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Characteristics of Ancient Rome Criminal Law Process

I. Archaic Era Criminal Law Process in the Ancient Rome Law Development

Criminal law process evolution clearly reflects the level of legal culture of the society with the State order, as the personal nature of responsibility in the previous history periods (talio – revenge, paying back, and compositio – payment in blood) was the indication of under-development of public-legal basics or its existence at the embryonic stage. The criminal law process was not characteristic, as an area of legal system, of the ancient period. In this regard the Rome criminal law process is not an exception and it was preceded at the initial stage by the primitive revenge and vindictive principles. The objective of the present work is to study the ancient Rome criminal law process evolution with the consideration of relevant stages of development in the State and legal systems of Rome. There is no relevant scientific study of Rome's criminal law process in Georgian legal literature.

Ancient Rome criminal law process, similar to the civil law processes, has gone through the several stages of evolution. Chronologically - archaic period of legal development (754- 367 yy before Christ), Rex (rexes) period in Roman State (754-510 yy before the Christ) and early republican period (510 – 367 yy before Christ). For the above discussed periods the legal actions for criminal cases were implemented at the Curiata assemblies (comitia curiata). The information on such assemblies are provided in the legislative acts from early republican period, namely: laws on provocatio ad populum and limits of administrative penalties (30 buffalos and 2 sheep) (lex Aternia Tarpeia) and, of course, - Leges duodecim tabularum (laws on twelve boards).[1] The first part of commissional court processes was referred to as anquisitio (study, investigation) and considered the investigation carried out by the Magistrate. With the participation of informal citizens' assembly the magistrate was clarifying the fact of conviction of the crimen (crime). In case of its verification, at the third sitting it would issue the decreta (decree) on guilt, which was

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1 *Struve V.V.* (Editor), Reading Book on the History of Ancient World. Rome, Moscow, "State Educational-Pedagogic Publishing House of the Ministry of Education of Russian Federation", 1953, 25-29; *Kudinov O. A.,* Comments to the Origins of the Roman Law, Moscow, Publishing and Trading Corporation "Dashkov Co.", 2009, 70-76; *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 183; *Morev M. P.,* Roman Law. Text Book, 2nd Edition, Moscow, Publishing and Trading Corporation "Dashkov Co.", 2011, 551(in Russian).

usually followed by the provocatio ad populum et rogatio[2] procedure, which in the period of Rome republic considered the appeal of the citizen towards the public assembly of Centuria (comitia centuriata) on the decree issued by the magistrate in cases when the decree sentenced the guilty person to death and the citizen would appeal to Tribute public assembly (comitia tributa) – in cases when decree considered the payment of penalty. Hence, as a result of "provocatio ad populum" the criminal competence of the magistrates was limited with only the preliminary court-case processing. We are of the view that "provocatio ad populum" was not the legal way to appeal the sentence, but it was used as a political means of protest against the malfeasance from the officials. Ulpianus (Domicio Ulpianus) discusses in more detail the reasons and results of appellation in the first book on "Appeal", which states that "there is nobody who does not know how often and how necessary is to use the right to appeal, as it can indisputably correct the unjust results of lack of experience of the judge, although in some cases the correct decision can be changed to the worse – as the person who makes final decision does not always make better decision"(D.49.1.1).[3] Ulpianus in the same work discusses, whose court decision can be appealed through appeal rule, namely: "can the rescript of the princeps be appealed if, for example, province prezzi or any other person approached for advice the princeps and due to such request the rescript has been issued? For example the question was raised: is there right for appeal? It is possible that in the approach for the advice the false data were provided. On the above problem there is a rescript from divine Pius, which was given to the community of Thacians, stating that such rescript can be appealed. The following words are used in the rescript: "if anybody approaches us and we provide with the answer in writing, the person can appeal the answer. As if he/she approves that the written answer was false and did not coincide with the truth, it will be considered that we have not expressed any preliminary position, as we answered the question, which was falsifying the circumstances and giving the other view" (D.49.1.1.1).[4] In appeal process the Romans were determining specific requirements for the appealing party, namely Ulpianus indicated that "in the process of drafting appeal request, the following information must be indicated – who is applying for appeal, against whom is the appeal and which decision has to be reviewed via the appeal rule" (D.49.1.1.4).[5]

The claimant after the declaring the blame had to call (diem decree) the blamed person to the meeting of curiata (comitia curiata) during the pre-determined period of time. Then the defendant party should agree with the claimant the term (timing) for the appearance at "comitia

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2 *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 265 (in Russian).

3 Digesta Iustiniani, Volume VII, Books XLIIIV-L, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2005, 223 (in Russian).

4 Ib.

5 Ib., 225.

curiata", where he would be presented the blame, and finally the defendant would be accused in front of the meeting which had the authority to make decision on the sentence. "Comitia curiata" made decisions on the sentence based on the free and direct perception of the justice without following of any formal norms. In our view, Romans were trying to limit the wilful act from the magistrate via the justice function of the "comitia curiata", but with the consideration of one circumstance: if the magistrate followed the general view of the citizens, the citizens, by participation in the justice process, - were demonstrating the unlimitedness of civil freedom. Only for the specific cases, instead of "comitia curiata" the justice process was carried out by so called "quaestiones extraordinariae" (extraordinary commission).[6] German scientist T. Mommzen provides us with the important information on the court process in the ancient times.[7] Based on his correct position, the whole court authority of civita Romani (Roman community) was concentrated in the hands of the rex (ductor) (leader), who would sitting on the place of the judge (tribunal) in the stall of the battle phaeton (sella curulis) in the centre of the square and would implement the justice or make "the order" during the court days (dies fasti); personal guards (lictores) would stand beside him, and defendant or the arguing parties (rei) would stand in front of him. We do agree with the position of the scientist that the judge of the slaves was their lord. Woman would obey the power of the "paterfamilias" (family head) or the eldest male relative – "adgnatus proximus", as neither slave nor woman were considered as members of the Roman community in ancient times. It has to be mentioned that son being under the power of the father (in patria potestas) would obey to the power of only the paterfamilias and the court authority of the latter against their sons was competing with the court competence of the rex (ductor). But with one consideration: in patria potestas the "paterfamilias" (head of the family) was given the proprietary right, determining his power. The court process of the above discussed period was of public or private nature, depending on the person presenting the case: by the initiative of rex (ductor), himself or based on the request from the injured party. The process was public if the blamed person was imputed for the violation of peace in the society, in other words for the persons guilty for the crime convicted against the State, namely: high treason, collaboration with the enemy (proditio) or armed resistance against the government (perduellio).[8] However, it has to be mentioned that the person was deemed guilty in violating the social peace in the following cases: murder with the extreme cruelty (parricida), homosexualism, raping the virgin or mother of the family (matrona), false witnessing, setting fire, carrying out magical ritual, damage to the arable land plot, robbery of cereals from the field under protection of people and Gods during the

6 *Morev M.P.,* Roman Law. Text Book, 2nd Edition, Moscow, Publishing and Trading Corporation "Dashkov Co.", 2011, 551(in Russian).

7 *Mommzen T.*, History of Rome, Volume 1, 2nd Stereotype Edition, Saint-Petersburg, "Nauka", 2005, 131(in Russian).

8 Ib.

night - as the above crimes were considered as high treason and the guilty persons were taken to the court with such blame. The rex (ductor) was starting trial process; he, following the listening to the invited advisors, would declare the sentence. However, according to the Mommzen's position, to which we agree, rex (ductor) after starting the trial could assign the implementation of the further trial processes and sentence making to his deputy; the Deputy was selected from the Senatus (council of elders) members.[9] Scientist – Romanist also stresses the fact that appointment of two extraordinary deputies (duumviri perduellionis), who would make decisions against the rebellions, and mentioning of permanent deputies, who were assigned to "investigate the murder crimes", persecution and arresting of guilty persons (quaestores parricidii), characterised the later period and was not practiced in the period of rex-es.

In our view, after conviction the guilty person was presumably arrested. However it was allowed to let off the person under guarantee. Mommzen confirms the facts of torturing of the slaves during the interrogation of the blamed person, with the aim to get the testimony evidence.[10] It has to be mentioned that rex (ductor) did not have authority to forgive the convicted and he had to apply with "provocatio ad populum et rogation" request to the comitia curiata. The fact that the Gods could forgive the guilty person can be viewed as innovation and interesting: the one who falls on his/her knees in front of the Jupiter priest and asks for forgiveness, will not be punished with the flogging; the one who enters the priest house in the chains will be freed from the chains; and if the one sentenced to death, before reaching the place of punishment meets virgin priest of goddess Vesta, will be released from the sentence.[11]

II. Criminal Law Evolution in the Republican and Imperial Periods in Ancient Rome State

The situation was partially changed at the next stage of criminal law development, which is characteristic to the pre-classical stage of Roman justice development, covering the later republican period (367-27 yy, before Christ). During this period comitia curiata lost its old influence and unlimited authority; the Roman society realised that trials carried out in front of the masses of population and population participation was not always reflecting the justice, universal fairness. On contrary, for the achievement of acceptable sentence for the guilty person, there were frequent cases of political revenge against the opponents and usage of engaged crowds. It is indisputable that the ancient Roman public meetings became the arena for the famous eloquent public speakers (orators) and due to

9 *Mommzen T.,* History of Rome, Volume 1, 2nd Stereotype Edition, Saint-Petersburg, "Nauka", 2005, 132 (in Russian).

10 Ib.

11 Ib.

their talent it was possible to defeat any opponent and to accuse for actually convicted or created crimes. Despite the fact that in later republican period the magistrate still had right to determine the signs of crime and accuse the person based on his position, if the incriminated action was considering the death punishment or the penalty higher than the predetermined norm, then the magistrate had to present the sentence to the public meeting under the provocatio ad populum et rogatio procedure. Based on the above, we are of the view that there is an attempt to limit the universal authorities of the magistrate. Taking into account the above we shall assume that "comitia centuriata" and "comitia tribute" can be viewed as kind of courts for criminal cases, the above units were covering crimes based on the sentence considered for the crime (capite adquirere – request to punish the blamed person, or anquisitio pecunia – cash penalty).[12]

The unique source of Roman law - Digesta Iustiniani's volume I, title II, volume II, titles I, II, III, IV,V,VI,VII, X,XI,XII, volume III, titles I, II, III, IV,V,VI, volume IV, titles III and VIII, volume V, title I, volume XLII, title I, volume XLIX provide important information on the court authorities and criminal trial processes of ancient Rome during the Republican (510-27 yy before Christ) and Imperial periods (30 y. Before Christ – 476 after Christ), namely: information on the law and origins and inheritance nature of the wise; if any person does not obey to the person authorised to carry out trial process; information on summoning to the court process; if any person summoned does not appear at the court, or anybody summons the person who should be called based on the edict; the person summoned shall appear in the court or send his/her attorney or provide (other) guarantees; nobody has right to create obstacles using the force for the persons summoned to the court; on the persons, whose actions were creating obstacles for the one summoned to the court; if anybody would not fulfil the promise to appear to the court; on the days when it was not allowed to carry the trial processes, also on the postponement and other terms.[13]

The criminal trial process implemented by the magistrate took the form of preliminary investigation. Thus in Roman criminal law process similarly to the Roman civil law process, two distinctive stages were established: in iure (in front of the Magistrate) and apud (in) iudicem (in front of jury – iudex). However, in our view, if we try to find analogues in criminal and civil laws, we will make the essential mistake, as criminal justice at "in iure" (in front of the Magistrate) stage, with its sense was the essential review of the case at the magistrate court – the magistrate was checking the accusation against the defendant and was issuing verdict of guilty or not guilty. Moreover if the magistrate issued the verdict of not guilty, the decision was final and was not

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12 *Bartoshek M.*, Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 23, 48, 61(in Russian).

13 Digesta Iustiniani, Volume I, Books I-IV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 98-99, 189-215, 229-245, 310-405; Digesta Iustiniani, Volume II, Books V-XI, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 21-56; Digesta Iustiniani, Volume VI, Books XLI-XLIV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 167, 185,191,193; Digesta Iustiniani, Volume VII, Books XLIIIV-L, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2005, 224-259 (in Russian).

subject to appeal in "comitia". If the magistrate issued verdict of guilty the defendant had right to appeal the decision in "comitia", where the new trial would be led by the magistrate.[14] However as a result of above trial process the "comitia" would make the same decision as magistrate without any changes or would support its appeal: there was no intermediate decision and the voting was not taking place. We are of the view that despite the similarity of trial processes due to the stages in the process, the completely different trial process was taking place in Roman civil process, although the discussion of this issue is not the objective of present work.

During the later republican period the process of establishment of extraordinary permanent court commissions for the specific crimes has started. The activities of the commission were regulated by the special instruction, which clearly determined the essence of relevant crime and the punishment considered. Under the discussed conditions so called "Quaestiones perpetuae" (permanent courts) were established, which by the end of republican governance, deprived the ancient Roman comitias from the justice making function. Initiallu in 149 year before Christ under the lex Calpurnia (the law) the Quaestio de repetundis – commission discussing the cases of bribery and extortion from the high officials - was created.[15] The above law was the first among the numerous laws on leges repetundarum(the crime of bribery), which defined the crime of bribery, the court instance reviewing such cases was determined, and the guilty person was imposed to return 1/3 of the property acquired via his actions (however we have to mention that only colleagues had right to review the bribery cases related to the senators without participation of Roman people - cives Romani, as people could not control magistrates on the territory of Italy and especially on the territories of the provinces).[16] Later, in 81 year before Christ, the commissions were created in the period of dictatorship of Cornelius Sul – for the following crimes - quaestiones de secariis (on robbery, crime of murder of injured), quaestiones de veneficiis (crime on murder via poisoning), de peculate (on plunder of state property), de falso (falsification of testament, will and money falsification); the punishments for such crimes were de ambitu (depriving the right to be appointed on state position for 10 years period), de maiestate (the punishment for the wilful gathering of army and starting armed actions against other State, offending the state of Rome by the Magistrate and for the offending of the Magistrate),[17] the above commissions have again limited the authority of "Comitia", thus expanding the court actions by the senators, especially for the quaestiones de secariis et de veneficiis crime cases. As we can see, during the last years of republic, "comitia" court was covering only the high treason and the cases for which the extraordinary and permanent court commissions were not created yet.

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14 *Morev M.P.*, Roman Law. Text Book, 2nd Edition, Moscow, Publishing and Trading Corporation "Dashkov Co.", 2011, 553(in Russian).

15 *Bartoshek M.*, Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 184(in Russian).

16 Ib.

17 Ib., 185-186.

The court reviewed the criminal cases collegially, sometimes with the participation of 50 judges (iudex); this, in our view, was significantly reducing the possibility to influence the activities of the judges and supported the trust to the court in the society. The list of officials granted the right to become the judge provided by the Sexrus Pomponius in II century after the Christ is very interesting. Based on the above list in Rome the justice was implemented by 10 tribunes from the Plebeians (tribuni plebis), 18 praetors, 6 aediles curules (D.1.2.34). In the provinces of the Rome Imperia the function of judges was assigned to the praesidis – heads, chairman - vice-gerent and their deputies.[18]

Similar information can be found in volume V, title I of Digesta Iustiniani – "on the courts, where each person shall submit the claim and be responsible for it" – in paragraph 12, giving the list of categories of persons, who are not allowed to become the judge, namely: "but those who have right to appoint the judges, can't appoint any person as a judge: appointment of some people on the position of judge is against the law, nature and tradition. Nature is against the deaf-and-dumb and imbeciles, persons under age, as they lack the consciousness (it is against the rules for appointment of judges). Law is against appointment of those who were expelled from the senate. The tradition is against appointment as judges of women and slaves as they can't execute the civil duties and not because they lack the consciousness. For those who can become the judges it does not matter if they are in the government or are themselves the governors".[19]

The special praetors were the chairmen at the commissions. They would make the oath to review the cases based on the law on the relevant commission. In addition to the judges the criminal case trial was attended by the former aediles (aediles curules – iudex quaestionis) based on the request from the praetor.

In the period of late republic any citizen of Rome (cives Romani) had right to present the public accusation (quivis de polulo – any citizen of Rome could become claimer for actiones populares claims).[20] However, it has to be mentioned that the citizen of Rome achieving age of 60 was losing the right to be the claimer or vote in the "comitia". Claimer, as informer/denouncer (delator), was informing the criminal court magistrate about the specific crime (postulatio) and his readiness to carry out the court persecution of the suspected (nomen deferre –suing in the court). The court magistrate would receive (nomen recipere) the relevant written statement (libellus accusatiorius). The statement would be also made/joined by the co-claimers - subscriptores (if applicable). Under the magistrate's order the suspect would be entered (inscriptio) into the list of criminal cases, which would be followed by the announcement of case contents. Then the defendant "reus" (defendant). With the consideration of case circumstances, it was possible to

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18 Digesta Iustiniani, Volume I, Books I-IV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 173 (in Russian).

19 Ib., 27.

20 *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 269 (in Russian).

have "iuramentum calumniate" from the claimer (giving oath against the unguilty person with the intention, the above was punished under the law "lex Remmia" (the law was punishing for the false blame made for self-interest, the punishment was the loss of civil dignity in the form of depriving from the right to act as claimer or witness in the court), in such cases the claimer was punished according to SC Turpillianum (the guilty person -infamia – was dishonoured; he would lose the right to renew the sue and was sentenced to the same punishment as the calumniator). Gaius discusses the above criminal action in volume four of "Proncial Edict", it states that: "The one-year validity of claim against the person giving the bribe in order to stop the submission of claim to the court is counted from the point when he had paid the bribe if the person taking the bribe had possibility to present the claim in the court. But if other person paid money (bribe) to direct the court process in favour of the person, then we have the question to start counting the timing for the claim validity from the moment of payment of bribe by the person or from the moment when the first person heard about such payment; as we understand the person not having information cannot sue in the court and it is fair to start counting the time (year) when the person became aware (of such payment)" (D.3.6.6,7,8).[21] In the volume 3 of "For Edict" Paulus stated that "if someone has taken bribe from the third party not to claim against me and the money was paid by me or my attorney, or by the person managing my personal matters, and I have endorsed such action, it would be reviewed as payment of bribe by me.... $1. If the money was received to make damage to the son of the family, the claim should be placed for his father. If the son has taken the money, in order to create or not create damage for him, the claim should be placed against him…"[22] Our attention is drawn to the statement made by Ulpianus in volume 11 of book "For the Edict": "If under my proposal you swore and were exempted from the court, and then it was indicated that you made the false swear, Labeo states that the claim should be placed against such person on the abuse." Pomponius deems it correct to have deal in the process of swearing; Marcelus shares the same idea in volume 8: "One must protect the thing for which he/she made an oath" (D.4.3.21).[23] According to the correct position of M. Bartosheko, the researcher of Roman law, an old hypothesis on the putting the sign C on the forehead of the person guilty in the above offense is not true.[24]

At the second stage of Roman empire, in the period of Dominate (282-476 yy), chronologically coinciding with the post-classical period of Roman law development, the criminal justice process had undergone another change and instead of Quaestiones perpetuae and Senators' justice, the servants of Emperor were assigned the function of judge for criminal cases, these were the praefectus Urbi in Rome and praefectus praetorio – in Italy and other provinces of the empire.

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21 Digesta Iustiniani, Volume I, Books I-IV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 405(in Russian).

22 Ib., 405.

23 Ib., 447.

24 *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 59 (in Russian).

As a result of administrative reforms implemented by the Emperor Diocletiane the praesides provinciarum (province governor) becomes the first court instance body for the criminal and civil cases; Decision of praesides provinciarum could be appealed with the highest ruler via the appeal rule. These servants were investigating the cases in the "extra ordinem cognition" (extraordinary) courts based on the inquisitorial justice. In the period of Dominate, in addition to the normal rules for justice, the special court bodies were created for the specific ranks (senators, palace servants, soldiers and elesiastics).

In the period of empire the investigation process replaces the blame process and the inquisition considered the investigation of malfeasance cases; and later for the actions against the heretics it considered the creation of special court by the Roman Catholic Church. Inquisition process was carried out by the few servants. Now the emperors were punishing the past offenses with the new sanctions, which determined the new punishment system. As for the initiative for the persecution of the crime, the private claim/blame principle was still valid, however it lost its exclusivity and more often the public accusation was presented by the various instances of state government (ex officio). Gradually, extra ordinem cognitio becomes universal determining the criminal law process, which supported the replacement of damnatio (sentencing to death via crucifixion or head amputation, or more "moderate sentence" – battle with the wild animals or gladiators, or in sentencing to compulsory and permanent penal servitude at mines for the criminal offences) with the punitio (generally selection and conforming of punishment for the guilty person).[25] The justice process itself become more free and determination of punishment depended on the internal belief of the judge with the consideration of guiltiness of the person (sed non ex lege – this is not relevant to the law) and his/her social status. Taking of the accused person to the court by force was also allowed.

III. The Rights and Duties of Participants of Criminal Law Process in Ancient Rome

We deem it expedient to describe the court process in ancient Rome. The court process was carried out in open area, at the forum square. Marcellus stated in the volume 1 of "Digest": "The court hearings should finish at the same place where they started" (D.5.1.30).[26] In the volume 51 of Ulpianus's work "For Sabinus" we can read: "If the order on case review does not state a place, it is assumed that the order was given to carry out the court trial at the place where the court decisions are made, not to create the awkward situation for the arguing parties" (D.5.1.59).[27] The magistrate with the assigned function of the judge – the Praetor was sitting at the higher place

[25] *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 97, 248 (in Russian).

[26] Digesta Iustiniani, Volume II, Books V-XI, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 35(in Russian).

[27] Ib., 47.

(tribunal); he was surrounded by the chairs for judges, claimers, defenders, guarantors and defendant him/herself. In the same title of Digest, paragraph 37 gives the extract from the 5th volume of Callistratus's work "Court trial process", where it is stressed that "if case concerned the violence and proprietary issues, it is indicated in the rescript from divine Adrianus, written in Greek and granted to the Tesalia community, that the case on violence should be reviewed before the proprietary issue."[28] The IX board of Leges considered that if the person appointed as the judge or arbitrator (mediatore) for the criminal case was accused for the receipt of cash payment (bribe), he would be sentenced to death.[29] According to famous romanist I. Baron, if the magistrate with the judge functions determined the new injustice rule and used it at any of the trials, the defendant (despite his origin) should be given right to use the same rule; in addition, if the jury dolo and culpa (with intention or due to carelessness) made the unfair verdict (iudex qui litem suam facit), he would be responsible for such action, namely: in case of dolus (intentional) the judge was imposed the reimbursement of incurred loss in total volume; in case of culpa (carelessness) – he had to pay the amount determined by the judge.[30] The above discussed rules were incorporated in the civil law collections issued by the emperor Justinian (Corpus Iuris Civilis), namely in volume II, title II, paragraph I of Digesta seu Pandectae Iustiniani,[31] which states "...it is clear that the rule perceived as fair to be used against other person shall be deemed as the rule valid to the same person". The provision set by Ulpianus in volume 21 of the book "For Edict" is also important: "If the son of the family appointed as the judge reviews his case and makes decision, then responsibility will only cover the property he owned at the moment of the decision making at the court. The judge is considered as decision maker in his own case (case in which he holds an interest) when he makes decision which is against law and is intentional abuse; the decision was made with abuse of it was clearly determined that the judge was over-loyal, inimical or the self-interest was identified; in this case he would be imposed payment of real value of the case" (D.5.1.15).[32]

The person under the threat of court persecution or already accused person, was obliged to come to the court in black clothes, with the hair and beard, expressing his grief; the senators had to wear togas with narrow borders instead of porphyry togas with wide borders. The relatives and

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28 Digesta Iustiniani, Volume II, Books V-XI, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 37(in Russian).

29 *Struve V.V.* (Ed.), Reading Book on the History of Ancient World. Rome, Moscow, "State Educational-Pedagogic Publishing House of the Ministry of Education of the Russian Federation", 1953, 29; *Kudinov O.A.,* Comments to the Origins of the Roman Law, Moscow, Publishing and Trading Corporation "Dashkov Co.", 2009, 74 (in Russian).

30 *Baron I.,* System of Roman Civil Law, Saint-Petersburg, Publishing House of Aslanov R. "Legal Centre Press", 2005, 806(in Russian).

31 Digesta Iustiniani, Volume I, Books I-IV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 197 (in Russian).

32 Digesta Iustiniani, Volume II, Books V-XI, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 27 (in Russian).

friends of defendant had to wear the mourning clothes. The defendant had right to postpone the court trial by 10 days in order to better prepare for it. Moreover the first volume of Callistratus's work "Court trial process" describes additional circumstances, when the investigation of the case could be postponed for acceptable reasons: "Sometimes the investigation is hindered by the acceptable reason and such reason can come from certain persons, for example if there is an information that the important documents related to the dispute are kept with the person, who is not present due to the state duties; the divine brothers (Marcus Aurelius Antoninus Karakala and Publius Septimius Geta) indicated in the rescripts with the following words: "it is human to allow postponement for the circumstances, for example if the party to the process lost son or daughter, or wife lost husband, or son – lost parent and for such circumstances the investigation can be postponed for short time" (D.5.1.36).[33] The guilty person was supported by advocati ac laudatores (processual defender to the guilty person, who played role of defender or witness in the favour of guilty person and provided assistance to the defendant with his advice and authority).[34] Advocatus was perceived as well-known and respected person. Despite the fact that advocatus was not making a speech at the trial, he was demonstrating the moral support to the defendant (or one of the parties). The defender was sitting on the chair besides or near the person he was defending. The prosecutor or his patron was starting the court trial. Then the composition (consilium) of the court trial was decided, Celsus in volume 3 of "Digests" describes the process in the following way: "two out of three judges, in case of absence of the third one, do not have right to try, as the trial was the responsibility of all of them. But if the third judge was present, but expressed the different view, then the court decision made by two (judges) was supported: in other words, is not it true that the decision was made by all of them?" (D.42.1.39).[35] In the same volume 3 of "Digests" Marcellus expressed his view, that "Only in case when all judges were present, it was considered, that all judges were making decision."[36]

It was possible to carry out voting for the new candidacy for judge, if one of the judges would be absent due to some reasons, this process was referred to as "subsortitio". It was also permitted to appoint the prosecutor without consideration of interests of the defendant. "...Causa persona, loco, tempore, qualitate, quantitate, eventu…" – it is necessary to determine the motive, place, time, volume, nature and result of crime, as well as the personality of the guilty person.[37]

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33 Digesta Iustiniani, Volume II, Books V-XI, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 37 (in Russian).

34 *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 25, 178 (in Russian).

35 Digesta Iustiniani, Volume VI, Books XLI-XLIV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 185 (in Russian).

36 Ib.

37 *Morev M.P.,* Roman Law. Text Book, 2nd Edition, Moscow, Publishing and Trading Corporation "Dashkov Co.", 2011, 557 (in Russian).

IV. Court Investigation

At the next stage of the process the court investigation (probatio, as affirmation) was carried out: the discussion (altercatio) was conducted between the parties. Cross interrogation was carried out by the prosecutor and the suspect's defender. In 52 year before the Christ the law was adopted "lex Pompeia de ambitu" (the Pompeus law on punishing the unlawful taking the position of magistrate) - one of the 13 laws, which quite strictly punished the person guilty for mentioned action – 10 years of exile from Rome state or from senate and magistrature; the law was regulating the criminal justice process.[38] The above mentioned law determined the length of prosecutor's and defender's speeches: accordingly – 3 and 2 hours. In the event if the prosecutor terminated the claim, then the trial process in the court would stop too. But if the false accusation was pre- identified then the prosecutor was punished accordingly, which is clearly indicated in the volume 2 of Pompeus's work "About the Debauchery", see the extract: "... though in addition to the price definition, in case of accusation in false witnessing, the investigation was carried out; as the accusation in false witnessing should be separated from the loss incurred to the slave owner due to the torturing of his slave" (D.3.4.9).[39] Criminal trial considered only three conditions: 1) Court investigation could finish in one session; 2) Postponement of trial was allowed only once; 3) The postponing of the trial was not limited (ampliatio – the term considered postponement of case and commencing of the new investigation in the criminal justice, if the court decided that the case circumstances were not fully investigated).[40] Ampliatio procedure was introduced in 123 or 122 years before the Christ by the tribuni plebis's Manius Acilius Glabrionis law on extortion which was annulled by the law lex Servilia in 111 year before the Christ, the latter law introduced "comperendinatio" (delay in decision making by three days) in cases of taking bribe and extortion by the officials.[41] In the period of dictatorship of Sula the "ampliatio" was restored excluding the cases on extortion, by the law lex Aurelia de ambitu adopted in 70 years before the Christ the ampliatio as well as comperendinatio were annulled and the law on completion of court investigation within one court session was introduced.[42]

V. The Rule for Interrogation of Witnesses

The witnessing for the criminal trial was obligatory and the right to call the witness was given only to the prosecutor. Leges duodecim tabularum's board VIII in case of false witnessing considered throwing the guilty person from the mountain Tarpeium (Saxum Tarpeium). The same

38 *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 180, 195.
39 Digesta Iustiniani, Volume I, Books I-IV, *Kofanov L.L.* (Responsible Editor), Moscow, 2002, 405 (in Russian).
40 Ib., 47.
41 *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 198 (in Russian).
42 Ib., 184.

board determined the depriving from the citizenship and proprietary status the witness, who first agreed to give the testimony and afterwards refused or changed his own testimony.[43] The above action was considered as very heavy guilt, as the person convicting such crime was forbidden to enter deals and transfer the property by heritage; practically he was deprived from all citizenship and proprietary rights. In our view we consider as manifestation of modern equality principles of the citizens against the law the unacceptance of "privillegium", which was punishable in Roman court too. We are of the view that the fact, that if the case concerned blasphemy, high treason and obliteration of the Will which would give liberty to the slave, the judge considered allowable to get the testimony of the slave against his lord, as the important novelty, as ancient Rome slave had "dominica potestas" status and was not the subject of the law. Hermogenianus provides us with important information on the above in the volume 1 of "Extracts from the laws": "Only for the specific reasons the slave was given the right to give the testimony evidence against his Lord: if such testimony, in their view, proves that the Will giving them liberty was destroyed. The slaves have also right to indicate the guilt of their patrons in distribution of insufficient bread to their people, hiding proprietary cense and printing false money" (D.5.1.53).[44] Accordingly in other types of legal relationships the slave could participate only with the permission from his lord. It has to be mentioned that paragraph 7, title VIII of volume IV of Digesta Iustiniani – "Taking the duty of the moderator judge" indicates that the slave did not have right to be selected as moderator judge.[45] The slaves were questioned after questioning of prosecutor and witnesses. Ancient Rome criminal trial process did not prohibit interrogation of slaves under the torture. The witnessing of the slave, even for the civil cases, was obligatory only in cases when his testimonies were obtained through the torture (quaestio).[46] Papinianius gives important information on the above in his work "About debauchery", volume 2: "The investigation is carried out using the torture against the slave who was presented the accusation; if the slave is considered as guiltless the prosecutor has to pay the double price (of the slave) in favour of his lord..." (D.3.6.9).[47] It was prohibited to use torture against the free citizen of Rome for getting the desired testimony (tormentum)

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43 *Struve V.V.* (Editor), Reading Book on the History of Ancient World. Rome, Moscow, "State Educational-Pedagogic Publishing House of the Ministry of Education of the Russian Federation", 1953, 29; *Kudinov O.A.,* Comments to the Origins of the Roman Law, Moscow, Publishing and Trading Corporation "Dashkov Co.", 2009, 74, 76.

44 Digesta Iustiniani, Volume II, Books V-XI, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 45 (in Russian).

45 Digesta Iustiniani, Volume I, Books I-IV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 539 (in Russian).

46 *Dojdev D.V.,* Roman Private Law. Text Book for Higher Education Institutions, Moscow, "Norm", 2003, 256 (in Russian).

47 Digesta Iustiniani, Volume I, Books I-IV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 405 (in Russian).

Inquisitio (inquisition) in Rome criminal law process, which had only accusatory nature, considered collection of evidences. If needed, at the preliminary stage of trial the prosecutor could receive from the praetor the special authority, meaning that he would be given the open paper, by which he had right to obtain required evidences even via using the measures of compulsion.

VI. The Established Practice for Making Court Decision and Its Characteristics

Following the completion of proving process the judges were conducting the voting in order to make court decision. Modestinus in volume 7 of "Pandectae" stated on the essence of the above process: "Court decision is the statement of the judges which finalises the dispute and ends with the punishment (of the defendant) or denial to the request (of the prosecutor)" (D.42.1.1).[48] The decision was made based on the majority of votes, which is reflected in volume IV, title VIII, paragraph 18 of Digesta Iustiniani: "When three (state) judges are appointed and two of them, in the absence of the third, make agreed decision, such (decision) is void, as the majority decision is effective if it is known that all judges participated in decision making process".[49] If the votes of the judges were evenly distributed in the process of court decision making "just for the cases on liberty, in accordance with the constitution of the divine Pius, the decision in favour of liberation is winning, in other cases – the decision in favour of the defendant. The same rule is valid for the public courts".[50]

In the court decision making it was acceptable to violate the terms for the decision making. The above is mentioned by Ulpianus in volume 6, "For the Edicts": "The person who leads the court trial does not always follow the (legal) timing for the court decision making, on contrary, he sometimes reduces and in other cases extends it based on the nature and importance of the case, or with the consideration of the obedience or the caprice of the parties. For very few cases the decision would be executed before the expiration of the "determined time", for example if the sentence is payment of subsistence or the decision is to decline the assistance to the person who had not achieved the age of 25" (D.42.1.2). [51]

The judges were given the waxed boards. The judges would write on the board either letter "A" (absolvo – verdict of not guilty) discharge, or letter "C" (condemno – verdict of guilty)[52] – condemn. The position expressed by Paulus in volume 17 of "For Edicts" is interesting: "the one who has right to assign the punishment is also given the right to issue the verdict of not guilty"

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48 Digesta Iustiniani, Volume VI, Books XLI-XLIV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 167 (in Russian).

49 Digesta Iustiniani, Volume I, Books I-IV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 547 (in Russian).

50 Digesta Iustiniani,Volume VI, Books XLI-XLIV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 185 (in Russian).

51 Ib., 167.

52 *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 20 (in Russian).

(D.42.1.3).[53] But in the paragraph 55 of the same title, volume 55 of "For Sabinus" Ulpianus stated: "The Judge after he made court decision cannot be the judge any more (for the same case). And we use the same rule, the judge who once assigned more or less punishment, cannot any more change his court decision: as he, badly or well, once had already undertaken his responsibility".[54] In volume 6 of "Digest" Alfenus Varus provides the important position, "when we were asked if the judge who made incorrect decision (on the case) can make decision on the same case, the answer was no, he cannot".[55]

In contrary to the modern criminal court trials, the practice established for the court decision making in the ancient Rome is considered as novelty, as if more than one-third of the judges would state that the essence of the case was not fully clear for them (sibi non liquere), the process could take place several times. The repeated trial would take place if the majority of the judges would make decision – "NL" – non liqueat (not clear). However, Paulus stated in volume 17 of "For Edicts", that "according to the Pomponius during the trial process devoted to the issue of liberty, if in contrary to several judges the issue is unclear for one judge, and others agree between each other, and the judge made an oath declaring that the case was not clear for him, the remaining judges for whom the case is clear make decision without participation of the above mentioned judge, as despite the fact that he is against the position, the majority is winning".[56] We are of the view that the above was significantly limiting the probability of mistake from the court and supported the establishment of fair justice. In other cases the judges would make the verdict of guilty or not guilty.

If in criminal case the judge declared the verdict of guilty against the person, the outcome would be considered as the merit of the judge and would support his political career. By the law "lex Cassia tabellaria" adopted in 137 before the Christ the secret ballot procedure was introduced for the "comitia" processes, excluding the cases related to the high treason, for which lex Caelia introduced the secret ballot procedure in 107 before the Christ.[57] In 80 year before the Christ Sula introduced free choice for giving the vote.

If the defender won the court trial he would receive the payment, referred to as palmarium; the victory was identified with the palm branch[58]. If the court trial was, on contrary, won by the prosecutor, he would get the present (praemium ex lege); for the false accusation in bribery of

53 Digesta Iustiniani, Volume VI, Books XLI-XLIV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 167 (in Russian).
54 Ib., 191.
55 Ib., 193.
56 Ib., 185.
57 *Bartoshek M.,* Roman Law. Notions, Terms, Definitions, Moscow, "Legal Literature", 1989, 184 (in Russian).
58 Ib., 237.

electorate, the accused person would get back his rights; liberti (the person who gained the liberty) would get the status of person born free (ingenui), but the person accused in high treason was losing the citizenship of Rome, which considered the limitation of legal capacities (capitis deminutio media). The above view is confirmed by title V, volume IV of Digesta Iustiniani - paragraph 5 on limitation of legal capacities, where Paulus in volume 11 "For Edicts" stated: "...§1. The person committing the high treason will be limited in his legal capacities at such a level that he will lose the citizenship. "Replace" is related to the persons who left the ones who were leading them, persons who moved to the side of the enemy, persons declared as enemies, or persons identified as enemies based on the valid law".[59]

VII. Main Principles of Ancient Rome Criminal Law Process

When discussing the importance of ancient Rome criminal law, we should not forget that the Roman legal culture influenced the modern private law as well as development of many institutes in the area of criminal law. In our view, in this regard, it is interesting to cover the legal sentences established in Roman law, the aspiration of which is reflected in the established norms-principles of modern criminal law process. Namely in the legal sentences which reached us, we can read: Tutius semper est errare in acquietando, quam in puniendo; ex parte misericordiae quam ex parte iustitiae – it is always safer to make mistake in making verdict of not guilty and not in making verdict of guilty, to the mercy and not – to the justice;[60] Receditur a placitis iuris potius quam iniuriae et delicta maneant impurnita – let's say No to the established laws, then allow to leave unpunished the crime and offence;[61] Satius esse impunitum reliqui facinus nicentis quam innocentem damnari – it is better to leave the crime unpunished than to punish innocent;[62] Sine culpa non est aliquis puniendus – nobody shall be punished in absence of blame;[63] Spes impunitatis continuum affectum tribuit delinquendi – the belief in impunity is encouragement for the commitment of crime;[64] Mellior est iustitia vere praeviniens quam severe puniens – the justice which is truly preventive is more desirable that the justice which is strictly punishing;[65] De morte hominis nulla est cunctatio longa – when we talk about the death of the human being no

59 Digesta Iustiniani, Volume I, Books I-IV, *Kofanov L.L.* (Responsible Editor), Moscow, "Statut", 2002, 501 (in Russian).
60 *Temnov E.I.,* Latin Legal Expressions, Moscow, "Iurist", 1996, 382 (in Russian).
61 Ib., 347.
62 Ib., 359.
63 Ib., 369.
64 Ib., 371.
65 Ib., 258.

postponement can be considered as long;[66] Ignorantia iudicia est calamitas innocentis – the ignorance of the judge is the misfortune for the innocent![67] Quotiens nihi sine captione investigari potest, eligendum est, quod minimum habeat iniquitis – if it is possible to make indeficient decision the least unfair decision should be made;[68] Minatur innocentibus qui parcit nocentibus – one, who feels pity for the guilty person, will threaten the innocent;[69] Optimus testis confitens reus – the acknowledgment of the guilty person – is the best witness;[70] Qui parcit nocentibus innocentes punit – the one who shows mercy for the guilty will punish the innocent;[71] Nemo tenetur seipsum accusare – nobody is liable to blame himself;[72] Paribus sententiis reus alsolvitur – if the votes (of the judges) are equally divided, the accused person is innocent;[73] In dubio pro reo – the suspicion is in favour of the accused person.[74]

VIII. Conclusion

Despite the short volume of the present work, we managed to describe how the Roman criminal law process was implemented with the consideration of stages of Roman civilisation. The present work:

1. Named and interpreted the legislative basis of Roman criminal law process;
2. Listed and described the public institutions implementing the criminal justice process with the consideration of chronological evolution;
3. Described the stages of criminal justice process - in iure (in front of the magistrate) and apud (in) iudicem (in front of the judge – iudex). Attempt to identify the analogues in criminal and civil processual norms will cause the mistake of essential nature, as criminal justice at "in iure" (in front of the magistrate) stage with its essence is the material review of the case at the magistrate court, magistrate was checking the accusation against the person and was making the verdict of not guilty or guilty. Moreover if the magistrate made the verdict of not guilty, the decision was final and was not subject to appeal at comitia; and if the magistrate made the verdict of guilty then the accused person had right

66 *Temnov E.I.,* Latin Legal Expressions, Moscow, "Iurist", 1996, 126 (in Russian).
67 Ib., 192 (in Russian).
68 Ib., 345.
69 Ib., 260.
70 Ib., 297.
71 Ib., 335.
72 Ib., 275.
73 Ib., 299.
74 Ib., 200.

to appeal the verdict at the comitia, where the trial was led by the magistrate.[75] However as a result of the above process the comitia would adopt the decision without any changes or would support its appealing: neither the intermediate decision was made, nor the voting took place;

4. Rights and duties of the parties to the process;

5. We directed our attention towards the Latin legal sentences, which influenced the norms and principles of modern criminal justice process;

6. Stressed several novelties, which enables us to conclude that these circumstances have not become the topics for the scientific research. Namely: a)Practice of interrogation of slaves in trials against their lords in the process of investigation of crimes committed against the State, supporting the equality of citizens against the law in ancient Rome and excluded any type of privilege (privillegium) despite the fact that the slave was not the subject of the legal system and in any other relationship the involvement of the slave depended on the will of his patron; b) the court trial was conducted in open area and the court was reviewing the criminal cases collegially, in some cases with the participation of 50 jury (iudex). This was significantly reducing the possibility to influence the activities of the judges and supported the trust to the court in the society; c) The judge was authorised to repeat the trial several times, if more than one-third of the judges would state that the essence of the case was not clear for them (sibi non liquere). The repeated trial would take place if the majority of the judges would make decision of "NL" – non liquet (is unclear), which gives the researchers the opportunity to assume that ancient Roman criminal justice, at least formally, tried to avoid the irremediable mistakes and creation of conditions supporting the objective and full investigation; d) The God could forgive the guilty persons: the one who falls on his/her knees in front of the Jupiter priest and ask for forgiveness, will not be punished with the flogging; the one who enters the priest house in the chains will be freed from the chains; and if the one sentenced to death, before reaching the place of punishment meets virgin priest of goddess Vesta, will be released from the sentence.

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75 *Morev M.P.,* Roman Law. Text Book, 2nd Edition, Moscow, Publishing and Trading Corporation" Dashkov Co.", 2011, 553 (in Russian).

Davit Bostoghanashvili*

Several Critical Comments on Views Stated in the Dissertation Work of Davit Chikvaidze "Church (Canon) Law Process"

Davit Chikvaidze in chapter I of his dissertation work reviews principles of church law process. In our view it is at some extent artificial to review the specific norms of church law at church law process principle level. Proceeding from the contents of term "principle", the norms reviewed by the author are the "main provisions; guiding ideas… main rules for behaviour"[1] for the church procedural law; the above in our view does not reflect reality. More importantly the principles of church law process are not considered by any of the researchers of church law process known to us (V. Tsipin[2], P. Bumis[3], N. Suvorov[4], Nikodim[5] and etc.); it is mentioned by the author on page 14 of the dissertation work: "… the vast majority of researchers do not discuss the principles of canon law process", - however he does not indicate the small number of researchers who in their works discuss the issues of our interest. Moreover, D. Chikvaidze states in dissertation conclusion (page 127): "In the studied scientific works we do not encounter any indication on principles of canon law"; there is an impression that author first decided to look for the principles of canon law and only afterwards "found" them[6].

As for the norms indicated as principles, let's discuss them separately:

1. Principle of obligatory tolerance of repenting person:

a) At first it has to be mentioned that term "tolerance" has several meanings in Georgian language, for example: receipt, sacrifice, tolerate, protect, mercy[7]. It would be desirable for the author to discuss the meaning of the term, provide his understanding of the term and then use it as a title for the sub-chapter; as the author mentions in the summary part of the same sub-chapter the

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1 Dictionary for Foreign Words (Prepared by Mikheil Chabashvili), Tbilisi, Printing House "Ganatleba", 1973, 332.

2 *Tsipin V.,* Course on Church Law, Klini, 2004 (in Russian).

3 *Bumis P.,* Canonic Law, Tbilisi, 2007 (in Georgian).

4 *Suvorov N.,* Textbook on Canonic Law, Moscow, 2004 (in Russian).

5 *Nikodim (Milaš),* Orthodox Canon Law, Saint-Petersburg, 1897 (in Russian).

6 It has to be also mentioned that D. Chikvaidze in his book Canon Law – during the discussion of Principles of Canon Law Process unlike the dissertation work mentions two more principles: "Defense of Defendant in the Trial Process" and "Impossibility to Change Decision of Meeting" (see *Chikvaidze D.*, Canon Law, Series of Lectures, Tbilisi, 2008, 124-126). It seems that later, in the process of working on dissertation work, author came to the conclusion that the norms considered as principles before were not relevant.|

7 *Rukhadze G.* (Editor), Dictionary of Old Georgian Language, Tbilisi, 2008, 395.

principle of obligatory tolerance of repenting person is deemed as principle protecting from punishing without trial and retaining the church membership.

b) In the process of discussion of mentioned above "principle" author is based on two main norms, provided below: article 52 of apostle canons and article 43 of Trule Council. In our view, none of the mentioned articles can be used for justification of existence of the mentioned principle. Article 52 determines the responsibility of bishop or priest, if he does not tolerate the sinful person coming back to the church with the repentance. Hence the norm covers specific church offense and is not the principle of canon process, like the article 53[8],which determines the responsibility of bishop, priest or deacon who does not take (eat) flesh and wine on holiday justifying it with the statement that they abhorred it; or similar to article 51[9]which determines the responsibility of bishop, priest, deacon or other "clergy" if he abandons the marriage, flesh and wine justifying it with the reason that he considers it with abomination and etc. It is interesting that if the author reviews such specific offense as process principle, then why does not the author review the general norm stated in article 6 of Second World Council – "It is not allowed to accept the person as prosecutor without investigation" – as the principle?

As for the canon 43 of Trul Council, this is also the norm of specific nature and envisages that sins from the past shall not become obstacles for the person desiring to become a nun. We cannot agree with the author that this norm is in some ways related to the mentioned above principle.

c) In the same sub-chapter author quotes the words of Balsamon, famous canonical law researcher: "there is no sin, which can supersede the love of mankind by the God"[10]and then continues the discussion that "this statement legally considers that ecclesiastic does not have right to expel person without trial despite the heaviness of sin, if he/she repents his/her sins". In our view, we cannot conclude directly from the words of Balsamon principle of canon law process; the above indicates to the love of mankind by the God and not to the principle provision of canon law for review of cases.

2. Principle of proving of all guilt.

In the process of discussion of this "principle" D. Chikvaidze refers to Cartagena's 130 canon. Mentioned norm cannot be used as the justification of existence of principle of canon law process. This article discusses that if one person presents several accusations against the member of church and cannot prove the first one, and then the remaining accusations are not accepted.[11]In

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8 See *Nikodim (Milaš),* The Canons of the Orthodox Church, With a Commentary, Volume I, Tbilisi, 2007, 103 (in Georgian).

9 Ib., 102.

10 *Chikvaidze D.,* Church (Canon) Law Process (Dissertation), 15, availbale at: <www.law.tsu.ge>.

11 See *Nikodim (Milaš),* The Canons of the Orthodox Church, With a Commentary, Volume II, Tbilisi, 2011, 238-239 (in Georgian).

this case, the canon covers the person whose accusation is not accepted and not the norm determining the principle.

First of all, the above does not cover the case when several persons present several accusations against the same clergyman; in this case if one accusation is not proved the other claims still are subject to discussion;

Second, it would be better if the author could discuss the norm in sub-chapter 2.2, sub-chapter 2, chapter III, discussing "the persons whose blames (church) are not accepted"; moreover Nikodim Milaš, commenting on the article 130 of Cartagen, states: "The present canon is closely related to the 128 and 129 canons of the same meeting."[12] These canons review the persons whose blames are not accepted; for example person without Eucharist (article 128), slaves and liberated persons, persons who are not allowed to become prosecutors under the civil legislation, heretics etc. (article 129); these persons are discussed by D. Chikvaidze in the relevant paragraph.

Third - D. Chikvaidze on page 15 of his dissertation work, discussing the Cartagen article 130 states: "accusation presented against the church or civil person…"; however the article 130 discusses only the accusations against the clergymen.[13]

Fourth – author mentions on the same page (page 15): "... if the accuser could not prove any of the accusations, then all accusations presented by him/her were considered as unacceptable and unproved." We cannot agree with the author in this case too, as article 130 discusses unproven first accusation and not one of the accusations, which is also mentioned by Nikodim Milaš in his interpretation[14]; It is unconceivable and illogical that in case of three accusations, if the first two were proved and only the third one could not be proved, that the first two, already proved, accusations could be considered as unacceptable.

3.Principle of inadmissibility of dual punishment for the same sin.

D. Chikvaidze uses canon 25 of apostles for justification of the above "principle", which determines the responsibility of clergyman for conviction of debauchery, false oath and robbery; namely they must be punished by withdrawal of clergy title, but they shall remain as the members of the church and should not be punished by the limitation of right to receive the Eucharist. The mentioned norm is not a principle of church law process, as it covers only specific offense and not all cases; the above is discussed by Nikodim Milaš [15]and author himself[16], when providing as example articles 29 and 30 of apostle canon. These articles discuss the guilt, such as Simony and

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12 See *Nikodim (Milaš),* The Canons of the Orthodox Church, With a Commentary, Volume II, Tbilisi, 2011, 238 (in Georgian).

13 Ib.

14 Ib.

15 See *Nikodim (Milaš),* The Canons of the Orthodox Church, With a Commentary, Volume I, Tbilisi, 2007, 62-63 (in Georgian).

16 *Chikvaidze D.,* Church (Canon) Law Process (Dissertation), 16, availbale at: <www.law.tsu.ge>.

using public authority for getting the title of Bishop; these crimes are punished by excommunication and expel.[17]

For comparison it would be interesting to discuss canon 86 of Truli meeting, according to which: "We decree: clergyman who gathers and supports the prostitutes for the debauchery shall be deprived from the title and excommunicated; the civil man for the same actions shall be deprived from the right to receive Eucharist."As we can see, in this case the civil person is punished only by depriving the right to receive Eucharist, as for the clergyman – by the withdrawal of title and depriving the right to receive Eucharist. The above and other conditions discussed exclude the consideration of above mentioned rules at a principle level.

Moreover, apostles' 25 canon deals with the irrelevance of two punishments for specific crime and not the unacceptance of double punishment. In the modern criminal law process the principle of prohibition of repeated punishment of the same crime is well known ("ne bis in idem")[18], but the above considers unacceptance of repeated condemnation of already condemned person; therefore the above principle cannot be used for comparison. The "Principle" discussed by the author can be compared with the separation of main and additional sentences characteristic to the punishment system[19] (more so, as author discussed main and additional punishments in chapter VII of his work); In this case we can consider the withdrawal of clerical title and depriving the right to receive the Eucharist as main punishment as well as additional punishments. Depriving right to receive Eucharist for the civil person for the debauchery can be considered as main punishment, for clergyman – withdrawal of clerical title (as main punishment), and depriving right to receive Eucharist as additional punishment. Our above view is confirmed by the statement provided by the author in his work (page 89) "principle of prohibition of dual punishment for one crime (we assume that it is technical mistake and should state sin) is defined under this decree (decree of Dositeos Nekreseli on criminal case of priest Petre[20]) in the way that the additional punishment is also unacceptable". Withdrawal of clerical title, is of course, heavier punishment as "withdrawal of clerical title is permanent and clergyman can never get any hierarchical title, even if he repents the sin and gives promise to undertake his obligations according to the canons",[21] unlike to the depriving the right to receive the Eucharist for civil person – such punishment in case of debauchery considers depriving the right to receive Eucharist for certain period. Thus clerical person would be assigned the punishment in the form of withdrawal of title for conviction of several specific offences (for example debauchery); unlike

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17 See canons in *Nikodim (Milaš),* The Canons of the Orthodox Church, With a Commentary, Volume I, Tbilisi, 2007, 62-63 (in Georgian).

18 See *Treksel Sh.,* Rights of Human Being in Criminal Law Process, Tbilisi, 2009, 401(in Georgian).

19 See, for example, *Nachkebia G., Fvalidze I.* (Editors), General Part of Criminal Law, Tbilisi, 2007(in Georgian).

20 *Dolidze I.* (Editor), Monuments of Georgian Law, Volume 5, Tbilisi, 550.

21 See *Nikodim (Milaš),* The Canons of the Orthodox Church, With a Commentary, Volume I, Tbilisi, 2007, 41 (in Georgian).

other offences (for example Simony) for which the clerical person would be assigned withdrawal of title as well as depriving the right to receive Eucharist. Thus we cannot share the position of D. Chikvaidze that the norm provided in apostles' 25th canon can be reviewed as principle.

4. Principle of prohibition of lowering the clerical person's title

D. Chikvaidze's above "principle" is based on canon 29 of IV World Chalcedon Council, which determines that lowering the clerical title of bishop is heresy, if the person is considered to be undeserving the honour to be bishop he cannot deserve the honour to be a priest, therefore such person should be deprived from the church services, and if he is innocent he should retain the above honour. In this case also, we cannot agree with the author that the above mentioned norm is a principle of church law process, as the principle should equally cover whole process. As it is known, the clerical as well as civil persons were subject to the church jurisdiction and in different periods the same law was governing the cases from different categories, such as family-marriage, certain crimes, property related disputes and etc. This specific norm considers only the possibility to prohibit lowering bishop's title to the title of priest; moreover the definition indicates what determined adoption of such norm (Evstate Beriteli lowered three bishops appointed by Poti Tirseli to the title of priest, which was a reason for claim and resulted in adoption of the above norm)[22]. Hence, we cannot agree with the author's view that the above norm is a principle of canon law process.

5. Obligatory principle of decisions for other local churches

D. Chikvaidze in the first paragraph of sub-chapter five, following the general review moves to the discussion of article 9 of bishops' law; in the next paragraphs author reviews other sources of Georgian church law. Of course, it is positive that author discusses the sources of Georgian church law, however it is not clear the reasons for which author tries to justify the above principle for the whole Orthodox Church based only on the Georgian sources.

D. Chikvaidze, on page 91 of his dissertation states: "Right for Eucharist is the full capacity at the church of Christ and for the Christians". We cannot share this position of the author due to the several circumstances: first of all capacity is not right and therefore right to receive Eucharist cannot be the full capacity; secondly, capacity is closely related to the age of person, his mental and spiritual condition; however the right to receive Eucharist is not limited by age in orthodox churches even newly born baby can receive the Eucharist if he/she is baptised: "it is not necessary to come for Eucharist in a healthy spiritual and physical condition. Even devils, if they are not under the influence of devil during the church service, can receive the Eucharist"[23]; thirdly, if author considered something different in term "capacity", then it had to be indicated in the dissertation text, otherwise the above is at least unclear.

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22 See *Nikodim (Milaš),* The Canons of the Orthodox Church, With a Commentary, Volume I, Tbilisi, 2007, 395-396 (in Georgian).

23 *Bumisi P.,* Canonic Law, Athens-Tbilisi, 2010, 100 (in Georgian).

Moreover, if right to receive the Eucharist is full capacity and not receiving the Eucharist reduces the capacity, then how can the author explain the fact that Eucharist for infant is permitted, but infants are not allowed to be married and become priests, moreover it is allowed to marry the person who is deprived the right to receive Eucharist.[24]

It has to be also mentioned that specialists of Church Law discuss the church capacity and relate origins of this right with the secret of baptising[25]; however none of the works, studied by us, contain discussion on clerical capacity.

Thus we do not agree with the positions stated by D. Chikvaidze in his dissertation work – "Church (Canon) Law Process" – related to the principles of Canon Law Process and his consideration of right to receive Eucharist and clerical capacity as identical.

[24] See, for example, Article 6 of the Records on Ruis-Urbnisi Meeting, in: Monuments of Georgian Law, Volume III, *Dolidze I.* (Editor), Tbilisi, 1970, 117; Article 8 of the Records on Ruis-Urbnisi Meeting, New Edition, Tbilisi, 2009,442.

[25] See, for example, *Tsipin V.,* Course on Church Law, Klin, 2004, 176-185 (in Russian).

Michael Bichia*

Object of Civil Legal Relations

Introduction

Civil legal relations object problem has never yet been a subject of special study of the legal Georgian literature. This issue is discussed when researching of other categories or specific institutions of common law and in connection with them, which leads to the heterogeneous understanding of the theoretical content of the object. Different opinions about the issue have emerged in the recently published textbooks, in the part which the concept of this issue recognized in the legislation of Georgia in the last century is actually given; the other part, though, is based on a decision given in the new law, however, theoretical basis of old and new solutions to the issue are not explained.

The scientific conclusions, accepted in the general theory of the law are less reflected in studies of civilists. The work of *Irodion Surguladze*, the law theorist "Government and Law",[1] the published part of which is devoted to the issue of the legal relationship, remained beyond the focus of civilists.[2]

There are different opinions about the object of civil legal relations.[3] In the Western civil law the object of civil legal relations is considered as due event, though in certain cases the real

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1 *Surguladze I.*, Government and Law, Tbilisi, 2002 (in Georgian).

2 In civil studies, on this issue see: *Jorbenadze S.*, Property and Property Rights, "Stalin Tbilisi State University Works, Legal Studies Series", Vol. 89, 1960; *Zoidze B.*, The Nature of the Legal Relations, "Matsne, Economics and Law Series", №1, 1986; C*hanturia L.*, Introduction to the Civil Law General Section, Tbilisi, 1997; *Zoidze B.*, Georgian Property Law, Second Reviewed and Improved Edition, Tbilisi, 2003; *Kereselidze D.*, General Systematic Concepts of Private Law, Tbilisi, 2009. In the theory of law on this issue see: *Natchkebia G.*, Notion of "Criminal Defense Object", "Law", №6-7, 1999; *Savaneli B.*, Modern Legal Theory, 3rd Edition, Tbilisi, 2004 (in Georgian).

3 In connection with the problem given in the civil law, see: *Joffe O.,* Disputable Issues of Legal Relations, in: Essays on the Civil Law, *Joffe O.* (Editor), Leningrad, "Leningrad University Publication", 1957; *Magaziner J.,* Object of Law, in: Essays on the Civil Law, *Joffe O.* (Editor), Leningrad, "Leningrad University Publication", 1957; *Alekseev A.,* On the Object of Law and Legal Relation, in: The Issues of the General Theory of the Soviet Law, *Bratus S.* (Editor), Moscow, "State Publisher of Law Literature", 1960; *Dudin, A.,* The Object of Legal Relations (Problems of Theory), Saratov, "Saratov State University Publishing House", 1980; *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998; *Lapach V.,* System of Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, "Law Press Center", 2002; *Polyakov I.,* Theories of Understanding of the Legal Relations Object Essence, "Scientific Works of Vernadsky Tavricheskiy

sector elements are presented as an object of civil legal relations that was not given a proper academic assessment.[4]

It is to be established, how reasonable is it to use the term "object of civil legal relations". Problematic is the issue on whether the object of civil legal relations is an ideal event, real event, or ideal-real event. It is also to be defined, if there exists an objectless civil legal relationship, which gives the place to an object between the legal categories. Clarification of these issues is of great importance from the methodological and practical points of view.

Relevant is also the issue the issue of limiting the object of civil legal relations with the criteria of lawfulness, morality and circulation ability. This is associated with legal relations object exitence – non existence in case of absence of the above features a legal obligation and proprietal legal relations. Should be outlined specific characteristics of objects in absolute and relative relations. Their study is necessary, because it often can be that any event is beyond the legal settlement and the subject can not manage to realize its own right on. In addition, the role of systematization of common law in this regard is big. In depth study of the problem is necessary for the development of the common judicial practice of law.

1. Theories of Object of Civil Legal Relations

1. 1. „Object“ as a legal - technical term

The category "object" is used in several terminological combinations in the civil law: "object of law", "object of legal relation", "civil rights object" and "object of civil legal relations". Their "non legal" content is equal, but they are different for the "legal" approach, that depends on which level of legal impact is a legal regime of the object formed.[5]

National University, Series Law Sciences", Vol.19 (58), № 2, 2006; *Vakulina A.,* On the Concept of the Object of Civil Legal Relations, "Modern Science Intensive Technologies", №4, 2009. On the common legal relations see: *Kechekyan S.,* Legal Relationships in Socialist Society, Moscow, USSR, "Academy of Sciences Publishing House", 1958; *Tkachenko I.*, Methodological Issues in the Theory of Legal Relations, Moscow, "Legal Literature", 1980 (in Russian).

4 *Bekker E.*, System des heutigen Pandektenrechts, Weimar, 1866; *Erman W.*, BGB, Handkommentar, 1. Band, 9. neubearbeitete Aufl., Münster, "Aschendorff", 1993; *Jauernig O.,* Bürgerliches Gesetzbuch, 10. neubearbeitete Aufl., München, "C.H. Beck", 2003; *Wieling H.*, Sachenrecht, Bd. I, Sachen, Besitz und Rechte an Beweglichen Sachen, 2. Aufl., Berlin/Heidelberg, "Springer", 2006; *Prediger E. J.,* Die Grundlagen des Eigentumsrechts, available (in German) at: <http://doctorate.ulbsibiu.ro/obj/documents/REZ-GERM-PREDIGER.pdf> [07.05.10]; *Bucher E.*, Das subjektive Recht als Normsetzungsbefugnis, Nr. 3, Tübingen, "Mohr/Siebeck", 1965, see: <http://www.eugenbucher.ch/pdf_files/03.pdf> [07.05.10].

5 *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 110-111, 153-154, available (in Russian) at: <http://www.civillex.net/book/actprobl1998.pdf> [15.04.10].

"Object of law" and "object of legal regulation" are related to each other but they are not identical legal categories. It is necessary to review the object in close contact with the law and the right. The object of law is the object of legal regulation; the object of law is the external manifestation, to which the regulatory action of law is directed, i. e. public relations. As an object of legal relations is considered good (things, products of spiritual creative activity, food, personal goods, effect of action).[6] Thus, the object of law and object of legal regulation are identical notions.[7] And the object of the right is manifestation of the "objective reality" that serves the interests of the people in this way it bears the capacity of immaterial and material goods.[8] The object of should not be considered as equivalent to the object of law, because it is contrary to scientific peceptions on legal norms and rights.[9]

At the same time, the object of civil legal relations may be goods (dividable goods, concession rights) or authorities on use of goods. The contemporary law does not recognize any transfer of immaterial goods, as they lack transfer capacity. Thus, civil rights and civil legal relations objects in connection with immaterial goods do not match.[10] Logically the matter concerns the interrelation between the categories of the whole and the part.[11] The object legal relationship is specific as it is an element in the system of public relations (a part of whole), due to the subjects interact.[12] And methodological bases of the legal relations and rights are different, namely, the legal relationship is not holy due (it is in the middle between the due and the essence[13]), but the right is related to the ideal phenomenon.

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6 *Alekseev A.,* On the Object of Law and Legal Relation, in: The Issues of the General Theory of the Soviet Law, *Bratus S.* (Editor), Moscow, "State Publisher of Law Literature", 1960, 287; *Lapach V.,* System of Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, "Law Press Center", 2002, 71; *Polyakov, I.,* Theories of Understanding of the Legal Relations Object Essence, "Scientific Works of Vernadsky Tavricheskiy National University, Series Law Sciences", Vol.19 (58), № 2, 2006, 114-115; see: the website: <http://science.crimea.edu/zapiski/2006/law/uch_19_2l/polyakov.pdf> [09.04.10].

7 *Alekseev A.,* On the Object of Law and Legal Relation, in: The Issues of the General Theory of the Soviet Law, *Bratus S.* (Editor), Moscow, "State Publisher of Law Literature", 1960, 287.

8 This position share *Vengerov A., Alekseev S., Lapach V.*, see: *Arzumanyan A.*, Immaterial Goods as Objects of Civil Rights (These for the degree of Candidate of Sciences), Krasnodar, 2008, 12, available (in Russian) at: <http://kubsau.ru/dep_diss/files/20081016arzumanyan.pdf> [09.04.10].

9 *Alekseev A.,* On the Object of Law and Legal Relation, in: The Issues of the General Theory of the Soviet Law, *Bratus S.* (Editor), Moscow, "State Publisher of Law Literature", 1960, 287; see also: Polianski Speech, "The Soviet State and Law", 1950, №9, 86.

10 *Arzumanyan A.,* Immaterial Goods as Objects of Civil Rights (These for the degree of Candidate of Sciences), Krasnodar, 2008, 8, available (in Russian) at: <http://kubsau.ru/dep_diss/files/20081016arzumanyan.pdf> [09. 04.10]; also see the website: <http://www.kubagro.ru/autoref/20081016arzumanyan.pdf> [09.04.10].

11 *Kotareva V.*, Legal Category of "Object" of Civil Legal Relations and Its Correlation with the Related Definitions, "Bulletin of the Belgorod Law Institute of the MoIA of Russia", № 2 (10), 2007, 26, available (in Russian) at: <http://www.belui.ru/Doc/Vestnik/Vestnik-2007-2.pdf> [09.04.10].

12 *Polyakov, I.,* Theories of Understanding of the Legal Relations Object Essence, "Scientific Works of Vernadsky Tavricheskiy National University, Series Law Sciences", Vol.19 (58), № 2, 2006, 114; also see the website: <http://science.crimea.edu/zapiski/2006/law/uch_19_2l/polyakov.pdf> [09.04.10].

13 *Natchkebia G.*, Subject of Criminal Law, Tbilisi, 1997, 117.

As well, the object of civil legal relations is not identical to the object of civil circulation. Although almost all the objects can can be objects of civil (economic) circulation, but with the exception of personal non proprietal goodness, because it and the owner of the goods are indivisible gauqopadia and civil legal relations are established also in purpose to protect the personal non proprietal goods. Thus, the object of civil legal relations is much wider than the civil circulation object.[14]

In addition, the object of legal relations shall be separated from the subject of legal relations.[15] The subject is much larger than the object. Both subject and object are the subject, but the subject is the acting object, and the "object" is the item on which the subject makes the effect.[16] Some objects of a civil legal relationship, can not be the item, because the item is the real event, and the real essence regularity is the natural history science research area.[17] However, there are no completely isolated from each other subjects.[18] Thus, it is worth, considering the isue of due and essence, to use the "object of civil legal relations".

1. 2. General philosophical approach to object of civil legal relations

It is known that the object was also mentioned as the "object of cognition". The material nature is the object of cognition, which exists independently of any consciousness in its objective given.[19] General philosophical appoach considers the object in connection with the subject. The object is that, on which the subject's action is directed.[20] In voluntary relationship of a human being and nature, the subject is the a human being, and the object is nature (or its part).[21] It is

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[14] Yearly essay "Objects of Civil Legal Relations", available (in Russian) at: <http://works.tarefer.ru/67/100421/index.html#> [02.04.10].

[15] *Savaneli B*., Theory of Law (Jurisprudence), Tbilisi, 1993, 101; *Savaneli B*., Modern Legal Theory, 3rd Edition, Tbilisi, 2004, 110 (in Georgian); *Khuroshvili G.,* develops a similar idea about the subject of crime. The subject of the crime is a material item defined via specific components of crime, with impact on which criminal damages the object of crime, see: *Khuroshvili G.,* The Object of the Crime, in: General Part of Criminal Law, *Natchkebia G., Dvalidze I.* (Editors), Tbilisi, 2007, 113-114 (in Georgian).

[16] *Dudin, A.,* The Object of Legal Relations (Problems of Theory), Saratov, "Saratov State University Publishing House", 1980, 28, 68.

[17] *Avaliani S.,* Theoretical Philsophy, Tbilisi, 2007, 127, 241 (in Georgian).

[18] Ib., 21, 22, 39.

[19] *Kutelia A.,* Some Issues of the Marxist Theory of Cognition, "Mnathobi", №4-5, 1943, 188-189 (in Georgian).

[20] *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 113, available (in Russian) at: <http://www.civillex.net/book/actprobl1998.pdf> [15.04.10]; On the objects of law as a notion opposite to the subject of law see also: *Schack H*., BGB, Allgemeiner Teil, 9. neu bearbeitete Aufl., Heidelberg, "C. H. Müller Verlag", 2002, 48.

[21] *Dudin, A.,* The Object of Legal Relations (Theory Issues), Saratov, "Saratov State University Publishing House", 1980, 9; On the correrlate of the subject and object see: *Bast R.A.* Einleitung (Introduction) on Philosophy of Rickert, XV, see: <http://www.phil-fak.uni-duesseldorf.de/philo/rickert/rickert.pdf> [12.12.09].

important that legal science should form an independent legal category of the object based on the general philosophical object theory, which defines a specifics of the research subject.[22]

Logical is the question: why is the philosophical category of the object of legal relations used or why is not the philosophical understanding of the object of legal relations extended to its subject?[23]

1. 3. Legal theories of objects of civil legal relations

1. 3. 1. Monistic theory

Within the special legal approach, there are monistic and pluralistic theories of objects of civil legal relations.[24] Monistic theory considers as the object of legal relations only the action or only the item or only the public relation.

1. 3. 1. 1. Property law theory

According to the Property law theory, an object of legal relations is the item or the subject of the material world, which has the objective economic value, which is expressed not by practical benefit, but in the price. Benefits is the subjective category, price is the expression of the objective economic value of an item. Therefore, an essential sign of an item is the price. Also, one of the features of an item is corporeality,[25] (firmness). According to the consideration, widespread in the Western legal literature, from the legal point of view, objects are items. A broad understanding of the subject (= object of law) is everything that can be subjected by people to enforcement of the legal authority. Here the human will is decisive.[26] Also, it is not necessary fort he matter to be in a

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[22] *Joffe O., Shargorodsky M.,* Issues of the Law Theory, Moscow, "State Publishing House of Legal Literature", 1961, 229-230; *Scheglov V.,* Civil Procedural Legal Relations, Moscow, "Legal Literature", 1966, 20-21 (in Russian); On the necessary relations of the subject and object see: *Wahsner R.*, Die Materie der Erkenntnis kann nicht gedichtet werden (Zu den Bedingungen einer materialistischen Spekulation bzw. Dialektik und zur Unmöglichkeit einer monistischen Abbildtheorie), Z - Nr. 77, 2009, 143, available at: <http://anstoss.dkp-berlin.info/rw.pdf> [03.04.10] (in Russian).

[23] *Osnovin V.,* Soviet State-Legal Relations, Moscow, "Legal Literature", 1965, 62 (in Russian).

[24] *Vakulina A.,* On the Concept of the Object of Civil Legal Relations, "Modern Science Intensive Technologies", №4, 2009, 58; also see the website: <http://www.rae.ru/snt/pdf/2009/4/21.pdf> [15.04.10] (in Russian).

[25] *Klepitskaya T.,* Notions of "Item" and "Property" in the Civil Law, Moscow, 1998, 18; also available at: <http://www.oupi.ru/ilibr/kt/1.pdf> [23.05.10] (in Russian).

[26] *Erman W.*, BGB, Handkommentar, 1. Band, 9. neubearbeitete Aufl., Münster, "Aschendorff", 1993, 193; On the objects of law see also: *Schack H.*, BGB, Allgemeiner Teil, 9. neu bearbeitete Aufl., Heidelberg, "C. H. Müller Verlag", 2002, 48; Whatever is not the subject of law, is its object: everything that may be differentiated by human and serves for his usage, in the legal sense is a thing, see: *Bydlinski P.,* Bürgerliches Recht, Bd. 1., Allgemeiner Teil, Dritteueberarbeitete Aufl., Wien/NewYork, "Springer", 2005, 30.

hard material; can be a liquid or gaseous; only technically is possible to implement on them legal powers.[27] The opinion was also expressed that instead of the "objects" it was reasonable to use notions "items and property".[28]

When studying of object of legal relations it is important to limit the possible area of its implementation. Material-proprietal items certain properties are changed as a result, and this is perceived through the sense organs (change of shape, mass, chemical composition, change of location in the space). An important sign of objects of law is their legal character[29] and the item as a real event is less important for law.

1. 3. 1. 2. "Action theory"

In the monistic approach can be found the "Action theory", according to which the legal influence or regulation can be done only by the voluntary action,[30] which, in turn, will create material goods, is directed towards use or disposal. Here is a question: If we deny items and recognize only actions as the objects, then where must be placed the civilistic theory of items?[31] The object of the civil action is the action of a subject, which focuses on the material and immaterial goods.[32] However, the "action theory" representatives use philosophical approaches in their arguments. For example, in *Joffe's* opinion, the object is a philosophical category, which may have its own specific application. The object is not that due to which this phenomenon exists, but that due to which this phenomenon is affecting or may affect.[33] *Magaziner* as well conidered as the object the item to which a person's consciousness and behavior is directed. In addition, the

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27 *Holch G.*, Münchener Kommentar, Bürgerliches Gesetzbuch, Allgemeiner Teil, Bd. 1, 4. Aufl., *Säcker Fr.* (Editor), München, "C. H. Beck", 2001, 904.

28 *Jorbenadze S.,* Basic Problems of the Future Civil Code of Georgia, in: the Proceedings of the International Conference "Law Reform in Georgia", Tbilisi, 1994, 149 (in Georgian).

29 *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 139.

30 *Joffe O.,* The Soviet Civil Law, Leningrad, "Publishing House of Leningrad State University", 1961, 216; *Joffe O.,* Disputable Issues of Legal Relations, in: Essays on the Civil Law, *Joffe O.* (Editor), Leningrad, "Leningrad University Publication", 1957, 50. Only the debtor's action is the object of impact of right and duty. On the mentioned see: *Magaziner I.,* Object of Law, in: Essays on the Civil Law, *Joffe O.* (Editor), Leningrad, "Leningrad University Publication", 1957, 66, 69 (in Russian).

31 *Vakulina A.,* On the Concept of the Object of Civil Legal Relations, "Modern Science Intensive Technologies", №4, 2009, 58; also see the website: <http://www.rae.ru/snt/pdf/2009/4/21.pdf> [15.04.10].

32 *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 115; on this see: *Polyakov, I.,* Theories of Understanding of the Legal Relations Object Essence, "Scientific Works of Vernadsky Tavricheskiy National University, Series Law Sciences", Vol.19 (58), № 2, 2006, 116-117, available (in Russian) at: <http://science.crimea.edu/zapiski/2006/law/uch_19_2l/polyakov.pdf> [09.04.10].

33 *Joffe O.,* Relationship on Soviet Civil Law, Leningrad, "Publishing House of Leningrad State University", 1949, 81 (in Russian).

item is not the element of legal relationship but just an item by means of which (and not due to which) the legal relations arise, as in law, this is the indirect material source of specific relations.[34] Right and duty is directed to ensure action, out of all all events of the outside world, by human actions only is possible such an impact, that is carried out by rights and duties. Neither item nor non proprietal good is able to give such a respond.[35] Thus, the object is to which the right and duty of legal relations subjects are directed. That is why the object is the essential element of civil relations.[36]

However *Joffe's* position is controversial, according to which the content of legal relations is action and as the legal object of rights and duties action is named as well. So, what is a legal object, is also a content of legal relations at the same time?[37] If action is the content of legal relations, then how the legal analysis meets external items (goods), as the objects of legal relations? The consideration of action as the object excludes the external subjects from the field of legal research. In addition, the behavior can not be the subject of legal regulation or the object of the right, because human actions are of a material nature. Behavior is an activity, it is manifested in human action.[38] The action is a psychophysiological phenomenon, and the main sign of the object is its legal nature.[39]

The point is that the object legal relations is affected by the right and duty itself. From the general philosophical point of view, object is an item of the world, existing independently of the subject and associated with it reality, however, is not sufficient to explain the essence of the problem. General philosophical category "object" and legal category "object of legal relations" do not match. Object of legal relations is a spesial legal problem.[40]

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[34] *Magaziner I.,* Object of Law, in: Essays on the Civil Law, *Joffe O.* (Editor), Leningrad, "Leningrad University Publication", 1957, 75-76 (in Russian).

[35] Ib., 82.

[36] *Joffe O.,* The Soviet Civil Law, Leningrad, "Publishing House of Leningrad State University", 1961, 95 (in Russian).

[37] *Joffe O.,* Disputable Issues of Legal Relations, in: Essays on the Civil Law, *Joffe O.* (Editor), Leningrad, "Leningrad University Publication", 1957, 24. On this controversy see: *Alekseev A.,* On the Object of Law and Legal Relation, in: The Issues of the General Theory of the Soviet Law, *Bratus S.* (Editor), Moscow, "State Publisher of Law Literature", 1960, 299 (in Russian).

[38] *Alekseev A.,* On the Object of Law and Legal Relation, in: The Issues of the General Theory of the Soviet Law, *Bratus S.* (Editor), Moscow, "State Publisher of Law Literature", 1960, 294-295 (in Russian).

[39] *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 139; On different phsychical possibilities of human impact see: *Rieß W.*, Die philosophische Begründung einer Theorie von Individuum, Gemeinschaft und Staats bei Edith Stein (Dissertation zur Erlangung der Grades eines Doktors der Philosophie), Berlin, 2008, 400-402, available at: <http://www.qucosa.de/fileadmin/data/qucosa/documents/136/1214926534757-3730.pdf> [15.05.10].

[40] *Dudin, A.,* The Object of Legal Relations (Problems of Theory), Saratov, "Saratov State University Publishing House", 1980, 33-35.

1. 3. 1. 3. "Theory of goods"

In accordance with so called "Theory of goods", the object of legal relations is good. It is considered material and social benefits by which the participants in the legal relations satisfy their legitimate interest.[41] It widespread in civilism that material and immaterial goods are presented as the object of legal relations: things, products of spiritual creative activity, results of operations, personal non proprietal goods.[42] As the object of right *Matuzov* recognized good that satisfies the interest, the needs of subject[43] (we'll discuss this theory in detail when study of dogmatism).

1. 3. 1. 4. Will and consciousness, as an object

Should be metioned the attitude with which the object is an abstraction – an idea of economic-legal nature. The empirical basis for this abstraction is an endless diversity of material and spiritual values in the form of trade.[44]

The object of legal relationship under which *Lapach* considers the consciousness and will of the debtor is always specific-individual. The consciousness and will of the debtor is the intermediate link between the law and actual relations. Law cannot affect a person's consciousness and will, as a result, the relations between the subjects either is not established at all or only the actual relations are established.[45] The coincidence of the object of legal relations and the object of rights is excluded. Human impact on the real things is a result of putting consciousness and will in substantive form, so the law can impact on the action not directly but indirectly, through consciousness and will.[46] Practical activity, which is carried on by the influence of law on the subject's consciousness, concerns the process of regulation of actual relations. There are no direct contacts between the actual activity and law, including the connection to be established eventually, due to debtor's consciousness, which is the only object of

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41 *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 118; also see: <http://www.civillex.net/book/ actprobl1998.pdf> [15.04.10].

42 *Sannikova L.,* Obligations to Render in the Russian Civil Law, Moscow, "Wolters Kluwer", 2007, 3, see: <http://ilts.ru/files/file238.pdf> [23.05.10]. For this also see: *Kotareva V*., Legal Category of "Object" of Civil Legal Relations and Its Correlation with the Related Definitions, "Bulletin of the Belgorod Law Institute of the MoIA of Russia", № 2 (10), 2007, 27, available (in Russian) at: <http://www.belui.ru/ Doc/Vestnik/Vestnik-2007-2.pdf> [09.04.10].

43 *Matuzov N.,* Person. Democracy: Theoretical Problems of Subjective Law, Saratov, "Publishing House of Saratov University", 1972, 239 (in Russian).

44 *Lapach V.,* System of Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, "Law Press Center", 2002, 54, 55.

45 Ib, 108.

46 Ib., 91-92, 107.

legal relations.[47] Here it feels like an attempt to see the due nature of the object, but the subject's individual aspects are accentuated that deprives the legal character.

1. 3. 1. 5. Legal aspects of the object of civil legal relations

In monistic theory there also can be found the concept, in accordance to which the object of legal relations is legal mode. The items special features by itself are not subject to legal regulation, because only the actions of people can be properly legally effected. The right cannot be directed to the things, but since it can not certainly affect human activity "it can ensure their active influence on the external subjects of the nature". In this case, as the object is considered a thing, but it is not the object of rights, but the object of action.[48] Here *Senchischev* considered as the object of legal relations the legal value of item, action, property, other category and immaterial right (legal mode).[49] Of Georgian scientists, *Surguladze* considered object as ideal event, next to legal elements – rights and duties. Object is a real-life phenomenon, which seems to have no internal connection to the ideal existence of the right and the duty, but in reality it is not so with it.[50]

Generally, "legal" relations do not arise on the bare spot and they are not an independent type of relations. There is only a legal regulation of public relations. Review of legal relations as public relations draws legal relation from the area of legal problems, because relations are the real event; the constituent part of the public relations is action, which should have a practical character;[51] relations are relative, finite and specific. These features are immanent for the real field.[52] This is associated with the relationship problem between essence and due. Therefore, to study the object of legal relations, it is necessary to review it in conjunction with these circumstances.

It should be noted that the notion of legal relations, as one of special forms of the attitude between rights and obligations, in this regard, makes a specific substantial unity compared to the content of life relationship. Originality of the substantial content, naturally does not exclude

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47 *Lapach V.,* System of Objects of Civil Rights in the Legislation of Russia: Dissertation, presented to obtain the PhD. Law sciences, Rostov, 2002, available (in Russian) at: <http://www.lib.ua-ru.net/diss/cont/99037.html> [21.05.10]; also available (in Russian) at: <http://www.law.edu.ru/book/book.asp?bookID=113817> [21.05.10].

48 *Joffe O.,* Relationship on Soviet Civil Law, Leningrad, "Publishing House of Leningrad State University", 1948, 93, 95 (in Russian).

49 *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 139; *Joffe O.* added the there are no legal mode of an item, see: *Joffe O.,* Soviet Civil Law, Leningrad, "Publishing House of Leningrad State University", 1961, 221 (in Russian).

50 *Gamkrelidze O.,* Introduction into the Book of *Surguladze I.*, Government and Law, Tbilisi, 2002, 28 (in Georgian).

51 Ib., 100, 102, 104, 107 (in Georgian).

52 On the given characteristics of real essence see: *Avaliani S.,* Theoretical Philosophy, Tbilisi, 2007, 35- 36, 38 (in Georgian).

certain interaction between real-life processes and legal elements, given in legal relations.[53] At the same time, the object of legal relations does not exist in somewhat isolation. If legal relation is the form, expressed in the main legal category, then we have to imagine the notion of the object, as the content of this relation and as object which is in the midst of legal regulation in different cases.[54] At the same time, legal relations from the very beginning has been described as the abstract scheme of legal settlement of public relations that comes to purely legal category only by means of the object of legal relations.[55] The object is the element of the regulatory system, which is isolated from the "natural environment". Such isolation is based on the fact that in the system of legal regulation real compositions are considered not for their immanent qualities, but according to the legal functions; therefore it is subject to legal patterns. Their "natural contents" form only the basis on which the new, pure legal features are constructed, due to which "natural object" enters the regularities of legal forms.[56] Also the object in legal sense of the term is the element of legal relationship, but it is the object of the actual area; on the other hand, the constituting part of public relations is action, which should have a substantial character;[57] the object is finite, specific, unique, and can be found cause-effect relation with the others, as well as the world belonging existing in a time,[58] i. e. it contains the actual part as well.

In this respect legal mode or the positive legal provisions are important. They contain the imperative and dispositional standards and are based on the subjective-legal requirements which determine the rights, duties, permit, prohibition and pre-requisites for absolutely every person, in respect of which they are established.[59] It is interesting, that observation of the object is the direction of consciousness, this object may be not only the items and events nature of, but also the human inner world (psyche, consciousness) phenomena.[60] I. e. speaking of the object of right it is defined as a legal mode of good that applies to the real and the ideal basics.

Thus, the legal mode of objects of civil legal relations "is set not for different goods, but for people who perform different legally significant actions for these goods". It determines the action of the subjects, which is related to material and immaterial values. The legal mode due to this

53 *Surguladze I.*, Government and Law, Tbilisi, 2002, 135 (in Georgian).
54 Ib., 136-137.
55 Ib., 144-145.
56 Ib., 188.
57 On these features of the real sector see: *Tkachenko I.,* Methodological Issues in the Theory of Legal Relations, Moscow, "Legal Literature", 1980, 104, 107 (in Russian).
58 On these above features of the real essence see: *Avaliani S.*, Theoretical Philosophy, Tbilisi, 2007, 35, 39, 47, 41-42 (in Georgian).
59 *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 140.
60 *Avaliani S.,* Theoretical Philsophy, Tbilisi, 2007, 127, 241, 266 (in Georgian).

feature is different from the different objects of civil circulation.[61] Legal mode has a special-legal value. Thus, the object of legal relations is legal mode, but it needs other features as well (optional, may be).[62]

Bevzenko fairly mentioned that this idea of *Senchischev* is original, but it is deficient: as the object of legal relations he presents legal norms and rights (system of requirements).[63] It is not clear in what form the legal mode can be considered as an object of law and an object of right. The legal mode that contains legal models in positive law is a positive law, the same legal mode that can not be considered as the object of itself the object of self impact. On the other hand, the definite mode of positive law can not be the object of the right, because here it comes to inverse relationship – standards determine the content of the rights, and not on the contrary.[64]

Although, by this view, there is an attempt to put the object of discussion in the legal framework, however, in its turn, it is connected to the theory of interests. This concept means psychological-individual aspects and can not explain the legal context of the object. The given is connected with the circumstances of the assessment - excluding of the object for the content of legal relations. In addition, consideration of legal mode as the object of legal relations can be considered as partially justified, because it is necessary to clarify its content taking into consideration the problems of due and essence relationship.

1. 3. 1. 6. Object of civil legal relations – the event inside or outside of legal relations?

The concept of the objectless legal relations is defined as well, which is incorrect, since it is impossible the objectless legal relations[65] to exist; by recognition of item as the only object of legal relation is considered as a reflex action of legal norm and the refutable service role for public relations regulation, which is carried out by means of legal relations.[66] *Joffe* and *Shargorodskiy* did not consider an object as the element of legal relations, though they recognized

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61 Yearly essay "Objects of Civil Legal Relations", available (in Russian) at: <http://works.tarefer.ru/67/100421/ index.html#> [02.04.10].

62 *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 145-146.

63 On this consideration see: *Vakulina A*., On the Concept of the Object of Civil Legal Relations, "Modern Science Intensive Technologies", №4, 2009, 59.

64 *Yakusheva M*., Property Relations and Legal Mode of Property of the Entities of the Russian Interior Ministry, in: the Proceedings of the Law Department, *Liverovskiy A*. (Editor), Issue 13 (23) – 14 (24), Saint-Petersburg, "Publishing House of the Saint-Petersburg State University of Economics and Finances", 2009, 32; also see the website: <http://finec.ru/files/doc/University/jurfac/vyp13(23)-14(24)ver.pdf> [02.04.10] (in Russian).

65 *Tolstoy I.*, On the Theory of Legal Relations, Leningrad, "Publishing House of the Leningrad University", 1959, 65, 67 (in Russian).

