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Accusation of a Crime against Property

1 Introduction

Theft has been of the most common crimes. According to Vakhtang Batonishvili there can be different varieties of crimes: "theft can be of different sorts and kind, and it would take long to list all of them. Not all thefts are equal." (Vakhtang Batonishvili's Law Book, Article 150).[1] Since the Law Book is based on the casuistrical system the legislator deems it impossible, as we can see, to list every case. Due to this diversity, not every type of theft is "equal".[2] The reference to the non-uniformity of theft makes us think that responsibility for different types of theft should have been different as well. Vakhtang Batonishvili distinguishes three types of theft (Article 151, burglary, while the spouses were at home, Article 152 – theft committed on the way to the war battle, and Article 153 – robbing a lady by removing jewelry[3] while prescribes the payment of seven times the value/amount for other types of theft than the above-mentioned ones. Further, the breaking in the church, destruction of a cross and an icon, breaking in the ruler's cashier's box should be regarded to be other types of theft as well, about which Vakhtang Batonishvili mentions that he does not address such types of thefts: "We have not prescribed anything with regard to breaking in the church, destruction of a cross and an icon, breaking in a ruler's cashier box; ruler and Catholicos can impose the amount of payment charge as they wish."[4] The referenced provision indicates that the legislator sets forth different responsibility and distinguishes the theft of state and church property from the theft of an individual's property. This means that the majority of thefts committed against private individuals falls under the category of delict, and all cases of theft of state and church property should be regarded as public delict. In this case, too, the type of delict is determined not by an action per se, but according to the affected party. Piracy[5] is

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1 Georgian Legal Monuments, Volume 1, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 519.

2 Means equal. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 1204.

3 Georgian Legal Monuments, Volume 1, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 519.

4 Ib., 520.

5 Piracy – plundering, robbing. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 699; Pirate – Extortioner. *Orbeliani S.S.,* Georgian Dictionary, Volume I, prepared according to Autographic Lists, Study and the Index Part included by *Abuladze I.*, Tbilisi, 1991, 461.

distinguished separately under the crimes against property, which fell under one of the grave crimes according to the prescribed punishment.

In this case we are interested in the defamation of crimes against property as a delict; whether there are the provisions in the old Georgian law that set responsibility for the accusation of theft, or piracy and if existent, what sanctions were envisaged and which types of delict can they be attributed to. Further, based on the variety of thefts can different responsibility be observed in relation to the accusation of theft?

2 Accusation of Crimes against Property as a Delict

David Batonishvili considers accusation of theft as grave "case", along with state crimes. "The definition 3 – it is regarded to be a grave crime[6] if someone accuses another person wrongfully of disloyalty towards the king, or the law, or accuses of theft, or assistance with breaking in a fortress, or for keeping correspondence etc. with the enemy."[7] If the legislator treats accusation of theft as a grave "case", this makes us think that such action was subject to punishment. We have mentioned the variety of theft above. It is interesting what type of accusation of theft David Batonishvili mean, does this apply only to the accusation of theft from state and church, or any type of theft is implied. In the referenced provision along with theft only the accusation of theft of state property is indicated, that makes us think that when legislator talks about the accusation of theft in this case he may have in mind accusation of theft of state and church property. This justification is reinforced by another circumstance; Article 155[8] of Vakhtang Batonishvili's Law Book sets forth special responsibility for the theft of state and church property that indicates that such types of theft are declared as state crimes. If we follow this idea then it should not be a surprise why David Batonishvili considers accusation of theft to be a grave crime. But this is just an assumption which could be proven in case the provisions or court rulings can be identified that set forth different responsibility for the theft of state and church property.

Agbuga Law Article 86(1) is a banning provision, where sanction is not indicated. At a glance, we may get an impression that accusation of theft was not punishable. Agbuga law – [in case of accusation of theft] - 86. "If a man accuses another person of theft, without being sure, he is doing a wrongful action."[9] Being sure means whether the person is convinced.[10] When this

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6 Action – activity, act. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 1131.

7 David Batonishvili Law, Text published and Research added by *Purtseladze D.,* Tbilisi, 1964, 154.

8 Georgian Legal Monuments, Volume 1, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 520.

9 Ib.,459.

10 *Orbeliani S.S.,* Georgian Dictionary, Volume I, prepared according to Autographic Lists, Study and the Index Part included by *Abuladze I.*, Tbilisi, 1991, 212.

Article is considered in entirety the following conclusion can be made, in the first part the legislator talks about making charges, when a person does not have sufficient grounds for this, it may mean such case when a person conscientiously is wrong about the culpability of another person, and in such case accusation of theft was not punishable. The reason for such assumption is the lack of a sanction in a provision and an indication that such action is "improper"[11] and a person should not commit it.

And in case an individual does not believe the accused person's oath or the words of witnesses and continues with accusation his action would then be subject to punishment. Agbuga law [in case of accusation of theft] - 86. But if he believes to an oath or neither to witness, punishes and rebukes the person, and afterwards if the stolen property is found elsewhere, give back to the accused person what has been taken as punishment, and reimburse from his belongings to the extent of what such person had been wrongly accused of, for having accused without having justification and for rebuking/defamation of an innocent person.[12] Rebuke is defined as causing public embarrassment, disgracing a person.[13] As can be seen from the provision, a person is subject to responsibility for accusation without justification and the defamation of an innocent person. Defamation implied disgracing.[14] Therefore, accusation of an innocent person of a crime was equal to his insult. This provision can be used to corroborate that accusing of theft was a delict directed against honor and dignity. Accusation of a crime is referenced in first as well as second paragraph of the above-mentioned article. The forms of accusation of commissioning a crime are different in these paragraphs. In the first case the accusation is demonstrated by that the accuser does not have sufficient grounds for the accusation, and in another case an accuser disregards existing evidences and still accuses of theft, and at the same time does this in public,[15] i.e., according to Agbuga law for the imposition of responsibility for the accusation of theft the two above-mentioned factors were to be present. As for the subjective part of the delict, according to the provision we cannot say that for the legislator should take into consideration the intentional nature of the action for the imposition of responsibility. In the first paragraph it can be identified clearly that an individual is wrong and his accusation is unintentional and he accuses an innocent person of commissioning a crime. As we have mentioned legislator does not regard such action lawful, but yet, it is not punishable. And under

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11 Improper – inappropriate. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 1290.

12 Georgian Legal Monuments, Volume 1, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 459.

13 *Orbeliani S.S.,* Georgian Dictionary, Tbilisi, "Raf. D. Erisavi Editorship and Aleksandre the Bishop" and "Arsen Kalandadze and Amkh. Printing House", 1884, 50; *Abuladze I.,* Old Georgian Dictionary (Materials), Tbilisi, 1974, 73; *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 220.

14 *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 299.

15 Ib., 1236.

the second paragraph, imposition of responsibility for accusation of theft makes us think that this action should have been committed intentionally. But it is not clear in the provision that the individual had realized accusation of an innocent person. Indicating that the accuser did not believe the oath of an accused individual and witnesses does not mean that he had comprehended the accusation of an innocent person. It is possible that the person was sure of the correctness of his accusation. We think that the grounds for the imposition of responsibility were not the presence of intent, but the factor that the person should have taken into account existing evidences (oath, witness's statements).

N. Urbneli also refers to this Article: "the essential feature of this accusation [of theft] is that when a person does not know for certain about the theft and accuses another person saying he is in the possession of the stolen property. Such accusation is verbal, merely "bad and improper" and fine is not indicated. Another accusation was more severe, included verbal and action. Certainly, the accused person would be able to vindicate himself, use oath and witness. But the accuser had also the freedom not to give up, "to judge, take away (alleged stolen property) and publicly rebuke "the person who had been accused wrongly. In addition, if later the stolen property was found elsewhere then "to give back to him what had been taken away plus the same amount."[16] As we can see, N. Urbneli strikes a line between first and second paragraph of this Article according to that in the first case accusation is only verbal and punishment was not envisaged for such slandering, and in another case accusation is verbal and is also accompanied with an action (taking away stolen property). It can be seen from the definition of the scientist that the intent is absent in another case also. The focus is placed more on the factor that an "action" is performed in addition to the verbal accusation. But in our opinion main grounds for the imposition of responsibility is more due to the factor that the evidences are more in favor of the accused person and the slanderer does not take into account the mentioned circumstance.

The provision similar to Article 86 of Agbuga law is Article 159 of Vakhtang Batonishvili Law Book: "if a person accuses another man of theft or other crime, disgraces him, then if the stolen property is found elsewhere and if the accuser had taken something from there, half belongs to him who says oath, and compensation for trouble should also be given to him. If nothing has been taken from there, he should still give compensation for trouble, as appropriate."[17] In the cited article there is a direct indication on the accusation of theft. But a question arises whether this Article contain the accusation of other crimes, because following theft it is mentioned "or accuses of something else. In this case two assumptions can be made. First, that Vakhtang Batonishvili had in mind the variety of types of theft and second – that other types of crimes are implied as well. We should shift towards the first assumption more, because the words "will take away" from there indicates that it is about property. At the same time the referenced Article is in the Chapter

[16] *Urbneli N.,* Atabags Beka and Agbuga and Their Law, Tfilisi, 1890, 359-360.

[17] Georgian Legal Monuments, Volume 1, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 521.

"Title about theft and its law", which provisions comprise the crimes against property. Similar to Agbuga law in this case also we can say that mere accusation, if it was demonstrated in "light form" was not a delict, because such type of accusation the legislator does not mention at all. Responsibility was instituted for such accusation, if it was attended by "cause tormenting",[18] disgracing a person.[19] The mentioned article also does not demonstrate that in this case a person has comprehended the slandering of an innocent person. Here, too, the focus is on the type of accusation, that it should be accompanied by disgracing.

G. Nadareishvili refers to the mentioned Article as well: "It was considered disgracing a person, naturally, if someone would accuse another person of theft or any other crime without knowing true matter of the case. In social practice there have been cases when an innocent man was accused of a crime and he would justify his innocent by oath. To express such situation Vakhtang Batonishvili's Law book Article 159 refers to "disgracing".[20]

Probably such an approach was not in place for every crime directed against property. The harshest punishment was stipulated for piracy. Pirate is defined as an extortioner, robber[21] while piracy – as plundering, pillage, robbery.[22] If we follow the definition in case of piracy, apparent seizure of property took place. Bagrat Kurapalat's law (Beka-Agbuga Law Article 113) refers to the mentioned issue: "if pirates break in the Church without permission of the owner and accuse that he knew the owner shall swear he did not know by bringing twenty four witnesses and will be believed. Pirates will be handed over, and he will not be blamed for imposed punishment. Loot should also be taken back in full."[23] In this case, not the victim party but the perpetrators themselves are slanderers. Oath is present in this article as well, but unlike the above-referenced provisions where oath was not sufficient basis for the victim party in this case bringing witnesses by a master was sufficient evidence to prove his innocence.

Therefore, accusation of theft was regarded to be a delict, although for the imposition of responsibility apparently the type of slandering mattered. In case an individual was accusing another person of theft without having evidences such action did not count as delict. The action became punishable in case the accusation was clearly groundless when the accuser, despite existing evidences and against the statements of witnesses still accused the person of theft, at the

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18 Torment – means trouble. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 1215.

19 Disgracing – inappropriate. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 1264.

20 *Nadareishvili G.*, Protection of Human Honor and Dignity according to Georgia Feudal Laws and Judicial Practice Materials, "Almanach", No14, 2000, 67.

21 *Orbeliani S.S.,* Georgian Dictionary, Volume I, Prepared according to Autographic Lists, Study and the Index Part Included by *Abuladze I.*, Tbilisi, 1991, 202, 461.

22 *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 699.

23 Georgian Legal Monuments, Volume 1, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 466.

same disgraced him publicly. As we have mentioned above, theft could be of many kinds. Irrespective of the type of theft a person was accused of, the mentioned issue did not impact the type of responsibility, just the forms of expression of slandering mattered. Different situation should have existed in relation to the accusation of piracy. We can express assumption (in accordance with Article 113 of Bagrat Kurapalati Law) that slandering of piracy, irrespective of the form its demonstration would count as delict. This can be explained by the fact that piracy itself represented one of the graves crimes.

3. Punishments stipulated for Accusation of Crimes directed against Property

For the example that the government had share from the property sanctions imposed on an offender Article 154 of Vakhtang Batonishvili Law Book[24] is usually quoted: "if a stolen property belongs to a farmer twice as much is given to the farmer and the remainder belongs to state."[25] However, how was the issue with the accusation of theft was to be decided.

Bagrat Kurapalati's law (Article 113, Beka-Agbuga Law) in case of accusation of complicity in piracy a pirate who was at the same time slanderer was handed over to the victim: "pirate should be handed over, and can be punished as they wish. Loot/rug and dishes should also be handed over in full, or seized."[26] Handing over in case of accusation of robbery is not surprising, we see such sanction in another case of accusation, for example, when accusing of murder.[27] After handing over a perpetrator would be entirely rightness.[28] The following words are the testimony to this: "and can be punished as they wish".[29] Besides, fully give back[30] loot/rug and dish,[31] or take away.[32] Of course, a perpetrator would be imposed a separate punishment for piracy, which is not indicated in this article, we think because this provision directly relates to slandering.

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24 *Vacheishvili Al.,* Georgia Law History Studies, Volume I, Tbilisi, 1946, 60.

25 Georgian Legal Monuments, Volume 1, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 519.

26 Ib., 466.

27 Article 38 of the Vakhtang Batonishvili's Law Book, in: Georgian Legal Monuments, Volume I, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 491.

28 *Dolidze I.*, Old Georgian Law, Tbilisi, 1953, 250-251.

29 Georgian Legal Monuments, Volume I, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 466.

30 Loot - Rug and dishes. *Orbeliani S.S.,* Georgian Dictionary, Volume I, Prepared according to Autographic Lists, Study and the Index Part Included by *Abuladze I.*, Tbilisi, 1991, 202, 104; *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 19.

31 Reverse-give back. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 1184.

32 Georgian Legal Monuments, Volume I, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 466.

Accuser of theft was to return what he had received from accused person and moreover (Agbuga Law – [in case of accusation of theft] –86). "And what has been accused of, give back, for having accused without proof and has disgraced an innocent person.[33] The punishment used in the provision can be considered as a property sanctions for "has taken away" may mean something that is of material value. Probably, in each specific case the amount of payment would be different. It was to be dependent on the value of the article which theft a person was accused of, for in case of theft the payable seven times as much was determined according to the stolen article. According to this Article of Agbuga Law we can say that accusation of theft was delict under private law, public element in this case cannot be identified at all.

In Article 159 of Vakhtang Batonishvili Law as well in case of accusation of theft, property sanction is used: "Whatever accuser takes away half belongs to an accused person, and should also compensate for trouble. Even if he does not take away anything from there, still he has to give compensation for trouble, as applicable".[34] Labor – self-sacrifice work, efforts.[35] Compensation for trouble was property punishment that a person was to pay in favor of a victim. In addition, the payment of compensation for trouble was to take place in favor of the accused person. In this case a question arises as to who was accused person. Probably, this is a person who has been slandered, who because of the accusation of theft had to claim his innocence with an oath. Two types of sanctions are used in this provision since two types of actions are reviewed. In the first case "accuser" "takes away something",[36] and in another – "if he has not taken away". Although, it should be clarified what can be the indication in the provision on "if takes something away" in the norm, or "even if cannot take away". Since it is about taking away something this "something" should be of material value. In general, when committing theft a thief had to repay seven times the stolen property. It is possible that when it is about accusation of theft legislator focuses on the fact whether or not he succeeded in getting this seven times the stolen property from an accused person. Respectively, the determination of punishment was dependent on the mentioned fact. In the first case, he was to given half of taken seven times as much to the person giving the oath and at the same time pay compensation for trouble. In the second case, he only paid compensation for trouble. Slanderer has to pay charges half of which belongs to an accused person,[37] but there is no indication in relation to another half, which gives us grounds to consider that second part of property belonged to the state. Moreover, as has been mentioned slanderer had to pay compensation for trouble as well to the accused person who had to express oath. As for the

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33 Georgian Legal Monuments, Volume I, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 459.

34 Ib., 521.

35 *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 261.

36 Phrase of the Article 159 of the Vakhtang Batonishvili's Law: "if takes away something" probably has the same meaning as Article 86 of the Agbuga Law "bring back".

37 *Nadareishvili G.*, Protection of Human Honor and Dignity according to Georgia Feudal Laws and Judicial Practice Materials, "Almanach", No14, 2000, 67.

meaning of the compensation for trouble in general, as has been mentioned, was the property compensation established for disgrace. Trouble is defined as work, efforts, nuisance.[38] Respectively, compensation for trouble is to be understood to mean property compensation that was given to a person for the "trouble" for having to say oath. Since the amount of compensation for trouble is not indicated probably it depended on social status of a slandered individual.

In old Georgian law, the type of punishment was very often determined by the subject of crime. One of the rulings of 1789 cited by G. Nadareishvili is an example of this, according to which Termovsesa and Sarkisa complained that Terarakela misappropriated church property. Akpati Archbishop David, Amilakvari Luarsab and Secretary Simon, other honorable lay and clerical persons participated in the consideration of the case. Ter-Sarkisa accused Ter-Arakela of stealing napkins. Court deemed this to be slandering and punished Ter-Sarkisa. "Slanderer was first beaten and then dismissed from priesthood." However, after a little while it was identified that Ter-Sarkisa was right. Church belongings sold by Ter-Arakela were returned by the buyer to the Church. The court discussed again and ruled: "for the time when Ter-Sarkisa was dismissed from priesthood Ter-Arakela should be dismissed for the same period." Moreover, Ter-Arakela was to pay to Ter-Sarkisi "compensation for beating".[39] We are interested in first part of this ruling, for on the basis of it we can judge as to how could a clerical figure be punished for slandering. Unlike the above-listed cases priests were sentenced to beating. As Iv. Javakhishvili mentions "beating was an accepted punishment for certain light crimes. They used stick, or a strip or a whip as the means for beating. As the simplest means at the same time was one of the oldest. This punishment was used in secular justice as well as in monastic and corporate ones (Martyrdom of Shushanik, George Mtatsmindeli)."[40] The ruling does not specify the number of beats determined in this case for the priest.

As for another type of punishment dismissal from priesthood, that the court had used, is based on the status of the slanderer and of course could not have been used in other cases.

Thus, the punishments used in case of accusation of crimes directed against property provisionally can be broken down into two groups: public punishments: beating, deprivation of the right of specific activity (dismissal from priesthood), in some cases also property sanction and private types of punishments: handing over, compensation, property compensation. The use of beating and deprivation of right to be engaged in certain activity depended on the status of a slanderer. Handing over and the application of property sanctions was dependent on the crime directed against property one was accused of as well the value of the article which theft a person was accused of.

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38 *Orbeliani S.S.,* Georgian Dictionary, Volume I, Prepared according to Autographic Lists, Study and the Index Part Included by *Abuladze I.*, Tbilisi, 1991, 149; *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 261.

39 *Nadareishvili G.*, Protection of Human Honor and Dignity according to Georgia Feudal Laws and Judicial Practice Materials, "Almanach", No14, 2000, 63.

40 *Javakhishvili Iv.,* Works in Twelve Volumes, Volume VII, Tbilisi, 1984, 361.

3. Conclusion

Old Georgian law is based on casuistic system, in relation to the accusation of theft we have to pay attention to the fact that every case of slandering of this crime was not considered delict under the old Georgian law. So to say, "simple" form of accusation of theft that implied blaming a person in theft without evidence was not punishable although legislator did not approve of such action. Accusation of theft was punishable in case a person would continue accusations without having witnesses and evidences of theft, would disgrace an accused person[41] and disgrace him. But the case of accusation of piracy was different. In this case responsibility was not based on the form of accusation and apparently in any case accusation of piracy was regarded a delict. We think that in this case the fact that piracy under the old Georgian law was regarded as one of the gravest crimes and respectively was severely punishable, therefore and accusation of any form was subject to punishment. Therefore, based on the provisions of the law we can conclude that accusation of crimes against property was regarded punishable.

According to the review of punishments used in cases of accusation of crimes directed against property we can say that the application of the type of punishment depended on the fact as to which crime a person was accused of as well as the personality of a slanderer, the other factor also influenced the type of delict. Only public punishments are used against slanderer, when an offender is a cleric. As for accusation by private individuals in such case, mainly private law punishments were used. "Hand over" in terms of severity of punishment differs significantly from property sanctions. This fact can be explained as follows: handing over is used by the legislator in case of accusation of piracy, and property sanctions are instituted when a person is accused of theft. In this case, the severity of a crime one is accused of is a determining factor.

According to the punishment for the accusation of crimes directed against property we can say that if in some cases such accusations should be qualified tentatively as public delict in another case the same actions are of private law nature. As if the provided conclusion is contradictory but it is based on the punishments used in legislative provisions and court ruling. Resolving the issue in a different manner was related to the status of an accuser. Public punishments were used for clerics while in relation to private individuals, as has been mentioned above; mainly private law sanctions were used. In the presence of determined circumstances, probably half of property compensation paid by an accuser belonged to the state (Article 159, Vakhtang Batonishvili law), respectively, an action in such case should also be considered to be public delict.

[41] Disgraceful – unseemly *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.*, Tbilisi, 1984, 1264.

The diversity of theft did not result in instituting of different punishments; difference could be only in the amount of property compensation amount for it was directly dependent on the value of an item. In general, seven times the value of an item was used as compensation in case of theft.[42] In article 159 of Vakhtang Batonishvili Law Book[43] about the accusation of theft a perpetrator was to pay according to the property he had taken away. "Took away" probably implies property he had received from an accused innocent person before, and this would be determined according to the value of an item which theft he was accused of.

[42] Georgian Legal Monuments, Volume 1, Vakhtang VI Law Books Collection, Text published, Study and Vocabulary provided by Professor *Dolidze I.*, Tbilisi, 1963, 519.

[43] Ib., 521.

Lela Janashvili*

The State of Autonomies and the Nation of Nations
(Historical Preconditions and Perspectives)

1. Introduction

Complex form of the state and the process of decentralization become more and more important in the modern constitutionalism. Federalism, like regionalism, has special perception of the idea of democracy, as legal system formally adjusts to democratic configuration at the extent that the addressees of the legal norm participate in normative proceedings (this is what Kelzen refers to as "autonomy").[1] The "state of the autonomies" model of regional territorial arrangement, which is "personal" for Spain, is its clear proof. But the question whether the "state of autonomies" is indefinite, infinite or clearly formulated model – is still actual.

Spain is the last state of modern Europe where autocratic regime existed during long time period and is was abolished in natural way, after the death of General Franco. Fascist regime in national policy not only didn't recognize national features of Spanish nations but aspired towards their evening-out; the first stage of implementation of democratic processes completed in 1978 by adoption of Constitution, according to which Spain formed as decentralized state. Legal recognition of national and historical regions by the main law of the country was significant novelty. The mentioned issue strengthens the opinion of regional form of territorial arrangement of the country in the science of law even more. Above all, the term, popularized by the Constitution and established in legal literature – the country of autonomies (El Estado de las Autonomías) became the subject of judgment of Spanish scientists. Spanish form of autonomy can't be identified either with simple centralization form or the elements of form of federal state. Unlike the regions of centralized state, the authority of Spanish autonomous entities is based not only on self-organization on the level of administration, but provides for legislative, executive and, at certain extent, judicial authorities too. Their difference fro the subjects of federal state is expresses in the circumstance that the authorities of the latter has constitutional-legal character and the autonomies get it from central authorities.

According to the Constitution of 1978, regionalism was announced the main direction of the country; although, 30 years of existence of Spanish democratic state have shown that autonomy of

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1 *Sabater J.A.,* Constitucionalismo y Derecho Constitucional – materiales para una introducción, Valencia, "Tirant lo Blanch", 1996, <http://www.uned.es/dpto-derecho-politico/VII._Asensi%20bis.pdf>.

regions and nations remain acute problem in the bosom of uniform national state. The mentioned problems are so deep that failure to address them could result in the failure of Spanish state.

The aim of the present article is to highlight specific legal nature of the relatively new model of state territorial organization – "state of autonomies."

2. Specific Nature of Spanish Regionalism – Historical Preconditions

Specific nature of Spanish regionalism, primarily, reflected in the new type of territorial arrangement of the country – the "state of autonomies". Spanish regionalism is considered as political order existing in the country, which, regardless its countries-old experience, achieved concrete real form only by the Constitution of 1978.

The "state of autonomies" guaranteed by Spanish Constitution, is evaluated by experts as good practical "way out" against the background of the existing problems, but the presently existing deep crisis casts doubt on this provision at certain extent. And the above mentioned is conditioned by historical pre-requisites of regional policy.

Complex process of formation of the state of Spain experienced long evolution and when the issue of regional problems reflected in constitutional legislation of Spain is touched, primarily the fact of existence of a lot of constitutions, acting in Spain during two centuries, shall be mentioned[2] - 1812, 1834, 1845, 1869, 1876, 1931 and 1978.

Spain, as regional state, covers three periods: 1. II half of the XIX c. – initial phase of Spanish regionalism; 2. II Republic (when regionalism obtained legal character) and Francism; 3. The phase of decentralization of the country.

II half of the XIX century is considered as the rising phase of regional movement and although regionalism have always been fundamental element of the history of Spain, it reached critical form only by the Constitution of 1931, during II Republic.

On April 14, 1931 Spain was announced a republic. The period of restoration of Bourbons' monarchy, which lasted almost half a century, was over. Republic of a new type was formed, during which many social-economic reforms were implemented. Significant event was the adoption of the Constitution of December 9, 1931 which attempted to address problems in religious, regional and social spheres.

Particular discussion was caused by the issue of regionalism. The problems related to the forms of territories arrangement of the state, existing in Spain during centuries, together with recognition of peculiarities of regions and the problem of national unity, gradually but negatively was impacting centralism and deepening separatism,[3] although the region obtained the contours of constitutional and administrative - legal notions for the first time. The region was defined, as

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2 *Lataillade C.I.*, *Rodríguez Z.T.*, Constitucionalismo Histórico de España, Madrid, "Editorial Universitas S.A.", 1995, 11.

3 *Merino Merchan J.F.*, Rejimen Historicos Españoles, "Dilex S.L.", 2008, 195.

historical part of the nation, which was formed of geographic, historical and social characteristics.[4] The authors of new constitution didn't want to define the state wither in federal or in unitary form, as both forms were experiencing crisis by then. They wanted to find a new model. According to the Article 1 of the Constitution, "Spain is worker's democratic republic, which is based on freedom and justice. Powers of all authorities are based on people and follows from them. The Republic represents uniform, integrated state where the autonomy of municipalities and regions is combined". When defining territorial organization of the state, appealing to the mentioned Article led to certain confusion. Some authors considered that such definition had certain obscure content, as the Constitute spoke about political - administrative status of each region under the conditions of weakened federalism.[5]

According to the Article 11 of the Constitution, if one or several adjoining provinces decide to form autonomous region as political - administrative union within Spain, with consideration of requirements of the Article 12 of the Constitution, they would have to present their own statute. One significant novelty of this provision shall be mentioned. For the first time in the history of Spanish constitutionalism, provinces were given the opportunity to unify and create autonomous grouping, legal status of which would be strengthened by the statute.

Thus, the process of autonomization began in Spain by the Constitution of 1931, and the term "autonomous republic" was first established as Constitutional term.

According to the Article 13 of the basic law, federation of autonomous unions was absolutely inadmissible. And the Articles 14-16 contained the issues related to the distribution of competences between the autonomies and the central state. The competences of autonomous regions were also defined by the statutes.

The Constitution strictly forbad the right of independent initiative of autonomous regions to establish relations with other countries. It was exclusive right of the state to delegate certain legislative functions to autonomous entities through the law, but it should not violate the harmony of interests between the Republic and the local entity.

If required, assessment was performed by Constitutional Court. The Constitution also provided for the opportunity of withdrawal the autonomy. According to the Article 22, any province, unified in the autonomy, could leave it and transfer into direst subordination of the central authority. During short period of acting of the Constitution, political autonomy was implemented by Catalonia, Galicia and Basque.

This, according to the basic law of 1931, the state was defined in the terms of territorial arrangement as regional - integrated state. But democratic regional ideas experienced fiasco as a result of civil was developed in 1936-1939. The validity of the Constitution, as well as the statutes if Catalonia and Basque, was abolished by the Decree of 1937. The process of implementation of

4 *Khubua G.*, Federalism as Normative Principle and Political Order, Tbilisi, 2000, 60.

5 *Barrachina J.E.,* Las Comunidades Autónomas: su ordenamiento Jurídico, primera Edición, "Promociones Publicaciones Universitarias", Barcelona, 1987,127.

strongly centralized policy began, central and extremely stringent principle of which was the principle of hierarchic subordination to the central administration.[6]

According to Organic Law dated January 10, 1967 of the State (7 Organic Laws were adopted during Franco Regime), municipalities and provinces were recognized (Chapter VIII referred to local administration). Province was defined as territorial division of the Administration, as union of municipalities (454.2), as one of territories entities of the State Administration. As for the national problem, expression of national feelings by Catalonians, Galicians and Basques during 40 years of Franco dictatorship was regarded as grave crime against unified Spanish people and was strictly persecuted. In national policy the fascist regime didn't recognize national peculiarities of Spanish peoples. Centralization reached extreme limits. National problem was announces as non-existing, but fascism proved to be unable to suppress the aspiration of minorities towards autonomy. All the above mentioned contributed to its strengthening to certain extent.

The history of constitutionalism of Spain of XIX-XX c.c., certainly, left chaotic impression and the period of validity of progressive constitutions was very short (Cadiz Constitution was valid in 1812- 1814, 1820- 1823 and 1836- 1837; the Constitution of 1837 – in 1837-1843; Basic Law of 1869 – in 1869-1874, and the Constitution of 1931 – in 1931- 1939). The Constitutions of 1080-1976 doesn't provide comprehensive information on the problems of territorial structure of Spain; not because the problem didn't exist but because the mentioned issue was ignored.[7]

3. Constitution of 1978

Constitution of Spain of 1978 is often referred to as the result of change of political situation which enabled transfer from Francist dictatorship to democracy.

Victory of Francism in bloody and long civil war (1936 – 1939) formed the basis for establishment of dictatorship. Fight with constitutional state began: political freedoms were abolished, trade unions were liquidated, the principle of distribution of powers didn't apply, etc.

After General Franco's death (November 20, 1975), on November 22, 1975, Juan Carlos I was announces the King of Spain. The government of Adolpho Suarez began implementation of political reforms. Despite the protest of oppositionists, legalizations of democratic processes became possible.[8]

The first important event of transitional period was the Law of Political Reforms, adopted in October 1976 by the government of Franco period and Referendum of December 15.

Although the Law had very small volume, it established extremely important innovative ideas, which allowed implementation of democratic processes; the above mentioned implied the following:

6 *Esteban J.D.*, De la Dictadura a la Democracia, Madrid, "Universidad Complutense", 1977, 92.
7 Ib., 34.
8 Ib., 33.

a) Definition of Cortez's legislative power and its organization in two chambers (Congress of Delegates and Senate);
b) Announcement of democracy and people's sovereignty as the main basis of the state;
c) Organization of future democratic elections;
d) Formation of mechanism of constitutional reform;
e) Identification of King's prerogative in the following spheres: appointment of the Chairman of Government with the consent of Congress majority, dissolution of Cortez ahead of scheduled time with convening of new legislative elections; appointment of constitutional referendum, etc.

Since the first months of 1977 legalization of parties and trade unions, which had recently revealed real tolerance,[9] began. The process reached its culmination during registration of Communist Party on Holy Week of 1977. At the same time, the Government performed liquidation of National Movement and Francism trade unions.

After rejection of Francist political principles it became possible to conduct the Congress and Senate elections, which was performed in accordance with the Law on Political Reforms and Royal Decree No 20 dated March 18, 1977.

Elections in both Cortez Chambers were held on June 15, 1977. The results showed that the will of the people in favor of democracy was clearly expressed, besides, reformatory course of the Government was approved. Union of Democratic Center (UCD) achieved significant victory in Congress elections, but it didn't represent absolute majority and it could not make decisions independently. The issue of adoption of new constitution was put on agenda. Transitional period entered the phase of strengthening of constitutional law and order.

Work on the fist draft was completed on December 22, 1977; it was published in official bulletin on January 15, 1978. After introduction of a lot of amendments and additions the text was finally published on April 17, 1978 as the bill of Constitution.

Constitutional Commission had to work against the background of serious political opposition. They faced the challenge to develop a bill, which would satisfy each political power at certain extent. The following below mentioned factors should also be taken into account: economic crisis (continuous growth of the number of the unemployed, energetic crisis, inflation); activation of national and regional movement, which gave origin to the formation of pre-autonomous regime; formation of Catalonia Generalitete; significant pressure from armed forces; unification of civilian forces for the purpose of arrangement of overturn; the above mentioned was accompanied by the risk of terrorism from the side of ETA and GRAPO.

Increase of regionalism could be considered one of the important events of transitional period. Pre-constitutional debates proceeded under the motto: "Regionalism – New Formula of the

9 *Llorente R., Reyes F., Blanco Canales M.R.*, Legislación Política Española, centro de Estudios Constitucionales, Madrid, 1980, 67.

Existing Democracy".[10] During development of draft Constitution political movement of regionalism obtained legal form.[11]

Reflection of regional problems, accumulated during centuries, in the main law of the country was unavoidable. The above mentioned became the main issue of pre-constitutional debates. Two problems were outlined in regard to the regionalization of the country: 1. obvious dissatisfaction of centrists against decentralization policy; 2. legislative basis for strengthening of regionalism.[12]

In the opinion of researchers the agreement on decentralization of the country could be considered the biggest achievement of democratization at that time. Article 2 and Section VIII of the Constitution prove it. The basic provisions of the Article 2 – unity of Spanish nation and implementation of the rights of the nations integrated in it and the right of autonomy of regions – directly relates to the issues of territorial arrangement of the country. Central Article 137 of the Section VIII, according to which territorial - organizational structure of the state unifies municipalities, provinces and autonomous unions. Article 137 of the main law could be considered the crown of decentralization of the country, as territorial arrangement of the country in the mentioned form, against the background of centuries-long centralism, was almost equalized with federal.[13]

Draft Constitution of Spain was approved by Constitutional Commission on June 20, 1978, and the Congress Plenum on July 21; following the relevant legislative procedure, the text was considered in Senate, which adopted it on October 5, but with certain changes. Establishment of mixed commission of delegates and senators was necessary for development of uniform text, which would be submitted to the both Chambers. The mentioned text was finally formulated on October 25 and was approved by both Chambers on October 31, 1978.

Constitution was finally adopted by Spanish population on December 6, 1978, via Referendum. The following voted against it: New Forces (Fuerza nueva), Spanish Falange (Falanga Española) and Revolution League of Communists. Basque Nationalist Party (Partido Nacionalista Vasco) and Catalonian Nationalist League (Ezquerra Republicana de Catalunya) abstained.

On unified session of both Chambers, in front of Cortez, the King signed the Constitution on December 27, 1978 and it was published in official bulletin of the country on the existing languages in Spain on December 29, 1978, after which is came into force.

It's unnecessary to speak about the scope of significance of adoption of modern, democratic Constitution for Spain. Nevertheless, it couldn't address several important political issues, which still remain the topic of acute debates.

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10 *Belmonte J.*, La Constitución, cit. doctor Gumersindo Trujillo, Madrid, "Editorial prensa Española", 1978, 353.

11 *Alonso de Antonio J.A.,* El Estado Autonomico y el principio de solidaridad como colaboración legislativa, Cortes Generals, Madrid, 1997, 86.

12 *Belmonte J.*, La Constitucion, cit. doctor Gumersindo Trujillo, Madrid, "Editorial prensa Española", 1978, 351.

13 *Cotarelo R., Maldonado J., Ramon P.*, Espana, Madrid, "Tecnos", 1991, 57.

Firstly, the following circumstance shall be mentioned that the Constitution of 1978 is recognized as the result of consensus for the purpose of solving of important political problems of Constitutionalism of Spain.[14]

The main law of the country of 1978 could be assessed in the following words: the Constitution of Spain didn't introduce significant innovation in constitutional doctrine and it shall not be regarded as the reference point in the history of Spanish constitutional law either by originality of creation or by provisions, as it happened in the case of Constitutions of 1812 and 1931. Of course, it wasn't the purpose of creation of the Constitution and its authors didn't have such intent either. The goal was one – the Constitution, as the result of consensus and it should be acceptable for the Parliament and wide circles of society. The peculiarity of the main law of 197 was that it attempted to solve the principal problems, which existed in Spanish constitutional system.[15]

Delay of modernization of Spain was caused by the significant events developed in XIX-XX c.c. Important task should be addressed by the new Constitution – it should take into account the previous experiences. It was necessary to adopt the text, which wouldn't belong to one party only, but it would recognize human rights, delimitation of the state and the church, co-existence of different regions and nations in the bosom of Spain, distribution of power, establishment of democratic principles, centralization of the country, although the central governmental ideology should be taken into account – maximum limit of regionalization, high level of competences of territorial entities within the boundaries of uniform Spanish state.

The issue of two-chambered arrangement became the topic of disputes in the process of development of Constitution. Finally consensus was achieved: extremely weakened form of two-chambered arrangement. According to the Constitution, General Cortez of Spain represents Spanish nation and consists of two Chambers – the Congress of Delegates and the Senate. In accordance with the Article 69, Senate is the Chamber of territorial representation. 4 senators shall be elected in each province based on general, equal, direct and secret vote; each island or the group of islands, having their own body – Cabildo or the Council of Island – shall elect the following number of senators: three senators from Canary Islands, Mallorca and Tenerife, one senator from each island or group of islands – Ibiza, Formentera, Menorca, Furteventura, Gomera-Hierro, Lanzarote and La Palma. Ceuta and Melilla elect two senators. Besides, autonomous unions mean one additional senator per million residents. Appointment of senators is performed by legislative assembly or supreme collegial body of autonomous union. Proportional system of formation of Senate creates certain disproportion. In particular, the provinces, including cities with millions of population (Madrid and Barcelona) have the same number of representatives in the Senate as the smallest province from the viewpoint of population.

Spanish Senate is considered in the cross-section of institutional asymmetry, where participation of representatives of national and regional territories occurs.

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14 *Molas I.*, Derecho Constitucional, Ia edición, Reimpresion, 1998, Madrid, "Tecnos", 2001, 14.

15 *Belmonte J.*, La Constitucion, cit. doctor Gumersindo Trujillo, Madrid, "Editorial prensa Española", 1978, 349.

The Senate of Spain actually reflects political composition of the Congress; the role of Senate in legislative process is essentially limited by the authorities of introduction of only technical corrections into bills or postponing of the date of consideration of a bill. Senate's consent is required in the case of concluding of agreement between autonomous unions. But the Congress of Delegates shall be informed about the decision made (Articles 137-139 of Senate Regulations). The authors, who support regionalization of the country as well as federalization, consider that one of the most important issues is the reform of Territorial- Representational Chamber of Senate, which would facilitate more active participation of autonomous unions in formation of the will of the central government. The Senate of Spain, dissatisfied with its limited rights, vigorously tries to enlarge the functions. The two-chambered system of Spain could be characterized as absolutely equal and imbalanced model. Formation of Senate, as the body of representation of regions' interests is possible only in the case of transformation of Spain into federal state.[16]

Important issue, which the main law of the country tried to solve, was national problem. Acute debates were held in Constitutional Commission on the topics of the unity of Spanish nation and the rights of the autonomies of nations and regions. Article two of the main law of the country, according to which the Constitution is based on firm unity of Spanish nation, united state, which is indivisible for all Spanish citizens, was considered to be the fundamental principle of the Constitution of Spain and functioning of the state. Besides, the right of autonomy of nations and regions and complete equality among them is recognized and guaranteed.[17] The given Article was the topic of strict discussions of Spanish scientists and politicians. The topic is still actual.

The position of Socialist Party during pre-constitutional debates was as follows: "Spain, as the nation, existed long before the given constitution; thus the only thing to be done is finding of the relevant legal basis, but, at the same, time, bringing it in conformity with the reality. Our big desire is that the Constitution of 1978 takes into account the current legal actuality. Out amendment sounds like this: the Constitution established and provides guarantee of unity of Spanish nation, the right of autonomy of nations and regions and solidarity among them. In the aspect of constitutional law, the above mentioned represents correct form. Legal forms, higher expression of which is the Constitution, have collected facts. And in this case the fact is one – centuries-old existence of Spanish nation".[18]

One group of scientists consider that the mentioned Article was the key to centuries-old problem and optimal variant of its solution, as three perspectives of addressing of the issue is provided in it.[19] Primarily, Spanish nation could be announced the highest union with firm guarantee of unity; also, the existence of other unions in the bosom of the state of Spain, which were differentiated as nations and regions; and the third – equality among all regions and nations

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16 *Khubua G.*, Federalism as Normative Principle and Political Order, Tbilisi, 2000, 86.

17 *Peces-Barba G.*, Constitución Española de 1978, Un estudio de Derecho y Politica, Madrid, "Tecnos", 1995, 30.

18 Diario de Sesiones del Congreso de los Diputados, No 66, 1978, sesión num. 5 de la Comisión de Asuntos Constitucionales y Libertades Públicas, 2304-2306, Constitución Español, Trabajos parlamentarios, cit. Vol.II, 846-848.

19 *Peces-Barba G.*, Constitución Española de 1978, Un estudio de Derecho y Politica, Madrid, "Tecnos", 1995, 35.

in order to guarantee the highest idea of unity of Spain, eliminate imbalance among developed and less developed zones.

The first question, asked by scientists in regard to the Article 2: what is implied under, what is included in the notion "Spanish nation" (Nación Española). In accordance with the Article 1 of the Constitution, Spain is defined as political unity, national sovereignty belongs to Spanish people, where the state authority follows from. Spanish people are expressing national will.

In regard to the Article 2 is could be said that it includes controversial provisions. On the one hand, it declares the single nature of Spanish nation, and on the other hand it speaks about multi-national nature of the country. Detailed analysis of the text of the Constitution could provide the answer:

a) the existence of only one nation is recognized by the Constitution;
b) the nations and regions are constituent components of the nation;
c) national unity follows from the Constitution;
d) the authorities of nations and regions are derived: the Constitution, on the one hand, knows national sovereignty, on the other hand – establishing authority, owned by the state. The nations and regions, in accordance with Section VIII of the Constitution, own self-governance, which they implement through the relevant statutes, although the latter are adopted through issuance of organic law by General Cortez;
e) the Constitution knows only Spanish citizenship.

Thus, is the nations are constituent components of the nation and they don't own the establishing authority, what represents the boundary between them and regions. Primarily, these are geographic, historical, economic peculiarities, language, etc. Besides, the nations include the notion of region, but with deeper originality.

Spanish nation is defined as the nation of nations (Nación de Naciones), as legal expression of unity of Spanish people under uniform political law and order.[20]

The nation (Nación), nationality (Nacionalismo) and the principle of nationality (Principio de las Nacionalidades) – are political terms, the essence of which cause great polemics. The scopes of which of the three theories, formed about definition of the term "nation" are satisfied by Spanish nation?[21]

1. Objective theory (in which racism theory is pointed out); 2. Subjective theory, which implied will of each person for the formation of people, desire of each person to be the subject of this unity; 3. Mixed theory, which included the elements of subjective as well as objective theory. In particular: the nation is natural unity of people who was brought to living and social unity by territorial unity, origin, peculiarities.

According to dictionary of Alfonso Palenzia (XV c.), etimological roots of the word nation (Nación) are defined: "people who know where they were born and have not come from other

[20] *Molas I.*, Derecho Constitucional, Ia edición, Reimpresion, 1998, Madrid, "Editorial Tecnos", 2001, 35.

[21] *Gonzales Navarro F.*, España, Nación de Naciones, el modelo federalismo, Pamplona, "EUSNA editorial Universidad de Navarra, S.A.", 1993, 49.

places". In the XVIII c. the mentioned notion obtained deep political content, which implied national sovereignty, national independence and establishing authority. But seven constitutions the XIX c. of Spain didn't contain the notion of either nationality or region. Only Federal Constitution of 1873 was the exception, which didn't came into legal force (in accordance with the Article 1, Spanish nation consisted of 17 states, including Cuba and Puerto Rico).

In the present-day world nation is the historical concept. Pretension that the idea about Spanish nation existed since middle ages is groundless. Identification of the notions of the state and the nation is also inappropriate. National state (El Estado Nacional) is not the last possible form of the state, as today multi-national political institutions exist and we see emergence of various national unions. Multi-nationality implies the existence of various national unities, when the state doesn't hamper their transformation into higher unity. In the case of Spain the nation of nations, we may say the nation of nations and regions, which is diverse, but integrated, appears to be the higher unity. But the existence of different nations and regions in the higher unity of Spain facilitates separatism. Spain, as the state of nations and regions, can be (and has to be) only one state, but he state of autonomies guaranteed by the Constitution.[22]

In Spanish reality the unity of nations leads to the notion of nation. And for the purpose of determining – what is the meaning of the word "nations" – there is only one way out – to refer to the dictionary. But the dictionary published by the Academy of Spanish Language didn't provide answer to the asked question. It includes traditional definition: the unity of constituent individuals and people's characteristic circumstances.[23]

Twenty-year authoritarian regime formed complete disorder in regard to the national issue. The Constitution of 1978 considered one side of the problem – attempt of integration against incomplete, partially transferred provisions. But two opposing ideologies formed around the issue. The first – the rights, who where the followers of traditional Spanish nationalism theory. The motto was – there is no nationalities, but Spanish and thus the term of nationality was denied. The second, the lefts' sector, who were against of incorrect, subjective understanding of the term "nationality". According to their ideology, nationality is the possibility of self-identification of each autonomous union, in order to transform into independent states. In their opinion, Spanish nationalism had neither historical, nor scientific basis.[24]

Spanish Constitution of 1978 declared Spanish people and Spanish nation as synonyms, as according to the Article 1, national sovereignty follows from Spanish people. Nevertheless, Spanish nation is not just people or people of peoples, but, as it is defined in the Article 2 of the Constitution – Spain is the nation of nations.[25]

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22 *Peces-Barba G.*, Constitución Española de 1978, Un estudio de Derecho y Politica, Madrid, "Tecnos", 1995, 34.

23 *Barrachina E.J.*, Las Comunidades Autónomas: Su ordenamiento Juridico, Barcelona, "I Promociones Publicasiones Univesritarias", 1987, 171.

24 *Gonzales Navarro F.*, España, Nación de Naciones, el modelo federalismo, Pamplona, "EUSNA editorial Universidad de Navarra, S.A.", 1993, 50.

25 Ib., 98.

The Constitution avoided clear delimitation of the nation and nations. Besides, it doesn't specify the criteria according to which the region shall be referred to as national. The first additional provision of the Constitution speaks about national territories: "the Constitution protects and respects historical rights of national territories existing earlier". The above mentioned implies Catalonia, Basque and Galicia, whom the above mentioned status was granted to before adoption of the Constitution and which have their own language. But the main law doesn't define whether recognition of only linguistic difference is sufficient for determination of nationality. E.g. in accordance with the Article 7 of the Statute of Valencia autonomous union, official language of the union, together with Castilian, is Valencian (El Valenciano).[26] The Parliament of Balearic Islands adopted Law N3/986 on April 29, 1986 on linguistic regulation, according to which, since XIII c., Catalonian language is the own language of autonomous union of Balearic Islands. In both cases the union is referred to as regional and not national.[27] In accordance with the dictionary of autonomous terms, national territories are the territories, which obtained the status of autonomy through referendum (the second transitional provision). They are also referred to as historical nations, or historical autonomous unions (Catalonia, Basque and Galicia).[28]

On August 19, 1978, during consideration of Draft Constitution, acute disputes were held in Senate in regard to the terms "nations" and "regions" specified in the Article 2. Delegate Andres Mollet made the following comment to the Article: "the Constitution is based on pluralism, equal rights among the peoples, the right of autonomy of the nations and regions and the right of self-determination of the latter. Dear Senators, let's not deceive ourselves. There is no firm unity here. It's not either unified fatherland or firm unity of the fatherland. But we have to keep in mind that political reality of the state of Spain is much richer and interesting than everything we are discussing now. Spanish state, whether we like it or not, is multi-national and national and regional unions co-exists within Spain. But they have different levels of desire of self-governance. It would be the same as if the Constitution tells us that the sun doesn't rise in the morning, or sets at the last hour of the evening. And as for self-determination, it doesn't necessarily mean separatism. Self-determination is the right to choose your future".

Senator Fernandez Miranda I Hevia mentioned about the term "nationality" provided in the Article 2: "the word "nationality" is defined in the dictionary of our Academy as the peculiarity characteristic for people and individuals, constituting the nation. It can't be referred to as the synonym of the nation".

Article 2 of the main law of 1978 represents the main foundation of Spanish state,[29] as the most important principles of functioning of the state are accumulated there:

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26 There is an acute dispute among linguists on Valencian language. Some consider that Valencian language is nothing more but the dialect of Catalonian language, and others insist on its independent character.

27 *Segado F.*, El sistema Constitucional Española, Madrid, "Dikinson", 1991, 195.

28 Diccionario de terminos autonomicos, Ministerio de Administraciones Publicas, Madrid, 1993.

29 *Peces-Barba G.*, Constitucion Española de 1978, Un estudio de Derecho y Politica, Madrid, "Tecnos", 1995, 14.

1. Spain, as real equality;
2. Indivisible unity of the nation;
3. Spanish nation, as the establisher of the Constitution;
4. the mentioned Article recognizes the right of autonomy of the nations and regions;
5. Spain, as the "state of autonomies", as plural reality, as Spanish nation is integrated by nations and regions. It shall be mentioned that it's not a homogenous unity or people of peoples, but the nation of nations.[30]

Thus, the Article 2 recognizes the existence of nations and regions in Spain, but doesn't specify the difference between them, and the notion of Spanish nation is defined as "nation of nations" – legal expression of the unity of Spanish people under political law and order, which is integrated with different nations and regions and can exercise the right of political autonomy, if they have the desire of the above mentioned.[31] The group of people, as the subject of autonomy, implies the unity of people,

a) who live within clearly delimited geographic are of the given state;
b) who is less in quantity, than the rest of the population of the state;
c) members of which are the citizens of the given state (their autonomy shall be ensured within the boundaries of the state);
d) members of which differ from the rest of citizens based on ethnical, linguistic or cultural sign;
e) members of which wish to maintain their particular qualities and individuality.[32]

The content of autonomy, in particular, "the state of autonomies" shall always comply with legitimate interest of protection of sovereignty of the state, on the one hand, and demands of preservation of their identity by minorities, on the other hand.[33] According to the main norm, all Spanish citizens own Spanish nationality, as constitutes the part of Spanish nation. According to Spanish nationality, national and regional independence is preserved within the state. Ascription to Spanish nation means ownership of Spanish nationality, as the connection between the individual and the whole, i.e. the nation and the state.[34]

The members of Spanish political union are Spanish citizens, i.e. Spanish by nation, although they can own other national status as well. In accordance with the Article 1 of the Statute of Basque Autonomous Union, - Basque people, or Euscal Heria, as the expression of their nationality, forms autonomous union for implementation of self-governance. In accordance with the Article 1 of the Statute of Valencian Autonomous Union, - Valencian people (El Pueblo Valenciano), historically

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30 *Rodrigez Zapata J.*, Teoria y practica del Derecho Constitucional, Madrid, "Editorial Tecnos, S.A.", 1996, 99.

31 *Gonzalez Navarro F.*, España, Nacion de Naciones, el modelo federalismo, Pamplona, "EUSNA Editorial Universidad de Navarra, S.A.", 1993, 55.

32 *Heintze H.J.*, Wege zur Verwirklichung des Selbstbestimmungsrechts der Völker innerhalb bestehender Staaten, 36 (in: *Khubua G.*, Federalism as Normative Principle and Political Order, Tbilisi, 2000, 97).

33 *Khubua G.*, Federalism as Normative Principle and Political Order, Tbilisi, 2000, 97.

34 *Gonzalez Navarro F.*, España, Nacion de Naciones, el modelo federalismo, Pamplona, "EUSNA Editorial Universidad de Navarra, S.A.", 1993, 64.

organized as the Kingdom of Valencia, establishes autonomous union within integral unity of Spanish nation. In accordance with the Article 1 of the Statute of Extremadura Autonomous Union, Extremadura, as the expression of historical-regional originality, establishes autonomous union within integral unity of Spanish nation. The Preamble and first articles of the Statute of Balearic Islands speak about Balerean people (El Pueblo de las Islas Baleares), etc.

3.1 Why "The State of Autonomies?"

The main law of 1978 does not directly determine the form of the territorial organization, however, it is clear that there was found the intermediate model of a regional state. The Constitution made the autonomy integrated with democratic institutions according to the idea of unity and the constitutional principle of the autonomy of regions and nations.

The form of territorial organization of a country established by the Constitution of 1978 had been differently perceived by the scientists (before the issue was solved by the Constitutional Court) – a plural state (Tiero Galvani), an autonomous state (Sanches Agesta), a regional state (Gregorio Peses Barba), unitary-federal (Arinio), unitary-regional (Fernando Rodriges), half federal, half centralized, half regional (Munios Machado), federal – regional (Fernando Trugilio), an autonomous state with federal nuances (Simon Tobalina), an integrated state (Rodriges de Minioni), an asymmetrical federal state (Jordi Sole Tura, Gonsales Ensinari), the state of autonomies (Klavelo Arevalo).

Despite the diversity of opinions there was reached the agreement about determining the form of the territorial arrangement of Spanish State as "Autonomous State", which is the result of evolution of the regional state.[35]

In the pre-constitutional debates the subject of discussion was the 145th article of the Constitution, according to which the federation of autonomous union was absolutely unacceptable. The problem that is expressed by the mentioned article, is not the problem of the federal state, the subject of discussion was the technical disorder of this article, as the 2nd and 3rd articles of the Constitution mean the solidarity of nations and regions and at the same time, the decentralization of the country. Thus, it is likely that the federal arrangement is the future of the country.[36]

The issue was finally explained by the Constitutional Court by the judgment of 6/1982, the 4th of November and the Spanish State was called "the Autonomous State" (El Estado de las Autonomías).

According to the judgment of the Constitutional Court, "the State of Autonomies" is the corresponding model of the country, first of all, in order to achieve the relevant cooperation

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35 *Rajoy M.,* Los Problemas de la Organización Territorial del Estado, AA.VV. Organización Territorial del Estado, Ediciones Universidad de Salamanca, Salamanca, 1993, 42.

36 Diario de Sesiones del Congreso, núm. 88, 1978. Sesión número 20 de la comisión de asuntos Constitucionales y Libertades Públicas, 3262-3263, Constitución Española, trabajos parlamentarios, cit., vol. II, 1536-1537.

between the state and the administrations of the autonomous union. This will provide with making the just decision. The cooperation is necessary for better functioning of the autonomous state. The "Autonomous State" is the type of the country, which, despite many unsolved problems, has the claim on development and progress.[37]

There were established the guarantees for "the Autonomous State" by the Constitutional Court – forming the concept of "autonomy" and ascertaining its boundaries. According to the decision of 4/1981 "Autonomy undoubtedly is the limited power subordinated to sovereignty, but its principle can't be understood as a unitary reality."

4. Political Situation

The mentioned harmony was violated in 2006, when, as a result of modification of the Statute of Catalonian autonomous union, Catalonia was considered as the nation. In accordance with the Article 1, "Catalonia, as nation, implements self-governance within the Constitution and the mentioned Statutes, which represents the basic institutional norm". The above mentioned aspiration of the Statute of Catalonia caused strict criticism of Spanish experts and politicians.

One part of experts considered that it might be the way to the new doctrine of Spanish constitutional law and order.[38] In 2010 Constitutional Court of Spain finished hearing of Constitutional suit of delegation of People's Party of the Congress of Spain against the provision of Catalonian Statute, which identified "Catalonia, as nation" (Cataluña como Nación) and "national reality of Catalonia" (realidad nacional de Cataluña). By Decree 31/2010 dated June 28, 2010,[39] Constitutional Court determined in regard to the "nation" that in accordance with the Article 2 of the Constitution of 1978, Spain recognizes only one – Spanish nation. The existence of other nations on the territory of Spain would disintegrate the foundation of the Constitution and political system. Constitutional Court can't permit the implementation of the above mentioned initiative – institutional modification of the system based on radical methods. The above mentioned can only be implemented thought Constitutional reform and not through the Statutory reform.

Political situation is also complicated by the events developed in recent years, especially by the crisis in Euro zone, which significantly impacts domestic politics of Spain.

Mass manifestation of September 11, 2012 which was held in Catalonia, showed, as minimum, that the situation between Spain and Catalonia is extremely tense. The even has deep resonance within as well as outside the country. Experts were already discussing the methods of divorce which would be less harmful for the both parties. On the other hand, the role of this new state, its relation with EU and other basic institution of the world is important. In the opinion of

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37 STS 64/1982 de 4 de noviembre, 174.

38 *Fernández Farreres G.*, Hacia una nueva doctrina constitucional del Estado autonómico?, Madrid, "Thomson-Civitas", 2008.

39 <http://boe.es/boe/dias/2010/07/16/pdfs/BOE-A-2010-11409.pdf>.

the Professor of Economy of Harvard University, "separately standing Catalonia will be one of the richest countries of the world".[40]

In 2012 Public Opinion Polling Center conducted Sociological survey on independence of Catalonia[41], results of which were published on September 26, 2012.[42]

The outcomes related to the question – what would they vote for in the case of referendum – were as follows:

Independence "Yes" – 51,1%

Independence "No" – 21,1%

Abstained – 21,1%

The answers to the question on possible territorial- organizational arrangement of the state of Catalonia were distributed as follows:

Independent state – 34%

Federal state – 28,7%

Autonomous union – 25,4%

How the both answers can be interpreted when the results related to independence are different? Those who wish Catalonia to be autonomous union, are not included among those who with independence ("No" and "Abstained" was divided among them). Besides, those who wish independent state (the second question) also wish independence (the first question).

The circumstance is interesting that the answers of those who wish federal state (the second question) to the question whether they wanted independence or not, might be divided between "Yes" and "No". These circumstances have conditioned the paradoxical results which were obtained: if the choice relates to independence, the answer "Yes" is unambiguous. When the choice is to be made among "independent state", "federal state" and "autonomous union", majority votes for independent state. But what is the choice is only between the "independent state" and the "federal state"? In this case the latter would win, as the answer would imply the votes, given in favor of "autonomous union".

As a result of the mentioned survey we could conclude that in answer to what Catalonians wish, Catalonians choose the latter of the independent state and the federal state. But it's not excluded that within the federal state, Catalonians' aspiration towards the independent state becomes stronger, although federal standards of the state of Spain lack important element like participation of territorial entities in the process of formation "ascerto"-state will through federal chamber.[43]

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40 *Rogoff K.*, "Catalunya seria uno de los paises mas ricos del mundo", 4 April, 2012, available (in Spanish) at: <www.ecomonia.e-noticies.es>.

41 Public Opinion Poll Center (*Centre d'Estudis d'Opinió*-CEO) is the authority of Catalonian Generalitete , which performs polling on elections, rating of political parties and leaders, post-election period. It was established based on the Decree of January 11, 2005.

42 <http://todoloqueseaverdad.blogspot.com/2012/09/preferencias-catalanas.html>.

43 *Khubua G.*, Federalism as Normative Principle and Political Order, Tbilisi, 2000, 90.

The answer of the Government of Spain to the demand of Catalonians is as follows: "neither Spain is the problem, nor independence is the way out"; "independence doesn't mean separation of Catalonia but the end of Spain".[44]

Individuality of Spanish model is well reflected by the position of Spanish authors. One of them considers that Spanish model of autonomies is a special contribution of Spain in Constitutional law, which has extremely big theoretical significance. And in the opinion of some authors, Spain only demonstrated sad originality, out of which, during decades, only autonomous chaos may emerge.[45] Spanish centrist politicians openly pronounce that "state of autonomies" should be abandoned in favor of federal model.[46] Following the development of the events, the answer to the above mentioned question will follows in the nearest future.

5. Conclusion

In the history of modern constitutionalism "the state of autonomies" is comparatively a new model. Spanish Constitution suggested the new form of territorial arrangement of a state. The Constitutional Court established the guarantees providing the system and "the state of autonomies." According to the Constitution, "Autonomy" is the right which the nations and regions integrated with the Spanish Nation have. Autonomy is the main principle of organizing the democratic state, which also includes the principle of unity. However, while discussing the example of Spanish State we can come to the conclusion that the evolution of "the state of autonomies" is in its crucial phase. It is obvious, that the acute problems existing inside the Spanish National State could not be solved with the help of regionalism . The detailed responses to the questions will be received in the near future. The parliament election of Catalonia on the 25th of November, 2012 can be considered to be one of the catalysts, the results of which the future of "the state of autonomies" will be more or less depended on. This election is considered to be the most important in the history of Catalonia that will be able to change the reality. And the events are developing at lightning speed, according to ex-president of the Generals of Catalonia, Jordi Pujoli, Catalonia is already ready for independence, only the situation they are in today is dramatic.[47]

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44 Alberto Ruis Galladron, Minister of Justice of Spain, see: <http://www.elperiodico.com/es/noticias/elecciones-2012/gallardon-independencia-sacar-catalunya-fuera-acabar-espana-2221644>.

45 *Hanf D.*, Bundesstaat one Bundesrat?, 32 (in: *Khubua G.*, Federalism as Normative Principle and Political Order, Tbilisi, 2000, 90).

46 < http://www.abc.es/20121008/espana/rc-monago-estado-autonomico-necesita-201210081156.html.>.

47 <http://www.periodistadigital.com/cataluña/barcelona/2012/11/05/jordi-pujol-cataluña-bueno-preparada-cadena-ser-mas-independencia-estatut-votaria-catalan.shtml>.

Lana Tsanava*

Regionalism as the Form of Territorial Organization of the State

1. Introduction

It is well known, that law is "the spirit of people", manifestation of spirit of the people. And as a proof of the above statement, Spanish and Italian nations, distinguished with their internal individuality and originality, established original legal system for territorial organization in the form of regionalism. Regionalism is created based on the modern trends, more and more noticeable in the states with the developed legal systems. The above trends include strengthening of Unitarian tendencies in federal states, and increasing decentralization in Unitarian states. Wide decentralization and at the same time, retaining the strong role of central government are the positive sides of unitarism and federalism consolidated in the regionalism.

Part of the scientists consider regionalism as decentralized unitarism, however other scientists review it as pre-federation or even federation. After the deep study of the system one can clearly see that regionalism is independent territorial organization form of units characterized with the unique signs. The present article reviews main characteristics of regionalism and accordingly the characteristics differentiating it from other forms. Moreover the article discusses the possibilities of regionalism, including solution of ethno conflicts and minorities, support to the social-economic development of the State. It has to be mentioned, that Spain has chosen the regionalism for overcoming the ethnic problems and separatism, as for the Italy, the objective of regionalism was to eradicate the disparity of regions. We can give positive answer to the question whether the above experiment was successful in the above European countries, as both of the countries managed to regulate acute problems in the country via the regionalism. Study of forms of territorial organization is especially important for Georgia, as it is still in the process of search for the organic form of territorial order. Sharing regionalism experience can become important for Georgia for eradication of ethno-conflicts and regional disparity.

2. Essence of Regionalism

2.1. Notion of Region

Word "region" originated from the Latin word "regere" and means management. Notion of region with its modern meaning is first encountered in antique Rome. Rome was divided into 14 regions, which were representing pure administrative-territorial units and lacked any type of

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independence. Soviet Georgian Encyclopedia defines region as large territorial unit,[1] in French, German and Spanish language dictionaries the word is defined as territory with individual characteristics. Region attained its first constitutional meaning in main law of Spain in 1931 year, which indicated that Spain consisted of communes, provinces and regions. Spanish literature defines region as territorial unit which is established under the influence of geographic, historic and social factors and the unit itself can be divided into different administrative units. Notion of region after the constitution of Spain was formulated in the constitution of Italy in 1947.[2] Region is historically established political union. Region is the part of something larger, whole; population residing in the unit is characterized with the feeling-emotional connections. Region is characterized with the complex of individual signs, based on which the population living in the region is considered as unity with firm connection by "others" too.[3]

2. 2. Regionalism, as State's Territorial Organization Form

2.2.1. History of Regionalism

Regionalism as state's territorial organization form was established in Spain and Italy following the defeat of Fascism regime, as the reaction to the dictatorship and strict centralization. Regionalism is based on wide decentralization, autonomy of territorial units. In other countries autonomy is granted to only specific part of the country, in case of regionalism, all regions of the country are equipped with the autonomy. The need to develop original form of the State was caused by the challenges faced by Spain and Italy. On the one hand Spain was faced with acute ethnic problems and Italy was faced with the problem of development of economically under-developed regions, on the other hand society was requesting decentralization of government in the whole country in the countries liberated from the fascist dictatorship. As it was inevitable to grant autonomy to Catalonia and Basque, Spain decided to implement decentralization via the autonomisation process in the whole country. Such approach enabled Spain to neutralize the perception of exclusiveness by one part of the State. Granting autonomy to only two regions historically struggling for independence could be perceived as the victory of separatist forces; however the total autonomisation of the country was perceived as the new model for territorial organization of the State.[4] System, which acknowledges the special rights of minorities, is economically and politically ineffective, limits free market economy and free movement of labor. The members of minority groups do not like to leave the settlement territories, where there are concessions established for them. In political terms, system which acknowledges idea of

1 *Melkadze O.,Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 55.
2 *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 4-7.
3 Ib., 8-9.
4 Ib., 86.

extraordinarity of certain group, divides the society and complicates the achievement of joint consensus.[5] Therefore, general decentralization policy has more advantages than the partial decentralization policy.

