market is characterized by economies of scope, which increase efficiency by offering additional services based on their core business (collected data, trust, innovations based on various products).[17] Thus it creates an invisible barrier to competitiveness for a new actor, as he has to offer customers not only a new product, but also an entire ecosystem around that product.[18]

The above-mentioned factors indicate that the digital market is highly prone to such distortions of competition as the acquisition of market power and high concentration. All this leads the market to "creative destruction".[19]

2.2. Challenges of the European Commission in the direction of competition enforcement

2.2.1. ex-post or ex-ante?!

The biggest challenge for competition enforcement in the digital market is achieving the main goal of competition law, protecting and restoring competition for the benefit of consumers. Due to technological progression timely intervention in digitized markets is vital for the entry of new players into the market. According to EU law, the Commission only after the violation, i.e. "*ex-post*" appears on the scene, with rather long and tiring procedures. Consequently, it is easier for economic agents to gain market power and drive potential competitors out of the market.[20] As a result of using the economic characteristics listed in subsection 1.1 to its advantage, the operating platform avoids competitors and strengthens its positions in such a way that the implementation of anti-competitive actions at later stages loses its meaning.

Whether this is a legal defect is still a matter of discussion. As evidenced by the EU's relationship with Google and the immunity generated by powerful digital platforms, the fact stays that enforcement fines are no deterrent for digital platforms. Also, the Commission's Cease and desist type orders are ineffective, since they do not ensure the restoration of the competitor's violated rights, and it is very difficult to move in the direction of private enforcement in the conditions when the violation of competition is not established by public enforcement. Such order itself also allows the violator to keep the achieved benefit, i.e. it does not have a restitutive, i.e. "restorative" function in a broad sense.

Furthermore, if we look at Articles 101 and 102 of the "Treaty on the Functioning of the European Union" (hereinafter "TFEU"),[21] EU law does not prohibit anti-competitive practices by non-dominant digital platforms. Therefore, if a digital platform in a non-dominant position engages in anti-competitive practices, thereby consolidating market power, the Commission is powerless with its mechanisms.[22]

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17 Ibid, 33.

18 Furman Report of the Digital Competition Expert Panel, Unlocking digital competition Report of the Digital Competition, 2019, Par. 1.106.

19 *Panzar J.C., William J Baumol W.J., Willig R.,* Contestable markets: An Uprising in the Theory of Industry Structure, The American Economic View, Vol. 73, 1982, 491.

20 *Schweitzer H., Welker R.,* Competition Policy for the Digital Era, CPI Antitrust Chronicle, 2019, 3–4.

21 Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012, 0001 – 0390, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> [09.02.2023].

22 *Geradina D., Katsifisd D.,* Strengthening effective antitrust enforcement in digital platform markets, European Competition Journal, VoL. 18, No. 2, 2022, 370.

2.2.2. Narrow View of Enforcement

A major obstacle for competition agencies is the information asymmetry that exists between them and digital platforms. It is difficult to assess violations related to algorithm changes, especially in the absence of a technical team. This means that it is possible that a digital platform violates competition norms but fails to come under the watchful eye of the regulator due to inadequate knowledge or technical difficulties in obtaining evidence.

Noted scholars *Feldman* and *Lemli* have noted on US competition law enforcement for digital platforms that: regulators are "deliberately focusing on the trees, not the forests."[23] According to them, the current structure of the competition law does not make it feasible to determine "alleged competitive harm" and "competitive harm in synergy". They develop the idea that actions that may individually be legal compliant evaluated in a bundle may result in anticompetitive actions for a digital platform.[24]

The above-mentioned challenge stems from the case law, setting a high burden of proof standard for the regulator, which is why they focus on one vertical, when cumulatively, the violation may exist in several different directions. Due to such a narrow view, the Commission's "Google Shopping" decision became the subject of intense criticism, since the Commission assessed only the direction of "Shopping",[25] while the restriction of competition arising from Google's search engine also applied to other verticals. Due to the narrow vision, there was no restorative result for Google's competitors.

There are significant shortfalls in the perception of digital products/service. The decision of the European Court of Justice (hereinafter "CJEU") of *Consten and Grunding*develops the idea that the more products are offered individually by producers, which are perceived differently in the eyes of the consumer, the more the effectiveness of competition law among such producers decreases. [26] If this statement is applied to the digital reality, technological advances, cost reductions and innovations related to differentiated goods can no longer ensure the ability of the consumer to substitute one product/service for a different one, since what matters is the external perception by the end-consumer, not the content of the product/service. Consumer perception is related to market power, which is a significant barrier to new market entrants.

In addition, enforcement patterns of the regulators, that heavily focus on price and volume become outdated for digital platforms, as most products in this industry may not have monetary value. In such market the competition outbursts more in the direction of innovation, since for a new entrant strengthening its market position is only feasible through an innovative product.[27]

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23 *Lemley M. A., Feldman R.,* Atomistic Antitrust, William and Mary Law Review, Vol. 63, Issue 6, 2021, 1869.

24 Ibid, 3.

25 Case AT.39740, Google Search (Shopping), Commission Decision, [2017].

26 Case C-56/64, Consten and Grundig v Commission of the European Economic Community, [1966], ECR 299, 343.

27 *Shelanski H.A.,* Information, Innovation, and Competition Policy for the Internet, University of Pennsylvania Law Review 161, 2013, 1663.

2.2.3. Modernization of the Enforcement Mechanisms

Competition enforcement counts down the cases where the narrow view presented above has led the CJEU or the Commission by erroneously considering certain non-competitive actions as pro-competitive (false positive) or, on the contrary, as negative (false negative), especially when it comes to digitalization.[28] In such a case the market is forced to correct mistakes by enabling new competitors to enter because of excessive market power and increased prices. A well-known mechanism is to regulate similar issues with case law, however it proofs to be ineffective to remove existing market conditions or barriers to entry.[29]

Considering above, it is deemed more appropriate to equip EU competition law with more interventionist instruments. The framework for the practical application of "error-cost"[30] mechanism should be revised. This development also implies a review of the distribution of the burden of proof, especially in cases where a combination of several actions creates a violation of competition. [31] According to *Schweitzer* and *Welker*, such actions rendering sufficient potential for harm should establish the restriction of competition by object until the platform meets its burden of proof.[32]

2.2.4. Compliance with the Legal Setting

It is to be assessed whether the above-mentioned initiative complies with the TFEU and EU case law. Although, on the one hand, Articles 101 and 102 of the TFEU clearly outline presumption opportunities, the categorization of actions and placing the burden of proof entirely on the economic actor may dramatically change the current legal situation.[33]

Pursuant to the Budapest Bank case, a violation by object of Article 101 of the TFEU may solely be established only if there is sufficient and reliable experience on its the restrictive effect of such actions on competition, otherwise an additional analysis is needed to assess the effects.[34] If categorization of non-competitive conduct by object is constituted for digital platforms and the burden of proof is shifted to them, both the practice and the legal norms need to be altered. The questions and implications of strict regulation must also be considered: 1. How foreseeable is the presumption of infringement by object and the reversal of the burden of proof? 2. To what extent will the principle of equality in entrepreneurial activity be ensured and how will the public legal dilemmas be overcome in

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28 Case C-230/16 Coty Germany GmbH v Parfumerie Akzente GmbH [2017] ECLI:EU:C:2017:941, See: *Kuenzler A.,* Competition law enforcement on digital markets—lessons from recent EU case law Journal of Antitrust Enforcement, 2019, 7, 249–278.

29 *Baker J.B.,* The Antitrust Paradigm, Harvard University Press, 2019, 82-89.

30 Error-cost analysis is a technique used to resolve ambiguous issues in competition law. With this method, the probability of error within the given information is reduced, the volume and type of the necessary information is determined.

31 *Geradina D., Katsifisd D.,* Strengthening effective antitrust enforcement in digital platform markets, European Competition Journal, VoL. 18, No. 2, 2022, 376.

32 *Schweitzer H., Welker R.,* Competition Policy for the Digital Era, CPI Antitrust Chronicle, 2019, 4

33 *Colomo P.I.,* What Can Competition Law Achieve in Digital Markets? An Analysis of the Reforms Proposed, 2020, 12, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723188> [09.02.2023].

34 Case C-228/18, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, [2020], ECR, Par. 52.

the existing case laws? and 4. May similar legislative initiatives become a barrier to innovation and market development and what is the readiness index of national agencies and courts, in addition to the Commission, to properly harmonize and implement the aforementioned initiative in relation to digital platforms.

This skepticism exists despite the plausibility of the model proposed by *Geradina* and *Katsifisdis.*[35] However, the question stands to what extent the digital platform will be given the opportunity to defend against the presumption as well as how the evaluation and sharing of their arguments by the Commission on a practical level occurs. If we consider the active exporting areas of EU competition law to third countries, problems may arise in this context as well.

2.2.5. Restorative Measure – a Mechanism for Solving the Dilemma

The goal of modern competition law is to ensure effective competition.[36] Generally we face two types of competition enforcement measures: behavioral and structural. It is quite difficult to choose the correct punitive measures. Factually, the use of punitive injunctions and fines by the Commission and agencies against digital platforms, and antipathy to structural measures, does not ensure recovery for affected competitors.

Many authors recommend the introduction of restorative measures to safeguard the status quo existing before the violation.[37] For instance Vestager's report points to such restitution elements as granting access to data to competitors or compensating for informational asymmetry otherwise.[38] Stigler's report also considers it permissible to introduce an obligation to share data.[39]

In fact, this direction may lead to the need for the creation of a new regulation, since there is an opinion that the current legal framework does not contain guidelines for the imposition, implementation or monitoring of restorative measures. However, Article 7(1) of Regulation 2003/1[40] is an important entry to overcome such a barrier. The broad interpretation of a norm makes it feasible to assert that effective enforcement also includes the possibility of eliminating anticompetitive effects in the digital market. However, the practice also goes beyond mere prohibitory orders. Practice also speaks for marching beyond mere prohibitory orders. For instance, the measure used by the

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35 *Geradina D., Katsifisd D.,* Strengthening effective antitrust enforcement in digital platform markets, European Competition Journal Vol. 18, No. 2, 2022, 380-381.

36 *Adamia G.,* Constitutional Aspects of Economic Competition, Journal of Constitutional Law 2, 2020, 99 (in Georgian).

37 *Ritter C.,* How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? Journal of European Competition Law & Practice 3, 2016, 12.

38 European Commission, Directorate-General for Competition, *Montjoye, Y., Schweitzer, H., Crémer, J.,* Competition policy for the digital era, Publications Office, 2019, 67 <https://data.europa.eu/doi/10.2763/407537> [09.02.2023].

39 Stigler Committee on Digital Platforms, Policy brief summarising the main concerns of digital platforms and provides a viable path to address the identified concerns, Final Report, 2019, 117-118, <shorturl.at/gjsP0> [09.02.2023].

40 Council Regulation (EC) No 1/2003 on The Implementation of The Rules on Competition Laid Down in Articles 81 And 82 of the Treaty, 16/12/2002.

Commission in one predatory pricing decision, requiring the elimination of the consequences and the restoration of the original situation, was not considered by the court to be a violation, despite its restorative nature.[41]

Neither the fundamental principles of competition nor private law of the European Union prohibit the imposition of restorative measures in public enforcement. It is important to establish a test on the basis of which restitution mechanisms will be applied. The necessary components of this test are adequacy, effectiveness, and the need to eliminate the anti-competitive act and its consequences. Failure of any of the elements creates significant shortfalls both legally and in terms of market development.[42] In doing so, attention should also be directed towards the regulatory norms for monitoring the assigned measures. It is reasonable to share the UK's model of monitoring carried out by sectoral regulators.[43]

3. Exporting Potential of Competition Enforcement Policy Related to Digital Platforms in Georgia

It is no longer a fresh word that the EU's aspiration to build a common area of shared democracy, prosperity and stability has long gone beyond its formal borders.[44] In the aftermath of the agreement on Partnership and Cooperation between Georgia and the European Union concluded in 1996,[45] the Georgia-EU Association Agreement[46] set much more ambitious and concrete plans in the direction of competition law harmonization. Both parties undertook to encourage each other in achieving mutual benefits and increasing the level of integration, including the promotion of a single digital market in Eastern Partnership countries. Chapter 10 of the same agreement exerted special significance to free and unrestricted competition in trade relations.

Under the Article 204 (1) of the Association Agreement, Georgia undertook to develop comprehensive competition law framework with stated objectives. According to the second part of the same article, a reference was made to the body responsible for the effective enforcement of competition laws, equipped with relevant powers.

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41 Case C-62/86, AKZO Chemie BV v Commission of the European Communities, [1991] ECR 286, Par. 155-157.

42 E.g., In the Google-Android case, Google was required to cease and desist from future anti-competitive actions with respect to its search engine, and as a restorative measure, Google undertook to display alternative search engines on their new devices, however, the old smartphones continued to operate with the same structure – a classic example of inefficiency. *Genai P.*, An update on Android for search providers in Europe, The Keyword, 2019.

43 In the United Kingdom, the Competition and Markets Agency actively liaises with the Digital Markets Unit under the Data Protection Authority.

44 *Margvelashvili T.,* Fostering E-commerce in the light of the Deep and Comprehensive Free Trade Area (DCFTA): A Case Study of Georgia, Law Journal No. 1, 2020, 148 (in Georgian).

45 Agreement on Partnership and Cooperation, 22 April 1996.

46 The European Union External Action, 'Eastern Partnership (EaP), <https://eeas.europa.eu/diplomatic-network/eastern-partnership/419/eastern-partnership_en-> [09.02.2023], Article 28 and 29.

The harmonization of the enforcement mechanisms also stems from this obligation and aims at the transposition of the EU's competition legal agenda to Georgia.[47] Although the competition approximation process is evaluated positively, there are still some gaps in the direction of competition enforcement before full harmonization with the European Union.

3.1. Georgia's Digital Environment

Considering Georgia's soviet legacy, achievements in the field of information technologies (ICT), such as full internetization, the establishment of the Electronic Trade Facilitation System (TFS), are very welcome from the digital economy development point of view.

Digital platforms are considered one of the priority areas of economic growth. For instance, on March 16, 2018, the idea of the "Digital Silk Road" was presented and the country's aspiration to become "a regional leader and major player in e-commerce technologies" was highlighted.[48]

In addition to the emergence of domestic major players in the digital economy, the society gained access to major international digital platforms as well.[49] Echoing the experience of the EU, anti-competitive actions on the part of international and local digital economic actors are not rare, which is why the National Competition Agency has a significant role, on the one hand, to actively monitor the market, to identify the facts of violations on the territory of Georgia, and, on the other hand, to develop effective mechanisms for responding to anti-competitive actions of digital platforms.

3.2. Role of the Competition Agency

Publicly available documentation of the Competition Agency of Georgia offers scant practice in terms of monitoring digital markets and detecting violations by the players. Nonetheless a very interesting market monitoring report is there for a review covering hotel-booking digital platforms.[50]

The triggering point to launch monitoring in the mentioned market was the statement submitted on November 15, 2016, according to which "Booking.com B.V." may have established a violation of Article 7 of the Law of Georgia on Competition.[51] According to the statement the violation was manifested in the so-called application of broad MFN.[52] On January 9, 2017, the agency terminated the proceedings on the afore-mentioned statement provided that "Booking.com B.V." and its

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47 *Loladze T.,* International obligations and cooperation in the field of competition, the first international scientific-practical conference, Competition policy: modern trends and challenges, Collection of Works, 2017, 134 (in Georgian).

48 Ministry of Finance, <https://mof.ge/News/8357> [02.09.2023].

49 For instance: Vendoo.ge, Veli.ge, Extra.ge, Area.ge, edX-like ESx etc. They operate in different directions and create completely unique digital markets. Digital work platforms (Glovo, Wolt, Bolt, etc.) are also an interesting to be zoomed in on.

50 Report of the Competition Agency of Georgia, 2019, <https://admin.competition.ge/uploads/ba93e69448d1440f806dd21c5a19edd9.pdf> [09.02.2023].

51 Law of Georgia "On Competition", Legislative Gazette, 08/05/2012

52 Report of the Competition Agency of Georgia, 2019, 5 <https://admin.competition.ge/uploads/ba93e69448d1440f806dd21c5a19edd9.pdf> [09.02.2023]. Most Favored Nation or parity principles.

subsidiary company would offer MFN conditions similar to EU countries to counterparties operating on the Georgian market.[53] This decision is interesting in several ways.

Firstly, the mentioned case is a pioneering case of investigating the possible facts of violation of competition on the part of digital platforms, which is why for the Competition Agency it should have been a platform for determining the criteria and basic enforcement measures specific to digital markets. It is to be welcomed that despite the termination of the case investigation, the market was still monitored, however, with incomplete results and at an interval of 3 years, which is quite a long time in the technological progress setting. Unanswered questions are whether the digital economic agent is perceived as a special case for Georgian competition law and whether more effort is needed in this direction.

The Competition Agency's decision contains extensive citations of Georgian and EU substantive law, as well as French and German practice in relation to Booking.com.[54] It is worth noting that the Agency refrains from giving further explanations. It relies on the EU case-law framework and, without examining the restrictive effects of competition, takes the position that a possible infringement does not meet the legal standard of reasonable doubt. It also states that the limitation is insignificant. Among the respondents, there are no direct competitors in the market for whom the restrictive effect might be more problematic.[55] In response to this criticism, it is stated that "the agency did not receive a complaint against Booking.com; Also, the agency was not applied by the existing and/or potential competitors of the said economic agent."[56]

Undoubtedly, this decision establishes an interesting practice in determining the narrow application of the MFN condition, but difficulties arise in justification the decision. Moreover, the monitoring report completed in 2019 actually contains a similar vision. In both instances, the effects that could have been caused by wide use in the period before 2017 remained outside the Agency's focus. It is also worth noting that the Agency is to a certain degree limited by the scope and evidence of the application/complaint, though, this does not limit it from sharing its own strong positions and information necessary to promote competition enforcement patterns to the public in their decisions.

3.3. Transposition of Competition Policy attributed to the Digital Platforms in Georgia

It is a positive obligation of the state to "create a normative environment that encourages and does not drive viable entities out of the market."[57] The obligation to develop free competition is also

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53 The decision of the National Competition Agency on "Refusal to start an investigation based on the application of the Competition Law and Consumer Protection Center N01/1090 of November 15, 2016" 09/01/2017. <https://admin.competition.ge/uploads/bab070eafe7a4cfb824dddeaaa0d1b81.pdf> [09.02.2023].

54 Ibid, 11-14.

55 Ibid, 16.

56 Ibid.

57 Decision of the Constitutional Court of Georgia on case No. 1/1/655, LLC "SKS" against the Parliament of Georgia, April 18, 2019, paragraph 5.

among the constitutional obligations. The obligation to develop free competition is also among the constitutional obligations.[58]

The Georgian Competition Agency actively applies EU law norms and precedent decisions in its justifications. Despite the fact that the definitions of the Commission or the CJEU do not have binding effect in Georgia, they need to be considered as a soft law as a subsequent factor of the competition law harmonization process.

Assessment should be directed to the extent to which the enforcement of the competition law in Georgia is at the stage where the emphasis should be placed on the new discussions and processes taking place in the EU. The answer is simple, but multifaceted. In order for Georgia to move forward on the path to the EU accession, it is essential for the country to absorb new trends and directions. Technological progress makes the move towards digital platforms irreversible, which is why Georgia is faced with the challenge to quickly go through the evolutionary steps of competition enforcement policy and meet prepared to the challenges of the digital economy.

Herewith, it should be noted that the discussions on enforcement of competition for digital platforms in Georgia must pass the economic and legal test. If Georgia takes the initiative to reverse the burden of proof in relation to digital platforms, or introduces ex-ante regulations, it is worth analyzing to what extent this is consistent with its economic development aspirations in terms of doing digital business. While the agency is still not restricted from requiring the other party to proactively plead their innocence,[59] balancing exercise is strongly advised in such legislative initiatives.

It also becomes completely logical to transfer part of the restorative measures for the digital platforms discussed above to the Georgian legal space, based on the fact that the Georgian competition law is nourished with the normative and precedential basis of the competition of the EU. Nevertheless, it is recommended to evaluate the economic and political importance of the application of such measures.

Last but not least, it should be said the most active role for such legal transplants "transplants" to succeed in Georgia is assigned to the Competition Agency. It has the power to set limits, frameworks, and precedents to prevent anti-competitive practices in the digital marketplace. Accordingly, more courage and a higher degree of reasoning in the decisions, instructions and orders are desirable. While Courts also have a significant function, since the appeal of the result of public enforcement or the precedents of private enforcement are not so common in Georgia,[60] they have less opportunity to contribute to the deployment competition enforcement processes within digital platforms.

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58 Decision of the Constitutional Court of Georgia in case #2/11/747, "Giant Security" LLC and "Security Company Tigonis" LLC against the Parliament of Georgia and the Minister of Internal Affairs of Georgia, December 14, 2018, paragraph 2.

59 Order of the Chairman of the Competition Agency No. 40 of October 28, 2020 "On approval of the procedure and procedure for investigating the case," 04/11/2020.

60 *Adamia G.,* Prospects of private enforcement of competition law on the example of abuse of a dominant position in Georgia, Georgian-German Journal of Comparative Law, No. 10, 2020, 22-42 (in Georgian).

4. Conclusion

There is a growing consensus in the public that current EU competition law requires revision to address the challenges of competition enforcement arising from the digital economy. Despite several important decisions and results achieved through fines and bans, such mechanisms are perceived as less effective in the fight against the elimination of market power and the restoration of competition.

In this article, several proposals have been made from the EU's perspective aiming at tackling the dilemmas related to digital platforms. The first initiative is ex-ante legislative proposals. This analysis made it clear that solving the main problematic issues through this mechanism is not easy. There is a great risk that digital platforms will exploit legal loopholes to their advantage. The rationale behind the second proposal consisted in presumption of restricting competition by object for certain violations. Despite the great support from researchers, the compatibility of such a mechanism with the EU legislation induces questions and does not exclude the possibility of inaccuracies in regulation in the conditions of technological development. There is a tangible initiative on the part of the execution in the direction of introducing restorative measures. Following this, it is worth noting that there is no need to implement fundamental legislative changes, since the utilization of such a mechanism in its broad sense and according to recent practice is consistent with the EU's normative and case-law framework.

An important part of the paper was devoted to the analysis of readiness and existing practices in the field of enforcement of competition on digital markets in Georgia. The position was strengthened that it is necessary for the country, in the conditions of the growing digital economy, to abide with the ongoing discussions and legislative initiatives in the EU. Despite the fact that every new normative act or definition of the European Union does not automatically becomes effective on the territory of Georgia, the obligations of harmonization such processes are unavoidable by virtue of accession pathway.

To prepare Georgia's competition enforcement policy for tackling with the anti-competitive actions of powerful international or local digital economic agents, it is important to outline the problems to be solved and next possible steps. In doing so, the legal transportation of the EU law shall be carried out considering national characteristics. The initiatives proposed by this article are largely consistent with the Georgian legislative framework, which means that there is no need for fundamental normative changes. Nonetheless, as already mentioned, the competition agency and the court have an active role in the proper management of the processes. Bold steps on their part, clarifications made in accordance with the EU law are the main factors in the implementation of the healthy competition policy.

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Mariam Chilachava*

The Role of Cryptocurrencies in Private Law and the General Framework for their Regulation

The 21st century is known for its strong technological advancements, where blockchain technology and a cutting-edge product built on it like cryptocurrencies are evolving daily. According to recent research, bitcoin is particularly appealing to both experienced and novice investors. Numerous individuals and legal entities around the world accept cryptocurrencies as payment. Cryptocurrency can be used to purchase both products and services. As a result, the need for legal regulation of cryptocurrency is high on the priority list.

The purpose of this article is to evaluate the legal status of cryptocurrencies, namely what its legal character is and whether it is conceivable to treat cryptographic currency as an object of private law, as property, as electronic money, or as virtual cash. Is it better than traditional currencies, and if so, what are they? All of the foregoing will be reviewed in light of the suggestions of the United States of America, Australia, Argentina, Brazil, Germany, Zealand, Japan, South Korea, China, Georgia, and the European Central Bank.

***Keywords**: Blockchain, Electronic Money, Virtual Currency, Fraud Schemes, Cryptography, Cryptocurrency, Crypto Provider, Money Laundering, Fiat Money, Wealth.*

1. Introduction

Because of the rapid growth of technology, there is a need in doctrine to define the legal status of cryptographic currency. Is cryptocurrency a subject of private law, and if so, how should it be classified? What laws govern it and is it accepted as legal currency in developed nations? Is a license required for a cryptocurrency provider? What are the hazards of the cryptocurrency industry?

The right legal classification of the economic market and the execution of previously created laws in Georgian legislation are critical for the growth of the economic market. As a result, the work's task is to offer readers with the required cryptocurrency information, to define the status of bitcoin in private law based on proven techniques and international legal acts, and to share recommendations for mitigating associated dangers.

The study used doctrinal and non-doctrinal research approaches. Furthermore, descriptive, collection, comparative-legal, systematic analysis, and logical research methods were employed to fulfill the paper's goals and objectives.

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2. The Essence and Concept of Cryptocurrency

Since the 1990s, the number of Internet users has increased tremendously, and digital technologies have evolved in tandem. Based on the two factors outlined above, the digital currency is born, allowing for the exchange of goods and services in the virtual community. The European Union encourages these innovations and has been monitoring the "business of electronic money institutions" since 2000. However, the emergence and rise in popularity of a new type of cryptographic currency, such as Bitcoin, has presented new challenges to central banks. The decentralized structure of cryptographic currencies, as well as the characteristics of making and storing payments, have become the focus of intense research.[1] As a result, cryptocurrency has become a topic of interest in both the economic and legal communities.

Satoshi Nakamoto's main goal was to create a currency that would not be subject to inflation, would be completely independent of any central regulatory institution, would be fast and flexible, and would have very low commission fees.[2]

Due to the international economic crisis at the beginning of the twenty-first century, the idea of creating Bitcoin emerged. In early 2017, the Harvard Business Review stated, "Blockchain is a fundamental technology with the potential to create a fundamentally new economic and social system."[3]

2.1. The History of Cryptography

The first DLT research was published in the scientific journal "New Directions in Cryptography" in 1976, but its implementation was considered too difficult and risky for a long time.[4]

Stuart Haber and Scott Stornetta published the first paper on a chain of blocks produced by cryptographically protected calculations at the end of the twentieth century, in 1991.[5] Haber and Stornetta 's main goal was to develop a system that would combine several documents into a single block.[6] Documents were hashed in the system (the conversion of input data into cryptographic data using mathematical algorithms) to generate a single unique code.[7]

Cryptography is a science that protects information and so it is an information encryption mechanism. Cryptography has piqued the interest of centuries of researchers and is now one of the most developing, interesting, and innovative fields.

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1 *Chkoidze N., Tomaradze G.,* Virtual/Cryptographic currency and its features Regulation of Virtual Currencies, Tbilisi, 2014, 4 (in Georgian).

2 *Nakamoto S.,* Bitcoin: A Peer-to-Peer Electronic Cash System, 2008, 3, <https://bitcoin.org/bitcoin.pdf> [23.02.2023].

3 Please see *Hu Q., Abdulhakeem S.A.,* Powered by Blockchain Technology, DeFi (Decentralized Finance) Strives to Increase Financial Inclusion of the Unbanked by Reshaping the World Financial System, Modern Economy, Vol.12 No.1, China, 2021, 5.

4 *Diffie W., Hellman M.*, New Directions in Cryptography, IEEE Transactions on Information Theory, 1976, NY, 644- 654, <https://ieeexplore.ieee.org/iel5/18/22693/01055638.pdf> [24.02.2023].

5 *Bayer D., Haber S., Stornetta S.,* How to Time-stamp a Digital Document, Journal of Cryptology, NY, 1991, 99–111.

6 Ibid, 329–334.

7 Ibid.

In 2008, a social network article was published, which was later included in the number of scientific articles. The author of this article[8] was identified as Satoshi Nakamoto.[9] The article published under the pseudonym Satoshi Nakamoto raises awareness of blockchain and blockchain-based cryptographic currency – Bitcoin (and later other cryptocurrencies). Satoshi Nakamoto periodically published information about blockchain and bitcoin via a mailing list for several years, which helped popularize the system, but Satoshi Nakamoto vanished in 2010.

One of the most frequently asked questions these days is who Satoshi Nakamoto is. This pseudonym may not belong to a single person, but maybe it represents dozens of people who laid the groundwork for a new era – the cryptographic world.

2.2. The Role of Blockchain in Establishing Bitcoin as the Most Popular Cryptocurrency

Distributed ledger technology (DLT) is an alternative to legal regulation. The distributed ledger technology was developed to eliminate the negative aspects of the banking system. Blockchain, as well as cryptocurrency, are based on this technology.[10]

Since 2008, Bitcoin has grown enormously in popularity, and it appears that the technology that underpins its creation has been pushed to the sidelines. Blockchain is essentially a publicly accessible encrypted database. Any transaction is open to the public, but privacy is protected. As a result, the system is both anonymous and public at the same time.[11]

Today, Bitcoin is widely regarded as the most popular and in-demand cryptocurrency. Bitcoin is the currency most closely associated with blockchain technology, and it conducts several million transactions per year anonymously and without government oversight. Some regulations have already been developed, as I will discuss in the following chapters.

It is worth noting that the value and importance of Bitcoin are increasing year after year. It is not an inflationary instrument in the same way that conventional fiat money is. Because of blockchain technology, it is extremely stable and systematic.

The essence of blockchain is founded on three distinct facts: 1. record verification; 2. record protection; 3. record storage of existing and previously implemented records – these three conditions or elements ensure the stability of Bitcoin.[12] As a result, without blockchain technology, crypto-currency would not exist, and if it did exist, it would not be the guarantor of stability that it is now.

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8 *Nakamoto S.,* Bitcoin: A Peer-to-Peer Electronic Cash System, 2008,1-8, <https://bitcoin.org/bitcoin.pdf> [23.02.2023].

9 This is most likely a made-up name. According to one widely held belief, Satoshi Nakamoto may be a group of programmers whose names are an abbreviation for Japanese concerns: Samsung, Motorola, Toshiba, Nakamichi.

10 *Chilachava M.,* Specific Private-Legal Aspects of the Blockchain System Functioning, Law Journal, No. 2, Tbilisi, 2021, 163 (in Georgian).

11 *Crosby M., Pattanayak P., Verma S., Kalyanaraman V.,* Blockchain Technology: Beyond Bitcoin, NY, 2016, 71.

12 *Lansiti M., Lakhani K. R.,* The Truth About Blockchain, Harvard Business Review, 2017, <https://hbr.org/2017/01/the-truth-about-blockchain> [24.02.2023].

2.3. Bitcoin's Advantages over State-Managed Currencies

Bitcoin is a cryptocurrency based on cryptographic algorithms that is growing in popularity. Bitcoin is the "future money" that can be used to buy goods and services today.

Bitcoin has numerous advantages over state-controlled currencies.

a) Decentralization and ease of participation in the system

The first advantage is the fact that it is decentralized.[13] Decentralization is the fundamental principle of blockchain technology in general, and thus of all cryptocurrencies that have been and will be created on its basis. Because this system is decentralized, it lacks a superior regulatory body and is completely autonomous. In particular, aside from the buyer and seller, no one else participates in this process – neither the central bank, nor the regional bank, nor the state; it turns out that decentralization precludes the participation of a third party.[14]

The second advantage is the ease of inclusion in the system, which also eliminates the involvement of third parties. For example, whereas opening a simple account in a bank is associated with bureaucracy, as is making even a simple transaction, creating a Bitcoin address (account) only takes a few seconds and incurs no additional costs in the form of commissions.[15]

b) anonymity and transparency

The next advantage is anonymity. Although the user creates his address (account) by providing identification data, his name and surname are anonymized for privacy reasons, which means that no identification data is recorded during the transaction. As a result, all of his transactions are private and anonymous.[16]

Despite the anonymity mentioned above, the system is transparent, as evidenced by the public availability of transaction data.[17]

c) exceptionally low fees, speed, and irreversibility

As I previously stated, the main goal of the blockchain-Bitcoin system is to create money that is immune to inflation and has an unprecedentedly low transaction fee when compared to banks. For example, whereas banks charge significant fees for international transactions, Bitcoin transaction fees are set by the user or are non-existent. According to unwritten law, the higher the fee, the higher the priority of the transaction for the "miner" and the sooner it can be executed. As a result, the cost of a million dollar transaction can be one dollar, ten dollars, or one hundred dollars and it will never be exorbitantly priced.

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13 *Frankenfield J.,* Cryptocurrency Explained With Pros and Cons for Investment, 2022, <https://www.investopedia.com/terms/c/cryptocurrency.asp#citation-6> [25.02.2023].

14 Ibid.

15 Ibid.

16 Ibid.

17 *Crosby M., Pattanayak P., Verma S., Kalyanaraman V.,* Blockchain Technology: Beyond Bitcoin, NY, 2016, 71.

Aside from the unprecedented low fees, the main thing that distinguishes blockchain-based transactions is their speed and efficiency.[18] For example, if there is a concept of working and non-working days in the banking system, and the recipient of a transaction made on Friday can be charged on Monday, this is not permitted in the system in question. A blockchain-based transaction can last between 10 minutes and half an hour.

In addition to unprecedentedly low fees and operational efficiency, blockchain-Bitcoin technology, unlike the banking system, is distinguished by the irreversibility of previously completed transactions.[19] As previously stated, bitcoins that have already been sent cannot be returned unless the recipient returns them.

d) inflation protection

The main advantage of cryptocurrency, specifically Bitcoin, is that it is resistant to inflation. The reason for this is due to its decentralized nature. Furthermore, there is no supervisory or superior body in charge of the system.

Cryptocurrency is not fiat money, the value of which in the market is directly dependent on gold or silver; it is completely independent of stock markets and fiat money. The demand for a cryptocurrency and its mathematical algorithms are the factors that determine its value and strength.[20]

Cryptocurrency appears to have a number of advantages over fiat money. As a result, it is immune to inflation and will never become a victim of an international economic crisis.

3. The Legal Status of Cryptocurrencies

Determining the legal nature of cryptocurrency is a difficult issue because there is no clear classification.

It is worth noting that the emergence of cryptographic currency and its growing popularity necessitated the development of legal classification and regulation. As a result, the states' main task is to work on the following issues and develop a regulatory model:

1. whether a cryptocurrency based on blockchain technology (such as Bitcoin) should be considered a statutory currency;
2. if a cryptocurrency is not considered a currency, it must be classified as a commodity or thing, such as property or computer software;
3. how should crypto currency be regulated and taxed;
4. whether cryptographic money transfers should be regarded as authentic;
5. because of the system's autonomy and decentralized nature, as well as the increased risk of money laundering, the latter should be strictly controlled or not.

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18 *Hamacher A.,* What Are Flash Loans? The DeFi Lending Phenomenon Explained, 2021, <https://decrypt.co/resources/what-are-flash-loans-the-defi-lending-phenomenon-explained > [25.02.2023].

19 *Frankenfield J.,* Cryptocurrency Explained With Pros and Cons for Investment, 2022, <https://www.investopedia.com/terms/c/cryptocurrency.asp#citation-6> [25.02.2023].

20 *Cunliffe J.,* Is "Crypto" a Financial Stability Risk?, 2021, <https://www.bankofengland.co.uk/speech/2021/october/jon-cunliffe-swifts-sibos-2021> [25.02.2023].

Thus, let's consider how the first generation of blockchain technology – cryptographic currency, Bitcoin, is organized and classified today.

3.1. Bitcoin as a Property Good

The traditional definition of property no longer exists in today's reality. Nowadays, property is dematerialized and digitized. However, according to modern Georgian legal literature, the right of ownership should be extended to intangibles such as software, Internet site content, and even personal data.[21]

It is quite logical that a group of researchers believe that DLT may have something to do with property, though it is not yet fully established to what extent a cryptographic currency can provide a legal position on property.[22] There are, however, states that recognize Bitcoin as property.

The **Japanese** approach to this issue is interesting, as cryptocurrency is defined as a property that may be used as a unit of payment for both products and services by an unidentified person to an identifiable person, or property that may be exchanged for an unidentifiable person by individuals among themselves under Japan's Tax Services Act.[23] By the same act, it is determined that only those business operators who are registered in local tax bureaus in accordance with the relevant procedural rules can carry out financial operations related to the exchange of cryptocurrency. The mentioned company must be a joint-stock company or a foreign cryptocurrency exchange enterprise with a resident representative and an office in Japan. However, ICO are not prohibited in Japan; rather, they are not regulated at all and have no legal framework.[24]

Initial Coin Offering (ICO) is an initial coin offering that, in essence, is very similar to the well-known corporate law institution – IPO (Initial Public Offering). Despite their similarities, they have two major differences: 1. During the IPO, the investor becomes the owner of the company's shares, whereas during the ICO, he does not; 2. In the case of the ICO, the object must be based on blockchain technology.[25]

The first difference mentioned above is an important advantage of ICO over IPO, because in the former, the company's owner retains a controlling stake while receiving money, whereas the investor receives valuable cryptocurrency in the future. Furthermore, investors from any part of the world can be attracted in the shortest amount of time.

Importantly, it is a legal requirement in Japan for cryptocurrency exchangers to have an individual contract with a dispute resolution center, aka arbitration, with expertise in cryptocurrency.

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21 *Zarandia T.,* Property Law, Second Completed Edition, "Meridian" Publishing House, Tbilisi, 2019, 224-225 (in Georgian).

22 *Cutts T.*, Bitcoin Ownership and its Impact on Fungibility, Coindesk, 2015, <https://www.coindesk.com/bitcoin -ownership-impact-fungibility> [25.02.2023]; also see *Kelvin F., Low K., Teo E.,* Legal Risks of Owning Cryptocurrencies, NY, 2018, 47.

23 Please see *Umeda S.,* Regulation of Cryptocurrency in Selected Jurisdictions, The Law Library of Congress, 2018, 53-62.

24 Ibid.

25 *Gabisonia Z.,* The Essence and Problems of Legal Regulation of Blockchain Technologies, Journal of Comparative Law, Tbilisi, 3/2019, 6 (in Georgian).

If such arbitration does not exist, the cryptocurrency exchange must create one. This system will be responsible for handling customer complaints.[26]

Bitcoin is considered as a consumer good in **South Korea.** This is demonstrated by the Supreme Court of Korea's decision, which determined that cryptocurrency can be confiscated as property during criminal proceedings.[27] Based on this, it is clear that the mentioned decision qualifies cryptocurrency as property in the monetary sense. It is worth noting that, since 2017, Korea has been preparing a legislative package on cryptocurrency regulation, which will address three major issues: the incorporation of cryptocurrency into existing financial transaction legislation, the active fight against money laundering, and the modification of taxation.[28]

Bitcoin has been recognized as a "unit of account" and "private money" by the **German Federal Ministry of Finance**. Because virtual currency is neither electronic money nor legal tender in Germany, transferring Bitcoin should be regarded as a transfer of goods, potentially subject to VAT and income tax.[29]

BaFin confirmed the Ministry of Finance's position in December 2013 that Bitcoin is a "unit of account" and thus a financial instrument under the German Banking Act (Kreditwesengesetz). According to BaFin, Bitcoin is neither legal tender nor electronic money under European or German law. At the same time, it clarifies that Bitcoin payments and mining are not regulated and do not require a license. If you buy and sell bitcoins for a living, you must obtain a license under the German Banking Act. As Bitcoin is classified as a "unit of accounting," it makes sense that Bitcoin-related businesses require a license from BaFin based on their business model.[30]

The **New Zealand** Supreme Court ruled in the case "Rusco v. Cryptopia" that cryptocurrency is intangible personal property.[31] When discussing the issue of considering cryptocurrency as property, the court relied on Lord Wilberford's opinion that "before a right or interest can be admitted into the category of property or rights affecting property, it must be definite, identifiable by third parties, capable of being accepted/recognized by third parties in its nature, and possessing some degree of permanence or stability."[32]

3.2. Bitcoin as an Electronic Currency

The traditional definition of electronic money is the nominal value of funds expressed electronically. Its main task is to develop such a universal payment system that can be used to pay for

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26 *Umeda S.,* Regulation of Cryptocurrency in Selected Jurisdictions, The Law Library of Congress, 2018, 57.

27 *Lee J., Kim J., Yim S.,* Virtual Currency Regulation Review, Great Britain, 2018, 184-187.

28 Ibid.

29 Please see *Berberich M., Wohlfarth T.,* Virtual Currency Regulation Review, Great Britain, 2018, 118-131.

30 Ibid.

31 *Norrridge R., Moir A., Morgan C.,* Growing Body of Common Law Decision That Criptocurrencies Can Amount to Property: Ruscoe v. Cryptopia Limited (in Liquidation) CIV-2019-409-000544, 2020, 728, <https://hsfnotes.com/pwtd/2020/05/18/growing-body-of-common-law-decisions-that-cryptocurrencies-can-amount-to-property-ruscoe-v-cryptopia-limited-in-liquidation-civ> [26.02.2023].

32 Ibid.

goods or services remotely via a computer, to complete a transaction, to carry out industrial and commercial activities, and so on.[33]

Bitcoin is considered an electronic currency in **Australia**, but it is not a financial product. Any activity involving cryptographic currency is not a licensable activity (except when the activity is directly related to fiat money). The Australian Digital Currency and Commerce Association contributed to the development of the Australian Electronic Currency Industry Code, which establishes and defines the standards deemed necessary for the management of crypto-currency businesses, though compliance and adherence to these standards is mandatory for association members only.[34]

Brazil is taking a similar approach. Although Bitcoin is not a financial asset, it has been recognized as an electronic currency (Niobium Coin (NBC)) by the Brazilian Securities Exchange Commission (Comissao de Valores Mobiliarios (CVM)). According to their definition, digital currencies are only securities when they serve a specific purpose, such as paying dividends to investors or when they are required for the management of the votes needed for running the company, etc.[35]

Argentina is one of the countries that recognize Bitcoin as an electronic currency. However, according to Argentina's approach and the supreme law – the constitution – virtual currency lacks a legal basis, and the only authority that can issue it as electronic money is the country's central bank.[36] This approach existed until 2014-2015, however, after this period, legal changes made by the Argentine government to the national currency led to a doubling of the use of Bitcoin.[37] Against the backdrop of the economic crisis, Argentina's existing legal regulations were put to the test, which would undoubtedly affect the cryptographic currency.[38] It became popular in Argentina, even for everyday items.[39]

Initially, Bitcoin was considered a virtual currency in **China** as well, and China's central bank was more tolerant of Bitcoin than of its predecessor QQ coin. Profits from virtual currency trading were subject to income tax in 2009, according to data released by the State Administration of Taxation in China. Even so, in December 2013, the Central Bank of China and five other government agencies

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33 *Sichinava D., Maghradze M.,* Principles and problems of transition to electronic money, in the collection: Globalization and Business, Tbilisi, 2018, 177 (in Georgian).

34 *Margossian A., Bagnall M., Mitra R., Halforty I.,* Virtual Currency Regulation Review, Great Britain, 2018, 6-17.

35 Please see *Gomes F. M. D. N., Rocha T. M. V., Martins A. C. R.,* Virtual Currency Regulation Review, Great Britain, 2020, 60-72; also see *Soares E.,* Regulation of Cryptocurrency in Selected Jurisdictions, 2018, 21-25.

36 *Olivera D., Russo C.,* Argentina's Biggests Futures Market plans to join Bitcoin Party, Bloomberg, 2018 <https://www.bloomberg.com/news/articles/2017-11-02/argentina-s-biggest-futures-market-plans-to-join-bitcoin-party?leadSource=uverify%20wall> [26.02.2023].

37 Please see *Moreno J.*, Virtual Currency Regulation Review, Great Britain, 2018, 1-6; also see *Rodriguez-Ferrand G.,* Regulation of Cryptocurrency in Selected Jurisdictions, 2018, 2-5.

38 *Eguino H., Schachtele S.,* A Playground for Tax Compliance? Testing Fiscal Exchange in an RCT in Argentina, 2020, 1-3 <https://publications.iadb.org/publications/english/document/A-Playground-for-Tax-Compliance-Testing-Fiscal-Exchange-in-an-RCT-in-Argentina.pdf> [26.02.2023].

39 Ibid.

issued a joint directive declaring Bitcoin to be illegal tender. According to this source, Bitcoin is not a currency in and of itself; Bitcoin is a virtual commodity that cannot be used in circulation as a currency. According to the above guidance, Bitcoin users can only buy and sell Bitcoin at their own risk, and financial and payment institutions are forbidden from dealing with Bitcoin. Similarly, bitcoin exchange websites must register with the Bureau of Telecommunications and follow anti-money laundering regulations.[40]

With the increasing popularity of cryptocurrency, China is attempting to create a regulatory complex for it that, on the one hand, would bring cryptocurrency within the scope of legal regulation while, on the other hand, would not stifle technological innovation. According to the relevant circulars, ICOs have been banned across the country since 2017, with violations resulting in both civil and criminal liability.[41]

The People's Bank of China defines the legal policy of cryptocurrency in China, with the involvement of which the China Banking and Insurance Regulatory Commission issued working recommendations in 2018, according to which local cryptocurrency will be considered legitimate electronic money only if it is issued by the People's Bank of China and has the same characteristics as real fiat money.[42]

3.3. Bitcoin as a Virtual Currency and its Regulatory Framework

The **United States** has one of the world's largest markets. In 2013, the United States Supreme Court issued the first rulings on virtual currency.[43]

Bitcoin is recognized as a virtual currency in the United States of America. Bitcoin can be used as electronic money," suggests Texas state judge Amos Mazzant. It allows you to buy goods or services. It can also be exchanged for common currency, such as US dollars. Therefore, Bitcoin is a currency or a type of money, and investors who wish to invest in BTCST do so.[44]

It should also be noted that it is illegal in Russia to issue any type of cryptocurrency as a means of payment. Despite this, the exchange of cryptocurrency for real money is not prohibited and is only possible by authorized persons who must ensure the identification of the person exchanging personal data.[45]

According to FinCEN's[46] March 2013 guidance, "Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies," the Bank Secrecy Act[47] applies to

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40 Please see *Fu A.,* Virtual Currency Regulation Review, Great Britain, 2018, 96-108; also see *Zhang L.,* Regulation of Cryptocurrency in Selected Jurisdictions, 2018, 30-34.

41 *Gong L., Yu L.*, Blockchain & Cryptocurrency Regulation, China, 2019, 262-263.

42 Ibid.

43 *Lynch S.,* U.S. judge says SEC can pursue Bitcoin-related lawsuit, Washington, 2010 <https://www.reuters.com/article/us-court-sec-bitcoin-idUSBRE97517G20130806> [26.02.2023].

44 Ibid.

45 *Sidley Austin LLP*, Virtual Currency Regulation Review, 2018, 333-335.

46 The Financial Crimes Enforcement Network is a bureau of the United States Department of the Treasury that collects and analyzes information about financial transactions in order to combat domestic and international money laundering, terrorist financing, and other financial crimes.

persons who create, store, distribute, distribute, exchange, receive, or count virtual currency. Thus, three main segments were distinguished: "users", "administrators" and "exchangers".

"Users" who acquire virtual currency and use it to purchase real or virtual goods are not regulated entities. An "administrator" or "exchanger" who (1) receives and settles convertible virtual currency or (2) buys or sells virtual currency for any purpose is a "money transmitter" and is subject to FinCEN regulation.[48]

The New York State Department of Financial Services (DFS) published a draft regulation of virtual currency in July 2014. This is the first document that will establish a comprehensive regulatory framework for Bitcoin. The framework includes consumer protection, anti-money laundering, and security rules for virtual currency businesses. Persons who conduct activities such as receiving and sending virtual currency on behalf of clients; holding or controlling virtual currency on behalf of customers; exchanging virtual currency for both real currency and other virtual currency; issuing virtual currency, and others will be required to obtain new types of licenses (dubbed "BitLicenses"). Virtual currency miners and merchants who sell goods and services for virtual currency do not need to be licensed by this project. BitLicense holders must identify all users, keep a reserve of the corresponding virtual currency, and own it. Finally, DFS will conduct security audits of BitLicense holders to prevent further incidents like the MtGox[49] hack.[50]

Georgia has been actively working on the classification of cryptocurrency and the incorporation of related regulations since the beginning of 2020. The article "virtual asset" was added to the Organic Law of Georgia on the National Bank of Georgia, which includes cryptocurrency but it is not considered as a legal method of payment, according to the most recent amendments.[51] The registration of a virtual asset service provider has been determined in the amount of 5,000 GEL, according to Law of Georgia "On Registration Fees," which went into effect on January 1 of this year.[52] Furthermore, according to confirmed information from the National Bank of Georgia, the National Bank will develop rules for the registration of virtual asset service providers by July 1, 2023. The rules define, among other things, the registration requirements, including the list of documents to be presented. Therefore, no cryptocurrency-related activity will be permitted until the necessary license is obtained.

The **European Central Bank** classifies virtual currency based on two main criteria: a) the ability to purchase virtual currency with a regulated currency. b) the ability to buy real goods and services with virtual currency;[53] and there are three major schemes:[54] 1. The virtual currency has nothing to do with the real economy, according to the closed virtual currency scheme. Such virtual

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47 A person engaged in the business of money services must register with FinCEN and comply with established anti-money laundering requirements, according to the aforementioned act.

48 FinCEN, FinCen Cryptocurrency Regulation, 2013.

49 Mt. Gox was a bitcoin exchange based in Shibuya, Tokyo, Japan.

50 *Sidley Austin LLP*, Virtual Currency Regulation Review, 2018, 345-350.

51 Please see "On the National Bank of Georgia" regarding amendments to the Organic Law of Georgia <https://matsne.gov.ge/ka/document/view/5562437?publication=0> [26.02.2023].

52 Please see Law of Georgia "On Registration Fees" <https://matsne.gov.ge/ka/document/view/5561976?publication=0> [26.02.2023].

53 *European Central Bank Eurosystem,* Virtual Currency Schemes, 2012, 9.

54 Ibid.

currency has no real-world value and cannot be cashed out.[55] 2. In a one-way virtual currency scheme, it is possible to purchase virtual currency in exchange for real currency; however, reverse exchange is not permitted, and all conditions regarding this currency are written by the creator of said virtual currency.[56] 3. In the two-way virtual currency scheme, it is possible to buy and sell virtual currency for real money, allowing for two-way exchange.

3.4. The Risks of Using Bitcoin in Fraudulent Schemes and Money Laundering

Bitcoin, which is based on the blockchain platform, is a completely decentralized mechanism with no supervisory authority to control transactions. Because of the aforementioned definition, there is a significant risk that Bitcoin will be used for fraudulent schemes, legalization of illegal income, money laundering, and so on. This situation is exacerbated by the fact that countries do not take a consistent approach to Bitcoin and there is no centralized institution of order and classification.

South Korea takes this issue very seriously at the legislative level. On March 5, 2020, the Korean National Assembly amended the Act on the Provision of Information Derived from Certain Financial Transactions, increasing the obligations of virtual "good" providers from one to two, though the government's announcements will not impede the development of the said cryptocurrency and technology.[57]

The aforementioned issue was handled very carefully in **Georgia**. In particular, amendments to the Law of Georgia "On Promotion of Preventing Money Laundering and Financing of Terrorism," which includes crypto-currency, went into effect on January 1, 2023. Article 17 Prima: "Transfer of a convertible virtual asset" was added to the aforementioned law, which prescribed and specified the virtual asset service provider's obligations and established the inevitability of the supervisory authority's role.[58]

3.5. Legal Regulation of Cryptocurrency – European Central Bank Approaches

Closed virtual currency schemes that operate within a specific virtual community and do not deviate from this scope are less relevant to central bank performance. The situation is different for the other two schemes, which are related to the real economy. Virtual currencies that can be exchanged bilaterally for real currency, in particular, create the possibility of forming a speculative environment; and in cases where real goods and services can be purchased with virtual currency, the issue of competition with traditional currencies arises.[59]

The European Central Bank document discusses the potential impact of virtual currency schemes on the Central Bank's performance of the following functions: a) price stability; b) financial

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55 Ibid.

56 *Chkoidze N., Tomaradze G.,* Virtual/cryptographic currency and its peculiarities, regulation of virtual currency (on the example of BITCOIN), Tbilisi, 2014, 49 (in Georgian).

57 *Lee J., Kim J., Yim S.*, Virtual Currency Regulation Review, 2020, 251.

58 Please see Law of Georgia "On Promotion of Preventing Money Laundering and Financing of Terrorism" <https://matsne.gov.ge/ka/document/view/5562294?publication=0> [27.02.2023].

59 *ECB*, 2012, 33.

stability; c) payment system stability. This document also addressed the potential reputational risk to the central bank posed by incidents involving the security of virtual currency schemes.[60]

Based on preliminary analysis, the European Central Bank report concludes that, given the current situation, virtual currency schemes: do not pose a threat to price stability as long as currency creation remains low; are usually unstable but do not threaten financial stability due to their limited connection with the real economy, low sales volume, and small number of customers; it is currently unregulated and unsupervised by any state structure. Customers, however, are exposed to credit, liquidity, operational, and legal risks by participating in this scheme. Because of the lack of specific legal norms, it can pose a challenge for state structures, as the aforementioned schemes can be used for illegal activities by criminals, fraudsters, and money launderers. It may have a negative impact on central banks' reputation. Given that the use of these schemes is increasing significantly and incidents related to these schemes are widely publicized, the public may perceive the central bank's improper performance of its job or function as the cause of the incident; because they are similar to payment systems, they fall under the responsibility of central banks, creating the need to at least study the development process of these schemes and prepare a preliminary report. Although these schemes can have a positive impact on financial innovation and provide consumers with an alternative means of payment, it is clear that they also pose risks that, for the time being (due to the small volume of virtual currency), can only affect consumers.[61]

The ECB also lists a number of variables that are causing the volume of virtual currencies to increase. These include: a) the availability and growing use of the Internet, which increases the number of people who participate in the virtual community; b) the development of e-commerce and digital goods, which creates an ideal setting for virtual currency schemes; c) the higher level of anonymity compared to other electronic payment instruments, which is attained when using virtual currency; d) the lower costs (fees), compared to traditional payment systems; e) more direct and faster transactions. The European Central Bank believes it is important to periodically monitor the growth of the schemes in order to appraise the risks because virtual currency schemes will continue to expand.[62]

However, in terms of investor protection and market integrity, the European Central Bank's 2022 Financial Stability Review mentions crypto-assets as a risk buffer.[63] The factors that make cryptocurrency a threat were highlighted in the aforementioned work. These include: misleading information; a lack of rights and protections, such as grievance procedures or grievance mechanisms; product complexity, sometimes with built-in levers; fraud and malicious activity, money laundering, cybercrime, hacking, and computer viruses; market manipulation (lack of price transparency and low liquidity).[64]

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60 Ibid.

61 *ECB*, 2012, 47.

62 *ECB*, 2012, 52.

63 *EBA*, *Eiopa E.*, EU Financial Regulators Warn Consumers on the Risks of Crypto-Assets, 2022 <https://www.esma.europa.eu/sites/default/files/library/esa_2022_15_joint_esas_warning_on_crypto-assets.pdf> [27.02.2023].

64 Ibid.

Furthermore, transparency and accountability to regulatory bodies are critical, as the latter is the only way to reduce the risks listed. As a result, strict transparency requirements should be implemented, as well as conduct standards.

4. Conclusion

The meaning of cryptographic currency was established within the scope of the conducted research; cryptocurrency certainly has an important place in private law and its existence is inconceivable apart from private law also was determined; cryptocurrency can be classified as an intangible asset because it has the basic elements to be classified as such. However, in order to spread property regulation norms and define a regulatory lever on cryptocurrency as a property – must be shared globally, not just by a few countries.

Many problematic issues emerged while researching the nature of cryptocurrency, necessitating the immediate implementation of appropriate regulation at both the national and international levels. These issues include crypto-investor vulnerability, the implementation of fraudulent schemes, the risk of money laundering, and so on. As a result, cryptocurrency confusion may cause irreparable harm to the country's economy, reputation, and individuals who appear as crypto market players.

Various countries around the world, including Georgia, are actively working on legislative changes related to AML policy, which is encouraging. When working on changes, it is critical to set an important limit that will not unreasonably complicate economic market development by introducing inappropriate licensing or other procedures. To do so, the legislator must have a thorough understanding of the uniqueness of cryptocurrency, its legal status, its advantages over fiat money, and all of the elements that make it innovative.

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Zhiron Khujadze*

Kafka, Benjamin, Derrida: On Violence, Law and Justice

Kafka's parable "Before the Law" tells us about the countryman who spends his whole life in front of the law's gate and aims futilely to gain access to it. This article is devoted to the main question expressed as follows: why can't the man attain his aim? Wording the question is already an interpretation which in Kafka's world is not completed by "solving". And philosophers of "irresoluble" are Walter Benjamin and Jacques Derrida. They read Kafka (his literature and his personality) and help the man from the country, which requires analysing the connections and relations between the law (das Gesetz, la loi) and violence, law (das Recht, le droit) and religious teachings, the law and its origins, law and justice.

***Keywords**: Kafka, Benjamin, Derrida, before the law, teaching, violence, law, justice, deconstruction.*

1. Introduction

Kafka was a practicing lawyer who often wrote about legal issues, although he did not write as a lawyer, or specifically as a judge, prosecutor or defense lawyer, but as an "other" who experiences alienation and oppression is unable to understand the "system" and his "legal subjectivity". In his world "being the other" is the rule, not the exception, and to speak as an "other" is to grasp the illegitimacy of an order. By double observation, both from the external and internal perspectives, Kafka evaluates the law, detects its internal contradictions which usually remain beyond the horizon of the bureaucratic machine and are perceived as the subject of mechanical "correction".

Two contributing factors assisted Kafka in describing the alienness before the law. First, he was an "outsider", a German-educated secular Jew who lived in a Czech province of the Austro-Hungarian Empire. He couldn't (didn't) identify himself as truly German, Jewish or Czech, which precluded his undoubted belonging to any of the three cultures. Second, he worked as an attorney for the state agency responsible for administering the worker's compensation scheme in Prague. Kafka represented injured Czech workers who sought protection under a complicated legal system built on German legalese, in conditions of economic and linguistic subordination.[1]

Theodor Adorno wrote about Kafka's work that each sentence says to interpret it, and none permits the interpretation.[2] A clear example of this ambiguity, of simultaneous prohibition-permission, is the parable "before the law" ("Vor dem Gesetz*")* first published in December 1915. The parable, based on the author's diary (1914), had been written one year earlier, during the composition of *The Trial* which was first published after the author's death in 1925. His diary informs us that this portion

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1 *Litowitz D.E.,* Franz Kafka's Outsider Jurisprudence, Law & Social Inquiry, Vol. 27, № 1, 2002, 104.

2 *Adorno T.W.,* Notes on Kafka, Prisms, *Weber S., Weber S. (trans.)*, Cambridge, 1983, 246.

of *The Trial*, the legend, told by the prison chaplain to Josef K., is a rare exception that made the author experience satisfaction and happiness. Perhaps that is the reason why it was published separately from the novel twice in Kafka's lifetime.[3]

Since the parable tells us about the story of impossibility of having access to the law, the main issue of the article is the law (*Gesetz*), law (*Recht*), but not the law in an abstract, rather the law's (in the broad sense and not only legal) relationships to its foundation, violence and justice. Where does the law come from? Do we know the moment of its origin? Is it possible to penetrate it? What does it mean to be before it? Does it always presuppose violence, e.i. coercive enforcement in itself? What is the difference between law and justice? The parable will be presented as conductive, accepting, motivating of different ideas, but not unequivocally rejecting.

Seeking answers to the above questions requires referring to the thoughts of others, and for this, we will have to borrow the ideas of the two greatest thinkers of the twentieth century – Walter Benjamin and Jacques Derrida. Benjamin's discussion on the inseparable connection between law and violence, on Kafka's prose imbued with the influence of Jewish tradition, and Derrida's reasoning on the ahistorical origin of the law, on the relationship between the law and justice, as general and singular, calculable and incalculable, provide fertile ground for various interpretations of the fable.