66 Ib., 63

that it is a part of legal relations. *Alekseev* considered an object as the element of legal relations. Later *Joffe* recognized the object of legal relations as the necessary element of legal relations,[67] as if the right and duty are not directed at any object, i. e. they do not have their own object, then they are all useless.[68]

It is to be noted that civil legal relations are somehow on the border of real and ideal areas. Accordingly, the civil legal relationship is a definite way of connection of essence and due.[69] The object is a necessary element of legal relations, but it is not a part of the content of legal relations. After the legal relations arise as a result of legal fact, arise right and duties that have specific subjects to certain objects. If there arises a legal relationship, existence of the named elements is believed. Thus, the object obtains a new form due to the influence of rights and duties as a result of legal fact, which together with its natural qualities, is wrapped under the legal "umbrella" and bears the legal context. But the event grown out of real basics that is a matter of interest from the legal standpoint, can not exist only in the ideal form. The ideal can not exist independently of the real sector.

1. 3. 2. Pluralist theory

1. 3. 2. 1. Objects corresponding to the types of civil rights (numerous objects theory)

Pluralist theory is divided into two groups: one group considers as objects of civil rights all type of goods corresponding to the civil rights types (item, action, immaterial good, services, etc.);[70] the second group defends the division of objects into items and actions. Pluralistic position kept *Khvostov, Trubetski, Shershenevich, Korkunova*, in the modern times – *Alekseev, Bezurek, Sukhanov, Tarkh*ov and others.[71]

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67 *Dudin A.,* The Object of Legal Relations (Problems of Theory), Saratov, "Saratov State University Publishing House", 1980, 22.

68 *Joffe O.,* Soviet Civil Law, Common Part. Ownership. General Theory of Obligations, Leningrad, "Leningrad State University Publishing House", 1958, 7 (in Russian).

69 On the transition from the due to the essence see: *Natchkebia G*., The Subject of Criminal Law, Tbilisi, 1997, 127 (in Georgian).

70 *Dudin, A.,* The Object of Legal Relations (Theory Issues), Saratov, "Saratov State University Publishing House", 1980, 73; *Senchischev V*., The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 119-120, see: <http://www.civillex. net/book/ actprobl1998.pdf> [15.04.10]; *Bekker E.*, System des heutigen Pandektenrechts, Weimar, 1866, 62, see: *Joffe O.,* Relationship on Soviet Civil Law, Leningrad, "Publishing House of Leningrad State University", 1949, 75. On this provision see: *Braude I.,* On the Issue About Relationship in the Soviet Civil Law (Abstract), "The Soviet State and Law", №3, 1951, 56 (in Russian).

71 *Vakulina A.,* On the Concept of the Object of Civil Legal Relations, "Modern Science Intensive Technologies", №4, 2009, 59.

A good and authority to excercie-use a good may be an object of civil legal rights. When good is transferred to another person, it becomes the object of legal relations (transfer of good, work, services). In other cases, the object of legal relations is powers of the use of good (ownership-use, disposal, special rights and use of immaterial goods).[72]

1. 3. 2. 2. The second group of objects of civil rights – items and actions

Pluralist theory includes dualistic sub-theory, where item and action are presented as the object of civil legal relations. However, *Genkin* thinks that action and item cannot be reviewed in one plane – action acts on item; item is the external, not internal element of legal relations.[73] The object seems to be the external thing, which is considered outside of legal relations, as the ideological relations,[74] but it's just a limitation of consideration of the legal relations in statics. From methodological point of view, both are the phenomena of real essence.

In addition, *Polianski* believed that since property relations being typical for civil legal relations, its object is an item, but in some legal relations, the object is not presented as an item. Legal relations do not impact an action; the action is affected by right via legal relations.[75] *Kechekian* considers as object of right things, debtor's actions, immaterial good, in a few instances, actions of the authorized person.[76] *Agarkov* recognized as the content of civil legal relations not rights and duties, but actions of the participants of civil legal relations, and as the object of civil legal relations, first of all considered an item to which this action is directed.[77] Based on this, *Joffe* made a fair conclusion that *Agarkov* allowed existence of other immaterial objects as the objects of legal relations.[78]

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[72] *Arzumanyan A.*, Immaterial Goods as Objects of Civil Rights (These for the degree of Candidate of Sciences), Krasnodar, 2008, 12-13, available at: <http://kubsau.ru/dep_diss/files/20081016arzumanyan.pdf> [09.04.10].

[73] *Genkin D.*, in: *Braude I.,* On the Issue About Relationship in the Soviet Civil Law (Abstract), "The Soviet State and Law", №3, 1951, 58 (in Russian).

[74] *Magaziner J.*, Soviet Commercial Law, Leningrad, 1928, 174-186; *Jaichkov K.,* On the Doctrine of Civil Relations, "Bulletin of Moscow University, Series of Economics, Philosophy and Law", 1956, №7, 131 (in Russian).

[75] *Genkin D.*, in: *Braude I.,* On the Issue About Relationship in the Soviet Civil Law (Abstract), "The Soviet State and Law", №3, 1951, 58 (in Russian).

[76] *Kechekyan S.,* Legal Relationships in Socialist Society, Moscow, "USSR Academy of Sciences Publishing House", 1958, 142, 150 (in Russian).

[77] *Agarkov M.*, Obligation under the Soviet Civil Law, Moscow, "Jurizdat", 1940, 22-23 (in Russian). Accoring to *Bratus* and *Polianskiy,* content of right-the duty includes action, and the object of legal relations is thing, however, everything in legal relations may not be things. Therefore, the possibility of the existence of objectless legal relations was allowed, see: Speeches of *Bratus S.*, *Polianskiy I.,* "The Soviet State and Law", №9, 1950, 86 (in Russian).

[78] *Joffe O.,* Relationship on Soviet Civil Law, Leningrad, "Publishing House of Leningrad State University", 1948, 78 (in Russian).

Shershenevich said that object of legal relations is the possibility the interest satisfaction: a) the items, as part of the outside world; b) actions of other persons. When an item is the object of legal relations, relations are of property nature; if action is the object, then it comes to obligation or personal rights or special rights.[79]

Thus, pluralistic theories are united by the fact that object of legal relations may be different.[80] In a pluralistic approach, actually, deficiencies of the monistic theory are repeated, and the specifics of object of legal relations is not properly presented.

2. Dogmatic definition of the object of civil legal relations

2. 1. Theory of goods in dogmatics

According to the Civil Code of Georgia, object of private legal relations material and immaterial goods of property or non-property value, is not withdrawn from circulation by the order, established under the law (Article 7 of the Civil Code of Georgia). In this sense, object of legal relations is material and social good, by use of which participant of the legal relations satisfies the legitimate interest.[81] In general, it is impossible to discuss the given issue without representation of the economic and legal aspects of "good". Definition of the object of law as a good, has a general significance and it can be used in virtually any field of the legal regulation, including relations, regulated by the procedural law.[82] Thing, which may be linked to satisfaction of human needs, is called usage; in order for thing to become good, four conditions must exist in a cumulative manner: 1) human needs; 2) thing properties that in causal connection with satisfaction of human needs make the thing useful; 3) recognition of this causal connection by human; 4) capacity to govern a thing in a way to use it for the satisfaction of these needs. Goods, towards which aspire subjects of legal relations, are always events and processes of the objective reality. Realization of legitimate interest, given in the aspiration to the relevant good, transits to material, spiritual and social reality. When implementation them in law, they usually gain meaning of the principles of fairness and proportionality. These principles are distinctively implemented in the legal matter of the different fields of law.[83]

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79 *Shershenevich F.,* General Theory of Law, Lectures, delivered in Moscow Commercial Institutes, 1909, 293 (in Russian).

80 *Vakulina A.,* On the Concept of the Object of Civil Legal Relations, "Modern Science Intensive Technologies", №4, 2009, 58; also see the website: <http://www.rae.ru/snt/pdf/2009/4/21.pdf> [15.04.10] (in Russian).

81 *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 118 (in Russian).

82 *Lapach V.,* System of Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, "Law Press Center", 2002, 72, 59 (in Russian).

83 Ib., 73, 60, 68.

It is known that the property relations are civil legal relations, established for the specific property; property relations for trade-related material goods are relations that arise in connection with the use of various property goods. Property goods (property), property – non property goods, non property goods that are associated with a person are separated. Property goods are things, money, securities, property rights.[84] Thus, the Article VII of the Civil Code, is dialectically connected with the Article 147 of the same Code, in which property is all the things and nom material property goods that may be possessed, used and disposed by people and can be unlimitedly purchased, if it is not prohibited by law or contrary to public morality. The notion of "property" is legally mainly extended on the directions: one of them is things and second obligation rights of demand.[85] "Property" means all types of material values in the property and obligation law. Property is a broad category. In addition, any material or immaterial good shall be characterized by legal objectivity, i. e. must be a legally recognized object of law. Legal subjectivity of goods is defined in various ways: one of the signs is direct consideration of the objects of civil rights in the Law.[86] Material good is all the things and actions that satisfy material needs of a person.[87] Matter can not be expressed by the space only; it is not the only or the most important feature of the matter. The matter is the diversity of different properties. Space belongs to the circle of forms of matter existence, the most general of its properties. The second form of matter existence is time. Within matter, there could be separated different types of matter according to motion.[88] For example, a thing is a corporeal property good, the possession, use and disposal of which is not prohibited by law.[89] Result of action and service are material good as well, as by the performance of work, a certain material good is created. Immaterial good includes result of creative work, such as science, art or literary works, and so on.[90]

Property-non property goods are work and services, intellectual property objects, the exclusive right to them, information, the office and commercial secrecy. These objects acquire the trade form and take part in circulation so that do not lose characteristic of non property goods.[91] The third group includes goods, that are closely related to the personality of carriers of these goods (health and life; dignity; privacy; personal and family secrets; name, authorship, etc.).[92] In

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84 *Lapach V.,* System of Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, "Law Press Center", 2002, 261, 202 (in Russian).

85 Ib., 274.

86 Ib., 164, 165.

87 *Kobakhidze A.,* Civil Law, General Part, I, Tbilisi, 2001, 233 (in Georgian).

88 *Lapach V.,* System of Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, "Law Press Center", 2002, 152 (in Russian).

89 Explanatary Dictionary of the Main Legal Terms, available (in Georgian) at: <http://www.tbappeal.court.ge/upload/r_1001.pdf> [25.11.10].

90 *Kobakhidze A.,* Civil Law, General Part, I, Tbilisi, 2001, 233 (in Georgian).

91 Ib., 202.

92 Ib., 202-203; in accordance with the Article 128 of the Civil Code of the Russian Federation – the objects of civil rights are money and securities, other property, including property rights; labor and services; which are

addition, the objects of civil rights, which are not in the circulation, shall be directly indicated under the law.[93]

The Article 7 of the Civil Code of Georgia recognizes that the object of private legal relations is "material good of property value" and "immaterial good of non property value". This causes a certain ambiguity, as within the definite limits, the object can be removed from circulation. In addition, property rights are able of circulation; personal non-property rights are unable to circulation.[94]

2.2. Object of absolute and relative relations

2.2.1. Object of absolute relations

The term "absolute" in ontological understanding, meaning the moment of infinity, the features of absolute right is that it is opposed to not any particular person's, but also to a duty of al the third parties. This duty is assciated with refraining from action that violates an absolute right.[95] I. e. Absolute are rights, "which can be violated by any person and therefore are protected from

protected by of intellectual activity and equalized with it means of individualizing (intellectual property); immaterial goods. In accordance with the Part II of the Article 129 of the same Code, objects of civil rights, which are not allowed into circulation, shall be expressly indicated by law. It was determined in the Part I of the Article 150 of the Civil Code of the Russian Federation that immaterial rights and goods that are indivisible and intransmissible, belong to a citizen from birth or by force of law. Const. the Article 128, Parts I and II of the Article 129, the Article 150 of the Civil Code of the Russian Federation, see: <http://www.interlaw.ru/law/docs/10064072-016.htm> [07.10.10]; The Article 178 of the Civil Code of Ukraine is of the same content, see the website: <http://meget.kiev.ua/kodeks/grazdanskiy-kodeks/glava-12/> [07.10.10]; Relevant parts of the Article 129 of the Civil Code of Belarus are similar, see: <http://pravo.kulichki.com/vip/gk/00000012.htm#g6> [07.10.10]; Similar standard, see Part I of the Article 177 of the Civil Code of Ukraine, see: <http://meget.kiev.ua/kodeks/grazdanskiy-kodeks/glava-12/> [07.10.10]; There is a provision of similar content in the Civil Code of the Republic of Belarus (Article 128). In addition, in the Civil Code the Republic of Belarus (Section III, Chapter VI) is given classification of items based on different features (movable and immovable objects; enterprises as the objects of rights; divisible and indivisible items; complex items; the main item and attribute; fruit, production and income). There are mentioned animals, on which the rules applicable to the property are extended; items, which are determined individually and by generic feature; results protected under the intellectual property, service and commercial secrets, money, paper currency. Cont. the Articles 130, 132-142 of the Civil Code of the Republic of Belarus, see: <http://pravo.kulichki.com/vip/gk/00000012.htm#g6> [07.10.10]; In this respect, the closest of the Civil Code of Georgia is the Article IV of the Civil Code of the Republic of Azerbaijan, as the object of civil legal relations may be material or immaterial goods, which have a property or non-property value, which are not removed from the civil circulation by law. Cont. the Article IV of the Civil Code of the Azerbaijan Republic.

93 *Lapach V.,* System of Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, "Law Press Center", 2002, 290 (in Russian).

94 Ib., 278.

95 On the absolute right see: *Joffe O.,* Soviet Civil Law, Common Part. Ownership. General Theory of Obligations*,* Leningrad, "Leningrad State University Publishing House", 1958, 75 (in Russian).

any person".[96] Absolute rights arise only by themself, without any connection with anything, in particular, *extra-relatio* (independently).[97] To the absolute right corresponds only a general duty of every person not to interfere with the authorized person's "realm".[98]

It is noteworthy that in the face of items are rights as the objects of law. This is felt especially obvious when it comes to the absolute and relative rights, without distinction of any kind between the rights and items, because they can be protected and are transferrable. However, it is clear that this is not to be the base for equalization of a right and an object. Objects of law, being items, are considered to be corporeal and incorporeal objects (requirements, immaterial rights (company, information, etc.) and property rights).[99]

The right is the power of will. The object is to which the power of the will extends. Property rights are absolute rights that the gives authority to the object of law. Objects of property law are mainly only a corporeal items, since ownership, mortgage, usufruct, and so on exists only for the corporeal items.[100] Items are corporeal things. The Civil Code indicates item as thing and outlines its corporeal condition. Alos object used in a broad sense and includes everything that the object of law might be.[101]

It should also be mentioned the problem of body of alive human being. Human body is not a thing. A person has a personal right to their own personal body. Artificial solid parts of the body such as cardiac pacing, artificial knee joint, tooth stopping, etc. also belong to body.[102] In general, the body is not a mere biological object, but an intermediate between the personal and social identity. Civil Code assigns a living person the legal status of a subject to the law. This rule is applied in two ways: a) the right to the will of defense from interference of the third party and b) possibility to dispose of the body within the imperative law. The law order identifies human being

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96 *Bratus S., Joffe O.,* Civil Law, Moscow, "Znanie", 1967, 41 (in Russian); *Kobakhidze A.,* Civil Law, General Part, I, Tbilisi, 2001,100 (in Georgian).

97 *Prediger E. J.,* Die Grundlagen des Eigentumsrechts, available at: <http://doctorate.ulbsibiu.ro/obj/documents/REZ-GERM-PREDIGER.pdf> [07.05.10].

98 *Ennektserus L., Kipp T., Wolf M.,* Course of German Civil Law, Vol. 1, Introduction and General Part, Translated from the 13th German Edition by *Grave, K., Polinskaya G*. and *Altshuler B*., edited with introduction and remarks of *Genkin D.* and *Nowitski I. M.*, "Publishing House Foreign Literature", 1949, 274 (in Russian).

99 *Jauernig O.,* Bürgerliches Gesetzbuch, 10. neubearbeitete Aufl., München, "C.H. Beck", 2003, 33; *Holch G.*, Münchener Kommentar, Bürgerliches Gesetzbuch, Allgemeiner Teil, Bd. 1, 4. Aufl., *Säcker Fr.* (Redakteur), München, "C.H. Beck", 2001, 904; also *Palandt O.*, Bürgerliches Gesetzbuch, München, "C.H. Beck", 2002, 61; *Schack H.*, BGB, Allgemeiner Teil, 9. neu bearbeitete Aufl., Heidelberg, "C. H. Müller Verlag", 2002, 48; BGB, Bd. 1, Allgemeiner Teil mit EGBGB, *Heidel T., Huesstege R., Mansel H.P., Noack U.* (Hrsg.), "Deutscher Anwalt Verlag", 2005, 330.

100 *Wieling H.*, Sachenrecht, Bd. I, Sachen, Besitz und Rechte an Beweglichen Sachen, 2. Aufl., Berlin/Heidelberg, "Springer", 2006, 10, available at: <http://www.scribd.com/doc/28697021/E-book-Sachenrecht-Band-1-Hans-Josef-Wieling> [25.05.10].

101 Ib

102 Ib., 63.

not from an independent individual, but in conjunction with the community.[103] It is noteworthy that the human body is matter in physical sense, but it is not a thing, because it can not be the object of civil circulation, while things are objects with ability of circulation.[104] Property rights are associated with the prevalence of corporeal things, if absolute rights may have any content and besides property rights include also personal and immaterial rights. In this sense, the notion of absolute rights is broader than property rights.[105] Things are material objects, subject to prevalence by human beings.[106] Immaterial goods, if not otherwise implied by their essence, are objects of personal non property rights. Believed that these kind of absolute rights exist outside legal relations and they did not regulate, but provide protection in case of violation.[107]

Thus, the rights that arise outside legal relationships, are absolute rights (rights to life, health, name and other rights), which arise together with the owner subject. The absolute character of property is their exclusive, immutable and inviolable right.[108]

In addition, object shall be considered in conjunction with the, as a subject uses the right in connection with the specific object. Here, attention should be paid to the part of the right – legal authority, which may not be equalized with the actual power. The right of prevalence is a legal power, to impact a definite object (thing, person, result of human creativity, property) or to exclude the impact on it of the other person.[109] If civil right has no means of impact on actual behavior of subjects in civil circulation, and any impact on the debtor is made on the level of legal conscience, then the right has no direct means of impat on a material-corporeal object. At the same time, since we are talking about legal mode of good, there are real and perfect basics. The object of legal relations, as *Senchischev* noted, includes legal and "unlawful" givens. The legal nature is legal impact on the object of the legal relations and legal mode of this object, as a result

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103 *Tag B.*, Auf das Thema "Wem gehört mein Körper?", in: Unser Körper, Editorial of *Reusch S.*, 38-39, available at: <http://www.rwi.uzh.ch/lehreforschung/alphabetisch/tag/dbr26_Tag_web.pdf> [02.04.10].

104 *Zoidze B.,* Georgian Property Law, Second Reviewed and Improved Edition, Tbilisi, 2003, 26 (in Georgian).

105 *Bucher E.,* Das subjektive Recht als Normsetzungsbefugnis, Nr. 3, Tübingen, "Mohr/Siebeck", 1965, 145, available at: <http://www.eugenbucher.ch/pdf_files/03.pdf> [07.05.10].

106 Zusammenfassung: Akzession, Vermischungu und Verarbeitung. Bemerkungen zu der allgemeinen Regelung für bewegliche Sachen im Biirgerlichen Gesetzbuch: <http://dissertations.ub.rug.nl/FILES/faculties/jur/2002/j.e.wichers/wichers.PDF> [07.05.10]; on the similar considerations see: *Lapach V.,* System of Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, "Law Press Center", 2002, 106 (in Russian).

107 Ib., 115, 106.

108 *Prediger E. J.,* Die Grundlagen des Eigentumsrechts, available at: <http://doctorate.ulbsibiu.ro/obj/documents/REZ-GERM-PREDIGER.pdf> [07.05.10].

109 *Ennektserus L. et al,* the mentioned work, 246.

of this impact.[110] Here, there is authority to influence the right (request for right), but other types of powers are separated as well, which apply not to the right itself, but object.[111]

Notable is that things as objects of civil legal relations, are characterized by internal (qualitative) and external signs. Internal signs exist independently of law and human, they define an object as an independent expression of external reality with its inherent natural qualities. External signs are manifestation of real properties outside and they are important for truth. Objects of property rights (legal relations) are physical things. Objects of property rights can not be objects contained within obligatory and other civil rights, including ownership sets (specialization principle). Property rights on the other property civil rights are impossible.[112]

Therefore, as we are talking about the right, it is believed that the subject has a legal effect on the object of legal relations. Thus, as a result of the legal fact the absolute right that exists outside legal relations, having acquired legal "clothes", will impact the object or other material manifestation of the essence, which will be in a legal "mist". Although the absolute right and object of absolute relations have the roots in actual relations, but, by virtue of the legal fact, it takes a new form – legal. The object of absolute relations has a close connection to the real sector. And immaterial goods and are non transferrable and unable of circulation, but ordinary objects in civil legal relations. This shows that good is of broad meaning and it includes items, things, and immaterial goods; thus, ability of circulation should not be the obstructing moment for recognition of these goods as objects of legal relations.

2.2.2. Object of relative relations

Relativity, in the ontological sense, is dependence on the other. This is about objective or ontological relativity.[113] Accordingly, the relative right is opposed by the duty of a particular individual, who not only should refrain from action, but also to have some positive effects in favor of an authorized person.[114] Therefore, relative is the right, which is protected from definite person (or persons) and can be violated only by this person (or persons).[115] Here the subjects are personified.[116] Consequently, in the relative relationship each element must be defined, including the object.

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110 *Senchischev V.*, The Object of Civil Legal Relations. General Concept, in: Actual Problems of Civil Rights, *Braginskiy M.* (Editor), Moscow, "Statut", 1998, 149 (in Russian).

111 *Ennektserus L. et al,* the mentioned work, 259.

112 *Badmaeva S.,* Objects of External Rights in the Russian Civil Law (Abstract of Dissertation for the degree of Candidate of legal Science), Moscow, 2008, 8-9 (in Russian).

113 *Avaliani S.,* Theoretical Philsophy, Tbilisi, 2007, 300 (in Georgian).

114 *Joffe O.,* Soviet Civil Law, Common Part. Ownership. General Theory of Obligations, Leningrad, "Leningrad State University Publishing House", 1958, 75 (in Russian).

115 *Bratus S., Joffe O.,* Civil Law, Moscow, "Znanie", 1967, 41 (in Russian).

116 *Malien N.,* Civil Laws and the Rights of the Individual in the USSR, Moscow, "Legal Literature", 1981, 105.

Relative rights only arise as a result of linking, or *ex-relatio*; i. e. relative rights arise by means of legal relations.[117] Relative right can not exist outside the frames of obligatory relations, which would suggest that this right in due form will impact the exiting event. Thus, the object of relative relations shall be a legal object, which itself is considered in legal relations and has its specific characteristics.

However, the interesting point is reached in the Article 7 of the Civil Code of Georgia, that the good shall not be removed from circulation the established under the law, in order to be estimated as the object of private legal relations. It should be pointed out that the agreement, as a social institution, is based on the contractors' mutual trust and honesty. There is one important principle of common law – the object of the contract, should not be limited to those things that are in the trade circulation, or the costs, reasonable from the point of view of morality or law. The object of the contract is an item or the content of promises of the parties, the value, which is mentioned in the expression of the desire of the parties, or a good for which a contract has been concluded. According to common law, true is the agreement, if the object of the agreement is able to circulation; agreement, where the object is unable to circulation – is not. According to the principle of freedom of contract, the parties can select the object. They are not restricted in the choice by morality, legality and ability to circulation of the selected object. For example, in the deal on the order of murder, the object of the agreement is provision of murder services; the purpose is a desire of person's death, motivation – aspirations for the elimination of the unwanted person. The object of such contract is illegal and immoral, but it is legally true, however lacks the mechanism of coercive protection.[118]

In the common law agreement has the force of law in for the participants and the third parties, as well as for the court, if it is concluded in accordance with the material and procedural legislation requirements. Such an agreement is called also a "Private law".[119]

3. Conclusion

An object of legal relations and an object of rights or laws are not identical; this problem is logically related with interrelation of the part and the whole categories. In addition, the object of civil legal relations is much broader than object of civil circulation. They differ from each other by methodological bases as well. The object of legal relations and the subject of legal relations shall be separated from each other by real and ideal bases.

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117 *Prediger E.J.,* Die Grundlagen des Eigentumsrechts, available at: <http://doctorate.ulbsibiu.ro/obj/documents/REZ-GERM-PREDIGER.pdf> [07.05.10].

118 *Osakwe K.,* Comparative Law, Schematic Comment, Moscow, "The Lawyer", 2008, 93, 543, 544 (in Russian).

119 Ib., 82.

As the theories about object of legal relations, the general philosopical approach is deficient because it exceeds the are of juridical problems; some defects can be seen in monistic theory as well, which admits only one event as the object of legal relations. The object is shown here in nonlegal view as well. According to this understanding, it is interesting to discuss legal mode as an object of the legal relations. Though the object is understood by ideal bases here which is important but it is necessary to consider real basis of the problem. The pluralist theory contains the same deficiencies as the monistic theory, since it admits real events as an object of the legal relations but the difference is that pluralistic approach acknowledges any kind of expression of real area as an object of the legal relations.

Thereby the object gains the legal "cover" by the influence of rights and duties and becomes the necessary element of the civil legal relations.

As for absolute right it doesn't affect the legal object because it admits factual basis but it affects real events. Juridical fact gives a legal "vesture" to the object of absolute relations and it becomes legal also having close connection with real area. Objects of absolute relations (immaterial goods) also can be goods which are taken out of circulation. In relative relations private autonomy is important which occurres in freedom of contract. Participators of the contract defy the content, form and the object of it. Because of that the object shouldn't be restricted by circulation ability in relation of obligation. If we consider the concept of circulation ability it appears that in the Article 7 of the Civil Code only the object of regulative civil legal relations is presented. But civil legal relation arises for the purpose of protection too. Civil legal relation implies regulative and protective legal relations. So, the construction given by the Code meaning that "the object of private legal relation must be the good which isn't taken from circulation according to the law" breaks down and circulation ability loses its mandatory status in defying the object of civil legal relations. Generally the object of property and relation of obligation converge.

Although the subject is a real event, when person satisfies his interests with the subject's useful features the subject becomes the object because it has a positive meaning and so is recognised by the law. Under the Georgian Civil Code the object of legal relations in basis has a the theory goods which focuses on private autonomy. The object of civil legal relations must be defined by the theories about goods and legal mode and by finding the proper middle between the monistic and dualistic theories.

Irma Gelashvili*

Legal Status of Frozen Embryo

1. Introduction

Progress of medicine caused many problems absolutely unknown and unexpected for the jurisprudence. Particular challenge was determination of the legal status of the embryo resulting from artificial fertilization and maintained in the test glass or in frozen condition.

First legal or ethical debates related to frozen embryo took place in 1981,[1] when after death of the Australian couple in plane crush it was found that in Los-Angeles clinic there were stored two their frozen embryos. Of course, this caused great debates.[2] Some regarded that the frozen embryo should be equalized with the foetus and therefore, their birth should be provided through surrogate mother.[3] While the opponents stated that the embryos, as the property, were included into the heritage and therefore the authorized person – the heir could make decision about their future.[4] As the embryo genetically belonged to the donor and not to the deceased father and the informed consent didn't show the will for services of the surrogate mother, in addition, the five-year term of their storage was about to expire, the embryo were destroyed, though identification of the status of frozen embryo remained the challenge for jurisprudence.

Problems related to the test tube embryo, in European law[5] are solved radically, while Georgian legislation, in this respect, has the gaps and lacks scientific study. Georgian law, in this respect, is in some way close to the regulation of the common law countries where for the last two decades the extensive discussions go on in relation with *in vitro* embryo status. Approach to the issue is non-uniform in the doctrine and judicial practice as well. Authorized persons may make different decisions with respect of the frozen embryos: they could be destroyed by melting, could be transferred to the other infertile couples for the purpose of reproduction, could be used as the object of researches and destroyed in result of the expiry of their maintenance term.[6]

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1 *Rosen A., Rosen J.*, Frozen Dreams: Psychodynamic Dimensions of Infertility and Assisted Reproduction, Washington, "Routledge", 2005, 273.

2 *Field M.,* Surrogate Motherhood, Expanded Edition, "Harvard University Press", 1990, 42.

3 *Feinberg J.S., Feinberg P.D.,* Ethics for a Brave New World, 2nd Updated and Expanded Edition, "Crossway Books", 2010, 443.

4 See: *Ozar D.T.,* The Case Against Thawing Unused Frozen Embryos, Life Choices, in: A Hastings Center Introduction to Bioethics, 2nd Edition, *Sale W. F.* (Editor), Washington, "Georgetown University Press", 2000, 447.

5 For example, Germany, Switzerland, Italy.

6 *Anderson M.,* Are you Mommy? A Call For Regulation of Embryo Donation, "Cap. L. Rev.", Vol. 35, 2006, 601.

According to Article 144 of Georgian Law on Health Care (hereinafter referred to as LHC) the embryos' conservation through freeing is allowed though such issues as embryos maintenance standards, conditions, terms, further considerations in case of disputes between the parents or in case of death of them are not stated yet.

Goal of the research is scientific analysis of the legislation in relevant sphere, identification of the positive and negative aspects of different regulations of the problem based on the example of continental Europe and common law countries, improvement of national legislation, providing of legislative proposals for harmonization of the law and development of practical recommendations for determination of legal measures.

2. Substance of Freezing of the Embryo

Approximately in 2 days after artificial fertilization of the ovum, two or three so called fresh[7] embryos with two, four or eight cells are placed into the woman's body and the excess embryos are stored for the purpose of further use and cryo-preservation is regarded as the most successful form of storage. It should be noted that in the countries of common law the fertilized embryo before its implantation is called "pre-embryo", as well as the terms: "early embryo",[8] "pre-zygote",[9] "ex-utero embryo",[10] "proto-embryo" and "pre-implantation embryo."[11]

Unlike *in vitro* embryo, for birth of the pre-embryo transplantation into the woman's body is additionally required. While, like the embryo, it is the carrier of genetical code and it already contains sex, colors of eyes, skin and hair, shapes of face and body, as well as pre-desposition to the diseases and even temperament.[12]

Actually, it is the "small microchip"[13] containing information though it is not unique yet as the process of dividing into cells is not completed yet and it is unclear, which cell will be formed into which organ, moreover, it is possible that we received not only one individual but twins.[14]

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7 *Elder K., Dale B.,* In-Vitro Fertilization, Cambridge, "Cambridge University Press", 2011, 198.

8 *Robertson J.,* Reproductive Technology and Reproductive Rights: In The Beginning: The Legal Status of Early Embryos, "Va.L.Rev.", Vol. 76, 1990, 438.

99 *Arado Th.,* Frozen Embryos and Divorce: Technological Marcel Meets the Human Condition, "N.Ill.U.L.Rev.", Vol. 21, 2001, 242.

10 Exact translation – out of uterus

11 *Fuselier B M.,* The Trouble with Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes over Cryopreserved Pre-embryos, "Tex.J.onC.L.&C.R", Vol. 14, 2009, 148.

12 *Fiandaca Sh.,* In Vitro Fertilization and Embryos: The Need for International Guidelines, "Alb. L.J.Sci.&Tech.", Vol.8, 1998, 344.

13 Ib., 354.

14 *Robertson J.,* Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos, "Va.L.Rev.", Vol. 76, 1990, 518.

Embryo conservation implies its placing into the liquid nitrogen and freezing at minus 196 degrees[15] and if required, its melting and implantation into the woman's body.[16]

Though initially, the embryo stored through method of freezing lost its viability, due to the mentioned technology it is regarded that its storage up to 50 years period is possible.[17]

Advantage of storage of the embryo by freezing is that in case of unsuccessful operation the parties avoid repeated medical intervention for creation of the embryo, as well as risk, inconvenience and financial costs. In addition, as freezing of unfertilized ovum is not recommended due to high water content,[18] in case of freezing of the embryo the chance of reproduction is much higher. By implantation of the embryo the chance of pregnancy increases as in result of selection implantation of the strongest of them into the woman's body is provided.[19] Possibility of birth of a child by means of surrogate mother after death of the biological parents is regarded as one of advantages of cryo-preservation.[20]

First successful birth after freezing of embryo, its further melting and implantation into the woman's uterus took place in 1984, in Australia.[21] Since that freezing of the embryos became one of the techniques for continuation of the family line.[22]

In many countries and particularly in the countries of common law freezing and storage of embryos is legalized, unlike the continental Europe countries where application of the mentioned technology is unacceptable or restricted. Law of Italy on Medically assisted procreation of 2004 allowed creation of no more than three embryos through artificial insemination but their cryo-preservation and destruction is prohibited. Doctor was obliged to implant all created embryos to the patient irrespective of the interests of the latter.[23] Though, later, cryopreservation was legalized in exceptional cases, in case of *OHSS*[24] syndrome of the patient.[25]

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15 *Arado Th.,* Frozen Embryos and Divorce: Technological Marcel Meets The Human Condition, "N.Ill.U.L. Rev.", Vol. 21, 2001, 244.

16 Ib.

17 *Coleman C.H.,* Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes, "Minn.L.Rev.", Vol. 84, 1999, 60.

18 *Troeger M.,* The Legal Status of Frozen Pre-Embryos When A Dispute, "J.Am. Acad.Matrimonial Law", Vol. 8, 2003, 564.

19 *Fiestal D.H.,* A Solomonic Decision: What Will Be the Fate of Frozen Preembryos?, "Cardozo Women's L.J.", Vol. 6, 1999, 107.

20 *Blank R., Bonnicksen A.,* Medicine Unbound: The Human and the Limits of Medical Intervention: Emerging Issues in Biomedical Policy, Vol. 3, "Columbia University Press", 1994, 55.

21 *Rosen A., Rosen J.,* Frozen Dreams: Psychodynamic Dimensions of Infertility and Assisted Reproduction, "Routledge", 2005, 273.

22 First Child in Result of Freezing of the Embryo was Born in Georgia in 2006, see: <http://invitro.ge/geo/index.php?page_id=126>.

23 *Allahbadia G., Merchant R.,* Contemporary Perspectives on Assisted Reproductive Technology, New Delhi, "Elsevier", 2006, 400.

24 *Ovarian Hyperstimulation Syndrome.*

25 *Seli E.,* Infertility, "Blackwell Publishing", 2011, 204.

Freezing of the embryo is prohibited, without any exceptions in Croatia and Switzerland,[26] German Law on Protection of Embryos[27] of 1990 does not limit the number of ova to be obtained for fertilization and interprets embryo as the fertilized and developing ovum dividing into cells of which is commenced and hence, freezing of the zygote[28] is permitted while freezing of the embryo, divided into at least two cells and hence progressing is prohibited.[29]

Principles of Artificial Conception of Humans (hereinafter referred to as European Council Principles)[30] mentioned in the report of the expert committee of European Council do not provide for freezing, rather, 7th principle provides to the single persons with risk of infertility the right of storage of the gametes only for the purpose of future personal use, provided that at a time of artificial insemination the requirements of the mentioned principles will be complied with.

3. Agreement on Freezing of the Embryo and Results of Violation Thereof

3.1. Agreement on Freezing of Embryo

Issue of conservation of the embryo does not unambiguously belong to the sphere of private law and in this case the norms of public law prevail. We have the service agreement, which, with its substance, is *sui generis*.

Creation of *in vitro* embryo and its further conservation includes both, medical service, applying the technique of artificial insemination and cryo-preservation. Hence, in consideration of the dispute the norms of general obligations law and contractual norms of entrusting through analogy could be used. In this case, we have the agreement, by virtue of which one of the contractors is obliged to fulfill the actions related not to certain material result but rather achievement of the other effect.

Article 144 of LHC providing for freezing of the embryo says nothing about the form thereof, allowing us to suppose that the agreement on storage of the embryo could be made verbally as well. In addition, obligation of execution of written agreement for extracorporeal fertilization being the precondition for embryo freezing imperatively stated by LHC Article 143 should take into consideration. Regarding the above and the specific nature of the agreement, contacting on freezing of the embryos, as a rule, is provided in written.

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26 *Seli E.,* Infertility, "Blackwell Publishing", 2011, 204.

27 See: < http://bundesrecht.juris.de/eschg/__1.html>.

28 *Zigota*, *pronuclear embryos before syngamy.*

29 *Robertson J.,* Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics, "Colum. J. Transnat'l L.", Vol. 43, 2004, 205.

30 Report on Human Artificial Procreation Principles-Set Out in the Report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences, 1989, available at: <http://www.coe.int/t/dg3/healthbioethic/Activities/04_Human_embryo_and_foetus_en/default_en.asp>.

Object of the agreement is storage & servicing and this is the difference from the subject of agreement. This is the wealth which should be provided to the creditor by the debtor in result of fulfillment of the obligation under agreement and therefore, the subject of the agreement coincides with the subject of obligation.[31]

Though the embryo is not a property but in case of freezing it falls under the legal regime of the thing.

According to part I of Article 327 of Civil Code of Georgia "A contract is considered entered into of the parties have agreed on all of its essential terms in the fprm stipulated for such an agreement." According to part II of the same Article "Essential terms of the contract shall be those on which a agreement must be reaches at the request of one of the parties, or those considered by law to be essential."

In case of freezing of the embryo identification of the parties, contents of service and stating of the rights and obligations of the parties in the conditions of implementation thereof should be regarded as essential terms. As regarding the contents of the activities and goals of the service provider – medical clinic the paid nature of the agreement is undoubted, for the person to whom the service is provided, normally, the compensation amount including the necessary costs is known in advance.[32] If the parties have not stated the amount of payment, then, in case of existence of tariffs, the tariffs shall be regarded as agreed upon and in case of absence of the tariffs – common payment.

Thus, if the parties have not stated the payment the tariffs set by the storing clinic based on the standard conditions should be regarded as agreed upon.

3. 2. Term of Freezing/Storage of the Embryo

In the countries where cryopreservation of the embryos is allowed, as a rule, the legislation states the general term of storage of the embryos and this demonstrates once more the complex nature of operation of the norms of private and public law for regulation of the issue.

According to the British Law on Human Fertilization and Embryology[33] of 1990 the aggregate term of embryos storage is specified as 5 years though according to the amendments[34] made later, in 2008 the specified term was increased to no more than 10 years from the date of issuance of the license for artificial fertilization.

In 1996, mass media of Great Britain informed that 3.000 embryos stored in 33 clinics with expired 5-year storage term should be destroyed.[35] Italian doctors offered to the British to purchase the embryos but their offer was rejected, as, according to the statement of the Ministry of

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31 *Bezvenko R.,* Objects of Civil Legal Relations. Significant Problems of the Theory and Practice, *Belov V.* (Editor), Moscow, "Yurait", 2008, 318 (in Russian).

32 *Sukhitashvili D.,* Comments to GCC, Book IV, Vol. II, Tbilisi, 2001, 32 (in Georgian).

33 See: < http://www.legislation.gov.uk/ukpga/1990/37/crossheading/licence-conditions>.

34 See: <http://www.legislation.gov.uk/ukpga/2008/22/part/1>.

35 *Ibrahim M.*, Ethical Furor Erupts in Britain: Should Embryos be Destroyed?, "NY Times", 1 August, 1996.

Health, regarding effective legislation, their different use was prohibited without consent of the parents.[36]

Roman Catholic Church expressed protest in relation with the mentioned actions, stating that the embryos should be treated with respect and they should not be destroyed by pouring of alcohol and their disposal, rather, they should be given the opportunity to disappear naturally.[37] Irrespective of the mentioned, approximately 3.300 frozen embryos were destroyed[38] and in the same year from 20.000 to 30.000 embryos were destroyed by the reason of expiry of the storage term in USA.[39]

According to the Committee of Ethics of American Society of Reproductive Medicine, if there is no will identified in advance, with respect of the future of the embryo, the five-year term of storage is expired and the couple could not be found, it is given the status of "abandoned" embryo and it is further melted and destroyed.[40]

According to principle 7 III of European Council, gametes shall not be stored for the period greater than the one specified by the legislation or the other normative acts.

According to Article 144 of LHC, term of conservation of the embryo through freezing shall be determined by the couple, according to the established rules, though no explanation is provided about what does the established rules mean. The mentioned norm is of disposition nature and leaves the decision on term of storage of the embryo to the agreement between the parties, moreover, it could be said that setting of the storage term is not a essential condition of the agreement.

Hence, if the agreement between the parties does not state the term of conservation of the embryo the storage shall be provided up to fulfillment of the general conditions for termination of the obligation specified by Civil Code.

3.3 Key Rights and Obligations of the Parties in Case of Embryo Conservation

Embryo conservation belong to the category of bilateral paid agreements where fulfillment of the obligation by one of the parties is followed by the coinciding obligation of the other party.

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36 *Ibrahim M.*, Ethical Furor Erupts in Britain: Should Embryos be Destroyed?, "NY Times", 1 August, 1996.

37 Ib.

38 *Lemonick M.*, Sorry, Your Time Is Up, "NY Time", 12 August, 1996, 41.

39 *Dickens B.M., Cook R.J.*, Some Ethical and Legal Issues in Assisted Reproductive Technology, "International Journal of Gynecology & Obstetrics", Vol. 66, 1999, 58.

40 Disposition of Abandoned Embryos, "Fertility and Sterility", Vol. 82, Suppl. 1, 2004, available at: http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/abandonedembryos.pdf.

3.3.1 Rights and Obligations of the Service Provider

Service provider - medical facility has the right to claim the payment for storage and at the same time, it shall maintain properly the "object" entrusted to it, in particular, provide conditions fit for storage – conduct the technological process, maintain relevant temperature and provide control to prevent any damages. In addition, unlike the unpaid agreements, where the storer shall show due care of the good manager and fairly maintain the thing as though it was his own one, while in case of storage of embryo the party shall create special conditions and show greater prudence. Medical facility is responsible not only in case of intentional damage or gross negligence but also in case of minor negligence.

Confidentiality should be regarded as one of the obligations of medical facility as conservation of embryos is within the agreement on medical services while the medical records comprise personal privacy. In addition, Article 28 of Georgian Law on the Patients' Rights provides for compliance with the confidentiality requirements by the medical service provider.

3.3.2 Rights and Obligations of the recipient

According to the agreement on embryo conservation, the recipient shall pay to the service provider the agreed price and shall have the right to demand the embryo at any time. In such case, application of Article 770 of Civil Code is possible, through analogy, according to which the bailor may demand return of the bailed thing at any time, even when the time period of the bailment was fixed.

In relation with the demand of returning of embryo the precedent in USA, *York V. Jones case*[41] is of interest: infertile couple residing in New Jersey applied to the famous Virginia Jones Institute for artificial fertilization. After several unsuccessful attempts of achievement of pregnancy, on the basis of informed consent of the couple, six pre-embryos were frozen for further implantation though before medical intervention the couple made decision to perform the operation in leading Los Angeles clinic and for this Jones Institute was required to transfer the pre-embryos. The institute refused to transfer the pre-embryos motivating refusal based on the agreement stating than melting of the pre-embryos should be provided in their clinic only, for the purpose of implantation to the plaintiff. According to the clinic's statement, transportation of the embryos was similar to transportation of goods thus compromising the honor of embryos and in addition, possibly, their viability could be endangered. The couple applied to the court and claimed withdrawal of the pre-embryos from the unlawful possession.[42] The court assessed the agreement between the couple and

[41] *York V. Jones,* 717 F.Supp.421, 425 (E.D.Va.1989) (in: *Robertson J.,* Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos, "Va.L.Rev.", Vol. 76, 1990, 502).

[42] *A cause of action in detinue.*

institute about storage of the pre-embryo as the agreement on deposition[43], according to which the storer was obliged to return the property entrusted to him for storage.

Based on the mentioned, the plaintiff was awarded the right of requesting and withdrawing of the embryos. The court directives and agreement did not directly state the place of implantation and the party had the right to change location of the embryos at its own discretion.

By the mentioned precedent the legal regime of the property was applied to the embryo one more time.

3.4. Competition of the Property and Contractual Requirements in Case of Purchase of the Embryo from Unlawful Possession

In case of refusal to transfer the embryo from the side of medical service provider the consumer has the right to demand them on the basis of both, the property and contractual claim.

Basis of request implies the norm of the law, which, in case of presence of certain conditions, entitles the party to demand from the other party to perform, act or abstain from performing.[44]

Basis for demand, as a rule, consists of two parts: abstract, general description of certain factual circumstances, components and the legal outcomes established by the law in case of such components.[45]

"Competition of the legal bases of the requirements is apparent where the same or similar factual circumstances comply with the founding norms of several requirements and in particular, preconditions provided for by the description part."[46] In such cases there should be established whether one of them should be stated as the basis for demand or it is possible to apply several requirements simultaneously.[47]

In case of storage of the embryo, at a time of its demanding from the unlawful possessor competition of the bases for demand arises as the recipient can request protection of his lawful interests both, by the property (vindication) and obligation (contractual) claim.

"Vindication is the claim of the owner or the other lawful representative to the unlawful possessor with the requirement of withdrawal of a thing implying non-contractual demand of the non-possessor owner (or the other lawful owner) to the non-possessor holder on returning of the thing determined by the individual sign."[48] Substance of vindication claim relies upon absolute

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43 *Bailor-bailii contract.*

44 *Boeling H., Chanturia L.,* Methodology of the Court Decisions on Civil Cases, Tbilisi, 2004, 38 (in Georgian).

45 Ib.

46 *Chachava S.*, Competition of the Claims and Bases for Claims, Tbilisi, 2011, 22 (in Georgian).

47 *Larenz/Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 9. Aufl., 2004, 18, RdNr.18 ref. (in: *Chachava S.,* Competition of the Claims and Bases for Claims, Tbilisi, 2011, 22 (in Georgian)).

48 *Kochashvili K.,* Ownership – Fact and Right*,* "Journal of Law", №2, 2009, 11 (in Georgian).

property right, according to which the owner, according to Article 158 II and 172 of Civil Code, has the right to freely take possession over the thing belonging to him or make use of such thing, including claiming recovery of the thing from unlawful possession.[49]

If the plaintiff bases his right of recovery of the embryo from unlawful possession upon the contractual norms, the legal basis will be provided by Article 361 II of Civil Code within general obligations law, as well as by the analogy, Article 770 of the agreement on depositing should be considered.

In competition of the property and contractual claims, it would be reasonable to give preference to the latter as the precondition for submission of the vindication claim is absence of the obligation relations between the parties.

In case of refusal to provide the embryos, though holding by the storer is unlawful, but between him and the ,"owner" there still are the relations within the obligations law and as the property right was violated within the contractual relations, it would be reasonable to provide its protection within the norms of obligation law.

Unlike the competition of demands where the prerogative of the plaintiff is selection of the favorable one between the claims, in case of competition between the bases for demands application of one of the legal bases of demand is the authority and obligation of the court.[50]

As the court is in charge of attributing of the law the plaintiff is not obliged to juridically assess the legal relations. In legal assessment of the dispute the judge is independent and the legal basis specified by the parties shall not be restricting for him/her. According to the explanation by the cassation chamber of the Supreme Court of Georgia "the court shall not be restricted to the legal basis specified by the plaintiff, plaintiff's legal qualification of the disputed legal relations and he/she provides his/her own qualification of the legal relations."[51]

In addition, preference is given to the basis of claim establishing of the preconditions of which is possible in the easiest and most prompt way and in respect of process economy is the best way for achievement of the goal of the parties.[52]

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49 Recommendations in the Sphere of Civil and Administrative Law Developed in Result of Regular Meetings of the Judges at the Supreme Court of Georgia and Uniform Practice of the Supreme Court of Georgia on the Issues of Civil Law, Tbilisi, 2011, 34 (in Georgian).

50 *Chachava S.,* Competition of the Claims and Bases for Claims, Tbilisi, 2011, 13 (in Georgian).

51 Case No AS-973-1208-04, Department of Civil, Entrepreneurial and Bankruptcy Cases, Supreme Court of Georgia, 2005 (in Georgian).

52 *Boeling H., Chanturia L.*, Methodology of Making of the Court Decisions on Civil Cases, Tbilisi, 2004, 44 (in Georgian).

3.5. Responsibility of the Parties for Violation of the Agreement on Embryo Conservation

Violation of the obligations arisen from the contractual relations cause responsibility within the civil law – sanctions against the violator directed towards recovery of the creditor's (sufferer's) property (sometimes non-property) condition, through imposing initial or additional obligations over the violator.[53]

Imposing of the proprietary responsibility is the key lever for protection of the sufferer through which the proprietary condition should be recovered or compensated.

For imposing of the contractual responsibility the fact of violation of the obligations by the contractor should take place, which unifies into the common system of violation of the obligations all types of breaches and covers all possible deviations from the regime of contractual obligations.[54]

Georgian Civil Code does not contain any common definition of noncompliance or violation of obligations; rather it specifies the conditions of proper fulfillment, in particular, according to Article 361 II of Georgian Civil Code "the obligation must be performed duly, in good faith and at the time and place determined."

Hence, violation of the obligation implies: non-performance of the obligation, improper/incomplete performance thereof or fulfillment with the delay.

It is disputable what results could be caused by non-performance of the key obligations by recipient in case of embryo conservation, delay in payment of the agreed price or non-payment,[55] as well as improper performance of the obligations by service provider followed by destruction of the embryo.

3.5.1 Non-compliance with the Term by recipient

Payment of the agreed price for conservation of the embryo is the recipient's key obligation and its proper performance implies timely payment of the full about.

Delayed payment is one of the types of non-performance, to which Georgian Civil Code adds particular legal significance among the breach types.

According to Article of GCC failure to perform the undertaken obligation within the stated time period, irrespective of relevant notification shall be regarded as non-compliance with the term of performance of obligation.

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53 *Zoidze B.*, Property Responsibility for Violation of Obligations, Tbilisi, 1989, 20 (in Georgian).

54 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd Edition, Oxford/Portland/Oregon, "Hart Publishing", 2006, 108.

55 *Katz K.,* Wells Conference on Adoption Law, the Legal Status of the Ex Utero Embryo: Implications for Adoption Law, "Cap. U.L. Rev.", Vol. 35, 2006, 329.

The debtor shall be regarded as the delayed payer if he malignantly (intentionally or through negligence) fails to fulfill the obligation within the stated term. In result of analysis of Article 401 of GCC it is clear that non-performance with the term is always result of the malignant action and if the delay of the payment occurred not by the reason of debtor he shall not be responsible for compensation of losses for the creditor's benefit.

Guilt, as a subjective category, has particular significance on the legal structure of delayed payment unlike the general rules where presence of guilt in violation of the obligations as the objective category is not decisive. As violation of the obligation should be distinguished from the responsibility for violation, the common concept of breach does not imply presence of the common precondition for establishment of responsibility.[56]

Responsibility is excluded if impossibility of performance takes place[57] and delay of payment from the side of recipient was caused by the circumstances out of his control, which could not be foreseen at a time of agreement.[58] In this case the creditor is not entitled to claim performance of the obligation and hence, the debtor is exempted from the responsibility, he shall not be obligated to pay the agreed interests for delay as per Article 403 I of GCC. Exemption provided for by Article 405 of GCC stating that for repudiation of the agreement not setting of additional term is required if it is clear that it would have no any result, shall be applicable to the impossibility of performance as well. Though in this case the debtor is not guilty in non-performance, the creditor shall have the right to avoid the agreement.

Hence, precondition for delayed payment is presence of objective possibility of performance when due and notification of the debtor with the request of payment when due "to exclude the possibility of non-performance by the reason of negligence."[59] Notification shall be unambiguous and clearly stated; its function is to remind the debtor that the creditor demands performance of the obligations when due.[60]

Setting of the additional term is equal to notification as well and such term shall be reasonable and this would be sufficient for reliable identification of the will of party in breach, its acceptance and until the will of the other party is clear, no claim for compensation of losses should be made instead of request of performance of the obligations.[61]

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56 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd Edition, Oxford/Portland/Oregon, "Hart Publishing", 2006, 387.

57 *Vis major.* In contemporary civil law term force majeure created with the influence of the French doctrine is used *force majeure.*

58 *Lando O.,* Salient Features of the Principles of European Contract Law: A Comparison with the UCC, "Pace International Law Review", Vol.13, Issue 2, 2001, 365.

59 *Chitashvili N.*, Significance of Guilt in Case of Determination of the Contractual Responsibility, "Journal of Law", №1, 2009, 167 (in Georgian).

60 *Machaladze S.*, Compensation of Damages in Case of Non-fulfillment of Obligations (Comparative Analysis of Georgian and German Legislation), "Georgian Law Review", Special Issue, 2004, 78.

61 Case AS-946-1203-05, Department of Civil, Entrepreneurial and Bankruptcy Cases, Supreme Court of Georgia, 2006.

Regarding the above, the recipient shall be deemed as delayed payer if he fails to make the payment due malignantly and fails to make the agreed payment irrespective of creditor's notification and setting of the additional term for performance of the obligation.

3.5.2 Secondary Claims of the Service Provider

Violation of the basic and non-basic contractual obligations by the debtor is an objective circumstance giving to the creditor the right to make the secondary claim.

Non-performance of the obligations may force the party to repudiate the agreement. This is the extreme measure where there is no sense in continuation of the agreement.

GCC considers rejection of the agreement and termination of the agreement as identical concepts. In addition, Article 352 of GCC specifies the results of avoidance of the agreement while Article 405 states the preconditions for breach of contract.

Avoidance of the contract is empowering right – in case of presence of certain preconditions a party has the opportunity to achieve certain legal outcomes, end the contractual relations with the specific rights and obligations and move it into the different legal mode[62].

Service provider may breach the contract if the valid agreement is violated substantially, materially by the reason of the recipient and irrespective of setting of the additional term (notification) by the creditor the debtor fails to perform the undertaken obligation.

According to the general rule application of service provider's secondary right of avoidance of the agreement causes the restitution, though as in this case it's impossible, based on Article 407 of GCC the recipient may claim compensation of the losses caused to him by malignant non-performance of the obligation.

3.5.3 Service Provider's Right on Retention

Right of retention as the mean for securing of performance of the obligation, was stated by the Roman Law.[63]

GCC does not provide for general concept of retention though regarding the trade-off nature of the bilateral agreements it entitles both parties to refuse to perform the obligations before the responsive actions from the side of the other party, with the exception of cases where the party should have performed the obligation in advance (Article 369 of GCC).

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[62] *Pipia A.*, Termination of the Agreement and Invalidation of the Agreement – Difference and Legal Outcomes, Special Issue, "Georgian Law Review", 2008, 71.

[63] See: *Zimmermann R.,* The Law of Obligations-Roman Foundation of the Civilian Tradition, "Oxford University Press", 1996, 201-227.

Mentioned general norm establishes the right of suspension of performance which, in case of storage of the embryo implies refusal to provide services with respect of implementation of the necessary action though the right of suspension of fulfillment may be limited if it is against the provision of good faith and is apparently incompatible with the interests of the other party.[64]

Hence, if the recipient has delayed the payment, the unconditional refusal to perform the obligations by the service provider, what would cause destruction of the embryo, should be regarded as failure to act in good faith.

Regarding the specific nature of the "object" to be stored, for proper fulfillment of the obligation the service provider shall take the other measures for influencing the debtor, primarily notify the recipient or set the additional term. In addition, except for suspension of fulfillment the creditor is entitled to seize the "thing" held by him for the purpose of securing delayed performance and compensation of the expenditures.[65] By special norm 776 Georgian Civil Code grants the storer right not to return the lodged thing until the incured costs and agreed price are paid. According to the mentioned norm the creditor shall be entitled to oppose his non-basic obligation to non-performance of basic obligation of the debtor.[66]

On the basis of agreement on freezing of the embryo, the service provider shall be entitled to maintain and not to transfer the embryo to the recipient before payment of the agreed price, where the parties desire, for example, to transfer the embryo to the other medical facility for the purpose of storage, as well as implantation or donation to the others.

Right of maintenance & retention of the thing is the means for securing fulfillment of the property obligation and comprises of suspension & seizure of the property of lodger to secure fulfillment of claims outstanding and due.[67]

Institute of retention of a thing is very unclear as it is not unambiguously recognized as a means for securing the claim and only in few agreements they are stated for securing compensation of the costs by the creditor. Nevertheless, similar to the means for securing of the claim, the right of retention is intended for proper performance of the obligation where the object of relations is the debtor's property.

GCC does not define the object of retention rather it considers unacceptable retention of the land parcel by the lessor in case of default (Article 565). Hence, all the other movable and immovable properties could be used by the creditor as a security for fulfillment of the obligations.

Outcomes of the right of retention are of particular significance though they are unclear as well. In particular, whether retention implies refusal to transfer the thing or it implies its disposal

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64 *Vashakidze G.*, System of Complicated Obligations of the Civil Code, 2010, 77.

65 *Sarbash S.V.*, Right of Retention as Method of Securing of Obligations, in: Significant Problems of Civil Law, Moscow, 1998, 13 (in Russian).

66 *Vashakidze G.*, System of Complicated Obligations of the Civil Code, 2010, 76 (in Georgian).

67 *Sukhitashvili D.*, Comment to GCC, Book IV, Vol. II, Tbilisi, 2001, 60 (in Georgian).

as well. To answer the mentioned question it would be reasonable to compare the right of retention of a thing with the legal lien provided for by GCC where the right of lien, in the cases directly specified by the law, is executed by the creditor without agreement with the debtor.

Right of retention and legal lien have the common signs: both of them are intended for securing the creditor's claim; the property of debtor or a third person plays the role of security; in case of both, legal lien and securing of the claim by the creditor holding of the thing by a creditor is required; securing of the claim is provided unilaterally by the creditor.[68] Though, if the lien is intended for disposal of the thing and performance of the obligation by the proceeds thereof, the possibility of disposal of a thing in result of its retention is questionable.

Application of the rules for disposal of the collateral to the retention right with analogy would not be reasonable[69] as the legislator has introduced different terms and these terms are not used with the identical meanings anywhere,[70] in addition, according to Article 5 of GCC legal analogy should be applied only for regulation of the relations not directly specified by the law. In this case we deal with the special norm, which, according to teleological definition, should be regarded as the instrument for influencing the debtor for the purpose of proper fulfillment of the obligation. In case of embryo conservation the issue could be resolved in the other way as in dealing with the issue identification of the nature of the right is decisive as well. Right on the embryo is the personal right as well and therefore, to secure the incured expenses disposal of the embryo is unacceptable.

If, irrespective of retention of the embryo, the recipient fails to perform the undertaken obligations for various reasons, e.g., because of loss of interest due to death of the spouse or divorce, the storer shall have the right terminate the agreement based on the rights provided by the law, finally resulting in refusal to provide service and destruction of the embryo. If the embryo is regarded as the object of special category intentional destruction of which is unacceptable than, regarding the status of embryo, its donation should be provided. The storer will need to apply other instruments for the purpose of protection of his interests. Though, before regulation of the issue by the special norm, the mentioned possibility can not be ensured.

3.5.4 Outcomes of Disposal of the Embryo

The legal and ethical problem arises where the service provider applies the right of lien and not the right of retention of the embryo in case of non-payment of the agreed price by the recipient and disposes it off. In accordance with the legal regime of the thing, as losing of the ownership occurred willfully, the authorized person can't claim the thing from possessor in good faith,[71]

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68 *Kobakhidze K.*, Right of Retention of Things, Work for the Seminar, held at the TSU, 2007, 23 (in Georgian).
69 *Sukhitashvili D.*, Comment to GCC, Book IV, Vol. II, Tbilisi, 2001, 60 (in Georgian).
70 *Kobakhidze K.*, Right of Retention of Things, Work for the Seminar, held at the TSU, 2007, 23 (in Georgian).
71 *Zoidze B.,* Georgian Property Law, Tbilisi, 2003, 75 (in Georgian).

particularly where acquisition of the embryo took place on the basis of the paid deal (Article 187 II, GCC). Though, as the embryo is not a thing, this issue could not be resolved relying on the norms of property law only. In the mentioned case the following should be distinguished: the disposed embryo still is in the stored, frozen condition, or it was implanted and whether the child was born or not.

In the first case, where the embryo is not implanted into a woman's body, it should be claimed as the embryo, as a potential child, could not be used as a lien or other means for securing the unfulfilled obligation of genetical parents and disposed off. Such deal should be recognized as unacceptable, invalid deal, by virtue of Article 54, GCC causing the obligation of restoration of the initial condition. The situation further complicates where the embryo is already implanted into the body of fair buyer and is even further disputable and problematic where the child was already born. Genetic parents of the embryo may not claim from the fair buyer to terminate pregnancy or, on the contrary, continuation thereof, particularly, where this is dangerous for the recipient's health as reproduction is within the scopes of private life and is protected from intervention.

In any of the above cases, where transfer of the embryo to recipient takes place without valid rights resulting in birth of a child the issue should be resolved based on the child's interests rather than regarding the interests of the genetic and/or social parents and in each specific case this should be done through studying of the individual facts.

The above problem is very hard to solve and not only from the legal point of view but in moral respect as well where no any unambiguous solution exists and therefore, it is reasonable to establish inacceptability of conservation of embryos by the law.

3.6 Outcomes of Improper Fulfillment of the Obligation (Destruction of Embryo) by the Service Provider

3.6.1 Breach by the Service Provider

One of the types of non-performance is improper performance, implying difference in performance contents or other difference from the fulfillment specified by the parties.[72]

Storage as the agreement of paid services is intended for protection of the thing from damage and misappropriation[73]. In case of embryo conservation duly performance of the obligation implies performance of the undertaken obligations according to the contractual terms and conditions, storage of the "object" so (in such conditions) that to ensure obtaining of the viable embryo after melting, taking into consideration the normal medical risk.

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[72] *Machaladze S.,* Compensation of Damages in Case of Non-Fulfillment of Obligations (Comparative Analysis of Georgian and German Law), Special Issue, "Georgian Law Review", 2004, 82.

[73] *Braginski M.I., Vitryanski V.V.,* Contractual Law, Agreements on Performing of Works and Providing of Services, Moscow, "Statut", 2002, 668 (in Russian).

Violation of the obligation from the side of service provider may be both, action and omission, where he should act in accordance with the law or agreement and he had not performed the undertaken obligation.

GCC states the principle of malignant responsibility: though, for assessment of violation of the obligation, as a fact, the guilt of the debtor is not decisive, for imposing of the responsibility and obligation of compensation of losses the guilt is of decisive significance "as a person becomes liable to compensate damages not the damages as such but his guilt."[74] The debtor shall not be responsible for the negative results conditioned by the circumstances independent from his will.

According to Article 8:800 of the Principles of European Contract Law[75] non-performance of the obligations shall be excusable if the party will prove that such non-fulfillment was caused by the force majeure and at a time of making of the agreement it or the results thereof could not reasonably be taken into consideration or overcame.

Improper performance may be caused by intention or negligence of the debtor. If it is proven that storage of the embryo was provided in improper way resulting in termination of development of the embryo and in addition, the guilt of the storer is proved, he shall be charged with the obligation of compensation of losses.

In relation with the above, precedent in USA, case *Jeter V. Mayo Clinic Arizona*[76] is of interest: on the basis of the agreement between *Jeter*, the plaintiff and the medical clinic the defendant was transferred five frozen embryos destroyed by negligence of the clinic. The plaintiff applied to the court with the claim for compensation of damages caused by decease of the family member,[77] violation of the fiduciary obligation and non-performance of the agreement.

Arizona court of the first instance regarded the first argument as groundless as the claims of such type provided for the right of claiming compensation of losses for elimination of human life while the embryo did not belong to this category. General law did not recognize the right of claiming of compensation of losses for damage of the viable human embryo by negligence. The court did not consider the specified fact as violation of the principle of responsiveness.

For the instance of appeal particular difficulty was in determination, whether three-day eight-cell embryo was a person or not and hence whether the parents' claim of compensation of losses caused by death of the family member should be satisfied. According to the plaintiff's statement the pre-embryo was viable as existed objectively, though the court assessed the embryo

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74 *Kochashvili K.,* Guilt as the Condition of Civil Law Responsibility (Comparative Legal Research), "Law Journal", №1, 2009, 107 (in Georgian).

75 See: *Lando O., Beale H.* (Editors), Principles of European Contract Law, Part I and II, Prepared by the Commission on European Contract Law, "Kluwer Law International", 2000, 379.

76 Ref: *Katz K.,* Wells Conference on Adoption Law, the Legal Status of the Ex Utero Embryo: Implications for Adoption Law, "Cap. U.L. Rev.", Vol. 35, 2006, 331.

77 *Wrongful death.*

as "potentially viable"[78] and distinguished the embryo in the test-tube from the foetus in human body and regarded the argument – "if not the damage the embryo would be a living human" – as ungrounded and explained that ex utero the embryo was not a human and the plaintiff was entitled to claim for compensation of damages caused by loss of the property only, as well as for violation of the agreement on lodging and principle of responsiveness.

Hence, by the mentioned court decision the approach to the embryo as a property in the countries of common law was emphasized one more time.

3.6.2 Right to Claim Compensation of Damages for Destruction of the Embryos

Article 394 of GCC provides the general basis for compensation of damages caused by non-performance of the obligations and Article 407 is the special article entitling the creditor to claim from the debtor compensation of damages caused by malignant non-performance of the obligations. Hence, preconditions for compensation of damages caused by violation of bilateral obligations are as follows: violation of the obligations arisen from the valid bilateral deal, expiry of the term set for their performance, causing of damages in result of breach and existence of the debtor's guilt in violation.

Destruction of the embryo by service provider excludes restoration of the initial status, hence, according to Article 409 of GCC, if no compensation of damages with restoration of the initial situation is possible or inadequately high costs are required for this, monetary compensation could be paid to the creditor.

According to Article 408 I of GCC, "A person who is obliged to compensate for damages must restore the state of affairs that would have existed if the circumstance giving rise to the duty to compensate had not occurred." Restitution is excluded due to destruction of the embryos and therefore, caused damages shall be compensated to the party shall.

Damage implies the outcomes of infringement of civil rights of the sufferer. As the infringed rights may be of both, property and non-property nature, hence, the damages could be divided into the corporeal and non-corporeal types. Though the embryo is not a property it has its "value". Its destruction may cause significant mental suffer and pain, particularly regarding physical and psychological difficulties accompanying in vitro procedure.

Moral damages imply physical and psychological suffering of a person because of inroad upon one or another good. Though GCC does not provide definition of non-property damages, neither the methods for their calculation, rather, it provides only normative basis. The legislator has left the mentioned issue to the doctrine and judicial practice for assessment.

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[78] *Heathcotte B.J.,* Strained Application of the Viability Standard to In Vitro Frozen Embryos-Deconstracting Jeter V. Mayo Clinic Arizona, "Indiana Health Law Review", Vol. 5, 2008, 260.

Objective absence of the moral damages does not *a priori* imply satisfaction of the claim for compensation. According to the positive law, imperative norm of Article 413 of GCC regards that monetary compensation for non-property damages is allowable in cases exactly specified by the law only. According to the general rule, compensation of moral damages is possible only in case of damage to health and infringement of personal non-property rights. Article 18 of GCC provides the basis for protection of the mentioned rights within the civil law and provides the list of personal non-property, absolute rights, which should not be deemed complete, as possibly, in the individual cases, in relation with the right on free development of a person the other personal rights could be regarded as having similar legal protection.[79]

Right on reproduction undoubtedly belongs to the sphere of personal and family life and therefore, the court should determine inadequate means for securing thereof[80] and regard the right on reproduction, not specified in Article 18, as worth of legal protection.

Hence, as destruction of the embryo is not covered by the compensation of moral losses in the cases directly specified by the law, the legal basis for the claim should be specified inroad upon non-property right of reproduction as general personal right.

3.6.3 Calculation of Losses Caused by Destruction of the Embryo

The main goal of imposing compensation of damages is protection of the expected interests originating from the agreement so that to place the party in the condition, with respect of the property, as though the agreement was fulfilled.[81]

As the damages take place by the reason of non-performance of the promise, the quantity of damages should not exceed the losses. Therefore in calculation of losses the benefits of the party in breach should not be taken into consideration, rather, calculation should be provided regarding evaluation of losses.

In calculation of the extent of the damages caused by breach of the contractual obligations GCC does not specify the form of guilt in violation of obligations, according to Article 414 the creditor's interest towards proper fulfillment of the obligation should be taken into consideration.

According to Article 9:503 of the Principles of European Contractual Law[82], the party in breach should bear responsibility for damages foreseen by him at the stage of making of the agreement or should foresee as its legal outcome of the unlawful action and if the party acted

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79 *Kereselidze D.,* General Systematic Concepts of Private Law, Tbilisi, 2009, 137 (in Georgian).

80 *Ninidze* T., Comments to GCC, Book I, Tbilisi, 1999, 64 (in Georgian).

81 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd Edition, "Hart Publishing", 2006, 442.

82 *Lando O., Beale H.* (Eds.), The Principles of European Contract Law, Part I and II, Prepared by the Commission on European Contract Law, "Kluwer Law International", 2000,441.

intentionally or by gross negligence, he shall be responsible not only for the proposed damages but for the caused damages in full.

Destruction of the embryo creates the liability of compensation of caused corporeal damages. Though damages could not be calculated on the basis of the value of embryo, the costs related to artificial insemination and creation of in vitro embryo could be taken into consideration. In this case there are the costs as actual damage and this, of course, is subject to compensation. In calculation of the damages payment made for conservation shall be taken into consideration as well.

Unlike the material damages, calculation of the moral damages is difficult as the moral values of a person are infringed, non-property wealth, which is an invaluable category. Moral damages have no monetary equivalent.[83] Monetary compensation is the surrogate only and because of absence of the better sanction the law protects, through charging of payment, the rights infringement of which result in moral damages.[84]

Regarding the nature of the infringed good and due to impossibility of exact calculation of the degree of moral suffering it is reasonable not to fully compensate the damages but rather its compensation as far as it is possible.

Article 413 I of GCC provides for compensation of moral damage "in a form of reasonable and fair compensation." What is regarded as such is the issue of evaluation and the court determines this individually in each specific case.

Form of the guilt does not influence the quantity of compensation, though, as a rule, the court takes into consideration the degree of guilt though the guilt, in civil law, is the condition of responsibility and not the measure thereof, the court allows the exception where in calculation of compensation, attitude of the offender towards the action committed by him is taken info consideration.[85]

Goal of compensation of moral damages is not restitution of the infringed right rather, compensation has the following functions: satisfy the sufferer; impact the offender and prevent infringement of the personal rights by the others[86].

Irrespective of the goal of the sanction, mitigate the plaintiff's pain caused by damage. Compensation should not be unreasonably high, the court should take into consideration both, attitude of the sufferer towards the infringed right and property status of the defender.

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83 *Ninidze T.,* Moral Damages in the Civil Law, Journal "Soviet Law", №2, 1978, 45 (in Georgian).

84 *Chkhikvashvili Sh.*, Moral Damage in the Civil Law, 2nd Edition, Tbilisi, 1998, 21 (in Georgian).

85 Recommendations in the Sphere of Civil and Administrative Law Developed in Result of Regular Meetings of the Judges at the Supreme Court of Georgia, Tbilisi, 2011, 55 (in Georgian).

86 Recommendations of the Supreme Court of Georgia on the Problematic Issues of Civil Judicial Practice, Uniform Practice of Georgian Supreme Court with respect of Civil Cases, Tbilisi, 2007, 70 (in Georgian).

4. Pre-Embryo as "Common Property"

It is recognized that after implantation of the embryo woman is regarded as only person authorized to make decisions[87] as her bodily interests should be taken into consideration from the outset.[88] Though, the case is different with the pre-embryo in the test tube or the frozen one.

Pre-embryo is the result of merger of the gametes of two individuals, their joint potential biological issue and, though woman's physical load is greater than the one of the man, the pre-embryo belongs to the parents equally[89].

Dispute related to the frozen embryo, regarding the properties of the disputed "object", could not be regarded in the context of relations within either property law or contractual law. Embryo is not and can not be a thing, it is a potential individual and it belongs to the potential parents not in the corporeal sense but in the context of personal rights, excluding, in all cases, necessity of joint consent of the potential parents. If potential father is incapable, mother shall have the opportunity to give birth to a child through implantation of the created embryo; while if the mother is recognized as incapable by the court, father's request dealing with the birth of child through surrogate mother could not be satisfied as Article 143 II of LHC imperatively requires consent of the couple for the services of surrogate mother.

Similar rule should be applied in case of recognition of a person as missing or as deceased. Particularly problematic is determination of the outcomes of refusal to of one of the authorized persons to implant the conserved embryo on the basis of loss of interest where the conflict of the right of reproduction of the potential parents takes place.

In vitro creation of the embryo implies the medical service where autonomy of the will is decisive. According to Article 5 III of the Convention on Human Rights and Biomedicine "a person may reject the consent given earlier at any time at his/her own discretion." Freedom of consent implies that it may be cancelled at any time and a person's decision, if he/she was provided with full information about expected results, should be taken into consideration. According to Principle 4 of European Commission, the technologies of artificial fertilization may be applied only if a person has given free informed consent, clearly, in written, in accordance with the national legislation. According to Principle 8 3 embryo of a couple stored but not used by them may be used for artificial fertilization only upon consent of the couple.

Unlike the above, Article 144 of LHC says nothing about the above but declares allowed the method of conservation method.

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87 *Robertson J.,* Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos, "Va.L.Rev.", Vol. 76, 1990, 454.

88 *bodily interests are directly implicated*

89 *Robertson J.,* Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos, "Va.L.Rev.", Vol. 76, 1990, 454.

4.1 Judicial Practice

In the science almost all success causes legal or ethical dilemma and until the rights and obligations are stated by the legislation the burden of regulation is vested upon the court.

In consideration of the disputes related to storage of the embryos the judicial practice is non-uniform not only in the different legal systems but within the experience of the specific country as well.

In common law the following models of problems solving are distinguished: in the opinion of some scientists, if the embryo was created and frozen, regarding its dignity, it should be implanted to the suppliers of the gametes or to the other infertile couple; according to the other, extreme approach, the frozen embryos should be destroyed;[90] There is the other opinion as well, stating that only woman shall have the right on the embryo as her contribution is particular, in psychological and physical respects and some part of them regards that such right of an women shall be protected only if she intends to implant the embryo and give birth to a child independently.[91]

4.1.1 Nachmani vs. Nachmani

First precedent related to the frozen embryo was established in consideration of the dispute *Nachmani vs. Nachmani*[92]: infertile Hebrew couple applied to the medical clinic for artificial fertilization. As the plaintiff R. Nachmani was not able to bear a child, the embryos created in vitro, on the basis of the agreement should be implanted to the surrogate mother. Eleven embryos were frozen for further implantation though before the couple divorced. The plaintiff demanded recognition of the rights on pre-embryos and their implantation to the surrogate mother and the husband refused. The main objective of the court was to decide, what should be preferred husband's right – not to be a father, based on "ownership" of the half of genetical material or the wife's right – be a parent[93]. Haifa district court satisfied the claim and granted the right on the embryo to the wife. The supreme court of Israel mad the decision for the benefit of the plaintiff as well, stating that the husband has violated agreement and similar to the natural fertilization, he had no right to claim for the declared consent[94].

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90 *Haut M.C.,* Divorce and the Disposition of Frozen Embryos, "Hofstra L. Rev.", Vol. 28, 1999, 506.

91 *Fiestal D.H.,* A Solomonic Decision: What Will be the Fate of Frozen Preembryos?, "Cardozo Women's L.J.", Vol. 6, 1999, 118.

92 A.H.2401/95, *Nachmani v. Nachmani* 50(4) P.D. 661 (Isr) (in: *Dorner D.,* Human Reproduction: Reflections on the Nachmani Case, "Tex. Int'l L.J.", Vol. 35, 2000, 2).

93 *Dorner D.,* Human Reproduction: Reflections on the Nachmani Case, "Tex. Int'l L.J.", Vol. 35, 2000, 7.

94 *Shapo H.,* Frozen Pre-embryos and the Rights to Change One's Mind, "Duke Journal of Comparative & International Law", Vol. 12, 2002, 78.

The Supreme Court, with seven votes of eleven against four, for the purpose of the balance of interests, made the decision on the basis of universally recognized principles of justice and moral. Based on the principle of justice, which is the main source of the law,[95] the court regarded that in case of rejection of the claim the plaintiff would lose the last chance of being the genetical parent what would be greater damage than stating of paternity to the defendant against his will.

Four judges had the different opinion, they stated that before imposing of the parents' obligations the man should have additionally express his consent.

4.1.2. Davis v. Davis

Two of nine *in vitro* embryos created in result of artificial fertilization were implanted to the plaintiff, Ms. Davis and froze the remained seven embryos. In this case the operation was unsuccessful. The couple divorced soon and as it was expected, husband was against implantation of the embryos to his wife. Initially the plaintiff demanded implantation of the embryos to her motivating her demand with the fact that she was the mother and the embryos were preborn children,[96] though, at the stage of consideration of the case at the Supreme Court, due to her new marriage, the plaintiff demanded transfer of the pre-embryos to the other infertile couple.

Court of the first instance satisfied the claim. In making decision the judge relied upon the argumentation of famous French scientist, geneticist, *Gerome Lejeune*, according to which the life commences from the moment of conception and the early embryo should be equalized with the embryo, which is a human being.[97]Argumentation of the defendant that the pre-embryo, unlike the foetus, had no nervous system and all four cells were genetically identical and therefore it should not be regarded as a human being was not shared by the court.[98]

The mentioned precedent was followed by significant criticism. In the opinion of the commentators the court did not take into consideration biological reality that "irrespective of genetically unique nature of the early embryo and its potential of development into a human being, it was not the individual carrying the interests and rights."[99] Decision by the judge that four-cell embryo in the test tube was equalized to the human being was called "unprecedented elementary logical mistake."[100]

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95 *Dorner D.,* Human Reproduction: Reflections on the Nachmani Case, "Tex. Int'l L.J.", Vol. 35, 2000, 7.

96 Embryos in a Divorce Case: Joint Property or Offspring?, "NY Times", April 21, 1989.

97 *Dolgin J.*, Defining the Family: Law, Technology and Reproduction in an Uneasy Age, "NYU Press", 1999, 166.

98 *Misner Ch.,* What if Mary Sue Wanted an Abortion Instead? The Effect of Davis v. Davis on Abortion Rights, "American University Journal of Gender & the Law", Vol. 3, 1995, 283.

99 *Robertson J.,* Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos, "Va.L.Rev.", Vol. 76, 1990, 445.

100 Ib., 482.

Court of appeal reviewed the decision by the court of first instance and established that by giving the embryo the right of life the law on abortions was violated, the equal rights on the frozen embryos were give to the gamete suppliers, according to Tennessee Supreme Court[101] though the frozen embryo was not a human being, yet, it was not the property, this was the special category, which deserved respect due to potential life. As a person has the right to reproduction or non-reproduction, the court regarded forced paternity unacceptable as this implied imposing of the financial, emotional and legal burden against the person's will. In addition, interest of the woman to transfer embryo to the infertile couple was regarded insufficiently solid to overcome the man's interests. Based on the mentioned the court did not satisfy the claim.

For maintenance of the balance of interests Tennessee Supreme Court developed certain practice: if the gametes suppliers fail to agree upon the pre-embryo the dispute should be resolved according to the agreement made before in vitro procedure, while if the parties have not agreed upon the mentioned in advance, the preference should be given to the party, which desires to destroy the embryos, except for the cases where there is good reason. If the party claims the right of donation of the embryo to the third party the interests of the opposite party should be satisfied and if the woman desires to implant the embryo herself and she has no any other chance to have the genetical child, the question should be resolved in her favor.[102]

4.1.3. Kass v. Kass

After numerous unsuccessful attempts of treatment of infertility Maurio and Steve Kass applied the procedure of artificial fertilization, in result of which nine embryos were created and four of them were implanted to Maurio's sister, who, as surrogate mother, should bear the child and after birth transfer the children to the genetic parents and froze the remained five embryos. Parties, in the written informed consent expressed their will that in case of divorce the regime of joint ownership of the spouses would be applicable to them and incase of death or the other cases they refused to implant the embryos and transferred them to the relevant institution for biological researches.

Medical intervention was again unsuccessful in this case and after termination of pregnancy of the surrogate mother the couple divorced. Irrespective of the informed consent the plaintiff requested the right of ward over the embryo for additional attempt of implantation, as this was her last chance of biological motherhood and this was rejected by the defendant and demanded fulfillment of the agreement and transfer of the embryos for scientific researchers.

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[101] *Davis v. Davis*, 842 S.W.2d 588 (Tenn.Sup.Ct.1992) (in: *Haut M.C.,* Divorce and the Disposition of Frozen Embryos, "Hofstra Law Review", Vol. 28, 1999, 501).

[102] *Haut M.C.,* Divorce and the Disposition of Frozen Embryos, "Hofstra Law Review", Vol. 28, 1999, 501.

Court of the first instance considered the dispute within the contractual context so that it has not focused attention on the embryo. According to the court's opinion there was no difference between in vitro and in vivo embryos[103] and hence, the court regarded destruction of the pre-embryo as potential life unacceptable and vested the right of deciding of their future upon the mother. Actually, this was the only precedent where the contractual requirement was specified as only legal basis.[104]

Court of appeal cancelled the decision of the court of first instance based on the fact that the prior agreement between the parties was quite apparent[105], in addition, it recognized the right of veto of the opposing party, with respect of implantation of pre-embryo as the fundamental right worth of protection regarding personal development, though it did not provide any explanation on how the dispute should be resolved in case of absence of prior agreement. And by the decision[106] of Supreme Court of New York the man's right on reproduction was invalidated after participation in the artificial fertilization program and therefore, the exclusive right of decision with respect of the future of pre-embryo to the mother.

4.1.4. Evans v. United Kingdom

In relation with the fate of the pre-embryos the decision of European Court of Human Rights on case *Evans v. United Kingdom*[107]. N. Evans and her partner applied to the medical clinic for treatment of infertility. Examination showed that the plaintiff had the cancer of ovary and urgent surgical intervention was required. They explained to the patient that if the amputation would take place in the nearest future, she would have the chance to give birth to a child in case of artificial fertilization of the ovum. They explained to the couple that in accordance with the UK Law on Human Fertilization and Embryology of 1990 each of them had the right to cancel the initially state consent at any time, before implantation of the embryo to the woman's uterus. Man signed the consent on artificial fertilization for the purpose of joint treatment of infertility and implantation of the embryos created in result of the mentioned manipulation to Evans. In addition, 5-year term of cryo-storage of the embryo was stated.

In 2001, in result of *in vitro* fertilization 6 embryos of the couple were created and frozen as because of surgical operation with N. Evans pregnancy was possible no earlier than in 2 years.

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[103] *Fiandaca Sh.,* In Vitro Fertilization and Embryos: the Need for International Guidelines, "Alb.L.J. Sci.&Tech.", Vol. 8, 1998, 341.

[104] *Shapo H.,* Frozen Pre-embryos and the Rights to Change One's Mind, "Duke Journal of Comparative & International Law", Vol. 12, 2002, 83.

[105] *Fiestal D.H.,* A Solomonic Decision: What Will be the Fate of Frozen Preembryos?, "Cardozo Women's L. J.", Vol. 6, 1999, 118.

[106] *Kass v. Kass,* 696 N.E.2d 174 (N.Y. 1998), available at: < http://law.jrank.org/pages/24752/Kass-v-Kass-Embryo-Custody.html>.

[107] *Evans v. United Kingdom*, [2007] ECHR, Application #6339/05.

In 2002 the couple separated and by this reason the man requested the clinic to destroy the embryos. Evans, on her side, applied to the court and demanded granting of the right of implantation of the embryo to her, on the basis of non-compliance of the law of 1990 with the Articles of 2, 8, and 14 of the Convention on Human Rights of 1998. According to the plaintiff's statement, Article 2 of the above Convention, according to which – "right on life of each individual is protected by the law" – should be applicable to the embryo as a human being as well. Depriving of the right of implantation of the embryo was against the right on respect to the personal and family life stated by Article 8 of the Convention and in addition, it was against unacceptability of discrimination guaranteed by Article 14.

UK court of the first instance[108] did not satisfy the claim for the following circumstances: according to the law of 1990 the man stated his consent on joint treatment, what, as such, excluded continuation of treatment by the woman independently and giving birth to a child; consent was made with the provision that it could be cancelled at any time before implantation and in case of change of the situation, if the couple was not in love any more, the man's will not to be a father of Evans's child should be absolutely clear. The main thing was that the court regarded that the embryo was not a human being and hence the right on life, recognized and guaranteed by the Convention should be applicable to it. Based on paragraph 3 of the law of 1990 the court emphasized that both, man and woman had the right of cancellation of the stated consent.

Plaintiff focused attention on the reasonable explanation of the consent and the dramatic outcomes of rejection of the claim. In particular, unlike the defendant, Evans would have no any opportunity of becoming genetical parent and in addition, particular role and load, both, physical and psychological, of a woman in case of artificial fertilization was admitted. Still the court of appeal maintained validity of the decision of the court of first instance. In the conditions of conflict of rights of non-intervention into the life of both parties the preference was given to the man's right – avoidance of the obligations and burden of a biological parent. According to the court's decision, implantation of the embryo would cause additional financial responsibility of the man and this implying supporting of minor children – obligation of payment of the alimonies and imposing of such obligation without a person's consent would be unreasonable and unjustified.

On 11th February 2005 N. Evans applied to the European Court of Human Rights with the claim against United Kingdom. The Plaintiff demanded granting of the right of implantation of the pre-embryo created on the basis of initial consent of the former partner relying on Articles 2, 8 and 14 of the Convention.

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[108] *Evans v. Amicus Healthcare Ltd and Others* (in: *Douglas G.*, Evans v. Amicus Healthcare and Others; Hadley v. Midland Fertility Services Ltd and Others [2003] EWHC 2161 (Fam), Who Has the Right to the Fate of their Embryos?, available at: http://www.ccels.cf.ac.uk/archives/issues/2003/douglas.pdf)).

European Court of Human Rights, in decision-making relied upon the national – English law, according to which the life commences from birth and not from conception and therefore, the foetus had no any independent rights and interests and eleven judges against four stated that:

1. The embryo has no right of life and hence, no violation of Article 2 of the Convention has taken place.

2. Respect of private live provided for by Article 8 of the Convention means respect to the decision of each party and this includes the individual's choice, whether to become a genetical parent or not. Respect to the dignity and freedom of will of an individual is the legislative guarantee, excluding any exemptions. In case of in vitro fertilization, donor of the gametes shall have the guarantee that his/her genetical material will not be used without his/her consent.

The court regarded as there was no European consensus in relation with the mentioned issue and the national legislation, in particular, the law of 1990, clearly stated the possibility of rejection of the previous consent, in conflict of interests no violation of Article 8 the Convention has taken place. Appealing by the plaintiff to Article 14 of the Convention, prohibiting discrimination was not shared by the court as well.