2.2.2. Between the Unitarism and Federalism

Some authors of regionalism mention regionalism as decentralized Unitarian state or pre-federation. It is true that regionalism, as form of state's territorial organization was created under Unitarian model, but it crossed the borders of unitarism, including decentralized Unitarian state. At the same time, it does not represent federalism as differs with several characteristics. Therefore regionalism is independent, distinctive form, which is created as a result of merger of advantages of unitarism and federalism, with the consideration of tendencies – principles of federalism are introduced in Unitarian state and vice versa. Regionalism influenced with Austrian-German theories was constitutionally acknowledged in 1947 Italian constitution and 1978 Spanish constitution. Later it was adopted in Sri-Lanka and South Africa.

2.2.3. What is Regional Autonomy?

Autonomy is related to many associations. On the one hand it is used by decentralized states in terms of administrative autonomy; on the other hand autonomy is related to the form of federal state. Regional form of autonomy cannot be considered as identical to the simple decentralization form and federal state. Unlike the regions of decentralized state, autonomy of territorial units in Italy and Spain is based on administrative self-organization and considers legislative government.[6] Regional territorial units like subjects of federation are given wide legislative and executive power. In some areas it even exceeds the federation subject with the scale of competence, but there is significant difference between them. First of all, this difference is reflected in the act determining the region's status. Regions are not equipped with the founding government adopting the constitution. However the rule for getting statutes differs from the rule on adoption of ordinary legislative act. Region's statutes determine its competence, institutional order of legislative and executive government, rules for their establishment and organization. In the process of development of their statutes, the autonomies are not equipped with the same level of freedom as federation subjects. The federation subject determines its own government organization and order, however in case of autonomies, the State constitution determines the main framework for internal structure and organisation; therefore governing system in the regions is generally unified and based on united principles.[7]

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5 *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 64.

6 *Janashvili L.,* Tendencies of Spanish Regionalism, Journal "Samartali", 1999, N1, 66 (in Georgian).

7 *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 71 (in Georgian).

2.2.4. Symmetry or Asymmetry?

All regions do not have similar status. In Spain Catalonia, Basque, Galicia and Andalusia have relatively higher status compared with other autonomies, which is determined by ethnic factors; therefore they are referred to as autonomies. Spanish researcher Hoakin Garsillio Morillio designates the asymmetry existing in the Spain with sport terminology and refers to them as "First League" and "Second League" autonomies.[8] However it has to be mentioned that under the constitution of Spain there is not a straightforward definition of autonomy competence, its expansion is possible with the agreement of State once in every 5 years' time. Via this mechanism competences between the national and historic autonomies are equalized gradually. Analogically in Italy five regions out of 20 – Sicilia, Sardinia, Valle D'aosta, Friuli-Venice- Julia, Trentino-Alto-Adie have special status. The reason for distinguishing Sicilia and Sardinia was their economic under-development, in case of remaining three other regions – the different ethnic-linguistic composition.[9] Therefore asymmetry of territorial order can be perceived as organic feature of regionalism.

2.2.5. Area of Authorities of Regions

The authorities of regions include social, cultural, health, local self-governance, local budget, finances, police, social security protection issues. Legislative and executive bodies are functioning in the regions. The head of regional government is equipped with dual representation, is representative of the state in the region and region's representative at general-state level. The regional parliament is established via the elections and under its competence it is authorized to issue legislative acts. It is strange, but in Spain the laws issued under the exclusive authority prevail laws adopted at general-state level; however in federalism the federal law is always hierarchically higher compared with the law of the subject of federation. However the central authorities have the capacity to draw their line. They are authorized to issue basis norms to ensure homogeneity of laws in regions.

Legal existence of authorities does not have meaning, if it does not have financial resources. Therefore, for the implementation of granted authorities the regions have their own financial resources, expressed in existence of own taxes as well as allocation of part of general-state taxes and exclusion on state subventions. Autonomy distributes these revenues on its territory based on its will, meaning that the regions have budgetary and financial autonomy.

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8 *Morilio K.G.,* Between Regionalism and Federalism: the Territorial Structure of Authority in Spain, Report on Regionalism and Local Issues at the U.S. National - Democratic Institute Conference (27-2, IV,1996) (in: *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 87).

9 *Melkadze O.,* Constitutionalism, Tbilisi, 2010, 163.

Regional languages are acknowledged as the state language at regional level. The regions are authorized to have their own flag, state emblem. As we can see, in functional terms regionalism is the state close to the federal standards. However, administrative supervision over the regions is implemented, which is unacceptable for federal regime. On the other hand, regions have local self-governance units, which determine the three level government systems in the country.

3. Regionalism as Political Movement

3.1. Factors Driving Regionalism

3.1.1. Regionalism and National State

The modern regionalism movement is originated from the different, peripheral groups of population, stressing their identity. Need for regionalism and its development were caused by the national state idea widely spread in 19th century. According to the concept of national state "Nation" and "State" are considered as identical categories, leaving no space for the existence of representatives of different ethnos and nationality. Therefore, for different groups regionalism is the mean for self-determination, self-realisation. Regional movement is not national movement. Regionalism strives to protect its own autonomy within the united States and not establishment of sovereign state. It desires unity only because of language, environment protection or other factors.[10] Regionalism is developed around the region and not the state.[11] Regionalism looks at different territories from the perspective of the whole.[12]

3.1.2. Theory of Internal Colonization

Besides the ethic-cultural difference the second important basis for the creation of regionalism is an economic factor. According to so called internal colonization theory "Rebel of provinces" is the result of unequal economic development levels in different territorial units.[13] In Spain the development of regionalism was mainly caused by increasing ethno problems, on the other hand the under-development of regions plaid decisive role in development of regionalism in Italy.

Regionalism as political movement requires decentralization of government and economic and social development of regions, increasing their political weight in the State. As G. Khubua states: "Regionalism is one of the forms of movement against the increasing centralization

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10 *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 10-11.

11 *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 59.

12 *Moore H.E.,* Regionalism and Permanent Peace, Journal "Social Forces", Vol. 23, No. 1, 1944, 16.

13 *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 12-16.

tendencies in the state governance, economic and political areas."[14] The main requirements for the regional movement are: realization of self-determination right, reinforcement of self-governance institutions, decentralization, including decentralization of bureaucracy, retaining originality.[15] All the above means that regionalism is in opposition to the centralized state. Regionalism movement is strengthening in the Europe. France, Belgium, Italy, Spain, Great Britain – none of these countries are free from regionalism; less problems in this regard are faced by Germany due to the well-developed federal structures.[16]

3. 2. Regionalism and Decentralization

3.2.1. Advantages of Decentralization

It has to be mentioned that decentralization is important for the regions as well as for the strengthening of central government. Modern state covers many authorities, which influence the population in all directions. The state regulation circle is so wide, that even in small countries it is impossible to settle everything at national level. Therefore the states try to delegate the solution of local issues to the local bodies, by this way state gets time for the fulfillment of more effective goals. According to Iohanes Traut central government gains more rights, freedoms and authority via decentralization than it allocates initially. Decentralized state government even without many rights is stronger than the centralized government.[17] Ineffectiveness of centralized management system was confirmed by the modern management. The success of the enterprise depends on autonomy of its branches and structural units.[18] Therefore for many years, the issue of decentralization was under discussion in Europe. The government is moving from the large cities down towards the provinces and towns with a high speed and large scale.[19]

3.2.2. Decentralization, as a Mean Ensuring the Subsidiarity Principle

Decentralization is a mean for ensuring the subsidiarity principle. Under the decentralization conditions subsidiarity is used for the vertical distribution of authorities between the various levels of government. There are issues which can be solved only by the central government, however estimation of local problems at State scale is ineffective. Subsidiarity principle considers transfer of authority to the level which will be able to implement them better

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14 *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 15.
15 *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 60.
16 *Newhouse J.,* Europe's Rising Regionalism, "Foreign Affairs", Vol. 76, No. 1, 1997, 74.
17 *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 150.
18 Ib.,118.
19 *Newhouse J*., Europe's Rising Regionalism, Journal "Foreign Affairs", Vol. 76, No. 1,1997, 68.

and at lower costs. Decentralization is a mean for government binding, the binding of government ensures protection of individual freedom of human being. As a result of institutionalization of decentralization the local democracy is developed, the relationship between the population and government becomes more transparent. Local representatives of local government are aware of local problems, they have more information about local situation and therefore their activities are more effective. Local representative has more trust and support from population compared with the emissar appointed by the central government. The political pluralism as well as promotion of local political leaders is also ensured. Decentralization is means for the adequate reaction on political situation. Retaining the state unity is sometimes impossible without decentralization. Denmark for the rejection of this principle paid high cost in the form of losing Schlesenwing and Golschtin, Netherlands lost Belgium and England – American colonies and etc.[20]

Decentralization of regional level is the mean for the realization of self-determination rights. Autonomy etymologically means leaving with own rules. Right to leave with own language, religion, culture, habits and traditions enable the population of region to retain identity, without losing identity to realize the right for self-determination. Regionalism ensures "diversity in unity and unity in diversity".[21] Financial independence of regions supports economic development of regions. Equal development of regions creates possibility to have equal density of population, solving the problem of "tadpole" capitals and towns.

4. Spanish Regionalism

4.1. Historic Introduction

4.1.1. Beginning of Spanish Constitutionalism

1873 year was important stage in history of Spanish constitutionalism. In 1873 the Spain was declared as Republic. Republicans came to the government, majority of them were federalists. Federalists turned out to be the only political force considering the positive ways for the solution of acute national autonomy problem. Federalism managed to consolidate the interests of various political parties and other stakeholders, and moreover federalism was the form relevant to the existing political situation.[22] At the same time ideology of federalism is the organic part of Spain's history, as Spain was never the centralized state. Present regions of Spain were independent kingdoms and were jointly part of confederation type of state of Spain.[23] But federalism with the first republic of Spain became the history, as general Pavia dissolved the

[20] *Gogiashvili G.,* Comparative Federalism, Tbilisi, 2000, 209.
[21] *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 32.
[22] *Janashvili L.,* Evolution of Spanish Regionalism in Constitutional Legislation, Journal "Human Being and Constitution", No 4, 2002, 59.
[23] *Payne S.*, Nationalism, Regionalism and Micro Nationalism in Spain, "Journal of Contemporary History", Dedicated to Walter Z. Laqueur on the Occasion of His 70th Birthday , Vol. 26, No. 3/4, 1991.

Parliament in 1874 and restored the monarchy. Under the strenuous political situation in 1931 parties with republican orientation won the parliamentary elections. Monarch left the Spain and the republican management-government form was peacefully restored in Spain.[24]

4.1.2. Federal or "Integral State"?

In 1931 the issue of determination of territorial settlement of the state was raised again. Notion of federalism was associated with the unsuccessful experiment of 1873 year which later resulted in anarchy. Society perceived the federalism as division of sovereignty which would result in separation of the state. The issue of Catalonia required solution; the above issue was finally solved in original system, which was opening ways for the facultative autonomy. Facultativity was reflected in the right of local government to gain autonomy via approaching the central government (if desired). This was formula for "integral state", which was defended by the socialist member of parliament Khimene de Asua in 1931 year and considered synthesis of Unitarian and federal states with the consideration of all forms of local autonomy. This doctrine of integral state was borrowed from Hugo Preus.[25]

In 1932 year Cortes commenced development of draft law on autonomy of Catalonia. The parliamentary committee made significant changes to the draft presented by the representatives of Catalonia, the text of the draft became reasonable, it did not any more contain the irritating provisions like "on the federation of Spanish people". However this draft also became the subject of major critic, the Catalan were blamed in breakdown of constitution of Spain; finally the parliament approved only 9 articles from the presented statutes. Further autonomisation of country was not achieved at this stage too, as under the difficult foreign and internal conditions the government could not manage to overcome the problems. With the support from German and Italian fascist forces the unrest was transformed into the civil war. Finally, following the civil war in 1936-1939 years, the dictatorship of General Franco was established in Spain. During Franco's long term dictatorship the government was implementing the strict centralization policy. The autonomies were annulled, and mentioning of any autonomy was forbidden under the blame of separatism. Franco's regime was distinguished with two pathological drives – anti-communism and anti-separatism.[26] Oppression of regional self-governance resulted in acute ethnic problems. Franco's National Homogenization program gave the opposite results and his ideology became the strong catalyser of activation of regional movement.[27]

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[24] *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 80.

[25] *Lovo P.,* Modern Big Democrats (Translation of Institute of Political Sciences of Georgia), Tbilisi, 2002, 565.

[26] *Moreno L.,* Federalization and Ethno Territorial Concurrence in Spain, "The Journal of Federalism", 1997, 67 (in: *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 83).

[27] *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 81-84.

Franco during the last years of his leadership, acknowledged Khuan Carlos as the successor to the throne and following his death, in 1975 the power was peacefully transferred to the heir of the throne. After the restoration of democracy the pre-constitutional autonomies were established. In 1978 prior to inaction of constitution the Basque and Galicia were granted autonomy preliminarily. The valid constitution reflected the technique related to the autonomies, which was developed in 1931. The above technique considered that the regionalization system should not be determined at once, but the state should first acknowledge the right of various regions for autonomy.[28]

4.2. Types of Autonomy

Constitution of Spain distinguishes two types of autonomy. Catalonia, Basque, Galicia and Andalusia have the autonomy of first level. Autonomies differ from each other with the scale of competences. Authorities of ordinary autonomies is limited with 22 competences indicated in article 148 of constitution (organization of local self-governance, agriculture, fishing, museums and cultural inheritance, sport, culture, teaching the language of autonomous region, administrative police and etc.).[29] First level autonomy unlike the second level autonomy envisages the authorities, which are not specially granted to the central government by the constitution.[30] Moreover, according to the part 2, article 148 in 5 years' time the autonomies are given possibility to gradually widen their competences via the change to their status but within the framework determined under the article 149, on expense of competences belonging to the special state governance.[31] Difference between the first and second level autonomy is in the process of acquiring the State's special authorities. The first level autonomies are entitled to directly receive expanded authorities, and the ordinary autonomies can acquire such authorities gradually after the 5 years' period via the change of status.

4.3. Ways to Acquire Autonomy

4.3.1. Ordinary Procedure

Constitution also considers the different ways for the achieving autonomy. The autonomy can be acquired under the local or state initiative. In case of local initiative there are three options, which according to Philip Lovo can be referred to as normal, special and deviation from normal processes.[32] Normal process is provided in article 143 of constitution. According to constitution neighboring provinces, island territories and provinces which represent the one historic part, with joint historic, cultural and economic signs can create autonomous societies (autonomous

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28 *Lovo P.,* Modern Big Democrats (Translation of Institute of Political Sciences of Georgia), Tbilisi, 2002, 565.
29 Ib.,566.
30 *Janashvili L.,* Tendencies of Spanish Regionalism, "Journal Law", 1999, No 1, 66.
31 Constitutions of Foreign Countries, Part III, *Gonashvili V.* (Editor), Tbilisi, 2006, 207-209.
32 *Lovo P.,* Modern Big Democrats (Translation of Institute of Political Sciences of Georgia), Tbilisi, 2002, 566.

unions).[33] Implementation of such initiative is related with quite difficult procedures. Initiative on getting autonomy can be presented by council of stakeholders (delegates) or inter-island body, as well as two-third of municipalities, who represent the majority of their populations. In case of unsuccessful initiative it is possible to re-initiate in five years' time. This first way which is related to the normal way is the mean for achieving the second level autonomy. The draft statutes for the second level autonomy is developed by the council (convention) which comprises of province council or inter-island body and parliament members and senators elected among them; the document is passed to the Corteses of Spain for the acquiring the statutes according to the rules for the adoption of organic law.

4.3.2. Special Procedure

Special procedure enables the autonomous unities to directly acquire the first level competences. According to article 151 the senators and regional members of parliament willing to jointly establish autonomy can convene meeting (convention) with the objective to develop statutes for the autonomous entity. Following the adoption of statutes by the absolute majority of the congress the draft statutes is transferred to the constitutional commission of congress, which reviews the statutes document during two months' period together with the members of parliament participating in the council with the aim to jointly determine the project. Following the achievement of consent the text is transferred to referendum. If the majority of population in all provinces accepts the statutes draft, it is transferred to the general Corteses, both chambers of which ratify the document; the document is finally signed by the King and it is published as a law. If the consensus is not achieved between the constitutional commission and representative council (convention) the draft statutes is transferred to the general Corteses in the form of draft law. The text approved by this body is transferred to referendum; in case of support from population the promulgation is continued according to the above mentioned procedure. If any of the provinces rejects the draft, the autonomous entity will be created without participation of such province.[34]

4.3.3. Pre-constitutional Autonomies

Process of deviation from the norm is considered under the miscellaneous provisions of the constitution; these provisions cover so called "historic" nations, such as Catalonia, Basque and Galicia. "Territories which via referendum acquired statutes projects on autonomy in the past and have status of temporary autonomy at the moment of publishing the constitution, can immediately undertake the measures considered under paragraph 2, article 148 of the constitution, immediately after the representative bodies of pre-autonomy with the absolute majority of votes and inform about this the government."[35] This provision can be interpreted in the following way – as establishment of deviation

[33] Constitutions of Foreign Countries, Part III, *Gonashvili V.* (Editor), Tbilisi, 2006, 204.
[34] Ib., 210-211.
[35] Ib., 218.

procedure for the acquiring of autonomy and granting it simultaneously to the above three historic regions, as they were granted autonomy under the 1931 year constitution.[36]

4.3.4. State' Sauthority in the Process of Autonomy Creation

Autonomies may be created under the initiative of State. According to the article 144 of the constitution of Spain there are three options: 1) Territory does not exceed the territory of one province (it covers the African territories of Suete and Melilla); 2) If the territory is not part of any province; 3) If local authorities abstain to give autonomy, Corteses are able to initiate the autonomy formation process.We cannot compare the autonomy with own status with the subject of federation despite the type of competence they are granted, as they are limited by the constitution at a much higher level. Statutes shall determine the rights of autonomy with the 149 article and if the autonomous entities exceed the constitutional statutes before the referendum then the unit cannot avoid the rising issue on unconstitutional action.[37]

4.4. Institutionalization of Autonomies

Constitution has two approaches to the institutional order in autonomies. In case of ordinary autonomy the constitution determines only the few requirements for the contents of the statutes: it should contain the title of autonomy, borders of territory, its authorities, title for the autonomy institution, structure and location. In case of autonomies acquired via the special procedure, their structure is provided in the constitution, according to which autonomous organization consists of legislative council elected via general voting and the proportionate representative system and the government council, implementing executive and administrative functions. The council has chairman, elected by the council among its members and appointed by the King; he/she is the highest person of autonomous organization and representative of the state in autonomous organization. The highest body of law making of autonomous organization is under the jurisdiction of the Supreme Court (article 151.1). Thus the autonomies with fewer competences have more freedom. However all autonomies are not functioning under the above system.

4.5. System for Separation of Competences

4.5.1. New Form of "Cooperative Federalism"

As for the legislative competences the law of autonomies is equivalent to the state laws; Spanish regionalism in this regard is analogues to the federalism. The system determined under the

[36] *Lovo P.,* Modern Big Democrats (Translation of Institute of Political Sciences of Georgia), Tbilisi, 2002, 567.
[37] Ib., 568-569.

constitution of Spain can be characterised as cooperative federalism. Besides the supremacy of constitution, there is no hierarchical difference between the acts of the State and autonomies. However in the modern cooperative federalism the majority of competences distributed between the two subjects are competitive and not exclusive. Article 149 covers the issues belonging to the area of state's special governance. But as mentioned by Philip Lovo "the very small part of these rights is special, when they exclude any intervention of autonomous unity. Part of these rights are included in the competences of autonomy(..), part consider the execution of governance by the autonomous unity(..), part is limited by the basis legislation (..), others are defined as distributed rights."[38] Article 149 indicates to the authority of the State in the form of basis legislation, meaning that autonomies have right to fill up the framework defined by the State with their own legislation.

4.5.2. Expansion of Competences of Autonomies

According to the article 150 it is possible to transfer extraordinary authorities to the autonomies. The general Corteses can transfer to autonomies the authority to adopt legislative acts on the issues belonging to the exclusive governance of the state. They can also transfer the authorities "which can by their nature be subject to transfer or delegation". In this case the transfer of financial resources should be also considered. The miscellaneous provisions go further; they acknowledge the rights of so called foral territories – Basque and Navarra. Foral means that the regional competence does not depend on the will of central government.[39] However it has to be mentioned that the constitution of Spain together with the wide authorities of autonomies considers the special right of the state to restrict independence of autonomous unity. For the harmonization of autonomous processes the state has right to issue basis, framework laws, including the law on issues coming under the special governance of autonomy. Spain used this right for the harmonization of processes of autonomies, which resulted in a big unrest. Finally the constitutional court acknowledged the above law as the basis law.[40] The system for competence distribution also covers the residual competences, which are taken from German federalism. In case of residual competence the state law prevails according to the principle that the state law is the public law and the unity laws are the private, fragmental laws and should match the integral system.[41] "All issues which under the statutes are not competences of the autonomy come under the governance of the state" (Article149.3).

Such complex system for distribution of competences creates many conflicts and is subject of endless disputes. Constitutional court has undertaken the difficult and "ungrateful" function of

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38 *Lovo P.,* Modern Big Democrats (Translation of Institute of Political Sciences of Georgia), Tbilisi, 2002, 573.
39 *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 53.
40 *Lovo P.,* Modern Big Democrats (Translation of Institute of Political Sciences of Georgia), Tbilisi, 2002, 571.
41 Ib., 575.

interpretation of unclear constitutional provisions.[42] According to the article 161 of the constitution constitutional court is entitled to make decisions on disputes between the autonomous units and the State or between the autonomous units. The state as well as autonomous government is entitled to request the cancellation of acts adopted by each of them. During the initial period of autonomy of Basque and Catalonia the government transferred many laws to the constitutional court, which made it possible to rationally distribute competences between the centre and the regions.[43]

4.6. Finances

Competence without financial resources is meaningless. Therefore the issue of distribution of finances between the autonomies is important. As for all other issues, Spain uses the differentiated approach for this case too; we can distinguish foral and ordinary systems. Foral system is valid for Basque and Navarra; the other 15 autonomies use the ordinary system. According to article 157 the finances of autonomy include: a) taxes, which were partially or fully transferred by the state; b) own taxes, special customs fees and payments; c) inter-territory compensation fund; d) revenues received through the transactions within the private law; e) profits generated through credit transactions. Autonomy uses its autonomy in the process of distribution of funds and independently allocates funds based on own view.

4.7. Supervision and Control of Autonomies

Oversight of autonomies is one of the elements distinguishing Spanish regionalism from the federal states. Federalism does not acknowledge the institute of administrative supervision. According to the different competences the different types of supervision are determined. Control over the autonomies in relation to the legislative acts is implemented by the constitutional court, in case of delegated authority – by the government, in case of autonomous governance and with regard to its decisions – by administrative justice bodies, in case of economic and budgetary activities – estimation chamber (article 153). Article 155 of constitution considers the institute of "federal compulsion". If the autonomy is not fulfilling undertaken obligations or its actions create serious danger for the general interest of Spain, and the warnings had no results the government is entitled to implement required measures with the consent of absolute majority of senate. It is also important that there are representatives of the state in the provinces constituting the autonomy, in the form of governor, who supervises the social order.

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42 *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 52.

43 *Lovo P.,* Modern Big Democrats (Translation of Institute of Political Sciences of Georgia), Tbilisi, 2002, 575.

4.8. "Country of Basques"

4.8.1. Status of Basque

For the creation of full idea about the Spanish regionalism it is important to discuss the Basque country holding the special status. Basque region is characterized with the integration of smaller autonomous units under the autonomous territorial unit; in other words the autonomisation of the country has stage nature and is represented by several levels.[44] Basque consists of Alava, Hiposkua, Biscayan provinces and Navarra. According to the autonomous statutes of Basque, Basque people for the expression of their nationality and for the implementation of their self-governance establishes autonomous unity with the title Euskadi or Country of Basques, under the united Spanish state.[45] The statutes determine the flag of Basque, moreover the Basque language is acknowledged as the official language of Basque. The political rights are assigned to the persons who use the territory of Basque for living according to the country's legislation. Basque with its competence exceeds the competence of other autonomies and is the first level autonomy. The area of authorities, besides the rights granted to all autonomies, include development-retaining of local civil legislation, establishment of administrative, economic and procedural norms, establishment of region's election legislation, fishing in internal waters, establishment of irrigation systems for the irrigation channels installed on the rivers located on the territory of Basque, pharmaceutical activities, culture, internal trade, industry development, rail, air and sea transportation of Basque country, ports, airports and metrological services, tourism and sport, social development and etc. Statutes separately determine the areas, where the autonomous unity ensures the execution of general-state legislation, including: penitential legislation, labor legislation, international markets, ports and airports of the State importance, intellectual and industrial property. International relations are one of the most important areas. Basque is entitled to conclude agreements on collaboration with other regions, however before concluding such agreement it has to inform the general Cortes.[46]

Among the competences of Basque it is important that it is entitled to have own police, led by the Basque government. However the same statutes determine the areas where only the country's security service and military forces are entitled to act. Thus there are two cases of intervention: 1. Basque government approaches the state for assistance and 2. Central government makes such decision, in cases when there is a threat damaging the general-state interests. However for the above the consent of Security Council, consisting of representatives of centre and regions

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44 *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 110.

45 *Janashvili L.,* Basque Autonomous Unity, Legal Basis, Journal "Human Being and Constitution", 2001, No 1, 66.

46 *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 111-114.

on the parity basis, is required. Finally for the utilization of security forces the government is responsible to the general Corteses.[47]

4.8.2. Basque Authority Structure

Basque authority structure is represented by the parliament, government and chairman of the government. The parliament is elected for four years' period. Chairman of the government is elected by the parliament and approved with the decision of Monarch, who is the supreme representative of Basque as well as supreme representative of the state on the territory of region. On the territory of region the high court of Basque is the Supreme Court instance for the region; chairman of the court is appointed by the Monarch.[48] Central government restored the traditional privileges of Basque region including the autonomous taxation system. Despite the wide authorities, exceeding the competence of federation subject, the nationals from Basque are of the view that the mentioned statutes do not match their historical statutes. However, according to Stenly Payne, the Basques had their culture, language for the centuries, but "Basque Nation" is the concept of 1890-s years. As a result of centralization Basque province lost less than other provinces, such as Aragon, Catalonia kingdoms. Basque in medieval centuries was never fully independent unit. However the Basque movement is full of total separatism. The movement is radical, segregated, intolerant and even racist with the indication of their distinctiveness.[49]

4.9. Characteristics of Spanish Regionalism

This is the form of territorial organization of Spain. The facultative principle of autonomies and definitions of competence issue reveal that the State does not wish to grant wide competences to the regions, but if the regions urge for such competences the state retains the way backward and determines exceptions for all rules. The state in case of request from the regions is ready to grant everything except for the secetion, including issues coming under its special governance. As a result we have the dynamic process which is directed towards the widening of regions' competences. Due to the wide authorities of territorial units Spain is often reviewed as federal state or the state functioning as a federal country. However several important aspects differentiate it from federation. First of all, in federation the member countries have no subordinate relations with the centre; autonomies legally depend on the state. The power of federal subjects has constitutional-legal nature; the autonomies get it from the central government.[50] Federal state

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47 *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003, 113-114.

48 Ib., 114-115.

49 *Payne S.*, Nationalism, Regionalism and Micro Nationalism in Spain, "Journal of Contemporary History", Dedicated to Walter Z. Laqueur on the Occasion of His 70th Birthday , Vol. 26, No. 3/4, 1991.

50 *Janashvili L.,* Basque Autonomous Unity, Legal Basis, Journal "Human Being and Constitution", 2001, No 1, 63.

besides the wide competence of the federation subject has second important characteristic – participation of federation subject in the management of the state. All important decisions are made with their participation; moreover the connection body of the subjects, the higher chamber of the parliament plays important role in the legislative process, the above is not given in case of Spain. The role of Senate in the legislative process is essentially limited with the technical corrections or right to postpone the discussion; in case of autonomies the consent of the senate is necessary for the conclusion of agreements between the autonomies, in case of intervention of central state in the activities of regions and distribution of financial resources from the inter-territorial equalization fund.[51] Hence senate does not have capacity to make important influence over the formation of the State's will. Additionally there is no administrative supervision, no state representatives in case of federalism. Moreover regions are limited with constitution similar to the federation subjects as well as by the state basis laws. Thus Spanish model is a compromise between the centrifugal and pro-central elements, Unitarian and federal orders.

And finally, there is dispute on whether the work of Spanish legislators on the creation of new form of state organization is successful. Part of the scientists is of the view that, this is special contribution of Spanish legislators to the constitutional law theory, other part of scientists think that Spain displayed the unfortunate creativity.[52] However if we consider the past of Spain which was full of unrest, it can be stated that the regionalism is functioning successfully.

5. Conclusion

At the end of the article we can make several conclusions related to the regionalism and we can provide our recommendations regarding the issues of future territorial organization of Georgia.

Regionalism is an independent form of territorial organization, which via the integration of unitarism and federalism acquired its own distinguished features, several features discussed in the present article, which do not exist neither in unitarism nor in federalism, confirm this idea. One of the main characteristics of regionalism is its dynamism. As a result of dynamism regionalism became flexible order fitting the "practical requirements". This form makes it possible to eradicate the acute processes in the country.

In case of Georgia we can distinguish several aspects to justify why regionalism can be chosen as the future form of territorial organization. First of all, common historical preconditions are relevant for Georgia and Spain-Italy. Both Spain and Italy, like Georgia, were divided in small kingdoms. Following the consolidation both countries found themselves under the strict centralization conditions. Decentralization, as a reaction to the dictatorship was the request of

[51] *Khubua G., Traut I.,* Federalism, Regionalism and Autonomy, Tbilisi, 2001, 48.

[52] *Melkadze O., Tevdorashvili G.,* Regionalism – Form of State's Territorial Organisation (Regarding the Georgian Perspectives), Tbilisi, 2003.

whole society and not only the various ethnic groups. Georgia has also undergone the strict centralization process. There are acute ethnic problems in Spain; Italy was distinguished with under-development of regions and misbalance. Georgia faces both of the above problems. Hence there is possibility to have means for satisfaction of requests from the separatists and on the other hand, to ensure equal distribution of general prosperity all over the country.[53]

It can be stated that constitution made its choice in favor of regionalism. With the consideration of the fact that the constitution declares the country as united and undividable, it also plans to achieve wide decentralization, creation of bicameral parliament and separation of competences on a normative basis. Combination of these two principles is possible only in the regional state.

Regionalism is a moderate model; federalism is the most radical decentralization alternative. For taking the state from the crisis condition the fast, flexible and sometimes radical and original approaches are required, which is possible under the unitarism. Regionalism includes the freedom and compulsion, centralization and decentralization. Centralization is required for the implementation of radical reforms; decentralization is required for ensuring the freedom. These two elements will enable Georgia to establish social-economically equally developed state. Therefore the constitution should establish the decentralized form of territorial organization. It should not include the vision for future or action program. Communist constitutions belonged to such system which were attractive but described the "future" using the abstract notions.[54] Hence based on the above the conclusion is that it is expedient to share the regionalism experience before the achievement of territorial unity, with the consideration of interests of lost territories as well as remaining Georgia.

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53 *Kedvel Ch.,* Views on Future Decentralisation of Georgia, Journal "Human Being and Constitution", 2000, No 4, 174.

54 *Shaio A.*, Self-limitation of Authority, Tbilisi, 2003 (Translated from English by *Maisuradze M.*, Scientific Edition and Introduction by *Ninidze T.*), 1.

Tamar Gvaramadze*

Sanctions for Tax Code Violations

Liability to fulfil tax liabilities is reinforced via the Constitution of Georgia, indicating on the special importance of tax payments.[1] Taxes are one of the main sources for the generation of budgetary funds required for the country existence.[2] For example, according to the official data from the Ministry of Finance, during 2011 year State Budget of Georgia mobilised about GEL 6 500 million revenues, out of which GEL 5 802 million was received in the form of taxes comprising 88% of total budgetary revenues.[3]

The taxes are considered as the basis for the sovereignty of European countries.[4] Accordingly creation of relevant mechanisms for tax setting and collection is one of the characteristics determining the sovereignty and independence of the country and without them it would not be possible to implement management of the State.[5]

Due to the high importance for the formation of state and budgetary funds, the issue related to the taxes are very relevant in the scientific literature of western countries. The special interest is drawn to the results of non-fulfilment of tax liabilities, which can be explained by high society and public interest expressed towards the state budget. Therefore, society's interest towards the issue of imposing responsibility over the tax payers in case of non-fulfilment of tax law requirements is always high.[6]

Therefore, it is very important and interesting to understand how each state regulates issues related to the violations of tax code. Such regulations reflect the attitude of State towards the persons violating tax legislation and responsibility measures set for them. Moreover, the scientific studies on tax sanctions are also interesting.

Georgian legislative literature does not provide a study for the legal nature of responsibility measures determined for the tax violations, objectives of setting such responsibility and functions,

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1 Article 94, Part 1 of the Constitution of Georgia, 1995 (as of 14 August 2012), available (in Georgian) at: <www.matsne.gov.ge>.

2 *Rogava Z.*, Taxes, Taxation System and Tax Law, Tbilisi, 2002, 11.

3 See official information on the web-page of the Ministry of Finance of Georgia: <http://www.mof.ge/News/4914#> [14.08.2012]; and same for the data on fulfilment of 2011 year State Budget: <http://www.mof.ge/common/get_doc.aspx?doc_id=9288> [14.08.2012].

4 *Kovics L.*, European Commission Policy on Exit Taxation, "European Tax Studies", No 1, 2009, 4.

5 See: Tax Policy in the European Union, European Commission <http://ec.europa.eu/publications/booklets/move/17/txt_en.pdf> [24.08.2012].

6 *Hatfielki M.,* Tax Lawyers, Tax Defiance and the Ethics of Casual Conversation, "Florida Tax Review", No 10, Volume 10, 2011.

which are the areas of high importance. The objective of present work is to study the main definitions of sanctions determined for the tax violations provided in western scientific literature; to discuss their functions and objectives for introduction; and to study Georgian legislative regulations for the tax sanctions. The present work separately discusses the fine, as special form of sanction imposed for the tax code violations. Moreover, relation of such fines with the similar institute of public law will be discussed. The topic of the research is the sanctions determined by the Georgian legislation, which are set for committing classical type of tax violations and not the sanctions, which are imposed for the violation of customs rules and which, following the reform to the customs and tax legislation[7] are part of tax legislation.

Research and study of above discussed issues gives us possibility to provide the scientific views on the research topic in the form of conclusions, which is important for the development of Georgian tax law science.

The descriptive and comparative legal research methods will be used in the present work.

1. The Sanctions Determined for the Violation of Tax Code and Different Types of Sanctions

Mankind during its existence has established various types of punishments (various types of responsibilities) for various types of offences, including: death penalty, imprisonment, restriction in certain rights, penalties and etc. Listed punishments are still the most spread types of sanctions in modern society. In various legal systems, approaches to the setting different measures of punishment/responsibility for legal offences of various levels differ. For example, in USA for committing less serious crimes (which in Georgian legal system is equivalent to the administrative offence) initial punishment is in the form of penalty, in terms of heaviness of the crime the next punishment level considers the probation, then limiting of some rights and finally imprisonment. As the scientists indicate, in case of serious offences (crimes) it is possible to use combination of several types of sanctions against the offender.[8]

Majority of Continental as well as Anglo-American legal systems consider pecuniary penalties for violation of tax legislation.[9] However, there are other sanctions set together with the penalties. Moreover, as it was mentioned in the introduction to present article, the topic of present

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7 In 2010 the government of Georgia initiated reform to the tax and customs legislations; as a result in 2010 the Parliament of Georgia adopted the new Code, which united the tax and previously valid customs legislation. See New Tax Policy Direction of the government of Georgia <http://www.mof.ge/RevenuePolicy#> [20.08.2012] and official web-page for the Parliament of Georgia: <http://www.parliament.ge/index.php?option=com_content&view=article&id=2&Itemid=34&lang=ge> [08.10.2012].

8 *Becker G.S., Landes W.M.,* Crime and Punishment, An Economic Approach, 1964, available at: <http://www.nber.org/chapters/c3625.pdf> [20.03.2012].

9 *Basila A., Katz R., Katz N.D., Finkelstein H*., New Preparer Penalties, "CPA Journal Federal Taxation", 2008, 40-45; *Merrill P., Prior A*., Tax Law Changes in the Wind, "Financial Executive", 2004, 54-57.

article is tax sanctions, which are established only for the classical type tax violations and not related to the responsibility measures set for the violation of customs rules, which are envisaged under the tax code in case of Georgia.

Different legal systems have differing approaches to the tax sanctions. For example, in Federal Republic of Germany imprisonment and pecuniary penalties are determined as criminal responsibility for the violation of tax code, and only pecuniary penalty is determined as a form of administrative responsibility measure.[10]

Imposing administrative responsibility for violation of tax law is not characteristic to the Great Britain, as to the country with general law; Great Britain system considers only criminal and civil responsibilities. Moreover the pecuniary penalty is a form of sanction, assigning of which within certain amount, is made by the tax bodies themselves without relevant court decision.[11]

Taking into account the fact that valid Georgian tax code considers violation of customs rules together with the classical violations of tax code, the following sanctions are set for violations considered by tax legislation: warning, fine, pecuniary penalty, restricting right to cross Georgian customs border, free confiscation of goods or/and transport of the offense.[12] The new approach towards the responsibility measures for the tax code violations is in place, which does not any more have only financial form. The above is caused by the fact that the part of listed sanctions except for the penalty and warning, are set for the violation of customs rules and are not responsibility measures for classical tax code violations. Mentioned above sanctions do not belong to the research subject of present article.

One can classify sanctions envisaged for the violation of tax code based on different characteristic.

For example, relevant sanctions can be divided into two main groups based on analysis of legislative norms: financial (pecuniary) and non-financial sanctions.

In addition to the above mentioned classification, western scientific literature discusses other types of classifications. According to the above classifications the sanctions can be divided into direct and indirect sanctions. Direct are sanctions, which are imposed directly for violating the tax regulation and such sanctions are determined under the tax legislation of relevant legal system. This type of sanctions often have a financial (pecuniary) form. However there are cases when sanctions are determined according to non-tax legal norms. For example, in certain countries, entrepreneur whose activities are subject to licensing is required to present relevant document annually for license re-issuing; the above document confirms payment of taxes. If tax payer has not paid taxes the license will not be renewed and entrepreneur will be assigned relevant responsibility for not renewing the license. Moreover the confirmation of tax payment may not have the form of direct sanction. For example, in certain cases, to

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10 See Chapter 8, Fiscal Code of Federal Republic of Germany, available (in English) at: <http://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html> [15.03.2012].

11 *Whitehouse Ch., Stuart-Buttle E.,* Revenue Law – Principles and Practice, 11th Edition, London/Dublin/Edinburg, "Butterworths", 1993, 20-22.

12 Article 270, Part 2, Tax Code of Georgia, 2010 (as of 25 June 2012), "Legislative Matsne", No 54, 2010.

withdraw credit from the bank it is required to confirm the fulfilment of tax liabilities by the tax payer.[13] By their essence, the two sanctions discussed above have economic nature; however in the first case it has effect on revenue generation by the person, as limits the activities or imposes additional penalty; in the second case – sanction hinders person's involvement in civil turnover.[14]

Georgian tax legislation does not consider such indirect tax sanctions. As for other legislative acts, similar type limitations are not considered by Georgian legislative acts, however it does not exclude existence of internal regulations in banking or finance-credit institutions, according to which existence of tax indebtedness can be considered as basis for denial of credit. However, we cannot generalise and view them as separate forms of sanction.

Anglo-American legal literature, theory differentiates additions to the taxes and sanctions, however for both cases term sanction can be used, as they have similar legal nature.[15] Anglo-American legal system is characterised with the fact that there is no separate administrative responsibility, as defined responsibility for administrative misconduct; the above legal system considers only civil and criminal legal responsibility. Therefore civil as well as criminal responsibility measures are established for tax code violations which can be used separately as well as jointly.[16] American scientists often divide tax sanctions into these forms. The important difference caused by assigning these two types of sanctions is that in case of penalising person under the civil rule the burden of evidence is with the tax payers; as for the criminal law cases, such liability is totally transferred to the prosecutor. These forms also differ with the methods of funds recovery; if penalty is assigned using the same ways and methods as for the principal amounts of the tax liability, then sanctions belong to civil type; however if decision is made by the court then there is a criminal law sanction in place.[17]

Classification of tax responsibility measures in civil and criminal sanctions is characteristic of precedent law system of European court for Human Rights and not only of Anglo-American legal system. According to article 6 of European Convention on Human Rights, right for fair court is limited with only criminal accusation or civil legal right. In order to have trial / dispute on violation of multi-aspect right for fair trial at European Court for human rights, he/she should

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13 Problems of Tax Administration in Latin America, Joint Tax Program Organization of American States Inter-American Development Bank, Economic Commission for Latin America, *Hopkins J*. (Editor), "Johns Hopkins Univ. Press", 1965, 313-314.

14 Ib., 316.

15 *Cords D*., Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs, "Brigham Young University Law Review", No. 6, 2005, 1565-1571 <http://lawreview.byu.edu/archives/2005/6/2CORDS.FIN.pdf> [23.08.2012].

16 Ib.

17 Problems of Tax Administration in Latin America, Joint Tax Program Organization of American States Inter-American Development Bank, Economic Commission for Latin America, *Hopkins J*. (Editor), "Johns Hopkins Univ. Press", 1965, 319.

prove existence of criminal accusation or civil rights envisaged by article 6 of Convention.[18] Whether the violation belongs to the administrative misconduct and therefore is considered under the article 6 of the law for "criminal law accusations" or the violations come under the civil law clauses, the Human Rights' European Court decides based on the criteria established via precedent law practice during the years. The court in many of its decisions indicates that proceeding from the convention objectives to define the nature of responsibility to be imposed over the person it is not sufficient to define to which area of law it belongs under the national legislation of the country. The issue should be checked for three signs, one of which is the level of punishment for such an action.[19] In many decisions court indicated that if sanction with its essence was much heavier than the loss incurred due to the misconduct then it was a criminal law sanction, which was aimed to punish and not the civil law sanction which was aimed to get relevant compensation. Above approach has been indicated in many court decisions and is part of precedent court at present.[20] The court indicates that criminal law sanctions are differentiated with their punishing nature. Accordingly the administrative penalties including tax penalties with the similar nature are considered as criminal law sanctions.[21] Thus the court despite the consideration of sanction under the tax legislation, may consider the sanction as criminal law responsibility measure based on size, level and strictness of the sanction.

1.1. Financial Type Sanctions and Basis for their Establishment

In the process of review of tax sanction classifications under the various signs, it was mentioned at the beginning that tax sanctions can be financial and non-financial. Scientific literature differentiates only two types of financial sanctions valid for the violation of tax code: penalty and fine. Fine unlike the penalty has certain characteristics and therefore, will be separately discussed in chapter 3 of the present article.

As for the penalties, there are different criteria and basis for their assignment; hence there are various forms of such sanctions.

In many cases the amount of penalty depends on the specific type of violation, and based on type of violation – as a result of illegal action implemented by the person – on the volume of loss incurred by the budget.[22]

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18 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, <http://conventions.coe.int/treaty/en/treaties/html/005.htm> [23.08.2012].

19 For example, see the following cases discussed at the European Court for Human Rights: *Janosevic v. Sweden*, Application No 34619/97, [2003] ECHR;
Ziliberberg v. Moldova, Application No 61821/00, [2005] ECHR; *Kirakosyan v. Armenia*, Application No 31237/03, [2009] ECHR.

20 See Course Outline: Fair Trial in Criminal Cases, Published by the Council of Europe, 10-13; Course Outline: Fair Trial in Civil and Administrative Law/Public Law, Published by Council of Europe, 7-11, available at: <http://www.coehelp.org/course/view.php?id=30> [23.07.2012].

21 See *Ziliberberg v. Moldava*, Application No 61821/00, [2005] ECHR.

22 *Rogava Z.*, Tax Law, Tax Control and Tax Responsibility, 1st Edition, Tbilisi, 2009, 340.

Under Georgian legislation the penalty for the tax violations are set in the form of fixed amount as well as percentage payment calculated on the basis of the relevant amount. Penalty can be also assigned on the basis of combination of the above two methods. Thus the penalties are divided into fixed and non-fixed types. As mentioned in scientific literature, in many cases, Georgian Tax Code considers calculation of penalty in percentages from the revenues generated by tax payer, from the amount payable additionally, reduced tax amount, payable tax amount, amount to be offset or returned, unpaid tax amount and etc.[23]

In certain cases Georgian legislation in calculation of penalty is based on the maximum amount or in the form of fixed payable amount. In case of revealing of several tax violations (so called joint tax violations) so called sum principle is used. In case of presence of several tax violations together the tax sanction is used for each violation separately. The stricter sanction – higher penalty does not dilute the less strict sanction and utilisation of tax sanction does not exempt the tax payer from the fulfilment of tax liabilities, for which the responsibility was imposed.[24] It has to be also mentioned that specific basis for assigning certain sanction is not reinforced by the Georgian legislation. It is not indicated and there are no theoretical discussions on how to define the amount of the penalty. Moreover, there are frequent changes to the Georgian tax code, namely changes to the amount of penalty assigned for specific violations; in majority cases there are no legal explanations provided for such changes and often initiator of legislative changes indicates to the requirement for the liberalisation or restricting proceeding from the economic interests of the country, which does not determine legal contents and nature of the change.

In theory, penalties are considered as most frequently used administrative sanctions, which are different from criminal as well as civil penalties.[25] The scientists indicate that administrative penalty is one time pacuniary payment assigned to the person who implemented illegal action, which is not reimbursement of losses and does not cause the registration of conviction, but is related to the negative financial and proprietary results.[26]

In general, penalties as sanctions imposed for the conduct of administrative offences are considered as easiest to execute by the scientists. According to the scientists' view in the process of penalty imposing the heaviness of violation must be considered together with the material condition, salary, stipend and other types of incomes of the person violating the tax code.[27]

In theoretical context, the issue of imposing penalties for the legal persons is interesting. According to the position expressed in the literature, as the accusation of legal person cannot be separated and is always related to the specific accusation of the physical person, he together with the company must be assigned the payment of penalty.[28] However according to tax legislation, in this case the sole responsibility and joint payment of sanction for the violation of tax code is not

23 *Rogava Z.*, Tax Law, Tax Control and Tax Responsibility, 1st Edition, Tbilisi, 2009, 340-341.
24 Ib., 341.
25 *Salkhinashvili M.*, *Loria V.*, Administrative Payments and Their Utilisation, Tbilisi, 2000, 61.
26 Ib., 66.
27 Ib.
28 *Loria V.*, Administrative Process Law of Georgia, Tbilisi, 2002, 270.

considered by the law. For the above we shall consider that tax legislation does not consider the accusation as the pre-condition of the assignment of responsibility.

Pecuniary penalties, as financial type sanctions mainly belong to civil sanctions according to the Anglo-American system. Moreover, according to the American scientists, in setting financial sanctions it is important to calculate the loss and amount - loss incurred due to the non-payment of taxes.[29] The American example on setting penalties is interesting. In the process of setting the penalty as tax code sanction, the USA tax code as the legislations of other countries, applies two ways for penalty determination: first – directly setting the determined amount of penalty or determined percentage of the unpaid tax. This approach changes with the heaviness of the violation and amount of unpaid tax.[30] However it does not consider the possibility to reveal the conducted violation and responsibility measures are not relevant to the costs for administering the process.[31]

In addition to the percentage based sanctions, Anglo-American system uses the fixed penalty amounts for the violations which are not related to payment of any amount and are related to fulfilment of other types of liabilities such as submission of declarations and etc.[32]

Together with the theoretical consideration of cash sanctions it is important to review the issue of their utilisation in practice. According to the official information provided by Legal Entity under Public Law of Georgia – Revenue Services, during the period of 1 January 2011 to 20 September 2012 the penalty as the cash sanction for various violations considered under the tax code was used in 76 792 cases (moreover the above data does not include the number of penalties assigned by the Audit Unit of Revenue Services during its field tax inspections).[33]

1.2. Non-financial Sanctions

As mentioned above, the valid Georgian legislation considers non-standard forms of sanctions together with the financial sanctions as the responsibility measures for the violation of tax code. Such sanctions include: warning, restricting the right to cross the Georgian customs border, free of charge confiscation of property or/and vehicle. The above sanctions, with the exception of warning, are used for the violation of legislative requirements by the persons

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29 *Cords D*., Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs, "Brigham Young University Law Review", 1565-1571, available at: <http://lawreview.byu.edu/archives/2005/6/2CORDS.FIN.pdf> [23.08.2012].

30 *Raskolnikov A*., Crime and Punishment in Taxation: Deceit, Deterrence and the Self-Adjusting Penalty, "Columbia Law Review", 2006, 18-19, available at: <http://papers.ssrn.com/sol3/papers. cfm?abstract_id=823468> [23.08.2012].

31 Ib.

32 Tax Law Design and Drafting, Volume 1, International Monetary Fund, *Thuronyi V.* (Editor), Washington D.C., "IMF Graphics Section", 1996, 130.

33 The public information was requested from the Legal Entity under the Public Law – Revenue Service for the period from 1 January 2011 up to the request date on the various sanctions used by the tax bodies. The above mentioned information is provided in the written reply provided by the Revenue Service, letter No 21-03/65091.

responsible for the fulfilment of norms regulating customs-legal relationships and they are not used for the classical tax violations.

In Georgia, warning is the non-financial sanction considered for the conduct of tax code violations. This sanction is widely used for classical administrative violations. Similar to Georgian legislators this type of sanction is well known for legislators of other countries. However, under the Georgian legislation warning as a sanction for the tax code violations can be used only in exceptional cases. Namely, warning as a sanction is used in cases of violation of certain rules of utilisation of cotrol-cash machines, transportation of goods without documentation, violation of sales and recoding rules and violation of customs rule. Thus unlike the financial sanctions, this type of sanctions are not used for all types of illegal tax actions. Definition of legal nature of warning is interesting. In parallel with the tax sanctions, the Georgian legislations determines the administrative responsibility measures by the code for administrative misconducts, which along with various sanctions covers the warning too. As the sanctions established under the tax and administrative violations' codes have similar nature, the view of scientist about these sanctions is interesting. Scientific literature considers the warning as the lightest form of sanction, which is executed by the person determining it immediately after the decision making via the public reading of the warning.[34] However in contrary to the cases of administrative violations, tax code does not specify the rule for such sanction execution; moreover the practice of public reading in the process of execution does not exist in tax bodies. Accordingly there is certain gap in this area in the tax legislation.

During several months, namely during the period of 1 April 2011 to 22 November 2011[35] there was one additional non-financial sanction considered by the Georgian tax code for the tax code violations – teaching tax legislation. It is interesting that there are no analogues of such sanctions in the legislations of other countries. Despite the changes to the legislation, the tax bodies have not used such sanctions in practice. The above is confirmed by the official information No 21-03/65091 provided by the Revenue Service of Georgia on 20 September 2012.[36] It is possible that the above information was the basis for the legislators to remove the above norm from the Georgian tax code after few months' time.

Scientific literature actively studies the usage of non-financial sanctions for illegal actions under the tax legislation; however non-financial sanctions are not used as frequently as financial ones. However as confirmed by various researches the most widely spread taxation sanction – pecuniary penalty is not always the effective responsibility measure against the tax code violations. Despite the fact that in majority of legal systems the taxation bodies have various legal tools to use

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34 *Loria V.*, Administrative Process Law of Georgia, Tbilisi, 2002, 269.

35 Law of Georgia on the "Changes and Amendments to the Tax Code of Georgia", available (in Georgian) at: <www.matsne.gov.ge> [23.08.2012].

36 The public information was requested from the Legal Entity under the Public Law – Revenue Service for the period from 2011 up to the request date on the various sanctions used by the tax bodies. Provided information does not indicate the utilization of tax training as a sanction form, indicating that the above sanction has not been used.

the compulsory measures against the property and revenues of the tax payer, e.g. put ban over the property, bank account and revenues in the form of salary of tax payer, or execute the property disposal, in certain cases these mechanisms are not sufficient and effective for the execution of financial sanctions. Taking into consideration the above, the part of the scientists think that the legislation should define more alternatives for financial sanctions in addition to the warning. For example, restricting the special right (for example the financial specialist is temporarily deprived from the right to implement financial activities in case of illegal action). In some legal systems, it is possible to have as responsibility measure for violation of tax legislation in the form of withdrawal of relevant licenses and activity permissions. The other part of theorists sceptically review use of alternative measures; they are of the view that utilisation of similar measures may have negative affect over the entrepreneurial activities of the tax payer. Moreover the above will reduce the profitability of these enterprises and their capacity to cover the tax liabilities will reduce. They consider such non-financial sanctions only after the tax payer does not (cannot) pay tax liabilities in accordance with the determined plan and agreed financial schedule.[37]

According to Georgian legislation, withdrawal of license or termination of its validity is not the responsibility measure determined for the tax code violation, but can be the result accompanying the violation of licensing conditions and serves the stability of public order in general and does not ensure protection of specific tax norms.[38] Certain legal systems consider non-financial, extraordinary sanctions. For example, there is quite interesting responsibility measure effective in Sweden: making public the audited tax payers and the sanctions used against them.[39] The above action has quite high preventive effect, as influences the entrepreneurial relationships and affects the trustworthiness of the subject involved in civil turnover. However in Japan, where the list of tax payers is published, only the information on large tax payers is published and in this case it does not serve the prevention purposes. The similar publication practice is also used in France with the indication of assigned penalty amounts, however being in the list is not a sanction and has only the informative purpose.[40]

According to the changes to the Georgian Tax Code made on 12 June 2012, such information also became public. However, it does not mean the sanction and only implies that the existing information on tax payers becomes public.[41]

Making the information on responsibility assigned over the tax payer public, as a form of sanction has been studied by American scientist – Oliver Ordman. He discusses the above

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37 Tax Law Design and Drafting, Volume 1, International Monetary Fund, *Thuronyi V.* (Editor), Washington D.C., "IMF Graphics Section", 1996, 128.

38 Article 22 of the Law of Georgia on Licensing and Permissions, 2005 (as of 1 October 2012), available (in Georgian) at: <www.matsne.gov.ge>.

39 The above was caused by the high level of freedom of word and press for the long period of time, see: Problems of Tax Administration in Latin America, Joint Tax Program Organization of American States inter-American Development Bank, Economic Commission for Latin America, *Hopkins J.* (Editor), "Johns Hopkins Univ. Press", 1965, 311.

40 Ib., 311-312.

41 Article 39, Part 1, Tax Code of Georgia, 2010 (as of 25 June 2012), "Legislative Matsne", No 54, 2010.

measure as a form of sanction on the example of several countries. However he is of the view that it would not be expedient to apply such measures in taxation systems of other countries, as public dissemination of such information is not studied in the context of other countries. Therefore, the scientist is of the view that it is necessary to study well the above action as a form of sanction for each country before practical its implementation.[42]

Theory often discusses the issue, how effective are such non-financial sanctions as imprisonment, whether is it required to use criminal law responsibility measures for tax legislation violations, or it is sufficient to assign only civil responsibility measures and to liberalise criminal law legislation in this direction. There is no straightforward position among the scientists on the issue and it depends on the taxation policy and legal system of the country.[43]

Moreover the scientists discuss the basis for the definition of responsibility, how to determine the responsibility measures and their volume for different type of tax legislation violations. According to the American scientists the big part of illegal actions in taxation are observed in the form of illegal increase of setoffs envisaged by the legislation. In their view, it is better to enact financial sanctions in the volume relevant to the offsets indicated in the declarations, which in turn partially includes the illegal offsets. Accordingly the more difficult is to determine the offsets by the tax administration the higher is a probability to assign the sanction. In this case, according to the professor of Columbia University, the effectiveness of sanctions for the tax legislation violations will be improved.[44] Some of the scientists are of the view that majority of responsibility measures enacted for the tax legislation violations do not consider the material and human resources used for revealing of such violations, on the other hand the tax payers use various methods and tools to avoid taxes, therefore such measures are not proportionate.[45]

Moreover, it is interesting to review the issue of assignment of tax responsibility over the specific authorised person and introduction of special form of sanction, which is referred to as authorised person sanction by the scientists. According to the scientists, the above special subjects are those physical persons who are responsible for taxation issues in the company. Due to non-fulfilment of duties by the above person, the sanctions will be used specifically for the specific physical person and not against the enterprise, legal entity.[46]

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42 Problems of Tax Administration in Latin America, Joint Tax program Organization of American States inter-American Development Bank, Economic Commission for Latin America, *Hopkins J.* (Editor), "Johns Hopkins Univ. Press", 1965, 312- 313.

43 *Raskolnikov A.*, Crime and Punishment in Taxation: Deceit, Deterrence and the Self-adjusting Penalty, "Columbia Law Review", 2006, 18-33, available at: <http://papers.ssrn.com/sol3/papers.cfm?_abstract_id=823468> [23.08.2012].

44 Ib.

45 Ib.

46 Tax Law Design and Drafting, Volume 1, International Monetary Fund, *Thuronyi V.* (Editor), Washington D.C., "IMF Graphics Section", 1996, 128.

2. Goals and Functions of Taxation Sanctions

Similar to goal and functions of other sanctions, it is interesting to define the goal and functions of sanctions for the violation of tax legislation. With the definition of goals and functions of specific sanction the purpose of the sanction is determined, what are the goals the legislator desires to achieve via the measure, what function it should implement, the latter will be defined for the specific measure.

2.1. Goals

Among the goals for the introduction of taxation sanction the scientists first of all distinguish the halting effect for the tax payers to conduct illegal action due to the level/volume of expected responsibility. Moreover it is important that the relevant responsibility measure is fair and proportionate to the good which was jeopardised in the process of misconduct.[47]

Scientific literature reviews various theories covering the sanction goals. One of such theories is rational choice/option theory, which notes regarding the inaction of various measures for the illegal action that to achieve the relevant results from the specific sanction, it is necessary to have strict sanction and the taxation administration bodies have actual capacity to use them. The above mentioned theory reviews the rational approach for each tax payer in individual prism and is of the view that identical cases cannot be rational for all tax payers and depend on the material condition of the tax payer and other relevant circumstances. Jointly these two goals shall overcome the loss which can be incurred in case of implementation of illegal action and increase level of prevention of illegal actions due to the responsibility measures enacted.[48]

As mentioned above the American scientists consider the financial sanctions as well as freedom-limiting responsibility measures as the responsibility measures for tax legislation violations, if the violation is of an important nature. However, financial sanctions have positive economic effect, and the imprisonment is related to incurring of higher costs. According to the scientists, financial sanctions can be defined in the amount covering the funds used for the revealing of illegal action by the taxation bodies; moreover such sanctions may fully cover tax administration costs.[49] Some scientists think that State often aims to maximally increase the revenue part of the budget in the process of setting the proprietary type responsibility measures. Under these conditions the State is interested in the systematic violation of law requirements to fulfil the revenue part of the budget through paid penalties and other payables.[50] However the

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47 Tax Law Design and Drafting, Volume 1, International Monetary Fund, *Thuronyi V.* (Editor), Washington D.C., "IMF Graphics Section", 1996, 111

48 Ib., 120 -122.

49 Ib., 111-1112.

50 *Rogava Z.*, Tax Law, Tax Control and Tax Responsibility, 1st Edition, Tbilisi, 2009, 298.

strict sanction assigned for the illegal action, generally does not improve the condition of tax discipline and moreover, contradicts the non-repressive goal of sanction.

Non-repressiveness objective of the sanctions for the tax legislation violations is expressed in consideration of material condition of person in the process of assigning the legal responsibility. Sanction used against the person shall not limit the person from the opportunity to generate income in future. The above should be considered in the process of definition of tax rates as well as determination of responsibility measures for the violation of tax legislation.[51]

The size of taxation responsibility against the person shall be used with the consideration of personality, level of accusation, circumstances making the responsibility heavier or lighter.[52]

The objective of sanction itself is avoiding the violation of tax legislation by specific tax payer as well as general prevention, as the danger of such sanctions and practice of using them against other persons force the tax payers not to misconduct. However non-conduct of illegal action still depends on two factors: to correctly determine and select the size of sanction and to have rational and clear legislation. Tax payer should be able to logically determine the options faced and in this case, according to the view of economists, the tax payer will conduct the violation if such violation will bring more benefits compared with the expected penalty.[53]

As mentioned above, in general law systems, civil as well as criminal law sanctions may be assigned for the tax legislation violations. In this case civil sanctions have generally two objectives: eradicate the specific violation, reimburse for the incurred loss and promote fulfilment of requirements set by the legislators; its secondary objective similar to the criminal law responsibility is to punish the person for the violation. It is assumed that, civil type sanctions are easily definable and administrable. The simplest way for the above is introduction of penalties as sanctions, which is calculated as the percentage of unpaid liabilities.[54] However, as was already mentioned, the penalties can be determined in the form of fixed amount.

Moreover, in the systems where the administrative and civil responsibilities exist independently from each other, unlike the civil sanctions, it does not have the objective to only reimburse the incurred loss, and in this case the element of punishment comes on the surface as in the criminal law responsibilities.

As American scientists indicate, the most important is to understand the meaning of sanction. Sanctions will not achieve their objective if tax payer does not understand its meaning and possibility to get responsibility for non-fulfilment of liabilities. It is important that the taxation administrations can easily reveal and react on the tax legislation violations. Hence, there are high execution indicators for norms for which checking the fulfilment of its requirements is simple. Accordingly those

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51 *Rogava Z.*, Tax Law, Tax Control and Tax Responsibility, 1st Edition, Tbilisi, 2009, 302.

52 Ib.

53 Tax Law Design and Drafting, Volume 1, International Monetary Fund, *Thuronyi V.* (Editor), Washington D.C., "IMF Graphics Section", 1996, 118-120.

54 Ib., 127.

requirements of legislation, for which it is difficult to examine the implementation, become the target for the frequent violations.[55]

Due to the financial nature of tax legislation violations it is logical to determine financial sanctions; however utilisation of such sanctions is not always effective. If the tax payer is at the point of bankruptcy or is insolvent and does not have capacity to pay taxes and more so the assigned sanctions, then according to some scientists, the imprisonment sanctions shall be used, as financial sanctions will not achieve the required objectives. However, in majority of legal systems, imprisonment is not envisaged for civil misconduct and as indicated in literature the preference may be given to restricting various type of rights for the assigning the responsibility. But it should be considered that such sanctions do not result in termination of entrepreneurial activities, which will have negative influence over the enterprise operations and make it impossible to secure funds in future.[56]

Together with the objectives of taxation sanctions, it is interesting to determine the objectives of general payables. Scientific literature distinguishes two main objectives of administrative sanctions: punishment of violator and avoiding the illegal action.[57] In certain cases the objective of the sanction is to use measure of fair effect for the action committed by the violator.[58]

2.2 Functions

Together with the goals the sanctions envisaged for the tax legislation violations, have following functions: punishment, prevention and reimbursement of costs incurred by the State.[59] Functions and goals are very similar; however they are reviewed independently in the literature.

Sanction has first of all capacity to eradicate the violation and increase the fulfilment indicator. However the sanction itself must be fair. In majority of legal systems utilisation of sanction means implementation of proportionate responsibility measures for the cases when the person does not fulfil his/her liabilities. Together with the eradication of violation and prevention functions, the financial sanctions have a function to generate the revenue part of the budget. On contrary the non-cash type sanctions cause the spending of budgetary funds. Moreover, it is possible to define the financial sanction in the volume to cover all administrative costs incurred for the revealing of the violation. Sanction may also be enacted to promote the solution of disputes at an early stage. Taxation sanctions really have significant preventive function for the members of society, as it stresses the high importance of tax

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55 Tax Law Design and Drafting, Volume 1, International Monetary Fund, *Thuronyi V.* (Editor), Washington D.C., "IMF Graphics Section", 1996, 130-131.

56 Ib., 132-134.

57 *Salkhinashvili M.*, *Loria V.*, Administrative Name and Their Utilisation, Tbilisi, 2000, 18.

58 Ib., 31.

59 *Cords D.*, Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs, "Brigham Young University Law Review", No. 6, 2005, 1565-1571, available at: <http://lawreview.byu.edu/archives/2005/6/2CORDS.FIN.pdf> [23.08.2012].

payments, which is reflected differently in different legal systems with the introduction of both types of responsibilities: civil and criminal responsibilities.[60] The scientists are of the view that criminal law sanctions, for inaction of which higher standard of evidence is required, are used less frequently but have real prevention function compared with the civil and administrative sanctions.[61]

3. Fine – as the Certain Measure of Tax Responsibility

As mentioned at the beginning of the article, the fine is one of the forms of financial sanctions envisaged by the legislation on tax code violations. As the fine unlike the cash type sanction, penalty has many characteristics; we deem it expedient to review it separately.