2. Before the Law

As the full version of the parable covers only one page, let's introduce it here:

"Before the Law stands a doorkeeper. To this doorkeeper there comes a countryman and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment." Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the countryman has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years. He makes many attempts to be admitted, and wearies the doorkeeper by his importunity. The doorkeeper frequently has little interviews with him, asking him questions about his home and many other things, but the questions are put indifferently, as great lords put them, and always finish with the statement that he cannot be let in yet. The man, who has furnished himself with many things for his journey, sacrifices all he has, however valuable, to bribe the doorkeeper. That official accepts everything, but always with the remark: "I am only taking it to keep you from thinking you have omitted anything." During these

[3] *Born J.,* Kafka's Parable "Before the Law": Reflections towards a Positive Interpretation, Mosaic: An Interdisciplinary Critical Journal, Vol. 3, № 4, 1970, 153-154.

many years the man fixes his attention almost continuously on the doorkeeper. He forgets the other doorkeepers, and this first one seems to him the sole obstacle preventing access to the Law. He curses his bad luck, in his early years boldly and loudly, later, as he grows old, he only grumbles to himself. He becomes childish, and since in his yearslong contemplation of the doorkeeper he has come to know even the fleas in his fur collar, he begs the fleas as well to help him and to change the doorkeeper's mind. At length his eyesight begins to fail, and he does not know whether the world is really darker or whether his eyes are only deceiving him. Yet in his darkness he is now aware of a radiance that streams inextinguishably from the gateway of the Law. Now he has not very long to live. Before he dies, all his experiences in these long years gather themselves in his head to one point, a question he has not yet asked the doorkeeper. He waves him nearer, since he can no longer raise his stiffening body. The doorkeeper has to bend low towards him, for the difference in height between them has altered much to the countryman's disadvantage. "What do you want to know now?" asks the doorkeeper. "You are insatiable." "Everyone strives to reach the Law," says the man, "so how does it happen that for all these many years no one but myself has ever begged for admittance?" The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words roars in his ear: "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it."[4]

Giorgio Agamben in *Homo Sacer: Sovereign Power and Bare Life*, discussing Kafka's legend, emphasizes the Law that demands nothing of man and commands nothing, it no longer prescribes anything except its "openness". It is a "pure form" in which law asserts itself with the greatest force at the point where it no longer prescribes anything, operates as a "pure ban" in which the Law is in force without significance: "The open door destined only for him includes him in excluding him and excludes him in including him. And this is precisely the summit and the root of every law. When the priest in *The Trial* summarizes the essence of the court in the formula "The court wants nothing from you. It receives you when you come, it lets you go when you go," it is the originary structure of the *nomos* that he states."[5] At that moment, the empty potentiality of law gets to such a degree that it becomes indistinguishable from life. That is why the man reaches his aim only when the door is closed, for if the door's very openness signified invisible power or empty force of the Law, closing the door would be its destruction.[6]

Agamben decrypts the first letter of Josef K.'s surname not as Kafka, but as the old Latin word – *kalumniator* which means a slanderer. A false accusation was a great threat to Roman Law, and a calumniator was punished by engraving the letter K on his forehead. *The Trial* starts with the sentence: "Someone must have slandered Josef K., for one morning, without having done anything wrong, he was arrested." So Agamben concludes that Josef K. slanders himself, brings a slanderous trial against himself. The only guilt is self-slander, accusing oneself of non-existent guilt.[7]

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4 *Kafka F.,* Before the Law, Wedding Preparations in the Country and Other Stories, *Muir W., Muir E. (trans.),* New York, 1978, 127-128.

5 *Agamben G.,* Homo Sacer: Sovereign Power and Bare Life, *Heller-Roazen D. (trans.),* Stanford, 1998, 50.

6 Ibid, 53, 55.

7 *Agamben G.,* K, The Work of Giorgio Agamben: Law, Literature, Life, *Heron N. (trans.), Clemens J., Heron N., Murray A. (eds.),* Edinburgh, 2011, 13-14.

For the words to be used when talking about a parable should be "maybe", "perhaps" and not "certainly" or "indeed", so we can say: "Perhaps the man from the country" or "perhaps the doorkeeper". And the doorkeeper may be the colonizer who promises the conquered people to grant his law, share his culture, give benefits from his economy and teach his language, but a promise remains pending. In the story, the man from the country decides to wait when he closely looks at the doorman and sees his "big sharp nose and long, thin, black Tartar beard", so his appearance causes fear and only "the other" can provoke dread. And the other's law, be it cultural or legal, never becomes yours despite the efforts and waiting.

We can cite one example from the past which is non-violent[8], but still an unwarranted model of legal transplantation. Legal transfer to be successful should be assimilated to the deep structure of the "new law", to the social world meanings that are unique in different legal cultures. Gunther Teubner discusses the transplantation of the Continental (mostly German) legal principle of good faith (*bona fide*s) in British law, the purpose of which was the unification and harmonisation of European contract law, and which caused the irritation of bind arrangements, that tie law to the social discourses, and alienation of the contract law principles established in domestic legal order that were linked to a different type of economic transactions than continental. Teubner translates legal transplantation into the language of social systems and calls it "legal irritation", which means the "irritation" of a domestic legal space by a rule, concept or institution transferred from foreign legal order: "Foreign rules are irritants not only in relation to the domestic legal discourse itself, but also in relation to the social discourse to which law is, under certain circumstances, closely coupled."[9]

No admittance to the law is the law. Law has a self-referring nature. It regulates its adoption, operation, losing force or change. We can imagine the constitution with only one article that claims: "Law is abolished". In this case, law "does not exist" by the stipulation of law itself, but if law does not exist, it can not enact anything, therefore, the absence of law must be an event not based on law, which we can call a life, or the condition when the relation itself ensures the regulation of relation. The man from the country is mistaken when he thinks that the law is for everyone. It would be so if the law prescribed it. But the guard's last words to the dying man are puzzling: "No one else could ever be admitted here, since this gate was made only for you." If we don't suppose here the superhuman dimension and stay in the systemic legal space, what comes out? Did the guard break the law by not letting the man in? Conceivably, and it is a paradox, the law was intended for the man not to enter into it. The law which states that "you have the right to not enter the law" is different from the law which states that "entering into the law is prohibited". The right to not enter the law and the prohibition of entering are not the same. The first has a positive connotation and says nothing about admittance to the

[8] The understanding of violence should not be limited to its individual, such as oppression, rape, torture, property damage, or mass manifestations, such as war and terrorism, that is, the basic definition of violence should not be subjective, whose main sign is aggression. Violence does not require a vertical line of power or a concrete, identifiable perpetrator and victim. A man placed in an era, as a social being, coexists with violence all along. We mean violence concomitant of social practices and institutions, internal to them. This kind of violence is mostly manifested in hidden forms. We can call them structural, systemic, objective violence.

[9] *Teubner G.,* Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences, The Modern Law Review, Vol. 61, № 1 1998, 31-32.

law, while the second has a negative composition which by forbidding entry into the law excludes the acting possibility.

The doorman does not age. He is not a human in a biological sense. He is not identifiable as a concrete person from whom you can require an answer, that is why he causes fear. He has no history as he repeatedly produces himself, the doorman is always young and unchanging. He does not specify the number of guards but simply notes that even he, so powerful, is afraid of the third one. This innumerability, which possibly is not so and the guard may be the only obstacle to access the law, indicates an institutional impassability, a bureaucratic labyrinth, which is threatening because it is a labyrinth and not because someone is inside. The form itself is alarming. This is confusing for Josef K., not the people whom he encounters along the way, but the Trial itself. The Trial is the true appearance of law, and not the norm or the person who applies it.

The doorman often uses the vocabulary of "father" and he, as a father, always prevails over the countryman, as a "son". Kafka's *Letter to his Father* conveys son's attitude towards his father being physically and psychologically stronger than him, which makes the son feel feeble to gain independence. Although the father seems to support his son to escape from his influence, it reminds of the moment when playing together, one child is holding, even squeezing the other's hand and shouting: go away, why don't you go? Kafka thinks that father genuinely said the word "go", but unconsciously he always held him back with the strength of his personality.[10]

The man gets old in waiting and indecisiveness. But in his old age he "becomes childish". His life is circular, it ends where it started. He wasted the days in timidity. He was defeated, but failure is feasible where there is even a slight possibility of victory. So, what would be counted as a victory? Perhaps, the resistance even at the cost of further punishment, or at least leaving the place? But, by no means just waiting, expecting, sitting on a stool, begging, talking. As Nietzsche says: "Damned I also call those who must always *wait* – they offend my taste: all the publicans and grocers and kings and other shop- and country-keepers."[11]

3. Benjamin and Kafka: Talmudic Categories and the Violent Nature of Law

3.1. The Parable from the Talmudic Categories

In June 1938, in a letter addressed to Gershom Scholem, Walter Benjamin speaking about Kafka notes: "Kafka's work presents a sickness of tradition. Wisdom has sometimes been defined as the epic[12] side of truth. Such a definition stamps wisdom as inherent in tradition; it is truth in its

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10 *Kafka F.,* Dearest Father, *Stokes H., Stokes R. (trans.),* Great Britain, 2008, 77. Speaking about the relationship between power and the family, Benjamin notes: "The fathers punish, but they are at the same time the accusers." *Benjamin W.,* Franz Kafka: On the Tenth Anniversary of his Death, Illuminations: Essays and Reflections, *Zohn H. (trans.), Arendt H. (ed.),* New York, 1969, 114.

11 *Nietzsche F.,* Thus Spoke Zarathustra, *Del Caro A. (trans.), Del Caro A., Pippin R.B. (eds.),* Cambridge, 2006, 156.

12 Epic (epikos) as a word defining the genre, comes from the Greek term epos, the original meaning of which is a "word". If myths tell us about the stories of gods, epic poem narrates about heroic characters.

haggadic consistency." And adds: "It is this consistency of truth that has been lost."[13] Benjamin associates the crisis of tradition with the dying out of wisdom expressed in epic form and transmitted orally, which had been noticed by many before Kafka.[14] He mentions Haggadah which in Jewish culture designates the parts of Talmud, the rabbinical stories that serve to explicate and confirm the Halachah, i.e., laws at large. Benjamin regards Halachah as a doctrine, teaching (*Lehre*) and notes that Kafka's parables don't lie before *Lehre*, as Haggadah lies before Halachah, but threaten it. Kafka confronted the crisis of transmission not with the superiority of truth over expression, but the other way around. He has a concern not about the truth as such, but wisdom as a particular modality through which the truth is conveyed. Therefore, Kafka "saved" the haggadic character and "sacrificed" the truth, he separated form and content, preferred the former to the latter. That is why the form of Kafka's prose is not simply parabolic: "Kafka's writings are by their nature parables. But it is their misery and their beauty that they had to become *more* than parables."[15]

In the text dedicated to the 10th anniversary of Kafka's death, Benjamin mentions Haggadah and Halachah again. He talks about the double meaning of the word "unfolding". The first is when a bud unfolds into a blossom, and the second is when the boat made by folding paper unfolds into a flat sheet of paper. This second kind of "unfolding" is characteristic of the parable, when a reader takes pleasure in unpacking the content so he has a meaning in the palm of his hand. However, Kafka's parables unfold in the first sense, like the blossoming of a bud. That is why their effect mirrors poetry. However, this does not mean that his works belong completely in the tradition of Western prose forms. They have similar connection to doctrine as the Haggadah does to Halachah, but there is no *Lerhe* which is the final point of the story. We just have an allusion to it. Kafka might have said that these (more than parables) are relics transmitting *Lehre,* but it would be more accurate to consider them as preliminary stages, precursors preparing *Lehre.*[16] Kafka's parables are like blossoming, unfolding gradually, let us acknowledge more and more, but the final point remains hidden. In the Haggadah-Halachah relation, this second (and *Lehre*) is lost, therefore, the stories parables tell are stories with the message lost. They don't explain laws, but this absence points to the future presence for which Kafka's works have to pave the way.

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13 *Benjamin W.,* Some Reflections on Kafka, Illuminations: Essays and Reflections, *Zohn H. (trans.), Arendt H. (ed.),* New York, 1969, 143.

14 2 years before the letter to Scholem, Benjamin in his essay "The Storyteller" mentions the dying out of wisdom, the thought expressed in epic form and transmitted orally, as the reason why storytelling is reaching its end. What differentiates the novel from all other forms of prose literature, such as the fairy tale or the legend, is that it neither comes from oral tradition nor continues into it. The storyteller tells from his experience or the experience shared by others, and he in turn makes it the experience of the listeners. And the novelist is isolated in himself, he has no counsel. See. *Benjamin W.,* The Storyteller: Reflections on the Works of Nikolai Leskov, The Novel: An Anthology of Criticism and Theory 1900-2000, *Hale D.J. (ed.),* Malden, 2006, 364.

15 *Benjamin W.,* Some Reflections on Kafka, Illuminations: Essays and Reflections, *Zohn H. (trans.), Arendt H. (ed.),* New York, 1969, 144. Also, see. *Schonfeld E.,* Am-ha'aretz: The Law of the Singular. Kafka's Hidden Knowledge, Kafka and the Universal, *Cools A., Liska V. (eds.),* Berlin/Boston, 2016, 114-119.

16 *Benjamin W.,* Franz Kafka: On the Tenth Anniversary of his Death, Illuminations: Essays and Reflections, *Zohn H. (trans.), Arendt H. (ed.),* New York, 1969, 122.

Eli Schonfeld, professor of Jewish and European philosophy, interestingly connects Benjamin's consideration of Kafka and parable's (*Before the Law*) relation to the Talmudic characters of *am-ha'aretz,* which literally means the people from the earth (in the book of Ezra, it is opposed to *am Yehuda,* the people of Judah) and in rabbinic literature represents the person ignorant of the law, and of *talmid chacham* which means a wise pupil, the scholar of the law, of the Torah. *Am-ha'aretz* does not follow the rules of purity, not because he rejects the divine origin of the law, but rather because he is ignorant. Yet the law applies to him, since ignorance of the law excuses no one (*Ignorantia legis neminem excusat*), however, his intentional sins are considered as unwitting misdeeds (he is different from *shana ve-piresh* who studied the Torah and consciously decided to reject it). Not only he does not know laws, but he also is not aware of the meaning "being before the law". That is why the man from the country is *am-ha'aretz,* and the doorman is *talmid chacham,* who does possess not specific knowledge, but the art of study. He realises the dialectics involved in Talmudic learning, thus, for him, Torah never amounts to laws, but perceiving the difference between the law and Torah (teaching) constitutes his knowledge. On the one hand, formal legal system, which through coercion and power creates order among legal subjects, and on the other hand, teaching that makes us understand the true meaning of life. The knowledge of this "difference" is lacking in *am-ha'aretz*, who cannot differentiate between Torah and nomos, Torah and lex, Torah and Gesetz.[17]

Schoenfeld observes that the starting gate of *am-ha'aretz* is false knowledge. He thinks that the law should always be accessible to everyone. He finds the law universal, but this approach fails when it turns out that the law is never general. He has to journey a long way, spend his whole life at the door of the law, before the hidden knowledge will appear to him. As for the doorkeeper, he was always there, waiting for the man to come. His knowledge is the knowledge of uniqueness of time and the law. "Not at the moment" – says the doorkeeper to the man, means the right time. The priest, in Chapter 9 of *The Trial*, tells Josef K. that the story contains two important statements, one at the beginning, one at the end; the one says that the doorkeeper can't allow the countryman in now, and the other says that entrance was intended for him alone. And there is no contradiction between the two, but the first implies the second. Therefore, to know the appropriate moment is to know the singular. To Josef K.'s remark, that the doorman did not perform his duty and he should have let the man get into the law, the priest replies that he does not have sufficient respect for what was written. If chaplain's reasoning is correct, then it turns out that the doorkeeper knows that for the man, that is, for *am-ha'aretz*, entering the law has no sense. Or even more so, it has no sense for him also, because the world of meaning lies not inside the law, but before the law. A *talmid chacham* comprehends that penetrating the law leads to its violation. To fulfill the law completely and definitely is impossible. The death of the man is associated with the death of ignorance, not in the sense of dying *am-ha'aretz*, but because the truth that the gatekeeper tells in the end is revealed, which has always been there, but

[17] *Schonfeld E.,* Am-ha'aretz: The Law of the Singular. Kafka's Hidden Knowledge, Kafka and the Universal, *Cools A., Liska V. (eds.),* Berlin/Boston, 2016, 109-112. Schonfeld refers to a 1934 letter in which Benjamin writes Werner Kraft that he intends to show why the concept of the "laws" in Kafka, as opposed to the concept of "Lehre", has an illusory character and is, in fact, a decoy. See Citation: Walter Benjamin, The Correspondence of Walter Benjamin: 1910-1940, eds. Gershom Scholem and Theodor W. Adorno, trans. M.R. Jacobson and E.M. Jacobson, The University of Chicago Press, Chicago 1994, 463.

has been hidden, covered by the visible, external, it was covered by the law. The law covered teaching, *Gesetz* covered *Lehre*. Waiting was not a futile effort, because the man learned that the true law is singular, only for one, and therefore, it is no longer the law but teaching – *Lehre*. Kafka's genius lies in the fact that during the crisis of tradition, he exemplifies the "ignorant" as the cognizant of the teaching that exist beyond (the other side? in front of?) the law. In this case, the truth is passed not through the haggadic consistency, but through ignorance.[18]

Unlike this interpretation, which is guided by Judaism, it is necessary to bring the parable into a legal-political dimension, which will focus not directly (or only) on religious definitions, but on law as an essentially violent system, on the types of violence and on the possibilities of escaping from it.

3.2. The Doorman as a Policeman and the Man from the country as a Revolutionary

Hannah Arendt in her work *On Violence* notes that "the very substance of violent action is ruled by the means-end category, whose chief characteristic, if applied to human affairs, has always been that the end is in danger of being overwhelmed by the means which it justifies and which are needed to reach it."[19] Benjamin discusses the violent nature of law from the means-end perspective in his essay *Critique of Violence* (1921), where he talks about natural law and positive law, notices that the former justifies the use of violent means for just ends, and the latter attempts to warrant the justness of the ends through the justification of the means. The theory of positive law should become the initial (and not the final) subject of critique, because it undertakes a fundamental distinction between kinds of violence independently of cases of their exercise. Positive law distinguishes between sanctioned force and unsanctioned force by their historical origin, that is, it determines the legitimacy of violence based on a specific event. Ends that have general historical acknowledgment may be called legal ends, and ends which lack such acknowledgment – natural ends. The function of law is to deny the natural ends of the individual in those cases in which such ends could be pursued by violence, whereas the legal system erects legal ends that can be obtained only by legal power. From the general maxim of present-day European legislation that all the natural ends of individuals must come into collision with legal ends if pursued with violence, follows that law perceives violence in the hands of individuals as a threat to legal order. If this is the case, law should be afraid of not violence as such, but only the one which is directed to illegal ends. Interestingly, law monopolises all violence in itself. Therefore, Benjamin concludes:

"… that the law's interest in a monopoly of violence vis-à-vis individuals is explained not by the intention of preserving legal ends but, rather, by the intention of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law."[20]

Benjamin distinguishes between lawmaking and law-preserving violence. "New conditions" established after the military violence (military violence, which is used directly, as predatory violence

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18 Ibid, 119-128.

19 *Arendt H.,* On Violence, San Diego, New York, London, 1970, 4.

20 *Benjamin W.,* Critique of Violence, Selected Writings, Vol. 1, 1913-1926, *Jephcott E. (trans.), Bullock M., Jennings M.W. (eds.),* Cambridge, London, 1996, 239.

towards its ends, is primordial of all violence used for natural ends) as a new "law", which proves its worth in victory and bans "the violence of others", that means forbids legal subjects from pursuing their natural ends, stands for lawmaking violence. That is why the figure of a "great" criminal, who confronts law with the threat of constituting a new one, causes fear for the state and admiration of public. As for law-preserving violence, violence as a means, it is used to achieve legal ends (e.g., compulsory military service which forces the use of violence as a means to the ends of the state). Kind of a mixture of these two forms of violence is present in *police*. Its power is formless and nowhere-tangible. If the legal decisions are determined by place and time and recognise "a metaphysical category", which can be under the critical evaluation, police elude such critique. The state, because it no longer has the power to ensure empirical goals through legal order, provides the police with the possibility of action, which it uses in cases where there is no clear legal regulation and when the indeterminacy of legal goals leads to "free" action, i.e., imposition of a "new law" and its execution by the same "institutor":

"True, this is a violence for legal ends (it includes the right of disposition), but with the simultaneous authority to decide these ends itself within wide limits (it includes the right of decree). The ignominy of such an authority … lies in the fact that in this authority the separation of lawmaking and law-preserving violence is suspended."[21]

The doorkeeper of Kafka's parable resembles a policeman who is both a legislator and an executive. This is revealed in his conflicting propositions. Throughout the fable, one gets the impression that by not granting access to the law, he expresses the law's demand, but the final phrase that the law was only for the man furnishes a different meaning to his actions. The doorkeeper is independent, or at least independent enough to decide the fate of the man. The law is entrusted to him, he makes and executes the law, but the man thought that the doorman was only an executor whose function was to observe the requirements of the law be followed. The man thought that he lived in a "democracy" where the legislative and executive powers are separated, and not in an absolute monarchy where the two are combined and that is why its operation is more "bearable", or at least understandable. The doorkeeper tells the man that he cannot allow him in now (or yet), which means that "allowing in" depends on him, because if the lawgiver were "other" than the guard, he would have to say that he does not know, he does not decide. Countryman's words "You are insatiable" refer to the capability of the doorkeeper, because insatiable cannot be a person who depends on the law established by someone else. An insatiable can, but does not carry out, just as the doorkeeper can adopt and enforce the right to enter the law. Perhaps, he realises his "excessive" power and behaves as "great lords" use to do. He becomes indifferent as he acknowledges his boundless power over the countryman.

Is there any other way than violence for regulating conflicting human interests? Benjamin thinks that a totally nonviolent resolution of conflicts cannot lead to a legal contract, because, even in the case of a peaceful agreement, all parties are provided with the right to claim about applying violence against the other if the agreement is infringed.[22] However, contrary to the legal, official order,

[21] Ibid, 242-243.
[22] Ibid, 243.

negotiation among private persons, as a technique of civil agreement, can be managed nonviolently, which happens where there is civilized outlook, which presupposes courtesy, trust and peaceableness. It happens in the dialogue, thus, in the language which is the sphere of human agreement inaccessible to violence. This is evidenced by the fact that no legislation on earth originally stipulated a sanction for lying.[23]

Benjamin associates the foundation of state power with mythical violence, which sets boundaries, does not annihilate the adversary but provides them with rights by establishing a "new law". It is confronted by divine, i.e., law-destroying violence. However, it is only relatively, not absolutely, annihilating, which means that it annihilates goods, right, life, but not the soul of the living. As an example of the first, Benjamin cites the legend of Niobe. Niobe's arrogance calls down fate upon her which brings about a bloody murder of her daughters and sons by Apollo and Artemis, and the mother Niobe turns to stone from the sorrow. But turning into a rock does not mean death, as even a cold stone feels the tragedy that the gods have inflicted upon it. Niobe is a perpetually mute bearer of guilt and a boundary stone on the border between gods and men. When it comes to divine violence, its example is God's bloodless annihilation of the company of Korah, without warning and threat, which ultimately makes this judgment expiatory: "Mythic violence is bloody power over mere life for its own sake; divine violence is pure power over all life for the sake of the living. The first demands sacrifice; the second accepts it."[24]

Jacques Derrida, discussing Benjamin's essay, on divine violence says: "Instead of founding *droit*, it destroys it; instead of setting limits and boundaries, it annihilates them ... instead of killing

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[23] Ibid, 244-245. Benjamin's disposition towards the language is evident in the essays "On Language as Such and on the Language of Man" (1916) and "The Task of the Translator" (1923). In the first, he mentions the bourgeois concept of language, which treats the word as a means of communication. This understanding is contrasted by the founding, "pure language", which comes from God. God creates the world in the word and his word is cognizable because it is a name. However, God does not create man from the word, but sets a language in man. Only a man can name his own kind. Thus, the word does not have an accidental relation to its object, as it is understood by the bourgeois view of language, it does not give mere signs that are established by some convention, but in it the word and what the word expresses coincide with each other. After the original sin, the word becomes a signifier. The knowledge of good and evil abandons the name, because it is knowledge from outside (it has no name given by God, therefore it is nameless, empty). See: *Benjamin W.,* On Language as Such and on the Language of Man, Selected Writings, Vol. 1, 1913-1926, *Jephcott E. (trans.), Bullock M., Jennings M.W. (eds.),* Cambridge, London, 1996, 64-71. In the second essay, Benjamin talks about the possibility of translation and notes that the translation should not strive to convey the same meaning as the original, to say the same as the original work says, because the purpose of the literary work is not communication, on the contrary, it is this nontransitive, inexpressible, incommunicable feature of language that brings it to life. Therefore, the translator should not try to convey identical meanings of the words, but to present this "non-communicating" so that reader knows about it. This feature makes the language "poetic". In a literary work we recognize the essential, that is: "beyond communication ... as the unfathomable, mysterious, 'poetic.'" See: *Benjamin W.,* The Task of the Translator, Illuminations: Essays and Reflections, *Zohn H. (trans.), Arendt H. (ed.),* New York, 1969, 69-70. (Kafka writes this to Milena: "I am constantly trying to communicate something incommunicable, to explain something inexplicable ...").

[24] *Benjamin W.,* Critique of Violence, Selected Writings, Vol. 1, 1913-1926, *Jephcott E. (trans.), Bullock M., Jennings M.W. (eds.),* Cambridge, London, 1996, 250.

with blood, it kills and annihilates *without bloodshed*. Blood makes all the difference."[25] However, it is not so easy to distinguish between divine violence and man-made horrors if we only take the "blood" as a determinative component. If we think of the Nazi concentration camps, mass killing was committed by gas, not by bullets, thus, without blood. The Holocaust is not an uninterpretable manifestation of divine violence. On the contrary, it is the result of instrumental rationality. Therefore, Derrida goes beyond Benjamin's messianism and considers "Critique of violence*"* too Heideggerian, too messianico-marxist, or archeo-eschatological.[26]

However, blood for Benjamin is the symbol of mere life, it is just a sign, not literally perceived liquid tissue. Mythical violence needs such a sign to confirm its power, while the divine rejects signs, so, Korah and his company don't die with "ordinary deaths", they are swallowed up by the earth, with no trace to remain.

If the mythical violence founds a new law, the divine suspends the old without establishing one. The resembling image of divine violence, that is the manifestation of pure immediate violence, is the revolutionary violence, which does not aim at changing and strengthening state power as it occurs during a political general strike, but sets itself the sole mission of destroying state power as a consequence of the proletarian general strike. If the mythic is recognizable, it is impossible to refer to pure violence since identifying its specific manifestation means falling into the same mythical circle, i.e., seeking for its justification and getting involved in the economy of means-end.[27] If the man from the country wants to destroy state power, abolish it without future restoration, he must be a revolutionary leader but without assurance that he is accomplishing this exact task. At this point, the means-end relationship must break, as long as violence must justify itself, which means, it must negate the other that it tries to annul, and it must negate itself as well. This simultaneous double annihilation gives rise to the previously impossible innovation which eventually excludes violence.

Pure violence functions as „yet to come". The possibility of its realisation means its authenticity. After bringing about a revolt, the revolution starts seeking self-legitimation, developing justifying "reasoning", falling into the same historical cycle.

According to Agamben, the cessation of the usual continuity of time and the beginning of a new era is not as inconceivable as it seems. Such practices were experienced in primitive societies, when people ruptured the homogenous flow of profane time by performing violent rituals. These rituals restored primordial chaos, made humans contemporaries of the Gods and allowed them approach to the original dimension of creation. Whenever the community was threatened, the world was losing the meaning, only by such a regeneration of time was possible to begin a new era.[28]

We can catch an instant glimpse of the very moment when the old is destroying. It immediately ceases to exist when new sources of power are created. To "the very second" between annulment and

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25 *Derrida J.,* Force of Law: The "Mystical Foundation of Authority", Deconstruction and the Possibility of Justice, *Quaintance M. (trans.), Carlson D.G., Conell D., Rosenfeld M. (eds.),* New York, London, 1992, 52.

26 Ibid, 62.

27 *Benjamin W.,* Critique of Violence, Selected Writings, Vol. 1, 1913-1926, *Jephcott E. (trans.), Bullock M., Jennings M.W. (eds.),* Cambridge, London, 1996, 239-240, 251-252.

28 *Agamben G.,* On the Limits of Violence, *Fay E. (trans.),* Diacritics, Vol. 39, № 4, 2009, 107.

establishment we can call a pure event, which never happens but operates as "always to come", because justice requires so.

4. Conclusion

The religious reading of the parable denied the generality of the law. The law is for one, it is singular, therefore, it is teaching. Penetrating the law is to violate it, and fulfilling the law is to abolish it, thus, is contradictory to its own logic. The man from the country is aware of it, not consciously, but inwardly, by intuition. That is why he spends his whole life before the law. Doesn't he have a family, wife and children? Is anyone waiting for him? But first, if someone (something) waits, it is teaching through which everything (someone and something) makes sense.

The political reading of the parable revealed the violent nature of law. Both, to found and to preserve law require violence. State power is impossible without violence. Violence, even to just ends, functions as a means to an end, and it is not possible to compromise between the justness of the ends and the justification of the means. At the very moment of lawmaking, in the name of power, it establishes as law not an end free from violence but necessarily bound to it. Therefore, the pure and immediate existence of violence, i.e., the possibility of justification based solely on itself, could be realised only by elimination of the state, that is, by law-destroying force.

The end in the next issue

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Gia Gogiberidze*

Peculiarities of Legal Regulations of Financing Political Parties in Foreign Countries

(Comparative-legal aspects)

Political parties are important and indispensable subjects of modern political life, which play an essential role in functioning of democratic political system. Increasing the role of political parties in political processes made such unions face new challenges, think about institutional strengthening and perfecting consistently, develop effective mechanisms to overcome the confrontations related to the organization of a complex and multifaceted election campaign, as well as their participation in other aspects of political life. The increased role of political parties, in turn, has a significant impact on the issues of financial support of parties. The new functions and tasks require additional financial resources to ensure the capacity and sustainability of parties. The specifics of financing political parties, keeping healthy competition, fairness and transparency in the mentioned process, force the states to implement the regulation of financing parties on the basis of a special legislative norm.

The presented article reviews the features related to the legal regulation of financing political parties in foreign countries. The range of discussed issues concerns the overview of the peculiarities of the legal regulation of both state financing and private financing of political parties. The article also discusses the issues concerning the publicity and transparency of the financial activities of political parties and the mechanisms of supervision and responsibility for the financial activities of political parties.

Keywords: *political party, state financing, private financing, donation, membership fee, transparency.*

1. Introduction

Political parties play an important role in the development and functioning of modern representative democracy. Political parties establish and develop a specific political worldview among people, moreover, they form government bodies through the election that contributes to implementation of government. The functioning of political parties has institutionally reinforced the point of view that the political party is the most important link, an intermediary institution[1] for ensuring the

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1 *Morlock M.,* Functions of Parties and Work of the Parliament, International Scientific Collection – Constitutionalism – Achievements and Challenges, *Ugrekhelidze M., Kantaria B. (eds.),* 2019, 222 (in Georgian).

relationship between the government and the people.[2] The institutional development of political parties has a history[3] of centuries that offer the characteristics which determine the foundations of activities of modern political parties and their multifaceted functions. Among these multifaceted functions of political parties, it is worth noting the function of "providing the participation of people in making fundamental decisions (function of transmission belt), selection of political leaders (function of electing the ruler), uniting and taking into account the views of different interest groups with common ground (function of integration of groups)".[4]

The institutionalization of political parties, the growth of their role and importance in the political system of a country, naturally led to the necessity of legal regulation of their activities. Currently, the legislation of almost all countries contains special norms regarding the legal bases of the activities of political associations. Moreover, in some countries, the norms and principles of the activities of political parties are confirmed by the constitution of the country. One of the interesting norms for organizing the activities of political parties concerns the legal regulation of financing political parties. The functional and institutional development of political parties, the recognition of their leading and irreplaceable role in political processes, complex and multifaceted election processes, complicated election technologies and, accordingly, the increase in the resources needed for elections, the complex organizational arrangement of political parties and the grown personnel resources necessary for functioning parties arose a necessity for solid financial foundations, which in turn, encouraged political parties to seek new sources of financing, cover the increased financial needs and facilitate the smooth functioning of the parties. In order to conduct the mentioned processes on the basis of fair, equal and healthy competition, the states should ensure the formation of an appropriate legal support which would contribute to the smooth operation of political parties, dealing with the challenges and ensure the transparency and accountability of political parties' activities. Last century modern democratic states began to care about the creation of legal norms regulating the financing of political parties. This process has taken place especially actively since the second half of the last century. The documents adopted by a number of international organizations made a significant contribution to the legal regulation of financing political parties which defined the essential principles of financing. In this regard, it is worth noting Recommendation 1516 of the Parliamentary Assembly of the Council of Europe of May 22, 2001 "On financing political parties",[5] Recommendation of the Committee of Ministers of the Council of Europe of April 8, 2003 to member states on "Common rules against corruption in financing of political parties and election campaigns".[6] It should be

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2 Standards in Public Life, The Funding of Political Parties in the United Kingdom, Fifth Report of the Committee on Standards in Public Life, 1998, 24, <https://assets.publishing.service.gov.uk /government/uploads/system/ uploads /attachment_data/file/336870/5thInquiry_FullReport.pdf> [24.02.23.]

3 *Kernalegenn T., van Haute É. (eds.),* Political Parties Abroad, A New Arena for Party Politics, the Taylor & Francis Group, 2020, 1.

4 *Gegenava D. (ed.),* Constitutionalism, general introduction, Book I, 2018, 277 (in Georgian).

5 Parliamentary Assembly, Recommendation 1516 (2001), Financing of political parties <https://pace.coe.int/pdf/663caf382b4bd9ad74a07342af142ba826d215d445bb7cdfbe3ccef9cd70e4a4/recommendation%201516.pdf> [24.02.23].

6 Recommendation of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns <https://www.coe.int/t/dg1/

mentioned the 2006 document of the Venice Commission (European Commission for Democracy through Law) "Regarding the Limitation of Financial Contributions from Foreign Sources to Political Parties",[7] the 2010 Venice Commission Document "Guiding Principles – Regarding the Legal Regulation of the Activities of Political Parties"[8] and the 2020 Venice Commission Document "Political Parties Guidelines on legal regulation of activity – second edition".[9] The Convention of the United Nations Organization "Against Corruption" also includes the norms on ensuring the financial transparency of the activities of political parties and candidates participating in the election process.[10] These specified documents defined the principles which should be considered by the legal norms to regulate financing of political parties. For example, according to the recommendation 1516 of the Parliamentary Assembly of the Council of Europe of May 22, 2001, "the rules of financing political parties and conducting election campaigns should be based on the following principles:

- existence of a reasonable balance between state and private funding;
- distribution of state subsidies among parties based on fair criteria;
- existence of clear rules regarding private donations;
- determining the limit of the maximum amount of expenses during the election campaign;
- full transparency of reporting;
- existence of an independent audit body;
- introduction of liability measures for violation of existing rules.[11]

In the majority of democratic states, the adoption of the necessary legislative acts for the legal regulation of financing political parties began in the second half of the last century. Following the current practice, the norms related to the regulation of financing political parties are either directly covered in the laws regulating the activity of political parties or imposed a particular law. For example, in the Federal Republic of Germany, the mentioned issues are regulated by the Law "On Political Parties",[12] in Spain by the Organic Law "On the Financing of Political Parties",[13] in Austria

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7 Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources, Adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)014-e> [24.02.23].

8 Guidelines on Political Party Regulation by OSCE/ODIHR and Venice Commission, Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)024-e [24.02.23].

9 Guidelines on Political Party Regulation, 2nd ed., Adopted by the Venice Commission at its 125th online Plenary Session (11-12 December 2020), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)032-e> [24.02.23].

10 United Nations Convention „against Corruption" (7.3.) <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf> [24.02.23].

11 Parliamentary Assembly, Recommendation 1516 (2001), financing of political parties ,Art.7, <https://pace.coe.int/pdf/663caf382b4bd9ad74a07342af142ba826d215d445bb7cdfbe3ccef9cd70e4a4/recommendation%201516.pdf> [24.02.23].

12 Gesetz über die politischen Parteien (Parteiengesetz), <https://www.gesetze-im-internet.de/partg/BJNR007730967.html> [24.02.23].

by the Federal Law "On Federal Support of Political Parties",[14] specific laws on financing political parties are also applied in Argentina,[15] Iceland,[16] Serbia[17] and other.

It is significant that the regulation of funding political parties is determined by the constitution of individual countries. For example, the Constitution of the Republic of Turkey, the Constitution of the Republic of Brazil, the Constitution of the Federal Republic of Germany and others. Article 68 of the Constitution of the Republic of Turkey enshrines the principle of the state to "provide political parties with necessary financial resources on an equal basis".[18]

The existing legal norms regulate not only the general financing of parties, but they also concern the financing of parties in the process of conducting elections and election campaigns (for example, in France). In addition, the norms regulating the financing of election campaigns include much stricter requirements than the norms regulating the current financing of political parties. According to the existing legal norms in different countries, the main sources of funding political parties are the following: a) state funding; b) private donation; c) membership fee; d) revenue streams from various events and others. For example, in accordance of Article 2 of the Organic Law of Spain "On the Financing of Political Parties", the source of financing of political parties can be: state financing; membership fees and affiliate contributions; income received from the own activities of the parties; private donation in cash or in kind; resources acquired by loan or credit and others.[19]

2. Regulation of State Financing of Political Parties

One of the most important sources of funding political parties is state funding. The purpose of state funding is to support political parties to overcome the multifaceted challenges, create a fair balance between public and private funding, to facilitate the fair conduct of political competition and the introduction of democratic principles in the activities of parties.

It is meaningful that one of the tasks of state financing is to assist parties to maintain their independence from large donors and promote the creation of equal opportunities in the activities of political parties. As the famous German scientist M. Morlock notes. "the model of state funding

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13 Ley Orgánica 8/2007, de 4 de julio, sobre financiación de los partidos políticos, <https://www.boe.es/buscar/pdf/2007/BOE-A-2007-13022-consolidado.pdf>, [24.02.23].

14 Federal Act on Federal Support of Political Parties, <https://europam.eu/data/mechanisms/PF/PF%20Laws/Austria/Austria_Federal%20Act%20on%20Federal %20Support%20of%20Political%20Parties_2012.pdf>, [24.02.23].

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17 Law on Financing of political parties, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/71474/76708/F1388605993/YUG71474%20English.pdf> [24.02.23].

18 Turkey's Constitution, <https://www.constituteproject.org/constitution/Turkey_2017.pdf?lang=en> [24.02.23].

19 Ley Orgánica 8/2007, de 4 de julio, sobre financiación de los partidos políticos, Art 2. <https://www.boe.es/buscar/pdf/2007/BOE-A-2007-13022-consolidado.pdf>, [24.02.23].

should be principally neutral towards the parties which means that it should not include impulses having a beneficial or harmful effects on the competition for one or another party."[20] Recommendation 1516 of the Parliamentary Assembly of the Council of Europe of 22 May 2001 also emphasizes the importance of financing political parties from the state budget and indicates that the existence of such financing avoids their dependence on private donors and ensures equal opportunities for political parties. In addition, according to the recommendation, the state subsidy should take into consideration the political support which political parties enjoy because it is evaluated by objective criteria, such as the number of received votes and the seats in the parliament, however, it should pave the way for new parties in the political arena and make the equal conditions for them to compete with the parties which have been operating for a long time.[21]

There are distinguished two main directions of state financial support of political parties. One direction is related to direct state financing, when the state allocates financial resources for financing political parties, while the second, indirect financing provides for the establishment of certain benefits for a political party. For example, allocating free airtime for political parties, free or subsidized space or communication facilities for the events organized by political parties, tax benefits, and others. The indirect support towards political parties is usually implemented during the election campaign.

In different countries, there are different models of receiving state funding, which are reinforced by the legislation of the respective countries. They depend on the results acquired by the political party in the last elections of the legislative body, including the number of parliamentary mandates.

Following one of the models, one part of the state funding, allocated to political parties is distributed equally to all political parties, while another part of the funding is received by the political parties in keeping with the number of received votes in the elections. For example, in Argentina, 20 percent of the funding allocated to political parties is distributed equally among all political parties, and 80 percent is distributed among the parties according to the number of received votes in the elections. Referring to Serbian law, 30 percent of funds allocated to political parties are distributed equally among all political parties, and 70 percent is distributed among political parties represented in the legislative assembly.

According to one of the models, political parties enjoy the direct state financing considering the number of received votes in the election and proportional mandates in the legislative body. A similar mechanism is provided, for example, by the Spanish Law "On the Financing of Political Parties" based on which a one-third of the subsidies allocated for the financing of political parties are proportionally distributed among the parties which have received seats in the legislative body. Two-thirds of the state subsidy is disbursed among those parties which obtained votes in the last election of the legislative body proportionally to the received votes.

Conforming to another model, the receipt of state funding by political parties is related to the number of votes received by the political party in parliamentary, presidential and/or local self-government body elections. For example, in Finland, a political party cannot receive state funding if it

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20 *Morlock M.,* The Law of Parties as Competition Law, TSU Journal of Law, 2009, #2, 251 (in Georgian).

21 Parliamentary Assembly, Recommendation 1516 (2001), Financing of political parties, Art.8, <https://pace.coe.int/pdf/663caf382b4bd9ad74a07342af142ba826d215d445bb7cdfbe3ccef9cd70e4a4/recommendation%201516.pdf> [24.02.23].

fails to win a seat in the legislature. According to another model of state financing, financial resources allocated by the state to political parties are equally distributed among all registered political parties. However, such a model is rarely used nowadays.

Irish legislation considers the concept of "qualified party", which in turn, creates a basis for the relevant party to receive state funding. As claimed by the law, a qualified party is the party which is registered in the registry, participated in the last election and has a representative in the House of Representatives or the Senate.[22] In addition, in order a political party to receive funding, it must be entered in the registry of political parties and have received at least 2 percent of votes in the last election of the House of Representatives.

In some countries (for example, France), along with the financial assistance furnished by the state to political parties, there is also a rule of providing individual assistance to the candidate nominated by the political party for participating in the elections. In compliance with this rule, the state provides the candidate participating in the elections with various types of assistance to arrange election campaign, for example, printing the essential materials, allocating the necessary space for the placement of election-campaign materials, etc.

The legislation regulation of financing political parties also contains a reference to the volume of direct state financing. For example, according to the Austrian law "On State Support of Political Parties", non-parliamentary parties, which have obtained the right to funding from the state budget, are given funding in an amount of 2.5 euros for each vote received in the elections, and those parties that are represented in the legislative body – in amount of 4.6 euros for each vote. Besides, if a political party gets more than 5 seats in the legislative body, it receives additional state funding in amount of 218,000 euros. A similar mechanism was provided by the Law of Lithuania "On Financing of Political Organizations", following which political parties enjoyed the right to receive state funding if they passed the electoral threshold in the last parliamentary elections. The amount of funding was determined by 0.50 Lithuanian litas for each vote of the elector.

In some countries, in agreement with the principle of "relative upper limit" which protects the proportionality, the amount of state financing of parties should not exceed the total amount of own income of the respective party.[23] By the legislative experience of some countries, the amount of financial aid allocated by the state to political parties is determined based on a specific percentage of the country's state budget, for example, in Serbia, the amount of total funding of political parties is 0.15% of the state budget of the year.

3. Regulation of Private Financing of Political Parties

Along with state funding, private funding is an important source of financing political parties, which plays an essential role in formation of budgets of political parties. The sources of private financing of political parties include membership fees of a political party, donations, and income received from various events.

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22 Electoral Act, 1997, <https://www.irishstatutebook.ie/eli/1997/act/25/enacted/en/html> [24.02.23].

23 *Kobakhidze I.,* Law of Political Unions, Tbilisi, 2008, 118 (in Georgian).

Membership contributions of the members of political party are one of the oldest sources of funding for political parties, which played a significant role in the financial provision of political parties. The amount of membership fees is usually determined by the authorized body of the relevant political party and represents the monthly contribution of the members of political party. In addition, for a long time the legislation did not establish any limitation regarding the amount of membership contribution of a political party, however, in the recent period, in the legislation of individual countries, there is a tendency to establish the maximum amount of membership contribution of a political party.

Donation as a kind of private funding of political parties is a subject to special legislative regulation in most cases. As a rule, donation is made by a physical or legal person in favor of a political party, which can be either in monetary form or free of charge or at a discount (under favorable conditions), transfer of other material or non-material value or provision of services.

In accordance to the existing legal regulations, different countries apply threshold to accept financial donation. Legal norms also set limits who a political party cannot receive donations from. Based on the recommendation 1516 of the Parliamentary Assembly of the Council of Europe of May 22, 2001, along with state funding, private funding, especially donations, is considered an important source of financial support for political parties. However, according to the recommendation, to avoid the possibility of illegal influence and corruption on the party created by private donation, the following rules should be applied:

"a) Donations from state enterprises, state-controlled enterprises and firms that supply goods or provide services to state bodies should be prohibited;

b) Getting donations from companies registered in the offshore zone should be prohibited;

c) Strict restrictions on donations of legal entities should be introduced;

d) The maximum amount of donation should be defined by the legislation;

e) Donations from religious organizations should be prohibited.[24]

The legislation of different countries provides for a different approach to the legal regulation of the donation. Legislation usually specifies from whom donations cannot be accepted but some countries define from whom private donations can be accepted. For example, the Icelandic law "On the Financial Activities of Political Parties and Candidates and Their Obligation to Submit Relevant Information" determines the circle of individuals and groups from whom it is prohibited to receive donations, in particular, it is prohibited to receive donations from: "Anonymous donors; from enterprises owned by the state or municipality or being under the control of the state or municipality; from public organizations that are owned by the state or municipality; From a foreign citizen who does not have the right to vote in Iceland, as well as from enterprises and organizations that are registered abroad."[25] Also, in keeping with the mentioned law, it is limited to receive donations from one legal

[24] Parliamentary Assembly, Recommendation 1516 (2001), Financing of political parties, Art.8 <https://pace.coe.int/pdf/663caf382b4bd9ad74a07342af142ba826d215d445bb7cdfbe3ccef9cd70e4a4/recommendation%201516.pdf> [24.02.23].

[25] Act on the Finances of Political Organisations and Candidates and their Information Disclosure No. 162 of 21 December 2006, <https://europam.eu/data/mechanisms/PF/PF%20Laws/Iceland/Iceland_Act%20on%20Political % 20Party%20Funding_2006_en%20amended%202011.pdf> [24.02.23].

entity in the amount of more than 400,000 Icelandic Krona during a year. A similar norm is offered in the Spanish legislation, following which the amount of donation made by the same person in favor of a political party during a year should not exceed 50,000 euros.

One of the important prohibitions related to the implementation of the donation in different countries involves the inadmissibility of receiving a donation from an anonymous source or from a legal or individual person of a foreign country. In this regard, the recommendation of the Committee of Ministers of the Council of Europe of April 8, 2003 "Common rules against corruption in the financing of political parties and election campaigns" considers the obligation to the states to "restrict, prohibit or regulate foreign donors".[26] Accepting donations from an anonymous source or from a legal or physical person of a foreign country is prohibited by the Spanish organic law "on the financing of political parties". Gaining donations from foreign legal entities and individuals is also precluded by Irish legislation. However, Irish law allows a certain amount of money to be accepted as an anonymous donation (up to €126). If a political party acquires a donation of more than the above amount from an anonymous source, the information should be reported to the Standards Commission within 14 days, and the mentioned amount should be transferred to the specified commission.

In some countries, legal entities participating in public procurement are forbidden from donating to a political party. According to the amendments to the Spanish law of 2015 "On the financing of political parties" (Article 5), in Spain, legal entities and also associations without the status of a legal entity have not got the right to make a donation to a political party.[27]

4. Publicity of Financial Activities of Political Parties

One of the important aspects related to the legal regulation of financing political parties is recording the information about the income of the political party and ensuring its publicity. This requirement is reinforced in the recommendations provided by international organizations. For example, according to the recommendation 1516 of the Parliamentary Assembly of the Council of Europe of May 22, 2001, "funding of political parties should be capitalized in compliance with the principle of publicity, for which the political party is required to:

a) Strict accounting of all income and expenditure, which must be submitted to the audit authority at least once a year and which must be published.

b) Disclosure of information about the donor whose financial support exceeds a specific limit".[28]

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[26] Recommendation of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns, art. 7 <https://www.coe.int/t/dg1/legalcooperation/economiccrime/ cybercrime/cy%20activity%20interface2006/rec%202003%20(4)%20pol%20parties%20EN.pdf> [24.02.23].

[27] Ley Orgánica 8/2007, de 4 de julio, sobre financiación de los partidos políticos, Artículo 5. <https://www.boe.es/buscar/pdf/2007/BOE-A-2007-13022-consolidado.pdf>, [24.02.23].

[28] Parliamentary Assembly, Recommendation 1516 (2001), Financing of political parties, Art.8 <https://pace.coe.int/pdf/663caf382b4bd9ad74a07342af142ba826d215d445bb7cdfbe3ccef9cd70e4a4/recommendation%201516.pdf> [24.02.23].

A similar provision is contained in the recommendation of the Committee of Ministers of the Council of Europe of April 8, 2003 "Common rules against corruption in the financing of political parties and election campaigns", according to which "the state should take into account the requirement that the budget of a political party should comprehend detailed information about all types of donations, including their nature and value".[29]

In consonance with the same recommendation, "the state should require that political parties regularly, but not less than once a year, submit information on their financial activities to the independent body[30] exercising control over the financial activities of political parties" But at least once a year they should publish information about their financial activities, including information about the expenses incurred on the election campaign.[31]

The domestic legislation of the majority of countries provides for the publicity of data on the income and expenses of political parties and establishes the obligation of the political party to submit the relevant information to the authorized state body, which in turn, ensures the hype of the submitted information. According to legal regulations, political parties are required to account for all income received, indicating the source, form and origin. Special heed is taken of the issue of receiving and recording private donations. Political parties should pay special attention to receiving donations in accordance with the requirements of the legislation, as well as to the observance of the limits established by the legislation for gaining donations. Otherwise, the party must ensure that the donation received in violation of the legislation is either returned or transferred to the state budget. The mentioned issue gains special relevance in the process of the pre-election campaign.

The mentioned issue gains special relevance in the process of the pre-election campaign. In some countries (Canada, Norway) political parties assure the publicity of their financial reports and post the information on a special website.[32] As stated by the legislation of the majority of countries, information on the incomes of political parties, as well as data on expenditures and their targeting, are subject to publicity. The information about donors also takes special notice of publicity. For example, according to the Austrian law, if the amount of the donation exceeds 50,000 euros, the information about the donation is immediately subject to publicity with reference to the data of the donor. In Norway, a similar obligation arises if a political party receives a donation of more than NOK 30,000, and in New Zealand if it gains a donation of more than NZD 15,000.

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29 Recommendation of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns, Art. 12 <https://www.coe.int/t/dg1/ legalcooperation/ economiccrime/ cybercrime/cy%20activity%20interface2006/rec%202003%20(4)% 20pol%20parties%20EN.pdf> [24.02.23].

30 Ibid, Article 14.

31 Ibid, Article 13.

32 For example, in Norway there is a website for this purpose: <http://www.partifi nansiering.no.>; In Canada web-site: <www.elections.ca>.

5. Mechanisms of Taking Supervision and Responsibility for Financial Activities of Political Parties

The mechanism of taking supervision over the financial activities of political parties is considered as a part of the legislative regulation of political party financing. The recommendations of international organizations provide for the obligation of the states to form an independent body to supervise the financial activities of political parties. From this perspective, based on the recommendation 1516 of the Parliamentary Assembly of the Council of Europe of May 22, 2001 "the state should establish an independent audit body with sufficient powers to control the reports submitted by political parties and the expenses of the election campaign." A similar recommendation to the states is included in the recommendation of the Committee of Ministers of the Council of Europe of April 8, 2003 "Common rules against corruption in the financing of political parties and election campaigns".

The legislation of most countries provides norms that determine the existence of similar bodies and their functions. In various countries, the state bodies that are entrusted with the authority to supervise the financial activities of political parties are different. For example, in a number of countries (Spain, Austria and others), the role of an independent body for supervision over the financial activities of political parties is played by the audit service. In some countries (for example, Canada, New Zealand, etc.), the Central Election Commission performs a similar function, and in other countries (Norway, Luxembourg, etc.), the function of supervision over the financial activities of political parties is provided by several state bodies (including the Court, the Chamber of Control, the Statistical Service and other). The bodies supervising the financial activities of political parties, as a rule, ensure the receipt of information and relevant documentation regarding the income and expenses of political parties, as well the annual financial declaration of the political party, and promote the publicity and accessibility of the information to the public. In most cases, these bodies reveal violations in the financial activities of the political party and apply the mechanisms provided by the law to respond to the violations. In addition, they request the relevant political party to ensure the correction of the violation.

Different types of sanctions are used in many countries for the violation of the requirements established by the legislation of financial activities by political parties. The sanctions take the form of financial sanctions, as well as administrative-legal and in some cases criminal liability.

The most common form of financial sanctions is the temporary or permanent suspension of state funding for a political party for violating the requirements related to financial reporting by the political party. For example, under Czech law, a political party is cut off from state funding if the political party does not submit an annual financial report within the stipulated time.

Administrative or financial fines are also applied to political parties. For example, under Austrian law, if a political party submits incomplete or incorrect information in its annual report, it will be fined up to 30,000 euros or 100,000 euros, depending on the type of the violation. Under Czech law, if a political party or movement gains a donation prohibited by law and does not return it to the donor, a fine of twice the amount of the illegal income is imposed.

The legislation of individual countries anticipates criminal liability for the political party in the form of a fine or suspension of the right to work. Another type of sanctions includes banning the activities of political parties or canceling the results obtained in the elections for the candidate

nominated by the party. For example, according to Article 69 of the Turkish Constitution, "Political parties that accept aid from foreign states, international institutions and persons and corporate bodies of non-Turkish nationality shall be dissolved permanently."[33]

6. Conclusion

As mentioned, political parties are the most important institution of modern representative democracy, which plays an essential role in the development of parliamentary democracy and the functioning of the political system. In addition, for the sustainable functioning of political parties and overcoming the multifaceted challenges, it is important to provide political parties with proper financial support, which should be based on various sources of funding.

In order to conduct the financing process of political parties fairly, transparently in healthy competition, the states are implementing appropriate legal regulations, which in turn, are based on the principles defined by international organizations.

The legal regulations adopted by the states enhances the mechanisms of both state funding and private funding of political parties, determine the terms and conditions of their acceptance and use, ensure the existence of a reasonable balance between state and private funding. Countries have rational approaches to the formation of the state funding system of political parties and the regulation of private financing. An important task of the legislative regulation of financing a political party is to increase the publicity of the process related to the financing of political parties, to promote proper awareness of public, to ensure effective supervision of the financial activities of political parties, to identify and prevent those mechanisms and sources of financing that are not provided by the legislation and oppose the healthy financing of political parties, the principles of management based on competition.

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Tinatin Erkvania*

Interpretation Methods of the Constitution in German Constitutionalism (Distinct Aspects)

At this stage of development, it is vital for the science of Georgian constitutional law to actively conduct comparative-legal studies in order to perceive better both their own (constitutional) identity and the experience of other legal cultures and the prospects of integrating their best practices into the national legal system.

The article analyzes the key issues for the theory of constitutional law (distinct spectrum), in the context of interpretation methods of the constitution seeing the example of the German constitutionalist discourse, which in turn, is essential considering the science of European constitutional law, on the subject of perceiving and determining the worth schemes of basic human rights and, in general, understanding the essence of constitutionalism.

Keywords: *worth schemes of the constitution, comparative constitutionalism, interpretation methods of the constitution, basic human rights, concept of human dignity.*

"The liberal (German "freiheitlich"), secularized state lives by prerequisites which it cannot guarantee itself. This is the great adventure it has undertaken for freedom's sake. As a liberal state it can endure only if the freedom it bestows on its citizens takes some regulation from the interior, both from a moral substance of the individuals and a certain homogeneity of society at large. On the other hand, it cannot by itself procure these interior forces of regulation, that is not with its own means such as legal compulsion and authoritative decree. Doing so, it would surrender its liberal character (freiheitlichkeit) and fall back, in a secular manner, into the claim of totality it once led the way out of, back then in the confessional civil wars."[1]

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1 *"Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann. Das ist das große Wagnis, das er, um der Freiheit willen, eingegangen ist. Als freiheitlicher Staat kann er einerseits nur bestehen, wenn sich die Freiheit, die er seinen Bürgern gewährt, von innen her, aus der moralischen Substanz des einzelnen und der Homogenität der Gesellschaft, reguliert. Anderseits kann er diese inneren Regulierungskräfte nicht von sich aus, das heißt mit den Mitteln des Rechtszwanges und autoritativen Gebots zu garantieren suchen, ohne seine Freiheitlichkeit aufzugeben und – auf säkularisierter Ebene – in jenen Totalitätsanspruch zurückzufallen, aus dem er in den konfessionellen Bürgerkriegenherausgeführt hat"* – Ernst-Wolfgang Böckenförde, In: Staat, Gesellschaft, Freiheit, 1976, 60. This quote reviews the so-called Böckenförde Dilemma (Böckenförde-Dilemma), which Ernst

"The Role of the judge is to understand the purpose of law in society and to help the law achieve its purpose."[2]

1. Introduction

The concept of the constitution is directly related to the idea[3] of constitution definition. The idea of restricting government power with basic rights is a prerequisite for the legitimacy of the constitution. These prerequisites need to be identified in detail, which, due to the abstract nature of the text of the constitution, creates a problem of interpretation.

The constitution is both the basis and the limit of the government activities. Constitutions define the scope of the government's activities and are the precondition of the legitimacy of the government.

In recent decades, the European continent has experienced significant political changes. Political development is the main determinant of constitutional development. This type of important events are the "return to Europe" of the Baltic countries, as well as the reception of the Euro-Atlantic constitutional experience in the post-Soviet countries, the formation of common European Market, breaking the "Iron Curtain" and the demolition of the Berlin wall, the end of Marxism-Leninism (1989)[4] and the European Union, establishing a supranational, multi-level legal space.

After the end of the Cold War, researchers of comparative law and political science specialists began to compare the European experience to the Atlantic region.[5] Today, some generally speak about the "European-Atlantic constitutional state".[6] The comparison of these two spaces is logical, because they have a lot in common considering the political and legal processes from the 18th century to the present day. The same processes, for instance, the end of socialism, produced many innovations in Europe, which resulted in the emergence of different legal categories in the European context. The development of Georgian constitutionalism is inconceivable without the analysis of this comparative-legal context. In accordance with all of the above, taking into account its limited scope, the purpose of the article is to review only certain aspects (and not a complete) of the constitution interpretation methods, directly characteristic of German constitutionalism. From this point of view, the article reviews the essential postulates of the concept of constitution and constitutionalism, issues of an institutionalization of constitutional justice, the distinct methods of constitution interpretation and their interrelation; the essence of the principles of inviolability of human dignity; particularities of the definition of the constitution essential principles; the so-called "Anti-constitutional constitutional law" as a phenomenon; the so-called "Formula of constancy" of constitution, the concept of the so-called

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Wolfgang Böckenförde (a famous constitutional theorist and philosopher of law, a judge of the German Federal Constitutional Court in 1983-1996) formulated in the 60s of the 20th century.

2 Barak, Aharon, The Judge in a Democracy, 2006.

3 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.,* Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. Völlig neubearbeitete und erweiterte Aufl., 2014, 614.

4 *Häberle P.* in: *Battis U., Mahrenholz E.G., Tsatsos D.* (Hrsg.), Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz, Berlin 1990, 19 ff.

5 *Nolte G.*, European and US constitutionalism: Comparing essential elements, in: *Nolte G. (ed.),* European and US Constitutionalism, Cambridge 2005, 3-20.

6 Ibid.

"constitutional identity" in the multi-level legal framework of the European Union and other essential issues related to the methods of interpretation of the constitution, considering the diverse legal context of continental Europe, essentially, on the example of Germany.

Law regulates relations between people and reflects their own values.[7] The main function of a judge is to perceive the social goal of law and support the process of achieving this goal.

The role of the judge is logical and special in the process of clarification/interpretation of the constitution.

From this perspective, the purpose of the article is to provide Georgian judges with material for judgment about separate schemes of constitutional interpretation methods, to deepen the scientific discourse related to these issues, to encourage academic discussions, in general, and to offer a comparative legal overview for relevant theoretical reflections.

2. The Concept of Constitution and Constitutionalism – Essential Elements

The constitution may consist of one or many equally important basic laws (Israel) or unwritten customs (United Kingdom).[8] Some constitutions are defined by the international legal context (Bosnia-Herzegovina), and in some totalitarian states there is a system of other norms above the constitution or at its level, which absorbs the text of the constitution.[9]

Constitutions delineate the goals of states, form the collective memory[10] of the constituent society, and legitimize the idea of a state by appealing to specific ideals. For example, the Article 2 of the Treaty on European Union defines the essential value spectrum of the Union, and the Article 7 of the same Treaty provides the procedures for breaching the Treaty in case of violation of these values. This procedure was successfully used by the European Commission in relation to Poland, which was accused of subjecting the judicial system to political influences and violating the principle of the rule of law (appointing new judges after shortening the general tenure of judges).

In reality, the text of the constitution and the degree of its implementation differ from each other. The idea of the constitution and its normativity are determined by the interaction of these two

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7 *Barak A.,* The Judge in a Democracy, 2006, 3 et seq.

8 Supreme Court (UK), the decision of September 24, 2019, UKSC 41, paragraph 39: "Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context."

9 For example, the order on the deportation and extermination of Jews in Germany during the National Socialism (The Third Reich), see. („Jüdenbefehle"); See *Herdegen M.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.,* Handbuch des Verfassungsrechts, 1. Auflage 2021, § 1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 1.

10 Ibid, Rn. 2.

factors. The Constitution is the "Memory of Democracy".[11] If the text of the constitution and the quality of its implementation are interconnected, the constitutional culture is higher.