4.2. Principle of good Faith as the Court's Instrument for Resolution of Disputes between the "Co-owners" on the Frozen Embryos

4.2.1. Complication of Fulfillment in the Conditions of Changed Circumstances

Basis for modification of *pacta sunt servanda* principle is *Rebus sic standtibus*, releasing the party from responsibility partially or fully in the changed circumstances.[109]

Changed circumstances may develop if the circumstances out of control of the parties objectively exclude fulfillment of the obligations[110] and complications take place[111] where fulfillment is impossible but is the heaviest burden for the debtor. If in the former case the agreement between parties is terminated, in case of complication of fulfillment the relations may be modified. The parties should make attempt to adjust the changed circumstances to the agreement, on the basis of good faith.[112]

Impossibility and complication of fulfillment is established by the international codification creating common legal framework,[113] though, with the different definition. Objective

[109] *Lando O.,* Salient Features of the Principlesof European Contract Law: A Comparison with the UCC, "Pace International Law Review", Vol.13, Issue 2, 2001, 365.

[110] *Vis major, force majore.*

[111] *Hardship.*

[112] *Lando O.,* Salient Features of the Principlesof European Contract Law: A Comparison with the UCC, "Pace International Law Review", Vol.13, Issue 2, 2001, 368.

[113] See: *Lando O., Beale H.* (Editors), Article 6:111 of Principles of European Contract Law, Part I and II, Prepared by the Commission on European Contract Law, "Kluwer Law International", 2000, 561.

impossibility of fulfillment of the obligations, in Georgian civil doctrine is regarded as the *force majeure* circumstances, which could not be foreseen and are inevitable circumstances independent from the will of the debtor,[114] while complication of fulfillment is not specified separately in GCC, rather, it states by Article 398 I that "if the circumstances providing basis for making of the agreement were apparently changed and the parties would not make the agreement or make it but with the different contents, then adjustment of the agreement to the chanced circumstances may be requested. Otherwise, regarding specific circumstances, the party to the agreement could not be claimed strict compliance with the unchanged agreement."

Necessary precondition for application of the specified norm is change of the substantial circumstances regarded as the basis for the agreement, avoidance or elimination of the outcomes of which is out of control of the parties and if in case of foreseeing of these circumstances in advance the parties would not make the agreement or execute it with the different contents. As complication, as a rule, is related to the economic issue, in case of the dispute related to implantation of the frozen embryo, it is disputable whether divorce could be regarded as complication of fulfillment as it is not a circumstances independent from the will of the parties. Though, on the other hand, possibly, the basis for divorce could be unforeseeable, unlikely contractual change, arisen after making of the agreement on freezing of the embryo.

In assessment of the specific fact divorce should be regarded as the changed circumstance impacting decision of the potential parents as in case if the causes of divorce could be foreseeable, the parties would not undergo the difficult in vitro procedure[115].

Party, subjected to the changed circumstance, should not be imposed the entire burden of the risk of non-foreseeing of the circumstances, particularly, if the contractual gap causes apparent inequality and imbalance.

In case of agreement modification resulting from complication of fulfillment, for dealing with the contractual inequality, the court should rely upon the universally recognized juridical principles and principle of good faith is particularly significant among them.

4.2.2. Significance of the Principle of Good Faith for Determination of the Legal Status of Frozen Embryo

Autonomy of the will of a person and verbatim will of the wall is in many cases opposed by the principle of good faith.[116]

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[114] *Zoidze B.,* Comments to GCC, Book III, Tbilisi, 2001, 273 (in Georgian).

[115] *Upchurch A.,* A Postmodern Deconstracrion of Frozen Embryo Disputes, "Conn.L.Rev.", Vol. 39, 2007, 2126.

[116] *Vashakidze G.,* Good Faith According to Georgian Civil Code – Abstraction or Effecive Law, "Georgian Law Review", №1, 2007, 22 (in Georgian).

Good faith means acting by the participants of civil turnover with due care and responsibility, respect to the rights of one another,[117] though, it is not simply ethical and moral principle, rather, it is the normative category, even it has no general theoretical status and is considered within the legal doctrine as a "norm", "most significant principle", "rule", "maxima", "obligation", "standard of conduct" and "unwritten source of justice". [118]

Good faith is not a specific norm, rather, it is the source of the other norms and it is the universal category, which became the foundation for all laws. The substance of the specified principle is that each party should act in good faith and in accordance with the principles of honest businessmen,[119] as required by the customs of turnover.[120]

Starting from the Roman law, principle of *bona fide* was of particular significance in *ius civile* and roman juridical thinking.[121] In German law good faith was recognized as the "royal norm", purpose of which was "moralization" of the law[122] and which is effective up to present, as a supreme norm modifying the other norms.[123]

Article 8 III of GCC, similar to the laws of the other countries, obligates the participants of legal relations to execute their rights and obligations in good faith. Principle of good faith is mostly applied in the cases where "claim formally complies with the effective corporeal law but its implementation in the specific case is unjust."[124] The mentioned principle is of particular significance in case of presence of the legislative gaps and contradicting provisions, what is expressed in the function of explanation. Legislation of some countries[125] directly specify interpretation of the agreement on the basis of good faith while in the other countries interpretation is the prerogative of the court.[126]

Article 52 of GCC, in interpretation of expression of the will emphasizes reasonable judgement rather than good faith, though "reasonable" is wider concept and includes judgment on the basis of universally recognized principles, including judgement taking good faith into consideration.

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117 *Zoidze B.*, Comment to GCC, Book III, Tbilisi, 2001, 270 (in Georgian).

118 *Hesselink M.W.*, The Concept of Good Faith, in: Towards European Civil Code, *Bar Ch.V.* (Editor), 4th Edition, "Kluwer Law International BV", 2011, 622.

119 See: *Lando O., Beale H.* (Editors), Article 1:201 of the Principles of European Contract Law, Part I and II, Prepared by the Commission on European Contract Law, "Kluwer Law International", 2000, 561.

120 Paragraph 242 of German Civil Code.

121 See: *Zimmermann R.,* The Law of Obligations: Roman Foundations of the Civilian Tradition, New York, "Oxford University Press", 1996, 667.

122 *Zweigert K., Kotz H.,* Introduction to Comparative Law, 3rd Edition, Oxford, "Clarendon Press", 1998, 172.

123 *Lando O.,* Salient Features of the Principlesof European Contract Law: A Comparison with the UCC, "Pace International Law Review", Vol.13, Issue 2 Fall, 2001, 14.

124 *Kereselidze D.*, Most General Systematic Concepts of the Private Law, Tbilisi, 2009, 84 (in Georgian).

125 See: Paragraph 157, BGB.

126 *Hesselink M.W.*, The Concept of Good Faith, in: Towards European Civil Code, *Bar Ch.V.* (Editor), 4th Edition, "Kluwer Law International BV", 2011, 629.

In addition to the interpretative function, in the legal doctrine the supplementing, restricting, limiting and mitigating functions of the principle of good faith are distinguished.[127]

In consideration of the disputes between potential parents in relation with the embryo the court should make decision through weighting of the interests of the couples, relying on the general legal principles, particularly significant of which is the principle of good faith. In addition, though Georgian legislation does not regard the embryo worth of the legal protection, in each specific case the purpose of use of the obtained embryo should be taken into consideration as well.

If one of the parties desires to transfer/donate the embryo for medical-biological researches and the other party is against this, the dispute should be resolved in favour of the latter, as personal right of reproduction is preferential towards the right of research.

In the conditions of the contractual gap, in case of collision of interests, the preference should be unambiguously given to the person, who has no any alternative chance of reproduction.[128] In case of contractual regulation but legislative gap, if the right – not to be the parent, the basis for which is of economical nature – avoidance of the alimony obligations opposes to the realized expectation of origination of life, the preference should be given to the latter and the court, applying the restricting, limiting functions of the principle of good faith should mitigate particularly severe outcomes of the agreement.

Though theoretically giving birth to a child is theoretically more reasonable than destruction of the embryo, it is possible that the genetical parent was not able / desiring gestation and for the purpose of child birth and demand transfer of the embryo to the surrogate mother or recipient. According to Article 143 b I of LHC, for transfer of the embryo to the uterus of surrogate mother and its growing consent of the couple is required. With teleological definition of the norm specified at donation of the embryo obligatory nature of the consent of gametes suppliers may be established. In such cases the law is in the deadlock, as each of the parties has its justified interests and in these conditions, what should be preferable – whether provide opportunity to the embryo, created potential life, to be born or not, is beyond the competence of the law.

5. Conclusion

Studies showed that Georgian law does not contain the mechanism for protection of the embryo. Actually, frozen embryo becomes similar to the category of object of the law. Though the fertilized ovum in the container or the frozen one could not be considered as a human being, it is

[127] *Hesselink M.W.*, The Concept of Good Faith, in: Towards European Civil Code, *Bar Ch.V.* (Editor), 4th Edition, "Kluwer Law International BV", 2011, 625.

[128] *Robertson J.,* Prior Agreement for Disposition of Frozen Embryos, "Ohio St. J.J.", Vol. 51, 1990, 421.

undoubted that the embryo is not a property, rather, it is the greater wealth.[129] It is a phenomenon of potential life and this, similar to the *in vivo* embryo, it should be equalized with the subject with the conditional legal capacity and this implies recognition of legal protection thereof.

Analysis of the negative results of conservation of the embryo would demonstrate necessity of creation of the legal regime excluding equalization of the embryo with the thing. For this, it is necessary, to prohibit freezing of the embryo similar to the European regulations and this would not be the attempt of limitation of the right on reproduction, rather it will be the effort of regulation thereof.

[129] *Fuselier B. M.,* The Trouble with Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Pre-embryos, "Tex.J.On C.L.&C.R.", Vol.14, 2009, 155.

Tamar Zoidze*

Payment of Damages, Caused by the Substandard Product in Court Practice of Georgia

I. Introduction

Development of market relations brought to public attention such issue as quality of products. Stabile and trustful civil circulation requires objects of circulation to be compatible with the quality standards. Together with many other factors, it depends on the law defining quality and liability over the harm caused by the substandard products. Issue about responsibility for substandard products is regulated by the Civil Code of Georgia (further mentioned as CCG) as well as special law, such as "Law on Protection of Consumer Rights", "Law on Products and Service Certificate", etc.

It should be mentioned that problem of Substandard Products is still a serious, global problem, proof of which can be Directive # 314, "On Liability over Substandard Products", adopted by EU on July 25, 1985, and Directive[1] # 34, about changes in it, adopted on May 10, 1999. All these ensured strict responsibility over Substandard Products and making consumer's interests a priority. Besides, material as well as moral damage is subject to compensation.

This article studies Judicial Law of Georgia regarding use of those CCG norms, about the problem of payment of damages, caused by substandard products. Before providing the cases of the separate precendents, it should be mentioned that this practice is not huge – it is being formed just now. However, it is possible to see many important issues in them, which are important for correct interpretation of the code norms.

II. Separate Cases of the Liability

1. Electric Power as a Product (so called "Case on not delivering power")

According to the Article 1011, CCG, electric power is also considered to be a "Product". Electric power is referred to as a product in the Article[2] 2, Directive 374, of July 25, 1985.

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1 *Pfeiffer Th.,* Juris Texte Zivil- und Zivilprozessrecht, Saarbrücken, "Juris/Luchterhand", 2005, 619-624; German Law, Part III, Moscow, "Statut", 1999, 835-846.

2 *Schulze R., Zimmermann R.,* Basistexte zum Europäischen Privatrecht, Textsammlung, 2.Auflage, Baden-Baden, "Nolos Verlags Gesellschaft", 2002, 211-225.

Though German Legislation doesn't consider electric power as an item, it is considered as a product.[3] It is clearly highlighted in the German Doctrine that when delivered electric power is faulty, substandard, liability is assigned to power delivering organizations.[4]

Attention should be paid to the fact that nondelivery of the electric power is qualified as a substandard product. Regarding this question, there exists an interesting decision in court practice of Georgia, namely, so called "Nondelivery of Electric Power Case,"[5] where damage caused by nondelivery of power is qualified as health damage caused by substandard electric power. It should be mentioned that this case is an original and rare precedent and demonstrates major legal impairments in Georgian Jurisdiction. The case is as follows: A plaintiff submitted a claim at the court of first instance against the Ministry of Fuel and Energy and demanded compensation for moral damage. The plaintiff's statement was based on the economic circumstances in the country, in the 90s of the last century. In particular the period of well-known energetic crisis and general difficulties, familiar to Georgian population. The plaintiff, actor and journalist by proffession, stated that it was in these years that he lost work capability, opportunity of self-realization as an actor and a journalist. Besides, his health suffered a lot, because of multiple deseases and their treatment, he went through.

Court of first instance partially satisfied the action, and imposed on Fuel and Energy Ministry of Georgia payment of damages within GEL 5000, i.e. less than plaintiff asked for. Verdict was appealed first to court of appeal and then - Court of Cassation.

Having used Article 1011, CCG as a basis for considering electric power as a product, District Court raised the question of its subquality, which was demonstrated through non-delivery.

Supreme Court cancelled the verdict of the District Court due to its non – substantiation and returned it back. District Court had to clarify whether according to the Article 1010, CCG electric power was substandard or not, i.e. if non delivery of electric power could be considered as substandard. According to German Jurisdition in this case not only substandard, but even product does not exist. You can not label electric power substandard, when it does not exist. It is true that we can not discuss it as of a tangible item, but being an object of sale and purchase, it can be regarded as a product and respectively its quality can also be considered – but by no means during non –delivery, as electric power - in the view of the Article 1011 - is not present.

2. Blood as a Product after being Processed (so called "Case of AIDS")

After being processed, blood belongs to such products which must meet high standards. It can be said, that blood belongs to the type of products that are "hazardous" for peoples' health and life. Respectively, "Blood Banks" that are busy with realization of these products, should ensure

[3] *Palandt O.,*Kommentar zum BGB, 62. Aufl., München, "Verlag C.H.Beck", 2003, 2712, Rn.1, 2.

[4] *Landscheidt Ch.,* Das neue Produkthaftungsrecht, Herne/Berlin, "Neue Wirtschafts-Briefe", 1990, 56, Rn.33.

[5] *Kuhlman H.J.,* Produkthaftungsgesetz: Gesetz über die Haftung für fehlerhafte Produkte, Kommentar, 3. Aufl., Berlin,"Verlag Erich Schmidt", 2001, 78.

its high level security. Specifically it must not contain dangerous, contagious desease. So called "Blood Storage Bodies are obliged to pay for damages, when blood and body parts are contaminated with contagious, infectious deseases".[6]

In one of its decisions,[7] Supreme Court of Georgia mentioned that "when purchasing blood, relatives of the victim assumed that the product was undoubtedly reliable, high-quality and nobody warned them about item's possible drawback". In case of absence of warning by the manufacturer, could blood existing on hand be a high-quality product? Blood does not belong to the type of products where indication of substandard quality (information about hazard for health/life) could ease responsibility of a manufacturer. These are such products civil circulation of which without garantee of its full safety is not acceptable. Even more so – blood banking bodies sell it. Their activities are of commercial nature and their duty is take all kinds of precautions for its safety. Transfer of even 10 % of product safety risk to a consumer, is considered the same as transferring responsibility. It can be said that individual safety criteria should be determined for each particular product. Accusation of a consumer for blood shortfall is out of the question.

3. Informational Fault, as a Shortfall of a Product (so called "Vaccine Case").

It is highlighted in the references that, error in usage is a result of manufacturer's organizational mistake. i.e. there is no fault in the product[8] itself. Regarding a product connected with danger, a manufacturer is liable to provide its secure use through directions for use and warnings. Correction of some other faults through this way is not permitted. In this case the fault of the product is incompleteness or incomprehensibility of instructions for use, which could not be understood and foreseen by an average consumer. Not complete indication of product's harmful, hazardous qualities may also be considered as Informational shortfall. The objective of so called warning from the manufacturer's side is to give a consumer an opportunity to avoid danger, which he may not be able to foresee.[9]

It should also be mentioned that threat of the product itself, which is due to its type, does not make the product less harmful, i.e. its hazardous designation, function is not a drawback of a product. e.g. After injuring the body by shooting of a pistol, injury should not become the reason of weapon's security drawback, as damage occurred only because the weapon was used, activated.[10]

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6 *Kuhlman H.J.,* Produkthaftungsgesetz: Gesetz über die Haftung für fehlerhafte Produkte, Kommentar, 3. Aufl., Berlin,"Verlag Erich Schmidt", 2001, 78.

7 Case №AS-296-624-07, Supreme Court of Georgia, 2007, case is available (in Georgian) at: <http://prg.supremecourt.ge/DetailViewCivil.aspx >.

8 *Walter R.,* Produkthaftungsrecht, Teil II, Kommentar, Köln, "Bundesanzeiger",1990, 126, Rn.11.

9 *Netellbeck B.I.,* Produktsicherheit/Produkthaftung: Anforderungen an die Produktsicherheit und Ihre Umsetzung, Berlin/ Heidelberg, "Springer-Verlag", 1995, 32.

10 Ib., 39.

In contrast to German Legislation, Georgian legislative doctrine includes neither product safety requirements, nor types of its faults. The only source where there is talk about types of faults is the Law "On Protection of a Consumer's Rights", which has general information about product's common and major drawbacks.

As for court practice, there exists Supreme Court decision,[11] which establishes practice of reimbursement for damages caused by the information shortfalls. **The contents of the case is the following**: chamber of administrative and other category cases, in the Supreme Court considered a case on reimbursement of damages caused by substandard products, with Korean vaccine as a substandard product. The victim is a 12-year old child, who was injected this vaccine. In particular, after preventive vaccination for B hepatitis, the child developed desease of tetraparesis – paralysis of upper and lower extremities. Victim's legal representative claimed for reimbursement of the damages caused by substandard medicine, which he proved with lack of any warning, note about possible side effects, in which case they would not have used it and avoided that condition. i.e. evident is substandard quality of the product, which is expressed through lack of annotation, warning or information about the product (in this case about medicine).

Supreme court imposed reimbursement of the damages on the manufacturer, respective to Section 4, Article 26, Law of Georgia "On Drugs and Pharmaseutical Activities" and in this way specified informational shortfall. This Law envisages obligation of the subjects occupied with medical assets circulation and use to provide information on various peculiarities of its use, which are not indicated in their directions for use. The Court also did not receive verified proof, which would confirm submission of the warning information by the vaccine producer company.

Respectively, in this case there was incomplete indication of the information about product's harmful qualities. In the presence of warning the victim would have a possibility of a choice - whether to use this vaccine or not. But in this case the victim was devoid of choice.

Court should have substantiated its decision about damages caused by substandard product through responsibility norms as well. Namely, notion - product (material goods), comprises so called vaccine, medication, drugs, production of which requires more prudence and respectively, envisages strict responsibility. As this medication falls under the notion product, respectively, the next step is determination of its substandard level, which caused damages due to its low quality. Article 1010, CCG, defines a product as sybstandard, when "it does not provide its expected reliability." In this case due to specificity of the product, its expiration date and presence of respective warnings, instruction for use should be considered as reliability, because use of this product causes grave outcome.

Despite the fact that court took correct decision from the standpoint of result, it would be better if it had determined subquality criteria accurately and established a uniform term. As

[11] Case №BS-434-25-(3K-05), Supreme Court of Georgia, 2005, case is available (in Georgian) at: <http://prg.supremecourt.ge/DetailViewAdmin.aspx>.

Article 1010, of Civil Code does not have precise, specific definition of the notion subquality, its meaning should be filled by the court practice.

4. Items, as Goods Subject to Protection

CCG Article 1009-1014 does not indicate necessity of payment for product damage, if item is damaged. As a rule it happens through delictual responsibility. Namely, pursuant to CCG Article 992. Paragraph 1 of German Law "On Responsibility over a Product" envisages possibility of payment for damages incurred to the item. The same is confirmed in the Article 9, of the mentioned Directive, of EU, based on which not only harm to life and health is considered to be *a damage*, but also harm and destruction to any property (except substandard products), cost of which is no less than 500 Euros and usually is intended for personal use and consumption or it was maily used and consumed by a victim.[12] Damage to an item in view of responsibility norms doesn't necessarily mean changing of the substance physically. It is enough to have the item's use possibility reduced.

CCG Article 1009 talks about incurring damages generally and does not highlight type of goodness, to which damage is done. It states that manufacturer of substandard product carries responsibility over the damage caused by this product. This Article doesn't state the type of harm that is meant – only to life and health or at the same time harm to items as well? According to the Article 1014, CCG, which states that obligation of payment of damages applies to the damage, caused by death, or harm to the body or health, it can be concluded that this article doesn't apply to the damage caused by items. Again, it should be mentioned that in Georgian legal system, general rules of delictual responsibility is used in case of property damage. Article 1014, CCG, has electric power in the notion of a product. Substandard electric power can cause damage to **items**. Though in such case ordinary delictual responsibility is used.

"The Law On Protection of Consumer Rights" also indicates to the damage by substandard quality products, which presents rules different from tose in CCG. The Article 2 of the mentioned Law states, that every consumer of Georgia has right to claim reimbursement of damages to his property caused by a harmful product. Term "Property" should include "items" too.

German Law "On Responsibility over Product" states damage to an items separately and determines cases when question of liability does not arises. In particular, in the 2nd paragraph of the 1st Article of the Law it is stated: "In case of item damage, these rules are used only if the item is damaged, which is not faulty itself and which, because of its properties, is used for personal use and the plaintiff consumed it mainly for this purpose."[13] From this statement it is evident, that if

[12] *Schulze R., Zimmermann R.*, Basistexte zum Europäischen Privatrecht, Textsammlung, 2.Auflage, Baden-Baden, "Nolos Verlags Gesellschaft", 2002, 211-225.

[13] *Kuhlman H.J.,* Produkthaftungsgesetz: Gesetz über die Haftung für fehlerhafte Produkte, Kommentar, 3. Aufl., Berlin,"Verlag Erich Schmidt", 2001, 35.

substandard quality product damages a product sunstandard itself, the person incurring damage is devoid of responsibility.[14]

Not only in one court decision falty relevance to Norms has been found, during resolving of such judicial disputes. In most cases it happens during reimbursement of the damages caused by fire. More specifically, damages to the item, caused by delivering unquality electric energy. This kind of judicial disputes are quite frequent. Main reason of fire is delivery of substandard electric energy which is demosnstrated in getting higher voltage than acceptable.

Not only in one court has falty ratio of decision Norms been found, but also during resolving of such judicial disputes as well. In most cases it happens for reimbursement of the damages caused by fire. More specifically, damages to the item, caused by delivering unquality electric energy. This kind of judicial disputes are quite frequent. Main reason of fire is delivery of substandard electric power which means higher than acceptable voltage, i.e. "short circuit." There is no doubt that the cause is substandard electric power, but raising a question of reimbursement of the damages caused by substandard electric power depends on the judge's capability to correctly estimate and define the norms. Though Article 1009 starts with imposition of the reimbursement of the damages on the manufacturer, who may have agreement or be in delictual legal relationship with the victim, at the end of this article several cases are listed, where responsibility is excluded: if conditions excluding payment of damages are taken out, logical question will arise: What kind of damages does Article 1009 reffer to? Article 1014, CCG directly points to it and specifies the first sentence of the Article 1009: "according to the Article 1009 obligation of payment of damages refers to the damage, which is caused by death or damage to the body or/and health." In view of the fact that present debates applies only to the payment of property, item damage, application of the Article 1009, CCG should be excluded, as precondition of its use is the Article 1014, CCG.

It is interesting how should this controversy be settled? The answer is simple: On the basis of the norms of general delictive justice. Though it is necessary to make changes to the Article 1014, CCG and to reflect payment of damages to the property in it too, similar to the EU Directive. This will establish additional garantees for the indemnitee.

5. Responsibility Regardless of the Agreement (so called "Case of Ipkli")

According to the Georgian legislation, responsibility for the damage inflicted by a substandard quality product occurs regardless of the agreement.

According to Article 1009, manufacturer of substandard quality products is held responsible regardless of whether it is bound by agreement with the complainant consumer. Consequently, there is no difference wether the product that was the cause of damage was given to the

[14] *Kuhlman H.J.,* Produkthaftungsgesetz: Gesetz über die Haftung für fehlerhafte Produkte, Kommentar, 3. Aufl., Berlin,"Verlag Erich Schmidt", 2001, 35.

complainant by the manufacturer or by another person. For instance, if a complainant purchased the product that caused damage not directly from a manufacturer but from another person who had purchased the product from a manufacturer, it is still the manufacturer that holds responsibility notwithstanding whether there is any agreement-based relation between the manufacturer and the complainant or not.

In one of its decisions,[15] the Supreme Court of Georgia imposed the responsibility of reimbursement of damage was imposed not on the product store but on the factory producing bread that had no agreement-based relation with the complainant.

The case was as follows: the complainant plaintiff purchased a bread baked in a limited liability company "Ipkli", as a result of which he got poisoned and had to undertake medical treatment. Later, by a conclusion of an appropriate expert it was established that the bread contained black particles – a rat's droppings. The Court of First Instance satisfied the plaintiff's claim for reimbursement of damage towards the bread manufacturer. Finally, after receiving the appeal, the Court of Cassation also considered it fair to impose damage reimbursement on the manufacturer based on Article 1009 of the Civil Code of Georgia. It also indicated Article 1009 of the Civil Code of Georgia defining the substandard quality of a product. Since the substandard quality, the manufacturer and the damaged inflicted by the product was defined, the liable person was held responsible for reimbursement of damage. The manufacturer had violated the so called responsibility for oversight over the project and launched a substandard quality product into civil circulation.

The defendant was obliged to assert that the bread was of a good quality on its production and launching into civil circulation and that he was not responsible for transformation of the product into a substandard quality one. He also had to assert the way how the rat's droppings could have fallen into the bread. After bringing all the evidence, his guilt regarding the above issue would be established. However, it should be mentioned that it would be rather difficult for the defendant to bring the evidence for the above.

6. The Influence of Level of Development of Science and Technology on Responsibility (so-called "Case of AIDS")

It is worth mentioning the so-called "case of AIDS"[16] which is about inflicting damage to one's health by substandard -quality products. The content of the case is as follows: after giving birth to a child as a result of Cesarean section, the plaintiff needed a certain amount of blood transfusion. The blood was acquired by her relatives in a blood bank in Kutaisi. By the conclusion of the doctors, HIV (the so-called AIDS) became the reason of the disease that occurred to the

[15] Case №AS-751-1118-06, Supreme Court of Georgia, 2007, case is available (in Georgian) at: <http://prg.supremecourt.ge/DetailViewCivil.aspx>.

[16] Case №AS-296-624-07, Supreme Court of Georgia, 2007, case is available (in Georgian) at: <http://prg.supremecourt.ge/DetailViewCivil.aspx>.

plaintiff and her child. The virus was found in the blood purchased by the relatives in a blood bank in Kutaisi. Since the issue was obvious – blood containing HIV which was harmful for health, the plaintiff stated her claim in her appeal to court correspondingly and required reimbursement of both material and moral damage. The Court of First Instance partially answered her claim. The Court of Appeal of Kutaisi stated in its verdict that despite the high level of development of science and technology, it was the duty of Kutaisi blood bank, i. e. the manufacturer, to "produce and sell safe blood only, notwithstanding the cost of the research that would take to do that." In this case the court did not consider Paragraph E of Section One of Article 1009 as a circumstance excluding the manufacturer's responsibility and also stated that nobody had warned the consumers of the possible fault in an item's validity and, of course, they had expected a valid, safe product.

The Supreme Court of Georgia stated some completely new definitions in its verdict. Specifically, a circumstance not excluding responsibility such as "the high cost and rareness of the appropriate technologies were emphasized separately." The Court mentioned the manufacturer selling this type of product who has a proper competence and its realization is connected with a certain amount of risk. It is responsible for providing the enterprise with proper equipment. At the same time, the Court mentioned the case in which a manufacturer can be released of responsibility. Namely, when realization of a product harmful for health and/or life and much of a research becomes impossible to implement due to the level of development of science and technology, the manufacturer has the right to inform a consumer by means of an instruction or a warning so that the latter can make a proper decision. To a certain degree, this circumstance could be viewed as assigning the responsibility to somebody else.

The Court also rightly explained that non-existence of agreement about the quality of an item should not become the basis for releasing from responsibility, since the manufacturer, based on its activity and product specificity, was to produce a high quality, perfect item. Whereas the consumer has some trust of the manufacturer, he/she has to be more sensitive to its activity, especially because the consumer does not have adequate knowledge about the product.

Thus, the Supreme Court made a correct judicial assessment of the circumstances. However it would be a good idea if it also defined the exact meaning of the level of development of science and technologies, so that it could become obvious to a defendant that his/her claim was groundless.

Releasing from responsibility in the above-mentioned manner is connected with information about the level of development of science and technology and the realistic opportunity to consider it as well as the time of the start of its civil circulation. According to both the Georgian and the German law, development of science and technology is evaluated in the period of time when the mentioned product was launched for realization. Accordingly, its establishment is crucial for ruling out or establishing the responsibility of a manufacturer. This concrete lawsuit suggests a

question: to what extent was it impossible and unavailable for the manufacturer to consider the level of development of science and technology in the period when this product – blood was launched for realization? From the verdict of the Court it becomes clear that from the side of the plaintiff – the manufacturer there was a case of **subjective** impossibility to consider the level of development of science and technology. Specifically, because of lack of funds the organization producing blood failed to check the safety a dangerous product such as blood (which can be a carrier of many other dangerous diseases).

It can be said that organizations producing blood bear doubled responsibility. They are responsible for careless actions of a donor. However, since the goal of their commercial activity is selling blood, they must ensure its safety.

7. Distribution of the Burden of Assertion

Distribution of the burden of assertion is one of the problematic issues when damage is inflicted by a substandard -quality product. Article 1012 of the Civil Code of Georgia imposes the whole burden of assertion on the complainant, in contrast to the German law that solves this difficulty by a principle introduced in the court practice, namely, distribution of assertion between the parties. This method is called "Beweislastumkehr" and keeps a fair balance between the rights and responsibilities of the parties to protect their own interests in front of the court. Although this rule can be similar to a norm provided by Article 102 of the Civil Processual Code that states that **"*each party should assert the circumstances on which it bases its claims.*"** However, this rather looks like a method for abolishment of evidence. For example, if a complainant says he/she has suffered damage from the manufacturer's part, or in other words, the damage caused by a product poorly produced by the manufacturer is evident and until the manufacturer successfully asserts that he/she is not to be blamed for the fault that appeared in the product and was acting in compliance with all rules, did not violate the obligation to oversee the item, etc., his/her guilt will be considered guilty and therefore, responsible to the complainant.

The German law states that the burden of assertion cannot be always imposed on the complainant. In cases considered in the 2nd indent of Article 1 of the Law on "Responsibility for substandard -Quality Products" (points B and G of Section I of Article 1009 of the Civil Code of Georgia), namely, when: "based on the circumstances of the case, it may be assumed that at the time the product was launched for realization, it had no fault which caused damage", "the manufacturer had not produced the product for sale or any other commercial purpose or within its professional activity", – these are exactly the cases when it is the manufacturer who has to assert whether the responsibility should be excluded or not. Such distribution of assertion is probably caused by the fact that the manufacturer may know the existing circumstances better.

Although there is a regulated norm for "the burden of assertion" in the Georgian law, as has already been mentioned, it imposes this responsibility on a complainant only. It is natural that the lawmaker might not be able to predict the result that application of this norm may bring, since flaws can be discovered in any law, but whatever cannot be regulated by law should be construed by a doctrine and court practice.

There are a number of decisions in the Georgia court practice too, where the rule of distribution of the burden of assertion identical to that existing in Germany is established.

One of the decisions of the Supreme Court of Georgia states that a defendant – a company producing vaccines, one of which became the reason for a severe disease of a little child, failed to disprove the arguments brought by the complainant. Therefore, the court made the company producing the vaccines fully responsible. Namely, it is mentioned in its decision: "the Court of Cassation cannot share the defendants' opinion on the lack of cause-and-effect relation between the vaccine and the resulted effect. The ground for the above is given for the Court of Cassation by the conclusions researched and introduced in the case by the Court of Appeal that, based on Section 2 of Article 102 of the Civil Processual Code, belongs to one of the type of evidence. The analysis of the above evidence deprives the Court of Cassation of the possibility to exclude the existence of cause-and-effect relation, while ***as concerns the additional and argumented cassation claim that would refute the conclusions attached to the case, it is not presented by the persons appealing cassation.*** It is established by the materials presented in the case that *G. Kobalia* was healthy before taking prophylactic vaccines against B hepatitis and there is no doubt that worsening the health conditions of the above person coincides with the period after vaccination."[17]

It is worth mentioning that initially it is the complainant who starts the assetion process. The pre-condition for asserting the contrary by the manufacturer are arguments presented by the complainant. On the one part, asserting the arguments may be a heavy burden for a complainant. First, according to Article 1102 of the Civil Code of Georgia, the complainant should assert the damage inflicted upon him/her as a result of consuming the substandard -quality product and second, the claim that the product was really of a substandard quality. Proving suffering of damage should not be difficult for a consumer, whereas assertion of the substandard quality of a product, namely where a mistake had been made when it was produced is difficult for him/her to evaluate and prove as he/she has no sufficient knowledge, experience in order to discern even with an unaided eye the flaw of the product. The burden of his/her assertion should be limited to the fact of the infliction of damage and, of course, finding the cause-and-effect relation between the inflicted damage and the substandard quality product.

In the above decision, the complainant plaintiff succeeded in presenting the evidence in the form of expert conclusions stating that there really existed the cause-and-effect relation between

[17] Case №BS-434-25 (3k-05), Supreme Court of Georgia, 2005, case is available (in Georgian) at: <http://prg.supremecourt.ge/DetailViewAdmin.aspx>.

the substandard quality product and the effect that had arrived. Particularly, because of inappropriate and poorly prepared instruction which showed itself in there being no perfect annotation about the side effects, the complainant was deprived of the possibility to select whether he/she should have taken or not have taken the vaccination.

The German law approaches the issue rationally. According to the 4th indent of Article 1 of the "Law on Responsibility for a Product", the complainant should assert the justificatory circumstances of the responsibility, namely: the substandard quality of a product, the damage and the cause-and-effect relationship between them. It also specifies that assertion about the fault is not the responsibility of a complainant.[18] His/her main aim is to prove that the mistake was made in the sphere of a manufacturer, that is, under his/her supervision. Accordingly, he/she is no longer responsible to expain the reasons that have caused the fault to occur.[19]

It is also noteworthy that the complainant has to assert the identity of the manufacturer whose substandard quality product has caused the damage. In this case it is unacceptable and actually impossible to change the assertion to benefit of the complainant.[20]

Another interesting decision was made by Tbilisi Court of Appeal[21], who did not satisfy the claim of a plaintiff to reimburse his/her damage - specifically, for the computer that was destroyed as a result of a short circuit, since the complainant was unable to prove the fact of infliction of damage. Particularly, the complainant was to present the fact of computer damage and the evidence of its causes based on an expert's conclusion. The reason for its non-presenting was the actual impossibility to do so, since the complainant, as he has mentioned himself in the claim application, got rid of the "burned-out" computers. Therefore, it is questionable whether there was any damage at all and if there was any, whether it occurred as a result of a faulty action by a defendant. As the complainant-defendant has said, he had purchased the eight above-mentioned computers in a computer store "Alta" for a certain amount of money. He verified all that by a notice issued to him by the company. The court did not acknowledge the noticet as evidence and therefore did not verify the fact of payment of a sum by a plaintiff. The court considered that the fact of purchasing the computers and payment of their cost should be verified by a presenting direct document of payment and not by a notice issued by a company. Due to the lack of one of the main components of holding somebody responsible – evident damage, holding the defendant responsible was ruled out.

The court did not regard as verified the actual circumstance that the computers went out of order due to providing a non-standard high voltage of electric power, in other words - provifing a

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18 *Kuhlman H.J.,* Produkthaftungsgesetz: Gesetz über die Haftung für fehlerhafte Produkte, Kommentar, 3.Aufl., Berlin, "Verlag Erich Schmidt", 2001, 69.

19 *Walter R.,* Produkthaftungsrecht, Teil II, Kommentar, Köln, "Bundesanzeiger", 1990, 373, Rn.116.

20 Ib., 372, Rn.115.

21 Case №2b/2040-07, Tbilisi Court of Appeal, 2007 (in Georgian).

substandard quality product. Therefore, based on Articles 1010-1011 of the Civil Code of Georgia, the court imposed the burden of assertion only on the complainant and released the defendant of it.

The complainant appealed against the above-mentioned decision by the rule of cassation, but the Court of Cassation considered his claim unacceptable.

Another questionable issue is whether the damage would be reimbursed to the plaintiff complainant in case the fact of provision of substandard quality electric power were true, even if there damaged computers were not at hand. It is possible to assume that the reason for destruction of the computers was not the provision of high voltage, but their improper installation. In this case, first of all, a cause-and-effect relation should be established between the substandard quality product and the damage that has occurred, which already became impossible because of there being no damaged items at hand. The question is, how could the fact of providing substandard quality electric power be proved in a different way? Maybe the court should have checked whether the complainant was receiving any electric power that day at all? In other words, was there any product delivery?

There is also another another court decision[22] when in a similar situation the claim of a complinant plaintiff for reimbursement for the inflicted damsge was fully satisfied. Specifically, the court obligated a company producing electric power to reimburse the plaintiff for the damage caused by a fire. Expert conclusion verifies the factual circumstances that the cuse of fire was providing substandard quality electric power that was expressed in the failure to provide the electricity of permissible parameters which resulted in the short circuit and starting of fire. The court also verifies the cause-and-effect relations between the fire that started in the apartment and the actions of the defendant organization. Therefore, the fault of the defendant has been confirmed and reimbursement for the damage was imposed on him fully. The court considered the arguments brought by the plaintiff as confirmed since the defendant had failed to deny then. It turns out that the defendant has tsken the burden of "the failure to prove" the results.

III. Conclusion

The anaylsis of court practice has vividly demonstrated how the norms regulating reimbursement of damage created by substandard -quality products are applied. Of course, the Civil Code of Georgia cannot answer all the questions. This is natural. This is why the court practice should fill in the gaps of the law, which is what the courts actually do. The courts do their best to consider the precedents of the other countries to fairly protect the rights of both the complainant and the manufacturer. According to Section One of Article 4 of the Civil Code of Georgia, "the Judge has no

22 Case №AS-798-1072-05, Supreme Court of Georgia, 2006, case is available (in Georgian) at: <http://prg.supremecourt.ge/DetailViewCivil.aspx>.

right to refuse to administer justice even if there is no legal norm or if the norm is vague". Therefore, he/she should not have the right to decide the case unfairly in case of absence or imperfection of the legal norm. In this case he/she can apply the court analogy in order to establish the correct, fair court precedent. Namely,

a) Electricity cannot be considered a substandard -quality product when the damage occurred due to failure to provide electricity. It is impossible to talk about substandard quality of a product when there is no product at hand.

b) Lack of funds cannot be stated as a reason for not considering science and technology when such consideration serves inspection of a safety of a product "harmful" for human life and health, namely – the blood. It is noteworthy that the Georgian courts have elaborated new instructions in this regard.

c) The acting legislation does not provide for reimbursement for the damage inflicted by a substandard quality product when the damage by such a product occurs to an item. Such an approach of a legislator should be considered inappropriate to European Union law. Therefore, it appears reasonable that the norm be changed.

d) The courts should distinctly differentiate between dfferent types of project faults. Namely, in case of incomplete information about dangeraous qualities of a product there is an obvious fault in instructions. Therefore, the court can freely apply the norms of responsibility for substandard quality products, since substandard quality of a product implies a fault in instruction.

Giorgi Makharoblishvili *

Remuneration and Insurance, as Legal Guarantee of Protection of Directors of Capital Companies against Responsibility

I. Introduction

In corporate law, corporate management, legal tools, methods and subjects of its implementation, represent one of the criteria of profitability, consequently, (property) increase of shareholder value[1]. Corporate management is the process, implemented by certain competent person(s). In entrepreneurial law, they are referred to as directors and managers. The process of management of company has its specific signs, fulfillment of which required highly qualified personnel; and high qualification is conditioned by the ability of maximal perfect fulfillment of specific duties. These duties are imposed on directorate of corporation. Differentiation of duties shall be carried out into primary and secondary duties, legal[2], contractual duties and those following from charter.[3] The obligations for the subjects, bearing the mentioned duties, as a rule, are defined unilaterally. Their unilateral nature is conditioned by the presence of the relevant legal as well as charter-related contractual reservations, violation of which forms the basis for putting their responsibility on agenda.[4] Although, good corporate management, in addition to duties, implies the existence of rights. In this case, they speak about autonomy of definition of directors' and officers' rights and obligations on charter-related and contractual base. The latter is related to the reduction of the risk of responsibility of the directors of corporation. Reduction of the standard of imposition of responsibility is one its examples. But the subject of consideration of the present paper is the review of the institution of the so-called indemnification[5] and insurance[6] of director and manager, assigned to the number of legal categories of protection of directors. The goal of the present paper is

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1 The so-called shareholder value, see: *Burduli I.,* Property Relations in Joint Stock Company, Tbilisi, 2008, 220-223 (in Georgian).

2 Some Articles of the Law of Georgia "On Entrepreneurs", namely, Para. 6 of the Article 9 and the Article 56 could be used as the basis for definition of legal duty of directors.

3 *Chanturia L.,* Corporate Management and Responsibility of Directors in Corporate Law, Tbilisi, 2006, 201 (in Georgian).

4 In regard to responsibility of directors in general see: *Chanturia L.,* Corporate Management, Tbilisi, 2006, 202-407; *Palmiter A.,* Corporations, New York, "Aspen Publisher", 2006, 188-249.

5 Indemnification.

6 Directors & Officers Insurance.

revelation of Georgian legislative- regulatory scarcities and negative and positive features of broad statutory autonomy on the basis of comparative-legal analysis and identification of alternative way of its solution. Comparative analysis of the issues is based on legal doctrine of leading countries of Georgian, Anglo-American and continental law[7]. Moreover, due to absence of Georgian judicial practice in regard to these issues, the basic theses will be supported only by foreign judicial practice.

II. Legal Basis and Nature of Remuneration and Insurance of Executive Bodies (Persons)

1. Contract, as the Basis for Definition of Remuneration and Insurance of Directors[8]

Director is the most important subject of direction of activities of capital companies. Its legal status depends on the contract concluded by the enterprise with him/ her and legislative regulations. Following the charter and concluding of the contract, director is connected with the company by corporate- legal as well as obligatory- legal relations.[9] As a rule, the contract, concluded with the director, is considered to be specific type of contract, referred to as official contract,[10] although the Law on Entrepreneurs doesn't provide for such a reservation. Consequently, civil- legal relations are delimited from corporate- legal relations. The latter implies the first stage of determination of director's authorities, which lies in the act of appointment of director. In particular, the director's authority (in general) is defined by the charter and the contract concluded with him/ her, but it's necessary to propose and appoint the relevant candidate prior to concluding the agreement. The decision on appointment of director is considered to be the basis of organic- legal relations, and the contrac concluded after appointment by the relevant body[11] with director form the

7 USA, UK and Germany are implied.

8 The basis of determination of indemnification and insurance terms is identical and the both are subject to definition by the contract concluded between the company and the directors, unless otherwise stipulated by national legislation. Consequently, the contract in the present section shall be considered only on the basis of indemnification and we won't have to allocate insurance as separate paragraph in the 2nd section of the paper.

9 *Chanturia L., Ninidze T.,* Comments to the Law on Entrepreneurs, Tbilisi, 2002, 425. Compare: *Lazarashvili L.,* Labor Contract with the Company Director. Partner and Director in Internal Relations of the Company, in: Theoretical and Practical Issues of Modern Corporate Law, *Liluashvili G.* (Research Supervisor), Tbilisi, 2009, 314 (in Georgian).

10 E.g. *Chanturia L., Ninidze T.,* Comments to the Law on Entrepreneurs, Tbilisi, 2002, 425; *Lazarashvili L.,* Labor Contract with the Company Director. Partner and Director in Internal Relations of the Company, Tbilisi, 2009, 309-328 (in Georgian).

11 Dirrefent subjects act in capital companies – LLC and JSC – as the body, appointing the director and defining his/ her authorities: in LLC the mentioned authority is granted to the general meeting of partners (in accordance with sub-paragraph "e") of Para. 6 of the Article 9^1 of the Law on Entrepreneurs, and in JSC, which is not obliged to have supervisor's board, this authority may be given to the general meeting; in other aspects, the authority of the Supervisor's Board includes appointing the director, concluding the contract and

catalogue of the fundamental rights and obligations,[12] by which the director shall be guided in the course of direction of the enterprise.[13] As a result, official contract together with the charter shall be the legal basis,[14] where not only the scope of authorities, duties of director, minimum and maximum term, during which he/ she can be appointed on the position of the director of the company; the contract, concluded with the director may also define the conditions of director's compensation, as well as the so-called indemnification and insurance. Shortly, legal regulation of the issue under consideration doesn't provide any kind of imperative legal reservation[15] by Georgian legislator. Consequently, it shall be considered according to dispositive ability and possibility of free definition of the content of the contract. So, the admissibility of indemnification and the possibility of consideration of the provisions of insurance shall be regulated by the charter and, following the charter, by the contractual relations existing with directors.

2. Double Nature of Directors' Remuneration – Remuneration of Activities and Remuneration of the Process-related Expenses

2.1. Directors' Compensation

Directors' activities can be defined in various directions, although compensation may not be given for his/ her activities.[16] It can be limited by national legislation, charter and/ or contract. As a rule, compensation is defined in the amount, adequate to the time spent for corporate management of the company,[17] and directors, who are managers and employees and related in internal organic manner, i.e. by membership status, as a rule. don't receive remuneration of the leading position of the company.[18] Giving of compensation depends on several factors. Primarily, it is financial abilities of the company, although the main prerequisite of the basic salary, as a rule, is the education and experience of the executive person, and the so-called variable salary is

determining of the scope of his authorities ((sub-paragraph f) of Para. 7 and sub-paragraph e) of Para. 8 of the Article 55 of the Law on Entrepreneurs. In regard to the body authorized for appointing, see: *Lazarashvili L.,* Labor Contract with the Company Director. Partner and Director in Internal Relations of the Company, Tbilisi, 2009, 328- 330 (in Georgian).

12 Just this description of rights and responsibilities include the terms of the director's compensation, reimbursement of process-related costs and insurance.

13 Sub-paragraph e) of Para. 8 of the Article 55 of the Law on Entrepreneurs, available at: <www.matsne.gov.ge>.

14 Georgian legislation is implied.

15 Unlike US Revised Model Businnes Corporation Act (R.M.B.C.A), which will be considered in details in the Section III paragraph 2. Consequently, the analysis of the second, legislative basis of indemnification will be provided in the next section.

16 *Schneeman A.,* The Law of Corporations, 5th Edition, Delmar, "Delmar Cengage Learning", 2008, 348.

17 The mentioned time includes attending general meetings, committee meetings and spending time due to other functional loadings.

18 *Schneeman A.,* The Law of Corporations, 5th Edition, Delmar, "Delmar Cengage Learning", 2008, 348.

defined by activities of the executive person, which depends on labor productivity.[19] In its turn, the companies, represented by good executive, have much higher company reputation and value.[20] Remuneration of management may consist of the fixed, as well as variable components. The fixed component consists of the salary.[21] As for determination of variable salary, the most important factor is the executive person's contribution, made in short-term and long-term financial activities of the company. The variable component often consists of annual bonuses.[22] For the purpose of raising the motivation of activities, the directors' variable remuneration comprise important part of remuneration contract. In particular, profit plan is often given to the executive persons, which consists of pension, medical and other similar plans.[23] The latter reservation is also contained in the Law on Entrepreneurs, according to which remuneration of director's labor may be made from the profit of the company.[24] This case, as a rule, is referred to as monetary remuneration, which is conditioned by its essence – director may be given certain interest in profit, which is technically feasible by handing over the shares.[25] The right of use of the important system of remuneration like stock option may also be given to the executive persons.[26] But remuneration, based on shares and option[27] is the issue requiring shareholders' decision. The reason is that capital- related compensation includes latent costs important for shareholders. These costs are invisible, as accounting practice can't determine the real value of option-based remuneration.

In parallel, together with the increase of simplicity of putting the issue of directors' responsibility on agenda, following various scandals,[28] their remuneration rises. The above

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19 Corporate Management Handbook, International Financial Organization, Tbilisi, 2010, 101 (in Georgian).

20 *Bryan S., Hwang L., Klein A., Lilien S.,* Compensation of Outside Directors: An Empirical Analysis of Economic Determinants, 2000, 1, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=244540>.

21 *Murphy K.,* Executive Compensation, in: Handbook of Labor Economics, Vol. 3b, *Ashenfelter O., Card D.* (Editors), "Elsevier B.V.", 1999, 2485-2494.

22 Ib., 10-15.

23 Corporate Management Handbook, International Financial Organization, "Publishing House IFC", Tbilisi, 2010, 101 (in Georgian).

24 The above mentioned is regulated by sub-paragraph k) of Para. 6 of the Article 9^1 and sub-paragraph k) of Para.8 of the Article 55 of the Law on Entrepreneurs, available at: <www.matsne.gov.ge>.

25 *Schneeman A.,* The Law of Corporations 5th Edition, Delmar, "Delmar Cengage Learning", 2008, 348.

26 The essence of functioning of the option is as follows: option gives to its holder the right of buying or selling the share at pre-determined price. E.g. option may give to the owner the right of buying of the company's shares at the present price, say 1 GEL, after three months. The option holder expects change of the price of shares, where he/ she hopes to gain profit from. The holder may suppose that the price of share will increase by 2 GEL. In this case the option holder will gain the profit in the amount of 2 GEL. See: *Murphy K.,* Executive Compensation, in: Handbook of Labor Economics, Vol. 3b, *Ashenfelter O., Card D.* (Editors), "Elsevier B.V.", 1999, 2485-2563; *Hall B., Murphy K.,* Stock Options for Undiversified Executives, "Working Paper", No. 01-16, 2001, 1-55.

27 *Bryan S., Hwang L., Klein A., Lilien S.,* Compensation of Outside Directors: An Empirical Analysis of Economic Determinants, New York, 2000, 9-12, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=244540>.

28 See. e.g.: *Sharfman B.,* The Enduring Legalicy of Smith v. Van Gorkom, "Del. J. Corp. L.", №33, 2008, 1-19.

mentioned is conditioned by number of circumstances.[29] In addition, formation of circumstances found reflection in legislative documents.[30] E.g. invited directors, acting on behalf of the company in relation to third persons, represent shareholders, i.e. they are the shareholders' agents.[31] The latter follows from the so-called principal- agent relations, which, in its turn, is based on the principle of distribution of ownership and management.[32] The creative of this kind of relation is management problems of the company.[33] The problem of management of companies, as a rule, is addressed through responsibility of the executive persons. Shortly, legal relations experience kind of circulation in economic activities, the reference point and the ending point of which turns out to be the "trial" of leading persons. The formula is simple – wide scope of authorities involves great responsibility. In order to prevent the latter from becoming the directors' fear syndrome against taking of entrepreneurial risks,[34] the labor contract, concluded with the director, alongside with the provisions on labor remuneration or within these provision shall specify, as precisely as possible, specific contractual terms, regulating their indemnification and insurance, if, of course, there is no conflict with imperative regulations on legislative level.

2.2. Indemnification, as the Type of Remuneration

In parallel with putting of the directors' responsibility on agenda and simplicity of initiation of legal proceedings, it was necessary to demonstrate the legal structures of their liberation from responsibility. Indemnification and insurance became the subject of attention of modern corporate law only after the bankruptcy of the world's largest corporations[35] significantly shook the capital market.[36] The responsibility for unsuccessful activities of the company, conditioned by unqualified and negligent actions of directors, is imposed on the latter.[37] Recently the trend is noticeable that unsteadiness of economic climate directly reflects on the issue of responsibility of

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29 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 467 (in Georgian).

30 E.g. Sarbanes-Oxley Act. *Schneeman A.,* The Law of Corporations, 5th Edition, Delmar, 2008, 348.

31 *Bryan S., Hwang L., Klein A., Lilien S.,* Compensation of Outside Directors: An Empirical Analysis of Economic Determinants, New York, 2000, 1, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 244540>.

32 The first fundamental paper on separated nature of company owners and company capital and of control its disposal was written in 1932 by Adolph Berle and Gardner Means, see: *Berle A., Means G.*, The Modern Corporation and Private Property, New York, "Macmillan", 1932.

33 *Armour J., Hansmann H., Kraakman R.,* Agency Problems and Legal Strategies, in: The Anatomy of Corporate Law, 2nd Edition, *Kraakman R.* (Editor), New York , "Oxford University Press", 2009, 35-53.

34 Modern corporate law, and corporate management – even at larger extent – basically relates to management of risks and their diversification.

35 E.g.: Worldcom, Enron, Tyco, Adelphia.

36 *Stauss K.*, Indemnification in Delaware: Balancing Policy Goals and Liabilities, "Del. J. Corp. L.", Vol. 29, No. 1, 2004, 145.

37 In regard to responsibility of directors in general, see: *Chanturia L.,* Corporate Management, Tbilisi, 2006, 202-405 (in Georgian).

persons, directing legal entrepreneurial relations. Consequently, introduction of certain provisions for encouragement of persons in the course of implementation of similar activities is necessary. For this very reason, legislative acts of various countries often allow or oblige company to perform indemnification of directors and company managers[38] against the obligations, emerging for them (directors) following their official position.[39] The Institute of insurance of directors complete this standard of protection.[40]

As it was already mentioned above, the contract concluded by the company with the director may form the basis determining the policy of remuneration. Although, according to Georgian legislation, only contractual regulation may provide it. As for e.g. US legal regulations, the situation is different there. In particular, the reformed version of the Model Law on US Business Corporations[41] provides normative regulation of indemnification on legislative level.[42] For the purpose of clearer demonstration of regulatory deficiency of Georgian legal entrepreneurial relations, the essence of indemnification, its types and criteria of application shall be considered in comparative-legal aspect.

III. The Essence, Types and Procedure of Implementation of Indemnification

1. Explanation of the Essence of Indemnification

The basis of Indemnification institution, along with contractual relations, are legislative regulations, which are strengthened by this or that court decision.[43] But the question is: what is indemnification, what is it's essence? Indemnification is an institution, which includes reimbursement, by corporation to the directors and managers, of the expenses, following the legal proceedings[44] held in regard to their being in the official position.[45] In general, despite of

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38 It is important that the norms and provisions regulating indemnification and insurance, as well as other provisions, apply to the company directors, managers and representatives in exactly the same manner. See: *Palmiter A.,* Corporations, Examples and Explanations, 5th Edition, New York, "Aspen Publisher", 2006, 261.

39 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 261.

40 *Dobiac J.*, I Came, I Saw, I Underwrote: D & O Liability Insurance's Past Underwriting Practices and Potential Future Directions, "Conn.Ins.L.J.", №14, 2008, 1-24.

41 R.M.B.C.A.

42 R.M.B.C.A §8.51, §8.52, §8.53, §8.54.

43 E.g.: *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (see: *Ramsay I.,* Liability of Directors for Breach of Duty and the Scope of Indemnification and Insurance, "Company and Securities L. J.", №3, 1987, 139).

44 Legal doctrine of the USA defined legal procedures as anticipated, inevitable or completed action, suit, process, whether criminal- legal or administrative- legal or mediation or investigative. See: R.M.B.C.A §8.50 (6).

45 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 471 (in Georgian); *Schneeman A.,* The Law of Corporations, 5th Edition, Delmar, "Delmar Cengage Learning", 2008, 348; *Pinto A., Branson D.,* Understanding Corporate Law, 3th Edition, New Providence, "Matthew Bender", 2010, 523; *Hamilton R.,* The Law of

essential and content-related[46] difference of legal dispute, indemnification applies to directors. The possibility of application of the mentioned authority remains valid even after resignation of the director from company's management position.[47] It includes, on the one hand, reimbursement of lawyer- and court-related expenses, an on the other hand, reimbursement of penalties, amounts of peaceful arrangement or other charges. The mentioned institution experienced significant modification in USA legal space. The first case, which was registered in 1939 in judicial practice, ended unfavorably for the director, as the Supreme Court of New York considered application of indemnification as diversion from corporation's activities, i.e. the subject, not authorized for reimbursement of the expenses of legal proceedings.[48] Just the mentioned decision is considered the basis of the need of establishment of indemnification of directors, as well as the representatives or managers of a company.[49] After that amendments were introduced in the existing US laws,[50] which allowed corporations reimburse procedure expenses to the directors in the case of existence of certain pre-conditions.[51] Existence of indemnification gives the company director more "courage" and possibility of making decision on taking the risk. Without it directors will be more prudent and careful.[52] Anyway, directors shall be protected against the obligation of payment of charges due to ungrounded suits. Although excessive provisions of broad indemnification may lead to the lack of directors' responsibility and reimbursement of procedural expenses of dishonest managers.[53] And the latter would form the basis of neglecting of legal corporate regulations and unfair actions of directors.[54] Various *ex post* and *ex ante* preventions

Corporations, 5th Edition, St. Paul, "West Group", 2000, 524-530; *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 261-262.

46 Whether criminal- legal or administrative- legal.

47 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 261. The latter is technically feasible when the provisions of indemnification between the company and the director are included in the contract concluded with the director. In the case the contract, concluded with the director, has mandatory-legal nature, which shall not be terminated by his resignation from managerial position of the company, i.e. termination of corporate-legal relation. Compare: *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 526. In general, in regard to indemnification contract existing in private legal relations, see: *Kleinberger D.,* No Risk Allocation Need Apply: The Twisted Minnesota Law of Indemnification, "William Mitchell Law Review", Vol. 13, No. 4, 1987, 777-842.

48 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 523.

49 Ib., 523.

50 E.g. Delaware entrepreneurial legislation provides for the possibility of indemnification by corporation of the existing or former directors, managers, employees and representatives in the case of existence of certain circumstances. Del. Gen. Corp. L. §145 (c) (see: *Stauss K.*, Indemnification in Delaware: Balancing Policy Goals and Liabilities, "Del. J. Corp. L.", Vol. 29, No. 1, 2004, 161).

51 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 471 (in Georgian).

52 But it doesn't mean that directors are not obliged to act within the limits of fairness, like any reasonable person would do.

53 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 261-262.

54 It's the case when corporation would provide for director's indemnification in the case of violation of fiduciary duty by him. It would be neglect of the results of the goals and efficient functioning of one of the

are possible for protection of the essence of fundamental institutions, established in corporate law. In particular, it's possible to find the "golden mean" through differential classification and procedural realization of implementation of the types of indemnification. Consequently, procedural application of either different or equal pre-conditions towards differentiated types of reimbursement will allow successful use of qualified manager's skills in favor of the company and regulation of separate, but important phase (issue) of the "holder-owner" problem existing in corporate law. As a result, on the one hand, active mechanism of observance of substantial pre-conditions of imposition of director's liability will be maintained, and, on the other hand, legal basis of granting to managers of more discretionary powers related to entrepreneurial activities shall be created, by which, finally, both parties, the director as well as the company, will achieve harmonization of business relations. And the latter will contribute to substantial aim of entrepreneurial subject– increase of material wealth.

2. Classification of the Types of Indemnification

Classification of the types of indemnification lies in the bases of its raising to legal level. Ranging of the bases lies within the subjects, developing indemnification provisions. In this aspect, differentiation of the types of indemnification of procedural expenses is possible into legislative, statute, and contractual types. Unlike Georgian legislation, Model Law of the USA business corporations classifies legislative indemnification into voluntary, mandatory types and indemnification, established by court ruling. Absence of analogous legislative reservation in Georgian legal space doesn't exclude formation of similar classes of indemnification. Furthermore, this classification, existing in the USA, e.g. permitted indemnification, after it is established by partners' agreement (statute),[55] it obtains mandatory force for implementation by the parties[56], i.e. one of the provisions of the contract to be concluded with the director is definition of indemnification in the statute and its reflection in contractual relations.[57] In spite of the absence of initial non-mandatory (imperative) requirement turns implementation of what is to be done voluntarily into mandatory.[58] For better understanding of the above told, indemnification shall be reviewed by classified types.

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most important institution of corporate law – fiduciary duties. *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 261-262.

55 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 262.

56 And mostly by the company.

57 *Stauss K.*, Indemnification in Delaware: Balancing Policy Goals and Liabilities, "Del. J. Corp. L.", Vol. 29, No. 1, 2004, 163-165.

58 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 524.

2.1. Mandatory Indemnification

Model Law of the USA business corporations directly delimitates the types of indemnification and specifies mandatory indemnification as one of its types.[59] In particular, if the director is involved in legal procedures, which was conditioned by his position in the corporation and he successfully acts as the responder,[60] the company shall be obliged to indemnify process expenses including the costs of lawyer's service.[61] The rights of demanding of the right of obtaining the reimbursement of successful director's process expenses exists whether the suit was places on behalf of corporation or by the third party. This right protects this director against malicious rejection of indemnification by the corporation.[62] But the question arises: when the director's acting as responder and the defense is implemented successfully, and secondly, is mandatory indemnification possible for partially successful protection?! In the first case, the answer is simple: when the suit is rejected, withdrawn due to lack of evidences or when no liabilities were imposed on the company after completion of procedures.[63] The director is also considered successful when the plaintiff withdraws the suit or missed the time limits of submission of suit.[64] However, the most important out of the criteria, defining director's being successful is that the expenses born during legal procedures shall be reimbursed to the director, if he/she wins process.[65] Although, if the court leaves the plaintiff's suit without hearing, it will not b considered as the director's success. As for partial success, legislation of some of the USA states provides for the possibility of its admission. In particular, it makes the amount of indemnification of the company director related to the amount and level of director's being successful.[66] E.g. is the plaintiff's demand was satisfied partially, the director shall get partial[67] indemnification of process expenses.[68] As for Georgian legislative reality, it doesn't provide for any kind of reservation in

59 R.M.B.C.A §8.52; Del.GCL §145 (c).

60 Or legal procedures are completed in his/ her favor.

61 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 524.

62 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 262.

63 Ib., 262-263.

64 *Schneeman A.,* The Law of Corporations, 5th Edition, Delmar, "Delmar Cengage Learning", 2008, 349.

65 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 474 (in Georgian).

66 *Stauss K.*, Indemnification in Delaware: Balancing Policy Goals and Liabilities, "Delaware Journal of Corporate Law", Vol. 29, No. 1, 2004, 173-174.

67 The decision of 1974 of Delaware Supreme Court shall be mentioned here: *Merritt-Chapman Scott Corp. v. Wolfson*, 321 A.2d 138 (Del.1974) (see: *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 263).

68 In regard to the sum subject to indemnification of procedural expenses for directors and its amount see: *Mazu D.,* Indemnification of Directors in Actions Brought Directly by the Corporation: Must the Corporation Finance its Opponent's Defense? "Iowa. J. Corp. L", №19, 1-36. Although, in legal doctrine there are opinions which oppose to the institution of indemnification and consider that the company shall not be charged with payment of legal procedures with its opponent, as it would be implementation of

regard to process expenses as far as the director is concerned. But it provides for the obligation of reimbursement of expenses born by the shareholder outside of the court in the case of submission of derivative suit[69] as well as the lawyer's fees.[70] This legislative reservation does not concur with classic understanding of indemnification of directors' process, following the circumstance that the director shall be indemnified just due to his/ her being on managerial position. In addition, the latter does not correspond to the real status of the company's shareholder. Shortly, Georgian legislation does not contain provisions similar to the indemnification in the USA.

2.2. Permitted Indemnification

The USA Model Law directly provides for the possibility of consideration of permitted indemnification.[71] Georgian legislation also provides for its technical admissibility. In particular, consideration of indemnification provisions is possible in the statute on in the contract concluded by the Supervisor's Board with the directors.[72] According to both the USA and Georgian legislation, reimbursement of the costs of the process is mandatory if it is defined by the company's statute, internal regulations or contract. All other types of indemnification, as a rule, is voluntary.[73] The existence of permitted indemnification, pre-condition of which is the director's being in the role of successful defendant on legal process, doesn't mean automatic reimbursement of expenses. It's the right existing in the scope of discretionary authorities of the company, which, as a rule, depends on who submitted the suit. If the suit is submitted by the third party, in this case the company may or may not reimburse the expenses of the director, acting as unsuccessful defendant.[74] Admissibility of reimbursement is defined by some more criteria. The first – the corporation may reimburse the costs of the process if the directors acted honestly and believed that their actions were following the best interests of the company.[75] During criminal proceedings the costs of director's process shall be indemnified if he/ she honestly believed that his/ her actions weren't unlawful.[76] Model Law allows corporation to regulate the mentioned issues by

unreasonable circular of disposal of funds. As an example, see: *Kuykendall M.,* A Neglected Policy Option: Indemnification of Directors for Amounts Paid to Settle Derivative Suits - Looking Past "Circularity" to Context and Reform, "San Diego L. Rev.", №32, 1995, 1064-1128.

69 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 414- 420 (in Georgian).

70 Sub-paragraph of Para. 5 of the Article 53 of the Law on Entrepreneurs, available at: <www.matsne.gov.ge>.

71 R.M.B.C.A §8.51.

72 Sub-paragraph "a" of Para. 6 of the Article 54 and sub-paragraph "f" of Para. 7 of the Article 55 of the Law on Entrepreneurs, available at: <www.matsne.gov.ge>.

73 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 524.

74 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 263-264.

75 R.M.B.C.A §8.51, (a)(1)(i)(ii).

76 Ib., (a)(1)(iii).

the statute,[77] although there should be no indemnification of expenses caused by intentional law violation[78] or damage.[798081]

But what happens if the company or the company's shareholders institute legal proceedings against the director? If is directly provided in the USA Model Law and is referred to as prohibited case of implementation of indemnification.[82] According to the Model Law, unless otherwise decided by the court, the corporation may not reimburse the costs of the process if they are caused by director's verdict of guilty[83] and if the suit was submitted by the company or the company's shareholders against the director.[8485] Director shall also lose the right of indemnification if the court rules that he received financial profit, which he wasn't entitled to receive.[86]

2.2. Advance for Fees and other Expenses

If legal process against the director is in progress or if she/he is the target of the coming legal process, as a rule, he/ she doesn't want to wait for making the decision on indemnification after completion of the process and wants to get indemnification in advance to pay the expenses related to lawyer's service, experts, etc.[87] The company's promise on reimbursement of process expenses after successful performance of the director during the legal process might prove to be useless if he/ she (the director) can't afford payment of such expenses from his/her own pocket.[88] For this very reason, most of the US states provides for issuance of advance for assumed

77 R.M.B.C.A §8.51, (a)(2).

78 Compare: *Stauss K.*, Indemnification in Delaware: Balancing Policy Goals and Liabilities, "Del. J. Corp. L.", Vol. 29, No. 1, 2004, 171-173.

79 The amount of expenses, obligation of indemnification of damage, fines, lawyer's fee and other costs is provided by Delaware Corporate Law, see: *Stauss K.*, Indemnification in Delaware: Balancing Policy Goals and Liabilities, "Del.J.Corp. L.", Vol. 29, No. 1, 2004, 168-170.

80 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 472 (in Georgian).

81 Several court decisions exist in regard to the amount of expenses and types of indemnification, see e.g.: *Reinhard & Kreinberg v. Dow Chemical Co*., 2008 Del. Ch.Lexis 39 and *Citadel Holding Corp. v. Roven*, 603 a.2d 818 (Del. 1992) (see: *Pintov A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 525).

82 *Schneeman A.,* The Law of Corporations, 5th Edition*,* Delmar, "Delmar, Cengage Learning", 2008, 350.

83 R.M.B.C.A §8.51 (d)(2).

84 But id the suit is submitted against the director by the company or shareholders of the company, but the director's action accommodates within the standard behavior category of indemnification, the director may be indemnified the expenses of such process. R.M.B.C.A §8.51 (d)(1); *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 265.

85 Compare: *Kuykendall M.,* A Neglected Policy Option: Indemnification of Directors For Amounts Paid to Settle Derivative Suits - Looking Past "Circularity" to Context and Reform, "San Diego L. Rev.", №32, 1995, 1064-1128.

86 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 524.

87 Ib., 525.

88 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 265.

expenses.[89] When issuing such advance, on this stage it's not clear whether the director's mandatory indemnification will occur or not if the pre-conditions of performance of permitted indemnification are present. But in order to receive an advance, the director shall submit to the corporation a written confirmation that he/ she honestly believes that his/ her actions correspond to the standard of behavior required for receiving the indemnification.[90] In the written confirmation, the director shall also undertake the obligation to return the advance received for payment of process expenses if his/ her behavior does not conform to the scope of standard actions of either mandatory or permitted indemnification.[91] It is remarkable that this obligation of the directors doesn't require security.[92] It, usually, is secured by the whole property of the director, within direct and immediate responsibility.[93]

Practical realization of the right of pre- payment (advance) of process expenses requires the decision, made by the Board of Directors or General Meeting of Shareholders.[94] The procedure of voting and decision-making is directly defined by the USA Model Law.[95] There is no other direct ruling of the Model Law in regard to the procedure, but in its comments it is specified that if there is the so-called "Red Flag"[96] indicator in regard to the director's indemnification, the Company shall not have the authority to approve the issuance of advance.[9798] One more important circumstance should be mentioned here. The Sarbanes-Oxley Act[99] adopted after *Enron and WorldCom* scandals establishes specific limitations in regard to the amount subject to issuance to the director. In particular, paragraph 402 of the Sarbanes-Oxley Act declares issuance or increase of credit in the form of issuance of personal loan to directors and managers in corporations an unlawful action. This legislative document might be assumed as prohibition of issuance of advance to the directors. However, judicial practice of the USA explains from another aspect. In one of the court decision[100] the judge *Louis Kaplan* explains that prohibition of the Sarbanes-

89 R.M.B.C.A §8.53.

90 Ib., §8.53 (a)(1).

91 Ib., §8.53 (a)(2).

92 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 525.

93 R.M.B.C.A §8.53 (b).

94 Ib., §8.53 (c).

95 Ib., §8.53 (c)(1)(i)(ii), §8.53 (c)(2).

96 So called "Red flags". *Roth M.,* Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective, "Journal of Corporate Law Studies", Vol. 8, 2008, 368-369; *Sale H.,* Good Faith's Procedure and Substance: In re Garemark International Inc., Derivative Litigation, in: The Iconic Casec in Corporatate Law, *Macey J.* (Editor*),*St. Paul, "Thomson/West", 2008, 292-293.

97 In general, issuance of advance refers to the category of discretionary authorities of the company, but if the company binds itself in regard to issuance of advance with the statute of the company or the agreement, concluded with the director, it shall be obliged to reimburse the director's expenses within the limits admissible according to the legislation. R.M.B.C.A §8.58 (a).

98 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 265.

99 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 32- 35 (in Georgian).

100 *Envirokare Tech, Inc. v. Pappas* (S.D.N.Y., 2006).

Oxley Act relates only to personal loans. As a result, he concludes that issuance of advance to directors and managers for process expenses does not represent personal loan[101] and, consequently, there will be no collision of laws.[102][103]

2.4. Indemnification to be Performed by Court Order

The above analysis refers to the policy of indemnification of the expenses of the director, which originated following his position in the corporation. The issue is interesting when the subject of dispute between the corporation and the director is the dispute on indemnification provisions. When speaking about indemnification provisions, first, it should be mentioned whether they bear mandatory, non-mandatory, dispositional or imperative nature. The USA Model Law directly defines that the provisions on pre-payment of indemnification or process expenses shall be defined only the way the present section, regulating indemnification, rules.[104][105] Imperative requirement of the law is obvious. Consequently, its extension or modification is possible unless otherwise provided by the same Law.[106] Majority of corporations defined the mandatory nature of provisions of indemnification and advance by the statute, which, certainly, shall conform to legislative norms.[107] Although, from the director's standpoint, the circumstances may turn into unfavorable manner for him/ her. The Change of composition of the Board may significantly influence the structure of capital company. And the latter may lead to introduction of certain amendments into the statute of the company. Briefly, the managing bodies of the company can change the norms, provided in the statute, regulating indemnification or issuance of advance at any time.[108] For this reason the qualified director always prefers the

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101 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 525-526.

102 The Sarbanes-Oxley Act §402 and R.M.B.C.A §8.53 is implied.

103 In order to determine the comparative legal relation of the right of advance reimbursement of process expenses according to the Model Law and Delaware Corporate Law, see: *Stauss K.*, Indemnification in Delaware: Balancing Policy Goals and Liabilities, "Del. J.Corp. L.", Vol. 29, No. 1, 2004, 174-177.

104 R.M.B.C.A §8.59.

105 Compare: *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 266. Also: *Stauss K.*, Indemnification in Delaware: Balancing Policy Goals and Liabilities, "Del. J. Corp. L.", Vol. 29, No. 1, 2004, 166-168.

106 Compare: *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 527.

107 R.M.B.C.A §8.59.

108 Classical example of the mentioned case is considered to be the decision made by Delaware court in 1994, where the National Media Corporation, after it had forced the director to protect himself/ herself from two federal charges, entered a modification in its statute, according to which the company refuses to reimburse the director's expenses related to the process, lawyer service and costs, whether the director's actions are honest or not. The court announced the verdict, according to which the company was ordered to pay the indemnification of the director's expenses and additionally charged the Corporation with the fine in the amount of 1 550 000 USD. *Salanab v. National Media Corp*., 1994.

implementation of provisions related to reimbursement of process expenses on contractual basis.[109] Nevertheless, this or that corporation may refuse to indemnify the director. The USA Model Law provides legislative regulation of such case. If the corporation refuses to use discretionary authority regarding indemnification, in the case of existing of certain pre-conditions, the court can order the corporation to pay the indemnification of expenses to the director.[110][111] There are several pre-conditions for establishing of indemnification by the court. The first – if the court determines that the director is authorized for mandatory indemnification[112], it will order the corporation to reimburse the expenses;[113] the second – the court will oblige the corporation if it's established that payment of process expenses or their issuance in advance was determined by the authorized body of the company[114], i.e. it shall be the result of action, performed by the corporation.[115] If the action performed by the director doesn't conform to the standards of the rules of allowed behaviour, and he/she fails to present written evidence required for receiving the advance or during the legal procedures initiated on behalf of the company the issue of imposing an obligation upon him/ her is determined, or it is proven that he/ she acted for the purpose of obtaining of personal profit, the court, with consideration of all evidences, may decide that restriction of the issue of director's indemnification or issuance of process costs in advance is fair and reasonable.[116] As a result of restriction, only reasonable expenses originated from legal procedures may be reimbursed to the director.[117]

3. Fees on Fees [118]

Indemnification, as a rule, includes the obligation of reimbursement of process expenses. The corporation may refuse to fulfill the indemnification obligation, defined by the statute of the company. In such case, the director can have a dispute on violation of the contract.[119] The existence of disputable circumstances finds different consequential reflection upon the amount and the type of reimbursement to be issued by the director. If the director has to protect the right of indemnification through legal proceedings, the amount of the suit will be defined by the claim of reimbursement of not only the expenses originated from the precious legal procedures, but the

109 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 526.
110 In this case, expenses include the process costs as well as the amounts for covering the liabilities existing in regard to the director
111 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 265.
112 R.M.B.C.A §8.52.
113 Ib., §8.54 (a)(1).
114 Ib., §8.54 (a)(2).
115 Ib., §8.58 (a); compare: fn. 106.
116 Ib., §8.54 (a)(3)(i)(ii).
117 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 265.
118 The so-called "Fees on Fees".
119 *Schneeman A.,* The Law of Corporations, 5th Edition, "Delmar Cengage Learning", 2008, 350.

expenses of legal proceedings performed (initiated) for claiming the performance of indemnification.[120] In regard to the mentioned issue, Delaware Supreme Court made precedential decision.[121] Delaware Supreme Court explained the content of the norm of Delaware Corporate Law, regulating indemnification.[122] In particular, "indemnification is applied "*in the case of any legal procedures*" shall be explained the way that "legal procedures" shall include the expenses of legal procedures initiated for claiming of performance of indemnification. The institution of payment of fees on fees will encourage managers to work in the position of the director of the corporation."[123] Similar, but modified version of Delaware Corporate Law is included in the Model Law of Business Corporations. It leaves the possibility of establishment of mandatory nature of payment of fees on fees with the court, providing its classification, as one of the sub-types, in the norm, regulating establishment of indemnification by judicial order.[124] If the court rules that the director shall be granted the right of application of reimbursement of process expenses or indemnification, it (the court) can also establish, in regard to the corporation, the obligation of reimbursement of the reasonable expenses, which originated for the director during the progress of the process for establishment of the court order on indemnification.[125] Parallel regulation of the discussed issues[126] is not provided in Georgian Corporate Law, but the analysis of the further, procedural issues of performance of indemnification is necessary for perfection of these issues.

4. Procedural Side of Performance (Receiving) of Indemnification

Specific element of reimbursement of process expenses is the procedure of real reimbursement of expenses. According to the Model Law, after it is established that process expenses may be indemnified to the director, several steps remain for carrying this decision into effect. The first – the company may not implement indemnification[127] before the indemnification is authorized (permitted) in regard to specific legal procedure. And authorization is required after the decision on implementation of indemnification is made.[128] Essential loading of the given case

120 Fees on Fees.

121 *Stifel Financial Corp. v. Cochrane*, 809 A.2d 555 (Del. 2002) (see: *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 526).

122 Del. GCL §145 (a).

123 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 526.

124 R.M.B.C.A §8.54 (b).

125 Ib., §8.54 (b) first sentence.

126 Category of the issues include indemnification of managers, but due to almost identical nature of pre-conditions of reimbursement of process expenses and insurance of directors and managers, their division into individual categories would not be appropriate, consequently, analysis will be conducted only in regard to the directors. Identity is also proven by the relevant norm of the USA Model Law. R.M.B.C.A §8.56.

127 Ib., §8.51.

128 R.M.B.C.A §8.55 (a).

lies in the implementing body and procedural context of receipt. After taking obligation by the company on statute-based or contractual implementation of indemnification,[129] real indemnification of specific case of payment of expenses requires decision-making by the company. There are three bodies authorized to make decision on issuance of indemnification. The first – the decision on reimbursement of process expenses may be made by the Board of Directors, if it includes two or three directors. The decision shall be taken by simple majority of votes, and the Board shall be authorized to make decision if majority of directors with the right of voting are present (quorum).[130] According to the Model Law, similar decision can be made by special committee, created for the process of indemnification, consisting of two or more directors.[131] If there are less than two uninterested directors, special commission can be created by the Board of Directors.[132] Besides, the interested[133] director can also participate in the process of formation of special commission. And, finally, the Model Law considers the third opportunity as making of decision on issuance of indemnification by the meeting of shareholders.[134] In the latter case, who is not qualified as uninterested director and who holds shares with the right of voting may be deprived of the right to exercise the right of voting in the case of making decision on indemnification.[135] After the body, specially determined by the the Model Law makes decision on indemnification, it required authorization. Authorization of indemnification requires exactly the same procedure as the decision on determination of process expenses.[136] But is there are less than two uninterested directors in the Board of Directors, only the commission, specially elected by the Board of Directors, shall have the right of authorization.[137] Finally, the information about indemnification shall be communicated by the company to the shareholders of the corporation in written, at the time of approval of annual reports.[138] The considered procedural issue represents the last two steps in implementation of indemnification.

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129 Ib., §8.58 (a).

130 Ib., §8.55 (b) (1).

131 Ib., §8.55 (b) (1) second sentence.

132 Ib., §8.55 (b) (2)(i)(ii).

133 It's logical that the interested director is defined as the subject of receipt of indemnification, whom the company reimburses process expenses.

134 R.M.B.C.A §8.55 (b) (3).

135 Ib.

136 Ib., §8.55 (c).

137 R.M.B.C.A §8.55 (b) (3).

138 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 474 (in Georgian); R.M.B.C.A §16.21 (a). As for Georgian legislation, according to sub-paragraph "g" of Para. 6 of the Article 54 of the Law on Entrepreneurs, the competence of general meeting of shareholders include the authority of approval of the report of directors and Supervisory Boards.

As for Georgian legislation, it's impossible to find similar provisions. But determination of the body making decision on indemnification is possible based on the principle of specific law and through explanations.

After implementation of amendments dated March 14, 2008, the Law of Georgia on Entrepreneurs defines the possibility of existence of two-step as well as one-stage management[139] i.e. provides for the mixed system.[140] Consequently, following different management systems, different subject shall be defined as the competent body for making decision on indemnification.

If we have to deal with one-stage management system, the Law on Entrepreneurs doesn't contain any provision like making decision on indemnification within the competence of general meeting of JSC.[141] But it doesn't mean that the body authorized for decision-making will stay undefined in the case of one-stage management. In such case in corporate law they speak about written[142] and unwritten (explicit and implicit) authorities of management body (general meeting of shareholders. Series of authorities, unprovided for by the law, definition and specification of which, as a rule, is possible by statute, shall be implied in the framework of such unwritten authorities.[143] Although, if there is not such reservation in the statute, even it will not exclude or limit the scope of competences of general meeting. In short, if the implementation of indemnification occurs in the case of one-stage management system, it, certainly, will be defined by the general meeting.[144] Consequently, when it comes to making decision on issuance of process expenses, general meeting of shareholders shall be defined as the authorized body. But if perform implementation of the norms of the USA Model Law, regulating indemnification, into Georgian reality, we'll deal with not only the existence of unwritten competences of the general meeting, but unwritten authority of executive body – Board of Directors – as well.[145] On the basis of the above analysis it could be said that due to lack of Georgian legislative regulations, in the case of initiation of legal proceedings, general meeting has exclusive authority of implementation of indemnification provisions,[146] and the body, authorized for determination and issuance of process expenses, following unwritten competences, is the general meeting of shareholders or may be Executive Board.

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139 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 110- 150 (in Georgian).

140 Recommendations and Materials of Work Meeting of Judges in the Law on Entrepreneurs, Supreme Court of Georgia, International Financial Organization, Tbilisi, 2009, 7- 22 (in Georgian).

141 Article 54 of the Law on Entrepreneurs doesn't contain similar regulation.

142 The chain of authorities, defined in Para. 6 of the Article 54 of the Law on Entrepreneurs is implied in the area of written competences.

143 The latter follows from the principle of statute-based independence

144 Which, according to Georgian legislation, will also be classic example of implementation of unwritten authorities.

145 Following the circumstance that the USA Model Law, alongside with definition and authorization of indemnification, as the competence of general meeting of shareholders, implies the Board of uninterested directors as alternative means. R.M.B.C.A §8.55 (b)(1).

146 In the case of one-stage management system.

As for two-step management system, different environment is created here due to the existence of the institution of the Supervisory Board. The Law on Entrepreneurs directly defines the authority of concluding the contract with the director as the competence of Supervisory Board.[147] As a rule, indemnification shall be provided for in the statute. As a result, Supervisory Board performs the implementation of the provisions on indemnification, admitted by statute, through its specification in the contract, concluded with the director. The Law on Entrepreneurs defines the category of the decisions, which can be taken only with the consent of Supervisory Board.[148] It is simple, that in this case we speak about co-decision, in which the "main" managing body,[149] as well as controlling body[150] shall participate. The mentioned category of decisions includes "*definition of participation in profit and similar relations*" for the director.[151] In order to make proper use of this authority by the Supervisory Board possible, the mentioned norm shall be explained. If we base on teleological explanation of the norm, "*similar relations*" implied broad range.

Wide definition of "*similar relations*" shall be made in regard to profit, i.e. whether it was or not the legislator's aim to provide for other opportunity of receiving the profit, i.e. receiving the asset, for the director. In the form of short summary: the legislator provided for the possibility of admission- existence of the types of remuneration of managing persons, other than profit, which may be, for example, stock option.[152] But it will be narrow definition of the norm. The landmark of broad definition would lie in the following definition of *remuneration*: remuneration, as already discussed above,[153] includes compensation to be issued for director's activities as well as issuance of process expenses. The last link of the above-developed logical judgment is the definition of how possible it is to regard the reimbursement of expenses as the type of remuneration. We have to deal with remuneration when the director receives specific benefit (asset) from the company. If the company, based on the statute and the contract concluded with the director[154] recognizes the institution of indemnification as admissible, it means that the director, following specific circumstance, in particular, following the managing position of the company, may be given the remuneration for judicial expenses. The latter depends on the "good will" of the company – how much it will consider its admissibility in the statute.[155] Consequently, if the company hasn't defined the application of the right of indemnification, following the managerial authority in the company, the director himself/ herself will have to reimburse the judicial expenses (both in the case of justification or imposition of compensation of damage) from his/ her personal property. If the

147 Sub-paragraph "f" of Para. 7 of the Article 55 of the Law on Entrepreneurs, available at: <www.matsne.gov.ge>.
148 Para. 8 of the Article 55 of the Law on Entrepreneurs, available at: <www.matsne.gov.ge>.
149 General meeting of shareholders.
150 Supervisory board.
151 Sub-paragraph "k" of Para. 8 of the Article 55 of the Law on Entrepreneurs, available at: <www.matsne.gov.ge>.
152 *Hall B., Murphy K.,* Stock Options for Undiversified Executives, Working Paper No. 01-16, 2001, 1-55.
153 See chapter II 2 of the article at hand.
154 According to Georgian legislation.
155 But if indemnification is defined in the statute, it becomes mandatory for the company.

director has to make similar payment, it will be the liability following from the implementation of his activities, i.e. liability, "received" from the company. However, if reimbursement of expenses of legal process, held due to director's honest actions, occurs from the property of the company, it will be the action, covering the liability, which is nothing else but granting material good to the director, specifically, transfer of asset. As a result, based on theological definition and system analysis of the above mentioned norm it could be said that Georgia legislation provides for more possibilities of explanation in the case of two-stage management. The following was obtained as a result of explanation: In the case of existence of two-stage management, general meeting of shareholders together with the Supervisory Board is defined as the body, making decision on issuance of indemnification.[156] This authority of the Supervisory Board is established by sub-paragraph "k" of p. 8 of the Article 55 of the Law on Entrepreneurs. If the issue of indemnification is on agenda in the case of one-stage system, the decision on its issuance will be made by general meeting, which shall be defined this way just following the unwritten competence. In short, if managing bodies of capital-type company, operating in Georgia decide the possibility of admission of the institution of indemnification, technical opportunity for it will be given to them by the scope of statute-based autonomy and the possibility of concluding the contract with the director, and if the need of practical application of indemnification arises, according to system differentiation of management, procedural issuance- implementation of indemnification shall occur in the two above mentioned directions. In parallel with process expenses, the institution of insurance of managing persons, which following its functional loading, shall be considered alongside with the institution opf indemnification, is extremely important.

IV. Insurance, as Legal Guarantor of Protection of Managing Persons

1. Legal Essence of Insurance of Managing Persons[157]

The institution of indemnification is strengthened by the institution of insurance, which is one of constituent elements of remuneration policy of managing persons.[158] Economic successfulness of the company is conditioned by correct corporate management of entrepreneurial activities.[159] The

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156 Unless otherwise defined by the statute, Para. 8 of the Article 55 of the Law on Entrepreneurs, available at: <www.matsne.gov.ge>.

157 The Scope of the present paper doesn't include review-analysis of content-based and procedural implementation of insurance, as legal institution, so scientific analysis of insurance, regulated by the Civil Code of Georgia doesn't fir either content-relater or structural context of the paper.

158 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 261.