Fine like tax penalties or other sanction types are defined not only by the tax legislation; its notion is covered by public as well as private legal norms.

However unlike the other norms regulating the private legal and public legal relationships the notion of fine has number of characteristics in tax legislation.

According to the tax code of Georgia, fine is envisaged in the chapter devoted to the types of tax code violations and responsibilities and is one of the forms of sanctions.[62]

First of all it is expedient to interpret the legislative notion of taxation fine.

On contrary to the fines defined for the administrative violations and penalties considered by the civil legislation, according to the tax legislation the fine is not the mean for securing. Fine is the responsibility measure payment of which is assigned to the person for non-payment of tax claims.[63] According to the Georgian legislation, fine is accrued on the tax amount and it is a difference between the unfulfilled tax liability and sum of additionally paid taxes. Moreover, fine is accrued for each overdue day.[64] Amount of fine unlike the other cash sanction –penalty, is always the 0.07 percentage of the unpaid amount for each overdue day.

Analysis of mentioned legislative norms reveals that assigning fine as sanction for tax legislation violation has certain characteristics. Namely, fine is assigned to the tax payer only in case if tax payer's tax liabilities and claims have negative balance (saldo). Only in this case the fine is accrued. For calculation of fine the 0.07 percentage is accrued on the balanced amount (negative). In case of other cash sanctions – the penalty is accrued for the conduct of specific violation and negative saldo (balance) does not bear any meaning. Thus, fine is not assigned to a person for specific violation, the issue of fine accrual raises at the moment of violation, but

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60 Tax Law Design and Drafting, Volume 1, International Monetary Fund, *Thuronyi V.* (Editor), Washington D.C., "IMF Graphics Section", 1996, 117-118.

61 *Cords D.*, Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs, "Brigham Young University Law Review", No. 6, 2005, 1565-1571, available at: <http://lawreview.byu.edu/archives/2005/6/2CORDS.FIN.pdf> [23.08.2012].

62 Article 270, Part 2, Tax Code of Georgia (as of 23 August 2012), "Legislative Matsne", No 4, 2010.

63 Ib., Article 272, Part 1.

64 Ib., Article 272, Part 2.

whether the fine is accrued or not and what will be the fine amount, does not depend on the contents of specific violation. Therefore fine by its nature is a typical pecuniary sanction.

As mentioned above, in Georgian legislation fine is considered by the tax legislation as well as administrative violations' code and similar type of fee is considered by the civil code.

Fees, which sometimes are referred in the practice to as civil fines are considered under the articles 416 -420 of Civil Code of Georgia.[65] Authors of comments to Civil Code define the fee as the additional mean to secure the fulfilment of liability, which has to be paid by the debtor for non-fulfilment or improper fulfilment of liability. Literature distinguishes two functions of fees: first- this is stimulation of fulfilment of liability and second – this is a mean to reimburse the loss by the lender. It is interesting that the fee is paid by the person despite the occurrence of loss due to the un-fulfilment of liabilities. However, as mentioned in the literature, in the event of fee payment, on the one hand, under the Georgian legal system, it has the form of offset fee, which excludes both the payment of fee and the reimbursement of loss and on the other hand the legislation provides the parties with the opportunity to agree on the amount of fee, which may be more than the volume of possible loss.[66]

It is true that fee is the concept envisaged under the civil law and study of fees is not covered under the present research, but provided general discussion already confirms that this measure envisaged under the civil code is essentially different and has other legal nature compared with the taxation fine.

As for the fine envisaged under the Code on Administrative Violations, although it is true that fines considered under the Tax Code and Code on Administrative Violations have a nature of public law and both are established within the administrative responsibility, they still have different legal nature. Fine considered under the tax legislation is one of the forms of taxation sanctions, which together with other cash sanction – penalty – is assigned to the tax payer as a responsibility measure. Despite the identical title, the fine envisaged under the Code on Administrative Violations has other meaning. For these purposes the fine is not the administrative payable (claim)[67] i.e. sanction form; it is additionally assigned in case of non-fulfilment of

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65 Articles 416-420, Civil Code of Georgia, 1997 (as of 1 October 2012), available (in Georgian) at: <www.matsne.gov.ge>.

66 *Zoidze B.,* Comments to the Civil Code of Georgia, Book III, Tbilisi, 2001, 487-498.

67 According to Article 24, Part 1 of the Code of Georgia on Administrative Misdemeanours, the forms of payments include: warning; penalty; withdrawal (with payment of value) of item, which was the mean, direct object of administrative offence or was the subject, means of transportation or supply of goods in case of violation of rules related to the movement of goods on the customs border of Georgia as envisaged under the Tax Code of Georgia; confiscation of the item, which was the mean, direct object of administrative offence or was the subject, means of transportation or supply of goods in case of violation of rules related to the movement of goods on the customs border of Georgia as envisaged under the Tax Code of Georgia; depriving the citizen of special right (driving license for vehicles); withdrawal of right to carry the arms; compulsory works; administrative imprisonment. The above list does not consider the fine, as responsibility. See: Article 24, Part 1, Code of Georgia on Administrative Misdemeanours, 1984 (as of 18 August 2012), available (in Georgian) at: <www.matsne.gov.ge>.

sanctions enacted for certain type of administrative violation. If for assigning the tax responsibility the voluntary fulfilment of sanction does not bear any meaning as the fine by itself is a sanction, in case of administrative violations fine is determined for the person in case of voluntary non-fulfilment of payment. Moreover, amount of fine determined for administrative violations unlike the taxation fines, is fixed for the specific administrative violations.[68]

Analysis of above mentioned norms makes it clear that under the administrative law the notion of fine is not homogenous and it has different meaning for the purposes of tax and administrative violations.

Besides the legislative regulations, it is interesting to review the court practice and definitions provided in the scientific literature. Taxation fine is defined by the Supreme Court of Georgia as material manifestation of legal accompanying result of non-payment of principal amount of tax; therefore for fine assignment the main idea is to reimburse the compensation for the period, when the tax payer has not had legally paid the principal amount of tax and not the fulfilment of initial liability via the late payment of principal amount of the tax. The court considers fine as the continuation of taxation-legal responsibility of the tax payer, which is direct result of responsibility of tax payer for the tax payment.[69] Moreover, Supreme Court of Georgia in one of its decisions indicated that the fine is one of the forms of responsibility defined for the tax payer.[70]

In terms of fine accrual, the decision of large council of Supreme Court of Georgia dated 5 December 2005 is also interesting, covering the accrual of fines for the VAT payers for the cancelation of VAT offsets. The above mentioned decision is interesting as the court notes that for the violation of rules for VAT offsetting the liability of payment of offset amount are assigned to the person who used such offset, however the tax payment liability is over the supplier (seller) of goods. For this case, the large council indicated that the subjects of tax responsibility are those tax payers, who are assigned the fine as a responsibility measure for non-payment of taxes, violation of tax legislation. Based on the above, the court indicated that fine is so called additional payment due to the non-timely payment of amounts. Therefore, responsibility for violation should be generated in

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68 According to the Code of Georgia on Administrative Misdemeanours, the liability to pay the fine is defined for certain type of violations, when the person conducting the offense does not voluntarily fulfil the assigned responsibility. Such violations include: violation of border regime rules in internal sea waters of Georgia and territorial sea; violation of rules of driving vehicle or driving under the influence of alcoholic, narcotic or psychotropic means, or transfer of vehicle for driving to the person under the above condition; violation of vehicle driving rules; unpermitted taking the land plot owned by the State or self-governing body or /and using the land without permission. See Articles: 55^5, 114^2, 116, 117, 118, 118^1, 118^2, 118^3, 119, 120, 121^1, 122, 123, 125, 125^2, 125^3, 127^1, 135, 151^1, 152^3 of the Code of Georgia on Administrative Misdemeanours, 1984 (as of 18 August 2012), available (in Georgian) at: <www.matsne.gov.ge>.

69 Case No BS-258-248 (4K-09), Council for the Administrative and Other Category Cases, Supreme Court of Georgia, 2009, in: Decisions of the Supreme Court of Georgia on Administrative Cases, Taxation Disputes, No 3, *Jorbenadze S.* (Editor), 2010, 53.

70 Case No BS -265-251(K-06), Council for the Administrative and Other Category Cases, Supreme Court of Georgia, 2006, in: Decisions of the Supreme Court of Georgia on Administrative Cases, Taxation Disputes, No 2, *Jorbenadze S.* (Editor), 2010, 149.

the event when the tax payer does not pay taxes within the determined time period. Thus fine is the form of responsibility determined for the tax payer, which cannot be used for the person, who is not considered as tax payer.[71]

According to the scientists' view, the fine with its contents is the sanction bearing the right restoring nature. Liability to pay fine forces the debtor to properly fulfil undertaken tax liability. Moreover, by means of fine the State achieves the compensation for the loss incurred due to the overdue tax liability at certain level. Therefore, fine is taxation sanction, which is established by the legislator for untimely and incomplete payment of taxes for the purpose of compensation of loss incurred by the State treasury. Moreover the scientists are of the view that fine is the rights' restoring sanction only in case if its objective is relevant to the actual budgetary loss. Size of fine would be related to the inflation ratio and other circumstances.[72]

In addition to the above, the scientific literature notes that in the process of definition of fine size the loan interest rate should be also taken into consideration, which may be paid for the loans taken due to the untimely payment of state taxes.[73] If the size of fine exceeds the actual budgetary losses, then the fine loses its compensation meaning and becomes the punishment type sanction by its nature. The person is assigned the taxation responsibility for the untimely payment of taxes for all cases of untimely payment, despite the reasons for such untimely payment. The fine is accrued even in the event when the tax payer after the expiry of tax payment term, independently finds out about the mistake made in calculation of taxes and pays to the budget the difference in tax amount; for such cases the tax payer is exempt from other types of responsibilities.[74] Fines are accrued only on the taxation indebtedness not paid timely and its accrual on other amounts including unpaid penalty amount is not allowed. Hence the fine is not accrued on the tax sanctions.[75]

The back forth power of the law is also interesting. The scientists note that if following the violation the size of the fine was reduced (under the law) the fine accrued before the enforcement of the law should be recalculated and reduced within the newly determined amount. If under the changes to the law the size of fine is increased, then the new size of fine will not be spread over the period preceding the enforcement of the law.[76]

In terms of legal nature of the fine it is interesting to study the similar concept in USA. As it was already mentioned in the present article, under the general law system, civil and criminal responsibilities are defined for the tax legislation violations. Within the civil responsibility the violations are assigned as the additional payments together with the penalty payments, which can be compared with the fine in Georgian legal system. According to the view of American

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71 Case No BS-817-403(K-KS-05), Large Council, Supreme Court of Georgia, 2005, see official web-page for the Supreme Court of Georgia: <www.supremecourt.ge>.

72 *Rogava Z.*, Tax Law, Tax Control and Tax Responsibility, 1st Edition, Tbilisi, 2009, 342-343.

73 Ib., 343.

74 Ib., 343.

75 Ib., 344

76 Ib.

scientists, the latter is a form of sanction; however its legal nature shall be determined based on the purpose for which the mentioned additional payments have been established. According to the scientists, the additional payments may have compensation nature, as well as punishment and prevention nature. The nature of additional payment is determined by the legislator who defines the size of such additional payment. It is also interesting that similarly to the Georgian system, the tax payer has to pay the above additional payment even if he himself submits the amended declaration before the revealing of violation by the taxation bodies.[77]

Thus the approach of legislation and scientists to the fine concept is not homogenous. It has to be mentioned that despite the different positions of the scientists, the fine envisaged for the tax legislation violations is not the mean for securing the payment for the un-fulfilment of assigned responsibility or additional tool to ensure fulfilment of assigned liability. As it is defined as the form of taxation sanction, it is assigned together with other types of sanctions in the event of existence of tax indebtedness. Moreover, as the sanction is not calculated proportionately to the each amount unpaid to the budget for compensation, therefore fine has more punishment nature than compensation purpose.

4. Conclusion

As it was mentioned at the beginning of the article, the objective of the article was to present scientific conclusion on the legal nature of sanctions based on the study of the sanctions determined for the violation of tax legislation.

It is interesting that sanctions envisaged for the classical tax violations are not distinguished with variety and the legislation is restricted with only few provisions, such as: penalty, fine, warning. Based on the comparative research results, and study of nature and basis for the establishment of these sanctions it can be concluded that due to the financial nature of tax violations it is necessary to study the issue scientifically before the introduction of sanctions. The expediency of introduction of specific financial or non-financial sanction shall be determined, and for financial sanctions the size of the sanction shall be estimated using the scientific methods and it should be based on the scientific research.

In the process of introduction of specific sanctions it is necessary to theoretically study the aims and functions of the sanction, which ensures the achievement of balance between the proportionality and goals to be achieved and determines the effectiveness of the sanction. Moreover it will be possible to determine the compensative or punishment nature of the sanction.

And finally, in terms of the fines it has to be mentioned that even the tax law is the part of administrative law and tax responsibility is the type of administrative responsibility, unlike the

[77] *Elliott Th. M.,* Department of Revenue of Montana v. Kurth Ranch: The Demise of Civil Tax Fraud Consequences?, "Vanderbilt Law Review", Vol. 48, 1995, 1450-1459.

administrative violations, the taxation fine is one of the forms of the sanctions, which has certain characteristics different from those of other sanctions. For example, in all cases one percentage indicator is used in contrary to the penalties; moreover the basis of its calculation is different from the methods of penalty calculation. Taking into account the discussions developed in the present article, fine is very different from other financial sanctions and with its legal nature belongs to the compensation contribution to the budget due to the un-fulfilment of tax liabilities; the above with its essence is not a sanction and we can discuss possibility to regulate and define fines independently from the sanctions.

For the establishment and further development of Tax science in Georgia it is necessary to continue research in this direction. As the training, learning based on the research will ensure the correct legislative development in the country.

Sergi Jorbenadze*

Order of the President of Georgia as the Data Containing Privacy

(Court Ruling of the Supreme Court of Georgia No bs-1278-1210 (k-o8) of July 5, 2010

1. Introduction

A court decision (ruling) has the biggest practical importance for the interpretation of legal provision in modern jurisprudence. Notwithstanding the fact that Georgia does not belong to the countries with common law, judicial practice still plays a biggest precedent role for the development of the field of law.

Law cannot regulate human relations. The main aim of law is establishing common order, which sometimes is the condition for the existence of the general character of its content. Due to this fact, simplification of law from the point of view of its practical action on the basis of a concrete case is of significant importance.

The only means of realization of law is expressed in the rule of behavior reflected in its observance. In its turn, each rule of behavior, revealed various persons, cannot be always of similar character, and it also requires some regulation. The means of regulation in the given way is the definition of will expressed as a result of the relations between the parties on the basis of a court decision, observance of the norms of law as well as their violation.

The present work concerns the court ruling, which has been assigned the significance of a precedent in modern Georgian jurisprudence. The precedent may not always be ideal for all persons but it should by all means comply with the existing normative acts.

The court hearing discussed in the present work is important from the two points of view: a) it applies to the constitutional right of each person – freedom of information, and b) it establishes a certain practice, which does not correspond to the norms of behavior in force in the country, as well as the norms of behavior recognized internationally.

In all, the work is based on the discussion of the Ruling of the Supreme Court of Georgia of July 5 2010 No bs-1278-1210(k-08) and its analysis.

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2. Ruling of the Supreme Court of Georgia of July 5 2010 No bs-1278-1210(k-08)[1]

2.1. Short Description of the Court Decision

Object of dispute: Rendering ineffective individual administrative-legal act and carrying out an action in the form of issuing public information.

Short description of the dispute: In the present case the appellant (the side appealing at the court of first instance) was demanding from the President administration (the defendant in the court of first instance) receipt of public information on the following questions***: on the copies of the decrees of the President of Georgia*** and the copies of the documents verifying natural calamities happening in Georgia in 2006 and the amount of damage received by Georgia as a result of these calamities. A public body refused to issue the above-mentioned documents by means of an administrative-legal act, and as a result, the party demanding the information filed an appeal in court.

The Tbilisi City Court partially satisfied the demand of the appellant and the administration of the President of Georgia was ordered to issue the copies of the Decree No 73 of February 2006 and No 280 of May 18, 2006 of the President of Georgia. Both sides of the dispute appealed against the decision. The Tbilisi Court of Appeals rendered a decision on the case, in accordance to which solely the appeal of the President administration was satisfied. The decision of the Tbilisi City Court was cancelled in the part, according to which the administrative body was charged with carrying out the action. The side demanding the issue of public information entered a cassational appeal.

The cassation appeal was not satisfied, and the decision of the Tbilisi Court of Appeals of March 12, 2008 remained unchanged.

2.2. Analysis of the Court Decision

Several important details have been pointed out in the court decision:

a) The court believes that the President of Georgia, within the frames of his authority (one of which is exactly issuing decrees) does not represent an administrative body and therefore, there exists no obligation to issue public information;
b) The Chamber of Cassations also believes that issuing a decree on amnesty by the President of Georgia is the constitutional and legal right, a special authority of the President and the order carrying out broad discretion, should not be subjected to public disclosure;

[1] See the details of the given ruling at:<http://prg.supremecourt.ge/DetailViewAdmin.aspx>.

c) The court decision also dwells upon the so-called unprocessed information. As you may know, the cassational appeal involved the receipt of information on natural calamities as well. The public body did not issue this information for the reason that it did not have the given documentation processed. The Court considered the given action as absolute observance of legal norms and considered that the appellant could not point to legal norms, which would demand processing public information from public institution;[2]

d) The court divides the information containing personal data into two parts: highly sensitive and a ordinary personal data.

2.2.2. Privacy

In accordance with the Constitution of Georgia, human rights and freedoms are divided into three main parts: 1) political rights and freedoms; 2) social-economic rights and freedoms; 3) personal rights and freedoms.[3] The latter comprises a whole basis of the legal status of a person,[4] and according to it, one of the rights is freedom of information. Personal privacy is inviolable.[5] It represents personal data of a person, since it provides an opportunity of his identification.[6] When there arises a question of issuing personal data to a person, the person should decide himself how public he wants it to be. And a result of determining the fact of personal privacy, the administrative body is obliged not to issue such information at the request of the provision of such personal information, otherwise there will be the fact of violation of human rights stipulated by the Constitution of Georgia.[7]

In accordance to paragraph 2 Article 47 of the Constitution of Georgia, the information in connection with human health, finances and any other private questions should be inaccessible unless there is direct consent of the person to issue such information. In accordance with the

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2 It should be mentioned that the opinion of the court in this connection became a precondition for establishing a certain practice (eg.: Case No 3/3935-11, Tbilisi City Court, 2011. The court of higher instance also agrees with the given matter – please refer to the Case No 3b/2198-11, Tbilisi Court of Appeals, 2012). Public institutions avoid issuing public information stating the fact that such data has not been processed by them, and the court believes this fact to be the observance of the legislation of Georgia (eg.: Case No 3/3646-22, Tbilisi City Court, 2011). As a result of the decision rendered by the Supreme Court, public institutions, instead of providing the person requiring public document with public information (In accordance with Part one, Article 37 of the General Administrative Code of Georgia, the one who demands public information has the right to choose public information), advises to use him a web-site and thus avoids the fulfillment of the obligation stipulated by the legislation. The court also considers this fact within legal frames (eg.: Case No 3-112, Regional Gori Court, 2008).

3 *Tsnobiladze P.*, The Constitutional Law, Tbilisi, 1999, 138.

4 Ib., 147.

5 Case No 1/3/407, Constitutional Court of Georgia, 2007.

6 *Tskepladze N., Turava P.,* Referential Manual on Administrative Law, Tbilisi, 2005, 119.

7 For example.: Case No bs-430-548-k-03, Supreme Court of Georgia, 2004.

Article, there should first of all be determined, which are the health, finances and any other private questions:

a) A question connected with the health of a person, which decease he has, etc. represents information about a person's condition;
b) A question connected with the financial situation of a person represents the information connected with the income, the property in the ownership of a person;
c) A private question of a person can be the information providing an opportunity to identify such person, for example his data on work experience, etc.

In accordance with the legislation, each of these questions is protected from disclosure. This fact is stipulated in the Constitution for the purpose of protecting human rights of a person.[8] Therefore, the question of inviolability of privacy is of utter importance. "It means an opportunity of an individual to lead his personal life in his own discretion and to be protected from the interference of the state and other persons in his private sphere".[9]

In connection with the given case we should first of all consider how the Decree of the President of Georgia applies to the private questions of a person.[10] At present administrative or court proceedings pays special attention to the regulation of the question of the means of personal identification. It can be seen from many examples that the names of the persons involved in court disputes or the names of the persons working in public sector are often crosshatched.[11]

2.2.3. Legal Importance of Court Decision

The first guarantee of human rights protection is hearing a case at the proceedings and appealing to the court. There is a distinction made between the judicial and non-judicial mechanisms for protecting the given question among the inner state institutions.[12] Among them the most important is the mechanism of judicial protection.[13] Therefore, the biggest importance is given to the decision rendered by the Court the concrete questions, which can often be in the form of non-uniform practice.

A court ruling is very important from the point of view of personal data, since personal data is classified on the basis of rulings. No such differentiation of personal data took place before the hearing or after it.

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8 *Shaio A.,* Self-restriction of Government, Introduction in to Constitutionalism, Tbilisi, 2003, 76.
9 Case No 2/1/484, Constitutional Court of Georgia, 2012.
10 The amnesty document itself does not represent the information in connection with the state of health or financial matters of a person.
11 For example, Kutaisi Court of Appeals, 2011, available (in Georgian) at: <http://www.opendata.ge/#!lang/ka/cat/georgian_judicial_practice/topic/53>.
12 For example, an administrative claim.
13 *Kvathcadze M. et al,* Constitutional Law, Tbilisi, 2006.

As we have mentioned above, the court divided personal data into two groups: highly sensitive personal data and ordinary personal data.

2.2.3.1. Highly Sensitive Personal Data

The court believes that this category involves those questions of a person, which are connected with his previous convictions. In other words, nobody has a right to know which concrete person has been granted amnesty by the President of Georgia.

In accordance with the court opinion, sensitive means the data connected with the criminal past of a person. From this point of view, we can suppose that any question connected with criminal activity of a person should by all means be kept secret.[14] In its turn, this means crosshatching names not only in the orders but also in court decisions, which does not often take place in the current practice.[15] Therefore, it is important to define where all of these questions contain highly sensitive personal data concerning the previous convictions, the punishment adjudged or the criminal deed. If we take into consideration the court decision, all the above-mentioned questions should be united in the given category.

In this case the question is discussed from the objective point of view, i.e. its differentiation is carried out by a third person, taking into consideration his own opinion. Therefore, it is interesting to consider the question from the subjective point of view as well, which should be determined in accordance with the concrete natural person. For example, "a" does not wish to make it known to the public that his enrollment in the army was postponed for some period. This question was settled by the order of the President of Georgia.[16] It is indisputable that the name pointed out in the order is personal data. Let us imagine for example, that a natural person requests this order to be issued as public information. Which action should be taken by the President administration?[17] It should consider the given data as highly sensitive personal data and

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14 We mean the confidentiality of the data providing an opportunity to identify a person.

15 For example, a(a) ip- the practice of developing freedom of information, which demanded public information from the Tbilisi City Court in connection with the concrete court decision. It was connected with the case of imposing punishment on a natural person, because the latter had performed illegal abortion. The court made the information public, pointing out the name of the criminal defendant. If we agree with the opinion of the Supreme Court of Georgia, the given case includes highly sensitive personal data and therefore, this data should not be made public by a public institution (we should also mention that the given court decision was not published on the official web-page of the organization intentionally, since it does not have means of crosshatching the personal data contained in the given decision).

16 The Order of the President of Georgia is discussed for the reason that on the basis of the present court ruling there took place a sort of similar common practice in common laws and like in the case with the decree of the President of Georgia, these orders by the President of Georgia providing an opportunity for personal identification were also considered confidential.

17 The example is based on one of the cases that took place in the present administrative proceedings, when the administration of the president of Georgia issued the orders at its disposal pointing out the names (as well as personal numbers).

not disclose it. The practice of todays' administrative proceedings also does not share the opinion of the Supreme Court of Georgia and discloses the information on a person's enrollment in the army.[18] If the question of postponed enrollment is so sensitive for a person then the dissemination of such information can be considered as violation of private confidential information.

We can compare this with the case of infringing nonmaterial damage. If according to the person, the dissemination of this information may cause his embarrassment, he may believe that his moral rights have been violated. If we consider that for each person the case of incurring nonmaterial damage is of individual nature, this case should also be regarded from the subjective point of view.[19] Therefore, we will get the following conclusion, according to which the highly sensitive personal data should be formulated in accordance with the subjective opinion of a subject.

2.2.3.2. Ordinary Personal Data

In contrast to highly sensitive personal data, the ordinary personal data provides an opportunity for the identification of a person, from the information not connected with his previous convictions. For example let us consider the same Order No 115 of the President of Georgia on postponed enrollment of February 28, 2011,[20] in which there is also pointed out the person's name, date of birth and personal number. Although neither of them have committed any criminal crime, and neither of them has had any past convictions, or criminal past, but because of this disclosure of the information they may deem that highly sensitive personal information has been issued and that this is directly connected with the violation of their rights.

Therefore, it is nearly impossible (or if possible- then only at the level of a supposition) to determine when we are dealing with ordinary personal data or when a public institution will have a right to issue it without permission. The legislation of Georgia provides only one exclusion, when according to Part one, Article 44 of the General Administrative Code of Georgia it believes that carrying out of public legal authority by officials is public information and does not allow a public institution to make it confidential.

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[18] For example, see: Order No 213 of the President of Georgia, 2012, available (in Georgian) at: <www.matsne.gov.ge>. The official page of the legislative bulletin, pointing out. On the basis of this, one natural person (we do not mention his name intentionally in the thesis) had his enrollment date postponed for 1 year. The order is given without crosshatching and it reveals the person's name, his date of birth and personal number. In accordance with the court, this question should have been considered as highly sensitive personal information but it did not happen so.

[19] When comparing we should by all means mention that the law is obligatory for each person and it applies equally to each person (on the question of equality for the law please, refer to the *Podkolzina v. Latvia*, Application No. 46726/99, [2002] ECHR). Therefore, if highly sensitive personal data is confidential for one person, then the same question should similarly be regulated in connection with other persons as well.

[20] Available (in Georgian) at: <www.matsne.gov.ge>.

2.2.3.3. Positive Side of the Court Ruling

We should consider it a positive side of the court ruling that it is the first time that such differentiation of personal data by the general courts has taken place. The court has established a new term in jurisprudence, which may be used when talking about the questions of confidentiality. In some cases, the court practice extends a concrete legal institution. Unfortunately, it is rarely observed in Georgia when the court determines such a relevant question. From this point of view, the present court ruling provided by the Supreme Court of Georgia is an innovation, which has distinguished two types of personal data: firstly, personal data containing the information on person's criminal past and therefore, the information concerning the action which may cause critical attitude of the public and secondly, the personal data containing the questions connected with a parson's activity and life, not involving his criminal activity description.

2.2.3.4. Negative Side of the Court Ruling

The court ruling points to the discussion, in which it concludes as follows: "The highly sensitive personal data is separated from the ordinary personal data by means of a special legal regime. Processing such category of data, its disclosure requires consent from a person. In this case there acts a presumption that the administrative body is obliged to protect the private sphere of a person until the person himself shows a will to reveal such information."[21]

In this case the court works out an opinion according to which if personal data is not "highly sensitive", then one may make it public. This statement is in conflict with Article 41 of the Constitution of Georgia, as well as articles 43, 44 and 45 of the General Administrative Code of Georgia.

The norm stipulated by the Constitution of Georgia regulating the freedom of information, can be discussed from two points of view: on the one hand, it protects state interests and on the other- it protects public interests.[22] Concrete natural persons are also considered as public. Therefore it is implied that the establishment of the fact of personal secret is aimed at the protection of these rights. Therefore, a public body is obliged to make confidential all the information representing personal secret[23] in its essence and it does not matter whether it is highly sensitive or ordinary personal data. In both cases the information must be kept confidential.

On the other hand, the court discusses the question of processing information and explains that if a public body does not possess a processed information, no one will have an opportunity to get it.

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21 Motivational part of Decision of the Constitutional Court of Georgia on the case No bs-1278-1210 9k-08, 2010.

22 Case No1/3/209, Constitutional Court of Georgia, 2004, 276.

23 This does not apply to Part 1, Article 44 of the General Administrative Code of Georgia, according to which the personal data of officials is public and any person can get acquainted with this data.

Such view of the court is not legally logical as: in accordance with Article 41 of the Constitution of Georgia, any person can get the information on the documents kept in a public body. The case when it concerns confidential information, is an exception. The court does not mention such data, which in its turn excludes the fact that the administration of the President of Georgia makes this information confidential.[24] When considering this question, the court opinion is not based on the supremacy of the Constitution of Georgia. Although the Constitution of Georgia does not directly stipulate for the obligation to process determined information, this does not provide the court with the authority not to pay attention to the violation of obligations by a public body.

A legislator cannot determine all types of legal relations on his own. He can talk about the essential, general principles on the basis of which various relations can be solved. Therefore, the nonexistence of law should not serve as a basis for blocking constitutional norms, while it can be realized without the law as well.[25] If there does not exist any relevant legal norm, the court should by all means use an analogy. In its turn, the analogy can be of two types: analogy in law and legal analogy. Each of them must by all means be based on the general principles of the Constitution of Georgia and comply with the law stipulated by the Constitution.

Let us for one moment imagine a case: what would a legislator do at the moment of the creation of the General Administrative Code of Georgia if the problem appeared exactly at the stage of its creation? If we consider the fact that a public body is itself obliged to issue information at request, the legislator would use this very rule and would oblige the public body to create information.[26] In this case if the court decided the question was as to charge public bodies with this obligation, this would be absolutely justified.[27]

2.2.4. Uniform Practice

The view of the Supreme Court of Georgia is shared by the court of lower instances. One of the vivid examples is the Tbilisi City Court, which considers the orders of the President of Georgia on the adoption, expiration, termination and granting Georgian citizenship to be personal

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[24] In this case we are mentioning the second controversial question of the ruling in connection with the natural calamities, which took place on the territory of Georgia and the damage incurred by Georgia in 2006. In all, we should also mention the fact when talking about the negative side of the ruling, since apart from the fact that the court believes that amnesty documents include confidential information, it develops a different view in connection with the obligation to process information (in the possession of a public body).

[25] *Zoidze B.,* On the Direct Action of the Constitution and the Necessity of Adopting Laws, in: Problems of Law, Jubilee Volume dedicated to the 70th Anniversary of Roman Shengelia, *Chanturia L., Shengelia E.* (Editors), Tbilisi, 2012, 50.

[26] Exactly on the basis of the principle of similarity and freedom of information, as the general principles of the institution of law.

[27] *Zoidze B.,* On the Direct Action of the Constitution and the Necessity of Adopting Laws, in: Problems of Law, Jubilee Volume dedicated to the 70th Anniversary of Roman Shengelia, *Chanturia L., Shengelia E.* (Editors), Tbilisi, 2012, 48.

secret and does not oblige a public body to disclose them.[28] Such consideration of the question by the court of first instance is connected exactly with the protection of personal data and is directed at protecting constitutional rights. When considering such case, the court is guided by the principles when the question of disclosing personal data is the first aim of public interests.[29] Public interests can cause public restriction as well,[30] on the basis of which there will be a restriction of the right stipulated by Article 41 of the Constitution of Georgia.

The given idea should by all means be based on the example of interest of public in connection with concrete questions. A public interest may be considered from the point of view of the way it is requested, which questions the person requesting public information is most interested in, obtaining which data is of main priority for this person. In modern practice, most often public information is requested to enquire how many persons and which nationalities have received Georgian citizenship[31] rather than for whom or how many people would the President of Georgia postpone enrollment in military service by his order.

These examples point to the fact that the court should discuss the questions of public interests, on the basis of the will determined by the public.[32]

3. Summary

The discussion of the present court ruling is formed in connection with the question of human rights assigned by Article 41 of the Constitution of Georgia, regulating the legal institution of freedom of information. The Constitution should aim at people being able to solve complicated and disputed questions peacefully by means of this document.[33] One of the important examples of solving the question is requesting public information from a concrete administrative body, which can be considered from two points of view: a) human right and b) public institution obligation.

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28 Case No 3/8420-11, Tbilisi City Court, 2012.

29 Eg.: Case No bs-1435-1393 (k-08), Supreme Court of Georgia, 2009 – a person was asking information about the persons participating in an auction. The public body did not issue this information and explained it by the fact that the requested information was confidential. According to the Court, in some cases public interests may be considered as higher than the interests of a concrete person. Therefore, one can conclude that in certain cases a person gets a refusal to be provided public information if apart from his interests public interests will appear simultaneously.

30 *Izoria L., Khubia G., Korkelia K., Kublashvili K.,* The Comments to the Constitution of Georgia, Basic Human Rights and Freedoms, Tbilisi, 2005, 148.

31 See information on the receipt of Georgian citizenship and expatriation at: <http://www.opendata.ge/#!lang/ka/cat/other_useful_information_text/id/134>; as well as the information on the receipt of Georgian citizenship and granting Georgian citizenship at: <http://www.opendata.ge/#!lang/ka/cat/other_useful_information_text/id/138>, as well as such information as how many people have been granted Georgian citizenship at: <http://www.opendata.ge/#!lang/ka/cat/news/topic/555/>. It should be mentioned that there has not been registered any case in administrative proceedings when a person would want to receive public information on one's posponed enrollment in the army.

32 I.e. Case No 3/8420-11, Tbilisi City Court, 2012.

33 Compare: *Schwarz H.,* The Stages of Building Constitution, Journal "Constitutional Law Overview", Vol. I, 2010, 5.

The court ruling discussed was the first case in the legal practice of Georgia, when personal data was classified into several types. In particular, they were differentiated and there have been distinguished two main types of personal privacy: highly sensitive personal data and ordinary personal data. This view of the court has created a uniform practice, when there was determined such data, when the name mentioned in it must not become known to the third persons.

The court view can be discussed from the two points of view: a) A ruling important for practice; b) a ruling which is contrary to the Georgian legislation. The first one represents an example of establishing common practice, and the second question refers to the question of the protection of the so-called highly sensitive personal data. Apart from this ruling, there is no such provision in Georgian jurisprudence, according to which there would be made any definition of such types of personal data. Therefore, we can say with confidence that the given ruling became a sort of a precedent, which had its influence on further court decisions as well. In particular,

a) The Tbilisi City Court decision No 3/8420-11 of January 20, 2012 shared a view[34] that the names of the natural persons pointed out in the Order of the President of Georgia are personal data, but it does not mention as to which categories they belong;
b) The Tbilisi City Court decision[35] No 3/3924-11 of July 25, 2012 in which the court states that solely the information kept in a public body shall be disclosed.

The practice of developing judicial precedents has been approved by many leading countries of the world. In this case the most significant is the view of the court of last instance and the relevant interpretation of the norm in respect of the relevant question. Therefore, sometimes a legally unjustified view of cassational instance is the basis for the establishment of the wrongly interpreted practice of a legal norm.

[34] <http://www.opendata.ge/userfiles/files/gadackvetileba(3).pdf>.
[35] <http://www.opendata.ge/userfiles/files/GADAWYVETILEBA.pdf>.

Jaba Usenashvili *

Problem of Realisation of Right for Privacy In the Process of Implementation of Operative-search Measures Controlled by the Court

1. Introduction

In the modern epoch human rights and rule of law are the achievements of mankind and main values for civilised states. It is true that political and legal development processes taking place during the centuries were not consecutive. However from the medieval centuries until today level of protection of human rights in the sovereign country is one of the main indicators of democratic development of the international legal entity. Despite the above, in the process of implementation of public authority, the protection of fundamental areas guaranteed under the law on human rights is still a problematic issue; namely: "for the provision of important issues for the society the individuals are provided with the relevant authorities, however their actions shall be implemented within the limits to avoid the fictive nature of the individuals' freedom."[1]

In this regard the constitutional and international legal provisions covering the functions of state bodies and their authorities have extraordinary importance; according to these provisions process of realisation of public interests are limited by the rule of law.[1]

During the last 10 years, in parallel to the complex measures implemented in the area of fighting against the crime, the problematic issues related to the implementation of operative-search activities by the special services have gained importance for the scientific circles.[2] It is natural that all the above

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* Doctoral Student of the TSU Law Faculty. All positions expressed in the article belong to the author and does not reflect official position of any organisation.

1 *Burjanadze G.*, Justification of Verdict Made by the Jury Court (Adequacy of Georgian Legislation with the European Standards), in: Collection of Articles International Standards of Human Rights Protection and Georgia, *Korkelia K.* (Editor), Tbilisi, 2011, 25-46 (in Georgian).

1 Compare – *Kublashvili K.*, Main Rights, Tbilisi, 2003, 18 (in Georgian).

2 The above is confirmed by the fact that Constitutional Court of Georgia for the last years several times discussed the issue on the relevance of article 20 of the Constitution of Georgia on the operative-search activities and specific article of Georgian law. See, *inter alia*, Resolution of the Constitutional Court of Georgia dated 9 February 2005, No 2/2/316; Resolution of the Constitutional Court of Georgia dated 26 December 2007, No 1/3/407; Resolution of the Constitutional Court of Georgia dated 22 December 2011, No 1/4/515; Resolution of the Constitutional Court of Georgia dated 29 December 2011, No 2/1/484; Resolution of the Constitutional Court of Georgia, Second Board, dated 12 April 2012, stated report record on the case *Association of Young Lawyers of Georgia and citizen of Georgia, Tamar Chugoshvili v. the*

mentioned, first of all, is related to the effectiveness of realisation of right for privacy as guaranteed by the Human Rights' Law.

According to the definition provided by the Constitutional Court of Georgia:

"In the event of violation of any component of personal life the right privacy is violated in general; however this fact does not give the right to state that via the violation of any such right component, the article 20 of Constitution of Georgia is violated. In this case the specific construction provided in the constitution regulating the inviolability of personal life has to be taken into account. Without such consideration there is high danger to incorrectly interpret contents of protected privacy right component, limits of allowable interventions."[3]

Accordingly, one of the central problems of the present research is review of legislative guarantees related to the inviolability of personal life and in case of necessity the basis for the legitimate intervention in personal life.

The article reviews guarantees of protection of personal life envisaged under the Constitution of Georgia and international agreements, jurisprudence of constitutional and international courts/case law[4], their scope and legitimate basis for intervention. For the comparative legal purposes, the article analysis various modern European and several post-Soviet country legislations,[5] related to the legal mechanisms for the public authority based on the operative –search activities.

In the process of research, the practical materials related to the operative-search measures were obtained from almost all regional centres of Georgia;[6] based on the analysis of above materials numerous legal problems have been identified. It is natural that vast majority of these problems are directly related to the issue of proper protection of right for privacy as envisaged under the human rights' law.

And finally, due to the strictly confidential nature of above mentioned practical materials,[7] the identification details of physical persons and relevant state bodies are not indicated in the present article. Research is focused on positive and negative legal circumstances revealed in these materials.

Parliament of Georgia (constitutional claim No519), available at: <http://www.constcourt.ge> [date of last renewal 18.09.2012] (in Georgian).

3 See Resolution of the Constitutional Court of Georgia dated 19 December 2008, No 1/7/454 on *Citizen of Georgia Levan Sirbiladze v. The Parliament of Georgia*, II-2 (in Georgian).

4 It has to be mentioned that in scientific circles there are disputes with regard to the mentioned terminological aspect. Part of lawyers refers to the law created via collection of precedential interpretations, reflected in the specific decisions of the European Court for Human Rights as "Jurisprudence of the European Court of Human Rights" and considers incorrect to use term "Case Law" for these cases. According to their position the above mentioned are the cases generated not only via the court doctrines, but the very form is the only way to perceive the real essence of the convention. Second part of scientists consider irrelevant to go so deeply into the issue and deem the terms "Jurisprudence" of the European Court of Human Rights and "Case Law" as synonyms. In present article the both terms are used with the identical meaning – in Georgian.

5 Focus on the legislation of post-socialist countries was caused by the fact that in terms of legal regulations related to the operative-search activities there are systemic and not individual type of differences between the post-Soviet country models and western-European models – in Georgian.

6 Author has legitimate access to the mentioned materials due to the author's work authorities.

7 Article 5, Part 1 of Law on Operative-search Activities, 1999 (in Georgian).

2. Right of Privacy (General Review)

Before moving to the discussion of regulations related to the operative-search activities, proceeding from the research contents, it is expedient to briefly state the legal aspects related to the right of privacy.

Based on the scientific view widely spread in the history of state and law, discussions covering the role of personality and state as well as separation of private and public areas are encountered in antique, Socrates and Aristotle periods.[8] However the right of privacy in the form of modern legal category, was created in second half of 19th century in United States of America.[9] For example, one of the well-known researches of the period devoted to the importance of privacy protection is: James, Fitsjames Stephen's philosophical work: Liberty, Equality, Friendship.[10]

It is not disputable that level of legal protection of privacy right (which is first of all reflected in its practical realisation) is one of the central problems of the temporary society. Moreover, if we consider the technological achievements in communication area and scale of their utilisation in everyday life,[11] it will become clear that issue of privacy protection is faced with new and more complex challenges every day.[12] In general, above reality is most acutely manifested in criminal law area,[13] which is a result of specific nature of the area.

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8 *Okruashvili M.*, Right of Privacy (the article is printed under the umbrella of non-governmental organisation –"Institute of Freedom"), 2005, 9 (in Georgian).

9 See in detail on historical basis for the right of privacy: *Westin A.F.*, Privacy and Freedom, "Wash. & Lee L. Rev.", No 25, 1968, 166; *Sir Stephen J.F.*, Liberty, Equality, Fraternity, London, "H. Holt and Company", 1873; *Griswold v. Connecticut*, 381 US. 479 (1965); *Seipp D.J.*, The Right to Privacy in American History, Cambridge, Harvard University Program on Information Resource Policy, 1978, 9-16.

10 *Sir Stephen J.F.*, Liberty, Equality, Fraternity, London, "H. Holt and Company", 1873.

11 For example: "In the epoch of modern technologies mobile phones are equipped with the high-technological functions, such as recognition of multi-media, photo taking, video and audio recording, access to internet, high capacity of storing the various type data, sent and received notifications. Mobile phones are often used as a diary, note book, means for recording and storing important life and business details. Mobile phones have system for recording incoming and outgoing calls, capacity to store details of contact persons. With the consideration of these functions, we can state that mobile phone is not only the form of protection of proprietary right, but also has more specific role and therefore requires specific protection. In other words, mobile phone is not only an item, which is valuable only when used for communication, it is also the carrier of personal, medical, commercial and other type of information" – extract from the public letter from the public organisations "Youth for Justice" and "Ombudsman", dated 21 June 2011 which covered the events of 26 May 2011 in Georgia (in Georgian).

12 On the modern challenges in the area of right of Privacy see additionally: *Hetzer W.*, op. cit., 15; *Laqueur W.*, Krieg dem Westen. Terrorismus im 21.Jahrhundert, Berlin, "Propyläen Verlag", 2003, 336-338. *Ignatieff M.*, The Lesser Evil. Political Ethics in the Age of Terror, Princeton, "Princeton University Press", 2004; Terrorism and Human Rights, *Ranstrop M.* (Ed.), "Routledge", 2007; *Sofsky W.*, Violence, Terrorism, Genocide, War, San Antonio, 2003.

13 Compare: "Möge es dem Gesetzgeber gelingen, für die Abwägung der durcheinander wirrenden Interessen auf der Waage der Themis die richtigen Gewichte zu finden!" (see: *Beling E.*, Die Beweisverbote als Grenzen der Wahrheitsforschung im Strafprozess, Darmstadt, "Franz Steiner Verlag", 1903, 40).

It has to be mentioned that at a world scale, at the present stage of mankind development, about 100 legal acts cover protection of privacy.[14] Moreover, there are thousands of interpretations provided under the international legislations as well as national courts' laws.

The right for privacy in Georgian legal area is reinforced via the article 20 of the Constitution of Georgia together with several international acts.[15] According to the Constitution of Georgia: "Private life of each individual, place for the private activities, personal records, correspondence, conversations via telephone and other technical means, notifications received via the technical means are inviolable. Limitation of such rights is allowed under the court decision or without such decision in case of emergent need as envisaged by the law."[16] Mentioned right is one of the most important guarantees for the free development of the personality[17] and despite the long term legal experience does not have comprehensive definition. The Constitutional Court of Georgia defines that:

"The court does not deem possible or necessary to comprehensively define "Privacy" concept.[18] It would be mistake to limit the whole contents of right for privacy with the article 20 of the Constitution of Georgia. Specific issues related to the privacy are also envisaged under other articles of the Constitution of Georgia, such as: articles 16, 36, 41 and etc."[19]

Despite the above mentioned, as it is clear from the article 20 of the Constitution of Georgia, right for privacy does not belong to the spectre of absolute rights and based on supreme law, as well as article 8 of European Convention for Human Rights[20] intervention into the private life is allowed in case of simultaneous existence of 3 conditions:

1. Intervention is considered in accordance with the Law;
2. Intervention has Legitimate Aim;
3. Intervention is necessary in a Democratic Society.

According to the case law established by the European Court for the human rights, the limitation envisaged by the law first of all considers that there is legal possibility to intervene in the private life according to the relevant provisions of national legislation. Moreover, the above norms shall meet the principles of *availability, comprehension and clarity* required for its

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14 *Solove D.J.*, A Brief History of Information Privacy Law, "GWU Law School Public Law Research Paper", No 215, 2006, 1-4.

15 Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950; Article 12 of the Universal Declaration of Human Rights, 1948; Article 17 of the International Covenant on Civil and Political Rights, 1966.

16 Article 20, Paragraph 1 of the Constitution of Georgia, 1995.

17 *Kublashvili K.*, Main Rights, Tbilisi, 2003, 155 (in Georgian).

18 In this part of discussion the Constitutional Court was based on the Case Law of the European Court of Human Rights. Compare: *Niemietz v. Germany*, Application No. 13710/88, [1992] ECHR (Ser. A) 29.

19 *Levan Sirbiladze v. the Parliament of Georgia*, No 1/7/454, the Constitutional Court of Georgia, 2008, II-1 (in Georgian).

20 European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11with Protocol Nos. 1, 4, 6, 7, 12 and 13, 1950.

understanding.[21] According to the court definition, the law should clearly state the scope of discretion and ways for utilisation of such discretion. The expedience of operative measures to be used should be considered. All this is necessary to protect individual from the wilful intervention of the State in his/her rights.[22]

The legitimate purpose for intervention into the private life, in general, is caused by the liability of the state to combat against the crime. Such liability is especially important today in the process of combat against such horrible international crimes as terrorism.[23]

Article 8 of European Convention on Human Rights also allows the limitation of privacy right only in the cases when it is necessary in a democratic society, i.e. is required, for example, for the proper functioning of democratic institutions. Above mentioned depends on nature of operative measures, their scope, duration, basis for utilisation, nature of authorised bodies and other legal issues.[24]

3. Theoretic Understanding of Operative-search Activities

3.1. Operative-search Activities – Brief Review

As already mentioned, at present operative-search measures are considered as one of the most effective mechanisms used against the crime. This is especially true, when we talk about secret listening and monitoring of internet communications,[25] with the consideration of amazing speed of technological development. It is not any more disputable that increasing share of communication between the individuals comes on distance type communications which is based on electronic devices.

There are two main legislative models regulating operative-search activities in the legal systems of various countries; these models can be conditionally divided into western-European and post-Soviet models.[26] In several western-European countries (*inter alia* Germany, France) the

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21 See: *Handyside v. the United Kingdom*, Application No. 5493/72, [1976] ECHR (Ser. A.), 24; *The Sunday Times v. the United Kingdom*, Application No. 6538/74, [1979] ECHR (Ser. A.), 30; *Kruslin v. France*, Application No. 11801/85, [1990] ECHR (Ser. A.), 36; *Huvig v. France*, Application No. 11105/84, [1990] ECHR (Ser. A.), 30; *Valenzuela Contreras v. Spain*, Application No. 27671/95, [1998] ECHR (Ser. A.), 36; *Rekvényi v. Hungary*, Application No. 25390/94, [1999] ECHR (Ser. A.), 52.

22 *Malone v. the United Kingdom*, Application No. 8691/79, [1984] ECHR (Ser. A.), 82.

23 On the above see additionally: *Freedman M.*, Freedom or Security. The Consequences for Democracies Using Emergency Powers to Fight Terror, Westport, "Praeger", 2003; *Hetzer W.,* op. cit., p.15; *Laqueur W.*, Krieg dem Westen. Terrorismus im 21. Jahrundert, Berlin, "Propyläen Verlag", 2003.

24 See: *Silver and Others v. the United Kingdom*, Application No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, [1983] ECHR (Ser. A.), 61; *Camenzind v. Switzerland*, Application No. 21353/93, [1997] ECHR (Ser. A.), 30.

25 Article 7, Part 3, Sub-paragraphs "t" and "m" of the Law on Operative-search Activities, 1999.

26 As mentioned, such division has at some level a conditional nature, as in this regard in some the western-European as well as post-Soviet countries there are slightly different, mixed type of models – in Georgian.

operative-search activities are considered as ordinary investigation actions regulated by the criminal law code;[27] as for the post-Soviet countries (*inter alia* Georgia, Azerbaijan, Lithuania) model, the above mentioned activity is regulated via the independent normative act - Law on "Operative-search Activities."[28]

Law of Georgia on "Operative-search Activities" (hereinafter referred to as Law) was adopted on 30 April 1999 and became effective on 15 May 1999;[29] however during the following years numerous significant amendments were made to the Law.[30] Such changes were caused by the upcoming practical challenges; some of the changes were made due to acknowledgement of unconstitutional nature of several norms.[31]

According to the Law, the operative-search activity is defined as system of measures implemented via the open and secret methods, which is strictly confidential;[32] the legitimate authority to implement such measures is assigned only to the special services of state bodies.[33] It is not disputable that implementation of operative measures with the human rights' perspective is a very sensitive issue, as this type of activities "potentially consider the highest intervention into the private life of accused (or other individual) person"[34] and in certain cases are subject to the strict court control.[35] The extraordinary importance of the issue determines the fact that the Law on "Operative-search Activities" defines as clearly as possible the goals, main principles, form of mentioned activities and actual and legal basis for their implementation.

When dealing with the issue of practical implementation of operative measures, in general, the strictly defined time-frame (terms) and effective monitoring of precise and homogenous fulfilment is stressed. The present issue became the subject of discussion at the Constitutional Court of Georgia.[36]

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27 See: Criminal Procedural Code (Strafprozeßordnung, StPO) of German, 1987; Criminal Procedural Code of France, 2000, available at <http://legislationline.org/documents/section/criminal-codes> [date for last update 18.09.2012].

28 See the Law of Georgia on Operative-search Activities, 1999; Law of the Azerbaijan Republic on Operative-search Activity, 2000; Law of the Lithuanian Republic on Operational Activity, available at: <http://legislationline.org/documents/section/criminal-codes> [date for last update 18.09.2012].

29 Article 22, Part 1 of the Law on Operative-search Activities, 1999 (in Georgian).

30 See in detail official web-page of the Parliament of Georgia: <http://www.parliament.ge > [date for last update 18.09.2012].

31 See Case No 1/3/407, Constitutional Court of Georgia, 2007 (the words following the Article 9, Part 2, sentence one of the Law on "Operative-search Activities" – "only under the order of the judge and resolution of prosecutor" "… or …" was determined as anti-constitutional); Case No 2/1/484, Constitutional Court of Georgia, 2012 (Article 8, Part 2 was determined as anti-constitutional) (in Georgian).

32 Article 5, Paragraph 1 of the Law on Operative-search Activities, 1999 (in Georgian).

33 Compare: Article 1, Paragraph 1 of the Law on Operative-search Activities, 1999 (in Georgian).

34 See New Wave of Court Reforms, Magazine "Law-making", editor *Gogishvili M.,* Third Edition, 2008, 9. See also interpretation note on Draft Law of Georgia Criminal Law Procedural Code, 3 (electronic version available at official web-page of the Ministry of Justice: <www.justive.gov.ge> [Date for last update 18.09.2012]).

35 Article 7, Part 3, Sub-paragraphs "t" and "m" of the Law on Operative-search Activities, 1999 (in Georgian).

36 See in detail: Case No 2/1/484, the Constitutional Court of Georgia, 2012 (in Georgian).

3.2. Historic Basis of Operative-search Activities

Operative-search activity of conspiracy nature is the ancient and widely spread method of execution of authority in Georgia's as well as world history. Initially, the procedural regulation for the secret measures was not subject to the special separation determined for the investigation purposes and was mainly the basic area of activities for the special services. Similar to the present reality the special services were considered as one of the strong tools used for ensuring the country's security. Operative measures in various historic literatures are mentioned with the following titles: "the secret services", "art of secret services" and "espionage".[37] It has to be also mentioned that historically, and especially during the medieval centuries, the Georgian state was distinguished with comprehensive effectiveness and success in the area of implementation of operative measures of conspiracy nature.

According to the statement of professor B. Aladashvili: "Davit Agmashenebeli can be truly considered as the great national figure who transformed the secret services into the strong tool for provision of country's security, this area before was lacking proper attention."[38] None of his predecessors or successors has paid such attention to the secret service.[39]

As for the situation existing oversees in this area, for approximately same period (X-XI centuries) two great leaders referred to as the founders of the secret services – Sultan Adug Addaula and vizier of Selchuks, Nazim al Mulki were active in the Islamic Emirates; they developed the "network of operative secret agents" on the territory of kingdom located on the territory from Caspian See to Oman[40] at such level, that according to Arabian historian Abn Al-Jausi "people were reluctant to openly talk even with their wives and slaves."[41]

It has to be also mentioned that during this period several important scientific works were developed and devoted to the issues of state management and operative, intelligence services were the integral part of this works. The treatise "Sanet-Name" [42] can be considered as the most well-known and comprehensive scientific work devoted to the secret service theory and practice; the treatise was written in XI century by Nizami Al-Melkim under the order of Al-Mulkim Melik Shah; the work along with other recommendations, advice the kings to have numerous secret agents.[43]

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37 *Aladashvili B*., Special Services and Espionage, Book I, Tbilisi, 2005; *Aladashvili B*., Secret of Espionage, Tbilisi, 2007; *Aladashvili B.*, Special Services and Espionage, Book II, Tbilisi, 2009 (in Georgian).

38 It has to be mentioned - the fact that during the kingship of David IV Agmashenebeli all strategic decisions made and successes achieved were based on the analysis information obtained by the secret servants, *Aladashvili B*., Special Services and Espionage, Tbilisi, 2007, 3 (in Georgian).

39 Ib.

40 State in South-West Asia, in the South-East part of Arabia Peninsula, on the Coast of Arabia Sea.

41 *Metz A.,* Muslim Renaissance, "Science", Moscow, 1966, 32 (in Russian).

42 Mentioned work for that time was actually the ready instruction for the functioning of operative, intelligence network- in Georgian.

43 *Javakhishvili Iv*., Essays in 12 Volumes, Volume VII, Tbilisi, 1982, 212 (in Georgian).

The treatise "Sanet-Name" considers the secret service as a preventive mechanism which also covers other, wider areas; according to Nizam Al-Mulki, intelligence servants had to act in the status of traders, travellers and doctors and control the clerical persons, viziers, nobles and tax collectors; finally the coordinated, large scale operative network had to be established on the whole territory of the empire, which would work on eradication of crime, identification of betrayers, collection and processing of information on external threats based on the pre-determined schemes. The secret agents were also involved in other types of conspiracy activities. According to the view of several historians, we can't exclude that Davit Agmashenebli, fluent in language of neighbouring countries, including Arabic and Persian,[44] used the above mentioned work in the process of creation of wide network of secret servants.[45]

As mentioned above, during the historic development, neither in medieval centuries, nor later, none of the Georgian Kings paid the same attention to the institutions implementing operative activities as the King David IV Agmashenebeli. However in different periods kings were using the efforts of intelligent and trained secret servants for overcoming the acute challenges faced by the country. We can consider so called "deserter problem" of XVIII century as one of such challenges faced by the country. The problem was so widely spread that on 13 December 1768 king Erekle issued the special decree on "charging the missing men" covering the identification of deserters and their lashing.[46] Based on the historic sources, experienced spies were actively involved in the above mentioned processes.[47]

And finally, we should mention the intensity of such activities during the Soviet period. Soviet Union was one of the first countries, which established the Special Purpose Divisions (so called "Specnaz"), among such divisions the most famous were: "Alfa", "Omega", "Kobalti", "Wispel" and others.[48] The mentioned units were subordinated to the "KGB" and "GRU".[49]

Under the current Russian legislation, operative-search measures and rules for their execution are considered as state tools for the investigation purposes which are legally separated from the intelligence services.[50]

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44 *Javakhishvili Iv*., History of Georgian Nation, Book II, Tbilisi, 1979, 359 (in Georgian).

45 *Aladashvili B*., Special Services and Espionage, Tbilisi, 2007, 6 (in Georgian).

46 Ib., 8.

47 It has to be also noted that the activities of intelligence service did not turn out to be sufficient and based on the decision of the King the village itself became responsible to catch the deserters and take them to the government or pay 6 tuman (Georgian money), Ib. (in Georgian).

48 *Aladashvili B.*, Special Services and Espionage, Tbilisi, 2007, 77 (in Georgian).

49 "KGB" – Committee for the State Security, it has undergone numerous structural reorganizations for the last years and at present is the special service equipped with the similar authorities: Federal Service of Security of Russia (FSS), Service for Internal Intelligence Service (SIIS), Federal Agency of Government Connection and Information under the President of Russian Federation (FAGCI), Federal Service of Security (FSS), Service of President Security (SPS), Main Division for Special Programs of the President (MDSPP), as for the "GRU" (The Main Division of Investigation – MDI) it continues functioning (in Russian).

50 See Federal Law on Operative-search Activities of Russian Federation, 1995, available at: <http://base.garant.ru/10104229/ > [Date for last update 18.09.2012] (in Russian).

4. Legal Regulation for Operative-search Activities and its Relevance with the International and Constitutional Standards for Privacy Protection

4.1. General Review

As mentioned above, the law strictly defines the legal pre-conditions for the implementation of operative-search measures, namely: goals, main principles, types and actual and legal basis for their execution. Mentioned legal regulations with their nature determine the authority of public government and adherence to them is the imperative liability of special services envisaged under the legislation. It is natural, that the detailed approach of the legislator to the issue is caused by the liability of proper protection of constitutional and international-legal rights of relevant persons in the process of execution of operative measures. The Constitutional Court of Georgia in one of its precedential decisions interpreted:

"Fight against crime is one of the main functions of the State. However, despite the democratic objectives of the activities, it is necessary to implement the careful regulation of operative-search actions… large part of operative-search activities is not noticed by the society; the above almost excludes the possibility of control from the society. Under such conditions the precise and unambiguous legislative regulation of operative-search activities is the most important guarantee for the protection of human rights."[51]

Thus, the legal possibility of intervention in the Right of Privacy guaranteed by the Constitution and international acts[52] shall be based only on the preliminarily determined, legal criteria for the operative-search activities and diligent adherence to them.

In case of intervention in the private life of individual in the form which with its legal nature represents the harsh intervention in the protected area (for example execution of secret listening to his/her telephone talks), the international law for human rights additionally determines several founding guarantees; in the event of adherence to them the intervention is considered as justified.[53] Namely it is necessary to determine the following:

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[51] See Federal Law on Operative-search Activities of Russian Federation, 1995, available at: <http:// base.garant.ru/10104229/ > [Date for last update 18.09.2012] (in Russian). II-10.

[52] Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 1950, Article 8; Universal Declaration of Human Rights, United Nations (UN), adopted and proclaimed by the General Assembly Resolution 217 A (III) of 10 December, 1948; Article 12, International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200A (XXI) of 16 December 1966, Article 17.

[53] See *Huvig v. France*, Application No. 11105/84, [1990] ECHR (Ser. A.), 34; *Amann v. Switzerland*, Application No. 27798/95, [2000] ECHR (Ser. A.), 76; *Valenzuela Contreras v. Spain*, Application No. 27671/95, [1998] ECHR (Ser. A.), 46; *Prado Bugallo v. Spain*, Application No. 58496/00, [2003] ECHR (Ser. A.), 30.

1. Legal nature of the crime,[54] within fighting against such crimes the secret listening to the telephone conversation will be allowed;
2. Category of persons which can be subject to the secret listening to telephone conversations;
3. Duration of secret listening to the telephone conversations;
4. Procedure for verification, utilisation and processing of obtained data;
5. Security measures in terms of availability of such information to third parties;
6. Conditions for destroying the data.[55]

Due to the limited format of the work, within the framework of present research, the attention was drawn to the issues listed as first and third paragraphs of the above list.

4.2. Crime Subject to the Operative Measures

Article 2 of the Law provides exhaustive list of goals for the measures considered under the Law, i.e. defines the preconditions, existence of which is necessary for planning one or more operative actions envisaged under article 7, part 2 of the Law. Classification of mentioned goals can be conditionally done in three categories:[56]

1. Goals related to the eradication or/and prevention of crime or other illegal actions:
   - 1.1. Identification, eradication and avoiding of crime or other illegal actions;
   - 1.2. Identification of person, who prepares, conducts or/and has conducted crime or other illegal action;
   - 1.3. Search and determination of actions lost as a result of crime or other illegal action;
   - 1.4. Obtaining necessary factual data on the criminal law offences.
2. Goals related to the prosecution of person:
   - 2.1. Prosecution and presenting to the relevant state body of person, who is hiding from the investigation, court, as well as execution of sentence or other compulsory measures defined by the court;
   - 2.2. Prosecution of persons reported missing.
3. Goals related to the identification of person:

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[54] Related to this issue, the European Court for Human Rights, Case law uses the term – "Nature of the Offences", which with its essence and drive shall not be subject to the narrow definition. For the definition of above mentioned standard, the limitation shall be determined for the specific composition of crimes as well as for the minimal size of sanction – in Georgian,

[55] See original: "In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed".

[56] Compare: Article 2 of the Law on Operative-search Activities, 1999 (as of 30 May 2012) (in Georgian).

Identification of person who committed crime or other illegal action (identification of name, surname, age, citizenship).

The listed paragraphs clearly show that area for the execution of operative actions is quite wide; however there is a different approach towards the operative measures subject to the court control. Namely, according to part 2, article 9 of the same Law, in order to implement operative measures, limiting the confidentiality of notifications transferred via the telephone or/and other technical means, one of the following conditions should be in place:

1. Written statement from the victim of illegal actions;
2. Data about the illegal action, for which the punishment in the form of imprisonment for the period more than 2 years is considered in line with the criminal code.

Thus, compared with other operative measures with lower limitation effect the measures subject to the court control have certain types of restrictions, which relates to the minimum size of sentence. On the other hand, in case of written statement from the victim, legislator creates the possibility to execute them for any type of crime.[57] Accordingly, legislator does not *a prior* determine the limited circle of crimes, in fighting against which the execution of measures subject to the court control is allowed. The restriction is valid only in case, when we do not have a written statement from the victim of illegal action. Such regulation of the issue directly contradicts the international standards which are compulsory for the Georgian legal system.[58]

It has to be noted that one of the fundamental differences between the western-European and post-Soviet models (as mentioned at the beginning of the article) is related to the above issue. Namely, former Socialist countries attempt to avoid definition of preliminarily regulated restrictions, which from the very beginning prohibit obtaining information via operative measures, which is less characteristic to the legislation of western-European countries. For comparison, article 4 of Lithuanian Law on "Operative-search Activities" defines the following:

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[57] Including in relation to so called "low importance" crimes. It has to be mentioned that in Georgian Criminal Law legislation there is no separate definition for the "low importance crime" as the legislative term. However additional minutes No 7, article 2, paragraph 2 of the Convention of Protection of Human Rights and Main Freedoms uses the notion of "low importance crime" and defines exception for it in terms of determining right for appealing at minimum one superior instance; the same convention does not provide the specific definition for the phrase "low importance crime" and leaves the above issue in discretion of countries signing the convention for internal regulation. In Georgian legislative reality all criminal actions which do not consider imprisonment as one of the forms of punishment were considered as crimes with low importance. The above is covered under in article 48, sub-paragraph 5^2 of Criminal Law Procedural Code dated 20 February 1998. According to article 48, sub-paragraph 5^2 of Criminal Law Procedural Code dated 20 February 1998: "the resolution and other decisions on the crimes for conviction of which the relevant article or part of the article of the criminal law code does not consider imprisonment as a form of punishment is not subject to the appeal, with the exception for cases when the accused person requests to issue the sentence of not guilty or the prosecutor requests the annulment of sentence of not guilty" (in Georgian).

[58] On status of Georgian legislation and European Convention on Human Rights and case law based on the above convention see: *Korkelia K.*, Application of European Convention on Human Rights in Georgia, Tbilisi, 2004, 41-84.