The 1787 Constitution of the USA is the first constitution drawn up by modern standards in the world. The first constitution of the analogues standards in Europe was adopted in Poland in 1791. It is also worth noting the Constitution of Corsica of 1755, written in Italian, which took into consideration the worldview prerequisites of antiquity with democratic elements.[12] The same can be said about the San Marino Constitution of 1600.

In Europe, the French Revolution contributed to the development of the idea of a constitution. During the 19th century, the majority of European countries had their own constitutions. The clearest example of a liberal constitution is the Belgian constitution of 1831, which recognized the standards of parliamentarism and a catalog of fundamental rights. At that time, In Europe, if a state had a written constitution, it was regarded as a good "tone".[13]

The type of the constitutional state is the result of the development of common European/Atlantic legal culture.[14] A number of dates are important in the context of constitutional development: 1776 (Virginia Bill of Rights)), 1789 (French Revolution), 1848 (so-called Paulskirche Constitution), 1689 ("Glorious Revolution "), 1831 (Belgian Constitution), 1919 (so-called Weimar Constitution), 1947 (Italian Constitution) and a new wave of constitutions, starting from Sweden – 1974, then Greece – 1975, Netherlands – 1983, etc.

In Europe, after the end of the First World War and the Russian Revolution of 1917, European states established democratic republics and adopted the first constitutions: 1920 – the Constitution of Estonia, 1921 – the Constitution of Georgia, 1922 – the Constitution of Latvia, which is valid until today,[15] the Constitution of Lithuania in 1922, etc.

The type of living constitutional state is presented in the works by the authors: John Locke and Charles-Louis Montesquieu, Jean-Jacques-Rousseau and Immanuel Kant. From this point of view, the USA has been noteworthy with „Federalist Papers" since 1787.

In 1803 the Supreme Court of the USA made an important decision, "Marbury vs. Madison." [16] It should be mindful of noting the decision of the German Federal Constitutional Court of January 15, 1958 -„Lüth Urteil "[17], which emphasizes the "system of objective values" as a phenomenon and perceives it as an essential part of the German Federal Constitution objective values" as a phenomenon and perceives it as an essential part of the German Federal Constitution.

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11 *Kirchhof P.* in: *Depenhauer O., Grabenwarter Chr., (Hrsg.),* Verfassungstheorie, 2010, 70 f. Rn. 2.

12 *Küpper H.,* Einführung in die Verfassungssysteme Südosteuropas, Wien, 2018, 13 f.

13 Ibid.

14 *Häberle P.* in: *Battis U., Mahrenholz, E.G., Tsatsos D. (Hrsg*.), Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz, Berlin 1990, 19 ff.

15 After de-Sovietization, Latvia did not adopt a new constitution, only the Constitution of the First Democratic Republic of 1922 was restored (Latvian language: action. It is worth noting that from the countries united in the Soviet Union, only these four countries managed to adopt the constitution (Baltic countries and Georgia).

16 *Häberle P.* in: *Battis U., Mahrenholz E.G., Tsatsos D. (Hrsg.),* Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz, Berlin 1990, 19 ff.

17 BVerfGE 7, 198.

From the legal and cultural point of view, the important stage[18] of developing constitutional life is the emergence of the "formula of permanence" in the Norwegian constitution (1814), as well as in the constitutions of Portugal and Spain (1976 and 1987/82), the references to the founder people of the constitution and the annals of "cultural heritage" in the constitutions of Italy 1947 and Spain 1978, and other.

Western "constitutionalism" is more of law and order?? than the special variety.[19] Its spiritual and worldview foundations are primarily the Age of Enlightenment, constitutional development in the North American colonies, „Federalist Papers", the French Revolution, and political liberalism of the 19th century. There is no so-called Non-Western constitutionalism, therefore, the term "Western" is not exclusive, but descriptive. Constitutionalism is "Western" in the sense of the historical developments of Western Europe and North America. As a model, constitutionalism has already been adapted in Latin America, India, South Africa, Israel, Japan, Taiwan, etc.

The concept of "constitutionalism" includes a wide range of models related to the idea of perceiving the right of people to political self-determination as the source of the legitimacy of a state and exercising power within the constitutional framework. The models of "legal constitutionalism" and "political constitutionalism" are opposed to each other: the first one implies a constitutional-legal model based on fundamental rights and the idea of judicial control of political (majority) decisions; The second involves the idea of securing a democratic order through the interaction of political forces and an increased republican culture.

Within the framework of Western constitutionalism, law and order is characterized by a number of elements, which include the direct application of the norms of the constitution, the principle of the primacy of the constitution and constitutional laws, the horizontal distribution of power with the institutional provision of their balance, the system of basic rights and strong constitutional justice from a material point of view. Some constitutions also recognize a "vertical" division of powers taking into account the principle of federalism and the acceptance of local self-government.

In addition to all of the above, constitutionalism is a socio-cultural phenomenon.[20] The prerequisite of the concept of the state is the concept of politics. The state represents the political status[21] of the people. Accordingly, constitutional law is "political law".[22] From this point of view, the process of interpretation/explanation of the constitution cannot be completely freed from the political context.[23] In addition, constitutional law can be discerned perfectly when it is practiced.[24]

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18 Ibid, 19 ff.

19 *Herdegen M.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.,* Handbuch des Verfassungsrechts, 1. Auflage 2021, §1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 1-6.

20 Ibid. Rn. 17.

21 *Schmitt C.,* Der Begriff des Politischen, in: *Walter M. (Hrsg.),* Carl Schmitt: Der Begriff des Politischen – Synoptische Darstellung der Texte, Berlin, 2018, 55 ff.

22 *Isensee J. in: Isensee J., Kirchhof P. (Hrsg.),* Handbuch des Staatsrechts, 3. Aufl. 2014, §268 Verfassungsrecht als „politisches Recht".

23 *Dworkin R.,* Law as Interpretation, in: Texas Law Review, Vol. 60, 1982, 527 et seq.

24 *Herdegen M., Masing J., Poscher R., Gärditz K.F.,* Handbuch des Verfassungsrechts, 1. Auflage 2021, Einleitung, Rn. 10.

In contemporary reality, the processes of political democratization and transformation, including revolutions taking place in many countries were followed by the creation of an exceptional political and legal order, within which the constitution and its composition not only acquired a special role, but also became a defining political action in the essence of these processes. This implied South Africa, the transitional constitution established in 1994 after toppling the Apartheid regime and the current constitution of 1997, Latin American countries, etc. The same can be said about the post-Soviet space and the countries formed within it, freed after the collapse of the Soviet Union, and regaining independence, which adopted new constitutions or restored the old ones (for example, the Constitution of Latvia in 1922). In this regard, the term "transformational constitutionalism"[25] was created and developed. In connection to this type of transformability, the catalog of basic rights recognized by the constitution and a certain amount of judicial activism acquire a special importance to the development of social and economic rights, as well as to the establishment of standards for banning the discrimination. In this context, there arise some questions about the degree of judicial activism in accordance with the constitutional framework when judges explain/interpret constitutional norms. From this perspective, the issue of the scopes of the constitutional legal methodology and their identification, as well as the legitimation of judicial law, is of special concern.

3. The Role of Courts in the Constitution Interpretation: Two Different Institutional Models of Constitutional Justice

Two models of constitutional justice institutionalism differ from each other[26]: the American, within the framework of the model of 1803, the general judicial justice checks the constitutionality of laws "incidentally" and administrative measures in relation to ordinary laws. This model of "mixed" justice has been adopted by Canada, India, Australia and Israel. It is in operation in Japan and many Latin American countries. In Europe, this model was shared by Switzerland and the Scandinavian countries. Besides, without any correlation to the power of the Constitutional Court, ordinary court judges in Greece and Portugal have the right not to apply laws if they consider them unconstitutional.

The American model is contrasted with Hans Kelsen's Austrian model of 1920, in the arrangement of which the constitutionality of laws is verified by specially created constitutional courts. This model of "concentrated" justice has been embraced by many states in continental Europe, including: Germany, Italy, France, Spain, Belgium, Liechtenstein, Poland, Greece, Portugal and some Latin American countries.

Generally, it is not essential which model a country prefers, the main thing is how effective the judicial practice is. In this regard, as it is often noted in scientific sources, there is no longer any difference between American „judicial review"[27] and European „Constititional review".[28] According

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25 *Herdegen M.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.,* Handbuch des Verfassungsrechts, 1. Auflage, 2021, §1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 82-89.

26 *Brünneck A. v.,* Verfassungsgerichtsbarkeit in den westlichen Demokratien, Ein systematischer Verfassungsvergleich, 1992, 28 ff.

27 When the founding fathers of the US Constitution met in Philadelphia in 1787, they had knowledge of the foundations and prerequisites of European constitutionalism. Their worldview was imbued with the views

to the widespread opinion, the idea of the supremacy of the constitution includes the tools[29] to automate provisioning in a systemic-immanent manner.[30] From this point of view, special attention is drawn to the scheme[31] of basic rights, essential principles[32] and the issue of legitimacy of constitutional justice. In addition, the scope of action[33] of constitutional courts[34] when interpreting the Constitution is also subject of dispute: on the ground of the widespread opinion, the principle *"in*

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of Locke and Montesquieu. The US Supreme Court was established in 1789 based on Article III, Paragraph 1 of the US Constitution, which in turn was supplemented by the Judiciary Act of 1789. Initially, the court consisted of 6 judges. Since 1869, there have been 9 members of the US Supreme Court.

28 *Brünneck A. v.,* Verfassungsgerichtsbarkeit in den westlichen Demokratien, Ein systematischer Verfassungsvergleich, 1992, 30.

29 *Stern K.,* Das Staatsrecht der Bundesrepublik Deutschland, B. 1. Zweite, völlig neubearb. Aufl., München 1984, 165 ff.

30 *Starck Chr.,* Das Bundesverfassungsgericht in der Verfassungsordnung und im politischen Prozeß, in: FS 50 Jahre Bundesverfassungsgericht, Tübingen, 2001, 3; Kritisch dazu: *Möllers Chr.,* Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, in: Das entgrenzte Gericht, Berlin, 2011, 285; vgl. *Kenntner M.,* Das BVerfG als subsidiärer Superrevisor? in: NJW 2005, 787 f.; s. auch, *Heusch, A.,* Der Präsident des Bundesverfassungsgerichts als Hüter und Reformer der Verfssung,in: NVwZ 2010, 210 f.

31 "In consideration of the ever increasing politisation of society, the constitutional review process will defend more intensively both the structure of the constitution as one of democracy and rule of law was well as the political and personal rights of the individual." Cited: *von Brünneck A.,* Constitutional Review and Legislation in Western Democracies, in: *Landfried Chr. (ed.),* Constitutional Review and Legislation, Baden-Baden 1988, 260; Cf. *Brugger W.,* Grundrechte und Verfassungsgerichtsbarkeit in den Vereinigten Staaten von Amerika, Tübingen, 1987, 22 ff.; See also: *Starck Chr.,* Menschenrechte – aus den Büchern in die Verfassungen, in: *Nolte G., Schreiber L., Der* Mensch und seine Rechte – Grundlagen und Brennpunkte der Menschenrechte zu Beginn des 21. Jahrhunderts, Göttingen 2004, 9 ff.

32 Es gibt also Rechtsgrundsätze, die stärker sind als jede rechtliche Satzung, so daß ein Gesetz, das ihnen widerspricht, der Geltung bar ist. Man nennt diese Grundsätze das Naturrecht oder das Vernunftrecht. Gewiß sind sie im Einzelnen von manchem Zweifel umgeben, aber die Arbeit der Jahrhunderte hat doch einen festen Bestand herausgearbeitet, und in den sogenannten Erklärungen der Menschen- und Bürgerrechte mit so weitreichender Übereinstimmung gesammelt, daß in Hinsicht auf manche von ihnen nur noch gewollte Skepsis den Zweifel aufrechterhalten kann". Cited: v. *Radbruch G.,* Fünf Minuten Rechtsphilosophie, in: Rhein-Neckar-Zeitung vom 12.09.1945, Cited: *Radbruch G.,* Rechtsphilosophie, 8. Aufl., *v. Wolf E., Schneider H.-P., (hrsg.),* Stuttgart 1973, 327 ff.

33 Dazu *Dreier R.,* Zur Problematik und Situation der Verfassungsinterpretation, in: *Dreier R., Schwegmann F.,* Probleme der Verfassungsinterpretation, Baden-Baden 1976, 13 ff.; See also, *Schneider Hans-Peter,* Verfassungsinterpretation aus theoretischer Sicht, in: *Schneider H.-P., Steinberg R. (Hrsg.),* Verfassungsrecht zwischen Wissenschaft und Richterkunst, Heidelberg, 1990, 39 ff.; See also, *Mahrenholz G. E.,* Verfassungsinterpretation aus praktischer Sicht, in: *Schneider H.-P., Steinberg R. (Hrsg.),* Verfassungsrecht zwischen Wissenschaft und Richterkunst, Heidelberg 1990, 53 ff.; zur grundrechtlich legitimierten Verfassungsinterpretation *Hillgruber Chr.,* Verfassungsinterpretation, in: *Depenheuer O., Grabenwarter Chr.,* Verfassungstheorie, Tübingen, 2010, 506 ff.; auch, *Grimm D.*, Constitutional Adjudication and Constitutional Interpretation: between law and politics, in: 4 NUJS L. Rev., 2011, 5 ff.

34 Bishop Hoadly's Sermon (preached before the King, 1717): „Whever hath on absolute autoruty to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them." Zitiertnach *Lockhart W. B., Kamisar Y., Choper J. H., Shiffrin St. H.,* Constitutional Law, Cases-Comments-Questions, 1991, 7th ed., 1; See also, *Häberle P.,* Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat, JZ 1989, 913 ff.

claris non fit interpretatio" [35] does not apply with reference to the Constitution. Many entities („offene Gesellschaft der Verfassungsinterpreten")[36] are involved in the process of interpreting the Constitution but as the last interpreters[37], only the Constitutional Courts are authorized to represent the main actors.[38]

The special constitutional court acts as „the least dangerous to the political rights of the constitution"[39] in relation to other state bodies, and it is also perceived as "the most dangerous branch"[40] with respect to other constitutional bodies.[41] In addition, within the framework of specialized and mixed constitutional justice, the theses related to the idea[42] of their legal legitimacy are opposed to each other. For example: Judicial activism vs. Judicial self-restraint,[43] Countermajoritarian difficulty,[44] Political question doctrine [45] and so on.

After the development of supranational legal instruments[46] in the field of human rights, they speak about cooperative relations (sometimes collision relations)[47] between national, international and supranational courts.[48] There is also a conversation about "asymmetry of constitutional justice"[49] or

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35 The legal principle implies the following: if the content of the norm is clear, it should not be violated by its interpretation.

36 *Häberle P.,* Der Kooperative Verfassungsstaat, Berlin, 2013, 263.

37 "Das Subsidiaritätsprinzip verlagert diese Ermessensfreiheit [für die Auslegung des Grundsatzes der Subsidiarität] nicht gewaltenteilungswidrig auf die Gerichte. Somit liegt die primäre Interpretationskompetenz bei der Legislative und bei der Exekutive." *Isensee J.,* Subsidiaritätsprinzip und Verfassungsrecht, 2. Aufl., Berlin, 2001, 315.

38 *Carl Schmitt*: "Jeder Interpretationsakt ist ein Akt selbständig schaffender Synthese eines "Gesetzgebers", mag es sich um extensive oder intensive Interpretation, um Analogie oder "einen Beweis aus dem Gegenteil" handeln. Der Gesetzgeber wird konstruiert, nicht rekonstruiert. Der Jurist, der ein System schafft, formt alte Gedanken um und führt neue ein," Cited: *Wilde R. C.,* „Das letzte globale Linie", Carl Schmitt und der Kampf um das Völkerrecht, Berlin 2014, 69.

39 *Hamilton A.,* in: The Federalist Papers, Nr. 78.

40 See in detail: *Carey G. W.,* The Judicial Assault on the Constitution, in: *McLean E. (ed.),* The Most Dangerous Branch, Lanham 2008, 1-16; See also, *Klein H.H.,* Verfassungsgerichtsbarkeit und Gesetzgebung, in: *Badura P., Scholz R.,* Verfassungsgerichtsbarkeit und Gesetzgebung, München, 1998, 49 ff.

41 *Herdegen M.,* Verfassungsgerichtsbarkeit als *pouvoirneutre,* in: ZaöRV 2009, 259 ff.

42 *Bischof G., Gehler M.,* „Foundering Fathers" versus „Founding Fathers"? Comparative Aspects oc Constitutionalizing EU-Europe and the United States, in: *Bischof G., Gehler M., Kühnhardt L., Steininger R.,* Toward a European Constitution, Salzburg 2005, 11 ff.

43 *Allan T. R. S.,* Constitutional Justice, A liberal Theory of the Rule of Law, Oxford New York 2001, 185 ff.

44 *Hwang Sh.-P.,* Verfassungsgerichtlicher Jurisdiktionsstaat? (Diss.), Berlin 2005, 61 ff.

45 See in Detail: *Allan T. R. S.,* Constitutional Justice, A liberal Theory of the Rule of Law, Oxford New York 2001, 161 ff.

46 *Hesse K.,* Deutsche Verfassungsgerichtsbarkeit an der Schwelle zum neuen Jahrhundert, in: *Schwarze J.,* Verfassungsrecht und Verfassungsgerichtsbarkeit im Zeichen Europas, Baden-Baden 1998, 170 f.

47 *Proelss A.,* Bundesverfassungsgericht und überstaatliche Gerichtsbarkeit, Diss., Tübingen, 2014, 15 ff., 203 ff.

48 *Due O.,* A constitutional Court forthe European Communities, in: Constitutional Adjudication in European Community and National Law, Butterworth 1992, 3 ff.; *Badura P.,* Supranationalität und Bundestaatlichkeit durch Rangordnung des Rechts, in: *Schwarze J. (Hrsg.),* Verfassungsrecht und Verfassungsgerichtsbarkeit im Zeichen Europas, Baden-Baden 1998, 71 ff.; *Rosenfeld M.,* Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court, in: international journalofconstitutionallaw, Vol. 4,

"unification of constitutional courts"[50] in the „Multilevel Constitutionalism"[51] of "common European constitutional law"[52].

2006, 623 f.; *Herresthal C.,* Voraussetzungen und Grenzen der gemeinschaftsrechtskonformen Rechtsfortbildung, in: EuZW 2007, 398; *Haratsch A.,* Die kooperative Sicherung der Rechtsstaatlichkeit durch die mitgliedstaatlichen Gerichte und die Gemeinschaftsgerichte aus mitgliedstaatlicher Sicht, in: EuR 2008 Heft Beiheft 3, 99 ff.; *Sauer H.,* Kompetenz- und Identitätskontrolle von Europarecht nach dem Lissabon-Urteil – Ein neues Verfahren vor dem Bundesverfassungsgericht? In: ZRP 2009, 197; *Hofmann J.,* Zur Absolutheit des Menschenwürdeschutzes im Wirken des Präsidenten des BVerfG Hans-Jürgen Papier, in: NVwZ 2010, 218; *Isensee J.,* Integrationswille und Integrationsresistenz des Grundgesetzes – Das Bundesverfassungsgericht zum Vertrag von Lissabon, in: ZRP 2010, 34; *von Bogdandy A.,* Prinzipien der Rechtsfortbildung im europäischen Rechtsraum – Überlegungen zum Lissabon-Urteil des BVerfG, in: NJW 2010, 1 (2); *Everling U.,* Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte, in: EuR 2010, 91 (94); *Nettesheim M.,* Die Karlsruher Verkündigung – Das BVerfG in staatsrechtlicher Endzeitstimmung, in: EuR-Bei 2010, 118; *Proelß A.,* Zur verfassungsgerichtlichen Kontrolle der Kompetenzmäßigkeit von Maßnahmen der Europäischen Union: Der „ausbrechende Rechtsakt" in der Praxis des BverfG, in: EuR 2011, 243; *Beck G.,* The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor, in: ELJ: review of european law in context, 17, 2011, 480 f.; *Möllers Th., M.J., Redcay K.,* Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union? In: EuR 2013, 416; *Gerhardt M.,* Europäisches Parlament und Bundesverfassungsgericht, in: NVwZ-Beilage 2013, 54 ff.; *Voßkuhle A.,* Verfassungsgerichtsbarkeit und europäische Integration, in: NVwZ-Beilage 2013, 27 ff.; *Méndez Cr.E.,* Currenttrends and perspectivesregardingconstitutionaljurisdiction in the Member States ofthe EU, in: Rivista di studi politici internazionali: Vol. 80, 2013, 559 ff. etc.

49 *Mayer F. C.,* Verfassungsgerichtsbarkeit, in: *von Bogdany A., Bast J., (Hrsg.),* Europäisches Verfassungsrecht, 2. Aufl., Heidelberg 2009, 598; See also, *Hong Q. L.,* Constitutional Review in the Mega-Leviathan: A Democratic Foundation for the European Court of Justice, in: ELJ – review of European law in Context, 16 (2010), 697 f.; s. auch, *Dyevre A.,* The German Federal Constitutional Court and European Judicial Politics, in: West European politics, Vol. 34, 2011, 346 ff.

50 *Voßkuhle A.,* Das europäische Verfassungsgerichtsverbund, in: NVwZ 2010, 1 ff.; auch, *Vesterdorf B.,* A constitutional Court forthe EU? in: International journalofconstitutionallaw, Vol. 4, Issue 4, 2006, 607 ff.; See also, *Hatje A.,* Demokratische Kosten souveräner Staatlichkeit im europäischen Verfassungsverbund, in: EuR-Bei 2010, 124; *Nettesheim M.,* Europäischer Verfassungsverbund? in: *Depenheuer O., Heintzen M., Jestaedt M., Axer P.,* FS für Josef Isensee, Staat im Wort, Heidelberg 2007, 733 ff.; *Pernice I.,* La Rete Europea di Costituzionalità – Der Europäische Verfassungsverbund und die Netzwerktheorie, in: ZaöRV 2010, 59.

51 On this issue, see: *Pernice I.,* Multilevel Constitutionalism in the European Union, WHI – Paper 5/02, 3 ff.; *Walter Chr.*, Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law, in: German Yearbook of International Law 44 (2001), 175 f.; *Fabrini S.,* Transatlantic Constitutionalism: Comparing the United States and European Union, in: European Journal in political research: official journal of the European Consortium for Political Research, Vol. 43, 2002, 549 ff.; *Ress G.,* Supranationaler Menschenrechtsschutz und der Wandel der Staatlichkeit, in: ZaöRV 2004, 636 ff.; *Walter Chr.,* Der französischeVerfassungsrat und das Recht der Europäischen Union, in: EuGRZ 2005, 32. Jg., Heft 4-7, 79 f.; *Leschke M.,* Die Verfassung der Europäischen Union: Eine kritische Betrachtung grundlegender Anreizwirkungen der europäischen Gewaltenteilung, in: *Beckmann K., Dieringer J., Hufeld U. (Hrsg.),* Eine Verfassung für Europa, 2., aktualisierte und erweiterte Aufl., Tübingen, 2005, 183 ff.; *Wilkinson M. A.,* Who's afraid of a European Constitution? In: E.L.Rev., Vol. 30, 2005, 297 ff. *Similarly see:* Political Constitutionalism and the European Union, in: The Modern Law Review, Vol.76, 2002, Nr. 2, 213 f.; *Haack St.,* Verlust der Staatlichkeit? Tübingen 2007, 115 ff., 157 ff.; *Schlink B.,* Abschied von der Dogmatik: Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel, in: JZ, 62. Jg., 2007, 157 f.; *Knauff M.,* Konstitutionalisierung im inner- und überstaatlichen Recht

Among the international and regional instruments of human rights protection, the European Convention on Human Rights and the European Court of Human Rights have a dynamically growing influence on the development of the judiciary, constitutional and common courts of the Georgian legal system. Since its entry into force (May 20, 1999), the European Convention on Human Rights has been an integral part of the Georgian judicial area and an important source after the Constitution, taking into account the hierarchy of norms.

Besides, under the auspices of the European Union's coherent rights policy, the latter often uses human rights reservations when reaching agreements with the third countries. From this point of view, the newly ratified EU/Georgia Association Agreement is also a special legal source. Although the prospect for Georgia to join the European Union is already discussed, the modern constitutional-legal discourse in the country is closed to the topics about the impact of supranational legal instruments (e.g., the Charter of Fundamental Rights of the European Union or the judicial system of the European Union) on protection of human rights, which requires further research. Within the framework of constitutional legal dogmatics, the theses of the legitimacy[53] of constitutional control[54] differ from each other that refer to the necessity of special constitutional justice (or the so-called real control) of

– Konvergenz oder Divergenz? in: ZaöRV 2008, 484; *Pieroth B.,* Politischer Freiraum zur Umgestaltung des Bundesstaats, in: ZRP 2008, 90 (90 ff.); *Diggelmann O., Altwickler T.,* Is there Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism, in: ZaöRV 2008, 632 f.; *d'Aspremont J., Dopagne F.,* TwoConstitutionalisms in Europe: Pursuing an Articulationofthe European and International Legal Order, in: ZaöRV 2008, 974 f.; *Ley I.,* Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich, in: ZaöRV 2009, 335 f.; *Similarly see:* Verfassung ohne Grenzen? Zur Bedeutung von Grenzen im postnationalen Konstitutionalismus, in: *Pernice I., von Engelhardt B., Krieg S.H., Ley I., Saldias O., (Hrsg.),* Europa jenseits seiner Grenzen, Baden-Baden, 2009, 91 ff.; *Walker N.,* Multilevel Constitutionalism: Looking Beyondthe German Debate, LSE 'Europe in Question' Discussion Paper Series, Nr. 08/2009 June 2009, 3 ff.; *Cananea G. D.,* Is European ConstitutionalismReally "Multilevel"? in: ZaöRV 70, 2010, 06 f.; *Steiger H.,* Staatlichkeit und Mitgliedstaatlichkeit – Deutsche staatliche Identität und Europäische Integration, in: EuR-Bei 2010, 57 (58); *Mahoney P.,* From Strasbourg to Luxemburg and Back: Speculatingabout Human Rights Protection in the European Union afterthe Treaty ofLisbon, in: HRLJ, Vol. 31/2011, Nr. 2-6, 75 ff.; *Tridimas T.,* Constitutional review ofmemberstataction: The virtues and vicesof an incompletejurisdiction, in: Int J Constitutional Law, Vol. 9 2011, 739 ff.; *Thym D.,* Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsrechtliche Kontrolle, in: EuZW 2011, 169 f.; *Jestaedt M.,* Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts, in: *Masing J., Jounjaan O., (Hrsg.),* Verfassungsgerichtsbarkeit, Tübingen 2011, 37 ff.; *Franzius Cl.,* Europäische Verfassung als Rahmenordnung demokratischer Politik, in: EuR-Bei 2013, 169 f.; *Bieling H.-J.,* Europäische Verfassung als „neuer Konstitutionalismus", oder: zur europäischen Begrenzung der demokratischen Politik, in: EuR-Bei 2013, 219 f., etc.

52 *Häberle P.,* Gemeineuropäisches Verfassungsrecht, in: EuGRZ 1991, 18. Jg. Heft 12/13, 261 ff.; See also, *Arnold R.,* Das Prinzip der Kontrolle des Gesetzgebers in der Verfassungsgerichtsbarkeit Mittel- und Osteuropas als Ausdruck gemeineuropäischen Verfassungsrechts, in: Jahrbuch für Ostrecht, Bd. 43, 1. Halbband, 2002, 17-28.

53 *Möllers Chr.*, The ThreeBranches – A comparative Mode of Separation of Powers, Oxford, 2013, 126 ff.; *Böckenförde E.-W.,* Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation, in: NJW 1999, 9 ff.

54 *Häberle P.,* Grundprobleme der Verfassungsgerichtsbarkeit, in: *Häberle P. (Hrsg.),* Verfassungsgerichtsbarkeit, Darmstadt 1976, 3 ff.

the scope of constitutional control, which is inspired and determined by the classical debate on the mutual influence[55] of law and politics, as well as the legal and political discourse[56] distinct[57] by corresponding legal mindset[58] domestic, regional and international legal area[59] provided with relevant constitutional [60]and legal[61] perspectives.[62] For various legal orders, the determining factor of identity is the pertinent constitutional law[63], therefore, the appropriate constitutional-legal reality[64] is a peculiar perception of "essence" and "the very essence"[65] in multilaterally divided context of our reality.[66]

This well-known phrase by *Charles Evans Hughes,* „We are under a Constitution, but the Constitution is what the judges say it is," attracts the special attention of specialized constitutional control systems. Considering the classic assumption, the issue of legal concretization, in an extended sense, is also the subject of "discourse interactions"[67] („offene Gesellschaft der Verfassungsinterpreten ")[68] of various state bodies; the definition and interpretation[69] of the constitution norms is an immanent function of the constitutional courts.[70] From this viewpoint, the Constitutional Court is the last interpreter of the Constitution.[71]

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55 Cf.*van Ooyen R. Ch.,* Politics, Staatsrecht und die demokratische Kontrolle der Macht im Spiegel totalitärer Erfahrung, in: *van Ooyen R. Ch (Hrsg.).,* Verfassungsrealismus, Baden-Baden 2007, 15 ff.

56 *Cf. Langer L.,* Judicial Review in State Supreme Courts, NY, 1965, 123 ff.

57 Cf. *von Beyme K.,* The Genesis of Constitutional Review in Parlamentary Systems, *Landfried Chr. (ed.),* Constitutional Review and Legislation, Baden-Baden, 1988, 38.

58 *Möllers Chr.,* Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, in: Das entgrenzte Gericht, Berlin, 2011, 323 ff.

59 *Huber P.*, Die EU als Herausforderung für das Bundesverfassungsgericht, Vortrag an der Humboldt-Univ. zu Berlin am 26. April 2012 (FCE 02/12).

60 Cf. *Häberle P.,* Gemeineuropäisches Verfassungsrecht, in: *von Bogdany A./Bast J. (Hrsg.),* Europäisches Verfassungsrecht, 2. Aufl., Heidelberg 2009, 26 -31.

61 Cf. *Nolte G.,* Messias oder Machiavell? Die Menschenrechtspolitik der USA, in: *Nolte G., Schreiber L., Der* Mensch und seine Rechte – Grundlagen und Brennpunkte der Menschenrechte zu Beginn des 21. Jahrhunderts, Göttingen 2004, 86 ff.

62 *Meyer T. D.,* Die Rolle der Verfassungsgerichtsbarkeit zwischen Recht und Politik, Diss., Bern 2011, 83 ff.

63 Cf. *Canothilo J. J. G.,* Interkonstitutionalität und Interkulturalität, in: *Blankenagel A., Pernice I., Schulze-Fielitz H. (Hrsg.)*, Verfassung im Diskurs der Welt, Tübingen, 2004, 83 ff.

64 *Kloepfer M.,* Perspektiven der Verfassung, in: *Grundmann St., Kloepfer M., Paulus Chr., Schröder R., Werle G., (Hrsg.),* FS 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin, Berlin 2010, 1299 ff.

65 *Häberle P.,* Menschenbild im Verfassungsstaat, Berlin, 2005, 29.

66 Carl Schmitt (1954): "Das Volk, die Nation bleibt der Urgrund alles politischen Geschehens, die Quelle aller Kraft, die sich in immer neuen Formen äußert, immer neue Formen und Organisationen aus sich herausstellt, selbst jedoch niemals ihre politische Existenz einer endgültigen Formierung unterordnet", cited: *Bascheck N.,* Anfeindungen – Carl Schmitts "Begriff des Politischen" aus der Perspektive der Systemtheorie Niklas Luhmanns, Darmstadt 2010, 79.

67 *Müller J. P.,* in: *Schefer M., Peters, A.,* Grundprobleme der Auslegung aus Sicht des öffentlichen Rechts, Symposium zum 60. Geburtstag von René Rhinow, Bern 2004, 84.

68 *Häberle P.,* Der kooperative Verfassungsstaat, Berlin, 2013, 263 f.

69 About the limit and object of interpretation, see in detail: *Barak A.,* Purposive Interpretation in Law, 2005, 3 et seq.

70 *Quint P. E.,* 60 Years of the Basic Law and its Interpretation, in: JöR (N. F. 57) 2009, 1 ff.

71 Cf. *Möllers Chr.,* Die drei Gewalten, Göttingen 2008, 137.

The science of modern constitutional law does not debate the issue of the need to interpret the norms of the Constitution:

Considering the scope and scale of the interpretation of norms, a number of theses have been developed over time: „only be considering the meaning oft the constitutional text, the idea of the primacy of the constitution can be understood. This primacy is of a semantic nature, because it would be rather strange to say that a text of uninterpreted symbols has such primacy; the idea of syntactic primacy is unintelligible." [72]

Taking into account the scope of the interpretation of norms, a number of theses has been developed over time:[73] „An Interpretation is correct in law if and only if it reflects the author's intention"[74]; „[...] to the extent that the law derives from deliberative law-making, ist interpretation should reflect the intenstions of ist law-maker". It [here: Germany's Federal Constitutional Court] has the last word in the interpretation of the constitution, which means that the latter defines the framework within which the constitution gets involved in political processes. This provided *R. Smend* with the opportunity to say in celebration of the ten-year anniversary of the Federal Constitutional Court that the basic federal law, in practice, works as the Federal Constitutional Court interprets it. But this does not mean that the Federal Constitutional Court is free to interpret the Constitution. If it were so, the principle of the Constitutional Supremacy would be violated and the principle of the primacy of the constitutional freedom and legal assessment would come into. This would oppose the basic law, which recognizes the supremacy (paragraph 3 of article 1, paragraph 3 of article 20 of the basic law) and implies the principle of supremacy on action, but not the principle of constitutional freedom and legal assessment. Therefore, the German Federal Constitutional Court adheres to the general rules of interpretation of the law. Constitutional control is carried out by taking account of the existing dimensions."[75]

The Federal Constitutional Court of Germany also notes that "the purpose of the interpretation is to determine the content of the norm in accordance to its literal meaningand essential composition",[76] etc.[77]

In this context, *Alexander Hamilton* mentions: „The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any

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72 *"only be considering the meaning oft the constitutional text, the idea of the primacy of the constitution can be understood. This primacy is of a semantic nature, because it would be rather strange to say that a text of uninterpreted symbols has such primacy; the idea of syntactic primacy is unintelligible.* See *Moreso J. J.,* Legal Indeterminacy and Constitutional Interpretation, Dordrecht, 1998, 131.

73 Cf. *Berns W.,* Constitutional Interpretation in the Court's first Decades, in: *Eastland T. (ed.),* Benchmarks – Great Constitutional Controversies in the Supreme Court, Washington, 1995, 1-12; *Glendon M.A.,* Toward a Structural Approach to Constitutional Interpretation, in: *Eastland T. (ed.),* Benchmarks – Great Constitutional Controversies in the Supreme Court, Washington 1995, 141 ff.; *Kavanagh A.,* The Idea of Living Constitution, in: Canadian Journal of Law and Jurisprudence Vol. 16, No.1, 55 ff.

74 *Moreso J. J.,* Legal Indeterminacy and Constitutional Interpretation, Dordrecht, 1998, 160 -161.

75 *Starck Chr.,* Verfassungen, Tübingen, 2009, 125.

76 BVerfGE 35, 263, 278.

77 *Imboden M.,* Normenkontrolle und Verfassungsinterpretation, in: Verfassungsrecht und Verfassungswirklichkeit, Festschrift von Hans Huber zum 60, Geburtstag 24. Mai 1961, Bern 1961.

particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." [78]

Before the establishment of separate constitutional courts, the authority to interpret the constitution was held by the Parliament, in the socialist republics – by the Supreme Presidium.

In general, two types of interpretation of the constitution differ from each other: concrete and abstract interpretation.[79]

The Constitutional Court is equipped with the power of abstract interpretation, if the latter has the type of constitutional proceedings on the basis of the Constitution, which creates the possibility to interpret the norms of the Constitution separately and abstractly without referring to a specific case, as a result of submitting a relevant application (e.g. Bulgaria, Hungary, Ukraine, etc.). In some countries, the Constitutional Court is entitled to interpret not only the constitution norms but also the general legal norms within the framework of abstract interpretation (e.g. Azerbaijan, Ukraine). The specific interpretation of the Constitution is the opposite version – the Constitutional Court interprets the norms of the Constitution on the basis of the disputes under consideration within its classical powers.

The Constitutional Court of Georgia is not equipped with an independent type of constitutional proceedings that allows to interpret the Constitution. The Constitutional Court of Georgia interprets the norms of the Constitution within its powers, and not in the format of independent proceedings specially created for this purpose.

The normative framework, which allows the Constitutional Court of Georgia to interpret the norms of the Constitution, is quite diverse, however, in terms of this the Court seems fairly restrained in practice. In this regard, the judgment of February 5, 2013[80] is particularly significant. By this judgment the Constitutional Court refused to consider the constitutionality of constitutional laws (in terms of substantive constitutionality), which is a clearly controversial topic, because the constitutional law is also a normative act, any form of which can be appealed in the Constitutional Court. The justice of the Georgian Constitutional Court is going through the new stages of development and, so far, it does not have a firmly established dogmatics regarding a number of fundamental issues. It should be emphasized that with the established justice of the Constitutional Court of Georgia[81]:

"When resolving specific disputes, the Constitutional Court is obligated to analyze and evaluate both the relevant provision of the Constitution and the disputed norm in the context of the basic principles of the Constitution not to deviate completely from the order of values provided by the Constitution as a result of the interpretation. This is the only way to achieve a complete definition of

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78 The Federalist Papers, no 78; *Gerber S. D.,* To Secure These Rights, The Declaration of Independence and Constitutional Interpretation, New York 1995, 103 ff.

79 *Tsanava L.,* Constitutional Control and Interpretation of the Constitution (Modern Constitutional Law (Book I), 2012 (in Georgian).

80 Citizens of Georgia – Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze against the Parliament of Georgia, N1/1/549 (in Georgian).

81 Decision of the Constitutional Court of June 28, 2010 (466th Constitutional Lawsuit) – Public Defender of Georgia against the Parliament of Georgia, II-4.

the constitution norm which, in turn, contributes to the correct assessment of the constitutionality of a specific disputed norm." (Decision N1/3/407 of the Constitutional Court of Georgia, December 26, 2007 on the case of the Association of Young Lawyers of Georgia and Georgian citizen Ekaterine Lomtatidze against the Parliament of Georgia). The Constitutional Court expressed a similar approach to the case of Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia (decision N2/2-389 of October 26, 2007). "The Constitutional Court, when checking the constitutionality of disputed norms, is not limited only to specific norms of the Constitution. It is true that constitutional principles do not establish basic rights, but the contested normative act is also subject to verification on the ground of the main principles of the Constitution, in connection with individual norms of the Constitution, and from this point of view, the judgment must be conducted in a unified context. The Constitutional Court must determine to what extent the appealed act is compatible with the constitutional-legal order established by the Constitution".

4. Methods of Constitution Interpretation in German Constitutionalism

4.1. Principles and Criteria of Constitution Interpretation

The principle is clear, nevertheless, the constitution itself is not an apparently discernible phenomenon, it needs to be interpreted.[82] A central theme of modern constitutionalism is the constitution interpretation by the criteria that go beyond common law standards[83] of interpretation. A well-known example is the methodological dispute in the US constitutional law between different forms of historical interpretation ("originalism") and the idea of perceiving the constitution as a "living instrument". A number of methodological approaches also competes in making an interpretation of the German Federal Constitution.

The conventionalities for the normative constitution[84] are the limit of legislative (including the founder of the constitution), executive and judicial powers with the value scales in the constitution and the entire text of the constitution. They highlight the problem of constitution interpretation. Setting the limit for the legislators and free political decision-makers to steer, depends on the constitution interpretation. In this sense, the legislator is not outside the limit established by the constitution. The limit is identified by the interpretation of the Constitution, which is under the control of the Constitutional Court.

The normative constitution is determined by several factors: the normative and real conventionality[85] differ from each other. The normative conventionalities are: the principle of the constitution supremacy, separation of powers, protection of basic rights. In particular, the constitution

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82 *Hillgruber Chr.,* Verfassungsinterpretation, in: *Depenhauer O., Grabenwarter Chr., (Hrsg.),* Verfassungstheorie, 506 ff.

83 *Herdegen M.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.,* Handbuch des Verfassungsrechts, 1. Auflage 2021, § 1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 82-89.

84 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.,* (*Hrsg.),* Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 613 ff.

85 Ibid.

should create such a structure of a government organization that power cannot be monopolized and, the possibility for executive bodies to fulfil their own functions (obviously, within the constitutional framework). Constitution lacks legitimacy if it does not recognize the essential components of the separation of powers. Political culture and the readiness of civil society to lead political processes and to participate in them are the real conventionalities for the normative constitution.[86] The political culture, which determines the degree of constitution norms, also needs to develop the science of law to an appropriate stage.[87] The real fundamentals of the constitution are based on the normative cores of the constitution, , for example, the political beliefs of the political parties and candidates are the reflection of the political culture of the society that vote for them.

The constitution is both the basis and the limit (scale) of the state's activities. When interpreting the constitution, the principle of the supremacy of the constitution should be taken into account. To determine how the activity of the state is regulated by the constitution, it is necessary to identify the essence of the relevant constitutional norm.

The science of German constitutional law distinguishes several principles of the interpretation of the constitution:[88] literal meaning, grammatical construction, systematic definition, normative will of the historical legislator and objective teleological issues. The definition of a constitutional norm and, in general, the definition of a norm is always abetted by creativity. But the latter should not go beyond the essence of the norm to be explained.

When interpreting the constitution, it is common to address to the methodology of norm interpretation by Friedrich Karl von Savigny for the purposes of private law and further teleological factors, which, in addition to the latter (teleological interpretation), includes: grammatical, logical, historical and systematic methods of interpretation. Despite the possibility of using this classical canon of norm interpretation, the process of constitutional interpretation follows special rules and methods.

In this context, the classical methods to ascertain the norm in the science of constitutional law, considering the methodology of norm definition, are exposed in their own way. In particular, the use of the canon established by Savigny is inevitable. It is also inevitable to use the method of teleological explanation. However, the latter is used in constitutional law with different substantive composition. For example, the definition of the constitution is followed by additional factors, such as “the idea of the constitution unity ”, “practical compatibility” (to allow for monitoring legal benefits), “functional-legal correctness” and others.[89] The last-mentioned, in fact, forms the components of the method for systematic explanation, which is a variety of Savigny's classical methods of explanation. In addition, the historical will of a legislator is also considered when interpreting the constitution, which is a type of historical interpretation as well. Besides, the teleological definition is used to identify the goals of constitutional norms. Savigny’s classical methods used to interpret the constitution are of equal grade and none of them is preferred.

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86 *Hesse K.,* Die Normative Kraft der Verfassung, 1959, 16 ff.

87 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P. (Hrsg.),* Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. Völlig neubearbeitete und erweiterte Aufl., 2014, 613 ff.

88 Ibid.

89 625 ff.

Although scholarly legal opinion has consolidated on the idea of constitutional justice, the same cannot be said about the methods of Constitution interpretation, about which, differences of opinions and discussions continue to this day.

Modern positivized constitutions, successors of the US Constitution, are characterized with a high degree of normativity. Legally binding constitution that proclaims this idea should facilitate and stabilize democratic political processes[90]. This requirement has to be required while interpreting the constitution. When interpreting the constitution, the will of the constituted legislative must be identified and not to be allowed to act on the ground of the subjective attitude of the norm interpreter. But can the "will of a lawmaker" be a chimera?[91] The legislature of the Constitution and its will are a fiction from a legal perspective.[92]

The majority of modern constitutions base their legitimacy, explicitly or implicitly, on the idea of popular sovereignty. German constitutional law theorist Christian Stark diagnosis several special methods of interpreting the constitution:[93] classical-hermeneutic method of interpreting the Constitution, schematic (problem-oriented) interpretation of the Constitution, the so-called scientific interpretation of reality, hermeneutic-concretizing interpretation of the Constitution, etc. The following chapters discuss each of them.

4.2. Methods of Interpreting the Constitution

4.2.1. Classical-hermeneutic Model of the Constitution Interpreting

The development of this method is connected with the ideas of the German scientist Ernst Forsthoff.[94] The explanation of the classical hermeneutic method of Constitution interpreting is expressed in several sentences:[95]

- The Constitution must be interpreted in the same way that laws are interpreted. The existence of the constitution in the form of law is the result of the rule of law and the basis of its stability;
- The process of interpreting the law is confined within limits according with the classical-hermeneutic interpretive methods by Karl fon Savini.[96] These methods of explanation include: grammatical, logical, historical and systematic methods. In this context, the special nature of the Constitution is not rejected in relation to other laws. The latter can be

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90 *Hillgruber Chr.,* Verfassungsinterpretation, in: *Depenhauer O., Grabenwarter Chr., (Hrsg.),* Verfassungstheorie, 506 ff.

91 Ibid.

92 Ibid.

93 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. Völlig neubearbeitete und erweiterte Aufl., 2014, 613 ff.

94 *Forsthoff E.,* Die Umbildung des Verfassungsgesetzes = ders., Rechtsstaat im Wandel, 2. Aufl., 1976, 130 ff.

95 *Böckenförde E.-W.,* Die Methoden der Verfassungsinterpretation – Bestandaufnahme und Kritik, in: NJW 1976, 2089 ff.

96 *Savigny C. v.,* System des heutigen römischen Rechts I, 1840, 212 ff.

examined as an additional element to the interpretation. This factor should not lead to the infirmity of the classical methods to interpret the law.

By the specified method, the constitution is equated with the law. Nevertheless, the constitution creates a framework and its norms are more abstract than ordinary law[97].This is already an answer to the question whether only the Savinian canon is sufficient for the interpretation of the Constitution. Obviously, it is not enough, because the constitution differs from ordinary law in many ways and requires additional standards of interpretation.

4.2.2. A Schematic, Problem-oriented Interpretation of the Constitution Norms

In general, during the interpretation of the constitution, the classical methods of norm interpretation are completed. Only the fact that the text of the Constitution is the limit of its interpretation is not sufficient to ensure the legitimacy of the Constitution (only the latter can be binding), because the normative composition of the same text frequently requires interpretation.[98] From this point of view, when interpreting the constitution, the classical methods of norm interpretation are extended through a schematic explanation. In this context, there must be considered: the importance of prejudice; Comparative-legal aspects and the European Convention on Human Rights, with its European judicial interpretations of human rights and justice; The principle of proportionality, etc. In this process, the importance of prejudices is special, which creates the experience of interpreting the constitution norms.

Peter Häberle also often emphasizes the importance of "an open society interpreting the constitution".[99] In the scope of the latter, a broad concept of the constitution interpretation has been developed, according to which the final responsibility for the interpretation of the Constitution rests with the Constitutional Court, and before the Constitutional Court, the Constitution is actually "interpreted" by various branches of government and also by social groups through their legal activities.

Christian Stark criticizes such a broad interpretation of the constitution and calls it incompatible with the framework-character of the constitution and the scientific context of law. He notes that the legislation is not a concretization of the Constitution, but a politically directed activity of the legislator, relied on the constitutional powers and substantive and procedural instruments of the Constitution.[100]

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97 *Böckenförde E.-W.,* Die Methoden der Verfassungsinterpretation – Bestandaufnahme und Kritik, in: NJW 1976, 2089 ff.

98 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.,* (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. Völlig neubearbeitete und erweiterte Aufl., 2014, 628.

99 *Häberle P.,* Die offee Gesellschaft der Verfassungsinterpreten, in: JZ 1975, 297 ff.

100 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.* (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 627.

4.2.3. The So-called a Scientific Interpretation Corresponding to Reality

This method of constitution interpretation derives from Rudolf Smend's doctrine of "integration".[101] The essential thesis of this method of interpretation is the following: the substance and reality of the constitution, not its literal composition or terms, are the basis and scope of its interpretation.[102]

This method of constitution interpretation is an extreme form of its schematic interpretation, which is saturated, in part, with the arguments of Peter Heberlet. First of all, this method should be distinguished from the process of constitution interpretation, within the framework of which it is studied the description of the reality setting in the norm and the redirection to it. The following non-normative factors: the social function of the constitution, the conscience of citizens, social transformations are considered in the scientific interpretation of reality. In this context, the normative factors of the interpretation of the Constitution are overcome providing for the contemporary epochal changes. At this time the flexibility of the constitution is addressed to be in correlation with the contemporary reality. Christian Stark[103] points out that this method of interpreting the constitution gets the normative preconditions concealed and interpreting the constitution on the ground of social sciences, the normative dimensions of the interpretation are changed into non-normative factors and furnish social philosophy to grasp normativism, which is unacceptable. In his opinion, the constitution, as a groundwork document, leaves enough space for politics and social philosophy, and a further expansion in the so-called "reflection of reality with a scientific interpretation" is not necessary.

4.2.4. Hermeneutic, Concrete Interpretation of the Constitution

The starting point of this method are the following theses:

- The interpretation of the constitution as concretization (Konrad Hesse)[104]; In that regard, problems of interpretation arise only when the constitution does not contain unambiguous scales and there is no constitutional solution to the problem. The interpretation of the constitution, in this sense, has a law-making and complementary nature, which results in a legal "concretization". In practice, this kind of interpretation is done using the frame-norms of the Constitution (essential principles, basic rights). The limit for such an interpretation of the Constitution is the text of the Constitution.
- Methodical rationalization of the concretization process; in this light, the constitutional norm is perceived as a scale and framework of norms designed for individual cases. From

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101 *Böckenförde E.-W.,* Die Methoden der Verfassungsinterpretation – Bestandaufnahme und Kritik, in: NJW 1976, 2089 ff.

102 *Smend R.,* Staatsrechtliche Abhandlungen, 2. Aufl., 1968, 188-196.

103 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.* (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 631.

104 *Hesse K.,* Grundzüge des VerfassungsR der Bundesrepublik Deutschland, 8. Aufl., 1976, 11 f.

this standpoint, it is necessary to concretize the constitutional norm for individual cases but in unviolated way.[105]

4.2.5. Integration Function

Besides, its integrative function is also considered when interpreting the Constitution. Obviously, it is incontrovertible that a good constitution serves the function of public integration.[106] The methods of its interpretation are not freely chosen. The use of each method should include and be consistent with a specific ground.

4.2.6. Lawmaking through Interpretation of the Constitution

It is difficult to neatly disconnect the method of interpretation of the Constitution from the teleological interpretation of the norm which constitutional law-making is committed.[107] Constitutional law-making, like legislating, in general, is necessary when the law flawы and needs to be filled. In this context, no one is unlimited, the functional purpose of the constitution appears as a binding mechanism in this process. In constitutional law-making, consideration should be focused on the fact that sometimes the constitution provides a legislator making political decisions that It is not allowed.

Constitutional legislation is not always a fact that the constitution interpretation goes beyond the text of the constitution. In German constitutional law represents several cases[108] when the issue concerns constitutional law-making: for example, the possibility of deploying German Peace Corps in different parts of the world under the auspices of the United Nations (UN) is not provided by the German Federal Constitution. On the contrary, Clause 2 of Article 87 "A" of the Constitution emphatically states that "military forces must be used for self-defense only in the cases expressly provided by the Constitution". If we consider that the changed international legal and political reality requires a similar activity on the part of the German Federation (Article 24 Paragraph 2 of the German Federal Law and Germany's Accession to the UN) the Federal Constitutional Court Germany made the decision that obliges the German government to seek the prior approval of the Lower House of Parliament for each new deployment of military forces in a peacekeeping mission in any parts of the world.[109]

Another example is the 1999 decision of the German Federal Constitutional Court on the financial equalization of federal lands.[110] Without specific constitutional provisions, the German Federal Constitutional Court compels the federal legislature to adopt the so-called the scaling law that

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105 See in detail: *Böckenförde E.-W.,* Die Methoden der Verfassungsinterpretation – Bestandaufnahme und Kritik, in: NJW 1976, 2089 ff.

106 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.,* (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 631.

107 Ibid, 634.

108 Ibid, 635.

109 BVerfGE 90, 286 (381 f.).

110 BVerfGE 101, 158.

will specify and complement the relevant constitutional-legal provisions on horizontal financial equalization (Article 106, paragraph 3, sentence 4 of the German Federal Constitution; Article 107, paragraph 2, 1, 2 and sentences 3). The Federal Constitutional Court of Germany emphasizes the need to "develop" the federal constitutional principles and "to shape them for getting the financial constitution coincided with the contemporary dimensions and verified periodically."[111]

Another example of constitutional legislation is the so- called legal obligations for protection (grundrechtliche Schutzpflichten), which are used as subjective rights, developed within the framework of Article 1, Paragraph 1 and Article 6, Paragraph 1 of the Federal Constitution of Germany.

Christian Stark indicates that what cannot be substantiated through an objective teleological definition, considering the frame-character of the constitution, must be affirmed by its own spatial explanation.[112]

4.2.7. Interpretation According to the Constitution (Verfassungskonforme Auslegung)

To ensure the effective working of the Constitution, it is necessary to interpret the existing legislation in accordance with the Constitution, even if the common law is explained contrary to the Constitution.[113] This definition of the constitution is one of the variations of the legislative norm definition, not the constitution. Using this type of interpretation method requires vigilance for a law not to be added different meaning by a judge and replaced the essential composition of the legal norm with his own individual narrative.

It should be noted that not only the Federal Constitutional Court, but also ordinary courts are restricted by the constitution interpretation in Germany. The ordinary courts are required checking the possibility of interpreting the norm constitutionally by using this interpretation method, and then stop the proceedings and apply to the Constitutional Court with appropriate constitutional submissions regarding the issue of the constitutionality of the applicable norm.[114]

4.2.8. Comparative Legal Method (Comparativism) as a Method of the Constitution Interpretation

The process of using the comparative legal method is like a journey.[115] There is an opinion that comparative legal analysis has its own methods, which are completely different from the methodical

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111 BverfGE 58 (218); *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.* (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 635.

112 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 636.

113 Ibid.

114 Ibid, 637.

115 *Frankeberg G.,* Critical Comparisons: Re/thinking Comparative Law, 26 Harv. Int'l L. J., 1985, 411-455.

teachings of national law and the process of presenting them in a comparative context.[116] The comparative legal method has become an method of constitution interpretation in many of the highest courts[117] in the world, for instance, the Supreme Court of the Great Britain, the Constitutional Court of Colombia, the Constitutional Court of South Africa, and to some degree, the Supreme Court of the United States. The importance of this method to interpret the fundamental rights is special. Decisions of the supreme courts of different countries are essentially used as comparative legal examples. In particular, the German Federal Constitutional Court is active in using the comparative legal method as a method of constitution interpretation. It is problematic and interesting how relevant examples are used as comparative legal tools. From this angle, the issue of "functional equivalence" of the comparable norm or constitutional institution is of decisive importance.

In Europe and Germany, the comparative method of constitutional law has more applications in practice, which is not the case with the US Supreme Court.[118] The different development of the USA and Europe can be explained by the dynamic processes taking place within the framework of European law and the growing intensity of judicial practice ensuring integration. Comparative legal interpretation played a special role in interpreting the Treaty on European Union itself. The comparative legal interpretation of the Constitution takes place at several levels: when strengthening one's own arguments while rejecting or recognizing the examples given in the manner of comparative legal analysis.

The frequency of using the comparative legal method at the level of the European Supreme and Constitutional Courts is due to the worldview proximity of the national legal order of the European Union countries and the European supranational law. This reason explains the fact that the German model of reservations about integration was successfully introduced in other countries of the European Union (Denmark, Czech Republic, Spain).[119]

4.2.9. The So-called Dynamic, the Same, Evolutionary Definition Method

The dynamic, the same evolutionary definition method is used to interpret[120] the European Convention on Human Rights. This method is a type of the teleological interpretation method. In this case, the convention is interpreted as „living instrument, which must be interpreted in the light of present day conditions".[121] Applying to this method, despite the emphasis on evolution and dynamism, the European Court of Human Rights does not go beyond the classical criteria of norm interpretation. The appeal of the dynamic, the same, evolutionary method of norm definition is connected with such

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116 *Hwang Sh.-P.,* Verfassungsrechtlicher Jurisdikstionsstaat? Eine rechtsvergleichende Analyse zur Kompetenzabgrenzung vopn Verfassungsgericht und Gesetzgeber in den USA und der Bundesrepublik Deutschland, Berlin 2005, 35.

117 *Herdegen M.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.,* Handbuch des Verfassungsrechts, 1. Auflage 2021, § 1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 82-89.

118 Ibid.

119 Ibid.

120 *Grabenwarter/Pabel,* § 5. Allgemeine Fragen der Auslegung der EMRK, in: Europäische Menschenrechtskonvention, 7. Auflage 2021, Rn. 14-16.

121 Ibid.

multi-meaningful conventional concepts as "morality" and "public order". The ideas about them have significantly changed since the 50s, therefore, when focusing on these concepts, the quality of modern social development should be taken into account. It is an engrossing subject how the method of interpreting the norms of the European Convention on Human Rights can be used to interpret constitutional norms. In this context, we approach the classic debate in the US constitutionalism: originalism or non-originalism, or the idea of a "living constitution". This problem is complicate enough to sort out a dogmatic solution, it depends on each case and context. In general, the method of dynamic or evolutionary definition can be used in the interpretation of ambiguous concepts like "morality" in the case of the definition of the constitution. However, for "originalists" this may be debatable.

4.3. Comparison of Interpretive Methods

In Europe, originalism is not used as a method of interpretation, however, in Austria, regarding the issues of federal separation of legislative powers, originalist and structuralist interpretation methods are applied.[122] It is difficult to describe the methodology of interpretation of the norm within the judicial system of any country by emphasizing the superiority of any method of the constitution interpretation because the process of interpretation is quite complex and, from this frame of reference, judicial practice creates an eclectic reality. In this respect, Mark Tashnet also talks about a kind of "eclecticism". [123] It is generally accepted that the Austrian Supreme Court is more legalistic than its Canadian, German, Indian or South African counterparts.[124]

The standard of the constitution interpretation is elucidated by many factors: textualism that provides reading the text of the constitution word-for word, the contextual perception of interrelated norms, the identification of criteria confirming the will of the legislator, the identification of the preconditions for spatial or objective interpretation, the perception of the "structural" principles of individual norms of the constitution or the system of norms, precedent and judicial doctrines that have been developed on this basis, court evaluations and public policy.[125] Additional requirements are: the principles of constitutional interpretation followed by the deference to established judicial practice or newly elected government, international and comparative law, or the advanced scientific opinions rampant in academic circle.[126]

Despite the above-mentioned factors, it would be a mistake not to notice the similarity in the interpretation methodology of the Constitution. Despite similar arrangements in the context of constitution interpretation and the resemblance of the interpretation method, there are clear differences: for example, in the USA, the comparative interpretation method is used less than in

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122 *Rosenfeld M., Sajó A.,* The Oxford Handbook of Comparative Constitutional Law, New York 2012, 689 et seq.

123 *Tushnet M.,* The United States: Eclecticism in the Service of Pragmatism, in: *Goldsworthy J.* (ed.), Interpreting Constitutions: A Comparative Study, 2007, 7.

124 *Rosenfeld M., Sajó A.,* The Oxford Handbook of Comparative Constitutional Law, New York, 2012, 695 et seq.

125 Ibid, 696.

126 Ibid.

European countries while the originalist method of interpretation is used more in the US and sometimes in Australia; the "structural" principle of constitutional norm interpretation plays a more important role in Germany, Canada, India and South Africa than in the USA and Australia; Academic scientific opinion is more vital to interpret the constitution in Germany than in other countries of common law, especially while interpreting old constitutions, etc.[127]

There is no hierarchy among the classical methods of norm definition, although some reservations can be made about when which one is used:[128]

- The literal interpretation of the norm is used when the content of the text is appreciable. An "interpretation" inconsistent with the literal meaning of the norm is already legal action through the addition-correction of the law;
- Through the teleological definition it can be proved that the specific meaning of the norm must be interpreted against the established legal terminology, because the norm can include exceptional expressions through non-established terms;
- Systematic interpretation of the law is relevant in the case when the interrelationship of norms provides the interpreted norm with a unique, specific acknowledgment;
- An important criterion to interpret the norm is also the substantive precondition that guided the law-makers in the process of developing the norm. But it is not restricting for the interpreter of the norm and is less extensive in relation to the teleological definition of the norm;
- In relation to the teleological criteria in the process of defining the norm, the purpose of the law foreseen by the legislator is also important. The judge is restricted by this purpose of the norm to assign another function to the norm;
- The objective teleological definition of the norm is mainly applicable even when the historical aim of the legislator is not uniquely recognized and the aims stated by the content of the norm, in a way, are contradictory. Sometimes, during the teleological interpretation of the norm, one can also appeal to the purpose of the legislator if using teleological criteria turns out that the legislator was likely to mean the same thing. From this perspective, the purpose of the legislator and the objective-immanent goal of the norm create mutually complementary factors. In order to identify the aim of the norm, this type of interactive understanding of the latter (the interrelationship of subjective-objective definitions) is often fruitful.