159 But according to the opinion, established in legal literature, reimbursement policy and insurance reflects on corporate management at less extent, see: *Baker T., Griffith S.,* The Missing Monitor in Corporate Governance: The Directors' and Officers' Insurance Carrier, "Geo. L. J.", № 95, 2007, 1795 and further (in: *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 528).

complexity of economic success of the company increases the scale of responsibility of managing persons in proportion to the multiplicity of their duties. And proper planning of remuneration policy places in question the issue of increase of directors' responsibility.[160] Usually, release of directors from responsibility may be regulated through arrangement of insurance in the statute of the Company.[161] Whether the legislation of this or that country provides for admissibility of indemnification on legislative level, insurance stands separately and it, as a rule, is admissible.[162] Situation is different in the USA, where the Model Law[163] directly admits insurance of managing persons, although the latter, unlike indemnification, doesn't have mandatory nature (on legislative level)[164]. According to the Model Law, the corporation[165] can insure itself in regard to indemnification and the possible liabilities, which are not reimbursed by the right of indemnification.[166] Consequently, functional loading of insurance shall be defined in two directions: it's the way of finding of financial resources by the company, which is required for reimbursement of thy director's judicial expenses based on the statute of the company or the contract and represents legal guarantee of funding of directors' and managers' liabilities.[167]

1.1. Insurance which Covers Company's Liabilities

In order to clarify reimbursement policy of the company, the relation of indemnification and insurance shall be identified. Indemnification, actually, is a kind of insurance guarantee of managing persons, which is secured by the company, i.e. the company will carry out reimbursement of process expenses in the case of existence of certain pre-conditions. It directly serves for

160 *Roth M.,* Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective, "Journal of Corporate Law Studies", Vol. 8, 2008, 369.

161 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 483 (in Georgian).

162 E.g. the Law of Germany on Joint Stock Companies and the Act of Companies of Great Britain of 2006 doesn't recognize the application of admissibility of indemnification, although in both systems the existence of directors' and managers' insurance is acceptable, see: *Roth M.,* Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective, "J. Corp. L. Studies", Vol. 8, 2008, 369; *Black B., Farukshina A.,* Insurance of Liability of the Members of Managerial Bodies, Indemnification of Expenses and Advance Payment of Judicial Expenses, "J. Corp. Manag.", №6 (73), 2010, 53- 50 (in Russian).

163 R.M.B.C.A §8.57.

164 Mandatory nature of insurance can be established through implementation within its statute-based autonomy and/ or provision in the contract, concluded with the managing person. Compare: *Chanturia L.,* Corporate Management, Tbilisi, 2006, 482 (in Georgian).

165 It shall be mentioned that basically open joint stock companies use insurance policy.

166 The latter implies director's liability, emerged in his/her regard from derivative suit. *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 266. Although, earlier provisions of the USA legislation recognized inadmissible directors' indemnification in the case of derivative suit, as fulfillment of liabilities, imposed on the director in favor of the corporation, would be imposed on the corporation itself, consequently, "purposeless" circulation of funds was considered unreasonable. *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 528-529.

167 *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 528.

protection of the interests of managing persons in the company. However, the company, in its turn, tries to reduce the liability, taken in regard to directors. For this reason it ensured the indemnification. And after the use of the right of indemnification by the director, the company either ensures its funding from its own property and/ or requires its funding from the third party, insurance company,[168] if, certainly, it is insured. Content-related side of primary functional loading of insurance is now clear: in this case it is not the guarantor of insurance of individual property of managing persons,[169] but the legal guarantor of securing of corporation's property, which insured corporation's liability in regard to directors in the section of indemnification.[170]

1.2. Insurance of Liabilities of Managing Persons

Opposite condition of insurance of corporation's liabilities is insurance of director's liabilities. Their common essence reveals at the point of funding: in both cases the insurer subject is the corporation, although in the second case directors are also obliged to contribute the part of insurance payment.[171] Often the director has not financial possibility to pay for the originated liability, compensation of which possible at the expense of insurance. It has double meaning. The first – insurance of the director's liability protects the director himself/ herself against the obligation of fulfillment of liabilities, emerged as a result of performance of entrepreneurial activities. The second – insurance of managing persons bears more content-related loading in regard to the corporation, as thus the company's property, consequently the shareholders' capital is secured in the case of occurring of damage as a result of carelessness on the part of the executive body.[172][173] It shall be mentioned, that the Model Law doesn't limit insurance provisions by imperative nature of indemnification provisions.[174] And it means that the corporation can

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168 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 267.

169 Directors and managers, in their turn, are protected by indemnification contract, concluded with the company. And it represents the last stage of development of logical chain of the first functional loading of insurance, thus constituting a kind of circuit of obligations- responsibilities.

170 *Baker T., Griffith S.,* How The Merits Matter: Directors' and Officers' Insurance and Securities Settlements, "U. Pa. L. Rev.", № 157, 2009, 13.

171 *Roth M.,* Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective, "Journal of Corporate Law Studies", Volume 8, 2008-2009, 370.

172 The result of violation of obligations by the directors is represented by the famous scandal cases of *Enron and WorldCom,* where the main part of liabilities of the directors- members of executive body was covered by insurance company, see: *Chanturia L.,* Corporate Management, Tbilisi, 2006, 481 (in Georgian); *Pinto A., Branson D.,* Understanding Corporate Law, New Providence, "Matthew Bender", 2010, 528; *Dobiac J.*, I Came, I Saw, I Underwrote: D & O Liability Insurance's Past Underwriting Practices and Potential Future Directions, "Conn.Ins.L.J.", №14, 2008, 1-24.

173 *Baker T., Griffith S.,* How The Merits Matter: Directors' and Officers' Insurance and Securities Settlements, "U. Pa. L. Rev.", №157, 2009, 13.

174 R.M.B.C.A §8.57.

reimburse to the director the expenses and liabilities, reimbursement of which is prohibited by indemnification norms.[175]

2. Hypothetic Pre-conditions of Implementation of Insurance

As a rule, directors' insurance package covers any liability or expense, emerged in regard to the director due to his/ her being in official position.[176] However, this general rule has exceptional cases, where factual existence of damage doesn't lead to origination of the obligation of issuance of insurance. Directors' insurance insures only the liability, emerged due to violation of obligations based on carelessness;[177] directors' insurance doesn't cover cases, where the damage emerged following the personal interests, which were based on dishonest action;[178] Insurance policy doesn't cover liability emerged due to violations, committed deceitfully, for the purpose of obtaining of unlawful compensation, violation of the obligation of openness and intended violation of obligations.[179]

3. Georgian Corporate Legislation Reality in regard to the Institution of Insurance

As for the Law on Entrepreneurs, it does not contain the norms, defining insurance on legislative level. However, like the admissibility of indemnification can be defined according o the Law on Entrepreneurs,[180] the existence of insurance can be defined based on at least one addition. Like in majority of the US states, the institution of directors' insurance in Georgia could be implied as the constituent element of the institution of insurance.[181] The mentioned opinion is also confirmed by successful attempt of introduction of "Soft Law"[182] in Georgian legislative space, which was created only for commercial banks so far.[183][184] In particular, one of the sections of Corporate Management Code of commercial banks refers to the assessment and remuneration

175 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 267.

176 R.M.B.C.A §8.57.

177 *Chanturia L.,* Corporate Management, Tbilisi, 2006, 482 (in Georgian).

178 *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 267.

179 *Hamilton R.,* The Law of Corporations, 5th Edition, 2000, 532-534; *Palmiter A.,* Corporations, 5th Edition, New York, "Aspen Publisher", 2006, 267; *Chanturia L.,* Corporate Management, Tbilisi, 2006, 482 (in Georgian).

180 Sub-paragraph "k" of Para.8 of the Article 55 of the Law on Entrepreneurs, available at: <www.matsne.gov.ge>.

181 See chapter III 4 of the article at hand.

182 Soft Law.

183 Corporate Management Code for Banks, GBA, International Financial Corporation, Tbilisi, 2009.

184 The initiative of introduction of Corporate Management Code also exists, which was expressed several years ago. See: *Loladze G.,* Alternative Ways of Increase of Responsibility of Management of Joint Stock Companies (from Compulsion to Stimulation), II German - Georgian Symposium in Corporate Law, GTZ, Tbilisi, 2003, 430 (in Georgian).

of the members of managing bodies, It defined remuneration policy and its constituent elements. P. 5 (f) of the paragraph b) of this section provides classification of the types of non-monetary remuneration of managing persons. Out of them, insurance represents one of the types. Consequently, it could be concluded that the institution of directors' insurance is being gradually introduced in Georgian legislative reality as well. As a result: combined analysis of sub-paragraph "k" of p.8 of the Article 55 of the Law on Entrepreneurs and p. 5 (f) of the paragraph b) of the Section on assessment and remuneration of the members of managing bodies allows to arrive to the conclusion that like in the USA legislative space, in Georgian legislative reality the institution of insurance could be implied as the constituent part of the right of indemnification and to conclude that practical implementation of indemnification and insurance institution in Georgian corporate law space, in the framework of statute-based autonomy, is admissible.

V. Conclusion

As, a conclusion, it could be sail that exact definition and implementation of indemnification and insurance policy in capital-type companies gradually obtains more and more functional and content-related loading. The mentioned policy shall be defined on the basis of imperative legislative regulations. Georgian entrepreneurial law doesn't contain direct reservation related to indemnification and insurance, although based on the analysis provided in the paper, obscure norms and provisions, teleological or systemic definition of which could be used as orientational means of definition of indemnification and insurance policy, are formed.

In short, procedural application of either different or similar pre-condition in regard to differentiated types of indemnification and insurance will provide the opportunity of successful application of managing person's skills for the benefit of the company and regulation of separate, but important stage (issue) of "principal- agent" existing in corporate law. As a result, on the one hand, active mechanism of observance of substantial pre-conditions of imposition of directors' liability will be maintained, and, on the other hand, legal basis will be created for granting to managing persons of more discretionary authorities of decision- making related to entrepreneurial activities, by which, finally, the both parties – the director as well as the company – will achieve harmonization of business relations. And the latter will contribute to the substantial aim of entrepreneurial subject – increase of financial benefit.

Natalia Motsonelidze*

Principle of Restitution in Kind (According to Georgian and German Civil Codes)

1. Introduction

Civil Code of Georgia (hereafter "GCC") Title IV regulates DUTY TO COMPENSATE DAMAGES. The very first article, i.e. article 408[1] of it regulates Duty to Restore the Original State of Affairs – so-called restitution in kind. In its content, article 408 of GCC is analogous to German Civil Code Article 249, which determines the form and extent of compensation for damage. Though the name and structure of these articles differ, they are similar in essence. In both cases main reason for compensation for damage is to Restore the Original State of Affairs for the victim.

As for the structure of the mentioned articles, they significantly differ. Article 408 of GCC consists of four parts, which include the definition of the term "Restoration of the Original State of Affairs", as well as the possibilities for exercising of this right. German Civil Code Article 249, however, is relatively concise after 2002 reform. It consists of two parts and the lawmaker entrust in-depth definition of its essence to practice of law and legal literature.

In article 408 of GCC, the effort of lawmaker to give detailed definition of the possibilities of Restoration of the Original State of Affairs based on the nature of damage and extent of its implementation is underlined. Focus is on compensation for bodily injury or harm inflicted to the health of a person, and the right of the victim to demand allowances if his ability to work has been lost.

Nowadays, there are frequent cases of compensation for damage based on article 408 of GCC. The citizens quite often bring an action before the court concerning Restoration of the Original State of Affairs. According to the statistics of the Supreme Court of Georgia, since 2005 Court of Appeal has adopted about 90 decisions on the above-mentioned subject.

The court decisions include the definition of the content of article 408 and alike the German court decisions, indicate the Restoration of the Original State of Affairs, as the most essential means for compensation for damage. One of the decisions of the Chamber of Civil Cases of the Supreme Court of Georgia indicates that obligee may be given monetary compensation only if the compensation for damages is impossible by restoration of the original state of affairs, i.e. restitution

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1 GCC, Article 408, 1997, Parliamentary Bulletin, №31, 1997 (in Georgian).

in kind under Article 408.[2] Besides, by the "Original State of Affairs" the Supreme Court implies not only the state before the damage occurs, but actually incurred loss of property in the form of non-received profit.[3] In this case, the court considers it mandatory to present evidences of potential profit. This practice differs from the approach of German Federal Court, which is relatively loyal focusing only on the foreseen, hypothetic development of the past state and the results that are the direct consequence of the action causing the damages.[4]

Restoration of the Original State of Affairs has been widely and thoroughly discussed in German practice of law and legal literature. Since the Article 408 of GCC is analogue of German Civil Code Article 249 in its content, it is expedient to consider different legal aspects of Restoration of the Original State of Affairs based on German practice and doctrinal sources. Therefore, in present document the principle consolidated in GCC concerning the restitution in kind is defined based on the example of German law.

Present research aims at highlighting the topical issues in relation to compensation for damage by restitution in kind. It provides legal definition and content of the principle of restitution in kind based on the analysis of German legislation and practice, as well as detailed description of the forms and ways of Restoration of the Original State of Affairs. Besides, unreasonable enrichment of obligee has been analyzed in the light of principle of restitution in kind. In conclusion, the peculiarities of regulation of restitution in kind in Georgia are provided. Principle of restitution in kind has been analyzed using the of historic-legal, comparative law, dogmatic and normative methods of study.

2. Development of German Civil Code Article 249

Following the legislative reforms undertaken in 2002 in Germany, number of institutes of Civil Code has been significantly changed. In particular, reforms applied to general part of Civil Code, general part of contract liability law and purchase and hiring agreements. Main goal of the reform was harmonization of Civil Code with the EU recommendations, which provide for introduction of a uniform system of consumer rights protection in member states. Besides, German lawmaker had already recognized the need for the reforms in the said institutes.

As was mentioned above, the reform applied to the contract law too. Limitation period, norms of impossibility of giving performance and performance assurance have been significantly changed

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2 Case №AC-682-643-2011, Supreme Court of Georgia, 2011, available (in Georgian) at: <http://www.supremecourt.ge/>.

3 Case №AC-1424-1439-2011, Supreme Court of Georgia, 2011, available (in Georgian) at: <http://www.supremecourt.ge/>.

4 BGH LM § 823 (F) Nr. 10; *Larenz K.,* I § 28 I, 471 f. Lange H. (in: *Lange H., Schiemann G.,* § 5 II 1, 218; Rn. 1. (in: *Oetker H.,* Münchener Kommentar zum BGB. § 249 Art und Umfang des Schadensersatzes, 5. Auflage, 2007, Rn.312)).

in favour of purchaser and consumer. These changes were made in compliance with the law on "modernization of contract law" of 26 November 2001, which entered into force on 1 January 2002, and the law on "amendments to norms of law of delict" of 19 July 2002. The latter applied to Article 249, which had the following wording:[5]

1. A person who is obligated to compensate for damages must restore the state of affairs that would have existed if the circumstance giving rise to the duty to compensate had not occurred.

2. Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration. When a thing is damaged, the monetary amount required under sentence 1 only includes value-added tax if and to the extent that it is actually incurred.[6]

3. Universal Importance of Article (Section) 249 of German Civil Code

German Civil Code Article 249 is also often called the provision of universal importance.[7] This is caused by the fact that Restitution in Kind – a common principle for entire law, and its universal nature is supported by this article. This norm is common not only for Civil Code, but also for secondary laws[8] to Civil Code that increases its significance. Therefore, the right determined by article 249 demanding that other party restores the state of affairs that would have existed if the circumstance giving rise to the duty to compensate had not occurred shall be defined in detail.[9] Such a need for definition is caused also by the fact that articles 249 and 250 concerning the Nature and extent of damages to be compensated do not specify the ground of demand of compensation for damage. In order to compensate for damage via these articles, their correlation with other norms of civil law shall be determined based on delict-legal relations. The most important statements determining the significance of article 249 of German Civil Code, are stipulated also in article 280 (Damages for breach of duty) and article 823 (Liability in damages). Besides, as was mentioned above, article 249 applies not only to the relations arising within the ranges of law of delict, but also to the relations which exist beyond German Civil Code, which are regulated by supplementary laws. Therefore, role of article 249 is critical and it is a norm of universal importance.[10]

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5 *Prütting H., Wegen G., Weinreich G*., BGB Kommentar, 1. Auflage, München, "Luchterhand", 2006, 339.

6 § 249, German Civil Code (BGB), available (in English) at: <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html>.

7 *Prütting H., Wegen G., Weinreich G.,* BGB Kommentar, 1. Auflage, München, "Luchterhand", 2006, 337.

8 Ib., 337.

9 *Baldus M., Grzeszick B., Wienhues S*., Staatshaftungsrecht: Das Recht der öffentlichen Ersatzleistungen, 3. Auflage, Heidelberg, "C.F Müller", 2009, 19.

10 *Prütting H., Wegen G., Weinreich G.,* BGB Kommentar, 1. Auflage, München, "Luchterhand", 2006, 337.

4. Sense of the Principle of Restitution in Kind

Principle common to entire law of delict, which relates to semantic extent of compensation for damage, is determined by Article 249 part and is known as Principle of Restitution in Kind.[11] So-called "restorative function" characteristic for law of delict is based on this principle.[12]

According to the ruling theory of delictual law, obligor shall compensate in kind for damage caused by him.[13] This statement implies restoration of State of Affairs, which are economically equal to the state before the damage occurs.[14] Restitution of sufferer must be carried out not by indemnity payment, but, to what extent is possible, by regenerating good, that he had lost as a result of damage.[15]

The content of restitution in kind considers restoration of that primary situation which existed before the conditions for need for damage restitution occurred. Accordingly, as this event belongs to the past,[16] or, that is, it existed in the past, restitution in kind implies restoration of the state, which is equivalent to the primary, past state.[17] This means, that the requirement to eradication of results is directed towards restoration of primary state, to "equation in kind"[18], and principally not towards indemnity payment.[19]

Restitution in kind obliges the debtor to restore the state, which would exist in case of non – existence of damage restitution obligating conditions. Above mentioned clause consists in itself not only restoration of damaged goods, but also restoring the situation which would be relevant to the economic situation of victim in case of non – existence of the damage.[20] For example, in case of damaging vehicle, the person, who had damaged the vehicle, must compensate not only expenses for vehicle repair, but those losses too, which the person suffered during the period of not using the vehicle,[21] or, on the contrary, the profit, which the person could get and which would help to improve his/ her economic situation. In order to establish all above mentioned, it is necessary to analyze and take into account what situation could occur in case of non – existence of illicit action.[22]

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11 *Joussen J.,* Schuldrecht I, Allgemeiner Teil, Jena, "W.Volhammer", 2008, 359, Abs. 1044.
12 Ib., Abs. 990.
13 Ib., Abs. 1044.
14 RGZ 76, 146; *Brox H., Walker W.,* Allgemeines Schuldrecht, München, 2007, § 31, Abs. 2 (in: *Joussen J.,* Schuldrecht I, Allgemeiner Teil, Jena, "W.Volhammer", 2008, 359, Abs. 1045).
15 *Joussen J.,* Schuldrecht I, Allgemeiner Teil, Jena, "W.Volhammer", 2008, 360, Abs. 1045.
16 *Baldus M., Grzeszick B., Wienhues S.*, Staatshaftungsrecht: Das Recht der öffentlichen Ersatzleistungen, 3. Auflage, "C.F Müller", 2009, 19.
17 BVerwGE 38, 336, 346 Urteil vom 12. Oktober 1971 (in: *Baldus M., Grzeszick B., Wienhues S.*, Staatshaftungsrecht: Das Recht der öffentlichen Ersatzleistungen, 3. Auflage, "C.F Müller", 2009, 19).
18 Ib., 69, 366, 371.
19 *Baldus M., Grzeszick B., Wienhues S.*, Staatshaftungsrecht: Das Recht der öffentlichen Ersatzleistungen, 3. Auflage, "C.F Müller", 2009, 19.
20 BGH 30, 29, 31, 40, 345, 347, VerR 1974, 90; NJW 1985, 793 (in: *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 918).
21 *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 918.
22 BGH NJW 2000, 664, 667; NJW 2000, 734, 736; NJW 2001, 673, 674.

All above mentioned testify, that the restitution in kind is determined not only by the situation which existed before the occurence of damage restitution conditions,[23] but also by probable, hypothetic development of past conditions, and, results obtained from it.[24] For example, if the conditions obliging damage restitution occured as a result of illicit action of the debtor, the hypothetic, probable development of the situation can be assessed by analyzing what the result could be in case of legal actions of the debtor.[25]

When the content of restitution in kind is reviewed, it is important not to mix and misinterpret two different events - indemnity payment for restitution in kind and regular indemnity payment. As it was mentioned in the beginning of the article, restitution in kind differs from other ways of compensation by the fact, that it, as a rule, does not imply financial compensation. The damage is compensated in kind, which considers restoring the primary conditions for trespassed person. Though, in some cases, restoration of primary conditions in kind may imply exactly indemnity payment. For example, if the trespassed person in case of non – existence of conditions obliging damage compensation could alienate goods for some price, then restitution in kind must be carried out with money, i. e. paying the money to the victim.[26] When the directive regarding restitution in kind is given excluding indemnity payment, first of all, recalculation of the damage (damaged good, moral damage, health injuries) into money and establishing equivalence to money must be excluded. The main goal of this principle is to satisfy trespassed person in kind. Though, on the assumption of the character of dispute, in some cases, payment in kind can be not only movable or immovable assets or health, but money too. On the contrary to above mentioned, in case of regular indemnity payment, money represent not payment in kind, but the mean of equivalent compensation of caused damage. Such differentiation is crucial, in order not to misinterpret the law. According to general rule, restitution in kind, stipulated by the Cl. 249, is the primary mean for compensating the damage. The creditor applies to other means of damage compensation, for example, indemnity payment, only in cases, when restitution in kind is impossible. But that does not mean, that the legislator strictly establishes imperative order of means of damage compensation. On the contrary, the creditor, as the most important subject of obligatory legislation, is authorized to determine, which means of damage compensation he/ she will choose. In such case, the creditor must make decision, taking into account profitability of damage compensation, as well as interests of the debter and principles of justice.

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[23] Statt aller Hagen (in*: Lange H., Hagen H.* (Fn. 1142) 59, 61 (in: *Oetker H.,* Münchener Kommentar zum BGB, § 249 Art und Umfang des Schadensersatzes, 5. Auflage, 2007, Abs. 312)).

[24] BGH LM § 823 (F) Nr. 10 (in*: Lange H., Schiemann G*., § 5 II 1, 218, (in: *Oetker H.,* Münchener Kommentar zum BGB, § 249 Art und Umfang des Schadensersatzes, 5. Auflage, 2007, 312)).

[25] BGH NJW 2000, 734, 736 (Amtspflichtverletzung eines Notars); also 2000, 664, 667; 2001, 673, 674; LM (Bb) Nr. 75. (in: *Oetker H.,* Münchener Kommentar zum BGB, § 249 Art und Umfang des Schadensersatzes, 5. Auflage, 2007, Rn. 312).

[26] BGH NJW 2000, 734, 736 (Amtspflichtverletzung eines Notars); also 2000, 664, 667; 2001, 673, 674; LM (Bb) Nr. 75 (in: *Oetker H.,* Münchener Kommentar zum BGB, § 249 Art und Umfang des Schadensersatzes, 5. Auflage, 2007, Rn. 312).

5. Forms of Restitution in Kind

German legislation does not imply any provision regarding damage compensation by restitution in kind. In general, most important is to have technical and legislative possibilities for damage compensation by means of restitution in kind.[27] If such possibility really exists, trespassed person can always request damage compensation in accordance with Cl. 249 of GCKC. Above mentioned clauses offers trespassed person, according to the content of damage, make the choice between alternative means of damage compensation, particularly, request restoration of primary state, or substituting the goods with goods of proportionate meaning and price, or by compensation of expenses for restoration of goods or health by the person causing the damage.

5.1 Restitution in Kind by the First Part of the Clauses 249 of German Civil Code

First part of the Clauses 249 determines restitution in kind directly by the person causing damage, that implies restoration of its primary state by him/ her. Along with, it does not matter, restitution in kind implies **compensation of proprietary or non – proprietary damage.**[28] Besides, as the first part of the Cl. 253 of GCKC unequivocally says, that indemnity payment for compensation of non – material damage can be requested only in cases determined by law, when the non – material damage occurs restitution in kind is one of the main and primary means of compensating the request.[29]

5.2 Restitution in Kind by the Second Part of the Clauses 249 of German Civil Code

The second part of the Clauses 249 determines the second kind of restitution in kind. In this case the matter is the right of trespassed person to request compensation of impartially necessary for restoration of damaged subject or health costs.[30] The **scope** of above mentioned compensation is determined by what is needed for restoration of the subject. Besides, it is necessary to explain, that these costs imply not only simple restoration of subject or health, but bringing it to the state, which is determined by the first part of the same clauses – i. e. to the primary state.[31] The first sentence of the second part of the Cl. 249 clearly states the scopes of compensation. Particularly, the

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27 *Schmidt R.,* Schuldrecht, Besonderer Teil II, Gesetzliche Schuldverhältnisse, 4. Auflage, "Dr. Rolf Schmidt", 2006, Abs.1096.

28 *Oetker H.,* Münchener Kommentar zum BGB, § 249 Art und Umfang des Schadensersatzes, 5. Auflage, 2007, Abs. 309.

29 Statt aller Hagen (in: *Lange H., Hagen H.* (Fn. 1142), 59, 61 (in: *Oetker H.,* Münchener Kommentar zum BGB, § 249 Art und Umfang des Schadensersatzes, 5. Auflage, 2007, Abs. 309)).

30 *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 918.

31 Ib., 919.

compensation is limited by "indispensable" costs. Indispensable are only those costs that would fully satisfy economically reasonably thinking person, in case of being on the place of trespassed person from the point of view of targeted and sufficient compensation of the damage.[32] Accordingly we can conclude, that in case of damaging subject, the request to restore it is allowed only in case the expenses for its restoration significantly do not exceed the subject cost. If the expenses significantly exceed the subject cost, the creditor, instead of restitution in kind, must request compensation according to the 2nd part of the Cl. 251 of GCKC, which, in general, implies indemnity payment.[33]

In spite of the 2nd part of the Cl. 249 implies damage compensation by indemnity payment, the main interest of the trespassed person is not receiving the indemnity payment, but retention of the subject. This means, that while receiving the indemnity payment the main goal of creditor is to return with received indemnity payment the subject or health to its primary state. The above mentioned is shown by the fact, that **while determining the scope of damage important is not the cost of the subject, but determining, what expenses must be covered for restoring the subject.**[34]

In order the right to request compensation of the damage, determined by the 2nd part of the Cl. 249 it is important the possibility of restoration the damage in kind to exist. The example of impossibility of restoring the damage is full destroying of the subject. In such case the right of the trespassed person to request arises not according to the 2nd part of Cl. 249, but according to the Cl. 250[35] or 1st part of the Cl. 251,[36] for which, on the contrary to the restitution in kind, determining is compensation of the cost of the subject or financial interest.[37] in this latest case the cost of the subject is calculated, in case of non existence of obligating damage compensation conditions, by establishing the difference between the cost of the subject and the real cost of the subject after getting damage.[38]

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32 BGHZ 115, 364 (386) (in: *Joussen J.,* Schuldrecht I, Allgemeiner Teil, Jena, "W.Volhammer", 2008, 363, Abs. 1056).

33 *Joussen J.,* Schuldrecht I, Allgemeiner Teil, Jena, "W.Volhammer", 2008, 363, Abs. 1056.

34 *Looscherders D.,* Schuldrecht, Allgemeiner Teil, 6. Auflage, München, "Carl Heymanns", 2008, 304, Abs. 951.

35 BGB §250. **Compensation of damage financially after the deadline has passed.** The creditor can set the deadline for restoring the primary state to the obliged person with such terms, that after the deadline has passed he/ she will refuse to restore the primary state. After the deadline has passed the creditor may request indemnity payment, if the restoration of the primary state is not carried out in time; restoration of the primary state is excluded. German Civil Code (BGB), available (in English) at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html

36 BGB §251. **Compensation of damage financially without setting the deadline.** 1. If restoration of the primary state is impossible, or it is not enough for compensation of losses of the creditor, then the person obliged for compensation of the damage must compensate losses financially, German Civil Code (BGB), available (in English) at: <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html>.

37 *Looscherders D.,* Schuldrecht, Allgemeiner Teil, 6. Auflage, München, "Carl Heymanns", 2008, 306, Abs. 958.

38 BGH, NJW 1984, 1569 (2570); BGH, NJW 1985, 2413 (2415) (in: *Looscherders D.,* Schuldrecht, Allgemeiner Teil, 6. Auflage, München, "Carl Heymanns", 2008, 306, Abs. 958).

5.3 Creditor's Right of Choice

The trespassed person can make the choice between two alternative ways of restitution given above. Though the issue, can the creditor change once made decision later by another one in favour of another way, is arguable. According to views from references, changing the request to restore the subject determined by the 1st part of the Cl. 249 by the request to compensate expenses determined by the 2nd part of the Cl. 249 is allowed only in case, when the debtor is not able to restore the subject, or when the debtor is not willing to fulfil the request in reasonable dates. Besides these two preconditions it is necessary for the debtor not to have carried out any expenses for fulfilling the request determined by the 1st part of the Cl. 249.[39] The goal of such limitation is protecting debtor's interests, particularly, protection of the debtor from creditor's self – will, and also from additional and hollow expenses.

The situation is different when, on the contrary, the request to compensate expenses (2nd part of the Cl. 249) is substituted by the request to restore the subject (1st part of the Cl. 249). In such case relatively more strict restriction is set and it is not limited only with cases when the debtor has carried expenses, but, with some exclusions, such substitutions practically in all cases are restricted. According to the court practice, exceptions are allowed only in cases, when the creditor has reasonable excuse, which justifies his request for change. Allowing such exceptions is determined by necessity to protect creditor's interests, which in Delict law has priority.[40]

6. Ways of Restitution in Kind

For restitution in kind the trespassed person must make a choice between above mentioned ways, based on reasons of economic profitability. Particularly, as the main goal of restitution in kind is minimizing the damage,[41] it must be determined, how would behave the reasonably thinking human in order to eradicate the damage.[42] Though, besides the principle of profitability, while making the decision, the creditor must take into account the peculiarities of damaged good. Perhaps in some cases, taking into account peculiarities of the subject, it maybe impossible to restore, and it must be substituted with new one, or vice versa. This differentiation and making adequate decision in restitution in kind has considerable meaning for proper usage of the Cl. 249. Therefore the content of means of restitution in kind in relation with specific damage must ne reviewed.

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39 *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 918.

40 Ib., 918.

41 *Schubert M.,* Beck'scher Online-Kommentar BGB (*Bamberger G., Roth H.* (Hrsg.)), 21. Auflage, München, "C.H. Beck", 2011, Abs. 181.

42 BGHZ 125, 56, 61 - NJW 1994, 999 (in: *Schubert M.,* Beck'scher Online-Kommentar BGB (*Bamberger G., Roth H.* (Hrsg.)), 21. Auflage, "C.H. Beck", München, 2011, Abs. 181).

6.1 Restoration

6.1.1. Content

Restoration is one of the main and primary means of restitution in kind, which implies restoration of primary state. Though it must be mentioned, that, according to widely spread opinion, under primary states only the state existing before damage is considered. The hypothetic development of the event, i. e. state, which would not exist in case of non – existence of circumstances obliging compensation, must be taken into account too. For example, if the person had purchased stock by fraud, the defrauded can request compensation not only for additional sum paid, but compensation for the whole cost of stock, as, if we hypothetically develop given circumstances, we can conclude, that in case of absence of trickery the defrauded would not have purchased stock at all. Accordingly, exactly the above described would be that primary state, which would exist in case of absence of the state obliging to compensate the damage.[43]

There is ambiguous view on formulation of **"restoration of primary state"** in German literature. Some authors consider, that this formulation is vague, and, in some cases, arguable.[44] For example, in case of repair of the vehicle damaged in car accident, even if it has no signs of damage, it cannot be considered as a car that never had been in the accident. Though, under the content of restoration of primary state by restitution in kind is considered only coming close or partially equation to the state that would exist in case of absence of damage.

In general, the content of restoration of primary state has different meanings according to what kind of damage has happened.

6.1.1.1. Restoration of Non – Proprietary Damage

According to the first part Cl. 253 of GCKC, material compensation for non – proprietary damage can be requested only in cases strictly determined by the legislation. Besides, restitution determined by the 2nd part of the Cl. 249 covers only cases of damage of the subject or the body. Accordingly, in the **Delict law,** the restitution in kind determined by the first part of the Cl. 249,[45] stays as the only way of compensating of non – material damage, which can be expressed as any action taken or refused by the debtor. For example, the debtor can be requested to erase or destroy the video recording, photo, audio recording or any other kind of material, or refuse incorrect information hurting pride, abstain from disclosure of secret information on someone's intimate

43 *Prütting H., Wegen G., Weinreich G.,* BGB Kommentar, 1. Auflage, München , "Luchterhand", 2006, 340.

44 *Schmidt R.,* Schuldrecht, Besonderer Teil II, Gesetzliche Schuldverhältnisse, 4. Auflage, Grasberg, "Dr. Rolf Schmidt", 2006, Abs.1096.

45 *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 919.

life obtained illegally, etc.[46] While compensating non – proprietary damage debtor's activity or inactivity is directed towards restoring primary state of trespassed person – in kind and not with money. The main goal of the first part of the Cl. 249 is not reducing expenditure of the person causing damage, but its main goal is not to happen materialization of non – proprietary good and interest. Though this provision in itself does not exclude that, in some cases, for restoration of non – proprietary damage exactly financial expenditure an became necessary.[47]

6.1.1.2. Restoration of Proprietary Damage

Proprietary damage is proprietary loss measured in money quantity and compensated by money reimbursement. The concept of proprietary damage, as well as the concept of property in GCK is not clearly defined.[48] According to the decision of German Federal Court, proprietary damage is not fully legal, but it is associated with legislation economic definition.[49]

In case of proprietary damage the initial mean of damage compensation is restitution of damage in kind, or restoration of primary state. While applying means for compensating damage, determined in the first and second parts of Cl. 249 the initial goal must be considered protecting creditor's indefeasible interest and full satisfaction of this interest. Protecting in this way violated rights differs from other means of compensating damage consists in, that trespassed person is moved by the interest to keep damaged good, and not receive financial compensation.

The ways of restoring above mentioned good differ by what good is damaged in what kind. While restoring the damage, right according to the character of damaged subject, some problematic issues occur, which will be reviewed below.

In case of damaging subject, the mean for its restoration is repairing it, or substituting with new one.[50] The trespassed person must make choice taking into account economic profitability.[51]

6.1.2. Repairs to the Item

Restoration of item via repairs is considered only in case, if such item is restorable. Moreover, according to the German court practice, for the utilization of article 249 it is not important what costs are related to the restoration of the item.[52] For example, the mentioned article is even used in

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46 *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 919.

47 Statt aller Hagen (in: *Lange H., Hagen H.* (Fn. 1142), 59, 61 (in: *Oetker H.,* Münchener Kommentar zum BGB, § 249 Art und Umfang des Schadensersatzes, 5. Auflage, 2007, Rn. 182)).

48 *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 926.

49 BGH (GrZS) 98, 212 (217);101, 225 (227f).

50 *Prütting H., Wegen G., Weinreich G.*, BGB Kommentar, 1. Auflage, München, "Luchterhand", 2006, 340.

51 *Oetker H.,* Münchener Kommentar zum BGB, § 249 Art und Umfang des Schadensersatzes, 5. Auflage, 2007, § 309.

52 NJW RR 1989, 332.

the cases when the full rehabilitation of damaged house is implemented; as a result of such rehabilitation the house in economic, technical and functional terms will not be identical with the original condition. In such cases, the value of new house may be significantly higher compared with its original value.[53]

Court practice related to article 249 may place in unfair condition the debtor against the creditor. Namely, in this case we have a problem, which is related to placing the creditor in better condition compared with his/her original condition. If we discuss the above mentioned example, we can conclude that creditor is not provided with its original, initial condition; creditor is provided with more than he/she had before incurring the loss. Therefore it is expedient, to deeply study each specific case for article 249 and relevantly determine the area of its utilization. First of all, it is necessary to follow the proportionality between the unjust action of the debtor, occurred result and the measures to be undertaken for the reimbursement of incurred loss. Considering the above the economic profitability shall be estimated. Based on which the interests of both parties will be protected and moreover, the creditor will not be placed in unequal condition.

6.1.3. Replacement of Item with the New One

Replacement of item with a new one is another form for the reimbursement of incurred loss. In relation to this delict–legal concept there is not a straightforward approach in the literature and it is problematic in several aspects.

The only issue, the authors' positions do not contradict and they coincide is **replacement of basic items with the new ones based on the category sign.** Namely in case of total damage of such item, replacement of such item with identical item is considered as reimbursement of loss according to the article 249. For example, in case of damage to the new car, its replacement with the car of the same class and type is considered as reimbursement of loss via the restitution in kind.

However for the secondary consumption items based on their **category sign** the position of different authors and the court practice do not coincide. According to the court practice, when we deal with the secondary consumption items as determined under the category sign, it might not be profitable to restore them and it might be more profitable to replace it with a new one for creditor as well as for debtor. For example, in case of damage to the car used for the secondary consumption it may not be possible to restore some of its parts and they must be replaced with new ones.[54] In this case the cost incurred by the defendant might be higher that the value of the car. Therefore, the practice of Federal Court of Germany is of the view that in such case **replacement** of damaged

[53] BGH 102, 322 JuS 1988, 988 (in: *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 920, Abs.15).

[54] *Prütting H., Wegen G., Weinreich G.*, BGB Kommentar, 1. Auflage, München, "Luchterhand", 2006, 340.

second-hand car with a **new one** is the most profitable form of restitution in kind envisaged under the article 249.[55] Some authors have view different from the one of the court;[56] they are of the view that replacement of damaged item with a new one is not a form of restitution in kind[57] and it belongs to the area regulated under article 251 (reimbursement of loss) and not article 249.

The position of Federal Court of Germany is shared by number of German scientists. According to their view, in order to consider an action as reimbursement of incurred loss, it is important that the debtor provides the creditor with the new item of the same type and value,[58] in other words, we have in place restoration of economic condition which would exist in case if damage was not incurred.

Based on the above, it can be noted that despite the difference in views of the authors, one is clear – for majority of **items –** full restoration of original condition is possible via the repairs to the item, and in case of **items defined under the category sign and basic consumption items –** via the replacement of such items with a new one.

Utilization of article 249 is disputable in case of destruction of the items, which are not determined under the **category sign** or belong to **secondary consumption items.** Full restoration of such items is unconceivable. However, it does not mean that restitution in kind is impossible at all and the claimant should apply the reimbursement of loss considered under article 251. In the event of such limitation, the objective of legislator is to protect the inviolability interest of a person; article 249 would become ineffective and moreover, in most delict cases the utilization of article 249 would become impossible. Of course, legislator considered such danger and envisaged the restoration of item to the condition which is maximally close to its original condition as reimbursement of loss under restitution in kind.[59] The answer to the question, what can be the difference between the original and restored conditions, is hard. According to one position, it is sufficient not to have "essential difference" between the restored condition and hypothetic condition.[60] Moreover, according to the practice of Federal Court of Germany, in order to exclude such essential differences, it is necessary to restore the damage with the "item of similar and equal value".[61]

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55 BGH 66,239,247,92,85,87f, VerR 1972, 1024, NJW 1992, 302, 304 (in: *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 919).

56 *Schiemann G.,* in: *von Staudinger J.*, Kommentar zum Bürgerlichen Gesetzbuch, Berlin, 2005, § 249, Rn.182.

57 For the mentioned see also "Schmidt JuS", 1986, 517 (in: *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 919).

58 *Lange H., Schiemann G.,* Schadensersatz, Handbuch des Schildrechts in Einzeldarstellungen, Bd.1, 3. Auflage, Tubingen, "Mohr Siebeck", 2003, 215.

59 BGH NJW 2003, 1042, 1043 (in: *von Staudinger J.*, Kommentar zum Bürgerlichen Gesetzbuch, Berlin, 2005, § 249).

60 *Lange H., Schiemann G.,* Schadensersatz, Handbuch des Schildrechts in Einzeldarstellungen, Bd.1, 3. Auflage, Tubingen, "Mohr Siebeck", 2003, 215.

61 BGHZ 92, 85, 89 - NJW 1984, 2282.

For the definition of "item homogeneity" it is necessary to carry out objective estimation of restored item's features. The main criterion for estimation is the perception existing in the civil society regarding the characteristics of certain item. The insignificant difference, which does not reduce the value of item and does not hinder its consumption, is not essential difference and accordingly, is not obstacle for the restitution in kind.[62]

The item has **"equal value",** when the item subjectively with its features has equal substance compared with the damaged item. Moreover, this criterion implies consideration of material interests of the injured person; additionally it considers immaterial component of item to be restored under restitution in kind; all the above ensures protection of inviolability interests.[63]

If the criterion for the "item homogeneity and equal value" is not met, restitution in kind is impossible and creditor's claim on reimbursement of loss should be fulfilled based on article 251, part one.[64] Of course, in case of un-fulfilment of above mentioned criterion, the creditor himself loses interest for reimbursement of loss via restitution in kind and he can reject such reimbursement. However, in such cases, under agreement between parties, it is still possible to reimburse loss via restitution in kind, if creditor considers as reimbursement for loss the provision of new item according to the conditions of article 249.

6.1.4. Restoration in Case of Health Injury

Physical or mental pain, unlike the unhealed disease and damage to dignity and honour, is damage to the good, estimation and measurement of which in an amount is impossible. In such case, we can talk about encroachment to the immaterial good, in case of which injured person can ask for the restoration of original condition instead of cash compensation from the offender under the article 249 of GCC.[65]

According to part 2, article 249 injury to the person considers injury to the person's body.[66] The injury to the body is subject to the reimbursement if according to the conclusion of a doctor for recovery of person ambulatory treatment, or any type of treatment is required. Such treatment includes: rehabilitation measures, purchase of auxiliary items for long term use (for example wheelchair for disabled), equipping the residential house of the injured with the devices required for the utilization of wheelchair, transportation of injured person to the medical unit and etc. Moreover,

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62 *Schubert M.,* Beck'scher Online-Kommentar BGB (*Bamberger G., Roth H.* (Hrsg.)), 21. Auflage, München, "C.H. Beck", 2011, Abs. 316.

63 Ib., Abs. 312.

64 BGH NJW-RR 2003, 1042, 1043 (in: *Schubert M.,* Beck'scher Online-Kommentar BGB (*Bamberger G., Roth H.* (Hrsg.)), 21. Auflage, München, "C.H. Beck", 2011, Abs. 318).

65 BGH NJW 53, 1386, RG 94, 3, 148, 122 (in: *Schellhammer K.,* Schuldrecht nach Anspruchsgrundlagen, sant BGB Allgemeiner Teil, 7. Auflage, Heidelberg, "C.F Müller", 2008, 636, Abs. 1269).

66 *Schiemann G.*, in: *von Staudinger J.*, Kommentar zum Bürgerlichen Gesetzbuch, Berlin, 2005, 217.

additional costs related to the requirements such as visiting injured person by family members and etc. are also subject to reimbursement.[67]

In case of injury to the person, guilty person is responsible for the negative results such as psychological and spiritual trauma and not only injury to the specific organ of the body. Moreover, it is not necessary to have causal connection between such trauma and injury to specific organ of the body; it is sufficient to determine high probability of non-existence of spiritual and psychological trauma in case of absence of injuring action.[68]

In case of injury to the person the injured can't use funds reimbursed by the debtor according to the part 2, article 249 on his/her discretion; the injured person is assigned liability to use funds for specific purposes. Amount of funds to be reimbursed is determined via calculation of necessary costs, with the consideration of costs of treatment prescribed by the doctor. Therefore, it is necessary to precisely determine the amount objectively required for the treatment of person. The guilty person (causing injury) is not liable to incur unnecessary costs. For example, if it is not necessary to place the injured person into the hospital for his/her treatment and he/she has somebody at home who can look after him/her, then the person guilty for the injury is not liable to reimburse costs of hospital treatment as well as costs required for hiring support personnel.[69]

As it is clear from the above mentioned, in case of injury to the body only the real costs required for the treatment or already incurred by the injured person (for treatment) are reimbursed. Based on the above the necessary pre-condition for the reimbursement of damage considered under the part 2, article 249 is the existence of actual possibility of health rehabilitation (same for the damaged item, possibility for its restoration). In other cases, the right for claim for the injured person is created based on articles 251 or 252 of GCC, considering reimbursement of loss in the form of cash compensation.

7. Unjustified Enrichment

As it was mentioned several times in the present work, unlike other means for the reimbursement of loss, article 249 aims to restore the original condition which existed before the creation of circumstances determining the loss reimbursement. Accordingly, any cash reimbursement paid by the debtor is directed towards **restoration** of original condition and not towards the cash compensation of loss, as envisaged under article 251.

However, in case of article 249 it is often problematic to solve the issue related to the targeted utilization of compensation received for the restoration of incurred loss. The following question should be answered: is creditor liable to actually use received reimbursement and spend amount for

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67 *Prütting H., Wegen G., Weinreich G*., BGB Kommentar, 1. Auflage, München, "Luchterhand", 2006, Abs. 40.

68 *Erman W.,* BGB Handkommentar, B. I, 12. Auflage, Köln, "Otto Schmidt", 2008, 824-925, Abs. 38, 39, 40, 43.

69 Compare: "Zeuner JZ", 86, 640, "Grunsky JuS" 87, 441 (in: *Prütting H., Wegen G., Weinreich G.,* BGB Kommentar, 1. Auflage, München, "Luchterhand", 2006, Abs. 24).

the restoration of item or for treatment. The above fact is important as it can become the reason for the unjustified enrichment of creditor.

According to the widely accepted position, in this regard, we shall separate injury to the person's health and damage to the item.

7.1 Injury to the Person's Health

In case of injury to the body, the injured does not have right to use received funds on his/her discretion, and to ask reimbursement of costs need for which is not actually generated yet. For example, Federal Court of Germany refused to the person asking for the funds for plastic surgery to get rid of scar after the surgery; the motive for such refusal: it was not possible to anticipate the result, therefore at this stage surgery operation was deemed inexpedient.

In case of injury to body or other health injuries the injured person is liable to use received compensation for treatment or other measures required for health recovery. According to article 253 the injured person is prohibited to receive reimbursement for immaterial damage for gaining profit. If the injured had right to receive reimbursement of fictive costs of treatment then the article 253 would lose its meaning. The same counts for part 2, article 249, which determines restitution rule in kind in case of health damage. Therefore, in case of physical injury, the specific injury and costs related to the recovery and not the fictive costs should be calculated.

7.2. Damage to Item

The issue of reimbursement of loss in case of damage to the item is solved completely differently. In this case the injured person has freedom of choice. According to court practice, the injured person can freely make decision on the utilization of reimbursement, in other words he/she can determine whether to use the funds for actual restoration of the item.[70] For example, in case of damage to the car, creditor can use the received reimbursement for repairing the car or leave the car in damaged condition. In both cases the debtor has liability to reimburse the incurred loss. In case of leaving the car in the damaged condition, the amount to be reimbursed is determined via the hypothetical calculation of costs required for repairing the item. Court justifies such approach with the argument that in any case the property of creditor is reduced due to the incurred damage.

Scientists often critique such approach of the court and are of the view that existence of such opportunity creates risk for unjustified enrichment.[71] The injured person can claim reimbursement of

[70] BGHZ 61, 56 (58), 66, 239, (241, 76, 216, (221), 81, 385 (391) (in: *Looscherders D.,* Schuldrecht, Allgemeiner Teil, 6. Auflage, München, "Carl Heymanns", 2008, 305).

[71] Anwaltskommentar Magnus §249 Abs. 17 (in: *Looscherders D.,* Schuldrecht, Allgemeiner Teil, 6. Auflage, München, "Carl Heymanns", 2008, 305).

costs that were not actually incurred.[72] Therefore, if restitution in kind is determined by the interest of injured to restore the original condition, we shall exclude the possibility to use received reimbursement on his/her discretion. The injured person shall be assigned the liability to use funds for purpose, as it is determined for cases of body injury. Otherwise, the similar relations should be regulated not by article 249 but by article 251, which regulates cash compensation for loss. Such separation has essential importance for the calculation of amount to be reimbursed. The amount of costs considered under part 2, article 249 might be totally different and in most cases be more than the amount considered under part 2, article 251 for reimbursement of incurred loss.[73]

8. Restitution in Kind in Line with Article 408 of Civil Code of Georgia

As it was mentioned at the beginning of the present work, we can read the similar approach to the regulation of concepts from the article 249 of GCC and article 408 of CCG, which determine the principle of restitution in kind. In both cases the main objective of legislator is to maximally reduce loss incurred by creditor and restore the legal condition which existed before the damage. The relevant provisions are reinforced under the first parts of article 249 of GCC and article 408 of CCG. The both norms determine that person liable to reimburse a loss, shall restore the condition which would exist if the circumstances generating the reimbursement liability did not happen. Accordingly, in interpretation of part one, article 408 of CCG, we can be easily guided by German court practice and legal dogmatic, which is quite rich.

Unlike German legislation, Georgian legislators interpreted the contents and form of restitution in kind related to certain categories of loss in article 408 itself; such interpretations are expanded in the remaining three parts. Accordingly, part two, article 249 of GCC and parts 2, 3 and 4, article 408 of CCG regulate specific forms of restitution in kind in a different form. However, with the consideration of similarity of norms' general contents, we can use the German experience as guidance in definition of above mentioned norms in CCG.

According to part two, article 408, the person shall be given monthly payment for the lost or reduced ability to work as a result of health injury. As an objective of above mentioned norm is to restore the condition existing before the injury, the amount of payment shall be determined based on the condition in which the creditor would be in absence of the injury. Moreover, according to general rule, in the process of definition of payment amount the following should be taken into account: revenue lost due to the total or partial work disability as well as interests of infants and incapable dependent members of the family.

According to part 3, article 408 of CCG, in case of health injury, in addition to the request of monthly payment, the injured person has right to request from the debtor the costs of treatment in

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72 *Looscherders D.,* Schuldrecht, Allgemeiner Teil, 6. Auflage, München, "Carl Heymanns", 2008, 305.

73 *Prütting H., Wegen G., Weinreich G.,* BGB Kommentar, 1. Auflage, München, "Luchterhand", 2006, 342.

advance. Moreover, for the right to request such costs in advance it is necessary to have medical conclusion on the expedience of medical treatment. If we share the court practice of Germany, for the reimbursement of similar costs it is also necessary to anticipate the results of treatment at least partially. The objective of above provision is to avoid assignment of unjustified costs over the debtor; which actually do not ensure treatment of injured person. Proceeding from the purpose of article 408, the treatment of injured considers not only hospital or medication treatment, but also all types of measures for recovery including visiting special treatment places, exercise under the special supervision, massage and other measures ensuring recovery of health of injured person and restoration of his/her original condition. According to article 408, in order to generate the creditor's right to claim it is necessary to have actual possibility to restore original condition. If restoration of original condition is impossible, the injured has right to request cash reimbursement i.e. compensation for the incurred loss based on article 409 of CCG.

As mentioned above, article 408 of CCG pays special attention to the loss incurred due to the injury to the body or health injury and attempts to regulate in detail the rights and liabilities of parties. According to part 4, article 408, the injured person has right to ask for compensation instead of monthly payment considered under the part 2 of the same article in case of existence of important grounds. The "important" nature of the ground, first of all depends on interest of injured person and nature of injury.[74] For example we can consider as important ground the desire of injured person to create better living conditions due to his/her health condition, to purchase wheel chair, to equip the car with the devices required for the disabled persons, to differently equip work environment and etc. Above mentioned measures are related to high one-time costs, which can be considered as basis for the compensation request.

Despite the fact that legislator attempts to pay more attention to the loss incurred due to the injury to body or health injury, compared with other types of damage, and to determine the basis of its restitution with the specific norms, the list of such basis cannot be exhaustive due to the diversity of civil activities. Therefore the cases which are not considered under parts 2, 3 and 4 of article 408 shall be regulated under general rule, determined under the part one of article 408 and which is analogous to article 249 of GCC.

Conclusion

Based on the research, the following conclusions can be formulated:

Restitution in kind is the most optimal form of loss reimbursement in German and Georgian laws. It can be used for the reimbursement of proprietary as well as non-proprietary losses. Restitution in kind with its contents and purpose is different from other forms of loss reimbur-

[74] *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.* (Editors), Comments to Civil Code of Georgia, Book Three, Liability Law, General Part, Tbilisi, 2001, 454 (in Georgian).

sement. In case of restitution in kind, the main objective of creditor is to restore original condition and not to receive cash compensation.

Moreover for simplification of purpose achievement it is possible to use various ways of restitution, such as replacement of damaged item with a new one, treatment of injured in case of injury to the body and etc. Moreover, for the latter case the German legislator does not define the list of specific ways for restoration and is limited with the general provision. Georgian legislator demonstrates a different approach, which due to the special place of life and health in the general hierarchy of rights,[75] for the maximal protection and provision, attempts to offer exhaustive list of restoration means. However, we are of the view that to avoid uncertainty for the parties, similarly to the German legislator, it is expedient to develop general provision on the restitution in kind for non-proprietary losses; the above for each specific case will give the parties possibility to decide themselves which tool or means to use for the restoration of original condition proceeding from mentioned provision and own interests.

Principle of restitution in kind is one of the mechanisms for implementation of restoration function characteristic to the delict law. Mentioned principle, proceeding from its purpose, excludes cash compensation as the mean to satisfy the injured person. In case of restitution in kind, any type of compensation, even cash compensation, is always directed towards the restoration of original condition and not only towards the satisfaction of creditor.

[75] *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.* (Editors), Comments to Civil Code of Georgia, Book Three, Liability Law, General Part, Tbilisi, 2001, 454 (in Georgian).

Nata Sturua*

Disclosure of information causing property harm

1. Introduction

The results of disclosure of harmful information is regulated by the Article 993 of the CC, according to which "a person who intentionally or negligently released or discloses the facts causing property damage to another person, shall reimburse the damages arising out of them, if these facts are clearly wrong". The Part II of the Article 993 of the CC defines the exclusions for reimbursement, in relation with this article interesting is the Article 18 of the CC, according to which the name, honor, dignity, business reputation and privacy of a person. It's interesting what are the different grounds, and what is the legal consequence of the application of these two articles. What is the difference between the good protected under these two articles? To determine this, it is necessary to determine the basics of responsibility of the 18 and 993 Articles of the CC.

The comparison-legal method will be used in order to determine where the border lies between violation of good, protected under personal rights by the Article 18 of the CC and disclosure of harm generating information. The paper discusses the models of settlement by the common law and continental European legal systems, which are compared to the relevant aspects of the legislation of Georgia.

The Article 993 of the CC imposes liability for disclosure of facts causing harm to property, therefore, it is particularly interesting, what is the difference between violation of business reputation and disclosure of facts causing ham to property? How much the Articles 18 and 993 of the CC – complement each other? Must be defined exactly what is deemed to be violation of business reputation and what is property harm generating information. Otherwise, the Article 993 of the CC is useless.

It is interesting, what is meant by right on name and whether the Article 18 of the CC covers liability for any to disclose of the harm generating facts.

It is necessary to establish the freedom of expression, the limits of permissible criticism and to define distribution of what information is allowed by law.

It is important to determine whether it is possible to request compensation of harm as a result of the spread of harmful information after the death of a person.

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In determining the liability for disclosure of harmful information, the Law of Georgia "On freedom of speech and expression" must be considered, which regulates the grounds of protection of the right violated through defamation. Interesting is the difference between defamation, determined by this law and disclosure of harmful information determined by the CC, whether the Article 993 of the CC contains defamation.

The work will consider the grounds for responsibility for disclosure of the information causing property harm based on the legislation and judicial practice of different countries.

The work consists of introduction, main part and conclusion. The first chapter will discuss issues related to disclosure of the information causing material harm, grounds of its origin both in common law and continental European countries.

In the second chapter the difference between disclosure of harmful information and the violation of honor and dignity.

The third chapter includes the difference between bearing of name and disclosure of harmful information.

The fourth chapter is about the difference between disclosure of harmful information and violation of the business reputation on the example of different legal systems.

The fifth chapter defines the limits of disclosure of harmful information and permissible criticism.

The sixth chapter is devoted to preconditions for liability for the disclosure of harmful information after the death.

The conclusion provides a set of problem solutions, how necessary is separate regulation of the issue under the Article 993 of the CC, whether the Article 18 of the CC includes it and what legal consequences are caused by each of them.

2. Disclosure of harmful information, as the base for liability

The legal consequences of disclosure of harmful information are set by the Article 993 of the CC, defines the grounds for responsibility. In addition, the Article 18 of the CC protects against violation of the basic human rights, which provides for liability without guilt.

Thus, for protection of the violated right in case of disclosure of wrong information, there are the Article 993 of the CC, the Article 18 of the CC and the Article 992, which regulates the delict obligations in general. The legal grounds in each case are different, the legislator under the Article 993 of the CC determined as disclosure of harmful information as the precondition and under the Article 18 of the CC business reputation, name, dignity and honor are protected and in each case there must be the information violating the mentioned right, if confirmation of the fact causing the property harm is impossible, in such case the violated right may be protected under the Article 18 of the CC or the Article 992 of the CC.

In addition, there is the Law of Georgia "On freedom of speech and expression", the Law of Georgia "On freedom of speech and expression" of which sets liability for disclosure of the essentially false statement of facts, which are damaging to the plaintiff.

2.1. Disclosure of information causing property harm by the common law countries

Disclosure of material harmful information, as well as the type of delict, have emerged in the common law countries by the end of the XVI century.[1] The first case, which was reviewed within the framework of the above-mentioned delict, dealt with the slanderous phrases said during sale of the land.[2]

Disclosure of harmful information was reviewed under the delict of different name, it was called "humiliation of the right"[3], "unfair competition"[4], "defamation of the right"[5], afterwards it was extended to the disclosure of false information not on the property and rights, but on the quality,[6] as a distinguishing mark, and has been called "defamation of activity".[7] For the liability onset the plaintiff should prove[8] that the information was false, and the party had suffered damage.[9]

Over time, it became clear by the contents of cases that "harmful lies" needed other legal grounds. This type of delict is not one of the types of defamation[10] but a separate form of liability for disclosure of information causing harm.[11] The main principle, which was formed as a result of review of cases, is the economic damage, which does not affect the reputation of any person or a property separately.[12]

For the first time, defamation of the right and the quality was united under one delict by John Salmond[13] and was called "harmful lies".[14]

Definition of "harmful lies" in the legal literature of the common law countries is the following: One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss if he intends pecuniary harm by publication of the statement or acts in reckless disregard and does not verify whether the information is correct.[15]

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1 *Prosser W.L.*, Injurious Falsehood: The Basis of Liability, "Columbia Law Review", №3, 1959, 425.

2 Case *Pennyman v. Rabanks* in relation with purchase of the land portion, the defender said the slanderous phrase that was enough to set liability, see: Reports of Cases, The Law Journal Reports for the Year 1837, Edited by Montagu Chambers.

3 Disparagement of Title.

4 Unfair Competition.

5 Slander of Title.

6 *Hayden P.T.,* A Goodly Apple Rotten at the Heart, Commercial Disparagement in Comparative Advertising as Common-Law Tortuous Unfair Competition, "Iowa Law Review", № 67, 1990, 5.

7 Trade Libel.

8 Ib., 427.

9 Pecuniary Loss.

10 Defamation.

11 *Hayden P.T.,* A Goodly Apple Rotten at the Heart, Commercial Disparagement in Comparative Advertising as Common-Law Tortuous Unfair Competition, "Iowa Law Review", №67, 1990, 8.

12 Ib., 426.

13 Sir John Salmond – the judge of the High Court of New Zealand.

14 *Prosser W.L.*, Injurious Falsehood: The Basis of Liability, "Columbia Law Review", №3, 1959, 425.

15 *Wadloww Ch.,* The Law of Passing-off, Unfair Competition by Misrepresentation, London, "Sweet and Maxwell", 2011, 19.

The following preconditions are necessary for imposing liability for disclosure of harmful information: first of all, this is a "malicious lies",[16] when imposing liability for "harmful lies", existence of "malicious lies" was so important that the mentioned delict was known under the "malicious lies"[17] name.[18] It is interesting what is meant by "malicious lies".

"Malicious lies" means desire to harm the other party,[19] but subsequently an approach was developed, according to which the "malicious lies" implies intention and motive.

Another necessary precondition for imposing liability is false information.[20] The important fact is that the plaintiff has to prove the defendant's fault, that's why this delict is not a form of strict liability.[21] In this delict should be a special harm to the plaintiff's activity that distinguishes it from violation of reputation and other delicts.[22]

The most important and the main distinguishing factor of harmful lies from other delicts is the special harm[23] – pecuniary damage.

2.2. Grounds for liability for disclosure of harmful information under the German law

The German delict law consists of three main aspects that are specifically regulated delict, liabilities containing the rules and strict liability cases under various acts.[24]

Paragraph 823 of the Civil Code of Germany establishes the responsibility of the person who intentionally or negligently causes damage to life, body, health, freedom, property or other rights shall be obliged to compensate the damage incurred.[25]

Civil Code of Germany provides for liability for the specific delict situations. These situations are: a threat to someone's reputation; responsibility for the harm caused by the animal; liability for damage caused by fallen building, etc.[26]

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16 Malice.

17 Malicious Falsehood.

18 *Wadloww Ch.,* The Law of Passing-off, Unfair Competition by Misrepresentation, London, "Sweet and Maxwell", 2011, 21.

19 *Prosser W.L.,* Injurious Falsehood: The Basis of Liability, "Columbia Law Review", №3, 1959, 429.

20 *Wade J.W.,* Second Restatement of Torts Completed, "American Bar Association Journal", №65, 1979, 367.

21 One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if: (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity; see: *Langvardt, A.W.,* Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood, "Temple Law Review", №62, 1989, 916.

22 Ib., 20.

23 *Kluwer W.,* Torts, New York, "Aspen Publishers", Law and Business, 2007, 327.

24 *Opoku K*., Delictual Liability in German Law, New-York, "Cambridge University Press", 1972, 232.

25 Civil Code of Germany, Para. 823, Saarbrücken, "Juris", 2005 (in English).

26 *Opoku W.,* Delictual Liability in German Law, New-York, "Cambridge University Press", 1972, 234.

Under the paragraph 824 of the Civil Code of Germany economic interests are protected: "A person who states or publishes lies[27] in order to undermine the reputation of another person, or to harm his income by any means, must compensate the damages arising thereof. If the person spreading information does not know and can not know the information is false, then he is not liable for damages."[28]

Liability for intentional harm due to creating threat for another person's reputation may occur as well under the paragraph 823 of the Civil Code of Germany, liability may arise also under the criminal procedure, if paragraphs 186 and 187 of the Criminal Code are violated, which provide for liability for defamation. Disclosure of false information can also be considered as an action against the moral and liability may arise also arise under the paragraph 826 of the Civil Code of Germany.[29]

Under the paragraph 824 of the Civil Code of Germany disclosure of harmful information is no sufficient legal grounds for liability onset. It is necessary that the statement is relate specifically to the plaintiff's professional and business activities.[30]

The German Federal Court heard the case, where the newspaper article was about the negative aspects of electronic organ. Plaintiff – the firm that produced the electronic organ – argued that the content of the article published the facts causing property harm. The purpose of the article was not specifically to harm the plaintiff's work, moreover, the defendant did not know about the existence of the plaintiff, nor the readers of the newspaper article could connect the plaintiff with the article. The court ruled that there was no connection between the plaintiff and the aim of the article and therefore did not impose obligation of reimbursement to the defendant.[31]

This approach should also be considered in Georgia, it is necessary the disclosed information to be related the to the plaintiff. The aim of disclosure of false information should be causing harm to the plaintiff.

Paragraph 824 of the Civil Code of Germany prohibits disclosure of such information only that is changed by perceptions and is based on the assumption only,[32] but it does not mean that it is forbidden to express own opinions and views.

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27 Contrary to the Truth.
28 *Opoku W.,* Delictual Liability in German Law, New-York, "Cambridge University Press", 1972, 234.
29 Ib., 236.
30 Ib.
31 Ib., 234.
32 Ib., 237.

3. Difference between disclosure of harmful information and violation of human dignity and honor

Human dignity is the inherent human right protected under the Constitution of Georgia. "In accordance with the Article 17 of the Constitution of Georgia, people are assigned rights towards the State in based on the human. The State is obliged to respect human dignity, i. e. respect the people."[33] And protection of honor means the human right not to be presented in the society in an unjust way in a negative light."[34] "Human honor and dignity are protected also under the Article 18 of the CC, accordingly, the Article18 of the CC makes the grounds for the civil legal protection of the honor and dignity.[35] One of the important elements of violation of honor and dignity are false information and injustice. Injustice means that disseminated information about the person not true."[36]

Article 13 of the Law of Georgia "On freedom of speech and expression" provides for civil liability for defamation, the law distinguishes between defamation of private and public entities. Guilt is not a precondition for imposing liability for defamation private person, and for defamation of public entity a person is imposed liability if "defendant knows that the statement is false or acts in reckless disregard that caused a statement containing of essential false fact".

It is interesting to make a distinction between good protected under defamation by the Law of Georgia "On freedom of speech and expression" and honor and dignity protected under the Article 18 of the CC. In both cases, protected is the person's right not to be presented to the society against his will. Person's honor and dignity are broader concepts, out of dignity derive all the other rights, because the dignity, a it was mentioned above, means to be a human being,[37] and defamation in Georgia until 2004 was punishable under the criminal legal order and after the Law of Georgia "On freedom of speech and expression" was passed, it was decriminalized, therefore, there is no limit established within the civil regulation and for violation of individual reputation the Article 18 of the CC is to be used or the Article 13 of the Law. The mentioned requires definition by courts and establishment of strict separation between them.

The main distinguishing mark between disclosure of harmful information and violation of the honor and dignity is the nature of the distributed information, since when disclosure of harmful information the information should include the facts causing property damage and aim at property damage, and when violation of the honor and dignity a person is always being humiliated in the eyes of the society but the aim is not an economic damage.

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33 *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 137 (in Georgian).

34 Ib., 146.

35 Ib.

36 *Langvardt A.W*., Free Speech versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood, "Temple Law Review", №62, 1989, 908.

37 *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 146 (in Georgian).

3.1. Difference between disclosure of harmful information and defamation under the common law

The defamation Act,[38] acts in England, which specifies that defamation is the disclosure both orally and in writing of information prohibited by the law, false and humiliating.[39] Incorrect information must necessarily relate to a person's reputation, which differentiates it from disclosure of harmful information.[40]

For onset of responsibility there shall be the following requirements: namely, the information shall relate to the plaintiff, which means that any external person who will listen or read this information, immediately connects this information with the plaintiff. The information to be harmful, i. e., disclosure of information should cause humiliation of a person in the the society familiar with him, and take away the desire of others to communicate with him.[41] Only disclosure of defamatory information is not sufficient for imposing liability, it is necessary that the information to be false, because the truth may also violate a person's reputation, that will not impose liability.[42]

Before the imposition of liability for defamation, shall be determined whether the disclosed information is within the cope of the law,[43] which implies the following: there are cases provided for by the law where disclosure of information is permitted. There are absolute and qualified privileges. If the scope of the law is abused, in this case, the liability for information disclosure shall onset and the plaintiff will bear the burden of proof that the party went beyond the scope of the limits of the law.[44]

The main distinguishing mark of the named two delicts is the protected good. "Harmful lies" refers to violation of business reputation, which causes economic damage where under the

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38 Work on the Defamation Act in Great Britain started in 1938, but hearing of the Act was postponed due to the World War II and was renewed only in 1948. Passing became possible in 1952. *Todd E.C.,* Statutes, the Defamation Act 1952, "The Modern Law Review", 1953, 198.

39 False information distributed in writing or any physical form is called libel, and information distributed orally – slander.

40 *Langvardt A.W.,* Commercial Falsehood, and the First Amendment: A Proposed Framework, "Minnesota Law Review", №62, 1993, 11.

41 *Langvardt A.W.*, Free Speech versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood, "Temple Law Review", №62, 1989, 908.

42 Ib., 11.

43 Ib., 912.

44 Absolute right means statements on the court processes and Parliamentary sessions, however, statements made there do not use the right of absolute defense. If newspaper article is being prepared, disclosure of information in connection of such issue is permissible if there is a public interest; see: *Langvardt A.W.,* Free Speech versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood, "Temple Law Review", №62, 1989, 912.

delict of defamation only violation of personal reputation is meant. In case of "harmful lies" it is necessary to prove the guilt.[45] In addition, the plaintiff must prove the falsity of disclosed information.[46]

Both delicts are characterized by the fact that the information that applies in a particular society, shall cause to the people around the averse perception of the person's reputation in one case and of the plaintiff's the business reputation in the other case, that effects the economic interests.[47]

In order to determine under which delict should onset liability when disclosure of false information, it is necessary to establish a clear border between economic interest and reputation of a person. There is an assumption, according to which, if disclosure of false information caused harm to the plaintiff's economic activity, it would be better to suit under "harmful lies", and the harm is caused to the plaintiff's reputation, it is better to suit under the delict of defamation, despite the fact that the plaintiff has suffered economic damage as well.[48]

The most important distinguishing mark, due to which it is the most complicated to impose liability for the delict of "harmful lies" is the fact that the plaintiff has to prove special harm.[49] Economic harm is meant under the special harm.

3.2. Difference between disclosure of harmful information and defamation under the German law

General personal rights are protected in Germany by the basic law.[50] The paragraph 823 of the German Civil Code imposes liability for harm caused to life, body, health, freedom, property and other rights.[51] Within this delict, initially, protection of reputation and general and personal rights was not possible, so the separate responsibilities under the other articles were established, such as parts 1 and 2 of the paragraph 253 and the paragraph 847.[52]

Since 1958 the scope of the German Civil Code was extended over the violation of reputation and was explained that personal rights[53] are likely to impose liability for violation of

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45 Malice.

46 *Lada S. P.*, Patents, Trademarks and Related Rights: National and International Protection, Cambridge: "Harvard University Press", 1975, 1699.

47 *Langvard A.W.,* Commercial Falsehood, and the First Amendment: A Proposed Framework, "Minnesota Law Review", №62, 1993, 11.

48 Ib., 14.

49 The European Handbook on Edvertising Law, Edited by Lord Campbell of Alloway and Zahd Yaqub, London, "Cavendish Publishing", 1999, 523.

50 Basic Law of Germany – Grundgesetz, Para. 1 and 2. *Gordley J., Merhen A.T.,* An Introduction to the Comparative Study of Private Law, Cambridge, "Cambridge University Press", 2006, 255.

51 Civil Code of Germany, Para. 823, Saarbrücken, "Juris", 2005.

52 *Gordle J., Merhen A.T.,* An Introduction to the Comparative Study of Private Law, New York, "Cambridge University Press", 2006, 254.

53 Right of Personality.

the personal area, i. e. "other rights" under the first part of the paragraph 823 of the German Civil Code means harm to reputation as well as violation of other basic rights.[54]

Personal rights is a general right, which means that human rights are protected for all unexpected situations. In order to establish liability, it is necessary to be a harm, and the right be violated.[55]

Property harm[56] and non-property harm[57] are differentiated in Germany. The paragraph 823 of the German Civil Code protects a person's reputation when moral harm occurs and in case of property harm the paragraph 824 of the German Civil Code is used.[58]

In Germany criminal liability is established for defamation, the German Criminal Code distinguishes insults, spreading of false information and defamation.[59]

When making the Civil Code of Germany, the legislators wanted criminal responsibility to be imposed for defamation, that is violation of reputation was not considered in the list of rights protected under paragraph 823 of the German Civil Code, but over time, as it was mentioned above, the named article was interpreted in such a way that under the general personal rights violation of reputation is considered as well.[60] Nowadays, in line with the modern requirements, decriminalization of defamation goes across Europe.[61]

Like Germany, libel was regulated by criminal law under the legislation of Georgia, but it was decriminalized in 2004. However, unlike the German Civil Code CCG protects a person's business reputation under the Article 18 - CC as well as of the Article 993 – CC. In Germany harmful information disclosure, is regulated under the paragraph 824 of the German Civil Code that establishes the responsibility of the person who causes harm to another person's income and property by disclosure of false information. Precondition for the mentioned delict is that the defendant must know that the information is false and disseminate such information guilty. If the plaintiff proves that the disclosed information is incorrect, but the defendant proves that he had a legitimate reason to assume that the information is correct, no responsibility will occur.[62]

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54 *Spindler G., Rieckers O.,* Tort Law in Germany, "Kluwer Law International", 2011, 68.

55 *Rogers H.W.V.,* Damages for Non-pecuniary Loss in a Comparative Perspective, London, "Springer London", 2001, 121.

56 Pecuniary Loss.

57 Non-pecuniary.

58 *Rogers W.V.H.*, Damages for Non-pecuniary Loss in a Comparative Perspective, New York, "Springer", 2001, 120.

59 *Gordley J., Merhen A.T.,* An Introduction to the Comparative Study of Private Law, New York, "Cambridge University Press", 2006, 255.

60 Ib., 254.

61 Europe's Parliamentary Assembly on April 27, 2005 issued a document that deals with the issue of decriminalization of defamation, where the benefits of regulation of the issue by civil procedures is provided for better protection of the human rights and protection of the right of freedom of speech and expression. http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc05/edoc10531.htm

62 *Spindler G., Rieckers O.,*Tort Law in Germany, "Kluwer Law International", 2011, 68.

4. Difference between disclosure of harmful information and right on name

The right on name is protected under the Article 18 of the Civil Code of Georgia. However, the Article 17 - CCG is called the "right on name", which provides only for the right to change the name and relations connected with it that does not create a legal basis for the name protection. The Article 18 – CCG, which provides for personal non-property rights, considers the right on name that is identical to the right on name protected under the paragraph 12 of the German Civil Code.[63]

The two cases of protecting the right on name are provided for by the Article 18 of the CCG – when a person is disputed the name and when there is an unauthorized use of his name.

The right of request of termination and denial of action is provided for violation of the right on name.[64]

The Civil Code of Georgia provides for liability without guilt regarding the right on name and in case of guilt – claim for compensation is possible.[65] Under the part 6 of the Article 18 – CCG: "If the violation is caused by the culpable act, a person shall be entitled to claim damages (loss) compensation, reimbursement may be requested as a profit that the offender has received."

Copyright protection may be required for violation of the right on name of course, if the requirements established by the law are met and the name is duly registered.[66]

The Article 993 – CCG establishes the right to claim for compensation of harm as a result of disclosure of harmful information, but this delict protects only disclosure of facts causing property harm, therefore, there must be property damage for liability onset, and where the name is disputed or unlawfully used the right protection is possible regardless of property damage. Therefore, in each specific case disclosure of information causing property harm and violation of the right on name provided for in the Article 18 – CCG must be clearly separated.

The main distinguishing feature is guilt, since the Article 18 – CCG imposes responsibility without guilt, while the legal basis for the Article 993 – CCG is guilt.

4.1. The right on name and disclosure of harmful information under the German law

The right on name is inseparable from a human being from his personality.[67] For violation of the personal rights in Germany legal consequences are provided as a delict, where Human Rights pursuant to German Basic Law are meant.[68] Paragraph 12 of the German Civil Code

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63 *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 142 (in Georgian).

64 Ib., 156.

65 *Smith B.H., Ohly A., Schloetter A.,* Privacy, Property and Personality, Civil Law Perspectives on Commercial Appropriation, New York, "Cambridge University Press", 2005, 109.

66 Ib., 109.

67 *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 142 (in Georgian).

68 *Heiderhoff B., Zmij G.,* Tort Law in Poland, German and Europe, Münich, "European Law Publishers", 2009, 36.

protects the right on name,[69] by which the liability for the violation of the right on name is determined. If it is impossible to regulate the relations under the paragraph 12 of the German Civil Code, then the grounds for liability for violation of general personal rights are applied.[70]

According to the German Civil Code regarding the protection of the right on name, there are two kinds of problems: one, which refers to the use of the name without authorization,[71] and the second – the right to use the name.[72]

The person's name, or a pseudonym, as well as the name legal entity are meant under a name.[73]

The right on name is an absolute right, therefore, when unauthorized usage of a name, or doubt for the right on name, it is not necessary to have harm to the economic interests of a person, which differentiates it from disclosure of harmful information.

In connection with name the Federal Court of Germany found that everyone has the right to choose what kind of perception people have on a person, this means that the person has the right to decide where and how to use his name.[74]

It is possible to claim damages for the violation of the plaintiff's right on name, which occurred as a result of violation of the right to a name, profit received by the defendant's use of the name can also be requested, regardless of whether the plaintiff would have received this profit or not. In addition, the plaintiff has the right to request royalty, for the use of his name. Of course, for requesting of compensation for all the three types of harm, it is necessary that the name is licensed.[75]

In Germany there is the Trade Marks Act, which regulates the issues, connected with the use of name as a trade mark.[76] However, the paragraph 12 of the German Civil Code is much broader and includes both commercial and non-commercial use of name.

4.2. Difference between disclosure of harmful information and use the name of another person in accordance with the common law

Unlike Georgia and Germany, in England there does not exist an established norm for protection of the right on name.[77] Protection of the right on name is implemented through a

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69 *Heiderhoff B., Zmij G.,* Tort Law in Poland, German and Europe, Münich, "European Law Publishers", 2009, 36.

70 Ib.

71 Protection against Misrepresentation.

72 The Right to Anonymity.

73 *Smith B.H., Ohly A., Schloetter A.,* Privacy, Property and Personality, Civil Law Perspectives on Commercial Appropriation, New York, "Cambridge University Press", 2005, 109.

74 Ib., 110.

75 Ib., 110.

76 The Trade Mark Act.

77 *Du Bouly v. Do Bouly*– during the proceedings in England Lord Chelmsford explained that the common law does not establish any special norm in connection with the adoption of a name. If when using the right on

variety of delicts, such as using someone else's name,[78] slander,[79] disclosure of harmful information.[80] Initially the mentioned delicts were referred to under one name, and were called "unfair competition",[81] however currently competition law is the independent legal field in England and is governed by separate norms.[82]

Each delict protects the right on name in a different way. Previous chapters discussed the difference between defamation and disclosure of harmful information; this chapter will discuss a difference or similarity between disclosures of harmful information and use someone else's name.

Rules regulating the use of someone else's name appeared in the 19th century. Initially it was considered as a delict based on lies, later, while hearing a case in the British House of Lords[83] Lord Dipolock[84] explained that the following five prerequisites should be for imposing liability for the use of name of another person: disclosure of incorrect information,[85] by a person related with similar activities among customers or potential customers, which aims to cause harm to the name.[86]

Thus, in England for imposing liability under the delict of use of the name of another person, it is necessary that the offender works in the same field as the affected party.[87] The right on name is protected under the legislation of Georgia despite the fact whether the violator and claimant work in the same field.

In England there is the Trade Marks Act as well,[88] which provides the form and preconditions to be met to register a name as a trade mark. The mentioned Act protects not the name itself, but the name as a commercial object.[89]

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name harm will occur, it will be considered under the appropriate norm, and if the person decides to use the name, which does not correspond with his relatives, the common law does not provide for any such restrictions, see: *Wadloww Ch.,* The Law of Passing-off, Unfair Competition by Misrepresentation, London, "Sweet and Maxwell", 2011, 125.

78 Passing-off.

79 Defamation.

80 Injurious Falsehood.

81 Unfair Competition.

82 *Derclaye E*., The Legal Protection of Database, A Comparative Analysis, Cheltenham, "Edward Elgar Publishing", 2008, 225.

83 House of Lords.

84 Lord Dipolock.

85 Misrepresentation

86 *Wadloww Ch.,* The Law of Passing-off, Unfair Competition by Misrepresentation, London, "Sweet and Maxwell", 2011, 12.

87 *McCulloch v. Lewis A May LTD* – the famous radio anchor is the plaintiff, who used the pseudonym Uncle Mac. His program was very popular in England. The defendant was the wheat-producing company, which has released a new product, and called it Uncle Mac. The plaintiff demanded damages because of the use of his name and his reputation has suffered harm. The Court explained that because the plaintiff and the defendant did not work in the same field, thus the plaintiff, could not demand compensation under the delict of use of the name of another person, because prerequisites for this delict were not satisfied, see: *Beverley-Smith H.,* The Commercial Appropriation of Personality, Cambridge, "Cambridge University Press", 2004, 73.

88 The UK Trade Mark Act 1994, available at: <http://www.legislation.gov.uk/ukpga/1994/26>.

89 *Very R.W.,* Towards a European Unfair Competition Law, A Clash between Legal Families, Utrecht, 2005, 244.

Trade Marks Act shall not restrict the action of the delict of use of the name of other, since a party may lawsuit based on this of whether its right is registered.[90]

There is a similarity between the usage of a name of another person and spread of harmful information, in the case of both delicts against the plaintiff is disclosed information that is harmful, and the information is wrong. However, protected areas are different for each delict.[91]

Despite the fact that prerequisites of violation of the right on name established by the legislation of Georgia are different form the legal grounds for protection of the right on name established in England, the differentiating features between disclosure of harmful information and the right on name in accordance with the laws of Georgia and England are alike. The main distinguishing feature based on the both legal frameworks between disclosure of harmful information and the right on name is the contents of the false information. In Georgia, as well as in England, it is necessary that false information relates to a person's property, business reputation. In England when disclosure of harmful facts there must be "malicious lies", while in Georgia there must be a guilt that is actually identical to a notion of "malicious lies".

There different period of limitation for the use of someone else's name and "harmful lies". Period of limitation for protection of the right, violated by "harmful lies" is one year, while for using of the name of another 6 years established.[92] Periods of limitation are regulated differently in Georgia and England and the Article 128 - CC specifies that the limitation period does not extend to personal non-property rights protection.

5. Difference between disclosure of harmful information and violation of business reputation

It is necessary to explain what is meant by the notion of business reputation protected under the Article 18 – CC; Supreme Court of Georgia by the decision № 3k/376-01 of July 18, 2001 explained that "business reputation means evaluation of a person's professional or other business skills by the society. Profession is a craft, activity, expertise that needs definite preparation, and by which people earn their living, and the business skills that are meant by business reputation, have those who are involved in economic activities. Hence, violation of the business reputation that the Article 18 of the CC provides for, shall be directed to business operations exercised by a person. A person may suffer a material harm due to such violation, i. e. miss the profit, lose a customer, and so on. Therefore, an understanding of the business reputation stipulated by the

90 *Very R.W.,* Towards a European Unfair Competition Law, A Clash between Legal Families, Utrecht, 2005, 244.

91 *Carty H*., An Analyses of the Economic Torts, Second Edition, New-York, "Oxford University Press", 2010, 220.

92 *Wadloww Ch.,* The Law of Passing-off, Unfair Competition by Misrepresentation, London, "Sweet and Maxwell", 2011, 455.

Article 18 – CC shall not be extended neither to political nor public service officials. In connection with official activities of these persons defamation (violation of honor and dignity), may occur but not violation of business reputation.[93]

The decision of the court separated business reputation and violation of honor and dignity, but it is important to separate business reputation protected under the Article 18 – CC and the right, protected under disclosure of harmful information under the Article 993 – CC. To cause economic damage, disclosure of false information shall endanger a person's activity, humiliate him in the eyes of people around, i. e. the damage shall be inflicted to business reputation, which is reflected in the economic situation.

As have been discussed above the paragraph 824 of the German Civil Code, analogy of which is the Article 993 – CC, considers violation of business reputation, and the personal reputation (honor and dignity) is regulated separately by the paragraph 823 of the German Civil Code and libel causes criminal liability. But business reputation is protected only under one paragraph 824. Also in England slander and "harmful lies" are different.

It is clear that the business reputation protected under the Article 99 – CC and the Article 18 – CC are the same, then it is interesting, how much same are grounds for the responsibility.

Unlike disclosure of harmful information, precondition of legal request for violation of business reputation under the Article 18 – CC is not a guilt, but it is also specified that in case of guilty spreading of information it is a possible to claim for compensation, and for spreading of false information without guilt the affected party has the right request to refrain from further spread of false information and to publish information in response.[94]

Thus, the Article 993 – CC and the Article 18 – CC protect a business reputation of a person, but under the Article 993 – CC it is possible to claim compensation without guilt and a precondition for liability under the Article 993 – CC – is guilt. This means that it is always better for the plaintiff not to bear the burden of proof of the defendant's guilt that causes ignoring of the Article 993 – CC.

All the above puts under question the need of existence for the Article 993 – CC, since the same rights are protected under the Article 18 – CC and has a higher standard of protection.

6. Freedom of expression and the limits of permissible criticism

Human freedom, freedom of thought, freedom of information is protected by the Constitution of Georgia, as opposed to the area of protected rights. In this chapter we will discuss freedom of expression as a pretext for imposing liability when disclosure of harmful information. As well as the scope of permissible criticism.

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93 *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 142 (in Georgian).

94 Ib., 150.

The part 2 of the Article 993 – CC determines that the reimbursement obligation does not arise when disclosure of such information, which serves to protect the legal interest. Hence, the limit is established, but this norm needs to be defined.

In the countries of common law the individual cases are established by the law, when there is no liability for disclosure of information. It is explained that liability for disclosure of information is not imposed during the court process, during the investigation procedures are the responsibility of the high-profile information.[95]

In Georgia there is a Supreme Court decision, which clarifies that the scope of criticism of policy makers and public persons are wider than those of normal individuals, but it is necessary to determine who is deemed as a policy maker and whether the defendant is protected by law.[96]

The Law of Georgia "On freedom of speech and expression" establishes limits of absolute and qualified privileges under the subparagraph "a" of the paragraph 2 of the Article 3 of this Law, opinion is absolutely free. According to the Law opinion is: "evaluative judgment, opinions, comments, as well as any form of expression of views, which reflects an attitude to any person, event or subject and does not contain provable or deniable fact."

The Article 15 of the Law of Georgia "On freedom of speech and expression" establishes a qualified privilege for defamation and specifies that: "a person is assigned a qualified privilege for statements containing materially false fact, if:

A) He has taken reasonable steps to verify the accuracy of the facts, but failed to avoid a mistake and took effective measures to restore the reputation damaged by defamation;

B) He intended to protect the legitimate interests of society and the protected good outweighs the caused harm;

C) The statement was made with the consent of the plaintiff;

D) The statement was a proportionate response to the statement made by the plaintiff against him;

E) The statement was a fair and accurate reporting of the event, which is of public interest."

It has not been established by the legislation of Georgia whether the information disclosed during the investigation activities and court hearings has the qualified privilege, which must be necessarily determined and shall be also determined whether it is possible to request reimbursement for considerations expressed in such cases.

The limits of absolute and qualified privilege established by the Law of Georgia "On freedom of speech and expression" cannot be automatically extended in case of disclosure of harmful information, as the Article 13 of the Law stipulates that defamation damages to the plaintiff shall be inflicted, and the disclosed information determine by the CC Article 993 causes property harm and relates to business reputation. It becomes clear that there is an essential difference between

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[95] *Wadloww Ch.,* The Law of Passing-off, Unfair Competition by Misrepresentation, London, "Sweet and Maxwell", 2011, 457.