"The presumable basis for the implementation of operative-search measures can be the preliminary information that crime directed against the State, or other major crime is planned or already implemented;[59] or there is information about a person, who plans or has already committed a crime or there is information that person is member of criminal organisation, or there is information on the activities of special services of foreign countries (on the territory of Lithuania)."[60]

It is true that in one part of the text of present norm major crime is stressed, however at the same time the cases of crime preparation or implementation of crime are defined in general. Moreover, in the following articles of mentioned normative act, legislator does not determine any type of restrictions on the composition of crime or categories of crimes, for which the relevant state bodies would not have right to implement operative-search measures subject to court control. Almost identical approach is encountered in legislations of Russia and Azerbaijan, which define actually unlimited areas for the types and composition of crimes for the implementation of above mentioned measures.[61]

Unlike the post-Soviet model for legislative regulation of operative-search activities, the big part of western-European countries define much higher standards and allow implementation of operative-search measures for only preliminarily determined compositions of crime. For example, according to article 100a of Criminal Law Procedural Code of Germany, secret listening to telephone conversations is allowed if the specific facts create a suspicion that person might be executor, supporter or participant of preparation, attempt or implementation of following crimes:

1. Crime, which is directed against the democratic state which is based on peace, external security, or rule of law or high treason;
2. Crimes against the state defence;
3. Crimes directed against the public order;
4. Crimes directed against the security of military forces of NATO (North Atlantic Treaty Organisations) located on the territory of Federal Republic of Germany;

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[59] Or in specific case term "heavy crime" shall not be interpreted *a prior* as relevant to the heavy category crime envisaged under the article 12, part one of the Georgian Criminal Law Code. In the official English translation of the Lithuanian Law on Operative Search Activities the phrase "major crime" is used, which can be also translated as "important crime", which in terms of specific legal regulations is interpreted not as crime for which the punishment of no more than 10 years‘ imprisonment is considered, or crime due to the carelessness for which the punishment of more than 5 years‘ imprisonment is considered but the crime for which the imprisonment is considered as one (or the only) of the forms of punishment. In general in widely spread legal literature the English term for "heavy crime" is "grave crime" (in Georgian).

[60] See original: "Probable cause for operations shall be preliminary information about a crime that is being planned or has already been committed against the state, about another major crime, about an individual who is planning or who has committed a crime, about an individual’s association with a criminal organization, as well as about the activities of foreign intelligence services" (official translation)

[61] See Article 10, Para. IV of the Law of the Azerbaijan Republic on Operative-search Activity, 1999 (as of 30 May 2012); Article 2 of the Federal Law of Russian Federation on Operational - search Activities, 1995 (lastly amended 2004).

5. Falsification of cash and securities;
6. Trafficking, murder, termination of life with carelessness and genocide;
7. Crime against the personal liberty, thuggery, robbery, extortion;
8. Money laundering and ownership of items acquired via the illegal actions.

Additionally, the law lists several additional crimes, for which listening to telephone conversations is allowable.[62] Relatively different approach is used by the French legislators, which similar to the German procedural legislation defines strict limits on the implementation of operative-search activities subject to court control; however in this case restriction is oriented towards the type and size of punishment and not towards the specific composition of crime. Namely, according to article 100 of French criminal law procedural code allows secret listening to telephone conversations only for the crimes, for which the punishment in the form of imprisonment for not less than 2 years period is considered.[63]

As it is clear from the comparative legal analysis, Georgian legislation requires some improvement in this direction, in order to exclude the potential responsibility of country against the European Court for Human Rights. On the other hand, we have to consider the reality existing in Georgia at present. Namely, establishment of strict restrictions may have negative affect on the tendencies of detection of crimes and statistical indicators. In general, preparedness for such decision in criminal law policy shall be based on the high level of legal awareness in the public, which first of all must be reflected in the level of cooperation of public with the legal reinforcement bodies in the detection and prevention of crimes.

Thus, it is expedient to act according to so called gold ratio principle, at the first stage determine less strict form of restriction and like French legislation, determine the possibility to secretly listen to telephone conversations or other communications in case of crimes for which the punishment in the form of imprisonment for no less than 2 years is determined.

4.3. Terms Related to the Implementation of Operative Measures

Issues related to the duration/ terms of implementation of operative-search measures gained special importance for the last years. For example, in December 2012 the following issue was raised at the Constitutional Court of Georgia: constitutionality of legislative regulations covering the continuation of term determined for the collection of additional data on the possible criminal

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62 See exhaustive list: Article 100a of the Criminal Procedural Code (Strafprozeßordnung, StPO) of Germany, 1987. Available at: <http://legislationline.org/documents/section/criminal-codes> [Date for last update 18.09.2012].

63 See original: "For the investigation of felonies and misdemeanours, if the penalty incurred is equal to or in excess of two years' imprisonment, the investigating judge may order the interception, recording and transcription of telecommunication correspondence where the requirements of the investigation call for it. Such operations are made under his authority and supervision".

action.[64] For clarity, at the initial stage of the research, we review the legislative regulations covering the terms of implementation of operative measures.

As mentioned above, when the issue is related to the implementation of the operative-search measures, which infringe the confidentiality of notifications provided via the telephone and other technical means, the legislator deals with the regulation of terms required for their implementation with the special care. Article 7, parts 3 and 4 consider two alternatives for implementation of above mentioned measures:

1. Based on the order of the Judge;
2. In case of emergency, based on motivated decision of prosecutor.[65]

In this regard existing legislative terms are in full accordance with the standards defined with the consideration of human rights' laws, which first of all consider achievement of prudent balance. Namely, motivated petition of prosecutor on implementation of operative-search measures considered under article 7, paragraph 2, sub-paragraphs "t" and "e" is reviewed in the period of 24 hours following its receipt by the regional (city) court judge or the judge relevant to the place of crime conviction; judge satisfies such petition or rejects it.[66] Similar strict approach is used for the motivated resolution on the implementation of analogues measures issued by prosecutor for emergency cases. In such cases the prosecutor is liable in 12 hours following the commencement of operative-search measures (and if the term expiry coincides with the non-working day, then no later than after one hour following the term expiry) to submit petition to the regional (city) court to acknowledge the implemented operative-search measures as legal. The court judge is liable to review the petition at the closed court session within 24 hours following the submission of such petition and make relevant decision.[67]

Unlike the above mentioned regulations, prolongation of preliminarily determined term is indisputably problematic issue, need for such prolongation is generated in the event when the operative information on the criminal actions of the person requires collection of additional information. The above issue was covered at Constitutional Court which declared the paragraph 2, article 8 of the law as unconstitutional. Indeed until 24 April 2012 the above mentioned paragraph of valid Law defined the following: "if operative information on the criminal action of the person requires collection of additional data, the term for the implementation of operative-search measures can be prolonged for term of up to 6 months period under the motivated resolution of the Head of Operative-Search Body, with the consent of the Prosecutor." In the process of constitutional law making the defendant, representative of the Parliament of Georgia interpreted, that paragraph 2, article 8 of the Law did not allow the prolongation of term for the implementation of operative-search measures, for execution of which the resolution from the

64 See: Case No 2/1/484, Constitutional Court of Georgia, 2012 (in Georgian).
65 Which within the period defined under the law also requires verification of legality (in Georgian).
66 Article 7, Paragraph 3 of the Law on Operative-search Activities, 1999 (as of 30 May 2012) (in Georgian).
67 Ib., Article 7, Paragraph 4.

court judge is required;[68] in his view, the norm under dispute covered only the basis for prolongation of term envisaged under article 8, paragraph first of the law. In other words, he appealed implementation of operative-search activities, which are required for the review of statement received on the crime and for the commencement of investigation for the specific fact. According to the determined procedures, legislator determined the term of 7 days for implementation of measures of this type.[69]

Despite the validity of arguments provided by the parties, it was clear that the text prior to the changes due to its ambiguity did not indicate on the impossibility to continue operative measures subject to court control due to its vague nature;[70] therefore, Constitutional Court used the unique, precedential interpretation as a basis for acknowledgement of present norm as unconstitutional:

"Constitutionality of one specific content of norm is not sufficient for the confirmation of constitutionality of the whole norm. All possible contents derived via the conscious definition of the disputable norm shall be compared with the constitution and if any of such contents do not follow the requirements of constitution then the norm is unconstitutional. The law must not give the conscious implementer of the law the legal possibility to violate human rights."[71]

It is natural that the above decision of the Constitutional Court was basis for changes to the law; as a result of such changes the issue of constitutionality of disputed issue was clarified. Namely, on 24 April 2012 the paragraph 1^1 was added to the paragraph 1, article 8 with the following contents:[72] "if operative information on the criminal action of the person requires collection of additional data, the term for the implementation of operative-search measures can be prolonged for term of up to 6 months period under the motivated decree of the Head of Operative-Search Body, with the consent of the Prosecutor except for the operative-search measures considered under article 7, paragraph 2, sub-paragraphs "t" and "e"; term for implementation of these operative-search measures can be prolonged only in line with the rules considered under article 7, paragraphs 3 and 5.

Proceeding from the principle of systemic interpretation of norms,[73] the above mentioned legislative change also clarified the legislative regulations governing the prolongation of term up

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68 Case No 2/1/484, Constitutional Court of Georgia, 2012, I-14 (in Georgian).

69 Ib., I-12.

70 The above is reflected in the court discussion, which states "at the stage of case discussion the ambiguity of norm and possibility to interpret differently the norm under dispute was considered as problematic issue. The contents of the norm are perceived differently by parties and they provide diametrically different interpretations" (ib., I-11).

71 Case No 2/1/484, Constitutional Court of Georgia, 2012, II-13 (in Georgian).

72 See Article 1 of the Georgian Law on Changes to the Law on Operative-search Activities, 2012, No 6060-IS (in Georgian).

73 It has to be noted that according to the Article 26, Paragraph 3 of the Organic Law on "the Constitutional Law of Georgia" (as of 30 May 2012) in the process of checking of normative act the constitutional court of Georgia takes into consideration the literal meaning of disputable norm as well as the real meaning

to 9 and 12 months envisaged under article 8, paragraphs 3 and 4. Namely mentioned possibilities for term prolongation do not cover the operative-search measures subject to court control.

It is undisputable that the Constitutional Court with the discussed resolutions adjusted the legislative regulations on prolongation of terms with the above mentioned standards determined by the case law of European court; however until now the fact that the initial term for which the permission for the implementation of operative-search measures are issued, is not provided in the law is still problematic. The above deficiency of the legislation give the prosecutor submitting the petition the legal possibility to request, without definition of term or for the artificially extended time period, sanction for the implementation of operative-search measures which limit the confidentiality of notifications via telephone and other technical means and with its nature is intervention in the area of privacy.

During the research process the petitions submitted by the Chief Prosecutor of Georgia and in general, by the prosecutors working in the prosecution system were studied. Additionally numerous resolutions related to the preliminary permissions for the implementation of operative-search measures subject to court control or/and checking the legality of measures undertaken under the emergency need issued by city (regional) courts functioning under the system of general courts of Georgia were studied. As mentioned above, based on high confidentiality of mentioned materials the research results are reviewed without indication of any identification data.

As a result of study and generalisation of about 100 petitions/resolutions it was concluded that according to the established court practice, initial term for the implementation of above mentioned measures is defined as 30 days.[74] It has to be also mentioned that in relation to the given initial term there is no difference between the prosecutor and court practices. The submitted petitions requested the term of exactly 30 days for the implementation of secret listening to the telephone conversations or/and for the making secret video recordings and all these petitions were satisfied with the indication of same term. The research could not identify the cases when the prosecutor via petition was asking for more than 30 days term and that the court did not satisfy the mentioned above request.

The differences of technical nature were identified between the court decisions issued before the implementation of operative measures and the resolutions issued on the legalisation of already implemented measures; namely, in the first instance the petition as well as resolutions contained the term of 30 days in the form of only days, for example (see extract from the resolution with the changed identification details):

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expressed and practice for its application, and the essence of the relevant constitutional norm. For the similar discussion see: *Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia*, No. 1/2/384, Constitutional Court of Georgia, 2007, II – IV (in Georgian).

74 In all studied petitions and resolutions the 30 day term was not fixed with the term "30 days" but with the indication of period from the specific date to the specific period, for example from 5 March 2010 to 5 April 2010 (in Georgian).

"Operative-search measure – secret video-audio recording to be implemented, namely in the period of 07 November 2010 to 07 December 2010 the meeting and conversation of G. Kh. With K.L. and other persons involved in criminal relationship to be identified and recorded."

Unlike the above mentioned, in the event of legalisation of already implemented operative measures, the term used in the processual documents is indicated in minutes. For example (see extract from the resolution with the changed identification details):

"The operative-search measure – secret telephone listening implemented by the employees of operative-technical department, investigation service, the Ministry of Finance of Georgia during the period of 11:27 of 1 February 2011 up to 13:02, 1 February 2011 to be acknowledged as legal."

All the above mentioned can be used as the basis for conclusion, that despite the incompleteness of legislation, the issue is regulated in straightforward manner by the court and is in line with the international standards defined for this area. It is obvious that the above is a positive tendency; however for the avoiding of possible theoretical or practical risks, it is expedient to regulate the issue of allocation of maximum 30 days as an initial term for the implementation of measures subject to the court control at legislation level.

5. Effectiveness of Court Control over the Operative-search Activities and its Role for the Realisation of Right of Privacy

5.1. Legal Mechanisms for Court Control

Court control mechanisms and effectiveness of their practical realisation have decisive role in the realisation of Right for Privacy in the process of implementation of operative-search measures. Such approach is a result of simple fact that, in general, in the process of implementation of measures via secret methods, big part of operative measures is not noticeable for the subjects of these measures as well as for the wide society, which almost excludes the control from the society. Under the above conditions the court undertakes the function of legal guarantor for the protection of legitimate rights of relevant persons. However, on the other hand, the above can't go over the phrases recorded on the paper, if there are no firm legislative guarantees required, which will be used by the court as the legitimate tool for the influence making.

Theoretical as well as practical study of the issue revealed that the problems in this area with frequency of identification and legal importance have essential nature and require prudent and effective legislative steps from the party of the state bodies.

As mentioned above, the law divides the system for operative measures into two categories:

1. Operative measures which do not require court control (*inter alia* control purchases, controllable supply, collection of notes);
2. Measures under the court control (*inter alia* secret listening and recording; taking information and fixing via the communication channels, secret video and audio recordings; electronic observation using the technical means).

In relation to the operative measures categorised under the second paragraph the article 7 determines the specific legal regulations, which specifically cover procedures for the implementation of court control and their effectiveness. Namely the law determines the following preconditions:

1. Petition should be submitted to the court following the preliminarily defined rules for terms;
2. Prosecutor's petition submitted to the court should be motivated;
3. Petition should be accompanied with the case materials;
4. In the process of issue review judge shall listen to the interpretations provided by the prosecutor;
5. Prosecutor's resolution, based on which the operative measure is implemented and legality of which should be further verified by the court should be motivated.

At first glance, the legislator defines quite high and effective standards for the procedural-legal preconditions, which provides the court with the effective means for the control implementation; however when the issue is related to the implementation of the type of public authority which is not noticeable for the society, ensuring the protection of main human rights requires higher legal detalisation.

Due to the practical importance of the issue, it is expedient to cover the practical materials studied during the research process in the following paragraphs which will enable us to create some idea about the practice of general courts in this area.

5.2. Motivation of Processual Documents

We can state boldly that out of five components provided above only the first one – issue related to the procedural terms - does not create practical problems. The present research could not identify the case where, for example, the prosecutor submitted the petition with the violation of terms or/and legalisation of operative measures implemented according to such petition; the above is, of course, a positive fact.[75] Unlike the above, the requirements on motivation of processual documents and sufficiency of documents to be attached are fulfilled only formally.

Imperative request of the legislator, according to which the petition submitted by the prosecutor should be motivated, first of all considers that arguments provided in the petition should clarify the reason for implementation of operative measures, which by their legal nature significantly intervene in the area of privacy protected by the constitution of Georgia and international legal acts; why is requested (in general) 30 day term necessary and why the same objective cannot be achieved in a shorter period of time? In relation to the potential objects of the operative measures - what determined creation of specific suspicion that the person could have

[75] However it is natural that there were no expectations at the beginning too for the simple reason that in mentioned type procedures the defence party is not participating at all and the issue in strictly confidential form is fully entrusted to the State apparatus. Accordingly in case of even theoretical existence of the fact it is less possible that the fact becomes known to the public.

connection with the criminal fact? And etc. The requirement for the submission of case materials to the petition has the similar objective; such requirement is quite general and the legislation does not provide details on information to be provided in the materials accompanying the petition.[76]

For example, the studied practical documents contained one petition which covered the fact of possible falsification at the work;[77] for the above with the motive of emergency need, on the basis of resolution issued by the prosecutor the secret video-audio recording has been implemented within the time envisaged under the law. Petition was submitted to the specific regional court in East Georgia on the acknowledgment of legality of implemented operative measures; petition included the following justification:

"... division commenced preliminary investigation on the criminal law case No, crime envisaged under article 341. Investigation was based on the ….. report from the chief inspector-investigator R.K. indicating that [concrete official] G.G. prepares false notes [confirming the specific fact] for the specific amount."

In the process of operative-search measures, as the postponement could result in destroying the important factual data, or obtaining of above mentioned data could become impossible, based on my motivated resolution, …. the employees of operative-technical department implemented the emergency operative-search measures "secret video-audio recording"- in village ….. during the period of ---January 20 ---year, from __:__ hours to __:__ hours on ---January 20 ---year the meeting and conversation of L.D. with K.K. and other persons involved in criminal actions were fixed and recorded (mentioned persons do not hold immunity envisaged under the law).

Proceeding from the above, guided by the article 7, paragraph 4 of the Law on "Operative-search Activities", I apply for the petition to acknowledge as legal the "secret video-audio recording" implemented during the period of ---January 20 ---year, from __:__ hours to __:__ hours on ---January 20 ---year."

The same body has submitted several other petitions on the legalisation of implemented operative measures; these petitions have been studied under the present research and they had almost the identical nature.

Despite the fact that at the initial stage only the prosecutor himself and the judge have access to such petitions, it is a fact that the prosecution party does not provide sufficient justification to enable the judge to identify that the intervention in the private lives of the objects have legitimate objectives.

The court provided only limited review type sentences in the resolution on the legalisation of the measures and indicated only to the following facts: who applied the court with the petition,

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[76] Moreover in the research process we were interested in statistical data which relates to the positive and negative decisions on the petitions submitted by the prosecutor with the aim to sanction the operative measures. For the above purpose we approached in writing the Division of Statistics, Practice learning and generalisation, Supreme Court of Georgia; however according to their reply the above information is not recorded in the form of separate statistical report (Letter No 36-K from the Supreme Court of Georgia, dated 28 May 2012) (in Georgian)).

[77] Article 341, Criminal Law Code of Georgia, 1999 (as of 30 May 2012) (in Georgian).

what was requested and what was the decision of the judge. Court has not discussed the materials provided together with the petition.

It has to be noted that above critique raises the question – is the court equipped with actual tools to implement effective court control over the above mentioned operative measures? In other words whether the present situation is caused by the indifferent approach from the court or existence of only formal legislative mechanisms for the implementation of control? For example, prosecutor approaches the court with petition to implement secret listening to the telephone conversation of specific person; the prosecutor in the justification part appeals that attached materials contain the report prepared by the operative employee after the conversation with the confident;[78] the report clarifies that potential object of the mentioned operative measure for the specific amount was issuing false notes to the citizens and he/she communicated with the persons connected to the criminal actions mainly via the telephone. The logical question is raised: in the event of the above and similar situations, under the valid legislation, what should be the actions of the judge, what questions shall be given to the prosecutor, making it possible for the judge to understand if there is such information or the confident (agent) person providing information in real. Naturally the answer to the above question is quite tough, as it will not be exaggerated to say that there are not real tools in legislation.

To overcome above mentioned problem it is expedient, based on the relevant legislative changes to equip the judge with the discretion to summon and interrogate the confident at the court in the process of issue discussion; the above would increase the role of the court in the process of balancing the proportionality policy in the event of intervention in the areas of privacy and in the reinforcement of rule of law. All the above would eradicate or significantly reduce the widely spread position that at present court's control functions do not satisfy any result oriented standards and only serve the self-deceiving policy. In case of such initiative, it will be difficult to present the contr-argument on why should the judge be equipped with such trust from the state, as even under the current legislation (at the closed court sessions) some information belonging to the state secrets can be revealed.

5.3. Operative-search Measures Implemented against Preliminarily Undetermined Persons

If we go back to the example provided in the last chapter, it has been clarified that prosecutor submitted the petition on the legalisation of operative measures conducted not only against the person about whom there was information on possible connection with the criminal

[78] According to Article 1, Paragraph 2, Sub-paragraph "a" of the Law of Georgia on Operative-search Activities, 1999 (as of 30 May 2012): "Interrogation is voluntary and the person is not warned about the criminal law responsibility for false witness or denial to provide witness. Operative employee or investigator drafts the report on the interrogation in line with the defined rules; such report is not presented to the person" (in Georgian).

actions, but also indicated the phrase without any specificity: "persons involved in the criminal relationships"; secret audio and video recording was conducted against these persons too; moreover there was no additional information provided in attached materials, even in the confidential form, not accessible for the defence. Similar situation was in place in many other resolutions.

For example, we can read in the resolution on murder attempt case:[79]

"To allow ….. Department employee …. to carry out operative-search measure – "secret audio recording" against the L.N. located in the room 9 of the hospital ….. and relatives visiting him/her during the period of __April 20 __ Year and ___ March 20___ year (mentioned persons do not hold immunity envisaged under the law)."

Despite the provision in the resolution indicating that the persons visiting the heavily injured person in the hospital do not have immunity envisaged under the law, it is not clear, how did the court determine the identity of persons visiting the wounded person and how could the court decide whether the totally hypothetic persons did not have immunity?

The issue of utilisation of materials obtained via the sanctioned operative measures against the preliminarily undetermined persons as evidences is also problematic. For example, let's imagine such situation: secret listening to the telephone conversation is sanctioned by the court for the telephone number used or owned by A, however the same number was occasionally used by external person (his/her colleague B) and he /she conducted the telephone conversation with the person (L) not connected with the specific criminal fact (for which the sanction on the listening was issued). As a result of above conversation completely new criminal fact was revealed. Will the information obtained by chance have the power of evidence/ proof for the newly revealed criminal fact?

In such case two principally contradicting arguments might be raised, one of which relates to the rights of individual and second, related to the public interests: according to the legal advisers working in the areas of protection of human rights the above mentioned case only formally satisfies the rules for the obtaining of evidences; however in terms of legal essence, it will be considered as evidence obtained via illegal (but not in terms of legal offence[80]) means, as the petition submitted by the prosecutor and provided justification requesting the implementation of operative measures, did not at all relate to the circumstance revealed by chance and logically the resolution issued based on the above petition cannot be legitimate for the involuntary cases. In contrary to the above, position oriented towards the public interests deems unjustified and illogical that the State denies to react on the criminal fact already revealed due to the procedural regulations, as we may be dealing with the preparation and attempt of highly dangerous crime.

Thus, it is difficult to categorically support one of the provided arguments, as in isolation both arguments sound quite convincing and logical. Accordingly, under the above circumstances,

[79] Articles 19, 109 of the Criminal Law Code of Georgia, 1999 (as of 30 May 2012) (in Georgian).

[80] As the actions against the person who by chance was in the area of operative actions, in case of absence of blame, will not be given the qualification of blame (in Georgian).

we deal with the correct balancing of proportionality policy. Within the individual position, we deem that evidences obtained under the similar conditions shall be considered as legal and the issue on the consideration of such facts as evidences for the specific criminal law case shall be defined according the procedures envisaged under the criminal law procedural code.

6. The Right of Person to Dispute the Legality of Operative Measures Implemented Against Him/Her

Article 6, paragraph 2 of the law defines the provisions guaranteeing the protection of rights of the person subject to the operative measures. According to the above provision: "Person, who is of the view that the actions implemented by the bodies conducting operative-search measures were followed by the illegal restriction of person's rights and liberties can appeal against the legality of such actions at the relevant superior state body, to the prosecutor or at the court." On one hand, the above provision is the legal mechanism oriented towards the human rights law, however if we consider the issue with practical view, realisation of such rights is possible only for the persons, for whom the information obtained as a result of implemented operative measures were used as evidences. In other cases, for example the persons, against whom the secret listening to telephone conversations is conducted and as a result of such actions important facts have not been revealed, never notice that during the specific time period the state was intervening in the area of privacy.

Essence of the present problem is directly related to the person's right to be informed following the operative-search measures about the fact that he/she was the object of surveillance. Despite the numerous years' discussions, the above issue remains problematic for the European Commission and European Union as well as member countries.[81] Some of the countries are still reluctant to include such provisions in the legislation. It has to be mentioned, that legality mentioned in the article 8, paragraph 2 of the European Convention on Human Rights covers the need for the mechanisms required for informing the person. The analogues right of the person is also guaranteed by article 13 of the Convention. Back in 1978 year, the European Court for Human Rights indicated on very famous case (Klass case) that following the completion of operative measures (in this specific case the secret listening to the phone conversations were conducted) the individual should be informed. The above is caused by the fact that person shall get information on intervention in his/her rights and the executive government shall exclude the probability of possible wilfulness.[82] The only area where the court manifested abstention was the definition of specific term and interpreted that such right is not automatically generated following the completion of operative actions; there should not be any more the objectives which were basis for the secret implementation of the above actions.

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[81] Compare: *De Hert P., Boehm F.*, The Rights of Notification after Surveillance is over: Ready for Recognition? Digital Enlightenment Yearbook, *Bus J. et al.* (Eds.), "IOS Press", 2012, 19.

[82] Compare: *Klass and Others v. Germany*, Application No. 5029/71, [1978] ECHR (Ser. A.), 58.

In addition to the court jurisprudence, the European Council reinforced the similar approach via the recommendations developed by the Committee of Ministers on 17 September 1987 on the utilisation of personal data;[83] the above was followed in the following years by the introduction of notification liability at a principle level. Under the present situation, European Court for the Human Rights determined the violation of article 8 of the Convention and indicated to the States that with the consideration of relevant specificities, in the aspects of positive liability, they shall introduce the legislative mechanisms for the notification of objects of operative actions.[84]

It can be stated that Germany and Belgium are the exemplary states in terms of the above mentioned issue. Germany had to implement the guarantee mechanisms in legislation due to the case lost at the European Court for Human Rights; Belgium solved the issue at a national level, namely on 22 September 2011 the Constitutional Court of Belgium determined as unconstitutional the Belgian Secret Service Act, with the motive that following the implementation of secret measures against the person the law did not consider provision of information to the object of the measure and clearly defined the constitutional importance of the notification liability.[85]

It has to be also mentioned that unlike the European Council the European Union has relatively low right protection standard for the above issue. European Union accepts the notification duty on the operative actions only at the law framework level, via the inter-analysis if general provisions;[86] the above has several times become the subject for the critique.[87]

Proceeding from the above mentioned, Georgia as the signing member to the European Convention on Human Rights,[88] is liable to join the approach of European Court on the duty of notification to the objects of the operative-search actions and like Germany and Belgium shall reinforce the international-legal principle in the national legislation.

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83 Principle 2.2 of the Recommendation No. R (87) 15, Council of Europe, Regulating the Use of Personal Data in the Police Sector, Adopted by the Committee of Ministers on 17 September 1987 at the 410th Meeting of the Ministers' Deputies.

84 See: *Weber and Saravia v. Germany,* Application No. 54934/00, [2006] ECHR (Ser. A.), 135; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, Application No. 62540/00, [2007] ECHR (Ser. A.), 90; *Shimovolos v. Russia*, Application No. 30194/09, [2011] ECHR (Ser. A.), 68.

85 Case No. 145/2011, Belgium Constitutional Court, 2011, Paras. B. 82-B.92.

86 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31, *inter alia* Articles 3, 10 and 11. Same see: *mutatis mutandis,* Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, at Para. 37; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on a Comprehensive Strategy on Data Protection in the European Union, CON (2010), 609 Final of 4 November 2010.

87 *De Hert P., Boehm F.*, The Rights of Notification after Surveillance is Over: Ready for Recognition? Digital Enlightenment Yearbook, *Bus J. et al.* (Eds.), "IOS Press", 2012, 39.

88 As it is known, Georgia signed the European Convention on Protection of Human Rights on 27 April 1999, the convention was enacted on 20 May 1999, following its ratification by the Parliament of Georgia.

7. Conclusion

Thus, in the present article, with the consideration of article format, the attention was drawn to all theoretic and practical aspects, which are important for the modern scientific challenges under the current court practice conditions. With the objective to deeply analyse the problematic issues, the article provided several times the examples and provisions from the case law of the international court, as well as legislative acts effective in many leading world countries; the article provided comparative analyses in relation to the national legislation and court practice. The various relevant materials from the criminal law cases reviewed at the general courts of Georgia as well as several valid legislative acts were also discussed in the article.

Based on the above, we can provide the conclusion in the form of several provisions, providing the modern approach to the issues raised in the research and cover the progressive view required for the solution of revealed problems:

1. Under the Georgian legislation the area for operative measures subject to the court control is actually unlimited and besides the several exceptions covers the unlimited spectre of crimes, which contradicts the standards adopted by the jurisprudence of European Court for Human Rights (case law). Accordingly it is expedient to introduce restrictions for the crimes in a way similar to the one used in the French legislation, namely sanction to implement secret listening to the telephone and other type communications can be issued only for the actions the punishment for which considers imprisonment for no less than 2 years' period;

2. In relation to the operative actions subject to the court control the legislator does not define the duration related to the terms of implementation; the above in the process of implementation of public authority (minimum theoretically) provides space for wilful actions. It is expedient to define 30 days as the initial term for implementation of operative measures, in other words to incorporate the general court practice at a legislative level;

3. Considering the fact that the measures subject to the court control have highly confidential nature and sanctioning as well as legal mechanisms for further implementation are wholly assigned to the public sector, the more legal specificity is expedient. Namely, it is desirable to add to the law a norm, which will establish the specific parameters for the drafting of petition and resolution; the above in the practical reality will support the achievement of soundness of above mentioned documents and ensure provision of required details;

4. With the consideration of present legislative reality, in terms of operative-search activities, the judge has no contact with the confident, who provides the information based on which the specific operative measures are implemented. The above from the very beginning creates the precondition for implementation of only superficial (formal) control. Accordingly, it is expedient to equip the judge with right to summon and interrogate the confident in the court during the discussion of sanctioning of operative measures, if deemed required. Such discretion should be granted via the relevant changes to the legislation;

5. It is undoubtedly problematic issue whether the information obtained by chance as a result of implementation of conspiracy measures, although the court control has not been executed in this direction, could have the power of evidence. Considering inter-balance between the public and individual interests, it is expedient to deem the evidences obtained via the above form as legal; however the decision on accepting the above facts as evidences for the specific criminal case should be made in accordance with the regulations envisaged under the procedural legislation;

6. Article 6, paragraph 2 of the Law gives the person right to dispute the legality of operative actions implemented against him/her. The above in many cases is practically impossible, as there is no mechanism of provision of information to the object of the operative actions. Accordingly it would be expedient to define legislatively the liability to provide information to the persons when the objective or secret of the operative measures is completed.

Koba Kalichava*

Strategic Aspects of Improving Ecological Legislation

1. Introduction

The questions of improving ecological legislation in Georgia and its harmonization with the European laws have been discussed more and more actively in the recent years.[1] As a result, in 2010 a relevant body prepared the draft Environmental Code aimed at the improvement of environmental legislation and its conformity with the law of the EU.[2] Although, due to the lack of the involvement of the society and interested groups, as well as the lack of close cooperation with expert members, these works have been finished without success, the expression of political will in connection with the necessity to improve environmental legislation remained a good sign for future perspectives. On the other hand, it is clear that the improvement of environmental legislation, apart from political will, also depends on other factors, and we can point out some of them.

2. Advantage of the Codification of Environmental Protection Law

Modern legislative practice of environmental protection knows two main means of systemic improvement of environmental legislation.[3] The first way is a *satellite model*, which means uniting only general, the so-called horizontal norms in one whole document.[4] The priority of this model in the environmental law is determined by the feature, which is characteristic of the field. Environmental law requires constant improvement, so that it conforms to the newest technical achievements and overcomes any expected, "aging of language fixation"[5] tendency of legislation. Additionally, it, "simplifies the process of bringing certain fields closer to the EU legislation and new challenges",[6] which facilitates its progress and competitive ability in respect of other sectors.

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1 It should be noted that the idea of developing the Code of Environmental Protection first appeared in 2009, at the meetings of the project Sustainable Biodiversity Management in the South Caucasus of the Federal Ministry of Economic Cooperation and Development of Germany (BMZ). It was aimed at the Europeanization of the Georgian environmental legislation, see: *Winter G., Turava P., Kalichava K.*, Analysis and Evaluation of the General Norms of Environmental Protection Law, Tbilisi, 2010, 3-4.

2 Explanatory Card of the Draft Code of Environmental Protection, Paragraph "a", Subparagraph "a.a", available (in Georgian) at: <http://moe.gov.ge/index.php?lang_id=GEO&sec_id=39&info_id=256>.

3 Compare: *Winter G.*, Umweltgesetzbuch oder Allgemeines Umweltgesetz?, "ZUR", 2007, 298 ff.

4 Ib., 298.

5 Ib.

6 Ib.

At first sight, the Georgian environmental legislative system may be considered a satellite model, although the saw called "framework law" on "Environmental protection", which has been in force since 1997 in Georgia, does not include those signs of partial codification, which are definitely characteristic of the legislative traditions of this model (e.g.: Switzerland[7] and Poland[8]). Codifications of such type include the identical system characteristic of the general part of the Environmental Code (in the form of evaluation of influence on environment, integrated permissions control, availability of environmental protection information, and other instruments), which is common for special parts of environmental law (air, earth, water, biodiversity, etc. legislation). In Georgia such general type of instruments are scattered in different acts and therefore, they do not meet the unification requirements.

A second way of the systemic reforms of environmental legislation is the *codification of the whole field of environmental law*. (e.g.: France,[9] Sweden, England, etc.). The aim of the latter is to overcome the dangers, regulation deficits, inner and outer conflicts, etc. expected as a result of a fragmentary perfection by way of a systemic apprehension. We should mention:

-Unification and harmonization: rationalization and coherence of the legislation acting by the creation of notions, regulations and institutions, the aim of which is overcoming mutual disparities and legislative collisions,[10] as well as the "exceeding norms"[11] and dispersion.

- Transparency and simplification: the aim of codification is structural, conceptual and language improvement of environment law, cancellation of dim regulations, so that law is understandable for the addressee.[12] On the other hand, its aim is flexibility, dynamization and procedural simplification of regulations while preserving the highest environmental standards.[13]

- The Code as an orientation type of a document: From this point of view, codification unifies legal experience and the knowledge accumulated in the field, which acts as a law and, "an order of ideas", pointing direction to the subjects carrying out legal activity (preparation of the relevant draft laws).[14]

Codification as an impulse for the development of theory and practice: it is clear that the Environmental Code shall be taken into consideration as a legally sustainable and stable document. This will facilitate the development of theory and practice in this field (the creation of comments, manuals, monographs, theses, and other types of works, as well as management of

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7 In det.: *Grieffel A.,* Entwicklung und Stand des Umweltrecht in der Schweiz, "EurUP", 2006, 324 ff.

8 In det.: *Schrmann J., Sommer J.*, Das aktyekke Umweltrecht Polens, "EurUP", 2006, 331 ff.

9 In det.: *Kromarek P.,* Die Umweltrechtskodifikation in Frankreich, "EurUP", 2006, 299 ff.

10 *Kahl W.,* Umweltrechtliche Instrumente im Umweltrecht, Berlin, 2007, 6.

11 *Kloepfer M.,* Bedeutung des Umweltgesetzbuchs aus Sicht der Rechtswissenschaft, in: Umweltbundesamt (Hrsg.), Herausforderung Umweltgesetzbuch, Berlin, 2007, 22.

12 *Kahl W.,* Umweltrechtliche Instrumente im Umweltrecht, Berlin, 2007, 6.

13 Bundesumweltministerium, Begrundung des Umweltgesetzbuch (UGB), I Buch, 2008, 13, see: <http://www.bmu.de/files/pdfs/allgemein/application/pdf/ugb 1_allgem_vorschriften_begruendung.pdf>.

14 *Kahl W.,* Umweltrechtliche Instrumente im Umweltrecht, Berlin, 2007, 6.f.

discussions and conferences on the questions of environmental law).[15] The environmental law which is in force in Georgia, has less perspectives in this direction. Due to the waiting for the changes in systemic, content as well as structural, etc. deficiencies for a long time, it becomes complicated to work on this dogmatic material. Therefore, the interest in this connection is also low.

- Strengthening environmental protection: from this point of view codification provides an opportunity for complex protection,[16] which creates an opportunity for the implementation of integrated control, contrary the so-called traditional model of "selfish protection" of separate (land, water, air, etc.) components.

On the one hand, the aspiration of Georgia to bring the current legislation closer to principles of the EU environment laws[17] and on the other hand, to carry out systematized improvement[18] of legislation system will be realistically more possible within the frames of codification. It creates large perspectives for a fundamental (and not fragmentary) change of the field.

2. The so-called Objective "Key Terms" of Environmental Protection Reform

Modern administrative law includes impulses of modernization of public governance and sources of cognition, the so-called "key terms".[19] Its aim is to create a systemic correlation of the order of ideas, values, and argumentation, which does not provide a unique answer to any problematic question, but shows the way in this direction.[20] From this point of view, the following represents the relevant key terms for the purposes of *environmental protection reform*:

- *Innovation*, creating open space for renovation and new changes from the point of view of perspective (e.g.: dynamizing environmental obligations while accepting such indefinite legal terms like "technical achievements");[21]

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15 *Kahl W.,* Umweltrechtliche Instrumente im Umweltrecht, Berlin, 2007, 9.

16 Bundesumweltministerium, Begrundung des Umweltgesetzbuch (UGB), I Buch, 2008, 15, see: <http://www.bmu.de/files/pdfs/allgemein/application/pdf/ugb 1_allgem_vorschriften_begruendung.pdf>.

17 There was an official statement made on bringing the Georgian environmental legislation closer to the laws of the EU made in the Agreement on Partnership and Cooperation, on the one hand, between EU and its member states, and, on the other hand, between Georgia" on 22.04.1996. It was planned within the frames of the Agreement to carry out several legislative changes, (eg., refer to the Article 57of the "Law of Georgia on Atmospheric Air Protection", 1999), but this has not yet been carried out. For more details about the discrepancies between the Georgian environmental laws and the EU standards, see: *Winter G*., *Turava P*., *Kalichava K*., Analysis and Evaluation of the General Norms of Environmental Protection Law, Tbilisi, 2010.

18 It should be mentioned that the preparation of the Environmental Code, the aim of which was harmonization of this sphere with the EU law, was entered in the 2010 implementation program of ENP AP.

19 *Voskuhle A*., "Schlusselbegriffe" der Verwaltungsrechtsreform, "VerwArch", 2001, 196.

20 *Hoffman-Riem W*., Tendenzen der Verwaltungsrechtsentwicklung, "DOV", 1997, 439.

21 *Hoffman-Riem W*., Tendenzen der Verwaltungsrechtsentwicklung, in: Ders (Hrsg.), Innovation und Flexibilitat des Verwaltungshandelns, Baden-Baden, 1994, 13. From the point of view of communication, please see *Hirche W*., Das Umweltgesetzbuch als Instrument rechtlicher und administrativer Innovation, in: *Bohne E.* (Hrsg.), Das Umweltgesetzbuch als Motor oder Bremse der Innovationsfahigkeit in Writschaft und Verwaltung?, Berlin, "Duncker & Humblot Berlin", 1999, 57 ff.

- *Efficiency,* which implies maximum care for state and natural resources[22] (eg.: delegating a public duty to private sector, by way of speeding up administrative management, reorganization of public power, certain fields of economization, etc.[23]);

- *Communication ability*, which is one of the most important challenges of public management.[24] Along with the creation of a common database, it also includes relations existing between an administrative body and the parties involved in administration (deepening communication before consultation by way of the so-called institutionalization of a "round table", perfection of information cooperation with expert groups and searching for new forms of communication for achieving this goal, mobilization of the third persons, authorization to participate in permissions administration process, obtaining environmental reports within the process of ecological audit and the procedure of influencing environment, etc.[25]);

- *Publicity*, which means participation of the society not only from a narrow point of view (publishing a permission statement, getting acquainted with documentation, presenting a complaint, etc.), but also publicity from the broad point of view (especially by the creation of information bank, civil telephone networks, computer information programs, etc.);[26]

- *Acceptability,* which means an ability to perform state events effectively and practically, which provides it legitimacy (especially it presents the creation of a model of an administrative decision acceptable for all the parties, which can be reached by way of creating a flexible system);[27]

They point out the aims of facilitating investments in connection with acceptability in the literature.[28] The developed multidimensional[29] relation between ecology and economics in environmental law creates criticizing the law of order and the formation of new market instruments in environmental law[30]. Since the effectiveness of environmental protection largely depends on the level of the economic and social stability of a country and the implementation of environmental protection significantly depends on the level of economic and social stability,[31] and

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22 In accordance with the minimal principle, the notion of efficiency means reaching one's aim with minimal loss, and the so-called Maximality Principle will be understood as getting maximum benefit by already active means. Please refer to: *Schmidt-Asmann E.* (Hrsg.), Effizienz als Herausforderung an das Verwaltungsrecht, Baden-Baden, "Nomos Verlagsgesellschaft", 1998, 246.

23 *Voskuhle A.*, "Schlusse, begriffe" der Verwaltungsrechtform, "VerwArch", 2001, 197f .

24 *Pitschas R.*, Allgemeines Verwaltungsrecht als Teil der offentlichen Informationsordnund, in: *Hoffmann-Riem W., Schmidt-Asmann E., Schupert G.F.*(Hrsg.), Reform des Allgemeinen Verwaltungsrecht, Baden-Baden, "Nomos Verlag", 1994, 227 ff.

25 *Voskuhle A.,* "Schlusse, begriffe" der Verwaltungsrechtform, "VerwArch", 2001, 200.

26 Ib., 201 f.

27 Ib., 202 f.

28 *Knopp L., Piroch I.,* Umweltschutz und Wirtschaftskrise, "ZUR", 2009, 409 ff.

29 From this point of view, Dieter Grimm explains preventive state in the multidimensional context of limitimited freedom. According to him, "protection of freedom and limiting freedom are interconnected….whatever is protection from the position of a victim, is a limitation of freedom for the person performing activity", see: *Grimm D.*, Die Zukunft der Verfassung, Frankfurt am Main, "Suhrkamp", 1994, 213.

30 *Knopp L., Piroch I.,* Umweltschutz und Wirtschaftskrise, "ZUR", 2009, 409 ff.

31 *Grandjot R.*, Die Auswirkungen der Rahmengesetzgebungskompetenz im Umweltrecht auf die Wirtschaft, "NuR", 2005, 679 ff.; *Knopp L., Piroch I.,* Umweltschutz und Wirtschaftskrise, "ZUR", 2009, 409.

due to the fact that it is possible to implement full-fledged instruments solely in economically strong societies,[32] it is supposed that economic instruments or those oriented at the market) and the concept of sustainable development determine acceptable perspectives of administration of the law.[33] Environmental law requires fundamental improvement in this direction. In this case, there should be proportionality in the level of economic development, created economic problems and (in the form of different options[34]).

3.The so-called Modal "Key Terms" of Environmental Protection Reform

As we have mentioned above, the purposes of administrative law mentioned above do not represent the means of overcoming a problem. They only aim at identifying a problem. On the contrary, modal "Key terms" give grounds for the formation of *legislative strategies*. From this point of view, the following groups can be pointed out:

- Cooperalization;
- Deregulation;
- Privatization;
- Economization;
- Regulated self-regulation.

Out of the named strategies, the most significant is the cooperation law.[35] The aim of Cooperalization is implementation of a government style characteristic of a democratic and legal state, which is expressed in the distribution of responsibility between the state and the society.[36] Its aim is reaching a consensus (known under the name Consensus Instrument[37]) by means of an administrative agreement (eg. Concession, recovery measures or privatization), as well as institutionalization (or transferring "quiet" negotiations well-known in practice in the legislative space) and by way of broadening the involvement of society in the process of taking a decision. On the one hand, it facilitates the simplification of enforcement and on the other- it assists an interested party in formulating correct legal opinion and perspectives.

An important strategy of modernization of environmental (and in general administrative) law is regulation, which means a decrease of existing norms and regulations.[38] It should be noted

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32 *Held G*., Eine teuere Illusion, "Die Welt", 10.1.2009, 8, in: *Knopp L., Piroch I.,* Umweltschutz und Wirtschaftskrise, "ZUR", 2009, 409.

33 *Knopp L., Piroch I.,* Umweltschutz und Wirtschaftskrise, "ZUR", 2009, 410 ff .

34 There are especially meant the instruments of direct (permissions, demands, bans, etc.) and indirect (environmental statements, ecological audit, trading with emmissions certifictaes, etc.) regulation. Please, see the details of the instruments in environmental law in: *Kloepfer M.*, Umweltrecht, München, "C.H. Beck", 2004, Para. 5.

35 *Voskuhle A*., "Schlusse, Begriffe" der Verwaltungsrechtform, "VerwArch", 2001, 207.

36 *Kloepfer M*., Umweltrecht, München, "C.H. Beck", 2004, 198.

37 *Lubbe-Wolf G*., Instrumente des Umweltrechts, "NVwZ", 2001, 491 f.

38 Comp. *Ronnelfitsch M*., Selbsverantwortung und Deregulierung, Berlin, "Duncker & Humblot", 1997, 40.

that often, legislative changes carried out under the aegis of regulation require more norms and complex regulatory structures,[39] which is understood rather in the dogmatic notions of re-regulation.[40] As opposed to this, regulation means "evading, diminishing, elevation of state regulation, banning state monopolies, and overcoming different intrusion in free competition."[41] Regulation is not a painless process. The free space created by it increases different risks (for example, the risks from the creation of flexible rules, as well as the risks connected with the decrease of control over the fulfillment of material requirements and various standards, etc.).

As compared to the previous cases, the opportunity of the strongest innovation in administrative law is created by taking into consideration the power of market in regulation, i.e. *economizing administrative legal order*.[42] This indirect instrument is aimed at using the economic interests of the addressee of the norm in the effective resolution of regulation.[43] Its aim is (especially as a result of globalization of environmental protection) the deficit of enforcement created in the law of order and the flexibility of regulation system by means of the instruments of taxes, financial liability, and trading in environmental certificates.[44] Besides, the tendency of economization in environmental law (permissions) should not replace the main substance.[45] Nearly 40 years of the development of the law of classic order has proved its importance in the field of protection from atmospheric air, water and waste.[46] At the same time, historical examples point to the difficulties in overcoming the results of the dangerous substances present in the soil, in the sea and in ground waters, which takes more energy than its preventive protection.[47] From this point of view, cancellation of the instruments of direct control is unacceptable, for example, in connection with So_2 emissions (which have negative impact on human health) and it is acceptable to have such measures (economizing) in connection with CO_2 type contamination (which has no influence on logical environment). In this case the aim of the legislator is the creation of relative models[48] within the frames of public duties and the obligation of the state to

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39 A clasical example was a legislative change carried out in Germany in 1996 in the field of building regulation, which concerned the questions to be transferred for experts with public authority in connection with notification and certain construction projects, which in their turn caused increase of repressive state control. Such case was the privatization of state control over construction objects of the fifth category in 2010 in Georgia, which later on necessiated a rough involvement of the state in the field.

40 *Voskuhle A*., "Schlusse, Begriffe" der Verwaltungsrechtform, "VerwArch", 2001, 207.

41 *Stober R*., Ruckzug des Staates im wirtschaftsverwaltungsrecht, Köln u.a., "Carl Heymanns Verlag", 1997, 1.f.

42 *Wasmeier M.*, Marktfahige Emissionslizenzen, "NuR", 1992, 219 ff; *Knopp L*., *Piroch I.*, Umweltschutz und Wirtschaftskrise, "ZUR", 2009, 410 ff.

43 *Lubbe-Wolf G*., Instrumente des Umweltrechts, "NVwZ", 2001, 485.

44 *Wustlich G.*, Okonomisierung im Umweltrecht, "ZUR", 2009, 517 ff.

45 Comp. *Wahl R.*, Das deutsches Genehmigungsgrecht, in: *Dolbe K.P.* (Hrsg.), Umweltrecht im Wandel, Berlin, "Erich Schmidt Verlag", 2001, 244.

46 *Lubbe-Wolff G*., Instrumente des Umweltrechts, "NVwZ", 2001, 485.

47 Ib.

48 Comp.: *Voskuhle A.*, Gesetzgeberische Regelungsstrategien, in: *Schuppert G.F.* (Hrsg.), Jenseits von Privatisierungs und "schlankem" Staat, Baden-Baden, "Nomos Verlagsgesellschaft", 1999, 47 ff.; Especially important is to define equivalent control models in view of the scale of relevant activities.

fulfill these duties is stipulated by the Constitution.[49] It should be noted that the environmental law of the EU member states has a significant influence from this point of view.[50]

5. The Features of Modernization of Environmental Law of Georgia (Discussing the Example of Permission Law)

As we know, environmental law was fully revised since 2005. The main reason was "Optimization of the activity subject to permissions for environmental impact",[51] which in its turn was based on the ideological basis of the young state of Georgia – "Economic Liberalism"[52] and "simply cancelling the mechanisms of regulation by the state",[53] which has skeptical attitude by the modern jurisprudence.

From this point of view, modern constitutional law has critical attitude to the influence of "wild liberalism" on legal order.[54] The philosophy of ecology considers multi-polar aspects of human rights, freedoms and risks, the ideology of "Liberalism and Calvinism" to be the main hindering mechanism for the sustainable development of a country and the protection of basic rights.[55] *Ernst Forsthoff* characterized the state which existed in the epoch of industrial community as a victim of boundless processes of technical and social "realization", where absolute priority belongs to economic development and where a state is constantly degrading and cannot fulfill its goals.[56]

Apart from this, the liberalization of the law is often contrary to the cooperationalization and acceptability principles. As we know, cooperationalization of law is mainly based on the horizontal relations between the parties involved in the administrative law.[57] In the administrative law its content is mainly integrated in the mechanisms of permission control.[58] In Georgia the legal analysis of the "optimization" of the activity subjected shows that an opportunity of cooperative cooperation between a state, an investor and the third parties has been limited in the frames, in

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49 *Voskuhle A.*, Gesetzgeberische Regelungsstrategien, in: *Schuppert G.F.* (Hrsg.), Jenseits von Privatisierungs und "schlankem" Staat, Baden-Baden, "Nomos Verlagsgesellschaft", 1999, 57.

50 In this connection we should mention the influence of the Directives on Emissions Certificate trade (2003/87/EG) and Ecoaudit (1221/2009/EG-EMAS III) on national legislation.

51 Subparagraph " a.a.", Paragraph "a" of the Explanatory Card of the Draft of the Law of Georgia on the Permission to Influence Environment.

52 On economic analysis of deregulation see: *Papava V.,* Georgian Economy (Mistakes, Threats and Resolutions), in: Crisis in Georgia, Tbilisi, 2009, 24-34.

53 *Khaduri N.*, Economic System in Georgia, in: Are We Getting Closer to Europe? The Centre of Research of Economic Problems, Tbilisi, 2010, 91.

54 *Ekard E.*, Zukunft in Freiheit, Leipzig, "Schlussig Verlag", 2004.

55 Ib., 12 ff.

56 "The fire essence of today social living is not the state any more but industrial society" (see: *Forsthoff E.*, Staat der Industriegesselschaft, München, 1971, 30 ff, 47, 164).

57 *Treutner E.*, Verhandlungsstaat oder kooperativer Staat?, München, 1999, 9ff.

58 *Bohne E.*, Der Informale Rechtsaaat, Berlin, "Duncker & Humblot", 1981, 20 ff.

which regulation was carried out , which made the regulation system lose is acceptability ability.[59] The thing is that since in complex environment permissions administration is one of the means among the carriers of multi-polar interests,[60] this relation was also terminated by cancelling this chain link. When carrying out any serious economic project, the investor was not in the regime of a dialogue with the state, which also does not cause any obligation to inform society either.[61] Therefore, this causes alienation and the investor may become a victim of retrospective intervention of the state or private legal appeals, which creates unstable environment for activity.

In accordance with legal methodology, the representatives of the "new scientists working in the field of administrative law",[62] who work on the questions of modernizing administrative law, point to the importance of dogmatic categories, doubting which is by all means groundless. In this connection, they point out the systemic importance of an administrative-legal act (meaning stabilization and control functions) in the literature, without which it is impossible to have modern public administration.[63] Therefore, the science of modern administrative law points to other modernization factors of administrative law (e.g.: improvement of the inner structure of inner procedure, decrease of administrative costs, underlying organizational and personal factors, etc.).[64] From this point of view, the process of modernizing the process of environmental law in Georgia was developed one-sidedly, without taking into consideration other legal means (especially phased permission administration,[65] voluntary participation in ecological audit,[66] trade in emissions certificates,[67] etc.).[68] In other words, the current environmental legislation of Georgia does not envisage an opportunity to simplify administration form solely in concrete circumstances and transfer the matter of regulation in the different form of cooperation between the state and the entrepreneur. Therefore, the process of deregulation, which was aimed at boosting the economic development in Georgia, does not reach its real aim from the point of view of legal safety, and it is radically opposite the idea of modernization of public administration in accordance with its content.

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59 On administrative process as a means of acceptability see: *Wurtenberger Th.*, Akzeptanz durch Verwaltungsverfahren, "NJW", 1991, 257 ff.

60 *Bohne E.*, Der Informale Rechtsaaat, Berlin, "Duncker & Humblot ", 1981, 20 ff.

61 It should be noted that in Germany in order to simplify permission law the main purpose of the so called Schlaikhter commission was to bolster investments so that there was nodamage to "the third persons and society" and generally the "substance of permissions law" (see: *Bullinger M.*, Investitionsforderung, "JZ", 1994, 1129, 1131; *Schlichter O.*, Investitionsforderung durch flexible Genehmigungsverfahren, "DVBI", 1995, 174 ff.).

62 In Germany most notable are Eberhardt-Schmidt-Asman, Volfgang Hofmann-Rhein, Gunar Falke Schupert, Roman Loezer, Martin Aifert, Hans-Heinrich Trute (in: *Biermann H.*, Verwaltungsmodernisierung, Berlin, "Duncker&Humblot", 2011, 62).

63 *Biermann H.*, Verwaltungsmodernisierung, Berlin, "Duncker&Humblot", 2011, 63.

64 Ib., 64.

65 It should be noted that phase administration is established in the construction legislation of Georgia.

66 See detailed information on this instrument in: *Schmidt-Preus M.*, Steuerung durch Organisation, "DOV", 2001, 45 ff.

67 See detailed information on this instrument in: *Rostock M.*, Treibhausgasemissionshandelssysteme in den USA und Optionen des Linking mit dem EU-Emissionshandel, Nordestadt, 2010, 12 ff.

68 Eg. in connection with ecological audit, the problems of legal regulation in Georgia see: *Winter G.*, *Turava P.*, *Kalichava K.*, Analysis and Evaluation of the General Norms of Environmental Protection Law, Tbilisi, 2010, 124, 132

6. Perspectives of the Europeanization of Environmental Legislation

It is clear that Europeanization[69] is one of the main impulses of environmental law reform of the EU member states. These processes are motivated by EU competence and (environmental) influence on the national legal system,[70] as well as the wish to eliminate old regulations at the level of internal politics.[71] The exceptional attractiveness of the European law is expressed in the conceptual change of the traditional institutions of environmental law. There is especially pointed out a new understanding of legal safety (legal trust). From this point of view, the European legislation gives clear advantage to common interests[72] as compared to individual interests. Additionally, the European law creates a wide opportunity for innovational and conceptual reaction in respect of new challenges which is by all means caused by the evaluation of environmental impact and the European instruments of integrated control.[73] Additionally, an administrative law reform does not mean cancellation of regulations from the point of view of the European law. It should be noted that nearly 80% of new instruments in environmental law, approved by the EU, have purely legal character of an order.[74] It is aimed at modern scientific and technical development causing eco-central and anthropogenic dangers, in placing it in strict legal frames, which determines the legal frames of the scale of action of the environmental law.[75]

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69 *Scheuning D.*, Europarechtliche Impulse, in: *Hoffmann-Riem W.*, *Schmidt-Asmann E.* (Hrsg.), Innovation und Flexibilitat des Verwaltungshandelns, Baden-Baden, "Nomos Verlagsgesellschaft", 1994, 289 ff.; Environmental protection as the aim of the EU and the main principle of the European Policy of Environmental Protection, see: *Schroder M.*, Umeltschutz als Gemeinschaftsziel und Grundsatze des Umweltschutzes, in: *Rengeling H.W.* (Hrsg.), EUDUR, Bd. I, München, "Carl Heymanns", 1998, 181 ff.

70 *Calliess Ch.*, Die Umweltkompetenzen der EG, "ZUR", 2003, 129 ff.

71 *Wahl R.*, Das Deutsches Genehmigungsrecht, in: Dolbe (Hrsg.), Umweltrecht im Wandel, Berlin, 2001, 248.

72 EuGH, Urteil vom 20.9.1990, Rz., 5/89, Slg. 1990-1, 3473, *Voskuhle A.*, "Schlusselbegriffe" der Verwaltungsrechtsreform, "VerwArch", 2001, 192. In this German law this transformational change is known in connection with the notion of public wellfare within the context of constitutional and legal paradigms. According to it, the "pursuit of happiness" arising from American constitutionalism, the concept of individuallized well-being should be replaced with the new philosophy of "pursuit of survival", the aim of which is saving human existential basics in the form of the supreme collective kindness, *Schneider H.P.*, Vom Wandel staatlicher Verantwortung, in: *Hesse J.J.*, *Zopel Ch.* (Hrsg.), Der Staat der Zukunft, Baden-Baden, "Nomos Verlagsgesellschaft", 1990, 127, 142.

73 *Voskuhle A.*, "Schlusselbegriffe" der Verwaltungsrechtsreform, "VerwArch", 2001, 196.

74 *Holziger K.*, *Knill Ch.*, *Schafer A.*, Steuerungswardel in der europaischen Umweltpolitik?, in: *Holzinger K.*, *Knill Ch.*, *Lehmkuhl D.* (Hrsg.), Politische Steuerung im Wandel, Opladen, "VS Verlag", 2003, 103. The importance of the law of order in Europe is mostly caused by the free turnover of articles and services within the common inner market, which is guaranteed by Part 2, Article 26 of the Lisbon Agreement (AEUV). From this point of view, the national decision made in the field of environmental protection can be assigned cross-border importance at the scale of the European community, see: *Ruffert M.*, Der transnationale Verwantunksakt, "DV", 2001, 463.

75 *Holziger K., Knill Ch.*, *Schafer A.*, Steuerungswardel in der europaischen Umweltpolitik?, in: *Holzinger K.*, *Knill Ch.*, *Lehmkuhl D.* (Hrsg.), Politische Steuerung im Wandel, Opladen, "VS Verlag", 2003, 103.

The comparative-legal analysis of the environmental law of Georgia as compared to the EU environmental law, clearly points to fundamental noncompliance[76] existing between the two systems. And it is clear that Georgia aspires to bring Georgian environmental legislation closer to the legislation of the European Union in phases.[77] This requires laborious work with the active participation of political institutions, administrative resources as well as other interested and expert groups.

7. Summary

The necessity of a reform of the environmental law in Georgia is determined by the existing legal state which has been created as a result of the optimization and radical regulation of this field. As we have mentioned, the reform does not comply with the fundamental principles recognized in modern environmental law (eg.: the concept of institutional cooperationalization, acceptability and integrated control). Improvement of this condition depends on several factors: From a pure formal point of view, systemic improvement of the legislation of this field can be carried out by way of a complex codification and satellite model. Additionally, as we have mentioned above, the priority characteristic of codification, as well as the state aspiration of Georgia to carry out systemic improvement of the current environmental law clearly point to the perspectives of better implementation of the process within frames of the Code. In the other case as a minimum, a satellite model should be chosen. From the conceptual point of view the goal as well as modal "key terms" should be taken into consideration, and regulatory institutions should create an opportunity to compare flexibility and various (ecological, economic and social) interests.

[76] See: *Winter G., Turava P., Kalichava K.*, Analysis and Evaluation of the General Norms of Environmental Protection Law, Tbilisi, 2010 (permissions system, evaluation of environmental impact, prevention of damage and salaries, environmental planning and ecological audit); *Winter G*., *Khuchua N*., Analysis and Evaluation of the Environmental Law of Georgia, Tbilisi, 2010 (Forest resources, protected territories and species protection).

[77] See 17th footnote.

Giorgi Makharoblishvili*

M & A's Constructive Effect on Joint Stock Companies

1. Introduction

The methodical basis for selection of mergers/acquisitions for the purpose to study the structural changes was their complexity, variety of combinations and specific corporate/tax origins. Prescription of changes in structural elements of JSC using the merger-acquisition strategies and the post-transaction result contain different legal elements. Restructuring motive is the basis for starting the process of searching for new ways of legal relationships, attraction of new/additional investment or creation of diversified capital portfolio by the "Inherent". The transaction motivator is the perspective view of synergy effect of combination results. The synergy is achieved by consolidation of legal methods, opportunities and industrial-geographic areas of profitability of purchase. It is utopic to achieve the objectives without changes to the strategic and organizational elements of the JSC implemented throughout the process of synergy, efforts directed towards the increase of corporation and shareholder's value. Changes of structural elements are the reflection of panoramic reality of corporation.

The catalogue of constructive effects of the merger-acquisitions for the JSC cover such issues as the rights of shareholders in the reorganized society, main strategies for their protection, management structure and post-transaction condition of company established as a result of the reconstruction. For the correct systemic approach review of the above as the results of the corporation combination should be implemented separately.

2. Composition of Constructive Changes in JSC

The structural phenomenology of the corporation is reflected in the recognition as the entrepreneurial relationship the ideal-type interaction between the multi-facet elements of corporation's complex construction and diffusive relationship between the dualist corporate legal and economic –marketing elements of the corporation. Activation of inter-relationships is based on the organizational transformation practices. According to the organizational method of capital

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management,[1] among the systematically significant changes[2] reorganization is the last "step" in "economic game of artificial creature".[3] Merger-acquisition is the classic case among the reorganization basics for the simple reason that these types of corporation combinations (part of them) are the reorganizational[4] transactions.[5] They themselves are reorganizations.[6]

Reorganization for the purpose of the present article is used as category in wider essence. It can be interpreted via several main dimensions. First dimension, conditionally, covers the typological, organizational and substantial transformation of corporation as legal subject. Typological conversion is not the replacement of hypothetically existing sub-types inside the same legal form (changing "closed" JSC with the "open" JSC or vice versa). Organizational transformation considers change in legal form, when the concentrated capital of the target organization managed with the economic ways changes its management legal form in uninterrupted regime of economic turnover of the capital. As for the substance transformation, it achieves the re-directing of the entrepreneurial activities. The latter is vertical and coincides with the contextual definition of conglomerated merger.

The second dimension is formed via the reflection of results of the first dimension transformation process on the rights of the corporation owners (shareholders). The shareholders can be categorized in two sub-categories: holding control package of shares and dissident shareholders.[7] The sub-type of the second column of the conditional diagram is the post-transactional capital structure. In general, the second dimension covers the analysis of legal condition of shareholders' and capital structure as a result of M&A integration.

The concept of third dimension covers the analytical consideration of rotation of management of companies participating in the combination. The essence of this dimension is understood through the deductive analysis of transaction competences of persons with the management authorities. Competence should be interpreted in a wider sense. The competence together with number of authorities covers the list of obligations too.[8]

The above discussion covers the details of basis of the constructive changes of the corporation. In addition to the organizational changes merger/acquisition in some specific cases may cause the "antonym" of changes – the liquidation. The contrast of liquidation against the changes is the volunteer

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1 Economists refer to it as "organisational method" of enterprise management. See: *Posner R.*, The Economic Analysis of Law, Boston, "Aspen Publisher", 2007, 409.

2 *Palmiter A.,* Corporations, New York, "Wolters Kluwer", 2006, 591-627.

3 *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 661.

4 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 546-548.

5 *Gilson R.,* The Law and Finance of Corporate Acquisitions, New York, "Foundation Press", 1986, 450.

6 See: Federal Income Tax, Code and Regulations, *Dickinson B.M.* (Editor), Chicago, "CCH Incorporated", 2012-2013, 341; Article 14[4], Law on Entrepreneurship, 1994, available (in Georgian) at: <www.matsne.gov.ge>.

7 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 360-370.

8 For example, fiduciary liabilities. See: *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 119-124.

termination of organization existence. In corporate combinations, this is an action which can be implemented at the last stage of finalization of acquisition integration, which is assigned to the last type of fundamental "changes", more correctly to the constructive changes category.[9]

3. Reorganisation Level Restructuring

3.1. Organisational Conversion

The post-transactional condition of JSC structural elements varies with the changing types of transactions. The strategic reconstruction stigma of JSC is the change of organizational-legal forms and functioning.

In general "reorganization" means the action or process of creation of new.[10] It might cover establishment of new corporation or change of shareholding structure and the management with the prospect to continue activities with the same or changed name. For the enterprise the organizational conversion considers change of legal form as determined by normative acts. The basis for initiation of organizational change is of voluntary nature.[11] M&A as its basis can be ranged only as sub-structural. Based on the class nature of the corporate combinations, change of JSC as the legal entity is based on the controlled transaction which can be subject to the negotiations.[12] The above type of transactions is full proprietary and share purchase of the corporation, merger and consolidation.[13] But what is the relationship between conversion of legal form of JSC and specific strategies of acquisition and how is the change of organizational form generated?!