4.4. The Distinctive Issues Related to the Definition of Fundamental Rights

The catalog of basic rights in the Constitution of Germany was rarely changed. Despite this solid nature and long constitutional jurisprudence, judicial practice continues to face unanswered questions that has developed a number of theories for using to interpret fundamental rights. The liberal, institutional, democratic-functional, social state compatible theories of basic rights and also the

127 Ibid.

128 *Larenz K.,* Methodenlehre der Rechtswissenschaft, 1960, 258 ff.

value theory about the definition of basic rights differ from each other.[129] The standard of interpretation of fundamental rights depends on which theory is followed by the interpreting authority. Nevertheless, when selecting these theories, the interpreter of the norm is still not completely free, he is constrained with the constitutional restrictions. In addition, classical methods of defining the norm are used to determine basic rights, which, in turn, is a kind of limiting factor. According to the justice of the Federal Constitutional Court of Germany, the method of interpretation is preferred when explaining the norm and considering the core of the constitutional norm describing the basic right reaches the maximum limit of its validity.[130] However, all of this depends on what the limit of the relevant basic right is and how it is interpreted, and what type of legal kindness can be discerned as a counterweight to the basic right. The most recognized principle to define the fundamental right is that the scope protected by the fundamental right and its limit should be distinguished from each other. The protected area is identified by the definition of the fundamental right, taking into account the constitutional limit of the individual fundamental right. In view of the justice of the German Federal Constitutional Court, the area protected by fundamental rights is, in essence, broadly interpreted. If the sphere, protected by the fundamental right is harassed, the right to free development of a person should be considered (Paragraph 1 of Article 2 of the Federal Constitution). For example, the German Federal Constitutional Court provides a wide interpretation of the constitutional concept of a family including unmarried parents. If the parents are divorced, there are two families.[131] Besides, according to the German justice established by the constitutional concept of marriage, only the relationship between a man and a woman is considered, the partnership between representatives of the same gender is not recognized by the constitutional concept of marriage, but it is protected by the basic right to the free development of a person.[132]

Fundamental rights can be limited by valuable legal favors. The issue concerns legal kindness provided by the Constitution (eg, the rights of others) or values derived from the Constitution (eg, public health). The means used to protect these values must be useful, necessary and proportionate (principle of proportionality)[133]. In this context, the Federal Constitutional Court of Germany develops the control tools to identify the legitimate limitation of fundamental rights or their violations. Proportionality is usually balanced by the Federal Constitutional Court[134] of Germany, based on the principle of the rule of law. The principle of proportionality emanates from the principle of the rule of law.

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129 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P., (Hrsg.),* Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 638.

130 Ibid, 639; BVerfGE 4, 7 (72); 32, 54 (71); 39, 1 (38).

131 BVerfGE 127, 263 (287).

132 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.,* (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 641.

133 See in detail: *Barak A.,* Proportionality – Constitutional Rights and theirLimitations, Cambridge 2012, 129 et seq.

134 BVerfGE 23, 127 (133).

"Hypertropia of basic rights" – that is how Karl August Bettermann[135] characterized the process of continuous expansion of the normative essence of basic rights recognized by the German Federal Constitution 35 years ago.[136]

As mentioned, to explain fundamental rights there is used a specific theory, more relevant to it. In this sense, the content of a fundamental right can be identified differently, depending on which theory of fundamental rights is used by the judiciary – liberal (and based on the rule of law), institutional or democratic-functional.[137] Therefore, it is interesting how to select between the theories of basic rights and whether the constitution furnishes some restrictive criteria for this type of freedom of choice.[138] The essential theories about basic rights, according to Ernst-Wolfgang Biokenforde[139], are the following: liberal or civil (adequate to the legal state ground) theory of basic rights, institutional theory, value theory of human rights, the theory of basic rights appropriate to the democratic functional and social state.

According to the theory of liberal or civil (adequate to the legal state ground) rights, fundamental rights are the individuals' rights to liberty against the state. In this regard, basic rights are perceived as pre-state rights that are realized without interference by the government. Such liberal understanding of freedom only provides the state with negative obligations. This context is the problematic part of the theory of liberal basic rights: the so-called Blindness to the social prerequisites of freedom (rights to liberty) and the process of its implementation.[140]

According to the theory of institutional basic rights, basic rights are represented not only by the rights to personal self-defense against the state, but objective principles for the areas protected by them. In this context, basic rights are discerned to require institutionally secured spheres of life. Basic rights (and the idea of freedom) within this theory are perceived not only as subjective rights, but also as "objectified", already normatively and institutionally determined[141] rights (freedom). The influence of this theory in practice is great, because under its influence, the space to implement basic rights is opened for legislative regulation of the areas protected by basic rights. From this point of view, the law is perceived not as an interference with the fundamental right, but as a prerequisite for its implementation. Freedom, in this context, is understood not only as a normative idea directed against the home state, but also the idea oriented on specific goals, which aims at executing the institutional objective essence of the practical provision of the freedom principle.[142]

The value theory of basic rights is established on Rudolph Smend's[143] theory of integration. In accordance to this theory: basic rights are valuable?? categories with which legal order is imbued and

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135 *Bettermann K. A.,* Hyperthropie der Grundrechte. Eine Streitschruft, Hamburg, 1984.

136 *Sommermann K.-P.,* Die Entwicklung der Grundrechte und Grundrechtsdogmatik in Deutschland, in: *Blanke H-J., Magiera S., Pielow J.-C., Weber A., (Hrsg.),* Verfassungsentwicklungen im Vergleich – Italien 1947 – Deutschland 1949 – Spanien 1978, Berlin 2021, 62ff.

137 *Böckenförde E.-W.,* Grundrechtstheorie und Grundrechtsinterpretation, in: NJW 1974, 1529 ff.

138 Ibid.

139 Ibid.

140 Ibid.

141 Ibid.

142 Ibid.

143 Ibid.

on which the idea of the state is based, in turn, whose function is integration. Integration of the people living within the state, in the context of the values is recognized by the basic rights. Conforming to this theory, the entire state and public culture is revolved around these values. Consistently, the basic rights, as well as institutional theory, have primarily an objective dimension and not subjective requirements. In this respect, the value categories recognized by the idea of freedom are not considered a pre-state reality, it is a part of the constitution from the moment of its adoption.[144] The results of the institutional theory of fundamental rights and the value theory are comparable, because in both cases the issue concerns the objectification of the right to freedom. Nevertheless, the value theory of basic rights contains additional components: values often change, and this also causes the "change" of the essence of rights, which is problematic; It is impossible to identify values only by legal methods, and humanitarian sciences appear to be an additional methodology of definition, which is also problematic. On this occasion the idea of freedom gets relativized, because it turns into a freedom determined by value categories, which is ensured by a state, which is problematic as well.

In general, the constitutional courts try to use the value theory of basic rights or the standard of basic rights interpretation, through the values recognized by the latter in case of conflict of fundamental rights or values weighting. However, this theory does not ensure the final answer in the mentioned cases. As there is no hierarchy between values, simultaneously interests are weighed when fundamental rights collide and priority is given to the greater kindness. This conflicting context makes the theory ambiguous and it must be used in practice conscientiously in order not to undermine the essence of any fundamental right. The starting point of the theory of democratic functional basic rights is their perception in accordance with the public and political functions.[145] From this perspective, there are considered democratically determined basic such as freedom of expression, freedom of assembly and demonstrations, freedom of the press, freedom of association, etc. According to this theory, basic rights are perceived as factors implementing the public interests of citizens, within the framework of which political processes take place "from the bottom up" citizens to the principles of state management. The idea that basic rights mainly define the individual's non-state and pre-state opinion, in accordance with this theory, is recognized but perceived as the result of apolitical, bourgeois thinking. The notion of basic rights, in keeping with this theory, is manifested in public, democratically constitutive functions, which define and determine the content of basic rights. In this regard, basic rights are functional, competent norms for the subjects of basic rights to participate in public and political processes and are not made out as separation and redistributing categories of competences between an individual and the state.[146] The influence of this theory on fundamental rights interpretation is considerable. In consonance with this, freedom is not only freedom as a value, but freedom "for something". From this point of view, ensuring freedom is a prerequisite for the exertion of democratic, political processes. The content and extent of freedom is determined by that function it serves. It is interesting that the intensification of the theory of basic rights, or the idea of the need to

144 Ibid.
145 Ibid.
146 *Smend R.,* Bürger und Bourgois im deutschen Staatsrecht, ders., Staatsrechtliche Abhandlungen, 1955, 313, 314.

exercise freedom, can lead to the relativization of the idea of freedom, which implies the obligation to exercise freedom. This context is not far from the communist theory of fundamental rights and caution is warranted when applying it in the process of interpreting fundamental rights.[147] Within the scope of the relevant definition of the social state of basic rights it is essential to consider the results of the liberal order formed within the theory of liberal basic rights, public development, the social life and social relations that replace this individual autarchy. From this angle, there are frequent cases when social preconditions determine the quality of the exercise of freedom. This means that the state should acquire an active role in creating social preconditions for the enjoyment of freedom. The theory of basic rights corresponding to the welfare state tries to overcome the issue of such legal and real alienation of freedom. According to this theory, basic rights define not only negative obligations of the state, but also represent rights of social demand addressed to the state. In this context, the positive obligation of the state to perform appropriate activities to ensure real social preconditions for the realization of freedom. In this respect, Individuals within the framework of the corresponding rights to social demands, are co-participants of the good things that the state creates for the real provision of the exercise of freedom. All this implies the necessity of mobilizing financial opportunities of the state. Since, in this sense, the implementation of basic rights depends on the financial capacity of the state, which includes limited resources, the social context of rights is narrowed in practice to the constitutional tasks of the state. This means that basic rights are not converted into rights to be supplied with social benefits in Germany. It becomes only the duties/tasks of the state to take into account the standard of the social state principle in making any decision. Accordingly, when defining the basic rights within the standard of the social state, their content is limited by assigning tasks to the state (Based on this type of theory, only this normative context is formed when defining the basic rights) and the rights of demand to receive social subsidies are not established. It is interesting what type of constitutional preconditions nourish this variety of theories to interpret basic rights and which theory of basic rights is recognized by the constitution. This arises the question about the availability of the unequivocal constitutional determinant.

Ernst-Wolfgang Böckenförde answers this question by describing several constitutional theoretical passages, emphasizing that the German federal constitution has its own theory of fundamental rights, which is nuanced in a number of contexts: the essential part of the federal constitution related to fundamental rights considers fundamental rights as freedom rights which implies the idea of a liberal and legal state based on the principle of freedom. This, in turn, is a response to National Socialism. The perception of the basic rights in accordance to the federal constitution does not end with this, in particular, by recognizing the principle of the social state, along with the principle of the rule of law, the federal constitution creates an instrument of social tasks of a state that emphasis the role of the objective dimension of the basic rights and the scope of the state's positive obligations. In this context, the state is obligated to create social preconditions for the full exercise of freedom. Relating to this point, the corresponding theory of liberal fundamental rights and the rule of law is not rejected, but modified by adding social elements.[148]

147 *Böckenförde E.-W.,* Grundrechtstheorie und Grundrechtsinterpretation, in: NJW 1974, 1529 ff.
148 Ibid.

Besides, the principle of democracy, which is the basis of the federal constitution, does not change or modify the theory of fundamental rights. The connection between the principles of the rule of law and democracy, the "liberal democratic legal order" ("freiheitlich-demokratische Grundordnung") that recognizes democracy and freedom within the rule of law) do not replace or suppress each other, but completes.[149] Democracy is a constitutional principle which creates an immanent constitutional limit.[150]

4.5. The Explanation of the Constitution Structural Principles

The constitution structural principles provide for special requirements for their interpretation. In German constitutionalism, the structural principles of the constitution, such as the principles of the legal state, democracy, a social state, federalism and republicanism, are connected to the categories of basic rights, as well as the concept of human dignity, and getting their interpretation isolated is not allowed.[151] This interrelation stems from Articles 20 and 28 of the German Federal Constitution where these principles are recognized as closely related standards.

Considering the essential principle of federalism federal entities should conduct their activities in accordance with the principle of federal loyalty. In order to ensure people's sovereignty, the federal constitution envisages a system of democratic governance and local self-government. The concept of democracy derives from a number of constitutional norms that describe electoral principles, the status of a member of the parliament, the law of parties, the principle of the majority, the separation of powers, the issue of parliamentary responsibility of the government, basic rights as negative rights, the principle of equality, the rule of law, administrative and constitutional justice.[152] Public formations, as an exception, are subject to the principle of democracy. For example, political parties, considering their functions.

As for the legal state, it can be a state that recognizes the principle of separation of powers and, simultaneously, has a monopoly of power.[153] From this point of view, the phenomenon of monopoly of power is in systematic contradiction with the principle of separation of powers and balanced by the latter. A legal state is bound to perform its duties. This law is the basic rights that guarantee freedom and equality. The principle of the rule of law also includes formal prerequisites, such as – paragraph 4 of Article 19 of the Federal Constitution, paragraph 3 of Article 20, Article 34, sentence 2 of paragraph 1 of Article 80, 103 – This article contains organizational and procedural norms that ensure[154] the implementation of basic rights. This principle generates the principle of certainty (foreseeability). In addition, state activities must be predictable and evaluable. Another important aspect is the idea of constitutionally binding state bodies and the powers of the Federal Constitutional Court. These material and formal preconditions of the rule of law principle lead to democratically

149 BverfGE 2, 1 (12 f.); BVerfGE 5, 85 (140 ff.).
150 *Böckenförde E.-W.,* Grundrechtstheorie und Grundrechtsinterpretation, in: NJW 1974, 1529 ff.
151 Ibid, 641.
152 Ibid, 650.
153 BVerfGE 50, 290 (336).
154 BVerfGE 2, 380 (403); 45, 187 (246); 81, 347 (356).

legitimate state power.[155] The principle of the social state is an attribute[156] of the rule of law and federalism. The principle of the welfare state is a requirement for legislation to bring social balance and ensure social security.[157] The principle of the social state implies a task for the state to create a social order. In the exercise of this duty, the legislature enjoys a wide discretion.[158] The principle of the welfare state obligates the state, but does not point out how this obligation is to be carried out. If it were the other way around, it would contradict the principle of democracy.[159]

In the case of interpretation of the authority, organizational and procedural norms of the Constitution, classical methods of norm interpretation are also valid. When explaining the norms of competence, the origin of the constitutional norm is specially focused on. In this sense, it is common to refer to the legacy of the Weimar Constitution of 1919.

4.6. The Concept of Human Dignity – the Principle of Inviolability of Human Dignity

"Human dignity is inviolable." The German federal constitution begins with these words.[160] The obligation of the state to protect and ensure the principle of inviolability of dignity is a basis citizens' trust[161]. The concept of dignity is clear and nebulous at the same time. From this perspective, it is necessary to clarify whether this right represents an ethical appeal or a true legal norm, a political manifesto or a normative command, a description or a prescription.[162] It is very difficult to recognize its legal meaning. If this record is a legal norm, it arises the questions about the degree of its normative binding and the legal consequences it generates.

In the scientific literature, this sentence is often found categorical and, in this sense, imperative. On this basis it is clearly prescriptive rather than descriptive. It is complicated to define the principle of inviolability of dignity. The justice of the Federal Constitutional Court of Germany is diverse in this regard, but the more specific cases of the interpretation of this principle are, the more disputes its content arises.[163] Law does not have a monopoly on the definition of the concept of dignity, it is also explained by theology and philosophy. The record on the concept of dignity does not follow the classical standards on the definition of fundamental rights, it has its own dimensions.

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155 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.,* (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 652.

156 Ibid.

157 BVerfGE 5, 85 (198); 22, 180 (204); 27, 253 (283); 35, 202 (235f.).

158 BVerfGE 18, 257 (273); 29, 221 (235).

159 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 653.

160 The catalog of basic rights recognized by the Constitution of Georgia begins with this phrase. The influence of German Constitutionalism is clear.

161 *Isensee J.,* § 87 Würde des Menschen, in: *Detlef M., Papier, H.-J.,* Handbuch der Menschenrechte, B. IV, Grundrechte in Deutschland, Einzelne Grundrechte I, 5 ff.

162 Ibid.

163 Ibid, 6 ff.

The record of the concept of dignity can be found in both liberal and authoritarian and socialist constitutions.

The difficulty of defining the principle of inviolability of dignity is caused by its highest value. It is not allowed to change the concept of dignity either by the ordinary or a founding legislator of the constitution. It has a claim to absoluteness, which is alien to conventional norms.

The Federal Constitution of Germany recognizes the principle of secularism, therefore, it recognizes and perceives the concept of dignity in worldly relationships. Religion is not thematic for the Constitution but it does not exclude the access to such ethical standards that do not have worldly foundations considering the secular foundations of the Constitution.[164] Although the doctrine of the inviolability of dignity is a result of modern humanism, there is no records about it in the proclamations of human rights of the 18th century and in the legislative texts formed by the socialist trends in the 19th century.

For the first time, the concept of human dignity is found in the Weimar Constitution of 1919, where is an entry about "ensuring a life corresponding to human dignity". The concept of dignity is also mentioned in the preamble of the 1937 Irish Constitution and the 1945 Spanish Constitution.

After the Second World War, the evidence of the inviolability of human dignity can be found in a number of legal acts. Such is the Charter of 1945, the founding document of the United Nations (UN) of 1945, the Universal Declaration of Human Rights of 1948...

The appearance of references to human dignity in these texts was the result of the formal consensus of the anti-Hitler coalition.

After 1945, the concept of dignity appears in the Constitutions of the German Federal Units, in their preambles.

The German Federal Constitution became a guide for European Constitutional development.

In the European constitutions adopted after 1949, there is already a record about the concept of dignity. The Lisbon Treaty of the European Union of 2009 also appeals to the concept of dignity. The European Charter on Fundamental Rights repeats the same.

In contrast, the European Convention on Human Rights of 1950 does not mention the principle of inviolability of dignity, although the modern definition of the latter includes the concept of dignity in the guarantees of rights and freedoms. The European Court of Human Rights often appeals to this unwritten principle of inviolability of dignity.

The universal recognition of fundamental rights would lead to a renaissance of natural law after World War II. The reason for this is the Thomistic natural legal philosophy, as well as the Judeo-Christian doctrine of God's image and likeness. The positivism of the concept of dignity was perceived as a victory over the positive law of natural law. These types of entries do not contradict the secular character of the Constitution, but include prerequisites that are pre-constitutional. In general, the concept of dignity includes the ethical foundations that are worldview-determining for the modern state and, in this regard, "religion"[165] presented in the form of a mandatory ethos is peculiarly considered.

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164 Ibid, 9 ff.

165 Ibid, 21.

Paragraph 1 of Article 1 of the German Federal Constitution ("Human dignity is inviolable. It is the responsibility of the state to protect and respect it") represents positive law.[166] In this context, the positive category is positivized. But this still does not mean an exact answer to the question of what type of direct legal action this guarantee includes. The federal basic law for the principle of inviolability of dignity does not provide for its limitation and possibilities of weighing values, as it is contingent upon other basic rights. Thus, the concept of dignity is transformed into an absolute category within the framework of the current legal system. The revision of the principle of dignity of inviolability is not allowed within the framework of formal constitutional amendments (Paragraph 3 of Article 79 of the Federal Constitution, the so-called "constancy formula"). The relevance of the principle of inviolability of dignity is emphasized by the fact that the text of the Constitution begins with it. The principle of inviolability of dignity is a positive basis for other fundamental rights. But the concept of dignity itself is not a maintainable category.

Perceiving the concept of dignity as a positive law does not contradict the fact that the Constitution considered it as a positive category in its own text. The founders of the constitution took into account the non-legal category, the content of which they did not specify. Thus, the question of what the concept of dignity includes was left open for further interpretation but this does not mean unlimited freedom of interpretation. Arbitrariness[167] must be excluded when interpreting this context. The concept of dignity includes everything that was rejected by National Socialism. This is the person himself. The vagueness of the concept of dignity is caused by this. "Man is more than he himself knows." (Karl Jaspers).[168]

In general, the norms of the Constitution on basic rights are considered to be concretizations of the concept of dignity. Accordingly, the concept of dignity derives from the content of fundamental rights and vice versa. In this sense, there is a kind of interpretive interrelationship. If we interpret the concept of dignity in the nature-legal point of view, the latter aims at its absolutization, and on the contrary, when interpreting it in the international legal point of view, the concept of dignity is relativized.[169]

The principle of inviolability of dignity is a difficult legal category to define legal category, which does not mean a deficiency in its normative nature. According to the constitution, dignity is recognized equally for everyone, regardless of gender, origin, social affiliation, etc. The state is in the service of dignity, and people respect each other (recognize each other's dignity), regardless of any sign.

In the form of dignity, the constitution received the cultural and philosophical reception with its own text. The pre-legal essence of the concept of dignity is diverse. The idea of dignity was born and developed in the Judeo-Christian culture. This is not a coincidence.[170] The content and justification of dignity, considering its origin, is religious.

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166 Ibid, 23.
167 Ibid, 25
168 Ibid, 34.
169 Ibid, 40.
170 Ibid, 18.

On the way of its own development, the idea of God's image and likeness is connected to the Roman perception of the concept – and the philosophy of the Stoics. For Immanuel Kant, a man himself is the value, which is always an end and should not be a mean.[171] The humanism of the Renaissance and the philosophy of the Enlightenment corrected the content of the concept of dignity and turned it into a category of basic rights. This does not mean the denial or the need to deny the religious origin of the principle of inviolability of dignity, its genetic past. The constitutional recognition of the concept of dignity does not signify the constitutional recognition of Christianity as a religion. This development is simply an indirect result of the development of Christian culture.[172] Ideologically, freedom and dignity are considered together. In its religious origin, dignity is based on freedom of the will, in the ontological meaning on mind, in the moral meaning on the customary autonomy.[173] From a legal point of view, freedom is an emanation of dignity.[174] A liberal state recognizes and pays attention to dignity, as long as it does not interfere with the right to free development of a person and does not try to manage it. The goal of the social state is related to the concept of dignity.

The Federal Constitution of Germany does not rely only on its religious roots in the reception of the concept of dignity, it also shares the thoughts of Cicero, Thomas Aquinas, Pufendorf, Kant and other classics. The heritage connected to the concept of dignity in the creation of the constitution was nourished by Christianity, which was saturated with Platonist-Stoic elements and the secular ethos of the time of humanism (in turn, which is based on Christian traditions).[175] Appealing to the Christian foundations of the concept of dignity has only historical significance. The modern constitutional state perceives the concept of dignity considering the principle of secularism. The guarantee of dignity is secular and not religious in nature. Its meaning is prescriptive, not descriptive. The addressee of the principle of inviolability of dignity is the state government.

Dignity represents the highest value within the constitutional order. Human dignity is the "highest constitutional principle".[176] "The state exists by the will of the people, not vice versa – the people by the will of the state."[177] The concept of human dignity contains elementary standards of humanity. Based on this, the concept of dignity includes a kind of "humanitarian minimum". Dignity is the "foundation of fundamental rights", the "fundamental norm of the state" and the "highest constitutional value". [178]From this point of view, the importance of the principle of inviolability of dignity becomes clear. As a normative basis of law and order, it is guaranteed to the highest degree – the German Federal Constitution begins with the recognition of the inviolability of human dignity. In

171 *Kant I.,* Metaphysik der Sitten, 1797.
172 *Isensee J.,* § 87 Würde des Menschen, in: *Detlef M., Papier H.-J.,* Handbuch der Menschenrechte, B. IV, Grundrechte in Deutschland, Einzelne Grundrechte I, 40.
173 Ibid, 55.
174 Ibid, 57.
175 Ibid, 58.
176 *Dürig G.* in: *Maunz Th., Dürig G.,* GG (LitVerz), Stand 1958, Art. 1, Abs. 1, Rn. 14; BVerfGE 61, 127 (137).
177 *Herdegen M.* in: *Maunz Th., Dürig G.,* GG, Stand: 2020, Art. 1, Abs. 1, Rn. 1.
178 Ibid, Rn. 3.

addition, the inviolability of dignity implies that "interfering" with it to any degree is already a violation of the right and is not allowed. At this time, the principle of proportionality does not apply.

The constitutional record on the inviolability of dignity is not only an ethical and moral category that you can deny or affirm, but it is a part of the constitution and a normative principle.[179] In this sense, dignity is a "right to rights".[180]

The issue of recognition of the principle of inviolability of dignity as an individual fundamental right, despite the fact that it is considered accepted by the German Federal Constitutional Court and a number of famous scholars, is still controversial in German constitutionalism. Mainly, it would be too puritanical approach to perceive the constitutional record on the inviolability of dignity as having only an objective legal function and not as strained[181] with subjective legal components, in any case, the violation of the principle of inviolability of dignity, as a rule, leads to interference in a number of other areas protected by fundamental rights of freedom and equality, and, accordingly, the constitutional lawsuit can still be filed. The principle of inviolability of dignity protects not humanity in general, but each individual and his personal essence, therefore, it has an individual-subjective composition. The origin of the concept of dignity also indicates to its subjective nature and does not represent only a value-objective category. It is impossible to de-subjectify and objectify (generalize) the fact of violating the dignity of the Holocaust victims in the way of emphasizing the valuable goods infringed by state terror.[182]

In addition, if we perceive the basic right only as an objective principle, there is a danger that dignity will be subsumed by other basic rights. Consequently, the arguments in favor of the idea that dignity is also a basic individual right are compelling and more acceptable than the opposite.[183]

The concept of dignity, as mentioned, is difficult to define. The most common form is the Kantian thesis, according to which a person cannot be objectified and should only be the purpose of the law: the dignity of a person is violated when he is perceived only as an object, a mean to an attainable goal.[184] The concept of dignity is based on Judeo-Christian foundations (as a reaction to the crimes committed during the Nazi Third Reich) and this definition is not the only and final version of it. In this sense, it is subject to development.[185] Besides, when defining the concept of dignity, international legal standards are taken into account, such as, Article 3 of the European Convention on Human Rights, which prohibits "torture, inhuman or degrading treatment or punishment of a person". In general, the comparative legal method is an important landmark considering this context. It should be noted that the US Supreme Court often criticizes its own decisions, based on the comparative legal method.[186]

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179 *Böckenförde E.-W.,* in: JZ 2003, 809 ff. (812).

180 Ibid.

181 *Herdegen M.,* in: *Maunz Th., Dürig G.,* Grundgesetz-Kommentar, GG Art. 1 Abs. 1., Werkstand: 94. EL Januar 2021, Rn. 1-121.

182 Ibid.

183 Ibid.

184 Ibid.

185 Ibid.

186 US Supreme Court, Urt. v. 20. 6. 2002, Atkins v. Virginia, 536 U.S. 304 (2002) Fn. 21 (applying the death penalty to a disabled person): "Moreover, within the world community, the imposition of the death penalty

Every person is a subject of dignity. The concept of dignity ensures the protection of the individuality of every person in his or her existence. A person cannot be deprived of his dignity in the case of a criminal offense or "unworthy" behavior. The issue of persons with disabilities is particularly problematic, for example, in the case of sterilization, when the latter are not capable of giving consent in such cases. The constitutional record of dignity requires that the need for sterilization must be determined as a last suggestion, ultima ratio and both the guardian/ caretaker and the court should get involved in making that decision.[187]

Protection of dignity continues until the death of a person. However, when the issue concerns general personal rights, the protection of dignity continues even after death (postmortem protection of dignity). It is interesting that, in the case of organ transplantation, if there is no consent of the deceased, the transplantation violates his dignity.

The issue of protecting dignity in the prenatal (before human birth) stage is especially complex. The stage of making a person's right to life a subject within the framework of basic rights and the issue of activating the protection of dignity in the prenatal phase differ from each other.

The protection of dignity is logical, it does not apply to legal entities, because dignity is only a human phenomenon and addresses to a physical person. The principle of inviolability of dignity concerns not only a state, but also private individuals. In this context, it has a penetrating power in horizontal, private legal relations as well.[188] Protection of human dignity by the state implies that the state is obliged to create social preconditions that ensures dignity and protects it from interference by the third parties. In this respect, the concept of dignity has a social dimension. It should be noted that Article 79, Clause 3 of the German Federal Constitution protects the principle of inviolability of dignity. With the guarantee of immutability (the so-called formula of permanence): the constitutional concept of the inviolability of dignity must not be changed, otherwise the constitution will lose its identity.[189] It is obvious that the constitutional record on dignity, according to the German Constitutional Theory, has a pungent power in relation to the normative components[190] of the constitutional principles as well.

The concept of dignity is not found in Anglo-American constitutions. It should be mentioned that the European perception of the concept of human dignity is not fixed in the USA. This is evident by the fact that the US rarely accedes to international treaties in the field of human rights, and if it

for crimes committed by mentally retarded offenders is overwhelmingly disapproved", Cited from the following source: *Herdegen M.* in: *Maunz Th., Dürig G.,* Grundgesetz-Kommentar, GG Art. 1 Abs. 1., Werkstand: 94. EL Januar 2021, Rn. 43.

187 Ibid.

188 Ibid.

189 *Poscher R.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.,* Handbuch des Verfassungsrechts, 1. Auflage 2021, §17, Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 3-131; *Bognetti G.,* The conceptof human dignity in European and US constitutionalism, in: *Nolte G. (ed.),* European and US Constitutionalism, 2005, 85-107.

190 *Häberle P.* in: *Isensee J., Kirchhof P. (Hrsg.),* Handbuch des Staatsrechts, 3. Aufl. 2004, §22 Die Menschenwürde als Grundlage der staatlichen Gemeinschaft.

does, with numerous reservations. The imperative concept of dignity is unusual to the US. [191] When it comes to dignity, the two sides of the Atlantic take different positions. The US and European visions, in this case, do not coincide. There is a difference between legal cultures. These differences are determined by the legal historical past. These differences can be seen in the following examples: criminal witchcraft, the so-called hate speech and protection of dignity in the workplace, as well as privacy.

As for the criminal penalties, the US approach is known to be very harsh. The size of the fine is much higher than in similar cases in Germany and France. However, the death penalty returned to the US as a punishment just as it was slowly being abolished in European countries. Continental European countries have historically had different punishments for different social hierarchy. From the 1750s, the types of punishments imposed on the lower social classes were abolished, and a variety of relatively mild punishments remained in effect as such. At that time, In the USA, the situation was different[192] – on the contrary, light punishments imposed for high social classes were canceled and a variety of harsh punishments got prevailed.

The regulations imposed regarding Hate Speech are different in the US and European legal space. What is prohibited in Europe, in this sense, is allowed in the USA. The main reason for this is the European perception of the concept of dignity. In addition, so-called "mobbing" in the workplace is forbidden in European countries – directly by legislation (France) or judicial practice (Germany). This phenomenon does not occur in the USA. Although the concept of sexual harassment at the workplace was received in Europe from the USA, in the USA this concept is based on completely different legal prerequisites than in Europe. In this point, in the US, financial interest and career advancement motives are prioritized more than the concept of dignity.[193] As for the inviolability of private life, it is worth noting that the US prohibitions are directed only at the state, while in Europe identical prohibitions are directed not only at the state, but also at the media and, in general, at the public space.

Accordingly, the "mind of the law" in relation to the principle of inviolability of dignity significantly differs on both sides of the Atlantic. But it differs because the social development in these two cultural spaces is dissimilar from each other.[194]

4.7. Objective Dimension of Basic Rights – about the Positive Obligations of the State

When the German Federal Constitution was adopted, the objective legal character of basic rights was rejected.[195] Essentially, based on the decision of the state- Lüth [196] the defensive functions of basic

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191 *Whitman J. Q,* 'Human dignity' in Europe and the United States: The social foundations, in: *Nolte G. (ed.),* European and US Constitutionalism, 2005, 108-124.

192 Ibid.

193 Ibid.

194 Ibid.

195 *Starck Chr.,* Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.,* (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 644.

196 BVerfGE 7, 198 (204 ff.).

rights were filled with their own objective legal dimensions,[197] which determine the law of German human rights. The subjective nature of basic rights is strengthened by their objective legal categories.[198] The constitutional record of some basic rights indicates its objective legal character. For example, the norms on marriage and family (paragraph 1 of Article 6 of the German Constitution), property and inheritance (paragraph 1 of Article 14 of the German Constitution), etc.

The pervasive action of basic rights in private legal relations is a manifestation[199] of the objective dimension of basic rights. In addition, according to this doctrine, the so-called sovereignty of the state derives from the basic rights. Protective obligations, which imply the following: the state must create preconditions for the realization of fundamental rights, and during implementation of these rights it must be in accordance of the principle of proportionality, without violating the normative essence of fundamental rights.

However, the German Federal Constitution prefers the subjective legal function of basic rights, the objective-legal dimension only serves the idea of strengthening the subjective dimension.[200]

4.8. The Concept of "Constitutional Identity" in the Multi-level European Legal Space

Paragraph 1 of Article 24 of the German Constitution admits that on the basis of appropriate law, the supreme governing authority of the state can be given to interstate organizations. Lex specialis of the Article 24 of the Federal Constitution of Germany is Article 23, which recognizes the principle of "open statehood" („offene Staatlichkeit") as well as the idea of European unity („europäische Einigung") and contains the norms related to the issue of allocating state management powers in the context of integration into the European Union.

To join the European Union, it will be necessary to make changes to the Constitution of Georgia, which will consider the interaction of Georgian law with the law of the European Union and the list of relevant issues for the process of integration into the European Union, such as: the principle of subsidiarity, the limit of transferring state management competences, the manner of its resolution in case of a competence dispute, etc.

The so-called 2009 decision of the Federal Constitutional Court of Germany after the Lisbon decision[201], the concept of constitutional identity has become an important orientation for these member states of the European Union in the context of the application of European Union law.[202] The source of the concept related to "national identity as a limit of European integration" is the first sentence of Article 4, Paragraph 2 of the Treaty on European Union itself: „The Union shall respect

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197 *Depenheuer* in: *Maunz Th., Dürig G., ,* Grundgesetz-Kommentar, GG Art. 8., Werkstand: 94. EL Januar 2021, Rn. 121 ff.

198 *Herdegen* in: *Maunz Th., Dürig G.,* Grundgesetz-Kommentar, GG Art. 8., Werkstand: 94. EL Januar 2021, Rn. 17-25.

199 *Sachs* in: *Sachs M.,* Kommentar zum GG, 9. Aufl. 2021, Vor Art. 1, Rn. 27-38.

200 *Starck* in: *von Mangoldt H. v., Klein F., Starck Ch.,* (Hrsg.), Grundgesetz, 7. Auflage, 2018, Abs. 3 Art 1, Rn. 181.

201 BVerfGE 123, 267.

202 For a detailed comparative legal review on this issue see, *Calliess Chr., van der Schyff G. (ed.),* Constitutional Identity in a Europe of Multilevel Constitutionalism, Cambridge, 2020, 3 et seq.

the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." According to this formulation, the European Union is obliged to respect the constitutional identity of the member states. In this context, the principle of commitment to the European Union, which is described in Article 4, paragraph 3 of the Treaty on European Union, is often accentuated. The ongoing scientific debate at the level of the European Union and the member states, which is related to the identification of the concept of "constitutional identity", is quite intense. There are similarities and differences in the perception of this concept across the member states themselves.[203]

The German perspective is the following: the concept of "constitutional identity" is not found in the German federal constitution. This concept was developed by the German Federal Constitutional Court through its own decisions, Solange I [204] and Solange II [205], then the Maastricht[206] and finally the Lisbon decision.

In this context, it is important to consider the formula of permanence, which is also recognized by Article 23 of the same Constitution (Constitutional record of the European Union, its integration, its development and cooperation with it), Paragraph 1, Sentence 3. In this sense, the formula of permanence includes the immutability of such structural principles as: the principle of inviolability of dignity, the principle of the rule of law, the principle of democracy, the principle of republicanism, the principle of the social state and the catalog of basic rights. Consequently, in the process of European integration, these values are protected by the constitutional guarantee of immutability, which means that this constitutional core is inviolable. The German Federal Constitution discerns the concept of the identity of the constitution in close connection with the principle of democracy. According to the decision of Lisbon, the Federal Constitutional Court of Germany went further and assigned the following issues to the constitutional identity: citizenship, monopoly of military power, criminal law issues (separate aspects), financial management of the state, socio-cultural issues, etc.[207] Within the mentioned issues, the German legislature maintains its sovereignty. In this connection, the German approach differs from the Czech approach, where the Parliament, not the Constitutional Court, is authorized to review the transfer of governance and power (in particular, sovereignty) to the European Union in certain areas.[208] It is worth noting that by the justice of the France Conseil constitutionnel (Constitutional Council), constitutional identity is perceived as réserve de constitutionnalité.[209] The

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203 *Walter M.,* Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive, in: ZaöRV 72, 2012, 177-200.

204 BVerfGE37, 271.

205 BVerfGE73, 339.

206 BVerfGE 89, 155.

207 Cf. BVerfGE 123, 267 (357 f.).

208 See Pl. ÚS 19/08, 26.11.2008, para. 109, available at: <http://www.concourt.cz/ clanek/pl-19-08>.

209 CC, 10.6.2004, Loi pour la confiance dans l'économie numérique, déc. n° 2004-496 DC, Rec. 101; CC, 1.7.2004, Loi relative aux communications électroniques et aux services de communication audiovisuelle, déc. n° 2004-497 DC, Rec. 107; CC, 29.7.2004, Loi relative à la bioétique, déc. n° 2004-498 DC, Rec. 122; CC, 29.7.2004, Loi relative à la protection des per- sonnes physiques à l'égard des traitements des données à caractère personnel, déc. n° 2004-499, Rec. 126, cited according to the source: *Walter M.,*

concept of constitutional identity, in the case of France, derives from the decisions of the Constitutional Council and not from the French Constitution. From this point of view, the concept of constitutional identity belongs to the approach recognized by paragraph 5 of Article 89 of the French Constitution, which is similar to the formula of permanence and accepts the principle of immutability of republicanism. Related to this (Article 89 implies the immutability of the principles listed in Article 1 of the French Constitution of 1958) there is the issue of the persistence of such legal principles as: the principle of democracy and social state, laicism, unitarism, equality before the law, decentralization, etc. So far, based on Article 89, the Constitutional Council has not discussed the issue of European integration. It should also be noted that the French Constitutional Council does not consider the issue of constitutionality of constitutional amendments. In addition to Article 89(5), French constitutional identity may include Articles 2 and 3 of the Constitution, as well as Article 6 of the 1789 Declaration of a Man and Citizen. In this sense, French constitutional identity includes state symbols and the French language, as well as electoral principles and access to civil service.[210] Accordingly, French and German approaches to describing constitutional identity differ from each other. In addition, there is no common benchmark of any kind to construct a unified concept of constitutional identity in relation to EU law across member states. Accordingly, French and German approaches to describing constitutional identity diverge from each other. Moreover, there is no common benchmark to construct a unified concept of constitutional identity in relation to EU law across member states. Normally, based on Article 23 of the German Federal Constitution, the German Federal Constitutional Court carries out several types of control: a) identity control – whether issues subject to the guarantee of immutability (constitutional identity as a principle) are protected by EU law; b) subsidiarity control – whether the acts of the European Union are subject to the principle of subsidiarity; c) Control – whether the acts of the European Union comply with the limit (scope) of the separate governing powers devaluated to the European Union. Consistently, within the powers transferred to the European Union, Article 23 of the Federal Constitution of Germany with Article 79, Clause 3 of the same Constitution (formula of immutability) creates a boundary (constitutional identity), within which the European Union is not authorized to exercise governing powers. It should be noted that the issue of the relationship between European Union law and national law still has not been clearly identified. In relation to German federal legislation (including constitutional legislation), EU law is predominantly applicable, but the constitution still takes precedence. Individual details about this issue are regulated by Article 23 of the German Federal Constitution, already described in part (the so-called European Article). In this perspective, there is a cooperative relationship between the Court of Justice of the European Union and the constitutional courts of individual member states. In addition to the above, there are cases when the so-called the concept of "constitutional identity" is used by some member states to ignore the legislation of the European Union (for example, Poland),

IntegrationsgrenzeVerfassungsidentität – KonzeptundKontrolleauseuropäischer, deutscherundfranzösischer-Perspektive, in: ZaöRV 72 (2012), 177-200.

210 *Walter M.,* Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive, in: ZaöRV 72, 2012, 177-200.

which is unacceptable. Recently, the Court of Justice of the European Union often highlights[211] that it is unacceptable for the member states of the European Union to emphasize the principle of "constitutional identity" and not comply with the decisions of the same court. In this context, the Georgian legal and academic space should be significantly prepared, not to repeat the example of Poland, and to correctly interpret/configure the idea and concept of "constitutional identity" provided by the founding treaty of the European Union.

4.9. The So-called Formula of Permanence and "Unconstitutional Constitutional Law" as a Phenomenon

Article 79 of the German Federal Constitution provides for the possibility of amending the constitution and, simultaneously, defines what is not subject to amendment (the so-called guarantee of permanence). These are: basic human rights, the principle of the social state, the principle of the rule of law, the principle of separation of powers, the principle of democracy, the principle of federalism and the right to rebel (Widerstandsrecht). This article of the constitution is also a prerequisite for the elasticity of the constitution and the immutability of the value categories recognized by it.[212]

This entry of the constitution is a reaction to the reality of National Socialism, when the law of March 24 1933, Ermächtigungsgesetz (the so-called "authorizing" law) rejected the legal order established by the Weimar Constitution.

Furthermore, Article 146 of the German Federal Constitution, unlike other constitutions, states that the constitution is only valid until it is replaced by a new constitution. In this context, the issue of interrelationship between Article 146 and Article 79 of the Federal Constitution is unclear and a matter of dispute.

In general, the Federal Constitution, by including these articles in the text of the Constitution, recognizes the well-known constitutional doctrine of the distinction between the "founding government" and the "founded government". Pouvoir constituant is the founding government while pouvoir constitué-founded government. This doctrine derives from the Emer de Vattels teachings of the defining doctrines of the US constitutional order, and Abbé Emmanuel Joseph Sieyès, the revolutionary pamphlet-„Qu'est-ce le Tiers État?"?

Article 79 of the German Federal Government binds the established government with the unchanged norms of the Constitution. What happens if the new constitution is adopted? In this context, there are several theories, some of them exclude confining the constituent power by the majority principle in agreement of the Article 79, while others, on the contrary, need to pursue the procedures considering the same article. Regarding the guarantee of permanence/immutability, which is included in paragraph 3 of Article 79, it is also in question whether the founding government should follow this standard or not (the guarantee of immutability or permanence – constitutional identity).

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211 See the most relevant decision of the Court of Justice of the European Union of February 22, 2022 in the case: C 430/21 (in Georgian).

212 *Herdegen M.* in: *Maunz Th., Dürig G.,* Grundgesetz-Kommentar, GG Art. 79., Werkstand: 94. EL Januar 2021, Rn. 1-195.

According to the common opinion, the guarantee of permanence extends to the content of the new constitution.

In addition, constitutional laws and records that contradict the Constitution are considered "Unconstitutional constitutional law".[213]

As a rule, such laws do not have legal force, but in some cases, if their repeal leads to a worse result, it can be temporarily left in force based on the relevant constitutional record. For example, the entry provided for in Article 117, paragraph 1 of the German Federal Constitution, which provided leaving in force the norms inconsistent with Article 3, paragraph 2 (equality of men and women) of the Constitution until March 31, 1953, until repealed by a new federal law.

It is often indicated in the scientific literature that despite the constitutional principle of separation of church and state (principle of secularism), the constitutional norms on the cooperation of the church and the state may represent "unconstitutional" constitutional law.

Finally, this opinion is rejected (referring to the relevant articles of the Weimar Constitution, which are part of the 1949 Federal Constitution in accordance with Article 140 of the German Federal Constitution). Constitutional laws that contravene Article 79, Part 3 of the Federal Constitution (formula of permanence) are void upon entry into force, even if it was enacted in full compliance with legislative procedures. Such would be the case of the entry in the constitution of the death penalty, which, on the ground of the German doctrine, contradicts Article 1 of the Constitution (principle of inviolability of dignity).

5. Conclusion

Constitutionalism encompasses substantive rules and cultural identity, as well as the self-perception of each political society.[214] The development of European integration processes has made the differences between the US[215] and European constitutionalism more obvious, which is evident in the light of the justices of the Strasbourg and Luxembourg courts.

Interestingly, comparative constitutionalism has been experiencing some renaissance in recent years.[216] Accordingly, taking into account the Georgian reality, for the development of the science of Georgian constitutional law, it is necessary to review the experience that creates unity in the analysis of the US and European constitutionalism. It is necessary to develop Georgian constitutionalism in the context of mutual analysis and reconciliation of the European and American constitutional theories.

From this point of view, the article considering its limited scope, offers an overview of the individual methods of the constitution interpretation directly characteristic of German constitutionalism.

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213 Cf. *Jacobson G. J.,* Constititional Identity, 2010, 34 et seq.

214 Ibid.

215 Cf. *Murphy W. F., Fleming J. E., Barber S. A., Macedo St. (ed.),* American Constitutional Interpretation, Sixth Ed., 2019, 107 et seq.

216 *Ginsburg T.,* Comparative Foreign Relations Law, in: *Bradley C. A. (ed.),* The Oxford Handbook of Comparative Foreign Relations Law, 2019, 64.

The conclusions presented in the article may become an important impetus for a Georgian legislator or law enforcer when explaining the elements of constitutional framework or re-defining them in accordance with modern constitutional and legal standards.

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Normative Regulation of the President's Veto in Georgian Legal Reality

In modern constitutionalism, the mechanism of checks and balances between the highest executive bodies is one of the main characteristics of a legal and democratic state. The interaction of the government branches is limited by the constitution and includes many tools, among which the right of the head of a state to make the reasoned statements on the law adopted by the legislative body and return the law to political discussions, must be highlighted. This right, which is often specified as the presidential veto in republican countries, has an exceptional importance in terms of the practical implementation of checks and balances principle.

In Georgian legal reality, constitutionalization of the presidential veto is connected to adoption of the Constitution in 1995. Since this period, the procedural rules defined by the Constitution of Georgia have undergone many changes, and finally, on the basis of the constitutional reform of 2017, they were formed with the current version. The abovementioned constitutional reform led to a new regulation of the president's involvement in the legislative process. The purpose of this article is to identify and discuss issues related to the normative regulation of the president's veto.

Keywords: *promulgation, presidential veto, parliament, reasoned statements, legislative process, checks and balances principle.*

1. Introduction

The organizational arrangement of the modern state is based on the principle of separation of powers, the practical implementation of which ensures the effective functioning of the state. The principle of checks and balances, which is one of the important elements of the separation of powers, includes various mechanisms of interaction between the central branches of government in the constitutional framework, among which the power of the President to sign and publish the law or return it to the parliament with reasoned statements (later – the president's veto). The legal nature of the presidential veto and its importance are determined by many political and legal factors, the practical implementation of which makes the presidential veto a powerful competence tool or an act of symbolic importance.[1] However, along with political factors, the issue of legal regulation of this

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1 *Javakhishvili P.,* Anatomy of the Normative Regulation of the Veto of the President of Georgia, in the Collection: "800 years of constitutionalism", Tbilisi, 2017, 116 (in Georgian).

institution is major. The normative institutional setup of the President's veto essentially settles the model feature of the veto and the anatomy of the president's relationship with the branches of government. From this point of view, the Georgian legal reality where the institution of making statements on laws by the President belongs to the type of issues, which from a normative aspect, has withstood the challenges of constitutional amendments and maintained a special importance connected with the supervisory powers of state bodies.[2]

In Georgian legal reality, providing the President with the power of veto by the constitution is connected to the adoption of the Constitution of Georgia in 1995. Constitutionalizing the President's veto as a supervisory authority was aimed at establishing the standards of contemporary constitutionalism in Georgia, however, in this way, the legislator also conditioned the regulation of the power of the President and the determination of its scope.[3] In accordance to the constitutional reform of 2017, the Constitution of Georgia experienced extensive changes, as a result, a new version of the Constitution was formed. Along with other articles of the Constitution, the changes also impacted the procedure of signing and publishing the law by the President of Georgia. As specified by the constitutional amendments, the institution of the presidential veto of Georgia was formed with different editing than the normative regulation before 2017, which arises the high interest to the mentioned issue and defines its relevance. The purpose of this article, based on analytical, teleological, systematic and historical research methods, according to the current version of the Constitution of Georgia, is to discuss the main features of the legal regulation of the veto of the President of Georgia and to draw attention to the issues which can give rise to the different opinions in the practice and doctrine of Georgian constitutionalism.

2. The Evolution of the Institutionalization of the Presidential Veto

In Georgian legal reality, on the constitutional level, the right of the President to address the Georgian Parliament with reasoned statements on the law, is related to the adoption of the 1995 Constitution of Georgia that created one of the important aspects of the interaction between the President of Georgia and the Parliament and strengthened the scope of the powers of the President of Georgia in the field of law-making activities.[4] It should be mentioned that the Constitution of the First

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2 The President of Georgia addressed the Parliament of Georgia with motivated remarks for the first time on December 21, 1995 regarding the Law of Georgia "On Parliamentary Factions". The second President of Georgia, in 1995-2003, vetoed about 20 bills of the Parliament of Georgia, most of which were taken into account by the Parliament of Georgia. In 2004-2008, the Head of State of Georgia did not address motivated remarks to the Parliament of Georgia, and in 2008-2013, this right was used 16 times, most of which were overcome by the Parliament. The fourth President of Georgia used the right of veto 11 times, only 2 of which were shared by the Parliament of Georgia. It is worth noting that the third President for the first time submitted reasoned statements to the draft constitutional law, which included changes in the Constitution of Georgia. Since 2018 the 5th President of Georgia has used the right of veto only twice. For details, See *Javakhishvili P.,* Chronicle of the evolution of the veto of the President of Georgia, in the collection: "Avtandil Demetrashvili 80", Tbilisi, 2021 (in Georgian).

3 *Javakhishvili P.,* Anatomy of the Normative Regulation of the Veto of the President of Georgia, In the Collection: "800 years of constitutionalism", Tbilisi, 2017, 114 (in Georgian).

4 Ibid.

Democratic Republic of Georgia of 1921 did not contain any provisions even regarding the adoption of the law. The Article 54 of the Constitution established imperatively – "The right of the Parliament is to legislate".[5]

The adoption of the 1995 Constitution was preceded by the quasi-constitutional reforms of the 1990s, which had a fragmented and chaotic nature due to the political instability. In this period, a range of control and supervisory powers of the acting President (head of the state) were acclaimed with unique meaning, and a precise analogue cannot be found in the constitutional reality of foreign countries of that period. For the first time in the legislation of Georgia, the veto institution got regulated by the Law of the Republic of Georgia of April 14, 1991 "On establishing the position of the President of the Republic of Georgia and in connection with it providing amendments and additions for the Constitution of the Republic of Georgia".[6] It was the first time in the history of Georgia, the head of the state had been allowed to use the suspensive, latent veto on the law.[7]

The President of Georgia was granted the right to refuse to sign the bill and return it to the legislative body with the reasoned statements within two weeks. If the Supreme Council approved the decision by two thirds majority of members, the President had to sign the bill or put it to a referendum.

The procedure for signing and publishing the law is explicated by the 1992 Law of the Republic of Georgia "On State Power", which is referred to as the "small constitution"[8] due to the fragmented arrangement of constitutional and legal issues. In compliance with the Article 13 of the mentioned law, for publishing the law it was essential to have the signatures of the speaker and the chairman of the parliament, the head of the state[9] that was a unique institution in Georgia at that time. According to the paragraph 4 of the Article 17, the head of state signed the law, however, he could return it with "his points of view " to the parliament "for reconsidering and voting again" no later than within ten days, and if the parliament approved the previous decision by the same procedure established for adopting the law, the Chairman of the Parliament signed the law.[10] The identical rule was specified by the regulation of the Parliament of Georgia made in 1994.[11]

In order to create a complete picture of the legal nature of the institution, it is important to evaluate the evolutionary process of the legal regulation of the presidential veto. From this frame of reference, it is to mention the original version of the 1995 Constitution of Georgia and the analysis of the changes made in it until today.

The Article 68 of the original edition of the Constitution of Georgia established the procedure for signing and promulgating the law, which also provided several procedures about the involvement

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5 Constitution of the Democratic Republic of Georgia, 1921, Article 54.

6 Law of the Republic of Georgia "On Establishment of the Office of the President of the Republic of Georgia and Amendments and Additions to the Constitution of the Republic of Georgia", 1992 (in Georgian).

7 *Javakhishvili P.,* Anatomy of the normative regulation of the veto of the President of Georgia, in the collection: "800 years of constitutionalism", Tbilisi, 2017, 114 (in Georgian).

8 Law of the Republic of Georgia "On State Power", 1992.

9 It should be noted that, considering the peculiar form of state government of Georgia at that time, the chairman of the Parliament and the head of state represented the same position.

10 Ibid, the Clause 4 of the Article 17 (in Georgian).

11 Regulations of the Parliament of Georgia, 1994, the Article 56 (in Georgian).

of the President of Georgia in this process. The constitutional edition of this period enabled the President of Georgia to utilize the right of classic, suspensory veto which the legislative body could overcome in case of getting support from the increased number of members of the parliament. In the framework of constitutional reform, the authentic edition of this norm had altered three times before the constitutional revision of 2017: in 2004, 2010 and 2011.

However, the mentioned changes were only related to the certain procedural details connected with signing and introducing the law, for example, the required number of votes of PMs and the procedural terms to overcome the veto.[12] The constitutional reform of 2017 defined a new arrangement of the institution of the presidential veto of Georgia and a different role of the President in this process.

3. The Main Elements of the Legal Arrangement of the Presidential Veto

The current edition of the Constitution of Georgia entitles the President the right to sign and introduce the law or return it to the Parliament with the reasoned statements. The mentioned right is only of a suspensive nature and the parliament has the opportunity to overcome it, however, it belongs to the important supervisory powers of the President over the legislative function of the Parliament of Georgia, which, to some extent, is regarded as a powerful tool for protecting the rights of citizens from the powerful political class in the majority.[13] The constitutional and regulatory arrangement of this institution is characterized with diverse aspects, both in terms of normative and practical realization that makes it be discussed in detail.

3.1. Sending the Law to the President

In accordance with the first paragraph of the Article 46 of the Constitution of Georgia, the law adopted by the Parliament of Georgia is sent to the President of Georgia within 10 days, who signs and publishes it within 2 weeks. Before the constitutional reform of 2017, the Constitution of Georgia established a 7-day deadline for sending the bill adopted by the parliament to the President, who would make the relevant decision within 10 days. Hence, as stated by the constitutional changes, the terms for sending the bill to the President and making the decision, altered. In addition, before producing the constitutional amendments, holidays and days off were not taken into consideration when calculating the deadlines.[14] As for the current legal arrangement, the regulations of the Parliament of Georgia establishes that the terms, which are defined by the Constitution of Georgia in

[12] According to the constitutional reform of 2004, the term for forwarding the law to the President increased from 5 to 7 days under the Article 68 of the Constitution. Based on the 2010 amendments the number of votes to override the veto changed and the list of PMs for organic laws was determined by 3/5, and for constitutional laws by 2/3. The 2011 amendment also affected the number of votes on the constitutional law (in Georgian).

[13] *Dzamashvili B.,* The Feasibility of Equipping the President with the Right of Veto in the Legal and Political Reality in Georgia, Student Law Journal, 2013, 99 (in Georgian).

[14] See the Article 6 of the Law of Georgia "On Normative Acts" effective before the constitutional law of October 13, 2017.

days shall refer to calendar days.[15] The mentioned issue is similarly assigned by the Organic Law of Georgia "On Normative Acts".[16]

It should be pointed out that the constitutional amendment also affected apparently terminological, but important legal nuance – the President of Georgia will be given a "law" and not a "bill". Provided the Constitution of Georgia, the Parliament of Georgia is the highest legislative body, and law-making is its exclusive authority. It is clear even in the way of explaining the norm by grammar-based approach that sending the "bill" to the President of Georgia, which was envisaged by the pre-2017 edition, made the process of signing and publishing a bill as a requirement for "becoming it a law" and in this sense got the President to be a participant in the law-making process. This was inconsistent with the principles of institutional and functional separation of powers. It did not correspond to the practice of foreign countries where a law is sent to the president for signature, not a bill.[17]

3.2. The Refusal of the President to Sign the Law

In consonance with the paragraph 2 of Article 46 of the Constitution of Georgia, the President of Georgia signs and makes a publication of the law within 2 weeks or returns it to the Parliament with the reasoned statements. However, the paragraph 6, Article 46 of the Constitution sets that if the President does not perform the actions specified by the paragraph 2, Article 46 of the Constitution (he did not sign a bill into law and return it to the parliament of Georgia without reasoned statements the law will be signed by the chairman of the parliament. In this regard, the valid norm was drawn up with a different edition before the constitutional reform of 2017 that was limited to general formulation only. The Paragraph 5 of Article 68 of the Constitution stated that if the President did not publish the law within the stipulated period of time, it could be signed by the Chairman of the Parliament and there was no reference to the relevant paragraphs of this Article. Simultaneously, the paragraph 5 of Article 68 (pre-2017 edition) was formulated after the paragraph of the Constitution, which defined the procedure for overcoming the reasoned statements. Respectively, the abovementioned referred to the case when the Parliament overcame the reasoned statements of the president, re-sent the president the initially adopted law and the president did not sign the law, eventually.

Recent edition accurately states that if the president does not perform at least one of the actions defined by the paragraph 2, Article 46 of the Constitution, as well as the action defined by the paragraphs 3, 4 and 5 of the same Article of the Constitution, the mentioned is explained in practice not as a violation of the norm of the constitution but the constitutional decision of the president to refuse to carry out this action, and as a result, the speaker of the parliament acquires the authority to sign and publish the law, which has taken place in many cases.[18] Hence, the consequences determined

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15 See the Article 4 of the Regulations of the Parliament of Georgia.

16 See the Article 6 of the Law of Georgia "On Normative Acts".

17 *Papashvili T.,* The President's Veto Right: Dimensions and Context, Models of State Governance: Georgia's Constitutional Reality and Perspective, *Gegenava D. (ed.),* Tbilisi, 2016, 28 (in Georgian).

18 The Law of Georgia "On Amnesty" adopted on December 28, 2012 was signed by the Chairman of the Parliament of Georgia. Also, the Chairman of the Parliament of Georgia signed the Law of Georgia "On Amendments to the Law of Georgia on Broadcasting" adopted on February 21, 2018. The Chairman of the

by the paragraph 6 of Article 46 applies not only to signing of the law by the president after overcoming the veto by the parliament, but also the occasion when the president neither makes reasoned statements nor signs the law.

3.3. Formation of Reasoned Statements

In agreement with the Constitution of Georgia, the president has the power to return the law to the Parliament with reasoned statements. In turn, the paragraph 2, Article 122 of rules of procedures of the Parliament of Georgia establishes that the statements of the President of Georgia must be drawn up in the form of a bill. Consequently, the President of Georgia, except for the statements conveying the critical opinions in relation to the law adopted by the Parliament, presents the Parliament of Georgia a bill with the notes that are produced in the form of proposal. So, the argumentation listing the reasons why the President does not agree with the legislative amendments accepted by the Parliament is introduced to the supreme representative body of the country. The bill formed in accordance to the notes is based on the president's recommendations and proposals regarding the law. This can be an alternative version to resolve the issue or an offer of valid amendment before making the changes. However, it might be controversial when a primary law is initiated without a current edition. In this case, an alternative version for revising it is considered appropriate.

It should be noted that the President of Georgia lacks the ability to use the right of veto on the law only partially. In particular, the president formulates reasoned statements with respect to the whole law and cannot veto one part of the law and sign and publish the another one. Reasoned statements are made in a joined form, based on the perception of the law as one unit. Presenting the president several laws (legislative packages) to be singed is different case from the above. If the president considers only a part of the several laws merged in a legislative package "problematic", he/she can make reasoned statements only in relation to these laws, and sign the rest (if the reasoned statements admit this).

And finally, from the perspective of practical realization, the case can be complicated when the President of Georgia is sent the amendments of a particular law adopted by the Parliament, which the President does not accept and returns it to the Parliament with reasoned statements. However, the alternative arrangement of the issue forwarded by the President to the Parliament (reasoned statements of the President), in addition to the change in that one law, also requires modifying another legislative act. It is significant to define how possible it is to prepare and make additional amendments to the new legislative act by the president to resolve the issue. Especially, since the Constitution of Georgia does not provide the right of legislative initiative for the President of Georgia.

3.4. Consideration of Reasoned Statements in the Parliament

In accordance with the Constitution of Georgia, the further procedure involves considering reasoned statements of the President of Georgia by the Parliament. In particular, if the President of Georgia returns the law to the Parliament with reasoned statements, the latter will vote the statements

Parliament of Georgia signed the Law of Georgia "On Amending the Criminal Procedure Code of Georgia" adopted on September 6, 2022.

of the President of Georgia, which will be discussed at the plenary session of the Parliament and adopted in one reading. Primarily, the law with reasoned statements, returned by the President of Georgia is voted, and then – the original edition of the law.[19] If the parliament accept the reasoned statements, the final version of the law is introduced to the President of Georgia within 5 days, who signs and publishes it within 5 days. If the Parliament does not welcome the reasoned statements of the President[20], the original version of the law is voted. In case the law is supported, it is presented to the President of Georgia within 3 days, who signs and publishes it within 5 days. If the Parliament does not accept the President's reasoned statements, and the initially adopted law is unable to get the required number of votes, the law is considered rejected.