[96] *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tbilisi, 2009, 155 (in Georgian).

defamation and disclosure of harmful information; different goods are protected under each article. But in the case of defamation, the court may apply the privilege norms established for defamation for case of disclosure of harmful information as well, via interpretation.

7. Protection of rights after the death

It is defined under the Article 19, CC that the right on name and personal dignity is protected after the death of a person. Is it possible to make a request for harm resulting from disclosure of harmful information after the death of a person?

The Article 19 – CC establishes that a person who, although is not the right bearer, but still has an interest worthy of protection, has the right to protection the violated right. Property damage compensation after the death of a person is inadmissible; accordingly, compensation of harm for disclosure of harmful information shall not be requested after the death of a person, since the main legal ground for this delict is property damage and it compensation.

In the common law countries compensation for defamation shall not be requested after the death of a person.[97]

Under the paragraph 4 of the Article 6 of the Law of Georgia "On freedom of speech and expression" the dead person's moral rights protection is inadmissible, this statute is vague comes into conflict with the Article 19 of the v, which provides that protection of dignity is possible after the death. It is necessary to determine what rights are protected under defamation, because if there is no separation between the rights protected under Article 13 of the CC and the rights protected under the Article 18, it is difficult to define the scope of law.

It is interesting to determine the limitation period. Under CC - the Article 128 is clarified that the limitation period does not extend to personal non-property rights, but disclosure of the harmful information is many in the mentioned part. The limitation period defined under the Against 128 of the CC acts in this regard. Under the Law "On freedom of speech and expression" is established that a claim of defamation must be brought to court by a person within 100 days after seeing or could have seen the adverse information distributed.

8. Conclusion

In order do refine the use of the norm for harmful information, it is necessary to determine the difference between the legal grounds for general personal rights protection and the legal grounds for disclosure of harmful information. Legal grounds for business reputation, the right on name and defamation shall be determined and clearly separated based on the court practice.

[97] *Wadloww Ch.,* The Law of Passing-off, Unfair Competition by Misrepresentation, London, "Sweet and Maxwell", 2011, 455.

It is necessary to set a common definition of harmful material facts, which must be separated from the reputation of a person and activities, because in both cases, harm is caused to reputation, but in on case to a personal reputation, and in the other case to activity. However, person is often equalized with activities and in such cases the main distinguishing attributes must be pronounced.

It is necessary to take into consideration the media-related issues in order to define a defendant. In accordance with paragraph 2 of the Article 6 of the Law "On freedom of speech and expression", in court disputes on the defamation published by a journalist in the media means, defendant is the media owner. With respect to this paragraph, shall be taken into account that the expression is an absolute privilege and in each particular case it must be evaluated whether statutory framework was kept, or despite the privilege the rights of others are still violated. It should also be noted that a journalist, who just technically provides distribution of the statement, is deemed to be an inappropriate defendant.

The Law of Georgia "On freedom of speech and expression" is similar to the legal settlement of delicts of defamation in the countries of common law and gives a person a qualified privilege when distribution of false facts. May be indicated when disclosure of harmful taking into account the preconditions of delict.

It is necessary to define the limits of permissible criticism, to determine what is meant by the public interest, the limits for eligibility of the information must be carefully defined by the law. In each case, the court must evaluate importance of the protected information and the protected good within the established frames.

The main thing to be determined is the relation between the Article 18 and the Article 993 of the CC, because, as it was mentioned above, with the use of comparison-legal method, it became impossible to determine difference between them; neither the German nor the English legal base is not familiar with the regulation of business reputation by various rules, only the right to protect honor and dignity, which is called defamation is different, protection of the right on name and other rights is different, but the rule of request for damages arising as a result of violation of business reputation is determined by a separate delict.

According to current law, if the violation meets the preconditions specified in Article 18 of the CC, it is better to launch the claim on the mentioned legal grounds, because the legal grounds provided by the Article 993 of the CC are very difficult to prove.

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Salome Kerashvili[**]

Mergers & Acquisitions
(Legal Foundations)

1. Introduction

In the environment of economic globalization and technological progress[1] domestic and international transactions of enterprises acquire increasing economic significance. It is conditioned by the circumstance that in the segments of extensive competition, where rapid growth of the value of enterprise is the hardest task, the management of each company tries to achieve the strategic goal – maximization of profit – by drawing up diverse portfolio of production, which implies diversification of production, and, at the same time, creation of synergetic effects with other enterprises. Besides, motivation of taking over the enterprise of conditioned by the wish of investment of free capital in profitable business and thus receiving quick rendit on the part of liquid strategic investors.

Increase of the value of enterprise is the guideline and complex challenge for the management,[2] and central economic aim for the investor. As a rule, this goal is achieved in two ways: 1. endogenic development of production: when the enterprise develops products and widens qualitative and geographic area of market with its own forces, which requires great efforts and, besides, represents the process, extended in time; and 2. though takeover, acquisition of the enterprise, represented in the same or similar segment or creation of strategic alliance with it, which means more risk in less time and, consequently, opportunity of rapid increase of rendit.[3] As terminological aggregate for the second method, we can use English legal-economic notion *Mergers & Acquisitions* (hereinafter - *M & A)*, established in the practice.

The purpose of this article if to define legal framework of *M & A,* i.e. acquisition, merger of enterprises and forms of cooperation between enterprises. For the purpose of orientation in complex

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1 About New Economic Trends, see: *Grant R. M.*, Strategisches Management, München, "Pearson Studium", 2006, 639-665.

2 *Busse W.*, Was ist und was bedeutet Shareholder Value aus betriebswirtschaftlicher Sicht? "ZGR",1997, 271-290.

3 Compare: *Picot G.*, Handbuch Mergers & Acquisitions, Stuttgart, "Schäffer-Poeschel", 2000, 10.

problems of transaction of enterprises definition of general legal bases is necessary. *M & A* doesn't represent codified, homogenous sphere of law. Consequently, there is no legal standard and its fragmented regulation is scattered in national and international business law and customary law established in international circulation. All forms of transaction of enterprises are impossible in the format of the article. So we will touch only its basic forms: acquisition of enterprises and takeover of enterprises on capital market. We will also touch typical procedural standards of *M & A*, established in international practice.

2. Definition of Basic Terms

2.1 Enterprise

The notion of enterprise, used here represents synthesis of legal and economic definition of an enterprise. It, for lawyers, enterprise is an organizational-legal entity, which creates functional and institutional unity and is accommodated within the limits of organizational law,[4] the economists consider an enterprise as the part of economic unity, which is managed by the entrepreneur at his/ her own expense and at the expense of certain entrepreneurial risk.

Following the above mentioned, an enterprise may be defined as the unity of assets, rights, experience, entrepreneurial actions and relations, accommodated within organizational-legal limits.[5]

2.2. Mergers & Acquisition

Mergers & Acquisition is the international term, established in business language and its analogue in Georgian language would be amalgamation of enterprises, i.e. their merging (*merger*) and acquisition, i.e. takeover of enterprises (*acquisition*) using various private law instruments. Definition, used in this article, implies the process and forms of transaction of enterprises, in particular:

- purchase and sale of enterprises;
- amalgamation and division of enterprises;
- change of organizational form of enterprises and other type of reorganization;
- contractual alliances and cooperation of enterprises;
- takeover of shares on stock exchange;
- methods and forms of funding of transactions of enterprises, i.e. the above mentioned processes.[6]

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4 BGHZ 74, 359, 364.

5 Compare: *Picot G.*, Handbuch Mergers & Acquisitions, Stuttgart, "Schäffer-Poeschel", 2000, 15.

6 Compare: Ib.

2.3. Asset Deal & Share Deal

Purchase of an enterprise is a private-law act and in implemented through the purchase contract. Two forms of purchase of an enterprise shall be delimited: 1. Asset-based acquisition of an enterprise (*asset deal)* and right-based acquisition of an enterprise (*share deal*).[7] In the first case the stakeholder buys all the balance assent, and in the second case the subject of purchase contract is the share of the target enterprise, i.e. the security, which represents the right f participation in the enterprise.

2.4. Due Diligence

The notion of *Du Diligence* (hereinafter – *DD),* emerged in Anglo-Saxon law systems, in particular, in legal bosom of US capital market, expresses inspection of the target enterprise based on due diligence principle, established in legal and economic circulation.[8] Inspection implies system analysis of legal, economic and technical parameters of an enterprise.[9]

2.5 Takeover

Takeover is acquisition of controlling block of shares of the company on stock exchange of securities, where stock trade has public and organized nature.[10] The pre-requisite of takeover of a company on open capital market is, certainly, placement of the shares of target enterprise on stock exchange of securities (*initial public offering/going public*).

3. Historical Origins and Actual Statistics

Development of modern-type corporate law started in the second half of the 19th century. There is direct connection between this phenomenon and economic concentration processes initiated in the same period – institutional perfection of stock and capital market law allowed entrepreneurial groups to obtain share packages through capital market or alienate them.[11] This method allowed creation of bog alliances, which were able to implement ambitious technological projects and control markets.[12]

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7 *Beck R., Klar M.*, Asset Deal vs. Share Deal – Eine Gesamtbetrachtung unter expliziter Berücksichtigung des Risikoaspekts, "DB", 2007, 2819.

8 *Hemeling P.*, Gesellschaftsrechtliche Fragen der Due Diligence beim Unternehmenskauf, "ZHR", 2005, 169, 274.

9 *Beisel D., Klumpp H.H.*, Der Unternehmenskauf, München, "Beck", 2009, II, Rn.1 f.

10 Compare: *Grunewald B., Schlitt M.*, Einführung in das Kapitalmarktrecht, München, "Beck", 2007, § 17, 339; *Wymeersch E.*, Übernahmeangebote und Pflichtangebote, "ZGR", 2002, 520-521.

11 *Reichert J.*, Die neue Vielfalt. Grenzüberschreitende Unternehmenszusammenführungen in der Praxis: Motive und Modelle 1998 – 2008, in: Festschrift für Uwe Hüffer zum 70. Geburtstag, *Kindler P., Koch J., Ulmer P., Winter M.* (Hrsg.), München, "Beck", 2010, 805.

12 *Horn N.*, Aktienrechtliche Unternehmensorganisationen in der Hochindustrialisierung (1860-1920). Deutschland, England, Frankreich und die USA im Vergleich, in: Recht und Entwicklung der Großun-

The first type of synergetic alliance between enterprises is connected with legal institution of American trust (*Trust*). Rockefeller's Standard Oil Trust was established in 1882 in this form. The mentioned trust represented amalgamation of several oil companies; the shareholder of these companies handed over the packages of shares to the Board of the Trust for management, in return to which they received trust certificates. Later other American companies imitated this model. But it wasn't the only model of *M & A*.[13] American courts, noticing dissonance between the amalgamation of enterprises in the form of trust and traditional *ultra-vires*-theory (which is the principle, establishes in Anglo-Saxon corporate law and limits the freedom of management action for the purpose of the enterprise, fixed in the statute), facilitate the change of paradigm. American legislation undertook to regulate strategic alliances of enterprises demanded in the practice: in particular, it developed legislative regulation of holding of companies.[14]

Different approach towards the form of alliances of enterprises was formed in European legal cultures. In England the practice of takeover of enterprises on capital market was more developed, which is proven by *City Code on Takeovers and Mergers*[15], adopted in 1968. In Germany this method wasn't very popular till 2000. In Germany, unlike England, the institution of merger was conjunctural and the Law on Shares of 1937 provided for it too. Out of big transaction performed in Germany based on amalgamation method, the merger between Hypobank and Vereinsbank, performed in 90-ies of the last century, shall be mentioned, as a result of which HypoVereinsbank was formed, and merger of Veba and Viag formed one of the biggest companies – E.ON.[16]

The differences between national styles of regulation were making it more difficult to create transnational alliances of enterprises, but, at the same time, stimulated creative solutions achieved through bypass methods. Thus simulated synthesis of companies was created. Companies of different countries were unifying on contractual bases so that their legal identity and independence wasn't lost. But management of connected enterprises was carried out in coordinated manner. Obvious case of the mentioned model is the alliance of Dutch Royal Dutch Petroleum Company with British Shell Transport and Trading Company, created in early 20th century. Although the companies failed to agree on uniform model of corporate management, they found solution in the

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ternehmen im 19. und frühen 20. Jahrhundert, *Horn N., Kocka J.* (Hrsg.), Göttingen, "Vandenhoeck-Ruprecht", 1979, 171.

13 *Lamoreaux N. R.*, The Great Merger Movement in American Business 1895-1904, New York, "Cambridge University Press", 1985, 1.

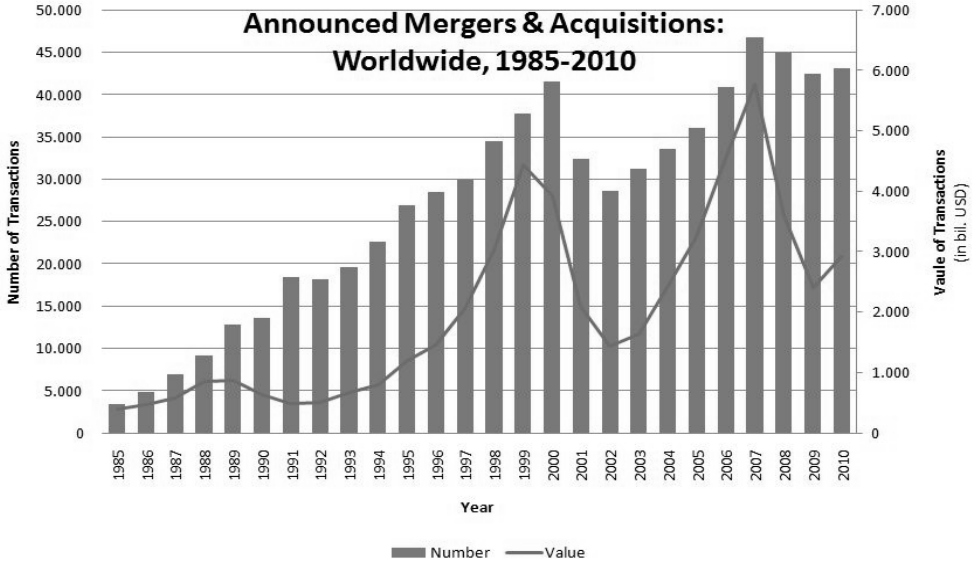
14 *Horn N.*, Aktienrechtliche Unternehmensorganisationen in der Hochindustrialisierung (1860-1920). Deutschland, England, Frankreich und die USA im Vergleich, in: Recht und Entwicklung der Großunternehmen im 19. und frühen 20. Jahrhundert, *Horn N., Kocka J.* (Hrsg.), Göttingen, "Vandenhoeck-Ruprecht", 1979, 172.

15 *Komo D.*, Grenzüberschreitende Zusammenschlüsse britischer und deutscher Unternehmen, Frankfurt a. M., "Peter Lang", 2008, 29-32.

16 *Reichert R.*, Die neue Vielfalt. Grenzüberschreitende Unternehmenszusammenführungen in der Praxis: Motive und Modelle 1998 – 2008, in: Festschrift für Uwe Hüffer zum 70. Geburtstag, *Kindler P., Koch J., Ulmer P., Winter M.* (Hrsg.), München, "Beck", 2010, 806.

so-called "combined group's structure."[17] "Marriage" of Royal Dutch/Shell in the form lasted for almost 100 years (1907-2005).

Unification of European law, which started in 90-ies of the 20th century, made it possible to form uniform standard of acquisition and merger of companies. The relevant legal instruments were improved in three directions: 1. European Directive on Takeover of Enterprises was adopted[18], 2. European Directives on Merger of Joint Stock Companies[19] and amalgamation of Capital Companies Established in Different Member Countries[20] were created, 3. common European organizational- legal form – European joint stock company (*Societas Europaea*)[21] was formed. Consequently, the realization of transnational cooperation of companies was facilitated from legal-technical view, which was caused by colossal demand emerged in economic practice in regard to this phenomena since 80-ies of the 20th century. The following graph[22] reflects the dynamics of development and total value of international alliances of enterprises from 1985 to 2010.



[17] *Komo D.*, Grenzüberschreitende Zusammenschlüsse britischer und deutscher Unternehmen, Frankfurt a. M., "Peter Lang", 2008, 6.

[18] Richtlinie 2004/25/EG des Europäischen Parlaments und des Rates vom 21. April 2004 betreffend Über-ahmeangebote, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:142:0012:023:DE:PDF>.

[19] Richtlinie 2011/35/EU des Europäischen Parlaments und des Rates vom 5. April 2011 über die Verschmelzung von Aktiengesellschaften, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:110:0001: 0011:de:PDF>.

[20] Richtlinie 2005/56/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 über die Verschmelzung von Kapitalgesellschaften aus verschiedenen Mitgliedstaaten, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:310:0001:0009:de:PDF>.

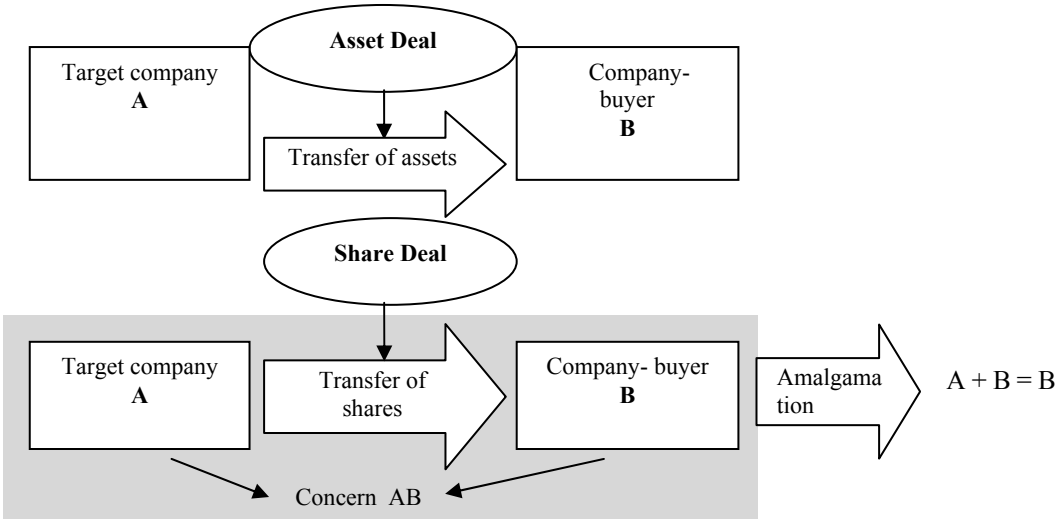
[21] Verordnung (EG) Nr. 2157/2001 des Rates vom 8. Oktober 2001 über das Status der Europäischen Gesellschaft (SE), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=ONSLEG:001R2157:0070101:de:PDF>.

[22] <http://www.imaa-institute.org/statistics-mergers-acquisitions.html#TopMergersAcquisitions_Worldwide>.

4. Forms of Acquisition of Enterprises – *Asset Deal vs. Share Deal*

The parties to transaction shall agree on the form of transaction. We have to distinguish two forms of transaction: *Asset Deal* and *Share Deal*. *Asset Deal* implies asset-based acquisition of an enterprise, and *Share Deal* means share-based, i.e. rights-based acquisition of an enterprise.[23] From functional standpoint both forms serve to the same goal – acquisition of the target company, although their economic, legal and fiscal results are radically different.[24]

The first distinguishing feature between these two forms of transaction relates to the identity of the parties. If, in the case of assets-based acquisition (*Asset Deal*), the target company acts as the party to purchase contract (seller), in the case of rights-based acquisition (*Share Deal*) the seller is the share-holder of the target company, if, certainly, the target company itself doesn't alienate its own shares.[25] Consequently, final structure of this dualist form is different from the buyer's standpoint: as a result of assets- based acquisition of an enterprise the assets owned by the target company transfer to the ownership of the company-buyer so that the target company itself doesn't lose legal identity, and purchase of its shares may lead to its liquidation, if the buyer buys strategic majority of shares and performs liquidation of the acquired company through additional corporate law instrument – merger of companies. In the case of *Share Deal* the property-related structure of the target company, by alienation of its share, remains the same and it is still the owner of the property and independent legal entity without changing the identity. Only personal composition of the shareholders of the target company is changed.



[23] *Knott H.*, Unternehmenskauf nach der Schuldrechtsreform, "NZG", 2002, 249; *Schröcker S.*, Unternehmenskauf und Anteilskauf nach der Schuldrechtsreform, "ZGR", 2002, 63, 65.

[24] *Beck R., Klar M.*, Asset Deal vs. Share Deal – Eine Gesamtbetrachtung unter expliziter Berücksichtigung des Risikoaspekts, "DB", 2007, 2819.

[25] Ib.

From the legal viewpoint, in both cases we deal with the purchase contract in accordance with pp. 1 and 2 of the Article 477 of the Civil Code of Georgia (CC). But it's necessary to delimit the forms of transactions from financial standpoint. The Law (CC, Article 477) formally equalizes purchase of asset and right, doesn't indicate to difference even implicitly, but in practice great importance is attached to differentiation between the purchase of assets and right. In the case of asset-based purchase of an enterprise, transfer of property is performed through singular succession (Singularsukzession)[26]: each asset included in the property is handed over to the buyer into ownership individually. And share-based purchase of an enterprise is performed by the method of universal succession, e.g. the share of an enterprise is a homogenous good. If, in the case of *Asset Deal*, following the buyer's interests, market value of each asset is determined individually, in the case of *Share Deal* there is no need of performance of similar operation for determination of the value of share.

In this direction, in the environment of scarcity of cautelar practice[27] and judicial law administration, the main topic of discussion for Georgian lawyers working in the sphere of *M & A* shall become looking for mechanisms of effective elimination of the results of non-fulfillment, improper fulfillment or violation of purchase contract of an enterprise, as, following the volume of and complexity of transactions, two-sided restitution is unimaginable difficult. So there is no alternative for reasonably compiled contractual reservations, individual guarantees and detailed inspection of the target enterprise prior to performance of transaction.

5. Standard Process of Mergers & Acquisition

Modern procedural standards of *M & AI* were formed and developed in the United States. They are not characterized by certain dogmatic framework and don't represent the product of the theory of law and economy. Practice of *M & A* is as diverse as the preferences, interests and motives of the target and buyer companies. But *M & A*, like any other planned process, is subject to certain methodical logic. Based on the above mentioned, three main phases of *M & A* process shall be distinguished: 1. planning, 2. performance, 3. implementation and integration.[28] The following Table[29] reflects the mentioned three procedural stages *M & A.* :

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[26] *Schröcker S.*, Unternehmenskauf und Anteilskauf nach der Schuldrechtsreform, "ZGR", 2005, 63, 65; *Beck R., Klar M.*, Asset Deal vs. Share Deal – Eine Gesamtbetrachtung unter expliziter Berücksichtigung des Risikoaspekts, "DB", 2007, 2819.

[27] In cautelar practice (Lat. *cautela iurisprudentia*) we mean praqtical activities of lawyers, the aim of which is prediction of eventual legal problem in practice and its preventive avoidance. In this sense, notary's and lawyer's activities, in particular, configuration of the terms of contracts, is cautelar practice. See: *Hartmann K. D.*, Einflüsse und Aufgaben der Kautelarjurisprudenz im Recht der Personengesellschaften, "DnotZ", 1989, 63.

[28] *Picot G.*, Unternehmenskauf und Restruktuierung, Teil I (Vertragsrecht), München, "Beck", 2004, Rn. 11 ff.

[29] Compare: *Picot G.*, Handbuch Mergers & Acquisitions, Stuttgart, "Schäffer-Poeschel", 2000, 21.

Process of transaction

1sh stage: planning of Mergers & Acquisition

Understanding of the need of transaction by the company-buyer; selection of the target company; strategic planning of transaction – optimization of economic and legal techniques

↓

2nd stage: performance of Mergers & Acquisition

Starting of negotiations – classifying of information
Protocol of negotiations
Preliminary agreement – Letter of Intent
Preliminary contract
Auditing of the target enterprise
Assessment of the target enterprise
Preparation of the basic purchase contract
Conclusion of contract
Closing of transaction

↓

3rd stage: implementation and post-merger integration

Final structure of transaction
Modification in Entrepreneur's Register
Final Inspection
Integration

5.1 Preparation of Transaction

The pre-requisite for acquisition of company is the understanding of the need of which step by the company and legal and economic preparation of the transaction. For this purpose the assistance of advisors[30], investment banks[31], auditors and tax inspectors, working in this sphere is required.

Optimization of transaction on the stage of planning includes analysis of feasibility of transaction (*Feasibility Study*). In the case of positive outcome of analysis (*Fairness Opinion*), the authorized bodies of the interested company shall make decision on beginning of transaction.[32] The structure of transaction shall be decided on this stage – choice shall be made between either share-based or asset-based acquisition of the target company.

From the position of the target company, realization of *Dual Track* process is possible, i.e. the company can be alienated to the investor directly and/or the shares of the company can be placed on stock exchange of shares (*Initial Public Offering*)[33].

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30 *Ek R., von Hoyenberg P.*, Unternehmenskauf und –verkauf, München, "Deutscher Taschenbuch Verlag", 2007, 9 ff.

31 Citygroup, Credit Suisse, DB Consult, Deutsche Bank, Dresdner Kleinwort, Close Brothers, Equinet, Goldman Sachs, Günther & Partner, HSBC, JP Morgan, Merrill Lynch, M & A International, Metzler, Morgan Stanley, Rothschild, UBS etc.

32 *Gran A.,* Abläufe bei Mergers & Acquisitions, "NJW", 2008, 1409.

33 Ib..

Choice is possible to be made between individual and auction procedures of alienation.[34] Selection of auction procedure by the seller may be more profitable for him/ her following psychological influence of auction on the buyer, as, in the phase of performance of transaction, as a result of competitive biddings, the price of the target company may dynamically rise. But, on the other hand, planning of auction incurs bureaucratic expenses and leads to protraction of transaction.[35]

5.2. The Letter of Intent (Letter of Intent/Memorandum of Understanding)

5.2.1 Notion

The activities performed by the interested companies for preparation of transaction are followed by the stage of contractual negotiations between the parties. On this stage each party tries to achieve the desired contractual condition, i.e. reflection of the set goal in the contract and preventive neutralization of risks.[36]

In *M & A* practice, due to complexity and risky nature of transaction, concluding of the Memorandum of Understanding or the Letter of Intern became mandatory tradition (*Letter of Intent/Memorandum of Understanding*)[37]. Preliminary agreement stresses the first approach of parties in the process of negotiations and aims at acceleration of bringing of contractual negotiations process to positive outcome and strengthening of mutual trust between the parties[38], as well as minimization of risks in the case of failure of transaction.

The institution of the *Letter of Intent* (*LoI*) is the product of Anglo-Saxon legal space, and, due to structural diversity, it doesn't fall under uniform legal definition.[39] From the formal and material point of view, the letter of intent in the wish and intent, expressed by the parties, that in the future they are going to conclude the contract of purchase of company.[40]

Based on the multiplicity of the expressed will, preliminary agreement can be differentiated in to unilateral and bilateral; agreement[41]. Unilateral agreement in the will, expressed by one party, as a

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34 *Knott H. J., Mielke W.*, Unternehmenskauf, 2. Aufl., Köln, "RWS", 2006, 97 f.
35 *Gran A.*, Abläufe bei Mergers & Acquisitions, "NJW", 2008, 1410.
36 Compare: *Junker A., Kamanabrou S.*, Vertragsgestaltung, München, "Beck", 2007, 4 ff.
37 *Rödder T., Hötzel O., Mueller-Thuns T.*, Unternehmenskauf, München, "Beck", 2003, § 3, Rn. 13; *Holzapfel H.J., Pöllath R.*, Unternehmenskauf in Recht und Praxis, Köln, "RWS", 2003, Rn. 7.
38 *Hölters W., Semler F.J.*, Handbuch des Unternehmens- und Beteiligungskauf, Köln, "Otto Schmidt", 2002, VI Kapitel, Rn. 20.
39 *Picot G.*, Handbuch Mergers & Acquisitions, Stuttgart, "Schäffer-Poeschel", 2000, 93; *Blaurock U.*, Der Letter of Intent, "ZHR", 1983, 334.
40 *Beisel D., Klumpp H.H.*, Der Unternehmenskauf, München, "Beck", 2009, I Kapitel, Rn. 67.
41 *Holzapfel H.J., Pöllath R.*, Unternehmenskauf in Recht und Praxis, Köln, "RWS", 2003, Rn. 7a.

rule - company- buyer on acquisition of the target company. Such unilateral "agreements" are atypical for practice – it can't provide purposeful effect, characteristic for the document of this type and is limited only by symbolic nature. And bilateral preliminary agreement is the manifestation of coinciding will of the parties. It, conditionally, could be referred to as "the real letter of intent".

Based on the content, *LoI* can be divided into two basic groups – "soft" and "hard" letters of intent[42]. Demarcation line between them lies in material- legal level of reservations: if the "soft" letter of intent represents only the exchange of good wishes and provides for eventual possibility of signing the basic agreement, "hard" letter of intent includes number of specific reservations, setting action imperatives to the parties.

5.2.2 Legal Nature of the Letter of Intent

The letter of intent, as a rule, doesn't have legally binding nature.[43] Here it shall be delimited from preliminary contract. Preliminary contract provides for obligatory contractual relations according to the Article 319 and following articles of the CC. Here the subject of obligation is not represented by substantial conditions which shall be agreed upon in the basic contract, but by preliminary contract the parties undertake to conclude the basic contract in the future. In short, preliminary contract provides for the obligation of concluding the basic contract.

Unlike preliminary contract the institution of the *LoI*, established in the international practice of purchase of enterprises, is not a contractual- legal document of binding nature. Although it indicates to emergence of obliging relations, it doesn't refer to contractual relations provided by the first sentence of p.1 of the Article 317 of the CC, rather, signing of the *LoI* indicates to the emergence of the number of non-contractual obligations, which, following p.2 of the Article 317 of the CC, could emerge on the stage of preparation of contract (including *culpa in contrahendo*). It implies, firstly, the obligation of due diligence in regard to the property and rights provided by p.2 of the Article 316 of the CC, the obligation of reimbursement of resultless expenses mentioned in p.3 of the Article 317 of the CC and the obligation of issuing of information provided by the Article 318. Nevertheless, emergence of the listed obliging-legal relations doesn't depend on signing of the *LoI* by the parties: obliging relations emerged in the phase of preparation of contract come into force from the moment of beginning of contractual negotiations by ipso jure parties.

Then what is the *LoI*? – The *LoI* is a legal instrument of hybrid nature. Only based on the fact that it represents the declaration of the intents of the parties in the future, we can't conclude

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42 *Pöllath R.*, Steuerliches Vertrags- und Formularbuch, München, "Beck", 2003, B.21.03, Rn. 5 f.

43 *Gran A.*, Abläufe bei Mergers & Acquisitions, "NJW", 2008, 1409, 1410.

that the *LoI* never contains any binding contractual reservations.[44] Provision of individual legally obliging reservations is possible in the Letter of Intent. And their identification is possible through the definition of the relevant reservation in analogue with the Article 337 and the following articles of the CC.[45]

5.2.3 The Content of Preliminary Agreement (Letter of Intent)

The agreement, primarily, contains the buyer's intent to purchase the specific target company through assed-based or share- based acquisition. And the target enterprise expresses the desire to hold the relevant negotiations with the interested party[46]. In addition to this fundamental element, *LoI* specifies the procedure of transaction. In this aspect, transfer window may be agreed. i.e. the period may be specified, within which the negotiation process will be completed and the basic contract will be concluded[47]. The volume and the quality of the information to be provided to the buyer shall be specified in details. Specification of legally binding provision on classification of information, as confidential – the parties shall undertake that they will not disclose the confidential information in the future and will not use it to cause damage to the other party. The contract on classification of information, as a rule, is concluded by the parties separately, but it can also be integrated into the Letter of Intent.[48]

Besides, the issues related to fair competition may ne regulated in details, applicable law, judicial jurisdiction can be chosen or private arbitrage can be agreed upon in the framework of the Letter of Intent. It's also desirable to agree upon the terms of inspection of the target enterprise and price setting procedures (*due diligence).*[49]

As we can see, content-based structure of the *LoI* can be formulated the way that legally binding provisions make the major part of the document. Although the *LoI,* as a rule, doesn't raise the obligation of concluding of the basic contract.

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44 *Kösters F.*, Letter of Intent – Erscheinungsformen und Gestaltungshinweise, "NZG", 1999, 623.

45 Compare: OLG Köln, OLG Report, Köln, 1994, 61.

46 *Pöllath R.*, Steuerliches Vertrags- und Formularbuch, München, "Beck", 2001, B.21.03., 1115.

47 *Bergjan R.*, Die Haftung aus culpa in contrahendo beim Letter of Intent nach neuem Schuldrecht, "ZIP", 2004, 395 ff.

48 *Hölters W., Semler F.J.*, Handbuch des Unternehmens- und Beteiligungskauf, Köln, "Otto Schmidt", 2002, I Kapitel, Rn. 126.

49 *Werner R.*, Haftungsrisiken bei Unternehmensakquisitionen: die Pflicht des Vorstands zur Due Diligence, "ZIP", 2000, 989; *Fleischer H.*, *Körber T.*, Due Diligence und Gewährleistung beim Unternehmenskauf, "BB", 2001, 841.

5.2.4 Agreement on *Break-up Fee* in the Letter of Intent

Negotiations between companies often finish without success. It is not surprising following the different interests of the parties to transaction and the existing risks. For achievement of final agreement, complex transaction requires overcoming of many barriers. And "failure to agree" is expensive.[50] So the parties include the agreement on compensation of damage caused by the failure of transaction in the Letter of Intent.

On the stage of preparation of transaction the interested company, in particular the target company, shall understand, that number of measures shall be taken for successful completion of transaction on the stage of negotiations, which involves substantial expenses.[51]

Following the above stated, usually the target company requests to agree upon the break-up fee in the case of failure of the purchase contract. Nevertheless, company- buyer also has to bear certain expenses (e.g. for inspection of the company). It's logical that in practice both companies agree upon the amount of compensation and terms of payment in the case of unsuccessful completion of the preparatory phase of transaction.[52] In short, the *break-up fee*[53] is not the form of guarantee following from the purchase contract, but it represents special reservation for the case if one party terminates negotiations or the transaction fails for some other reason.

The pre-requisite of payment of compensation can be failure of transaction by one of the parties, or emergence of some interfering circumstance, occurring independently from the will of the parties (e.g. the basic contract wasn't concluded in the agreed time frame). The parties may agree on other pre-requisites (*trigger events)* of *break-up fee*. It's desirable to accurately define these trigger events in order to simplify the procedure of claiming compensation and shorten eventual periods of eventual dispute.

Agreement upon *Break-up fee* serves for two basic purposes: 1. it protects the parties' property interests and minimizes financial risk factor in preparatory phase of transaction and 2. promising of compensation of damage and expenses pushed the parties towards successful completion of transaction: the parties will try to avoid resultless expense through concluding of the basic contract.[54]

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[50] E.g. Barclays-Bank demanded from ABN-Amro Bank the compensation of 200 mln EURO for broken transaction. In practice even bigger amounts occur: Werner Lambert (1,8 bln USD), Hewlett-Packard (675 mln USD), Hilton Hotels (560 mln USD) and Unocal Corp. (500 mln USD) have agreed on much higher compensations.

[51] *Hilgard M.C.*, Cash-free/Debt-free-Klauseln beim Unternehmenskauf, "DB", 2007, 559.

[52] In details see: *Hilgard M.C.*, Break-up Fees beim Unternehmenskauf, "BB", 2008, 286 ff.

[53] Similar terms are: Brocken Deal Fee, Cancellation Fee, Termination Fee, Inducement Fee, Failed Cost Agreement, Deal Protection Fee, Failure Costs Agreement, Bust-up Fee, Finders´ Fee etc.

[54] *Hilgard M.C.*, Break-up Fees beim Unternehmenskauf, "BB", 2008, 286-287.

Each party is ready, following economic principles, to undertake certain financial and time-based expenses, as it considers that the transaction is necessary for development of the company. So each party shall also be ready to undertake, at least partially, the risk of failure of transaction. What specific risks are faced? – Preparatory phase of acquisition and merger of enterprises implies investment of the time and transaction expenses: hiring of specialists (bankers, lawyers, tax agents), detailed inspection of the target company, structuring of transaction, creation of database, development of outline of purchase contract, taking bank credit for funding of transaction and its service. The mentioned expenses may reach very high point, which cuts the way back to the parties. Consequently, agreement of *break-up fee* is an efficient psychological lever for forcing of conclusion of the basic contract.[55]

5.3 Pre- Transaction Audit of the Target Company (Due Diligence)

5.3.1 The Sense of Due Diligence

Preliminary agreement is followed by the process of audit of the Target company, which is central and the longest phase of preparation of transaction. Its performance financially costs expensive to the parties. But acquisition of an enterprise without such inspection is unimaginable.

In practice, from 30% to 70% of transactions end without success. There are three basic reasons for it: 1. Having incomplete information about the object of transaction; 2. Improper assessment of the expected potential of synergy by the company- buyer; and 3. Weak integration of the purchased company on post-merger stage. The first two causes of failure are related to the over-assessment of the target company on pre-transaction stage. For the purpose of minimization of the mentioned risks, it's necessary to perform system analysis, i.e. *due diligence (DD*) of the target company[56].

The company- buyer needs comprehensive information about the target object in order to adjust its ideal image with reality. Finally, as a result of detailed inspection of the target company, the buyer tries to determine the price, assess synergetic effects and manage risks.[57]

Consequently. DD performs four general functions:[58]

- system inspection of the target company shall create perfect picture on the object of transaction for the interested company. It shall know what it is going to buy. On the basis

[55] *Geyrhalter V., Zirngilb N., Strehle C.*, Haftungsrisiken aus dem Scheitern von Vertragsverhandlungen bei M&A-Transaktionen, "DStR ", 2006, 1559, 1560.

[56] *Picot G., Pack H.,* Handbuch Mergers & Acquisitions, Stuttgart, "Schäffer-Poeschel", 2000, 221.

[57] *Vogt G.*, Die Due-Diligence – ein zentrales Element bei der Durchführung von Mergers & Acquisitions, "DStR", 2001, 2027.

[58] *Beisel D., Klumpp H.H.*, Der Unternehmenskauf, München, "Beck", 2009, II, Rn. 4; *Picot G.*, Handbuch Mergers & Acquisitions, Stuttgart, "Schäffer-Poeschel", 2000, 95.

of the obtained information the buyer becomes able to agree certain guarantees and the terms of fulfillment of the contract.

- Through DD the company- buyer tries to determine real price of the target company.[59]
- The company- buyer tries to predict transaction chances and risks.
- The process of inspection shall ensure transparency of the object to be purchased, which has affirmative function.[60]

DD doesn't represent legally mandatory pre-requisite of transaction and the subject of imperative legislative regulation, but the practice has given it the standard form. Following substantial logic of transaction, DD is a mandatory procedure.[61] Consequently, it's a custom, established in circulation – not a legal norm, but real factor of transaction which performs the function of one of the criteria of definition during interpretation of the basic contract.[62]

5.3.2 Due Diligence Procedure

The pre-requisite for audit inspection of the target company is provision of the interested party with the relevant information by the management. From procedural standpoint, audit inspection of the target company includes the following three steps: 1. collection of information, 2. processing of information, and 3. analysis of information. Time- and content- related limits of audit shall be regulated in details within the framework of the Letter of Intent for the purpose of prevention of in conflict of interests.

As a rule, the company- buyer is the most interested party in audit. So the group of experts, consisting of auditors, business law specialists and investment bankers, shall be organized by the company- buyer. Companies, which permanently perform *M & A*, create their own *DD* department on the level of middle management.[63] Otherwise the interested company hires the group of experts based on horizontal integration principle for performance of audit.

The stages and constituent elements of audit inspection are represented in the following Table:[64]

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[59] *Kiethe K.*, Vorstandshaftung aufgrund fehlerhafter Due Diligence beim Unternehmenskauf, "NZG", 1999, 976, 977 f; *Hörmann J.*, Die Due Diligence beim Unternehmenskauf, in: Festschrift für Pöllath & Partner, *Bierk D.* (Hrsg.), München, "Beck", 2008, 135, 142.

[60] *Merkt H.*, Rechtliche Bedeutung der due diligence beim Unternehmenskauf, "WiB", 1996, 145, 147.

[61] *Gran A.*, Abläufe bei Mergers & Acquisitions, "NJW", 2008, 1409, 1411.

[62] *Vogt G.*, Die Due Diligence – Ein zentrales Element bei der Durchführung von Mergers & Acquisitions, "DStR", 2001, 2027, 2031.

[63] *Müller-Stewens G., Schreiber K.*, Zur organisatorischen Anbindung des Akquisitionsprozesses im Käuferunternehmen, "Die Unternehmung", 1993, 290.

[64] *Rockholtz C.*, Due Diligence-Konzeption zum synergieorientierten Akquisitionsmanagement, in: Due Diligence bei Unternehmensakquisitionen, *Berens W., Brauner H. U., Strauch J.* (Hrsg.), 4. Aufl., Stuttgart, "Schäffer-Poeschel", 2008, 87.

1. Preparation of audit ⇨	2. Performance of audit ⇨	3. Analysis
Selection of the place of audit Determination of the aims of audit Creation of the group of experts Development of audit plan Sending to questionnaire to the company subject to inspection Analysis of preliminary information	Management presentation On-site inspection of the target company Research in database Research of elements of the target company Preliminary analysis of the results of audit Discussion of preliminary report with the management of the target company	Detailed analysis of results Prediction of financial flows Drawing up and coordination of Due Diligence Memorandum Development of strategy for solving of the detected problems

In extensive phase of *DD* the database, compiled by the target company, i.e. information contained in it, is studied in details. The database may be virtual (represented in the form of electronic information) and/ or real – the so-called data room. In both cases the target company compiles the database on the basis of the list of desired information (*document request lists*) submitted by the interested company.[65] The information obtained through the database shall not be disclosed to the third parties and shall not be used against the target company.[66] The relevant reservation, which shall also include the rules of use of information and technical service (*data room rules*),[67] shall also be agreed upon in the contract of determined by separate contract.

5.3.3 Types of Due Diligence

Based on the information to be studied, *DD* can be divided into three parts: 1. *Legal Due Diligence*, 2. *Commercial & Financial Due Diligence* and 3. *Technical Due Diligence*.[68] All the three type of DD, on their part, can be divided into sub-elements (see the Table). The mentioned systemization doesn't have any content-related loading – simply, it will help in better identification and structuring of material subject to analysis.

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65 *Henke U., Socher O.*, Fachbegriffe aus M & A und Corporate Finance. Der Unternehmenskauf in der Due Diligence Phase, "NJW", 2010, 829.

66 *Beisel D., Klumpp H.H.*, Der Unternehmenskauf, München, "Beck", 2009, I Kapitel, Rn. 63.

67 *Henke U., Socher O.*, Fachbegriffe aus M&A und Corporate Finance – Der Unternehmenskauf in der Due Diligence Phase, "NJW", 2010, 829.

68 *Beisel D., Klumpp H.H.*, Der Unternehmenskauf, München, "Beck", 2009, II Kapitel, Rn. 6-8.

Legal DD	Commercial- financial DD	Technical DD
Corporate-legal Obligatory- legal Material- legal Tax- legal Labor – legal Legal analysis of intellectual property	Analysis of the company strategy Analysis of market situation Analysis of finances and taxes Analysis of organizational model Analysis of product and service	Technological analysis Logistical analysis IT- analysis IP- analysis

In the framework of legal audit the target company's corporate legal arrangement and form of cooperation are inspected, as well as the company's statute, actual abstracts from Entrepreneurs' Register, structure and rights of shareholders, organizational and financial structure of the company, protocols of meetings of directorate and supervisory board, eventual consortiums of shareholders, etc. (*Legal/Corporate DD*). Potential buyers study commercial obligations, i.e. third party contracts of the target enterprise (*Legal/Commercial DD*), situation related to immovable property and material legal situation (*Legal/Real Estate DD*), situation in regard to intellectual property, patent, legal protection of trade marks and brands (*Legal/Intellectual Property DD*) and labor law-related situation of the target company with similar attention.

Economic audit[69] implies analysis of feasibility of acquisition of the target company, its chances and risks, market situation of the company, strategy and environment. And Financial audit[70] shall study property, financial and income-related situation of the target company, in particular – accounting of the company, cash flows, effectiveness of the made investments and future prognosis, as well as the company's tax documentation.

The purpose of technical audit is the identification of technological potential of the enterprise. It implies the quality and market potential of intellectual property and its constituent elements, trade marks and brands, innovation and know-how of the enterprise, as well as the level of development of information technologies and logistics.

In addition to the above listed, conventional types of audit of the target company, relative young forms of DD are frequent in modern practice of *M & a*: Environmental DD(*Environmental DD*[71] and Cultural DD[72]. If environmental analysis and analysis of assessment of its protection initially implied assessment of social costs of the risk of environmental damage by enterprises

[69] *Krüger D.*, Due Diligence bei Kauf und Verkauf von Unternehmen, "DStR", 1999, 174-175; *Gran A.*, Abläufe bei Mergers & Acquisitions, "NJW", 2008, 1409, 1412.

[70] *Knott H.J., Mielke W.*, Unternehmenskauf, Köln, "RWS", 2006, 13; *Ek R., von Hoyenberg P.*, Unternehmenskauf und -verkauf, München, "Deutscher Taschenbuch Verlag", 2007, 123 ff.

[71] *Holzapfel H.J., Pöllath R.*, Unternehmenskauf in Recht und Praxis, Köln, "RWS", 2005, 18.

[72] *Gran A.*, Abläufe bei Mergers & Acquisitions, "NJW", 2008, 1409, 1413.

operating in specific segments, in the course of time it obtained more extensive nature – at present the location of the enterprise, morphology of the building, engineering characteristics and equipment is assessed in the framework of this type of audit.[73] Also the level of compliance of the enterprise-s practice with the existing legislation is checked.

Cultural DD touches cultural peculiarities of the company, i.e. its image, traditions, attitude of public towards it, psychological aspects, etc. The purpose of such audit is to predict the ability of integration of the target enterprise, in particular, in the case of international transaction.

These forms of DD are not exhaustive. Their configuration depends on the interests of the parties, their agreement and peculiarities of specific legal orders. So the content-related volume and the forms of DD of the target company is the subject of individual agreement.

5.4 Concluding of the Basic Contract, Closing and Post-merger Integration

Logical end of preparatory stage is signing of purchase contract of an enterprise by the parties, either in the form of share deal or asset deal. Regulatory basis of both forms of acquisition are Article 477 and further of the CC. In the process of agreement upon the terms of contract the most important tasks of the parties is to avoid the conflict of interests in post-merger phase, which is possible through substantial guarantee agreement. Also, very important aspect is agreement on transfer of an enterprise without any material or right-related fault (Articles 488 and 489 of the CC), which shall be regulated in details in the contract, the more so that failure of transaction after completion of preparatory phase is not in the interest of either company. It shall not be difficult for the parties to agree in details on fault-free transfer of an enterprise after audit inspection performed on the preparatory stage. Besides, they shall completely regulate the issues related to private-law responsibility for violation of the terms of contract.

After signing of the contract, i.e. emergence of mutual obligation. the issue of closing of transaction comes to an agenda (*Closing*).[74] Closing of transaction implies fulfillment of the purchase contract by the parties – the company- buyer pays the agreed price, and the target company hands to it the object of purchase (property by the procedure of singular succession or share by universal succession method) and the related rights and obligations.[75] In the case of complex transaction, quite long time is required for its closing. So this time period shall be agreed upon in details in the basic contract. Besides, the parties shall not miss the factors, having decisive impact on nullification of the contract or its terms. In western practice, such factor us public-legal control of transaction by cartel services. Legal validity of the purchase agreement depends on agreement of

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73 *Picot G., Pack H.*, Handbuch Mergers & Acquisitions, Stuttgart, "Schäffer-Poeschel", 2000, 247.
74 *Knott H.J., Mielke W.*, Unternehmenskauf, Köln, "RWS", 2006, 16 f.
75 *Beisel D., Klumpp H.H.*, Der Unternehmenskauf, München, "Beck", 2009, IX Kapitel, Rn. 103 f.

this public- legal institution, which shall be taken into consideration by the parties in the course of agreement on contractual terms and determinations of duration of transaction. [76]

After successful closing of transaction, the time of post-merger management comes. Acquisition and merger of companies, as it was mentioned in the introduction, is a standard strategy, aiming at increase of the value of an enterprise. But from the standpoint of the company- buyer, the set goal isn't achieved automatically by closing of transaction, as strategic premiums, paid by it, are principally higher than the expected synergistic effects. So the basic work for the management of the company-buyer begins on post-merger stage.[77] It shall solve a complex problem: effective post- merger integration.[78] In the case of share deal, the management of the company-buyer has a choice out of three basic strategies: 1. create contractual concern with the purchased company (factual concern already exists since the moment of acquisition of share), 2. merge the daughter company with it (*upstream-merger*) or 3. merge with the daughter company (*downstream-merger*). Prediction of which strategy of reorganization will lead to success, depends on specific background circumstances.

After closing of transaction, additional, post- merger DD is often performed, the purpose of which is, on the one hand, identification of substantial changes, which occurred in the time period from concluding of the purchase agreement to closing of transaction, and, on the other hand, testing of possibilities of presentation of legal requirements towards the old management of the target company.[79] Number of technical issues is to be also solved: change or adjustment of the firm name, registration of the changed circumstances in the Entrepreneurs' Register, etc.[80]

6. Share-based Acquisition of Company (Share Deal) on Stock Exchange of Shares (Takeover)

6.1 General

Takeover is one of the forms of purchase of an enterprise. In this form, the company- buyer *(Bidder Company*) acquires the target company through purchase of its shares on the regulated stock exchange. Legal regulation of the mentioned issue is paid great attention in the systems, which, unlike Georgia, are associated with liquid financial markets. But homogenous legal model of regulation of *takeover* doesn't exist. Although regulatory approaches and their styles are different in different states, there are certain procedural norms, which have similar functional is different law

[76] *Beisel D., Klumpp H.H.,* Der Unternehmenskauf, München, "Beck", 2009, IX Kapitel, Rn. 103 f 105.

[77] *Jobsky T.*, Mergers & Acquisitions bei Restrukturierung/Sanierung, in: Restrukturierung, Sanierung, "Insolvenz", *Buth A. K., Hermanns M.* (Hrsg.), München, "Beck", 2009, § 26, Rn. 129.

[78] *Picot G.,* Handbuch Mergers § Acquisitions, Stuttgart, "Schäffer-Poeschel", 2000, 335.

[79] *Gunßer C.*, in: *Oppenländer F.*, *Trölitzsch T.*, Praxisbuch der GmbH-Geschäftsführung, München, "Beck", 2011, § 36, Rn. 20.

[80] *Gran A.*, Abläufe bei Mergers & Acquisitions, "NJW", 2008, 1407, 1415.

systems. In this section of the article we will discuss procedural issues of acquisition of companies on regulated market on the example of uniform law of the USA and EU.

6.2 Controlling Block of Shares and Mandatory Bid

Takeover procedure starts when one of the shareholders buys controlling block of shares, which is basically defined by 30-33% of total number of shares with voting right. In this case the buyer becomes obliged to publish a Mandatory Bid, by which he will offer the rest of the shareholders to buy their shares at the relevant price.

Mandatory Bid shall be made by not only directly the natural or legal person, who bought controlling block of shares, but the group of investors acting in concert (*Persons acting in concert),* if total number of their shares achieves 30- 33% limit. E.g. if the headquarter company buys part of shares, and daughter company – the part, and the sum of shares purchased by them reaches the limit set for the controlling block of shares, the headquarter company shall be obliged to apply to the rest of the shareholders of the target company with Mandatory Bid.[81]

Mandatory bid shall provide for fair price, which represents the amount of the highest price of the shares of the target company, which they had 6-12 months prior to publication of the mandatory bid. The buyer is obliged to offer similar conditions of purchase of shares to all shareholders. Mandatory bid, primarily, protects the interests of small shareholders and ensures equality of shareholders.[82]

One of the central requirements of regulation of *Takeover* is to give to the shareholders of the target company sufficient time and information for making the decision they have to make. So the published bid shall contain detailed informational prospect.

The time frame for receiving of a bid by shareholders varies from 2 to 10 weeks.[83] According to the USA capital market law, the period of bid shall last minimum 20 days. Section 13 (d) of Williams Act (USA) provides for the obligation of publication of bid: if the buyer holds certain amount of shares of an enterprise, it is obliged to publish information on bid, which shall include: its identification, financial source of purchase of shares, purpose of purchase, information on liquidation of the target company and other significant changes of its activities, as well as a certificate about the volume of share of the enterprise, owned by the bidder. Section 14 of Williams Act established certain procedural requirements. In particular, the shareholders, who sell their shares, can remove them from tender during 7 days from the date of bid publication.[84].

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81 *Grundmann S., Möslein F.*, European Company Law, Cambridge, "Intersentia", 2007, 601; Directive 2004/25/EC, Art.5, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= OJ:L:2004:142:0012:0023:EN:PDF>.

82 *Wooldridge F.*, The Recent Directive on Takeover-Bids, "European Business Law Review", 2004, 151.

83 Directive 2004/25/EC, Art. 6,7, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:142:0012:0023:EN:PDF>; *Edwards V.*, The Directive on Takeover-Bids- Not Worth the Paper It's Written On?, "European Company and Financial Law Review", № 4, 2004, 433-434.

84 *Magnuson W.*, Takeover Regulation in the United States and Europe: an Institutional Approach, "Pace Int'L. Rev.", № 21, 2009, 213-214.

The next central element of legal regulation of *Takeover* is definition if obligation of the company- buyer and its management. In this regard, capital market law must formulate clear standards. In particular, is shall be determined what range of freedom will be given to the bidder for definition of the content of the bid and to the management of the target company – for diversion of undesirable bid.[85].

According to American law, the bidder corporation is authorized to define the volume of shares it is going to include in the mandatory bid. Selling of shares to the bidder shall be performed on pro rata basis. And according to EU law, the buyer is obliged to make bid for the purpose of purchase of all the remaining shares. And, importantly, the bidder shall pay the same price for all shares (of one class)[86].

6.2 Hostile Takeover

The role and position of the management is very important in the case of *Takeover*. *Takeover* substantially impacts its interests. Alienation of the controlling block of shares is undesirable event (*Hostile Takeover)* for the management of the target company, as the dominant shareholder threatens the power and positions of the management. Often confrontation of shareholders' and management occurs, which is known as *principle-agent conflict.*

In ideal- typical case, management represents the manager of the entrusted property, and the shareholder is the owner of the company. Consequently, the director shall not interfere with shareholders in exercising their rights. In the case of hostile takeover the directorate of the target company shall maintain neutrality and not fail the deal which is in progress on the capital market through various manipulations, unless the decision of the general meeting of shareholders provide for other regulation. Besides, the management has the right to take the measures, required, for normal, routine activities of the enterprise to prevent infringement of the company's interests[87]. According to the 13th EU Corporate Directive, the directorate of the target company has the right to seek bidder- competitor, the so-called ,"White Knight", which, in its turn, positively affects the price of shares of the target company[88].

Hostile takeover regulation is different in the USA, where the management of the acceptor company is authorized to take protective measures against the undesirable bid.[89] Unlike European

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85 *Magnuson W.*, Takeover Regulation in the United States and Europe: an Institutional Approach, "Pace Int'L. Rev.", №21, 2009, 223.

86 Ib., 213.

87 *Denzel S.*, Die Neutralitätspflicht im europäischen Übernahmerecht: ein Vergleich mit dem US-amerikanischen System der Modified Business Judgement Rule, Bd. 76, Hamburg, "Dr. Kovac", 2005, 206-211.

88 *Heinrich M.*, Der wieße Ritter als Maßnahme zur Abwehr eines feindlichen Übernahmeangebots, "JWV", Jena, 2008, 30-32.

89 *Magnuson W.*, Takeover Regulation in the United States and Europe: an Institutional Approach, "Pace Int'L. Rev.", № 21, 2009, 205–206.

legislation, American case law gives more freedom of actions to the management of the target company. According to the judicial practice of Delaware Supreme Court, two-step system of checking of admissibility of the directorate's actions exist: 1. the directorate shall have reasonable doubt that the *takeover* represents significant threat for efficient activities and policy of the enterprise, and 2. the method of protection against *takeover,* selected by the directorate, shall be adequate to the threat. The management shall act in the framework of the principle of honesty and fundamental investigation of the situation. In this case the directorate doesn't need to obtain the relevant authority from the general meeting of shareholders. In the case of taking measures against the bid, in addition to monetary compensation, the management may provide for other factors: e.g. the volume of information provided to shareholders, terms of the bid, time of bidding, etc.[90]

Legal mechanism for protection against *takeover*, the so-called *Breakthrough Rule* is interesting, which prevents the enterprise to be purchased from creating artificial barriers against the *Takeover*[91]. According to *Breakthrough Rule*, the limitations related to alienation of shares and which are envisaged by the statute of an enterprise or the contracts concluded between shareholders, are null and void in regard to the bidder during the period provided for accepting the bid. And the limitations, provided by the status of the enterprise or shareholders' contracts, related to the voting right, become invalid on the general meeting, which shall decide the issue of protection against *Takeover*. Besides the shares, which ensure the right of more than one vote, give the right of only one vote to their holders.

Breakthrough rule also regulates the first meeting of shareholders to be held after purchase of shares. If 75% or more of shares proved to be held by the bidder, the limitations, related to the voting right of shareholders or alienation of shares, become invalid during the first general meeting. It also relates to the special rights of shareholders like determination of composition of the Supervisory Board of directorate. In the framework of the first general meeting of shareholders to be held after *takeover,* each share shall bear one voting right.

Breakthrough rule serves to the *Bidder'*s interests and creates better conditions to it for obtaining of control of the enterprise and changing of the company's statute.[92] It shall be mentioned that the *Breakthrough Rule,* provided by the 13th EU Corporate Directive, doesn't have mandatory legal force and each state decides the issues of transformation of this ruling in its own law. Consequently, almost none of EU countries force national companies to obey this rule. Nevertheless, at the same time. the member states give the companies disposition authority to use the *Breakthrough Rule*.[93]

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90 *Magnuson W.*, Takeover Regulation in the United States and Europe: an Institutional Approach, "Pace Int'L. Rev.", № 21, 2009, 215-216.

91 Directive 2004/25/EC, Art.11, available at:<http://eurex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L: 2004: 142:0012: 0023:EN: PDF>; *Maul S., Muffat-Jeandet D., Simon O.*, Takeover Bids in Europe, Freiburg, "Centaurus", 2008, § 41, Rn. 204, § 43, Rn 208.

92 *Wooldridge F.*, The Recent Directive on Takeover-Bids, "European Business Law Review", №15, 2004, 153-155.

93 Directive 2004/25/EC, Art.12, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L: 2004:142:0012:0023:EN:PDF>.

6.3 Squeeze-out and Sell-out

One more important aspect of takeover is the so-called *squeeze-out/sell-out*. *Sell-out* represents mandatory purchase of shares by the bidder on the basis of shareholders' demand, and *squeeze-out* – mandatory alienation of shares by shareholders on the basis of the bidder's demand.

In EU countries different limit of holding of shares is established for emergence of these rights, It varies between 90% and 95% of the shares of one class. Mandatory purchase of shares is possible when the bidder buys 90- 95% of shares through mandatory bid. *Sell-out* serves to the interests of small shareholders and allows them to sell their shares after the target company is placed under the control of the bidder. And the institution of *squeeze-out* protects the bidder's interests. Its aim is to facilitate efficient control of the target company by the company- buyer. In both cases the price of share will be determined by the price specified in mandatory bid. It shall also be mentioned that the implementation of mandatory purchase or alienation shall be carried out only in certain time, after making of decision on sale of shares by the shareholders. According to the 13th Corporate Directive of EU, the mentioned time period covers 3 months[94].

6.4 Concernization or Merger?

Although *Takeover* (acquisition of controlling block) and *Merger* (amalgamation) from the first glance, serve to one purpose, they differ from the point of view of legal requirements set towards them. In the case of *merger* the decision of the meeting of shareholders of both companies is required, and in the case of *takeover* the decision of the meeting of shareholders of the company-bidder is not necessary. And the shareholders of the enterprise to be purchased decide independently whether they want to alienate their share or not. Usually, in the case of offering the purchase of shares, general meeting shall be convened by the management or 15% of shareholders, in order to decide the issue of application of protective mechanism. One of the advantages of *takeover* is the fact that the will of directorates of both companies isn't required for performance of transaction, but the will of only the management of the company- buyer is enough.

Another characteristic feature of *takeover* is that in the case of purchase of shares, procedural requirements doesn't provide for judicial or notary inspection. There are no special norms regulating the *takeover* process in the bidder company and protecting its interests.[95]

The above mentioned two instruments differ based on legal consequences too. In the case of *merger* we receive legally uniform, unitary enterprise with simple management structure, while in

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94 *Edwards V.*, The Directive on Takeover-Bids- Not Worth the Paper It's Written On?, "European Company and Financial Law Review", №4, 2004, 438; Directive 2004/25/EC, Art. 15,16, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:142:0012:0023:EN:PDF>.

95 *Grundmann S., Möslein F.*, European Company Law, Cambridge, "Intersentia", 2007, 597.

the case of *takeover* – the group of enterprises (concern), where the cooperation of two or more directorates is problematic. There is also the problem of protection of small shareholders, representing the result of hard redistribution of role in this group. Capital market law facilitates regulation of just this problem. It prevents formation of the groups of interests; consequently, the shareholders of the company subject to purchase are equipped with the *sell out* right, which is not always characteristic for *merger* structure.[96]

Besides, the institution of *takeover* is favorable from economic viewpoint in four directions: 1. economic resources come to the hands of the persons, allowing their better use; 2. *takeover* prevents formation of synergy between the two enterprises; 3. it ensures change of inefficient management and 4 *takeover* can improve improper pricing of shares by the stock exchange of securities. If the shares of the companies are improperly priced on the stock exchange, prudent bidder can save the difference between the real price of the company shares and their market price.[97]

7. Final Prospect

Regulatory framework of merger and acquisition of enterprises established in international practice is as heterogeneous as the forms, aims and motives of transactions of enterprises. But certain regularity exists, which facilitates establishment of unified international practice of *M & A*. Procedural frameworks, reviewed in this article, also confirm this thesis.

Following the above stated, it would be proper to approximate Georgian practice of enterprise-related transaction to general standards, which requires initiation of substantial legislative package, or establishment of certain standards through autonomous ways by cautelar practice – establishment companies in legal circulation of a kind of customary law regulating transactions. Actual level of development of *M & A* practice on Georgian market hides many creative instruments of business development from the participants of economic circulation. *M & A* is diverse and necessary instrument of capital circulation, which shall not be left without attention.

Resume

Regulatory framework of merger and acquisition of enterprises in international practice is as heterogeneous as the forms, aims and motives of transactions of enterprises. But certain regularity exists, which facilitates establishment of unified international practice of *M & A*.

The goal of the present article is to review general legal fundaments of acquisition, merger of enterprises and forms of cooperation between enterprises, which is necessary for orientation in

[96] *Grundmann S., Möslein F.*, European Company Law, Cambridge, "Intersentia", 2007, 590-592.

[97] *Magnuson W.*, Takeover Regulation in the United States and Europe: an Institutional Approach, "Pace Int'L. Rev.", №21, 2009, 208-209.

complex problems of transactions of enterprises. *M & A* doesn't represent codified, homogenous sphere of law. Consequently, there is no legal standard and its fragmented regulation is scattered in national and international business law and customary law established in international circulation. The article discusses the basic forms of transactions of enterprises: acquisition of enterprises and takeover of companies on capital market. Also, typical procedural standards of *M & A*, established in international practice, are covered.

Sergi Jorbenadze*

Issuance of Public Information in Georgia

1. Introduction

Freedom of information is the right recognized by the constitution of Georgia. It is directed towards development of a fair state and civil society in a democratic state.

Freedom of information means access to information from public institutions that should become the guarantor of the state's accountability to population and transparency in its activities. This will make it possible for civil society to develop a perception that their votes in elections were not used in vain by the authorities. For proper functioning of the democratic system "is essential that the public has access to the information kept in governmental institutions."[1] The mentioned action can be considered as one of the modern binding ways of the government.[2] If the governmental authorities were not bound by the laws, then the notion – Democratic Republic – will be no more than a word, written on paper and the conditions specific for an absolute monarchy will be developed.[3]

Violation of a right granted by the Constitution of Georgia is connected with violation of an individual's dignity.[4] Human dignity and personal freedom are expressed in the fundamental human rights, including adequate protection and to full implementation;[5] otherwise it will be impossible to protect the autonomy of each person.

Protection of human rights is the supreme principle of a democratic state. The legislation of a country should be tailored to this very principle, which guarantees the stability of the state. In the XXI century one of the most important conditions of the stability of a democratic state, is correct and fair definition of the priorities between the private and public interests, based on

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1 *Adeishvili Z., Izoria L., Vardiashvili K., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* General Administrative Law Handbook, Tbilisi, 2005, 265 (in Georgian).

2 *Khubua G.,* Legal Theory, Tbilisi, 2004, 97 (in Georgian).

3 Ib.

4 This consideration can be strengthened by the court practice of foreign countries, for example, let's take the German Constitutional Court, in the decision of which, where speaking of the freedom of information, the parallels are drawn with the freedom of speech and expression, and violation of the both of them is considered to be a prerequisite to violation of human dignity – see: BVerfG, Beschluss vom 4. 11. 2009 - 1 BvR 2150/08, available at: <http://lexetius.com/2009,3327> (Paragraph 32).

5 Case №1/3/407, Constitutional Court of Georgia, 2007, available (in Georgian) at: <http://constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=429&action=show>.

which the common interests of the individuals and public bodies will be separated from each other, and unified, balanced system will be created.[6] It is a feature of a democratic state is to protect human rights and freedoms, where the actions of the government should not be directed only to accelerate progress of a particular issue.[7]

Government and Law are closely connected with each other,[8] that is confirmed by the relevant acting legislation in the country. The government provides a wide range of human rights, and acting within it does not constitute a violation of the law. Basic human right, first and foremost, the right that protects an individual from a state.[9] One of these rights deals with the issue of availability of information. Civil society should have the right to freely make use of any information in accordance with their wishes. On the other hand, to use the information, does not mean distribution of the data infringing upon the rights of other persons. Protection of human rights by the state may be expressed not only by action, but also by inaction, when it will not interfere with the person receiving the information or expression.[10] This behavior is typical of a democratic state, during the existence of which, obtaining of information from the commonly recognized sources is guaranteed by the Constitution of Georgia and setting of "information filter" to the human mind is inadmissible.[11] A person is protected by possibility of distribution and obtaining of information.

2. Types of Public Information

Public information is regulated as a separate legal institution in the General Administrative Code of Georgia (hereinafter – GACG), based on which possibility of requesting of a public information is regulated. Request of public information is a permitted right granted to the public in a democratic state. The bearer subject of the right to request public information can be "everybody" that includes both natural and legal persons.[12] Request of receiving of a public information to any public institution,[13] and when requesting it is not necessary to indicate the

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6 Case №1/2/384, Constitutional Court of Georgia, 2007, available (in Georgian) at: <http://constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=448&action=show>.

7 Case №bs-1250-1194 (k-09), Supreme Court of Georgia, 2010, available (in Georgian) at: <http://www.supremecourt.ge>.

8 *Khubua G.,* Legal Theory, Tbilisi, 2004, 95 (in Georgian).

9 *Kublashvili K., Demetrashvili A., Kvatchadze M., Losaberidze D., Rukhadze Z., Khmaladze V., Jibghashvili Z.,* Constitutional Law, Manual, Tbilisi, 2005, 102 (in Georgian).

10 Case №2/3/364, Constitutional Court of Georgia, 2006, available (in Georgian) at: <http://constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=452&action=show>.

11 Case №2-389, Constitutional Court of Georgia, 2007, available (in Georgian) at: <http://constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=430&action=show>.

12 *Tskepladze N., Turava P.,* Administrative Law, Manual, Tbilisi, 2010, 153 (in Georgian).

13 *Adeishvili Z., Izoria L., Vardiashvili K., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* General Administrative Law Handbook, Tbilisi, 2005, 266 (in Georgian).

person's motive and goal, which indicates the fact that the person can need a public information to realize the needs of legal interests of others.[14]

Speaking of a public information, first of all the differentiation of several types shall be made, as a result of which, it will be possible to discuss the matter, issuing of type of information is permitted by the Law of Georgia.

If we refer to the practice of the Constitutional Court of Georgia, we notice that there are four types of public information:[15]

A) Information that applies to the person wishing to receive the information;

B) Information protected at the official information sources, which does not apply to a person, but can be obtained under the legally established order;

C) Information containing the state, commercial or professional secret;

D) Data existing in the official records, which refer to private matters of concern, such as health, finances, and other issues.

Only the information in the C category of the above four categories, is not available for the third parties, in other cases, it may be partly made public. For example, the information, containing the state secret – in this case, classification is assigned to specific data not to make them public. The Law of Georgia prohibits issuance of information when the fact state secret is established.[16] The same is the situation with the commercial or professional confidential information, the issuance of which will violate the rights of a natural or legal person.[17] All the other information protected in a public agency is public information.[18]

Examples given in A and D categories are of personal information about the person. In the first case, familiarization of persons with the data of themselves is allowed by legislation. This is directly related to the paragraph 1 of the Article 20 of the Constitution of Georgia, according to which a person's privacy is inviolable.[19] However, the issue, given in the D category is public

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[14] *Khubua G., Kublashvili K., Izoria L., Korkelia K.,* Comments on the Constitution of Georgia, Basic Human Rights and Freedoms, Tbilisi, 2005, 355 (in Georgian).

[15] Case №2/3/406, Constitutional Court of Georgia, 2008, 408, available (in Georgian) at: <http://constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=522&action=show>.

[16] Case №bs -430-548-k-03, Supreme Court of Georgia, 2004, available (in Georgian) at: <www.supremecourt.ge>.

[17] Based on the practice of General Courts of Georgia and relevant legal norms, the term – tax secrecy originated, which in turn is regulated under the Article 39 of the Tax Code of Georgia; there has not been the practice of tax secrets after receiving of the new Tax Code (at least it is not possible for the retrieval by the third person), but for the tax secret established under the Tax Code acting until 2010 (Article 122), see: case №bs-70-67(k -06), Supreme Court of Georgia, 2006 and case №bs-623-590(k -06), Supreme Court of Georgia, 2007, cases are available (in Georgian) at: <www.supremecourt.ge>.

[18] Case №3b/685-10, Tbilisi Court of Appeal, 2010 (in Georgian).

[19] This issue relates to the decision of the Constitutional Court of Georgia in case №1/3/407, which is about the paragraph 1 of the Article 20 of the Constitution of Georgia, and the relevance of the legislation of Georgia with it (see: case №1/3/407, Constitutional Court of Georgia, 2007, available (in Georgian) at: <http://constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=429&action=show>).

information in the number of cases only. For example, the Supreme Court considers the decrees of the President concerning a pardon (amnesty) issues as containing of private confidential information.[20] Similar nature reservation makes the Tbilisi City Court, which considers the part of the Presidential decree concerning the issues of assigning of citizenship of Georgia to a person as a personal data for the reasons of public interests;[21] the mentioned opinion is shared by the Batumi City Court, that considers as a person's personal data[22] his name and family name in the Court's decisions.[23] Accordingly, the court speaks that in cases of a specific request by the third party[24] there should not be indicated the person identification resources in the court's decision.[25]

In contrast to the information on any natural person, the data kept on officials (which is related to their official activities) should be accessible to everyone. The mentioned is regulated by part I of the Article 44 of GACG. Although, under the law, the information on officials must be open, but in most cases the court practice holds this issue differently[26] and believes that the information on officials is a documentation to be proceeded separately and if it is not in the already created form, a public agency is physically unable to manage its issuance.

The case, described in the B category concerns the same issue, according to which, the public information is the information, protected under the official sources, which doe not apply to the person, wishing to receive it, but its adoption is possible under the order, established by the law. Any issued public information that does not apply to the requester, shall be considered under this context.[27]

The level of transparency of the administrative bodies may be established according to public information requested. In this case, the important is the role of civil society, which should

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[20] Case №bs-1278-1240(k-08), Supreme Court of Georgia, 2010, available (in Georgian) at: <www.supremecourt.ge>.

[21] Case №3/8420-11 3935-11, Tbilisi City Court, 2012 (available (in Georgian) only in the Court Archives).

[22] Data, giving possibility of identification of a person.

[23] Case №3-646/10, the Batumi City Court, 2011 (available (in Georgian) only in the Court Archives).

[24] Of course, this does not mean the public information requested by the trial party. Comp. *Adeishvili Z., Frost A., Ramishvili L., Tskepladze N., Kitoshvili D., Tughushi L., Tsotsoria N., Getsadze G., Kopaleishvili M.,* Freedom of Information, Guide, 3rd Edition, Tbilisi, 2005, 63-64 (in Georgian).

[25] The court speaks only of the individuals' names dashing. For example, in administrative disputes, claims put forward charged on the dashing of public institutions names in most cases end in favor of the plaintiff. See, for example, the Kutaisi City Court Decision in case №3/476-2010 (see: case №3/476-2010, Kutaisi City Court, 2010 (available (in Georgian) only in the Court Archives)) – this is absolutely logical, since an administrative body acts in the name of Georgia and shading of its name is devoid of substance.

[26] See, for example, case №3/3646-11, Tbilisi City Court, 2011 (available (in Georgian) only in the Court Archives).

[27] Of course, it is possible to retrieve public information about the personality of a person, but in this case the above-mentioned case of the B category is most often seen in practice. For example, let's take the information about the budget of any specific ministry, or any public information on the activities of any public agency requested, the requester of the public information makes application on the information that is kept in the official sources, does not apply directly to this person, but the issuance is allowed under the Law of Georgia.

be the primary source of obtaining the information. If we look at the existing practice in Georgia, we notice that the activity of the population is not of the highest rate.[28]

3. Issuance of Public Information

The information, protected in state agencies is open to everybody and any interested party has the right to see it.[29] Familiarization with the information carries the possibility of informational self-determination and free individual development.[30] However, it is interesting to look at this issue from the other point of view, revealing of how much possible is it that every person can obtain public information on any issue (which do not include confidential information) under the absolute protection of the Law of Georgia?

In order to answer this question we have to use the practice, implemented in judicial, or administrative bodies, according to which there are the four main aspects of the issuance of public information: **a) completely issued public information; b) incompletely issued public information; c) rejection to issue public information having no legal basis; d) inaction that can be referred to with the term ignoring.** Let's consider each of them:

3.1 Completely Issued Public Information

Completely issued public information – irrefragable answers to absolutely all the questions, given by a public body under the Law of Georgia, in accordance with the forms of the statute. The answer is considered to be irrefragable if it satisfies the desire of the requester of public information. On the one hand, this case may be considered a subjective point of view,[31] but comprehensive public information can exist only if it satisfies all the details of a requester.

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[28] See, for example, public information requested by the NNLP – Freedom of Information Development Institute from the LEPL – National Statistics Service of Georgia (Saqstati) according to which, in the 2011 first quarter, no requests were entered on the statistics into this public agency – see: <http://www.opendata.ge/#!cat/text_info/id/1211/lang/ka>. This case confirms the fact that the citizens of Georgia should more actively begin to request public information from administrative bodies, which eventually will be the main measure of democracy in the country.

[29] Case № 2/3/364, the Constitutional Court of Georgia, 2006, available (in Georgian) at: <http://constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=452&action=show>.

[30] See the same decision.

[31] For example, a person requested the public information on a salary of a person working in a specific public institution. If the person, whose information was requested, is not an officer, then these data can be considered as personal, and, accordingly, taking personal secrets into consideration, not be issued on the request of public information. As for the officers, their salary, bonus, allowance, etc. is anyway open to the public, because the Article 44 of the General Administrative Code of Georgia directly mentions it. At the same time, officials complete the relevant declaration, which are available to any person. From the personal point of view, it is possible, that the requester considers that this information does not constitute personal

In Georgia, the court practice divides the completely issued public information into the certain categories and considers as such a respond from the administrative bodies that are unable to provide public information due to the reason that the requested data is not processed.[32]

Rejection of a public agency to carry out such an action, if it contains confidential information, shall be deemed to be completely issued public information. Given that freedom of information is not an absolute right, and its restriction is permissible,[33] justified refusal shall be deemed to be a full response. In this regard the most important explanation was made by the Supreme Court of Georgia: the case in which the plaintiff was asking for information about persons participating in the auction, it was not provided by a public institution in the sense that the requested information was of confidential nature.[34] The Court explained that the public interest in some cases, may exceed the interest of particular person and be directed on a certain occurrence.[35] Therefore, we can conclude that in some cases may the right provided under Article 41 of the Constitution of Georgia, can be restricted to a person, if there will be public interest.

3.2 Incompletely Issued Public Information

Incompletely issued public information – based on the Law of Georgia, the answer provided by a public agency in violation of the law that does not give irrefragable answer to all the questions. The primary example for this category is a case when a public agency directs a requester of public information to the Web-site, instead of issuance of public information.[36] In accordance with the part I of the Article 37 of GACG, any person has the opportunity to choose the form of receiving of public information. Accordingly, if a person wishes to receive information in the material form, the public agency shall issue it as a document. However, judicial practice considers the public information on the Web-site as already issued, that is a satisfactory type of practice exercised by public institution.[37] In addition, the practice is aware of cases[38] where a requester of public infor-

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data. For this reason in the General Administrative Code of Georgia there is a procedure in place for an administrative complaint, and later, based on the Article 42 of the Constitution of Georgia, it is possible to appeal to the court.

32 See, for example, case №3/3935-11, Tbilisi City Court, 2011 (available (in Georgian) only in the Court Archives).

33 *Tskepladze N., Turava P.,* Administrative Law, Auxiliary Manual, Publication of the United Nations Association of Georgia, Tbilisi, 2005, 117-118 (in Georgian).

34 Case №bs-1435-1393(k-08), Supreme Court of Georgia, 2009, available (in Georgian) at: <www.supremecourt.ge>.

35 Ib.

36 It is believed that a public agency has this information kept with itself, but given that familiarization with it on the Web-site makes the work easier, it addresses the requester of the public information this way.

37 See: case №3/3646-11, Tbilisi City Court, 2011; also case №3/3935-11, Tbilisi City Court, 2011 (both available (in Georgian) only in the Court Archives).

38 This is about several decisions of the court, which deal with the issue of issuance of the public information, for example, see: fn. 39.

mation was rejected of issuance of information, due to the fact that the data at a public agency was not processed and the court considered this as compliance with the order, prescribed under the law.[39] In this case, there is the stipulation that opposes the legislation of Georgia, because the processing of public registry and, therefore, entry of data is the duty of a public institution and it shall duly exercise such powers in order to unrestrictedly issue access the public information to a requester eventually.[40] Handling of public information is one of significant types of provision of contact of the government with the outside world.[41] The mentioned is the right granted to citizens under the law, which makes them permanent subject of law.[42]

Cases where the administrative body issues a part of the requested public information shall be deemed as incompletely issued public information as well.[43] Thus, it neglects the desire and will of a requester and violates the applicable law.

3.3 Rejection of Issuance Public Information Having no Legal Basis

Rejection of issuance of public information having no legal basis – based on the Law of Georgia, respond provided by a public agency in violation of the law, giving totally unjustified reason for refraining from issuance of information. Judicial practice on the issue in Georgia is as follows: a public agency shall provide the information required prior to the main meeting, which consequently is the basis for the plaintiff's rejection.[44] Such an action of administrative agencies on the one hand, is to be welcomed, as they do not violate commitments, but on the other hand, the claimant receives the desired information later.

Under the current legislation is recognized the obligation of a single consideration of an administrative complaint at an administrative body as indicated in the paragraph V, Article 2 of the Administrative Procedure Code of Georgia (hereinafter referred to as APCG). Considering the fact that under the Law of Georgia, material and procedural administrative law is not separates, GACG contains a few typical norms, the primary example of which is the legal institution of an

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39 See, for example, case №3-112, Gori Regional Court, 2008 (available (in Georgian) only in the Court Archives) – the Court proceedings were terminated in the absence of dispute.

40 Case №3b-1697-07, Tbilisi Court of Appeal, 2008 (available (in Georgian) only in the Court Archives).

41 *Tsatsanashvili M.,* Informational Law, Tbilisi, 2004, 65 (in Georgian).

42 Ib., 71.

43 See, for example, the practice of the NNLP – Freedom of Information Development Institute when the administrative body made partial respond on its request of the public information <http://www.opendata.ge/#!lang/ka/cat/news/topic/168>.

44 See, for example, case №3/357-11, Kutaisi City Court, 2011; case №3/4319-11, Tbilisi City Court, 2011 (both available (in Georgian) only in the Court Archives).

administrative complaint.[45] This will first of all result in simplification in the applicant's interest, which may be expressed in satisfaction of the requirements. On the other hand, filing of administrative complaint is is a prerequisite for ensuring the right of appeal to the court, based on which, number of court cases, will not be artificially increased any more.[46]

As a rejection having no legal basis is considered a case when an administrative agency does not indicate any specific law, or a number of a duly assigned classification code and despite this refuses to provide public information,[47] or when a public agency explains it by the reason of being too busy with its activities.[48]

Rejection of issuance of public information having no legal basis shall be given to the requester in writing; otherwise we will face a public agency's inaction.

3.4 Inaction/Ignoring

Inaction/Ignoring[49] – is the absolute violation of the law of Georgia by a public agency. Refraining from action by a public agency is similar to rejection to give public information, but in this case, the legal basis for filing a lawsuit is different in nature.[50] The claimant shall prove that the rejection an administrative agency to carry on the action causes direct and immediate harm to him.[51]

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45 *Kharshiladze I.,* The Administrative Complaint as a Pretext for Filing a Claim, "Law Journal", №1, 2011, 182 (in Georgian).

46 Ib., 183.

47 See: case №3/357-11, Kutaisi City Court, 2011 (available (in Georgian) only in the Court Archives).

48 For example, when the LEPL – National Examination Center does not issue a public information only due to the reason that the information is requested during the national exams. See: the practice of the NNLP Information Freedom Development Institute, <http://www.opendata.ge/userfiles/files/ gemocdebiserovnulicentri0001.pdf>.

49 The term Ignoring is not regulated by the Law of Georgia and, therefore, is not know for the Georgian court practice, however, the aim of this thesis is to systematize the public information divide it into four categories. Ignoring is the case when public agencies do not have the desire at all to follow the obligations imposed by the Law of Georgia and does not provide the requester of the public information neither with the transmitted administrative-legal act, nor a response to the request of issuance of public information, nor informational document.

50 If a public institution indicated a not legally substantiated rejection for issuance of public information, the claimant may request nullification of an administrative-legal record and obligation to perform the action, meaning public information (Articles 22 and 24 of the APCG). In case of ignoring, as there is no issued administrative legal record, the plaintiff will be able to file a request for a specific action against an administrative agency only based on the Article 24 of the APCG. In the use of the Article 24 of the APCG, nullification of the contentious administrative-legal act is considered as well. Accordingly, use of the Article 22 of the APCG as a legal base is no longer a need. There, conclusion shall be brought from the author's discussion that simultaneous submission of the Articles 22 and 24 of the APCG as a legal base will not be illegal and will not cause nullification of a claim filed to the court on the administrative case.

51 *Kharshiladze I., Kopaleishvili M., Loria V., Tskepladze N. et al.,* Comment on the Code Administrative Procedure, Tbilisi, 2004, 182 (in Georgian).

Under the powers assigned by the law of Georgia, administrative body bears the obligation to immediately notify the person in case of rejection of issuance of public information and explain the appropriate rights. And in case of ignoring, this action is not performed by an administrative body at all, which eventually leads to the violation of the rights of the requester of public information.

Freedom information in its essence is in close connection with the freedom of expression.[52] If a person did not manage to get information, he cannot express his opinion about current events in the country, while restricting a person's freedom of expression will significantly impede the process of establishing a democratic state.[53]

One of the important issues of retrieving of information is the stipulation in the Part I of the Article 37 of the GACG, according to which, the one, who makes a request for obtaining the information, chooses a form of receiving of the information.[54] On the other hand, public information requested in a fair state, by all means shall be issued by a public institution, if it does not contain confidential data,[55] if public institutions do not perform the obligations under the law, the right of the public information requester will be violated.

3.5 Harm

The Law of Georgia law provides for possibility of reimbursement for property and non property harm caused by non issuance of public information that is regulated under the Article 47 of the GACG and under the second part of which the burden of proof lies upon the relevant public agency and/or public servant. In turn, the issue of harm can only be placed within the reasonable frame; if it is determined that public information was not issued to a person in violation of the law standards and due to unlawful action of public agency.[56]

When filing a reimbursement statement, applicants must submit the facts on which the request is based. The mentioned is as well indicated by the court practice, in accordance to which,

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[52] For example, in theory and practice of German law, the consideration is also expressed that protection of the freedom of information as a human right is impossible, unless freedom of expression is protected; see: *Gorning G.H.*, Aeusserungsfreiheit und Informationsfreiheit als Menschenrechte, Berlin, "Ducker & Humboldt GmbH.", 1988, 159.

[53] See also the consideration given on this issue in the German Law – Berliner Informationsfreiheitsgesetz, Budnesinformationsfreiheitsgesetz, Berliner Informationsgesetzbuch, Berlin, 2011, 7.

[54] *Kulesza E.,* Das Recht der Buerger auf Information ueber die Taetigkeit der oeffentlichen Stellen, 6-7, available at: <http://www.brandenburg.de/media/2628/Kulesza051117.pdf>.

[55] Comp. with definition (in German) of freedom of information see: <http://www.mehr-demokratie.de/informationsfreiheit.html> .

[56] Case №3/3935-11, Tbilisi City Court, 2011 (available (in Georgian) only in the Court Archives).

in such case a person shall submit a base for the request.[57] If a person fails to prove the fact of harm, even if the public information was not issued by a public institution, obligation of reimbursement does not arise for the administrative authority.[58]

If in case of rejection by the administrative authority to issue information or its inaction a person suffers harm, the issue of the harm reimbursement shall be settled base on the relevant norms of the GACG. In addition to the above-mentioned Article 47, the Chapter XIV of this Code indicates responsibility of the administrative body. Based on the Article 207 of the GACG "unless otherwise stated by the Code, the order established by the Civil Code of Georgia is used for reimbursement of harm, caused by the administrative body." This consideration should not be construed as civil law norms should be considered in order to settle a case when violation of the law of Georgia by public institutions. For example, in accordance with the paragraph I Article 208 of the GACG, the State is responsible for the harm, caused by the state structure or its employee, when exercising of official duties. The court shall first of all, use the relevant standards of the GACG and APCG and only then apply the legal acts regulated by the CCG.[59]

4. Conclusion

The Article 41 of the Constitution of Georgia, as the freedom of information regulating tenet, protects the state interest on the one hand and the public interest on the other hand,[60] that can expressed by classification of the personal/commercial data.