The line for determining the connection between them lies on the normative declaration of practical possibility to realize the autonomy of the will.[14] The voluntary nature of making transaction is the preliminary element of reorganization implementation. Authorization of merger and consolidation is the competence of General Meeting of Shareholders of both companies.[15] The number of entities and difference of interests determine the dualistic nature of the transaction. Negotiations are held between the management of both companies, whose authorities (of the

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9 *Hamilton R., Freer R.,* The Law of Corporations, 6th Ed., St. Paul, "Thomson/West", 2011, 398.

10 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 546.

11 *Hamilton R., Freer R.,* The Law of Corporations, 6th Ed., St. Paul, "Thomson/West", 2011, 399.

12 Compare: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 16-19.

13 *Rock H., Kanda K., Kraakman R.,* Significant Corporate Actions, Oxford, "Oxford University Press", 2009, 141.

14 The authorization of entering the controlled transaction by the general meeting of shareholders and existence of legislative provisions on the commencement of voluntary reorganization. See: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 325, 555-562. Compare: *Rock H., Kanda K., Kraakman R.,* Significant Corporate Actions, Oxford, "Oxford University Press", 2009, 133-145. Also, see Article 14, 14^4 and Sub-paragraph (b), Paragraph 6, Article 54 of Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>.

15 *Rock H., Kanda K., Kraakman R.,* Significant Corporate Actions, Oxford, "Oxford University Press", 2009, 134.

management) *quo warranto* nature is determined by the positive decision of the shareholders' general meeting. The decision made by the qualified majority of shareholders of the acquirer company is required if transaction causes change to the statutes or the corporation has to issue/increase the shares allocated for the implementation of agreement by 20%.[16] Specifically, the results are differentiated in line with its subjects. If transaction does not require changes to the acquirer company,[17] the merger transaction is not considered as the factor causing the fundamental changes for the survived company.[18] However, if during the implementation of merger process the changes to the statutes of the acquirer are required, then such transaction in USA is considered as the fundamental type of change.[19] At this stage corporate combination, indirectly is the basis for the fundamental change, but it does not cause organizational conversion, as the change to the statutes is related to the authorization of additional shares.

The opposite result is created for the target corporation. As a result of merger its property, without liquidation, in other words under the condition of maintaining the uninterrupted economic line,[20] changes legal form of management; its shareholders become the shareholders of the acquirer company and the property is transferred to the balance of acquirer company.[21] Following the changes, registration of details is conducted in accordance with the valid laws and the organizational conversion becomes legally binding.[22]

The legal effect of acquisition/merger on JSC as the united construction is not, of course, homogenous. In case of acquisition with corporation cash or partial acquisition of property, which was not from the beginning determined to be implemented as two stage transaction deal and purchase of substantial part of the property/share is not followed by the merger with the target company, the change of legal form is not implemented.[23] With the similar results[24] the triangle mergers are implemented; the corporation established for the purposes of the transaction continues

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16 *Hamilton R., Freer R.,* The Law of Corporations, 6th Ed., St. Paul, "Thomson/West", 2011, 389.

17 Compare: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 60-61.

18 M.B.C.A. §11.04(g), Official Comment, USA, 2009. Compare: *Rock H., Kanda K., Kraakman R.,* Significant Corporate Actions, Oxford, "Oxford University Press", 2009, 135.

19 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 260.

20 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/ West", 2008, 660-693.

21 *Cox J., Hazen T.,* Business Organizations Law, 3rd Ed., St. Paul, "West", 2011, 610-622.

22 See Decree No 241 issued by the Minister of Justice of Georgia on the approval of instructions on "Registration of Entrepreneurs and Non-entrepreneurship (Non-commercial) Legal Entities", Article 11, Paragraph 12, available (in Georgian) at: <www.matsne.gov.ge>.

23 *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 692-695, 701-703.

24 Identical result is in place for the lease agreements concluded with the autonomous manifestation of will between the shareholders and debt security owners or creditors, when the corporation transfers all its property to the newly established company. The property transferring corporation retains its legal entity, and for the agreement purposes the only asset for the newly established company is the transferred property. This in parallel with the proprietary acquisition differentiates it from merger and consolidation. See: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 562-564.

existence (direct triangle merger) or is merged with the target company (reverse triangle merger). Establishment of subsidiary of the acquirer and its reconstruction does not cause the organizational conversion of the acquiring company. Moreover, if we have the forward triangle merger, the organizational form of target company is transformed, which continues its entrepreneurial activities as subsidiary of the acquirer. On the contrary, if the target company "Survives" after the transaction, the legal form is not reconstructed except for the cases, when the acquirer makes decision to merge with the target JSC.[25]

Fundamental change of organizational form terminates the original "*nexus of contracts*" relationships existing for the establishment of the reorganized corporation. "Contract unity" metaphor describes the unique relationship, which is established between the shareholders, shareholders and corporation.[26] Organizational conversion with the establishment of the corporation causes the deconstruction of legal-establishment origins of corporation, which is somehow rehabilitated via the provisions envisaged in the main terms and conditions of the transaction. Such agreement in return for "letting" the target corporation, considers for the shareholders of the target corporation the distribution of stakes and retaining the status of shareholder in the acquirer company. Transaction itself, together with the legally obligatory nature, has corporate-legal type elements. Change of organizational-legal form is the type of fundamental corporation transformation, which together with the company statutes creates substantial substrata of "*nexus of contracts*" doctrinal metaphor.[27]

To give a brief summary, qualification of acquisition/merger as organization conversion is generated through the transfer of Target Company's shareholders' united capital to uninterrupted circulation of property accumulated under the new legal entity's organizational structure. The above can be considered as specific type of organization transformation, which in contrary to the established dogmatic definition of change of the legal from, considering the replacement of one legal form by the alternative form,[28] is a result of acquisition/merger where two or more enterprises can be involved.

3.2. Typological Conversion

The entrepreneurial entity of the capital type is typologically classified based on the relative calculation of its positive and negative segments. The search for the simplified ways for capital attraction directs the corporation to the inclusion of shares into the public sales. The procedural

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25 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/ West", 2008, 552-554.

26 *Cox J., Hazen T.,* Business Organizations Law, 3rd Ed., St. Paul, "West", 2011, 150-159.

27 Ib., 262.

28 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/ West", 2008, 553.

activities related to taking the share capital to the organized markets are quite expensive.[29]Actions directed towards the public selling of the company are the conceptual manifestation of *going concern*.[30] G*oing private,*[31]as contrary to *going concern* is the method of JSC's fundamental changes.[32] It is functionally utilized in several directions.

First – at the second stage of two-stage acquisition strategy (of the target company) implemented by the acquirer company it is reflected in the sub-system method[33] of the systemic approach to the exile of minority shareholders.[34] Together with the share splitting, repurchase of own shares and re-capitalization this is an organic change, causing the typological conversion of the company.[35] The method can be used at the last stage of the acquisition.[36]

Following the successful completion of first stage (bidding proposal) out of the two-stage acquisition, the exiling of minority shareholders of the target company under the sub-category of loan finance is implemented via the buyout of the shares by the management.[37] This type of transaction is subject to the legal regulations on special transparency.[38] All transactions directed towards the delisting are subject to the USA stock exchange market rule and regulation,[39] which is considered under the definition of "transaction test" and meets the requirements of "efficiency test". "Test efficiency" is reflected in the most of the LBO transactions, as it causes delisting of target company shares.[40] "Transaction test" covers all types of acquisitions which is implemented by the party placing the shares or by the affiliated entities, in other words, there should be controlling interaction between the acquirer and Target Company, in order to ensure the transaction is under the regulations of *SEC* 13E-3.[4142]

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29 The costs of share listings are increased by the amounts to be paid to lawyers/legal services, costs related to the preparation of financial documentation, adaptation to the stock exchange rules and adjustment of corporate management. In USA such costs vary between USD 300 000 to USD 800 000. However it does not include the amount to be paid to the insurance committee. See: *Haas J.,* Corporate Finance, New York, "West", 2011, 11-13.

30 Ib., 125-127.

31 See: *O'Neals H., Thompson R.,* Oppression of Minority Shareholders and LLC Members, Rev. 2d. Ed., New York, "Thomson/West", 2009, §5.27.

32 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 140.

33 "Going private″ was interpreted as the sub-typical manifestation of ″freeze-out" by the Delaware Court in 1977. See: *Lynch v. Vickers Energy Corp*., 383 A.2d 278 (Del. 1977).

34 See *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 765-779.

35 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 140.

36 Ib., 658.

37 *Haas J.,* Corporate Finance, New York, "West", 2011, 662-663.

38 *Booth R.,* Financing the Corporation, Villanova, "West", 2010, 562.

39 "Going private" is within the securities' market regulations. In USA the procedural imperative for its fulfilment of filling up of S.E.C.13E-3 formulated catalogue.

40 *Fleischer A., Sussman A.,* Takeover Defence, Vol. I, New York, "Aspen Publisher", 2000, 19.

41 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 136.

42 SEC. 13E-3rule has important exception in the form of 13E-3(g)(1): if the two-stage purchase tender offer is followed by the merger during one period after the bidding offer, acquirer and target companies were not affiliated companies before the completion of offer, the "Back-end" price to be paid to the minority shareholder is equal to or is more than the value fixed in the bidding offer or they receive the shares with

Second functional utilization of corporate actions related to delisting are demonstrated in the strategies applied for avoiding the "hostile" takeovers. The essence of "hostile" takeover, which considers the bidding offer made through the capital markets, covers the offer to the shareholders, whose shares are registered at organized capital market. Strategy considers the transformation of "open" corporation into the "close" company via the purchase of shareholders' shares.[43] The termination of public shareholders "rider" limits the corporation to acquire the control stake in the target company.[44] The above mentioned clearly shows the dualist and atypical nature of delisting strategy: it can be used as the strategy for the completion of takeover as well as the protection mechanism for takeover.

Implementation of typological conversion via utilization of delisting transaction has third functional motivator. The USA federal legislative regulation,[45] as well as law on entrepreneurs[46] and on stock exchange markets[47] determines the specialized requirements for the company which after meeting the specific conditions/provisions automatically become the subjects of legislative requirements.[48] In USA, the corporation with 500 or more shareholders and property with ten million or more value, must obey to the federal regulations and register itself in accordance with the legislation on securities.[49] If corporation meets the above criteria, it has to prepare and fill up quarterly, annual and special reporting forms.[50] Federal legislation implements the extraordinary supervision over the bidding offers and procedures for implementation by the representatives of the vote holders. Management or shareholder,[51] owning 10% or more of any type of company shares is liable to obey to the federal imperative requests and fill up and ensure submission of reports to prevent the potential chance for the buyout of shares via bidding (*MBO*) or involvement in the process of control transformation and their influence.[52] Violation of requirements on the financial reporting and transparency of information on current situation of the company can become the basis for the court trials and buyout of the shares by shareholders on the basis of

substantially same rights and bidding offer has complete information transparency including the acquisition goals, that it (acquirer) wanted to implement merger at the second stage, then (under the mentioned conditions) the implementer of delisting transaction is not required to fill up SEbiddingC. 13E-3 form. See: *Fleischer A., Sussman A.,* Takeover Defense, Vol. I, New York, "Aspen Publisher", 2000, 21; *Booth R.,* Financing the Corporation, Villanova, "West", 2010, 566.

43 *Haas J.,* Corporate Finance, New York, "West", 2011, 662.

44 *Gilson R.,* The Law and Finance of Corporate Acquisitions, New York, "Foundation Press", 1986, 913.

45 SEC. Rule 13E-3.

46 Article 55, Paragraph 1 of Law on Entrepreneurs determines the number of shareholders as such requirement: if the number of shareholders of JSC achieves 100, then establishment of supervisory board is compulsory.

47 In the law on securities the Securities Emission Process belongs to such category of requirements. See: *Jibuti M., Koranashvili K.,* On "Securities' Market", Comments to the Georgian Law, Tbilisi, 2004, 55, 79 and the next.

48 *Cox J., Hazen T.,* Business Organizations Law, 3rd Ed., St. Paul, "West", 2011, 658-660.

49 Securities Exchange Act 1934, Rule 12g-1.

50 According to Securities Exchange Act 1934, Rule 12, 13 these forms are10-K, 10-Q, 8-K.

51 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 254-259.

52 *Booth R.,* Financing the Corporation, Villanova, "West", 2010, 564.

violation of fiduciary liabilities.[53] Implementation and imposing of such legislative requirements for the large corporations are related to high costs.[54] It is logical to think that delisting transaction can be used as a method to meet the management interests and shareholders value, if the registration of the capital at the organised market does not achieve the set goals.

Delisting transaction with its functional manifestations is the strategy for the change of action areas for the company functioning. Although public offering of shares to the capital markets requires special regulation,[55] delisting is also important phenomena of capital market, normative regulation of which cannot be avoided by the legislator. Corporation listing can be considered as top-down typological conversion and the event taking place due to the specific circumstance. Logical development of specific events chain leads the general legislative requirements to the specific regulations. Therefore typological transformation of JSC via the placement of share on capital markets is referred to as deductive typological conversion.

In contrary to the above, delisting which covers number of legal actions for avoiding the special standardized requirements and is directed towards the prevalence of general regulations, can be referred to as inductive typological conversion. They are classical basis for the typological conversion of capital company. The methodological manifestation of delisting implementation is the interactive result of merger/acquisitions. Despite the fact that typological conversion is considered as "transfer from the light to the darkness" for the corporation,[56] correctness of its utilization should be checked via the analysis of specific circumstances and consideration of corporation's economic-legal status.

4. Structural-investment and Right' Reclassification of Shareholders

4.1. Change of Shareholders' Investment Portfolio

Stabilization of rights' conditions for the sources of shareholding capital accumulated in the corporate company is an important segment determining the correct corporate and economic profitability of the implemented investment. Under the conditions of investment risks, stability is the subject of active protection. The contextual stigma of investment risk is related to the possibility of

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53 For example, see *Santa Fe Industries, Inc., v. Green,* 430 U.S. 462, 480 (Sup. Ct. 1997). "Going private" transaction has many regulated elements, fulfilment of which by the management had become topic for many court trials. See in detail: *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 141-145.

54 *Booth R.,* Financing the Corporation, Villanova, "West", 2010, 562-563.

55 In parallel with regulation, "going concern″ is distinguished with its high costs, for which corporation is not often "ready" financially. Accordingly, in historic perspective, the substantial angle for the analysis of corporation's financial situation is the evaluation of value of "going concern″ and its methods. See: *Brudney V., Chirelstein M.,* Corporate Finance, New York "Foundation Press", 1979, 3-79.

56 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 136.

damage or loss of investment and reflected in qualitative indicator of such loss.[57] Concentration of capital by the person together with the capitals of other persons creates the diversified form of investment portfolio. This is a content basis of portfolio theory.[58] In practice it is implemented via using the legal form of corporation. Corporation in this regard is considered as the main method for the solution of problems (risk control) created as a result of capital consolidation.[59]

According to investment portfolio theory property portfolio is the opposite notion to the individual ownership, ownership risk, the source of which is investor and means the probability that the actual incomes will be different from the anticipated results, can be reduced without reduction of anticipated incomes.[60] By this way the shareholder's investment acquires the diversification. If the concentration of property in the form of portfolio results in diversification of property, it means that the portfolio is the result of risks' accumulation and contains the high risk ratio.[61] Logically the diversified investment portfolio containing the risk requires "re-insurance". The partial de-investment of capital and reinvestment in business organizations with other or same geographic and business lines is considered as corporate legal re-insurance action.[62] Merger-acquisition type reorganization transactions are the reinvestment corporate strategic tactics for the creation of diversified capital portfolio. If the shareholders of Target Company are represented as one unity, as a result of transaction integration, they together with the shareholders of acquiring company create two subtracts, by which the existing investment will be diversified. Diversification itself is the main qualifying factor in portfolio theory.[63]

The central object of corporation's structural transformation is the shareholders' structure. The principal concept of reorganization type transactions free from the taxing[64] is the retaining of corporate-legal connection of shareholder to the enterprise with the member status. For the company or its shareholders participating in the combination the promise of shares as the form of remuneration for held shares gives the continuation nature to the shareholder corporate (member) status.[65] Notation of transaction considers that they instead of their shares in Target Company the

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57 *Klein W., Coffee J.,* Business Organization and Finance, 11th Ed., New York, "Foundation Press, Thomson/ West", 2011, 243-245; *Gilson R.,* The Law and Finance of Corporate Acquisitions, New York, "Foundation Press", 1986, 115.

58 *Haas J.,* Corporate Finance, New York, "West ", 2011, 198-200.

59 *Posner R.*, The Economic Analysis of Law, Boston, "Aspen Publisher", 2007, 392.

60 *Gilson R.,* The Law and Finance of Corporate Acquisitions, New York, "Foundation Press", 1986, 125. The ancient statement illustrates the essence of portfolio theory: "never put all eggs in one basket". See: *Haas J.,* Corporate Finance, New York, "West ", 2011, 197.

61 Compare: *Klein W., Coffee J.,* Business Organization and Finance, 11th Ed., New York, "Foundation Press, Thomson/West", 2011, 21-26.

62 Compare with the stock rights of shareholder. *Klein W., Coffee J.,* Business Organization and Finance, 11th Ed., New York, "Foundation Press, Thomson/West", 2011, 295-298.

63 *Haas J.,* Corporate Finance, New York, "West ", 2011, 197.

64 *Ginsburg M., Levin J.,* Mergers, Acquisitions, and Buyouts, Vol. 2, New York, "Wolters Kluwer Law & Business", 2003, 16.

65 *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 675.

shareholders receive the shares of "survived" corporation. Type of reinvestment of pre-transaction capital of Target Company is implemented for the acquirer company.[66] As mentioned above, investment portfolio in essence means the capital-investment in corporation. According to portfolio theory, change of organizational method of investment (corporation) is equal to the change of management form of the invested capital. Hence, change of legal form of capital management using the reorganization type transactions considers change to the investment form.[67] In parallel with the change to the investment form, the shareholders' structure is also changed. The change of shareholders' structure should be reviewed in the context of acquiring/merging corporation, as Target Company as a result of reorganization type transaction, generally terminates its existence. At post-transaction stage the "Survived" company has reconstructed shareholder structure formed via the consolidation of parties-acquirer's (in other words own shareholders) and target company's shareholders - to the transaction.

In summary, transactions implemented via utilization of such acquisition/merger methods, which offer as payment the shares of acquiring/merging company, so called reorganization type transactions, result in variation in structurally two-dimensional elements of the JSC: the form of investment of target company shareholders is changed and by the way of increase of shareholders, the shareholding structure of the acquirer company is reconstructed.

4.2. Reclassification of Shareholders' Rights

Shareholder[68] is related to the corporation with member's legal status. The membership creates the individual's proprietary and management rights.[69] The fundamental concept of corporate organization, separation of control and ownership puts the management of daily entrepreneurial activities outside the competence of shareholders.[70] The right's classification of shareholders is determined by the type of the share. Determination of share classes is implemented at the establishment stage or via the changes to the statutes in case of functioning companies. This is the classification of internal structural rights of property of the individual owned in the corporation. The basis for the revision of rights of the shareholders determined by the statutes of the target company is the conversion of shareholders' structure and organizational form. As the last two, the rights' reclassification can become the result of acquisition/merger result. Due to the high probability of similar substantial variations of rights, the expression of

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66 *Gilson R.,* The Law and Finance of Corporate Acquisitions, New York, "Foundation Press", 1986, 341-343.

67 *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 675.

68 For the purposes of present chapter, "shareholder" considers ordinary person with voting right, so called *residual claimants*, as thematically legal classification of preferential shares, debt securities and convertible securities at post-transaction stage is the topic for separate discussion. For example, see: *Haas J.,* Corporate Finance, New York, "West", 2011, 281-494.

69 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 2, St. Paul, "Thomson/West", 2010, 452.

70 *Haas J.,* Corporate Finance, New York, "West", 2011, 499.

consent/denial via voting of shareholders on implementation of transactions prevents the undesirable reclassification of rights.[71] But there is a question: what can be the reclassification of shareholders' rights, how is the corporate combination reflected and what influence can it have?!

The inter-relationship between the activism of shareholders and management of reorganization type transactions is determined at normative level.[72] At the very initial stage of starting negotiations on transaction the nature of the combination is determined, it is desirable or unacceptable and it is decided how well does it fit the context of the developed business strategy. The pre-transaction attitude of shareholders towards the new company is essentially determining their future rights' conditions.[73] The catalogue of shareholders' corporate rights and rights related to the corporation vary from the management control to the receipt of interest from the invested capital. Acquisition/merger is the object of fundamental change; the shareholders' rights are subject to the fundamental change. In other words, it is possible to have the identical modification (acquiring similar rights) as well as discredited transformation of rights of Target Company.

In the first instance, the shareholder enters the acquiring company with the same stake participation as it had in Target Company, meaning that he retains the ownership of shares with the same rights and class. Despite getting the shares with the same class and rights, the rights' condition of the shareholder undergoes the substantial reclassification. This is caused by the change in the shareholding structure on the basis of combination of owners of two different companies. The weak concentrations of shares are created. The Magnitude of share concentration is sensitive for the rights' conditions of the shareholder. Reduction of concentration weakens the activism of the shareholders.[74] The control means for them (the large shareholders, who can influence the decisions) is limited in proportion with the share concentration. If the shareholder was granted the competence to influence the decisions in past or Pre-transaction Corporation, these rights are automatically diluted with the increase of number of shareholders. Influence on decision making is the very important means for control. The Delaware court interpreted that,[75] control exists in the corporation when the shareholder directly or indirectly has more than half of the voting authority.[76] On the other hand, the control which makes the person the controlling shareholder has specific premium value. Premium is the quite high surplus to the market value of the share of the non-controlling shareholders,[77] conversion of which into the financial benefit is

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71 *Booth R.,* Financing the Corporation, Villanova, "West", 2010, 838-842.

72 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 65-70.

73 Ib., 325.

74 Compare: *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 2, St. Paul, "Thomson/West", 2010, 302-304.

75 *Weinstein Enters., Inc., v. Orloff,* 870 A.2d 499, 507 (Del. 2005).

76 *Radin S.,* The Business Judgment Rule, Vol. I, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1126.

77 *Booth R.,* Financing the Corporation, Villanova, "West", 2010, 115-120.

achieved through the transaction of selling[78] the control via the private negotiations.[79] Therefore, change of control structure,[80] via the reorganization type transaction, does not result in paying the premium to the shareholders owning the control package of shares.[81] They get the same number of shares in the acquiring company as they owned (in general it is implemented with the similar proportion, however there is possibility to have different agreement between the parties at the stage of definition of transaction disposition), but the concentration weakens and the controlling indicator for the new reality is lost. As a result we have the limitation of specific segment of management authority based on the status of the shareholder. Of course it is impossible to re-classify the fundamental rights such as organic rights of request of information in the new company (*entry strategy*) and implementation of de-investment (*exit strategy*).[82]

Discredited classification of rights is generated from the various bases. Among them the substantial type of transaction is distinguished. Strategy of cash purchase of Target Company may put the shareholder in disadvantaged condition. Integration of transaction is the process of fulfillment of agreement conditions, where the parties shall implement the pre-agreed liabilities. Following the signing the transaction, the shareholder, who supported and gave the actions of the management *quo warranto* form and then transaction was closed, does not have possibility to change provisions of the agreement.[83] At the stage of initiation of negotiations on transaction, due to the incorrect perception of future profitability indicators for the shares by the target company shareholder (in other words the share is "relevantly unvalued" so called "*undervalued"*, on which is based the synergism expectations of the acquirer) the shareholder him/herself carries out de-investment of promising invested capital. De-investment is undesirable condition of the property if the shareholder has to re-invest capital in new entrepreneurial activities or similar activities having different legal establishment. Capital investment of former shareholder in desired activity, purchase of shares at stock exchange and relevant study of the market is quite expensive activity, causing the devaluation of de-invested capital from the target company. Methodological analysis of the mentioned approach varies with the variation of legal-economic circumstances. Accordingly, the results of analysis always depend on the indicators of data under the specific circumstances.[84]

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78 For sale mechanisms of control, see: *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 661-675.

79 *Dyck A., Zingales L.,* Private Benefits of Control: An International Comparison, Harvard, "CRSP Working Paper", No. 535, 2001, 2-4, available at: <http://papers.ssrn.com/abstract=296107>.

80 *Easterbrook F., Fischel D.,* The Economic Structure of Corporate Law, London, "Harvard University Press", 1991, 131-138.

81 Compare: *Sepe S.,* Private Sale of Corporate Control: Why the European Mandatory Bid Rule is Inefficient, "Arizona Legal Studies Discussion Paper", No. 10-29, 2010, 8-18, available at: <http://ssrn.com/abstract=1086321>.

82 *Armour J., Hansmann H., Kraakman R.,* Agency Problems and Legal Strategies, 2nd Ed., Oxford, "Oxford University Press", 2009, 40-42.

83 Compare: *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 55-62.

84 For example, what value is implied in broker services, legal consultations or services, economic study of new geographic zone and etc.

However, if the shareholder at pre-transaction stage can see the eventual threats to the presumable de-investment, the legal law and order[85] gives the normative capacity[86] to make profitable de-investment.[87] The above mentioned risk is generally related to the shareholders holding non-control number of shares, who do not have the means to influence the process of decision making on the transaction making.[88] The strategy envisaged by the law for exiting the company by dissident shareholder is the buyout of the shares. Shareholder, who did not agree with the fundamental change, rights' re-classification and reorganization, and expressed the opposite position to decision made at the general meeting, and if such decision violates his/her essential interest, e.g. causes undesirable de-investment,[89] creation of weak concentrations of shares or damaging reconstruction of rights (limitation of voting right, cancellation of right for giving the cumulative vote[90] and preferential right to purchase), he/she can request the de-investment with the protection of fundamental condition of fair compensation.[91] It should be stressed, that activation of such legislative protection requires the pre-condition of existence of controlled transaction. The protection of corporate-legal rights of the shareholders, who incurred the damage due to the combination and for determination of their provisions, they did not have capacity are subject to different legal regulation. The legal analysis of mechanisms for the protection of rights of dissident shareholders is topic of separate paragraph.

4.3. Main Mechanisms for Post-transaction Protection of Shareholders

In the process of acquisition/merger the two separate groups of shareholders are created: holders of control number of shares or, minimum the shareholders or group of shareholders holding at least potential capacity to influence the decision and giving their consent to the transaction[92] and dissident shareholders, shareholder or group of shareholders who cannot

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85 This does not consider the legislative rule of putting Veto on transaction by the shareholder, which supports the activity of shareholder via the voting mechanism; see: *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1568. Compare: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 43-44.

86 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 327-332.

87 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 76.

88 *Fletcher W.,* Fletcher Encyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thompson/West", 2008, 6.

89 Shareholder may not wish to de-invest due to the tax reasons. For example, stored shares, which are recorded in company's balance sheet until the death of shareholder, means avoiding taxes. Namely, in the calculation of value of shares stored until the death of the shareholder the income tax deductions are not considered. See: *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 771.

90 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 5, St. Paul, "Thomson/West", 2011, 240-242.

91 Article 53^1, Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>.

92 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 360-366.

influence the decision making on transaction, and who did not support the transaction.[93] There is a simple logic that the shareholder with the control number of shares, if we do not have the violation of contract agreements via the un-fulfillment of fiduciary liabilities from the management of the parties,[94] does not require legislative creativity, as determination of controlled transaction contents is based on the substantial element of autonomous expression of will by the shareholder controlling the proprietary or share sales/purchase of the enterprise.[95] Therefore, such shareholder limits himself and enters the corporate-legal agreement relationship with the acquirer corporation.[96] Hence the *caveat emptor of* the agreement depends on seller shareholder. Holder of small number of shares is in opposite corporate pre- and post-transactional conditions to the shareholder holding controlling number of shares. In the process of construction of specific type of transaction, small shareholder might not be given the chance to utilize the limited qualitative voting right. For example, in the process of acquisition of substantial part of shares with voting rights, the small shareholder does not have the capacity to have the individual reaction using the defense means against the takeover by the acquirer company.[97]Achievement of maximum percentage indicator by the acquirer, desire to increase the synergy and reduce the costs related to the corporation management[98] determines the decision to exile (*cash-out*) dissident shareholders.[99] However, the legislation *ex ante* defines the procedural realism of exile of small shareholders.[100] This creates the possibility for the small shareholder to de-invest, i.e. exit the company.

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93 *Shade J.,* Business Associations, New York, "West", 2010, 411-413.

94 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 60-62.

95 The shareholder with the control number of shares is assigned the fiduciary liabilities towards the company and minority shareholders. See: *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 2, St. Paul, "Thomson/West", 2010, 302-312. But in parallel with the fiduciary liabilities, the controlling shareholder has certain rights, as the person holding the controlling number of shares, which gives him authority to sell the controlling package of shares without violating the liabilities. As a result he/she does not violate the fiduciary liabilities via the disposal of controlling shares. See: *Radin S.,* The Business Judgment Rule,Vol. I, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1171-1190.

96 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 2, St. Paul, "Thomson/West", 2010, 326-328.

97 Compare: *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 77-79.

98 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 2, St. Paul, "Thomson/West", 2010, 329.

99 *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 762-764.

100 *Cox J., Hazen T.,* Business Organizations Law, 3rd Ed., St. Paul, "Thomson/West", 2011, 621. In mentioned case, "exile" does not only mean regulation in the disposition of norms of obligatory selling. It considers implementation of ordinary merger. The difference between the two is in the difference between the shares with the voting rights: if for the activation of norm for obligatory selling requires ownerships of more than 95% of shares and it has imperative nature, for the decision on merger 75% of shares with voting rights are required as the proposition from the legislator, the partners can determine the quorum different from the above via the provisions in the statutes. Normatively it is allowed and determined the implementation of merger, where the acquirer company has the package of shares in the target company sufficient for decision making. Via ownership of such package, the acquirer makes decision on reorganization via merger without any obstacles. See Paragraphs 1, 2 and 3, Article 14^4 and Paragraph 1, Article 53^4 of Law on Entrepreneurship, 1994.

In contrary to the normative prevention, protection of rights of dissident shareholder is the topic of discussion at the court practice level and became the methodological segments covering the issues[101] of damages caused due to the opportunistic behavior of the controlling shareholder or the management and restoration of status quo.[102] In the process of selling the control by the shareholder with the control number of shares without distribution of premium to the small shareholders,[103] the small shareholder should not incur loss and shall get minimum the equivalent of his ownership in the company before the reconstruction.[104] The loss is directly related to the change of control. The latter considers the acquiring the direct influence over the management of company property, for which the acquirer pays the premium.[105] Legal protection from the above cases covers giving the dissident shareholder the right to protest against the transaction results (appraisal) and creates the second corporate mechanism for the protection from the undesired results.[106]

4.3.1. Exit Strategies and Their Activation

4.3.1.1. Selling of Shares as an Exit Strategy

It is possible to range the shareholders unhappy with the corporate combination in two directions. First – the category of shareholders, who in the process of making the deal and integration are disassociated and protest against it and request to leave the company with the fulfillment of concept of fair compensation[107]and second – the shareholders are not against becoming the shareholder of acquirer company, however, in a short period of time the profitability of being shareholder in a "new corporation" turns out to be stagnate and they decide to use the organic principle to leave the corporation and sell the shares to the third party. The both cases illustrate the un-painful method of de-investment. The first is referred to as the right to cash out the share as a result of reorganization, and second – as the right to sell the shares at the functioning stage.[108] The strategies vary based on the subjects and classification nature of legal

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[101] *Radin S.,* The Business Judgment Rule, Vol. I, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1568-1575.

[102] *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thompson/ West", 2008, 429-431.

[103] Compare: *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1198-1199.

[104] *Easterbrook F., Fischel D.,* The Economic Structure of Corporate Law, London, "Harvard University Press", 1991, 139.

[105] *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1199.

[106] *Hamilton R., Freer R.,* The Law of Corporations, 6th Ed., St. Paul, "Thomson/West", 2011, 380-387.

[107] *Easterbrook F., Fischel D.,* The Economic Structure of Corporate Law, London, "Harvard University Press", 1991, 145-147.

[108] *Armour J., Hansmann H., Kraakman R.,* Agency Problems and Legal Strategies, Oxford, "Oxford University Press", 2009, 40-41.

regulations. In case of getting relevant value/compensation in the process of de-investment, the shareholder enters the legal relationship with the corporation and asks the corporation to cash out the share owned by him/her.[109] In this case we have obligatory acceptance and acceptant, always the enterprise with which the person is related in the status of member and where the person has stake ownership.

The opposite target object to the above is given, when the shareholder uses the second strategy – selling of shares - for stake de-investment. In this case the subjectivity of agreement party is unlimited: the shares are listed at the organised public market with number of potential offerers[110] registered. In case of leaving company by the way of selling shares, the buying party is not known in advance in contrary with the first strategy. Moreover, in case of share selling the shareholder declares the invitation for the offers. Accordingly, it is not possible to talk about the compulsory acceptance. Potential buyer makes offer to the shareholder, who in the event of fair and effective market conditions, accepts the offer.

Stake de-investment, under the limits of withdrawal authority, considers receipt of value relevant to the invested capital, which is realized based on the legislative regulations on appraisal created via the separation of the shareholder from the reorganization type controlled transaction.[111] Implementation of second de-investment strategy is supported by the practice of strategic approach to the stake selling and existence of liquid capital markets. In "public" corporations, all public shareholders have unlimited right to exit the company. The essence of strategic approach to the selling the shares is determined by high liquidity of the market. According to the trends and statistics in the market turnovers, it is possible to maximally adequately determine the market value of the share of dissident shareholder. Therefore, in many countries operating under the effective organized capital markets, where it is possible to sell the stake at fair and adequate price diapason, the dissident shareholder is not granted the appraisal right, in other words to use the first exit strategy.[112] The both strategies are the corporate rights to protect small shareholders, which is used as the rights protection mechanism[113] against the shareholder with the control number of shares at the stage of substantial conflict.[114]

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[109] See Paragraph 1, Article 53[1], Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>.

[110] Legally it is more justified to state that, public proposal of shares is invitation for offer, and the potential "acceptant" (third party) via the offer to share owner make the shareholder the acceptant.

[111] *Armour J., Hansmann H., Kraakman R.,* Agency Problems and Legal Strategies, Oxford, "Oxford University Press", 2009, 41.

[112] *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1570.

[113] The current analysis of right protection mechanisms is classified as the legal strategies for the rights' protection via non-claiming means. Despite the fact that the appraisal right considers the determination of fair value via the court process, this is still the institute regulated at legislation level, where it is calculated in detail, that in case of non-acceptance of the fair value from the "company" it is possible to approach the court with the only motive to determine the fair value. Stressing the term "non- claim" is caused by the fact that in the process of entering the deals causing the substantial changes the minority shareholder can sue the management and the controlling shareholders with the blame that they violated the fiduciary liabilities. As a result realization of appraisal right similar to the violation of fiduciary liabilities as a mean to restore the

4.3.1.2. Right of Appraisal as Exit Strategy

In historic perspective, all fundamental decision requires the unanimous decision from the shareholders. This authority creates the right of Veto, which gives the shareholder the power to create obstruction. In order to prevent the abuse of shareholders voting rights based on the importance of agreement and proprietary rights, the precedents have been created in the court practice,[115] which gives the corporation the right to implement the corporate action despite the opposition from the individual shareholder.[116] Very soon the above was strengthened at the normative level. The legislator makes the fundamental change implementable without the unanimous decision.[117]

On the contrary, the minority shareholder has the appraisal right, to balance and compensate the annulation of Veto power on the general meeting.[118] Compensating is used in its direct sense and it considers request of fair price in exchange for the dissident shareholder's stake. The definition of authority is implemented at a normative level.[119] The activation of protest right is implemented for such fundamental changes as, merger, share exchange transaction, sale of whole property and changes to the statutes on the rights' restructuring of issued shares.[120] It is mostly used for "public" JSC, the basis for realization of which is the disassociation of the shareholder from the fundamental changes.

The shareholder, who does not agree and disassociates himself from the fundamental changes to the corporation, protests against the value of his shares and requests relevant compensation from the company.[121] The separation paradigm covers two stigmas. First- right to request compensation, mainly possible in *bona fide* merger and consolidation cases, when in exchange for letting his/her stake the minority shareholder is offered the cash or other type of

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"justice" via the starting court trial process is different with the exit strategy, such as selling of shares and leaving the company. See: *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 769. Despite the above mentioned there are fundamentally different elements characterizing the appraisal right and court cases on the violation of fiduciary liabilities. See: *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1648-1659.

114 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 82-83.

115 *Lauman v. Lebanon Valley Railroad*, 30 Pa. 42 (1858).

116 *Weiss A.,* The Law of Take Out Mergers: A Historical Perspective, "N.Y.U. L. Rev.", No. 56, 1981, 624-630.

117 In Georgian legislation such possibility is created by the Paragraph 1^1, Article 54 of the Law on Entrepreneurs, 1994. As for the specific transaction, it can be the "short form of merger, when the consent from the minority shareholders of subsidiary on the joining of Mother Company is not required by the legislation. See: *Fletcher W.,* Fletcher Cyclopedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thompson/West", 2008, 416.

118 *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1568.

119 For example, see: M.B.C.A. §13.01, 13.02, 2009.

120 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 80.

121 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 414.

payment from the "survived" corporation, but not the voting share. The combination sets the hypothetical pre-condition – before the merger the minority shareholder is given cash as a dividend for accepting the merger, such cash is paid in the process of merger or after closing the merger transaction.[122] In parallel the area for normative validity of appraisal and objective of such norm should be interpreted.

As mentioned above, appraisal right as the notion determined at normative level was established with the objective to balance the agreement freedom of corporation and autonomy of shareholders' will, in order to be able to authorize the fundamental changes. Based on the norm definition, disposition of the dissident shareholder to receive the compensation covers damaging rights reclassification as well as shareholder's capacity to request cash[123] as a compensation for his/her stake, if the shareholder protests against and does not agree to receive the shares in acquiring company.[124]

Historical and targeted dogmatic definition of appraisal considers it as mechanism for the protection of minority shareholders. However the trends of its practical utilisation essentially change the purpose of appraisal. Mentioned purpose is of ostentatious nature.[125] Namely, expression of protest does not impede the implementation of reorganisation type transaction or integration, meaning that the right for protest of the dissident shareholder is the legal mechanism for protection of shareholders with the control number of shares: they determine, enter and implement deals based on their views, and minority shareholder, besides the availability of institutional defence mechanisms of claiming against the violation of fiduciary liability, cannot impede this process using the appraisal right.[126]

Under the conditions of normatively limited utilization of protest rights, it is important to detail the boundaries of such utilization.

4.3.1.2.1. Boundaries of Utilisation of Appraisal Right

The scale of utilisation of protest rights by the shareholder is determined at legislative level. The preconditions for its utilisation vary in accordance with the corporate laws and orders. According to appraisal the dissident shareholder, minority shareholder unsatisfied with the decision made by the shareholders holding the controlling number of shares, can exit the company under the receipt of relevant and fair compensation. The essence of differences in protest rights is determined by the boundaries of its utilisation. Generally it is used for the protection of rights of

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122 *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1569.

123 *Fletcher W.,* Fletcher Cyclopedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 416.

124 *Cox J., Hazen T.,* Business Organizations Law, 3rd Ed., St. Paul, "Thomson/West", 2011, 636.

125 Ib., 83.

126 *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 769-770.

shareholders disassociated from the merger or combination.[127] However it can be also viewed as the type of repressive measures implemented against various institutional violations. For example, if JSC implements rights' reconstruction of shares or/and issuing new shares causes the creation of weak concentration of existing shareholders, it is possible to use by analogue the appraisal right.[128] It is clear that the above covers the situation when for implementation of acquisition procedures for the target company acquirer does not have sufficient authorised shares and therefore, it is required to issue new shares and use new shares for financing (contribution) the transaction. The issue, under its inductive definition, is related to the change of capital and shareholders' structure. Transformation of shareholders' structure is reflected on eventual results of control distribution and becomes the basis for the implementation of management rotation. But the issue becomes complex when the transformation requires changes to the statutes.

According to Georgian legislation, definition of capital amount and shares is done via the records in the company statutes. Share reconstruction or issuing new/ additional shares, logically requires changes to the statutes. The following issue is interesting : under the hypothetic existence of disputes, which basis for the use of protest right against the reduction of original share concentration of the acquirer company shareholders caused by the issue of new shares, will be possible – the decision of general meeting on issue of new shares or "adopted" changes to the statutes ?!

USA federal model law directly determines the reclassification of shares or rights' reconstruction as the changes to be reflected in the statutes.[129] On the contrary, the law of entrepreneurship only discusses in general terms the changes to the statutes and its details is considered as the issue to be governed under the autonomy of the statutory will.[130] The legislator determines the reorganisation or/and decision damaging the shareholder's rights as the preconditions for the cash out at fair value for the shares.[131] Meaning that issuing new shares as well as changes to the statutes can be considered as essential violation of interests. Therefore, the court practice on the issue of granting the right to express the protest shall be based on the postulate of changes to the statutes, as authorisation of new share issue is covered by the statutory regulations. Pursuant to the legislative definition of utilisation of protest right, the opposite argument is illogical as the decision made with the violation of fiduciary liabilities by the shareholder holding the control number of shares or the management is considered as basis for the violation of "essential interest".[132]

In contrary to the above, the legal nature of the protest has other implications too. As mentioned above, the boundaries of protest utilisation, is generally differentiated according to the

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127 For example, see: M.B.C.A. §13.02(a)(1).

128 In USA, in analogue situation, the Michigan court granted the dissident shareholder the authority to use the protest tight. See: *Morley Brothers v. Clark,* 361 N.W. 2d 763 (1984).

129 M.B.C.A. §13.02(a)(4)(5).

130 Sub Paragraphs (a) and (b), Article 54, Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>.

131 Paragraph 1, Article 53[1], Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>.

132 *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 769-772.

typological classification of transactions, In USA, the majority of States, does not consider the transaction of disposal of corporation property as normal entrepreneurial activity and grants the dissident shareholder the authority to protest.[133] Similar to USA, in Georgian legislation, selling of almost whole (in other words partial) property is not considered as normal entrepreneurial activity. As disposal of essential part of the property is the firm basis for reorganisation, it should be considered under the competence of general meeting of shareholders, which determines the decision making process on reorganisation.[134]

However, there are important regulations limiting the boundaries of protest right. The issue is related to the elements of public trading with securities. In parallel to the legislation allowance for the appraisal right, there are limiting norms for the exceptions. The US model law[135] and Delaware corporate law[136] directly set the limiting imperatives for the protest right of shareholders, shares of whom are registered for public trade and are covered under the regulation of capital market law.[137] It is impossible to use protest right and is not required, if for the determination of fair value for the dissident shareholder's share there is an effective market environment,[138] and the shareholder can receive the adequate compensation (so called *market-out* or *market exception*).[139] Moreover, under the existence of specific preconditions, the public shareholder cannot use general pre-condition postulates of protest right covering the merger and consolidation.[140] The above case is related to the existence of specially determined pre-conditions. For example, if the corporation is trading at the organised capital market and has minimum 2000 shareholders and its market value is minimum USD2 million,[141] shareholder cannot use the appraisal right.

And finally, the dimensional boundaries reveal its special form. It was mentioned above, that activation of appraisal right in *bona fide* transaction and is caused by the inadequate indicator of compensation. But the protest right can be used against the false and illegal transactions.[142] The specificity of utilisation is qualifying the appraisal as special, exclusive means for reimbursement of loss. By this way the claimant shareholder tries to oppose the merger procedure by one

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133 *Cox J., Hazen T.,* Business Organizations Law, 3rd Ed., St. Paul, "West", 2011, 637.

134 Sub-paragraph (a), Paragraph 6, Article 54 of Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>.

135 M.B.C.A. §13.02(b)(1)(i), official comment, 2009, sec. 13, 23-36.

136 Del. Code Ann. tit. 8, §262(b).

137 *Fletcher W.,* Fletcher Cyclopedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 420-421.

138 M.B.C.A. §13.01, official comment, 2009, sec. 13, 8.

139 *Easterbrook F., Fischel D.,* The Economic Structure of Corporate Law, London, "Harvard University Press", 1991, 149-152.

140 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 91.

141 M.B.C.A. §13.02(b)(1)(ii).

142 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/ West", 2008, 424-429.

additional tool.[143] To qualify the protest as a mean for reimbursement depends on the legal evaluation of the transaction. The transaction must be illegal, made unconscientiously or/and made via the violation of fiduciary liabilities. For example, revealing the cheating elements in the transaction, revealing of incompetent and illegal merger or consolidation, which can be deduced to the violation of fiduciary liabilities by the decision makers.[144] It is interesting, that generally, violation of fiduciary liabilities is the subject of separate discussion, but specific US State regulation mechanisms consider the appraisal as main tool for compensation of violated rights.[145] Protest right as the exclusive form of restoration of violated right, according to various court decisions, is interpreted differently. The essence of the first case is that if the shareholder's request is based only on violation of fiduciary liability and not on the illegal actions, then the protest right loses the special form of reimbursement.[146] According to the other direction in court practice the opposite is approved. The developed tendency included the statement that together with the violation of fiduciary liabilities it is not necessary to have facts for illegal actions and appraisal right remains the exclusive mean for reimbursement of loss.[147] Violation of fiduciary liabilities, according to the optimal view, can be considered at the stage of definition of fair value of compensation of the dissident shareholder. It is clear that at the stage of indifferent conditions of legislation regulations the practice is differentiated.[148]

As a summary we can state, that the general postulate of the appraisal right is the legislative protection mechanisms for the shareholders' rights who are disassociated with the reorganisation type transaction formation and results, which is characterised with the conjunctive boundaries of legal actions and exceptional cases. In any case, the court practice as well as legislative regulations show that the practicing the appraisal right is differentiated and its utilisation depends on normative approach valid for the specific country and orienteers of court practice.

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143 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 77.

144 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thompson/ West", 2008, 429-438.

145 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 105-108.

146 For example, the Hawaii Appeal Court considered legally right to use the protest right against the violation of fiduciary liabilities only in cases if the valuation of liabilities was related to cheating and legal offence. See: *M & W, Inc., v. Pacific Guardian Life Insurance Co.,* WL 32685 (Haw. App. Ct. 1998). By this decision, it rejected the thesis used by Delaware Court for Weinberger precedent, that any monetary remuneration is generated from the appraisal right and in cases of legal offence and cheating, protest right is related to the non-adequate compensation and referred to as appraisal right utilization risk. See: *Weinberger v. UOP, Inc.,* 457 A.2d 701, 714 (Del. 1983). For consideration of decision on Weinberger case in terms of appraisal context, see: *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1659-1662.

147 *Moon v. Moon Enterprises, Inc.,* 65 Ark. App. 246, 986 S. W.2d 134 (1999).

148 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 109-111.

4.3.1.2.2. Compensation of Share at Fair Value and Value Definition

4.3.1.2.2.1. Subjects for Definition of Fair Price

Among the elements of appraisal right, together with the above discussed issues, the central position is held by the compensation issue and mechanisms for its value.[149] Appraisal institute's purpose is the definition of fair value for the share of dissident shareholder in the company. The legislation grants the exclusive authority of fair price definition to the company, which via the supervisory board ensures the technical side of issue solution.[150] The shareholder who does not agree with the supervisory board decision can appeal/protest the price/value at the court.[151] At this stage the dualist nature of protest right is differentiated. First – in general it considers the separation of shareholder unhappy with the made decision from such decision. The shareholder unhappy with the reorganization or transaction conditions protests against whole transaction and requests relevant compensation. At present, according to Georgian legislation, the company is authorized to determine the fair value of the stake. Second – doubting the adequacy of calculation of disassociated shareholder's investment value by the company and protesting against it. The second is the result of the first; however the first does not impede the utilization of the second. The definition of adequacy of the price appealed by the shareholder is the subject of court discussion.[152] The difference between the price protested upon and the price determined by the court decision is paid by the company "survived" after the combination or the newly created company.[153] Therefore the protest right is the credit risk of the "survived" corporation.[154] But what is the fair price and what are the criteria for its definition (if applicable)?!

Protesting against the participation in the transaction requires evaluation. Evaluation shall be made at fair price; however there is no general definition for the fair price. It is the subject of study for the precise sciences and contains subjective and objective elements.[155] The subjectivity of the fair price is determined by its individualism. Adequate compensation shall be determined based on each specific circumstance and case. Despite the fact that there is no general scheme for definition of fair value, there are various methods and means for its definition in US legislative

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149 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 67.

150 Paragraph 4, Article 53[1] of Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>.

151 Ib., Paragraph 6, Article 53[1].

152 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 454.

153 For example, in *Hintmann vs. Fred Weber* case the Delaware court decided on payment of 29% appraisal premium value. The transaction price for each share was USD 260, following the appeal, the "Fair value" determined by the court equalled USD 335. See: *Hintmann v. Fred Weber, Inc.,* Del. Ch. Lexis 65, WL 376379 (2000).

154 *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1571.

155 Ib., 1584.

and court areas. Among them the "Delaware block" method and method "Based on Important Circumstances" are the most important.

4.3.1.2.2.2. Definition of Fair Value

The most difficult issue in legal understanding of the appraisal right is the definition of fair value of the dissident shareholder's share. The value of the share determined by the company shall be redefined by the court if the dissident shareholder does not agree with it.[156] The price for the stake under the appraisal context is referred to as "value" (*value*), "fair value" (*fair value*),[157] "fair cash value" (*fair cash value*) or "fair market value" (*fair market value*).[158] The etymological differentiation, does not determine the definition of substantial limit.[159] The term "fair" indicates the fact, that the value determined for the share quoted at the capital market at specific date or time is not final value.[160] The US model law for corporations indicates that immediately after the activation of corporation action "fair value" should be immediately determined using the subjective aspects and concepts and techniques of evaluation.[161] In parallel the Delaware corporate law defines the "fair value" at the legislative level as the value of the share on the date of merger covering all values, which were created as a result of merger.[162] The vague legislative basis for the calculation of "fair value" caused the activeness of the court practice and supported its creativity.[163]

In the process of calculation of value the liquidation value of the net property of the corporation should be taken into consideration; the assets and liabilities, goodwill, patents and trade-marks shall be evaluated and considered as well.[164] Together with the liquidation value the future business opportunities and strength of income streams of the corporation as going concern shall be considered.[165] In the process of appraisal, evaluation of some companies is complicated as they do not hold the reliable sources confirming the income history, are controlled by the majority

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156 *Easterbrook F., Fischel D.,* The Economic Structure of Corporate Law, London, "Harvard University Press", 1991, 152-154.

157 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 93.

158 *Cox J., Hazen J.,* Business Organizations Law, 3rd Ed., St. Paul, "West", 2011, 641.

159 There are positions reinforced by different court practice, according to which "fair value" is wide notional category and it exceeds the "fair market value" as, protest right is used by the shareholders holding the shares for which there is no liquid market or the shares are not "sellable" (liquid). In such case definition of fair value depends on many factors; however market value plays insignificant role in its definition. See: *Balsamides v. Protameen Chems, Inc.,* 734 A.2d 721-733, (N.J. 1999). Also see: *Swope v. Siegel-Robert, Inc.,* 243 F.3d 486, 492 (8th Cir. 2001).

160 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 93.

161 M.B.C.A. §13.01(4)(ii), official comment, 2009, sec. 13, 10-12.

162 Del. Gen. Corp. Law §262.

163 *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1589.

164 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thompson/ West", 2008, 455.

165 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 94.

of shareholders or/and their shares are not placed at liquid capital market.[166] Despite the above fact, the corporation evaluation, which following the determination of "fair value" is responsible for its payment, is important, as the value of dissident shareholder's share is determined on the basis of possible partial liquidation of corporation, as the property is identified and evaluated, which would be received by the shareholder if the enterprise as the economic unit terminated operational functioning. This method of evaluation is the conservative method of determining the net property value of the company. It evaluates the net property value of corporation and does not consider the property's *going concern* synergetic value,[167] at the same time the interest of the shareholder is to get the adequate value for his/her share from the reorganization type transaction to which he/she did not agree. Corporation should be evaluated in the context of *going concern* as the "acting reality" in the process of merger.[168] Accordingly, the objective of the appraisal process should be estimation of the interest of the shareholder, which he/she would get in case of *going concern* condition of the corporation. Therefore, corporation should be evaluated as operative organization and *going concern* enterprise, as the potential representative of market sector.[169]

The method known as "Delaware block" was considered as important technique in determining the adequacy of value.[170] The essence of the method lies in the calculation of arithmetical average of four types of values. In order to get weighted arithmetical average figure it is necessary to calculate the property, market, income and dividend values of the corporation.[171] Any circumstances related to the value are taken into account in the process of calculation.[172] In cases where it is not possible to determine the market value, additional three elements, such as balance value, provisions of property purchase agreements and cash value of compensation derived from the agreements, are used.[173] The shortcomings of the method were related to the special strictness of criteria for share evaluation and non-consideration of synergy interests. However the "Delaware block" method was declined by the Supreme Court of Delaware in Weinberger decision,[174] which indicated that in value evaluation all relevant circumstances shall be used,[175] except for price speculation elements, which may be created as a result of transaction.[176]

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166 *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1586.

167 *Cox J., Hazen T.,* Business Organizations Law, 3rd Ed., St. Paul, "West", 2011, 642.

168 *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1589.

169 *Applebaum v. Anaya,* 812 A.2d 880 (Del. 2002).

170 *Easterbrook F., Fischel D.,* The Economic Structure of Corporate Law, London, "Harvard University Press", 1991, 154-156.

171 Ib.,153.

172 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/ West", 2008, 465-466.

173 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 97.

174 *Weinberger v. UOP, Inc.,* 457 A.2d 701 (Del. 1983).

175 "Condition is relevant" which can influence the evaluation. Therefore, the court must use all "relevant" conditions/circumstances "necessary" components/ circumstances as the postulate for several method. The following is considered as the other circumstances: dividend rate for the dissident shareholder's stake, opportunities for increase or decrease of dividends, accumulated earnings used for payment of dividends,

New appraisal method caused some limitation in share evaluation. The Delaware corporate law contains the provision, that share value covers all values/prices created as a result of merger; the Supreme Court interpreted against the dissident shareholder and stated that "fair value" includes all elements accompanying the merger and created as result of merger, meaning that, synergy effect of specific transaction shall not be considered in the calculation of fair value of the share of dissident shareholder. The last concept was explained by the fact that dissident shareholder participates in the synergetic value of offered acquisition transaction (which he protests against) and not in the "fair value" of the target company as the unit.[177]

The objective of the appraisal process should be the definition of proportionate value of dissident shareholder, which does not mean the definition of transaction value of only the owned stake.[178] The price of share of dissident shareholder is calculated from the liquidation value of the owned share. During the calculation of liquidation value of the stake the minority shareholders' or liquidation discount can be taken into account.[179] Shareholder's discount depends on whether the shareholder with the control number of shares or the minority shareholder is disassociated with the corporation actions. Inclusion of discount in determining fair value depends on the creative approach of the court. If dissident shareholder is minority shareholder, he/she does not have authority to influence the company management and his/her share contains less value,[180] compared with the share owned by the majority shareholder. The discount of minority shareholders is antonym for the premium value for the shareholders with the control number of shares. Controlling shareholder has effective tools to control the company causing significant increase in the value. On the contrary, the minority shareholder does not have the real mechanisms for exercising such effect, accordingly is subject to the reduction in value, so called discount.[181] Utilization of discount for minority dissident shareholders depends on the court.[182] It means that following the evaluation of corporation using the above mentioned methods and definition of proportionate value of the share of minority shareholder, the discount will be deducted from the identified value, resulting in appraisal value i.e. "fair value" of the share.[183] Evaluation of enterprise and share always has fluctuating nature and depends on the specific

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corporation accounts, and its business prospects, selling (market) value of shares, market conditions, corporation reputation and any other condition which may influence the evaluation of stake. See: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thompson/West", 2008, 461.

176 *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1591-1592.

177 *M.P.M. Enterprises, Inc. v. Gilbert,* 731 A.2d 790, 795 (Del. 1999).

178 *Radin S.,* The Business Judgment Rule, Vol. II, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 1593.

179 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/ West", 2008, 467.

180 Ib., 468.

181 The Federal Estate Tax, 2011, 147-148.

182 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/ West", 2008, 467, 469.

183 *Cox J., Hazen T.,* Business Organizations Law, 3rd Ed., St. Paul, "West", 2011, 644.

circumstances. The above makes impossible to determine the fixed discount indicator and the latter (discount) also depends on actual circumstances.[184]

As for the reduction of stake value via the liquidity discount and calculation of "fair value", the methodological systematization is similar to the discount for minority shareholders. The level of share liquidity considers the level of difficulty/simplicity to sell it by the owner. The precondition for poor liquidity status can be existence of statutory limitation on disposal, practical difficulties related to the sale or limited number of potential buyers at the market. In presence of mentioned conditions the "fair market value" of the share is less than company's termination value. Hypothetic data is the determinant for the liquidity discount. The addressees for the liquidity discount are the shareholders of the both levels – controlling as well as minority shareholders. In this case the value of proportionately owned share of the dissident shareholder will be reduced at maximum discount rate.[185] As well as shareholders' discount, the definition of practical trends and orienteers of utilization of liquidity discount[186] depends on the court.[187]

And finally, the issue of consideration of control premium of the controlling shareholder in the company value is correlated with the realization of appraisal right. The "corporation property" theory gives the analytical perspective on the issue; the theory was developed by Berle in XX century.[188] According to the above theory, the premium value created from the disposal of control block is owned by the corporation and should be reflected in the corporate balance. "Corporate property" theory reveals that the premium value is owned by the company.[189] Court practice, in the process of trials on claims on appraisal right is subject to the orienteers of the above discussed theory. The Delaware Supreme Court considered it prudent that the corporation value is increased by the premium amount paid.[190]

In summary, the fairness principle requires to give the minority shareholder the compensation adequate to the share calculated with the consideration of synergy resulted from the merger ;[191] the court should functionally determine if such valuation of share is moderate.[192]

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184 The Federal Estate Tax, 2011, 149.

185 Ib., 151-152.

186 The shareholder and market liquidity discounts are identical to "inadequate evaluation of shares" (*under-price*), when the share of the target company is less than the real market value. The "under-price" or discount is considered as motivator for the purchase of target company, this difference between actual market value and current market value is equal to profit/benefit of acquisition transaction and is the source of anticipated profit. See: *Kraakman R.,* Discounted Share Price as a Source of Acquisition Gains, Cambridge, "Cambridge University Press", 1990, 29-62.

187 *Cox R., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, 2010, 102. Moreover it has to be mentioned that the US business corporate model law after the amendments made in 1999 does not any more consider liquidity discount method. See: M.B.C.A. §13.01(4), 2009.

188 *Berle A.,* Control in Corporate Law, "Colum. L. Rev.", No.58, 1958, 1212.

189 Compare: *Andrews R.,* The Stockholders' Right to Equal Opportunity in the Sale of Shares, "Harv. L. Rev.", No.78, 1965, 505.

190 *Rapid-American Corporation v. Harris,* 603 A.2d 796 (Del. 1992).

191 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 104-105.

4.3.2. De-Facto Merger Doctrine

4.3.2.1. The Essence of De-Facto Merger

The *ex post* strategic method of protection of shareholders from the integration results of reconstruction is the de-facto merger doctrine. The general strategy of exit is activated in the presence of determined pre-conditions. The essence of development and utilization of de-facto merger doctrine lies in the analysis of preconditions for the implementation of exit strategy. Moreover, it belongs to the area of court discretion on the realization of appraisal right. It is the result of court practice.[193]

In USA, majority of states,[194] provide the legal provisions to determine the authority for the compensations at fair value for the dissident shareholders in cases of total or almost total disposal of company property in the context of extraordinary entrepreneurial activities. In Delaware the appraisal right is used in connection with the merger and consolidation,[195] which is different from the New-York and Ohio regulations and Business corporate model laws,[196] where the appraisal right can be used for almost all fundamental changes.[197] In contrary with the Delaware corporate law, Georgian normative area creates the high scale area for the appraisal utilization. As the US business corporate model law, Georgian law on Entrepreneurs allows the protest and possibility to receive the adequate compensation for all fundamental changes. The reaction of shareholder in the form of company exit on every fundamental change is reflected in the law on entrepreneurs via the consideration of general disposition.[198] Moreover, avoiding the creation of appraisal right via the substantial property disposal is possible via the indirect ways under the statutory autonomy. If the partners make detailed provisions in the statutes, considering that disposal of total or almost total property is not perceived as "extraordinary" entrepreneurial activity and define it as the current operational strategy, then the dissident shareholder will be limited in using the appraisal authority due to the provisions in the statutes.[199] There is still question: what is the connection

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192 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/ West", 2008, 471.

193 *Shade J.,* Business Associations, New York, "West", 2010, 416.

194 Except for Delaware and California states, where the merger and consolidation are the preconditions for the utilisation of appraisal right. See: *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 22.

195 Del. Code. Ann. tit. 8, §262.

196 M.B.C.A. §13.02.

197 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 22-23.

198 " ... if otherwise not envisaged by the statutes". See: Paragraph 1, Article 531, Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>.

199 The competence for definition of authorised area of entrepreneurial activities is the part of authorities of general shareholders' meeting. Therefore at establishment stage, or in the dynamics of functioning changes to statutes does not contain any legislative obstacles for the shareholders. See: Paragraph 6, Article of Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>; Also see *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 23.

between the appraisal right and de-facto merger doctrine?! The connection line passes through the utilization mechanism.

4.3.2.2. Utilisation of De-Facto Merger Doctrine

De-Facto merger doctrine makes statement on court exceptional cases from the general rules in absence of direct successor for the liabilities for the corporate property sales.[200] The list of liabilities of target company, for which the acquirer company wishes to take responsibility and become successor and responsible for certain liabilities under the agreement, is subject of discussion and agreement in transactions on acquisition of corporation property. This type of transaction is often under the individual discretion of controlling shareholder. In contrary to the conclusion of individual purchase agreement, decision on merger or consolidation requires decision of shareholders' general meeting, meaning that without such decisions the consolidated companies will establish the *de facto* corporation.[201] The de facto nature of corporation does not give the shareholder right to carry out legal actions on its dissolution, excluding the cases, which are directly considered by the legislation. Therefore shareholder's main tool in this case is separation from the deficient combination.[202] The best way to protest against the transaction is to dispute at the relevant level court, where the shareholder is not given the right to vote for the merger/acquisition transaction and the legislative composition for practical utilization of appraisal right was not created, can start court suit on "actual" nature of the transaction.[203]

Corporate combination, integrated results of which has the same economic effect as the legal merger, but is formed via the purchase of total or substantial part of the property, is the de facto merger of corporations.[204] In case of merger or consolidation, at legislative level the succession of liabilities and consideration of appraisal right is regulated via the direct agreement.[205] On the contrary the sale of property does not create the appraisal right. Accordingly, when the management or shareholder with controlling number of shares agree on the type of transaction formation, they consider the purchase value, which is directly affected by the value of appraisal right. Hence their will is generated: to formulate transaction in the way that excludes activation of such authorities accompanying the merger as appraisal right, in other words to limit the area of action of post-transaction reclassified rights of the shareholder. This type of deal is like

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200 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 352.

201 Ib. 353.

202 Ib., 354-355.

203 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 78.

204 The most famous court decision on de-facto merger doctrine: *Farris v. Glen Alden Corporation,* 143, A.2d 25 (Pa. 1958). Additionally famous precedents: *Shanoon v. Samuel Langrston Co.,* 379 F.Supp 797 (Mich. 1974), *Marks v. Autocar Co., 153 F.Supp.* 768 (1954), *Pratt v. Ballman-Cummings Furn. Co.,* 549 S.W.2d 270 (Ark. 1977).

205 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 29-34.

the simulated deal – the parties use some type of "mask" hiding the real objective using various methodologies.

Equalization of results of property purchase with the results of merger combinations ends with the transfer of liabilities of Target Company to the "survived" corporation based on the legislative norms. De facto merger doctrine is especially important for the legislation of the countries, where the exercise of appraisal right is limited for the specific transactions. In such cases, the court may discuss whether the purchase of property is considered as results of merger. However, in some States, de facto merger doctrine is prohibited normatively at the legislative level.[206] Hence, instead of dispositional regulation of protest rights from the shareholders it is regulated imperatively.

The above institute in Georgian reality is limited by the concept of will autonomy. Accordingly, the court practice totally depends on discretion of judges and court orienteers. In any case, utilization of de facto doctrine should have some pre-conditions.[207] In order to consider the transaction as de facto merger, it should satisfy several criteria. There is no unified list of criteria. It is different depending on the legal belonging or differences in national regulations. Despite the above fact, the following elements should be the characteristics of transaction to qualify it as de facto merger.

First – Target Company, as an enterprise, after the sale of property should maintain the uninterrupted functionality tendency. On-going functionality means continuity in management, identical personnel, retaining the location of enterprise and uninterrupted continuation of main operational strategies related to property and business activities. Moreover, if the buyer pays the seller cash in exchange for the equipment-devices and specific lines (areas) of businesses, and the seller enterprise remains in business, does not terminate functioning, the transaction will not be the target object of de facto merger doctrine.[208]

Second – the uninterrupted status of target company shareholders should be in place. Issuing own shares by the acquirer company as the payment causes the integration of target company shareholders. Accordingly, transaction does not cause termination of shareholders' status. That is why the above doctrine covers only the specific type of property purchase transactions.