Conforming to the legislation of Georgia, the procedure of scrutinizing the reasoned statements of the President of Georgia does not allow to evade because the reasoned statements have to be supported completely not in part. In particular, the reasoned statements and the bill presented by the President are voted simultaneously. Thus, if the Parliament of Georgia is submitted several reasoned statements the latter should either accept or completely refuse them, which can hinder the process of political dialogue and agreement between the branches of government to create a better legislative arrangement.[21]

3.5. Reasoned Statements of the President Related to the Constitutional law

The current version of the Constitution states two different ways of revising the Basic Law. The process of re-examining the Constitution established the principle of "plural vote", which implied the incorporation of elections and being adopted by the parliament of two convocations of the constitutional law. In particular, the constitutional law is considered adopted in the case of three readings of the bill by the Parliament and gaining its support by at least two-thirds of the full composition. However, the constitutional law is introduced to the President for signature within 10 days after the bill is reviewed by the Parliament of the next convocation and approved by at least two-thirds of the full members.[22]

The second way of revising the constitution involves adopting the constitutional law by the Parliament with a majority of three-fourth of the votes. According to the Constitution of Georgia, the constitutional law, which is supported by at least three quarters of the full composition of the Parliament, is presented to the President of Georgia for signature and it is signed within the time limit and in the manner established by Article 46 of the Constitution. Especially, the constitutional law adopted by the Parliament is sent to the president within 10 days who makes a decision within 2 weeks.

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19 See, paragraph 3 of Article 122 of the Rules of the Parliament of Georgia.

20 It should be noted that in accordance with Article 66, paragraph 7 of the Constitution of Georgia, accepting the statements of the President of Georgia by the Parliament on the State Budget Law is allowed only with the approval of the Government.

21 In the case of the possibility of partial approval, the issue may be problematic: accepting only a part of the President's reasoned statements by the Parliament, should it be considered as accepting the President's veto or not, and by what procedure should it be discussed.

22 See, *Gegenava D.,* Introduction to the Constitutional Law of Georgia, Sulkhan-Saba Orbelian University Publishing House, Tbilisi, 2019, 31 (in Georgian).

The constitutional law on amendments to the Constitution, which was adopted by the Parliament with a majority of not less than two-thirds of the full composition, is signed and published by the President of Georgia within 5 days after its introduction, without the right to return it to the Parliament with statements. Apparently, the legislator has not considered it rational to establish the right of the president to veto the constitutional amendments approved by the parliament of two convocations, especially since the parliament of the second convocation only approves the law in one reading and cannot make changes to it.

And finally, it is interesting to highlight the issue of reasoned statements in the sense of the constitutional law related to the restoration of territorial integrity. In accordance with the Constitution, the constitutional law related to the restoration of territorial integrity is adopted by a majority of at least two-thirds of the full composition of the Parliament and presented to the President of Georgia for signature not as stated in the procedure established by the Article 77 (after discussion and approval by the Parliament of the next convocation in one reading), but as specified by the Article 46 within the stipulated period of 10 days.

Thus, it is important to determine whether the basic that does not provide the president with the authority to address the parliament with reasoned statements on the constitutional law approved by a two-thirds majority of the members of the parliament should be applied to him or not. The explanatory note of the constitutional law "On Amendments to the Constitution of Georgia" clarifies that the constitutional law related to the restoration of territorial integrity[23] is not a subject to the right of veto, since "it was appraised unreasonable to delay the enactment of the constitutional law adopted on the quoted issue by the presidential veto"[24], however, the legal regulation of the mentioned norm might be interpreted in a different way.

3.6. Signing and Promulgating the Law

According to the Constitution, after the President signs the law, it is sent for promulgation. In consonance with the Organic Law of Georgia "On Normative Acts", normative acts are published in electronic form on the website of the LEPL – "Legislative Herald of Georgia". The official publication of a normative act is regarded to be the first publication of its full text on the "Legislative Herald of Georgia" website. The law comes into force on the 15th day after its publication by an official body, unless another deadline is established by the same law. "Normative Act enters into force upon publication" means that the Normative Act comes into force at 12 p.m. on the day of publication. If the President of Georgia neither returns the law to the Parliament with reasoned statements nor promulgates it within the stipulated period of time, the Chairman of the Parliament signs the law within 5 days from the expiration of the time. In this case, it is necessary to determine why the Constitution indicates the expiration of the relevant term, and what happens if it is already clear (announced in advance or it became known on the day it was forwarded to the President) that the President does not sign the law? Based on the constitutional record, the speaker of the Parliament is

[23] The explanatory note of the Constitutional Law of October 13, 2017 "On Amending the Constitution of Georgia", see <https://info.parliament.ge/file/1/BillReviewContent/152295> [25.02.2023].

[24] *Kobakhidze I.,* Constitutional Law, 1st ed., Tbilisi, 2019, 290 (in Georgian).

only authorized to sign the law within 5 days after the expiry of the term defined by the Constitution for the President. Besides, the legislation of Georgia does not claim what legal consequences will arise if the Speaker of the Parliament of Georgia does not sign and promulgate the law within the established period. It is rational to assume that the law will not have one of the mandatory requisites defined by the legislation of Georgia for a legislative act – the signature of an authorized person, and accordingly, the law will not acquire binding legal force.

4. Conclusion

Signing and promulgating a law by the President of Georgia is the exclusive constitutional authority, which clearly defines the legal nature of the relationship between the President and the legislative body of Georgian political system. Making the reasoned statements on a specific law and presenting it to the parliament by the President is an additional way to once again introduce the law into the discourse of the political body. Taking into consideration the abovementioned, it is important to regulate the normative arrangements of the President's veto and its unified definition. The purpose of this article was to focus on the main aspects of the legal regulation of the right of the President's veto and to identify such features that are associated with the signing and publication of the law, making reasoned statements and parliamentary debate.

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Natia Mogeladze*

Political Corruption Monitoring System in Georgia

Georgia treated combating corruption, a harmful socio-political phenomenon, as one of the top priorities of public policy and, sharing international experience, has defined the regulation of the legality of political finance as an important element of the anti-corruption strategy.

In 2011, material changes were introduced in the Organic Law of Georgia on Political Associations of Citizens. The reform offered a completely new political corruption monitoring system in the country. They established the Financial Monitoring Service of Political Parties within the State Audit Office of Georgia with the main task to control the legality and transparency of political finance. To that end, the Monitoring Service was assigned to monitor and ensure the transparency of the revenues and expenses of the political parties and also was given the power to apply administrative proceedings and sanctions.

Since 2022, this mandate, along with other anti-corruption duties, has been granted to a legal entity under public law – the Anti-Corruption Bureau, which is independent in its operations and reports only to the Parliament of Georgia and the Interagency Anti-Corruption Council.

We will try in this study, giving due consideration to the best international practices, to analyze the specifics of the agencies controlling political corruption and assess the outcomes of their operations in the scope of the mandate. We will discuss the problems that remain a challenge based on the legislation applicable today and are a bar to the process of developing a more effective and result-oriented anti-corruption system.

***Keywords**: political corruption, voter bribery, monitoring, transparency, donation, mandate, anti-corruption agency.*

1. Introduction

Political corruption is a huge challenge for contemporary democracies. There is a universal consensus in this regard that the introduction of effective mechanisms for controlling the legality of the origin of the financing of political parties is an integral component of the development of democratic principles and the reinforcement of the rule of law. The transparency of political finances largely determines the legitimacy of the state political system and the public confidence therein.[1]

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1 *Herbert E.A., Shiratori R.* (*eds*), Comparative Political Finance Among the Democracies, Boulder, Colorado: Westview, 1994, 15.

It is worth noting that the availability of effective mechanisms for monitoring the legality of political finance remains problematic for the contemporary world, especially when new and more difficult-to-control sources of finance emerge, such as, for example, the financing of political processes using cryptocurrencies. The problem is particularly acute in such young democracies as Georgia. Therefore, it is especially important to have effective legal regulations to enable the monitoring of the legality and transparency of political finance.

Political corruption, which jeopardizes the rule of law, human rights, and freedoms; hinders the country's economic progress; and prevents the stable development of democratic institutions, is still deemed one of the problematic areas affecting the country's development. Along with that, political corruption makes a negative impact on the country's political culture, creates a non-competitive political environment, and infringes on the community's legal right to fair elections, thereby contributing to public disappointment and loss of confidence in political associations.[2]

There is consensus in the democratic world that political corruption negatively impacts the formation of the will of voters and impugns the credibility of election results. The so-called black, uncontrolled money affects the political process, thus preventing the progressive development of the country and giving rise to community frustration.

It is of prime importance to analyze all potential corrupt political practices and develop more effective response mechanisms. The problem of so-called 'political charity' has been a challenge for decades and is now becoming increasingly topical, which has been given greater scope by allowing to make donations to legal entities thus bringing businesses closer to political interests. This constitutes grounds for the fact that large companies always donate considerable funds to the ruling political party, which, in addition to gaining favor from the government, is often driven by receiving financial benefits. This context becomes more apparent in the process of political finance monitoring when the large donors are found to be the companies that receive significant funding through public tenders or simplified public procurement.

In this context, political corruption is not just the direct distribution of money but the creation of privileged, preferential conditions for individual companies, which then transfer funds to the account of a particular political party. One of the main objectives of this study is to analyze the various facts of political corruption and develop recommendations for the establishment of effective mechanisms for combating such challenges.

2. What is Political Corruption?

Corruption has many manifestations, though one of its most common forms is political corrupt practices, the fight against which is a serious challenge for the entire civilized world.

Political corruption is understood in various ways. In certain cases, it is used as a synonym for high-level corruption, which implies abuse of power by leaders, while sometimes it refers to corruption specifically in political and electoral processes.[3] The international anti-corruption orga-

[2] State Audit Office of Georgia, 'Political Finance Monitoring Methodology', 2014, 3.

[3] *Amundsen I.*, Political Corruption, CMI (Chr. Micheslen Institute), U4 Anti Corruption Resourse Centre, U4 Issue 2006:6, 5.

nization Transparency International defines political corruption as the abuse of entrusted power by political leaders for private gain.[4]

Based on the practice analysis, political corruption can be revealed in two forms. The first one involves acquisition and accumulation. This is when government officials abuse their power to gain benefits from the private sector, government revenues, and the economy in general. They try to use their current official status to the extent possible to accumulate property. And then reuse those resources to reinforce their position and maintain power.

The latter factor is another form of political corruption when the obtained resources, funds from the state budget, are used to maintain and expand power. The so-called mutual protection policy is formed, which implies the politically driven distribution of financial and material resources, advantages, and benefits. This is what creates privileged groups, a certain corrupt elite clan, who try to maintain and reinforce their power by bribing voters, illegitimately influencing the election process. 'Political corruption is a deviant political behavior manifested in the illegitimate use of public resources by the ruling political elite for the purpose of reinforcing or enriching their power.'[5]

A different form of political corruption is 'electoral corruption', affecting the will of the voters and the entire political process, during which the desired political team and government officials are elected by bribing voters and using uncontrolled funds to guarantee the acquisition and maintenance of public power. Obviously, this violates the healthy election process covering both the preparation process and the progress and summary of the elections.

'Electoral corruption is a system of bribing both voters and candidates, in the consequence of which both government and local authorities become a kind of expensive goods of the market economy, which can be purchased only by those having access to significant financial, material, informational and other resources.'[6]

Thus, obviously, corruption has many manifestations but all of them have one common feature posing a threat to the rule of law, democracy, and human rights, undermining justice and social equality, preventing healthy competition, hindering economic development, endangering democratic institutions, and moral values of a community. Therefore, the development of effective mechanisms and correct legal policies to combat all forms of corruption is of crucial importance for the progressive development of a country.

3. The First Organized System of Combating Political Corruption in Georgia

Before 2011, there had been no agency or mechanism in Georgia to provide effective control of political finance. In 2011-2012, material changes were introduced to the new Election Code and the Organic Law on Political Associations of Citizens following the recommendations of the Office for

4 The Global Coalition Against Corruption – Transparency International, Global Corruption Report, Political Corruption, 2004, 11.

5 *Shabalin V.A.,* Politics and Crime, State and Law, №4, 1994, 44.

6 *Kabanov P.A.,* Political Corruption in Russia: Concept, Essence and Main Forms of Manifestation №10, 2002, 33.

Democratic Institutions and Human Rights (OSCE/ODIHR), the Venice Commission and the Group of States Against Corruption of the Council of Europe (GRECO).[7]

With the amendments of 28 December 2011 introduced to the Organic Law of Georgia on Political Associations of Citizens, they established the first organized and structurally formed agency for combating political corruption. This mandate was assigned to the Control Chamber of Georgia (now the State Audit Office).[8] The Political Parties' Financial Monitoring Service (hereinafter – the Monitoring Service) was established within the agency with the main task to control the legality and transparency of political finance in order to make it possible to eliminate all manifestations of political corruption and establish a healthy, competitive electoral environment; to prevent funding of the entire political system from one source, bribing people for political purposes and monopolizing politics. To accomplish this mission, the Monitoring Service, along with the monitoring duties, was also given the authority to apply sanctions.

Worth noting is that separate regulations were scattered in the legislation, although the law laid down in detail the rules of political finance and the mechanisms for controlling its legality. The assignment of this mandate to the State Audit Office gave rise to differences of opinion because, despite the institutional independence of the above agency, there occurred doubts regarding its political neutrality. However, it should be noted that the monitoring of political finance by a supreme audit institution is an approved international practice, and given the actual environment in Georgia, assigning this duty to an independent monitoring body was the most optimal decision at the time.

The State Audit Office developed extremely detailed electronic forms of profit and loss statements[9] following international accounting standards not to leave room for political corruption. Considering the principle of transparency, the official website of the State Audit Office has been publishing since 2012 absolutely all information about political finances and expenses, and about violations identified and sanctions applied.[10]

Legal entities were prohibited from donating to political parties. They established new donation limits extended to both financial and non-financial resources. A political entity accepting any kind of donation was now under an obligation of mandatory reporting to the controlling agency. The Political Parties' Financial Monitoring Service has been authorized to apply seizure along with substantial financial sanctions.

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7 GRECO (Group of States Against Corruption) Evaluation Report on Georgia on Incriminations, Strasbourg, 2011, https://rm.coe.int/16806ca044 [24.02.2023]; Venice Commission and OSCE/ODIHR – Joint Opinion on the Draft Election Code of Georgia, Strasburg, 2011, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2011)094-e, [24.02.2023].

8 Organic Law on Political Associations of Citizens, The Parliament Gazette, 45, 21/11/1997, (Organic Law of Georgia dated 28 December 2011, No 5661).

9 Order No 10/37 of 23 January 2012 of the Chairman of the Chamber of Control of Georgia 'on approval of financial statement forms of political associations of citizens and instructions for filling them out'.

10 Website of the State Audit Office <https://monitoring.sao.ge/ka>, [15.02.23].

3.1. The Scope of the Mandate of the State Audit Office as an Agency Exercising Control over Political Corruption

It is important to analyze the legal regulations drafted to combat political corruption, which, considering the best international practices, have been introduced into the Organic Law on Political Associations of Citizens since 2011. In the wake of complete oversight of revenues received and expenses incurred, the restrictions established by the law also extended to those who have declared their election goals and use the material and financial resources to achieve the goals.

Now the object of monitoring was a legal entity directly or indirectly associated with the political party, whose expenses were related to the activities and goals of the party. To prevent the risks of political corruption, the mandate of the Political Parties' Financial Monitoring Service also extended to organizations directly or indirectly related to political parties, which implied access to information on donors and monitoring of incurred expenses.[11]

As part of the anti-corruption reform, the scope of activity of the Monitoring Service established by law was broad, although the restrictions have changed over the years. At present, legal entities under the control of or directly or indirectly associated with a political party, remain outside monitoring. Accordingly, companies directly or indirectly associated with politically interested persons donate funds to a political entity without any problems, which creates additional risks in terms of political corruption and poses a threat of inequality in the electoral environment.

4. Mechanisms for Monitoring the Legality of Political Finance

One of the important controls assigned to the Monitoring Service is the possibility of legal response to violations. Worth noting is that in the initial edition of the Organic Law of Georgia on Political Associations of Citizens, quite strict sanctions were imposed on offenders who were subject to monitoring. Sanctions included a fine of ten times the amount of the illegal donation. Since the changes to the law, the sanctions have significantly reduced and today include a fine of double the amount of the violation identified.[12] In this context, it is necessary to analyze the extent to which this type of sanction can serve as a deterrent and can prevent violations. However, it must be noted that imposing sanctions is not the ultimate goal of effective oversight of political activities. In all possible cases, the controlling bodies must especially focus on positive experiences in order to make the objects of monitoring interested in following the established rules and ensuring the transparency of the sources of funds and expenses.[13]

Implementation, acceptance, and concealment of prohibited financial and material donations to a political party became subject to sanctions. Non-fulfillment of the obligations under the law by a

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[11] Decision of 9 May 2012 of the State Audit Office, the Political Parties' Financial Monitoring Service, regarding the application of restrictions under Article 26^1 of the Organic Law of Georgia on Political Associations of Citizens to NNLE 'Movement A.L.'

[12] Organic Law on Political Associations of Citizens, The Parliament Gazette, 45, 21/11/1997, Article 342, (22.12.2022).

[13] *Ohman M.*, Fanding of Political Parties and Election Campaigns, Introduqtion to Political Finance, Enforcement, 2014, 4.

political party also became punishable. With the same changes, the mandate of the Monitoring Service broadened to imply the response to accepting, granting, or promising illegal gifts, revenues, services, or providing services, by any person for the purpose of election, if the value of the property (service) or transaction is below GEL 100. However, with the amendments introduced to the Criminal Code of Georgia in 2020, the above actions were fully criminalized and any illegal activity carried out for election purposes, regardless of the amount, became punishable by the Criminal Code and was treated as voter bribery.[14]

Admittedly, the above changes that criminalize any act of bribing voters are undoubtedly positive but to assess to what extent the law has had a deterrent effect or guaranteed the prevention of violations, it is important to assess its effective use in practice. Unfortunately, despite the alleged facts of voter bribery in the public space at the parliamentary and local self-government elections held after the changes, the law instrument could not be efficiently used. For example, during the 2020 parliamentary elections, the non-governmental organization Fair Elections revealed 64 cases of alleged voter bribery from various political entities; however, the organization reported that the cases were not appropriately responded to. Most of the alleged facts of voter bribery were not investigated at all.[15] Worth noting is that investigations were initiated in individual cases under the applications of the monitoring organizations; however, they did not identify and prosecute specific guilty persons in the context of a preventive measure.

The purpose of voter bribery is to influence voters by granting benefits from private resources, which affects the election outcomes and undermines the interest of fair elections. Leaving those facts unaddressed negatively affects future elections, and instead of preventing violations, that may play an encouraging role.

4.1. Specifics of the Main Violations Revealed within Monitoring

The Monitoring Service has revealed a number of illegal political finance schemes. To prevent further violations, it was important to take effective response measures. There have occurred many facts of donations made by a person with a declared electoral goal in favor of a desired political entity through third parties including those registered in the unified database of socially vulnerable persons.[16]

Within the administrative proceedings, there have also been a number of facts established that the interested political subjects gave monetary funds to third parties, who, in exchange for personal interest, deposited the funds in the form of a donation to a specific political party's account through their own bank account.[17]

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14 Criminal Law Code of Georgia, LHG, 41(48), 13/08/1999, (Law No 6726 of 20 June 2020).

15 International Society for Fair Elections and Democracy, Final Report of 2020 Parliamentary Election Monitoring, 34, <https://www.isfed.ge/geo/2020-saparlamento/2020-tslis-saparlamento-archevnebis-saboloo-angarishi> [07.04 .2021].

16 Decision of 10 May 2012 of the Tbilisi City Court Board of Administrative Cases regarding the imposition of an administrative fine, case No 3/2211-12.

17 Decision of 8 July 2012 of the Tbilisi City Court Board of Administrative Cases regarding the imposition of an administrative fine, case No 4/2766-12.

Under the existing conditions when legal entities were prohibited from donating to political parties, individuals interested in the election results made illegal donations by using staff members employed within their companies, circumventing the law. However, the Monitoring Service already had controls to study the financial standing of each donor. As part of the monitoring, there revealed cases when individuals donated the maximum amount allowed by law – GEL 60,000, which was equal to their salary for several years with no other confirmed source of income.[18]

Thus, obviously, Georgia has made the fight against political corruption one of the important areas of public policy, which is also reflected in the anti-corruption strategy and action plan developed by the Government, whereunder the establishment of an effective mechanism for monitoring political finance, promoting public control over political finance and ensuring political associations' accountability to the community, was set as a priority of the anti-corruption strategy.[19]

5. Funding of Electoral Entities by Legal Entities as a Source of Political Corruption

As mentioned above, following the anti-corruption reform implemented in 2011, it was forbidden to receive donations from legal entities; however, soon thereafter, in 2013, legislative amendments were drafted that allowed legal entities to make donations. The total amount of donations received from each legal entity was set at GEL 120,000 per year.[20]

Despite the fact that making donations by legal entities is an approved international practice,[21] given the actual environment in Georgia, such donations increase the risks of corruption. There is an opportunity to finance political processes from a source with large financial resources through illegal, deceitful deals, or the effect of political influence. All the more considering the fact that even when legal entities were prohibited from making donations, a number of facts of illegal political finance were revealed regarding the disguised funding of political entities circumventing the law by persons with declared election goals and legal entities related to political parties.[22] Some of the companies denounced for illegal donations were based in offshore zones and in Georgia, they were represented by persons related to the electoral entity.[23]

In addition to the above risks, the facts of so-called 'political charity' are worth noting, when legal entities participating in public procurements win tenders and then donate funds to the ruling political party on behalf of the company, themselves, and their staff members. This trend is evident during almost all elections held in Georgia.

Another factor in allowing donations to legal entities is related to the risks of financing the entire political process from one source and monopolizing the elections. This is the case when

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18 Decision of 15 March 2012 of the Tbilisi City Court Board of Administrative Cases, case No 3/1291-12. Decision of 2 April 2012 of the Tbilisi Court of Appeals on the same case, case No 4/A-76-12.

19 Decree No 550 of 24 June 2005 of the President of Georgia on the approval of the National Anti-Corruption Strategy of Georgia.

20 Organic Law of Georgia on Political Associations of Citizens, The Parliament Gazette, 45, 21/11/1997 (Law No. 2279 of July 29, 2013 – website, 15.12.2022).

21 Funding of Political Parties and Election Campaigns, A handbook on Political Finance, 2014, 368-390.

22 Decision No 4/A-155-12 of 17 July 2012 of the Tbilisi Court of Appeals Chamber of Administrative Cases.

23 Decision No 4/A-149-12 of 11 July 2012 of the Tbilisi Court of Appeals Chamber of Administrative Cases.

electoral entities with declared electoral goals may finance their own political plans from their companies along with the use of third parties. They may actually own dozens of business entities that they manage through a nominee and act as a disguised beneficial owner.

Worth noting is that the funding of both political parties and individual candidates by legal entities is a fairly common practice (e.g., in Italy, Malta, Croatia, Czech Republic, Denmark, Finland, Iceland, Ireland, India, Turkey, Ukraine, Netherlands).[24] However, there are many important factors to give due consideration to; and the challenges related to the equal electoral environment in the country and creating risks of funding the entire political system from one source are the first among them. In this context, the country's internal political and legal situation, and economic and other specific challenges must be taken into consideration, all the more so when the reports of many highly respected organizations working on corruption issues lay down that the facts of making donations to the ruling political party by the companies participating in public procurements and the persons directly or indirectly related thereto are frequent.

It is because of the risks and challenges of illegal financing that many countries have imposed a ban on the funding of political parties by legal entities (e.g., Belgium, Albania, Brazil, Estonia, France, Egypt, Hungary, Israel, Latvia, Mexico, Poland, Peru, Luxembourg). It is worth noting that the legislation of some countries prohibits the funding of political parties by legal entities, although allows the funding of individual candidates (e.g., Spain, Azerbaijan, Germany) and vice versa –allows the funding of political parties but prohibits the funding of candidates participating in elections (e.g., Japan, Armenia, Romania).[25]

Unfortunately, this problem has been a challenge for decades and still has not lost its urgency; on the contrary, authorizing legal entities to make donations enlarged the scope and made the business a larger donor subordinated to the political environment. In this sense, political corruption is not only the direct distribution of funds but the creation of privileged, preferential conditions for specific companies, which then transfer funds to the account of the selected political party.

Therefore, given the actual situation in Georgia and based on the best international practices, it is important to once again carefully assess the viability of authorizing legal entities to make donations and the risks potentially associated with the holding of elections in an unequal environment and the financing of the political process by groups concerned having large financial resources.

6. Political Finance Monitoring Systems in Foreign Countries

In today's world, the mandate of monitoring the funding of political parties and responding to violations has been assigned to various agencies. In most cases, the election management body performs that duty (e.g., Argentina, Azerbaijan, Brazil, Canada, Chile, Dominican Republic, Malta, Mexico, Ghana, Fiji, Poland, Peru, Sweden, New Zealand, Venezuela, Russia). In some countries, the duty of monitoring political finance has been distributed between the election management body and the audit institution (e.g., Armenia, Croatia, Ethiopia, Indonesia, and Lithuania). In some cases, the

[24] The international IDEA Political Finance Database: <https://www.idea.int/data-tools/world view/55?st=bpi#rep> [25.12.2022].

[25] Id.

controlling mandate is distributed among the election administration, the supreme audit agency, and various ministries (Cambodia, Finland); between the election administration and the court (Turkey); between the election administration and the specialized corruption control agency (Ukraine, Singapore). In the process of financial monitoring of parties, the court is involved with different mandates (for example, in Spain, Luxembourg, and Burkina-Faso).[26]

Like in Georgia, the duty of financial monitoring of political parties and legal response to violations has been assigned to an independent audit agency in, for example, Austria, Bulgaria, Israel, Mongolia, Morocco, and Tunisia. This mandate to the supreme audit agency is granted because of its status of independence. Under the Organic Law of Georgia on the State Audit Office, the State Audit Office shall be independent in its activities and bound only by the law. It shall not be allowed to interfere with and/or control activities of or request the State Audit Office to present a report on its activities unless expressly provided for by law. The exercise of any political pressure on the State Audit Office or taking any other actions that may infringe upon its independence shall be prohibited. The State Audit Office shall have operational, financial, functional, and organizational independence.[27]

Without any reasonable doubt, neglecting the principle of transparency and the information vacuum created thereby poses a threat of political corruption. The influence of money is one of the main factors that prevent many countries from achieving democratic ideals in political processes. Although money is a necessary element of democratic politics, in the hands of some individuals it can become a tool of inappropriate impact on the political process by bribing voters or influencing political decisions.[28]

Considering the above, it is important to establish an institutionally independent, strong, multi-functional anti-corruption agency in Georgia to effectively address the multifaceted challenges of corruption. Though the duties of monitoring political finance have been assigned to the newly established independent agency Anti-Corruption Bureau since 2022, there is still skepticism regarding its effective operation because of its neutrality and limited mandate.

7. Mandate of the Independent Anti-Corruption Bureau

Political corruption harms a healthy political environment, prevents the free expression of the will of the voters, and violates the equality of the electoral process, thereby contributing to public disappointment and loss of trust in political associations.[29]

The State Audit Office carried out the function of monitoring the legality of political finance from 2012 to 2022 and on 30 November 2022, the Parliament of Georgia approved a package of amendments to the Law of Georgia on Conflict of Interest and Corruption in Public Institutions, which defined the mandate of the operation of the legal entity under public law – the Anti-Corruption

[26] Funding of Political Parties and Election Campaigns, A handbook on Political Finance, 2014, 367-391.
[27] Organic Law of Georgia on the State Audit Office, Article 3, 26/12/2008.
[28] *Ohman M.*, Introduction to Political finance, Global Commission on Elections, Democracy and Security 2012, 33.
[29] *Ohma, M.*, Political Finance Regulations Around the World, / Stockholm: International IDEA, 2012, 48.

Bureau. And the Anti-Corruption Bureau was assigned the duties of monitoring political finance.[30] The above amendments were introduced in the scope of the 12-point recommendations of the European Commission to grant Georgia the status of a candidate for EU membership. The European Commission Opinion defined recommendations for granting candidate status to Georgia, the fourth paragraph of which concerns the need for anti-corruption reform, noting that Georgia should strengthen the independence of its Anti-Corruption Agency bringing together all key anti-corruption functions, in particular, to rigorously address high-level corruption cases; equip the new Special Investigative Service and Personal Data Protection Service with resources commensurate to their mandates and ensure their institutional independence.[31]

Combating political corruption, monitoring the legality of political finance, ensuring transparency and legal response to violations have been combined in the mandate of the newly based Anti-Corruption Bureau, which will start implementing the above functions from 1 September 2023.[32]

The monitoring mandate granted to the recently based Anti-Corruption Bureau is a system of legal measures aimed at reducing the risk of corruption in political finance by strengthening public control. However, it is still urgent to establish an independent, multifunctional anti-corruption agency in the country, which will be focused on the prevention of violations, also will be granted a law enforcement function, and be equipped with exclusive powers to investigate cases of corruption.

The UN Anti-Corruption Convention (UNCAC)[33] obligates each State Party to ensure the existence of a body or bodies engaged in the fight against and prevention of corruption. For many years now, all authoritative local and international organizations working on the topic of corruption in Georgia, including OECD-ACN[34] and GRECO[35], have been referring to the same. In Georgia, anti-corruption functions are distributed among different agencies; however, in the wake of the reforms already implemented in the country, it is important to create such an institutionally independent, strong anti-corruption agency, which will combine all areas of anti-corruption measures, and perform the investigation and criminal prosecution functions.[36]

According to non-governmental organizations working on corruption issues, the introduced legislative changes do not fully meet the European Commission recommendations. Although bringing anti-corruption functions into one body is treated positively, they believe that the announced reform

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30 Law of Georgia on Combating Corruption, Chapter V[2], The Parliament Gazette, 44, 11/11/1997 (Law of Georgia No 2204, dated 30 November 2022).

31 Commission Opinion on Georgia's application for membership of the European Union, Brussels, 17 June 2022,12.

32 Organic Law of Georgia on Political Associations of Citizens, The Parliament Gazette, 45, 21/11/1997 (Organic Law No 2279 of 1 December 2022).

33 United Nations Convention Against Corruption (UNCAC), 2003, Article 6.

34 Fighting Corruption in Eastern Europe and Central Asia. Anti-corruption reforms in Georgia / 4 th round of monitoring of the Istanbul Anti-CorruptionAction Plan, 2016.

35 Fourth Evaluation Round Corruption Prevention in Respect of Members of Parliament, judges and prosecutors, Evaluation Report Georgia, Adopted by GRECO at its 74th Plenary Meeting, Strasbourg, 28 November – 2 December, 2016.

36 OECD Anti-Corruption Network for Eastern Europe and Central Asia, Specialised AntiCorruption Institutions: Review of Models, 2008, 21-24, 31-38.

does not respond to the challenges facing the country in relation to corruption, especially when the Bureau is not given investigative authority and the issue of independent operation of the agency remains a challenge.[37]

The existence of an independent anti-corruption bureau in the country is important to ensure effective anti-corruption measures; however, for the successful operation of the recently established agency, it is crucial to gather all directions of anti-corruption measures within one system, *inter alia*, to equip the agency with a function of investigation and grant it both administrative and criminal legal response powers. Without this broad, independent mandate, the operations carried out by the agency will be important but ineffective in terms of outcomes.

8. Conclusion

Thus, obviously, the funding of political entities is an important source of political corruption. Although important legislative changes have been introduced in Georgia and the legal sources of funding a political party were laid down in detail to avoid the funding of the entire political system by those having large financial resources, to eliminate the influence on the formation of the voters' will, and to prevent the threats of political corruption, the existing regulations still allow mechanisms disguised by law, by using budget funds, the possibility of illegal influence on the formation of voters' will. Especially against the background, when legal entities are authorized by law to make political donations of GEL 120,000 during the year, which gives the opportunity to the companies associated with the political entity to mobilize substantial funds on the account of the desired political party. This obviously damages and makes the election environment uncompetitive. Besides, it increases the risks of influencing the will of voters. Considering all the above factors, it is crucial to limit the right of legal entities to make donations. It is important to further reinforce the system of monitoring the funding of political processes by circumventing the law in order to eliminate the possibility of financing political processes from one source and to create all the conditions for political entities to conduct election campaigns under equal conditions.

Although the mandate of the legal entity under public law – the Anti-Corruption Bureau was defined in the country on 30 November 2022, the reform does not include gathering multi-profile, different anti-corruption functions within one agency. Despite the fact that following the drafting of the anti-corruption policy, such important areas as monitoring of officials' property declarations, whistleblowing, political corruption, and other important areas were combined in the Mandate of the Anti-Corruption Bureau, there is still skepticism regarding its effective operation. Since the Bureau will not be able to independently investigate and prosecute, the possibility of effectively combating high-level corruption is doubtful.

Thus, it is advisable to form an institutionally independent, strong anti-corruption agency to cope with all directions of anti-corruption measures and perform the investigation and criminal prosecution functions. Such agencies will be staffed by both investigators and prosecutors to

[37] 'Transparency International – Georgia', Anti-Corruption Bureau Law Review, 2 December 2022.

eliminate, to the extent possible, all risks related to the impartiality and objectivity of the process, and unnecessary interference by interested parties in the course of an investigation.

In terms of anti-corruption reforms, Georgia maintains a leading position in the region; however, for greater progress in the Corruption Perception Index (CPI)[38], it is important for Georgia to continue and further facilitate anti-corruption reforms, adapt the best international practice to the actual environment, reinforce the respect for the rule of law and democratic institutions among the community so that the law is not perceived as a tool of pressure but make its enforcement a way of life and a guarantee of protecting one's rights.

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[38] The Corruption Perceptions Index (CPI) is developed and published annually by the global anti-corruption organization – Transparency International. The CPI ranks of countries around the world, based on how corrupt their public sectors are perceived to be. The CPI is based on the research of various international organizations and consulting groups. The results are given on a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. he 2022 Corruption Perceptions Index (CPI) shows that most countries are failing to stop corruption. The 2022 study shows that Georgia was measured with 56 points ranking 41st among 180 countries.

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15. International Society for Fair Elections and Democracy, Final Report of 2020 Parliamentary Election Monitoring, 34.
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18. *Ohman M., Falguera E., Jones S. (eds.),* Funding of Political Parties and Election Campaigns, A handbook on Political Finance, International IDEA, Stockholm, Sweden, 2014, 366-391.
19. *Ohman M.*, Introduction to Political finance, Global Commission on Elections, Democracy and Security 2012, 33.
20. *Ohman M.,* Political Finance Regulations Around the World, Stockholm: International IDEA, 2012, 48.
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25. Transparency International – Georgia', Anti-Corruption Bureau Law Review, 2 December 2022.
26. Decision No 4/A-155-12 of 17 July 2012 of the Tbilisi Court of Appeals Chamber of Administrative Cases.
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31. Decision of 9 May 2012 of the State Audit Office, the Political Parties' Financial Monitoring Service, regarding the application of restrictions under Article 26^1 of the Organic Law of Georgia on Political Associations of Citizens to NNLE 'Movement A.L.'

Levan Alapishvili*

Problems of Parliamentary Oversight on Secret Activities of Institutes of National Security Assurance System of Georgia

Democratic governance is based on the accountability of the government to the parliament. Oversight of the government activities by the representative body that has absolute legitimation of population ensures democratic environment for decision-making and efficient accountability of the Government. An effective system of accountability of the government to the parliament ensures the accountability of the government to its population. Parliamentary oversight of the government's activities is a constitutional obligation to ensure accountability to the source of power, i.e. citizens.

Significant part of activities and decisions of government is related to secret activities and documents. Legislative regulation of state secrets and delegation of authority or authorization to the Government is an exclusive competence of Parliament under the Constitution of Georgia.

The Parliament, the members of which do not have access to state secrecy cannot ensure the parliamentary oversight of secret activity of the Government or if decision-making regarding the issue of allowing access of Members of Parliament to the state secrecy is delegated to the government. Unlimited delegation of the right to regulate the access of MPs to the state secrecy comes into conflict with the Constitution, because it means the violation of accountability to the Parliament and separation of power which deprives the Parliament of the possibility to exercise oversight on the Government's work.

This work provides an analysis of the regulatory environment for state secrecy of Georgia and the delegation of authority of legal regulation of state secret management.

By presenting a comparative analysis of Georgian and foreign practice of parliamentary oversight regarding state secret activities, we are putting forward for discussion the issues related to the regulation of accessibility to state secrecy by members of Parliament and the suggestions regarding the solution of actual issues of parliamentary oversight of government's secret activities.

Keywords: *Democratic Governance, Security, State Secrecy, Parliamentary Oversight, Delegation of Authority, Parliament, Government, Judiciary, Accountability.*

1. Introduction

Democracy is based on the idea of representativeness of people, implying the governance and oversight of governance of various institutions created through elections. Moreover, democratic governance means governance that is limited by human rights.

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Democratic governance is characterized by separation of powers. Legislative, executive and judicial branches of power, with separated competences and oversight ensure the balance of power, governance decision-making within the framework defined by the Constitution or law.

Two out the three branches of the government, legislative and executive, are political institutions, with the judiciary being non-political.

Political institutions are characterized by policy formation and decision-making in accordance with party, ideological values and vision, within the framework established by the Constitution. Non-political branch, the judiciary, ensures protection and enforcement of rules set by political institutions, as well as control of the legality and constitutionality of the activities and decisions of governing institutions.

The significant part of separation and balance of powers, apart from judicial control, is the parliamentary oversight of the activities of the executive power. Parliamentary oversight and judicial control are kind of leverages that hamper the power and prevent the abuse of power.[1]

In the parliamentary republic, the parliamentary oversight of the government is exclusive competence of highest representative institution, which at the same time is the supreme legislator that is fully legitimated by people through elections. It is authorized to form and control the Government, to participate in the formation of judicial power.[2]

Parliamentary oversight is implemented within the authority delegated to the government by law. Setting limitations for the Government can be done only by laws that have public support (legitimation). "Setting certain limitations for the Government has always been considered as one of the key functions of the law", says Tony Honore[3].

In a democratic state, the decisions are made as a result of discussions. Without access to information and without spreading the information, it is impossible to lead discussion and to achieve results. Informed political debates taking place in the highest representative body provide for efficient oversight of the government's work and the democratic governance.

The activity of the legislative body is based on publicity and taking decisions with participation of different opinions. For this reason, the representative body is deprived of the possibility of quick decisions and actions. On the other hand, the executive government has the ability to act and make expedient decisions. A significant part of the government activity is not public or participatory. The activities of government, which are related to the prevention and response to various threats, are carried out secretly.

One of the challenges of the Parliamentary democracy is on the one hand, to ensure national security and on the other hand, to provide publicity and inclusiveness in the governance. It is hard to find consensus and to create sufficient mechanisms that would achieve both goals equally without damaging one another. The conflict between the publicity and state secrecy in public governance is obvious.

The Parliament, as a supreme legislative institution, equips the Government with the competence and scope of action by adopting the laws. Delegation of authority to the government is a

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2 *Montesquieu Ch.,* the Spirit of Laws, Tbilisi, 1994, 180-181 (in Georgian).

2 *Kublashvili K*., First Government – Parliaments and Parliamentarism, Tbilisi, 2022, 24 (in Georgian).

3 *Honore T.*, About Law: An Introduction, Tbilisi, 2018, 36 (In Georgian).

critical part in ensuring democratic governance and parliamentary oversight. Therefore, the scope of the government's activity and competence is limited by the will and decisions of the representative body that has absolute legitimacy. Unlimited executive power, either de jure or de facto, is a key feature of absolutist and dictatorial systems. Modern constitutionalism is built against such systems and therefore ensures the supremacy of the legislative body.[4]

The Georgian Consititution assigns the legislative authority only to the Parliament which is the highest representative body with people's mandate.[5] The Parliament defines the key areas of state policy with the help of legislation. The Government, within the scope defined by the Parliament, executes the laws adopted in the Parliament and implements domestic and foreign policies". [6]

The Parliament can fully regulate the issue or delegate the regulation authority by defining the scope of essential issues.

There are two forms for delegating the regulation authority: delegation of authority to limit the human rights and delegation of legislative authority without restriction of the human right. The latter is the action authorization form. Considering the fact that in exercising the power, the Parliament as well as the Government are limited by human rights, delegation of the authority to limit the rights carries more intensive character and requires more clarity, limitations and mechanism for oversight.[7]

Adoption of a legal act by the body equipped with appropriate powers is one of the major issues of legal positivism and formal legitimacy.[8] The main source for granting different bodies with relevant decision-making authorities is the Constitution. As noted, within the scope established by the Constitution, the Parliament is the only institution that can make decision itself or delegate the decision-making power to another body. That being so, delegation is of great importance for the legitimacy of decisions, for parliamentary oversight of governance, and for judicial control.

However, it is against Constitution to delegate the full legislative regulation of some issue to the Government without setting objectives and scope. The goals, content and scope of legislative authority shall be established at the moment of delegation by the law adopted by the Parliament itself.[9]

Without identifying the clear scope and principles for the government, delegation of authority will make it essentially impossible to validate the compliance of government's activities with law and protection of human rights. Even if the Parliament has not defined the scope of authority and essential issues, legal compliance of the government cannot be subject to validation on the ground that there will be no scope or principle against which the Government's resolution will be compared and it will be impossible to evaluate the extent to which it corresponds to the purpose provided in the law of the

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4 Rule Of Law Checklist, European Commission For Democracy Through Law (Venice Commission), Venice, 11-12 March 2016, 20, para 49 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>[18.02.2023].

5 Constitution of Georgia, parliament newsletter, 31-33, 24/08/1995, article 36, part 1.

6 Ibid, article 4, part 4, article 54.

7 *Gonashvili V., Eremeadze K., Tevdorashvili G., Kakhiani G., Kverenchkhiladze G., Chigladze G.,* Introduction to Constitutional Law, Tbilisi, 2016, 16 (in Georgian).

8 *Khubua G.,* Theory of Law, Tbilisi, 2015, 42, 55 (in Georgian).

9 Respect for Democracy, Human Rights and the Rule of Law During States of Emergency – Reflections, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 26 May 2020, para 65. <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e#>[18.02.2023].

highest representative institution. And this makes the parliamentary control, the control of the law enforcement and legality of the normative acts of the government a mare fiction. The impossibility of parliamentary oversight leads to a violation of the principle of separation and balance of power and leaves the government without the control of the electorate and highest legislative institution which has direct electoral legitimacy.

As mentioned, the Parliament has control mechanisms for the government's activities. These mechanisms provide institutional balance and mutual restraint between state bodies.[10]

In case of unlimited delegation by law, any individual who wants to validate the compliance of the government's decision with law, essentially remains without the right of protection. Court hearings and ruling about the compliance of the government's regulation with the regulatory law becomes impossible and it makes no sense even to refer to the court.

Georgian Constitutional Court has developed the standards of delegation of regulation authority and parliamentary oversight. Constitutional Court considers the unlimited delegation of authority by the Parliament for performance of constitutional obligation as a rejection to exercise legislative authority.[11] Herewith, the Constitutional Court deemed as the Parliament's obligation to define the legal scope and frame of delegated authority of regulation, in order for the body, to which the authority was delegated, to make decision solely within the scope of law and in accordance with it.[12] The Constitutional Court specifically discussed the issue of formal and unrestricted delegation, and the mere fact that the Parliament delegated the power to limit human rights to the government by law was not considered sufficient to recognize this decision of the Parliament and the decision of the government as constitutional. Delegation of authority only formally, without any framework, was considered by the Constitutional Court of Georgia to be against the Constitution, since it is the obligation of the state and parliament to exclude the risk of unreasonable or disproportionate restriction of human rights.[13]

Parliamentary oversight of secret activities carried out to ensure national security in accordance with the delegation and publicity standards of the Constitution ensures the compliance and effective accountability of the government's secret activities, which requires constant understanding and the search for new solutions. For this purpose, this work reviews the mechanisms of parliamentary oversight of the activities of the Government of Georgia and the experience in regulating state secrecy, which are related to the parliamentary oversight of the secret activities of the government.

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10 *Pirtskhalaishvili A., Mirianashvili G.,* Fundamentals of State Organization of Georgia, Tbilisi, 2018, 53 (in Georgian).

11 Decision of July 20, 2016 No.3/3/763 of the Constitutional Court of Georgia, the case "Group of members of the Parliament of Georgia – Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Giorgi Baramidze and others, a total of 42 members against the Parliament of Georgia", II-78.

12 Decision of February 11, 2021 No.1/1/1505,1515,1516,1529 of the Constitutional Court of Georgia, the case "Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia against the Parliament of Georgia and the Government of Georgia".

13 Decision of August 2, 2019 No.1/7/1275 of the Constitutional Court of Georgia, the case "Alexandre Mdzinarashvili v. National Communications Commission of Georgia". II-42.

2. Experience of Regulation of State Secrecy

In any state, along with public information, there is a state secrecy whcih is specially regulated. Access to information with the status of state secret is particularly important for effective parliamentary oversight of government activities.

By reviewing the legal acts that regulate the state secrecy of Georgia, it is possible to evaluate the delegation of authority as well as Parliamentary oversight of the government's activities.

Protection of vital interests of the country is the goal declared in the Law of Georgia on State Secrecy.[14] To provide for this goal, the Law regulates issues related to deeming information to be a state secret and protecting it.

Pursuant to the law on State Secrecy, information in the areas of defence, economy, foreign relations, intelligence, national security, and law enforcement, the disclosure or loss of which can prejudice the sovereignty, constitutional order, political or economic interests of Georgia or any party to international agreements and covenants that, based on the rule provided for by this Law and/or international agreements or covenants, shall be recognised as a state secret, and shall be subject to state protection.

Thus, the Law of Georgia on State Secrecy protects not only the secret information created as a result of the activities of Georgian government and executive institutions, but also the classified information of North Atlantic Treaty Organization (NATO) and other international organizations and states. Taking into account that the Parliament, as a representative institution with absolute legitimacy, is equipped by the Constitution with governance powers in the fields of both national and international relations, it is natural that the protection of all information used in international relations should be sufficiently ensured along with providing parliamentary oversight of the legality of protection of this information.

Law on State Secrecy defines the list of information that cannot be classified as state secret.[15]

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[14] Law of Georgia on State Secrecy, legislative herald of Georgia – 12/03/2015.

[15] Pursuant to the article 7 of the Law of Georgia on State Secrets, the following information cannot be deemed as a state secret:
1. Information that may prejudice or restrict the fundamental rights and freedoms of a person, his/her legal interests, or cause harm to the health and safety of the population may not be deemed to be a state secret. 2. Normative acts, including treaties and international agreements of Georgia, other than normative acts of the relevant agencies, which are related to national interests in the areas of defence, national security and law enforcement and which govern the activities of these agencies in the areas of defence, intelligence, national security, law enforcement and criminal intelligence activity, may not be deemed to be a state secret. 3. Maps, other than military and special maps that contain information or data on national defence and security as defined in the List of Information Deemed to be a State Secret, may not be deemed a state secret. 4. Information on natural disasters, calamities and other extraordinary events that have already occurred or may occur and that pose a threat to the safety of citizens; 5. Information on the condition of the environment and the health of the population, its living standards, including health care and social security, and on social-demographic indicators, and on educational and cultural levels of the population; 6. Information on corruption, illegal acts committed by officials and on crime rates; 7. Information on privileges, compensations, monetary rewards and benefits granted by the State to citizens, officials, enterprises, institutions and organisations; 8. Information on the state monetary fund and national gold reserve; 9. Information on the health status of public and political officials.

To avoid unlawful and/or unreasoned decision classifying certain information to be a state secret, Law on State Secrecy provides the list of different information within which, the specific information may be granted the status of a state secret. By this, on the one hand, the legislative institution establishes the scope of delegation of authority for the Government and delegates the authority for normative regulation and on the other hand, provides publicity and the parliamentary oversight of the government's acitivities in the area of state secrecy. The list of areas and information is the scope within which the compliance of government's decisions can be controlled.

Pursuant to the concept provided in the Law on State Secrecy, information itself is not a state secret, its status is established by a competent official under the relevant law or government's normative act adopted on basis of law. The list of such officials also includes the members of the Parliament[16]. By such disputable delegation of normative regulation authority, the institute that is subject to oversight (government) defines rules or makes decision to grant authority to the Parliement member which obviously decreases the possibility of parliamentary oversight.

Apart from the issue related to authority of information classification, another critical issue for parliamentary oversight and judicial control of government's activities is the access to classified information. It is impossble to have an authority of granting the status of a secret information (classification) when you have no right to access the classified information.

In consideation of state security interests, Law on State Secrecy restricts the right to access state secrets maintained in public institutions. Law on State Secrecy defines the list of people who may be granted the right to process, learn and work on information containing state secret (classified information).

Law on State Secrecy defines two different categories of officials who have the right to work with state secrets: people who have the guaranteed access to state secrecy and people who are granted access to state secret by authorized officials.[17]

State officials with guaranteed access to state secrecy are heads of constitutional and security institutes who are granted access to state secrets upon their appointment.[18]

The second category are the people who may be granted the right to access to state secret by an authorized official if they: (a) have confirmed requirement for accessing the classified information in order to carry out their official, professional and/or scientific activities and (b) meet trustworthiness and reliability criteria set by the Law on State Secrecy.

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16 Regulation #507 of GoG of September 24, 2015 „on approving the normative acts related to the operation of Georgian Law on State Secrets", legislative herald of Georgia, 29/09/2015.

17 Law of Georgia on State Secrecy, Legislative Herald of Georgia, 12/03/2015, Article 20.

18 People with guaranteed access to State Secrets:
a) The President of Georgia, b) The Prime Minister of Georgia, c) Member of the Government of Georgia, d) Chairperson of the Parliament of Georgia, e) Public Defender of Georgia, f) Member of the National Security Council, g) General Auditor of the State Audit Office of Georgia, h) Chairperson of the Constitutional Court of Georgia, i) General Prosecurot of Georgia, j) Head of State Security Service of Georgia, k) Head of Intelligence Service of Georgia, l) Head of Special State Protection Service of Georgia, m) Chairperson of the Supreme Court of Georgia, n) President of the National Bank of Georgia, o) Head of the General Staff of the Georgian Armed Forces.

Before granting the right to access to state secrecy, it is mandatory to conduct the security clearance and issue a positive conclusion on trustworthiness and reliability. The procedures of security clearance of the person applying for the access of state secret is conducted by the State Security Service of Georgia.

Members of Parliament belong to the second category of officials who will be granted the right to access classified information only if they can justify the need to know for their work purposes and if they obtain positive conclusion on the trustworthiness and reliability,[19] conducted by the institution that is accountable and controlled by the Parliament.

Furthermore, such secutiry clearance is conducted by using such secret methods that are not subject to parliamentary oversight or judicial control.

The decree,[20] issued by the Government under the authority delegated to it by Law on State Secrecy defines legal grounds for security clearance methods to be conducted by state security service before granting the right to access the state secret. In particular, State Security Service of Georgia shall conduct the security clearance of a person according to the procedures provided for by the Law of Georgia on Counter-Intelligence Activity and the Law of Georgia on Criminal Intelligence Activity. This means that before allowing the Member of Parliament the access to state secret, s/he will be checked against trustworthiness and reliability by open and secret methods, including, covert recording, electronic surveillance and visual control.

In the conditions of such normative regulation of security clearance for accessing state secret, neither the official with the right to access state secret nor the chair of the Parliement or Member of Parliament who may be granted the access to state secret, have the possibility or legal mechanisms to learn and varify the information obtained as a result of security check or the compliance and validation of the conclusion issued by such investigation. Moreover, the legislative act does not consider the possibility, principles and mechanism to regulate the conflict of interests related to parliamentary oversight.

European states and the United States have different approach to the management of state secrecy and parliamentary oversight.

In the Kingdom of Sweden[21], state secret is subject to regulation by a number of legislative acts. They are: the law on "public access to information and secrecy"[22] and ordinance on "public access to

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19 Law of Georgia on State Secrecy, Legislative Herald of Georgia, 12/03/2015. article 22, paragraph 4.

20 Decree of September 24, 2015 #507 of Government of Georgia "on approving the normative acts for enforcement of Georgian Law on State Secrecy", Legislative Herald of Georgia, 29/09/2015.

21 EU member state and NATO candidate state. 4th position in the Index of government's opennes of World Justice Project among 180 countries of the world and 31 countries of Europen region <https://worldjusticeproject.org/rule-of-law-index/country/2022/Sweden/> [18.02.2023]. Third in the Index of World Press Freedom among 180 countries <https://rsf.org/en/index>[18.02.2023]. Sweden has received 5 scores out of maximum six scores by access to information rating<https://www.rti-rating.org/country-data/> [18.02.2023].

22 Public Access to Information and Secrecy Act (2009:400) (in Swedish) <http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/offentlighets--och-sekretesslag-2009400_sfs-2009-400> [18.02.2023].

information and secrecy.[23] The leading role as a regulator in providing the publicity of information and protecting the state secret belongs to the Swedish Parliament which is the highest representative organ with an electorate mandate.

By law, any information or official document may be classified as a state secret if their protection as secret serves to the following interests:

1) national security, Sweden's foreign relations with foreign states or organizations, 2) financial, monetary or exchange rate policy, 3) inspection, control or other supervisory activities of public authorities, 4) crime prevention and investigation, 5) public economic interest, 6) protection of information about personal or economic conditions of private individuals, 7) Protection of animals or plants.

All other documents not enlisted above are public and it is inadmissible not to disclose them. Besides, Swedish Government does not hold the authority to define the scope for the secrecy of documents as it is at the discretion of the parliament. Within the scope of this discretion, the list of information that may be classified as secret, is provided in the Public Access to Information and Secrecy Ordinance of Swedish Parliament.

Providing secret information to the Swedish Riksdag (the highest legislative body) and the Parliamentary Ombudsman is mandatory[24] as part of the supervisory function. In Sweden, Parliamentary oversight of Government and administration activities (including secret activities) and the legality of decisions is mainly carried out by 4 independent and politically neutral parliamentary ombudsmen elected by the parliament. Access to information for members of the Riksdag and the Parliamentary Ombudsman is based on their high public legitimacy.

In Estonia[25], the issues of state secrecy is regulated by law on "State Secrets and Classified Information of Foreign States".[26] The title of the law emphasizes that not only the state secret of Estonia is protected, but also the classified information of foreign states and foreign organizations that was transferred to the competent institutions of Estonia or became known to the public official or servant.

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23 Public Access to Information and Secrecy Ordinance (2009:641) (in Swedish). <http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/offentlighets--och-sekretessforordning-2009641_sfs-2009-641>[18.02.2023].

24 Public access to information and secrecy, Stockholm, 2020, 26.

25 EU and NATO member state. 7th position in the Index of government's opennes of World Justice Project amont 180 countries of the world and 31 countries of Europen <https://worldjusticeproject.org/rule-of-law-index/country/2022/Estonia/Open%20Government/>[18.02.2023]. Fourth in the Index of World Press Freedom amont 180 countries <https://rsf.org/en/index>[18.02.2023]. Estonia has received 4 scores out of maximum six scores by access to information rating<https://www.rti-rating.org/country-data/>[18.02.2023].

25 Public Access to Information and Secrecy Act (2009:400) (in Swedish) <http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/offentlighets--och-sekretesslag-2009400_sfs-2009-400>[18.02.2023]

25 Public Access to Information and Secrecy Ordinance (2009:641) (in Swedish). <http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/offentlighets--och-sekretessforordning-2009641_sfs-2009-641>[18.02.2023].

26 State Secrets and Classified Information of Foreign States Act. <https://www.riigiteataja.ee/en/eli/503072018009/consolide>[18.02.2023].

The Parliament of Estonia, as the highest representative body with people's mandate holds all extensive powers to oversee secrets and classified activities, which ensures effective parliamentary oversight and government accountability. The Law "On State Secrets and Classified Information of Foreign States" excludes to the maximum possible extent the violation of the principle of accountability of the government to the Parliament in the field of secrecy. For this very reason, the Parliament of Estonia has defined in the law those officials who have official access to the state secrets of all degrees. This list includes:

a) the President of Estonia, b) Member of the Parliament of Estonia, c) a member of the Estonian government, d) judge, e) Commander of the Defence Forces, f) Chancellor of Justice and his/her deputy, g) Auditor General, h) President of the National Bank, Chairman and members of the Executive Board i) Chairman of the Data Protection Inspectorate.

In Estonia, the public servants who need to know state secret for their work have so called guaranteed admission. Upon appointment to such position, if a person refuses to confirm in writing the obligation to protect state secrets, it may become ground for not accepting or dismissing him from the position.

Estonian law does not define a separate competence for the Prime Minister in the area of state secrecy. The competence to establish the procedural regulations within the legal frames is granted solely to the government.

Similar to Georgia, in Estonia the law defines all areas and issues that can be classified as state secret. Moreover, the law sets maximum periods for keeping secrecy of a particular issue and the category of secrecy.

Guaranteed access to state secrecy may be granted not only to the officials who already have such access, but also to any citizen who has a justified need to know the secret information under the approval of the director of the institution holding such secret information or document, provided that the security clearance carried out by security service is positive. The decision-maker defines not only the right to access, types of specific information and the rule for reading the information, but also period for maintaining this right.

The authorities of the Members of US Congress in the area of state secrecy and secret activities of the government are defined in various legal acts. In consideration of specifics of the US state governance model (where not only Congress but also the President, the head of the executive with broad scope of authorities and head of the country, has the public legitimacy), the competences in the area of state secret management are distributed in a way that both branches can efficiently execute the public legitimacy.

In the USA, similar to Georgia, two conditions are set for obtaining the right to state secrets: (a) trustworthiness-reliability test (check) and (b) "need to know" principle. Person meeting these conditions will be granted access to state secret only after s/he confirms by signature the non-disclosure and protection of state secret statement.

Members of US congress do not have to take the trustworthiness-reliability check on the ground that they already are elected and legitimized by people under constitutional procedures.[27] In order for

[27] *Alaverdashvili G.*, Control of security sector in US Congress, Tbilisi, 2023, (in Georgian) <https://gyla.ge/ge/post/usafrtkhoebis-seqtorze-kontroli-amerikis-kongresshi#_ftn14> [18.02.2023].

the Members of US Congress to obtain the right of accessing classified information, they have to justify the need, undertake the check by executive bodies and receive their approval. Interestingly, the executive bodies have restricted competence for "need to know" check and approval granting by mandatory consultations of the President's administration with Congressional committees. Only after these consultations[28], the executive institutions, scope of competence and criteria can be defined for the inspection of the Congressmen's "need to know" of state secret.

In absolute majority of NATO states, the MPs have unlimited access to classified information and realization of this right does not depend on the decision of some institution of the government that is subject to parliamentary oversight. The access rights to classified information depends on their status, high legitimacy and occupied position.[29] In 7 NATO states, only the MPs who are the members of special or sectorial committees or occupy some parliamentary positions have the right to access classified information.

The study showed that in leading democratic states, for the purposes of parliamentary oversight of secret activities of the government, the dependence of the highest representative body and its members on the check or consent, in order to access classified information of executive government bodies is minimized.

3. Mechanisms of Parliamentary Oversight of Secret Activities of the Georgian Government

Parliamentary oversight of the secret activities of the Government of Georgia goes under general, political oversight, as well as special oversight over the government's activities. Therefore, the format, rules and mechanisms of oversight differ accordingly.

Both spheres and mechanisms of parliamentary oversight of the government's secret activities are characterized by the same features – publicity and involvement of the parliament as a representative body. Although special oversight mechanisms provide for a lower level of publicity to ensure the protection of state secrets, a small number of members of parliament have access to secret information.

For the effectiveness of parliamentary oversight of the government's secret activities, it is important to have a public discussion and debate on the issue among the various groups represented in the parliament. Debates in the committee or plenary session of the Parliament normally take place in a public session, which results in the adoption of a resolution, recommendation or resolution of the Parliament.

In case of both forms (general and special) of Parliamentary oversight of government's secret activities, conducting informed debates is restricted because MPs do not have access to classified information, while the executive government's representative called to the parliament for discussion has such access and s/he has to discuss with members of the Parliament about issues containing classified information.

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28 Congressional Oversight Manual, 2021, 67-71.

29 *Schierkolk N.Y.*, Parliamentary Access to Classified Information, Geneva, 2018, 22-23.

Accordingly, even if the parliamentary committee or plenary session is closed, the attendees, without having the right to access state secret, will not be able to obtain necessary information from the government's representative, which obviously makes it impossible to prepare a parliament's recommendation, adopt a resolution or discuss the issue of responsibility of the official who is accountable to the Parliament. Similarly, discussion of annual or special reports related to secret activities of the Government ends with no results.

Rules of Procedure of the Parliament of Georgia provide for a number of formats of parliamentary oversight of government's activities: bureau session, committee session, committee working group meeting, temporary investigation or other commission sessions, plenary session, group of confidence's session.[30]

In Georgia, parliamentary oversight of the government's activities is implemented via a number of mechanisms: control of enforcement of legislative acts of Parliament, validation of legal acts of government and its institutions, political debates, interpellation, minister's hour and thematic investigation.[31]

As mentioned, for the parliamentary oversight of government's secret activities, the issue of delegation of regulation authority and access to classified information is critical. Herewith, without validating and regulating the normative regulation competence of access rights of MPs to classified information and the compliance of decisions of the government to allowing access to classified information by MPs as part of their delegated authority in the context of Parliament being an institute with absolute public legitimacy, it will be impossible or inefficient to use all other mechanisms and to discuss issues in any format.