The result of the mentioned is that the public information is divided into the four main types: the information that applies to the one, wishing to receive the information; information protected in the official sources, that does not apply to the one, wishing to receive the information, but receiving is possible under the order established by the law; information, containing the state, commercial or professional secret; data in the official records that concern the private matters, such as health, finances, and other issues. Each of these, in certain cases, can not be made public for the third parties, because the right to receive information shall not be considered the absolute human right.[61] Despite the authority assigned by the country's supreme law, in many cases,

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[57] Case №3-707, Batumi City Court, 2005 (in: Analysis of the Court Practice, Freedom of Information, Part III, Association of Young Lawyers of Georgia, Tbilisi, 2008, 50 (in Georgian)).

[58] Case №3b-1244-07, Kutaisi Court of Appeal, 2007 (in: Analysis of the Court Practice, Freedom of Information, Part III, Association of Young Lawyers of Georgia, Tbilisi, 2008, 51 (in Georgian)).

[59] In relation with this issue, see the practice of General Courts of Georgia – for example: case №as-1147-1394-05, Supreme Court of Georgia, 2006, available (in Georgian) at: <www.supremecourt.ge>.

[60] Case 1/3/209,276, the Constitutional Court of Georgia, 2004, available (in Georgian) at: <http:// constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=121&action=show >.

[61] Case 2/3/364, Constitutional Court of Georgia, 2006, available (in Georgian) at: <http://constcourt.ge/ index.php?lang_id=GEO&sec_id=22&id=452&action=show> (in Georgian).

human rights may be restricted by the state.[62] The restriction of the right shall be executed to protect the public interest, in which case the state shall not infringe the principle of proportionality.[63]

As for issuance of public information, each of these categories defined in the work are described as a result of study of the practice existing in Georgia, based on which it can be divided into four groups: completely issued public information, incompletely issued public information, rejection to issue public information having no legal basis and ignoring. This division is not a final differentiation, and it may be extended with the development of the practice.[64]

[62] This consideration does not hold true for all kinds of right. For example, under the Article 15 of the Constitution of Georgia, the right to life is the inviolable human right and is protected by law. This stipulation is a guarantee for the protection of life and its restriction is prohibited.

[63] Comp. for example, the decision of the Constitutional Court of Georgia in case №1/1/477 (see: case №1/1/477, Constitutional Court of Georgia, 2011, available (in Georgian) at: <http://constcourt.ge/index.php?lang_id=GEO&sec_id=22&id=677&action=show>).

[64] The practice, implemented in the court a well a administrative bodies

Temur Tskitishvili*

Attempt of Result Qualified Threat Tort
(Comparative-legal Analysis)

1. Introduction

Attempt of result qualified delicts is one of the arguable issues in the contemporary criminal law science. The crime attempt is an intended action; in particular, attempt considers the action, which is directly directed towards the criminal result. Based on the above, it is impossible to have the careless crime attempt, as in case of carelessness, it is not possible to have action directed towards the result. Moreover, "directly directed" implies the intention and excludes the possibility of implementation of crime attempt with the eventual intention.[1] It is impossible to have action directly directed towards the result, which was not desired by the guilty person. The words "directly directed" express the inner part of criminal's action, his/her aspiration for causing the criminal result. In other words, the criminal attempt is the action determined by the objective. The objective of guilty person helps us to drop a boundary between the finalised crimes (e.g. intended heavy health injury, creation of threat for the life of human being) from the criminal attempt (e.g. intended murder). If the criminal attempt is made with only direct intention, how is it possible to have criminal attempt qualified with the subsequent result? Criminal qualified by the subsequent

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1 See: *Gamkrelidze O.,* Interpretation of Georgia Criminal Code, 2nd Edition, Tbilisi, 2008, 162; *Tsereteli T.,* Criminal Law Problems, Volume 1, Tbilisi, 2007, 488; *Mchedlishvili-Hedrich K.,* Criminal Law, General Part, Specific Form of Crime Manifestation, Tbilisi, 2011, 71; *Mamulashvili G.,* in the book: Private Part of Criminal Law, Volume 1, 4th Edition (Co-authors *Lekveishvili M., Todua N., Mamulashvili G.*), Tbilisi, 2011, 128-129; *Todua N.,* Crimes Creating Danger according to the Georgian Criminal Code, "Justice and Law", N2/3, 2007, 155; *Dvalidze I.,* in the book: General Section of Criminal Law, Handbook (Co-authors *Gabiani A., Gvenetadze N., Dvalidze I., Todua N., Ivanidze M., Mamulashvili G., Nachkebia G., Tkesheliadze G., Khuroshvili G.*), Tbilisi, 2007, 169; *Surguladze L.,* in the book: Court Practice Comments to the Criminal Law, Crime against Human Being (Co-authors *Gamkrelidze O., Tkesheliadze G., Surguladze L., Turava M., Ebralidze T.*), Tbilisi, 2002, 57 (in Georgian). Attempt for the crime with eventual intention is also excluded by several German scientists: *Puppe I.,* Der halbherzige Rücktritt, "NStZ", 1984, 491; *Streng F.,* Rücktritt und dolus eventualis, "JZ", 1990, 219; *Lampe E.,* Genügt für den Entschluß des Täter in §43 StGB sein bedingter Vorsatz?, "NJW", 1958, 333; *Kölz-Ott M.,* Eventualvorsatz und Versuch, Zürich, "Schulthess Polygraphischer Verlag",1974, 39, 98. For opposite position see: *Turava M.,* Criminal Law, General Part, Doctrine of Crime, Tbilisi, 2011, 298 (in Georgian); *Heinrich B.,* Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgart, "Kohlhammer", 2010, 275, Rn. 658; *Jescheck H.H.,Weigend T.,* Lehrbuch des Strafrechts, Allgemeiner Teil, Berlin, "Duncker&Humblot", 1996, 515; *Roxin C.,* Strafrecht, Allgemeiner Teil, Band II, München, "C.H. Beck", 2003, 353,§29, Rn. 71.

result is the combination of intention-carelessness. In particular, the main offence is executed with intention; however the qualifying result is not intentional. The raised issue is covered in the present letter in the relative-legal context, with the relation to the threat delicts.

2. General characteristics of delicts creating the threat

2.1. Delicts for abstract threat

The criminal law science differentiates the infringement delicts from the threat delicts. Infringement delicts are those which necessarily comprises of infringement of legal well-being, e.g. murder, health injury and etc. Infringement delict is more limited notion compared with so called material or result delict. Specific threat delict is part of result delicts, but can't be reviewed as infringement delict, as the typical characteristic of infringement delict is not a threat to the legal well-being, but the infringement of the above.[2] Threat delicts consider only threat to the legal well-being. There are three main types of threat delicts[3]: 1. Abstract; 2. Specific; and 3. Abstract-specific.

In abstract threat delicts the legislative body deems punishable the act itself, which is characterised with the dangerous features. The offence is finalised with the execution of actions described in the law and does not require the result in the form of infringement or concrete threat to be in place.

Abstract threat delicts cover the actions, in which there are no real infringements and no specific threats to the protected legal well-being.[4] The abstract threat delicts are those, in which the dangerous situation is not a part of action and is only the motive, base for existence of criminal law norm.[5] O. Gamkrelidze differently justifies the basis for existence of threat delicts in

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2 In legal literature the opposite position is also expressed, according to which the „term „Infringement" does not mean the actual damage to the specific object protected by the law, but also considers the actions, which create the danger for such damage", see: *Tsereteli T.,* Public Danger and Crime in Criminal Law, Tbilisi, 2006, 11 (in Georgian).

3 In Georgian legal literature the danger creating Delicts are divided into two parts: abstract and specific danger delicts, see: *Gamkrelidze O.,* Interpretations for Georgian Criminal Law Code, 2nd Edition, Tbilisi, 2008, 77; *Gamkrelidze O.,* Criminal Law Problems, Volume 1, Tbilisi, 2011, 18; *Tsereteli T.,* Public Danger and Crime in Criminal Law, Tbilisi, 2006, 164; *Tsereteli T.,* Criminal Law Problems, Volume IV, Tbilisi, 2010, 176; *Ugrekhelidze M.,* Guilt in Danger Delicts, Tbilisi, 1982, 3; *Todua N.,* Danger Creating Crimes according to the Criminal Law of Georgia, "Justice and Law", N2/3, 2007, 153; *Mamulashvili G.,* in the book: Private Section of Criminal Law, Volume I, 4th Edition (Co-authors *Lekveishvili M., Todua N., Mamulashvili G.*), Tbilisi, 2011, 126. For traditional two-type differentiation of danger delicts in German criminal code see: *Zieschang F.,* Die Gefährdungsdelikte, Berlin, "Duncker&Humblot", 1998, 15-22. Three-type differentiation of danger delicts in Georgian criminal law was first introduced by M. Turava, see: *Turava M.,* Criminal Law, Review of General Section, 8th Edition, Tbilisi, 2010, 76-77 (in Georgian).

4 See: *Wohlers W.*, Deliktstypen des Präventionsstrafrechts-zur Dogmatik "Moderner Gefährdungsdelikte", Berlin, "Duncker&Humblot", 2000, 283.

5 See: Ib., 281-282; *Brehm W.*, Zur Dogmatik des abstrakten Gefährdungsdelikts, Tübingen, "J.C.B. Mohr (Paul Siebeck)", 1973, 9; *Heinrich B.,* Der Erfolgsort beim abstrakten Gefährdungsdelikt, "GA", 1999, 74.

criminal law and administrative law: "infringement upon the legal well-being or creation of threat for such infringement is the motive for the announcement of legal act as well as basis for punishment of the guilty person. In administrative delicts the threat for the infringement of legal well-being is only the legislative motive for making the legal norm and not the basis for the punishment".[6] According to *O. Gamkrelidze's* view, the threat in administrative law is motive for creation of norm, and the basis for the punishment in this case is any type of open in-obedience to the will of legislator.[7]

In case of delicts creating abstract threat the legislator deems the determined action so dangerous that does not require creation of specific threat. [8] Legislator applies the abstract delicts in cases, when the case is related to the protection of especially important legal well-being. The more important the legal well-being is, the more justified is prohibition of abstract threat instead of specific threat.[9] Abstract delicts are also considered as legislative mechanisms for the protection of super-individual legal well-being.[10]

In criminal cases with abstract threat the threat is presumed by the legislator him/herself. In the process of creating such composition of offence, the legislator admits that the action described in the disposition of criminal law can in general, based on the life experience, damage the specific interests protected by the law.[11] Therefore it is not the competence of the court to determine or decline the specific threat for the infringement of specific object. Granting the court with the above right would be the revision of the law and conflict the legislator's will to punish the act. With the above view, the abstract threat crimes belong to so called formal crimes.[12]

P. Kramer considers abstract threat as the stage preceding the specific threat, which is located between the specific threat and infringement. In line with K*ramer's* position "infringement considers injury, specific threat - the probability of infringement and an abstract threat – probability of specific threat".[13]

Criminal law of Georgia considers the responsibility for the delicts creating the abstract threat such as illegal abortion (article 133)[14], non-provision of help (article 129), leaving in danger (article 128), leaving the sick in danger (article 130).

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6 See: *Gamkrelidze O.,* Criminal Law Problems, Volume I, Tbilisi, 2011, 15-16 (in Georgian).

7 Ib.

8 *Heinrich B.*, Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgart, "Kohlhammer", 2010, 59.

9 *Wohlers W.*, Deliktstypen des Präventionsstrafrechts-zur Dogmatik "Moderner Gefährdungsdelikte", Berlin, "Duncker&Humblot ", 2000, 283.

10 Ib., 285, Footnote 20.

11 *Brehm W.*, Zur Dogmatik des abstrakten Gefährdungsdelikts, Tübingen, "J.C.B. Mohr (Paul Siebeck)", 1973, 9.

12 *Tsereteli T.,* Danger Creating Delicts, "Soviet State and Law", N8, 1970, 56 (in Russian).

13 *Cramer P.*, Der Vollrauschtatbestand als abstraktes Gefährdungsdelikt, Tübingen, "J.C.B. Mohr (Paul Siebeck)", 1962, 68-69.

14 Punishment for the illegal abortion see in detail: *Tskitishvili T.,* Illegal Abortion – Intentional Murder or Danger Creating Delict?, in: Essays on Law and Political Thinking History (Collection of Essays devoted to George Nadareishvili), Volume I, *Peradze G.* (Editor), Tbilisi, 2010, 515-559 (in Georgian).

Mamulashvili G. and Todua N. consider as threat creating delict the leaving person in danger[15], the above we deem unjustified, as when leaving the person in danger the person is in specific danger-threat, however such threat is often created by third person and therefore the judge does not have to determine if there is any causal relationship between the inactiveness, leaving person in danger and being in danger. The reason for assigning responsibility over the person leaving other person in danger is not creation of specific danger, but avoiding neutralisation of already existing threat. Inaction creates the specific threat if by carrying out relevant action the above threat would not be created.[16] Inaction in leaving person in danger does not create the specific threat, such threat already exists notwithstanding the guilty person providing help or not. In leaving the person in danger the fact of person being in danger created the responsibility to act from the person convicting the crime and for the person in danger the responsibility to provide support is preceded with the state of danger. Inaction-leaving in danger cannot be considered as the reason for the specific threat (to be in danger) which already existed before the inaction. It is possible that a person is under danger due to the previous actions (car accident) of the person (leaving the person in danger) convicting the crime[17], but this preceding action is considered as the separate delict.[18]

Ugrekhelidze M. and Tkesheliadze G.[19] *also consider leaving person in danger as abstract delict. Ugrekhelidze M. and Tkesheliadze G.* consider the leaving person in danger as well as other abstract threat creating delicts as delicts without results or so called formal delicts. [20] Russian authors also consider the leaving person in danger as "formal" crime.[21]

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15 *Mamulashvili G.,* in the book: Private Section of Criminal Law, Volume I, 4th Edition (Co-authors *Lekveishvili M., Todua N., Mamulashvili G.*),Tbilisi, 2011, 126; *Todua N.,* Danger Creating Crimes in Georgian Criminal Code, "Justice and Law", N2-3, 2007, 154 (in Georgian).

16 *Gorelik I.I.,* Qualification of Crime, Dangerous for Life and Health, Minsk,"Wisheishaia Shkola", 1973, 19 (in Russian).

17 There is a special norm on the responsibility for leaving person in threat after the auto-road accident in German Criminal Code (paragraph 142, German Criminal Law Code, Deutscher Taschenbuch Verlag (in Georgian)).

18 Decisions from Supreme Court of Georgia on Criminal Law Cases, N9, 2003, 1168-1169. According to the Kutaisi Court decision G. Kikacheishvili was announced as guilty under section 4, article 276 (transport crime) and article 128 (leaving person in danger) of the criminal law of Georgia. Analogue qualification see: Decisions from Supreme Court of Georgia on Criminal Law, Private Section Cases, N1, 2005, 82-85 (in Georgian).

19 *Ugrekhelidze M.,* Guilt in Danger Delicts, Tbilisi, 1982, 4-5; *Tkesheliadze G.,* in the book: General Section of Criminal Law, Handbook, *Nachkebia G., Dvalidze I.* (Editors), Tbilisi, 2007, 121 (in Georgian).

20 Ib.; *Tkeshekadze G.,* Court Practice Comments on Criminal Law, Crime against the Human Being, Tbilisi, 2002, 206 (in Georgian).

21 *Juravliova M.P., Nikulina C.I.* (Editors), Criminal Law, General and Private Sections, 2nd Edition, Moscow, "Norma", 2008, 361; *Radchenko B.I., Mikhlina A.S.* (Editors), Comments to the Criminal Code of Russia, Saint Petersburg, "Piter", 2008, 220 (in Russian).

Turava. M. also considered leaving in danger as delict creating the specific threat, [22] but later he changed position and in his recent works he does not any more review the above mentioned delict as delict creating specific threat.[23]

Delict creating an abstract danger is also considered under the crime envisaged by article 129 of criminal law of Georgia – non provision of help.[24] Non provision of help is also punished under paragraph c, article 323 of German criminal law. Some of the authors review such offence as delict creating a specific danger.[25] Non provision of help, similar to the leaving in danger, should be considered as abstract delict, as leaving in danger and non-provision of help have nearly analogue objective and subjective contents. Difference between the two lies in executor. Leaving in danger is delict of duty; its executor is a special subject, who bears the function of guarantor. Another difference between the leaving in danger and non-provision of help – in case of leaving in danger the injured person finds him/herself in danger due to the preceding actions of the guilty person, in case of non-provision of help liability to help is always created via the reasons not dependent on the guilty person. The both delicts are purely delicts of inaction and are considered as finalised at the moment of avoiding implementation of obligatory action; in other words, for their finalisation it is not necessary to have a specific result; and the specific danger, which is considered under the state of danger should be present before the creation of liability to act from the person leaving other person in danger or not providing the help.

German legal literature presents the setting fire as delict creating abstract danger (article 306, paragraph a, section I, German criminal law).[26] In this case the basis for punishability is that setting fire in line with life experience created substantial danger for the lives and health of other persons. However setting fire will be the abstract delict only if defendant is sure that there is nobody in the house he/she is setting fire to.[27] If the defendant is not sure in the above and it turns out that there was somebody in the house, we would have specific danger delict and not abstract danger delict.

Criminal law science reviews the legitimation of abstract danger delicts as arguable and expresses position according to which the above type delicts are in conflict with the principles of

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22 *Turava M.,* Criminal Law, General Section Review, 7th Edition, Tbilisi, 2008, 86 (in Georgian).

23 *Turava M.,* Criminal Law, General Section, Doctrine of Crime, Tbilisi, 2011, 94 (in Georgian).

24 *Tsereteli T.,* Public Danger and Crime in Criminal Law, Tbilisi, 2006, 165; *Tsereteli T.,* Criminal Law Problems, Volume IV, Tbilisi, 2010, 177. For the opposite position see: *Nachkebia G.,* Criminal Law, General Section, Handbook, Tbilisi, 2011, 239 (in Georgian).

25 *Satzger H., Schmitt B., Widmaier G.* (Hrsg.), Strafgesetzbuch, Kommentar, 1. Auflage, Köln, "Carl Heymanns Verlag", 2009, 2127; *Fischer T.*, Strafgesetzbuch und Nebengesetze, 57. Auflage, München, "C.H. Beck", 2010, 2255, §323(C), Rn. 1. Not providing help is considered as abstract danger delict by Hainrich B., see: *Heinrich B.,* Der Erfolgsort beim abstrakten Gefährdungsdelikt, "GA", 1999, 74.

26 *Frister H.*, Strafrecht, Allgemeiner Teil, 4. Auflage, München, "C.H. Beck", 2009, 32.

27 Ib., 32.

presumption of guiltlessness, as abstract danger delict is an action, which in some cases does not consider the danger for the legal good.[28]

It is true that delict creating abstract danger is not based on specific, realistic danger for the legal good; however we cannot question the punishment for the above delicts. Under the conditions of technical revolution the need for punishment of delicts creating an abstract danger is increasing. In parallel with the development of technical sciences the cycle of actions that could create wide scale damage is widening, therefore the legislator announces the punishment for certain actions considering the scale of danger without creation of damage or creation of specific danger.

2.2. Specific danger delicts

In delicts creating specific danger the legislator is not limited with only description of action and requires that the situation of danger is created for specific object protected by the law via the actions from the person. Therefore, creation of dangerous situation, as the change in environment, circumstances is part of necessary characteristics of specific danger delicts.[29]

Specific danger delict requires having real danger as a result of relevant action to the protected objects.[30] Famous German scientist *K. Roksin* underlines the notions of reality of danger in describing the specific danger delicts. He also stresses that the specific case should be taken into consideration, meaning that the action should not be dangerous only in general terms; it should be dangerous in specific circumstances.

The above type delicts cover actions creating direct danger for the protected legal good; however such actions are not ended with any infringement.[31] In describing the specific danger delict, the legislator chooses formulation: "[...] and therefore, the danger was created to life or health and etc […]". Specific danger exists only if result depends on chance.[32] Chance plays important role in specific danger delicts.[33]

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28 Ib., 33. On irrelevance of abstract danger delicts with the constitutional legal principles, see also: *Graul E.*, Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht, Berlin, "Duncker&Humblot", 1991, 232; *Volz M.*, Unrecht und Schuld abstrakter Gefährdungsdelikte, Göttingen, Dissertations- und Fotodruck Franz Frank, 1968, 133. For opposite position see: *Ahn W.H.*, Zur Dogmatik abstrakter Gefährdungsdelikte, München, 1995, 111. The author of mentioned work considers justified the punishability of delict creating abstract danger based on the protection of legal good and public interests, despite the fact that in many cases it can be impossible to clearly identify the creation of danger, see: *Ahn W.H.,* mentioned work, 110-111 (in German).

29 *Tsereteli T.,* Danger Creating Delicts, "Soviet State and Law", N8, 1970, 56 (in Russian).

30 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, München, "C.H. Beck", 2006, 423.

31 *Wohlers W.*, Deliktstypen des Präventionsstrafrechts-zur Dogmatik moderner Gefährdungsdelikte, Berlin, "Duncker&Humblot", 2000, 283.

32 *Heinrich B.*, Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgart, "Kohlhammer", 2010, 59.

33 *Kratzsch D.*, Prinzipien der Konkretisiierung von abstrakten Gefährdungsdelikten-BGHSt 38, 309, "Jus", 1994, 379.

Independent practical meaning is given to specific danger delict for all those cases, where despite the specific danger situation infringement does not take place. The above raises a question: if the notion of danger is related to the non-execution of infringement by chance, what additional result should or can prohibition of danger have besides the prohibition of infringement?[34] As in case of specific danger delicts, non-execution of results depends on chance, it is not acceptable to question the need for punishment for the specific danger delicts, as absence of criminal results also depends on chance in case of attempt, but this does not make void the need for punishment. By punishing specific danger and criminal attempt, legislator stresses importance of protected object, the above is more evident in the event of abstract danger delicts. In case of abstract danger delict the action is punished despite the fact that there is not even specific danger and we deal with the action having dangerous characteristics.

Specific danger delicts are related to the special results – placing the object of infringement under danger.[35] Creation of danger for the existence of legal good, hence questioning the existence of protected interests can be considered as "results" separate from infringement and deserving punishment.[36]

In implementation of specific danger delicts it is necessary to determine causal connection between the action and specific danger. Specific danger delicts belong to the group of so called "material" criminal cases, [37] meaning that the above delict does not strongly differ from infringement delict based on the attributing (imputing) criteria, but in this case infringement result is replaced by the result of danger creation as derivative of action contents.[38]

Notion of specific danger is not used in general terms but only in relation to the specific case. In any case, court determines two publicly accepted conditions for the specific danger delict: first of all existence of action object and its placement under the influence of danger, and incriminated action should create danger close to the infringement of action object.[39] As an example of creation of specific danger we can discuss the following: driver exceeds the speed determined under the law and violates security rules or outruns the car on high way and creates the accident situation, however the accident is avoided due to the high qualification of other driver.

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34 *Wohlers W.,* Deliktstypen des Präventionsstrafrechts-zur Dogmatik "Moderner Gefährdungsdelikte", Berlin, "Duncker&Humblot", 2000, 286.

35 *Ugrekkhelidze M.,* Guilt in Danger Delicts, Tbilisi, 1982, 5 (in Georgian).

36 *Wohlers W.,* Deliktstypen des Präventionsstrafrechts-zur Dogmatik "Moderner Gefährdungsdelikte", Berlin, "Duncker&Humblot", 2000, 285.

37 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, München, "C.H. Beck", 2006, 423; *Tsereteli T.,* Danger Creating Delicts, "Soviet State and Law", №8, 1970, 57 (in Russian); *Ugrekkhelidze M.,* Guilt in Danger Delicts, Tbilisi, 1982, 6 (in Georgian).

38 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, München, "C.H. Beck" , 2006, 423.

39 Ib., 423-424.

We can present as an example for non-existence of specific danger the following: on the stiff mountain road, driver A has carelessly exceeded the speed limit and outrun B. If there was car driving from the opposite side, A would not be able to give way and avoid accident. However, there were no cars on a distance of 10 kilometres coming from the opposite road.[40] Despite the extremely careless actions from driver, there is no specific danger in place.[41] As *O. Gamkrelidze* mentions, in similar cases specific danger is not created not because such action (exceeding speed limit) is not sufficient for creation of specific danger, but because the road is empty.[42] In discussed case action object is not placed in the area of danger which is characteristic for the delicts creating specific danger.

In line with the relevant view of famous German scientist *H, Veltsel,* specific danger is directed only towards definite object. Legal good for *Veltsel* is to have legally protected object in the area influenced by definite accident. Abstract legally protected object – life (generally -T.c) cannot be placed in the zone of influence. To determine whether the legal good was placed in the zone of danger is not possible without specification of legal good.[43] Therefore specific danger is created for the life of specific person and not for the life in general.

In line with *Buri's* view under creation of transport danger we shall consider creation of danger for one specific vehicle and not for transport in general (paragraph 315 of German criminal law). Buri differentiated transport as road transport (in general) and transport, as specific vehicle (unit, specific). According to *Buri* danger cannot be created for the notion, it can be created for the specific object comprising this notion.[44]

In accordance with position of German Federal Court, when we are dealing with the specific danger delict, there must be danger in vicinity and existence of danger in distance is not sufficient.[45]

In line with the position expressed by the German court, criminal action should cause the critical situation, infringing security of specific individuals and objects, and the actual damage to the legal good should depend only on chance[46]

According to *E. Horni,* specific danger considers circumstances, based on which the natural sciences cannot positively determine, why the specific circumstances have not caused infrin-

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40 *Horn E.*, Konkrete Gefährdungsdelikte, Köln, "Dr. Otto Schmidt KG", 1973, 161; *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, München, "C.H. Beck", 2006, 424.

41 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, München, "C.H. Beck", 2006, 424.

42 *Gamkrelidze O.,* Criminal Law Problems, Volume I, Tbilisi, 2011, 19 (in Georgian).

43 *Welzel H.,* Das Deutsche Strafrecht, 11. Auflage , Berlin, "Walter de Gruyter & Co", 1969, 137.

44 *Von Buri M.*, Beiträge zur Theorie des Strafrechts und zum Strafgesetzbuche, Leipzig, 1894, 375. Buri states, that „if the danger is not created for such seperate objects, it is unacceptable to use paragraph 315 of Criminal law code of German Federal Republic (Citation is provided from *Horn E.*, Konkrete Gefährdungsdelikte, Köln, "Dr. Otto Schmidt KG", 1973, 162).

45 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, München, "C.H. Beck", 2006, 424.

46 Ib., 424.

gement.[47] *K. Roksin* fairly criticises Honri's above statement and notes that such definition would significantly limit notion of specific danger, as natural sciences can justify/explain everything (almost) if research/investigation is implemented correctly. Moreover, results of estimation made based on natural sciences are not always specific.[48] In line with Roksin's position, when accident with the car coming from opposite side was inevitable, it was excluded as the hurricane caused change of vehicle position on the opposite road, which was impossible to predict. It is not acceptable to reject the existence of specific danger only because such hurricane and its impact can be explained by natural sciences.[49]

Georgian criminal law considers responsibility for the specific danger creating delicts such as placing life in dangerous condition (Criminal Law of Georgia, article 127). The necessary condition for qualifying action under the article 127 of Georgian criminal law is creation of specific danger to the life of injured. Accordingly, in line with article 8, Criminal law of Georgia, the causal connection between the action and created specific danger shall be identified. Hence, *G. Nachkebia's* view of considering delict envisaged under article 127 of Criminal law of Georgia as delict creating abstract danger is not correct.[50] Contrary to *G. Nachkebia, G. Tkesheliadze* considers the above mentioned delict as specific danger delict, however he names such crime as non-result, in other words formal crime,[51] which cannot be shared. When we talk about specific danger and identification of causal connection, we are discussing result generating, so called material crime.[52] Specific danger of result is also a result of crime in some essence.[53]

2.3. Abstract-specific danger delicts

Besides specific and abstract delicts, the literature discusses third type of danger delict - abstract-specific danger delicts.[54] Abstract-specific delicts are referred to in literature as potential

47 *Horn E.*, Konkrete Gefährdungsdelikte, Köln, "Dr. Otto Schmidt KG", 1973, 160-161.

48 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, München, "C.H. Beck", 2006, 425.

49 Ib., 425.

50 *Nachkebia G.,* Criminal Law, General Section, Text Book, Tbilisi, 2011, 238-239 (in Georgian).

51 *Tkesheliadze G.,* Court Practice Comments to the Criminal Law, Crime against the Human Being, Tbilisi, 2002, 204; O. Gamkrelidze divides the crimes into two groups: Delicts with results and danger creating delicts, therefore O. Gamkrelidze considers danger creating delicts to be delicts without results, see: *Gamkrelidze O.,* Interpretation of Georgian Criminal Law Code, 2nd Edition, Tbilisi, 2008, 77 (in Georgian).

52 *Anastasopoulou I.,* Deliktstypen zum Schutz kollektiver Rechtsgüter, München, "C.H. Beck", 2005, 46-48; *Jescheck H.H., Weigend T.,* Lehrbuch des Strafrechts, Allgemeiner Teil, Berlin, "Duncker&Humblot", 1996, 263-264; *Horn E.*, Konkrete Gefährdungsdelikte, Köln, "Dr. Otto Schmidt KG", 1973, 11; *Graul E.*, Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht, Berlin, "Duncker&Humblot", 1991, 24.

53 *Tsereteli T.,* Criminal Law Problems, Volume II, Tbilisi, 2007, 419 (in Georgian).

54 One of the first works devoted to the abstract-specific delicts belong to German scientist H. Schroder, see: *Schröder H.*, Abstrakt-konkrete Gefährdungsdelikte?, "JZ", 1967, 522-525.

danger delicts (potentielle Gefährdungsdelikte).[55] In case of abstract-specific delicts the judge determines if in specific case the danger could cause heavy result. For example: first section of article 288, Criminal law of Georgia requires determining the following: would violation of rules for treatment of environmentally dangerous substances cause worsening of health or damage to the environment or other heavy result.[56] Same counts for the issues covered in articles 222, 233, 241, 242, 245 of Criminal law of Georgia, the above articles discuss the possibility to cause injury/damage.[57]

The characteristic of abstract-specific danger delict is ability to cause negative result ("Eignung")[58]. However, creation of specific danger is not characteristic of abstract-specific danger delict.[59]

If in case of so called abstract-specific danger delict judge has to identify if actions of criminal could cause injuries to the health of person or cause any other heavy result, what is the difference between this type of delict and specific danger creating delict; what is the difference which caused creation of third group of delicts and how this third type is differentiated? Judge is identifying possibility of infringement upon legal good from the actions of guilty person, is not this same as identification of specific danger? As specific danger also considers possibility of infringement. The answer to above raised questions is as follows: In discussed types of delicts we talk about possibility of result, which does not contain the specific danger of creation of specific result. In specific delicts specific delicts cover already created result, and the causal connection with relevant action can be identified.

Jeshek/Vaigend's famous handbook covers two types of danger delicts and delicts characterised with the general danger of action with the ability, potential ("Eignung") to generate specific result (so called potential danger delicts) to be determined by the judge are named as

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55 *Zieschang F.*, Die Gefährdungsdelikte, Berlin, "Duncker&Humblot", 1998, 162-163*; Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, "C.F. Müller", 2010, 8-9, Rn. 30.

56 *Turava M.,* Criminal Law, Review of General Section, 8th Edition, Tbilisi, 2010, 77 (in Georgian).

57 Todua N. and Mamulashvili G. categorise the above mentioned delicts as specific danger creating delicts, see: *Todua N.,* Danger Creating Crimes according to the Georgian Criminal Code, "Justice and Law", N2-3, 2007, 156; *Todua N.,* Sevelar Issues on Improvements to the Georgian Criminal Legislation, Temporary Problems in Criminal Law, in: Collection of Essays devoted to the 100th Anniversary of T.Tsereteli, *Gamkrelidze O.* (Editor), Tbilisi, 2006, 98-99; *Mamulashvili G.,* in the book: Criminal Law, Private Section, Volume I, 4th Edition (Co-authors *Lekveishvili M., Todua N., Mamulashvili G.*), 2011, 622 (in Georgian).

58 *Schröder H.*, Abstrakt-konkrete Gefährdungsdelikte?, "JZ", 1967, 525. In literature the abstract –specific delicts are also referred to as potential delicts (Eignungsdelikte), see: *Hoyer A.*, Die Eignungsdelikte, Berlin, "Duncker&Humblot", 1987, 16; *Graul E.*, Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht, Berlin, "Duncker&Humblot", 1991, 116; *Wolter J.*, Objektive und personale Zurechnung von Verhalten, Gefahr und Verletzung in einem funkzionalen Straftatsystem, Berlin, "Duncker&Humblot", 1981, 253.

59 *Heinrich B.*, Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgard, "Kohlhammer", 2010, 59, Rn. 165; *Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, "C.F. Müller", 2010, 8-9, Rn. 30.

abstract delicts.[60] The judge in this case determines possibility to have specific result, but this danger to have result is not specific and is generalised. Therefore in description of relevant delicts the words such as "could result…" are given. Phrase "could result" indicates that legal good is not under the influence from the specific danger, which is pre-condition for delicts creating specific danger.

The title for abstract-specific delict indicates that it has signs characteristic for both types of delicts. Specifically, judge does not have to identify specific danger, as for abstract danger delicts; in contrary to the abstract danger delicts, the judge does not have to determine specific danger, but has to determine that specific action coul*d cause* the specific result. However this possibility is not comparable to specific danger.

3. General review of danger creating delicts qualified by the result

In addition to the basic composition of danger creating delicts the criminal literature also distinguishes delicts qualified by the result. The danger creating delicts are qualified by the result where the result is not the component of delict's basic composition, but is sign of its qualified composition.

There are three different groups of delicts qualified by the result: first group comprises of delicts with its main composition and qualifying result caused by the carelessness (Article 242, section 2 of Criminal Law of Georgia), Second group of delicts with its main composition and qualifying result implemented with intention (Article 131, section 4 of Criminal Law of Georgia), and third group of delicts with its main composition implemented with intention and qualifying result caused by the carelessness (Article 130, section 2 of Criminal Law of Georgia; Article 133, section 3 of Criminal Law of Georgia).[61]

Criminal law literature separates delicts qualified by results by its formal and material terms. Formal delicts qualified by result are those, with intended basic composition and intended qualifying results or there is careless attitude towards the action as well as result. Material delicts qualified by result cover delicts with combination of intended main composition of delict and qualified result caused by carelessness.[62]

The composition considered under article 131, section 4 of Criminal Law of Georgia belongs to the delicts qualified by result with the non-real danger (intentional transfer of HIV

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60 See: *Jescheck H.H., Weigend T.,* Lehrbuch des Strafrechts, Allgemeiner Teil, Berlin, "Duncker&Humblot", 1996, 264. Graul E. also considers so called potential or abstract-specific delicts as the type of abstract danger delicts, see: *Graul E.*, Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht, Berlin, "Duncker&Humblot", 1991, 116.

61 *Gössel K.,* Dogmatische Überlegungen zur Teilnahme am erfolgsqualifizierten Delikt nach § 18 StGB, FS für Richard Lange zum 70. Geburtstag, Berlin, "Walter de Gruyter", 1976, 222-223, 238-239.

62 *Hirsch H.*, Zur Problematik des erfolgsqualifizierten Delikts, "GA", 1972, 65.

virus to two or more persons), composition considered under article 130, section 2 of Criminal Law of Georgia (leaving sick person in danger, resulted in heavy health injury or death) and composition considered under article 133, section 2 and section 3 of Criminal Law of Georgia (illegal abortion resulting in death).

It is interesting to review delicts qualified by result and to differentiate them from related delicts. For example, what is a difference between the causing death due to the carelessness and causing death due to the creation of danger? It is also important to clarify if it is possible to identify attempt in delicts qualified by the result in general, including danger creating delicts qualified by the result.

Before answering question where is a difference line between causing death due to the carelessness and causing death due to the creation of danger, the following example can be presented to illustrate the case: A wishes to threaten B. A starts fire from the car to frighten B and the bullet strikes B. Not only the danger to the life was created for B, but B also died as a result of wounds from the bullet.[63] A was aware of the danger for B created by his/her action, but A did not intend to cause B's death. How shall be the above action qualified?

It is interesting to review the above case based on German legislation, as paragraph 221, section 3 of German criminal law declares punishable creation of danger causing the death of the injured. Paragraph 222 of the same code punishes the death caused by the carelessness.

German scientist *R. Rengir* notes, that if B did not survive, we would not get the basic composition for the danger creation (221 paragraph of German criminal law). Based on his position to have danger delicts qualified by result it is necessary to have result (causing death) following the implementation of basic composition of danger creating delict.[64] *Rengir's* view indicates that he considers time interval,[65] meaning that we have danger creating delict qualified by the result, if first the danger creating action is carried out and then such action is followed by the specific result such as death or health injury. If implemented action is directly followed by the negative result, then we do not have danger creating main and qualifying composition, as if we are talking about causing death or health injury, we cannot have main composition of danger creating delict, as such danger is out of the scope of main composition of danger creating delict. As for the danger delict qualified by the result, it is true that result is sign of this composition, but should not directly follow action implementation; there should be time interval between the implementation of danger creating delict,

63 Similar example see: *Rengier R.*, Erfolgsqualifizierte Delikte und verwandte Erscheinungsformen, Tübingen, "J.C.B. Mohr (Paul Siebeck)", 1986, 240.

64 *Rengier R.*, Erfolgsqualifizierte Delikte und verwandte Erscheinungsformen, Tübingen, "J.C.B. Mohr (Paul Siebeck)", 1986, 240.

65 M. Turava emphasises the importance of time interval for the qualification of action as danger creating delict, but not the qualified by result, but for the identification of relationship between the main composition and attempt for the crime, see: *Turava M.,* Criminal Law, General Section Review, 8th Edition, Tbilisi, 2010, 136-137 (in Georgian).

result and creation of danger. Analogue position is derived from the following view from *R. Rengir* – he stresses terminological issue and states that paragraph 221, section 3 of German criminal law covers Infringement upon the "person under danger".[66] The above indicates that creation of danger should precede death of person and only after this the result shall come. Otherwise we do not have the composition of danger creating delict qualified by result.

As mentioned above section 2, Article 130 of Georgian criminal law considers responsibility for leaving sick person in danger causing death; moreover article 116 considers responsibility for death due to carelessness. Both compositions imply carelessness towards the life termination, but difference between these two cases is that composition under section 2, Article 130 considers leaving such person in danger as preceding action. As for the composition covered in Article 116, in this case death may be caused by various actions. In line with section 2, Article 130 the termination of life shall be preceded by leaving the person in danger. In composition covered in section 2, Article 130 the termination of life is qualifying circumstance for the leaving person in threat. As of the composition covered in Article 116, liquidation of life of injured person is basing circumstance of main composition and result causing action is implemented due to carelessness. In cases covered by section 2, Article 130 (leaving person in threat) is implemented intently and careless attitude is valid only for the result – liquidation of life. In all basic compositions the criminal has intended or careless attitude towards the result. In basic compositions it is impossible to have defendant acting with intention and having careless attitude towards the result. The above combination of intention and carelessness is possible only for the compositions qualified by the subsequent result,[67] as action taken in isolation without qualifying result is punishable itself and is the main composition. For example Article 133, section 3 of Georgian criminal law punishes illegal abortion causing termination of life, which is composition qualified with heavy (subsequent) result. In this case there is careless attitude towards the result, as for the action – illegal abortion – is intended action and it is punishable under section one, Article 133 even if no results follow such action. Same covers compositions under article 130 of Georgian criminal law. According to the fair position of famous Georgian scientist *T. Tsereteli* it is not possible to separately determine subjective composition of action for action and result in result causing, so called material crimes.[68] Otherwise it will become impossible to distinguish intention and carelessness. Whether the action is carried out with intention or due to carelessness is determined based on the attitude towards the result in delicts with results. In line with article 9

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66 *Rengier R.*, Erfolgsqualifizierte Delikte und verwandte Erscheinungsformen, Tübingen, "J.C.B. Mohr (Paul Siebeck)", 1986, 241.

67 *Ugrekhelidze M.,* Guilt in Danger Delicts, Tbilisi, 1982, 42; *Gamkrelidze O.,* Problem of Criminal Unjustice and Basis for Punishment of Participation, Tbilisi, 1989, 106-107; *Babilashvili L.*, Problems of Transport Crimes an Court Practice, Tbilisi, 2004, 151-152 (in Georgian).

68 *Tsereteli T.*, Criminal Law Problems, Volume II, Tbilisi, 2007, 44 (in Georgian).

of Georgian criminal law, action is carried out with intention if person was consciously aware that his/her actions were against the law, person considered the possibility of *result* against the law and was willing to get such *result*, or considered the unavoidability of such *result* (direct intention) or did not want to have such *result,* but consciously admitted such result or was ignorant to such *result* (indirect intention). As it is clear from the above definition, to identify whether the crime was convicted with intention, the attitude of person convicting the crime towards the result is considered. Based on the above, I do view position of *M. Turava,* discussing the combination of intention-carelessness in main compositions, as inappropriate.[69] In main composition only the conscious and not intended action can be reviewed from the perspective of carelessness. Intentional action in delicts causing results considers not only the conscious action but also conscious direction of actions towards the results. We should not consider as identical the conscious and intentional actions. Intentional action always considers conscious action, but conscious action does equal to intentional action.[70] Section one; Article 270 of Criminal law of Georgia considers punishment for violation of security rules or maintenance of transport movement by person driving the vehicle, if such action caused light health injury. Mentioned crime is considered as offense caused by carelessness, as the defendant must have carelessness attitude towards the result to qualify such action under article 276 of Criminal law of Georgia. Transport offence in general is carelessness delict.[71] Despite the fact that the crime is convicted due to carelessness, it also includes the conscious action. In particular, driving a car is conscious action, but as such conscious action is not consciously directed towards the result – harm to the health, the action is not considered as carried out with intention. Moreover, the rules for transport movement can be violated consciously and unconsciously, but this condition does not transform the composition considered under section one, Article 276 of criminal law of Georgia to the composition which covers both intention and carelessness. Soviet criminal law literature already covered the position that violation of transport movement rules differs from other compositions, as psychic attitude towards the action and result is different and mentioned offence has complex subjective angle, so called double or mixed form of guilt.[72] The above provision was fairly criticised.[73] We shall look for the combination of intention and carelessness in cases where there

69 *Turava M.,* Criminal Law, General Section, Doctrine of Crime, Tbilisi, 2011, 603 (in Georgian).

70 *Nachkebia G.,* Crime with Two Forms of Guiltiness, "Journal of Law", N1, 2009, 29 (in Georgian).

71 *Babilashvili J.,* Problems of Transport Crimes and Court Practice, Tbilisi, 2004, 156 (in Georgian).

72 *Tkesheliadze G.,* Responsibility for the Combination of Crimes, Tbilisi, 1965, 21; *Tsutskiridze G.,* Criminal Law Responsibility for the Violation of Transport Movement Security and Transport Maintenance Rules, Tbilisi, 1971, 135-136 (in Georgian).

73 *Gamkrelidze O.,* Responsibility for the Combination of Crimes, Journal "Soviet Law", N6, 1966, 85-86; *Ugrekhelidze M.,* Mixed or Double Guilt in Criminal Law, "Matsne, Series for Philosophy, Psychology, Economy and Law Issues", N1, 1971, 160-161; *Ugrekhelidze M.,* On Mixed or Double Form of Guilt, "Soviet Law", N1, 1980, 33-34; *Ugrekhelidze M.,* Guilt in Danger Delicts, Tbilisi, 1982, 42; *Kobiashvili U.,*

are more than one results.[74] We may have only one result in case of combination of intention-carelessness, but action taken in isolation should be creating independent main composition. If we consider possibility of combination of intention-carelessness in composition considered under section one, Article 276 of criminal law of Georgia, then all cases of self-hope and negligence should be considered as implemented with combination of intention-carelessness, where action was carried out consciously and result was unconscious. The above contradicts the legislative definition of carelessness.[75]

The case should be reviewed similarly to the cases related to the violation of transport movement rules, if making fire in the forest causes the setting fire to the forest. Lighting a fire is conscious action, but it cannot be reviewed as intentional action, as fire lighting was done without intention to set fire to the forest and with intention to get warmer. Lighting fire in forest will be considered as intentional action if objective of acting person was directed towards the causing harmful result (setting fire and burning the woods) or in case if the action (lighting fire in the forest) itself was punishable action and punishment of such action would not be connected to the result. If in delicts with results, the attitude towards the results determines if the action was intentional or due to carelessness, in compositions without results the court takes into consideration if the actor was consciously aware that was carrying out dangerous and prohibited actions for the purpose to identify the subjective composition of action.

4. Attempt of danger delicts qualified by result

It is interesting to determine if it is possible to have attempt of the crime qualified by the result, in particular danger creating delict qualified by the result? As we are aware, attempt is possible with intentional action, in case of delicts qualified by the results, we have intentional action, but in many cases of compositions qualified by the result the result caused by the action is not covered by the mentioned intention.

German criminal law science differentiates so called attempt qualified by the results (der erfolgsqualifizierte Versuch) from the composition attempt qualified by the result (der Versuch einer Erfolgsqualifikation).[76]

On Issues of Double or Mixed Guilt, "Soviet Law", N3, 1969, 14-15; *Babilashvili J.,* Problems of Transport Crime and Court Practice, Tbilisi, 2004, 152 (in Georgian).

74 *Gamkrelidze O.,* Responsibility for Combination of Crimes, Journal "Soviet Law", N6, 1966, 86 (in Georgian).

75 *Ugrekhelidze M.,* Mixed or Double Guilt in Criminal Law, "Matsne, Series for Philosophy, Psychology, Economy and Law Issues", N1, 1971, 160-161; *Gamkrelidze O.,* Responsibility for Combination of Crimes, "Soviet Law", N6, 1966, 85-86 (in Georgian).

76 See: *Roxin C.*, Strafrecht, Allgemeiner Teil, Band II, München, "C.H. Beck", 2003, 437-439; *Baumann J., Weber U., Mitsch W.,* Strafrecht, Allgemeiner Teil, Lehrbuch, 11. Auflage, Biefeld, "Ernst und Werner

We have attempt qualified by the result (der Versuch einer Erfolgsqualifikation) if together with the main delict (intentionally carried out or terminated at the stage of attempt) the heavy result which did not happen was also covered in the intention.[77] In many delicts qualified by the result [78] carelessness towards the result is sufficient, but this does not include all offenses qualified by the result and in some cases there must be intentional attitude towards the result. Example of crime with intention qualified by the result (in this case we consider existence of intention towards the action as well as result) is covered by paragraph a, section 4, article 131 of criminal law of Georgia, considering responsibility for transfer of HIV to two or more persons. In case if the HIV is transferred to one person, the offence is punished under section 2 of the same article.[79] Offences covered in both paragraphs 2 and 4 of criminal law of Georgia consider intention towards the result.

German criminal law literature distinguishes two cases of attempt qualified by result:

1. When the main offense has been undertaken, but the result qualifying the offense to which the actions of the criminal were directed, did not happen. For example, the criminal wanted to infect with HIV 2 or more persons, however his actions resulted in infecting only one person, and others avoided infection. Section 2, Article 131 of criminal law of Georgia considers responsibility for infecting persons with HIV. However paragraph a, section 4 considers responsibility for infecting 2 or more persons[80]. How the action must be qualified, when we have main offense – intentional infecting one person with HIV but the qualifying composition has not been implemented? Action shall be qualified under section 2, article 131 and under the attempt of crime under section 4, or only for the attempt considered under section 4, article 131? We think that it will be more correct to qualify the action for the attempt considered under section 4, article

Gieseking", 2003, 612, Rn. 41, 42; *Heinrich B.,* Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgart, "Kohlhammer", 2010, 288, Rn. 686; *Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, "C.F. Müller", 2010, 231-232, Rn. 617.

77 *Baumann J., Weber U., Mitsch W.,* Strafrecht, Allgemeiner Teil, Lehrbuch, 11. Auflage, Biefeld, "Ernst und Werner Gieseking", 2003, 612, Rn. 42; *Heinrich B.,* Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgart, "Kohlhammer", 2010, 288, Rn. 688; *Wessels J., Beulk W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, "C.F. Müller", 2010, 231-232, Rn. 617.

78 For example, composition considered under article 133, section 3 of Georgian Criminal Code: illegal abortion which caused termination of life.

79 The composition considered under the section 2, article 131 of Georgian Criminal Code shall ne viewed as main composition, despite the fact, that the main composition, is mainly considered under the section 1, as article 131 punishes the transfer of HIV and the section 2 of the same article considers the punishment for infecting by HIV, and section 1 considers the punishment for the creation of danger to infect with HIV. Hence, the compositions considered under the sections 1 and 2 are the independent main compositions, and compositions under 3 and 4 sections consider the qualified compositions.

80 Composition considered under section 4, article 131 of Georgian criminal law code considers both intention and careless attitude in relation to the guilt, but in this case we are concerned with the intentional attitude towards the result.

131, as the intention considered infecting 2 or more persons with HIV.[81] If the action is qualified with the combined crimes, in particular under section 2, article 131 and for attempt of crime under section 4, article 131, then the punishment will be artificially made stricter and what is essential, we'll have incorrect qualification. The legal literature also discusses the opposite position. For example, *M. Lekcveishvili* is of the view that when the attempt to implement offense qualified by the unreal result (intentional murder of 2 or more persons) is followed by the death of only one person, the action should be qualified under the combined crime, in particular intentional murder (article 108 of criminal law of Georgia) and attempt to murder 2 or more persons.[82]

2. The cases are also considered as attempt for the offence qualified by the result if the intentional actions directed towards the qualifying results are not followed not only by the qualified results but also by the results which are the necessary signs for the main offense. For example, for the above discussed example, the action directed towards the infecting with HIV of 2 or more persons is not followed by the infecting of any. In this case, action must be punished for the attempt of crime considered under section 4, article 131 of criminal law of Georgia, but in contrary to the attempt of offense discussed above, the judge should sentence lighter punishment considered for the crime under the law, as we do not have neither qualifying nor main result.

The issue of punishment for the attempts qualified by the result as discussed for the second case is considered by some of the German scientists as related to the possibility of punishment for the main offense attempt,[83] which is not a correct approach to the issue. If we consider the case as attempt for the offense qualified by the result and not as attempt for the main offense, the question whether the attempt for the main offense is punishable should not be factor determining the responsibility for the action, as offense qualified by the result contains higher social danger compared with the actions considered under the main offense and generally considers heavier punishment. Hence, decision on punishment for the attempt of offense qualified by the result should be independent from the responsibility for the attempt for the main offense.

In above discussed example the attempt for the qualifying offense is possible even when the main crime is not fully implemented, because the qualifying result is also covered in the intention and difference between the main and qualifying offense is only in number of victims. The attempt

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81 The issue is solved in a similar way in court practice. The above solution of issue for the murder conducted under the additional circumstances (murder of 2 or more persons), see: in Decisions from Supreme Court of Georgia on Criminal Cases, N2, 2004, 217-219; Decisions from Supreme Court of Georgia on Criminal Cases, N4, 2004, 870-873; Decisions from Supreme Court of Georgia on Criminal Cases, N5, 2004, 1070-1073 (in Georgian).

82 *Lekveishvili M.,* in the book: Criminal Law, Private Section, Volume I, 4th Edition (Co-authors *Lekveishvili M., Todua N., Mamulashvili G.*), Tbilisi, 2011, 43-44 (in Georgian).

83 *Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, "C.F. Müller", 2010, 232, Rn. 617.

for the qualifying offense will not be possible without full implementation of main offense, if the legislator is satisfied to use only carelessness for the qualifying result (e.g. in real delicts qualified by the result).

5. "Attempt qualified by the result" in danger creating delicts

In contrary to the attempt for the offence qualified by the result, German legal literature defines the "attempt qualified by the result" (der erfolgsqualifizierte Versuch) as the case, when the attempt for the conviction of main crime is due to carelessness followed by the heavy result, which could be considered by the guilty person.[84] Attempt for the crime qualified by the result and so called attempt qualified by the result is differentiated based on approach towards the qualifying result (subjective sign: intention and carelessness) and by the fact that in case of attempt for the crime qualified by the result the qualifying result does not appear, and in case of "attempt qualified by the result" the main offense is not fully implemented, but the qualifying result has happened. For example, attempt for illegal abortion, with the result of death of pregnant woman.

In order to determine if it is possible to have "attempt qualified by the result" in danger delicts, it is necessary to answer the following question: is it in general possible to have attempt with subsequent results in qualified offenses and if so, is it possible to include danger delicts? To answer the above question, it is necessary to identify if it is possible to have attempt for delict qualified by the result and attempt for main danger delicts, as the scientists supporting punishment for so called "attempt qualified by the result" deem the punishment for the attempt of main offense as necessary condition.

It is stated in German legal literature that responsibility for "attempt qualified by the result" should be excluded if there is no responsibility determined for the attempt of the main offence, as otherwise qualifying result would gain the importance as the condition for punishment and not as condition for hardening the responsibility, which would be against the legislative definition.[85]

In accordance with the German criminal law (§12), in contrary with the Georgian criminal law, there is differentiated approach to the punishment for attempt. German criminal law code distinguishes two types of criminal: crime (Verbrechen) and misdemeanour (Vergehen). The crime is action against law which considers as minimum 1 year imprisonment. Misdemeanour is

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84 *Baumann J., Weber U., Mitsch W.,* Strafrecht, Allgemeiner Teil, Lehrbuch, 11. Auflage, Biefeld, "Ernst und Werner Gieseking", 2003, 612, Rn. 41; *Heinrich B.,* Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgart, "Kohlhammer", 2010, 290, Rn. 692; *Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, "C.F. Müller", 2010, 232, Rn. 617.

85 *Kühl K.*, Der Versuch des Erfolgsqualifizierten Delikts, FS für Karl Heinz Gössel zum 70. Geburtstag, Heidelberg, "C. F. Müller Verlag", 2002, 205; *Roxin C.*, Strafrecht, Allgemeiner Teil, Band II, München, "C.H. Beck", 2003, 439.

action against law considering punishment of imprisonment under 1 year or penalty payment. All crime attempts are punishable, as for the misdemeanours, punishment should be specifically indicated in the relevant article. If specific article of German criminal law code does not indicate punishment for the attempt of specific misdemeanour, it means that only full implementation of such misdemeanour and not attempt is punishable. For example, placing other person in the situation dangerous for the life (misdemeanour) is punishable under section one, article 221 of German criminal law code; according to the section 3 of the same article the same action is punishable if it is followed by the death of the victim. Offense considered under section 3, article 221 of German criminal law code is crime qualified by the result, but in relation to the offense, punishment for the "attempt qualified by the result" is excluded, as attempt for the main offense considered by the article 221 is not punishable.[86] *K. Roksin,* in similar cases, supports qualification of case under the article, which considers separate composition for the careless crime. For example, paragraph 222 of German criminal law is setting responsibility for the termination of life due to the carelessness.[87]

As we are aware, Georgian criminal legislation considers punishment for the fully implemented crime, as well as preparation and attempt of crime. But it is interesting to determine - is it possible to have attempt for the danger delicts? As danger creating delicts are terminated at the level similar to the attempt and therefore is it justified to discuss preparation and attempt of delict?

Answering the question – is it possible to prepare or attempt danger creating delict – *T. Tsereteli* states that it is possible to attempt danger delict, however it covers such a low danger that its punishment would not be justified. According to his opinion punishment of delict attempts is not justified as in this way the criminal would be deprived from the opportunity to voluntarily stop crime.[88]

T. Tsereteli's opinion on punishment for the danger delict punishment can't be shared as crime in general is terminated at the incomplete crime stage and for the same motivation we have to say "No" to punishment of any incomplete crimes.

It is possible to have attempt for danger delicts, including those danger delicts belonging to the abstract, so called formal and non-result crimes. It is possible to have attempt for the delict creating danger such as illegal abortion (article 133 of Georgian criminal law). Many offenses

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86 *Jähnke B.*, Leipziger Kommentar, 11. Auflage, Berlin, "De Gruyter Rechtswissenschaften Verlag", 2005, 28-29; *Roxin C.*, Strafrecht, Allgemeiner Teil, Band II, München, "C.H. Beck", 2003, 439; *Rengier R.*, Erfolgsqualifizierte Delikte und verwandte Erscheinungsformen, Tübingen, "J.C.B. Mohr (Paul Siebeck)", 1986, 245.

87 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band II, München, "C.H. Beck", 2003, 439.

88 *Tsereteli T.,* Public Danger and Crime in Criminal Law, Tbilisi, 2006, 219-220; *Tsereteli T.,* Criminal Law Problems, Volume IV, Tbilisi, 2010, 231 (in Georgian).

considered under the German criminal law code[89] directly indicate on the punishment for the attempt for danger delicts (as for the misdemeanour).[90] The case is not about whether the delict is abstract or specific, more important is nature and legislative description of action of the punishable action.

Attempt for the danger creating delict is possible when the guilty person can implement the action and desires to create danger for other person.[91] Attempt for danger creating delict considers intention to create danger for the legal good. Based on E. Horni's position, intention to create danger intellectually considers imagination of possibility to create danger for the legal good, which also considers imagination of possibility to implement infringement. The criminal imaging the possibility to infringe, creates the sufficient intellectual condition for the creation of danger as well as eventual intentional infringement.[92] It is true that intellectual part of creating danger for the legally protected objects and its infringement can coincide, but intention (direct) considers will elements and intention for danger creation and infringement of legally protected objects differ in the aspects of will (desire). Desire to create danger does not consider desire to infringe the legally protected objects. Otherwise it would be possible to differentiate between the attempt for the danger creation and crime conviction.[93] The similar danger is in considering possible attempt with the eventual intention. For example, paragraph G, section one, article 109 of Georgian criminal law code considers punishment for the intentional murder with the means intentionally creating danger for the life and health of others. If the person committed intentional murder using the means intentionally creating danger for the life of other persons, we would have attempt to murder other person too in case if possibility for the attempt with the eventual intention was considered. If the criminal commits murder using the means intentionally creating danger for the life of others, the criminal always imagines the possibility to infringe upon other people's lives, but as he/she does not have desire to infringe upon other people's lives, the action is qualified as attempt to murder one and not two or more persons.

It is true, that attempt is possible in danger delicts, but this does not mean that it is possible to have attempt for all danger delicts. For example, attempt is not possible for danger delicts such

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89 Paragraphs 311 (2), 312 (2), 315 (2), 316 b (2), 317 (2), 324 (2), 325 (1), 326 (4). Strafgesetzbuch, 47. Auflage, 2009, Deutscher Taschenbuch Verlag.

90 *Arzt G., Weber U., Heinrich B., Hilgendorf E.*, Strafrecht, Besonderer Teil, Lehrbuch, 2. Auflage, Bielefeld, "Gieseking", 2009, § 35, Rn. 118; see also: *Zaczyk R.*, Das Unrecht der versuchten Tat, Berlin, "Duncker &Humblot", 1989, 322-325; *Fischer T.*, Strafgesetzbuch und Nebengesetze, 57. Auflage, München, "C.H. Beck", 2010, 2175, 2176, 2186, 2234, 2277, 2285, 2298.

91 *Arzt G., Weber U., Heinrich B., Hilgendorf E.*, Strafrecht, Besonderer Teil, Lehrbuch, 2. Auflage, Bielefeld, "Gieseking", 2009, § 35, Rn. 119.

92 *Horn E.,* Konkrete Gefährdungsdelikte, Köln, "Dr. Otto Schmidt KG", 1973, 204-205.

93 It is impossible to differentiate attempt for infringement of legal good and creation of danger for the legal good in line with so called Imagination or Cognition theory. On the above theory see: *Turava M.,* Criminal Law, General Section, Doctrine of Crime, Tbilisi, 2011, 293 (in Georgian).

as leaving in threat (article 128 of Georgian criminal law), not providing help (article 129 of Georgian criminal law) and leaving person in sickness (article 130 of Georgian criminal law).[94] Until the person is not in a threat, there is no stage for initiating or developing crime, and after the person is under the threat and therefore the liability to assist to the person under threat is created, and if the liability is not undertaken, the crime is considered as completed.[95] The same counts for all delicts, which are referred to as simply inaction delicts and which are not characterised by the result.[96] *T. Tsereteli* excludes the possibility of attempts for the purely inaction delicts, however he is of the view that there is possibility for preparation for such delicts.[97] Only poor attempt is possible in case of purely inaction delicts.[98] For example, A thinks that his/her child is on the swimming pillow and thinks that child can be drawn, but A does nothing to save the child. Later it was clarified that A made mistake and A's child was not on the swimming pillow. In such case we have poor attempt to leave person in threat, as instead of A's child the doll was on the pillow.

As we have identified the possibility of attempt in danger delicts, we can now discuss the issue of "attempt qualified by the result" in danger delict, in other words discuss the case, when attempt for the danger delict's main part caused heavy result due to the carelessness. But before moving to the discussion of attempts qualified by the result in danger delicts, it is expedient to briefly discuss so called attempt qualified by the result in general.

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94 *Gamkrelidze O.,* in the book: Court Practice Comments to Criminal Law, Crime against Human Being (Co-authors *Gamkrelidze O., Tkesheliadze G., Surguladze L., Turava M., Ebralidze T.*), Tbilisi, 2002, 213; *Mchedlishvili – Hedrich K.,* Criminal Law, General Section, Specific Forms of Crime Manifestation, Tbilisi, 2011, 61-62 (in Georgian).

95 *Roxin C.*, Strafrecht, Allgemeiner Teil, Band II, München, "C.H. Beck", 2003, 429; *Tsereteli T.,* Criminal Law Problems, Volume I, Tbilisi, 2007, 497 (in Georgian).

96 Based on Claus Roxin's position, we can differentiate from the purely inaction delicts the compositions, where implementation of attempt is possible; however he also notes that it is impossible to have attempt for the purely inaction delicts in the most of cases, see: *Roxin C.*, Strafrecht, Allgemeiner Teil, Band II, München, "C.H. Beck", 2003, 428-429. Roxin's position is not justified in this case, as presents the case of assignment of illegal punishment as the example for the pure inaction (§ 339). We can't review the illicit decision of the court as pure inaction delict. In contrary this is the delict to be implemented by action. The fact that the judge does not follow the law requirements, does not indicate to inaction. With the same logic, all crimes should be considered as inaction delicts, as conviction of crime is always preceded with some prohibition, legal requirement, which is not considered by the guilty person or which is not followed by the guilty person..

97 *Tsereteli T.,* Criminal Law Problems, Volume I, Tbilisi, 2007, 497 (in Georgian).

98 *Welzel H.,* Das Deutsche Strafrecht, 11. Auflage, Berlin, "Walter de Gruyter & Co", 1969, 206; *Jescheck H.H., Weigend T.,* Lehrbuch des Strafrechts, Allgemeiner Teil, Berlin, "Duncker&Humblot", 1996, 637; *Roxin C.*, Strafrecht, Allgemeiner Teil, Band II, München, "C.H. Beck", 2003, 429, Rn. 293; *Maurach R., Gössel K., Zipf H.,* Strafrecht, Allgemeiner Teil, Band 2, Heidelberg, "C.F. Müller Juristischer Verlag", 1989, 33, Rn. 99. The poor attempt is also punished; however in contrary to the attempt in case of poor attempt the Judge should use the lighter punishment, see: *Gamkrelidze O.,* Interpretation of Georgian Criminal Code, Tbilisi, 2008, 169; *Turava M.,* Criminal Law, General Section Review, 8th Edition, Tbilisi, 2010, 255 (in Georgian).

In line with section 2, paragraph 11 of German criminal law, the person is acting intentionally if he/she implements the comprising actions considered by the criminal law code, which considers the intention related to the action, as for the result the carelessness is sufficient. Hence, according to the above norm, as noted by the German scientists, the delict qualified by the result, despite the careless attitude towards the result, is the intentional crime and therefore "attempt qualified by the result" is also possible.[99]

Georgian criminal law code contains norm analogues lo to the paragraph 11 of German criminal law code. According to section one, article 11 of Georgian criminal law code[100] "if the criminal law considers increase of punishment for the subsequent result not reflected in the criminal's intention, then such increase is only possible if such result was due to the carelessness of the criminal. Such crime will be considered as intentional crime"? "Such crime" considers the composition qualified by the result in whole or only the main offense? According to *G. Nachkebia* "action carried out under two forms of guilt[101] will be qualified not as intentional and guilt caused by the carelessness, but it will be categorised as intentional guilt, and heavier result caused by the carelessness will be taken into account in the process of punishment assignment".[102] Based on the above, *G. Nachkebia* considers the offense qualified by the result as intentional delict. But the following question is raised: how can be the guilt considered as implemented intentionally, when the guilty person does not have intention towards the result and he/she has only manifested the careless attitude towards the result? How can we get intentional delict if the intention does not cover the result caused by the action? In case when the material delict (combination of intention-carelessness) qualified by the result is conducted the criminal has intentional attitude only towards

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99 See: *Baumann J., Weber U., Mitsch W.*, Strafrecht, Allgemeiner Teil, Lehrbuch, 11. Auflage, Biefeld, "Ernst und Werner Gieseking", 2003, 126, Rn. 72, 73.

100 Mentioned norm was first introduced to the criminal law code of Georgia in 1960. See: *Gamkrelidze P.,* Interpretation of Georgian Criminal Code, 2nd Edition, Tbilisi, 2008, 124 (in Georgian).

101 Compositions qualified by the result implemented under the combination of intention-carelessness were considered as "complex, mixed guilt" or manifestation of crime implemented with "guilt in two forms" (see: *Ugrekhelidze M.,* Mixed or Double Guilt in Criminal Law, "Matsne, Series for Philosophy, Psychology, Economy and Law Issues", N1, 1971, 59-174; *Ugrekhelidze M.,* Guilt in Danger Delicts, Tbilisi, 1982, 41.) The mentions position has present supporters in Georgian criminal law (see: *Nachkebia G.,* Criminal Law, Text Book, General Section, Tbilisi, 2011, 423; *Tkesheliadze G.,* in the book: General Section of Criminal Law, Text Book (Co-authors *Gabiani A., Gvenetadze N., Dvalidze I., Todua N., Ivanidze M., Mamulashvili G., Nachkebia G., Tkesheliadze G., Khuroshvili G.*), Tbilisi, 2007, 140-141; *Dvalidze I.,* in the book: General Section of Criminal Law, Text Book (Co-authors *Gabiani A., Gvenetadze N., Dvalidze I., Todua N., Ivanidze M., Mamulashvili G., Nachkebia G., Tkesheliadze G., Khuroshvili G.*), Tbilisi, 2007, 173. Notion of "Double Guilt" is against the present, normative definition of guilt.

102 *Nachkebia G.,* Criminal Law, Text Book, General Section, Tbilisi, 2011, 426, Tkesheliadze G. and Todua N. also view the crime implemented with the combination of intention-carelessness as intentional crime, see: *Tkesheliadze G.,* Criminal Law, General Section, Text Book, Tbilisi, 2007, 140-141; *Todua N.,* in the book: Private Section, Criminal Law (Co-authors *Lekveishvili M., Todua N., Mamulashvili G.*), Tbilisi, 2011, 87 (in Georgian).

the result, which is the basis for the main offense. For example, section one, article 117 of the Georgian criminal law considers responsibility for the intentional heavy health injury, and section 2 of the same article considers responsibility over the same action if it is followed by the liquidation of life due to the carelessness. In provided example, the offense considered under first section of the article 117 and not second section of the same article will be considered as intentional crime.[103] Difference between the offenses considered by the article 108 (intentional murder) and section 2 of article 117 lies in the subjective approach to the liquidation of life. In case of offense considered under section 2, article 117 the guilty person is connected with the result caused by the action with the careless attitude and not the intention; therefore the delict qualified by the result considered under the above norm shall be considered as carelessness delict. Whether the crime is convicted intentionally or due to the careless approach for the material delict (in other words delicts with the result) is revealed in the attitude towards the result.

Despite the legislative provision reflected in article 11 of Georgian criminal law, *K. Mchedlishvili and I. Dvalidze* correctly deny the idea of delict attempt qualified by the real result.[104] *M.* Turava considers introduction of article 11 to criminal law as early as in 1960 as *T. Tsereteli's* contribution.[105] M. Turava is of the view that the objective for introduction of provision considered under article 11 was to make applicable the attempt qualified by the result.[106] However *T. Tsereteli* excluded possibility of attempt in delicts qualified by the heavy results, justifying it through careless approach of guilty person towards the qualifying result.[107]

Article 133 of Georgian criminal law considers responsibility for the abstract danger delict such as illegal abortion. The section 3 of the same article punishes same action if it is followed by the liquidation of life. It is true, that illegal abortion is intentional action, however in this case the carelessness towards the heavy result – woman's death should be identified.[108] How shall the action be qualified, if attempt for the illegal abortion, e.g. injection of medicine with the intention to terminate the pregnancy, is followed by the woman's death? As section 3, article 133 of Georgian criminal law considers carelessness towards the result and the result is not covered in the intention of guilty person, we cannot use the attempt for the offense considered under section 3, article 133 of Georgian criminal law, despite the fact that the results is caused by the intentional

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103 For opposite position see: *Todua N.,* in the book: Private Section, Criminal Law (Co-authors *Lekveishvili M., Todua N., Mamulashvili G.*), Tbilisi, 2011, 87 (in Georgian).

104 *Mchedlishvili – Hedrich K.,* Criminal Law, General Section, Specific Forms of Crime Manifestation, Tbilisi, 2011, 84; *Dvalidze I.,* in the book: Criminal Law, General Section, Text Book (Co-authors *Gabiani A., Gvenetadze N., Dvalidze I., Todua N., Ivanidze M., Mamulashvili G., Nachkebia G., Tkesheliadze G., Khuroshvili G.*), Tbilisi, 2007, 173. For opposite position in Georgian criminal law science see: *Turava M.,* Criminal Law, General Section, Doctrine of Crime, Tbilisi, 2011, 605-606 (in Georgian).

105 *Turava M.,* Criminal Law, General Section, Doctrine of Crime, Tbilisi, 2011, 599 (in Georgian).

106 Ib., 606, Footnote 3.

107 *Tsereteli T.,* Criminal Law Problems, Volume I, Tbilisi, 2007, 502 (in Georgian).

108 *Gamkrelidze O.,* Interpretation of Georgian Criminal Code, 2nd Edition, Tbilisi, 2008, 125 (in Georgian).

action; the guilt should be qualified under the combined crime, in particular under article 19 of Georgian criminal law and section one, article 133 (attempt of illegal abortion) and article 116 (liquidation of life due to the carelessness). Qualification of action based on the combination of offenses and not based on the section 3, article 133 of the Georgian criminal law is also justified because result considered under section 3, article 133 followed not the illegal abortion but the attempt for such abortion.

German criminal law literature covers 3 main theories for the attempt qualified by the result: theories of a) danger of result; b) danger of action; and c) differentiation theory. The above theories differently regulate the issue.

According to the *Danger of result or lethality theory (die Theorie der Erfolgsgefährlichkeit)* precondition for utilisation of guiltiness qualified by the result is completion of action considered by the main guilt.[109] In case of attempt of implementation of main offense the result is not completed, therefore there is no "preceding result".[110] And according to the theory of danger of result it is necessary to have completed result considered under the main guilt, which causes the danger.[111] Moreover the delict qualified by the result is characterised with the result caused by carelessness and as there is element of carelessness, it is impossible to justify responsibility for the attempt, according to the theory of danger of result.[112]

Theory of danger of result correctly solves the issue with consideration of legislative definition of crime attempt. According to the article 19 of Georgian criminal law, the attempt for the crime considers the action directed towards the conviction of crime. If action of guilty person is directed towards the other (main guilt) result and the guilty person cannot achieve his/her objective and instead attempt to implement the main criminal action is followed by the result (caused by carelessness) which is a qualifying element. We can't state that the action of guilty

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[109] *Hirsch H.*, Zur Problematik des erfolgsqualifizierten Delikts, "GA", 1972, 75; *Altenhein K.*, Der Zusammenhang zwischen Grunddelikt und schwerer Folge bei den erfolgsqualifizierten Delikten, "GA", 1996, 30. Analysis of theory of Danger of result, see: *Heinrich B.*, Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgart, "Kohlhammer", 2010, 291.

[110] "Preceding result" considers the result, which follows implementation of main guilt and precedes result considered under the qualifying composition. For example, section 2, article 117 of Georgian criminal code considers criminal responsibility for the intentional heavy health injury, which caused termination of life. In this specific case the composition considered under the section 2, article 117 is composition qualified by result, and termination of life – qualifying result. Before the termination of life takes place as the subsequent result, it is preceded with the intentional heavy health injury, which has to be considered as „preceding result", as termination of life follows the intentional heavy health injury, as subsequent qualifying result.

[111] As we are aware, the danger is one of the imminent sign of crime. All crimes consider the danger. None of the crime is un-dangerous and beneficial for the society, in specific cases the danger of crime is created by the action or by the result itself.

[112] *Maurach R., Gössel K., Zipf H.,* Strafrecht, Allgemeiner Teil, Band 2, Heidelberg, "C. F. Müller Juristischer Verlag", 1989, 140-141, Rn. 117.

person was directed towards the result (qualifying), as the person did not have desire to get the result, moreover he never considered such result.

According to the German criminal law the attempt for guilt considers that the guilty person based on his/her perception starts implementation of guilt. Here the guilty person does not have idea about whole crime (e.g. about the getting result).

German scientist *B. Hainrich* criticises danger theory, he states that in case of causing qualifying result by attempt to implement main guilt, the action should not be qualified based on combined guilt; instead it should be qualified as attempt for qualifying guilt. According to his position different approach to the issue contradicts the legislative solution of the problem, based on which delict qualified by the result (in line with paragraph 11, section 2 of German criminal law code) is considered as intentional guilt, not excluding the possibility of attempt.[113] The scientist justifies the "attempt qualified by the result" by the fact that it enables to assign strict punishment for the guilty person.[114] For example, if the attempt of illegal abortion is followed by the liquidation of life, based on article 133, section 3 of Georgian criminal law, the guilty person may be assigned imprisonment for 3 to 5 years, but if we qualify the action based on combined guilt – attempt of offense considered under section one, article 133 and article 116 (liquidation of life due to carelessness) – the guilty person may be assigned the imprisonment for only 2 to 4 years period, as the above punishment is considered by the section one, article 116 and section one, article 133 does not at all consider imprisonment as a form of punishment.

It is not acceptable to use the worsening of the punishment as our objective and with this motive to artificially change guilt which is structurally caused by the carelessness to the intentional guilt. If it is required to increase the punishment for the specific action, it can be achieved without denial off logic and artificial constructions.

According to the *Theory of danger of action (die Theorie der Handlungsgefährlichkeit)* we can use the guilt composition qualified by the result even when the attempt for the main offense is implemented, however the heavy result is caused by such attempt.[115] Moreover it is not important which main delict is under discussion. The above is justified by the fact that the danger characterising the action typically is then implemented in the heavy result, and this does not depend on whether the main delict is completed or not. Moreover the law generally indicates to the heavy result as the condition making responsibility heavier, and without such condition it is possible to separate attempt and completion of guilt.[116]

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113 *Heinrich B.*, Strafrecht, Allgemeiner Teil I, 2 Auflage, "Stuttgart, Kohlhammer", 2010, 291, Rn. 695.

114 Ib., 291-292, Rn. 695.

115 Ib., 292, Rn. 696. In Georgian criminal law the above provision is supported by M. Turava, see: *Turava M.,* Criminal Law, General Section, Doctrine of Crime, Tbilisi, 2011, 605-606 (in Georgian).

116 *Heinrich B.*, Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgart, "Kohlhammer", 2010, 292, Rn. 696.

Although in contrary with the result considered by the main delict, the qualifying result does not have function for separating the attempt and completion, but this is sufficient argument to support the theory of danger of action. The supporters of the theory think that it is possible to have the attempt qualified by the subsequent result, when the qualifying result is caused by attempt and not incomplete implementation of main guilt. But if main guilt was not implemented completely, e.g. the result considered by the main guilt did not happen, it is not clear how are we moving to the qualifying guilt. The basis for qualifying guilt is the main guilt and if such basis is not provided completely, is it justified to move to the next step – qualifying guilt – by the attempt for the main guilt?

Representatives of theory of action danger focus on danger, which is the characteristic of action, and by which the attempt is carried out. Danger is characteristic of action even before getting the result considered under the main guilt. According to the supporters of theory of danger of action, fact that the heavy result is in place indicates to the danger of action for which the attempt was implemented.[117] Supporters of theory of danger of action do not decline the fact that it is not always simple to solve the issue of attempt for the guilt qualified by the result. In particular it is required to check the issue of ascribing the guilt and if the result is not the "creation" of guilty person then the ascription of guilt becomes problematic. The supporters of theory consider possibility of attempt for the guilt qualified by the result, if the heavy result follows the intentionally implemented attempt.[118]

It has to be mentioned that one of the main problems faced by the supporters of the above theory is the objective ascribing of result. The supporters of theory mix up the result caused by the actions of guilty person and action carried out under the personal responsibility of the injured person and impose the responsibility over the guilty person for the results which followed the actions carried out under the personal responsibility of injured person. It has to be also mentioned that theory supporters indicate to the possibility of attempt within the intentionally implemented action on one hand but in case of heavy result are not satisfied with the analogue of combination of guilt (attempt for the main guilt and separate guilt with the result caused by the carelessness) and qualify the action which considers the responsibility for the guilt qualified by the subsequent result and in addition indicate to the attempt article; the above can't be considered as logical solution of the issue.[119]

Representatives of differentiation theory (die differenzierende Theorie) differentiate the attempt qualified by the result based on the structure of action composition. If the qualifying result follows the action considered under the main guilt composition, there is still area for the attempt

[117] *Heinrich B.*, Strafrecht, Allgemeiner Teil I, 2. Auflage, Stuttgart, "Kohlhammer", 2010, 292, Rn. 696.
[118] Ib., 292, Rn. 696.
[119] Ib.

qualified by the result. The examples for the above are the offenses considered under the paragraphs 178 (sexual action under duress or rape, which caused the death of injured person) and 251 (robbery, which caused liquidation of life of injured person).[120] If the heavy result is caused by implementation of main offense, than the issue of attempt is removed.[121] Example for the above – offenses considered under first paragraph, article 226 (heavy health injury) and paragraph 306c of German criminal law. In case of heavy injury to the health the supporters of differentiation theory reject the attempt for the offense qualified by the result (e.g. health damage, followed by the liquidation of life – paragraph 227 of German criminal law) as qualifying result is caused by the damage to health, which is the result of specific action (systematic beating, wound and etc.). When the damage to health is followed by the liquidation of life, we have the case of transformation of less heavy result into the heavier result. The above does not include rape, as raping is the term indicating to the action and not to the result. It is impossible to have transformation of less heavy result to heavier one, as raping is formal, guilt without result and is completed at the point of raping, in other words the sign of raping offense does not have specific result.

Based on the discussions in German legal literature, if the damage to health is followed by the liquidation of life (paragraph 227 of German criminal law), it is difficult to state whether the stricter punishment is based on danger of action or danger of result.[122]

In contrary to the above it has to be mentioned that in case of offenses qualified by the result the legislators always relate the stricter punishment to the result and that is why such offenses are referred to as guilt qualified by the result. However there are cases in Criminal legislation when the stricter punishment is based on in-acceptance of subjective signs - motive, objective, and danger of means used in guilt implementation, but we cannot refer to them as to delicts qualified by the result as in many cases the qualifying sign is not the result but subjective sign (murder for self-interest, murder for simplification of other crime implementation) or objective sign, such as means of crime (murder using the means which create danger for other persons lives and health). If the legislator made the punishment stricter due to the danger of action, then we do not deal with the offense qualified by the result, but some other type of guilt. For example, the plunder is assigned stricter punishment compared with the robbery or stealing, but in this case we deal with different level of danger of action, however we shall not consider the above offenses as ones qualified by the result,

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120 *Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, "C.F. Müller", 2010, 232, Rn. 617; *Fischer T.*, Strafgesetzbuch und Nebengesetze, 57. Auflage, München, "C.H. Beck", 2010, 129, § 18, Rn. 7.

121 *Fischer T.*, Strafgesetzbuch und Nebengesetze, 57. Auflage, München, "C.H. Beck", 2010, 129, § 18, Rn. 7; *Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, "C.F. Müller", 2010, 232-233, Rn. 617.

122 *Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg, "C.F. Müller", 2010, 232, Rn. 617.

but as various types of criminal misconduct, offense. The term "guilt qualified by the result" itself means that the basis for assigning stricter punishment, qualifying sign must be the result and no other sign. We shall define the offenses with qualifying signs such as objective and motive, as offenses qualified by the objective and motive.

It is not acceptable and justified to admit the attempt for the implementation of guilt qualified by the result which is out of the scope of intention of the guilty person as well as to admit the carelessness in the main offense. In case of guilt qualified by the result which is out of the scope of intention of the guilty person to use the argument that according to the criminal legislation the guilt is implemented intentionally even when the intentional action is followed by the result caused by the carelessness (quilt qualified by the subsequent result) is not sufficient and is the artificial solution to the problem which is not based on the firm arguments. All combinations of intention-carelessness (delicts qualified by the subsequent results) are structurally carelessness offenses despite section 1, article 11 of Georgian criminal law and paragraph 2, and article 11 of German criminal law.[123]

When in offences qualified by the result the legislator is satisfied with the existence of carelessness towards the result and when the above result (qualifying) does not follow the intentional action of the guilty person, the person should be punished for the attempt of main offense and not for the offense qualified by the result, as attempt without intention contradicts with the legislative definition of the attempt.[124] Again, we do not have danger delict qualified by the result, when attempt of main delict creating danger is followed by the qualifying result. Basis for the danger creating delict qualified by the result is the completed offense and not attempt of the main offense according to *B. Hardung*. He states that when the legislator indicates to the action causing the qualifying result, legislator considers the completed main danger delict and not attempt of such delict.[125]

6. Conclusion

To conclude, it has to be mentioned that the idea of "attempt qualified by the result" contradicts with the legislative definition of attempt, as the attempt is intentional action, meaning that intention should cover not only the action, but also result. In contrary to the non-real formal

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123 For the similar position see: *Maurach R., Gössel K., Zipf H.,* Strafrecht, Allgemeiner Teil, Band 2, Heidelberg, "C.F. Müller Juristischer Verlag", 1989, 140-141, Rn. 117; *Gössel K.*, Dogmatische Überlegungen zur Teilnahme am erfolgsqualifizierten Delikt nach § 18 StGB, FS für Richard Lange zum 70. Geburtstag, Berlin, "Walter de Gruyter", 1976, 235.

124 *Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, Die Straftat und ihre Aufbau, 40. Auflage, Heidelberg,"C.F. Müller", 2010, 232, Rn. 617.

125 *Hardtung B.*, Versuch und Rücktritt bei den Teilvorsatzdelikten des § 11 Abs. 2 StGB, Köln, "Carl Heymanns Verlag KG", 2002, 80-81.

delicts qualified by the results (where the action as well as the result is covered by the intention of guilty person) in real delicts qualified by the result (combination of intentional action and result due to carelessness) the intention of guilty person does not cover the qualifying result.

In contrary to the attempt for the offense qualified by the result (der Versuch einer Erfolgsqualifikation), term, "attempt qualified by result" (der erfolgsqualifizierte Versuch), is contradictional, as the attempt considers the action, which was not followed by result. If there is a result, then we have the completed crime and not an attempt. And if the result is not in place, we do have neither the guilt qualified by the result nor the main guilt. Therefore when the result, defined as qualifying in the specific article of Georgian criminal law follows the attempt, it would more expedient to qualify the action with the combination of offenses, if the guilty person has careless attitude towards the qualifying result; however when the intention of guilty person covers not only the main offense but also the qualifying result, action can be qualified as attempt for the qualified offense, even when we have only result considered by the main composition and not the qualifying result, and even when we do not have any of the results. In the first case, when we have only the main result, the judge should impose the stricter punishment, and in the second case when we do not have either main or qualifying results, the punishment should be lighter.

Based on the above, it has to be noted that the presented arguable issue is successfully solved by the theory of "danger of result". Supporters of the theory are of the view that the necessary condition for the punishment of guilty person for the real composition is the completion of main composition da exclude the possibility of attempt for the qualified guilt, when guilty person has careless attitude towards the qualifying result.

Bachana Jishkariani*

Economic Criminal Law and Its Significance for the Contemporary States on the Example of Germany

1. Introduction

Economic criminal law is one of the most significant, dynamic and problematic spheres in the contemporary criminal law. Currently effective measures against the crime in the economic sphere could not be imagined without economic criminal law. This section of criminal law is the response from the side of the state against crimes committed in this sphere.[1]

Unfortunately, in Georgian legal literature, there is lack of the sources related to this issue though this does not mean that Georgian legislation and particularly the Criminal Code leaves the delicts in economic sphere without attention. Regarding scarcity of available literature analysis of the concept of economic criminal law, its bases, history of its origin and experience in the other countries is of special significance. This paper is focused on the situation in Germany, with respect of given issue. In addition, attention will be paid to the processes within the scopes of international organizations.

It should be also noted that economic criminal law, as the discipline, has its stable place in the European universities, whether in the form of obligatory or optional subject. Though, to gain in-depth understanding of the essence of crimes in this area, certain awareness in tax, trade and other spheres is required in addition to criminal law. To all this the EU legislation is added as well, which, on its side, significantly impacts the legal systems of the member countries.[2]

2. Concept of Economic Criminal Law

Though the concept of economic criminal law is applied in the legal literature for the decades, its common definition is not formulated in Germany yet.[3] This is caused by the fact that

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1 *Wittig P.*, Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 1, Rn. 1.

2 *Tiedemann K.*, Wirtschaftsstrafrecht Allgemeiner Teil, 3. Aufl., Köln, "Carl-Heymanns Verlag", 2010, Rn. 1.

3 *Dannecker G.* (in the collection of works: *Wabnitz H.B., Janovsky T.* (Hrsg.), Handbuch des Wirtschafts- und Steuerstrafrechts, München, "Beck", 2007), Kap. 1., Rn. 5.; *Richter H.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln,"Verlag Dr. Otto Schmidt", 2011), § 3, Rn. 22.

the given direction of criminal law could not be placed in the narrow framework, it requires complex approach.[4]

All attempts aimed at establishing the common concept have failed. For example, law issued in 1949, on economic crimes, did not contain any definitions of similar norm. In 1954, the amendments were made to this law including omission of its certain parts due to their inconsistency with the constitution, in particular, with the principle of certainty.[5]

Initially, in considering of the economic criminal law in general the main emphasis was made on the personality of the criminal as such, i.e. in categorization of the crime as the one of this sphere the decisive factor was a person, who has committed one or another unlawful action.[6] Later it became clear that limiting of the concept by this criterion only was not sufficient as assessment of economic crime took place from the various aspects and each aspect has its own purpose, which, naturally, could not be satisfied by the concept relying on the personality of the criminal.[7]

Regarding the above, in German legal literature at least four approaches are applied to definition of the economic criminal law:

2.1 Classical Criminological Definition

For criminological approach the decisive point is the person of a criminal. Economic crimes are equalized by classical approach with the term used by American sociologist Edwin Sutherland in 1939, so called "White-Collar-Crime." For him the economic crime was the one committed by the person respected by the society and having great authority.[8] Definitely, the aforesaid term takes its origin from this concept which can be translated in Georgian as follows:"*the crime committed by white collars.*" Goal of Sutherland, in using of this term, was rejection of widespread opinion that crimes are committed only in the lower strata of the society.[9]

In contemporary terms, the classical definition does not correspond to the requirements of dogmatics of criminal law as it emphasizes the person of a criminal rather than the criminal action per

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4 *Dannecker G.* (in the collection of works: *Wabnitz H.B., Janovsky T.* (Hrsg.), Handbuch des Wirtschafts- und Steuerstrafrechts, München, "Beck", 2007), Kap. 1., Rn. 5; compare with the earlier discussions *Tiedemann K.*, Entwicklung und Begriff des Wirtschaftsstrafrechts, "GA", 1969, 78 – in this case Tiedemann distinguishes the definitions of economic criminal law in the wide and narrow understanding.