Third – at post-transaction stage the target company terminates the ordinary economic operative activities and is liquidated or dissolved in line with the rules defined under the valid legislation.[209]

Fourth –Acquirer Company voluntarily undertakes the target company liabilities, which are substantial and necessary for the continuation of functioning in normal regime. It has to be also

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[206] For example, the Texas state legislation prohibits the de facto merger doctrine. See: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 294.

[207] For example one of the courts determined as the precondition for the consideration of transaction as de facto merger, payment of shares of Acquirer Company to the target company. See: *Armour-Dial, Inc. v. Alkar Engineering Corp.,* 469 F Supp 1198 (Ed Wis 1979).

[208] *Parson v. Roper Whithey, Inc.,* 586 F Supp 1447 (Wd Wis 1984).

[209] *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thompson/ West", 2008, 295-298.

mentioned that if the court applies[210] and considers the de facto merger doctrine, it is not necessary for the court to have all elements to classify the transaction as de facto merger.[211] If there are all elements discussed above, we have the relationship of mother-daughter companies in place. The legal mechanisms in this case, instead of utilization of appraisal right, gives the dissident shareholder or creditor opportunity to raise the issue of responsibility of mother company for the liabilities of subsidiary company based on the throughout responsibility principle.[212]

The discussions makes it evident that qualification of transaction as de facto merger generates two substantial functional results. First – the shareholders of acquirer company are authorized to conduct the general meeting and vote (for or against) for the implementation of merger[213] and second – all shareholders with voting right get the legislative "permission" to use the appraisal right.[214][215]

5. Management Rotation

Management rotation is the absolute accompanying result of corporation restructuring. The post-transactional reclassification of shareholders' rights is directly reflected in the composition of management units. The analytical basis of separation of two substantial elements of corporation - control and ownership – is the basis of reconstruction of management. The composition of management of both corporations participating the transaction (acquirer and acquired) is changed at a different degree.[216] The competence of management transformation is in hands of "control" implementing "higher" body. Accordingly, change to the directorate or the supervisory board of

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[210] Court practice in terms of de-facto merger is especially differentiated. Even in USA, various State court practices do not consider the de-facto merger doctrine. Moreover, utilisation of doctrine is limited in many States. "De-facto merger doctrine" is decline by doctrine of "independent legislative importance" ("*independent statutory significance*") (same as, "*equal dignity*" doctrine). According to the above doctrine, authorized corporate legal regulations valid in the country have their independent significance as substantial effectiveness of one provision and procedural requirements cannot be balanced by other provision, despite the fact that area and subject could be the same for the regulation, but the procedural requirements for the regulation can be different. Logically, according to the "independent statutory significance" doctrine shall be used when the sale of property does not cause the dissolution of company and the seller corporation retains the legal existence minimum for the period sufficient for the distribution of contribution to the shareholders. See: *Cox J., Hazen T.,* Business Organizations Law, 3rd Ed., St. Paul, "West", 2011, 614. The most famous precedent decision which declined de-facto merger doctrine, this is *Hariton v. Arco Electronics, Inc.*, 188 A.2d 123 (Del. 1963). See: *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 79-80; *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 614-617.

[211] For example, see: *New York v. National Service Industries, Inc.,* 460 F.3d 201 (2d. cir. 2006), *Berg Chilling Systemm, Inc. v. Hull Corp.,* 435 F3d 455 (CA 2006), *Forrest v. Beloit Corp.,* 278 F Supp 2d 471 (ED Pa 2003).

[212] *Kelly v. American Precision, Inc.,* 438 So 2d 29; see: *Presser S.,* Piercing the Corporate Veil, Danvers, "West", 2011, 99-107.

[213] *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 699.

[214] *Heilbrunn v. Sun Chemical Corp.* (Del. 1959).

[215] *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 29.

[216] *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 712.

the acquirer company depends on the will of shareholders.[217] If contribution of target company's shareholders weakens the "original" shareholding structure of the acquirer company at a degree, that the newly "joined" shareholders will have power to substantially influence the decision making,[218] then the directorate and supervisory board of the acquirer company will become subject of fundamental changes.[219] The change of management is the eventual result of reorganization type transaction or selling the control. Therefore, in the process of transaction formation, often, protection of directors' fiduciary liabilities,[220] from the existing management, is under the question.[221] On the contrary, if the pre-transaction vision of the acquirer company and motivator for the taking over the strange company is the evaluation of real value of the target company and analysis of its economic-legal potential,[222] it is possible that the decisive factors causing non-achievement of potential and benefits are seen as incorrect corporate management elements, conflict of interests and problems related to the "principle-agent".[223] It is logical that prospect of entering the combination with the target company by the acquirer company is related to the maximization of economic effectiveness via the improvement of corporate management.[224]

Corporate management, in economic context, is related to the marketing management of the enterprise. In the "open" corporation, where the part of the shares are owned by the director, the value of incorrect management is increased and it is spread over the benefits of all shareholders and determines the magnitude of total weighted benefit of the company.[225] It is natural that, at the transaction preparation stage, the management of Acquirer Company already knows and plans the specific strategy for achievement of synergy.[226] If at the transaction preparation stage the weakness of target company management segments is underlined, which is confirmed with the financial and legal "*due diligence*" competent conclusions, then it is unquestionable and inevitable to have the rotation of the management of Target Corporation.[227] Mentioned hypothetic judgment

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217 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol.5, St. Paul, "Thompson/West", 2011, 489-503, 523.

218 In described situation, as the protection from the acquirer corporation, the target company often used the provisions for "continuing directo" or "dead hand", which continuation of authority of the existent management, and limits the competence of future board, as under mentioned provision the management has acting on the date of adoption of transaction plan has exclusive competence to determine change to the shareholders rights' plan and reduction of certain rights there. See: *Radin S.,* The Business Judgment Rule, Vol. III, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 3258-3292.

219 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 2, St. Paul, "Thomson/West", 2010, 86-94.

220 *Radin S.,* The Business Judgment Rule, Vol. I, Boston/Chicago, "Wolters Kluwer Law & Business", 2009, 796-846.

221 *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 666.

222 *Vishwanath R., Krishnamurti C.,* Value Drivers and Target Valuation, 2008, London, "Response Books", 57-63.

223 *Depamphilis D.,* Mergers, Acquisitions, and Other Corporate Restructuring Activities, 5th Ed., Los Angeles, "Academic Press", 2010, 6.

224 Ib., 7-9.

225 Ib., 11-12.

226 *Gilson R.,* The Law and Finance of Corporate Acquisitions, New York, "Foundation Press", 1986, 387-400.

227 Ib., 371-386.

is valid only for property and share purchase cases, which is not followed by the merger.[228] In case of merger or consolidation, the period of target company management ends; and under the new management bodies the shareholders continue utilization of authorities granted by legislation, succession doctrine or statutes.[229] In any case, in the restructured company the change of shareholding structure becomes the basis for the management change or its composition with the completely new members, which would be analyzed based on the specific actual circumstances.

6. Liquidation

Result of the purchase of Target Company via the cash or through the share purchase, with the high probability, is liquidation.[230] Liquidation[231] is different from the termination of functioning of Original Corporation with the capital invested by the partners,[232] which ends during the reorganization without termination of shareholder's status.[233] The essence of liquidation,[234] not under the bankruptcy regime,[235] considers the voluntary[236] distribution of company's property.[237] In the liquidation process the requests from the creditors are satisfied and remaining property is distributed among the shareholders based on *pro rata* shares of the shareholders.[238] Company liquidation can be considered as the special specific manifestation of corporate restructuring.[239] On contrary to the last actions directed towards the ending of the economic

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228 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 7, 10-13, 16.

229 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 2, St. Paul, "Thomson/West", 2010, 29-34.

230 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 12.

231 *Vishwahath R., Krishnamurti C.,* Bankruptcy and Reorganization, London, "Response Books", 2008, 333.

232 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 16A, St. Paul, "Thompson/West", 2012, 352-359.

233 It is also referred to as "reorganisation without bankruptcy". See: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 15, St. Paul, "Thomson/West", 2008, 544-545.

234 At post transaction stage of merger/acquisition, liquidation is used for reduction of "going concer" value and costs for the simple reason, as in general liquidation (termination) value is lower than company's "going concer"- costs. It is natural, the latter condition concerns the acquisition of target company with the "closed" entrepreneurial activities, which is then taken publicly at the integration stage of transaction results, see: *Lopucki L., Mirick C.,* Strategies for Creditors in Bankruptcy Proceedings, New York, "Aspen Publisher", 2007, 10-12; *Glenn G.,* The Law Governing Liquidation, New York, "Baker, Voorhis & Co.", 2002, 68-70.

235 *Tabb C.,* Bankruptcy, Cincinnati, "Springer", 2002, 160-166.

236 "Voluntarism" considers transfer of corporation to the liquidation regime with the free expression of shareholders' will, where there are no pre-conditions for the legal compulsory liquidation. See: *Tabb C.,* Bankruptcy Anthology, Cincinnati, "Springer ", 2002, 141-155. The Georgian law envisages the Voluntarism in Paragraph One, Article 14 of Georgian Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>. Compare: *Depamphilis D.,* Mergers, Acquisitions, and Other Corporate Restructuring Activities, 5th Ed., Los Angeles, "Academic Press", 2010, 621.

237 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 16A, St. Paul, "Thomson/West", 2012, 63-67.

238 *Lopucki L., Mirick C.,* Strategies for Creditors in Bankruptcy Proceedings, New York, "Aspen Publisher", 2007, 17, 204-207.

239 Compare: *Vishwahath R., Krishnamurti C.,* Bankruptcy and Reorganization, London, "Response Books", 2008, 333-337.

"game" of acquisition or merger of corporation using the target company shares,[240] where the absolute majority of shareholders are given chance to manage the invested capital via the new management and new legal unit,[241] at liquidation stage the organizational substance disappears (the record in the register is deleted, the identification code is deactivated),[242] the shareholders' status is terminated and the shareholders' capital is withdrawn from the turnover.[243] We have the reverse procedural corporate action compared to the establishment. The liquidation change, the basis for the existence of legal entity, due to its integration results, can be considered as transaction category subject to the legal regime parallel to the reorganization type transactions, in other words the fundamental change, which is based on the transactional actions, shall be referred to as liquidation effect[244] combination.[245]

Liquidation as a special phenomenon is the established notion in the organizational law on entrepreneurial units. Its discussion in the context of "structural changes" is not conducted under the targeted and etymological definitions.[246] However, analysis of liquidation in the dimension of "constructive changes" is correct divergent approach. The organized union of persons is provided with the legal form by the law (with the "method" in understanding of economists).[247] The ordinary organizational type union gets the constructive form by including it under the construction with legal status with the preliminary agreement strategies and it is reinforced by means of legislative imperatives.[248249] Following the inclusion of organizational unit in the legal framework the legal-economic unity of persons is created organized via the legal norms, i.e. corporation is created.[250] Formation of corporation causes the activation of normatively offered and established structural elements adjusted to the practical case. Based on the integration of

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240 *Gevurtz F.,* Corporation Law, 2nd Ed., St. Paul, "Thomson Reuters", 2010, 661.

241 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 4, St. Paul, "Thomson/West", 2010, 5-10.

242 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 14A, St. Paul, "Thomson/West", 2008, 514.

243 *Kuney G.,* Mastering Bankruptcy, Durham, "Carolina Academic Press", 2008, 139-144.

244 Stressing the "liquidation effect" was caused by the fact that following the acquisition of Target Company by cash, the corporation is not dissolved automatically. It possesses cash in the form of property and can maintain functionality formally. Its liquidation depends on partners, if they express their will to distribute the received income in the form of liquidation dividends. See: *Maffia v. American Woolen Co.,* 125 F Supp 465 (SDNY). Indicated: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 16A, St. Paul, "Thompson/West", 2012, 14.

245 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 16A, St. Paul, "Thompson/West", 2012, 13-15.

246 Compare: *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 16A, St. Paul, "Thompson/West", 2012, 15-16.

247 *Posner R.*, The Economic Analysis of Law, Boston, "Aspen Publisher", 2007, 409.

248 Compare *Gordon J.,* The Mandatory Structure of Corporate Law, in: *Romano R.,* Foundations of Corporate Law, New York, "Foundation Press", 1993, 104-115.

249 *Cox J., Hazen T.,* Treatise on the Law of Corporations, 3rd Ed., Vol. 2, St. Paul, "Thomson/West", 2010, 159-160.

250 *Fletcher W.,* Fletcher Cyclopedia of the Law of Corporations, Rev. Ed., Vol. 1, St. Paul, "Thomson/West", 2006, 45-47.

persons and properties[251] the sue *generis* aggregate included in the legal unit's construction,[252] immediately after the assigning the legal entity status becomes the target object for the potential structural changes.[253] In other words, based on the corporate-administrative act on establishment, the specific union of persons is created and the "constructive unit" is established, which is subject to determined structural order. During its functioning it is possible to have internal structural changes "in corporate constructive units" starting from the shareholding structure and ending with the change of legal form and external changes starting from the corporate transactions and ending with the market control.[254] It is logical that in case of existence of status of entrepreneurial subject of persons' union any implemented change must be reviewed as "structural change" which is not its substantial, namely "constructive termination".

The structure serves the participation of corporation in the economic-legal relationships, i.e. it is the tool for the functioning of persons' aggregate and supports the enterprise to "follow the game rules" determined at the normative or capital market levels and to implement their adequate adaptation to the "corporate life".The eventual result of active involvement of organization in economic or legal relations is clearly spread over the corporation structure. Moreover this is the necessary source of its development and success. But here we talk about "Liquidation" which considers leaving the "game" in line with the rules determined by the legislation. To interpret the idea with other words, liquidation is opposite corporate action to the constructive unit formed at the stage of establishment. This is deconstruction, "dismantling" of structural elements in line with the rules determined at the legislative level. It causes the dissolving of persons' "sue general" union and de-investment of capital invested by its founders (shareholders). At the liquidation stage there is an organized process of organization termination in place. Accordingly, it is not possible to use "liquidation" and "change" as inter-substitutable or/and as two terms describing the same contents.[255] They are procedurally, essentially and by result differentiated corporate activities.

Total or almost total purchase of Target Company with cash is basis for the decision for liquidation. The target company or/and its shareholders sell the shares for cash to change the investment platform or with the de-investment motive. Implementation of motive is possible via the distribution of cash.[256] In exchange to cash, distribution of net income between the shareholders following the proprietary or share purchase of the company generally is implemented using the liquidation mechanism.[257]

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251 *Burduli I.,* Basic of JSC Law, Tbilisi, 2010, 401-402.
252 *Gordon J.,* The Mandatory Structure of Corporate Law, New York, "Foundation Press", 1993, 103-108.
253 *Glenn G.,* The Law Governing Liquidation, New York, "Baker, Voorhis & Co.", 2002, 66-72.
254 *Romano R.,* Foundations of Corporate Law, New York, "Foundation Press", 1993, 157-251.
255 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 16A, St. Paul, "Thompson/West", 2012, 8-10, 13-15.
256 *Oesterle D.,* Mergers and Acquisitions, St. Paul, "West", 2006, 12.
257 *Fletcher W.,* Fletcher Cyclopaedia of the Law of Corporations, Rev. Ed., Vol. 14A, St. Paul, "Thompson/ West", 2008, 515-520.

Analysis shows that the specific spectrum of transactions causes the reorganization type restructuring, and other type of transaction – constructive changes.[258] Reconstruction of reorganization type, sub-types of which are organizational and typological conversions, is opposed by the changes with liquidation effect i.e. deconstructive changes. They are differentiated from each other by the divergent nature. In any case, the shareholders' rights are disassociated with the contrast caused by confrontation of mentioned changes. Protection of rights, in both cases, is subject of corporate and civil regulations, as the investor's (shareholder) right in all type, structural or liquidation, changes is under the special protection.[259] The specific character of rights and their protection is reflected in the shareholder as the provider of capital to the company and his/her corporate strategic function of "higher body" forming the structural units of enterprise, which with the delegation of direct control over the ownership to the management and mechanism of "control of control", in the corporate[260] and capital market laws,[261] gives shareholder the substantial and functional sense.

7. Conclusion

The anthology of constructive changes to JSC is the interactive result of implementation of inter-enterprise acquisition/merger. The post-transactional condition of enterprise's structural elements varies with the change of transaction types. The strategic reconstruction stigma of JSC is the change of organizational-legal form and its functional significance. Organizational and functional reconstruction is impossible without re-classification of shareholders. Re-classification covers shareholding structure and their rights' catalogue. In corporate law the exit strategies and the provisions guarantying the possibility to receive the adequate compensation for the de-investment hold the dominant position among the systemic mechanisms for the strategic protection from the rights' devaluation. Of course, in parallel with the structural changes, the corporate combination causes such type of constructive change, as liquidation. The latter is the basis for termination of functioning.

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258 Compare: *Depamphilis D.,* Mergers, Acquisitions, and Other Corporate Restructuring Activities, 5th Ed., Los Angeles, "Academic Press", 2010, 615-618.

259 "Protection of shareholders" rights is related to the conflict of interests created as a result incorrect implementation of liquidation process by the management and/or liquidator. At the liquidation stage corporation creditors (any third parties with the right to request towards the corporation) which are granted the mechanisms for liquidation process control, fulfilment of liabilities before the maturity and *ceteris paribus,* have more protection. See Article 14, Law on Entrepreneurs, 1994, available (in Georgian) at: <www.matsne.gov.ge>. See also: *Tabb C.,* Bankruptcy Anthology, Cincinnati, "Springer", 2002, 361-398.

260 For example, see:*Jensen M., Meckling W.,* The Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure, "Journal of Financial Economics", Vol. 3, No. 4, 1976, 305-360; *Romano R.,* Foundations of Corporate Law, New York, "Foundation Press", 1993, 7-127.

261 *Steinberg M.,* Understanding Securities Law, 5th Ed., Denver, "Matthew Bender & Company Inc.", 2009, 141-142.

Ana Kharaishvili*

Partnerships' Legal Status in Systemic-Comparative Context

Introduction

The following 6 entrepreneur subjects are pointed out in the Law of Georgia on Entrepreneurs: Individual enterprises, Joint Liability Companies (JLC), Commandite Companies, Limited Liability Companies (LLC), Stock companies and Cooperatives. In accordance with the specifics characteristic to each of them, it is believed that Joint liability companies (JLC) and Commandite companies[1] are personal partnerships. The division between cooperative and capital types of societies is characteristic to any legal system (entrepreneur law). Notwithstanding the fact that at first sight there can be a clear differentiation between them,[2] a lot of issues make this differentiation unclear, especially from the systemic and comparative point of view. The following questions are actively heard in the legislative literature and legal practice: are the cooperative societies, formations with the status of a legal person?[3] In this connection, which taxation regime applies to them? Which specifics are characteristic to their establishment? Should the fiduciary obligations of the managers (heads) apply to the partners of these societies; are securities[4] a partner share in the capital of Joint liability companies (JLC)[5] and Commandite companies? The discussion in connection with these topics and their analysis will give us an opportunity to point out the characteristic features of partnerships. Apart from this, the aim of the thesis is a general legal status of partnerships and their nature, rather than an exhaustive list and analysis of the features typical to concrete forms.

Apart from the logical and dogmatic methods of the thesis, the leading role belongs to the comparative and legal method. Additionally, the thesis is primarily based on the analysis of the

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1 Although for founding Commandite Companies it is obligatory to have a partner liable within the limits of a guarantee amount (commandite) apart from personally liable partner (a complementary) therefore the marks of a capital entity are also characteristic to this form of carrying out entrepreneur activity, that is why the given society is also called a hybrid society.

2 It is clear that the contrary regulation of the question of liability for a partnership and capital entity is the main differentiating feature for these two types of societies.

3 More of a Joint liability company.

4 There can be distinguished far more questions in connection with a partnership, although it exceeds the opportunities of the thesis, therefore we will offer the reader solely the analysis of the topics discussed above.

5 Or any other partnership – the following chapters of the thesis deal with different types of an American partnership. Additionally, the terms used in the thesis – a partnership and a partnership (personal, personified) society are used as synonyms.

regulation of entrepreneur legislation[6] of the United States and is aimed at dogmatic-theoretical distinguishing of the Georgian personal type as compared to the foreign experience.

The thesis has the following structure: 1. Introduction; 2. Historical origin of partnerships; 3. Partnership – a pure unity of persons or a separate person; 3.1. General; 3.2. Aggregate theory; 3.3. Entity theory; 3.4. Accompanying characteristics of Aggregate and Entity Theory; 4. Types of partnerships; 5. Characteristic features of establishing a partnership; 6. Fiduciary obligations of the partners of a partnership; 7. A share of a partnership in the form of securities; 7.1. General; 7.2. Howey test; 7.3 Williamson's amended test; 8. Summary.

1. Historical Origin of Partnerships

It is of primary importance for the basic analysis of the present challenges and structural features of the partnership to study the historical origin of these types of societies.[7] Certain forms of partnerships exist even since the time when people agreed to creating and selling production for the common goal. The existence of such societies in 2300 B.C. in antique Babylon is proved by the Hammurabi laws. The latter are the first legal source regulating certain relations characteristic of partnership types of societies. The second stage of the development of partnerships is connected with the old Roman Empire. The Roman "societas", which represented a personified partnership the regulations of which can be found in the Institutions and digests of Gaius and Justinian, with a common commercial risk and for the purpose of distributing the profit received, implied an agreement between two or more persons. In accordance with the Roman law, partners were responsible for individual actions only (and not the actions of other partners). Therefore, the agreement between persons formed for "societas", was not based on an individual subject, separated from partners (and of course, for a legal person as well). After the fall of the Roman Empire active trade and commercial relations developed around the Mediterranean have revealed that it was necessary for the partnerships to enter a new phase. After a long economical decline the Middle Ages were characterized by the revival of commercial activity and modernization. It was largely due to the given trade law – lex meractoria. There was again distinguished the aim of the Roman "societas";[8] Although, in accordance with the trade law, a partnership of the Middle Ages was called "commenda" and as compared to the Roman "societas", it was independent of its partners, and a separate society (status) was recognized. In accordance with the concept of the commenda, a partnership was more than a simple unity of persons (partners). Therefore, it was the

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6 US Unified Entrepreneur Legal Acts and Court Precedents have been implied.

7 *Maurice J.M.,* A New Personal Liability Shield for General Partners: But Not All Partners Are Treated the Same, "Gonz. L. Rev.", No 43, 2007-2008, 371.

8 There are distinguished 4 forms of "societas": "societas" omnium bonorum; "societas" omnium bonorum quae ex quaestu veniunt; "societas" alicius negotiatonis; "societas" unius rei – for a more detailed overview please, refer to The Jersey Law Commission, Consultation Paper No. 2/2008/cp, The Jersey Law of Partnership, 10-13, <http://www.lawcomm.gov.je/>.

very trade law that enabled the society to enter the terms of agreements, to have its property and purchase its rights as well as obligations. Such a society could have become a party to its own partners within a certain transaction. Incorporating the trade law in various national legal systems gave rise to main provisions of commercial law. Although, it is well known that the countries of the continental and Anglo-American laws, have chosen various ways of their development.[9]

2. Partnership – a Pure Unity of Persons or a Separate Person

2.1. General

When talking about a cooperative type of society, the analysts point to its agreement character and they consider that a personal society is a unity of partners with a relevant purpose, derived from an agreement, while a corporation can often be perceived as a legal person.[10] The agreement nature of personal society was determined by an American court decision.[11] According to the given precedent, a partnership cannot be established solely on the basis of ownership of common property or a profit distribution, and notwithstanding the fact that the law of Minessota does not envisage a mandatory test for the determination of existence or nonexistence[12] of a personal society, the nonexistence of an agreement between the parties is considered to be a basis for the nonexistence of the society. As for the nature of a capital type of society, the most widespread approach was formed as early as 1819 by the Chief Justice Marshal in connection with the case Trustees of Dartmouth College v. Woodward.[13] The Chief Justice explained that the corporation was a mere creature of law,[14] since he had such rights, which could not be given (obtained) by means of an agreement.

There have been developed 2 theories of legal doctrine in connection with the legal status of a partnership: Aggregate Theory and Entity Theory.[15] It was traditionally characteristic of the

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9 See *Maurice M.J.,* A New Personal Liability Shield for General Partners: But Not All Partners Are Treated the Same, "Gonz. L. Rev.", No 43, 2007-2008, 371-373. Additionally on the origin and stages of development of partnerships please refer to: *Story J.*, Commentaries on the Law of Partnership, 6th Edition, Boston, "Little, Brown and Company", 1868, 8; *Drake J.H.,* Partnership Society and Tenancy in Partnership: The Struggle for a Definition, "Michigan Law Review", Vol. 15, No 8, 1917, 609-630; *Parsons T.*, A Treatise on the Law of Partnerships, 4th Edition (Revised by *Beale J.H. Jr.*), Boston, "Little, Brown and Company", 1893; *Borden B.T.,* Aggregate-Plus Theory of Partnership Taxation, "Georgia Law Review", No 43, 2009, 725-737.

10 State created legal person, does not imply LEPL (Legal entity of Public Law).

11 *Bradley v. Bradley*, 554 N.W.2d76, 1996 Minn. App. LEXIS 1237.

12 The question of existence or nonexistence of a cooperative type of society in accordance with its state of establishment is very important for the American entrepreneur legislation as compared to that of Georgia. Please refer to the next chapters of the thesis.

13 U.S. (4 Wheat.) 518 (1819) – *Ribstein L.E.,* The Evolving Partnership, "Illinois Law and Economics Working Papers Series", No. LE06-025, 2006, 5.

14 Mere creature of law.

15 There also exists another version in connection with the Georgian equivalents of the names of the given theories. *Makharoblishvili G.,* Dogmatic-theoretical Separation of Entrepreneur Subjects on the Basis of Capital Entities, "Journal of Law", No 2, 2011, 102 – the author uses the following equivalents: aggregate theory, society theory.

countries with common law to refuse to recognize a partnership both as a society and as a legal person. According to this theory, a partnership was nothing but a simple unity of people. The entity theory was driven by a contrary approach. According to this approach, a partnership was a separate, nearly touchable organizational unity. A partner participation in the society was defined as a set of rights and obligations which was caused by the participation of a society in the entity and resembled mutual relations of shareholders in connection with the corporation.[16]

2.2. Aggregate Theory

As we have already mentioned, the Entity Theory was characteristic of the countries with common law, mainly the US regulation. However, historically there has not been a full agreement in connection with the given question.[17] In the middle of the 20th century in accordance with the contrary situation in different states, there were created 4 different groups: 1. Entity theory states;[18] 2. Liberal Aggregate Theory States;[19] 3. Borderline States;[20] 4. Strict Aggregate theory follower states.[21] According to the *entity theory*, a partnership society was defined as a separate independent organization for all purposes.[22] But most of the states followed *liberal modification of aggregate theory*. Apart from that, notwithstanding the fact that a partnership society was not recognized technically as a separate legal entity, in certain cases the Court even tended to assign such a status. Therefore, when considering each concrete case, facts and circumstances played a crucial role. A relatively small number of states were for the *Borderline theory*. The given approach also represents some sort of liberal aggregate theory taking into consideration a certain difference, in particular, if the liberal theory of society does not determine a partnership society as a separate subject except for certain cases, but defines it as such for certain purposes, according to

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We think that it would be better to refer to the first one as antity theory, and the second one – as society(body) theory, since in the aggregate theory a cooperative type of society is limited to a simple unity, society, while in the society theory the recognition of a separate subject is of decisive importance.

16 *Weidner D.J.*, A Perspective to Reconsider Partnership Law, "Florida State University Law Review", No 16, 1988, 3.

17 By 1893 the definition of a cooperative type of society widespread among the American lawyers was definitely supporting society theory. The following can be read about partnerships in the work published by Parsons in 1893 (see *Parsons T.*, A Treatise on the Law of Partnerships, 4th Edition (Revised by *Beale J.H. Jr.*), Boston, "Little, Brown and Company", 1893, 1) – a partnership is a legal entity (society), formed by the association of two or more persons). Although later, in 1914 the UPA (Sec. 6 (1), 25 (1)) points out the following: "A partnership is an association of two or more persons; A partner is co-owner with his partners of specific partnership property holding a tenant in partnership" (see: *Drakwe J.H.*, Partnership Society and Tenancy in Partnership: the Struggle for Definition, "Michigan Law Review", Vol. 15, No 8, 1917, 609-630).

18 Entity Theory States.

19 Liberal Aggregate Theory States.

20 Borderline States.

21 Strict Aggregate Theory.

22 Although, rarely and in exceptional cases there took place negligence of recognition of partnership societies as independent subjects.

the borderline theory, a partnership is sometimes a separate society, and sometimes it is not. Therefore, in such regulations the status of partnership remained quite dim. According to the *strict aggregate theory*, a partnership did not represent a separate subject by its nature and it could be considered as such in respect of the questions connected with procedural or property matters, although the latter did not change the simple unity of persons of partnership society (and not of its separate subjects).[23]

2.3. Entity Theory

Entity Theory was rather characteristic of the countries of the continental European law, although today it is also recognized by several US states; Moreover, the RUPA[24] regulation also recognizes the approach in certain cases.[25] For example, the entrepreneur law of the NY state does not recognize a Partnership as a legal entity, although there can take place a recognition of the status[26] for certain reasons.[27] At the same time, it is believed that perceiving and characterizing this type of society as an independent person, the organization serves the definition of Partnerships for the various legal purposes; the latter does not change the nature of personal society and notwithstanding the partnership (capital) marks, it mostly expresses an agreement nature.[28]

Notwithstanding the contrary attitude of American law, it is recognized by the modern legal literature[29] that Entity Theory is a privileged view a partnership. The Georgian law also shares the given privileged view. It considers partnership type entrepreneur subjects to be legal entities similar to capital entities. However, certain questions have been asked in the recent Georgian legal literature,[30] in particular, how do the legals statuses of Joint liability companies (JLC) and Commandite companies comply with the legal definition of a legal person pointed out in Article 24 of the Civil Code of Georgia and how does Partnership satisfy the "liability in connection with its independence from the point of view of property" in the conditions of personal liability. It can be easily done by means of abstracting partnership from the historical genesis from the legal point of view and we think that there should not be any mistakes there. Due to the fact that we recognize an entrepreneur subject (except for individual entrepreneur) as a legal person and we assign it a separate identity, we determine that all such formations should have their own property. Therefore,

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23 *Peck D.L.,* Partnerships: the Nature of Partnership before the Law, "Marq. L. Rev.", No 37, 1953, 66.

24 Revised Uniform Partnership Act (RUPA), 1994, Amended.

25 *Rothenberg R., Melnikova T.V.,* Comparative Forms of Doing Business in Russia and New York State-Proprietorships, Partnerships, and Limited Partnerships, "American Business Law Journal", No 40, 563, 2003, 5.

26 For example, a personal society may own a property on behalf of the society, and it can file a claim in court on behalf of the society, a claim can also be filed against the society – Ib., 12.

27 Ib., 12, 14.

28 *Ribstein L.E.,* The Evolving Partnership, "Illinois Law and Economics Working Papers Series", No LE06-025, 2006, 6.

29 *Borden B.T.,* Aggregate-Plus Theory of Partnership Taxation, "Georgia Law Review", Vol. 43, 2009, 20.

30 *Kiria A.,* System of Corporate Law in Georgia, Compilation of Corporate Law, I, Tbilisi, 2011, 15-67.

the articles determining the definition of partnership shall be described as follows: in the event of incurrence, the interests of creditors shall be satisfied only after the exhaustion of entity property from personal property, while in the capital entities the personal property of partners is still inaccessible for creditors after the exhaustion of entity property as well. Therefore, the Law on Entrepreneurs, determining the principle of solitary, personal liability, points out to the specificity of responsibility in these types of societies and does not bring in doubt in the existence of property of the society as a formation. It was the impossibility to have property in the ownership that became a precondition for recognizing a partnership as a separate subject, legal person for some countries supporting Aggregate Theory. Although, on the other hand, if we have a look at the historical origin of personal society (especially in the countries of Anglo-American law), and the genesis (till the recent times), we will see that there was no emphasis put on the separation of the society property and the personal property from its partners and the main theme was that behind a simple unity of persons there was Partners' personal property. It seems that the increase of the scale of entrepreneur activity or the difficulties of society relations have caused the change of the approach.

2.4 Accompanying Characteristics of Aggregate and Entity Theory

The relevant different legal approaches to the Aggregate and Entity theories about partnerships do not have only dogmatic importance. The specifics of filing a claim by the creditors against partnership society, the questions of taxation, a partner's leaving the partnership and other important questions depend on the fact as to which theory has been reflected in the legal system of a particular country.

The question of the so-called Business taxation regulated by taxation law is of crucial importance. Although, in accordance with the Georgian entrepreneur legislation, partnerships are legal persons and therefore, are taxed like capital entities (i.e. it is enough for the taxation law to know that they are legal entities), this question seems to be more difficult in the American law. An enterprise, which is classified as a partnership, is subject to one level of taxation, and an enterprise of a corporation type is the object[31] of so-called double taxation.[32] Therefore, a personified society shall be subject to the Internal Revenue Code,[33] Subparagraph ,"j"[34] if the subject of Subparagraph ,"r"[35] will be of decisive importance. In accordance to the changes entered in the given legislative act, the society itself was authorized to choose one of the approaches for taxation purposes. This institute is called check-the-box regulation, since in the two-page application submitted to the Internal Revenue Service (IRS) the choice can be marked in a simple way.[36]

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31 Double taxation, when the taxation is carried out at the level of corporation as well as share-holders.

32 We think that such a different approach is based on the very status of partnership as a simple unity of person.

33 Internal Revenue Code, 1986 Amended.

34 Subparagraph stipulating for a relevant taxation of the partnership society (simple unity of person is implied).

35 Subparagraph stipulating for a taxation relevant to the capital entity status.

36 *Fieald H.M.,* Checking in on Check-the Box, "Loy. L.A. L. Rev.", No 42, 2009, 452; *Borden B.T.,* Aggregate Plus Theory of Partnership Taxation, "Ga, L. Rev.", No 43, 2009, 717; additionally refer to: *Yin*

2. Types of Partnerships

Unlimited liability of partnerships was a historically qualifying mark of significant importance. In contrast to the American corporate and security law, which went through considerable changes and formation during the 20th century, the rules regulating personal societies reserved their stability till the end of the century. From the end of the 20th century there took place fundamental changes in the relevant regulations of the countries[37] with Anglo-American law,[38] which led to the creation of a new legal form of Partnership. The latter was characterized by limited liability, which causes the decrease of importance and the purpose of general partnership. The analysts of the given period even spoke about the death of partnership and the institution of unlimited liability.[39]

According to the current partnership law of the USA, there have been distinguished 4 types of societies[40]: a regular, general partnership, a limited partnership – LP, a limited liability partnership – LLP, and a limited liability limited partnership – LLLP. Notwithstanding the fact that partnership law is a states law, i.e. defines it independently, most of the states share the approach of a Revised Unified Limited Partnership Act[41] and an amended Uniform Limited Partnership Act.[42] It is according to the given acts general partnership,[43] which becomes similar to a JLC due to its basic features,[44] implies two or more persons joining the agreement voluntarily, for the purpose of carrying out activity (business) with the status of a co-owner. Apart from that, the agreement can be verbal as well as written. In contrast to the JLC, a state does not have to perform any active actions or recognition in order to found general partnership.[45] Therefore a general partnership is created without any formalities, and the partners are liable for the obligations of the society in full and without limits. Although it should be mentioned that the

G.K., The Taxation of Private Business Enterprises: Some Policy Questions Stimulated by the Check-the-Box Regulations, "SMU L. Rev.", No 51, 1997, 125; *Hamill S.P.,* The Taxation of Domestic Limited Liability Companies and Limited Partnerships: A Code for Eliminating the Partnership Classification Regulations, "Wash. U.L.Q.", No 73, 1995, 565; *Dean S.A.*, Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification, "Hofstra L. Rev.", No 34, 2005, 405.

37 Here: USA and Great Britain.

38 Partnership statutes are implied.

39 *Bradley C.,* Twenty-first Century Anglo-American Partnership Law?, "Comm. L. World Rev.", No 30, 2001, 330.

40 The LLC will not be discussed in the thesis since it has similarity with the legal marks of corporation. Although the court defined in connection with one case that LLC is neither a regular corporation nor a simple or limited partnership. It is a hybrid form –see: *Ribstein L.E.,* Are Partners Fiduciaries?, "III L. Rev" 209, No 1, 2005.

41 Revised Unified Limited Partnership Act (RUPA), 1994, Amended.

42 Uniform Limited Partnership Act (ULPA), 1916, Amended.

43 A partnership in which all partners participate fully in running the business and share equally in profits and losses (though the partners' monetary contributions may vary), see: *Garner B.A.,* Black's Law Dictionary, 9th Edition, 2009, 1230.

44 We basically mean the question of partners responsibility

45 *Maurice J.M.,* A New Personal Liability Shield for General Partners: But Not All Partners Are Treated the Same, "Gonz. L. Rev.", No 43, 2007-2008, 369.

creditors have to first exhaust the assets of the society (RUPA 306, 307). It is necessary to present (fill) relevant documentation in a relevant state body. In addition, it is mandatory to have as a minimum one general and one limited partner (ULPA 201). Here, similarly to the Georgian law, the liability of the first type of a partner is unlimited, and the second type has a limited liability. In addition, the limited partner traditionally does not take active part in the management of the society, but in certain states there is observed growth of competence. As for the so-called Limited Liability Partnership (LLP), its foundation was caused by a notorious business scandal. It was in this period that the question of unlimited personal liability was opened. After the formulated changes fifty states took into consideration this type of a society. It is also necessary for the establishment of LLP to submit documentation to the relevant official body (RUPA 201 (b), and at the stage of activity - filling in an annual report (RUP 1003 (c). As for the question of partner liability, the regulation is done in accordance with the states. In particular, in 1/3 of the states partners are not liable for the damage caused only by the delict carried out by other partners (professional negligence or any other more severe illegal act). Other states apply the concept of limitation of liability on a wider scale of relations. However, an unrestricted limitation of liability is not characteristic of these states. Personal and limitless liability is retained in connection with the negligence and illegal acts committed by the partners themselves or their subject persons. Transition of a Limited Partnership into a Limited Liability Limited Partnership is envisaged by the entrepreneur law of 15 states. ULPA is indifferent in relation to this form and although LLP separates general and limited partners, neither of them is liable for the obligations of the society.[46]

As for the partnerships characteristic of the Georgian legal space, as we have mentioned above, the Law on Entrepreneurs indemnifies a Joint Liability Company, the partners of which are personally liable for society obligations; and a commandite society, in which 2 partners with limited and unlimited liability (commandite and complementary) carry out the activity.

3. Characteristic Features of Establishing a Partnership

The feature of establishing a partnership is one of the most important and differently regulated questions in the American and Georgian law on partnerships. The legal status can be seen from different perspectives and there is a vivid historical influence of Aggregate and Entity theory on current legislation. A Georgian legislator, while attributing a Joint Liability Society[47] to a legal person,[48] and not distinguishing any differentiating rules at the stage of foundation, applies the same requirements characteristic of other entrepreneur subjects for the foundation of this

[46] *Siemens M.M.,* Regulatory Competition in Partnership Law, Working Paper, "International and Comparative Law Quarterly", 2009, No 58, 767-802, 4-6.

[47] In this case we will consider and compare only the Georgian Joint Liability Company and the American general partnership, since the contents or formal difference can be most likely seen in this case.

[48] Law on Entrepreneurs, 2.3.

society. Therefore, the partners conclude an agreement in writing on the basis of which the questions in connection with entrepreneur activity and/or relations with partners are regulated. [49] The registration application signed and verified by all the partners (notarization or verification by an authorized administrative body or a verification of its signature by a registration body), which is a part of partners agreement, shall be submitted to the registration body, in particular, LEPL acting under the Ministry of Justice – National Registry of Public Agency.[50] Finally, the existence of an entrepreneur subject, i.e. including JLC is determined by an extract from the registry of entrepreneur and non-entrepreneur (noncommercial) legal persons.[51]

As for the procedures of establishment stipulated by the American partnership law, there exists a different approach and this approach is a lawful result of the historical understanding (perception) characteristic of the countries with common law of the legal status of these types of societies. One of the court precedents of the Michigan state in connection with the case **Byker v. Mannes**[52] reflects the specifics of establishing a simple, general partnership characteristic of this state (and not only). In short the case was as follows: The Claimant Byker and the Defendant Mannes have agreed to invest skills, labor and capital in favor of (for the creation of) several business initiatives (enterprises). They would equally share the profit, damage and loss of the initiative. The Claimant and the Defendant have created 5 independent business enterprises in several years. According to an unwritten consensus existing between the parties, the latter agreed to equally participate in the distribution of profit and damages received as a result of the activity, to personally cover several credit obligations of 5 societies. In some time after their creation, one of the societies began to experience financial difficulties. In order to overcome the problem, the parties began to attract additional capital and accumulated financial means from various organizations. However, the situation did not improve. As a result, the defendant refused to issue additional amounts, and the claimant started several individual credit obligations independently from the defendant (Mannes did not know anything). Finally all business relations between the Claimant and the Defendant had ceased. Byker demanded sharing the expenses incurred from Mannes, and the latter refused to do so and the reason was that he was not aware of the non-fulfilled obligation (due credit). Byker filed a claim in court and pointed out that the parties had established a partnership, and the partner (Mannes) was obliged to satisfy his request and share the obligations of the entity. The Defendant denied the existence of any partnership and declared that he was doing only some businesses with the Claimant and there did not exist any partnership. The given dispute was analyzed by the courts of three instances.[53] The court of the first instance believed that the parties had created a partnership because at

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49 Article 3.4[1].

50 Articles 4.2, 5.1, 5.3.

51 Article 4.3.

52 *Byker v. Mannes*, 641 N.W. 2d2120 (Mich. 2002).

53 The position of the courts of all the three instances, as well as the plot of the case, except for a direct court decision, is based on the following work – *Mastrogiacomo P. Jr.,* Business Law – Partnership Formation -

such time the purpose of the parties to carry out entrepreneur activity is important as compared to the wish to create a partnership. Therefore, according to the court, there was an agreement between the Claimant and the Defendant that they would become partners and share their income and damage. The Michigan Court of Appeals did not agree with this idea and explained: the non-existence of the purpose to create a partnership is in contrast with the law of the Michigan State since the purpose of partners is of decisive importance in solving the question of existence and non-existence of a society. The Supreme Court of Michigan supported the first decision (of the court of first instance) and considered the partnership established. The court explained that if the parties actually agree on starting the relation under the definition of a partnership, there is no need to give it a label of, "a partnership". Therefore, in accordance with the given precedent, the Supreme Court of Michigan determined that the actions of the parties, including handing over financial means for entrepreneur activity, provision of obligations, carrying out everyday activity and operations, collecting the profit gained, point to the wish of the parties to act as partners, although there does not exist any formal documentation. The purpose of carrying out an activity with the status of partners, i.e. carrying out business as co-owners is the only thing that is necessary for the creation of a partnership (demanded by the law).[54]

As we have mentioned above, in the given precedent the court has pointed out several times to the agreement of the parties on the distribution of profit and loss; although this question was more discussed during a case hearing in the Texas Court of Appeals: **Valero Energy Corp. v. Teco Pipeline Co**.[55] As a result of the hearing it was determined that the parties acted on the basis of an operating agreement[56] and there was not any agreement on the distribution of profit or loss. When discussing the given case, the Court of Appeals distinguished the following 4 cumulative phases (marks) necessary for founding a partnership: a unity of the interests of entrepreneur activity; an agreement on the distribution of profit; an agreement on the distribution of loss; a joint authority to manage and control the society; [57] A non-existence of at least one elements of the given list points to the non-existence of the partnership (the fact that it has not been founded). And according to concrete circumstances, the Claimant did not satisfy this 4 phase test in its part concerning the distribution of profit and damage, i.e. neither the Partnership has been founded.[58]

Therefore, as you can see, American and Georgian entrepreneur law reflects a deep difference at the very stage of the foundation of partnership, but we think that this is caused by the very different approach at the deepest level of the status of partnership as a society. Although in

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A Partnership is formed by Parties Merely Intending to Carry on Business for Profit as Co-Owners. Byker v. Mannes, 641 N.W. 2d 210 (Mich. 2002), 82 "U. Det. Mercy L. Rev." 157, 2004.

54 *Mastrogiacomo P. Jr.,* Business Law – Partnership Formation - A Partnership is formed by Parties Merely Intending to Carry on Business for Profit as Co-Owners. Byker v. Mannes, 641 N.W. 2d 210 (Mich. 2002), 82 "U. Det. Mercy L. Rev." 157, 2004, 160-161.

55 *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S. W. 3d 576 (Tex. App – Houston 14th Dist. 1999).

56 Operating Agreement.

57 A community of interests in the venture; An agreement to share profits; An agreement to share losses; A mutual right of control or management of the enterprise.

58 *Waters S.A., Bligh J.,* Partnerships, "SMU Law Review", Vol. 54, 2001, 1547-1549.

the American law such type of society represents an entrepreneur subject, but gaining such a degree in this concrete case does not at all depend on formal demands (registration or its equivalent action is implied). As we have seen from the court precedents considered, it is enough to have the wish of the parties to carry out a common activity for the purpose of gaining profit. The latter (the wish of the parties) is an important factor in the Georgian entrepreneur legal space but it is not a factor which is enough for founding a society.

5. Fiduciary Obligations of the Partners of a Partnership[59]

The analysis of fiduciary obligations has a significant importance for the law of corporate governance. Although on the one hand the purpose of the legislator while assigning this type of obligations to the directors and managers is quite clear, on the other hand, the theoretical aspects of fiduciary obligations have been a matter of discussion even till today. The given question is especially vivid in partnership and notwithstanding the fact that the legislator[60] as a rule, does not take into consideration any promise, exception or definition from this point of view, the issue still bears a question mark – do partners have fiduciary obligations? Do these obligations act or should these obligations come into force in respect of a personified society partner along with a capital type of society? What are the questions above based on and why do we differentiate the institution of fiduciary obligations in accordance with partnerships and capital entities? The following chapter will contain an effort to answer these questions.

The term "fiduciary" was used to regulate such situations (relations), where a trust could not reach its goal, and one of the parties to the relationship did not act as a trustee.[61] It was for this reason that the fiduciary obligations were practically used by corporate societies.[62] In accordance with the modern corporate law, in the German as well as American law, the obligation of the chief bodies was divided into two large groups: (duty of care or duty of diligence, Sorgfaltsflight) and duty of loyalty, (Treuepflicht). These duty of care and duty of loyalty are called fiduciary

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59 The essence of fiduciary obligations has been only analyzed in the thesis as dogmatic in connection with a partnership. Please refer to the following in connection with fiduciary obligations in general, including those of enterprise directors / managers: *Block D.J., Barton N.E., Radin S.A.,* The Business Judgment Rule, Fiduciary Duties of Corporate Directors, Fifth Edition, Vol. I, "Aspen Law & Business", New York, 1998; *Ribstein L.E.*, Symposium: The Role of Fiduciary Law and Trust in the Twenty-First Century: A Conference Inspired By The Work of Tamar Frankel: Panel I: The Nature of Fiduciary Law and Its Relationship to Other Legal Doctrines and Categories: Fencing Fiduciary Duties, 91 "B.U.L. Rev." 899, 2011; *Mariani F.J., Kammerer W.Ch., Guffey-Landers N.,* Understanding Fiduciary Duty, 84 "Fla. Bar J." 20, 2010; *Giannini M.R.*, "Punctilio of Honor" or "Disintegrating Erosion?" The Fiduciary Duty to Disclose For Partners, Corporate Directors, and Majority Shareholders, 27 "Sw. U.L. Rev." 73, 1997; *Steele M.M.*, Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies, 32 "Del. J. Corp. L." 1, 2007.

60 Mainly Georgian legislators are implied.

61 Trustee.

62 *Demott D.A.,* Beyond Metaphor: An Analysis of Fiduciary Obligation, "Duke Law Journal", No 5, 1988, 880.

obligations[63] in the American law. The most widespread definition of the obligations mandatory to one partner in respect of the other was given by the New York State state judge, Kardozo, on the case **Meinhard v. Salmon**[64]: the persons who carry out entrepreneur activity (risky business activity) together, as co-partners, shall have a duty of care and loyalty towards each other. Many forms of behavior, which are acceptable in a common environment, are banned for the persons with less tightly connected distant relations, partners, as the parties limited by fiduciary obligations. A trustee is carrying a stricter inner moral than it is widespread in market relations. In this case not only honesty itself but the most sensitive pedantic respect and honor present the standard for behavior. Therefore, there is a tradition, which is very firm and unbending. The courts would treat the attempts to harm the duty inseparable from loyalty with great strictness. It was only for this reason that there was retained a higher standard of fiduciary's behavior than it is characteristic to the masses. The given standard will not get lower by any decision of the court.[65]

It is still a matter of dispute if it reasonable and appropriate to apply fiduciary obligations to partnerships. There are different opinions, which are based on various approaches to these types of obligations. For example, there is an opinion that in LLP fiduciary obligations should not be mandatory but at the stage of establishing the society partners should decide whether they will apply these requirements in respect of the society.[66] Notwithstanding these opinions, fiduciary obligations are well regulated at the level of American partnership law at the legislative level. According to RUPA, a partnership partner shall have both the duty of care and the duty of loyalty. Additionally, the given fiduciary obligations are entered in the category of such bodies, which cannot be changed as a result of partner agreement.[67]

Apart from the duties of loyalty and care, TUPA also makes partners liable for good faith[68] and fair, unbiased dealing[69] (it is considered[70] that this is caused by the very agreement nature of a partnership). Neither does the Georgian entrepreneur law distinguish any rules for exception. Although there is no separate norm on fiduciary obligations of a partnership in the Law of Georgia on Entrepreneurs,[71] this does not mean its nonexistence. The list of the persons with management authority listed in point one Article 9 of the Law points out all the partners for JLC and full partners (complementary) - for a commandite company. In accordance with Point 6 of the same Article, the persons mentioned above are obliged to have duties of care and loyalty. Therefore, we can conclude

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63 *Chanturia L.,* Corporate Governance and the Liability of the Heads in Corporate Law, Tbilisi, 2006, 199.

64 *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (see: *Rickert J.M.,* Ohio's New Partnership Law, "Clev. St. L. Rev.", No 57, 2009, 789).

65 Please also see: *Ribstein L.E.,* Are Partners Fiductiaries?, "U. III. L. Rev.", No 1, 209, 2005.

66 *Steele M.M.,* Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies, "Del. J. Corp. L.", No 32, 2007, 2-3.

67 Although there are exceptions in the USA as well. In accordance to the Delaware state.

68 Good faith.

69 Fair dealing.

70 *Rickert J.M.,* Ohio's New Partnership Law, "Clev. St. L. Rev.", No 57, 2009, 794.

71 In contrast to the American Law, with separate regulatory rules for capital and personified societies (The Corporate Management Principles of American Law Institute – ALI and Modeled Law on Entrepreneur Corporations – M.B.C.A. apply only to capital entities, and RUPA and RULPa- apply only to partnerships).

that Georgian legislation perceives all the heads of entrepreneur subjects at one level (except for an individual entrepreneur) and transfers this into one common regulation.

Notwithstanding the fact that in the American and Georgian entrepreneur legal acts fiduciary obligations apply to the partnership partners as well, as we have mentioned above, there is no one opinion in the scientific literature on this matter. Let us consider the idea of professor Ribstein[72] in connection with the given question. In contrast to the other analysts, the author in his work[73] considers not only the cases when fiduciary obligations should be used but he also emphasizes the cases when it is incorrect and inexpedient to use these types of obligations. In his opinion, fiduciary obligations should apply to those obligations only, where there is no agreement delegation of broad power on another person's property.[74] Broad power implies managerial authority without such limitations like active monitoring of an owner or recognition of power (freedom to act). Fiduciary obligations are relevant for the relations between corporation directors and shareholders and they cannot be adjusted to such relations between the parties, the activity of which is expected and implied like in the case of a general partnership. Although, from the economic point of view, fiduciary relations are one of the types of representation, with the separation of property and control. This does not mean that all representations (from the economic point of view) are fiduciary relations. Fiduciary obligations take place only in the case when the owner transfers open-ended power[75] to the manager. The introduction of fiduciary obligation in entrepreneur laws compensates and balances the inability of the owner to monitor, check and evaluate manager activity directly and daily. Therefore, in the opinion of Ribstein, only a partner acting in a partnership with centralized management shall have fiduciary obligations.[76] The main motive lying behind this concept is that a partner authority in partnership is not enough for the creation of a paradigm of fiduciary relations, since the copartners have important and substantial rights to actively engage and participate in the decision of a society, to get any information in connection with the enterprise. For example, the Court refuses to assign fiduciary obligations to a managing partner in one case[77] for the reason that notwithstanding the control of daily activity of the society by the partner, all the important future financial decisions were taken by the Executive Committee with the participation of all the partners.[78]

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72 Professor of the Illionois University Law College, author of more than 170 works, including: The Rise of the Uncorporation, New-York, "Oxford University Press", 2010; The Law Market, New-York, "Oxford University Press" (with *O'Hara E.A.*), 2009; The Sarbanes-Oxley Debate (with *Butler H.N.*), Washington, "American Enterprise Institute Press", 2006; The Constitution and Corporation (with *Butler H.N.*), Washington, "American Enterprise Institute Press", 1995; Bromberg & Ribstein on Partnerships (with *Bromberg A.R.*), Boston, "Little, Brown and Company", 1988.

73 *Ribstein L.E.,* Are Partners Fiduciaries?, "U. III. L. Rev." 209, No 1, 2005.

74 Contractual delegation of broad power over one's property.

75 Open-ended power.

76 According to Ribstein, the opinion of the judge Kardozo, the above-mentioned idea was caused by the fact that Salmon was not an ordinary partner but a manager partner of a centralized partnership.

77 *Walter v. Holiday Inns, Inc.,* 985 F. 2d 1232 (3d Cir. 1993).

78 The opinions of professor Ribstein on the obligations of partners of a partnership are presented in accordance with the work mentioned above, see fn. 72.

Therefore, the opinion of professor Ribstein should be based on the personified nature of a partnership. According to him, when assigning fiduciary obligations to a partnership, the scope of the authority delegated to participating partners and the limits of the participation of other partners is of decisive importance. In contrast to large corporations, in such societies there exists a much stronger practical and legal lever for manager control.

6. A Share of a Partnership in the Form of Securities

6.1. General

A share of partners in a partnership has been discussed in numerous American legal precedents and scientific theses. Although the approach in connection with the given subject is changing with the time, the main idea is unchanged: is there a share in partnership, an investment contract, i.e. a security. Due to the fact that in accordance with the Law of Georgia on Securities Market, similarly to the American law, investment contract is pointed out in the list of securities, the American regulation presented in this part of the thesis and the experience should be important for the Georgian legal space as well.

The Federal law on securities, in particular, the Securities Act[79] and the Securities Exchange Act[80] provide a broader and more exhaustive list of securities. In accordance with the given acts,[81] a security - is any share…[82] or investment agreement. As for the law of Georgia on securities market, according to it: securities are financial instruments and rights in the turnover , which can be publicly offered in the form of share or debt securities…,[83] as well as an investment contract.[84]

6.2 Howey Test

There is nothing separately said about a share of a partnership in the given acts. For this reason, the question of considering or not considering partner a share as an investment contract became widely discussed by the American courts.[85] From this point of view, the most popular and

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79 Securities Act, 1933.

80 Securities Exchange Act, 1934.

81 Which are mainly identical in the given part.

82 For a full list refer to – Securities Act, Section 2(1); Securities Exchange Act, Section 3 (a) (10).

83 For a full list refer to – Law of Georgia on Securities Market, Article 2, Point 32.

84 The term "Investment Contract" is used only once in the law, when it is named in the definition of the term "security". Therefore, investment agreement is considered one of the types of a security by which the investor carries out investment of funds (money, securities or any other property right, including intangible property) into economic activity. Additionally, it is necessary that this action by the investor has a purpose of income (benefit). Otherwise it will be a simple gift (including grants) or lending (including non-interest-bearing debts) - *Jibuti M., Koranashvili K.,* A Comment to the Law on Georgia on Securities Market, Tbilisi, 2004, 53-54.

85 The given questions in the given chapter have been discussed mainly in accordance with the following works: *Porter J.B.,* Modern Partnership Interests as Securities: the Effect of RUPA, RULPA and LLP

useful definition was made in connection with one of the cases[86] in the court in 1946. As a result, the Howey test was established which checked whether the share of a partner in partnership was a security (investment contract). In particular, an investment contract was defined as a contract, a transaction, a project, according to which investment of money in an enterprise is carried out with an expectation that the profit will be gained only as a result of efforts made by others. Therefore, the Howey Test considers a share of passive partners, investors to be a security. From this point of view, a general partnership share would in no way satisfy a Howey Test. It was against the, "concept of receiving profit only by means of the efforts of others", since in such a society partners had broad managerial authorities. In 1981 the Court of Appeals of the 5th county in the USA amended and filled the Howey test with new information in connection with the Williamson case,[87] and pointed out that a partner share in a general partnership can also be an investment contract if the investor proofs that a) the agreement between the parties leaves him so little power that his condition becomes similar to the status of a limited partner of a limited partnership; b) he is so inexperienced and has so little knowledge of concrete entrepreneur activity that he has no intellectual ability to carry out his rights; c) he is so dependent on the special ability of the society manager that he cannot replace him when carrying out his authority.

6.3 Williamson's amended Test

In accordance with the approaches discussed above (the Howey and Williamson tests), it was considered that the share of a general partnership (in most but not all the cases) did not represent a security, and the share of the Limited partnership, was such as a rule.[88] However, in the further editions of UPA and ULPA (RUPA, ULPA) society founding partners were given more freedom.[89] A catalogue of rules, which is unchanged by current acts, partner agreement, is very scarce, therefore, they consider[90] that it is possible (it is not banned by the acts if the partners

Statutes on Investment Contract Analysis, "Wash. & Lee L. Rev.", No 55, 1998, 985-993; *Bamonte T.J.,* Partnership Interests as Securities under Illinois Law, 19. "S. III. U.L.J." 333, 1994-1995; *Nahr C.J.,* What is a "Security" For Purposes of the U.S. Federal Securities Laws? An Analysis of Foreign Equity Interests, 17 "Am. U. Int'l L. Rev." 723, 2001-2002.

86 *SEC. v. W.J. Howey Co.,* 328 U.S. 293, 1946.

87 *Williamson v. Tucker,* 645 FD.2d 404 (5th Cir. 1981).

88 In the event of a limited partner of a Limited partnership, the given question was simpler, since the limited partner is mostly away from management and functions as a passive partner, an investor. Therefore, we will not discuss this question in detail in the thesis. In connection with this, please see American precedents, *Youmans v. Simon*, 791 F.2d 341 (5th Cir. 1986); *Rodeo v. Gillma*, 787 F.2d 1175 (7th Cir. 1986), l; *Stainhardt Group Inc v. Citicorp*, 126 F. 3d 144 (3d Cir. 1997) – the court developed a different opinion on this case and it did not consider the share of a limited society as a security).

89 Similarly to the Law of Georgia on Entrepreneurs, this law is also represented by dispositionary norms, including the regulation connected with partnerships, as compared to the recent amendments.

90 *Porter J.B.,* Modern Partnership Interests as Securities: The Effect of RUPA, RULPA and LLP Statutes on Investments Contract Analysis, "Wash. & Lee L. Rev.", No 55, 1998, 955, 566.

have a desire) to create a strictly centralized general partnership, where partners will have no managerial rights[91] and there will be an opportunity for its existence. On this basis there was developed[92] a Williamsons' amended test, which adjusts to any type of partnership irrelevant of the partnership structure and checks it from the point of view of the content and not according to formal marks whether we are dealing with a security. A share of a general or limited partner in a relevant society shall be considered as a security if the partner/the investor proofs that: a) partners' agreement leaves him so little authority that it is impossible to adequately defend his interests in the society; b) a partner has so less knowledge and experience in connection with the activity of an entity that it has no practical ability to carry out his authority; c) he is so much dependent on the unique business ability and skills of his managing partner that he is unable to perform his rights and obligations; d) the society is so big, and his interest is so little that it does not have any influence on the main management functions of the society.

Summary

Therefore, the aim of the thesis was to discuss a partnership, a personified society in comparison with the society legal status as well as the American law. As we have observed, this type reveals much more similarity with capital entity than it used to have years ago. A business enterprise grown from narrow, family or some close relations, today in certain cases is perceived as a sharply centralized society, the managing partners of which are limited by fiduciary obligations and their share in the society is a security.

One can understand from the thesis that notwithstanding the different origin, the Georgian and American partnership laws have similarities in a number of issues, although the historical heritage retains significant differences as well.

[91] *Simpson v. Ernst &Young*, 100 F. 3d 436 (6th Cir. 1996).

[92] *Porter J.B.,* Modern Partnership Interests as Securities: The Effect of RUPA, RULPA and LLP Statutes on Investments Contract Analysis, "Wash. & Lee L. Rev.", No 55, 1998, 985-993.

Ana Ramishvili*

Corporativeness as the Element Determining the Corporate Legal System

Corporate law is very important branch of private law. The perspective of its development highly depends on the condition of entrepreneurship in the country and the challenges faced or future challenges that could arise for the entrepreneurs in the process of their activity implementation. Georgian corporate law consists of general and private parts. The organization-legal forms of entrepreneurial activities included in the private part of the Georgian corporate law system determine the "pulsation" of the country economy. Creation of attractive entrepreneurial and investment environment is considered of special interest for any State. Attractiveness indicator is the successful activities of the entrepreneurs, which at certain level is the result of relevant support from the State expressed in offering the refined legal forms. In this regard the increasing drive of the entrepreneurial activities towards the self-regulation should be considered.

Achievement of effective functioning of organizational-legal forms of entrepreneurial activities is impossible without their effective establishment-organization. The improvement of organizational form is not a sole objective; its importance is expressed in the significant influence over the entrepreneurial activities.[1] The objective of the present article is to analyse the Georgian corporate law system in the corporate prism (context). This type of analysis will help us in comprehensive definition of qualitative characteristics of legal forms for the entrepreneurial activities which on the other hand is a pre-condition for their effective establishment-organization.

For the achievement of the above stated objective the article reviews the issues determining the contents of corporativeness. First of all the historic genesis of notion "corporate" and its relationship with the corporativeness are presented; second chapter reviews the essential criteria of entrepreneurs' legal entities; third chapter stresses the principle of limited liability, its purpose and scope of effectiveness. The dominating position of JSC compared with other organizational-legal forms and factors determining such domination are analysed; namely, in relation to the limited liability principle the nature of free disposability of shares, as the mechanism for financing corporate form is studied. And finally, the essential issues related to the delegation of management authority have been distinguished and analysed; what are the effects of these issues over the successful activities of companies. In the final part of present article, in the form of conclusion the issue of relevance to analyse the Georgian corporate legal system in the context of

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1 *Williamson O.E.,* The Modern Corporation: Origins, Evolution, Attributes, "Journal of Economic Literature", Vol. XIX, 1981, 1543.

corporativeness and result of such analysis in terms of revealing the new angles of qualitative characteristics of legal forms of entrepreneurial activities are discussed.

1. Interrelationship Between the Corporation Essence and Corporativeness

Deep analysis of Georgian corporate legal system without covering the key issue such as corporation is not expedient. Covering the subject implies the brief review of corporation's historic retrospective and determination of its present definition. It is possible to reveal the characteristics of Georgian corporate legal system and their comprehensive analysis is possible in this way.

Corporation is complex economic-legal institution. The definitions for the corporation[2] reflect the ideology of persons determining the definition. On the question – what implies the corporation – there is a following answer in Georgian legislation: corporation is Joint Stock Company.[3] By the above answer Georgian legislator shared the modern meaning of corporation as one of the forms of entrepreneurial activities.

Prior to gaining the modern significance corporation passed through a difficult way. The historic origins of corporate form can be found in Roman law. Starting from Roman law corporation has undergone four main cycles of transformation. At the first stage the concept of corporation as an entity separate from its members was developed. At the next stage the utilization of partnership for entrepreneurial activities was considered. At the third stage the paradigm has changed in the nature of entrepreneurial corporation causing creation of closed and open type corporations. The last stage was related to the globalization processes in business. All four cycles of transformation were accompanied by the changes in legal concept of corporation.[4]

Historic genesis of corporation notion provides us with the answer to the important questions related to the corporate law: what did determine the interest of entrepreneurial entities in corporate status. What are the pre-conditions for considering JSC as one of the most optimal forms for implementation of entrepreneurial activities under modern economic conditions? Answers to these questions are the corporativeness and accompanied advantages.[5]

Corporativeness is the basis for the analysis of corporate legal system. Modern definition of corporation is expressed in corporativeness. Status of legal entity, limited liability, centralized

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2 See: *Litowitz D.,* The Corporation as God, "The Journal of Corporation Law", Vol. 30, Iss. 3, 2005, 501-538; *Mccall B.M.,* The Corporation as Imperfect Society, "Delaware Journal of Corporate Law", Vol. 36, № 2, 2011, 509-573; *Nesteruk J.,* Conceptions of the Corporation and the Prospects of Sustainable Peace, "William Davidson Working Paper", № 423, 2001, 1-31.