For the analysis, we will review the possibility of using the control mechanisms of the enforcement of normative acts, validation of legal acts of executives with legislative acts of Parliament and interpellation to fulfil the function of parliamentary oversight of the secret activities of the government.

Control of enforcement of legislative acts falls[32] within the competence of the Parliamentary committee. The latter controls the progress of enforcement of legislative acts adopted by the Parliament (for this case – legal acts) and identifies issues.

The conclusion elaborated by the committee on enforcement of the legislative acts adopted by the Parliament may become subject to discussion at the plenary session of the parliament followed by adoption of the parliamentary resolution, the addressee of which will be the implementing government institution or government and the relevant committee of the Parliament.

Where the parliament identifies any abuse of the authority defined by law or its incorrect interpretation, it will prepare a relevant recommendation for the Government.[33] Herewith, depending on the scale of violation, the enforcement process of the legislative act may result in the procedure of discussion of the government official's responsibility.

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30 Rule of Procedure of Georgian Parliament, Legislative Herald of Georgia, 06/12/2018. article 25, article 34, article 46, article 68, article 92, article 157-159.

31 Ibid, article 38, article 39, article 93, article 149, article 153, article 155.

32 Rule of Procedure of Georgian Parliament, Legislative Herald of Georgia, 06/12/2018, part 1, article 38.

33 Ibid, part 3, article 38.

Government of Georgia has the authority to regulate only the issues that was transferred to it under the law adopted by the Parliament.[34]

After studying the state of enforcement of legislative act, under the Parliament's ordinance, the sectoral committee may be tasked to identify, change or specify the delegation and competence scopes in the legislative act to exclude misuse of the this act or its subjective interpretation and to initiate the relevant draft law.

Unlike the mechanism of enforcement of the normative act, the mechanism of studying the legal acts of government and their validity equips the Parliamentary committee with authority and there is no need to discuss the issue at the plenary session. This mechanism is rather flexible and efficient for parliamentary oversight than the control of enforcement of normative acts, the decision is made by the committee (in the form of the task or recommendation).[35]

The mechanisms for controlling the enforcement of the legislative act and studying the legality of legal acts of government and its institutions are similar to the competence of the Constitutional Court of Georgia regarding the constitutionality of the normative act issued within the scope of delegation and delegated authority and the competence of the court regarding the legal compliance. Thorough and regular execution of the authority to control the enforcement of legislative acts and examine the compliance of legal acts of government will have a positive effect not only on the parliamentary oversight of the government's activities, but also on justice and ultimately, will decrease the number of disputes and overloading of the constitutional and common courts.

As we can see, the mechanism for controlling the enforcement of the legislative acts and examination of the compliance of legal acts of government is of particular importance for determining the scope of Law on State Secrecy and of the government's competence to enforce it, in order to exclude the unreasoned restriction of the access of MPs to state secret and the levelling of the use of parliamentary debates, interpellation or other mechanisms on the government's secret activities.

Interpellation is a special mechanism of parliamentary oversight of the government activities. In the course of interpellation, members of the parliament address questions to the government or officials accountable to the parliament, and the latter are obliged to give answers to the question in a written form. Herewith, an integral component of the interpellation mechanism is the discussion of the issue at the plenary session of the Parliament in the format of a debate, normally, via the open session. Consideration of the question raised via the interpellation method may result in the adoption of the Parliament ordinance.[36]

Efficiency of the interpellation mechanism and process of parliamentary oversight of the secret activities of the government depends, on the one hand, on the access of members of the parliament to secret information, and on the other hand, on the provision of secret information during parliamentary debates and the possibility of conducting informed debates. If any of these is not provided, the interpellation process for parliamentary oversight of the government's secret activities cannot be

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[34] Organic Law of Georgia on Normative Acts, Legislative Herald of Georgia, 09/11/2009, part 1, article 12 and Georgian Law on the Structure, Authority and Rule of Operation of the Government of Georgia, Legislative Herald of Georgia, 3, 13/02/2004, part 1, article 6.

[35] Rule of Procedure of Georgian Parliament, legislative herald of Georgia, 06/12/2018, article 39.

[36] Ibid, article 149.

conducted. This means failure to fulfil the constitutional function of the accountability of the government and the parliamentary oversight of the government's activities.

4. Conclusion

The study of legal environment of parliamentary oversight of the secret activity of the Government of Georgia has emphasized the importance of allowing the members of the parliament of Georgia access to state secrecy for the overall parliamentary democracy and accountability of the government.

The rule of allowing the MPs to access the state secrecy is essentially different from the rules of democratic states. Access of Georgian MPs to state secrecy depends on the decisions of the government and also, the criteria and procedures established by the government which obviously increase the dependence of the parliament on the government and significantly reduces the possibility of parliamentary oversight of the government's secret activities.

Essential issues and procedures regarding the access to state secrecy by Georgian MPs shall be provided in the law adopted by the Parliament and the members of parliament shall not be subject to trustworthiness-reliability tests and approval by the governmental authorities.

The issue related to delegating the authority for verification of the reasonability of the need to know the state secret shall become a matter of discussion by setting clear criteria and establishing mandatory cosultations of the government with the Parliament before issuing the normative act.

It is necessary to create additional mechanisms to ensure the efficiency of parliamentary oversight of the government's secret activities.

Parliament and the government are political establishments represented by political entities of various interests and directions. The state secrecy and the secret activity of the government are the matters beyond the political party interests, they are the matters of national security, important for the whole state, requiring solution outside the scope of party politics.

In order to provide for a better parliamentary oversight of state secrecy and government secret activities, we do believe that the institute of a special speaker shall be created and elected by broad consesus of the parliament, whose competence will be government's oversight over the state secrecy management issues, oversight of the current legal environment, and preparation of annual alternative reports on government secret activities, which will be considered together with the government report. In order to preserve the political neutrality and independence of the special speaker, it is important that his term of office exceeds the term of office of the Parliament, thereby excluding his dependence on the political associations represented in the Parliament in a specific period of time.

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The Problematic Issues of Jury Selection

It is known that the jury is not an institutionally separate legal entity. It functions alongside the Court of First Instance and is a special form of administration of justice. Unlike ordinary proceedings when a judge makes a decision based on the law, a jury trial relies on the opinions of ordinary citizens applying to their "inner voice" – conscience, "common sense", folk wisdom and intelligence, public morality, sense of justice. That is why jury trial is considered the highest expression of democracy. It is an interesting institution in many ways. The article reviews the problematic issues of jury selection.

The article analyses theoretical and practical aspects of selecting non-professional judges, the preconditions of their selection, recusals and the jury composition. Legislative changes have been evaluated positively, but there are still challenges. Accordingly, the problems associated with jury selection are identified and the specific recommendations are made to prevent the process from delaying and choose independent, unbiased jurors.

Keywords: *jurors, selection, incompatibility, self-recusal, justified and unjustified recusal, party.*

1. Introduction

A jury trial is an alternative form of justice which within the competence of courts of general jurisdiction has to meet all the necessary requirements for the right to a fair trial.[1]

In the classical sense, in the court of jury, non-professionals, representatives of society decide the so-called question of "fact" – guilt or innocence of the accused, and the issue of law is decided by a professional judge. The institute of jury has been operating in many countries of the world for a long time. Nevertheless, it does not lose its relevance to this day, especially in Georgia where the court of jury has a short history.

The involvement of non-professionals in jury trial makes it possible to introduce the values, common views and experiences of ordinary people to the system that is governed by an elite of legal experts and abstract legal norms. Such involvement maintains the contact between society and judiciary and develops the trust of public to the system of justice and courts.[2]

Ilia Chavchavadze believed that the court of jury could have implemented fair justice in the country. He directly connected the institutions of a conciliator and jury with the ideas of fair justice among the society.[3]

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1 The Decision of the Constitutional Court of Georgia on November 13, 2014 in case N1/4/557,571,576, II-98 (In Georgian).

2 See *Bachmeier U.L., Daly B.L., Gerald T.,* Comparative Analysis: Systems of Trial by Non-Professional Judges in the Member States of the Council of Europe, Tbilisi, 2013, 10 (in Georgian).

3 The court of jury, history of origin and development, the Supreme Court of Georgia, Tbilisi, 2010, <http://www.supremecourt.ge/files/upload-file/pdf/finaljudge.pdf,> [23.01.2023].

Justifying the existence of a jury trial mainly depends on the proper formation of the jury pool, which in turn, implies the selection of jurors in accordance with the sophisticated legislation. The formation of an honest and impartial jury is a prerequisite for a fair verdict. The purpose of the article is to study/investigate the issue of selecting jury, identify the reasons for delays in the process of jury selection that ultimately hinder the effective functioning of the jury. The aim of the paper is also to search for the mechanisms to develop scientific proposals/recommendations for the introduction of strict guarantees of legislation, which ensure to select objective and impartial jurors along with the perfection of the regulatory norms for forming the jury.

2. The Requirements to a Juror, an Incompatibility and a Refusal to Perform Duty of a Juror

2.1. The Requirements to a Juror

According to Article 29 of the Criminal Procedure Code of Georgia (GCPC), a person is entitled to participate as a juror in the trial if:

a) is recorded in the database of the Civil Registry system of Georgia as a person over 18 years old;

The Article 29 of the Civil Code refers to a person over the age of 18, however, the first part of the Article 221 of the Civil Code refers to a person who has reached the age of 18.[4] It is necessary to specify by legislation whether a person over the age of 18 can be a juror or not.

In addition, it is important to consider how optimal the minimum age of 18 years is for a jury candidate. Jurors are not professional judges but they have to decide the guilt or innocence of the accused in the cases assigned to them. They make a decision based on life experience, a sense of justice and folk wisdom. Accordingly, there arises question of how 18-year-olds with their intellectual development, life experience, and inner sense of justice can take such a high responsibility. In comparison with most common law countries the minimum age limit is higher than in Georgia. For example, in England, New Zealand the minimum age is 20 years. The age limit is even higher in continental European countries, in France – 23, in Russia – 25. Considering the best practices of other countries, it is desirable to increase the mentioned minimum age to 23 years in Georgia.

Besides, examining age may be important in relation to some offences. For instance, when considering a case of domestic violence[5], it is essential to select age groups, taking into account the mental attitude towards the committed act. The perception of young people on this issue is sharply different from the views of middle-aged people and the elderly, who are more motivated by tradition and the obligation to protect the family (they act according to the principle of "what happens within the family, it should not be taken outside") and violence can be justified, while young people considering the principle of protection of rights and equality, facts can be evaluated and judged more objectively and fairly. Regarding this category of crime, it is also important to take into account the

[4] See, Part 1 of the Article 221 of the Criminal Procedure Code of Georgia.

[5] Note: The jury sentencing includes the crime provided with the Article 126, Part 2 of the Criminal Code of Georgia.

gender of the judges, because some of the women, in a variety of circumstances, might not consider the violence of one family member against another as a crime at all (for example, the violence of a husband against his wife). Obviously, such judges cannot make an impartial decision.

b) knows the language of criminal proceedings;

Without a direct and complete perception of the case, it is impossible to make a correct and fair assessment, draw a conclusion and finally make a decision. The assistance of an interpreter is not allowed. The jurors should be in the deliberation room, and they have to take the responsibility for violating the secrecy of the deliberation. On the ground of analyzing the practice, the people, who do not know the language, are mostly ethnically non-Georgians. They refuse as soon as they receive the invitation. On this basis, some turn up at the session and announce self-recusal in the hall. One of the jurors claimed to be good at the language of the proceedings, but during the deliberation, it became clear that he did not know the Georgian language well, he understood the discussed issues in a completely different way, about which seven jurors appealed to the chairman of the session.[6]

c) lives in East or West Georgia – depending on which part of Georgia the jury process is held in the district (city) court;

Before the change in 2016, the mentioned paragraph was formulated in the following way – "lives in the territory that is included in the jurisdiction of the court where the process is taking place". Such an arrangement created a danger of selecting for serving on the jury the acquaintances of the plaintiff or petitioner, the residents of the same city. In accordance with today's current version, the selection of the jury was specified within the scope of a relatively large territory taking into account the area of eastern and western Georgia, which, obviously, reduces the indicated danger. Therefore, it turns out that when a jury trial is held in the Tbilisi City Court, approximately 30% of summoned persons are from the population of Tbilisi/citizens registered in Tbilisi.

d) does not have such a limitation of opportunity that would prevent from fulfilling the duty of a juror.

As a result of the health assessment, it can be found that a person with a physical disability can serve as a juror due to mental health. For example, when discussing one of the criminal cases, a candidate for serving on jury was a disabled person who worked in the House of Justice and used a wheelchair. He did not declare recusal and he agreed to serve as a juror if he could move in the relevant infrastructure. The candidate was selected as a juror and participated in the discussion of the case until the end.[7] Almost everywhere in the world, jurors are members of the general public. In common law countries, it is a principle that the jury "shall represent the public". In America, this principle is defined as the principle of cross-section of community.[8] The representative nature of the jury trial is an emphasis of the democratic nature of this institution. However, there was the period when not all members of society could participate in the administrating justice. Preference was given to males and representatives of the middle class. The membership of the jury was often connected with

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6 Interview with judge Eka Areshidze, see Georgian Court Watch, <https://courtwatch.ge/articles/ekaareshidze/> [25.02.2023].

7 Ibid.

8 *Iorhandi L., Tsikarishvili K.,* Jury Court, Review of Western Systems, Tbilisi, 2009, 32 (in Georgian).

the property census. For example, property census was imposed in England until 1972. Because of this, jurors were mostly "male, middle-aged, middle-intelligent, and middle-class."[9] Another type of census was a residence restriction in England according to which a candidate for serving on jury must have lived in the United Kingdom[10] for at least 5 years after reaching the age of 13. In Belgium, they tried to select people with higher education and without education equally. In some American states, attention was focused on the candidates with education and moral values. In 1968, Congress passed Jury Selection and Service Act, which changed the requirements for jurors and established the principle of selecting at random from a fair cross section of the community. Even today, the requirements for education are different in various countries. In Italy, in the first instance, an incomplete secondary education is sufficient while in the Appellate Court, a complete secondary education is compulsory. The procedural legislation of Georgia does not include requirements for the education of jury candidates, since the nature of the jury trial is determined by folk wisdom and common sense.

2.2. Incompatibility

The recusal of service for jury is identical to the recusal of a judge, prosecutor, an investigator, a secretary of the session and is provided with Article 59 of the Civil Code. In addition, Article 30 of the Georgia Civil Code lists the persons whose participation in jury trial is incompatible. Such persons are: a state-political person, prosecutor, cleric, police officer, lawyer, an investigator and employee of the state security service system, active military serviceman, a participant of the criminal proceedings of the mentioned case, an accused, a convicted person and a person who was imposed an administrative fine for abusing a small amount of drug and less than 1 year has passed since the imposition of this administrative fine. Before the change on June 24, 2016, this list included a lawyer, a psychologist, a psychiatrist, however, by the current edition, the restriction of serving on jury has been removed for them but the opinions about participation of a lawyer in jury trial split down the middle. One part believes that the participation of a lawyer can assist to reach a legal verdict. Another part supposes that with the participation of a lawyer, the main meaning of the jury trial can be lost, since it is important to make out the attitudes of people, citizens towards the fact and give a correct assessment based on folk wisdom and justice not on the law.

According to Prof. N. Kovalyov, the presence of a lawyer or a police officer in the deliberation room can intimidate and erroneously influence jurors who are less qualified in the field of law.[11] However, practitioners, the judge and the prosecution positively evaluate the participation of lawyers in the jury. The list of Article 30 of the Civil Code does not include the judge. The restriction should also apply to him, since his opinion, his vision will have a great influence on the rest of the jury. Before the 2016 amendments, the Code of Procedure did not provide for the incompatibility of a

9 *Widman N.,* Jury trial (Common Law Countries), 2005, 33 (in Georgian).

10 *Iorhandi L., Tsikarishvili K.,* Jury Court, Review of Western Systems, Tbilisi, 2009, 32 (in Georgian).

11 Jurors in criminal proceedings, Human Rights Network of Georgia, Tbilisi, 2016, 55, see, citation: *Kovaliov N.,* Analysis of the Draft Law on Amendments to Criminal Procedure Code of Georgia Regarding the Jury Trial, 2016.

person with a conviction. A person, who was sentenced an administrative penalty for abusing a small amount of narcotic drug, was forbidden to serve on a jury. Based on the mentioned change, convicted persons will not be able to participate in jury trial, which can be evaluated in two directions: first, the convicted person is always in solidarity with the accused and cannot review a case objectively and impartially; the second, the judge can directly administer justice by issuing a verdict. Consequently, the moral authority to decide the fate of other people and judge the crimes committed by them should be held only by a person with inviolable authority. Also, the Code should specify whether the mentioned limitation applies to persons whose convictions have been expunged or dismissed. By comparison, in most common law countries, incompatibility applies to high-ranking officials, professional lawyers, and persons of appropriate age.

2.3. Refusing to Serve as a Juror

Legislation also regulates the grounds for refusing to be a judge. It is possible to evade the duty of a jury in the cases provided by the first part of Article 31 of the Code of Procedure. In particular:

a) If he was already a juror during the last year.

As during the last year, he has already fulfilled his civil obligation and served as a juror the person has the right to refuse to fulfill this duty again. Accordingly, he has to make a choice – either he repeatedly participates as a juror in the trial, or he refuses to perform this duty;

b) If he performs work related to the protection of human life, health or civil safety and it is impossible to change it in a specific period or it might cause significant harm proved by convincing information. This rule can be also applied to a person who does specific work only in exceptional cases. Before the change, the law provided for a different basis – "if he performs such work, the change can cause significant damage". The latter was further specified and explained by the legislator, and with the amendment of June 28, 2021, the people occupied with professions related to the protection of human life, health or civil safety were allowed to recuse. For example, if a surgeon has to make an operation at the time of jury trial, by submitting the appropriate documents, he can refuse to serve as a jury, since the patient is certain of competence, qualifications, experience, and high trust of the doctor.

Also, the last sentence of the mentioned paragraph – "this rule can be applied to a person performing other work of special importance only in exceptional cases" – is vague and requires additional clarification of the category of people performing other work of special importance and the exceptional cases they can be exempted from the duty of a jury;

It is necessary to evaluate each specific case and find out whether the interest of professional activity should be given priority.

c) due to health condition;

It is also essential to specify what is meant by health condition. A person may have certain health problems, in particular, he can suffer from a chronic disease, be under the supervision of a doctor and get the treatment consistently but simultaneously he is able to fulfil his professional duties at work. This is different from the case when a person suddenly experiences health problems, he is in need of being hospitalized and operated on or has to start to receive some an urgent therapeutic or a

surgical treatment immediately. This can be the main reason for a refusal, otherwise, the law can be used as a means of malicious recuse to serve a juror.

d) if he stays or traverses outside of Georgia;

When a person has been abroad for a long time, it is obvious that he cannot participate in the jury trial, but "traverse outside of Georgia for a long time" allows for different interpretations. If a person thinks/plans to go abroad and start working or continue studying for a non-specific period of time or he does not intend making for abroad in general, but knows exactly when he will go, because he has already booked a ticket, these facts should be the basis for refusing to serve on jury.

e) if he is over 70 years old;

An elderly person should have the right to choose and be able to refuse to fulfill the civic duty. The law allows an elderly citizen to recuse to serve as a juror. Unlike Georgia, in the majority of foreign countries with the experiences of jury trial, the maximum age limit for participation in the judicial process generally varies between 65-70 years (for example, in England the maximum age limit is 70, in New Zealand 65, etc.).

3. Selection, Removal and Self-removal of Jurors

3.1. Compilation of the List of Jury Candidates

The selection of jury takes place in the courtroom where are potential jurors, parties, including the accused, the chairman and the secretary of the session. The court is obliged to inform the parties about the place and time of electing jury. The parties have the right to attend the procedure of jury selection.[12] The law does not consider the participation of the parties in the session of picking jury mandatory, which is not correct. The parties must file motions for reasonable and unreasonable reliefs and the court shall satisfy the claims. In general, the participation of a prosecutor in the court session is mandatory.[13] The participation of a lawyer is also essential if a jury hears criminal case.[14] Accordingly, Part 3 of Article 221 of the Civil Code does not coincide with Part 4 of Article 33 and subsection "g" of Article 45 of the Civil Code. In practice, it is impossible to form a jury without the presence of the parties and their active participation. It is in the interest of the parties to select judges who are likely to share their positions, meet their demands and reach an acceptable verdict. Consequently, it is necessary to eliminate the gap and instead of the entry – "the parties have the right", the law should mention – "the parties are obliged". Candidates are not impersonated at the selection meeting; they are assigned a serial number, which aims at protecting their personal data. According to the initial version of the current procedural code, the judge, after hearing the opinions of the parties, established a list of 50 candidates from the unified list of voters considering the limit determined by him. If less than 14 candidates were selected, the judge would adjourn the hearing for 10 days and invite no more than 30 additional candidates to complete the composition of the jury to the established number. In accordance to the change of September 24, 2010, the list of candidates serving on jury increased to 100, following

[12] See, Article 221-3 of the Code of Criminal Procedure.
[13] Ibid, Article 33, Section 4.
[14] Ibid, Article 45, subsection "g".

the selection at random, and instead of the unified list of voters, the National Civil Registry Agency (based on the change of May 25, 2012, the State Services Development Agency) provided the obligation to introduce an annual list of the citizens who reached 18, no later than July 1. Because only 1/5 of the summoned appeared at the hearing, the selection often lasted for 3-4 months, sometimes it was necessary to hold more than 20 hearings to elect the candidates for serving on jury. In order to solve the problems, on June 24, 2016, the Criminal Procedure Code was amended, which came into force on January 1, 2017. According to the mentioned change, instead of 100 candidates, there was established the selection of 300 persons. They were sent the questionnaire, approved by the judge for 20 days before the session. At the first session, no more than the first 150 candidates from the list of 300 persons were sent summons by their serial numbers. If all jurors could not be picked at the first session, the session would be postponed for 10 days and the judge would invite the remaining 150 candidates from the list of candidates. In case of selecting less than 14 jurors, the judge would adjourn the session again and call 100 candidates based on the law, from which the required number of jurors would be chosen. However, the mentioned changes did not contribute to speeding up the selection process and therefore, were not effective. On June 28, 2021, the procedural code experienced another amendment, according to which, after hearing the opinions of the parties, the judge, following the principle of selecting at random, initiates a list of candidates for jury duty with a composition of no more than 300 people. The mentioned list should be loaded into a special program. Prosecutors and defense attorneys propose a combination of numbers – for example, 12 and 15 can be conventionally suggested which are indicated in the program and a list of 300 people is made from every 1215 people. At the first stage of selection 300 people should be summoned who are sent a notice and a questionnaire. However, the actual addresses of candidates often do not match the addresses of registration, or some of the candidates are abroad, and in most cases only 60-65 people turn up at the session. Compared to the previous procedure, the trend is positive because a number of candidates increased three times that makes it possible to complete the jury selection within a few sessions.

Not less than 15 days before the jury selection, the candidates are sent the questionnaire, which is approved by the judge after consulting with parties, to their places of residence. The candidates have to answer and return the completed questionnaire to the judge within 5 days.[15] If less than 10 candidates are elected, the judge can adjourn the hearing for 10 days and invite no more than 300 additional candidates to complete the composition of the jury to the established number.[16]

3.2. Selection, Removal and Self-removal of Jurors

The jury selection procedure involves the implementation of interrelated actions, removal and self-removal of jurors by the parties in accordance with the rules and procedures established by law.[17] The Civil Code provides the grounds for removing a juror, which are identical to the removal of a judge, prosecutor, investigator, secretary of the session, and therefore, it is formulated in one article,

[15] See, Section 1 of Article 221 of the Criminal Procedure Code of Georgia (in Georgian).
[16] See, Article 223-9 of the Criminal Procedure Code of Georgia (in Georgian).
[17] *Gabisonia I.,* Courts of Jury, Magistrates and Conciliation (Meditation), Tbilisi, 2008, 447 (in Georgian).

Article 59 of the Civil Code. In addition, if there is any reason featured in the article, the juror is obliged to immediately declare about removal.

The Civil Code considers self-removal not only of the juror, but also of the candidate for serving on jury. In particular, according to section 6 of Article 221 of the Civil Code, the candidate for jury duty is obliged to notify the court within 2 days about receiving the summons if there is a reason for recusal based on Article 30 of the Civil Code. So, the code differentiates not only the precluding circumstances for participation in the process, but the conditions proving the state of being incompatible for serving a juror. In other words, incompatibility for a candidate, and for the juror who has already overcome the incompatibility, the precluding circumstances to participate in the process provided with Article 59 of the Civil Code are the grounds for recusal. Accordingly, Section 6 of Article 221 requires clarification because it should not be about the recusal defined by Article 30 of the Civil Code, but the cause of incompatibility established by Article 30 of the Civil Code.

Before arranging selection session, the candidates, eligible for jury duty, are sent a questionnaire with a notice indicating the time and the place of the session and the obligation to appear at the session. But they are not informed about the requirements established by law, incompatibility, and reasons for refusing to serve as a juror. Being aware of the mentioned provisions is necessary in order to be a candidate able to file a justified motion for self-recusal. Accordingly, the law should provide the obligation for supplying potential jurors with the information. If the jury candidate does not want to publicly make a statement regarding self-recusal, he can inform the chairman of the session. When considering one of the cases of domestic violence, the jury candidate made a self-recusal and told the chairman that she herself was a victim of domestic violence, her husband abused her. It turned out that her son also insulted his wife and once she had to call for the patrol police.[18] Obviously, a candidate with such a negative experience would not be able to maintain objectivity and fulfill the duty of an impartial judge.

In practice, when making a recusal, jury candidates often indicate health conditions, for example, depression and a severe emotional state which are considered impediment to an objective decision. Mothers of young children often have to refuse because they don't have a babysitter. Also, one of the reasons is self-employment because employees have no guarantee of keeping a job and salary, especially when the salary of a candidate depends on the output, for example, a taxi driver, a flower seller, a babysitter. Self-employed persons, in the event of making a plea for self-recusal, are usually exempted from serving on a jury since the method of compensating them still has not been developed but it is essential to regulate this issue by law.

Criminal liability is imposed for a juror or a candidate for serving on jury if he/she fails to submit information to the court about his/her incompatibility with the jury or provides false information.[19] If the candidate does not appear in the court at the specified time without a good reason, fail to fulfill his/her duty or perform in an improper way, the chairman of the session will impose a

[18] Interview with the judge Eka Areshidze, see Georgian Court Watch, <https://courtwatch.ge/articles/ekaareshidze/> [25.02.2023] (in Georgian).

[19] See, Article 3672 of the Criminal Procedure Code of Georgia (in Georgian).

fine from 500 to 1500 GEL.[20] The amount of the fine should be deterrent, proportional to the damage and affordable for the person to pay.

At the jury selection session, the parties raise compelling and uncompelling recusals. Compelling recusal means refusing on a specific basis while an uncompelling recusal is a protest without explaining.[21] The prosecutor/advocate is not limited in presenting compelling recusals. If the presented charge provides for life imprisonment as a punishment, the party has the right to apply for 10 uncompelling recusals (before the amendment of July 10, 2015, the party had the right to decide 12 uncompelling recusals), in other cases, the party has the right to declare 6 unreasonable recusals.[22] In addition, each defendant could decide additional 3 convincing recusals. The prosecution was entitled to additionally address as many unreasonable recusals as the defendants used together. The mentioned rule delayed the already protracted selection process. If less than 50 candidates appeared in the court, the judge was allowed to start the session and select the jurors.[23] For example, if 40 candidates turned up at the selection session and the parties applied 5-5 uncompelling recusals, 5-5 compelling recusals, and in a case with 3 defendants, each would utilize additional 3-3 unreasonable recusals, i.e. 9, accordingly, the prosecutor also made an use of 9, for the total of 38 candidates could be disqualified and only two candidates could selected at the first meeting. Therefore, it can be said that by canceling the right to additional recusals for the accused and the prosecution, implemented by the amendment of the Procedural Code on June 28, 2021, another step was taken to prevent delays in process of selecting jury. However, taking into account the given example, it is better not to emphasize the possibility of starting the selection in the event of appearing less than 50 candidates, but to set a lower limit and only in case of turning up at least 60 candidates, it could be allowed to hold the selection session to be the procedure more effective and successful. The right to each type of recusal is exercised by the parties in turn: first – the prosecution, and then – the defense. In practice, the defense always fully applies the statutory quota of unconvincing recusal defined by law while the prosecution does not administer it. In general, it is believed that the parties screen potential jurors. Creating a psychological portrait of the candidates in advance will obviously help to set up a motion to compel a recusal. However, in this regard, the parties have few legal mechanisms. The personal data of the candidates are fully provided only to the chairman of the session, and the parties are given only the names and surnames of the potential jurors, which is not enough to fully identify a person.

In comparison, foreign countries have various regulations regarding compelling and uncompelling disqualifications. Some countries apply both or only one. For example, unconvincing recusal is not provided in England, Scotland, Northern Ireland, Austria, Norway. Both are allowed in Ireland where the parties have the right to 7 unreasonable recusals, and in Russia. In France and Belgium, the parties have only the possibility of using uncompelling recusal.

In America, the parties have the right to 5-12 unconvincing recusals, in Spain – 4, in Russia – 4, in Canada – 12, etc. As a rule, the parties have equal rights to uncompelling disqualifications, but there

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20 See. Section 5 of Article 236 of the Criminal Procedure Code of Georgia (in Georgian).

21 *Bachmeier U.L., Daly B.L., Gerald T.,* Comparative Analysis: Systems of Trial by Non-Professional Judges in the Member States of the Council of Europe, Tbilisi, 2013, 60 (in Georgian).

22 See, Section 10 of Article 223 of the Criminal Procedure Code of Georgia (in Georgian).

23 Ibid, Article 222, Part 2 (in Georgian).

are exceptions. For example, in France, the defense has more right to uncompelling recusal than the prosecution. In particular, the defense has the right to 5 unreasonable disqualifications, and the prosecution has 4. In England, unreasonable excuses were abolished, however, at the beginning of the 20th century, the defense had the right to 20 unreasonable excuses, then this number was reduced to 7, in 1982 – to three, and in 1988 the right to uncompelling recusal was abrogated as it delayed the process and hindered the effective administration of justice. The prosecution has never had the legal right to recusals, and today, the defense still can apply to the court with an appeal and demand a recusal of a candidate for serving on jury. If the jury is composed of other invited candidates, then the question of excluding the person will not be raised and he/she will not be included in the jury without motivation. But if he/she has to turn, then the judge reverts her/him and asks the accuser to present a reason for recusal. In such a case, recusal is motivated.[24]

Section 6 of Article 223 of the Criminal Procedure Code of Georgia provided for the inadmissibility of unjustified dismissal on grounds of discrimination, in particular, unjustified dismissal could not be used to discriminate against judicial candidates on the basis of race, skin color, language, gender, faith, worldview, political views or the membership of any association, ethnic, cultural and social affiliation, origin, family, property and rank status, place of residence, state of health, lifestyle, place of birth, age or any other characteristics.

This provision was not used in practice because it is very difficult to prove unjustified dismissal on the grounds of discrimination, so the legislator removed this part despite opposing international experts as the legislations of many foreign countries provide for similar regulations.

In the opinion of non-governmental organizations, for the purpose of banning all forms of discrimination, it is necessary to have an appropriate legal regulation, which will eliminate the possibility of a discriminatory approach in the judicial system... In general, the difficulty in proving the fact of discrimination cannot lead to the argument of refusing specific legal basis.[25]

In America, the exclusion of representatives of ethnic or religious minorities from the list of judicial candidates without compelling recusal means abusing the power by the prosecution.[26]

On the one hand, unjustified rejection seems to be an arbitrariness, since it provides an opportunity to exclude a candidate without any argumentation, on the principle of "having no special sympathy". But, on the other hand, there is a way for the party to dismiss an applicant without making the sensitive issues of his/her personal life so public (which would make him appear as a biased, undesirable candidate).

Despite the mentioned above, uncompelling delays the process. The OSCE and the Council of Europe gave the following recommendation to Georgia: to define the purpose of unjustified dismissal of jurors and make jurors immediately report when they have doubt about subjective or objective impartiality.[27]

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[24] See *Gutsenko K., Golovko L., Filimonov B.,* Criminal Law Process of Western States, translation, *Gogshelidze R. (ed.),* 2007, 175 (in Georgian).

[25] Jurors in criminal proceedings, Human Rights Network of Georgia, GNHR, Tb., 2016, 39 (in Georgian).

[26] Jury Institute (characteristics and problems), Caucasus International University, Tb, 2017, 44 (in Georgian).

[27] Joint Opinion on The Criminal Code of Georgia, OSCE/ODIHR and Council of Europe, Opinion-Nr.: CRIM – GEO/257/2014 [RJU], Warsaw/Strasbourg, 22 August 2014, §26

Impartiality of jurors may be affected by actual or potential acquaintance or family ties with a party or a witness, their affiliation or occupation, past involvement in litigation, an attitude of a juror toward the race of a judge or preconceived opinion about the accused.[28]

According to the definition of the European Court of Human Rights (the European Court), "in general, impartiality is defined quite logically, in a negative sense, as the absence of a preconceived opinion or bias."[29]

Regarding impartiality, the European Court in the case "Holm v. Sweden" stated -- "A connection between a juror and the accused or the prosecutor may be considered a violation of the provisions on an impartial trial."[30] In this case, the Strasbourg Court found that the relationship between the defendant and the five judges called their objectivity and impartiality in question, which in turn undermined the independence and impartiality of the Court. Accordingly, the European Court determined that there had been a violation of Article 6 (1) of the Convention.[31]

In accordance with Neil Widman, "arbitrary dismissal is still an important tool for recruiting an impartial jury", however, the author simultaneously focuses on the recommendation of the Washington Commission, following which the use of this right should be reduced as much as possible.[32]

The European Court also indicates the inconsistency of unjustified dismissal with the principle of random selection of jurors. Consequently, the abrogation of unjustified dismissal would facilitate the speeding up selecting jury without delay and make the process more optimal.

"Voir Dire" (jury selection process) is the process of interviewing, selecting, and removing potential jurors.

At the session of jury selection, when interviewing potential candidates, the parties try to achieve four main goals: 1. To obtain information from the jurors; 2. establish mutual understanding with them; 3. to introduce the basic legal issues to them; 4. To convince them to see the case in their (prosecutor/lawyer) point of view.[33]

The goal of parties is to find out the nature and approaches of each potential arbitrator. The past, experience and opinions of a candidate determine his/her worldview, how he/she can evaluate an evidence, argument and other issues related to the case. Specific skills and attitudes help the prosecutor/attorney to obtain such information from judicial candidates.[34]

The questions of the parties may refer to the personality of a candidate for serving on jury, personal qualities, authoritarianism, education, work activities, membership of various organizations,

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28 *McBride J.,* Ensuring that the Operation of Jury Triuals in Georgia Are Fully in Accordance with European Srandards, Tbilisi, 2017, 14-15, (in Georgian), see citation: Procedo Capital Corporation v. Norway, no. 3338/05, 24/09/2009; Hanif and Khan v. United Kingdom, no. 52999/08, 20/12/2011; Kristiansen v. Norway, no. 1176/10, 17/12/2015 (in Georgian).

29 See Piersack v. Belgium, Application no.8692/79, 1 October 1982, §30.

30 See Holm v. Sweden, Application no.14191/88, 25 November 1993.

31 Jurors in criminal proceedings, Human Rights Network of Georgia, Tb., 2016, 12, (in Georgian

32 Cf. *Widman N., Hans P.V.,* American Jury, Verdict, 2019, 120 (in Georgian).

33 Texbook of Judicial Skills, American Bar Association, Tbilisi, 2012, 58 (in Georgian).

34 Ibid, 67-68.

family status, children, the information about the case under consideration[35], religious/philosophical views, ideas on legal issues, direct and indirect experiences, areas of interest: books the candidate reads, movies the candidate watches. It is also necessary for the parties to receive information if the candidate is aware about drugs and firearms, if she/he trusts the police, the Public Prosecutor's office, if he/she thinks that because an accusation has been made, the accused is guilty. How he/she evaluates the silence of the accused, if he/she thinks that whether the accused was innocent, he would not have benefited from silence, if the candidate is a law abiding citizen, if he/she has bias towards the party, what information he has about the case, if he/she knows the victim, the accused, other participants in the process, whether he/she or their family members have ever been victims of a similar crime or other crime, regardless of such experience, if he/she can make an objective and fair decision, etc.

The candidate is obliged to give correct and comprehensive answers to the questions. The questions shall not interfere with the right to privacy, professional and/or commercial secrets, except when it is necessary for the interests of justice. A candidate of jury can be required the mentioned information if the part represents the justified request. If the disclosure of this information may cause irreparable damage to the interests of the candidate, he/she should provide the chairman of the session and the parties with the information.[36]

During the session of selection, the parties have to pay attention not only to the answers given by the candidates, but also to their "body language" that includes behaving, making movements and eye contact, showing favor, facial expressions which ensures to come to the conclusion. Gestures, manner of speaking, voice and tone provide an opportunity to find out the feelings and emotions of a potential juror. In general, it is believed that 60-65% of human relationships involve non-verbal communication. "There are two types of nonverbal indicators of jurors' feelings or a desire to avoid telling the truth: visual cues (what we see) and auditory cues (what we hear)."[37] Therefore, it is essential to make a constant observation of potential jurors both in the session hall or outside it, during the selection process or even breaks, before the selection, in the corridor, in the court building.

The parties must inform potential jurors of the important issues about the case that determine their legal position. Despite the fact that the chairman of the session provides the explanations about the applicable law, if the candidates have a wrong view of the legal provisions, the parties should also clarify the legal principles and find out whether the candidates understand the true essence of the legal provisions. It is vital for jurors to assess the information received at the trial correctly.

The questioning process indirectly aims at creating a favorable mood for the party and to have a certain influence on the views of the jury.

In the US experts, psychologists help differentiate between desirable and undesirable candidates. They observe behaviors of potential jurors not only answering questions but throughout the selection process. In the way of distinguishing between standard and non-standard behaviors of candidates, they advise the prosecutor/attorney about rejecting or selecting as a juror. Obviously, such

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35 In addition, it is important not to find out whether they know anything at all about the case under consideration, but to determine what they know about the given case, which will reveal their bias and the existence of a preconceived opinion (in Georgian).

36 See, Parts 4 and 5 of Article 223 of the Criminal Procedure Code of Georgia (in Georgian).

37 See, Textbook of Judicial Skills, American Bar Association, Tbilisi, 2012, 95-98, 109 (in Georgian).

assistance is associated with certain finances. The role of the judge is significant in selecting process because the judge makes the decision on excluding or self-excluding the jury candidate. According to Neil Widman, the court tries to establish more control over the trial process.[38] The parties often provide specific information to the judges in their own interpretation. At this time, the judge has to be vigilant to avoid making a mistake by jury.[39]

The judge, as a neutral person, is required to select an independent and impartial juror. These criteria are the starting point when considering the motions of the parties and making a decision on recusal.

The independence of the jury is assured by the fact that they are not accountable to anyone and have complete freedom to reach their verdict.

In addition, the juror should not have an interest in the outcome of the case, regardless of what factors may influence it (it will be family ties, friendships, work attitudes, simple acquaintances, etc.). "An impartiality of a person is related to his/her integrity to exclude the possibility of being bribed. The independence and honesty of each juror ensures an objective and fair trial."[40]

According to the procedural legislation, the chairman of the session appoints 12 selected candidates as the main members of jury and two as spare jurors. However, depending on the complexity of the case, it is possible to choose more substitute jurors.[41]

Under the original version of the Code of Procedure, an alternate juror attended the jury deliberations. Following the amendment of 2016, the substitute juror is not allowed to be present at the court hearing. He participates only in the court session. He takes part in deliberations and voting of the court only if he has replaced the juror. On this occasion, the court hearing starts from the beginning.

The deliberation of the jury is quite long and exhausting. The longest time period for rendering a verdict is 15 hours plus a reasonable time limit. Accordingly, based on the amendments alternate jurors do not waste time at the meeting as they do not engage in discussion and participate in voting, however, when an alternate juror is replaced in the deliberation room, the trial starts again that delays the long process of making a decision.

4. Conclusion

The jury court is unique because the case is discussed by representatives of the public, ordinary citizens who do not have legal education. The right of the accused to a fair trial can be challenged if the jury is interested in the case outcome. Therefore, it is especially important the procedure of selecting jury to be meticulously specific, relevant and complete for electing conscientious, objective and impartial jurors.

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38 *Widman N., Hans P. W.,* American Jury, Verdict, Tbilisi, 2019, 103 (in Georgian).

39 See Interview with judge Eka Areshidze, see Georgian Court Watch, (in Georgian) <https:// courtwatch.ge/articles/ekaareshidze/> [25.02.2023].

40 Commentary on the Criminal Procedure Code of Georgia, Authors' Collective, Tbilisi, 2015, 673 (in Georgian).

41 See Part 1 of Article 224 of the Criminal Procedure Code of Georgia, (in Georgian)

The paper highlighted the legal gaps which can delay the process of selecting. In addition, as mentioned in the special literature, "the parties win the case at the session of selection", which means that the parties have to inform the potential jurors about their own positions and the legislation confirming the positions and the main legal principles, get information from the candidates through surveys, and make the candidates feel positive about the prosecution or the defense and create the impression that the position of the party is reliable, sufficiently argued, correct and shareable. A high level of preparation of the parties ensures a correct formation of the jury. Ultimately, the judge has a responsibility for satisfying or denying the motions of compelling or uncompelling recusals and selecting objective and impartial jurors.

The recommendations highlighted in the paper are aimed at avoiding delays in formation of jury, conducting the selection process accurately and ensuring the election of fair and impartial jury.

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Irine Bokhashvili*

Practical Aspects of a Plea Agreement (bargaining)

In the modern world of negotiations, it is increasingly important to talk about the perfection and renewal of a plea agreement as a speedy justice in the criminal process.

The purpose of the presented work is to discuss and analyze the main essential features of a plea agreement based on the current legislation, existing domestic judicial practice, approaches of the European Court and the experience of foreign countries (mostly, the USA), which contribute to the enhancement of proposals for legislative or practical improvement due to the relevant conclusions.

The paper reviews such topical issues as: the guilty plea as the subject and basis of a plea agreement and the ratio of benefits gained in exchange for it; Participation of parties in a plea agreement and the analysis of their comparison with the concept of a party qualified to take part in the process; A motion to approve a plea agreement as the main formal basis for a mistrial; The place and role of the so-called "plea agreement standard" in the system of proof standards; The exceptional rule provided by Article 55 of the Criminal Code of Georgia and the issue regarding the independence of the judge during the selection/appointment of the type of punishment; Consideration of the motion for approval of a plea agreement and features of the appeal results (current issues of legislation and judicial practice).

As a conclusion, at the end of the paper, the author proposes the opinion on the main problematic aspects, and offers the following summary: at the current stage, it could not be appropriate to introduce changes about increasing the competence of the judge to determine the punishment in the first provisions of a plea agreement of the Criminal Procedure Code of Georgia; It is pertinent to develop the interpretation of the legal regulation and judicial practice in the direction of defining only beyond a reasonable doubt standard as a single standard for establishing a guilty verdict.; It is appropriate to refine the legal regulations and establish a new judicial practice of the prosecutor's appeal of the verdict on the approval of a plea agreement, and it is proposed to recommend that such a case should be considered as a revision of the verdict due to newly discovered circumstances and that the prosecutor exercise the mentioned competence on the basis of a motion.

Keywords: *Plea Agreement, guilty plea, fair trial, standard of proof, appeal.*

"Our values are in conflict and that in reconciling them we must compromise."

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1. Introduction

In the modern world of negotiations, it is increasingly important to talk about improving the plea bargaining institution as a form of speedy justice.

According to the statistical data of the Supreme Court of Georgia in 2021, from 16,649 cases received by the Court of First Instance, 14,955 cases were considered, and among them, 9, 147 were resolved through a plea agreement which comprises 64.4% of the cases.[2]

The aim of the paper is to discuss the essential features of the plea agreement based on the current legislation, judicial practice, approaches of the European Court and the experience of foreign countries (mostly, the USA), as a result, relevant conclusions will contribute to develop proposals for legislative or practical improvement.

2. Legislative Regulation of a Plea Agreement

Chapter XXI of the Criminal Procedure Code of Georgia is devoted to a plea agreement which has been reworked several times. As a result of the amendments of July 24, 2014, the model of a plea agreement was updated and established a new standard of proof – "standard of a plea agreement" which was determined by Article 3, Section 11[1] of the Criminal Procedure Code.[3]

2.1. The Subject and Basis of a Plea Agreement

A plea agreement is the basis (the only basis) to reach verdict without trial on the merits (CPC of Georgia, Article 209, Part 1). The formal basis for initiating a plea agreement can be, on the one hand, the written statement of the accused / convicted person made for the purpose of a plea bargain, and on the other hand, the written proposal of the prosecutor on setting up the agreement (CPC, article 210, part 11). A plea agreement may be motivated by several factors: the desire of a defendant to get less severe sentence; the confession of the accused, which is beyond plea bargaining (open, blind plea); the weakness in the case (in terms of evidence of the accusation and/or technical flaws admitted in the case); an intention to implement speedy justice and others.

According to the part one of Article 209 of the CPC of Georgia, the subject of a plea agreement is the formal accusation in the given criminal case and/or the punishment for this accusation. Before starting the process of a plea agreement, a written decision of the accusation must be issued by the prosecutor. Pre-trial detention of an accused cannot be the reason for initiating a plea agreement until the prosecutor does not make the decision on the confirmation of charges pursued by Article 169 of the CPC of Georgia. The accusation determined by the decision and the type and measure of

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1 Meir Dan-Cohen – Professor at University of California (Berkeley) School of Law. Article: *Dan-Cohen M.,* Article: Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, Vol. 97, Harv. L. Rev. 625, January, 1984.

2 Statistical information is available on the website of the Supreme Court of Georgia <2021w-statistic-3.pdf (supremecourt.ge)> [23.05.2023].

3 On making changes to the Criminal Procedure Code of Georgia, "Legislative Herald of Georgia" [23.05.2023].

punishment are the main subjects to set the agreement. Guilty plea is not considered as a matter of the agreement. The current model of a plea agreement considers guilty plea as an essential condition to make a plea agreement. Before the amendments of the July 24, 2014, CPC of Georgia recognized a form of a plea agreement in which a guilty plea could be as the subject to a plea agreement. For example, US legislation still provides the plea agreement on the basis of "nolo contendere" when the defendants do not contest the charges against them but agree to accept punishment (in contrast to the right to remain silent when the accused does not plead guilty).[4] In Georgian law, this form of a plea agreement was known as the agreement on sentence, in which the defendant "did not contradict the charge".[5] The agreement on the sentence made without guilty plea was the subject to harsh criticism. The main argument for its rejection was related to the right to a fair trial, which cannot be met with exact consistency by some institutions in the countries of common law, including a plea agreement and its individual forms.[6] The accused can identify some conditions to reach a plea agreement. If the prosecutor is open to compromise on charge and sentence bargaining, the accused may initiate to cooperate with the investigation or indemnify against damages (CPC, Article 209, Part 2). Finally, a plea agreement can be identified in the balance and proportionality of this mutual benefit. In the part of accusation or punishment the concession of the prosecutor favors the accused while the concession of the accused in the part of cooperation with the investigation or indemnification damages is in favor of the prosecutor.

2.2. The Participants in the Plea Agreement

A plea agreement as a judgment rendered without a hearing on the merits, first of all, is the right to the accused. Then, a plea agreement might be considered as a form of speedy justice imposed to unload the judicial system, provided to the prosecutor as an authority and ultimately approved by the court.

The concept of parties to a plea agreement is different from the concept of parties in a criminal case. The parties to the plea agreement are the accused[7] and the superior prosecutor of the given

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4 Federal Rules of Criminal Procedure, Title IV: Arraignment and Preparation for Trial, Rule 11, <https://www.law.cornell.edu/rules/frcrmp/rule_11> [23.05.2023].

5 See Sections 3, 4 of Article 209 of the Criminal Procedure Code (before the amendment of July 24, 2014) <Criminal Procedural Code of Georgia | "Legislative Herald of Georgia" (matsne.gov.ge)> [23.05.2023].

6 On the globalization of plea bargaining and the influence of its American model on civil law countries, see, for example: *Langer M.*, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, Harvard International Law Journal, 45(1), 2004. On the problems of the incompatibility of the plea agreement with the provisions of the fair trial and the principles of the competitive process, see also: *Laliashvili T.,* Problems of the Plea Agreement in Relation to the Main Principles of the Criminal Process, In the textbook: The Impact of European and International Law on Georgian Criminal Procedural Law, *Tumanishvili G., Jishkariani B., Shrami E. (eds.),* Pubishing House „Meridiani", Tbilisi, 2019, 363-379, (in Georgian).

7 In the case when a plea agreement is formed in a higher instance, since the subject of the agreement still remains the charge and/or punishment, the person should be considered as an accused. Otherwise, it is incompatible for the prosecutor to agree to charge the person convicted or acquitted by the court's verdict.

criminal case. They, applying a specific agreement, determine the scope and content of each issue within their own responsibilities and authorities, and enter into a bargain on charges or punishments.

A special case, when the General Prosecutor of Georgia or his deputy appears as a party to the agreement, is provided by Article 210, Part 13 of the CPC of Georgia. One of the conditions to make plea agreement is fully or partly release of an accused person from the civil liability.

Part 4 of Article 210 of the CPC imperatively requires the direct participation[8] of a lawyer in the process of negotiating a plea agreement for purpose of ensuring the fairness of the agreement. Apart from this general goal, the lawyer's participation has a very practical meaning: the prosecutor has less to explain the essence of a plea agreement and the rights to the accused because the accused receives the information from the lawyer. When making a plea agreement, the accused is more aware of various legal aspects that usually gets the process of negotiation easier. Taking into account the factual circumstances of the case, the accused, who has already been informed by the lawyer within the legal framework, can set prospective goals, therefore, the terms of the agreement from his side are real.

On some occasions, the legal representative of the accused becomes a participant in making a plea agreement. According to parts 11, 12 of Article 3 of the Code of Juvenile Justice of Georgia[9], the interests of the juvenile defendant are represented by his legal representative and signing the plea agreement with the juvenile defendant, the legal representative has to take part in the process, which does not exclude the participation of the lawyer as well (CPC, Article 210, Part 6).[10]

Although a plea agreement is finally approved by the court, the court is not allowed to be a party or participant of a plea agreement.[11]

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8 There are known several decisions of the Supreme Court of the USA which played an important role in making a plea agreement to provide a guarantee for the accused, the right to a lawyer, by the 6th amendment of the US Constitution. First of all, this is the case of *Gideon v. Wainwright*, (1963) 372 U.S. 335. ასევე, გამოყოფენ საქმეებს *Padilla v. Kentucky* (2010) 559 U.S. 356, *Missouri v. Galin E. Frye* (2012) 566 U.S. 134, *Lafter v. Cooper* (2012) 566 U.S. 156, which are known by the "plea agreement trilogy". See, e.g., *Roberts J.*, Effective Plea Bargaining Councel, The Yale Law Journal, 2013, 2650-2674.

9 Law of Georgia "Juvenile Justice Code", Article 3, 12/06/2015.

10 Georgian legal literature offers the opinion that the institution of a plea agreement harms the best interests of juveniles and it should not be appropriate to be applied. We may talk about perfecting and protecting all possible guarantees of scrupulous protection of the best interests when signing a plea agreement with a juvenile accused, but he/she ought not to be limited by a plea agreement, a "bonus" right to speedy justice, allowed in criminal proceedings which can be considered in the interest of a juvenile (For example, see Articles 11, 55 of the Juvenile Justice Code (adopted 12 June 2015). See: *Tskitishvili T.,* Separate Aspects of Regulating the Issues of Substantive Criminal Law Issues of Juvenile Justice, TSU Journal of Law, 2019, #1, 190-221 (in Georgian); On the shortcomings in signing a plea agreement with a juvenile see Coalition for Independent and Transparent Justice. The report of criminal justice working group, the use of plea agreements in Georgia, 2013, 19-21 (in Georgian) <http://coalition.ge/files/coalition_criminal_law_wg_ research_ geo_9th_forum..pdf> [23.05.2023]. It is interesting to see the current challenges in a plea bargaining for juveniles in the USA, which are related to the decision of the juvenile's negligence, e.g. Research conducted as a part of one of the dissertations, during which the author uses a large-scale interviewing method with practicing lawyers and manifests the real situation in practice: Dissertation: *Fountain E.,* Adolescent Plea Bargains: Developmental and Contextual Influences of Plea Bargain Decision Making, Washington, D.C., Georgetown University, 2017.

11 This nature of a plea agreement is, to a large extent, the merit of adversariarity, and the peculiar, different distribution of roles and competences among the participants will be clearly revealed in the adversarial and

The authority of the judge to approve a plea agreement with a guilty verdict derives from the essence of a plea agreement, which always results in being the defendant found guilty and convicted. Administering justice and finding a person guilty in every form is the inviolable competence of ordinary courts.[12]

2.3. Motion to Approve a Plea Agreement

While making a plea agreement, the motion to approve the plea agreement is an interim step. The first part of Article 211 of the CPC defines the content of the written motion for approval of the plea agreement. a) According to the point "C", the first part of Article 211 of the CPC, the motion must include sufficient evidences to reach verdict without considering the merits of the case provided by Article 3, Section 11^1 of the CPC. In practice, the mentioned norm is called the "standard of plea agreement", which by the amendments of July 24, 2014 was added to the three-step system of proof in adversarial procedure: probable cause – high degree of probability – beyond a reasonable doubt. It took a place between a probable cause and a high degree of probability.[13] The standard defined by Article 3, Section 11^1 of the CPC is used not only when the prosecutor submits a motion to approve the plea agreement, but it simultaneously creates the benchmark of guilty verdict reached without trial in merits (CPC Article 213, Part 4), so its place in the hierarchical structure of standards can only be proportionate to the standard of beyond a reasonable doubt. Otherwise, the issue might lead to the recognition of two ways to establish guilty verdict, different from each other by degree of proof which is completely unacceptable following the uniform standard of guilty verdict.[14] In fact, the standard of a

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inquisitorial criminal process. However, in the modern period, there is a tendency to integrate criminal justice processes of a different nature through their comparative legal research, borrowing/adapting individual institutions from each other. See: *Turner J.L.,* Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons, Plea Bargaining Regulation: The Next Criminal Procedure Frontier Symposium, William and Mary Law Review*,* Vol. 57, Issue 4, 2016, 1549-1596.

12 For examples from different countries about the role of the judge in a plea bargaining, see, the symposium materials: *Brook C.A., Fiannaca B., Harvey D., Marcus P., McEwan J., Renee Pomerance*, A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States, Wm. & Mary L. Rev., Vol. 57, 2016, 1147-1224. For the relatively early and modern English experience of the nature of court involvement in a plea bargaining (the problem of informal plea agreements), see, e.g., *Thomas Ph.A.,* Plea Bargaining in England, 69 J. Crim. L. & Criminology, 1978, 170-178; *Alge D.,* Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?", Vo. 19, No.1, 2013, 1-18.

13 Regarding the inconsistency of the standard of probable cause mentioned in the motion regarding the plea agreement before making the changes, see, for example: Transparency International – Georgia, Report: Plea Bargaining in Georgia, 2010, 36 (in Georgian) <Plea Bargaining in Georgia – Negotiated Justice – GEO (2).pdf (transparency.ge)> [23.05.2023].

14 After implementing the mentioned changes, the judicial practice knows different approaches to the application of the standard of proof in the judgment on the approval of a plea agreement. For example, by the verdict of Mtskheta District Court of June 27, 2016, the plea agreement was approved in criminal case #1/156-16. In the descriptive-motivational part of the judgment, when explaining the plea agreement and the essence of the charge, it is mentioned in relation to the evidence that: "The evidence and other facts in the case beyond reasonable doubt confirm the commission of the accused crime by A.Z-Vi and G.T-Shvili." In another case, for example, in the judgment of the Bolnisi District Court of April 15, 2020 (case #N

plea agreement is of the same quality as beyond a reasonable doubt that is manifested by a comparative analysis: both standards serve to establish guilty verdict; both are aimed at the objective person; both are based on a body of evidence; both have to convince the court of being the accused guilty. The difference lies in the essential preconditions provided by the standard of a plea agreement: the accused admits the crime; he/she does not make the evidences presented by the prosecution disputable; the accused refuses the right that his/her case can be tried on the merits. Based on these prerequisites solving the issue of proving the guilt of the charged person provides the "author effect" of procedural economy, which the plea agreement can offer and not the trial on the meritsof the case because of a long process of examining the evidence.[15]

In accordance with the above reasoning, it is not appropriate to consider the standard of a plea agreement between a probable cause and a high degree of probability because on the ground of a comparative analysis, it has different content and can be discussed as the standard of beyond a reasonable doubt. Some suppose that the main reason of considering the standard of a plea agreement between a probable cause and a high degree of probability is that a plea agreement is often discussed on the investigational stage when the case is not moved to the court yet, where the case will step-by-step move toward the higher standards of proof. But applying the standard of proof is determined by the content, not the stage of consideration of the case.

b) According to point "F", Part one, Article 211 of CPC of Georgia, , the type and size of the punishment requested by the prosecutor should be mentioned in the motion. Despite the fact that a plea agreement is a procedural institution of criminal law, it has an influence on imposing a punishment. As the parties participating in a negotiating process of a plea agreement, the accused agrees to the prosecutor on the punishment (Part 1 of Article 209 of the CPC). Current legal regulations, as well as judicial practice, recognize a uniform approach for the determination of the type of the punishment in the same form or following the changes in accordance with the procedure by Parts 6-8 of Article 213 of the CPC of Georgia. The court imposes a punishment as a constituent part

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1/110-20), the court notes: "Based on the case materials and the guilty plea of the defendant, the court concludes that the accusation is substantiated (provided by the Criminal Procedure Code of Georgia the evidences obtained in accordance with the law, sufficient to render a verdict without consideration of the merits of the case provided for in Section 11^1 of Article 3, which would convince an objective person that the accused committed a crime, taking into account that the accused pleads guilty, does not dispute the evidences presented by the prosecution and waives the right that his/her case can be tried on the merits.."

15 Reasoning is relevant in the legal comparison of standards. In practice, they are not detected with such strict accuracy and we can talk about the convergence of standards. For example, during the substantive hearing of the case, there might be a case where the accused pleads guilty and/or does not challenge the evidence of the accusation (uncontested proceeding). Just as the plea agreement, which is approved at the late stage of the case, at the end of the substantive hearing or during the proceedings in a higher instance (late guilty pleas), loses its main feature of procedural economy. For example, by the judgment of the Supreme Court of Georgia on November 7, 2018, the plea agreement was approved (case #453AP-18), where the court notes that in addition to the testimony of the witnesses, the charges presented against the convicted person are unequivocally confirmed by the combination of the evidence, which was assigned pre-judicial value following Clause "D" of Article 73. On the positive sides of signing a plea agreement at the early stage (EGP – early guilty pleas), See also: 2018 Report of the Chief Prosecutor of Georgia, 14 (in Georgian) <Multimedia/Files/Multimedia/Files/report/Chief Prosecutor's report 6.02.2018.pdf (pc.gov.ge)> [23.05.2023].

of administrating justice.[16] It is not reasonable to reduce the power of the court to determine the type of the punishment. Today, the court approves the plea agreement and the type and size of the punishment determined by the prosecutor.[17] On the other hand, if a punishment is removed from the subject of the plea agreement, but the guilty plearemains as the main pre-condition for the plea agreement, can the interest of the accused be breached? Can the balance between making compromise and getting benefit, provided in the plea agreement be violated if the accused pleads guilty (compromise), but in return, will not have a guarantee of imposing specific punishment (benefit)? It is possible to find an intermediate option. For example, within the framework of a plea agreement, the prosecutor can make a promise to the accused of providing a motion (recommendation) to the court on imposing a specific type of punishment.[18] If the motion to approve the plea agreement is already a motion including requiring, position, recommendation and support, applying a type of punishment is more a request than an imperative stipulation, as if the problem does not arise anymore. However, the non-binding nature of this motion is revealed by the decision made within the independence of the court (Article 212, Part 5 of the CPC of Georgia): on the full satisfaction of the motion (approval of the plea agreement) or rejection (refusal to approve the plea agreement). Regarding the mentioned, it is not considered to take a different approach of the court (partial approval of the plea agreement or approval with changed conditions initiated by the court) to the individual issues of the motion. The court either approves the motion in the same form as it was presented (taking into account the 6th – 8th parts of Article 213 of the CPC) or refuses to approve it. The main explanation of the mentioned trait is related to the basis of the motion – the agreement of the parties.[19] One of the rational solutions

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16 *Vardzelashvili I.,* Some Issues of Sentencing (Analysis of Judicial Practice), SEU, Tbilisi, 2020, 13, (in Georgian).

17 The opinion that in this case the function of the court is weakened and the position of the prosecutor is strong, see: *Turava M.,* Criminal Law, Overview of the General part, 9th ed., Meridiani, Tbilisi, 2013, 362. For reasoning in the same developed direction, see: International Transparency Georgia, Research: Plea Bargaining in Georgia, 2010, 15, 21 (in Georgian).