5 *Richter H.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln, "Verlag Dr. Otto Schmidt", 2011), § 3, Rn. 23.

6 *Otto H.,* Konzeption und Grundsätze des Wirtschaftsstrafrechts, "ZStW", 1984, 341.

7 Ib.

8 *Többens H.W.,* Wirtschaftsstrafrecht, München,"Vahlen", 2006, 2.

9 *Schwind H.,* Kriminologie, 21. Aufl., Heidelberg u.a., "Kriminalistik", 2011, § 21, Rn. 16; *Dannecker G.* (in collection of works: *Wabnitz H.B., Janovsky T.* (Hrsg.), Handbuch des Wirtschafts- und Steuerstrafrechts, München, "Beck", 2007), Kap. 1., Rn. 6.

se.[10] In addition, currently there is no any common classical type of a criminal (white collar). Economic crime may be committed by the representative of any, whether middle or low class employed in any firm.[11]

Later, in the Anglo-Saxon literature the terms "occupational crime" and "corporate crime" were introduced. The former term includes the crimes committed by any employee of the legal entity, within the scopes of his/her activities, for the detriment of the interests of such entity, while the latter term deals with the actions committed by such legal entity as such or the employee thereof, for the benefit of the entity.[12] Currently Commercial criminal law is the part of economic criminal law,[13] hence, its definition is not sufficient for understanding of the substance of entire economic criminal law. Economic crimes could be committed beyond the scopes of the entity as well.[14]

2.2 Definition within the Scopes of Dogmatics of Criminal Law

Understanding of economic criminal law, within the scopes of the dogmatics of criminal law, is associated with the concept of injustice. In the opinion of the supporters of this direction associating of the crime with the sphere of economics and defining of the concept by this is not sufficient as this does not create specific injustice, which would distinguish similar socially harmful actions from the other violations.[15] To emphasize the point of specific injustice, the criminal action should be linked with super-individual, collective legal goods, i.e. the delicts in the economic sphere endanger the economic order as a whole, and certain institutes thereof.[16]

Therefore with respect of criminal dogmatics, concept of economic criminal law is that it protects collective legal goods.[17] Though, for example, Roxin is critical to the idea of protection of non-individual legal goods. In his opinion, so called collective legal benefit, in reality, is the sum of individual legal benefits. For example, if the properties of several credit institutions are endangered, in reality, the legal benefits of individual institution are endangered.[18] Tiedemann does not agree with this opinion. He makes reference to German legislation applicable to the

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10 *Wittig P.*, Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 2, Rn. 11.

11 *Többens H.W.,* Wirtschaftsstrafrecht, München, "Vahlen", 2006, 3.

12 *Wittig P.*, Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 2, Rn. 12; *Dannecker G.*(in collection of works: *Wabnitz H.B., Janovsky T.* (Hrsg.), Handbuch des Wirtschafts- und Steuerstrafrechts, München, "Beck", 2007), Kap. 1., Rn. 6.

13 *Mittelsdorf K.*, Unternehmensstrafrecht im Kontext, Heidelberg, "C.F.Müller", 2007, 7.

14 *Wittig P.*, Wirtschaftsstrafrecht, 2. Aufl., "Beck", München, 2011, § 2, Rn. 14.

15 *Otto H.,* Konzeption und Grundsätze des Wirtschaftsstrafrechts , "ZStW", 1984, 342.

16 Ib., 342.

17 *Aschenbach H.,* Zur Entwicklung des Wirtschaftsstrafrechts in Deutschland seit dem späten 19. Jahrhundert, "JURA", 2007, 342.

18 *Roxin C.,* Strafrecht Allgemeiner Teil, Bd. 1, 4. Aufl., München, "Beck", 2006, § 2, Rn. 75 and further.

spheres of credits and stock exchanges, where their institutional nature is emphasized and this is beyond the individual interests.[19]

2.3 Definition based on the Criminal Law Procedures

Irrespective of absence of unified concept of economic criminal law or economic crime, the legislator had to assign judgment of the cases of this category to the special departments of the court. Regarding complexity of the cases and necessity of specific knowledge, in 1971, in the law on general courts, in particular, in $ 74c section the list of cases subjected to the competence of the criminal departments was provided.[20]

It should be mentioned from the outset that in this case only procedural aspects are considered. The above section was and is not intended for formulation of the legal definition, though currently, it fulfills significant orientation function. By its means combating economic crime is more effective.[21]

Section 74c of the Law on General Courts provides the list of the following crimes of economic nature: crimes, resulting from various special laws, for example, the law on patents, law on shares, law on the banks and stock exchanges, law on bankruptcy etc. In addition, the legislator included the crimes specified in the Criminal Code of Germany. These are fraud, bribery, **embezzlement** etc. These delicts will be within the competence of the special department, if special knowledge of economic aspects is required for dealing with them (§74c, No: 6).

In the light of the foregoing, no one of the above considered descriptions of economic criminal law is adequate for proper definition of this sector. None of them could be particularly preferred. We can conclude only that each of the approaches is valid in its way, regarding the approach to the economic crimes and economic criminal law, whether this are the points of the personality of the criminal, legal benefits or procedural issues.

3. History of Economic Criminal Law

Practice of regulation of the economic issues through the mechanisms of criminal law is not a phenomenon characteristic for recent few centuries. For example, classical Roman law provided for the punishment for jobbery in wheat. Main goal of this was ensuring supply of wheat to the population.[22] It is also interesting that the word false (Germ. "falsch") was introduced in German

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19 *Tiedemann K.,* Wirtschaftsstrafrecht Allgemeiner Teil, 3. Aufl., Köln, "Cal-Heymanns Verlag", 2010, Rn. 45.

20 *Richter H.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln,"Verlag Dr. Otto Schmidt", 2011), § 3, Rn. 26.

21 *Schwind H.*, Kriminologie, 21. Aufl., Heidelberg u.a., "Kriminalistik", 2011, § 21, Rn. 18.

22 *Tiedemann K.,* Wirtschaftsstrafrecht Allgemeiner Teil, 3. Aufl., Köln, "Carl-Heymanns Verlag", 2010, Rn. 48.

language from the medieval period and it is still significant term, applied in relation with the number of crimes.[23]

As for the further period, economic criminal law passed various stages of development. As early as in 1871, criminal code of German Empire contained corpus delicti of the fraud. Though, even earlier, legislation of North German Union contained the provisions of criminal law contents regulating entrepreneurship.[24] In general, it should be noted that in the 19th century the idea of liberalism dominated and main emphasis of the law moved to protection of an individual.[25]

For economic criminal law, the critical moment was commencement of World War I. In Germany, the entire economy was switched to military needs and strict regulation from the government was required.[26] By 1918, the situation developed so that total number of regulations containing criminal law sanctions for the economic issues achieved 40.000.[27]

After the end of World War I the inflation and product deficiency problems were to be dealt. German legislators have even established the special court working on the cases of speculation. There was also the attempt of avoiding of capital outflows from the country through imposition of stricter criminal sanctions.[28] In general, in Weimar Republic,[29] compared with the period of World War I, state intervention into the economy still decreased.[30]

By the period of national-socialist dictatorship (1933-1945), regarding the form of the state governance, so called managed economy was characteristic.[31] In the terms of dictatorship there were the cases where Hitler changed the adopted court decisions about which he learned by chance, through mass media. Similar facts and great number of the effective regulations contributed to legal instability.[32] While in the period before the Third Reich in German law economic criminal law plaid less significant role, the situation dramatically changed with taking over the power by Hitler. Economic was switched to the military production and its regulation by means of the criminal law mechanisms became more extensive. For example, the law on

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23 *Tiedemann K.,* Wirtschaftsstrafrecht Allgemeiner Teil, 3. Aufl., Köln, "Carl-Heymanns Verlag", 2010, Rn. 48.

24 *Aschenbach H.,* Zur Entwicklung des Wirtschaftsstrafrechts in Deutschland seit dem späten 19. Jahrhundert, "JURA", 2007, 343.

25 *Richter H.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln,"Verlag Dr. Otto Schmidt", 2011), § 2, Rn. 9.

26 *Jescheck H.H.,* Das deutsche Wirtschaftsstrafrecht, "JZ", 1959, 457; *Tiedemann K.*, Entwicklung und Begriff des Wirtschaftsstrafrechts, "GA", 1969, 73; *Aschenbach H.,* Zur Entwicklung des Wirtschaftsstrafrechts in Deutschland seit dem späten 19. Jahrhundert, "JURA", 2007, 343.

27 *Aschenbach H.,* Zur Entwicklung des Wirtschaftsstrafrechts in Deutschland seit dem späten 19. Jahrhundert, "JURA", 2007, 343.

28 *Richter H.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln, "Verlag Dr. Otto Schmidt", 2011), § 2, Rn. 20.

29 Germany was called so from 1918, before Hitler has taken over the power and declare the "Third Reich"

30 *Tiedemann K.*, Entwicklung und Begriff des Wirtschaftsstrafrechts, "GA", 1969, 74.

31 *Buchmann P.,* Wirtschaft und Recht im Nationalsozialismus, "JuS", 1991, 13.

32 Ib., 15.

economic sabotage of 1936 provided for sentence to death of those citizens of Germany, who took their property out of the borders of Germany intentionally or for the personal reasons, in breach of the requirements of the law and by this caused significant damages to German economy.[33] In general, the norms regulating economic sphere in the period of national-socialism did not respond to the requirements of the jural state and were tailored to the ideology and Fuehrer's personality.[34]

After World War II, few years of transition period were followed by creation of two states in 1949 – German Democratic Republic and Federal Republic of Germany. German Democratic Republic developed according to the model of Soviet Union up to its unification and its law was subjected to the relevant influence. As for Federal Republic of Germany, it was based on the model of free economy.[35] It is interesting that in the newly formed state the legislators initially attempted to maximally abstain from introduction into the economy with the criminal law methods. In 50-60-ies of 20th century maximal support[36] to the commenced economic boom[37] was of critical significance. As early as in 1949 the law on economic crimes was adopted its goal was reduction of the number of regulations effective before. The main innovation was distinguishing of crimes and violations[38]. According to Jescheck's opinion, this was one of the most important reforms in the legislative history of Germany.[39] In 1954 the law on simplification of economic criminal law was issued resulting in abrogation of many delicts provided for by the previous law.[40]

In the context of distinguishing between the crimes and violations the law of 1952 on violations is of particular significance. After its adoption it is unacceptable that the administrative bodies imposed the money penalties of criminal law nature.[41] German Constitution Court established that the criminal punishment is associated with social-ethical denouncement of the actions,[42] while administrative fines do not cause undermining of the authority of the penalized person to such extent.[43] Finally, the administrative fines do not make person's condition so heavy and in addition, unlike the criminal sanctions, according to German law, they could be applied to the legal entities as well.[44]

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33 *Buchmann P.,* Wirtschaft und Recht im Nationalsozialismus, "JuS", 1991, 18.
34 *Wittig P.,* Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 3, Rn. 5.
35 *Jescheck H.H.,* Das deutsche Wirtschaftsstrafrecht, "JZ", 1959, 458.
36 *Aschenbach H.,* Zur Entwicklung des Wirtschaftsstrafrechts in Deutschland seit dem späten 19. Jahrhundert, "JURA", 2007, 344.
37 In the history of Germany this was called "economic miracle".
38 *Richter H.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln, "Verlag Dr. Otto Schmidt", 2011), § 2, Rn. 26.
39 *Jescheck H.H.,* Das deutsche Wirtschaftsstrafrecht, "JZ", 1959, 458.
40 *Wittig P.,* Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 3, Rn. 9.
41 Ib., Rn. 10.
42 Collection of the Decisions of Constitutional Court of Germany BVerfGE 27,18.
43 Collection of the Decisions of Constitutional Court of Germany BVerfGE 27, 33.
44 *Wittig P.*, Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 3, Rn. 11 and further.

In the sphere of economic criminal law, first law on combating economic crimes of 1976 should be specially mentioned.[45] The law was adopted within the scopes of special commission, after discussions for several years.[46] On its basis, in the criminal code the new corpus delicti appeared, in particular, §264 – fraud in relation with the subsidies.[47]

In 1986 another law for combating economic crimes was issued. It caused number of changes to German criminal code. For example, Section 263a was added to the criminal code. According to this section, computer fraud is punishable, whether this is by the way of use of false data, unauthorized use of data or in any other way.[48] In addition, the other sections were added to the code as well. Section 264a states that fraud in the sphere of investments is punishable action as well.[49] Section 266a provides sanctions against the employer, if he/she fails to provide social insurance for the employee with the relevant institution.[50] Section 266b deals with misappropriation of the credit cards or cheques[51] etc.

The Law on Organized Crimes was adopted in 1992 and on the basis of this law the provision on money laundering was included into the criminal law.[52] Later the amendments were made to this section again, making its contents stricter.[53]

Among the laws issued in the recent period and impacting economic criminal law in general, the law of 1997 against corruption should be specially mentioned. On its basis, similar to the case with the law on economic crime, the amendments were made to the criminal code. Such provisions as section 298 – accepting of bribe and offering of bribe in the sphere of entrepreneurship were included.[54] Amendments were made in the chapter dealing with the civil servant's crimes as well.[55]

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45 *Tiedemann K.*, Wirtschaftsstrafrecht Allgemeiner Teil, 3. Aufl., Köln, "Carl-Heymanns Verlag", 2010, Rn. 53.

46 *Tiedemann K.,* Der Entwurf eines Ersten Gesetzes zur Bekämpfung der Wirtschaftskriminalität, "ZStW", 1975, 253 and further.

47 *Aschenbach H.,* Zur Entwicklung des Wirtschaftsstrafrechts in Deutschland seit dem späten 19. Jahrhundert, "JURA", 2007, 346.

48 *Möhrenschlager M.,* Das zweite Gesetz zur Bekämpfung der Wirtschaftskriminalität, "Wistra", 1986, 131.

49 For details see *Weber U.,* Das zweite Gesetz zur Bekämpfung der Wirtschaftskriminalität, "NStZ", 1986, 485 and further.

50 Ib., 487 and further.

51 Ib., 483 and further.

52 *Wittig P.,* Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 3, Rn. 17; *Wessels J., Hillenkamp T.*, Strafrecht, Besonderer Teil 2, 34. Aufl., Heidelberg u.a., "C.F. Müller", 2011, Rn. 890.

53 For details see *Dannecker G.* (in collection of works: *Wabnitz H.B., Janovsky T.* (Hrsg.), Handbuch des Wirtschafts- und Steuerstrafrechts, München, "Beck", 2007), Kap. 1., Rn. 97 and next.

54 *Dölling D.,* Die Neuregelung der Strafvorschriften gegen Korruption, "ZStW", 2000, 347 and next; *Wolters G.*, Die Änderungen des StGB durch das Gesetz zur Bekämpfung der Korruption, "JuS", 1998, 1103.

55 *Dölling D.,* Die Neuregelung der Strafvorschriften gegen Korruption, "ZStW", 2000, 335 and further; *Wolters G.*, Die Änderungen des StGB durch das Gesetz zur Bekämpfung der Korruption, "JuS", 1998, 1104 and further.

4. Influence of European Legislation on Economic Criminal Law

4.1 European Council and Economic Criminal Law

European Council established in 1949 is the largest association of the European states. It is an independent international organization and has its relevant bodies – the Committee of Ministers, Parliamentary Assembly and Regions Congress.[56] European Convention of Human Rights is the most important document effective within the scopes of European Council. It was adopted in 1950, in Rome and entered into force after ratification by ten states, in 1953.[57] Currently, one of the preconditions for EU membership is joining to this Convention.[58] Hence, all articles generally impacting criminal legislation of the member countries, including Georgia, should be taken into consideration with respect of the economic crimes. For example, Article 5 of the Convention states that each person has the right on justice and freedom, implying their protection from arbitrary deprivation of freedom.[59] With respect of combating economic crimes, particular attention should be paid to Article 6 of the Convention on Human Rights – right on the fair trial.[60] This Article requires from the EC members that any person had the opportunity of consideration of his/her case publicly and through fair trial, within the relevant terms. Article 6 is of great practical significance and this is confirmed by the statistical data as well. In particular, most cases considered by Strasbourg Court, for example in 2009, dealt with it.[61]

In addition to the above mentioned articles, for EU member countries the other articles of the Convention are of great significance and their consideration is beyond the scopes of this work. These are: right on life – Art. 2; prohibition of torture – Art. 3; principle of lawfulness – Art. 7; presumption of innocence – Art. 6. Para. 2 etc. In relation of violation of any of the specified articles the citizens may apply to the European Court the decisions of which contribute to fostering of universal standards in the European countries.[62]

Within the scopes of European Council over 200 agreements significant for the criminal law were made.[63] One of them is agreement on extradition. On its base, in case of presence of certain preconditions, one member country may demand from the other member to pass the sought

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56 *Safferling C.*, Internationales Strafrecht, Berlin u.a., "Springer", 2011, § 13, Rn. 4.

57 *Satzger H.,* Internationales und Europäisches Strafrecht, 5. Aufl., Baden-Baden, "Nomos", 2011, § 11, Rn. 7.

58 *Ambos K.*, Internationales Strafrecht, 2. Aufl., München, "Beck", 2008, § 10, Rn. 7.

59 *Meyer-Ladewig J.,* EMRK, 3. Aufl., "Nomos", Baden-Baden, 2011, Art. 5, Rn. 1.

60 *Müller-Gugenberger C.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln,"Verlag Dr. Otto Schmidt", 2011), § 5, Rn. 13.

61 *Meyer-Ladewig J.,* EMRK, 3. Aufl., Baden-Baden, "Nomos", 2011, Art. 6, Rn. 1.

62 *Müller-Gugenberger C.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln, "Verlag Dr. Otto Schmidt", 2011), § 5, Rn. 15; *Satzger H.*, Internationales und Europäisches Strafrecht, Baden-Baden, "Nomos", 5. Aufl., 2011, § 11, Rn. 19.

63 *Müller-Gugenberger C.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln,"Verlag Dr. Otto Schmidt", 2011), § 5, Rn. 16.

person, if the latter is in its territory.[64] Such person may be sought (or the verdict may be effected) for the crime of economic nature as well. In the same context, European Agreement on Legal Assistance is of significance as well.[65]

In sum, with regard to European Council, we should admit that agreements achieved within its scopes always require ratification by each of the member countries to ensure their actual enactment. And this is associated with the long procedures and reduces their effectiveness.[66]

4.2 European Union and Economic Criminal Law

Unlike European Council, European Union, regarding its structure, is equipped with greater number of legal instruments to influence entire legislation of the member countries and not only economic (criminal) law.[67] Idea of European Community, the predecessor of European Union was based on the economic relations. European Coal and Steel Association established in 1951 is regarded as the origin of European integration.[68]

From 1951, Europe has passed the long way, which resulted in further integration and further approximation of legal systems.[69] Currently the main action document of European Union is Lisbon Treaty enacted in December 2009. It was signed after failure of draft European constitution.[70] With respect of criminal law Lisbon Treaty introduced significant novelties. It should be noted that criminal law has always been regarded as one of the main expressions of sovereignty of the member countries and competence of European Union was not applicable thereto. European Union had no right to issue the directives dealing with the criminal law.[71] Though Article 83 of the Treaty on Functioning of European Union (part of the Lisbon Treaty) has dramatically changed the situation and this organization was entitled to issue the directives

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64 *Ambos K.*, Internationales Strafrecht, 2. Aufl., München, "Beck", 2008, §10, Rn. 73.

65 *Müller-Gugenberger C.* (in the collection of works: *Müller-Gugenberger C., Bieneck K.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln, "Verlag Dr. Otto Schmidt", 2011), § 5, Rn. 16; Within the scopes of European Council numerius other significant acts were issued, which impacts economic criminal law but this is not within the purpose of this paper. We could name the Treaty on corruption, terrorism, cyber-crime – for details see: *Dannecker G.* (in collection of works: *Wabnitz H.B., Janovsky T.* (Hrsg.), Handbuch des Wirtschafts- und Steuerstrafrechts, München, "Beck", 2007), Kap. 2., Rn. 27 and further.

66 *Müller-Gugenberger C.* (in collection of works: *Wabnitz H.B., Janovsky T.* (Hrsg.), Wirtschaftsstrafrecht, 5. Aufl., Köln, "Verlag Dr. Otto Schmidt", 2011), § 5, Rn. 16.

67 For details on impact on the criminal law of the European Court member countries see: *Jishkariani B.*, European Law and Its Impact on the National Criminal Law, "Journal of Law", №1-2, 2010, 240.

68 *Pechstein M.* (in collection of works: *Streinz, R.* (Hrsg.), EUV/EGV, München, "Beck", 2003), Art. 1 EUV, Rn.1.

69 For the history of European Union see: *Bieber R., Epiney A., Haag M.*, Die Europäische Union, 9. Aufl., Baden-Baden, "Nomos", 2011, §1, Rn. 14 and *Turava M.* (Editor), European Criminal Law, Tbilisi, 2010, 6 and further.

70 Why the Draft European Constitution has failed see: *Streinz R., Ohler C., Herrmann C.*, der Vertrag von Lissabon zur Reform der EU, 3. Aufl., München, "Beck", 2010, 14 and further.

71 *Hecker B.,* Europäisches Strafrecht, 3. Aufl., Heidelberg u.a., "Springer", 2010, § 8, Rn. 2.

containing provisions on criminal law in number of spheres.[72] For economic criminal law the following spheres are of particular significance, which it may impact, given Part 1 of Article 83: terrorism, corruption, falsification of payment means, computer crimes and organized crime. Though, if required, the directives may be issued in the other spheres as well. Purpose of Article 83 is the achievement of maximal harmonization of the legislations of member countries in the above spheres.[73]

In addition, it should be noted that Part 2 of Article 83 of the Treaty on Functioning of European Union, through which the European Union was entitled to issue the directives containing provisions dealing with criminal law, in the spheres where harmonization was achieved earlier by the other means.[74] But is it possible that European Union directly implemented criminal legislative activities and issue the regulations compliance with which would be obligatory as though these were the regulations of national legislation? This question has negative answer. Article 83 is intended only for harmonization and this deals with the minimal standards only. At first the directive is issued by European Union and further it will be implemented in the national legislations to become legally enforceable.[75] By signing of Lisbon Treaty the member countries have not gone so far to allow the mechanisms of direct intervention into the national criminal law.

Irrespective of maximal abstaining from intervention into the criminal law systems of the member states, in the legal reality of European Union certain novelties appeared with Lisbon Treaty, based on which Brussels is authorized to issue not only the directives but the resolutions with the criminal law contents and having effect of direct action. This novelty deals with the sphere of economic criminal law, in particular, Article 325 of the Treaty on Functioning of European Union – measures against fraud.[76] The Article obligates the EU member countries to implement the relevant measures to ensure effective protection from the fraud against European Union. In the previous formulation of this article, in Section 4 of Article 280 of the Treaty on European Union clearly stated that the measures to be implemented by the member countries did not imply criminal law,[77] but Article 325 does not contain this provision and this means that the way is open for the European Union for issuing of any acts with the criminal law contents in this

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72 *Satzger H.,* Internationales und Europäisches Strafrecht, 5. Aufl., Baden-Baden, "Nomos", 2011, § 9, Rn. 34.

73 *Jishkariani B.* Competence of Criminal Law Harmonization with respect of Functioning of European Union according to Article 83 of the Treaty, "Justice and Law", №3, 2011, 103; *Turava M.* (Editor), European Criminal Law, Tbilisi, 2010, 110 and further. Translation of article 83 see in *Turava M.* (Editor), European Criminal Law, Tbilisi, 2010, 120.

74 *Jishkariani B.,* Competence of Criminal Law Harmonization with respect of Functioning of European Union according to Article 83 of the Treaty, "Justice and Law", №3, 2011, 105.

75 *Hecker B.,* Europäisches Strafrecht, 3. Aufl., Heidelberg u.a., "Springer", 2010, § 8, Rn. 37.

76 *Turava M.* (Editor), European Criminal Law, Tbilisi, 2010, 126.

77 For details on criminal law situation in the past see: *Ambos K.,* Internationales Strafrecht, 2. Aufl., München, "Beck", 2008, § 11, Rn. 8.

sphere.[78] The same could be said about regulation of the customs sphere. EU Council and Parliament may, by virtue of Article 33 of the Treaty on Functioning of European Union implement the measures in the customs sphere, for expansion of the relations between member countries. This article does not specify that these measures shall not contain the criminal law. In the previous treaty on EU (Art. 133) this was specially stated.[79]

As we can see, Lisbon Treaty significantly impacts contemporary economic criminal law and particularly this is applicable to the member countries though when in 27 member countries the common approach is developed to certain delicts, this would apparently impact the other countries as well and Georgia among them. For the recent years Georgia makes extensive attempts to provide political & legal approximation with European Union. It is one of the active members of EU neighborhood policies and therefore, it will have to take this into consideration in the future.

Prior to the entry of Lisbon Treaty into force the EU member states were able to issue the framework decisions dealing with criminal law on the basis of mutual collaboration. Framework decisions, by their effect, could be compared with the directives, i.e. their implementation in national legislation is required.[80] With respect of economic criminal law, the significant framework decision is the one of 2001 on money laundering,[81] framework decision on bribery in the private sector of 2003 etc.[82] On the basis of these framework decisions certain amendments were made to the criminal legislation of the member countries.[83] Currently no framework decisions are issued; Lisbon Treaty caused the different legal reality though issued acts still maintain their force.

One more example of influence of EU legislation over the economic criminal law is existence of blanket rules in criminal legislation.[84] Substance of such norms is that they declare punishable the actions specified in the other regulations, in this case, in EU resolutions. Good example of this is Section 58 of German Code on Food and Consumer Goods. According to this section, those, who violate requirements of number of EU resolutions shall be subjected to deprivation of liberty for the period up to three years or money fine. Paragraph 2 of Section 114 of the Law on Geographical Names contains similar provision.[85] Those, who violate EU Resolution #510/2006[86] of 2006 and misuse the geographical name of the place of origin of the agrarian products, shall be subjected to the punishment.

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78 *Satzger H.*, Internationales und Europäisches Strafrecht, 5. Aufl., Baden-Baden, "Nomos", 2011, § 8, Rn. 24.
79 Ib., Rn. 25.
80 *Turava M.* (Editor), European Criminal Law, Tbilisi, 2010, 14.
81 Ib., 433; ABl. L 182, 5.7.2001, 1.
82 *Turava M.* (Editor), European Criminal Law, Tbilisi, 2010, 409; ABl. L 192, 31.7.2003, 54.
83 *Wittig P.*, Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 3, Rn. 28.
84 Ib., Rn. 33.
85 Compare: *Safferling C.,* Internationales Strafrecht, Heidelberg u.a., "Springer", 2011, § 11, Rn. 60.
86 ABl. L 93, 31.3.2006, 12.

5. General Part of Economic Criminal Law

Regarding specific nature of economic criminal law, in German legal literature, within the scopes of this direction, general and specific parts of economic criminal law are distinguished, though both of them are parts of economic criminal law. This is caused by the fact that economic crimes require different approaches to certain extent compared with the other delicts.

General part of economic criminal law deals with such issues as circumstances excluding wrongfulness, error, accomplice ship and actual doer, sanctions etc. Section 34 of Criminal Code of Germany deals with the extreme necessity excluding wrongfulness.[87] For economic criminal law the decisive is the point whether a person has committed one or another crime in the condition of extreme necessity, for example, to save the jobs, maintain operation of production. Though, German judicial practice, in evaluation of interests, in most cases, gives preference to such collective interests as environment protection, health etc. Therefore, environment pollution is unacceptable even for the purpose of maintaining of production. In this case the damaged legal good is more significant than the saved one and responsibility of a person due to the extreme need could not be excluded.[88]

As for the sanctions, the issue of the responsibility of legal entities in German law is of particular interest. In case of committing of economic crimes by natural persons, the punishments specified in the Criminal Code are applicable to them, whether this is deprivation of liberty, money fine, prohibition of operation or something else. As for the legal entities, traditionally, German criminal law does not recognize the issue of their criminal responsibility. Legal entities act through their bodies and representatives and by this way they acquire acting capacity and chargeability and therefore, their punishment within the criminal law is unacceptable.[89] Criminal sanctions contain social-ethical denouncement of the actions and its application to some association or its innocent members is senseless.[90] Regarding this traditional approach of German criminal law, the issue of responsibility of legal entities is resolved through administrative law, in particular, by Section 30 of administrative offences. This is the central rule of German legislation with respect of sanctioning of legal entities.[91] By its means the legal entity or association of

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87 *Duttge G.* (in the collection of works *Dölling D., Duttge G., Rössner D.* (Hrsg.), Gesamtes Strafrecht, 2. Aufl., Baden-Baden, "Nomos", 2011), § 34, Rn. 1 and further.

88 *Wittig P.*, Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 7, Rn. 3; *Tiedemann K.,* Wirtschaftsstrafrecht Allgemeiner Teil, 3. Aufl., Köln, "Carl-Heymanns Verlag", 2010, Rn. 193.

89 *Quante A.,* Sanktionsmöglichkeiten gegen juristische Personen und Personenvereinigungen, Frankfurt a.M., "Peter Lang", 2005, 96.

90 *Jescheck H.H., Weigend T.,* Lehrbuch des Strafrechts, Allgemeiner Teil, 5. Aufl., Berlin, "Duncker&Humblot", 2006, 227.

91 *Quante A.,* Sanktionsmöglichkeiten gegen juristische Personen und Personenvereinigungen, Frankfurt a.M., "Peter Lang", 2005, 26.

persons equalized with it may be imposed the fine up to Euro 1 million, if one of its leaders have committed the crime or offence resulting in the benefits or potential benefits for the organization. It should be noted that Section 30 does not specify any independent corpus delicti; it will take effect only in case of crime or offence specified in the other regulations.[92]

German law provides for liquidation of the legal entities in case of particularly grave crimes. For example, if the goals of its activities contradict with the criminal legislation or constitutional order, though such type of sanction is applied quite rarely as justification of the principle of proportionality in its application is quite difficult. In addition, this deals with loss of many jobs resulting from liquidation of the enterprise.[93]

This brief overview shows why German legal literature studies general part of economic criminal law separately. While for the entire criminal law complex assessment and analysis of the regulation is of interest, for economic criminal law the points related with the sphere of economics and requiring specific knowledge and approach are decisive.

6. Specific Part of Economic Criminal Law

Specific part of economic criminal law is not limited to the crimes specified in the Criminal Code. In addition to the Criminal Code, German legislation recognizes so called additional criminal law, i.e. special laws providing for the special crimes subject to punishment. Respectively, specific part of economic criminal law includes all of them. According to the themes, specific part of economic criminal law deals with the following spheres: crimes in public finance sphere, products falsification, internet manipulations etc.

Most widespread delicts in the specific part are fraud and misapplication[94] though the delicts contradicting with the Law on Foreign Economic Relations are of interest as well. This law was adopted in Germany in 1961 and it regulates the relations of German enterprises with the foreign countries. On the one hand, this Law regulates the trade policies and on the other – it deals with the foreign policies and serves to compliance with the embargoes adopted within the UN or EU scopes with respect of one or another issue. According to Section 35 of this Law, those, who hinder fulfillment of the sanctions of UN Security Council or EU, shall be subjected to deprivation of liberty up to 5 years or fine. Particularly this deals with unauthorized supply of the dual products (products which could be used both, for civil and military purposes) or military goods to the parties subjected to embargo. For example, this is applicable to supply of certain

92 *Wittig P.*, Wirtschaftsstrafrecht, 2. Aufl., München, "Beck", 2011, § 12, Rn. 3.

93 *Quante A.*, Sanktionsmöglichkeiten gegen juristische Personen und Personenvereinigungen, Frankfurt a.M., "Peter Lang", 2005, 100.

94 *Tiedemann K.*, Wirtschaftsstrafrecht Besonderer Teil, 3. Aufl., München,"Vahlen", 2011, 1.

products to Iran. By the EU resolution this is prohibited. If the products are still supplied, the relevant persons shall bear criminal responsibility.[95]

7. Conclusion

This brief overview of economic criminal law on the example of Germany clearly demonstrates significance of this sphere of law. Crimes related to the economic sphere require specific approach and investigation and therefore, it is time to do researches and commence work on the issues referred to above in the Georgian legal literature. Otherwise, Georgia will not be able to follow the active scientific activities in the sphere of economic criminal law ongoing all over Europe and will not be able to give effective response to the challenges facing criminal law due to origination of the new forms of crime.

[95] *Tiedemann K*., Wirtschaftsstrafrecht Besonderer Teil, 3. Aufl., München,"Vahlen", 2011, § 3, Rn. 75.

Gvantsa Beselia*

Which Role Can Ethics Management Play in the Improvement of the Performance of Public Administration? What is the Relationship between Ethics and Law in this respect?**

I. Introduction

The Twenty-first century is characterized by rapid changes in political, economical, and social aspects. A wave of new opportunities, challenges, new systems, and even new problems affect the development process for public administrations. Many countries are striving to establish and ensure more democratic values and principles. These, in turn, guarantee more accountability and transparency within the structure and process of the public administration sector. Creating a more ethical environment in the public sector by defining and managing public official behavior, what they have to do, and how they have to act is essential. Clearly defined policies and procedures can maintain better interaction outside and inside the public administration. Public official behavior and the way the public administrations deliver their services greatly effects and influence the lives of citizens.

Ethics are a widely discussed topic, especially during the last few years, however it is not so new in the public sector. The 1970s was called "the ethics decade" because of the unprecedented readiness and ongoing interests of government to concentrate and focus on the ethical conduct of public servants.[1]This continuing readiness of the government to build an ethical environment in public administrations and guarantee ethical behavior of public officials evoked the addition of the fourth "E" to "the holy trilogy of Efficiency, Economy and Effectiveness"[2] for public administration. The main aim of this thesis is to show that Ethics plays a crucial and important role in developing the public sector, why it is so important and how ethics management influences the delivery of services by public administrations.

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1 *Kernaghan K., Dwivedi O.P.*, Ethics in the Public Service: Comparative Perspective, Brussels, International Institute of Administrative Sciences, 1983, 1.

2 *Menzel D.C.*, Ethics Management in Public Organizations, What, Why, and How?, in: Handbook of Administrative Ethics, *Cooper T. L.* (Editor), 2nd Edition, New York, "Marcel Dekker", 2000, 355-356.

To identify how ethics can be managed and why ethics management is so important, we have to determine the essence of ethics, what does ethical behavior mean and what are the values for any public administration? Often ethical behavior is connected with corruption and conflicts of interest. While these are very important to consider there are other important values acknowledged by public officials that create an ethical environment. They help avoid corruption and conflict of interest. Values are implemented and determined differently depending on the country. Some countries such as the United States, Australia, New Zealand, and others[3] present a Code of Conduct which gathers important ethic values into one law. Other country's like Hungary, Croatia, and the Republic of Slovenia[4] have implemented and regulated basic values and standards of ethical behavior of public officials in the ordinary law of public service for their respective states. Georgia has chosen the later means to implement ethical norms in public servant working environment. This means that the Georgian public sector does not have codes of conduct. Georgia implements norms prescribed by ordinary legislation from Civil Service Law. These various distinctions between countries are caused by many cultural and historical factors which effect the development of ethics management and ethics at large. The most important are the social-economic and political factors that influence the developing process of countries' priorities, administrative culture, and traditions. There is a new wave of transition for public administration into a more managerial-type system. This system implements the consumer-oriented, private sector based principles to help the public sector become more flexible, operative, and open for consumer and new technologies. This thesis discusses how they influence ethic development in the public sector and what kind of roles they play through this process.

While discussing legislation on ethics, it is interesting to talk about the interaction and relationship between law and ethics. In many cases the ethical norms and legal norms are strongly linked with each other. Law regulates issues which are not covered by ethics and vise versa. This means that they are completing each other. As the law does not regulate some issues defined by ethics they can be considered as one of the reasons for creating codes of conducts and independent chapters in ordinary legislation settling ethical issues. This interaction between law and ethics will be part of our further discussion throughout this thesis.

This research is not based on empirical data; however there are some surveys from Organization for Economic Co-operation and Development (OECD) regarding knowledge and practice of OECD countries in the ethics development process. The discussion throughout this thesis will be descriptive, developing a comparison of different countries' experiences in the field of ethics. In the course of this discussion it will be identified what ethics is and how public

3 *Palidauskaite J.,* Codes of Conduct for Public Servants in Eastern and Central European Countries, 1, available at: <http://www.oecd.org/dataoecd/17/32/35521438.pdf> (last seen on 24th of October 2011).

4 Ib., 1-2.

administration can manage it effectively and efficiently by using different tools and mechanisms, such as coordination bodies, codes of conducts, monitoring and training programs. This will help to find out how ethics management can influence the performance of public administrations and why is it so important for the public sector to develop and maintain an ethical environment within organizations.

2. What is Ethics?

2. 1. "Core Values"[5] of Public Administration – What is Ethics?

What is ethics? This is the central question before starting a discussion about ethics management in general and its role and how it impacts the performance of public administrations and public service delivery. Without identifying basic principles and values for public administrations, it would be very difficult to discuss ethics and its definition. Ethics "is about values and the application of those values in any given context".[6] This means the practical use and functioning of those values and moral principles in public sector.[7] But what are those values which create relevant conditions for public officials to act and behave ethically? These values can be the traditions, customs, moral standards, ideals that are considered to be valuable not only for individuals but also for all of society. These values help individuals to act and behave correctly and right in society and these acts of individuals have positive effects and influences on that society. These values and right acts of individuals have to be expressed practically in public sector daily life. This will help public administrations create open, transparent, fair, and reliable conditions and environments for public officials and society. This practical expression can be achieved by providing and developing ethics in public administrations. Ethics considers principles, standards, and values that define what is right and wrong. These help public officials to make right choices and provide equal and impartial treatment by making fair decisions while delivering public service. These choices represent the preconditions necessary to guarantee transparency, impartiality, effectiveness, and integrity within public administrations in order to avoid conflicts of interest, corruption, and other unethical behavior that infringe not only ethical norms and values but also the legal order.

Ethics are defined as fundamental values and as "standards of behavior that set boundaries for conduct."[8]They set an additional framework for public officials. Public officials have to

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5 Building Public Trust: Ethics Measures in OECD Countries, Public Management Policy Brief No 7, OECD, 2000, 2, available at: <http://www.oecd.org/dataoecd/60/43/1899427.pdf> (last seen on 24th of October 2011).

6 *Chapman R.A*., Ethics in Public Service for the New Millennium, in: Ethics in Public Service for the New Millennium, *Chapman R. A.* (Editor), Burlington, 2000, 217- 218.

7 Ib., 218.

8 Building Public Trust: Ethics Measures in OECD Countries, Public Management Policy Brief No 7, OECD, 2000, 2, available at: <http://www.oecd.org/dataoecd/60/43/1899427.pdf> (last seen on 24th of October 2011).

understand their significant role as a servant of the public which brings a high degree of responsibility. "One of the essential characteristics and qualities of working in the public service within a modern democracy and one of the elements of the political environment is the emphasis on public accountability".[9]This quotation underlines the significance of being a public servant working for public administrations. To realize fully the degree of public responsibility helps the public sector to ensure democratic principles and standards and guarantee political stability and a positive political environment. A public official should not be self-interested and should act in the public interest and create the public good which increases public trust within society and affects not only its citizens but also public administrations. These are the main reasons countries are trying to identify and standardize values in order to develop ethics within the public sector.

The definition and acknowledgement of basic values is not enough to ensure that ethics work properly. It is important to ensure awareness of public servants about these values. Not having knowledge means not knowing how to act in different and especially in conflicting situations. While defining basic values of public administrations it is vital to solve the problem of educating public officials. However, only having knowledge of ethical norms and values is not sufficient because the sources for these values cannot be only educations and trainings but also family and traditions.[10]It is important to know how to use these values in practice because public sector ethics means the practical appearance of values in the working environment of public officials for any given country.

There are many varieties of values that influence public servants but not all of them are related with public sector ethics and it is difficult to list the most important ones for public administrations. We must consider the traditions, the political environment, and the administrative culture that create different priorities for different countries. For example, in the United Kingdom, The Committee on Standards in Public Life (chaired by Lord Nolan, also known as The Nolan Committee,) presented "Seven Principles of Public Life" and distinguished the following basic values for public administration: selflessness, integrity, objectivity, accountability, openness, honesty, and leadership.[11] The European Code of Good Administrative Behavior gives a much broader and detailed list of values connected with good administration, such as lawfulness, absence of the discrimination, proportionality, absence of abuse of power, impartiality, objectivity, fairness and courtesy.[12]The ethics code of the members of the Parliament of Georgia

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9 *Chapman R.A*., Ethics in Public Service for the New Millennium, in: Ethics in Public Service for the New Millennium, *Chapman R. A.* (Editor), Burlington, 2000, 224-225.

10 Ib., 168.

11 The Seven Principles of Public Life, Committee on Standards in Public Life, available at: <http://www.public-standards.gov.uk/> (last seen on 24th of October, 2011).

12 The European Code of Good Administrative Behavior (prepared by the European Ombudsman), available at: <http://www.ombudsman.europa.eu/resources/code.faces> (last seen on 20th of October 2011).

presented just six values: loyalty, honesty, impartiality, accountability, publicity and sincerity.[13] It is useful to study different countries' codes of conduct to have a more complete picture of basic values because those codes are the way to declare fundamental values for public administrations. Prioritizing values differ from country to country.

According to the OECD Puma Policy Brief No. 7 "*Building Public Trust: Ethics Measures in OECD Countries*" to identify "Core Values" and publish them as a standard and guideline for the daily work of public officials became the first and one of the main steps for all OECD countries.[14]This document lists eight of the most significant basic values: impartiality, legality, integrity, transparency, efficiency, equality, responsibility, and justice.[15]These are the most often declared values of public administrations in OECD countries. This list is not fixed and it is always fluid. The new millennium is open to new and rapid transformations and is full of new challenges and opportunities that impact changes in ethics development. This is unavoidable. Many internal as well as external factors affect ethics, i.e. political, social, economical, and cultural aspects.

2. 2. Impacts on Ethics Development in Public Administration

2. 2. 1. Political and Cultural Aspects

There are many external or internal factors influencing and affecting ethics development in public administrations. One of the main and important factors is the political environment of countries and their administrative culture and traditions. Identifying these aspects can help to understand the main reasons why there are distinctions between different countries and what kind of roles the political situation and administrative culture play in ethics development.

Public administrations are actively involved in political activities and policy making processes. It is obvious that political situations and political regimes can actively influence public sector ethics. Politicians are actively involved in defining and establishing basic values for public administrations and for the whole of society. Richard A. Chapman in his book "*Ethics in Public Service for the New Millennium*" calls the political environment a key factor in fostering and developing public service ethics, where politicians set conditions and create frameworks for public service, they define the political environment and establish public sector values.[16] This in turn affects the work of public servants.

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13 The Code of Ethics of the Members of the Parliament of Georgia, Tbilisi, 2004.

14 Building Public Trust: Ethics Measures in OECD Countries, Public Management Policy Brief No 7, OECD, 2000, 2, available at: <http://www.oecd.org/dataoecd/60/43/1899427.pdf> (last seen on 24th of October 2011).

15 Ib.

16 *Chapman R.A*., Ethics in Public Service for the New Millennium, in: Ethics in Public Service for the New Millennium, *Chapman R. A.* (Editor), Burlington, 2000, 219.

While talking about ethics development in the public sector, it needs to consider the political situation in different countries. Liberal-democratic countries are more open to discussing public service ethics and public officials are more actively involved in determining and establishing the basic values for public administrations than the nondemocratic countries. The reason being liberal-democratic countries and liberal-democratic societies are more open to establishing transparent, impartial, and efficient government and public administrations than authoritarian societies.

The political environment and political regimes significantly influence not only distinguishing basic values but also setting priorities of their respective countries. A transitional country, like Georgia, essentially acknowledges universally recognized democratic principles and implements them actively in real life. However, nowadays ethics is not a priority for Georgian politicians and public authorities. The reason is not only because of a politically transitional situation but also due to internal economic and social conditions. This does not leave much room for public service ethics. It has to be pointed out that, in 2009, despite having social and economical problems, the Georgian Parliament has adopted an additional chapter on ethical behavior for public servants in the ordinary law on "Public Service".[17] However, there was not and still is not active discussion on ethics issues even between various public administrators and public officials. Passive roles, low interest, and cynicism on the part of Georgian public servants caused by the transitional period and the challenging political, economic and social situation limits their readiness.

To fix the political situation in favor of democratic principles and to ensure that basic values and ethics in public administration positively affect governments and public administrations themselves, citizens need to become the main evaluators of governmental and public administration actions. These citizens are "likely to view government as less legitimate" when ethical scandals occur and the values, such as: fairness, justice, accountability, equity, responsiveness are not ensured properly.[18]

As noted, the political environment is a crucial aspect for public administration ethics but still there is another very important factor influencing the ethics development process and this is the cultural aspect. When defining values and ethics of public administrations, culture, traditions, and customs play a decisive role. In refining these values it is decided what is right or wrong as well as how to act and behave appropriately. Culture plays a big role in the definition of ethics for any particular country or situation. Bearing in mind cultural differences, it is quite possible that an action considered unethical in one country could be ethically justified in another. There are wide distinctions between Eastern and Western countries.

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17 Law on "Public Service of Georgia", Addition of Legislative Gazette and Statute Book of Georgia, N12, 2009, Art. 73^1-73^5.

18 *Frederickson G.H.*, The Spirit of Public Administration, San Francisco, "Jossey-Bass", 1997, 171.

It is important how we define culture. Is it only intellectual achievements or only the combination of beliefs, customs, and traditions? Or is it the way and style of living of an existing society? Or is it a set of all these aspects? The culture is dynamic, changeable and complex feature gathering all above-mentioned characteristics. Considering this, culture influences significantly and shapes the environment where individuals live and work. This in turn impacts the creation of a specific administrative culture typical of a particular society.

While talking about ethics development in public administrations it is important to consider the administrative culture of the public sector of particular countries. The national cultures have a significant impact on the way of managing public administrations and for this reason all organizations are "cultural-bound".[19] In some cases ethics is not a part of the administrative culture and it would be difficult for public officials to promote public sector ethics in their daily works. Organizational culture should encourage and create an environment where public officials feel that they are ready to accept raising ethical issues.[20]

Cultural divergences and distinctions between different countries have an impact on ethics development. This can be clearly seen in the codes of conducts development process in different countries.

2. 2. 2. Changeable Public Administration - New Public Management (NPM), e-government

Another influence on the development of ethics is the ever changing public administration system and style itself. New Public Management is one of the most acclaimed changes following the new wave of transformation of public administration structure and style.

NPM creates more free space for management and concentrates on creating a more decentralized and competitive public sector; it stresses private sector style management.[21] This means that the new approach establishes a business-like style and structure for public administrations. Besides the central aspect of NPM is the separation of politics and management.[22] Achieving this goal will be difficult, because public officials are actively involved

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19 *Schröter E.,* Deconstructing Administrative Culture: Exploring the Relationship between Cultural Patterns and Public Sector Change in the UK and Germany, in: Cultural Aspects of Public Management Reform, *Schedler K., Proeller I.* (Editor), New York, "JAI Press", 2007, 314.

20 *Gilman S.C.*, Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons, Prepared for the PREM, World Bank, Washington, D.C., 2005, 39, available at: <http://www.oecd.org/dataoecd/17/33/35521418.pdf> (last seen on 3rd of October 2011).

21 *Hood C.,* A Public Management for all Seasons, in: Public Management: Critical Perspectives, *Osborne S. P.* (Editor), Vol. V, London, 2002, 186-187.

22 *Kolthoff E., Huberts L., Van Den Heuvel H.,* The Ethics of New Public Management: Is Integrity at Stake? "Public Administration Quarterly Journal", Vol. 30, No 4, 2006/2007, 4, available at: <http://www.spaef.

in politics and their behavior and decisions influence the reputation of the government and its policies. Furthermore, NPM will share the principles and values of the private sector which often cannot be applicable to public administrations. The process of separating and implementing private-based principles can have a positive as well as a negative impact on public administrations and their values. It can positively influence the effectiveness and efficiency of any government. However it would be very difficult to treat citizens similarly as consumers as it is in private sector because the relationship between the public sector and its citizen covers numerous issues and is almost impossible for public administrations to create one formula to solve those issues. There are evident contrasts between the public and the private sector, not only regarding structure and organization of activities but also with sets of values and beliefs.[23] Business is more open and flexible but the same cannot be said about public administrations. The public sector is more rigid and bound by rules, regulations, and ethics; however the central players are citizens. Public officials are not as free in their actions and decisions as private employers. Public servants are working under pressure and are under great scrutiny from society. They are obliged to be less self-interested and to protect the public interest in order to create the public good. They have to be more accountable and responsive for their actions as public officials. The basic values of the private and public sector can be shared by both public and private organizations, but what is significant for the public sector is not decisive and vital for the private sector. The "civically inclined" people are more concentrated on the good and public interest, while "privately inclined" people are more interested in "maintaining the economy through commerce".[24] When governmental organizations are more "civically inclined" then the public interest will be ensured, otherwise public administrations provided by the "privately inclined" people, who accept business values and practices considered as unethical or unacceptable for pubic administrations, then corruption would be unavoidable.[25]

The development of Informational Technologies (IT) has impacted not only public administrations but all of us as well. The changes are so dramatic and rapid that it is almost impossible to avoid or not consider them. Technological means of communication become more and more necessary and attract global attention of the whole world. Consequently, it changes values and principles and certainly it affects the ethical environment of public administrations.

With new technological progress Governments are becoming more and more open and transparent giving opportunities for citizens to be actively involved in the policy and the decision-making process and control the Government's activities. The digital means can speed up the

com/search.php?journal=PAQ&year=&author=Emile+Kolthoff&title=Integrity&abstract=NPM&button=Search+Articles> (last seen on 25th of October 2011).

23 *Frederickson G.H.*, The Spirit of Public Administration, San Francisco, "Jossey-Bass", 1997, 177.

24 Ib.

25 Ib.

communication and information exchange between the public officials inside the public administrations and between the public officials and citizens outside the administration. This will positively influence efficiency of public activities. However, IT can negatively impact working relationships. It encourages individualism and ignores teamwork.[26]

Moreover, the implementation process of the new technologies and development of e-government supports creation of fast competition that forces public administrations to get things done as quickly as possible. This process can "devalue the ethical overhead that is the part and parcel of getting things done. Getting things done and staying competitive can be but are not always necessarily with high ethical standards."[27] Public administration reformers have to consider all these distinctions and low points while implementing and developing new approaches in practice that can negatively impact on public service ethics and on reputation of public administrations.

III. Ethics Management

1. How Can Public Administration Manage Ethics?

To declare basic values, identify how public officials have to behave and consider all aspects affecting the ethics development is not enough for proper working of public ethics. It has to be appropriately managed that means that public administrations have to create a relevant infrastructure. The public administration while building an infrastructure has to implement relevant tools and mechanisms to support ethics for a well-functioning program.

The following listed elements are vital for developing ethics in public administrations and for encouraging public officials to act ethically: a relevant political environment, an effective legal framework, workable codes of conduct, accountability, and socialization mechanisms, supportive public service conditions, an ethics coordinating body and an active civic society.[28] All of these define the concept of an "ethics infrastructure"[29] existence of which is significant for management

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26 *Bilhim J., Neves B.,* New Ethical Challenges in a Changing Public Administration, Social and Political Sciences Institute of Lisbon Technical University, Center for Public Administration and Policies, June 2005, 12, available at: <http://soc.kuleuven.be/io/ethics/paper/Paper%20WS4_pdf/Joao%20Bilhim_Barbara% 20Neves.pdf> (last seen on 25th of October 2011).

27 *Menzel D.C*., Ethics Management for Public Administrators: Building Organizations of Integrity, New York, "M.E. Sharpe", 2007, 3-4, available at: <http://books.google.ge/books?id=veQe50wY-acC&pg=PA11&lpg=PA11&dq=how+the+ethics+management+influance+on+performance+of+public+aministration&source=bl&ots=BVQbhMvD_b&sig=mVbswHi0DoSBM5lN9Yxu26uwNn4&hl=ka&ei=rYJ5TsrbG9SIhQec4IRj&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false> (last seen on 30th of August 2011).

28 Ethics in the Public Service: Current Issues and Practice, Public Management Occasional Papers No. 14, OECD, 1996, 6, available at: <http://www.oecd.org/dataoecd/59/60/1899269.pdf> (last seen on 3rd of October, 2011).

29 Ib.

of ethics. While create an ethics infrastructure, it is important to prepare a relevant environment in public administrations. It means that these elements have to be put into action, be understood and realized continuously. This is a dynamic process and as an ethics infrastructure is built and linked with public administrations, changes and reforms significantly influence it.

While managing ethics it is important to create relevant and supportive public service conditions where public officials act and work on daily. These conditions have to be acceptable and adequate for them. They are the main target of these processes. The supportive public service condition can be reached if public administrations, with its HR policy, guarantee the fair and equal treatment of employees while recruiting or promoting, ensure appropriate payment and security system.[30] To achieve supportive public service conditions public administrations have to start working on a program from the beginning. The starting point is to recruit and hire the "right people".[31]It is possible to recruit them by improving existing unethical procedures and using them create the right positions. By correcting these unethical procedures integrity is restored. These policies and procedures can build an administration's reputation and it will stress the importance of ethical behavior on any possible new recruit by explaining the policies openly and clearly and by asking them to undertake the obligation of ethical conduct in a public office oath[32] which can give the impression of the basic values of public administrations.

Ethics cannot be managed effectively without distributing relevant information. Public administrations have to avoid lack of knowledge and give opportunities to public officials so that they can be involved in managing ethics. The ethical rules and standards have to be comprehensive and accessible to public officials, they must know how to act to avoid misconduct and unethical behavior, and they must know about sanctions for violating ethics. Managers are obliged to avoid knowledge problems by creating transparent and impartial decision-making processes and through promoting and demonstrating ethics. All these aspects are considered in the OECD recommendation.[33]

These main elements and procedures are important to help public administrations manage ethics. Creating fair conditions, ensuring equal treatment, having an appropriate payment system, avoiding corruption, conflicts of interest and other misconducts have positive impacts on the performance of public administrations.

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30 Ethics in the Public Service: Current Issues and Practice, Public Management Occasional Papers No. 14, OECD, 1996, 38-39, available at: <http://www.oecd.org/dataoecd/59/60/1899269.pdf> (last seen on 3rd of October, 2011).

31 *Brumback G.B.,* Institutionalizing Ethics in Government, in: The Ethics Edge, *Berman E.M., West J.P., Bonczek S.J.* (Editors), Washington D.C., International City, County Management Association, 1998, 65.

32 Ib., 65-66.

33 Principles for Managing Ethics in the Public Service, Recommendation, PUMA Policy Brief No 4, OECD, 1998, available at: <http://www.oecd.org/dataoecd/60/13/1899138.pdf> (last seen on 3rd of September, 2011).

2. Codes of Conduct

While discussing ethics management, the first and the one of the most important steps is defining and declaring clear values and rules for public servants. Codes of Conduct are the main instruments for public administrations to define those values and rules that make ethics work appropriately. A code is connected with ethics management and helps managers properly manage it.

A code of conduct is a statement of principles and standards; it concerns the proper conduct of public servants,[34] and upholds high moral standards.[35]It functions as an internal document that regulates activities and the decision-making process, serves the public and meets their expectations towards public administrations.[36] In light of these definitions, a code creates an ethical environment and informs public officials how to act ethically which will positively effect on the citizens as well. Codes of conduct can be applied to different professions, politicians, teachers, lawyers, public officials of different ministries, agencies, departments. It is possible to provide and implement additional provisions or chapters in general codes of conduct to highlight and consider the specificities of the duties of other professions or positions.

Countries independently choose the form of codes of conduct. In some cases, countries are using the Ten Commandments[37]by declaring the basic values of the organization. This is very general and threatens the efficiency and preciseness of the code itself. Declared values put forth on one sheet of paper can be vague and insufficient for settling complex and problematic issues and cannot assist the public officials in dealing with controversial situations that appear during the daily work. It has its positive sides; it is easier for all public officials to read and comprehend the clearly stated values and for public administrations to distribute their policies and procedures throughout their respective organizations, departments, and/or agencies. American Society of Public Administration's (ASPA) Code of Ethics lists five basic values and at the same time seven-eight short points of main ways how ASPA members are required to act to achieve these purposes.[38]Some countries prefer to define their values, principles, and relevant procedures more

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34 *Kernaghan K.,* Promoting Public Service Ethics: The Codification Option, in: Ethics in Public Service, *Chapman R. A.* (Editor), Edinburgh, "University of Edinburgh Press", 1993, 18.

35 *Huddleston M. W., Sands J. C.*, Enforcing Administrative Ethics, in: The Ethics Edge, *Berman E. M., West J. P., Bonczek S. J.* (Editors), Washington D.C., International City, County Management Association, 1998, 147.

36 *Palidauskaite J.,* Codes of Conduct for Public Servants in Eastern and Central European Countries, 3, available at: <http://www.oecd.org/dataoecd/17/32/35521438.pdf> (last seen on 24th of October, 2011).

37 *Kernaghan K.,* Promoting Public Service Ethics: The Codification Option, in: Ethics in Public Service, *Chapman R.A.* (Editor), Edinburgh, "University of Edinburgh Press", 1993, 20-21.

38 Code of Ethics, American Society of Public Administration, available at: <http://www.aspanet.org/scriptcontent/index_codeofethics.cfm> (last seen on 6th of October 2011).

precisely and use a more complete form of the code – Justinian Code model.[39] "*Standards of Ethical conduct for Employees of the Executive Branch*" of United States is an extensive document with nine subparts and seventy eight pages. This code provides detailed determinations of the procedure for receiving gifts by public officials, conflicts of financial interests, impartiality while exercising the duties of the executive branch and the misuse of position.[40] It also provides exhaustive information on how public officials of the executive branch have to behave in the above listed situations. The same forms and detailed descriptions are used by Australia, New Zealand, and Korea.[41] The detailed rules and procedures can avoid misinterpretation by subjects of the codes but still there is the threat that overloaded and specific regulations can leave less space for discretion by public officials while exercising their duties. Besides complex, legal-structured regulations can be difficult for many non-lawyer public officials to completely comprehend the purpose and the demands of the code and to implement it in their practical work. When creating codes of conduct, "there must be balance between the specificity and breadth."[42]

The context of codes of conduct varies from country to country. These differences can be because of different historical, political, and cultural backgrounds. It is almost impossible to design one formula for what the codes of conduct regulate. These contextual diversities are inevitable and countries have to consider their priorities which include considering the political and cultural conditions and environment in public administrations. For example, Korea's code of conduct for maintaining integrity of public officials regulates mostly issues connected with fair performance of public officials, prohibition of involvement of politicians, third parties executing their public duties, and officials receiving unfair profits.[43] Australian public service code of conduct mainly covers the topic of the relationship between public servants and government, parliament and the public, conflicts of interest, gift acceptance and other personal behavior that negatively influences the Australian Public Service (APS).[44]

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39 *Kernaghan K.,* Promoting Public Service Ethics: The Codification Option, in: Ethics in Public Service, *Chapman R. A.*(Editor), Edinburgh, "University of Edinburgh Press", 1993, 20-21.

40 Standards of Ethical Conduct for Employees of the Executive Branch, 2002, United States Office of Government Ethics, available at: <http://www.oecd.org/dataoecd/61/31/35527111.pdf> (last seen on 7th of October, 2011).

41 Ethics Codes and Codes of Conduct in OECD Countries, OECD, available at: <http://www.oecd.org/ document/12/0,3746,en_2649_34135_35532108_1_1_1_1,00.html> (last seen on 7th of October, 2011).

42 *Gilman S.C.,* Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons, Prepared for the PREM, World Bank, Washington, D.C., 48, 2005, available at: <http://www.oecd.org/dataoecd/17/33/35521418.pdf> (last seen on 3rd of October, 2011).

43 The Code of Conduct for Maintaining Integrity of Public Officials, Korean Presidential Decree No 17906, 2003, available at: <http://www.oecd.org/dataoecd/18/13/35521329.pdf> (last seen on 7th of October, 2011).

44 Australian APS Values and Codes of Conduct in Practice, available at: <http://www.apsc.gov.au/values/ conductguidelines.htm> (last seen on 6th of October 2011).

To ensure the proper working of these regulations concerning codes of conduct, they have to be implemented and enforced properly. Identification and rules of enforcement, means and methods are vitally important because public officials must know how cases related to matters of ethical misconduct are inquired. The experiences of different countries in the enforcement process of codes of conduct also vary greatly. Many countries establish special committees, commissions or inspectors responsible to assist public administrations in implementing codes of conduct in their practical work.

Apart from these commissions and services there is another important aspect for effective enforcement of the codes of conduct - publicity. Publicity is an essential element and helps to promote the public trust and reminds public servants about the ethical standards, widespread involvement of public officials in the formulations of the codes can help an easier administration of codes of conduct.[45]An open and transparent process is an important factor for effective enforcement of codes of conduct. Public administrations, while formulating the code, have to consider and foresee interests and needs of public officials. Public officials are the main subjects of the codes and any kind of result can have an effect not only on them, but also on a public administrations reputation and on public trust at large.

Alongside the codification and systematization of the values and principles in codes of conduct, there has to be created special agencies, committees, organizations or other bodies which can monitor how values and rules are implemented in practice and how they promote ethics in the public sector.

3. Monitoring and Promoting the Management of Ethics

3.1. Coordinating and Monitoring Ethics Management

The main reasons and objectives for creating coordinative, advisory or investigative bodies are to maintain an ethics infrastructure, promote ethics in the public administrations, give advice or assist the public top managers and public officials in developing ethics environment. These bodies implement ethical rules and regulations in the real world, provide recommendations, surveys, and report on ethical conditions in public administrations and/or just monitor, inquire, and investigate misconduct of public servants in order to watch over ethics management in public administrations.

These bodies can exist in the form of committees, independent agencies, offices, and associations in public administrations. These are mostly created and work as independent, neutral, and impartial bodies. The OECD Public Management Occasional Papers No 14 considers the

[45] *Kernaghan K.,* Promoting Public Service Ethics: The Codification Option, in: Ethics in Public Service, *Chapman R. A.* (Editor), Edinburgh, "University of Edinburgh Press", 1993, 22.

main functions of these bodies by identifying three main roles: watchdog, counselor or promoter.[46]

The watchdog and central investigator body in Australia (New South Wales) is the Independent Commission against corruption (ICAC). ICAC was established by the New South Wales government in 1989. Its main responsibilities are to investigate corrupt conduct, prevent the corruption through advices and educate the public sector about corruption.[47]The ICAC is not only the prosecuting body but also exercises duties as an advisor and promoter. Committees, Commissions or offices can also play the role of a promoter of ethics in public administrations but not all of them have a right to investigate and prosecute ethical misconduct. The United States Office of Government Ethics (OGE), ensuring compliance of the ethical program for the executive branch with laws and regulations, providing education and training programs, is a watchdog at the same time. It is responsible to oversee financial disclosure and implement new systems in order to avoid and prevent any conflicts of interest by employees in the executive branch.[48]

The counselor's plays a role in the State Service Commission (SSC) of New Zealand. The main aim of the SSC is to improve the performance of the public sector and increase the quality of public service delivery. This Commission works with ministers and leaders, in order to identify and prioritize the objectives of the public service, set expectations, and helps public administrations achieve results.[49]Another advisory body is the Committee on Standards in Public Life in the United Kingdom. As an independent advisory body the committee provides annual reports, meetings, consultations, and recommendations about the standards of the public sector.[50]

The same bodies with the same function of overseeing and promoting ethics are established not only on the national but also on the supranational level. In 2005 the United Nations (UN) in its sixtieth session adopted a resolution. One of the main topics of this resolution was Secretariat and management reforms. To ensure an effective, efficient, and accountable Secretariat, guaranteeing transparency and integrity, the General Assembly of the UN made a decision to reinforce ethical conduct and develop a system-wide code of ethics for UN personnel.[51]Considering this resolution

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46 Ethics in the Public Service: Current Issues and Practice, Public Management Occasional Papers No 14, OECD, 1996, 39, available at: <http://www.oecd.org/dataoecd/59/60/1899269.pdf> (last seen on 3rd of October 2011).

47 Australian Independent Commission against Corruption, see: <http://www.icac.nsw.gov.au/about-the-icac/overview> (last seen on 10th of October, 2011).

48 Office of Government Ethics of the United States, see: http://www.usoge.gov/About/Mission-and-Responsibilities/Mission---Responsibilities/ (last seen on 10th October 2011).

49 State Service Commission of New Zealand, see: <http://www.ssc.govt.nz/strategic-direction> (last seen on 10th of October 2011).

50 Committee on Standards in Public Life of the United Kingdom, see: <http://www.public-standards.gov.uk/ourwork.html> (last seen on 10th of October).

51 United Nations General Assembly Resolution A/RES/60/1, 2005, 33, 34, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (last seen on 25th of October, 2011).

the UN Secretariat established the Ethics Office. The main objectives of this Office is to assist the Secretary-General in ensuring that all staff members observe and perform their functions in compliance with the highest standards of Integrity by promoting the culture of ethics, transparency and accountability. The Ethics Office provides confidential advices and guidance for staff and develops standards, trainings, and education on ethical issues.[52]

The third main role of these coordinating bodies as promoters can be discussed in the next chapter, while talking about the ethics training and studying programs.

3.2. Ethics Can Be Taught

It was discussed the importance of creating an ethics infrastructure and proper management of ethics in public administrations, also means and ways of managing public sector ethics and its positive effects on organizational environment and on its performance. Alongside these it is vitally important to bring the values and regulations to employees and make them familiar with them. Just writing rules and regulations is not sufficient for public administrations to achieve goals ensuring organizational culture and ethical behavior of public officials. To reach these goals public administrations need to promote ethics by creating and put into practice different training programs because just to know what is right and wrong cannot maintain and encourage an ethical environment. It is sufficient to teach public servants how to use this knowledge in their daily work and give "employees an understanding of why ethical behavior is necessary".[53]

Creating an ethics training program is not an easy task for public administrations. There must be a clear definition of what the mission of the training program is, what must be the results from these programs and also who the core addressees for these programs are. Without meeting the needs and interests of employees and public administrations themselves objectives will not be accomplished and the training will have only a formal status. So, while planning training programs public administrations should agree on tools, procedures and participants to avoid misuse of not only personal resources but the financial resources as well.

These ethics training programs can use different tools: trainings, staff meetings, discussions, seminars, case studies, assessments, and evaluations of performance. These programs should increase the sensitivity of employees to the importance of ethical principles and improve their ethical behavior.[54]

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52 United Nations Ethics Office - establishment and terms of reference, "Secretary-Generals Bulletin", 2005, Sections 1 and 3, see: http://www.centerforunreform.org/node/32 (last on 25th of October 2011).

53 *Bonczek S.J.,* Creating an Ethical Work Environment, in: The Ethics Edge, *Berman E. M., West J. P., Bonczek S.J.* (Editors), Washington D.C., International City, County Management Association, 1998, 75.

54 *Kernaghan K.,* Promoting Public Service Ethics: The Codification Option, in: Ethics in Public Service, *Chapman R. A.* (Editors), Edinburgh, "University of Edinburgh Press", 1993, 25.

First of all, it has to be considered that "ethics programs work best from the top down".[55] It means that to ensure the success of training programs top managers have to be trained. The managers are responsible to define and establish values, implement and institutionalize those values through the organization and develop and promote ethical environment. Almost all initiatives are coming from the top of the organization. To exercise all these duties and responsibilities, first of all top managers as rule setters have to be trained to give an example to employees on ethical behavior. "Nothing is more powerful for employees than seeing their managers behave according to their expressed values and standards".[56]

One of the important aspects in promoting ethics can be staff weekly meetings to discuss ethical implications, identifying potential problems, and provide strategy for solving issues.[57] Managers need to keep employees continuously aware that ethics are an integral part of their work and their acts have to be in compliance with an organization's values and standards. To identify and review an employee's work and his/her compliance with the organization's expectations on ethics, can be used the performance appraisal system, an open environment for communicating with and listening to employees in order to determine the employees' opinion of the ethical implications of management decisions and the level of acceptance of organization values.[58]

Ethics training and studying programs have a vital role for effective management of ethics in public administrations. Increasing ethical awareness and teaching how to act ethically in compliance with organizational values and standards positively influences public officials' daily work and the development of an ethical environment for public administrations. Considering all the above-mentioned aspects ethics can and must be taught. How to act ethically and how to apply all the values, rules, and standards set by an organization in the daily work can be achieved through effective ethics training and study programs. For these reasons ethics should become an integral part of not only the short training programs, but also of formal studying at Universities.[59] This can promote ethics not only inside the public administrations but also for potential recruits of the public sector. It can help make HR managers' work easier, while recruiting and hiring the "right" and "ethical" people for new positions in public administrations ensuring the start of the public performance improvement process.

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55 *Bonczek S.J.,* Creating an Ethical Work Environment, in: The Ethics Edge, *Berman E.M., West J.P., Bonczek S.J.* (Editors), Washington D.C., International City, County Management Association, 1998, 77.

56 Ib.,78.

57 Ib., 78-79.

58 Ib.

59 *Kernaghan K.*, Promoting Public Service Ethics: The Codification Option, in: Ethics in Public Service, *Chapman R.A.* (Editors), Edinburgh, "University of Edinburgh Press", 1993, 26.

4. Ethics Management – Improving the Performance of Public Administration

4.1. Ensuring Integrity – Administration Perspective

Ensuring integrity is a crucial aspect when developing policies for public administrations. Integrity as a concept can be confusing at first glance. However, to understand the importance and the linkage of this concept with public administration, it has to be defined this term in connection with public administrations.

Integrity in this perspective means behavior "in accordance with the values, norms and rules accepted by the organization's members and its stakeholders."[60] By this definition, integrity is closely related with daily work behavior and its interactions with established rules and values. Public officials have to act in compliance with these rules and values to guarantee integrity. However, organizational integrity is not related with behavior only. It covers more than the daily acts of public officials. Before acting, a public organization needs to build clear rules, strategy, structure, relevant tools and mechanisms. All these factors have to be presented in order to create a framework for an integrity development policy inside public administrations. Most important is to be ready to start this complex process.

Many international organizations or NGOs are providing different assessment systems or strategies towards this direction. For example, the National Integrity System (NIS) provided by Transparency International (TI) provides a framework for assessing causes of corruption and the effectiveness of national anti-corruption efforts.[61] But this framework is connected with issues only of corruption on national level. Integrity is not related with corruption only but it is a complex concept covering all violations of accepted values of organizations. ASPA runs a journal Public Integrity (PI) which refers not only to corruption issues but explores the functional, substantial, and topical issues of public administration; it investigates any level or branch of the government and promotes ethics understanding in government.[62]

It should be a priority to develop and maintain integrity in public administrations. OECD provides a special document on an Integrity Management Framework in public organizations and presents ways to analyze and renew instruments, processes, and structures to encourage integrity in public administrations.[63] According to this document, the integrity management framework

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60 *Huberts L.W.J.C., Van Den Heuvel H., Punch M.,* Ethics and Integrity and the Public-Private Interface, in: Integrity at the Public-Private Interface, *Hubers L.W.J.C., Van Den Heuvel H.* (Editors), Maastricht, "Shaker", 1999, 166.

61 National Integrity System Assessments, Transparency International, available at: <http://www.transparency.org/policy_research/nis> (last seen on 5th of October, 2011).

62 The American Society of Public Administration, "Public Integrity Journal", available at: <http://www.aspanet.org/scriptcontent/index_publicintegrity.cfm> (last seen on 5th of October, 2011).

63 Global Forum on Public Governance, Building a Cleaner World: Tools and Good Practices for Fostering a Culture of Integrity, Draft Agenda, OECD, Paris, 2009, 21, available at: <http://www.oecd.org/officialdocuments/

enforces integrity in the public sector and prevents integrity violations.[64] It gives three main elements for building integrity into public organizations: instruments, processes, and structure[65] which are interconnected and cannot function independently. The instruments need to be incorporated to foster integrity, processes ensure proper implementation and work of these instruments and the structure refers to the redistribution of responsibilities between different actors and coordination to achieve reliable policy and practice.[66]

This described process is not easy for many countries, especially countries that are just reshaping their systems of public administration. Sometimes it is very hard to concentrate and even discover an absence of public integrity. These redesign processes can create difficulties. There is not one recipe or a formula for building public integrity successfully. A major element in this sphere is ethical leadership.[67] Top personnel are obliged to set standards and develop insights to better tackle these complex and controversial processes and construct mechanisms to solve problems, they have to make public integrity the part of organizational strategy, look for creative solutions, be more critical about rules and procedures, emphasize on professionalism, ensure well-resourced institutions and create an "error tolerate" environment where mistakes made during work can be seen as a combination of institutional and personal failings and improved by training and education.[68]

Considering all these factors it can be stated integrity consequences leads to fundamental changes and towards improvement of public administrations. They enforce compliance behavior and activities of public administrations with basic values. They reshape and develop instruments, procedures, and structures for administration. They implement anti-corruption strategies and prevent violation of ethical norms and standards. In addition, they inform and educate public officials which in turn create an ethical environment for impartial, equal, effective, efficient, and transparent decision-making process and public service delivery. It is not easy to convince members of public organizations and society at large of just how important it is to build integrity. It is a time-consuming, complex, and controversial process. One cannot feel the positive consequences from the very beginning, so it needs patience and tolerance from public administrations and society to achieve the desired goals.

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publicdisplaydocumentpdf/?cote=GOV/PGC/GF(2009)1&docLanguage=En> (last seen on 25th of September, 2011).

64 Ib.

65 Ib.

66 Global Forum on Public Governance, Building a Cleaner World: Tools and Good Practices for Fostering a Culture of Integrity, Draft Agenda, OECD, Paris, 2009, 21-22, available at: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/GF(2009)1&docLanguage=En> (last seen on 25th of September, 2011).

67 *Huberts L.W.J.C., Van Den Heuvel H., Punch M.,* Ethics and Integrity and the Public-Private Interface, in: Integrity at the Public-Private Interface, *Hubers L.W.J.C, Van Den Heuvel H.* (Editors), Maastricht, "Shaker", 1999, 177.

68 Ib.,, 177-181.

"Integrity is the key stone of good governance"[69] and positively influences the performance of public administrations. It promotes building of public trust and this is one of the most important accomplishments.

4.2. Building Public Trust[70] – Citizens' Perspective

Every public administration has to be interested in gaining and building trust with their citizens as well as society as a whole. Every act and decision made by public administrations has significant impact on its citizens. Trust and responsibility are important values that public officials must live up to. They need to recognize basic values and create an ethical environment inside as well as outside the administration and communicate with their citizens and other stakeholders. It is the duty of every public official to properly manage ethics and develop a public integrity framework. The output and results of this performance are of great interest to citizens because decisions made by public officials and services delivered by public administrations can have both a positive and a negative impact on the lives of citizens. When becoming a public servant it is necessary to completely comprehend this responsibility.

Public officials have to comprehend and assume that they represent the people and work for them. In the democratic context, public administrators are ultimately responsible to the citizens; it is this responsibility that ennobles their work.[71]The opinions and beliefs of citizens have to be decisive for public administrations and during the decision-making process they have to be aware of citizens' attitudes and whether they approve or not of the decisions made by public bodies.

This is not a one-side process. Citizens also have to be more actively involved and interested in the activities of public administrations. They have to create a more active civil society to control more effectively government and public administrations and prevent corruption, bribery, and other violations of public integrity because sometimes even citizens themselves provoke corruption, bribery, and other unethical or illegal behavior.

Public administrations try to make uncomplicated rules and regulations; they attempt to create more open and transparent public sectors thereby ensuring equal treatment and easy access of information. This makes governments more democratic, reliable, impartial, accountable, effective, efficient, and ethical as well. New challenges brought about by reforms and transfor-

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69 Global Forum on Public Governance, Building a Cleaner World: Tools and Good Practices for Fostering a Culture of Integrity, Draft Agenda, OECD, Paris, 2009, 6, available at: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/GF(2009)1&docLanguage=En> (last seen on 25th of September, 2011).

70 Ib., 1.

71 *Frederickson G. H.*, The Spirit of Public Administration, San Francisco, "Jossey-Bass", 1997, 233.

mation processes guarantee involvement by citizens in the work of public administrations. It definitely affects the reputation of public administrations.

IV. Ethics and Law

In previous chapters were discussed interactions between organizational values and ethics, how those values can be used in the practical work of public administrations, how management of ethics can influence and positively affect performance of public administrations and how it helps public administrations develop and maintain public integrity. It is important now to explore the relationship between law and ethics. Many decisions made by public administrations and by public officials have to be in compliance with and based on law first of all. Governments and bureaucracies have to deal with not only unethical behavior but foremost with illegal behavior of public servants. This means that law and ethics do not work independently from each other but that they co-exist and actively interact with each other in the public sector. What is the relationship between law and ethics? How do they interact with each other and how does this interaction and relationship between law and ethics impact the improvement of public administrations performance?

4.1. Relationship between Ethics and Law

First it is necessary to define law and ethics and the way they interact within an ethics context. Ethics is related with values of public organizations and the use and application of these values in the practical work of public administrations. The definition of law within the context of ethics is difficult. There are many different definitions of law, defined by philosophers, lawyers, and practitioners, therefore it is impossible to cite here all definitions. The aim and subject of this thesis is not to give a complete definition of law rather to identify main differences and similarities of law and ethics so that it can help to see how they interact with each other and how this relationship influences performance of public administrations.

Georgian Scholar of Legal Theory, Professor Giorgi Khubua gives a definition and main characteristics of law. According to his definition the law proscribes definite rules of conduct in order to regulate social co-existence of people, these are compulsory rules of conduct that apply to all members of society; law is the unity of norms guaranteed by state force.[72] The main subjects of law are members of society – people who are required to perform the demands of the state expressed by a set of rules and regulations. The state creates this unity of norms to frame and regulate wide range of issues and aspects connected with the conduct of people. The law

[72] *Khubua G.,* Legal Theory, Tbilisi, 2004, 39.

determines rules for state politics, regulates the relationship between state and society, guarantees human rights and freedoms. These regulations help the state ensure peace, harmony, respect of human dignity, and other rights and freedoms as well as economical and political stability and integrity. To reach these goals people are obliged to act in compliance with a set of rules and regulations. The law is not a suggestion coming from the state; it is binding and compulsory for all citizens. For this reason the state sets not only the rules and regulations but also defines sanctions for breaching that law. The main aim of these sanctions can include taking into account a victim's sense of justice (repression), restoring the condition that existed before the breach of norms (restitution), and/or prevent the avoidance of future violations of the law (prevention).[73]

Defining rules and standards of behavior, "good" and "bad" conduct of public officials help public administrations to ensure the protection of the basic values and implement them in the practical work of public administrations achieved by ethics. The goals of the state: peace, harmony, prosperity, economical, and political stability, human dignity, integrity can be the central values for the state at large. Law and ethics are the mechanisms and tools for achieving these goals effectively and efficiently. Ethics, as well as law present unity and wholeness of norms regulating and framing conduct of people. In this case the addressees of law and ethics are the same – human beings.

Using this perspective the law set by the state and the public sector ethics applies to the same people, both law and ethics regulate the behavior and conduct of people and the norms of law and ethics are determined by specific state organs according to specifically defined rules and procedures. The last statement can be arguable because not all countries have defined clear rules and regulations in the field of ethics. It is obvious that ethical norms presented by codes of conduct are adopted and enforced by state organs - public administrations according to special procedures. In general there can be no fixed procedures for adopting codes. Laws are adopted by specially determined complex procedures.

Is it possible to have compulsory and binding ethical norms in public administrations? The answer to this question is found in codes of conduct. The codes of conduct are the systematically and clearly defined rules of conduct for public officials. This document not only establishes and recognizes organizational values it also mandates public servants to act in compliance with the demand of codes of conduct in order to avoid ethical misconduct and violation of values. It means that ethics as well as law has to be mandatory, if not, public administrations cannot achieve their goals of integrity, public trust, effectiveness, efficiency, in order to have a responsible and ethical public sector. However, there is a difference in how law and ethics use mechanisms of compliance. Regulation of law is carried out in an organized way by state authorities in accordance with special procedural rules.[74] On the other hand ethics enforcement may not be

73 *Khubua G.,* Legal Theory, Tbilisi, 2004, 55-56.
74 Ib., 45-46.

executed in such an organized way. It may not be as strict as it is in case of law and even may not be clearly defined at all. There can exist other pressures obliging public officials to act ethically. These pressures can be public opinion, conscience, and other inner aspects that can become a hindrance or an obstacle for misconduct.

Both law and ethics apply to the conduct of people, in this case public servants. Then why does the public sector need to set an additional framework for public officials by presenting ethics regulation of laws on public services that set basic principles and rules of how to act while delivering public services? Researching the laws of public services and their codes of conduct it can be discovered that ethical values and principles of law can sometimes be the same and be closely related to each other. Principles such as being loyal to citizens and to the state, equality, transparency, and publicity are equally important and relevant for law and ethics. It is sometimes difficult to identify which one is the foundation ethics or law. Sometimes values of ethics go beyond that of legal norms and on the other hand law may regulate broader aspects of people's life. Still there are many varieties of issues that are regulated and determined only by law or by ethics. Violation of ethical values such as courtesy or politeness is not considered an illegal act and if someone is not paying their fine it is a purely legal matter. Public sector ethics regulates the conduct of public officials within an organization and is connected with public services.

The most apparent violation is when the behavior of a public official is corrupt, then both law and ethics operate and interact together and do not obstruct or frustrate each other. Corruption is at the same time illegal and it is unethical. The mechanisms for fighting corruption are different for law and ethics. The norm of law applies and regulates facts and external appearance of conduct that is prohibited, permitted or demanded.[75]It defines a clear sanction for these acts and is not interested in internal reasons for the misconduct. In contrast ethics identifies the reasons for the misconduct and is more internally focused. The sanctions for misconduct vary in ethics. It can analyze ethical dilemmas, communicate with public officials about unethical behavior, provide ethical training, and implement studying programs. This helps prevent future misconduct and restores an ethical environment inside public administrations.

Law and ethics operate in different areas and have their own independent means of regulation. While they are closely connected and related to each other and have some similar characteristics, they can differ in the certain concrete situations as it was in the case of corruption. There can be differences in mechanisms, tools and/or approaches used which are not hindrances or obstacles for the work of law and ethics. These differences achieve a balance between them and they "should complement and supplement" each other and should harmonize their propriety[76] in order to avoid ethical and legal misconducts.

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75 *Khubua G.,* Legal Theory, Tbilisi, 2004, 52.

76 *Finn P.,* Law and Officials, in: Ethics in Public Service, *Chapman R.A.* (Editor), Edinburgh, "Edinburgh University Press", 1993, 138.

V. Conclusion

The purpose of this thesis was to discover how ethics management can improve performance of the public administrations. All aspects from identifying the basic values, to establishing a coordinating and monitoring body play significant roles in the process of ethics development and management. Just identifying and establishing basic values and principles for public administrations is not enough. It needs to be institutionalized and properly implemented in the practical daily work of public servants. For this purpose there are different tools and mechanisms used by public administrators.

Some countries are presenting and adopting codes of conduct with detailed regulations on how to act ethically. Some countries are legislating ethics as in the Queensland Public Sector Ethics Act.[77] Others legislate ethics by putting ethical norms into regular already existing laws on public service. Coordinating and monitoring bodies help administrations ensure implementation and fulfillment of these ethical norms. These aspects cannot be separate to work sufficiently. They are interdependent in a complex process of ethics management.

Ethics in itself is a positive phenomena. It helps people identify how to behave correctly. Considering ethics as an important means of ensuring established organizational values repeatedly can improve performance in public administrations. "Right" and "good" behavior based on acknowledged values and principles has positive impact not only on the performance of public administrations but also on society at large. These are the main reasons why many countries in the world are taking public sector ethics seriously and are trying to create a more ethical environment in the public sector by defining and managing behavior of public officials in the hopes it will guarantee more accountability, transparency, effectiveness and efficiency in the structure and processes of public administrations.

It is not an easy task to create a perfectly ethical environment within public administrations. All factors need to be considered before starting this complex process. These factors can be political, economical, a social condition, cultural and historical background, and people themselves because "human beings are, by the nature, imperfect."[78] The process of introducing and developing an ethics program has to be evaluated adequately in order to avoid misuse of resources that could devalue organizational goals. Fortunately for countries like Georgia supranational organizations, OECD, EU, UN, and other NGO's help by providing surveys, reports and recommendations. They are trying to assist government and public administrations in order to create an ethical infrastructure to facilitate managing ethics effectively and improving the performance of public administrations.

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77 Australian Public Sector Ethics Act 1994, available at: <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PublicSecEthA94.pdf> (last seen on 6th of October, 2011).

78 *Huddleston M. W., Sands J. C.*, Enforcing Administrative Ethics, in: The Ethics Edge, *Berman E.M., West J.P., Bonczek S.J.* (Editors), Washington D.C., International City, County Management Association, 1998, 154.

Tamar Zaalishvili *

Principle of Social State, Its Elements and the Human Right to Dignity – the Basis for Ensuring the Subsistence Minimum

1. Introduction

In the process of the historic development of Social State the drive of the State for the implementation of social goals surfaced the elements which established the pattern of Social State. Social equality, social care and social justice principles are the interrelated elements of one unified principle – principle of Social State. These principles supplement each other and specify the Social State principle.[1]

Each element of Social State principle is equally important and it is impossible to differentiate them hierarchically. Starting from the age of enlightenment they reflect the general goal of all social movements in the process of historic development. The goal is establishment of a better environment in social terms. Under such environment the public relationships are socially balanced, sustainable and fair.

Prior to discussion of each element separately, it has to be mentioned that one of the important aspects of Social State is relative level of social wellbeing. Except for comparative groups of "Better" and "Worse", there should be a point which will be used as a criterion for comparison. This criteriion is generally viewed as public standard.[2] The essential basis for the openness and effectiveness (processual actuality) of the Social State principle is the variability of standards, which is caused by the original development of social relationships on one hand and "self-dynamics" and social-political interventions in these relationships on the other.

The norm of constitution, which reinforces the principle of Social State is not only the programmatic proposal of general nature, but it is also the compulsory norm to be specifically implemented under defined limits. This norm is, first of all, directed towards the legislator. Therefore legislative bodies of all countries, including Georgia, are assigned the task to ensure creation of legislative guarantees for the principle of Social State reinforced under the constitution. Therefore, the comparative scientific analysis of the Georgian legislation and

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1 *Dreier H.*, Grundgesetz Kommentar, B. II, Tübingen, "Mohr Siebek", 1998, Art. 20, Rn. 36, 73.