3 Article 2, Paragraph 1, Law of Georgia on Enterpreneurs, 1994.

4 In detail on 4 main cycles of transformation, see: *Avi-Yonah R.S.,* The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility, "Delaware Journal of Corporate Law", Vol. 30, 2005, 767-818.

5 *Mahoney P.G.,* Contract or Concession? An Essay on the History of Corporate Law, "Georgia Law Review", Vol. 34, 1999-2000, 874.

management and freely disposable shares are the attributes of contents of corporativeness.[6] These are the key issues around which the corporate legal system is organized. The essential characteristics, provided above, separately and in combinations determine the organization effectiveness ensuring the successful operations of large firms consisting of many owners under the modern economic conditions.[7] It can be stated that their objective is satisfaction of economic requirements of large enterprises.[8] Based on the nature of main attributes of corporate form, their main purpose is steady serving the interests of shareholders[9] and not so much consideration of interests of enterprise employees, creditors, other suppliers, consumers[10] and generally the interests of the company.[11]

2. The Main Criteria of Entrepreneurs' Legal Entities

For inclusion into private legal relationships the parties to such relationships require physical or legal status depending on whether they deal with persons or organizations. By assigning the status of physical or legal entity the party to the relationship is acknowledged as legal subject.[12] Civil Code of Georgia identifies the legal subject as legal capacity.[13] Legal capacity is the privilege of human being, only the human being can have rights and liabilities,[14] which is the result of person's human nature;[15] this is equal of acquiring the legal status of physical person (entity).[16]

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6 *Mahoney P.G.,* Contract or Concession? An Essay on the History of Corporate Law, "Georgia Law Review", Vol. 34, 1999-2000, 873.

7 *Hansmann H., Kraakman R.,* The End of History for Corporate Law, Harvard Law School John M. Olin Center for Law, Economics and Business, "Discussion Paper Series", Paper № 280, 2000, 2.

8 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law?, in: *Kraakman R., Armour J., Davies P., Enriques L., Hansmann H., Hertig G., Hopt K., Kanda H., Rock E.,* The Anatomy of Corporate Law: A Comparative and Functional Approach, 2nd Ed., New York, 2009, 1 (hereinafter *Kraakman R., Armour J., Davies P.,* The Anatomy of Corporate Law).

9 *Hansmann H., Kraakman R.,* The End of History for Corporate Law, Harvard Law School John M. Olin Center for Law, Economics and Business, "Discussion Paper Series", Paper № 280, 2000, 2.

10 On consumer interest in corporate law see: *Yosifon D.G.,* The Consumer Interest in Corporate Law, "UC Davis Law Review", Vol. 43, 2009, 253-313.

11 Authors note that given signs do not necessarily indicate how to ensure the interests of other participants of the firm. They also do not indicate on the means which should be used to solve the conflict of interests in shareholders, especially conflicts between the controlling and minority shareholders. See: *Hansmann H., Kraakman R.,* The End of History for Corporate Law, Harvard Law School John M. Olin Center for Law, Economics and Business, "Discussion Paper Series", Paper № 280, 2000, 2. Despite the fact that in the same work the authors differentiate two models of corporation in terms of full power over the corporation. The first model, referred to as standard model, is model oriented towards the shareholder. Models traditionally referred to as alternative models are models oriented towards the management, employee and the State, The second model is model oriented towards the interested parties (stakeholders), which is considered as main alternative to the shareholder oriented model. In detail, see: *Hansmann H., Kraakman R.,* The End of History for Corporate Law, Harvard Law School John M. Olin Center for Law, Economics and Business, "Discussion Paper Series", Paper № 280, 2000, 3-11.

12 Article 8, Part 1, Civil Code of Georgia, 1997 (hereinafter referred to as GCC).

13 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 222.

14 *Chanturia L.,* Introduction to the General Part of the Civil Law, Tbilisi, 2000, 127.

The organizational forms of entrepreneurial activities provided in the private part of Georgian corporate law become the subjects of private-legal relationships based on assigning the status of legal entity.[17] Assigning status of legal entity to the entrepreneurial organizations is the evident characteristic of Georgian corporate law. For acquiring the legal status it is only required to transfer the characteristic capacities of the human being to the organizational-legal forms. The goal of fiction theory was actually achievement of the above result.[18] Creation of legal fiction of personality for the partnership of human beings,[19] in other words their personification,[20] which is considered by the legal conceptualism as "Legal personalization",[21] is the basic provision of fiction theory. The artificial personality created on the basis of law provided the partnerships of human beings with the legal capacity, which ensured separation of rights-liabilities of partnerships of persons from the rights-liabilities of the persons included in this partnership.

Consideration of organizational creatures of persons existing in the society as human beings could not ensure the full identity of them with the human being.[22] The human has also the ability to execute the granted rights and assigned liabilities. This aspect was stressed by the Personality Theory of Real Connection (organic theory). According to the theory real social existence of partnerships of human beings itself stipulates existence of persons separate of such partnerships.[23] They do not require creation of personality fiction by the law, as due to their social existence they themselves already have separate personalities[24] and therefore, they have separate identities. The law by acknowledgment of already existing personality in the social environment of people's partnerships made transfer of social reality to the legal reality possible. As the human being has organs, in the same way the partnerships of persons have their own organs, by which they are gaining rights and undertake liabilities. Accordingly they are "subjects of the will and action".[25]

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15 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 223.

16 Article 11, Part 1, GCC.

17 Article 2, Paragraph 3, Law of Georgia on Enterpreneurs, 1994.

18 *Chanturia L.,* Introduction to the General Part of the Civil Law, Tbilisi, 2000, 211.

19 Ib., 212.

20 *Krannich J.M.,*The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation, "Loyola University Chicago Law Journal", Vol. 37, № 1, 2005, 66.

21 Issue of legal personality in English company law is considered in relations with the limited liability principle, which is based on the decision made in 1897 year on the case *Salomon v Salomon & Co* [1897] AC 22 (in: *Mäntysaari P.,* Organising the Firm: Theories of Commercial Law, Corporate Governance and Corporate Law, Berlin/Heidelberg, 2012, 63). In corporate law legal personality has four functions. The first function – ensuring the uninterrupted activities of the corporation; the second function – assigning the different identity to the corporation; the objective of third function is to achieve the separation of property of corporation and the shareholders; and the last function provision of legal mechanisms for the corporation management. See in detail on functions: *Blair M.M.,* The Four Functions of Corporate Personhood, "Vanderbilt Law and Economics Research Paper", No.12-15, 2012, 1-43.

22 On "equalization" with the physical person, see: *Kereselidze D.,* The Most General Notions of Private Law, Tbilisi, 2009, 162-166.

23 *Friedman W.G.,* Legal Theory, 5th Ed., London, 1967, 557.

24 *Oman N.B.,* Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria, "Denver University Law Review", Vol.83, Iss. 1, 2005, 116.

25 *Chanturia L.,* Introduction to the General Part of the Civil Law, Tbilisi, 2000, 213.

Despite the above theoretic discussion which identified two criteria of Georgian notion of legal entity, the difference between the human beings and their partnerships, acting for the objective of implementation of entrepreneurial activities still remained unclear. The main reason for difference was the limited nature of the legal capacity, which was only manifested in the accentuation on property aspect[26] and was based on the objective of unification of persons. The legal capacity was transformed due to its nature and as a result of spreading the concept over the organized entities. The nature of organizational-legal forms of entrepreneurial activities determine the impossibility of existence without their own property,[2728] which raises the need for existence of property of organizational entity separate from the property of the members of the partnership. The need for existence of separate property is caused by the issue of independent proprietary responsibility of entrepreneurs,[29] even in cases when the responsibility of all partners towards the creditors for the company liabilities is not limited.[30] First of all the subject of the responsibility is the company property.[31] Only if the company property is not sufficient for satisfaction of company's matured liabilities and under certain pre-condition, the issue of distribution of company responsibility over the partners' personal properties is raised

For ensuring the responsibility with own property it is necessary to clearly separate the property of organizational entity from the personal property of company partners. The level of (clear) separation of property[32] in the entrepreneurial companies show the difference existing among them. The separation of property is achieved via two components. The separation of company property from the property of company partners is possible only via the both components together.

Under the civil turnover conditions the entrepreneurial company and its partners have their own creditors. For each group of creditors it is vitally important to know which property is available for satisfaction of their claims.[33] The first component ensures protection of company property from the personal creditors of the company partners, and accordingly, causes only the weak separation. The second component protects the property of company partners from the company creditors' claims.[34] Each component in isolation does not ensure clear separation of company property and partners' property.

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26 *Chanturia L.,* Introduction to the General Part of the Civil Law, Tbilisi, 2000, 211.

27 On inter-relationship between the company property and share capital see: *Burduli I.,* Proprietary Relationships in Joint Stock Company (Especially in the Process of its Establishment) on the Examples of Georgian and Austrian Laws, Tbilisi, 2008, 94-95.

28 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 229.

29 *Chanturia L.,* Introduction to the General Part of the Civil Law, Tbilisi, 2000, 222.

30 Article 20, Paragraph 1, Law of Georgia on Enterpreneurs, 1994.

31 Paragraph 3, Law of Georgia on Enterpreneurs, 1994.

32 On separation of property, see: *Hansmann H., Kraakman R.,* The Essential Role of Organizational Law, "Yale Law Journal", Vol. 110, 2000, 387-440. According to authors, the separation of property is the main issue for the organizational law.

33 *Mahoney P.G.,* Contract or Concession? An Essay on the History of Corporate Law, "Georgia Law Review", Vol. 34, 1999-2000, 876.

34 *Kraakman R., Armour J., Davies P.,* The Anatomy of Corporate Law, 9-10.

At the stage of establishment of entrepreneurial company the initial capital referred to as initial share capital of the company in legal terms, is one of the necessary pre-condition for getting the status of legal entity.[35] Based on the functions of share capital,[36] its importance is not limited with the establishment stage; therefore it generates the requirement to pay special attention to further maintenance and protection of share capital in future.[37]

In summary, the meaning of legal entity status for the entrepreneurs is the separation of property used in entrepreneurial activities from the personal property.[38]

3. Legal and Economic Results of Limited Liability

The second component ensuring the existence of separate property for the company protecting the property of company partners from the claims of company creditors is the limited liability. Limited liability is the clearly expressed principle of Georgian corporate law. Classification of entrepreneurial entities is possible based on - how the principle of limited liability is manifested in the company. Its effectiveness is manifested with the high clearness in the corporation. Therefore limited liability became the generally accepted characteristic of corporative form.[39]

Limited liability, as the principle developed[40] from the personal responsibility[41] considers that the investor is not personally responsible for the debts and other liabilities generated via the entrepreneurial activities,[42] as well as the company is not responsible for the personal debts and other liabilities of its partners.[43] Responsibility of partners is limited with the volume of his/her investment in the company.[44] The above limited liability from the party of the investors is the factor promoting the attraction of resources to the companies.[45] In Georgian corporate law, based on the limited liability principle two categories of partners to the company are distinguished.[46]

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35 *Chanturia L.,* Introduction to the General Part of the Civil Law, Tbilisi, 2000, 221.

36 On the functions of share capital, see: *Burduli I.,* Share Capital and its Functions, in: Theoretical and Practical Issues in Modern Corporate Law, Tbilisi, 2009, 208-261.

37 *Jugeli G.,* Protection of Capital in Joint Stock Company, Tbilisi, 2010, 29.

38 *Blair M.M.,* Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century, "UCLA Law Review", Vol. 51, № 2, 2003, 391.

39 *Kraakman R., Armour J., Davies P.,* The Anatomy of Corporate Law, 9.

40 For historical review of limited liability principle see: *Pettet B.,* Limited Liability – A Principle for the 21st Century?, "Current Legal Problems", Vol. 48, Iss. 2, 1995, 128-141.

41 *Mahoney P.G.,* Contract or Concession? An Essay on the History of Corporate Law, "Georgia Law Review", Vol. 34, 1999-2000, 875.

42 *Blair M.M.,* Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century, "UCLA Law Review", Vol. 51, No. 2, 2003, 437.

43 *Goulding S.,* Company Law, 2nd Ed., London, 1999, 9.

44 *Easterbrook F.H., Fischel D.R.,* The Economic Structure of Corporate Law, London, 1996, 40.

45 *Pettet B.,* Limited Liability – A Principle for the 21st Century?, "Current Legal Problems", Vol. 48, Iss. 2, 1995, 142.

46 Article 3, Paragraphs 2 and 4, Georgian Law on Enterpreneurs, 1994.

Limited liability in the corporative form as the agreement instrument[47] is the mechanism which serves the solution of agreement problems related to the changes of shareholders or management in the process of corporation activities.[48] Limited liability is the necessary factor for the capital market development. Despite the above fact, only the limited liability alone cannot explain the fact that the corporative form is considered as the optimal form for the implementation of entrepreneurial activities. We can only state with assurance that limited liability is only one part of[49] the result the ones using the corporate form for entrepreneurial activities are trying to achieve.[50]

The main deficiency of limited liability is that it does not ensure absolute protection of property owned by the company partners from the company creditors.[51] The limited role of limited liability is also indicated in cases when the company has the numerous partners and their participation in the company has insignificant nature. In case of assigning the responsibility for the company creditors with their all properties, evaluation, control and disposal of personal properties of these partners is complicated.[52] Accordingly in this type of companies the existence of limited liability regime loses its importance. In such circumstances, establishment of limited liability based on the agreement becomes more feasible model.[53] In practical terms it is sufficient for the company to indicate in the agreement with each creditor,[54] that the liability of partners is limited and they can't satisfy the claims (payable amounts) generated through the agreement using the personal properties of the partners.[55] It is possible to achieve the objective of attraction of partners to the limited liability regime via the above method. Such approach is in line with the firm's "nexus of contracts" concept. Despite the above, it is generally accepted that limited liability principle together with the disposability of shares is the main source for ensuring corporation financing.[56]

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47 *Kraakman R., Armour J., Davies P.,* The Anatomy of Corporate Law, 9.

48 *Blair M.M.,* Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century, "UCLA Law Review", Vol. 51, No. 2, 2003, 439.

49 *Alchian A.A., Demsetz H.,* Production, Information Costs and Economic Organization, "American Economic Review", No. 62, 1972, 778.

50 *Blair M.M.,* Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century, "UCLA Law Review", Vol. 51, No. 2, 2003, 441.

51 The "throughout liability" doctrine is the exception from the limited liability, see: *Burduli I.,* Share Capital and Its Functions, in: Theoretical and Practical Issues in Modern Corporate Law, Tbilisi, 2009, 236-259.

52 *Hansmann H., Kraakman R.,* Organizational Law as Asset Partitioning, "European Economic Review", Vol. 44, 2000, 814.

53 Compare: *Pettet B.,* Limited Liability – A Principle for The 21st Century?, "Current Legal Problems", Vol. 48, Iss. 2, 1995, 144.

54 *Kahan D.R.,* Shareholder Liability for Corporate Torts: A Historical Perspective, "Georgetown Law Journal", Vol. 97, № 4, 2009, 1090.

55 *Hansmann H., Kraakman R.,* Organizational Law as Asset Partitioning, "European Economic Review", Vol. 44, 2000, 815.

56 *Kraakman R., Armour J., Davies P.,* The Anatomy of Corporate Law, 9.

4. Disposability of Shares – Constitutional Sign of Corporative Form

Free transferability of shares is the factor determining the success of corporate form. Conceptually the above essential characteristic separates the corporate form from other entrepreneurial companies and its attractiveness compared with others is mainly caused by the economic benefits related to the share issuing and their disposability. The share reflects not only the rights generated but also the limited liability of shareholders.[57] Issuing shares is precondition for relevant specialisation of the enterprise activities.[58] The shares make it simpler for the corporation, on the one hand, to attract persons willing to participate in corporation, but do not have the competence to implement management activities and on the other hand, attract the persons with required knowledge, experience and skills for implementation of management activities; the above is especially relevant under the separation of ownership and management functions in corporate form.[59]

Transferability of ownership in corporation, expressed in the free disposability of shares implies that the existence of corporation is independent from the desire of shareholders to (namely) reject their participation in the corporation due to loss of interest, which at some point raised their interest in corporation and was expressed via the purchase of shares.[60] Unlike corporation, in case of partnership type Sole Proprietorship Company, capital of which is divided into stakes, the exit of the partner results in termination of insolvency case against the company is.[61] As for the LLC (limited liability company), capital of which is again divided into shares, the same result does not take place; however despite the essential difference, under the free disposability of shares there is a slight indication of one element in the norm, according to which in case of shareholder capital autonomy the right of LLC partners to dispose and mortgage the shares is considered.[62]

The concept of share transferability considers the existence of share capital divided into stakes. The Georgian law on "Enterpreneurs" in the JSC definition stressed this very fact and defined the JSC as the company, capital of which is divided into shares of different classes and number as envisaged by the statutes.[63]

The main advantage of share disposability is manifested in three inter-depending conditions. The principle, despite the changes into identities of the shareholders, creates possibility to carry out entrepreneurial activities without interruption, ensuring the avoidance of complications which are generated in partnership type organisations as a result of partner exit. The above mentioned

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57 *Butler H.N.,* The Contractual Theory of the Corporation, "George Mason University Law Review", Vol. 11, № 4, 1989, 107.

58 Ib.

59 Ib.

60 *Sprague R.,* Beyond Shareholder Value: Normative Standards for Sustainable Corporate Governance, "William & Mary Business Law Review", Vol. 1, Iss. 1, 2010, 49.

61 Article 31, Paragraph 2, Law of Georgia on Enterpreneurs, 1994.

62 Ib., Article 46, Paragraph 3.

63 Ib., Article 51, First Sentence.

two conditions jointly are conditions for the increase of share liquidity and maintenance of diversified investment portfolio via the simple ways.[64]

Total disposability of shares itself does not consider its free tradability at capital markets, [65] which stipulates existence of two types of corporations. The main advantage of free tradability of shares is implied in the maximal flexibility in terms of capital increase.[66]

5. The Main Aspects of Delegation of Management Authorities

5.1 Main Dichotomy of Corporate Law – Unanimity and Power

Entrepreneurial company, as any other organisation, for simplification of effective decision making process requires the management system. At the establishment stage of the entrepreneurial company, for the purposes of leading the enterprise activities the enterprise shareholders transfer part of their authorities to the company, which is reflected in the delegation of management and control authorities to the specific bodies of the company. The difference of entrepreneurial companies is manifested in the scheme used for delegation of management and control functions among the company bodies.

Requirement for the existence of management system in the enterprise considers two options for selection. The company shareholders must decide whether the enterprise management system will be based on unanimity or power criteria.[67] The first is defined as "any prudent and acceptable mean for consolidation of individual interests."[68] The second is characterised with the existence of central representation, which is provided with all relevant information and which is authorised to make decisions based on all available information.[69] The management structure which is based on unanimity is characterised with the access to relative (comparable) information by the enterprise partners. Decisions based on power are made in the enterprises, which is characterised with high level of information asymmetry or the company members have competing interests.

Georgian corporate law provides the entrepreneurs with all types of organisational-legal forms starting from the Sole Proprietorship Company with the management bodies based on pure unanimity and ending with the Joint Stock Companies with the management body system based on power. In SPC type company several partners jointly implement entrepreneurial activities[70] and each partner has equal right to participate in the management of the company, which is based on principle

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64 *Kraakman R., Armour J., Davies P.,* The Anatomy of Corporate Law, 11.
65 Ib.
66 Ib.
67 *Kenneth J.,* Arrow, The Limits of Organization, 1974, 68-70, in: *Bainbridge S.M.,*The New Corporate Governance in Theory and Practice, Oxford, 2008, 3.
68 Ib.
69 *Bainbridge S.M.,*The New Corporate Governance in Theory and Practice, Oxford, 2008, 3.
70 Article 20, Paragraph 1, Law of Georgia on Enterpreneurs, 1994.

"one vote for one partner".[71] In SPC the general assembly of shareholders makes majority of decisions based on majority rule, only for decisions which are beyond the company ordinary activities[72] the unanimity is required.[73] Unanimous decision making is the requirement of law and is used in cases when the content of decision to be made creates unequal condition for some partners or violates partner's essential interests.[74] This rule for decision making is justified as in SPS all partners equally participate in distribution of profit and loss, causing the creation of identical interests. Moreover, the partners have equal access to information. Principle "one vote one partner" is also valid for Commandite Partnerships but in a limited form,[75] due to legal nature of Commandite partnership, this is a modified form of SPS.[76] Due to objective reasons it is impossible to achieve the unanimity of all partners in CP.[77] At the moment of selection of CP form for the implementation of entrepreneurial activities the future partners realise the specifics of the organisation-legal form selected. Accordingly they are not driven by achievement of unanimity. For them CP is an effective form of consolidation of small capital and human resources.

Limited Liability Company is a transitional form from partnership type organisation to Joint Sctock Company with the management system based on full power. In LLC the power criteria is reflected in definition of partners' votes[78] based on the share proportions.[79] LLC is the medium business form created as a result of consolidation of capital. Despite this fact, in LLC unlike Joint Stock Company the power criterion is not clearly manifested. LLC has much simpler management body system, as for JSC the existence of supervisory board is mandatory for the management body system. Corporation is a legal form, where the decisions are made by the structural units of management body system which was created based on fully articulated power criteria. "De jure separation of ownership and control is the one of the main characteristics which differentiates corporation from other form of entrepreneurial organizations".[80]

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71 Article 9^1, Paragraph 10, Sentence One, Law of Georgia on Enterpreneurs, according to which each partner of SPS has one vote at the general meeting of partners.

72 Georgian legislator considered that for the issues which importance exceeds the ordinary activities of the company, the decision should be made at the meeting with the participation of all partners. See: Article 9^1, Paragraph 7, Law of Georgia on Enterpreneurs, 1994.

73 Ib., Article 3, Paragraph 5^1. According to which if the changes to the statutes is regarding the partner's voting right, share in profit/loss or his rights in the process of liquidation, the above decision should be made unanimously, if otherwise not considered by the relevant part of the statutes, which was adopted by the partners unanimously.

74 Ib., Article 9^1, Paragraph 9.

75 Ib., Article 9^1, Paragraph 10, Sentence One. According to which only full partner (complementer) of CP has one vote at the general meeting of partners, the limited partner (Commandite) does not have voting right. Granting them with the voting right is possible under the exceptional conditions by the statutes, which can be considered as expression of positive will by the full partners. See: Ib., Article 37, Paragraph 1, Sentence Two.

76 *Chanturia L., Ninidze T.,* Comments to the Law on Enterpreneurs, 3rd Edition, Tbilisi, 2002, 252.

77 Its confirmation is Article 34, Paragraph 4 of Law of Georgia on Enterpreneurs,1994, according to which right for adoption of CP statutes, right to implement changes to the statutes and registration data is granted only to the full partners (complementers).

78 Article 9^1, Paragraph 10, Sentence Three, Law of Georgia on Enterpreneurs, 1994.

79 The principle of proportions is strictly met in LLC. See Article 46, Paragraph 2, Law of Georgia on Enterpreneurs, 1994.

80 *Bainbridge S.M.,*The New Corporate Governance in Theory and Practice, Oxford, 2008, 4.

The above discussed dichotomy of corporate law is additional opportunity to identify the contextual difference between the entrepreneurial organisations. Unanimity or power is tool which simplifies decision on selection of legal form for the entrepreneurial activities. Close relationship between the management and ownership, or separation of ownership and control which is direct result of power criteria, are the manifestations of Enterpreneurs' free choice.

5.2. The Challenges Characteristic to the Separation of Ownership and Control

Separation of ownership and control is the main issue for the corporate law. The separation of ownership and control is clearly manifested in corporation.[81] Characterisation of "modern corporation" through prism of separation of ownership and control is as follows: "ownership without evident control over the property and property control without property ownership."[82]

Professional directors and managers hold management authorities in corporation; they in general do not hold any shares in corporation or have small number of shares in corporation. In other words, separation of ownership and control considers the cases, when the persons making decisions on behalf of corporation are not persons holding the right over the residual claims.[83] On the other hand the shareholders holding the residual claims do not have capacity to directly control the management. Such separation creates problems in collective actions, which is direct result of spread share ownership in corporation.

The importance of separation of control and ownership can be explained via inter-relationship between several factors. In the large firm making hierarchical decisions under existence of specific conditions and in relation to the specific decisions is more effective than the market deals. The optimal investment strategy should be mentioned separately as the factor which in response to changing market conditions create the possibility for investor to implement diversified policies. Taking into account the above factors, separation of control and ownership is the tool, which is precondition for existence of legal form, where the company size, hierarchic organisation and diversified and liquid capital are covered. The informative, deal and enterprise effectiveness resulted from the above discussed combination is the advantage of the form compared with other organisational forms.

The problems created as a result of separation of ownership and control have been clearly identified by one of the founders of modern economic theory in his work *magnum opu,* he assumed that lack of attention and misappropriation (peculation) would accompany the activities of organisation in which directors manage the cash of others.[84] The challenges created by the separation of control and ownership are described as agency problems and are mainly associated

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81 Issue of separation of ownership and control is characteristic of only the corporations, see: *Fama E.F., Jensen M.C.,* Separation of Ownership and Control, "Journal of Law and Economics", Vol. 26, 1983, 301-325.

82 *Berle A., Means G.,* The Modern Corporation and Private Property, New York, 1932, 69.

83 Residual Claim.

84 *Smith A.,* An Inquiry into the Nature and Causes of the Wealth of Nations, Electronic Classics Series, *Mains J.* (Editor), Portable Document File PA №18202, Pennsylvania State University, 2005, 606-607.

with the agency costs.[85] With the objective to reduce agency costs numerous mechanisms have been developed, the competition of which in the legislative regulation is referred to as "race to the bottom". Corporate law is considered as one of such mechanisms, with one of its functions to solve three types of agency problems.[86]

The problems related to the separation of ownership and control created the need for existence of corporate management as "corporate management and control system"[87] in corporation.[88] Georgian system for corporate management was traditionally two-staged.[89] The changes made to legislation[90] made it possible to create board type body specific to the US entrepreneurial corporations. With the consideration of above it should be worth to deeply understand the essence of a board. Team production theory[91] is one of the theories which provides us with the interesting explanation of the "most powerful and the most important body"[92] of American entrepreneurial organization.

5.3. Team Production Theory

5.3.1. General Review

Team production theory is corporate law[93] theory, attempting to explain the place, role and importance of board of directors in the corporation management system.[94] The main provisions of the theory also cover corporation and specific aspects of corporate law. The objective of theory authors

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85 *Jensen M.C., Meckling W.H.,* Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, "Journal of Financial Economics", Vol. 3, No. 4, 1976, 305-360, in: *Jensen M.C.,* A Theory of the Firm: Governance, Residual Claims, and Organizational Forms, 2nd Printing, Cambridge, "Harvard University Press", 2003, 86.

86 *Armour J., Hansmann H., Kraakman R.,* Agency Problems and Legal Strategies, in: *Kraakman R., Armour J., Davies P.,* The Anatomy of Corporate Law, 35.

87 Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, Communication from the Commission to the Council and the European Parliament, COM (2003) 284 Final, Brussels, 21.5.2003, 3.1.

88 *Butler H.N.,* The Contractual Theory of the Corporation, "George Mason University Law Review", Vol. 11, No. 4, 1989, 101.

89 *Chanturia L.,* Corporate Management and Management Responsibility in Corporate Law, Tbilisi, 2006, 166.

90 The amendments implemented according to the Law on Amendments and Additions to the Law of Georgia on Enterpreneurs, made on 14 March 2008.

91 Team Production Theory.

92 *Knapp,* Die Treuepflicht der Aufsichtsratsmitglieder von Aktiengesellschaften und Directors von Corporations, 15, in: *Chanturia L.,* Corporate Management and Management Responsibility in Corporate Law, Tbilisi, 2006, 113.

93 About the essence of corporate law, see: *Kraakman R., Armour J., Davies P.,* The Anatomy of Corporate Law, 1-34. On separation of corporate law and entrepreneurship law in the context of stakeholders, corporate social responsibility and corporate management, see: *Winkler A.,* Corporate Law or the Law of Business? Stakeholders and Corporate Governance at the End of History, "Law and Contemporary Problems", Vol.67, №4, 2004, 109-134.

94 In detail see: *Blair M.M., Stout L.A.,* A Team Production Theory of Corporate Law, "Virginia Law Review", Vol. 85, No. 2, 1999, 247-328. For critical analysis of theory, see: *Millon D.,* New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law, "Virginia Law Review", Vol. 86, 2000, 1001-1044. Also see.: *Meese A.J.,* The Team Production Theory of Corporate Law: A Critical Assessment, "William. & Mary Law Review", Vol. 43, Iss. 4, 2002, 1629-1702.

was to develop alternative model of well-known principal-agent model. They believe that team production approach is the relevant understanding of economic and legal functions of corporation.

Team production analysis is based on the observation according to which shareholders are not the only group providing the corporate enterprise with resources. In addition to shareholders, the management, employees, creditors and even local community, as the "team members" of one corporation, can contribute and have their own interests in successful activities of the enterprise.[95]

The problems of joint production are created in the team in cases when several types of investment or resources are consolidated and used in entrepreneurial activities, such resources are owned by different persons and results achieved via the coordinated efforts of two or more persons or group is not the sum of separable results from each utilised resource.[96] Moreover team production generally considers the production in which the production results are more than sum of separate results of team members and moreover covers the costs related to the organisation of team production and disciplinary measures used for the team. The main problems faced during the team production are avoiding duties by separate members and inseparability of results of joint work. Solution of the above problems is possible if the role of supervisor[97] is assumed by the neutral third[98] - decision making party, who is not a member of the team and who will check the contribution of team members.[99]

5.3.2. Corporation Vision and Role of Board of Directors

According to the team production theory and analysis the corporation is acting as "intermediary hierarchy", which owns the team production resources and results. In other words, "corporate assets are owned by the corporation itself and not by its shareholders."[100] The above position was justified referring to the legal and economic results of being legal subject by the

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95 *Blair M.M., Stout L.A.,* A Team Production Theory of Corporate Law, "Virginia Law Review", Vol. 85, No.2, 1999, 250.

96 *Alchian A.A., Demsetz H.,* Production, Information Costs and Economic Organization, "American Economic Review", No. 62, 1972, 779.

97 In the article the expediency of utilization of word monitor is underlined for the indication of person, who is assigned a duty to check the fulfillment of payments by the members. In their view, the word monitor implies all functions, assigned to this person. Monitor functions, in addition to the main disciplinary function include: definition of fulfillment results; distribution of interest; observation over the influence of means for the evaluation and definition of minimal productivity; conclusion of agreements and their review. See: *Alchian A.A., Demsetz H.,* Production, Information Costs and Economic Organization, "American Economic Review", No.62, 1972, 782-783.

98 On the ownership of third party as one of the sources of power in the firm, see in detail: *Rajan R.G., Zingales L.,*Power in a Theory of the Firm, "NBER Working Paper", №6274, 1997, 35-36. Analysis of various sources of power in the organization revealed that limited access to the critical assets is one of the strong means for the motivation of specific investments, which has raised the importance of hierarchy, as internal organization structure for the creation and distribution of power in the organization. Ib., 37.

99 *Alchian A.A., Demsetz H.,* Production, Information Costs and Economic Organization, "American Economic Review", No.62, 1972,781.

100 *Blair M.M., Stout L.A.,* A Team Production Theory of Corporate Law, "Virginia Law Review", Vol. 85, No.2, 1999, 251.

corporation.[101] More specifically, referring to such criteria of corporate personality, existence of corporation as legal entity depends on existence of own property which is separate from the property of shareholders. Control over these assets is implemented by independent "intermediary hierarchy", who is granted actually the absolute right to control and use it.

Independent "intermediary hierarchy" is the board of directors, authorities of which cover: coordination of activities of team members, distribution of production results and intermediating in the solution of disputes between the team members raised in the process of distribution of production results.[102] Moreover, team production model does not consider that board of directors consists of unselfish altruists, who are involved in daily activities of corporation and ensure issuing equal or fair share of team production increments to all persons who implemented enterprise specific investment. According to the theory authors, such approach to the corporation stresses and at the same time, explains the economic function of board of directors. Independent board of directors is the generally accepted mandatory characteristic of corporate form. The mandatory existence of the board differentiates the corporate form from other forms for entrepreneurial activities.[103]

Board of directors is the characteristic institute for the American corporate law. It executes the management and control functions in the corporation.[104] Georgian corporate law stresses the mandatory nature of separation of management and control by providing the list of criteria under which the existence of supervisory board as a formally separated body from the directorate is mandatory.[105] The legislator provides the interesting indication, according to which in case of formal separate existence of supervisory board, its functions and authorities envisaged by the law will be delegated to other bodies of the company through relevant provisions in the statutes.[106] The above indication in combination with two other provisions, according to which it is determined that in cases envisaged by the statutes member of supervisory board can be director of joint stock company[107] and law considers the possibility to transfer director's functions to the supervisory board in cases envisaged by the statutes,[108] gives us opportunity to see the embryonic signs of board of directors under the wide statutory autonomy condition, characteristic to the American corporate law. Based on the analysis of provided norms it can be concluded that company statutes can be used to create the body similar to American board of directors in Georgian joint stock companies. To state in other words, the possibility to select between the one-step and two-step corporate management options. In case of selection of monist system the

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[101] *Blair M.M., Stout L.A.,* A Team Production Theory of Corporate Law, "Virginia Law Review", Vol. 85, No.2, 1999, 292.
[102] Ib., 251.
[103] *Kraakman R., Armour J., Davies P.,* The Anatomy of Corporate Law, 12.
[104] *Chanturia L.,* Corporate Management and Responsibility of Management in Corporate Law, Tbilisi, 2006, 111.
[105] Article 55, Paragraph 1, Sentence One, Law of Georgia on Enterpreneurs, 1994.
[106] Ib. Article 55, Paragraph 1^1.
[107] Ib. Article 55, Paragraph 2, Sentence Two..
[108] Ib., Article 55, Paragraph 7^2.

problem of absence of clear separation of management and control functions is created, which finds its solution via independent directorate body in American corporate law.

According to intermediary hierarchy approach the high scale of free actions from the board of directors in corporate law is explained by the motivation/enhancement of enterprise specific investments and not by the shareholders' superiority norm[109] or by need to consider the interest of numerous stakeholders, as this is required by the representatives of "progressive" corporate law school. After the detailed analysis of two main mechanisms confirming the superiority of shareholders' interests they came to the conclusion that despite the certain processual aspects related to the making derivative claims (court claim) which are based on the view on the fiduciary liabilities against the shareholders and not belonging to the corporate enterprise, the legal norms regulating such corporations are aimed to protect the interests of the corporation as one whole, which automatically considers protection of interest of all members of corporate coalition and creation of value for them. Therefore the view that directors have fiduciary liabilities towards the corporation exceeds the liability to increase the shareholders' property and contains in itself consideration of interests of other numerous participants of corporation; the above benefits shareholders too, as this is long-term protection of their interests. Protection of long-term interests sometimes considers making the best decisions for corporation on the expense of interests of shareholders and interested parties (stakeholders).[110] Such approach agrees with the consideration of members of directors' board as trustful owners, whose responsibility is to consider the long-term interests of shareholders especially at the establishment stage of corporation, which stimulates the persons, who will become in future interested parties to be involved in team production process via the implementation of enterprise-specific investments and get the team production incremental results in a first place.[111] Justification of need for making decisions best for the corporation and not for its shareholders or/and interested parties (stakeholders) was provided by presenting the "corporate interest" argument to illustrate that independent hierarchy serves not only shareholders' interests but also interests of the corporation as one whole team. The corporation interests consider the function of well-being of all parties who implemented the enterprise-specific investment in the firm and agree to participate in external agreements, internal intermediary processes for the sake of firm,[112] which compared with other dispute resolution mechanisms have priority. Based on the above discussion the existence of the board of directors is stipulated by the need to protect the enterprise-specific investments of all members of the corporate "team", including shareholders, management, employees and creditors and not only for

[109] *Millon D.K.,* New Directions in Corporate Law, Communitarians, Contractarians, and the Crisis in Corporate Law, "Washington & Lee Law Review", Vol. 50, Iss. 4, 1993, 1374.
[110] *Blair M.M., Stout L.A.,* A Team Production Theory of Corporate Law, "Virginia Law Review", Vol. 85, No. 2, 1999, 291.
[111] Ib., 305.
[112] Ib., 288.

the protection of shareholders.[113] As for the second mechanism, its analysis revealed the insignificant nature of election rights especially in terms of election of the members of directors' board. In case of fundamental corporate changes the elections' rights were compared with the Veto right. The final analysis showed the instrumental and compensational nature of election rights. Based on the above and in according with the intermediary hierarchy approach the intermediary function of the Board of Directors balances the competitive interests in the way that does not come under the direct control of neither the shareholders nor other interested parties.[114]

In line with the position of the authors of Team Production theory the intermediary hierarchy approach complies with the perception of corporation as "nexus of contracts". Moreover the above approach considers the corporation regulating law as mechanism which fills up the gaps existing in the complex team production process, which was tough or impossible for the team members via only the conclusion of agreements. Therefore, it is more precise to state based on the team production analysis that corporation is "nexus of firm-specific investments", where different groups contribute with essentially specific resources, protection of which by means of agreements only is difficult.[115] Thus perception of corporation as "intermediary hierarchy" is more consecutive/relevant to the means through which the corporation is working than to the widely spread contractual interpretation of corporate law, which is focused on principal-agent problem. Thus the advantage of team production model is as follows: the results of the team as one whole exceed the sum of results of separate team members. In this type of horizontal relationships the principal and agent are not sharply separated.[116]

5.3.3. The Main Objective of Corporate Law

According to the authors of team production theory, corporate law, as the institutional replacement for explicit and implicit agreements, is the means for secondary solution of team production problems.[117] The main argument is the function of corporate law. Unlike principal-agent model and ownership rights' approach,[118] according to the team production analysis, corporation provides the solution to the team production problems.

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[113] *Blair M.M., Stout L.A.,* A Team Production Theory of Corporate Law, "Virginia Law Review", Vol. 85, No. 2, 1999, 253.

[114] Ib., 315.

[115] Ib., 275.

[116] Ib., 270.

[117] Ib., 250.

[118] The traditional economic analysis of firm generated the hierarchy theory, which gave form to firm's "grand-design principal-agent" model, where the vertical relationships take place unlike the "intermediary hierarchy" the objective of which to react on the horizontal coordination problems characteristic to the certain forms of team production. See: *Blair M.M., Stout L.A.,* A Team Production Theory of Corporate Law, "Virginia Law Review", Vol. 85, No. 2, 1999, 258-265. According to the "grand-design principal-agent" model the firm is created when there is desire of the entrepreneur to retain control over the enterprise

According to the team production approach the three aspects of corporate law determine the serving of "corporate interests" by the independent "intermediary hierarchy". The first aspect is related to the desire to be a member of the board of directors and maintain good reputation; for the above the director shall ensure satisfaction of minimal requirements from all members of the corporate team. The second aspect relates to the limitation of possibility to serve own interests under the corporate law. The third aspect considers such corporate culture norms as honesty and trust. Above listed three aspects of corporate law force the board of directors to be "intermediary hierarchy" and the significant economic advantage is achieved, which explains the domination of corporate form over other legal forms of entrepreneurial activities. Moreover, the intermediary hierarchy approach provides the corporate law itself with the firm theoretical basis in positive as well as normative terms.

The significance of team production theory is the fact that the theory managed to clearly define the main goal of corporate law – protection of one whole "corporate coalition". Prior to that team production dynamics was the factor determining the success of one of the forms for implementation of entrepreneurial activities in addition to the political and historical factors; the above factor ensures the unique economic advantage, which determines the attractiveness of this form compared with other organisational-legal forms and ensures the interest of large Enterpreneurs. The view of team production theory on the corporation as the political institute has to be also mentioned separately. According to this view, for balancing interests of corporate team members and reduction or solution of raised disputes the political mechanisms are widely used in addition to economic, legal and cultural mechanisms. And finally, one more time, we have to stress the contribution of theory in explaining the reasons determining the domination of shareholders' superiority and in attempt to deny such superiority.

5.3.4. Critics

The main critics of the team production theory is indication that the principal-agent model, which is based on shareholders' superiority norm, is the dominating paradigm in corporate law. Principal-agent model itself is based on the team production economic theory,[119] considering that the corporation is the "nexus of contracts" surrounded by numerous production factors. Therefore there is a view that to reject the traditional shareholders' superiority model it is better to present it as a normative theory.[120] Despite this the critics doubted the statement that the corporate law already reflected the argument for rejection of shareholders' superiority offered by the team

specific investment. Comparison of vertical and horizontal hierarchy, see: *Rajan R.G., Zingales L.,* The Firm as a Dedicated Hierarchy: A Theory of the Origin and Growth of Firms, "Quarterly Journal of Economics", Vol. 116, Iss. 3, 2001, 805-851.

[119] *Meese A.J.,* The Team Production Theory of Corporate Law: A Critical Assessment, "William. & Mary Law Review", Vol. 43, Iss. 4, 2002, 1634.

[120] *Millon D.,* New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law, "Virginia Law Review", Vol. 86, 2000, 1004.

production theory.[121] Additionally it was noted that the shareholders' superiority norm does not mean that the specific interests of other members of team are not protected and the argument that the transaction costs related to the attraction of specific investments is lower in corporation compared with other legal-organisational form cannot be used to confirm the advantages of intermediary hierarchy approach.[122] Even if corporate intermediary hierarchy approach theoretically ensures the low transaction costs, adoption of such model will have significant ownership costs.[123]

Team production model actually did not manage to make important contribution in the area of protection of stakeholders in terms of responsibility of board of directors. It only described the standard shareholders' superiority view on the inter-corporational relationships. The basis for the shareholders' superiority is the limitation of rights of non-shareholder participants to the limit, envisaged under the agreement relationships.[124] Such view was justified with the indication that if the board of directors in the process of decision making on balancing the different interests of the team, is under the political (meta-legal) influence, then the corporate team members, including shareholders will earn only the part from the incremental results of team production process, which would be available via implementation of such meta-legal influence over the board and will be related with higher costs; the above postulate can result in factors causing rent-seeking.[125] Moreover, the result of meta-legal influence of shareholders over the board is the reduction of "X-efficiency", as the board of directors will lose the stimulus for political leading, which will overcome mutual untrust and will support the collaboration between the shareholders and employees.[126]

6. Conclusion

One of the factors determining the success of any entrepreneurial company is the way of delegation of functions in the organisation. Status of legal entity, limited liability, disposable shares and delegation of management authority are the essential issues which determine the contents and nature of delegation of functions inside the entrepreneurial company. Therefore Georgian corporate law is organised around these very issues. Its objective to ensure the entrepreneurs with the variety of legal forms matching their interests and human as well as

[121] *Millon D.,* New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law, "Virginia Law Review", Vol. 86, 2000, 1003.

[122] *Meese A.J.,* The Team Production Theory of Corporate Law: A Critical Assessment, "William. & Mary Law Review", Vol. 43, Iss. 4, 2002, 1645.

[123] Ib., 1646.

[124] *Millon D.,* New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law, "Virginia Law Review", Vol. 86, 2000, 1005.

[125] Situation when people using time, money and other resources compete with each other for getting income exceeding their individual share.

[126] *Millon D.,* New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law, "Virginia Law Review", Vol. 86, 2000, 1043.

material capacities is achieved at this stage of development of Georgian legislation. In the offered legal forms for the entrepreneurial activities the main goal is ensuring qualitatively correct delegation of functions.

Brief discussion of criteria required for acquiring the legal status clearly showed the main characteristic of Georgian corporate law system. Entrepreneurial company is the separate subject of the law, which is a precondition for assigning the different identity and for responsibility with own property. The volume of initial capital and its relationship with the commencement of entrepreneurial activities and its direction towards the desired objective is an issue for separate discussion. The interesting issue is to identify how expedient are the steps made by the legislators in this direction.

Discussion of limited liability principle showed how the legal form of entrepreneurial activities are matched with the interests of entrepreneurs, in terms of the ways (forms) they want to implement their activities and accordingly distribute the threats. Is the possibility to establish limited liability based on the agreement in accordance with the entrepreneur's interests and legal form selected by him/her? Limited liability principle was discussed in relation with the free disposability of shares as the factor determining the success of corporate form and as the mechanism of its financing.

In the process of discussion of main aspects of management authority delegation the influence of dichotomy of the corporate law over the organisation's management body system was reviewed. Power criteria created the need for separation of ownership and control in the corporation. On its own the separation of ownership and control caused interest in separation of management and supervisory functions. The following issue was raised: is Georgian reality ready for the existence of body like the board of directors, as the formal separation of these units is considered as one of the means for separation of control and management authorities, which is manifested in separate existence of both bodies.

The main aspects discussed in regard with the status of legal entity, limited liability principle, disposable shares and authority delegation jointly compose the contents of corporativeness. Corporativeness is the relevant basis for the analysis of whole system of Georgian corporate law.

Davit Maisuradze*

Systemic-Comparative Analysis of Hybrid-Type Companies
(Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law)

1. Introduction

From general viewpoint, obviously, corporate law is one of the most interesting spheres of law and in corporate law itself, more interesting and problematic, as well as less actual and, correspondingly, less interesting issues could be found.

"The history of corporate law divides companies into two basic categories: partnership (personal) commercial-entrepreneurial companies and capital companies."[1] Partnership - type company depends on the state of its members, i.e. its partners with all of their property, directly and indirectly, are responsible to the creditors of the enterprise; also, each of them can actively participate in the management of the company, e.g. joint liability company is the company of this type. As for capital type company, like limited liability company, joint stock company or cooperative, i.e. where liability towards creditors is implemented by the property of the company – in such enterprises the partners aren't responsible to the creditors of the company with their property. In the case of capital- type company it's also possible for legislation specify minimum statutory capital, which shall be met with the company by the moment of registration or during certain period from the date of registration. Also, based on the statute, partners can determine the amount of contribution to be made by the partner, i.e. in the case of liability of the enterprise to the creditors, the partner shall run risk of losing only the contribution which he/ she made to the enterprise, and the liability shall not cover his/ her property.

In regard to various issues there are several significant differences between the partnership and capital- type companies, which, primarily, are related to the issue of liability – whether or not the partners are liable with personal property, as well as to the management of the company – how much the partner can participate in the management of the company; and to the rights- related state of the partner in regard to the processes occurring in the enterprise – whether or not the partner can demand accountability from the management of the enterprise, whether or not he/ she has the voting right; besides, the partnership- type company depends on the state of the members, i.e. change of member can be followed by liquidation or reorganization of the enterprise, and

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1 *Burduli I.,* Fundamentals of Stock Law, Volume I, Tbilisi, 2010, 110.

capital company doesn't depend on the state of the members. "In short, basically, there are four important features, differing corporation from other business formation. These are: (a) limited liability of the third parties towards creditors for investors (by which this legal form might be attractive for them from the point of view of making investments); (b) legal regime of free alienation of shares[2]; (c) the so- called perpetual life, i.e. regime of termless operation (the circumstance, that the existence- operation of corporation doesn't depend on change of its members or other factors, is implied here); (d) centralized management."[3]

Alongside with partnership and capital - type companies, in corporate law there also are "hybrid" type companies, where the features of partnership and capital companies are unified. In such type of company there are partners, who are liable with all their property and the partners who are liable with their contribution, and, consequently, liability doesn't cover their property. Following the principle of partners' liability, the rights and obligations of each partner towards the enterprise also differ. The main goal of our paper is to characterize these type of companies and provide systemic- comparative analysis with Delaware Corporate Law and in general with USA corporate law. The only entrepreneurial company in Georgian law, which could be referred to as hybrid-type company, is, probably, a Comandite Company, so I'll begin the systemic-comparative analysis of hybrid- type companies with review of Georgian comandite companies.

2. Comandite Company

Let's begin reviewing the hybrid-type entrepreneurial subjects with the review of Georgian hybrid-type entrepreneurial subject, where the partners are limited partner i.e. comandite, who is responsible with his/ her contribution – guarantee amount, and complementary partner, who is responsible with all his/ her property, and consequently, his/ her legal status is broader than that of comandite.[4]

While considering hybrid - type companies, we'll touch two, probably the most important issues: these are the issue of liability of partners, and, hence, the issue of liability of the company itself, and further, definition of legal status of partners. Review of Comandite Company will start from the issue of partners' liability.

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2 *Wells H.,* The Rise of the Close Corporation and the Making of Corporation Law, "Berkeley Bus. L.J.", No. 5, 2008, 263: "Close corporations face organizational and managerial problems different from those of public corporations. Public corporations can be owned by thousands of shareholders, so free transferability of shares is the norm and desirable. Close corporations, however, are typically formed by individuals who know one another well and who also work together at the corporation; thus, close corporation shareholders will seek restrictions on transfer of stock so they can control who they have to work with."

3 *Burduli I.*, Fundamentals of Stock Law, Volume I, Tbilisi, 2010, 116.

4 Law of Georgia on Entrepreneurs, "Bulletin of the Parliament of Georgia", 1994.

2.1 Liability of Partners

In accordance with p. 1 of the Article 34 of the Law of Georgia "On Entrepreneurs", "Comandite Company is the company, where several persons under uniform trade name, perform entrepreneurial activities, if the liability of one or several partners to creditors of the company is limited by payment of fixed guarantee amount – limited partners (comandites), and the liability of other partners isn't limited – full partners (complementaries)."[5]

As if follows from p. 1 of the Article 34 of the Law "On Entrepreneurs", comandite company consists of partners of two types: comandite and complementary – I'll begin the consideration of the issue of partners' liability from complementary partners.

Complementary partners of Comandite Company are liable with all their property, directly and indirectly, as joint debtors. The relevant rules of joint responsibility company of the Law "On Entrepreneurs" apply to full partners of Comandite Company (Para. 2 of the Article 34 of the Law "On Entrepreneurs"), unless otherwise provided by the Comandite Company itself.[6]

Full partners of Comandite Company are liable with all their property. They are joint debtors, i.e. they are liable with all their property and can apply the right of regression towards each other. The situation is different with comandite partners. Comandite partners are liable with their contribution, expressed in the form of guarantee amount. Comandite (limited) partners are not liable with all their property. Consequently, based on the principle of liability, the legal status of complementary and comandite partners is also different. According to p. 6 of the Article 3 of the Law "On Entrepreneurs", if limited partner of comandite company abuses legal form of limitation of liability, he/ she will be personally liable before creditors, with all his/ her property. "Cross liability" means allowing exception in the case when the partner abuses limited liability or organizational- legal form of limited liability."[7]

Based in the General Part of the Law "On Entrepreneurs" (p. 5 of the Article 3 of the Law "On Entrepreneurs" we know that contributor to entrepreneurial company can be material, as well as immaterial, also rendering of service or performance of work.[8] In Comandite Company, the contribution of comandite partner might be one of the above mentioned four, but finally, following contributing, the contribution shall be expressed in guarantee amount, by which comandite is liable. What will happen if, say, fifty thousand GEL is determined in comandite company as guarantee amount, and comandite made contribution in the amount of one hundred GEL? Which amount shall comandite be liable by and has the comandite partner the right of regression – demanding back, or the right to demand back fifty thousand GEL from the enterprise? Comandite, i.e. limited partner is liable by the amount actually contributed, i.e. one

5 Law of Georgia on Entrepreneurs, "Bulletin of the Parliament of Georgia", 1994.
6 Ib.
7 *Burduli I.,* Fundamentals of Stock Law, Volume I, Tbilisi, 2010, 25.
8 Law of Georgia on Entrepreneurs, "Bulletin of the Parliament of Georgia", 1994.

hundred thousand GEL. Based on the Law "On Entrepreneurs", only complementary partners have the right of regression if the latter is specified in the statute. In our opinion, even in the case, where, as we see in the above example, actual contribution is twice as big as the established guarantee amount, comandite partner shall have the right of regression only in the case specified in the statute, as he/ she hasn't the right of demanding back on the basis of the Law.

Legal Status of Partners[9]

The rights and obligations of partners in Comandite Company are based just on the principle of liability. As far as two partners are present, one of whom is liable with all his/ her property and the second – in the amount of guarantee sum, their rights and obligations are distributed in the following way: full partners (complementaries) have broader authorities, can participate in the company management, have the voting right, and limited (comandite) partners don't enjoy these rights; their rights could be partially increased only based on the statute and we'll talk about it below.

As we have mentioned above, p.2 of the Article 34 of the Law "On Entrepreneurs" specifies that the rights/ obligations related to the full complementary partners of Comandite Company in the section of Comandite Company also extend to full partners of Comandite Company. Consequently, we can say concerning full partners that complementary partners participate in the company management, can personally familiarize with the affairs of the company and examine the company's books and documents for this purpose, as comandite partners represent the sign of partnership- type company, i.e. the existence of complementary partners means that the enterprise depends on the state of members and in the case of withdrawal of one of the members reorganization process will begin. In regard to comandite partners the situation is different. Comandite is liable only with his/ her contribution – guarantee amount. Liability doesn't cover the property of comandite partner, so the rights of comandite partner are limited i.e. he/ she doesn't participate in the management of the enterprise[10] and doesn't participate in adoption of the statute of comandite company, introduction of amendments into the statute and registration data.[11] But in accordance with p.1 of the Article 37 of the Law "On Entrepreneurs", "limited partners enjoy the

9 *Siegel M.*, Fiduciary Duty Myths in Close Corporate Law, "Del. J. Corp. L.", No. 29, 2004, 377. Legal status of partners are different in open and closed-type companies, as the open type company is the company, shares of which could be admitted to stock exchange for trade. stock exchange and more possibility of purchase of shares of corporation provides better mechanism for protection of minority partner. In this case parallel could be drawn with partnership and capital type companies with the view that partnership- type company is a closed- type company, and capital company is more open, consequently it creates more guarantees for protection of rights of the share- holder who is in minority (following the purpose of our paper – the limited partner).

10 Article 37, Law of Georgia on Entrepreneurs, "Bulletin of the Parliament of Georgia", 1994. Although General Section of the Law on Entrepreneurs says, in accordance with Para. 1 of the Article 9, that comandite partner can also have the right of management, the Article 37 of the Law, as specialized section, specified the application of Para. 1 of the Article 9 in regard to comandite company.

11 Article 34, Law of Georgia on Entrepreneurs, "Bulletin of the Parliament of Georgia", 1994.

voting right only in the cases specified by the statute of the company", also, in accordance with p. 2 of the same article, "is one limited partner (comandite) is granted, by the statute of the company, the authority to perform activities of legal importance, which exceed the limits of common power of attorney, he/ she shall be liable according to the rules under p.6 of the Article 9 of this Law". And in accordance with p.6 of the Article 9 of the same Law, in the case of violation of obligation of good faith, the violator shall be liable with all his/ her property, directly and personally.[12]

As we have mentioned above, the Law "On Entrepreneurs" doesn't give the right to comandite partner to participate in company management; also, according to the Law "On Entrepreneurs", comandite partner doesn't have the voting right in the case of adoption of statute or introduction of amendments in the statute and/ or registration data by the comandite company. Nevertheless, the Law "On Entrepreneurs" provide for granting of the voting right to comandite partner, but only in certain cases (these cases don't include the above mentioned adoption of statute or introduction of amendments in the statute and/ or registration data) and granting of authority for performance of activities of legal importance, certainly, on the basis of the statute. Consequently, although the comandite's liability is limited, he could be granted voting right and the authority of representation by the statute.[13]

Comandite partner also has other rights following the nature of limited partner, which are expressed in implementation of control by comandite, in particular, on the basis of the Article 36 of the Law "On Entrepreneurs", "limited partners (comandites) have the right to request the copy of annual report and, for the purpose of familiarization with financial documentation of the company, examine the accuracy of annual report."[14] In my opinion, examination of accuracy of annual report through familiarization with financial documentation of the company – doesn't imply in itself that the comandites have the right of requesting the documentation for examination of accuracy of this report. The above mentioned, in my opinion, implies only the right of requesting of the copy of annual report. As for the right of requesting of financial documentation directly, it is specified by p.2 of the Article 36, which says that the comandite, through legal proceedings, and in the case of existence of significant grounds, can demand financial documentation of the company. The notion "significant grounds" is not defined by the Law "On Entrepreneurs". If follows from this notion that the comandite can demand familiarization with

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12 If any of comandites had the right of implementation of activities of legal importance, they shall be considered as joint debtors and shall be jointly liable for the implemented activities with all their property, directly and personally.

13 Granting of the mentioned rights to comandite is the authority of complementaries. Both the voting right and the authority of implementation of activities of legal importance could be granted to comandite on the basis of the statute, and only full partners have the right of adoption of the statute and introduction of amendments in it and in registration data (Para. 4, Article 34, Law of Georgia on Entrepreneurs, "Bulletin of the Parliament of Georgia", 1994).

14 In the mentioned case, we are talking about exercising of the right of control by the comandite partner in regard to complementary partner in the simplest form, which implies the demand of presentation of the copy of annual report and inspection of correctness of this report.

financial documentation of the company through legal proceeding not always, but only in the case of existence of special circumstances.

This is what the comandite company look like according to the Law "On Entrepreneurs". The goal of our paper is not only review of the nature of hybrid- type company and speaking about its partnership and capitalist origins, but we shall also elaborate on the issue of the extent of viability of hybrid- type company in Georgia and if only few companies of this type are registered – what is the reason.

2.3 Spreading of Comandite Company in Georgia

Before amendments of 2009, the Law "On Lawyers" provided for organization of legal activities by the lawyers in the form of entrepreneurial legal persons, where at least one partner wasn't limited partner, i.e. shall be the partner liable with all his property. In particular, initial wording of p.1 of the Article 18 of the mentioned Law was as follows: after obtaining of the certificate proving the right of lawyer's activities, the lawyer has the right to establish law bureau (office, legal firm, etc.), individually or together with other lawyers, for the implementation of lawyer's activities in the form of partnership or entrepreneurial legal person, where liability of minimum 1 partner will not be limited."[15] Following the mentioned Article, in order to establish legal firm implementing lawyer's activities, one should be registered either as joint liability company or Comandite Company.[16] Consequently, number of law firms, existing in Georgia, which are registered as comandite companies, is related to the record existing in the Law "On Lawyers", which had this binding nature. According to the Amendment dated November 17, 2009, this ruling was changed and organization of law activities is possible in the form of partnership, as well as Entrepreneurial legal person provided by the Law "On Entrepreneurs".[17]

According to present situation, based on the data of Registry of Entrepreneurs and Non-entrepreneurial Legal Persons, total 162 comandite companies are registered in Georgia, part whereof is liquidated, and the other part exists only on the basis of the Register data, but in reality doesn't implement further activities.[18] For comparison, 111668 companies are registered as limited liability companies; besides, there are 2586 joint stock companies and the similar number in the case of joint

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15 The mentioned paragraph was amended by the Law dated November 17, 2009 and based on the present wording, the lawyers, for the purpose of organization of legal activities, can choose the desired organizational-legal form.

16 Although the norms of the Law on Entrepreneurs, regulating Joint Liability Company spread to full partners of Comandite Company as well; edition of the above mentioned article of the Law on Lawyers allowed he lawyers registering as Comandite Company with participation of one full partner.

17 "Lawyer has a right, for the implementation of lawyer's activities individually, together with other lawyers or other persons, to create Legal Firm in the form of partnership or entrepreneurial legal person specified by the Law of Georgia on Entrepreneurs," - Para. 1 of the Article 18 of the Law on Lawyers, 2001.

18 Official Web-page of Public Service Hall, <https://enreg.reestri.gov.ge/main.php?m=new_index&state=search>.

liability companies – 2778. As for cooperatives – there are 2898 cooperatives, i.e. the number of other entrepreneurial legal persons, besides LLC, is almost identical to each other, with the exception of comandite companies. Based on the data of Registry of Entrepreneurs and Non-entrepreneurial Legal Persons, Comandite Company is the least popular entrepreneurial legal person.

In my opinion, the purpose of entrepreneurial activities shall be not only creation of documents, but creation of the documents, which will facilitate improvement of economic situation in the country and will create encouraging legal documents of economic life for the people who wish to implement business activities. For understanding of legal and economic loading of Comandite Company internationally, it's necessary to compare and generally characterize hybrid-type entrepreneurial subjects on the example of the United States.

3. Hybrid - Type Companies According to Delaware Corporate Law [19]

For the purpose of better analysis of hybrid- type companies in Georgian entrepreneurial law, it's necessary to conduct comparative- legal analysis. Following the goals of our paper, for the purpose of comparative legal analysis, we'll use Delaware Uniform Partnership Act, Limited Partnership Act and Limited Liability Act. Following the goals of the paper, we'll characterize limited partnership and limited liability limited partnership.[20]

During comparative-systemic analysis of Georgian Comandite Company and American hybrid type companies we'll pay special attention to the rights-related status of limited partner, as well as the responsibility of limited partner. At the same time, we'll touch the issues of full partner's rights and obligations and responsibilities. In Delaware corporate law, the diversity of hybrid type companies, their viability and, most importantly, the existence of hybrid - type companies, as the factor, encouraging economic activity, are of particular interest for us.

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19 *Conaway A.E.*, Symposium: The Delaware General Corporation Law for the 21st Century: ARTICLE: What We Can Learn From Other Statutory Schemes: Lessons to be Learned: How the Policy of Freedom to Contract in Delaware's Alternative Entity Law Might Inform Delaware's General Corporation Law, "Del. J. Corp. L.", No.33, 2008, 789: "First, alternative entities generally avoid entity level taxation. [n3] Second, Delaware alternative entities benefit from the contractual flexibility that permits sponsors to create a public entity and to install any managerial infra- structure desired. [n4] This internal contractual freedom also extends to the ability of investors to craft noneconomic ownership interests [n5] or to eliminate all voting rights if preferred. [n6] Third, public alternative entities are subject to different rules and regulations than corporations under the stock exchanges as well as the federal securities laws-rules that affect the internal governance of an entity. [n7] Fourth, and most unique to Delaware, in 1990, 1992, and 2004, Delaware adopted a series of amendments to its alternative entity acts that authorize owners to contractually limit or eliminate duties and liabilities, including fiduciary duties of owners or managers to each other, the entity, or another person that is a party to the entity's private agreement, so long as no attempt is made to limit or restrict the implied contractual covenant of good faith and fair dealing."

20 Legal Business Structures Table of the State of Delaware <http://revenue.delaware.gov/services/Business_Tax/business_structures_table.pdf>.

3.1 Limited Partnership

Probably American limited partnership resembles Georgian Comandite Company most of all. For identification of capital and partnership-type origins, as hybrid-typecCompany, it's important to analyze limited partnership.

According to p. 17-101 (9) of Delaware Limited Partnership Act, limited partnership is a partnership, which is established according to Delaware legislation and consists of 2 or more partners, whereof one or more partners are full partners[21] and one or more limited partner and following the purposes of Delaware legislation, includes Limited Liability Limited Partnership.[22]

As we see, one of the most important distinguishing features between limited partnership and Comandite Company, from the very beginning, is the issue of quantity of partners. In particular, as we already mentioned, in order to establish Comandite Company, existence of minimum 2 full partners and 1 limited partner is required in Georgian Comandite Company, and for limited partnership, existence of jointly obliged parties isn't necessary; one full partner is enough for establishment of limited partnership. I.e. for establishing of limited partnership minimum two partners are required, one of whom will be responsible with the whole property, and the second – with contribution.

Limited partner isn't responsible for the company's obligation with all his/ her property, with the exception of the case when he/ she is the full partner or, together with implementation of authorities of the limited partner, participates in the company management. If the limited partner participated in the company management, he/ she is responsible with all his/ her property only towards those, who has business affairs with the limited partnership and sincerely believed that the limited partner, following the content of his/ her activities, represented full partner.[23] In accordance with p. 17-306 of Limited Partnership Act, due to breach of company agreement, the limited partner could be mandated to recover the damage. But violation of company agreement (charter of the enterprise) or emergence of conditions, specified in this agreement, shall be specified as the basis for imposition of recovery of damage.[24] In accordance with p. 17- 502 (c) of Limited Partnership Act, the only sanction which could be applied to the limited partner, is reduction or abolishment of his/ her share, if he/ she doesn't make contribution, obligation of making of which was undertaken by him/ her.

Also, in regard to contribution, the approach of Delaware legislation is interesting, in particular, unlike Georgian Law "On Entrepreneurs", which, as we have mentioned above, expresses comandite's

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21 "General partners in limited partnerships are partners bound by the general fiduciary obligations of partners, and they are more: they are managing partners, who, as such, owe their non-managing partners "one of the highest fiduciary duties recognized in the law" (*Vestal A.W.*, A Comprehensive Uniform Limited Partnership Act? The Time Hase Come, "U.C. Davis L. Rev.", No. 28, 1995, 1195).

22 Limited Partnerships, 17-101 (9).

23 Limited Partnerships, 17-303 (a).

24 Limited Partnerships, 17-306.

contribution in the form of guarantee amount, in accordance with p. 17-50 of Limited Partnership Act, contribution of the partner could be expressed in monetary, property or service form or taking obligation by the partner that he/ she will make contribution in monetary or property or service form.