18 For example, while making a plea agreement the form of recommendation to the court does not limit it when imposing a sentence, and it is known by Rule 11 (c)(1)(B) of the US Federal Rules of Criminal Procedure <Rule 11. Pleas | 2021 Federal Rules of Criminal Procedure> [23.05.2023]. For factors related to sentencing in plea agreements, see: *Wolfson R. (ed.),* American Bar Association Rule of Law Initiative (ABA/ROLI), A Guide for Lawyers in a Plea Agreement and Negotiation Skills, Author Group, Meridian, Tbilisi, 2013, 128-133 (in Georgian).

19 It is essential to take into account the fact that during the negotiation of a plea agreement, the prosecutor knows exactly the volume and content of the "real" charge and considers the public interest from the point of view of the original, complete charge. He/she can proportionally determine the "fee" of the compromise in the part of the accusation in relation to the punishment, which is required in the plea agreement. However, the importance of judicial control over the terms of the agreement reached between the parties (especially the sentence) cannot be denied. For the example of Canada, on the prosecutor's ethical obligations during plea bargaining (including the proportionality of the charge and sentence), see: *Paciocco P.*, Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining, *McGill Law Journal*, 2018 CanLIIDocs 324, 45.
The experience of Australia is interesting, where a plea agreement is not formally allowed, however, in case of a plea agreement with the prosecutor, a concessional system of sentencing by the court is in effect. The determining factor here is how early the accused makes a confession (fast-track guilty plea), according to which the percentage of the punishment is reduced: *Bartels L., Wren E*., "Guilty Your Honor": Recent

to the disputed issue can lie in the revision of Article 55 of the Criminal Code of Georgia. The reasoning developed in the constitutional lawsuit #1556 (p. 15)[20] of December 21, 2020, which refers to the constitutionality of Article 55 of the Criminal Code of Georgia, is partially shared. According to Article 55 of the Criminal Code of Georgia: "The court can impose a sentence below the lower limit of the sentence or a slighter type of the sentence according to the Code, if a plea agreement has been concluded between the parties."[21] Such a record limits the court to impose a sentence, and at the same time, approving the type of the sentence requested by the prosecutor in the motion to accept the plea agreement is consistent with executing judgment by the court without considering the merits of the case as an action based on the agreement. The argument, made in the constitutional claim (see p.15 of the claim) about dependence of the court on a good will of the prosecutor to enter into plea agreement with the accused, cannot be shared. It is essential to interpret correctly the basis of the exceptional rule provided by Article 55 of the Criminal Code. This is not a "good will" of the prosecutor, it is understood as a "compromise" (concession -to get one in return) determined by existing conditions of making plea agreement, considering the public interest CPC, Article 16, Part 3 of Article 210). If Article 55 of the Criminal Code is changed in such a way that the authority of the judge will be entitled with the free universal competence outside the plea agreement to impose a sentence less than the lowest limit of punishment or slighter type of punishment, this will provide approaching uniform standars for guilty verdict while trial on the merits or without it. Simultaneously, the court will be allowed to deal with the problems of ensuring the independence of determining the sentence in a criminal case. As for the type of the final punishment when approving the plea agreement, the judicial practice is not expected to change much even if the court has the right to use the benefits provided by Article 55 of the riminal Code without limitation. Considering a motion to approve a plea agreement, the judge is guided by the position of the prosecutor on the type of the punishment specified in the agreement; If the judge considers that the type of the punishment requested by the prosecutor is too harsh and should be changed, according to the 6-8 parts of Article 213 of the CPC of Georgia, he/she can ask the prosecutor to change the condition of the plea agreement in the part of the punishment and get it slighter; if the prosecutor does not change the condition, the court using its (already general) authority, following Article 55 of the Criminal Code, will change the type of the punishment or refuse to approve the plea agreement. Judicial practice has not got frequent cases when the judge asks the prosecutor to change the condition of the plea agreement[22], thus, with this combination, the prosecutor is more careful about defining a type of the punishment. If the judge still has to refer to his authority and assign a type of a slighter sentence compared to the one requested by the prosecutor, the judge, in turn will be obliged to justify the decision in the part of changing the sentence. The defendant and his

Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on it's Operation, Adelaide Law Review, 2014, 361-384.

20 Constitutional Lawsuit #1556, 21 December 2020. According to the protocol records of the Constitutional Court of Georgia dated April 23, 2021, the mentioned constitutional claim was merged with the constitutional claim #1458 and accepted for making a review. See: Protocol of the Constitutional Court of Georgia on April 23, 2021.

21 Criminal Code of Georgia, Article 55, Legislative Herald of Georgia, 22/07/1999.

22 Regarding the lack of initiation by the court to change the terms of the agreement, see also: *Giorgadze G. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 642, 645 (in Georgian).

lawyer sign the plea agreement, support the terms of the plea, including the sentence, and there is no reason to file a motion and ask the court to change the terms requested by the prosecutor every time. Based on these conditions, there is an expectation that the amendment of Article 55 of the Criminal Code will not lead to a drastic change in the judicial practice of sentencing upon an approval of a plea agreement. As for the interests of the parties, if the court approves the plea agreement with a modified sentence, the accused receives more benefits. However, there might arise a question about the prosecutor's right to appeal the verdict of the plea agreement in the part of the punishment, which is not recognized by the CPC of Georgia (Article 215 of CPC).

2.4. Consideration of a Motion to Approve a Plea Agreement

The main purpose of the court is revealed at the stage of making plea agreement, when the court begins to consider the motion for approval of the plea agreement (plea discussion). This process can be divided into two directions. On the one hand, the court excludes procedural errors and creates the belief that the agreement is based on the true will of the accused (Article 212 of the CPC of Georgia), on the other hand, the court verifies the affirmative part of the agreement and the legitimacy of the sentence (Part 3 of Article 213 of the CPC of Georgia). Part 2 of Article 212 of the CPC of Georgia offers circumstances that contribute the court to find out if the accused is aware of the essence and consequences of the plea agreement and has made the decision considering free will. Based on the above, the plea agreement is justified as a form of case review when the main democratic principles of justice are rejected: the substantive review of the case, the examination of evidences and the right to refuse self-incrimination.[23] The norm is constructed in such a way that the element of voluntariness appears only in the recognition part (Article 212, Part 2, Clause "b" of the CPC). Although the analysis of the norms allows to provide counterarguments, there is no direct provision that the court is obliged to make out if the accused has voluntarily waived his right to a substantive hearing and examination of the evidence. Especially, the standard stipulated by Article 3, Section 11^1 of the CPC distinguishes three equally important circumstances: the accused admits the crime, does not dispute the evidence presented by the prosecution and refuses the right to consider the merits of his case by the court. Despite the fact that in accordance to Article 212, Part 2, Clause "I" of the CPC, before approving plea agreement the court is obliged to make certain that the accused is aware of his rights, including the right to have his case heard on the merits ("I.C" c/point), does not fully emphasize the main duty of the court to make sure that the accused voluntarily refuses to apply his rights. [24]

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[23] In the USA, within a plea agreement, the defendant's surrender of those essential rights, which are considered an important acquisition of the US Constitution (VI Amendment), is considered the primary and essential drawback of the plea agreement. Therefore, the court focuses on establishing to get the accused make the decision under conditions of free choice of action to receive an appropriate legal assistance. See, e.g.: *Redlich A.D., Summers A.*, Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry, Psychology Public Policy and Law, 18(4), 2011; Coercive Plea Bargaining, Policy Forum, Cato Institute, 2018, October <https://www.cato.org/events/coercive-plea-bargaining> [23.05.2023]; Among the decisions of the European Court, it is interesting, for example: Scopolla v. Italy (No.2) [2009] ECHR, 135 <SCOPPOLA v. ITALY (No. 2) (coe.int)>.

[24] However, the skeptical attitude of a part of the (legal) community towards a plea agreement as a formal process may be due to certain circumstances. The same US jurisprudence and legal practice, along with the

According to Article 213, Part 31 of the CPC of Georgia, the court should not approve a plea agreement if it cannot receive convincing answers[25] from the accused to the questions provided by Article 212, Part 2 of the CPC. The answers must be specific, declared separately and independently.[26]

According to Article 45, Clause "F" of the CPC, it is mandatory for the accused to have a lawyer, if he is negotiated on making plea agreement. The mentioned rule has been reinforced many times in the chapter of the plea agreement (CPC, Part 4 of Article 210; Parts 2, 3, 6 of Article 211, etc.). Provided Article 212, Part 2, Clause D of the CPC the court is obliged to make sure that the accused had the opportunity to receive qualified legal assistance. This record cannot be understood as a mere opportunity which the accused was free to use or refuse. It is implied that the accused could receive qualified legal assistance throughout the process of the plea agreement. Qualified legal assistance means assuring the court (by reviewing the case materials, explanations of the accused, hearing the answers and observing the actions by a lawyer) that the lawyer acted considering the best interests of the accused.[27]

2.5. Acceptance or Rejection of a Plea Agreement and to Appeal

As a result of reviewing the motion to approve a plea agreement, the court reaches a guilty verdict on the approval of the plea agreement or refuses to approve the plea agreement (Article 213 of the CPC).

a) Defining guilty verdict on the approval of a plea agreement and the procedure for appealing it are related to some controversial issues which lead to inconsistent judicial practice. The section 4 of Article 213 of the CPC determines the subject and scope of the evidence to reach guilty verdict without considering the merits of the case. According to this norm, the court is authorized to approve a plea agreement and find the person guilty if: a) the court has the evidences provided by Article 3, Section 11^1 of the CPC; b) the accused answered convincingly to the questions provided by Article 212, Part 2 of the CPC; c) the finally requested punishment is legal and fair. And, the process of inspecting substantiation of allegation and legality of the punishment provided by the section 3 of Article 213 of the CPC, serves the same purpose as the examination of evidences by the parties, making an introductory and closing statements of hearing.

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inevitable need for plea bargaining, recognize the existence of the "ugly practice of coercion" of a plea bargaining, which has become routine in the US judicial system: *Neily C.*, Overcriminalization and Plea Bargaining Make Criminal Justice Like Shooting Fish in a Barrel, Cato Unbound, A Journal of Debate, July, 2020.

25 Regarding the verification of a defendant's voluntary consent to a plea agreement after getting aware of the legal consequences, see, for example: Judgments issued by the European Court of Human Rights against Georgia (2005-2019), Collection, Georgian Bar Association, 65-67 <Final – ECtHR.pdf (gba .ge)> [23.05.2023].

26 *Giorgadze G. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 642, (in Georgian).

27 Regarding the issue it is interesting: *Chomakhashvili K.,* Legal Aid in Plea Bargaining. Overview of Georgian Legislation and Practice, UNDP, 2018; *Tinsley A.*, Criminal Legal Aid and Plea-Bargaining (Overview of International Standards and Recommendations for Georgian Legal Aid), UNDP, 2017, 11-17.

In both cases, the court creates a firm attitude towards its decision which is known as internal belief and considered to be a decision beyond a reasonable doubt in the competitive process.[28]

What is the attitude of the European Court of Human Rights to the institution of a plea agreement which includes declaring a person guilty without making substantive review! In general, the European Court of Human Rights does not consider the plea agreement as a process completely incompatible with the idea of a fair trial. This has been emphasized many times in the decisions of the European Court, including several cases against Georgia: Kadagishvili v. Georgia;[29] Natsvlishvili and Togonidze against Georgia.[30]

Article 215 of the CPC of Georgia defines the procedure for appealing the judgment on the approval of a plea agreement. Guilty verdict provided in the plea agreement is reached as a result of the strategic interaction[31] of the parties and it is a kind of agreed version of the verdict. "Agreed verdict" differs from a standard judgment as the interests of the opposing parties are usually unequally satisfied. For that reason, a rule to appeal the verdict of a plea agreement (subject, basis, term) requires a different arrangement from the general procedure. For example, according to the first part of Article 292 of the CPC, the verdict of the Court of First Instance can be appealed if the appellant considers it illegal and/or unjust. In contrast to the mentioned rule, Article 215 of the CPC defines different reasons for the subjects of appealing (convicted person, prosecutor) which are relevant to their interests.[32] Following the part 3 of Article 215 of the CPC, the convicted person has the right to file a complaint to a higher instance about quashing the decision on approval of a plea agreement, if 1) a plea agreement was signed under duress and threat or by deception; [33] 2) the right to defense was limited 3) there were insufficient evidences 4) The court ignored the essential requirements of the

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28 Regarding the issue, see. for example: *Fisher T.,* The Boundaries of Plea Bargaining: Negotiating the Standard of Proof, Vol. 97, Issue 4, J. Crim. L. & Criminology 943, 2006-2007; *Tsur Y.,* Bounding Reasonable Doubt: Implications for Plea Bargaining, The Hebrew University of Jerusalem, September, 2016.

29 Kadagishvili v. Georgia) [2020] <kadagishvili-saqartvelos-winaagmdeg.pdf (supremecourt.ge)> [23.05.2023].

30 For a detailed analysis of the mentioned case of the institute of a plea agreement, see: *Okhanashvili A., Surmava B.,* Georgian Model of a Plea Agreement in Light of the Secision of the European Court of Human Rights: the case of Natsvlishvili and Togonidze against Georgia #9043/05, German-Georgian Journal of Criminal Law, 2021, #1 (in Georgian).

31 On a plea bargaining as a strategic interaction between the prosecutor and the accused, see: *Mezzetti C., Baker S.,* Prosecutorial Resources, Plea Bargaining and the Decision to Go to Trial, Journal of Law Economics and Organization, 2001, Vol.17. No.1.

32 By refusing the right to a substantive review during the plea agreement, the accused loses the right to standard appeal (appeal, cassation) of the verdict established as a result of the substantive review, which does not contradict the fair trial guaranteed by Article 6 of the European Convention and Article 2 of the 7th Protocol With the right to appeal a criminal case guaranteed by Article. See, for example: Natsvlishvili and Togonidze v. Georgia, [2014], (in Georgian), (C) <NATSVLISHVILI AND TOGONIDZE v. GEORGIA (coe.int)> [23.05.2023].

33 Regarding the issue, it is interesting, for example, the judgment of the Chamber for criminal cases of the Tbilisi Court of Appeals of June 25, 2013, case # 1/ბ155-13.

law.[34] And, the prosecutor is entitled to request the annulment of the verdict only if the convicted person has violated the terms of the plea agreement (Part 4 of Article 215 of the CPC). Article 215 of the CPC does not offer a reservation about one-off nature of the appeal. In practice, the norm regarding the appeal of the judgment to the higher instance is interpreted differently, especially when a plea agreement is brought to a cassation trial.[35] According to part 3 of Article 307 of the CPC, the judgment of the Court of Cassation is final and cannot be appealed. As a rule, the propositions of a plea agreement are used to discuss it (CPC, Part 2 of Article 219; Part 3 of Article 230; Part 1 of Article 197, Clause "E"). Based on Article 297 of the CPC, to consider an appeal it is essential to apply to the norms of First Instance proceedings and the record of Article 230, Part 3, on the issue of approving a plea agreement during the consideration of an appeal. Article 306 of the CPC does not cover the record that allows to consider a plea agreement and use the propositions during the review of the cassation appeal. Due to the fact that the cassation proceedings do not directly contradict the propositions of a plea agreement (the plea agreement does not contain an element of substantive review, the court of cassation has the competence to make a decision in the form of a verdict, according to Article 250, Part 2 of the CPC, the prosecutor can reject the charge or a part of the charge or replace it with a slighter charge) it is permited to consider the issue of a plea agreement during cassation proceedings, and judicial practice provides the examples of this. The issue of how the propositions of Article 215 of the CPC should be applied when considering the issue of a plea agreement in the cassation proceedings leads to different interpretations, since the cassation proceeding is already the highest, final instance and the decision cannot be appealed. The rule of appealing provided in Article 215 of the CPC already furnishes the right to appeal the decision, including the decision obtained as a result of considering a plea agreement (judgment on refusal; judgment on approval), and it is appropriate even it is of one-off nature. Discussing a plea agreement during the cassation proceeding it is possible to talk only about the final decision, which cannot be appealed. In a possible case,[36] when the plea agreement is approved during the cassation proceedings,

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34 On this issue, see the US experience in appealing plea bargains in federal cases: *Ellis A., Bussert T.,* Stemming the Tide of Postconviction Waivers, Published in Criminal Justice, Vol. 25, Number 1, 2010, American Bar Association.

35 For example, by the judgment of the Supreme Court of Georgia on November 29, 2018, the plea agreement was approved, and the motion of the Kutaisi Court of Appeal of October 1, 2018 on the refusal to approve the plea agreement was canceled. In the resolution part of the verdict, the court was guided by Articles 301-307 and 209-215 of the CPC, stating that: "The verdict is final and cannot be appealed, except for the cases provided for by law." In other cases, the Supreme Court of Georgia by the decision of December 10, 2018 (case #416AP-18), the cassation appeal of the prosecutor was rejected and the decision of the Tbilisi Court of Appeal of June 21, 2018 remained unchanged. According to the resolution part of the ruling, the cassation chamber was guided by Articles 301, 307, 209-215 of the CPC which refused to satisfy the cassation appeal and indicated that the verdict is final and not subject to appeal. See: Collection of decisions of the Supreme Court of Georgia, Criminal proceedings, 2018, 43-58, 58-64 <http://old.supremecourt.ge/files/upload-file/pdf/2018w-sisxli-krebuli-10-12.pdf> [23.05.2023].

36 The mentioned case can be considered theoretically rather than in a common way in practice. As a rule, the statistics of approval of a plea agreement in cassation proceedings are not high, it is exceptional and has the form of a "guaranteed verdict", where the risk of violating the condition of the agreement is lower than the

the verdict is final and cannot be appealed, and the convicted person avoids fulfilling the conditions, the prosecutor can file not a complaint, but a motion to the appellate court as a newly discovered circumstance. Article 215 of the CPC creates such a basis. In contrast to the rule of appealing the verdict by the convicted person, when he has the right to appeal to the superior court within 15 days after the verdict is reached (Part 3 of Article 215 of the CPC), the prosecutor has the right to appeal to the court within 1 month after detecting the violation (and not after the verdict is issued), which confirms that breaching the plea agreement by the accused has the nature of the newly discovered circumstances.

b) Parts 5, 6^1 and 7 of Article 213 of the CPC provide for cases when the court refuses to approve a plea agreement within the framework of a motion and the case is continued from the relevant stage (where the motion was considered). As a result of the amendment of July 24, 2014, the party was allowed to appeal the refusal of the court to approve a plea agreement. According to part 2 of Article 215 of the CPC, the complaint must be submitted within 15 days and it will be considered by the higher instance court. In contrast to parts 5 and 6^1 of Article 213, the case provided by part 7 of the same article, when the court refuses to approve on the grounds that the accused has used his right and refused the plea agreement (withdraw the plea) without a substantive review, before passing the verdict, it is logical that it should no longer give rise to the right to appeal the decision. The legislation does not provide reasons and conditions when the accused may refuse a plea agreement. On the contrary, the accused has the right to refuse the plea agreement at any time before sentencing without the consent of the lawyer and he/she does not have a legal obligation to submit the refusal in the written form.[37] Consequently, the refusal to approve the plea agreement will result in passing a motion (unconditional, automatic) which cannot be subject to the appeal provided by Article 215, Part 2 of the CPC. In other cases, when the party submits an appeal against the refusal to approve the plea agreement, the court of higher instance can leave the appealing motion or approve the agreement which is reflected in the judgment. In the latter case, another unusual feature of a plea agreement might be revealed, when the judgment is made for the first time by the high instance without making a decision by the court of the first instance.

3. Conclusion

1) It is not appropriate to make an amendment in the Criminal Procedure Code of Georgia considering the competence of the court, against the will of the prosecutor, change the terms of a plea

minimum. Regarding the issue, see Activity Report of the Prosecutor's Office of Georgia 2021, 21, (in Georgian), <Microsoft Word – ad7e-f55d-3189-23ba.docx (pog.gov.ge)> [23.05.2023].

[37] Such formulation is more similar to the right of the accused to remain silent than to the right to refuse a plea agreement. It turns out that the accused rejects the confession made within the framework of the plea agreement, which does not require any justification or consent from anyone (including the lawyer). This is confirmed by the record of Article 214 of the CPC, according to which, if the accused refuses the plea agreement, it is not allowed to use his testimony against him. And, the rejection of the plea agreement is more reflected in the procedure of appeal by the convicted person against the verdict on the approval of the plea agreement provided by Article 215, Part 3 of the CPC when the appeal is submitted for making the verdict annulled.

agreement and reduce the type of the requested punishment. Except for that way of making changes to Article 55 of the Criminal Code of Georgia when the court is given the right to use the benefits provided by the mentioned Article without limitation (universal and not only in plea agreements);

2. Determining a guilty verdict to approve a plea agreement, the court is guided by the uniform standard of conviction that is beyond a reasonable doubt. The standard provided by Article 3 Section 11^1 of the Criminal Procedure Code is the guide of the prosecutor to draw up a motion for an approval of a plea agreement. Considering the circumstances of the same norm, it creates the basis for the court to be guided by the standard beyond a reasonable doubt when passing a judgment on approving a plea agreement;

3. According to the amendments which might be made in Article 215 of CPC the party has the right to appeal the refusal to approve a plea agreement only once, except for the issue to be considered in the cassation proceedings. Also, the prosecutor will have the right to apply a motion to the Court of Appeals and request vacating the verdict reached at any stage (including the cassation proceedings) of approving a plea agreement, if the convicted person breaches the terms of the plea agreement.

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The Scope of the Business Judgment Rule and its Relation to the Fiduciary Duties of Company Directors

Due to the dynamic and ever-changing nature of the corporate field, it is impossible to consistently ensure that the business entity will get guaranteed income from its business activities and that all corporate decisions made by the director will be beneficial to the company.

If the company directors were to be held responsible for any decision that did not result in a profit for the company, this would limit their freedom of action and discourage them from taking risky steps.

The main subject of this article is the Business Judgment Rule, which stipulates that a company director has the authority to make bad (unprofitable) decisions within specific legal limits without being held accountable for them.

Furthermore, an appropriate balance must be maintained in the legal system between the freedom of the corporate directors under the business judgment rule and the risk of being held accountable for dishonest activities and unreasonable steps taken by them.

Keywords: *Business Judgment Rule, Corporate Governance, Entrepreneurial Judgment, Fiduciary Duties, Abstention Doctrine, Conflict of Interest, Outside Directorship, Liability of Directors, Immunity Doctrine.*

1. Introduction

Entrepreneurial activities are legitimate and recurring business activities carried out by an entrepreneurial entity in an organized and independent manner, with the primary purpose of gaining financial profit. Entrepreneurship represents a dynamic and ever-changing process that is frequently influenced by external economic and financial factors. In most cases every enterprise goes through cycles of economic growth and decay. This is a regular occurrence in the corporate field. Furthermore, all business activities are accompanied with the danger that the entrepreneurial decisions made by company directors, including the contracts signed by them, may not always bring profit to the enterprise and will turn out to be unproductive. Due to the dynamism and variability of the economic and entrepreneurial field, it cannot be guaranteed that the company will receive stable income from entrepreneurial activities or that the transactions concluded by the directors will always be profitable for the enterprise.

If the company directors were legally held responsible for any decision that did not bring profit to the enterprise and turned out to be unprofitable, their freedom of action would be limited,

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preventing them from taking quick and bold steps. All of this, in turn, would be detrimental to the company, because without the directors taking certain risks and making bold decisions, the entrepreneurial entity would not be able to generate a substantial profit from its business activities and become an economically strong company. Due to the risk of personal liability, company directos would be more passive in the performance of their functions and refrain from making bold and risky decisions, which could inadvertently lead to the loss of profitable business opportunities for the enterprise.

At the same time, if corporate law did not provide a legal basis for holding company directors accountable in circumstances where their business actions harm the enterprise, the risk of them making arbitrary and wrong decisions would increase significantly. Therefore, it is important to keep the golden mean in a legal system and maintain a balance between the freedom of entrepreneurial decision-making of company directors and the imposition of responsibility for their unreasonable and dishonest actions.

The main topic of the present article is the Business Judgment Rule, according to which corporate directors have the right to make certain mistakes in their business judgment and make wrong entrepreneurial decisions without being held accountable for them. This article will examine the substance, legal conditions, and scope of application of the aforementioned principle in light of US corporate law. Furthermore, the aim and intent of the Business Judgment Rule, as well as its legal regulation in the United States, Germany, and Georgia, will be discussed. The article will also examine the theories and relevant case law related to the mentioned doctrine. The discussions in the article will place special emphasis on US case law due to the fact that the Business Judgment Rule was created at its core.

2. Fiduciary Duties of Corporate Directors

In order to carry out its managerial functions, an entrepreneurial entity needs to have a management body, which is an essential component of its corporate governance structure.[1] The articles of incorporation of the company may provide for the managerial authority to be exercised in different forms, namely, by one person solely, by several directors jointly or individually, or by all directors jointly.[2] The managerial authority of the director of the enterprise includes the representative authority as well, unless otherwise determined by the agreement of the partners. However, it is important to clearly distinguish between the two types of authorities. Managerial authority refers to the power to make decisions on behalf of the enterprise, while representative authority refers to the power to enter into relations with third parties on behalf of the company and conclude transactions with them.

Unlike partnerships, which are characterized by inside directorship (Prinzip der Selbstorganschaft) and are primarily managed by the partners themselves, corporations are characterized by the concept of outside directorship (Prinzip der Fremdorganshaft), and therefore, as a rule, the

1 *Clarkson K.W, Miller R. L.,* Business Law: Text and Cases, 15th ed., 2021, Chapter 40, 762.

2 See Article 41 para. 3 of the Law of Georgia "On Entrepreneurs".

company is managed by independent persons that are invited as directors.[3] Due to the fact that such directors are outsiders and not members of the company, there is a higher risk that they would hurt the corporation by improper actions and judgments. The danger of arbitrariness of the directors and the chance of taking unjustified risks when making decisions is much lower in personified partnerships with joint liability, where the partners themselves manage the company while also being personally responsible for the partnership's obligations, than in a corporation. This is due to the fact that in partnership-like companies, if the directors take incorrect actions that harm the enterprise, a lot of challenges may occur. For example, the company may be unable to meet its obligations on time and may be forced to satisfy creditors' demands from the partners' personal assets.

In any case, the director of the entrepreneurial entity is required to manage the company lawfully and to carry out its business activities with the diligence of a manager in good faith.[4] The director is considered to be the fiduciary of the business entity and its relationship with the company and the company partners is based on trust and loyalty.[5] Based on this relationship, the corporate director has fiduciary duties towards the company and its partners, which include the duty of care and the duty of loyalty in the first place.[6] In addition, the company director is obligated to adhere to the duty of good faith, the legal nature of which is debated in the legal doctrine (this issue will be discussed in the present article in the subsection of the duty of good faith). According to one point of view, the duty of good faith is part of the aforementioned fiduciary duties,[7] while the second point of view regards the duty of good faith as an independent fiduciary duty with its unique meaning.[8]

2.1. Duty of Care

Under the fiduciary duty of care the directors of a business entity must exercise due care and diligence while making business decisions on behalf of the company. They must exhibit reasonable care in carrying out their tasks in order to fulfill the company's goals while also protecting its best interests. The duty of care that the directors must demonstrate when carrying out entrepreneurial judgments and making business decisions is closely related to the Business Judgment Rule, which states that the directors' fiduciary liability can be reduced (if the relevant requirements are met) when they carry out their functions in good faith, despite the fact that their entrepreneurial decision caused harm to the company.[9]

The directors are obligated to care for the company in the same way that an ordinary, sane person would care for and behave in similar circumstances, with the belief that their actions are the

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3 *Fleischer H.,* in: Münchener Kommentar zum HGB, 5. Auflage 2022, Band 2, Vorb. (vor §105), Rn. 37-40.

4 See Article 50 para. 1 of the Law of Georgia "On Entrepreneurs".

5 *Clarkson K.W, Miller R. L.,* Business Law: Text and Cases, 15th ed., 2021, Chapter 40, 762.

6 *Miller R. L.,* Business Law Today, 11th ed., 2017, Chapter 29-4c, 731.

7 *Strine L. E. Jr., Hamermesh L. A., Balotti R. F., Gorris, J. M,* Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law, in: The Georgetown Law Journal, 2010, Vol. 98, 629.

8 *Couri v. Couri*, 95 Ill. 2d 91, 447 N.E.2d 334 (Ill. 1983).

9 *Hansen C.,* The Duty of Care, the Business Judgment Rule, and the American Law Institute Corporate Governance Project, in: The Business Lawyer, Vol. 48, no. 4, 1993, 1356.

most economically beneficial to the entrepreneurial entity.[10] The standard for evaluating the acts of the director within the scope of the duty of care is the level of care and diligence that an average reasonable person would apply in the given circumstances. The directors must act with the conviction that the decisions they make and the transactions they enter into with the third parties will benefit the business entity and serve its best interests.

The director is obligated under the duty of care to make reasonable judgments of the circumstances based on trustworthy and sufficient information and to make business decisions accordingly. If necessary, the director can consult with experts to gather relevant information and advice in order to be as informed as possible and make appropriate business decisions based on this knowledge. If the information acquired from another person turns out to be inaccurate or untrustworthy, directors will be freed from liability only if they acted in good faith.[11]

As a fiduciary, the company's director is responsible for researching the necessary information needed to make a business decision and is required to properly understand the risks involved. As a result, while evaluating a potential breach of the duty of care in making an entrepreneurial decision, the emphasis is placed primarily on the evaluation of the decision-making process[12] and the examination of the question of whether the director took appropriate steps to be sufficiently informed before making the business decision.[13] Furthermore, as part of the duty of care, it is crucial to establish how efficiently the director controls the company, particularly when delegating powers to managers and employees of the enterprise.[14]

If the company directors fail to exercise their due care and diligence and the business decisions made by them harm the company, they may be held personally liable, among others, as a result of the derivative claim filed by the shareholders, unless the director enjoys a liability privilege and is protected by the Business Judgment Rule as an exception rule.[15]

2.2. Duty of Loyalty

The duty of loyalty is a fundamental concept determining the actions of the corporate directors, which requires them to prioritize the interests of the business entity over anything else, even above their personal interests. The directors have the duty to apply their powers in good faith and to use them with the purpose of advancing the corporate goals of the company.[16]

Within the scope of the duty of loyalty, the corporate director is prohibited from engaging in various types of actions that are detrimental to the interests of the company, such as competing with the company by doing business activities in another entrepreneurial entity (without the consent of the

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10 See Article 50 para. 1 of the Law of Georgia "On Entrepreneurs".

11 *Clarkson K.W., Miller R. L.,* Business Law: Text and Cases, 15th ed., 2021, Chapter 40, 763.

12 *Smith v. Brown-Borhek Co*., 414 Pa. 325, 333, 200 A.2d 398, 401 (1964).

13 *Hansen C.,* The Duty of Care, the Business Judgment Rule, and the American Law Institute Corporate Governance Project, in: The Business Lawyer, Vol. 48, no. 4, 1993, 1358.

14 In re Caremark Int'l Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

15 *Clarkson K.W, Miller R. L.,* Business Law: Text and Cases, 15th ed., 2021, Chapter 40, 763.

16 *Allen W.T., Kraakman R.,Vikramaditya S. K.,* Commentaries and Cases on the Law of Business Organization, 6th ed., Wolters Kluwer, 2021, Par. 259, Ch.7.1.

company), usurpating the corporate opportunities of the company, and concluding deals despite the existence of a conflict of interest.[17]

2.2.1. Non-Competition Restriction

The corporate directors are not permitted to engage in the same business activities as the company without the company's consent, nor are they permitted to serve as directors of another company in the same industry.[18] Consent to the execution of such activities is deemed granted if the authorized body of the entrepreneurial entity expresses explicit consent or if the partners of the company, when appointing the director, did not ask the director to stop the activity despite being aware that the person was carrying out the mentioned activity.[19] The non-competition clause in the service contract with the director may stay in effect for some time even after that person is discharged; nonetheless, it is crucial that the parties reach Only in exceptional cases, without a specific agreement, may it be determined that the restriction on competition should continue even after the director's resignation.[20] Because the entrepreneurial entity normally has a strong economic interest in prohibiting its former director from participating in business activities that might compete with it for a certain period of time after the director leaves office, the company and the former director may enter into an indemnity agreement.[21]

2.2.2. The Usurpation of Corporate Opportunities

The corporate directors have no right to exploit the corporate opportunities related to the field of business activities of the entrepreneurial entity for their personal benefit or for the benefit of other persons other than this entity, without the prior consent of the entrepreneurial entity, provided that these opportunities became available to them while carrying out their official duties or as a result of their official position in the company and these opportunities could have been a subject of interest for the company from a reasonable viewpoint. If the general meeting or the supervisory board has already considered and rejected the use of the corporate opportunity, the prior consent of the entrepreneurial entity is not necessary.[22] This concept is known as the Corporate Opportunity Doctrine, which emanates from the fiduciary duty of loyalty and limits the capacity of company directors to exploit and pursue new business prospects personally unless they first offer the opportunities to the company.[23]

The courts take a number of factors into account when deciding whether or not there has been a case of the usurpation of corporate opportunities. For this purpose it should be determined: 1) whether the corporation will be able to use the corporate opportunity financially; 2) whether a specific business

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17 Ibid.

18 See Article 53 para. 1 of the Law of Georgia "On Entrepreneurs".

19 Ibid, para. 3.

20 *Roth M.* in: *Hopt K. J.* (ed.), Handelsgesetzbuch (Kommentar), 41. Auflage 2022, §112 Rn. 14.

21 *Fleischer H.* in: Münchener Kommentar zum HGB, 5. Auflage 2022, Band 2, §112, Rn. 32.

22 See Article 54 para. 1 of the Law of Georgia "On Entrepreneurs".

23 *Talley E., Hashmall M.,* The Corporate Opportunity Doctrine, California: USC Gould School of Law, February 2001, 1.

opportunity falls within the same field of business as the company's activity; 3) whether the business entity has an interest or expectation regarding this opportunity; 4) whether the use of the opportunity would lead to a breach of fiduciary duties by directors or a conflict of interest between the director and the managers.[24]

2.2.3. Conflict of Interest

When a corporate director has personal interest in a transaction that is being performed or has already been concluded, a conflict of interest arises. The director could be the other party to the agreement (this is known as "self-dealing") or own a significant stake in a company that is attempting to enter into a contract with the business entity. The directors are required to notify the general meeting or the supervisory board of the joint-stock company, or in the case of a monistic (one-tier) management system, the general meeting or the management body of the joint-stock company, of the relevant information regarding their personal stake as soon as they become aware of it and to specify the nature of their interest in the transaction that has been concluded or is about to be concluded.[25]

These requirements do not apply to joint-stock companies with a single partner who also serves as the company's director, nor do they apply to transactions made between a joint-stock company and its 100% subsidiary or 100% partner.[26] It is important to note that the joint-stock company has the right to contest a contract if the contracting party was aware of the presence of a conflict of interest and the absence of a consent from the joint-stock company at the time the contract was concluded.[27] If directors do not disclose a conflict of interest or engage in self-dealing (known as „Insichgeschäft" in German law), they might face legal action and may be held liable for the damage of the business entity. Based on the duty of loyalty, all fiduciaries must always and in all matters put the interests of the company above their own interests, and this duty naturally includes the prevention of conflicts of interest.

It is important to note that the presence of a conflict of interest does not mean that the directors have to resign immediately or that they are not entitled to profit from such a transaction. The most important thing is that they are committed to the business entity and transparent in their actions. They must take the necessary steps proactively to disclose the existing conflict of interest and obtain requred approval from the company. In this case, the duty of loyalty will not be considered violated by them.[28] A transaction with oneself (Germ. "Insichgeschäft") could be regarded as a provisionally ineffective transaction, the validity of which depends on the consent of the company.[29]

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

25 See Article 208 para. 1 of the Law of Georgia "On Entrepreneurs".

26 Ibid, para. 7.

27 Ibid, para. 8.

28 *Shishido Z.,* Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture, Vol. 39 Hastings L.J. 63, 1987, 83.

29 *Sethe R.,* Die Regelung von Interessenkonflikten im Aktienrecht de lege lata und de lege ferenda, in: SZW/RSDA (Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht), 4/2018, 378.

2.3. Duty of Good Faith

Company directors owe fiduciary duties of care and loyalty to the business entity, which means that they must act in the best interests of the company and not in their own personal interests. They are also obliged to observe the duty of good faith. Whether this duty constitutes a stand-alone, independent fiduciary duty or is part of other fiduciary duties is a subject of constant debate.[30] On the one hand, it is recognized that if a fiduciary relationship exists, all participants are bound to exercise the utmost good faith and honesty in all dealings or transactions involving the enterprise.[31] On the other hand, it is also recognized by various jurisdictions that corporate partners must exercise good faith in their dealings with other partners and must act in such a way that prevents them from obtaining any personal benefit without the knowledge of their corporate partners.[32]

Some people think that a key aspect of the duty of loyalty is the duty to act in good faith. According to this perspective, the duty of loyalty has traditionally been viewed as being much more extensive than the duty to refrain from behaving in a manner that might benefit one's own financial gain.[33] This view argues that the duty of loyalty forbids acting for improper purposes and requires that directors of the company supervise the company's adherence to the law while upholding the duty of good faith.[34] Another viewpoint holds that the content of the duty of good faith should be covered by a separate fiduciary duty since it is not sufficiently covered by the fiduciary duties of care and loyalty.[35] According to this view, the duties of care and loyalty do not cover all types of misconduct by company directors, because certain types of managerial misconduct fall outside the scope of these duties, and there are also various rules that limit a director's accountability within the scope of the duties of care and loyalty, while these limiting rules do not apply to the violation of the duty of good faith.[36]

3. The Essence and Significance of the Business Judgment Rule and the Related Theories

The Business Judgment Rule is a legal doctrine according to which a company director has the right to make mistakes and make wrong business judgments within certain legal limits, without being held responsible for it. The Business Judgment Rule is a legal principle derived from the American case law that protects corporate directors from fiduciary liability for the decisions they make on behalf of the enterprise.

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30 *Dickerson C. M.,* From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm, 22 Fla. St. U. L. Rev. 955, 1995, 956.

31 *Couri v. Couri* (95 Ill.2d 91 (1983).

32 *Hill C. A., McDonnell, B. H.*, Stone v. Ritter and the Expanding Duty of Loyalty, 76 Fordham L. Rev., 1769, 2007, 1773.

33 *Strine L. E. Jr., Hamermesh L. A., Balotti R. F., Gorris, J. M,* Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law, in: The Georgetown Law Journal, 2010, Vol. 98, 629.

34 Ibid.

35 *Eisenberg M. A.,* The Duty of Good Faith in Corporate Law, in: Delaware Journal of Corporate Law, Vol. 31, No. 1, 1-75, 2005, 1.

36 Ibid.

The Business Judgment Rule shields the directors of the company from accountability for the mistakes in their entrepreneurial judgment if they acted in accordance with the duties of care and loyalty when making the corporate decision. Unless it is clear that the directors have broken the law or acted against the interests of the business entity, the courts will not question or review their decisions, as the courts often lack the ability to reasonably assess whether the director's decision was reasonable and whether an impermissible risk was taken in the entrepreneurial judgment process.

In general, there is no unified notion regarding the Business Judgment Rule in corporate law. However, the existing opinions in this direction share a common idea that, based on the Business Judgment Rule, the courts should not question the entrepreneurial decisions made by the conscientious and disinterested company directors.[37]

3.1. Significance of the Business Judgment Rule

Several factors contribute to the need for the Business Judgment Rule in corporate law. First, the court does not have enough knowledge and experience to assess the validity and reasonableness of a specific business decision, so it should not be allowed to examine the corporate decisions made by the directors.[38] Because the company directors are involved in the enterprise's business activities and have detailed knowledge of the corporate processes taking place within the business entity, they are far more capable than the court to assess how reasonable it is to make an entrepreneurial decision based on the specific situation. It is in the interest of an entrepreneurial entity to have a qualified and experienced director, because such a person is less likely to make mistakes when managing the enterprise. However, it is impossible for a company director to foresee all circumstances and completely examine every relevant risk in advance.[39]

In case the decision made by the director turns out to be damaging to the company, he/she should not be held responsible for such a decision, the negative effect of which could not be predicted by any reasonable and diligent person in his/her position. The mere fact that a particular business decision ultimately did not result in a desirable outcome for to the company and was unprofitable to the enterprise is insufficient to impose liability on the directors acting in good faith, since they are protected by the Business Judgment Rule, provided that the relevant preconditions are met. If the company directors did not have this privilege, it would limit their activities because, due to the risk of personal legal responsibility, they would take fewer risks when making business decisions and would not take bold and innovative steps, which are required for the enterprise's development and its establishment as a strong and competitive entity in the market.

Entrepreneurial activities are typically associated with some level of risk, the outcome of which is unpredictable due to internal and external factors. As a result, based on the Business Judgment Rule,

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37 *Allen W.T., Kraakman R.,Vikramaditya S. K.,* Commentaries and Cases on the Law of Business Organization, 6th ed., Wolters Kluwer, 2021, Par. 269, Ch.7.4.

38 *Giraldo C. A. L.*, Factors Affecting the Application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU, in: Vicepresidencia Juridica, 2006, Bogotá (Colombia), 121.

39 *Bainbridge S. M.,* The Bishops and the Corporate Stakeholder Debate, in: Villanova Journal of Law and Investment Management, Vol. 4, Issue 1, 2002, Art. 2, 20.

the company directors have the discretion to take bold actions and make risky judgments. The main thing is that there should be no room for imprudent, uninformed and arbitrary actions on their part that will harm the company. The Business Judgment Rule is not applied if the company director permits the business entity to violate the law and arbitrariness occurs.[40] On the one hand, restricting the director's freedom of action too much and imposing rigid liability standards would be damaging to the effectiveness of the company's activities and would hinder the director from expanding the company and accomplishing its corporate goals. On the other hand, in order for the director's scope of action in the process of entrepreneurial judgment not to be overly broad and therefore promote his/her arbitrary actions, there must be a legal framework that ensures the proper application of the Business Judgment Rule so that there is no free space for making unreasonable and uninformed decisions, which would allow unscrupulouss director to make decisions detrimental to the company and avoid responsibility.

3.2. Theories Related to the Business Judgment Rule

There are various viewpoints in the field of corporate law concerning the exact nature of the Business Judgment Rule.

3.2.1. Business Judgment Rule as a Standard of Conduct

According to one view, the Business Judgment Rule is a standard of prudence (behavior) that the company director should follow when making entrepreneurial decisions.[41] When employing this approach, it is first determined whether there are sufficient legal requirements for applying the Business Judgment Rule in the particular instance, in which case the plaintiff has the burden of proof.[42] Only when all prerequisites are met, the Business Judgment Rule will be applied to release the company director from fiduciary liability.[43]

Under this theory, the plaintiff challenging the business decision of the director bears the burden of proof,[44] as to whether the company directors, in making the disputed corporate decision, breached any fiduciary duties.[45] If the plaintiff fails to meet the burden of proof, the court will apply the Business Judgment Rule to protect the directors.[46]

It should be noted that the decisions adopted as a result of the gross negligence of the director fall outside of the scope of the privilege of the Business Judgment Rule.[47] However, in this context, it is difficult to determine exactly when there is gross negligence present and how the latter should be

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40 *Miller v. American Telephone & Telegraph Co.,* 507 F.2d 759 (3d Cir. 1974).

41 *Fuhrmann L., Heinen A., Schilz L.,* Gesetzliche Beurteilungs- und Ermessensspielräume als „spezial-gesetzliche Business Judgement Rule, NZG 2020, 1368, 1377.

42 *Bainbridge S. M.,* The Business Judgment Rule as Abstention Doctrine, in: Vanderbilt Law Review, Vol. 57, Issue 1, 2004, 94.

43 *Cede & Co. v. Technicolor*, 634 A.2d 346, 361 (Del. 1993).

44 *Smith vs. Van Gorkom*, 488, A.2d 858 Delaware 1985.

45 *Cede & Co vs. Technicolor Inc*, 13, Delaware, 1987, A 2d 1182.

46 *McMillan L.*, The Business Judgment Rule as an Immunity Doctrine, 4 Wm. & Mary Bus. L. Rev., 2013, 529.

47 Ibid, 530.

distinguished from ordinary negligence. It is uncertain if the extent of the damage caused to the company by the director's entrepreneurial judgment or the scale of the director's unreasonableness should be utilized as an assessment factor in this situation.

Critics of this theory argue that the possibility of the courts to examine whether a breach of fiduciary duty has occurred should represent an exception, which is contrary to the aforementioned approach, since it allows the courts to over-interfere in business decisions and usurp the power of the directors, due to the fact that the court will only apply the Business Judgment Rule to the directors if it is determined from the facts of the case that there was no violation on the part of the directors.[48]

3.2.2. Business Judgment Rule as an Abstention Doctrine

In the case of applying the second approach in the context of the Business Judgment Rule, namely, the Abstention Doctrine, the privilege of the Business Judgment Rule automatically applies from the very beginning for the directors, and it is the plaintiff's obligation to rebut the presumption of the validity of the director's entrepreneurial decision.[49] The Abstention Doctrine is an expression of the reluctance of the courts to scrutinize the business decisions made by the company directors.

According to one viewpoint regarding the Abstention Doctrine,[50] the primary function of the Business Judgment Rule is to preclude court judgments on the breach of the fiduciary duties by the company directors.[51] The Abstention Doctrine is based on the Director Primacy model, in which the governing body of the company (Board of Directors) is not an agent, but acts as the principal of the company, which directs and manages the entrepreneurial entity through an effective and centralized decision-making process.[52] When applying the Director Primacy model, the tension between the power of the directors and their accountability (responsibility) is highlighted, with the application of the Business Judgment Rule offered as a possible solution.[53]

The Business Judgment Rule, as an Abstention Doctrine, means that in the absence of relevant preconditions, the courts should not be able assess the content of the corporate decision or its reasonableness.[54] According to the Abstention Doctrine, the conditions in the presence of which the court might evaluate the content of the challenged corporate decision include self-dealing or conflict of interest, fraud, etc.[55]

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48 *Bainbridge S. M.,* The Business Judgment Rule as Abstention Doctrine, in: Vanderbilt Law Review, Vol. 57, Issue 1, 2004, 94.

49 *McMillan L.*, The Business Judgment Rule as an Immunity Doctrine, 4 Wm. & Mary Bus. L. Rev., 2013, 524.

50 *Bainbridge S. M.,* The Business Judgment Rule as Abstention Doctrine, in: Vanderbilt Law Review, Vol. 57, Issue 1, 2004, 101.

51 *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (Ill. App. Ct. 1968).

52 *Bainbridge S. M.,* The Business Judgment Rule as Abstention Doctrine, in: Vanderbilt Law Review, Vol. 57, Issue 1, 2004, 86.

53 Ibid, 87.

54 *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (Ill. App. Ct. 1968).

55 *Bainbridge S. M.,* The Business Judgment Rule as Abstention Doctrine, in: Vanderbilt Law Review, Vol. 57, Issue 1, 2004, 97, 99.

The Business Judgment Rule, as an Abstention Doctrine, implies a legal presumption that must be rebutted by the plaintiffs, otherwise, the courts should not review the content of the business decisions made by the company directors.[56] The behavior of the courts in such cases reflects their role, which does not include the resolution of internal issues of entrepreneurial entities and the administration of business; These tasks are performed by a person specially appointed for this purpose, whose business judgment is to be considered decisive and final, unless it is proven that the person is motivated by fraudulent interests and acts in bad faith.[57]

In accordance with the Abstention Doctrine, the authority of the company directors of in the process of conducting business must be considered absolute if they act within the law and in good faith, and the court has no power to change the business decisions made as a result of the entrepreneurial judgment of the directors.[58]

3.2.3. Business Judgment Rule as an Immunity Doctrine

According to the third opinion, the Business Judgment Rule should be regarded as an Immunity Doctrine, because the effect of implementing the Business Judgment Rule is similar to the immunity and it exempts the company director from civil responsibility for such business decisions that he/she made within the scope of his/her corporate powers as the director of the enterprise.[59] This viewpoint holds that the Business Judgment Rule has the same foundation, procedure and effect as the immunity.[60] Under the Immunity Doctrine, the defendant bears the burden of proving that he or she is entitled to immunity.[61]

The Business Judgment Rule creates a certain type of "safe harbor" under the Immunity Doctrine[62] in order to protect the company directors from liability,[63] which is important to ensure the entrepreneurial freedom and the immunity of company directors when making risky business decisions. There are different approaches regarding the allocation of the burden of proof when applying the "safe harbor" concept. According to one view, the burden of proof is on the company director, who must prove the existence of the elements of the Business Judgment Rule, before moving into an "impenetrable harbor" and being shielded from legal disputes arising from an unprofitable entrepreneurial decision.[64] On the other hand, some argue that there is a presumption of validity in

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56 *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000).

57 *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (Ill. App. Ct. 1968).

58 *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (Ill. App. Ct. 1968).

59 *McMillan L.*, The Business Judgment Rule as an Immunity Doctrine, 4 Wm. & Mary Bus. L. Rev., 2013, 542.

60 Ibid, 574.

61 *Giraldo C. A. L.*, Factors Affecting the Application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU, in: Vicepresidencia Juridica, 2006, Bogotá (Colombia), 130.
Giraldo C. A. L., Factors Affecting the Application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU (2006), Vicepresidencia Juridica, 130.

62 *Paefgen W.G.,* Die Darlegungs- und Beweislast bei der Business Judgment Rule, in: NZG 2009, 891 (892).

63 *Cassim M. F.,* Contemporary Company Law, 2nd ed., 2012, 563.

64 *Branson D. M.,* The Rule That Isn't a Rule – The Business Judgment Rule, 36 Valparaiso University Law Review, 2002, 636.

relation to the entrepreneurial decision of the director, which can be rebutted; thus, the defendants (directors) may be required to justify their decisions within the framework of the litigation; however, it is important to note that the burden of proof initially falls on the plaintiff.[65] At this point, the plaintiff must prove that the company director violated some form of fiduciary duty – good faith, loyalty or care – in making the disputed entrepreneurial decision, and if the plaintiff (shareholder) cannot meet the evidentiary standard, the Business Judgment Rule will be applied in favor of the company director and the court cannot question the entrepreneurial decision made by him/her.[66]

If the plaintiff successfully rebuts the presumption of the validity of the entrepreneurial decision of the director, the burden of proof shifts to the defendant (company director), who must demonstrate that the specific transaction is fair to both the company and its partners and is in accordance with the so-called Entire Fairness Doctrine, which states that the transaction should be achieved as a result of fair price and fair dealing.[67]

4. Standards of the Business Judgment Rule in USA

The Business Judgment Rule is a corporate law doctrine originating from the American case law, the purpose of which is the exemption the directors of business entities from civil liability for the entrepreneurial decisions they make on behalf of the company.[68] This doctrine is a legal mechanism that shields directors from liability when they make business decisions and enter into transactions on behalf of the company while acting in good faith and based on sufficient information. The key consideration is that the actions of the directors are in the best interests of the business entity, and the decision-maker has no personal stake (conflict of interest) in the transaction or decision that is about to be made or has already been concluded.

4.1. Historic Development of the Business Judgment Rule in USA

The first application of the Business Judgment Rule in USA is associated with the 1829 decision by the Louisiana State Supreme Court,[69] in which it was recognized that the choice of a strategy of decision-making that would bring financial loss to the company cannot become the basis of the liability of the director, if there is such an error that would have occurred in the case of any prudent and considerate person's actions.[70] In 1847, the Supreme Court of the State of Alabama provided an important clarification regarding the circumstances under which the application of the Business Judgment Rule may be justified.[71] The court explained that the directors do not and cannot have

65 *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 260-6 1 (Del.1993).
66 *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 260-6 1 (Del.1993).
67 *Krasner v. Moffet,* 826 A.2d 277, 287 (Del. 2003).
68 *Bainbridge S. M.,* The Business Judgment Rule as Abstention Doctrine, in: Vanderbilt Law Review, Vol. 57, Issue 1, 2004, 89.
69 *Percy v. Millaudon* 8 Mart (n.s.) 68, (La. 1829).
70 *Percy v. Millaudon* 8 Mart (n.s.) 68, (La. 1829).
71 *Godbold v. Branch Bank,* 11 Ala. 191 (1847).

exhaustive knowledge of all the issues related to the activities of the business entity.[72] Accordingly, imposing an obligation on them to never make a mistake while adapting business decisions would be excessively severe and a condition that no ordinary prudent person could meet.[73] Later, the Supreme Court of Rhode Island recognized the Business Judgment Rule even more clearly and explained that a company director who acts in good faith and with diligence and makes a mistake while making an entrepreneurial decision should not be held liable for the negative consequences of such a decision.[74]

The establishment of the Business Judgment Rule in the United States was particularly facilitated by the case law of the state of Delaware in the 20th century. The Delaware Supreme Court clarified in its 1927 decision that an inadvertent error in business judgment cannot be subject to court review unless there is evidence in a particular case showing that the directors did not act with the belief that their actions were in the best interests of the enterprise.[75] Later, in another case, it was confirmed that an inadvertent mistake made by a company director in the process of making an entrepreneurial decision is not subject to judicial control.[76]

Regarding the scope of action of the corporate directors in the performance of their functions in the enterprise, the Supreme Court of the State of Delaware has held that the directors of a corporation are bound to act with the standard of care that an ordinarily prudent person would exercise in similar circumstances when managing corporate affairs.[77] Concerning the nature of the Business Judgment Rule, it has been widely accepted in the case law of the state of Delaware that the aforementioned doctrine represents a presumption, according to which, when making an entrepreneurial decision, it is presumed that, as a general rule, the company director makes corporate decisions based on sufficient information and acts in the belief that his/her actions are in the best interests of the enterprise.[78]

The Delaware Supreme Court rendered an important ruling regarding the Business Judgment Rule in 1985.[79] The court explained in this decision that the board of directors has the duty to make an informed decision on important matters, such as a merger with another company, and argued that it cannot circumvent liability by demonstrating the fact that the decision was also approved by the shareholders. The court noted that the directors are protected from liability if they relied in good faith on the reports submitted by managers, which was not the case in the aforementioned decision. Directors cannot rely on the share price when it differs from the market value. If the board of directors fails to disclose the lack of value-related information to the shareholders, the board is in breach of its fiduciary duty to disclose all material facts to the company.[80] The court observed that a director's duty to exercise informed business judgment is part of the duty of care, not the duty of loyalty; therefore, in

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72 *Flom J. H., Ward R.,* The Business Lawyer 42, no. 3 (1987), 995.
73 *Godbold v. Branch Bank,* 11 Ala. 191 (1847).
74 *Hodges v. New England Screw Co.,* 3 R.I. 9, 18 (1853).
75 *Bodell v. Gen. Gas & Elec. Corp.,* 140 A. 264, 267 (Del. 1927).
76 *Krasnick v. Pac. E. Corp.,* 180 A. 604, 607 (Del. Ch. 1935).
77 *Graham v. Allis-Chalmers Mfg. Co.,* 188 A.2d 125, 130 (Del. 1963).
78 *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984).
79 *Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985).
80 *Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985).

such cases, the motivation behind the director's action can be deemed irrelevant. Accordingly, there is no need to prove fraud, conflict of interest or bad faith in a particular case.[81]

The case law of the Delaware State Supreme Court is also associated with the recognition of the triad of fiduciary duties, which include the duty of care, the duty of loyalty, and the duty of good faith.[82] Although the same court dismissed the existence of the duty of good faith as an independent fiduciary duty a few years later,[83] and the courts disbanded the discussion of the triad of fiduciary duties, the duty of good faith still remains an essential component of any consideration on fiduciary duties.[84]

4.2. The Standards and Preconditions for the Application of the Business Judgment Rule

The Business Judgment Rule protects directors from liability if they have made decisions in good faith and in accordance with the appropriate procedures, even if those decisions turn out to be unprofitable for the company. Under the Business Judgment Rule corporate directors are not liable for the breach of the duty of care merely because they made certain mistakes. However, in order to enjoy this privilege, directors must meet certain standards of conduct.

Due to the fact that the corporate duties of directors are generally regulated at the state level in USA, there is no common definition of the Business Judgment Rule and no uniform standards that are applicable in this context. There are also different viewpoints regarding the nature of the Business Judgment Rule itself.[85] According to one view, the Business Judgment Rule represents a presumption of the legitimacy of a business decision, where the plaintiff has the burden of rebutting the presumption.[86] On the other hand, the Business Judgment Rule is considered a standard of care and should not be applied in cases of gross negligence.[87] There is also a different viewpoint, which regards the Business Judgment Rule as an Abstention Doctrine,[88] within the scope of which, the reluctance of the courts to exercise judicial control over business decisions and to examine their content is crucial, when the prerequisites for the application of this doctrine are present.[89] Furthermore, it is argued that the Business Judgment Rule represents a substantive rule that protects certain types of decisions in case of the presence of the legal prerequisites for the Business Judgment Rule.[90]

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81 *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

82 *Cede & Co. v. Technicolor,* Inc., 634 A.2d 345, 361 (Del. 1993).

83 *Stone v. Ritter,* 911 A.2d 362, 369-70 (Del. 2006).

84 *Smith D. G.*, The Modern Business Judgment Rule, Research Handbook on Mergers and Acquisitions, Forthcoming, in: BYU Law Research Paper Series No. 15-09, June 19, 2015, 2.

85 *Smith D. G.*, The Modern Business Judgment Rule, Research Handbook on Mergers and Acquisitions, Forthcoming, in: BYU Law Research Paper Series No. 15-09, June 19, 2015, 5-9.

86 *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984).

87 *Smith D. G.*, The Modern Business Judgment Rule, Research Handbook on Mergers and Acquisitions, Forthcoming, in: BYU Law Research Paper Series No. 15-09, June 19, 2015, 6-7.

88 *Bainbridge S. M.,* The Business Judgment Rule as Abstention Doctrine, in: Vanderbilt Law Review, Vol. 57, Issue 1, 2004, 90.

89 Ibid, 99.

90 *Gagliardi v. TriFoods Int'l, Inc.,* 683 A.2d 1049, 1051-52 (Del. Ch. 1996).

According to the model rules of the American Law Institute (ALI), corporate directors fulfill their duty of care if they act in good faith and with a reasonable belief that their actions are in the best interests of the corporation, and if they act as diligently as a reasonable prudent person would in similar circumstances.[91]

Corporate directors exercising business judgment are subject to the Business Judgment Rule if they are not personally interested in the decision to be made, if they are informed regarding the decision to be made in such a manner and to such an extent which they believe is reasonable in the given situation, and if they reasonably believe that they are acting in the best interests of the corporation.[92] As for the prerequisites for the application of the Business Judgment Rule, first and foremost, it is necessary to have a business decision made as a result of the entrepreneurial judgment, which must be distinguished from mere inaction, which, unlike active actions and conscious inaction,[93] does not fall under the protection of the Business Judgment Rule.[94] On the other hand, in order for a company director to be able to justify an error made in a business judgment and a decision that is detrimental to the company by using the Business Judgment Rule, it is not permitted to have a conflict of interest, which is the subject of discussion in most cases of litigation related to the Business Judgment Rule.[95] It is necessary for the company director to be a disinterested person (disinterested director) who has no economic interests in the concluded transaction or in the transaction to be concluded, in which case not only formal but also economic aspects should be taken into account.[96] The directors may not be an interested party, but their relative or family member may have financial interests in the particular transaction. If the company director acts based on such an interest, he/she should be deemed an interested person who has breached the fiduciary duty of loyalty.[97]

If the plaintiff presents sufficient evidence confirming that the decision-making process was conducted by the company director without collecting and analyzing the appropriate information, it will be assumed that the director made no informed judgment in the case, which is why the Business Judgment Rule will not be applied.[98] In addition, it is necessary for the application of the Business Judgment Rule that the business decision of the company director is based on a rational belief.[99]

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91 ALI's Principles of Corporate Governance §4.01 (a); American Law Institute, Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft No. 4, 1985, 4.01.a.

92 Ibid (c).

93 *Schima G.*, Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichichem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), Aktuelle Entwicklungen des Europäischen und Internationalen Rechts, Helbing Lichtenhahn Verlag, Basel, 2010, 379.

94 *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984).

95 *Schima G.*, Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichichem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), Aktuelle Entwicklungen des Europäischen und Internationalen Rechts, Helbing Lichtenhahn Verlag, Basel, 2010, 380.

96 Ibid.

97 Ibid, 380f.

98 *Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985).

99 *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984).

During the entrepreneurial judgment process, the directors should act in such a way that they believe that the business decision they make is aimed at the best interests of company and its partners.[100]

In some cases, it is examined additionally whether the company directors have abused the discretion granted to them for making entrepreneurial decisions, which is closely related to good faith.[101] However, it should be noted that the application of this criterion to determine whether or not the Business Judgment Rule should be applied in a given situation is debatable. According to one viewpoint, giving such controlling powers to the courts would turn them into so-called "super-directors" who would enjoy excessively broad discretion when making judgments on the entrepreneurial decisions of corporate directors.[102] Another opinion holds that the element of the abuse of discretion could be considered as a theoretical exception.[103]

4.3. The Scope and Exceptions of the Business Judgment Rule

In addition, it is crucial to determine to what extent the Business Judgment Rule operates in favor of the directors and in which cases it is unjustified to apply the doctrine to shield the directors from liability for the damage caused to the company by their mistakes.