2 *Zacher H. F.*, Das soziale Staatsziel, in: Handbuch des Staatsrechts der Bundesrepublik Deutschlands, Bd. 1, *Isensee J.*, *Kirchhof P.* (Hrsg.), Heidelberg, "C.F. Müller Juristischer Verlag", 1987, §25, Rn. 61, 1083; *Sachße C.*, Freiheit, Gleichheit, Sicherheit: Grundwerte im Konflikt, in: Sicherheit und Freiheit, *Sachße C.*, *Engelhardt H. T.* (Hrsg.), Frankfurt am Main, "Suhrkamp", 1990, 9.

development of recommendations for the implementation of the Social State principle by the legislation gains high importance.[3] This is the aim of the present scientific work.

2. Elements of Social State Principle

2.1. Social Equality

The idea of social justice itself contains the component of social equality. The objective of constitutional State – equality before the law cannot overlook the social inequality.[4]

The inequality of human beings is presented as somehow given fact in the statement – "all are equal before the law" as stipulated by the first paragraph of Article 3 of the Constitution of German Federal Republic. However, the same statement prohibits the legislator to deepen the above mentioned inequality legislatively. For the purpose of fair distribution of opportunities, the above norm requests to provide everyone, each human being with similar starting positions for development.[5]

If we consider the implementation of principle of social equality as the development process and, moreover, if we take into account the reinforcement of Social State principle by the basic law in such consideration, it becomes evident that in the general postulate of equality the component of factual equality is also considered.[6] In accordance with the concept of Social State oriented towards equality, the principle of Social State is defined as: equality of groups, stratums and classes. It is used in relation to the problems of the less privileged parts of population and minorities. Moreover, for the State the identification of relevant groups (e.g. definition of category of women who faced the obstacles in social emancipation) is a difficult issue due to the explanations given in relevant definitions.

The practice of the German Federal Constitutional Court confirms that social equality does not require equalization of everybody. Social equality as the general principle of equality gives the means for differentiation and requires differentiation itself. For example, the German Federal Constitutional Court, based on the principle of social equalization, endorsed the taxing of higher incomes by higher tax rate and exemption of lower incomes from the tax.[7]

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3 *Zaalishvili T.,* Functions of Social State Principle and Constitutional Guarantees, "Journal TEUSU", 2010, 174 (in Georgian).

4 *Zacher H. F.*, Das soziale Staatsziel, in: Handbuch des Staatsrechts der Bundesrepublik Deutschlands, Bd. 1, *Isensee J.*, *Kirchhof P.* (Hrsg.), Heidelberg, "C.F Juristischer Verlag", 1987, § 25, Rn. 35, 1068.

5 *Herzog R.* in: *Maunz Th., Dürig G.,* Grundgesetz, Art.20,VIII, Rn. 36 (in: *Scholler H.,* Das sozialstaats-prinzip im Grundgesetz, Fn. 27, see: <http://www.heinrich-scholler.de/06_Aufgaben_und_ Funktionen_ der_Gundrechte.pdf>, (05.12.2011)).

6 *Scholler H.*, Die Interpretation des Gleichheitssatzes, Berlin, "Duncker und Humbolt", 1969, 15.

7 BVerfGE (Entscheidungen des Bundesverfassungsgerichts), 09.02.1972 – 1 BvL 16/69, Bd. 32,333 (339), available at: <http: //dejure.org/1972,105>; 03.11.1982 - 1 BvR 620/78, Bd. 61, 319 (343 f.), available at:

Request for social equality is often related to the notion of equal opportunities. However the basis for this request might be not only avoiding the unequal initial opportunities caused by the unequal social conditions but also reduction of created inequality or its eradication even if such inequality resulted under equal initial opportunities. Such case in itself contains the "widening" of opportunities and results in the way that is in collision with the principle of freedom.[8]

Equality of opportunities is one of the aspects of the social-state type freedom in the constitutional states acting under the principle of freedom, which is based on the inviolability of human dignity and individual freedom as the basic right granted by the constitution. Social State which is obliged to be the guarantor of such freedom shall ensure creation of preconditions for the implementation of basic freedoms through the eradication of obstacles.

One of the elements of the social equality principle – the relative aspect of achieving the better condition – has changed its orienteer after some time and it expanded from the working class to general groups with low social conditions and requiring special social protection, such as: small farmers, war veterans, large families (with many children), refugees, disabled persons, children and youth, elderly, unemployed, homeless and etc.[9]

The idea of equalization created the mechanisms for legislative balancing against the economically dominant positions in guarantees considered by the labour code and leasing relationships (for the agreement termination part), as well as in competitive and other consumer relationships.[10] These mechanisms gained relevant processual-legislative forms within the court cases devoted to the labour/work and social issues. In the court practice of Germany various examples of social-state assistance to the society groups are related to the following issues: assistance to the youth and heavily injured, state school education, public residential constructions, state social assistance and taxes derived from the socially oriented tax policy (taxes, fees, duties).

2.2. Social Care

Protection from the so called "variable life accidents" gains high improtance for the implementation of the Social State principle. The above means that the social imbalance due to the loss of income caused by unemployment, illness, death and other risks has to be reduced to

<http: //dejure.org/1982,1> ; 17.10.1984 – 1 BvR 527/80, 1 BvR 528/81, 1 BvR 441/82, Bd. 68, 143 (152), available at: <http: //dejure.org/1984,192>.

8 *Dreier H.*, Grundgesetz Kommentar, B. II, Art. 20, Rn. 39, Tübingen, "Mohr Siebek", 1998, 90.

9 *Zacher H. F.,* Das soziale Staatsziel, in: Handbuch des Staatsrechts der Bundesrepublik Deutschlands, Bd. 1, *Isensee J., Kirchhof P.* (Hrsg.), Heidelberg, "C.F. Müller Juristischer Verlag", 1987, § 25, Rn. 33, 1066.

10 Ib., Rn. 34, 1067; BVerfGE (Entscheidungen des Bundesverfassungsgerichts), 07.02.1990 – BvR 26/84, Bd. 81, 242 (255), available at: <http: //dejure.org/1990,9>; 19.10.1993 – 1 BvR 567/89, 1 BvR 1044/89, Bd. 89, 214 (232), available at: <http: //dejure.org/1993,3>.

minimum. For the achievement of this objective, each person shall be given the relevant possibility for prevention.[11]

The establishment of social care system started by the end of 19th century in Germany.[12] Creation of industrial society widened the labour relationships. The risks related to the labour activities increased. The above changes raised multiple requirements for the labour code. It had become necessary to legislatively reinforce the social insurance system. This would grant the employees the possibility to insure from the essentially important risks such as disability, age, accident or sickness. They were able to reduce to the minimum the probability of income reduction connected to the above listed risks.

According to the resolutions of the German Federal Constitutional Court, the social insurance oriented towards ensuring the subsistence funds for the society and protection from various life accidents is the "special implication of the Social State principle."[13] The above determines the obligation of the legislator to define the state compulsory insurance in the following insurance systems: a) health insurance for the protection of population from the illness cases; b) accident insurance, which covers risks related to the work process in industrial society; c) pension insurance, which comprises social assistance as well as insurance components; d) unemployment insurance; e) insurance for the need of care in case of illness (the stage five in Bismarck's social insurance system).

The main principle of social insurance creates the mechanism for enhancing the distribution of individual risk to many persons. For the implementation of social insurance principle the system of organizational unities was created and developed with the relevant distribution of risks. Each participant of the system must be protected in case of insured risk taking place. The participant must not find itself alone against the negative results related to the risks.

According to the practice of the German Federal Constitutional Court, the basic law does not contain the constitutional guarantees for "existent social insurance system" or "regulation of specific principles."[14] Federal Constitutional Court provided the legislative body with the wide discretion in weighing of the compulsory social insurance to be implemented by the Social State and the basic right for free personal development.

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11 *Zacher H. F.,* Das soziale Staatsziel, in: Handbuch des Staatsrechts der Bundesrepublik Deutschlands, Bd. 1, *Isensee J., Kirchhof P.* (Hrsg.), Heidelberg, "C.F. Müller Juristischer Verlag", 1987, § 25, Rn. 40, 1071.

12 *Peters H.*, Die Geschichte der sozialer Versicherung, Bonn , "Bad Godesberg",1973, 49.

13 BverfGE (Entscheidungen des Bundesverfassungsgerichts), 27.05.1970 – 1BvL 22/63, 1 BvL 27-64, Bd. 28, 324 (348), available at: <http: //dejure.org/1970,3>; 28.05.1993 – 2 BvF 2/90, 2 BvF 4/90, 2 BvF 5/92,Bd. 88, 203 (313), available at: <http: //dejure.org1993,2/>; 08.04.1987 – 2 BvR 909, 934, 935, 936, 938, 941, 942, 947/82, 64/83, 142/84, Bd. 75, 108 (146), available at: <http: //dejure.org/1987,56>.

14 BVerfGE (Entscheidungen des Bundesverfassungsgerichts), 09.04.1975 – 2 BvR 879/73, Bd. 39, 302 (314), available at: <http: //dejure.org/1975,20>; 15.12.1987 – 2 BvL 11/86, Bd. 77, 340 (344), available at: <http: //dejure.org/1987,1786>.

The Social State principle can play the role of barrier against legislative interventions only in the area of social care. However it does not act as the "guarantee for the firmness" in relation to the specific individual requests. In this case the basic property right guaranteed under Article 21 of the German constitution should be applied, as the issue covers the request for the privileges created through own efforts or contribution to the relevant area (e.g. in state pension insurance). The implication of Social State principle varies for the above: on the one hand it can reinforce the individual legal positions or on the other hand justify their limitation.

Compulsory insurance covers those who due to the weak economic condition or inability, cannot manage their living independently. For the free choice of insurance for the spouses of employees it was determined that it is possible to decline the compulsory insurance only in case if some other need is not considered under the Social State principle. The similar issues cover the following aspects of decision-making: insurance for handicraftsmen and persons employed in various areas; determination of income limits in case of pension insurance for the population; determination of income limits for the insurance of the family members, who are also employees; compulsory insurance in freelance professions, handicraftsmen and agriculture; payment of additional fees in public servant's insurance.[15]

In relation to the unemployment insurance, the Federal Constitutional Court of Germany made resolution that this type of insurance is inevitable for the Social State.[16] Important decisions made in the area cover the following issues: support in employment, single-time assistance and payments for the temporary disability assistance, and unemployment benefits.

The decisions made in the area of health care cover the following: drug-store monopoly, provision of health services in areas with low population, social obligations towards the drug addicted persons and persons under the risk of drug addiction, creation of special institutions for physically and psychically sick persons and integration of these persons in the society, retaining the remuneration during the sickness periods, provision of health services by church hospitals, maintenance of low prices in health care system in line with the requirement of Social State principle, definition of the amount of instalments to the hospital insurance budget as defined by the law.

In accordance with the resolutions made by the Federal Constitutional Court of Germany, in the area of assistance to youth the legislative body may give the Social State the opportunity to

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15 BVerfGE (Entscheidungen des Bundesverfassungsgerichts), 16.10.1979 – 1 BvL 5/77, Bd. 52, 264 (274), available at: <http: //dejure.org/,1979,545>; 14.10.1970 – 1 BvR 307/68, Bd. 29, 221 (235), available at: <http: //dejure.org/1970,15>; 26.11.1964 – 1 BvL 14/62, Bd. 18, 257 (267), available at: <http: //dejure.org/1964,20>; 25.02.1960 1 BvR239/52, Bd. 10, 354 (368), available at: <http: //dejure.org/1960,1>; 12.12.1973 – 1 BvL 19/72, Bd. 36, 237 (245), available at: <http: //dejure.org/1973,320>.

16 BVerfGE (Entscheidungen des Bundesverfassungsgerichts), 04.04.1967 – 1BvR126/65, Bd. 21, 245 (254), available at: <http: //dejure.org/1967,10>.

use the support from private social organizations in achievement of their goals[17]. State does not have monopoly in the implementation of the Social State principle and therefore the activities of private organizations can be used for these purposes.

2.3. Social Justice

Social State principle, following its historical development, is generally considered as the mechanism for balancing the negative effects of implementation of basic rights reinforced by the constitution.[18] As the constitutional State grants the guarantees for the development of opportunities through the basic rights, it has to, under its responsibility towards the society condition, regulate and reimburse the negative effects from the utilisation of those rights. Hence, the leitmotiv of State's social formation is the provision of development opportunities to the weak stratums of society. Based on the above, the idea of social justice was incorporated in the Social State principle.[19] According to this idea, the State is Social if it provides assistance to relatively weak, and tries to participate in economic processes by following the social justice principle.

The idea of social justice shall not be considered as identical to the charity idea. Following its historical development and essence, it can be considered as a notion of order. The early period justice idea was mainly related to the justice provided by the will of God. By the beginning of 19th century the new perspectives on the labour issues raised the problem of non-self solution of social problems. Therefore the social problems and social justice became the part of political governance notion.[20]

Following the Heidelberg's and Bismarck's Germany and social legislation of the Weimar Republic, the free Social State which was based on the constitution, transformed the revolutionary war to the evolutionary program. It set an objective to establish the fair social governance. The Social State is faced with the following task – create general conditions under which the charity organizations will be able to operate. Moreover the principle of subsidiarity acquires the function of supplementary idea to the free constitutional State – despite the fact that it is not the element and inseparable part of the Social State principle. According to the subsidiarity principle, the public government should intervene only in case if the private units cannot or do not ensure creation of social guarantees.

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17 BVerfGE (Entscheidungen des Bundesverfassungsgerichts), 18.07.1967 – 2 BvF 3/62, 2 BvF 4/62, 2 BvF 5/62, 2 BvF 6/62, 2 BvF 7/62, 2 BvF 8/62, 2 BvR 139/62, 2 BvR 140/62, 2 BvR 334/62, 2 BvR 335/62, Bd. 22, 180 (204), available at: <http: //dejure.org/1967,14>.

18 *Bieback H.J.*, Sozialstaatsprinzip und Grundrechte, Journal "EuGRZ", 1985, 658.

19 *Herzog R.*, in: *Maunz Th., Dürig G.,* Grundgesetz Commentar, Art.20,VIII, Rn. 10 (in: *Scholler H.,* Das sozialstaatsprinzip im Grundgesetz, fn. 27, available at: <http://www.heinrich-scholler.de/06 Aufgaben_und_Funktionen_der_Gundrechte.pdf>, (05.12.2011)).

20 *Rawls J.*, Eine Theorie der Gerechtigkeit, Frankfurt am Main, "Suhrkamp", 1975, 177; *Höffe O.*, Politische Gerechtigkeit, Frankfurt am Main, "Suhrkamp", 1987, 382.

The requirements set by the Federal Constitutional Court of Germany towards the social justice principle was specified by the formulation, according to which "the State is liable to balance social inequality and achieve fair social governance."[21] Connection between the social balancing and social justice is justified in line with methodological as well as Social State theory. It reveals the inter-relationship between the elements of Social State principle (methodological justification), whereas the relationship between the justice and equality, and therefore relationship with the socially better environment is related to the announcement of idea of absolute justice (justification according to the Social State theory). "Justice" does not indicate to the normative objectives of the Social State and legally inevitable liabilities. It draws attention to the political-communication process and indicates the regulation goals to be implemented in the existing social situation. Without relevant methods and institutions the claims, requests and interests raised during the political communication process will not ensure the balance aimed at overall wellbeing.[22]

Notion "social" shall not be used as identical to the justice, prudence formula. Methodologically it means that it should not be based on the Social State principle without differentiation. Moreover, the special consideration should be taken for the specific content components, such as provision of minimal social standard, limitation of positions related to the economic power and prevention of social risks.

3. Principle of Social State and right of dignity as the constitutional-legal basis of provision of subsistence minimum

Principle of Social State, due to its scale and in-definitive nature, requires legislative specification. Social State principle itself does not imply neither specific liabilities nor subjective rights.[23]

It is true that particular directions in social care are guaranteed by the constitutional justice under the Social State principle, but this principle as a whole does not create the guarantees for the protection of existing social care system (its specific form). Therefore, it is possible to reduce social services envisaged by the law if such change is in line with the basic rights approved by the constitution.

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21 BVerfGE (Entscheidungen des Bundesverfassungsgerichts), 18.07.1967 – 2 BvF 3/62, 2 BvF 4/62, 2 BvF 5/62, 2 BvF 6/62, 2 BvF 7/62, 2 BvF 8/62, 2 BvR 139/62, 2 BvR 140/62, 2 BvR 334/62, 2 BvR 335/62, Bd. 22, 180 (204), available at: <http: //dejure.org/1967,14>.

22 *Zacher H.F*., Das soziale Staatsziel, in: Handbuch des Staatsrechts der Bundesrepublik Deutschlands, Bd. 1, *Isensee J.*, *Kirchhof P.* (Hrsg.), Heidelberg, "C.F. Müller Juristischer Verlag", 1987, § 25, Rn. 94, 1101; *Benda E.,* Der soziale Rechtstaat, in: Handbuch Des Verfassungs Rechts, Bd.1, Berlin, "Walter de Gruyter & Co.", 1995, § 17, 719.

23 BverfGE (Entscheidungen des Bundesverfassungsgerichts), 06.11.1979 – 1 BvR81/76, Bd. 52, 283 (298), available at: <http: //dejure.org/1990,133>; 29.05.1990 - 1 BvL 20/84, 1 BvL 26/84, 1 BvL 4/86, Bd. 82, 60 (80), available at: <http: //dejure.org/1990,1>.

Social State principle can be used as the direct basis for the subjective request only in case if the State does not fulfil the constitutional liabilities for the provision of social minimum relevant to the human being's dignity (in this regard the guarantee of human dignity can be interpreted as social-legislative program-minimum of constitution).[24] Therefore for the creation of Social State principle and guaranties for implementation of positive basic rights, it is necessary to define notion, contents and scope (scale) of the social minimum by the legislator.

The preamble of the Georgian constitution reinforces the principle of Social State, and the first paragraph of article 17 of the constitution guarantees inviolability of human honour and dignity. Dignity is equipped with the positive dimension of fundamentally important right and it guarantees "creation of fair social care system and minimum material conditions necessary for human living with dignity" by the State.[25]

Georgian legislation[26] defines the subsistence minimum as follows: "subsistence minimum is value expression of consumer goods per capita, which in accordance with the social-economic development level of the country provides the satisfaction of minimal physiological and social requirements." In line with the rules determined, the monthly value of subsistence minimum is defined. According to the above mentioned law, under the existing consumer prices and inflation and with the improvement of living conditions of the population, the minimum amount for the remuneration has to be taken closer to the subsistence minimum.

Based on general census data for 2002 the population of Georgia equals to 4 371 535 persons (1 174 275 families). According to 2011 year official statistics, the vulnerable population in Georgia equals to 1 773 294 persons (545 619 families), out of which the subsistence benefits are being distributed to only 408 367 persons (14 877 families). Family assistance was distributed to various category 20 199 families, and 855 325 (289 275 families) were covered under the health care state insurance scheme.[27] Under such limited social care conditions, the Georgian tax code does not take into account exemption from income tax for the income (remuneration for the work) lower than subsistence minimum generated by any resident physical person (with the exception of limited circle of particular persons). By the above the State ignores the constitutional-legislative liability on provision of social minimum and subsistence minimum. The above should be considered as violation of Social State principle and basic right to human dignity. This conclusion is reinforced by the resolution proclaimed by the Federal Constitutional Court of

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24 *Muckel St*., Sozialrecht, "Beck C.H.", München, 2009, 31; *Heinig H.M.,* Der Sozialstaat im Dienst der Freiheit: Zur Formel vom "sozialen" Staat in Art. 20 Abs. 1 GG, Tübingen, "Mohr Siebeck", 2010, 315.

25 *Izoria L., Korkelia K., Kublashvili K., Khubua G.,* Comments to Constitution of Georgia, Main Human Rights and Feedoms, Tbilisi, 2005, 88 (in Georgian).

26 See Article 2 of Georgian Law on "Rules for Calculation of Subsistence Minimum", available (in Georgian) at: <www.matsne.gov.ge>.

27 Data extracted from Social Service Agency web-page: <http://ssa.gov.ge > (in Georgian).

Germany in 90-ies related to the equalization of family incomes. In accordance with the definition provided by the Federal Constitutional Court – in line with the Social State principle reinforced by the constitution, the State should charge incomes of tax payers with taxes at such level that the remaining income is sufficient for creation of minimal conditions relevant to the human dignity.[28]

In line with the first paragraph of Article 6 of the German constitution reinforcing the special protection of marriage and family by the state, the relevant decisions of the constitutional court covers the subsistence minimum of each member of the family. Introduction of such economic guarantees and ensuring the suitable life of the family by the Georgian legislative body would create effective legislative mechanisms of state support to the family wellbeing as reinforced by Article 36 of the Georgian constitution. This is an issue, decision on which shall be taken with due consideration of components of the Social State principle as discussed above (provision of minimum social standard, limitation of positions related to the economic power, and prevention of social risks). The decision should be made based on the objectives of provision of minimal social standards and, in this case, subsistence minimum.

The reduction in budgetary incomes, as a result of exemption of low income population from the income tax, can be compensated by introduction of progressive tax system and relevantly, by imposition of higher income tax rates for the physical persons generating higher incomes. By this way, significant fluctuations in budgetary policy will be avoided and it will become possible to implement effective and prudent economic and finance-budgetary policy in the country. In this case, the above discussed issue can become the topic for discussion and relevant decision-making by the Constitutional Court.

4. Conclusion

Social State principle and basic right to human dignity as reinforced by the constitution of Georgia, create the responsibility for the Georgian legislator to provide legislative guarantees for the provision of the Georgian population with minimum social standard, and, in particular, with subsistence minimum. For the above purpose, changes and amendments shall be made to the tax code, which will consider that the income (remuneration for the works implemented) generated by any resident physical person is taxed with the income tax only if such income is greater than the subsistence minimum. Moreover, the economic guarantees for living with dignity for the families should be created. In particular, it is necessary to determine the legislative mechanisms for the provision of subsistence minimum to each member of the family.

[28] BverfGE (Entscheidungen des Bundesverfassungsgerichts), 29.05.1990 - 1 BvL 20/84, 1 BvL 26/84, 1 BvL 4/86 , Bd. 82, 60 (85), available at: <http: //dejure.org. /1990,9>.

Levan Makharashvili*

Regionalism in Europe and in Georgia
(Comparative legal analysis)

1. Introduction

Territorial arrangement of the country is one of the most important of the three components, the unity of which makes the notion of a state.

When reviewing the forms of territorial organization, it is necessary to discuss some substantial issues connected with the concept of the form of a state, in order to define theoretical issues connected with the concept of the form and territorial organization of a state based on the analysis of individual scientists' views and opinions.

The concept of the form of a state means: state agencies arrangement, i. e., the horizontal distribution of power between the supreme bodies of legislative, executive and judicial power; territorial organization of public authority, i. e., the vertical distribution of power between the state and its territorial, or state entities; authoritarian and democratic methods, i. e. regimes of public relations of the state's political institutions. I. Leibo believes that as a result of realization of these methods the law-based order of the state agencies activities is established.[1]

The form of the state, as the unity of its external features determined by the content of a state, is the unified legal category, the unified definition, and of course, the form of territorial order and the state (political) regime, as a triple expression of the authority under the legal concept (kind of an order of origin, organization and implementation), are in definite logical connection with each other. Furthermore, it is to be considered that the homogeneous factors affect establishment of the state and therefore, the formation of all the three elements thereof.

The state order form includes the basics of territorial structures of the public authorities, the principles and a number of peculiarities in the given state. The combination of these factors conditions the legal nature and specifics of a model, which can not be formed by coincidence of accidental circumstances, and most importantly, the order of every specific single state is always determinate and individual.

The two main forms of territorial organization of public authority are recognized in the constitutional law – unitary and federal, but such classification of the territorial organization of

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[1] *Leibo Y.I.,* Forms of Government in Foreign Countries, Moscow, "Norma-infra", 1999, 141 (in Russian).

states does not exclude existence of the mixed forms of the territorial organization for which there is a real perspective of broader extension and establishment as an independent legal phenomenon.

It should be noted that the mixed system or model does not mean a mechanical selection of two variations. This approach has established a lot of inconvenience in practice. Some "innovations" created in such form are formed within the legal system of one country, but, if it is shared by a group of followers, the newly formed mixed system finds its place in traditional classification, existing in the theory of the constitutional law. Such a novelty is a regional governance model of the political-territorial structure of states.

2.1. Regionalism – the new or forgotten form of the territorial organization

Discussion of regional-territorial organization of public authorities shall start with comparison of notions of region and regionalism.

Region is the Latin word "region", "regions", and means abuttal, limit, boundary. Latin "region" itself, originates from the term "regre", that means to govern. In Georgian Soviet Encyclopaedia region is defined as big territorial entity (eg., natural, economic, political, and so on).[2] In the explanatory dictionary of the English language, region is defined in several senses. On the one hand, it means a continuous area of land or space, definite district, area, and, on the other hand, it means an area of interest, or simply a field.[3] In the same meaning the term is used in medicine, where it describes the areas of the human body. The term "region" is also actively used in economics, politics, philosophy, sociology and other scientific disciplines.

According to the Legal Encyclopaedia, region means a big district, a group of neighbouring states or areas, territories united by a common features.[4]

In the meaning of administrative unit the term "region" was for the first time used in the ancient Rome, where it meant the administrative unit of the city, the number of which in Rome was 14. Regions of Rome had neither autonomous rights nor were they equipped with the legislative and executive functions.

The word "region" as a term denoting a territorial unit, undergoes rehabilitation in France in 1870-1940. Regional movement originates from the French provinces, Brittany and Provence. At the beginning of the twentieth century, in France, first in the manifesto "Manifeste de la Federation Regionaliste Francaise", published in 1901 and later in 1911, in the study by Charles Brenzet "La Regionalisme" there is a broad public discussion on the definition of regionalism and its functions.[5]

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2 Georgian Soviet Encyclopedia, Vol. 8, Tbilisi, 1984, 324 (in Georgian).
3 *Moris W.,* The American Heritage Dictionary of the English Language, Boston, "Houghton Mifflin", 1971, 1095.
4 *Tikhomirova M. Y.,* Legal Encyclopedia, Moscow, 2001, 741 (in Russian).
5 *Khubua G.,* Federalism as a Normative Principle and Political Order, Tbilisi, 2000, 59 (in Georgian).

Regionalism has been constitutionally recognized in Italy by 1947 and in Spain by 1978 basic laws, underwent a long testing period, and it can be said that it was established in some way and proved its effectiveness. Currently, the number of states with regional arrangement increased to four as a result of the implementation of this model in Sri Lanka and South Africa. So regionalism as a form of a state territorial organization is rare not only by the scope of use, but also by the results achieved in the classical countries of regionalism – Italy and Spain.[6]

By the end of the twentieth century, the definition of region was reflected in international legal acts as well. In the Regional Charter of November 18, 1978 the European Parliament defined the region as a territory, that from a geographical point of view, makes a certain integrity of territories which are closed structures and the population of which is characterized by certain common elements.[7]

2.2. Regionalism and regionalization

With the purpose of the essential review of the issue, first of all, the interaction of regionalism and regionalization is to be defined.

It is believed that the regional movement, if it does not endeavour to separatism and the full federalisation of a state, serves the country's decentralization and autonomy, or at least, formation of territorial units with more freedom. This is a process that is called regionalization. Accordingly, in this case, region should be understood as a sub national party, units. Meaning of the term "region" depends on its definition. Region can be interpreted as a unit, which is smaller than state, but larger than a small town, province, department. Region can be classical historical areas like traditional French provinces or the areas, which were independent in the past, such as Catalonia, Wales and Lombardy.

If the state has a strong political movement toward decentralization, regionalization, all parts of the country can be converted into regions, even if the parties had never previously been considered as separate regions.

Regionalism as a political movement, if it is strong and aggressive enough, becomes alike national separatism, ethnic minorities' aspiration to national self-affirmation. At this time, in the absence of a uniform criterion, the quality of its implementation may vary. Taking into consideration the experience of individual ethnicity and the region, regionalism and nationalism often contain identical functional elements, so a lot of categories and definitions that are relevant

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6 *Yarovoy G.,* Regionalism and Cross-border Cooperation in Europe, St. Petersburg, "Norma", 2007, 109 (in Russian).

7 Resolution on Community Regional Policy and the Role of the Regions and Annexed Community Charter for Regionalization (Minutes of the Sitting of 18 November 1988), European Parliament, Official Journal C 326, 1988.

in today's conditions in relation to nationalism, are undoubtedly to be considered in conditions of regionalism.[8]

Therefore, absolutely reasonable is professor G. Khubua's conclusion on the issue that in the literature on regionalism, the "persistence theory" has many supporters, according to which regionalism is a continuation of life of the old ethnic conflicts in the modern national states and civilized developed societies.[9]

3. Federalism and regionalism (Institutional differences and peculiarities)

There are many definitions of the Federal government in the literature. Given the etymological meaning of Federalism, (foedus – union), the scientists point out that it is the union state, including legally independent state entities whose independence is limited only to the right of the whole federation.[10] Each member of federation has the authority and governing bodies that operate within their competence within the relevant area, but still obey the supreme bodies of general government and authority of the federation. The territory of federation consists of the territories of its subjects (state, canton, union republic, etc.). Subjects of the Federation shall be entitled to adopt their own constitution, which is separated by the union constitution. Each subject has its own law and judicial system. In most of federations there simultaneously are the common citizenship and the citizenship of the union units.[11]

By their legal status and the extent of their autonomy regions clearly fall behind the subjects of federation. At the same time, the status of regions is higher than the status of administrative decentralized territorial structures.

In federal status, the form of solution of a variety of regional problems is the establishment of different target groups. At this time, for the realization of specific functions, several local subjects consolidate, as a rule, local self-government units.

At present the majority of democratic states are unitary by the form of the territorial organization, however, from the point of view of establishment of democratic institutions, they achieve rather important result by use of the form of decentralization. The regionalism itself as a form of territorial organization of state, is the territorial model formed and recognized in the bosom of unitary structure.[12]

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8 *Cameron D.M.,* Regionalism and Supranationalism: Challenges and Alternatives to the Nation-State in Canada and Europe, Institute for Research on Public Policy and Policy Studies Institute, Montreal/Quebec, 1981, 43-44.

9 *Khubua G.,* Federalism as a Normative Principle and Political Order, Tbilisi, 2000, 65 (in Georgian).

10 *Melkadze N.,* The Law of Foreign Countries, Tbilisi, 1995, 62 (in Georgian).

11 *Gladun E.,* Problems of Establishing Federalism in the Russian Federation, "Journal of Eurasian Research", Vol. 2, No. 2, 2003, 7-15 (in Russian).

12 *Swenden W.*, Federalism and Regionalism in Western Europe: A Comparative and Thematic Analysis, Basingstoke, "Palgrave Macmillan", 2006, 221.

4. Unitarism, as an expression of state power and governance centralization

Based on the classical theories of unitarism, the territory of the unitary state is divided into administrative-territorial units, which do not have any signs of political independence. Bodies of self-government, created in the territorial units shall be subject to the central governing authorities, their legal status is determined by norms of the common legal system in force and in total they make the united system of governing bodies of the entire country.

Unitary state is the relatively simple form of the territorial organization. Unitarism (lat. unus – one) reflects the classical perceptions of the nation of political unity and means the principle of centralization of the state power and governance.[13]

One of the bases for classification of the unitary states in the theory of constitutional law is the rate of decentralization of the state power. Therefore, centralized, relatively decentralized and decentralized unitary states are separated.

In the conditions of full centralization, administrative-territorial authorities, as a rule, are held by officials appointed from the centre, and there are no elected bodies of local self-government (Sudan, Malaysia). In some European countries (Poland, Bulgaria) the district level of territorial organization is performed by officer appointed by the central government.[14]

In case of relative decentralization, the institute of public administration (Prefect in France) appointed by the central administration as well as municipal bodies elected directly by the population municipal authorities (French Department Councils) act in territorial units of a unitary state.[15]

Significantly different is the decentralized unitary state government, which is represented by elected bodies of local authorities (County councils of England). Under these circumstances the central control to the activities of local authorities is formal and is expressed in budgetary and monetary-credit regulation. Moreover, there can be territorial autonomy within a decentralized state, which is equipped with the constitutionally upheld right of self-government of the part of the state territory. Unitary states are characterized by the special status of the territory. However, the administrative autonomy can be composed within the subject of federation. Analysis of the main features of unitary and federal territorial organizations within the diversity of modern constitutional law of foreign countries gives the possibility to conclude that it is very difficult to name states with pure unitary territorial organization.

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13 *Wilbur E.M.,* A History of Unitarianism, Socinianism and its Antecedents, Boston, "Beacon Press", 1972.
14 *Tikhomirova M. Y.,* Legal Encyclopedia, Moscow, 2001, 885 (in Russian).
15 Ib., 887.

5. Modern regionalist states

5.1. Spain

Georgian researcher *G. Gogiashvili* believes that without knowledge of the historical process of the development of a specific state and perspective analysis of the situation, we would be powerless to determine which form of territorial organization is acceptable for a state.[16] It is clear that with respect to Spain as well as with any other country, seamlessness of any model of territorial organization of public authorities in the specific society, is much determined by the historical regulation of state development. The history of Spain is rich in centralist authoritarian traditions of governance. For the first time political regionalization of Spain was implemented after the death of Franco. Before that, there were just two brief periods of decentralized governance in Spain: the Federal Republic in the years of 1873-1874 and the Second Spanish Republic in 1931-1936.[17]

The activities directed to the territorial decentralization of the Spanish state were based on the historically established traditions of regionalism and expressed regional identity not only in Basque Provinces and Catalonia, but also in Galicia, Andalusia in Asturia and other historical areas.[18]

In the political history of Spain regionalism has acquired the contours of first state-legal shape only in the Constitution of 1931, as the Spanish Constitution of 1978, it does not establish either a unitary or a federal state model. The current Spanish Constitution was not able to clearly define the attitude of the national-state unity and the regionalism. The unified attitude to the national state model is also unknown for the 1979 Constitution, the nation of "Spaniards", as well as "Spanish peoples" can be found in the Preamble of the Constitution.[19]

The Spanish Constitution,[20] unlike the ambiguous and vague provisions connected with the territorial organization model, clearly and explicitly recognizes the "indivisible unity of the Spanish nation." Under the Article 3 of the Constitution, Castilian language shall be the "official state Spanish language." All the Spaniards must know and have right to use the Castilian language. According to the Constitution, the other "Spanish languages" also have official status in the relevant autonomous units. Spain's autonomous units are territorial unions of public law of the political nature; autonomies, in accordance with the Constitution, within their competence carry

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16 *Gogiashvili M.,* Comparative Federalism, Tbilisi, 2000, 33-40 (in Georgian).
17 See <http://en.wikipedia.org/wiki/First_Spanish_Republic >.
18 *Börzel T. A.,* The Spanish State of Autonomies as a Form of Competitive Regionalism, Cambridge, "Cambridge University Press", 2001, 93-102.
19 See <http://www.senado.es/constitu_i/indices/consti_ing.pdf>.
20 See <http://www.senado.es/constitu_i/indices/consti_ing.pdf>.

out the regional political leadership of the territorial units. Therefore, it is permissible for the policy of an autonomous unit to differ from the policy of the central government.

The Spanish Constitution distinguishes between concepts of "nations" and "regions". However, it says nothing about whether there are "mixed nationalities", or whether only the recognition of linguistic differences is enough for the determination of the "nationality". It is also unclear, on what feature shall be based the difference of "nationalities" anatomy from the "region" anatomy. The Spanish Constitution, also vaguely identifies a mechanism for the separation of competences between the central government and the autonomous units. It can be said that the tough issue of regionalism was formulated as categories with vague contents in the Constitution of Spain of 1978, clarification of which was left to future.

Review of the Spanish model of the territorial organization of public authorities clearly shows that the regions in Spain are equipped with quite broad powers: autonomous communities have their own status defining the structural organization; autonomous structure of the governmental bodies and the local judicial authorities function in regions; the regional police service is created; autonomies have their own heraldic symbols. Given that all of these is performed in the conditions of the detailed separation of competencies, you can make the conclusion that autonomous communities in Spain indeed have no less and if not more autonomy degree than the federal government entity, however, equalization of their status with the legal status of the federation entity would not be valid, and theoretically correct.[21] However, if the speed of the current integration processes in Europe will also be taken into account, it becomes clear that separatist mood in certain regions of the Spanish has no real prospect, and the development of the united Spain has no alternative.

5.2. Italy

The Italian model of territorial organization of public authorities is based on the principle of regionalism. If the main determining factor of Spanish regionalism was the ethnic problem, formation of Italian "districts to a states" can be explained by backward position of the South districts of the country.

It should be noted that despite the ancient heritage of the country that comes from the Roman civilization, the history of the Italian modern constitutionalism involves only a century and a half. During this brief period of the state development Italy passed the constitutional monarchy, fascist dictatorship and democratic reforms milestones and came up with one of the most democratic constitutions which was adopted on December 22, 1947.

[21] *Janashvili L.*, Evolution of Spanish Regionalism in the Constitutional Law, Tbilisi, 2002, 59-60 (in Georgian).

Italy's Basic Law on Territorial Organization has recognized the principle of unitarism, with extensive decentralization of public authority and considered granting powers to the autonomous districts. Italy was divided into 20 territorial units, and all of them have been granted autonomous status. However, in case of Italy symmetry was violated and together with the national-territorial entities with broad powers, the administrative-territorial autonomies were formed, but unlike the Spanish model, creation of the national-territorial autonomy in Italy was conditioned by the two – social economical ethnic-linguistic motivations.[22]

Unlike the Constitution of Spain of 1931,[23] the Italian Constitution[24] provides the full list of the autonomous districts: Piedmont, Valle d'Aosta, Lombardy, Trentino-Alto-Adige, Veneto, Friuli-Venice-Giulia, Liguria, Emilia-Romagna, Tuscany, Umbria, Marche, Lazio, Abruzzo, Molise, Campania, Apulia, Basilicata, Calabria, Sicily and Sardinia.

Regional autonomy in Italy may have its own state bodies and have the legislative act determining a procedure for internal organization and activities of district – Statute.

Constitution, based on the principles established by the legislation of the Republic, recognizes provinces and communities within districts as the autonomous entities. The provinces and communities are territorial units of the state and district division. Provinces can be divided into districts with the relevant administrative functions. Despite the fact that the Constitution of Italy of 1947[25] determined the list of districts, including the possibility to change their borders, secession from them the provinces and communities was also considered, as it happened in 1963 with the creation of Molise district.

The Basic Law stipulates that upon consideration of the District Council positions it is possible to make decision under the Constitutional law to merge districts or create a separate district, if the population of the area exceeds a million and if more than one-third of municipal councils of the interested population demand to create a new district, which is expressed in a referendum with the majority of the population will confirmation.

It should be noted that from the point of view of the internal structure of the organization of autonomies and regulation their lawmaking powers, the Italian Basic Law is more detailed and imperative than the Spanish Constitution of 1978. However, such details did not prevent the Italian districts to approve for a wide range of authorities, which even caused comparison of their legal status with the status of the subjects of federation. Researcher, *T. Vasilyeva* said that in terms of scope, the competence of Italian regions is approaching, and in some cases is higher than the

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22 See: <http://en.wikisource.org/wiki/Constitution_of_Italy>.

23 See: <http://production.clineceter.illinois.edu/REPOSITORYCACHE/30/Q5yIX5tC8600tRU2W626ZMl50lZBw60Lh1f87D7C8Pw62oP797cB900ax15KOQ4USxKCS3zEFI97LguMwL8S8IIKWOR8nd2cUcuNyiAvp33_19231.pdf>.

24 See Article 131, available at: <http://en.wikisource.org/wiki/Constitution_of_Italy>.

25 Ib., Article 5.

status of subjects of federation and for comparison gives the example of powers of the Austrian lands and the Indian States.[26]

Based on the principle of broad decentralization and regionalism of the country's territorial organization, the Constitution of Italy aimed to overcome the difference between levels of social economical development, and to create a favourable environment for realization of broad rights of national-linguistic living in the individual autonomous districts.

Under the Italian Basic Law, all the autonomies must have the Statute, as the main normative act determining district's activities and the structural organization. The Constitution expressly stipulates that Sicily, Sardinia, Trentino-Alto-Adige, Friuli-Venice-Giulia and Valle d'Aosta have the special form and conditions of autonomy based on status approved by the Constitutional Laws. One of the features of asymmetry characteristic to the Italian regionalism is immediately obvious in the Constitutional provision: Statutes of the autonomies having the special authorities are integral part of the Constitution, while the Statutes of the remaining 15 districts are adopted by the usual, current law.

The problem of national minorities somehow influenced the legal nature-political nature of Italian regionalism. However, unlike Spain, this issue is not of the key role, because 94% of the population are Italians. Although the multiethnic factors have different roles in Spanish and Italian political life, some similarities can be observed in regulating of ethnic relations in the both countries. First of all, the individual approach to ethnic groups, is obvious, taking into account their needs, the quantitative and qualitative features.[27]

6. Issues of the territorial organization of Georgia and regionalism

The main purpose of review of the Spanish and the Italian forming of regional organization is to understand the European experience in relation with the Georgian reality. Upon the background of the unsolved problems of our territorial organization, our interest to their experience was motivated on the uniformity of a number of problems of the state development of these European countries and Georgia. Moreover, from the point of view of the country's unity and management, we face the prehistoric parallels, conditioning these difficulties: in Georgia, as well as both in Spain and especially in Italy, formation of the united independent state has occurred late; regionalism as the optimal form of the territorial arrangement, was established in Spain and Italy following the long existence of totalitarian, centralized regimes. After 70 years of one-party period Georgia faced the similar unresolved problems of territorial organization; ethnic

[26] *Vasilyeva T. A.* , The Legal Status of Districts with Common Statute in Italian Republic, "Soviet State and Law ", №5, 1983, 123 (in Russian).

[27] See: <http://gendocs.ru/docs/18/17638/conv_1/file1.pdf>.

factors, regulation of which is one of the main objectives of the Spanish and Italian regionalism became a serious problem for Georgia's territorial arrangement as well and conditioned the constitutional disorder of the country. Moreover, like Spain and Italy, the separatist aspirations of the territorial units *de jure* included in the country are still strong. The reality, taking into consideration of which Georgia's territorial problem is urgent, with a number of defining factors and the process itself can be viewed as the in connection with Spanish and Italian experiences. Thus, the first comprehensive attempt of the analysis of legal nature of regionalism we have carried out, we believe, will contribute to the correct choice of the forms of territorial organization in practice, development and establishment of the rational territorial model.

Historically, the issue of territorial integrity has always been a painful for the State of Georgia, fragmented for kingdoms and principalities. Despite the efforts of the Georgian kings, the country's reunification was often impossible due to objective reasons – the endless aggression of external invaders, as well as subjective factors – insubordination and betrayal of separate principalities. Nevertheless, "Georgia" as a notion, containing the geopolitical space with the features characteristic of a state has a long and short-term episodic history. The final integration of the Georgian lands was done only in the 60-ies of the XIX century under the yoke of the Russian Empire. In this period the national movement intensified in Georgia, whose main goal was to establish an independent state. This was made possible on May 26, 1918, when the National Council meeting adopted the Act of Independence of Georgia. Soon afterwards, on 21 February 1921 by adoption of the Constitution by the Constituent Assembly, the independence was presented constitutionally, but it did not hamper the Bolshevik annexation. Georgia's independence has been terminated by sovietisation on 25 February 1921.

According to the Constitution, it was necessary to resolve the territorial arrangement of the country. A resolution of this issue, was viewed in various aspects by the parties. Due to political affiliation, the National-Democratic Party rejected the idea of federalism. They believed federal arrangement was justified only for those countries that historically contained confederative elements. In addition, they believed the need of federal structure was in countries with a huge area where the unitary system could not create favourable conditions for good governance.

Federalists shared the position of national-democrats. However, denial of federalism by them was less connected with the historical motives. They believed that until the state of Georgia became stronger, the federal structure of the country could be harmful. The words of federalist G. Baratashvili on the Constitutional Commission on July 2, 1919 are known: "... Today I support unitary state, though I am a federalist".[28].

Federalists supported the principle of broad delegation of powers to autonomous territorial units, which, in their view, not only would solve the issues of local importance, but also would be

[28] "Center for Strategic Research and Development Bulletin", No. 48, 2001, 8 (in Georgian).

the best way of development of these areas. The federalists seemed not to exclude federalism as a future form of territorial organization of Georgia, but at that time they considered decentralized unitarism as a real base of the territorial arrangement of the country.

According to the Article 1 of the Constitution of 1921: "Georgia is a free, independent and integral state." Despite the fact that the term unitarism is not directly used in the first Article, based on the spirit of the debate of the majority of the Constitutional Committee meeting it is clear that the founders mean unitary state under the integral state. In their view, unitary state was not opposed to the democratic nature of the Republic as this concept deemed possible combination of the territorial units with autonomous governance status and local self-government institutions. Moreover, it was considered that unitarism did not rule out an autonomous government, where autonomy did not mean existence of entities with the "state" independence.

During the work of the Constitutional Commission the ultimate fate of Adjara and Zakatala was not yet known. Hence, some of the members of the Commission had proposed to enter into the Constitution the Article on the of the autonomous governance of Abkhazia only and to refrain from the regulation of the status of these two territorial units at a given point. Another part of the Commission members thought that mentioning of the constitutional status of autonomous units would from the very beginning make clear the principles of territorial arrangement of the country and thus make the basis for the territorial integrity of the state. It seems that the latter opinion has gained the support of the majority and the Article 11 of the Constitution was devoted to the principles of autonomous governance. In accordance with the provision, "The integral Republic of Georgia Abkhazia (Sukhumi District), Moslem Georgia (Batumi area) and Zakatala (Zakatala District) were entitled to autonomous management in local affairs" (Article 107). The next Article determined that the "regulations of autonomies shall be developed by a separate law" (Article 108). It is clear that the implementation of this constitutional requirement was impossible after annexation of Georgia.

Majority of the members of the Constitutional Commission deemed assignment of the autonomous governance status as justified in case the given territorial units were inhabited by different ethnic groups, included areas of a definite size or were areas of special importance from the economical point of view. Therefore, it is logical that from the first days of independence the discussions proceeded on the status of Abkhazia. Autonomous Government regulations had been developed, which were submitted for review to the Constituent Assembly in December 1920. According to this provision, autonomous governance meant the own authority in different fields. In Abkhazia Autonomy the legislative body consisting of 30 members – the People's Council and its executive authority Commissariat of Abkhazia were functioning. Regulations of autonomous governance of the Republic of Abkhazia was approved by the Parliament of the Republic the right of amending initiative belonged to the People's Council of Abkhazia and to the Parliament of Georgia.[29]

[29] *Matsaberidze M.*, Political Concept of the 1921 Constitution, Tbilisi, 1996 (in Georgian).

Determination of the status of "Mouslem Georgia" i. e. Adjara region has become an important political issue, after it had been returned from Turkey and included in Georgia.

Federalists believe that despite the fact that Adjara had been conquered by Turkey for a long time, the Adjarians must not be regarded as less Georgians than inhabitants of other parts of Georgia, respectively, the autonomous status would not be justified. Despite such a position, the State was obliged to fulfil a political commitment to awarding of the status of autonomy, which creates the necessary preconditions for the return of this area within the limits of Georgia.

Autonomous Soviet Socialist Republic of Adjara, was established on July 16, 1921, and its development was characterized by a certain specificity. The historical area of Adjara in the II half of the XVI century was captured by Turk-Ottomans and return of it to the homeland was managed only on the basis of the Agreement reached between Russia and Turkey on March 16, 1921. It is by virtue of this Agreement, that Russia assumed the obligation to grant autonomous status to Adjara, which was carried out by the Decree of the District Comité of Georgia of July 16, 1921.

South Ossetian Autonomous District was formed on April 20, 1922 by the decision of the Caucasian Bureau of the Russian Communist Party Central Committee, by the Decree of the Central Executive Committee of the Georgian SSR and People's Commissariat Council "On the arrangement of the South Ossetian Autonomous District". Thus, creation of South Ossetian Autonomous District in the historical region of Georgia, where the Ossetian population made a minority was on the initiative and with the participation of the Russian Bolsheviks. In accordance with the law of December 11, 1990, the Supreme Council abolished South Ossetia Autonomous District followed by the start of the armed conflict in the region.

The Supreme Council was the supreme government and the Council of Ministers was the supreme governing body of the Autonomous Republics. The supreme government body of the Autonomous District was the Executive Committee of the People's Deputies Council. Thus, in the Soviet period, the functioning of the territorial organization of Georgia can be represented in schematic form of a pyramid: the bodies of the central government, autonomous republics (Abkhazia and Adjara), autonomous district (South Ossetia) and other territorial entities that were subject to the central government of the Soviet Republic. Difference between the two forms of autonomy of the territorial units existing on the territory of Georgia during 70 years (autonomous republic and autonomous district) was that from the institutional point of view, an autonomous republic was the system similar of the Soviet Socialist Republic and had broader powers in comparison with autonomous district. An autonomous district had cover level of self-administration.

By the end of 80-ies and in the beginning of 90-ies the collapse of the Soviet Union became inevitable. In October 1990 the first multiparty elections in the Soviet space were held in Georgia, as a result of which national forces arrived in the government. In November of the same year transition period was announced in Georgia. The Constitutional Commission was formed to develop the new Constitution. Before that, the Supreme Council abolished the 33 articles of 185

of the Constitution of April 15, 1978, others were amended and 16 new articles were introduced. The most significant of these changes was the introduction of the institution of the President, as well as the system of prefects and Sakrebulo and abolishment of South Ossetian Autonomous District by the Law of December 11, 1990. As it is well known, the latter decision of the Supreme Council was followed with the armed conflict in South Ossetia, which led to the termination of jurisdiction of Georgia in this historic area of the country. Later, similar process emerged on the territory of the Autonomous Republic of Abkhazia, which in 1993 resulted in a victory of the separatist movement in Abkhazia. Action of the uniform state jurisdiction of Georgia was terminated in Abkhazia as well and the Autonomous Republic suspended from the governance of the de facto central government.

The following decision of the Constitution of Georgia of August 24, 1995 had been linked to the restoration of the territorial integrity "The territorial state structure arrangement is determined by the constitutional law based on the principle of separation of powers throughout the country after the restoration of full jurisdiction of Georgia" (Article 2, paragraph 3). The Constitution linked the issue of creation of a two-chamber Parliament to the restoration of territorial integrity as well. According to the Basic Law, after creation of appropriate conditions on the whole territory of Georgia and formation of the local self-government bodies, there will be the two chambers in the Parliament of Georgia – the Council of the Republic and the Senate.

Analysis of Adjara and Abkhazia constitutional provisions is important with respect of discussion of the future prospects of the territorial organization of Georgia. Subjects of the regulation of the Constitution of the Autonomous Republic of Adjara are the basic principles of the state government arrangement, the administrative-territorial arrangement, the state symbols of the Autonomous Republic.

On December 8, 2000 the Supreme Council amended the Constitution of the Abkhazian SSR of June 6, 1978. The reason of this amendment in the conditions of full legitimacy was aimed on the opposition to the processes taking place in the territory under the separatists' control on the one hand and the basic renewal of the Constitution acting in the Soviet era, taking into account the new reality of Georgia on the other hand.

The 1978 Constitution of the Autonomous Republic of Abkhazia has been changed qualitatively, the rights and freedoms of the Georgian citizens living in Abkhazia were widely declared. The Constitution does not include the list of areas designated to the governance of the Autonomous Republic. A basic law of autonomy provides that the matters assigned to joint governance of Georgia and Abkhazia, and the matters assigned to governance of Abkhazia shall be determined separately.

According to the Constitution, the supreme representative body of the Autonomous Republic of is the Supreme Council headed by the elected members from the list by majority. The work of the Supreme Council of Abkhaia was led by the Chairman of the Supreme Council, the later headed the work of the Presisium as well.

Analysis of the Constitutional law shows that the separation of competences was avioded by the Supreme Council of Abkhazia for the objective reasons, and the issues of legal separation of the autonomy and the Centre was postponed until territorial restoration of the country.

In 1990, the South Ossetian Autonomous District was declared as the Soviet Republic of South Ossetia and on December 9 elections of the so called independent state Supreme Council were held. The Supreme Council had adopted a decision on 11 December 1990 on abolishment of the South Ossetian Autonomous District.

Taking unto account Georgia's current territorial, ethnic and political problems, and upon analysis of the basic law of August 24, 1995 it is clear that when discussing the perspective options of the country's territorial arrangement, except the classical, centralized unitary form, more flexible model has to be acceptable. Therefore, it is proper to conduct discussion in the direction of the two alternatives – federalism and broad territorial decentralization, regionalism. But before discussing a regional model, as one of real alternatives for the country's territorial arrangement, it is necessary to pay attention to some of the factors related to the federal arrangement of Georgia, which undoubtedly are to be considered.

However, it must be said that the existing Constitutional stipulation, taking into account the experience of foreign countries, shall not be considered as only the pre condition for the establishment of a federal model. Spanish and the Italian territorial organization peculiarities may illustrate the above. For example, the basic law of Spain of 1978 determines not only designated to the central government special areas of governance, but also the powers of autonomous units. Competence of districts is defined in the Constitution of the Republic of Italy, 1947. Noteworthy is the fact that both the Spanish and Italian parliaments have two chambers, out of which lower chamber is the national representative body, while the upper represents the territorial units. It must be taken into account that the modern theory of constitutional law bicameral parliamentary system is no longer associated with the particular forms of the country's territorial organization.

It should be noted that the idea of Federalism has settled down in our country and a lot of people, who are more familiar with the characteristic features of the legal nature of federalism talk about it. Federalism can not and should not be viewed as a solution to the problem emerged on the national grounds. On ethnic grounds, as a rule, none of the modern federations are organized. The current situation in the world, is the evidence that there is an equal danger in the conditions of federalism as well as unitarism and the post-socialist space is a clear proof of it.

Taking into account the current reality, discussion of the federal-territorial arrangement of Georgia may be premature, however, upon study of European experience of the regional structure of the territorial organization of a state, the Spanish and the Italian experience, upon the background of analysis of the present and the past, it is realistic to think of territorial arrangement of Georgia in the form of the regional territorial organization formed on the unitarism principles.

Before presenting the general vision of the contours of territorial organization of Georgia, it is recommended to define the fundamental principles, which shall make the basis for future structure of the territorial model:

1. The arrangement of any form in the country shall be a strong, institutionally sound government equipped with the authority of implementation and protection of the common governmental interests; strict adherence to the Constitution and common-national legislation and performance of the unified standards of human rights and freedoms on the whole area shall be guaranteed; when forming the territorial units their historical geographical boundaries, but also ethnic specificity, local human and economic resources should be taken into account that are necessary not only for meeting of the region's social economical needs but also for its further economic development.

2. Due to the multi-ethnic nature of the population of Georgia, it is recommended that the administrative boundaries of regions containing densely populated ethnic groups, do not coincide with the boundaries of ethnic groups' settlement, i. e. the region should not be mono-ethnic. The share of the Georgian population of the region shall ensure effective governance. This way it will be possible not only to solve the problem of territorial integrity, but also to neutralize some secessionist aspirations of separate region as this was performed in the case of Spain and Italy.

3. Relations between the centre and the regions shall be developed in a manner which will promote the harmonization of interests of central and local government. For the promotion of economic development of the territorial units of the country it is expedient to found the regional development fund, whose main activity will be the program funding of territorial units and attraction of investments. Pure sharing of Italian or Spanish model will be difficult enough for our country, taking into consideration the Georgian reality. The European experience of regionalism will have to undergo some changes. The mentioned will be conditioned by the special status of the Autonomous Republics of Adjara and Abkhazia within Georgia. Their legal status will be larger than the national autonomies of Spain and special autonomies of Italy. Broad authorities of these autonomous units are the main reason for establishing asymmetric model in Georgia, since it is obvious that the other territorial units are not equipped with such a status. Adjara and Abkhazia are represented with the status of autonomous republics within Georgia from the 20-ies of the 20th century – and all this time enjoyed broad powers. It is obvious that the special status of these two autonomous republics will be retained in future. Similar autonomous units with special powers are in Italy and Spain as well, but the is different situation in Georgia. In particular, unlike the Italian district and Spanish autonomous communities having the special status, the Autonomous Republics of Adjara and Abkhazia are assigned the constituent power and in accordance with the acting legislation, the Parliament of Georgia does not take part in the development of their Constitutions. While according to the Italian and Spanish model of

regionalism, the country's parliament in both cases is not only involved in the development of the status of autonomies, but approves it. In the reality of Georgia, in relation to Adjara and Abkhazia the feature of the federal territorial organization is carried out, where the subjects of the federation have so-called "constituent power" on the local level.

When working on the future concept of the territorial organization of Georgia autonomous rights of Adjara and Abkhazia autonomies and other territorial units shall be considered both as the Georgia citizens' political and administrative form. Keeping and development of social cultural identity of the ethnic-linguistic minorities living in Georgia shall be implemented using the forms of national-cultural autonomy. The current political situation suggests that along with Adjara and Abkhazia, a larger territorial status should be given to the Tskhinvali region in comparison with other units. However, the legal status of this region by its volume shall not be equalized to the status of the Autonomous Republics of Adjara and Abkhazia. Based on Italian and Spanish experience, we deem reasonable unlike the country's historical areas, to determine the status of the former autonomous district based on the status approved by the Organic Law, adopted by the Parliament of the country. In relation with the region of Tskhinvali we deem it admissible that the local representative and executive bodies shall be completely elected, and the central government shall not participate in their formation. Like other territorial units of Georgia, in order to ensure kind of monitoring of the protection of the total-national interests and implementation of the uniform policy, we consider appropriate functioning of the institution of the representative of the central government in the former South Ossetia region.

For the implementation of the regional territorial organization, first of all it is necessary to carry out the government's decentralization-deconcentration. For this reason it is necessary to establish the elected bodies of the regional government in the regions. Decentralization of the government and delegation of certain powers to the regions will help creation the environment favourable for formation of the pluralistic democracy, which, in turn, shall create conditions for free expression of the interests of all the layers and groups of the society. Electivity of different levels of government shall allow the political parties being outside of the Parliament or in the parliamentary minority, to be at a regional level and ensure the realization of their political platform.

Decentralization of powers will support optimization of the central government activities. First of all, the central government will be exempted from the obligation of the local nature, a number of problems. Accordingly, the responsibility, will be assigned to the regional government will be elected by the people. The executive government in the regional territorial units can be formed with the participation of the central government.

7. Conclusion

Thus, taking into consideration the presented opinions, the future model of the territorial organization of Georgia takes shape of quite complicated, asymmetrical structure. As parts of the country shall be represented the Autonomous Republic of Adjara and Abkhazia, Tbilisi and Tskhinvali regions with relatively broad powers, as well as the historical territorial units with certain autonomous powers, which would be necessary to resolve the social economical issues of local importance.

Autonomies of Abkhazia and Adjara, Tbilisi and Tskhinvali regions will be presented along with other territorial units at the upper chamber of the Parliament of Georgia, the Senate that will ensure participation of the autonomous territorial units in the formation of the total-state will. With the Parliamentary system, the upper chamber will be the representative body representing the interests of territorial units.

When discussing the future model of the territorial organization, one of the pivotal issues is the separation of competences between the centre and regions. The competences between the centre and regions can be divided into 3 groups: 1) authorities assigned to the exclusive governance of the centre; 2) matters assigned to the exclusive governance of regions; 3) matters assigned to the joint governance.

Diversity of tasks that are faced by Georgia makes it impossible to pre-determine and include into the list of competences. Therefore the only solution is to define a special list of competence for the centre and regions, while assigning the remainder of the issues to the so-called "competitive competence", which means that the legal act of a region will be in force until adoption of the regulatory act to the same relationship by the central government. The region on the basis of delegation may be submitted to the enforcement of certain matters falling within exclusive competence of the centre, which will be accompanied by appropriate finances. In order to create Unified Regional Development Fund Spanish experience may be used where successfully operates the inter-territorial compensation fund, which provides for the distribution of the state funds among regions of the state. The central government should be encouraged by means of specific resources to finance regional governance in the practical realization of certain powers, including in the part of delegated authority, without which the autonomous status of the region may lose its main purpose.

Errors during theoretical development of the forms and the principles of territorial organization of processing and establishment of inorganic form for the country, may cause irreparable damage to the state of Georgia. Therefore, the aim of the research was to present regionalism in Georgia, as one of alternative forms of territorial arrangement, which will provide real economic, social, and legal reforms, that is one of the main preconditions of restoration of integrity of the county.

Ketevan Tskhadadze*

The Need for a Representatives Institution in Administrative Law

1. Introduction

In administrative law, just like in private law, there is a need for a person or an organization unable to carry out his/her interests, rights and obligations within legal relations to be represented by another person.

A representative's institution plays an important role in any legal process. Therefore, discussing the need for introduction of a representative's institution in administrative law became an important issue of the legal doctrine.[1]

It should be noted that neither the legal construction of a representative's institution nor the core model social relations in public law has generated independently. Rather, it is based on the dogmatics of a representative's institution of civil law.[2] When comparing the participants of legal relations in administrative and civil laws, it becomes evident that they are essentially identical.[3] It is characteristic of both branches of law that a third party – a representative performs the duties of the person unable to carry out his/her own rights and obligations.

The dominant doctrine agrees on the requirement for legal forms to be implemented in civil law on the basis of the norms of civil law.[4] Applying in administrative law the provisions of a representative's institution stipulated by civil law is feasible in case no general legal forms can be found in administrative law. However, at the same time, it is unacceptable to apply the provisions of civil law in administrative law directly. Application of provisions of private law is acceptable only by means of analogy and by aligning the administrative law to the interests of public law.[5]

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1 *Sonnek M.*, Die gewillkürte Vertretung des Beteiligten im Verwaltungsverfahren nach §14 VwVfG, "Druck: Copy-Center in Dahlem", Berlin, Univ.Diss. Freien Universität,1983; *Fritz H.,* Die Vertretung im Verwaltungsrecht, "Paul Jll", Stuttgart, Univ., Diss. Tübingen, 1962; *Kropshofer M.,* Verwaltungsverfahren und Vertretung, "Verlag s.n.", Mainz, Univ.Diss. Johannes Gutenberg, 1982.

2 Definition of a legal theoretic basis of a representative's doctrine was subject to ardent discussions among the German scientists in the 19th century (from Georgian) view: *Buchka H.,* Die Lehre von der Stellvertretung bei Eingehung von Verträgen, Frankfurt**,** "Rostock & Schwerin: Stille"**,** 1969; *Mitteis L.*, Die Lehre von der Stellvertretung nach römischem Recht mit Berücksichtigung des österreichischen Rechts, Wien, "Neudruck Aalen", 1962; *Hupka J.*, Die Vollmacht, Leipzig, "Duncker & Humblot", 1901.

3 *Forsthoff E.*, Lehrbuch des Verwaltungsrechts, München/Berlin, "Beck", 1961, 168.

4 Ib., 168.

5 *Gygi F.*, Verwaltungsrecht und Privatrecht, Bern, "Verlag Stämpfli", 1956, 32.

2. Theoretic Basis of a Representative's Institution

2.1 The Issue of Representative's Acceptability in Administrative Law

Introduction of the legal institution of a representative does not necessarily mean that representation is acceptable in implementing any legal action by an interested person. Activation of a general representative's institution may create the need for establishing substantial limitations for the acceptability of representation in administrative law. Limitation of the acceptability of representation is especially evident in public law where an interested person's personal participation is essential to carry out his/her rights and obligations. For example, it is unacceptable for a representative to receive secondary school education, pass mandatory military service or enjoy the right to vote instead of the interested person, since these rights and obligations should be carried out by the interested persons themselves.[6] Hence, implementation of the representative authority does not cover the actions within the administrative law to be performed personally.

The principle of unacceptability of representation covers actions to be by all means implemented through personal participation of an interested person. Not only is this a requirement for administrative law, but also it becomes necessary for this regulation to cover other branches of law too. For example, it is unacceptable to appoint a representative in a city court in case an interested person has to implement certain actions on his/her own. In private law, representation is not deemed unacceptable during actions within family and inheritance law that cannot be implemented by other persons.[7]

The acceptability of representation first of all depends on the objective pre-conditions proceeding from the intense relations of the administrative law.

The code of administrative offences considers participation of a lawful representative only. It concerns the cases when a person held liable under administrative law or an affected person is under age or is unable to carry out his rights due to physical or mental conditions. In this case, he/she is entitled to have his/her rights protected by his/her lawful representatives (parents, adopters, guardians, trustees).[8]

Tax law and executive law acknowledge participation in legal relations through a representative. According to Article 37 of Tax Code,[9] a taxpayer has the right to participate in taxpayer relations by means of a representative of two types (lawful and authorized). According to tax legislation, a lawful representative can be a body or other persons authorized by constituent documents of an enterprise/ organization. An action of a lawful representative of a taxpayer in

6 *Jellinek W.*, Verwaltungsrecht, Berlin, "Springer", 1950, 195.
7 *Fritz H.,* Die Vertretung im Verwaltungsrecht, "Paul Jllg", Stuttgart , Univ., Diss. Tübingen, 1962, 75.
8 Article 254 of the Code of Administrative Offences of Georgia, 1984, available at: <www.matsne.gov.ge>.
9 Article 37 of the Tax Code of Georgia, 2010, available at: <www.matsne.gov.ge>.

taxpayer relations automatically implies an action by this person (enterprise/ organization, physical body). As concerns the authorized representative of a taxpayer, it is a person authorized by a power of attorney to represent the interests of a principal before tax bodies and in a court.

According to the executive law, representation of the parties in the executive process is determined by the rule established by Procedure Code.[10] Therefore, participation of a representative in the executive process is implemented by means of regulations of civil law.

As for the entrepreneurial law, legal bodies and individual entrepreneurs are entitled to authorize their representatives called "procuratories" to protect their interests when implementing legal actions within entrepreneurial relations. According to Article 11 of the Law of Georgia on Entrepreneurs, a representative authority should be formed as a general trade power of attorney.[11] The person empowered by a trade power of attorney ("procurist") should register in the registry of entrepreneur and non-entrepreneur legal bodies. The "procuratory" empowers him/her to conduct any activity or carry out any legal action in a court and within other relations linked with functioning of the enterprise.

Objective pre-conditions for acceptability of a representation are much wider and more different in German entrepreneur and tax law. According to the German legislation, legal regulation of a representative's institution is carried out not only by legal norms but also by an entrepreneur and tax legislation. Besides, important issues of a representative's institution are regulated by the norms of civil law.

For example, Section 1 of Article 107 of Tax Provision of Germany stipulates that normally a taxpayer within tax law can appoint a representative only in the case he/she fails to carry out his/her tax obligations because of absence or for any other reason. Entrepreneur law, on the contrary, does not acknowledge any objective reasons for acceptability of a representation. The representative is generally appointed by the entrepreneur. Appointment of a representative empowered with entrepreneurial and legal authority is limited in the sense that acceptability of a representative depends on various pre-conditions within separate professional domains. Other than granting a representative authority, these pre-conditions for acceptability of representation may also include prohibition of representation of an entrepreneur, just like it is in case of conducting transportation for the entrepreneurial activity that takes place in parallel with the main professional activity and for which an entrepreneur needs an appropriate permission.

There is a different situation regarding the subjective conditions of acceptability of representation which provides for meeting certain pre-conditions by a representative. As for the civil law, the third party cannot affect in any way the appointment of a representative. General Administrative Code of Georgia (particularly, Articles 88 and 89) provide for the occasions of

[10] Article 18^1 of the Law of Georgia on Executive Proceedings, 1999, available at: <www.matsne.gov.ge>.
[11] Article 11 of the Law of Georgia on Entrepreneurs, 1994, available at: <www.matsne.gov.ge>.

mandatory appointment of a representative. An administrative body has the right to require from a party to appoint a representative based on the above articles if he/she has no permanent place of residence in Georgia or if more than 25 persons have submitted an application, etc.

2.2. Referencing Legal Norms Regarding Application of Provision of Civil Law in Administrative Proceedings.

According to the Georgian legislation, provisions of Civil Procedure Code of Georgia are applied in administrative proceedings.[12] Particularly, the legal state of the participants of the administrative process is regulated by the norms of both administrative and civil procedural legislation. As we know, there can be no legal relation without the participants and administrative procedural law is no exception in this respect. However, the circle of subjects of the administrative process is defined by the Civil Procedure Code of Georgia. Article 14 of Civil Procedure Code of Georgia defining the participants of the administrative process stipulates that in addition to the persons provided by Article 79 of the Civil Procedure Code of Georgia,[13] it is also the administrative body that has issued the administrative legal act or carries out an action of legal significance that participates in the administrative process.[14]

Consequently, administrative legislation widens the circle of participant subjects and involves them as an administrative body participating in a mandatory process. This is an important characteristic feature essentially differentiating administrative law from civil procedural law. Except the above persons, an administrative body should also be participating in the administrative process as a plaintiff or a defendant.

It is noteworthy that according to the German legislation, a representative's institution is not a close system. Important issues of a representative's institution are regulated by the norms of entrepreneurship, tax and civil law. It is common for administrative law to make a reference to the

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[12] View Section 1 of Article 1 of the Civil Procedure Code of Georgia, 1997, available at: <www.matsne.gov.ge>

[13] Physical and legal bodies participate in the civil process, also, in cases provided by law an organization that is not a legal body can also appear in court. Correspondingly, plaintiffs and defendants in the civil process are physical and legal bodies and organizations that are not legal body. According to Section 2 of Article 79 of the Civil Procedure Code, organizations that are not legal bodies may appear in a civil process as parties if expressly provided by law. Specifically, according to Article 45 of the Civil Code, non-registered association is not a legal body but may be represented in a court by its members and a duly authorized person. Also, according to Section 3 of Article 56 of the Law of Georgia "On Entrepreneurs", "a joint stock company is represented in court and in other legal relations by their respective directors". In such cases it is considered that legal bodies are involved in proceedings in a court personally, without any representative (view *Liluashvili T., Khrustal V.,* A Comment on the Civil Procedure Code of Georgia, 2nd Edition, Tbilisi, 2007, 143-183 (in Georgian)).

[14] View Section 1 of Article 14 of the Civil Procedure Code of Georgia, 1997, available at: <www.matsne.gov.ge>.

norms of civil law. When a concrete issue in public law is not specified, appropriate legal institution is regulated by referencing the norms of a private law.[15] This is caused by the fact that concrete institutes of civil law have an extensive experience of formation, since they have a long history of development. Therefore, understanding legal relation when comparing such institutions becomes even simpler. This can be said about a representative's institution which provides that actual conditions where a different person acts on behalf of the principal are one and the same in both public and private law.[16]

In spite of the similarities between the legal institutions, referring to the norms of administrative law in administrative proceedings when applying provisions of civil law should not result in application of norms of civil law by public law. Direct withdrawal of the forms of private law eliminates the basic differences between public and private law, since administrative law relations in their essence are fundamentally different from private law relations. Particularly, expression of a person's will that is typical of civil law may come into conflict with a state's will within public law. Also it should be noted that application of norms of private law does not always cover the administrative legal relations, since regulation of administrative legal relation is impossible without administrative legislation.[17]

3. Notion and Types of Representation

The term "representative" bears different meanings in both everyday life and law.[18] It depends on the different functions performed by the representative. Despite the diversity of the institution, the word to word interpretation of "representative" means "the person acting on somebody's instruction and/or on somebody's behalf."[19]

In legal relations, participation by means of a representative is not alien to legislations of many countries, including Georgia. For example, we encounter the term "representative" with various meanings (voluntary, lawful representative). The law of Georgia on Entrepreneurs differentiates between various types of such representation: the authority to carry out legal actions (trade power of attorney), trade representation and procuratory.[20] In Civil Code and Civil

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15 *Gygi F.,* Verwaltungsrecht und Privatrecht, Bern, "Verlag Stämpfli", 1956, 21.

16 *Fleiner F.*, Über die Umbildung zivilrechtlicher Institute durch das öffentliche recht, Tübingen, "J.C.B. Mohr", 1906, 9.

17 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P.,* A Guide to Administrative Procedure Law, Tbilisi, 2008, 33 (in Georgian).

18 *Sonnek M.*, Die gewillkürte Vertretung des Beteiligten im Verwaltungsverfahren nach §14 VwVfG, "Druck: Copy-Center in Dahlem", Berlin, Univ.Diss. Freien Universität,1983; *Fritz H.,* Die Vertretung im Verwaltungsrecht, "Paul Jllg", Stuttgart, Univ., Diss. Tübingen, 1962, 10.

19 View the Explanatory Dictionary of the Georgian Language, Omnibus Volume, Tbilisi, 1986, 557 (in Georgian).

20 *Chanturia L., Ninidze T.,* A Comment on the Law on Entrepreneurs, 3rd Edition, Tbilisi, 2002, 132 (in Georgian).

Procedure Code of Germany we encounter not only the notion of a person's representative but also the notion of a representative of an object and actions.[21] However, the legal institution of a representative also has its limited meaning. The term "representative"should be construed only as "acting on behalf of another person."[22]

Definition of a notion of a representative in administrative law is complicated by the fact that it has no single closed system. In contrast to administrative law, private law includes a wide system of a representative's institution. Since representation in administrative law is not a widely regulated institution, identifying the notion of this institution and its characteristic features is possible based on the norms of civil law and since representative's institution serves similar relations for both branches of law, in both cases we have the fact that "somebody acts on behalf of somebody else."

Both civil and administrative laws are characterized by three types of representation: lawful representative (gesetzliche Vertreter), voluntary representative (gewillkürte Verteter) and organizational representative (organschaftliche Vertreter).[23] They differ from one another by the fact that appointment of a voluntary representative depends on the principal's will to be represented by another person. In this case the principal grants his/her representative with the authority to act on his/her behalf. Opposite to appointing the representative by his/her own will, appointment of a lawful representative does not depend on his/her will but is based on the mandatory rule established by law.[24] Particularly, legally incapable persons' legal interests are protected by their parents, adopters and guardians. The peculiarity of an organizational representative lies in the fact that appointing a representative should be defined by the regulations of a legal body. In this case the representative has the authority of a body.[25]

According to Article 86 of General Administrative Code of Georgia, everybody has the right to communicate with an administrative body by means of a representative.[26] It should be noted that a person's participation in administrative proceedings is not obligatory (with several exceptions) and should be viewed as a citizen's right and not as an obligation. An interested party decides whether he/she will take part in administrative proceedings by means of a representative or personally. Civil servants are often more aware of the issue at hand when making a decision

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21 Article 91 of the Civil Code of Germany covers "representative objects" (vertretbare Sachen) while Articles 887-888 of the Civil Code of Germany covers the "representative's actions" (vertretbare Handlungen), see: <www.dejure.org>.

22 View *Rosenberg L.,* Stellvertretung im Prozess, Berlin, "Vahlen", 1908, 2; *Müller-Freienfels W.*, Die Vertretung beim Rechtsgeschäft, Tübingen, "Mohr Siebeck", 1955, 48.

23 Compare *Fritz H.,* Die Vertretung im Verwaltungsrecht, "Paul Jll", Stuttgart, Univ., Diss.Tübingen, 1962, 2; *Forsthoff E.*, Lehrbuch des Verwaltungsrechts, München/Berlin, "Beck", 1961, 168.

24 Compare *Rosenberg L.*, Stellvertretung im Prozess, Berlin, "Vahlen", 1908, 545.

25 Compare *Fritz H.,* Die Vertretung im Verwaltungsrecht, "Paul Jllg", Stuttgart, Univ., Diss.Tübingen, 1962, 3.

26 View Section 1 of Article 86 of the General Administrative Code, Georgian Legislative Bulletin, №32(39), 1999 (in Georgian).

and possess more judicial knowledge than the citizens that may be affected by the decision of this administrative body. General Administrative Code does not limit an interested person in having more than one representative that may simultaneously represent him/her in the administrative proceedings. It is also possible that the interested party be represented by various persons at different stages of the administrative proceedings.

Furthermore, General Administrative Code of Georgia considers two cases of mandatory representation. Article 88 of the Code covers the mandatory appointment of a representative.[27] In case a party to the administrative proceedings has no permanent place of residence in Georgia or has been registered without indication of an address, an interested party is obliged to appoint a legally capable person registered at the defined address in Georgia who will participate in the administrative proceedings instead of him/her.

Another instance when appointing a representative is mandatory concerns the persons who have submitted an application to the administrative body and more than 25 persons are signing this application. In this case the signees are obliged to appoint one representative. In case the above persons have not appointed a representative within the term determined by the administrative body, a person signing their application will be deemed as their representative.[28]

As for a procedural representative, this is the person who carries out all the procedural actions in court on behalf of and according to the interests of the principal provided by law and the power of attorney issued by the principal.[29] The institution of the administrative procedural representative is regulated by Article 15 of the General Administrative Code of Georgia.[30] Since state and local self-government bodies as well as any persons performing the authorities of the public law belong to administrative bodies. Therefore one of the parties to the administrative process (plaintiff or defendant) is by all means an administrative body represented in the court by a leader or public servant serving at the administrative body and who is appointed by the administrative body as its representative.

A state or local self-government body is authorized to conduct an administrative case by means of a representative who may be the servant of an administrative body, a lawyer or any other person possessing legal education. Namely, any Ministry representing a party in the administrative process may be represented by a Minister. A Minister does not need to present any document to carry out his/her authority. However, if a plaintiff or a defendant in the administrative proceeding is

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27 View Section 1 of Article 88 of the General Administrative Code, Georgian Legislative Bulletin, №32(39), 1999 (in Georgian).

28 View Articles 89 and 90 of the General Administrative Code, Georgian Legislative Bulletin, №32(39), 1999 (in Georgian).

29 *Liluashvili T., Khrustal V.,* A Comment on the Civil Procedure Code of Georgia, 2nd Edition, Tbilisi, 2007, 183 (in Georgian).

30 View Section 1 of Article 15 of the Civil Procedure Code, Georgian Legislative Bulletin, №6, 1999 (in Georgian).

represented by a person working in the body, a representative of an administrative body in this case is obliged to present to the court a power of attorney certified by a seal.

Appointing an official of the Ministry of Justice of Georgia or a public servant as a representative in administrative process is an innovation. According to the amendments made in the legislation on 7 April 2011,[31] this concerns two cases. The first case is when the cost of the matter of dispute exceeds 500,000 Lari and the second case is the case of especial difficulty from the factual and legal points of view.[32] In these cases the executive authority applies to the Ministry of Justice and requests appointment of an official from the Ministry or a public servant in the administrative legal proceeding. In such cases appointment of a representative is determined based on the Minister's order and according to Article 4 of the order. In case of involvement of the Ministry of Justice of Georgia in the above cases, the Minister of Justice of Georgia commits oneself to empower an official or a state clerk working at the above agency.

In the above case in civil and administrative cases (except a dispute based on the tax legislation of Georgia) the agency of executive authority participating in the case had to apply to the Ministry of Justice within 2 days from being notified about the court proceedings and submit the complete information on the case that is available to it.[33] The Ministry of Justice then makes a decision on its involvement or on its refusal about involvement in this type of cases within 3 days after such a request.[34] Although the Ministry of Justice may determine to refuse to participate in the case, the Minister of Justice has the authority to get involved in the case at any stage of proceedings and require appointment of an official from the Ministry of Justice or a public servant at any stage of proceedings.[35]

Thus, administrative legislation acknowledges both voluntary and mandatory appointment of a representative; therefore it grants the right to the administrative bodies to conduct a case and protect their interests with the help of a representative or a lawyer.

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31 Order of the Minister of Justice of Georgia №102, 29.05.2009, on establishing the rule for application to the Ministry of Justice of Georgia, the flow of materials and the appointment of a representative as regards to the matter of dispute worth more than 500,000 Lari and/or cases that are from the actual and legal perspective of especial complexity, available at: <www.matsne.gov.ge>.

32 Section 4 of Article 15 of the Civil Procedure Code of Georgia, Georgian Legislative Bulletin, №6, 1999 (in Georgian).

33 Article 2 of the Order of the Minister of Justice of Georgia #102, 29.05.2009, on establishing the rule for application to the Ministry of Justice of Georgia, the flow of materials and the appointment of a representative as regards to the matter of dispute worth more than 500,000 Lari and/or cases that are of a special complexity from actual and legal perspectives, available at: <www.matsne.gov.ge>.

34 Ib., Article 3.

35 According to the statistical data of the Ministry of Justice of Georgia, the Ministry of Defense was involved in 36 cases of the mentioned category while the administrative bodies were denied the involvement in more than 40 cases. Of overall cases where the Ministry of Justice was involved, 32 were reviewed by the court in an administrative manner and the other 4 – in a civil manner.

4. Representation in Material and Procedural Administrative Law and the Difference Between Them.

4.1. The Difference between the Law Regulating the Administrative Proceedings and the Administrative Procedural Law from the Perspective of Regulation of a Representative's Institution

Since the administrative proceedings law creates a certain legal matter in the sphere of public law, certain issues concerning dissociation from both the material administrative law and administrative procedural law are brought up.

It is comparatively easy to dissociate the administrative legal proceedings from administrative proceedings. From the functional point of view the administrative process should be construed as a means of providing legal protection to any person from any actions conducted against the administrative law and at the same time, as an essential result, helps to control administrative actions.[36] In contrast to this, administrative proceeding is aimed at issuing an administrative act or entering a public law agreement.[37] It defines the type of their execution and extends the norms of administrative law.

Based on the so far existing view, legal protection of a citizen, according to the administrative justice in Germany, first of all, should take place by court proceedings, while the purpose of administrative proceedings and the right of a citizen to participate is only expressed by widely informing the administrative body on important aspects in order to help it make a decision. In terms of this view, a citizen's participation in the proceedings takes place rather for the sake of expediency and not to strengthen his/her legal position.[38] Likewise, the administrative proceeding serves legal protection of a citizen and maximum usage of norms by means of administration.[39] This view has developed based on the German federal constitutional court practice, which can be subject to debate as based on the above, a citizen's right to being protected when exercising his/her legislation-protected rights becomes useless.

If within administrative proceedings no "successful" rights protection is achieved, there remains a possibility to apply to court in order to achieve the results to be considered by all means by the administration. These views verify the correctness of the formulation that is spread in the

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36 *Ule C.*,Verwaltungsprozessrecht, München, "C.H. Beck", 1987, 1.

37 *Kropshofer M.,* verwaltungsverfahren and Vertretung, "Verlag s. n.", Mainz, Univ., Diss. Johannes Gutenberg Universität Mainz, 1982, 75.

38 Decision of the Federal Administrative Court of Germany (BverwG 1967, 825); decisions of the of the Federal Administrative Court of Germany (BVerfGE 28,131; BVerfGE 41,58), available at: <www. dejure.org>.

39 *Kopp F.*,Verfassungsrecht und Verwaltungsverfahrensrecht, München, "Beck", 1971, 54.

judicial literature[40]: rights protection "in narrow sense" in case of administrative proceedings and rights protection "in broad sense" in case of court proceedings.

4.2. A Representative in Material and in Procedural Law

The leaders of an administrative body view mandatory participation of a representative in order to ensure legal protection (because of large costs in terms of time, labor and money) as an obstacle that undermines implementation of the administrative activity.[41] Therefore, there is an actual risk that citizen participation as a mandatory rule will be maintained only at a minimum level, on the surface and as a result no real legal protection will be ensured within the administrative proceedings.

As has been mentioned above, administrative legislation of Georgia regulates the necessity of involvement of a representative within the administrative proceeding both in a voluntary and a mandatory way. Correspondingly, in cases other than as stipulated by law, a citizen decides himself/ herself whether he/she will participate in an administrative proceeding through a representative or personally (Article 88 of General Administrative Code of Georgia). As for administrative procedural law, in this case also an interested party decides himself/ herself whether he/she should be represented in an administrative process by a representative, whereas an administrative body which is one of the mandatory parties in the process is always represented in the court by a leader or an official other than exceptions provided during participation of a representative of the Ministry of Justice.

In complex administrative proceedings within which the decision processes consist of various comprehensive, interrelated stages with various agencies participating and requiring a lot of time for this, an inexperienced person cannot protect his/her right individually and is dependent on a more experienced representative. Active protection of one's interests considers at least information on both the given purpose of an administrative proceeding and the relations among various stages as well as the significance and the results of co-participation of other agencies. Hence, in certain cases, reviewing the case materials is equal to the knowledge of law.

Exclusion of a representative would result in restricting the right of interested persons to participate in the proceeding and thus the function of legal protection by means of administrative proceeding would lose its purpose. Besides, involvement of a representative is necessary in cases when a principal is hindered from carrying out his/her interests. Here we can name many various grounds like absence for a long time, lack of time or expression of a faulty will regarding personal participation based on various motivations and etc.[42]

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40 *Häberle P.*, Grundrechte im Leistungsstaat, "VVDStRL", №30, 1972, 124.

41 *Thieme W.*, Verwaltungslehre, Köln/Berlin/Bonn, "Carl Heymanns Verlag", 1977, 120.

42 *Fritz H.,* Die Vertretung im Verwaltungsrecht, "Paul Jllg", Stuttgart , Univ., Diss.Tübingen, 1962, 1.

A professional representative in administrative proceeding has another important function which is about achievement of representing the principal's interests or to contributing to representing his/her interests. Effective protection of interests when a professional representative is involved is guaranteed because the latter provides carrying out the business to the end from the point of view of complex administrative proceedings and legal issues. Finally, professional representation in administrative proceeding aiming at right protection is necessary just because some negative aspects of this right can show up, specifically, if an interested person fails to participate in administrative proceeding when he/she had the possibility to do so, he/she can lose these rights. This corresponds to the general principle of depriving the right or losing the right by means of silence (Verschweigen) accepted in legal practice in spite of there being no expressly stated provisions.[43] The mentioned principle was developed based on Germany's federal administrative judicial practice.

5. Conclusion

It could be mentioned as a conclusion that representative's institution is essential due to many factors. For instance, as has been mentioned above, in complex administrative proceedings, participation of an experienced representative would be more effective. Active protection of one's own interests first of all depends on the knowledge of law. Hence, the representative, acting within the authority granted by the principal, should be able to implement his/her functions bona fide.

Furthermore, involvement of a representative is necessary in those cases when based on subjective grounds, a principal's interests are affected in case of his/her personal involvement.

As for the relations between the administrative body and a citizen, another important function of a professional representative in administrative proceedings is achievement of a guarantee to the interests of a principal and contribution to carrying out these interests. A citizen protecting his/her own interests and almost unable to cope with multiple complex legal and factual problems often considers he/she is confined within the bondage of willful activities of various agencies while he/she has the rights to participate.

Participation of a representative in administrative proceedings is important and effective for the administrative body itself. Since involvement of a representative, especially of a professional representative facilitates administrative activity within the administrative proceedings when it is already unnecessary to explain the legal circumstances of a certain case, the representative will already concentrate on the case and protection of interests connected with it and no grounds will hinder the activities of the administration.

[43] BVerwG ZBR 1979, 255; BverwG BauR 1980, 30, available at: <www. dejure.org>.

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