According to one point of view, the Business Judgment Rule constitutes a presumption that the directors of the company acted on an informed basis, in good faith, and with the honest conviction that their action was in the best interests of the business when making the entrepreneurial decision.[104] Therefore, if the corporation has a properly functioning governing body, the decisions made by it will not be challenged by the courts (unless the directors abuse their discretionary powers); in such a case, the courts will respect their business decisions and will not review them.[105] Since the director's decision is considered presumptively valid, the burden of proof rests with the party challenging the decision, who must rebut the presumption regarding the business decision of the director.[106]

It is not permissible for the courts to exercise judicial control over the business decisions made by company directors in good faith, since business decisions imply a presumption of due care.[107] But if the director demontrates fraud, bad faith or self-dealing, the presumption of due care is rebutted and the burden of proof shifts to the defendant, who must prove that the disputed business decision was fair to the corporation.[108] In such a case, the company directors have the obligation to prove that they observed the so-called Entire Fairness Doctrine and that the disputed business transaction was

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100 *Schima G.*, Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichichem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), Aktuelle Entwicklungen des Europäischen und Internationalen Rechts, Helbing Lichtenhahn Verlag, Basel, 2010, 385.

101 Ibid.

102 RJR Nabisco, Inc. Shareholders Litig., No. 10389, 1989 WL 7036 (Del. Ch. Jan. 31, 1989).

103 *Gagliardi v. TriFoods Int'l, Inc.,* 683 A.2d 1049, 1051-52 (Del. Ch. 1996).

104 *Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985).

105 *Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985).

106 *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984).

107 *Cede & Co. v. Technicolor, Inc.,* 634 A.2d 345, 260-6 1 (Del.1993).

108 *Cede & Co. v. Technicolor,* Inc., 634 A.2d 345, 260-6 1 (Del.1993).

achieved by both fair price and fair dealing.[109] In order for a plaintiff to rebut the presumption of validity applicable to business decisions, he/she must present the relevant evidence that the company directors, in making the disputed business decision, breached their fiduciary duties to the company, and if he/she fails to meet this initial burden, the Business Judgment Rule comes into effect in favor of the directors in order to ensure the substantive protection of their decisions.[110]

The entrepreneurial decisions made by company directors are respected by the courts, unless the directors have an interest in the decision, act in bad faith, behave irrationally or make the business decision with gross negligence without considering the relevant facts and information in a reasonable manner.[111] When a conflict of interest arises in a case, the Business Judgment Rule does not apply to protect the directors of an enterprise.[112] The Business Judgment Rule does not shield corporate directors from liability for the breach of fiduciary duty if they involve the company in a business transaction that results in a conflict of interest or in case they unlawfully appropriate a corporate opportunity of the business entity.[113]

A prerequisite for the application of the Business Judgment Rule is that the corporate directors exercise due care in the performance of their corporate duties; if they do not exercise due care, they cannot use the Business Judgment Rule as a protective shield.[114] A plaintiff may prevent the application of the Business Judgment Rule in favor of the company directors if he/she has sufficient evidence that the director's business decision-making was fraudulent, was motivated by bad faith, or was not justified by any rational basis.[115]

The Business Judgment Rule is based on the assumption that a director has acted with reasonable diligence when making a business decision. Accordingly, various factors may be considered when rebutting this presumption, such as whether the director was an interested party in the transaction, whether the director had the assistance of an attorney or expert, whether the governing body prepared a written report, whether the governing body acted independently, and whether it conducted adequate investigation before making a decision; it is also important to determine whether the director acted within a reasonable assumption that his/her decision was in the best interests of the corporation.[116]

The application of the Business Judgment Rule may depend on an alleged breach of any fiduciary duty.[117] Errors that can be classified as ordinary negligence do not give rise to liability under the Business Judgment Rule.[118] A court will not question a director's judgment, except in rare cases where the transaction is so negligently executed that the director fails to meet the prerequisites of the

109 *Cede & Co. v. Technicolor,* Inc., 634 A.2d 345, 260-6 1 (Del.1993).
110 *Mann v. GTCR Golder Rauner*, L.L.C., 483 F.Supp.2d 884 (D.Ariz.2007).
111 *Mann v. GTCR Golder Rauner,* L.L.C., 483 F.Supp.2d 884 (D.Ariz.2007).
112 *Davis v. Dorsey,* 495 F.Supp.2d 1162 (M.D.Ala.2007).
113 *Davis v. Dorsey,* 495 F.Supp.2d 1162, 1176 (M.D.Ala.2007).
114 *Davis v. Dyson*, 900 N.E. 2d 698 (Ill.App.1 Dist.2008).
115 In re Farmland Industries, Inc., 335 B.R. 398, 411 (Bankr.W.D.Mo.2005).
116 In re Lemington Home for Aged, 659 F.3d 282 (3rd Cir.2011).
117 In re Fleming Packaging Corp., 351 B.R. 626 (Bankr.C.D.Ill.2006).
118 In re Fleming Packaging Corp., 351 B.R. 626, 634 (Bankr.C.D.Ill.2006).

Business Judgment Rule.[119] Such a circumstance might arise when the director makes a decision with gross negligence, for example, when the information required to make a decision is not properly evaluated and the director acts completely uninformed.[120]

If the company directors violate their fiduciary duty of loyalty, the Business Judgment Rule should not be applied to protect them.[121] When the directors fail to fulfill their duties and demonstrate purposeful disregard of their responsibilities, they are in breach of their fiduciary duty of loyalty and they expose bad faith regarding their corporate duties.[122] The deliberate neglect of duties by a company director constitutes an unrighteous conduct resulting in a breach of fiduciary duty.[123]

5. The Legal Regulation of the Business Judgment Rule in Germany

The principle that the directors of a capital company enjoy the privilege of the Business Judgment Rule when conducting their entrepreneurial judgment is recognized in the modern German company law.[124] The introduction of this principle in German law is related to the decision made by the Federal Supreme Court of Germany in 1997 that was adopted as a result of the influence of the American corporate law,[125] which came into effect at the legislative level in 2005 through its establishment in the first paragraph of Article 93 of the German Stock Corporation Act (Aktiengesetz). The German Federal Supreme Court (BGH) ruled in 1997 that a company's directors have certain freedom when making business decisions and are not personally liable if they are sufficiently well informed and have made an entrepreneurial decision that is clearly in the best interests of the company.[126]

The Business Judgment Rule was acknowledged as a concept for the directors of the joint stock corporation with this ruling.[127] The need to introduce the Business Judgment Rule in the law of the German joint-stock companies was justified by two factors: on the one hand, it was considered difficult to evaluate an entrepreneurial decision ex post, when the decision itself was implemented from an ex ante perspective, and on the other hand, it was considered unthinkable to perform successful entrepreneurial activities without taking reasonable risks.[128]

It should be noted that, according to the prevailing opinion in legal theory, the Business Judgment Rule applicable to the directors of a joint-stock company can also be extended to the director of a limited liability company (GmbH), even though the aforementioned principle is not

119 In re Fleming Packaging Corp., 351 B.R. 626, 634 (Bankr.C.D.Ill.2006).
120 In re Fleming Packaging Corp., 351 B.R. 626, 634 (Bankr.C.D.Ill.2006).
121 *Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson,* 727 F.3d 719 (7th Cir.2013).
122 *Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson,* 727 F.3d 719 (7th Cir.2013).
123 *Stone v. Ritter*, 911 A.2d 362, 370 (Del.2006)
124 BGH Urt. v. 4.11.2002 – II ZR 224/00, BGHZ 152, 280 (282) = NJW 2003, 358.
125 BGH Urt. v. 21.4.1997 – II ZR 175/95, BGHZ 135, 244 = NJW 1997, 1926.
126 *Romeike F.* in: *Bannenberg B., Inderst C., Poppe S.* (eds.), Compliance, 2. Auflage 2013, Kapitel 4, Rn. 319.
127 *Fleischer H.* in: Münchener Kommentar GmbHG, 3. Auflage 2019, §43, Rn. 68.
128 *Kocher D.* Zur Reichweite der Business Judgment Rule, in: CCZ 2009, 215 (216).

explicitly codified in the German Limited Liability Companies Act (GmbHG).[129] However, it is also argued by others that the application of Business Judgment Rule may be restricted in case of limited liability companies in certain circumstances,[130] for example, when the director of the limited liability company has a double function and represents a partner with the majority of votes in the business entity.[131]

5.1. The Regulation of Article 93 of the German Stock Corporation Act

Under the German Stock Corporation Act (Aktiengesetz – AktG), particularly, according to the first sentence of the first paragraph of Article 93, the members of the board of directors have the obligation to demonstrate the diligence of a prudent and conscientious director when managing the business entity. There is no breach of duty if, in making the entrepreneurial decision, the member of the board of directors could have reasonably assumed that he/she was acting on the basis of adequate information in favor of the company.

Based on the second sentence of the first paragraph of Article 93 of the Stock Corporation Act, five legal prerequisites can be identified, the existence of which is necessary to apply the Business Judgment Rule in favor of the company directors in German law. These prerequisites are as follows: an entrepreneurial decision, acting on the basis of adequate information, acting without conflict of interest and undue influence, acting for the benefit of the company and acting with good faith. If at least one of these legal conditions is not met, the court examines the content of the business decision that caused damage to the enterprise, at which point the standard of prudence of a conscientious and diligent director should be used as the evaluation criterion. If the company directors fail to justify their entrepreneurial decision, they must compensate the enterprise for the damage caused and must restore the condition that would have existed if the corporate duty had not been violated by the director, at which point not only the property damage actually sustained by the entrepreneurial entity, but also its loss of profit, must be compensated.[132]

5.2. The Prerequisites of Article 93 of the German Stock Corporation Act

In order to implement the Business Judgment Rule in a specific case, there must be an entrepreneurial decision (Unternehmerische Entscheidung) of the director in the first place. Entrepreneurial decisions depend on unpredictable external influences and are characterized by a strong connection with future events.[133] An entrepreneurial decision is based on projections and evaluations, at which point the director chooses one of several possible alternatives and makes a business decision through entrepreneurial judgment.[134] Only active actions and deliberate inaction, i.e.

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129 *Fleischer H.* in: Münchener Kommentar GmbHG, 3. Auflage 2019, §43, Rn. 71.
130 *Easterbrook F. H., Fischel D. R.,* The Economic Structure of Corporate Law, 1991, 244 f.
131 *Fleischer H.* in: Münchener Kommentar GmbHG, 3. Auflage 2019, §43, Rn. 72.
132 *Willen M.* Die Business Judgement Rule – Auslegung der Legalitätspficht bei unklarer Rechtslage, 30.
133 *Fleischer H.* in: Münchener Kommentar GmbHG, 3. Auflage 2019, §43, Rn. 82.
134 *Spindler G.* in: Münchener Kommentar zum Aktiengesetz, 5. Auflage 2019, §93, Rn. 48.

making a conscious decision not to perform a specific action, may be considered an entrepreneurial decision; merely the failure to act (nonaction) is not protected by the Business Judgment Rule.[135]

The entrepreneurial decision should be made by the company director on the basis of adequate information. In this context, the method and manner of obtaining information by the director is important, as it should ensure an extensive examination of the bases required for making an entrepreneurial decision.[136] The information used must be reliable.

The next aspect to consider within the Business Judgment Rule is acting without conflict of interest and outside (undue) influence. It is worth noting that the absence of a conflict of interest as a prerequisite is not directly mentioned in Article 93, but it can be found in the governmental justification of this norm, according to which the decision-making body must act without conflict of interest, external influence and without gaining personal profit.[137] In addition, it is necessary for the director to act in favor of the entrepreneurial entity. The action of the director should be considered beneficial for the company when it is aimed at increasing the income of the company in the long run, as well as at strengthening the competitiveness of the products produced by the company or the services provided by it.[138] In this context, the requirements of Article 93 are met by any rational business decision made by the director.[139]

Moreover, in order to benefit from the Business Judgment Rule, the company director must act in compliance with the duty of good faith. If the company directors do not believe in the rightness of their decision when making it, it is assumed that they are not acting in good faith and the Business Judgment Rule will not apply to them.[140] A company director will not be considered conscientious if he/she behaves irresponsibly and misjudges the risk associated with an entrepreneurial decision.[141] In this context, the mere existence of subjective good faith is not sufficient, and good faith, like obtaining adequate information, must be based on the interests of the company and the diligence of a prudent director.[142]

5.3. The Burden of Proof

Germany deliberately avoided the adoption of the US model of the burden of proof when implementing the American Business Judgment Rule, which is considered to be beneficial for

135 *Schima G.* Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichichem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), Aktuelle Entwicklungen des Europäischen und Internationalen Rechts, Helbing Lichtenhahn Verlag, Basel, 2010, 395.

136 BGH Urt. v. 21.4.1997 – II ZR 175/95, BGHZ 135, 244 (253) = NJW 1997, 1926.

137 *Schima G.*, Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichichem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), Aktuelle Entwicklungen des Europäischen und Internationalen Rechts, Helbing Lichtenhahn Verlag, Basel, 2010, 394.

138 *Fleischer H.* in: Münchener Kommentar GmbHG, 3. Auflage 2019, §43, Rn. 88.

139 Ibid, Rn. 88a.

140 *Altmeppen H.* in: GmbHG (Kommentar), 10. Auflage 2021, §43, Rn. 12.

141 Ibid.

142 Ibid.

company directors.[143] According to the German model, when applying the Business Judgment Rule, the directors are obliged to prove that their actions were justified or that they were not responsible for the harm caused to the company.[144] As to the existence and the extent of the damage, as well as the causal connection between the actions of the company director and the damage sustained by the company, the burden of proof rests with the company,[145] and in case of a derivative claim – with an individual partner of the company or a group of partners.[146]

Similarly to the American corporate law, the plaintiff bears the initial burden of proof in German law, and must provide tangible evidence that there is a potentially improper action and breach of fiduciary duty on the part of the director, for example, in case the director of the company acted and made the decision regardless of the existence of a conflict of interest.[147] If sufficient evidence is presented to support the assumption that the company director violated his/her fiduciary duty when making the entrepreneurial decision, the burden of proof will shift to the director, who must dispel the doubts against him/her.[148]

Company directors may use the Business Judgment Rule to justify their entrepreneurial decisions, but they must carry the burden of providing proof of the extent to which the legal criteria of the Business Judgment Rule exist in a given situation.[149] Furthermore, the director can excuse an incorrect business decision by claiming that the same outcome would almost certainly occur if a different action had been taken, and the company would still be damaged.[150] Simply making an abstract assumption that a similar result would have occurred even if an alternative course of action had been taken is insufficient for justifying the acts of the director of the entrepreneurial entity.[151]

6. The Business Judgment Rule in Georgian Law

The Business Judgment Rule was codified in Georgian corporate law for the first time with the adoption of the new edition of the Law "On Entrepreneurs" in 2021. In relation to the Business Judgment Rule, Article 52 of the mentioned law specified that the duty of care is not violated and the director is not obligated to compensate the entrepreneurial entity for the damage caused by the entrepreneurial decision made by him/her if the company director could reasonably have assumed that he/she made the entrepreneurial decision on the basis of sufficient and reliable information, in accordance with the interests of the entrepreneurial entity, independently and without the conflict of interest or the influence of others.

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143 *Schima G.*, Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichichem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), Aktuelle Entwicklungen des Europäischen und Internationalen Rechts, Helbing Lichtenhahn Verlag, Basel, 2010, 402.

144 *Jickeli J.* in: Münchener Handbuch des Gesellschaftsrechts Bd. 4, 5. Auflage 2020, §114, Rn. 69.

145 *Spindler G.* in: Münchener Kommentar zum Aktiengesetz, 5. Auflage 2019, §93, Rn. 208.

146 *Jickeli J.* in: Münchener Handbuch des Gesellschaftsrechts Bd. 4, 5. Auflage 2020, §114, Rn. 69.

147 *Paefgen W.G.,* Die Darlegungs- und Beweislast bei der Business Judgment Rule, in: NZG 2009, 891 (894).

148 Ibid.

149 OLG München NZG 2013, 742 (743).

150 BGH NJW 2018, 3574 Rn. 39 ff.

151 BGH NJW 2018, 3574 Rn. 45.

Therefore, when evaluating the actions of the director of the company, it should be taken into account whether he/she made a business decision based on sufficient and accurate information and whether he/she acted in the best interests of the enterprise. In addition, it is necessary to establish whether the company director had any kind of personal interest towards the particular business decision and whether his/her actions were in good faith.

If any of the aforementioned elements are not present in the given case, the company director cannot justify his/her action with the Business Judgment Rule and he/she will have to pay damages for breach of fiduciary duty. If the actions of the director comply with the relevant requirements of the law (being informed, acting in the interest of the company, acting without a conflict of interest), then there will be no breach of fiduciary duty, namely, the breach of the duty of care. According to the second paragraph of Article 52 of the Law "On Entrepreneurs", the Business Judgment Rule does not apply if the entrepreneurial decision made by the company director is made in violation of the duties established either by the law or by the statute of the company.

6.1. The Scope of Liability

According to paragraph 2 of Article 50 of the Law "On Entrepreneurs", the company director is liable to the entrepreneurial entity for the damage caused by the culpable failure to fulfill the duty of care, and it is not permitted to limit the responsibility of the director for the intentional failure to fulfill this duty by the founding agreement or the decision of the partners. Such an entry in the statute of the company will be invalid, although it is possible to release the director of the company from the obligation to pay damages in cases where the damage was caused by his/her negligent act.[152]

It should be noted that the company directors are released from legal responsibility if he/she carried out the decision of the general meeting by his/her actions. This rule does not, however, apply if the director contributed to the general meeting's decision by giving false information or if the director knew the decision would be harmful but failed to tell the general meeting before the decision was made or executed.[153] The corporate directors are not eligible to use the Business Judgment Rule in their favor in this situation.

In regards to the breach of the duty of loyalty by the company director (competition restriction, usurpation of corporate opportunities, conflict of interest), the entrepreneurial entity can demand from the offending director, along with a compensation for the damage caused to the company, the payment of the agreed contractual penalty.

In addition, the entrepreneurial entity may require the infringing company directors, instead of the payment of a compensation, to either transfer the benefits received by the company directors from the transaction concluded for the benefit of themselves or a third party to the entrepreneurial entity or to cede the right to receive such benefits.[154]

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[152] See Article 50 para. 2 of the Law of Georgia "On Entrepreneurs".
[153] See Article 50 para. 4 of the Law of Georgia "On Entrepreneurs".
[154] See ibid, Article 53 para. 1, Article 54 para. 3, Article 208 para. 9 .

6.2. Joint Liability of Directors

In the event that the entrepreneurial entity is managed by several directors and the fiduciary duties are violated by the actions or inaction of several directors, they are accountable to the entrepreneurial entity jointly.[155] It is also worth noting that the general meeting of the entrepreneurial entity may make the decision to refuse the request for a compensation of the damage caused to the entrepreneurial entity by the director or to settle with him/her, only if such a decision is not opposed by the company partners owning at least 10 percent of the votes.

The company directors could also be released from the obligation to compensate the damage caused to the entrepreneurial entity, if the directors fulfilled the decision of the general meeting of the company by their corporate actions.[156] It should also be mentioned that the director of the entrepreneurial entity, who is being considered for the release from the responsibility to reimburse the entrepreneurial entity, is barred from voting on this matter.[157]

6.3. Derivative Claims of Shareholders

Based on the director's breach of fiduciary duty, the governing body, another company director, the supervisory board, and – in the cases provided by law – an individual partner has the right to seek compensation for the damage caused to the entrepreneurial entity. One or more shareholders have the right to file a lawsuit in their own name and in favor of the joint-stock company to enforce a claim belonging to the joint-stock company, including the claims against the company directors, for the compensation of the damage caused to the joint-stock company by the directors' failure to fulfill their duties, or for the transfer of the benefits received by the directors to the joint-stock company instead of the compensation of the joint-stock company's damage or for the request that the directors cede the right to receive such benefits.[158] It is crucial to note that when bringing a derivative (indirect) action, the company shareholder files the lawsuit in his/her own name and appears as a plaintiff in the case. At that time he/she does not participate in the lawsuit as the representative of the company. However, it must be emphasized that his/her claim within the derivative action is intended to satisfy the claim of the entrepreneurial entity rather than his/her own legal claim.

If 90 days have passed since his/her written appeal to the joint-stock company with the request to file a lawsuit with no result, and the court determines that satisfying the shareholder's request does not conflict with the predominant interest of the joint-stock company, the specific shareholder (or a group of shareholders) will be considered a proper plaintiff in a derivative lawsuit.[159] In this context it is also crucial to highlight that compliance with the abovementioned deadline is not required if the joint-stock company expressly declines to file a lawsuit before the period expires, or if compliance with this deadline would cause irreparable harm to the joint-stock company.

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155 See ibid, Article 55 para. 1.
156 See ibid, Article 55 para. 2.
157 See ibid, Article 55 para. 3.
158 See Article 222 para. 1 of the Law of Georgia "On Entrepreneurs".
159 See ibid, para. 2.

7. Conclusion

Many countries have yet to codify the Business Judgment Rule. Nonetheless, this principle is nowadays a widely recognized doctrine in corporate law, both in the common law system and in the civil law countries. Considering the freedom of entrepreneurial decision-making, it is acknowledged that the day-to-day functioning of a company, as as well as its long-term strategy, sometimes even requires company directors to adopt risky decisions that may ultimately harm the entrepreneurial entity.

All entrepreneurial decisions of a company director involve some level of risk, whether it is starting a new type of business activity or acquiring another company. The higher the profits that the entrepreneurial entity seeks, the greater the risk that the company directors must take in making decisions. If directors do not take bold and risky steps, this will hurt the company in the long run, because there is a high chance that an overly cautious and restrained director will miss out on business opportunities that might benefit the business entity.

It is impossible for the company's partners to ensure that the company director always makes correct calculations and that his/her decisions are always profitable for the business entity, because in many cases this depends on various external factors that are beyond the control of the partners and the directors. Holding the director of the entrepreneurial entity liable for any mistakes and decisions that result in financial losses for the company would be a significant deterrent and would severely limit the freedom of action of the director, whose innovative and bold decisions frequently determine the enterprise's market success.

Therefore, the recognition of the Business Judgment Rule in a legal system, including in Georgia, is critically important, because the establishment of this doctrine in corporate law creates guarantees of protection for the directors so that the honest and diligent director is not held responsible for the failure of the enterprise in all instances and enjoys freedom in making entrepreneurial decisions. The doctrine of the Business Judgment Rule is equally important in terms of exerting appropriate judicial control over business decisions made by directors. The director of the entrepreneurial entity has more comprehensive professional expertise and awareness of the company's internal operations. In general, the director is more capable than a judge when it comes to evaluating solutions to solve serious challenges of the company and their practicality. As a result, based on the Business Judgment Rule, it is reasonable to argue that the courts should only be able to review entrepreneurial decisions in exceptional cases.

The Business Judgment Rule, which serves as the foundation for the exemption from responsibility for the conscientious and diligent director, also guarantees that the company's directorship does not actually fall into the hands of the company's partners. If the partners could contest the decision of the director at any time and then go to court to have him/her held liable, this would strengthen the actual power of the individual partners over the director in the entrepreneurial entity, which would be contrary to the principles of corporate governance.

As the volume and complexity of entrepreneurial activity grows over time, including cross-border operations as well as cooperation between different industries, so do the demands on corporate management, in particular directors, to ensure the implementation and effective enforcement of the

appropriate corporate governance standards. Entrepreneurial entities should be allowed to perform their business activities freely within the context of fair competition, entrepreneurial freedom, and statutory autonomy, and to take the steps necessary for achieving their established entrepreneurial goals. Company directors must be able to operate the company with care, loyalty, and good faith, without the risk of excessive judicial oversight and strict liability, which does not rule out the possibility of the directors making unprofitable entrepreneurial decisions.

It is critical to ensure the freedom of action in the process of making business decisions for the governing body of the business entity since the capacity to freely make corporate decisions is an essential aspect of the enterprise's successful economic development. The applicable criteria should be explicitly established in law and interpreted by judicial decisions. In order to achieve a reasonable balance, it is also necessary to have precisely defined bases of responsibility that will influence the behavior of the directors and will ensure the prevention of arbitrary and inconsiderate actions, because such actions pose a significant threat to the effective functioning of the companies.

In the context of Georgia, it is crucial that following the codification in the Law "On Entrepreneurs" implemented in 2021, Georgian judicial practice be developed and the scope and standards of the freedom of entrepreneurial decisions be clearly established. This would provide more clarity on Georgia's current approaches and be an essential basis for legal stability. In the case of a lawsuit involving a breach of fiduciary duties, it essential to make it apparent how the burden of proof should be fairly balanced between the plaintiff and the defendant in light of the Business Judgment Rule. In order for the Business Judgment Rule to become more widely accepted in the legal consciousness, it would also be desirable to create a unified notion in Georgian corporate law regarding the aforementioned principle. The Law of Georgia "On Entrepreneurs" uses the term "freedom of an entrepreneurial decision" to refer to the Business Judgment Rule, whereas the Georgian legal literature and judicial practice use different notions, such as, for example, the "presumption of validity of business decisions", the "entrepreneurial judgment rule", the "presumption of a valid business decision" etc.

In any case, it is of the utmost importance that there be an adequate legal framework in corporate law that guarantees the proper application of the Business Judgment Rule and grants company directors enough discretion to act in the process of entrepreneurial judgment in order to accomplish the objectives of the company and fulfill its best interests. It is true that taking risks and non-profitable steps on the part of a company director is an essential part of civil turnover and the entrepreneurial field; however, it is also important to ensure that, as a result of the Business Judgment Rule, there is not too much room for making unreasonable and arbitrary decisions, so that the individuals acting in bad faith do not have the opportunity to make decisions that are harmful to the company and to commit fraudulent acts, and are also not allowed to evade responsibility by circumventing the fiduciary duties imposed on them.

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Problematic Aspects of Influence Trading in the Context of Comparative Legal Analysis of Georgia and European Countries

The present article examines the legal aspects of influence trading in light of the analysis of the "Criminal Law Convention on Corruption" of the Council of Europe and the legislation of several European countries. In this respect, the article analyzes the main legal framework of the act of influence peddling as defined in the Council of Europe Convention, the legal extent of its action, and the significance of its implementation in the national criminal law of each state. Thus, in this regard, the article analyzes in depth the key aspects of the trade institution under the influence of Georgia, Spain, France, Belgium, and Hungary, as well as the questions of their conformity with the Council of Europe Convention. Furthermore, in terms of comparative legal analysis, the differentiating legal characteristics of the trade institution under the impact of Georgia and the aforementioned European nations are explored.

Influence peddling, as a form of lever for exerting undue influence on officials through personal relationships, provides a corrupt background to the extent that this behavior undermines the reputation of state institutions and the degree of trust in them in the eyes of citizens. Influence peddling is comparable to lobbying in terms of exerting influence on government officials, which is why several European nations have declined to criminalize it. Hence, the concept of interaction between influence trading and lobbying organizations is extensively investigated. Ultimately, the key legal features of influence trading were analyzed in terms of comparative legal and systematic analysis, and a clear boundary was made between the aforementioned institution and other associated legal activities such as lobbying, legal or other services, and other consulting activities.

Keywords: *Officiary, Passive influence, Active influence, Official authority, Lobbying.*

1. Introduction

The key legal aspects of the criminalization of influence peddling are addressed in this article in the context of an analysis of Georgian and European legislation. Its character, legal nature, and the connection of the influence trading institution with bribery and lobbying activities recognized by law, in particular.

Influence peddling is well recognized to be the new norm in the ranks of corruption offences. Although it is not a conventional sort of corruption crime in its core and forms of expression, the prospect of exerting undue influence on state government officials constitutes a severe threat of

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damaging the prestige of the state apparatus and impeding its efficient functioning. In other words, influence trading appears to be one of the primary methods for unethical use of administrative resources as a type of lever for unlawfully influencing officials. As a result, influence peddling, with its functional aim, generates a corrupt backdrop.

Based on the foregoing, in order to analyze the feasibility of criminalizing influence peddling, the legal nature of the crime and the significance of the legal benefits protected by it must first be assessed. Due to the newness of the institution of trading in influence, the topic of whether it is acceptable to criminalize trading in influence, as well as the relationship between this already criminalized norm and bribery and lobbying operations, remains relevant in many European countries.

2. Analysis of the Composition of Influence Trading According to the Legislation of Georgia and European Countries

According to Article 12 of the Council of Europe's 1999 "Criminal Law Convention on Corruption", "Each Party shall take such legislative and other measures as may be necessary to establish as a criminal offense in its domestic law any act which manifests itself intentionally, directly or indirectly, in any In giving an unjustified advantage, or in promising or offering to give this advantage to someone who substantiates or confirms that he can have a negative influence on the decision-making by the persons mentioned in articles 2, 4, 5, 6 and 9, 10, 11, whether this unjustified advantage is served to such a person or to someone else. And, with regard to such influence, the solicitation, acceptance, or acquiescence to the offer or promise of such advantage, whether or not such influence has been effected, or whether or not such influence may or may not have the intended results".

On the basis of the above-mentioned Article, in accordance with the Law of Georgia of July 25, 2006, Article 339[1] – Trading under influence was added to the Criminal Code of Georgia. "The perpetrator of the crime can be either a natural person (a person close to the official) or a legal entity. In addition, a natural person should mean only a private person and not a public official who uses his official position."[1] "According to the first part of Article 339[1] of the Criminal Code, a person who needs to influence for his own or another person's interests, directly or indirectly, is interested in money, securities or others promise, offer or grant any unfair advantage to the influence peddler."[2]

According to the second part of Article 339[1] of the Criminal Code, a passive influence peddler is a person who claims or confirms that he can have an undue influence on the decision-making of an official or a person equal to him. Such persons can be: members of the employee's family, relatives, friends. "According to the European Convention on Combating Corruption, trading in passive influence means that a person who enjoys real or alleged influence over third parties asks for or receives unjustified privileges in exchange for influencing."[3] Here, it should be analyzed what real and alleged influence means. "Real impact is seen when a person, based on a close and strong relationship

1 *Lekveishvili M., Mamulashvili G., Todua N.,* Private Part of Criminal Law, Book II, 7th ed., 2020, 410 (in Georgian).
2 Ibid, 411.
3 Ibid, 411-412.

with the official, is sure that the official will definitely take his request into consideration. Presumed influence occurs when a person hopes, assumes (but is not sure) that he will be able to influence the official. However, if he fails to do so, he will also be considered a passive influence peddler, since he actually had some kind of relationship with the official, which gave him the hope of influencing the official."[4]

As mentioned, the Criminal Code of Georgia, within the framework of one article, provides for both types of influence peddling, namely, both active (the first part of the article) and passive influence (the second part of the article).

France's approach to this issue is interesting, in particular, second paragraph of Article 432-11 of the French Criminal Code punishes passive influence trading by a declared public servant, while Article 433 – 2 punishes passive influence trading by an ordinary subject (private person). Article 433-1 provides active influence trading committed by a public servant, and the second paragraph of the same article – active influence trading committed by a private person.

As we can see, the commission of active and passive influence peddling by a public official is provided for in separate articles, and the punishment is much stricter.

According to the second paragraph of Article 432 – 11, the disposition of trading with passive influence is formulated as follows: "directly or indirectly requesting donations, gifts or other benefits or accepting such offers and promises by persons who exercise public authority, perform public duties or are in elective public positions For the benefit of their own interests or those of others, in return for exercising their alleged or actual influence over the public authority/official in order to obtain employment, contracts or any other favorable decision."[5]

Thus, taking into account the status of a public servant, the increased responsibility of behaving conscientiously in the public or official sphere, the severity of the imposed punishment is doubled by the French legislation.

In the same way, the issue of punishment is decided in the case of active influence trading by a public official and a private person. I believe that the mentioned approach of the French legislator is fair, since the civil servant, taking into account the official responsibility assigned to him and the state's declaration of high trust in him, has a much higher level of legal obligation to act legally compared to a private person. Therefore, in case of committing the said action by an official and an ordinary subject, the legislation should clearly regulate a more severe punishment for the official. From the systematic and logical interpretation of Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe, it clearly follows that an active and passive influence peddler can be either an ordinary subject – a private person, or a special subject – a public official or a person equal to him. Thus, in the theory and practice of criminal law, the issue of considering an official as a subject of passive influence trading is problematic and somewhat differently considered.

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4 *Gamkhitashvili G.,* Problematic Aspects of the Separation of Bribery and Influence Peddling, Journal of Law Herald, No. 4, 2021, 130 (in Georgian).

5 Penal Code of France, 22/07/1992, <https://sherloc.unodc.org/cld/uploads/res/document/french_penal_code_html/french_penal_code.pdf> [20.05.2023].

In the Georgian legal literature, it is mentioned that "an official can be considered as a passive influence trade performer only if he does not use official authority or official authority, but uses a personal relationship, influences another official, and it is in exchange for such influence (for a fee) the object of the crime is given by an active influence peddler."[6]

"Thus, it should be noted that when an official appears in the case, it should not be considered unconditionally as his use of official authority, and therefore, we should not make this situation a presumption of use of official authority. In this case, too, for the correct qualification of the action, it must be established whether the official exerts undue influence on another official by using official authority to carry out a criminal action, or based on a personal relationship. In the latter case, the official should be considered a private person, and the crime should be qualified under the article of influence peddling."[7]

The mentioned issue has been decided in the same way in Hungary. In particular, according to Hungarian criminal law, the subject of passive influence peddling is not limited, it can be any person, including a public official, who claims that he can exert undue influence on another public official by actively influencing him to make a decision beneficial to the trader.[8] However, if a public official demands or receives an unfair advantage in order to give an official subordinate to him the task of making a decision beneficial to the interests of another person, then his action will be assessed as passive bribery,[9] because in this case the official uses his official authority and not his personal relationship with another official. The mentioned issue is regulated differently in France than in Georgia. In particular, the French legal doctrine explains that in the case of passive influence trading, a public official does not act within the scope of his official authority, but outside of it, in the process of making a decision for his "client". He simply uses his professional (official) position or social status to influence another official in order to make a decision that he cannot make within the scope of his official authority. French scholars believe that the influence-peddling public official, within the framework of his official function-duties, does not have the actual opportunity to make a decision beneficial to his "client", thus he uses his status or friendly/personal relationship to exert undue influence on the decision-making official.[10]

Thus, under French law, the use of not only a personal relationship, but also one's official authority, social status, as a kind of leverage, to influence another official, qualifies as passive influence trading. "And during passive bribery, the official bargains directly with his official powers and functions."[11] Thus, only such a case is qualified as bribery, when making a beneficial decision of the bribe giver depends on the implementation of a specific action by the official based on his official

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6 *Lekveishvili M., Mamulashvili G., Todua N.,* Private Part of Criminal Law, Book II, 7th ed., 2020, 413 (in Georgian).

7 *Gamkhitashvili G.,* Problematic Aspects of the Separation of Bribery and Influence Peddling, Journal of Law Herald, No. 4, 2021, 131-132 (in Georgian).

8 *Hollan M.,* Trading in Influence: Requirements of the Counsil of Europe Convention and the Hungarian Criminal Law, Acta Juridica Hungarica, 52, #3, 2011, 244-245.

9 Ibid.

10 *Philipp J.,* The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 36.

11 Ibid.

function or refraining from it. In the mentioned article, there is no discussion about the use of official authority by an official in relation to another official. Accordingly, under French law, the exercise of influence by an official using official authority on another official in order to make a decision desired by another person will be considered passive influence trading.

I believe that this approach unreasonably limits the essence of bribery and its legal scope. In particular, "by criminalizing bribery, the state wants that the official status assigned to civil servants is used only for the legal interests of the state and it does not become a source of enrichment for civil servants." That is, here the emphasis is shifted to the fact that the official "does not trade" his official position".[12] Which, in turn, refers to the issue of implementation/non-implementation of the actions included in his/her direct functions and duties by the official, as well as the abuse of the status due to his/her official position by the official in order to have undue influence on other officials. In the case of influence peddling, a passive influence peddler, while exerting influence on another official, is completely distanced from his official powers, he manipulates only his personal relationship with the other official.

Speculation by an official with official authority/status is one of the ways of using the official status, since at this time another official is influenced not because of the close relationship with this official, but only as a result of his status due to his service. In this case, it is the fact that the official uses his position in favor of another person's interests in exchange for money or other unfair advantage, which, in turn, contains clear signs of passive bribery.

There is a different approach to the subject of passive influence trading in Belgium. Although the Belgian legislator was inspired by the French anti-corruption legislation when working on the institution of influence peddling, in the end, influence peddling by a private person was not declared a punishment. In particular, the subject of passive influence trading is special – it can only be a public official. For example, if a private person receives some kind of unfair advantage from a third party in exchange for influencing an official, the said case will not be classified as passive influence peddling, **just because the private person, not the public official, traded his influence.[13] According to the Georgian criminal law, the action of the mentioned person is qualified under article 339[1] of the Criminal Code as passive influence trading.** Leaving the mentioned issue open has become the subject of quite intense debate in Belgian scientific circles. In response, the Belgian Senate drafted a bill on January 14, 2008, which also criminalized passive influence trading by a private individual, and sent the bill to the House of Representatives for consideration. The drafted law was aimed at bringing the national legislation of Belgium into compliance with the "Criminal Law Convention on Corruption" of the Council of Europe. The explanatory card of the said draft law directly referred to Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe, which clearly and unequivocally declares passive influence trading committed by any entity, both a private person and an official, as a punishment. The House of Representatives believes that in case of criminalization

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12 *Gamkhitashvili G.,* Problematic Aspects of the Separation of Bribery and Influence Peddling, Journal of Law Herald, No. 4, 2021, 135 (in Georgian).

13 *Philipp J.,* The Criminalisation of Trading in Influence in International Anti-Corruption Laws. University of the Western Cape, 2009, 44.

of influence trading activities by private individuals, the process of implementing legal forms of lobbying will be endangered.[14] Based on the mentioned basis passive influence, trading by private individuals is not declared as a criminal punishment, that is, this draft law was rejected.

Although Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe clearly and unequivocally declares active influence peddling as an act punishable by criminal law, in some European countries active influence peddling is still not considered a crime. For example, active influence peddling is not criminalized under Spanish criminal law. Regarding this issue, the recommendation given to the Hungarian authorities by the assessment group of the "Group of States against Corruption" (hereinafter referred to as – GRECO) established by the Council of Europe regarding the criminalization of active influence peddling is important. In particular, the group of GRECO evaluators clearly explained that "an unfair advantage should not be offered or transferred to the official, but to the person who claims that, taking into account his real or alleged relationship with the official, he can influence the actions of the public official." Thus, the report unequivocally stated that in the absence of active influence peddling criminalization, the Hungarian Criminal Code was not in full compliance with Article 12 of the mentioned Convention of the Council of Europe.[15]

The GRECO evaluation commission also noted that active bribery can only include a situation where the subject of a bribe is transferred to an official through a passive influence trader. This case is clearly active bribery. However, Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe clearly states that influence peddling does not mean passive influence peddler's influence on the official through the bribe, [16] this case is considered a classic type of bribery..

Despite the main features of influence peddling established by Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe, in some European countries there are still cases of recognition of unusual actions for classic influence peddling as a crime, one of the prominent examples of which is Articles 428 and 429 of the Spanish Penal Code Articles. In particular, according to Article 428 of the Spanish Penal Code, according to which "an act is punishable by criminal law, when a public official uses his position, any hierarchical position or personal relationship with another public official, in order for the said person to make a decision that brings economic benefit to him or to a third person.[17]" Article 429 contains a similar content, but with the difference that in this case the subject of the action is a private person.[18]

The actions provided for in the above-mentioned articles, in terms of their content and forms of manifestation, differ from classical influence trading. In particular, as already mentioned, in this case, a public official or a private person uses his superior position and directly influences the official, in order to make a decision that brings material benefit to him or another person. However, it should be noted that during the action provided for in Articles 428 and 429, it does not matter whether the

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14 Ibid.

15 *Hollan M.,* Trading in Influence: Requirements of the Counsil of Europe Convention and the Hungarian Criminal Law, Acta Juridica Hungarica, 52, #3, 2011, 245.

16 Ibid.

17 Criminal Code of Spain, 23/11/1995, <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf> [10.05. 2023].

18 Ibid.

offender received any benefit from a third party or received such a promise from a third party. In this regard, in the Spanish criminal law doctrine, it is noted that the designation of these articles as influence peddling is a legal error.[19]

According to the Georgian Criminal Law, the commission of the action described in Article 428 by an official is not unequivocally considered passive influence trading, because, in the case under consideration, the influence of the official on another official for the benefit of the interests of a third party is carried out not necessarily for any benefit offered by the third party or requested by him / on the condition of preference, but also, possibly, based on the direct and independent will of the official. Accordingly, the fact of an official trading his influence, "selling" the leverage of his influence over another official to a third party is definitely not apparent here. In order to qualify trading under the influence of an action as a crime, it is necessary that the fact of the official's actual possibility of influencing/influencing other persons becomes an object of trade.

Therefore, in the Georgian legal reality, the commission of the mentioned action by an official or another private person is qualified as complicity in the crime committed directly by the official under the influence. On the other hand, there will be complicity only if the other officer committed a crime and not a disciplinary offense. And if the official under the influence commits a disciplinary offense, in this case, depending on the factual circumstances of the case, the action of the official exercising the influence can be assessed as a disciplinary offense. In the event that he fails to influence the official (failed incitement), he can be held responsible for the preparation of a specific crime. If the official under the influence has not yet committed the crime, in this case the official is liable as an accomplice in the stage of preparation or attempt of this crime.

Let's consider the following example for more visibility: the judge of the Supreme Court asked his friend, who was the chairman of the council of one of the municipalities, to sell the plot of land owned by the municipality to his relative at a symbolic price. The chairman of the city council could not break the bond with his friend and sold the plot of land owned by the municipality to the said person at a symbolic price, that is, in fact free of charge. According to the current legislation, the mentioned issue should be resolved collegially, by the relevant commission, and at the same time, the real estate should be sold at the actual market price, not at the symbolic price.

In the case under consideration, the action of the chairman of the City Council, according to the factual circumstances of the case, is qualified as embezzlement, which was committed by using the official position (subsection "d" of part 2 of Article 182 of the Criminal Code of Georgia), and the judge of the Supreme Court is responsible for complicity in the aforementioned crime, namely Yes, for incitement (25; Article 182, subsection "d") and/or will be qualified as exceeding official authority (Article 333), and the influencing official – as complicity in this crime, in particular, as incitement. According to the Spanish Penal Code, the judge's action would be considered passive influence peddling and he would be punished under Article 428 discussed above.

In addition to the mentioned Articles 428 and 429, Article 430 of the Spanish Penal Code contains the composition of classic passive influence peddling. In particular, according to the

[19] *Philipp J.,* The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 39.

mentioned article, "a person who demands a gift or any kind of material compensation or agrees to financial benefits offered by a third party, in order to influence the official to make a decision in favor of the third party, is considered a trader with passive influence." [20]

As already mentioned, active influence peddling is not punishable under Spanish criminal law. Unlike the Georgian Criminal Code, in which unfair advantage is also specified as the subject of influence trading, in this case only material values are included as the object of influence trading and nothing is said about non-material goods.

Therefore, in Spanish judicial practice, the question of placing the cases of non-material goods requested by the official or his consent to the offer within the scope of the mentioned article is problematic. In particular, the person offered the official to employ his (the official's) spouse, if official would use his influence to convince another official to make a favorable decision for him, the official agreed to the said offer.

In the case under consideration, the Supreme Court discussed the extent to which the employment of the spouse could be considered as a subject of influence peddling, since, as mentioned, the crime in question provides for the offer of only direct material benefits to the official. Finally, the Supreme Court went beyond the legal scope of the material good contained in the article and explained that the definition, any kind of remuneration, allows for a broad interpretation and includes any kind of benefit, which, in turn, also goes beyond the economic nature of the benefit.[21]

Thus, judicial practice has also considered non-material goods to be the subject of the crime of influence peddling. The mentioned approach is correct and uniquely applicable to the standards established in international law. In particular, the United Nations Convention against Corruption of 2004 provides the concept of influence peddling,[22] in the definition of this article, the legal doctrine analyzes the scope of undue influence, according to which: "The range of undue advantage is wide, for the most part it can be something material and valuable (valuable), such as, for example: money, valuables, etc. But there can also be a type of non-material benefit, such as: important internal information, sexual or other favors, protection".[23] Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe[24] defines unjustified advantage as a crime, which, in its content, includes both material and non-material benefits

Article 299 of the Hungarian Penal Code, which is called abuse of function, provides for another case of recognition of unusual actions for classic influence peddling as a crime. The disposition of the mentioned article is formulated as follows, namely: "The person who asserts the

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20 Criminal Code of Spain, 23/11/1995, <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf> [10.05. 2023].

21 *Philipp J.,* The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 40.

22 United Nations Convention Against Corruption, New York 2004, <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf> [10.05. 2023].

23 *Philipp J.,* The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 15.

24 "Criminal Law Convention on Corruption" of the Council of Europe, Strasbourg, 27/01/1999.

possibility of influencing the actions of a public official, requesting or receiving an illegal advantage for himself or another person, as well as expressing consent to such an offer."[25]

It is worth noting here the second paragraph of Article 299[26] – Abuse of function (trade with passive influence), which provides for a case where a trader with passive influence claims that he can bribe a public official by transferring the bribe to the official. This article also provides for the situation when a person claims to be a public official. Both of the mentioned cases, by their essence and functional purpose, do not belong to the crime of classic influence peddling, because from Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe and its explanatory card, it clearly follows that the passive influence peddler uses a kind of "weapon" to convince the official only his personal relationship/attitude with the official.

In this regard, let's evaluate the following two cases:

1. Let's consider a situation where the case provided for in the second paragraph of Article 299 occurs. In particular, Vaso proves to Ivan that he can bribe the official, and "to provide this service" he asks for a certain fee both for himself and for the official to meet with the official to give the object of the bribe and to convince him to perform an action beneficial to Ivan or to refrain from performing such an action. If Vaso and Ivan agree on this, as mentioned, the act in question (Vaso's assertion that he can bribe the official) is considered a qualifying circumstance of passive influence peddling under Hungarian criminal law. According to the criminal law of Georgia, if Ivan agrees to Vaso's offer, pays him the "service fee" and also gives the amount to be transferred to the official as a bribe, this action may be qualified as preparation for giving a bribe at most (Article 18; 339 of the Criminal Code of Georgia), while If Vaso actually offers or gives money to the official, it will be considered giving a bribe. Such qualification is due to the fact that Ivan does not have any kind of relationship with the official, in particular, Ivan does not use Vaso as an intermediary link providing information (indirectly offering or giving a bribe) to communicate with the official, but in this relationship, Vaso, on his behalf, personally offers the subject of the bribe to the official and asks to perform the action within the scope of his official competence in favor of Ivan. In this situation, Ivan will be an accomplice in giving the bribe, namely an accessory, since by his action, by giving money to Vaso, he intentionally contributed to the commission of the crime. And Vaso will be the direct perperator of giving the bribe.

2. As for the case provided by the second paragraph of Article 299, when a person lies that he is allegedly a public official. According to the criminal law of Georgia, such an action is qualified not as influence peddling, but as fraud.

As already mentioned, based on Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe, trading in influence is a formal crime, which is manifested in the fact that it is concluded from the moment of the agreement of the traders with active and passive influence on the exercise of real or probable influence on the official, regardless of whether it was actually carried out or not. Not the impact or whether the desired result for the interested person came as a result of the impact.

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[25] Criminal Code of Hungary, 25/06/2012, <https://sherloc.undodc.org/cld/uploads/res/document/hun/2013/hungary_criminal_code_2012_html/Hungary_Criminal_Code.pdf> [29.05.2023].

[26] Criminal Code of Hungary, 25/06/2012, <https://sherloc.unodc.org/cld/uploads/res/document/hun/2013/hungary_criminal_code_2012_html/Hungary_Criminal_Code.pdf> [29.05. 2023].

In Belgian legal doctrine, the issue of termination of influence peddling is controversial. In particular, it is controversial when the influence is confirmed by the official, although it is not actually implemented or when the supposed influence does not have the desired result. In this regard, it should also be noted that the fact of an official exercising influence due to his official position is considered an aggravating circumstance and, therefore, is punished with a higher term of imprisonment.[27]

Therefore, the mentioned circumstance makes us believe that trading with passive influence is completed from the moment of the agreement of the parties, in particular, from the moment the official agrees to the benefit offered to him or from the moment the official requests such a benefit and the interested person (active influence trader) declares his consent to this request, regardless of whether or not the impact actually took place. And the actual implementation of the influence is considered not as the basis of the composition of influence trading, but only as its aggravating circumstance.

We think that the mentioned approach is quite correct, since the actual influence on the official significantly increases the danger of encroaching on the legal good, thus a stricter punishment should be provided for the mentioned action at the legislative level.

3. An Analysis of the Arguments Against the Criminalization of Influence Peddling

Despite the declaration of influence peddling as a criminal act in Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe, influence peddling is not considered a crime in some European countries. Thus, it is interesting to discuss the arguments against influence peddling as a criminal act from a legal and social point of view. In this direction, three arguments are mainly distinguished. Consider each of them:

The first argument is that some states have legal provisions for acts similar to influence peddling that they consider sufficient to criminalize influence peddling. For example, Germany has not criminalized influence peddling as a separate crime, although the German authorities suggest that some crimes, such as "breach of trust in an enterprise", may cover influence peddling to some extent.[28] It should be emphasized here that Germany did not make an official reservation on Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe, although, as mentioned, this action is not recognized as a separate crime.

Also, influence peddling has not been criminalized in the Kingdom of the Netherlands. According to their explanation, "the legislation regulating bribery, including the institution of its attempt or complicity, sufficiently ensures the protection of the state apparatus from unauthorized influence, and, therefore, they do not consider it necessary to consider the mentioned action as a separate crime in the criminal law code." A similar approach exists in Denmark as well. In their view,

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27 *Philipp J.,* The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 43-44.

28 *Slingerland W.,* Trading in Influence: Corruption Revizited. Saxion University, 2010, 3, <https://www.law.kuleuven.be/integriteit/egpa/egpa2010/slingerland_trading-in-influence.pdf> [28.12. 2023].

"Trading in influence is partially combined with the crime of bribery in the private sector, in the aspect of complicity".[29]

In relation to the mentioned issue, it should be noted that "in the case of the crime of influence peddling, the focus here is not directly on the official, but on the person who, on the basis of receiving personal benefits, will try to exert undue influence on the official, and if the official acts within the scope of the mentioned influence and makes an illegal decision, he will be held responsible It will not be given directly for taking a bribe, but – under another article of official crime (for example, abuse of official position or exceeding official authority). It should also be noted here that influence peddling is not a classic type of corruption crime, because in this case the official is not directly involved in corrupt transactions and profit-making processes. In order for bribery to appear, it is necessary to identify the direct participation of the main character of the mentioned crime – an official – in the corruption processes, and the latter is not clearly identified as part of influence trading. Thus, in the absence of influence peddling, those persons whose efforts the official committed an illegal act, in particular, another official crime (but not bribery), remain outside of criminal liability. In connection with this, there may be an opinion that the action of these persons can be evaluated as complicity in another official crime committed by the official, for example, organization or incitement. However, the consideration of the mentioned problem in such a narrow aspect is unjustified and cannot ensure the effective protection of the legal benefits provided for in the influence trading article. In particular, the legal significance of the criminalization of influence peddling and the scope of its harmful effects on the state/society is much wider compared to the commission of a specific official crime. Trading in influence includes a systematic chain of actions promoting the creation and development of a corrupt background, which undermines the prestige of the administrative apparatus of a democratic state and its effective functioning. In case if influence trader's actions will be considered to be complicity in other crime, the said person will be punished by criminal law only if he really influence the official, convinces him to commit the crime. And, if he tries to influence in vain (unsuccessful incitement), in this case he can be charged with criminal liability at most only for the preparation of the crime. Accordingly, the situation when a person asserts or confirms the possibility of influencing an official, for which he receives an unfair advantage, will remain beyond criminal liability, although in the end he will not even try to influence the official. At this stage, the legal good – the prestige of the state apparatus – has already been violated, although this action can no longer fall within the area of criminal protection. This, in turn, will also encourage active influence trading, which will ultimately help to create a corrupt atmosphere in the state.

In this case, considering these persons as mediators in bribery and classifying their action as complicity is legally groundless, since we do not have a perperator of bribery – an official, without whom the said composition does not exist. Taking into account all of the above, it should be noted that bribery in its classical sense does not include the signs of trading under influence, therefore, the presence of the latter as a separate crime in the Criminal Code is necessary."[30]

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[29] *Gamkhitashvili G.,* Problematic Aspects of the Separation of Bribery and Influence Peddling, Journal of Law Herald, No. 4, 2021, 134 (in Georgian).

[30] *Gamkhitashvili G.,* Problematic Aspects of the Separation of Bribery and Influence Peddling, Journal of Law Herald, No. 4, 2021, 135 (in Georgian).

The problem of clearly separating lobbying and influence trading is considered as the second argument. The United Kingdom did not declare influence peddling as a separate crime on this very basis, in their opinion such a decision would endanger legally recognized lobbying activities.[31] The Legislative Commission of the Belgian Parliament did not support the initiative to declare passive influence trading by a private person as a separate crime, because according to their definition, all such consulting professions, for example: lobbying, legal services, will be in danger due to the uncertainty of the essence of the influence and its wide scale.[32]

The Swiss legislator also finally refused to criminalize influence peddling, as they explained that it would lead to an unjustified criminalization of simple forms of lobbying activity. [33]

To clarify the issue of legal and social feasibility of the above argument, it is necessary to clearly define the essence and functional purpose of lobbying and influence trading. Lobbying can be thought of as an important means of persuasion. From this point of view, the exchange of information is the main essence of the relationship between a lobbyist and a politician. A lobbyist releases valuable information and distributes it strategically to persuade a person to make the decision they want.[34]

Thus, in order to justify the expediency of the existence of trading in influence as an independent crime, it is necessary to clearly establish the distinguishing marks between them. Due to the fact that trading in influence, in turn, creates a background of corruption,[35] in order to clearly distinguish between trading in influence and lobbying, first of all, it is necessary to analyze the interdependence of corruption and lobbying activities in general. "An important distinguishing sign of lobbying and corruption can be considered the forms of their implementation. Lobbying mainly involves the exchange of information, persuasion and the use of other methods allowed by law, while corruption involves the transfer of money or other benefits.[36] Thus, lobbying activity, in its essence, aims to exert influence, although the form/method of its implementation is markedly different from influence peddling.

In particular, lobbying activity involves legitimate influence, while influence trading is about the implementation of unfair, illegal influence. There is a very big content difference between them. The influence exerted in the process of lobbying activity as a lever of attraction/persuasion is legal to the extent that it is mainly aimed at solving issues of state/social importance, which is based on professional, analytical reasoning and relevant arguments related to this topic. Thus, here there is a kind of intellectual competition between two parties, the lobbyist and the decision-maker(s), a debate that takes place only around the discussed issue, related to its fundamental elements, and the final decision is the relevant fruit of this educational/analytical work process.

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31 *Slingerland W.,* Trading in Influence: Corruption Revizited. Saxion University, 2010, 4, <https://www.law.kuleuven.be/integriteit/egpa/egpa2010/slingerland_trading-in-influence.pdf> [28.05.2023].

32 *Philipp J.,* The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 48.

33 Ibid.

34 *Philipp J.,* The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 20.

35 *Lekveishvili M., Mamulashvili G., Todua N.,* Private Part of Criminal Law, Book II, 7th ed., 2020, 410 (in Georgian).

36 *Gogiberidze G.,* Doctoral Thesis on the topic: Lobbying and Legal Aspects of its Regulation, Tbilisi, 2012, 66 (in Georgian).

In the case of influence peddling, the illegality of the action stems from the fact that in this case, the passive influence peddler, in exchange for money or other benefits, uses his personal relationship with the official (acquaintance, friendship, kinship, etc.), speculates with which official with close status" and tries to persuade him to commit a specific action or refrain from it. It is this method that adds influence to the character of irregularity. The main thing here is that the influence trader's main lever is the existing relationship with the official, which is used to convince the official and ultimately achieve an illegal goal. In lobbying activities, the lobbyist's main "weapon" is his intelligence/knowledge in relation to a specific issue, which is expressed in putting forward weighty arguments and thereby convincing a person.

In the case of influence trading, the influence trader is not at all interested in the essence of the issue to be resolved, its future consequences, etc. He mechanically strives to satisfy the interest of the merchant only by active influence, for which he uses only the existing relationship with the official, and not his professional knowledge/experience in relation to the issue to be decided. At this time, the official's decision is not based on the result of analyzing objective arguments, but on the wishes of his relative/friend or other close people.

Specific individuals benefit from lobbying activities precisely for the purpose that lobbyists introduce issues/problems/opinions of interest to this group of individuals at a professional level to the representatives of the legislative/executive authorities and discuss legal ways of solving them. Lobbyists are a kind of intermediaries/representatives of these persons in relations with state bodies. In this aspect, lobbying activity is very similar to the provision of legal services, because in this case too, in exchange for the provision of legal services, a person pays a certain amount to a lawyer to represent and protect his interests in court or any other third parties.

In this sense, the lawyer also tries to influence the court in order to make a decision in favor of the person under his protection, which is a completely legal action. In this case, the most important thing is to exercise reasonable influence, which means that the lawyer should act only within the legal framework to protect the interests of his client, in particular, he should use all the legal ways and means of protection established by the procedural legislation. Thus, both the lawyer and the lobbyist are required to perform their professional duties legally. If signs of any crime are revealed in their actions, they will be held accountable under the relevant article.

Finally, it should be recognized that there is a distinct difference between influence peddling and lawful lobbying efforts, depending on how they are carried out. Criminalizing influence peddling does not prevent genuine lobbying or other advising actions from being carried out effectively. On the contrary, by criminalizing the aforementioned behavior, a clear boundary was created between legitimate and unfair influence, defining the legal scope of legitimate lobbying and other activities.

They use the complex structure and lack of clarity of the regulation on influence peddling as a third justification. For example, because to the complexity of the crime's structure, Danish authorities have declined to punish influence peddling, albeit they have not explicitly stated what they mean.[37]

[37] *Slingerland W.,* Trading in Influence: Corruption Revizited. Saxion University, 2010, 4, <https://www.law.kuleuven.be/integriteit/egpa/egpa2010/slingerland_trading-in-influence.pdf> [28.05.2023].

According to the Swedish authorities, neither Article 12 of the Council of Europe Convention nor the Explanatory Report clearly states the essence of "undue influence", which is why it is difficult for them to write the exact disposition of this crime in the Criminal Code.[38]

In this regard, it should be said that the Convention of the Council of Europe created the basic structure of influence trading, which clearly describes the essence of the crime, its functional purpose and its main difference from bribery. And the rest of the issues, such as: essence and scope of influence, subjects of action, subject of bribery, etc. It should be regulated by the domestic law of a particular state, taking into account the social/political factors existing in that state.

4. Conclusion

The institution of influence peddling was discussed in this article in terms of Article 12 of the Council of Europe's "Criminal Law Convention against Corruption" and a comparative legal study of numerous countries' criminal legislation. In general, it should be noted that Article 12 of the Council of Europe Convention provides constitutional aspects of the criminalization of influence peddling, a kind of clear pattern that, while protecting its main legal value, should be reflected in national criminal legislation, taking into account each country's socio-political situation.

It should be clearly and unequivocally noted that Article 12 of the "Criminal Law Convention on Corruption" of the Council of Europe punishes both active and passive influence peddling, and at the same time, the perpetrator of the mentioned actions can be any entity, both a private person and a public official or a person equal to him. It should be emphasized here that an official or a person equal to him will only be considered a subject of passive influence trading if the actual possibility of exerting undue influence stems from his personal relationship with another official only, and not from his official status/authority. In the latter case, the action should be qualified as passive bribery, since it is the fact that the official uses the privileges related to his position as a kind of leverage to influence another official.

In addition to the above, it is also important to briefly analyze the arguments against the criminalization of influence peddling. One such argument is the opinion that active and passive bribery includes the signs of influence peddling crime. In this regard, it should be noted that the subject of passive bribery is an official who "sells" his official position, which is manifested in the fact that the issue to be resolved is within his direct competence and/or uses his official status to influence another official.

In the case of influence trading, the lever for making the desired decision for the active influence trader is not the passive influence trader, but the official who is the addressee of undue influence. Trade in influence, by its essence and forms of manifestation, does not clearly fall within the legal area of classic bribery, it goes beyond its scope, which is why it became necessary to declare trade in influence as an action contributing to the background of corruption, as a separate crime.

Regarding the issue of the relationship between influence trading and lobbying activities, it should be clearly noted that they, by their purpose and forms of manifestation, are sharply different

[38] Ibid.

from each other. What is expressed in the fact that during influence trading, the fact of exercising undue influence on the representative of the government, using a personal relationship, and the lobbying activity essentially involves persuading the representatives of the state government in order to make the desired decision through the procedures established by law, based on the discussion of appropriate arguments and mutual exchange of opinions.

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