Delaware approach towards the right of obtaining information by the limited partner is also interesting. In accordance with Limited Partnership Act p. 17- 305, each limited partner has the right, within the limits of reasonable standards (and these standards imply what type of information and documents shall be issued and at whose expense, with consideration of time and location), as it is provided be the statute or established by full partners, so that to request information, related to the interests of the limited partner, from full partners from time to time.[25] According to the same provision, the list of information, which could be issued on the basis of request of the limited partner, could include in itself complete and correct information on the business and financial state of limited partnership, as well as the copies of payment of federal, state and local taxes,[26] names and actual and legal addresses of partners, copies of the statute and registration application of the company and amendments therein. The information on contributions made by each partner, the amount of such contributions and time of payment and any information, related to the limited partnership, as fair and reasonable,[27] could be made known to the limited partner. In my opinion, the above mentioned concretization facilitates better protection and realization of the rights of limited partner; besides the mentioned list is much broader than the issued specified in the Article 36 of the Law "On Entrepreneurs".

In accordance with Delaware Limited Partnership Act p. 17- 305 (b), full partner has the right to keep confidential from the limited partner any information, in regard of which the full partner considers that it contains commercial secrets or believes, in good faith, that disclosure of such information doesn't correspond to the best interests of the limited partnership or can cause damage the limited partnership or its business or the limited partnership is obliged, based on the law or the agreement concluded with the third party, to keep this information confidential.[28] Also, based on this article, comandite partner is granted the right to institute legal proceedings in the case of refusal of full partner to issue such information.[29]

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25 Limited Partnerships, 17-305.

26 Limited Partnerships, 17-305, (2) Promptly after becoming available, a copy of the limited partnership's federal, state and local income tax returns for each year.

27 Limited Partnerships, 17-305, (6) Other information regarding the affairs of the limited partnership as is just and reasonable.

28 Limited Partnerships, 17-305 (b), A general partner shall have the right to keep confidential from limited partners for such period of time as the general partner deems reasonable, any information which the general partner reasonably believes to be in the nature of trade secrets or other information the disclosure of which the general partner in good faith believes is not in the best interest of the limited partnership or could damage the limited partnership or its business or which the limited partnership is required by law or by agreement with a third party to keep confidential.

29 Besides, this Article very well specifies formal grounds, on the basis of which the procedure of requesting the information by limited partner shall proceed. In particular, it's considered the request on information by the limited partner shall be submitted in written, and full partner shall answer this request within 5 days (the statute

The issue related to exercising of the right of inspection and control by the limited partner, which we partly covered above, is also quite interesting. The Law of Georgia "On Entrepreneurs" speaks about general framework of the right of control and inspection – related to inspection of financial documentation. In particular, in accordance with p. 10 of the Article 3 of the Law "On Entrepreneurs", "each partner has the right to obtain the copy of annual report and all publications of the company, Besides, he/ she has the right to inspect the correctness of annual report and, for this purpose, familiarize with the company's documentation personally or through auditor, and request explanations from the bodies of the company even after submission of the annual report, but prior to approval of the report. If it turns out that there is a substantial mistake, the company shall be charged for inspection of the report. These rights of control and inspection could be limited only by this Law, and their extension is possible by the statute." As we have mentioned above, Article 36 of the Law "On Entrepreneurs" speak about the realization of the right of control and inspection by the limited partner of Comandite Company. So, consequently, Article 36 of the Law "On Entrepreneurs" establishes minimum standard of implementation of control by the limited partner, which could be further limited only by the Law "On Entrepreneurs" and extension is possible by the statute of the enterprise. In accordance with p. 17- 305 (f) of Delaware Limited Partnership Act, the statute of the enterprise can limit only the right of obtaining of information by the limited partner[30] and this limitation shall be interpreted as establishment of limitations by other means on the right of obtaining of information by the limited partner.[31]

I made an attempt to provide short review based on Delaware legislation on limited partnership and compare the issues of Georgian Comandite Company to the approach of limited partnership in order to better understand the advantages of approaches of both legislations. In my opinion, Delaware legislation is more liberal as compared with limited partnership provisions, which provides more probability of use and establishment of limited partnership in life, unlike Georgian Comandite

might specify shorter or longer period, although is shall not exceed 30 days), and if full partner doesn't reply or refuses to issue the information, the limited partner shall have the right to apply to the court and demand issuing of information through legal proceedings. The court shall rule whether the person, who requests the information, is entitled to receive such information or not. Although, based on the court decision again, limited partner might be obliged to reimburse the amount required for obtaining of the mentioned information by the limited partner. When the limited partner wishes to obtain the information specified in the mentioned provision, he/ she shall prove the coincidence of two circumstances: the first – that the information requested by him/ her is included in the above mentioned list and that the requested information in reasonably connected with his/ her, as limited partner's interests. The court could also rule to issue the information to the limited partner with observance of specific condition and establishment of the relevant limitations.

30 Actually, realization of the right of control and inspection, defined by the Law on Entrepreneurs, is expressed in obtaining of information in regard to financial documentation of the enterprise by the limited partner.

31 Limited Partnerships 17-305 (f): "The rights of a limited partner to obtain information as provided in this section may be restricted in an original partnership agreement or in any subsequent amendment approved or adopted by all of the partners or in compliance with any applicable requirements of the partnership agreement. The provisions of this subsection shall not be construed to limit the ability to impose restrictions on the rights of a limited partner to obtain information by any other means permitted under this chapter."

Company, examples of which are very few. Consequently, the approach, which creates more opportunities for establishment and development of enterprises, shall be preferred.

3.2 Limited Liability Limited Partnership

A Limited Liability Limited Partnership (LLLP) is a very interesting enterprise by its context and nature. Similarly to limited partnership, Limited Liability Limited Partnership is also a hybrid type company, where we have both limited and full partners. Also, there is another interesting fact regarding Limited Liability Limited Partnership, its legal status is regulated both by Delaware Limited Partnership Act, as well as Delaware Revised Uniform Partnership Act. It is especially interesting to see, what are the differences of Limited Liability Limited Partnership in relation to other Hybrid type companies.

In the process of founding in relation to number of partners, Limited Liability Limited Partnership has almost identical situation, as Limited Partnership. According to Delaware Limited Partnerhip Act, it is necessary, that there are minimum two partners, on of them being full partner, and another one limited. [32] In addition, Delaware Limited Partnership Act-is 17-214 (a), defines conditions, according to which Limited Partnership can be established as Limited Liability Limited Partnership. [33] Namely Limited Partnership can become Limited Liability Limited Partnership in case it is defined the by a charter of a Limited Partnership, but if it is not defined by the charter of a Limited Partnership, then consent of both full partners and limited partners is required. [34]

In case a Limited Partnership is a Limited Liability Limited Partnership, its full partners will have limited liability on the basis of Delaware Revised Uniform Partnership Act, and limited partners will have no liabiites on the basis of above mentioned *limited partnership act*-is 17-303 (a), when a limited partner is liable by his/her all property, in case he/ she participates in the management of the enterprise. [35]

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[32] Limited Partnerships, 17-101(9), "Limited partnership" and "domestic limited partnership" mean a partnership formed under the laws of the State of Delaware consisting of 2 or more persons and having 1 or more general partners and 1 or more limited partners, and includes, for all purposes of the laws of the State of Delaware, a limited liability limited partnership.

[33] *Rall L.G.L.,* Closely-Held Business Symposium: The Uniform Limited Partnership Act: A General Partner's Liability under the Uniform Limited Partnership Act (2001), "Suffolk U. L. Rev.", No. 37, 2004, 913: "…the limited partnership must be certain to take the proper steps to choose the election. To elect LLLP status, the limited partnership must make a statement in the certificate of limited partnership declaring the limited partnership a LLLP. The LLLP election should be included in the certificate of limited partnership delivered to the appropriate Secretary of State for filing when the limited partnership is formed. The election may also be made subsequent to the formation of the limited partnership. An existing limited partnership may elect to acquire or relinquish LLLP status by amending the certificate of limited partnership and filing the amended certificate with the appropriate Secretary of State. The amendment will become effective upon filing."

[34] Limited Partnerships, 17-214 (a).

[35] Delaware Limited Partnership Act, 17-214 (c): "If a limited partnership is a limited liability limited partnership, (i) its partners who are liable for the debts, liabilities and other obligations of the limited partnership shall have the limitation on liability afforded to partners of limited liability partnerships under the Delaware Revised Uniform

Delaware Revised Uniform Partnership Act 15-306 defines an issue of liability of a partner regarding obligations of an enterprise, or in other words the above mentioned provisions determines obligations of full partners. In cases defined by paragraph (a) of this clause (except for paragraphs (b) and (c) of the same clause partners hold solidary responsibility for liabilities of an enterprise or in other words the above mentioned clause provides for obigations of partners of a Limited Liability Partnership and in case we establish Limited Partnership as a a Limited Liability Limited Partnership, it may be covered by the same advantages in relation to the liabilities of partners, which are provided for in Delaware Revised Uniform Partnership Act[36] in realtion to Limited Liability Partnership.[37] Which advantages we are talking here? Namely according to the above mentioned article full partner is not responsible for liabilities of an enterprise, (b) in case the above liabilite was originated prior to his / her acceptance in the enterprise as a full partner, or (c) a liability of an enterprise was originated or it is related to events and circumstances, when a Partnership is a Limited Liability Limited Partnership and if this liability is originated from an agreement or a delict, in this case this liability is a liability of a partnership.[38] A partner does not bear personal liability only because he / she is a partner of an enterprise.[39]

As we see a Limited Liability Limited Partnership is one more attempt to make regulating of economic and legal state as flexible as possible on the basis of the legislation of USA and to provide more support for development of enterprises. Limited Liability Partnership issue according to Delaware Legislation is also rather interesting.

3.3. Limited Liability Partnership[40]

Limited Liability Partnership is similar to a Limited Liability Limited Partnership, but a Limited Liability Limited Partnership is created from already existing Limited Partnership, and a Limited Liability Partnership is formed from already existing Partnership.[41]

Partnership Act [Chapter 15 of this title], and (ii) no limited partner of the limited partnership shall have any liability for the obligations of the limited partnership under § 17-303(a) of this title."

36 Limited liability partnership is another hybrid type compay provided by the legislation of Delaware which we will talk about below.

37 *Miller E.S., Rutledge T.E.*, The Duty of Finest Loaylty and Reasonable Decisions: The Business Judgement Rule in Unincorporated Business Organizations?, "Del. J. Corp. L.", No. 30, 2005, 343.

38 *Kleinberger D.S.*, A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company, "Del. J. Corp. L.", No. 35, 2010, 879.

39 Delaware Revised Uniform Partnership Act 15-306: "(b) A person admitted as a partner into an existing partnership is not personally liable for any obligation of the partnership incurred before the person's admission as a partner. (c) An obligation of a partnership arising out of or related to circumstances or events occurring while the partnership is a limited liability partnership or incurred while the partnership is a limited liability partnership, whether arising in contract, tort or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of indemnification, contribution, assessment or otherwise, for such an obligation solely by reason of being or so acting as a partner."

40 The first act to regulate a Limite Liabiilty Partnersip was adopted in Texas in 1991. Delaware was the third state to adopt an act regulating a Limite Liabiilty Partnersip, see: *Naylor J.S.*, Is the Limited Liability Partnership Now the Entity of Choice for Delaware Law Firms?, "Del. J. Corp. L.", No. 24, 1999, 145.

As we have already mentioned Delaware Revised Uniform Partnership Act 15-306 defines an issue of partners in the Partnership and in the Limited Liability Partnership. In this regard partners of a Limited Liability Partnership and a Limited Liability Limited Partnership enjoy the same kind of advantages. Namely, liabilities of a Partnership which was generated or is related with events or circumstances, when the Partnership existed in the form of a a Limited Liability Partnership, regardless, whether the above mentioned liability was generated from an agreement, delict liability or from some other ways are fully liabilities of a Partnership. A partner is not personally responsible for the above mentioned liabilities, either directly or indirectly, in the form of indemnification or any other form only for the reason that he / she was or acted as a parter.[42] And paragraph (e) of the above mentioned article defines that a partner can take obligation to carry responsibility for liabilities of an enterprise in the form of indemnification, contribution or any other form to cover any or all liabilities of a a Limited Liability Partnership.[43]

As you have probably already noticed in the conext of liabilities of partners a Limited Liability Partnership is almost identical to a Limited Liability Limited Partnership.[44] A Limited

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41 Delaware Revised Uniform Partnership Act 15-1001 "(b) In order to form a limited liability partnership, the original partnership agreement of the partnership shall state that the partnership is formed as a limited liability partnership, and the partnership shall file a statement of qualification in accordance with subsection (c) of this section. In order for an existing partnership to become a limited liability partnership, the terms and conditions on which the partnership becomes a limited liability partnership must be approved by the vote necessary to amend the partnership agreement and, in the case of a partnership agreement that expressly considers obligations to contribute to the partnership, also the vote necessary to amend those provisions, and after such approval, the partnership shall file a statement of qualification in accordance with subsection (c) of this section."

42 *Bishop C.G.,* Closely-held Business Symposium: The Uniform Limited Partnership Act: The New Limited Partner Liability Shield: Has the Vanquished Control Rule Unwittingly Resurrected Lingering Limited Partner Estoppel Liability as Well as Full General Partner Liability?, "Suffolk U. L. Rev.", No. 37, 2004, 667. "During its storied existence, the control rule operated to make a limited partner personally liable for the obligations of the limited partnership simply because s/he participated in the control of the business. Often misunderstood, never defined, and inconsistently applied, the control rule operated to undermine the limited partner liability shield, the hallmark of the limited partnership. Consequently, one of the most laudable efforts of ULPA 2001 was to make the limited partner liability shield more secure by reducing liability exposure merely because the limited partner participates in the control of the limited partnership's business. To this end, ULPA 2001 section 303 boldly declares that a limited partner is not personally liable for an obligation of the limited partnership solely by reason of being a limited partner, "even if the limited partner participates in the management and control of the limited partnership."

43 Delaware Revised Uniform Partnership Act 15-306: "(e) Notwithstanding the provisions of subsection (c) of this section, under a partnership agreement or under another agreement, a partner may agree to be personally liable, directly or indirectly, by way of indemnification, contribution, assessment or otherwise, for any or all of the obligations of the partnership incurred while the partnership is a limited liability partnership."

44 As an example we may use an international law firm Skadden, Arps, Slate, Meagher & Flom (see: <http://www.skadden.com/default.cfm>), which is registered in Delaware State. Through State Department of Delaware we can find registration data of the above mentioned company (available at: <https://delecorp.delaware.gov/tin/controller>). The above mentioned registration data show that the law firm is registered as a a Limited Liability Partnership or a Limited Liability Limited Partnership. Inother words these two organizational-legal forms are very similar to each other by their content, though a Limited Liability Partnership is established on the basis of a partnership, where partners make a decision to turn their

Liability Limited Partnership is actually a new organizational-legal form and is still not well established in the majority of states of USA.

3.4. Dissimination of Hybrid-Type Companies in United States of America

Companies of Hybrid Type are very popular in United States of America since it is a very convenient form of organizational-legal structure, which provides immense opportunities to potential investors and local businessmen wishing to start new businesses to be flexible and to carry out effective coordination. Leading international legal firms of the world, local Americal companies often select organizational-legal form of a hybrid type company as a key for success of their business activities. For example, such a company as CNN is registered in the organizational-legal form of a hybrid type company, namely a Limited Liability Limited Partnership.[45] In this case if we see web page for seeking enterprise legal entities of State Department of Delaware we will find out that organizaional- legal form of CNN is Limited Liability Partnership or Limited Liability Limited Partnership.[46] The above is conditioned, as we have already mentioned above by almost identical legal expression of Limited Liability Partnership and Limited Liability Limited Partnership, especially in means of liability of partners.

Though the main task of our work is, on the basis of analysis of corporate law of US, particularly of Delaware and Georgian corporate law to draw a legal conclusion, why a Comandite Company is less popular in Business environment of Georgia and what legal amendments might have positive impact and encourage popularization of comandite companies in Georgia.

4. Prospectives of Future Development of Comandite Companies in Georgia

On the basis of the above work we may say that Georgian model of Comandite companies requires modifications and changes.

First of all, we need to refuse such regulations, provided by the law "on Enterpreneurhsip" where, as it is mentioned above, norms regulating General Partnerships regulate issues related to full partners of Comandite Companies.

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enterprise into a Limited LiabilityPartnership, and a Limited Liability Limited Partnership is established on the basis of a Limited Partnership where partners make a decision to turn their enterprise into a Limited Liability Limited Partnership. Besides, we can also see registration data of the same company through electronic searching web site of the State Department of New York. <http://appext9.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=2672856&p_corpid=2643032&p_entity_name=%53%6B%61%64%64%65%6E%2C%20%41%72%70%73&p_name_type=%41&p_search_type=%43%4F%4E%54%41%49%4E%53&p_srch_results_page=0>, where we see that the law firm is registered as a Foreign Registered Limited Liability Partnership, since it is a Delaware firm, registered in New York.

45 <http://edition.cnn.com>.

46 <https://delecorp.delaware.gov/tin/controller>.

Secondly, for the further simplicity of regulation of Comandite Companies founding of a comandite company with the participation of one partner should be feasible or in other words, existence of joint debters should not be required.

Thirdly, it should be possible that a full partner is not responsible with all his / her property for all liabilities of an enterprise, for exampe in cases where a new full partner joins an already established comandite society.

Fourthly, issue of a bond amount needs to be further simplified. According to the present legislation it is only possible for a comandite contribution to be expressed by a bond. We believe that the provision defined in general part of the law "on Enterpreneurship" which provides freedom of exercising a contribution to a partner should also cover comandite companies and a contribution should be limited only to a bond. A contribution should be both tangible and intangible, incuding providing services and performing work.

The fifth, we should increase rights of comandite partners by the law "on Enterpreneurship" and we should be able to limit these rights by a charter. Presently these rights are provided by the law and can be expanded by a charter, which does not seem to be realistic, I mean increasing rights by a charter. Therefore it is appropriate that the law provides originally a relatively large list of rights of a comandite partner.

In addition to the above mentioned amendments we can also define changes in other context. We can introduce any of the above mentioned organizational-legal form in corporate law of Georgia or we can provide all the advantages, characteristic of the above mentioned organizational-legal forms in the law of Georgia "on Entrepreneurship", in the chapter dedicated to comandite companies.

5. Conclusion

As it is obvious from the analysis conducted above, hybrid type companies are rather interesting type of companies which imply all sign of both capital and partnership companies.

While analyzing an American model, we believe we have clearly identified advantages of a hybrid type company of US as compared with that of Georgia, which probably eventually conditions that hybrid type companies are much more polar in United States of America, than they are in Georgia. Generally we can say that this type of hybrid type companies are much more convenient than any other partnership or capital company, since partners are have capability to be more flexible and they can independently select desirable property related status in an enterprise.

As it is mentioned above, a number of amendments are needed for "reviving" a Georgian comandite comoany, so that a comandite company becomes more popular and more attractive for both Georgian and foreign investors.

Kakha Palavandishvili*

Transformation of Origination of Property on Immovable Objects (Real Estate) in Georgian Legislation

I. Introduction

The objects of property right are very different from each other by its nature.[1] Different legal nature of the property requires different type of regulations.[2] Therefore due to their different nature the majority of the legal systems divide the objects into movable and immovable objects.[3]

"Division of the subjects into movable and immovable is most important form the point of view of their participation into the civil circulation and very important legal results are connected to this qualification".[4] Unlike movable objects, immovable ones are distinguished by social functional and therefore, importance, since immovable objects, unlike movable ones are characterised with ability of external influence, which it has based on its nature. This difference is reflected in many fields of property law, which differentiates movable and immovable property regimes.[5]

"Difference between movable and immovable objects is clearly reflected in obtaining of property on the above objects".[6] Rule for origination of property right of immovable objects is usually different from rule for origination of property of movable objects. This difference is very much conditioned by physical variety of movable and immovable objects, their social and economic functions. Establishment of modern systems of origination of right of property on immovable objects has a long history. Usually origination of ownership on immovable objects has been related with complying with various formalities since ancient times. In ancient Roman, ancient German law publicity elements were also very important. We should agree with the assumption that public-legal origins of formation of ownership on immovable objects should be conditioned by social function of immovable objects, by their special value.[7]

Two basic systems - private and real estate book systems were finally distinguished in the process of evolution of origination of right of property on immovable objects – Private and Real

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1 *Matei Y., Sukhanov E.A.,* Basic Provisions of the Law of Property, Moscow, 1999, 113.

2 Ib.,108.

3 Ib.,122.

4 *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 144.

5 *Matei Y., Sukhanov E.A.,* Basic Provisions of the Law of Property, Moscow, 1999, 108.

6 *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 144.

7 *Zoidze B.,* Georgian Law of Property, 2nd Edition, Tbilisi, 2003, 137.

Estate Book system.[8] Georgia, according to the rule of origination of property right set by Civil Code is a state of real estate book system.[9]

In Civil Code of Georgia, in December 2006 a certain innovation took place in relation to origination of right of property on immovable objects, which has replaced the rule on concluding a deal, existing before that. The law has given up the compulsory requirement for certifying a deal by a notary,[10] which is considered as the reason of "many misunderstandings and problems".[11]

The goal of the present study is to analyse rule for origination of right of property on immovable object suggested by the Civil Code, to understand its importance and influence on modern real estate market. Analysis of a specific court precedent enables us to say that the above innovation has already influenced real estate circulation. In the practice of Georgian judiciary lawsuits have appeared, which are resulted by the above legal innovation and as a result, court precedents have emerged. Therefore, focusing attention on the above issues in addition to the theoretical has immense practical importance. Considering specific precedents, a problem was identified while studying the issue, which exists in private law of Georgia in relation to the rule of origination of right of property on an immovable object. The present work is a modest attempt to show this problem.

2. Georgian Law - Part of Real Estate Book System

"Georgian Civil Code reinforces real estate book system".[12] "Within the real estate book system, consent of the owner and the buyer on immovable property transfer and its registration in the real estate book is required".[13] According to Article 183 of the Civil Code, "acquiring ownership of an immovable thing shall require a written document and registration of the acquirer in the Public Register".[14] Therefore, as it stems from this provision, registration in the Public Register or Real Estate Book is required for validity of the transfer of a right is required. Publicity is of crucial importance which defines the nature of the Georgian Law and determines its role within the German legal system.[15] Precondition of the publicity is a necessary "condition for countries with real estate book system",[16] meaning that "land ownership can only be acquired after its registration".[17] Competent authority for maintaining the Public Register, rules and procedure are determined by the Law of Georgia "on Public Register".[18]

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8 *Zoidze B.,* Georgian Law of Property, 2nd Edition, Tbilisi, 2003, 138.
9 Ib.,141.
10 *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 38.
11 Ib.
12 *Zoidze B.,* Georgian Object Law, 2nd Issue, Tbilisi, 2003, 144.
13 Ib.,141.
14 Georgian Law Concerning Amendments and Additions in Civil Code of Georgia, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 3879, 2006, 48.
15 *Zoidze B.,* Georgian Property Law, 2nd Edition, Tbilisi, 2003, 141.
16 *Chanturia L.,* Ownership of Immovable Property, Tbilisi, 2011, 176.
17 Ib.
18 Article 1, Law of Georgia on Public Registry, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 820, 2006, 48.

3. Rules for Acquiring Ownership on Real Objects

3.1. Approach based on Civil Code of Georgia

According to Article 183 of the Civil Code of Georgia, "acquiring ownership of an immovable thing shall require a written document and registration of the acquirer in the Public Register".[19] As it is demonstrated, this provision envisages written form of the transaction and registration of a right in the public registry. This provision does not require participation of a notary in the process of making a transaction. Affixing of signature in Public Register, in presence of authorised person is an alternative way. It is set that "if the deal participants affix their signature in registration body in presence of authorised representative, it is not necessary to verify authenticity of the signatures of the parties in order to verify the force of deal".[20] "This novelty put the legal security that existed at the market of the real estate and was used for protection of interests of the parties at least to a lesser extent, at risk".[21]

Current edition of Article 183 of the Civil Code is effective from March 15, 2007.[22] Before introduction of this amendment to the Civil Code, according to Article 183 paragraph 1, the rules of acquiring of immovable object should've been regulated in following way: "Acquiring ownership of an immovable thing shall require a notarized document and registration of the acquirer in the Public Register..."[23]

Notarial certification of a transaction and registration of an acquirer in the public register aims at protecting the interests of the acquirer of the real property as well as ensuring legal security and stability.[24] "Existence of notarial certification for certain types of transactions aims at strengthening preventive control measures to prevent parties to the contract from committing such errors that might affect them. Providing qualified legal consultation while certifying transactions is a duty of a public notary".[25]

It should be noted that according to Article 925 of the Civil Code of Germany - the transfer of ownership of the land "must be declared before the competent administrative authority in the presence of both parties. Without imposing restrictions on other administrative bodies, any notary is authorized to certify transfer of ownership of real property. Agreement on the transfer of ownership of the real estate can also be stated in the court settlement act or bankruptcy plan under

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19 Georgian Law Concerning Amendments and Additions in Civil Code of Georgia, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 3879, 2006, 48.

20 Paragraph 2, Article 311^1, Georgian Law Concerning Amendments and Additions in Civil Code of Georgia, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 4744, 2007.

21 *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 38.

22 Georgian Law Concerning Amendments and Additions in Civil Code of Georgia, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 3879, 2006, 48.

23 Civil Code of Georgia, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 786, 1997, 31.

24 *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 38.

25 Ib.

the effective court decision".[26] It is worth mentioning that initially only office for real estate book was considered as "a proper place". As of 1934, an optional right of notaries was introduced to certify this consent and since introduction of a law on certification of documents on 28 August 1969, office for real estate was replaced by notaries. Currently, notary is considered to be the "proper place".[27]

As it seems, rules for transfer of the property right in Germany was developed in favour of notaries. Probably, Georgian legislator gave proper consideration to this tendency when adopting the Civil Code and determined an obligatory rule for notarial certification for acquisition of property rights.[28] However, today cancellation of a notary's obligatory involvement in the process of acquiring ownership of the real estate property rights must be considered a step backward by which the private law system of Georgia was returned back to the development stage that German private law underwent some 50 years ago.

At the same time, the above-mentioned amendment might be considered as an opposite direction for development of rules on transfer of ownership of immovable property as well as it creates certain challenges and obstacles, put security of real estate turnover at risk and creates danger to affect interests of bona fide participants of the turnover.

3.2. Attempt for Regulating Payment of Purchase Value of Real Object

Paragraph 2^1 was added to Article 8 of the Law of Georgia on Public Registry[29] that initially was expected to become effective as of 1 January 2011,[30] and then as of 1 January 1 2012,[31] however, it was abolished before it came into force.[32] However, considering the importance of the issue under discussion as well as considering fundamental incompatibility of this legal amendment, several issues need to be taken into account. The above-mentioned Paragraph 2^1 defined that when registering ownership on immovable property, based on the purchase agreement, "in addition to other registration documents, the application should be enclosed along with the document certifying via transfer of price for purchase of immovable object in the bank institution. This obligation shall apply if the purchase payment is done in the monetary amount between the parties".[33]

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26 Civil Code of Germany (as of 1 March 2010) (Translator and Editor *Chechelashvili Z.*), §925, Tbilisi, 2010, 189.

27 *Chanturia L.,* Ownership of Immovable Property, 2nd Edition, Tbilisi, 2011, 177.

28 Article 183, Civil Code of Georgia, "Parliamentary Bulletin", No 786, 1997, 31.

29 Para. 1, Article 1, Law of Georgia on Amendments to the Law on Public Registry, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 3966-1, 2010, 74.

30 Ib., Article 2.

31 Article 1, Law of Georgia on Amendments to the Law on Public Registry, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2800, 2010.

32 Para. 2, Article 1, Law of Georgia on Amendments to the Law on Public Registry, 2011, available at: <www.matsne.gov.ge>.

33 Article 1, Law of Georgia on Amendments to the Law on Public Registry, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2800, 2010.

It is difficult to define precisely the purpose what might be the actual reasoning behind this novelty. It can be presumed that its purpose was to reduce the possibility of an artificial reduction on the value of the contract, or to protect the seller against the risk, or to reduce cash flow and, thus, promote banking operations.

All of the alleged purposes given above should not be regarded as appropriate public law interference in private relations. It should be noted that this legislative requirement, on the one hand, could not ensure restriction of possibility of artificial reduction of the contract value as well as protection of seller's interests. A person, if his aim is to show the different value from the actual price that was agreed upon, will be able to do it and will agree with counter-party to make payment in two instalments – one instalment through the bank transfer and the other one - by cash. This situation will not protect the seller's interests, but, on the contrary, will create preconditions for violation of his interests. On the other hand, reduction of cash flow and thereby similar interference in private relations to facilitate banking operations is such a blatant one, that it could not be considered as appropriate.

Certainly, use of public elements in private relationships is not new for the modern law; however, the goal should justify public law interference and the public good to be protected by imposing such restrictions should be proportional. Restrictions should be exceptional and reasonable in such a manner that any undue interference in private law relations should be avoided.

4. Competence of Georgian Civil Registry Office while Making Transactions on Acquiring Ownership on Immovable Property

4.1. Importance of Public Registry Service

The aim of the Public Registry is to ensure publicity. At the same time, public registry data has certain evidential function. "Presumption of reliability and completeness exists in relation to registry data - i.e. registry entries are considered to be accurate until the opposite is proved".[34] To some extent, legislation determines the scope of the presumption of reliability and completeness "in favour of the person who, on the basis of a transaction, acquires a certain right from another person and this right was listed in the registry on behalf of the seller; the registry entry is considered to be accurate unless a claim is lodged against this entry or the purchaser was aware beforehand that the entry is incorrect."[35]

Considering presumption of reliability and completeness, special importance is attached to the accuracy of entries. In case of existence of incorrect entries, if further entries are made on their basis, infringement of lawful rights and interests of any other person representing the party of the transaction, is imminent. Therefore, it is of utmost importance to create a legislative precondition in

[34] Para. 1, Article 312, Civil Code of Georgia, No 786, "Parliamentary Bulletin", 1997, 31.
[35] Ib., Para. 2, Article 312.

order to avoid a possibility of making incorrect entries to greatest possible extent. This goal can only be achieved through ensuring accuracy and completeness of documents that were submitted for registration to the largest possible extent. "The purpose of the Public Register is publicity which serves to establish the legal authenticity ... It should be based on reliable documents, which in a safe manner establish identity of the parties involved, their rights and legal capacity, as well as compliance of action with the law. A certified transaction, undoubtedly, represents such an act".[36]

While the notarial certification as an obligatory procedure is not required by law, what is the possibility of creating a degree of reliability in order to ensure appropriate completeness and accuracy of the registry entries? The answer to this question must be found in those provisions of the Law of Georgia on Public Registry which determine a registration authority, competence of the authorized person for registration, scope of his responsibility, and even his qualifications.

In the present chapter, the purpose of discussing the importance of the public registry - as a key characteristic of the real estate book system – is not to provide an exhaustive overview. The issue has been discussed to the extent that it is possible to see the importance of the public registry and, in this context, to analyze rules for acquiring ownership on immovable property as it is proposed by the Georgian civil law.

4.2. Authority of the Public Registry Service

Law of Georgia on Public Registry, in fact, does not say anything about a registration body and its personnel authorized to certify transactions. The Law only mentions that "the registration body and its employees shall not be responsible for the authenticity of the documents submitted for registration. They are responsible only for the registered data and for inter-compliance and security of the registration or other documentation they keep".[37] It gives the full authority for establishing rules and procedures for verification of documents to the Ministry of Justice, "... rules and conditions of verification of documents shall be determined on the basis of the Instruction on the Public Registry …"[38]

Regulating an important issue – such as rules and conditions for certification of transactions on immovable property - on the basis of an instruction is not a desirable event in itself. This fact in itself creates a sense of instability and possibility of frequent changes, but this could not be regarded as the only problem.

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[36] *Merlot M.,* Distinguishing Competence and Responsibility between Notaries and Registrators, Journal "Georgian Notary", No. 3-4, 2003 (Translation from Russian by *Tkebuchava M.,* as of following publications: "Non-budgetary Notary Development in Russia: Qualified Assistance, Protection of Rights of Citizens and Legal Entities", Moscow, 2000, 25).

[37] Para. 6, Article 3, Law of Georgia on Public Registry, "Georgian Law Bulletin" ("Sakartvelos Sakanon-mdeblo Matsne"), No 820, 2008, 42.

[38] Ib., Para. 9, Article 3.

Instructions on the Public Registry envisages a possibility of certification of authenticity of signature of the parties involved in the transaction by the registration authority.[39]

4.3. Persons Authorized to Certify Authenticity of Signature

In accordance with the instruction on Public Registry, "persons authorized to certify authenticity of signature are determined on the basis a legal act of the Chairman of the Agency".[40] Decree of the Chairman of the Agency defines persons authorized to certify authenticity of signature, however it does not imply any qualification or professional requirement. This means that the Chairman of the Agency is entitled to authorize any person with any qualification or profession to certify the authenticity of the signature. Certainly, this situation creates an additional risk that might hamper qualified productivity of the register.

4.4. Conditions for Certification of Authenticity of Signature of Transaction by Public Registry Service

In accordance with the instruction on the "Public Registry", "certification of authenticity of signature is carried upon submitting an application for registration of a right in the presence of an authorized person",[41] "only one copy of the transaction is subject to the certification of authenticity of signature which – as a registration document – together with the application shall be deposited with the registration authority".[42] Requirement for certification of authenticity of signature in the presence of an authorized person is completely rational and reasonable one, however, it is not desirable that only one copy is subject to certification. It goes without saying that it is important that each contracting party have a copy of signed and certified transaction. This fact has not only theoretical but also practical importance meaning that, in case of a dispute, one party has an original document signed by another party and certified by the competent authority.

4.5. Scope of Certification of Authenticity of Signature of Transaction by Public Registry Service

In accordance with the instruction on the Public Registry, "unilateral, bilateral and multilateral private legal transactions concluded in written form and related to object or intangible

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39 Instruction on Public Registry, approved by Minister of Justice, Decree No 3, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 2010, 6, Section 4.

40 Para. 2, Article 19, Instruction on Public Registry, approved by Minister of Justice, Decree No 3, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 2010, 6, Section 4, 2010.

41 Ib., Para.4, Article 19.

42 Ib., Para.6, Article 19.

property - except the power of attorney, will, life annuity, marriage contracts and other transactions in accordance with law - as well as administrative agreements, which create, alter or terminate rights related to objects and intangible property subject to registration in the Public Registry - are subject to certification of signature".[43]

A person authorized to certify authenticity of the signature verifies the authenticity of the signature on the transaction. This situation implies approval that a particular document was certainly signed by a particular person. According to the Instruction on the Public Registry, "only identification of a person signing a transaction and attestation of the fact of signature by the latter is carried out in the presence of an authorized person (to receive application for registration) while signing a transaction…"[44] The situation excludes verification of lawfulness of the transaction content and other substantive circumstances. This is reflected in the mentioned normative act. As it says, attestation of the fact of signature "…. does not imply compatibility of the content of the transaction with the existing legislation or attestation of authenticity of the will expressed by the parties or verification of other circumstances..."[45] This rule of certification of authenticity of signature on the transactions, in principle, does not meet the requirements of the real estate book system related to protecting interests of the acquirer of immovable property and ensuring legal security and stability.[46] In such a case, there is no remedy for protecting from unintentional mistake, intentional unlawful or fraudulent actions and possible harm through verification of content of transactions by a qualified specialist.

It is quite interesting fact and it should be emphasized that the Instruction on the Public Registry goes further beyond and provides a person authorized to certify the authenticity of a signature on a transaction with a right to certify authenticity of signatures of persons with disabilities as well as their representatives.[47] This authority seems not to be a usual one in the context of the general authority; however, considering that an authorized person of the public registry is not an official with special education background and does not verify the legality of the transaction and the nature of justice, persons with disabilities[48] are clearly in unequal position compared with the other party of the transaction.

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43 Para.1, Article 20, Instruction on Public Registry, approved by Minister of Justice, Decree No 3, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 2010, 6, Section 4, 2010.

44 Ib., Article 22.

45 Ib.

46 *Chanturia L.,* General Part of Civil Law of Georgia, Tbilisi, 2011, 38.

47 Instruction on Public Registry, approved by Minister of Justice, Decree No 3, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 2010, 6, Article 23.

48 Ib., Paragraph 1, Article 23 concerns dumb, deaf, deaf-and-dumb or the persons who are unable to any transaction independently due physical handicap and participation of appropriate specialists is considered during making any transaction, and the paragraph 2 concerns the persons, who are unable to affix the signature on the document due sickness, physical handicap or any reasonable excuse and their representative signs the document on their behalf. The above rule, somehow contradicts the Article 70 of Civil Code, which states transfer of right of signature by officially verified power of attorney, as opposed to order, which is regulated by the Article 709-722 of Civil Code.

Though mandatory participation of their representatives is provided, however, this could not compensate for inequality of the opportunity. Under the civil law, the legal status of a representative is confined within a certain legal framework[49] and while certifying the transaction it is necessary not only to protect the interests of persons with disabilities in relation to the other party but also in relation to their representatives that in general falls outside regulation of the above-mentioned rules for certification of a transaction.

Conditions related to signing a transaction and representation of legally incapable and disabled persons should also be emphasized. Though the Instruction on the Public Registry determines that these "... issues are to be defined in accordance with the existing legislation",[50] but this reference is more likely abstract rather than concrete and justified one. Whereas no relevant obligations are imposed on the persons authorized to certify authenticity of signature on the transaction, only qualification is not sufficient to guarantee that he will take proper consideration of the existing legislation.

More substantial importance is attached to these circumstances by considering that a person authorized to certify the authenticity of a signature does not verify the contents of the transaction and authenticity of the will expressed that is of principal value to be verified when making transactions by legally incapable and disabled persons in order to ensure adequate protection of their interests.

4.6. Possibility of Making Amendments in Non-Notarial Manner to Notarially Certified Transactions

Instruction on the Public Registry allows a possibility that "in case if a transaction is cancelled or changed the content of which was certified by a notary, relevant information must be placed on the agency's official website, which should be available to any interested person".[51] This provision makes it obvious that, under the Instruction on the Public Registry, cancelling or changing the transaction attested by a notary is possible, however, this opportunity is not stated explicitly. In such a case, a question should be answered whether it is possible to cancel the transaction or to make amendment to it in a different manner and form. The answer to this question is negative, as, for example, agreement to make amendments to the transaction is a transaction in itself and the same form as in case of main transaction should be applied, because it should be considered as a form of the transaction agreed between the parties. In this context, it is unclear, what is the purpose of the above-mentioned rule on publishing information on the Agency's official website, under the Instruction on the Public Registry. This action, without having a possibility to cancel or make changes to the transaction in a different form rather than the transaction is concluded, could not exclude reasons for annulment.

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[49] Civil Code of Georgia, "Parliamentary Bulletin", No 786, 1997, 31, Chapter 3.

[50] Article 24, Instruction on Public Registry, approved by Minister of Justice, Decree No 3, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 2010.

[51] Ib., Para. 2, Article 20.

4.7. Problem of Responsibility concerning Content of a Transaction

Stemming from the function of a person authorized to certify authenticity of the signature which is limited only by identification of the signatory parties and verifying the fact of signature, a problem of responsibility is raised in relation to persons involved in the transaction whose rights were affected.

As mentioned above, the content of transaction, authenticity of expression of will is not verified by an authorized person of the Public Registry. Unlawfulness of the content of the transaction and shortcomings in expression of will make a transaction void.[52] Thus, the transaction might be invalid while data of real estate book that are based on this transaction might be valid. It will affect the reliability and completeness presumption and, therefore, lead to legal consequences.

Regardless of the legal outcomes as a result of unlawful grounds, there is no subject identified for being held responsibility because a person authorized to certify the authenticity of the signature is not responsible for the compatibility of the content of the transaction with the existing legislation as well as for of the authenticity of the will expressed.

Certainly, notary certification of the content of transaction does not exclude a possibility of violating rights of parties to the transaction; however, naturally this risk is minimized at largest possible extent.

5. Making a Transaction on Acquiring Ownership on Immovable Property with Participation of a Notary

5.1. Role of a Notary in the Process of Making a Transaction

5.1.1. Legal Status of a Notary

According to the Law of Georgia on Notaries, "Notary's Office is a public law institution which is entrusted with a task to certify legal relations and legal facts between persons within the framework established by the State".[53] Notary is considered to be a person authorized to carry out State notarial and other related activities,[54] at the same time freedom of his professional activities,[55] independence and impartiality[56] is ensured by the Law. He/She performs his/her functions on the basis of appropriate remuneration[57] It is regarded that the independence and impartiality "is mostly ensured by the nature of the paid work".[58]

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52 *Chanturia L.,* Introduction to the General Part of Civil Law of Georgia, Tbilisi, 1997, 355.

53 Para. 1, Article 1, Law of Georgia on Notaries, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2283, 2009.

54 Ib., Para. 1, Article 3.

55 Ib.

56 Ib., Para. 2.

57 Article 21, Law of Georgia on Notaries, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2283, 2009.

58 *Burduli I.*, For Issues of Finances of Notary Bureaus and Remuneration of Notarial Work, "Law Journal", No 2, 2011, 35.

Independence and impartiality of the notary is insured by the legal guarantee and nature of paid work. "The Notary is independent and ought to be independent in order to gain the trust without which he could not perform his duties".[59] These features may be viewed as one of the principal values of the notary institution that explains the special trust in his respect.

5.1.2. Confidentiality of Notarial Acts

"A notary shall keep confidential the information that was known to him in connection with his official activities. This obligation shall remain in force even after dismissal of the notary".[60] It is considered that "the Notary's Office does not exist without trust, and trust can not be achieved without ensuring privacy".[61] In case of summoning a notary as a witness before a court, legislation of some countries does not impose an obligation upon a notary to disclose the professional secrets.[62] This shows the supreme importance of keeping confidentiality.

5.1.3. Notary's Liability

In proportion with providing public authority, a notary is held responsible that is reflected in liability for damages incurred as a result of his official duties[63] as well as disciplinary responsibility.[64] Liability for damages incurred as a result of his official duties should mean private law responsibility in favour of a victim. Compulsory professional liability insurance which is envisaged by the Law of Georgia on Notaries should be regarded as a kind of remedy for ensuring accountability and material responsibility of the notaries.[65]

Compulsory insurance of civil liability has apparently been reflected in the Georgian legislation by considering experience of the respective legislation of the EU states. "In all EU member states, the Governments require notaries to ensure compulsory insurance of civil liability".[66]

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59 *Deckers E.,* Notarial Work, Deontology and Structures, Part 2, Deontology, Journal "Notaries of Georgia", No 3-4, 2001, translation by *Kuprava R.*, Scientific Edition by *Zoidze O.* Translation is done according to following edition: "La profession notariale, sa deontogie et ses structures, 2000, Edite par les soins de la fondation pour la Promotion de la Science Notariale, Amsterdam", 11.

60 Para.1, Article 8, Law of Georgia on Notaries, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2283, 2009.

61 *Deckers E.,* Notarial Work, Deontology and Structures, Part 2, Deontology, Journal "Notaries of Georgia", No 3-4, 2001, translation by *Kuprava R.*, Scientific Edition by *Zoidze O.* Translation is done according to following edition: "La profession notariale, sa deontogie et ses structures, 2000, Edite par les soins de la fondation pour la Promotion de la Science Notariale, Amsterdam", 20.

62 Ib., 24.

63 Para.6, Article 3, Law of Georgia on Notaries, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2283, 2009, 46.

64 Ib., Para.7, Article 3.

65 Ib., Article 23.

66 *Deckers E.,* Notarial Work, Deontology and Structures, Part 2, Deontology Journal "Notaries of Georgia", No 3-4, 2001, Translation by *Kuprava R.*, Scientific Edition by *Zoidze O.* Translation is done according to

Reasons for disciplinary responsibility, types of disciplinary measures and rules for disciplinary proceedings are defined in the respective provisions of the Regulations on Disciplinary Responsibility of Notaries.[67] Disciplinary responsibility of a notary is not a specific feature of the Georgian legislation but it is recognized by legislation of other countries as well.[68] Possibility of imposition of disciplinary measures appears to be caused by the privilege of a notary to exercise public authority.

Regulating responsibility of a notary contributes to increase of quality of the accountability of a person carrying out public authority at the institutional level as well as before the client. This should be assessed as a positive sign of the notary institution. It is assumed that "independence, impartiality, confidentiality and responsibility are inherent and irrevocable features of the notary which accomplishes a liberal mission".[69]

Possibility of Notary liability creates high level of trust in regard of verification of authenticity of signature and speaks about its privilege towards the authorised representative of public registry.

5.2. Importance of the Notarial Act

5.2.1. Evidential Value of a Document Certified in a Notarial Manner

An argument in favour of requiring a notarial form of a contract is that "notarial form protects parties from rapidity"[70] and that "notarial form ensures legal security and stability".[71]

Form of notarizing the contract, in contrast to England and other common law countries, are recognized in the continental European law.[72] "Within the continental European civil law system, an official, notarially certified document is the main proof, having more power than, for example, the testimony of witnesses and others, and recognition of its authenticity always requires judicial assessment."[73] Under the Law of Georgia on Notaries "notarial acts ... have legal effect. Notarized

following edition: "La profession notariale, sa deontogie et ses structures, 2000, Edite par les soins de la fondation pour la Promotion de la Science Notariale, Amsterdam", 33.

67 Article 1, Regulations on Disciplinary Responsibility of Notaries, approved by the Minister of Justice of Georgia, Decree No 69, 2010, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 33.

68 *Deckers E.,* Notarial Work, Deontology and Structures, Part 2, Deontology Journal "Notaries of Georgia", No 3-4, 2001, Translation by *Kuprava R.*, Scientific Edition by *Zoidze O.* Translation is done according to following edition: "La profession notariale, sa deontogie et ses structures, 2000, Edite par les soins de la fondation pour la Promotion de la Science Notariale, Amsterdam", 30.

69 *Deckers E.,* Notarial Work, Deontology and Structures, Part 2, Deontology, Journal "Notaries of Georgia", No 3-4, 2001, Translation by *Kuprava R.*, Scientific Edition by *Zoidze O.* Translation is done according to following edition: "La profession notariale, sa deontogie et ses structures, 2000, Edite par les soins de la fondation pour la Promotion de la Science Notariale, Amsterdam", 34

70 Comments on Civil Law of Georgia, Book 3 (*Chanturia L.*), Tbilisi, 2001, 69.

71 Ib.

72 Ib., 111.

73 *Goloshvili G.,* Evidential Value and Execution Effect of a Notarial Act, Journal "Notaries of Georgia", No 3-4, 2001, 40.

document is of true evidential value".[74] As it is demonstrated on the basis of this legal provision, the law gives advantage to a notarially certified document rather than a document drawn up in a simple form.

Stemming from the value of a notarial form, it could be said that a document which is certified notarially in the sense of its evidential nature should prevail over a document drawn in non-notarial manner. Probably, the idea of participation of a notary in the process of concluding an agreement comes from that purpose. "Notaries have a key role and responsibility in protecting rights and interests of individuals and legal entities, in ensuring their legal security, stability and guarantees".[75]

Certainly, the issue of evidential advantage is on the agenda when there are two contracts on the same subject concluded in different terms, out of which one is notarially certified. Evidential advantage of the notarially certified document, apparently, derives from the assumption that a contract concluded with involvement of a notary is more protected from unlawful effect and, therefore, gains more credibility compared with a contract concluded in a simple written form. "… Notarially concluded and notarially certified document in accordance with law explains uncertainty in relations between the parties, in their rights and obligations. This could be achieved by notarial act if it certifies existence or non-existence of certain facts and conditions in a procedure established by law and thus excludes grounds for emerging disputes thereupon. Based on this consideration, notarial document represents "ready evidence" and "an evidence of prevailing effect" compared with the others.[76]

5.2.2. Importance of Notarial Certification of Content of Transaction

While concluding a purchase contract over the immovable property, "agreement between the willingness to sell and the willingness to buy constitute a kind of spine ...",[77] which consists of three elements, and namely: establishing an identity, a right and legal capability and compliance with the law".[78]

Defining identity of the parties explicitly, verification of legal capability, deep analysis of compatibility of the transaction with the law[79] should become a guarantee for ensuring protection of the legitimate interests of the parties to the transaction.

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74 Para. 1, Article 5, Law of Georgia on Notaries, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2283, 2009, 46.

75 *Goloshvili G.,* Evidential Value and Execution Effect of a Notarial Act, Journal "Notaries of Georgia", No 3-4, 2001, 40.

76 Ib.

77 *Merlot M.,* Distinguishing Competence and Responsibility between Notaries and Registrators, Journal "Georgian Notary", No 3-4, 2003, Translation from Russian by *Tkebuchava M.,* as of following publications: "Non-budgetary Notary Development in Russia: Qualified Assistance, Protection of Rights of Citizens and Legal Entities", Moscow, 2000, 27.

78 Ib.

79 *Merlot M.,* Distinguishing Competence and Responsibility between Notaries and Registrators, Journal "Georgian Notary", No 3-4, 2003, Translation from Russian by *Tkebuchava M.,* as of following

Notarial form ensures protection of interests of persons being in unequal conditions while concluding a transaction on transfer of ownership of real property.[80] "Through reinforcing the obligation of notarial certification, civil law protects interests of a seller as well as a buyer".[81] It seems, that this case means definition of compliance of content of transaction with law and definition of authority of the parties of transaction, which gives possibility of real protection of interests as of seller as well as buyer. It is accpeted, notarial attestation "has several functions: preventive function (the parties must pay due attention to the importance of the transaction); prevention from rapidness (this norm prevents the possibility of easy alienation and purchase of land); confirmation function (written form gives opportunity of easy proof of existence of transaction). It is not only proof, but gives opportunity easily define transaction content; function of legal provision (participation of notary facilitates provision of legal of relations). In particular, it is a guaranty for avoidance of mistakes by the parties in conclusion of transactions for land alienation and therefore avoids those negative results which may be caused by these kinds of actions. Thus, it is connected to the following important function. It is provision of authenticity of transaction".[82]

It is hard for an authorized person of the registration authority effectively and safely handle with a huge number of property rights that require registration.[83] At the same time, only existence of a notarial document should not be regarded as sufficient, "a notarial document as an act having evidential value, should have a basic feature such as authenticity".[84]

Authenticity, of course, is not achieved only by recognition of its authenticity on legislative level. "Authenticity of the notarial act means full, clear, explicit and objective reflection of will of the parties, their rights and responsibilities and facts of the matter".[85] Execution of aforesaid action by the notary, necessary for authenticity of the documents, is impossible without legislative regulation. The law must create the rule and base for its legal enjoyment.

5.2.3. Forms of Notarial Actions

According to the current legislation of Georgia, participation of the notary in conclusion contract is various and therefore cannot provide authenticity of the notarily concluded document and its evidential value. Notarial action may be executed in different manners, which means scope

publications: "Non-budgetary Notary Development in Russia: Qualified Assistance, Protection of Rights of Citizens and Legal Entities", Moscow, 2000, 27.

80 Ib., 28.

81 *Chanturia L.,* Ownership of Immovable Property, 2nd Edition, Tbilisi, 2001, 196.

82 Ib.

83 *Merlot M.,* Distinguishing Competence and Responsibility between Notaries and Registrators, Journal "Georgian Notary", No 3-4, 2003, Translation from Russian by *Tkebuchava M.,* as of following publications: "Non-budgetary Notary Development in Russia: Qualified Assistance, Protection of Rights of Citizens and Legal Entities", Moscow, 2000, 29.

84 *Goloshvili G.,* Evidential Value and Execution Effect of a Notarial Act, Journal "Notaries of Georgia", No 3-4, 2001, 40.

85 Ib.

and content of notarial actions. Based on importance of notarial verification, notarial actions take key place in the process of conclusion contract.

To talk over the evidential value of the notarialy certified document, certainly, is not perfect without discussing the forms of notarial action. While talking about the forms of transaction the Civil Code of Georgia states, that "The transaction or authenticity of signatures of the parties of the transaction must be certified by the notary or any other legal person in case of written form of transaction, in cases considered by law or based on mutual agreement of the parties".[86] The legislator precisely distinguished the transaction and authenticity of signatures of the parties. Certification of transaction should be understood as compliance of the content of document with current legislation as well as checking of authority of parties. The aforesaid norm appears in Civil Code of Georgia since December of 2006 as a result of amendments.[87] The norm active before the amendments was differently regulating the question of notarial certification, in particular, "If transaction requires notarial certification, than it must be carried out by the Notary, judge or legal person".[88] The given norm, in notarial certification of transaction, implies certification of transaction, i.e. if we rely on further discussions developed by the legislator during carrying out the amendments, it should imply the compliance of the content of transaction with the law and verification of authority of parties.

Active edition of Article 69 of Civil Code of Georgia, which distinguishes notarial certification of transaction and authenticity of signatures of contract parties, at the same time, considers the clause, that certification must be carried out in legally considered cases and at mutual agreement of the parties.[89] But is interesting what does the clause "legally considered case" means? While reading this clause you get an impression, that in particular cases the law and also the Civil Code makes differentiation, when the transaction must be certified and when only certification of authenticity of signatures is needed. Nevertheless, analyzing the particular articles of Civil Code and notarial law, it becomes clear that attitude of law to this question is very obscure and given term is not used homogenously.

Considering, that for acquiring the property rights, according to the general rule, notarial certification of transaction is not necessary,[90] the special norms are in force for some kind of transactions, which considers notarial certification of transaction. Like, life annuity, "Life annuity contract must be concluded in written form. In case of disposal of immovable property the contract must be notarialy certified".[91] As well as, in case of the will "Notarial form requires that the will is drawn up by testator and certified by the notary, and where the notary is not available – by the local

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86 Para.5, Article 69, Civil Code of Georgia, "Parliamentary Bulletin", No 786, 1997.

87 Article 1, Law of Georgia on Amendments and Additions to the Civil Code of Georgia, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 3879, 2006.

88 Para.3, Article 69, Civil Code of Georgia, "Parliamentary Bulletin", No 786, 1997, 31.

89 Para.5, Article 69, Civil Code of Georgia, "Parliamentary Bulletin", No 786, 1997, 31.

90 Ib., Article 183.

91 Ib., Article 942.

self-government institutions".[92] In one case, out of these two statements, the legislator talks about notarial certification of transaction, and in other case – about notarial attestation of transaction. But Civil Code says nothing about difference between certification and attestation. The aforesaid article 69 of Civil Code indicates nothing about differences according to this term and distinguishes only notarial certification of transaction and authenticity of signatures of contract parties.

At the same time, in some cases Civil Code indicates precisely about possibility of exercising of transaction by means of certification of authenticity of signatures,[93] which meets the definition of Article 69 of Civil Code, but on other hand the terms used in various articles of Civil Code, notarial attestation,[94] notarial certification,[95] and also certification in due manner,[96] have the same meaning. The legislator while using these terms has not thought about their meaning and weight. This consideration is proved by the norm, which defines the rule of presentation of transaction in public registry and according to which "written contract must be submitted to public registry for registration of rights on material and nonmaterial property".[97] The above circumstances also indicates that the legislator substantially does not differ terms "certification" and "attestation". But based on their meaning weight, difference between them has a huge legal importance. This could be the explanation to the exceptions stated in the Instruction "on public registry", when certification of authenticity of signature by authorized person of public registry, means power of attorney, will, life annuity and marriage contract, is not allowed.[98] This restriction seems to be conditioned by specificity of the mentioned transaction and its social implication, that their execution only by means of certification of authenticity of signatures was considered insufficient. It is true, that the above instruction does not concern the rules of notary activity, but presumably, the latest and the transaction peculiarities has defined forms of execution of notarial actions on them in existed notarial practice.

For notarial certification of wills, life annuity and marriage contracts it is used the form of certification of transaction by means of verification of transaction content and its authority. In other cases, only certification of authenticity of signature is carried out, in spite of, that the Civil Code, in many cases, defines compulsory participation of notary in the process of execution of transaction for similar will, life annuity and marriage contract, and does not indicates to any different rule.[99]

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92 Para. 2, Article 1357, Civil Code of Georgia, "Parliamentary Bulletin", No 786, 1997.

93 Ib., Para.1, Article 289^4; Para.2, Article 289^4; Para.1, Article 306^5.

94 Ib., Para.1, Article 284; Para.3^1, Article 302; Para.2, Article 1357; Article 1366; Para.2, Article 1367; Para.1, Article 1470.

95 Ib., Para 3, Article 289.

96 Ib., Para.3, Article 35; Para.3, Article 198.

97 Ib., Para.3, Article 35; Para.1, Article 311^1.

98 Para.1, Article 20, Instruction on Public Registry, approved by Minister of Justice, Decree No 3, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 2010, 6, Chapter 4.

99 See Para.3, Article 35, Civil Code of Georgia, "Parliamentary Bulletin", No 786, 1997. It considers obligation of certification of statute of entrepreneurial legal person in due manner, but in practice

The aforesaid circumstances reveal that the current Civil Code of Georgia does not define clearly, when it is necessary to certify the content of transaction and when certification of authenticity of signatures is sufficient. This may be considered as imperfection of the law. Nevertheless, the above question must be regulated simultaneously with establishment of forms of obligatory notarial certification of transaction on acquiring of property rights on immovable objects.

5.2.4. Notarial Certification and Notarial Attestation

Main requirements on execution of notarial actions are defined by the "Law on notaries".[100] Mentioned standard act does not make precise definition of notarial certification and notarial attestation, but includes some of the statements which give possibility to make certain conclusion. In the list of possible notarial actions it is given that the notary in "cases defined by the law or based on mutual agreement attests the transaction"[101] and "certifies authenticity of signatures affixed on document".[102] It is also underlined, that "...while attesting the transaction the notary certifies authorization of participants of transaction and their capability".[103] This clause reveals that the term "attestation" implies compliance of content of transaction with the law, verification of capability and authority of the parties. The term "certification" is used when we talk about the authenticity of signatures. "The law on Notaries dated Dec. 4, 2009 brought terminological mixture in these differences. The action which was celled notarial certification is called notarial attestation by this law".[104] At the same time it should be underlined from the beginning, that definition of Law "on notaries" does not comply with the attitude of Civil Code towards these term, which has been discussed above.

The law of Georgia "on Notaries" does not include any other norms of classification of notarial acts. It refers that "rules of execution of notarial actions is defined by instruction, which is approved by the Minister of Justice of Georgia introduced by the Georgian Chamber of Notaries".[105]

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certification of authenticity of signatures are carried out; Article 198, para.3, which states obligation of previous owner of requirement (right) to hand to buyer at his request certified document about concession of rights and requirements; Article 289, para.3, according to which, mortgage contract, on which the mortgage deed is issued by mutual agreement, must be notarialy certified; According to para.1 of Article 284 mortgage contract, which considers assignation and realization of mortgage item to debtor based on writ of execution issued by notary, must be notarialy certified. According to para.3^1 of Article 302, if agreement between creditor and owner considers assignation and realization of mortgaged item to creditor based on writ of execution issued by notary, in this case this kind of agreement must be notarialy certified.

100 Preamble, Law of Georgia on Notaries, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2283, 2009, 46.

101 Ib., Sub Para. "a", Para.1, Article 38.

102 Ib., Sub Para. "g".

103 Ib., Para. 2, Article 48.

104 *Chanturia L.,* General Part of Civil Code of Georgia, Tbilisi, 2011, 345.

105 Para. 2, Article 5, Law of Georgia on Notaries, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2283, 2009, 46.

By this instruction the different definition of notarial acts appeared in current Georgian notarial law.[106] The concept of public and private acts appeared.

By the instruction "on rules of execution of notarial actions" "for certification of the act (transaction, certificate etc.) for authenticity of which it is necessary to follow the notarial from by Georgian legislation, the notary is obliged to verify identity of parties (representatives), authority, capability, authenticity of expression of willingness and arrange compatibility of transaction with the legislation, adequate reflection of the parties in transaction, explanation of content of transaction and legal results to the parties, giving advices to them"[107] and the notarial act exercised by this method is called public act.[108]

While conclusion the transaction in a form of public act, verification of compatibility of the content of transaction with the legislation and capability and authority of the parties by the notary, implies attestation of transaction considered by the law "on Notaries" It considers obligation of notary to explain to the party of the notarial action "content of the notarial act and its legal results..."[109]

Certification of authenticity of the signatures of signatories is exercised by private act, when notary certifies only identity and capability of the parties.[110] It is underlined that "the notary is not responsible for compatibility of the private act with the law, or for the adequacy of willingness of signature in the private act".[111]

There is fundamental difference between public and private acts, accordingly between notarial attestation and certification of authenticity of signatures. While conclusion of public acts , role and place of the notary in the process of exercising of transaction significantly big, which gives huge possibility of provision of compatibility of transaction conclusion with the law, and in case of private act, the notary is not able to have professional influence upon the content of transaction. Because of participation of notary in conclusion of transaction goes down to formal level. He is not able to ensure function of notary in transaction exercising.

Form of certification of content of the transaction, as a rule, is applied with respect to complex and substantial transactions,[112] however, obligation of using form for certifying content should be reinforced by a normative act. Law of Georgia on Notaries does not determine preconditions for applicability of certification of transaction and attestation of transaction. More precisely, it mentions that "in cases established by law or agreement between the parties, he

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106 Article 15, Instruction on Rules of Exercising of Notarial Actions, approved by Minister of Justice of Georgia, Decree No 71, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 2010, 33.

107 Para. 1, Article 15, Instruction on Rules of Exercising of Notarial Actions, approved by Minister of Justice of Georgia, Decree No 71, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 2010.

108 Ib., Para. 2, Article 15.

109 Ib., Para. 5, Article 15.

110 Para. 6, Article 15, Instruction on Rules of Exercising of Notarial Actions, approved by Minister of Justice of Georgia, Decree No 71, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), 2010.

111 Ib., Para. 8, Article 15.

112 *Chanturia L.,* Introduction into General Part of Civil Code of Georgia, Tbilisi, 1997, 353.

certifies transactions".[113] Purchase of immovable property is not regarded within the cases established by law.[114] Therefore, it is possible that any contract on acquiring of ownership of property rights concluded with the participation of a notary, as in the case of certification of signature on the transaction by the authorized person of public registry, will be finished only by certification of authenticity of the signatures of the parties without certification their authorization and compatibility of the content of the transaction with the law.

This condition puts the stability of turnover of immovable property under risk, by failure to protect the parties to the transaction from the risk which should be prevented by notarial attestation.

Different was the attitude to the law "on notaries" of May 03, 2006, which regarded only possibility of transaction attestation.[115] If we also take into consideration, that until the amendments in article 183 of Civil Code made on Dec. 8, 2006, registration of buyer in public registry and notarialy certified document was needed for purchasing immovable object,[116] Georgian law has undergone kind of regress and already established ordinary regulation of continental European law, has been substituted by less improved, defected legal regulations, which cannot provide guaranty of protection of interests of immovable object purchase contract parties.

As opposite to the Georgian legislation, the legislation of Germany strictly distinguishes the terms from each other according to the form of notraial actions. The special law regarding the attestation[117] of content is in force in Germany (*Beurkundungsgesetz*).[118] The abovementioned law for definition of notraial attestation uses the term "*Notarielle Beurkundung*",[119] and for definition of certification authenticity of signatures is used "*offentliche Beglaubigung*"[120] and cases of public attestation by the notary is defined as a scope of a law.[121] The law indicates, that the notary is obliged to ensure that the will of the parties are clearly expressed, as well as pay attention to avoid mistakes and do not infringe upon the interests of inexperienced party.[122] The German legislation goes further and obliges the notary to inform the party, if there is any doubt of contradiction of transaction with the law or real, true interests of the parties and if the parties still require attestation of transaction, the notarial act should reflect this advice and the explanatory note of the parties must be attached to it.[123]

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[113] Sub-para. "a", Para.1, Art. 38, Law of Georgia on Notaries, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2283, 2009.

[114] Article 183, Civil Code of Georgia, "Parliamentary Bulletin", No 786, 1997.

[115] Sub-paragraph "a", Para.1, Article 41, Law of Georgia on Notaries, "Parliamentary Bulletin", No 210, 1996.

[116] Article 183, Civil Code of Georgia, "Parliamentary Bulletin", No 786, 1997.

[117] In aforementioned work the term "attestation" will be used for definition of "attestation of transaction content" according to the current law.

[118] Beurkundungsgesetz, 1969, available at: <http://www.gesetze-im-internet.de/beurkg/>.

[119] Ib., erster Abschnitt.

[120] Ib., dritter Abschnitt.

[121] Ib., §1.

[122] Ib., §17.

[123] Ib.

The procedure of notarial attestation (*Notarielle Beurkundung)* considered by the German legislation makes us to think, that the notary becomes familiar with a content of transaction in presence of parties before its signing. In particular, the wording of expression of will is read in presence of notary and afterwards signed by the parties.[124] The German legislation clearly defines the cases, when only attestation of signature is possible. §36 of law on attestation of content (*Beurkundungsgesetz*) requires notarial attestation (*Notarielle Beurkundung)* of all kind of cases, if anything else is not considered by §39,[125] whereas article 39 - requires possible cases of attestation of signatures, in particular the copy and other simple documents.[126]

It is obvious, that German legislation defines the rules of exercising of transactions more clearly. The given rule ensures observance to legality and equity while exercising transactions, stability of property turnover, which legal vice is rational.

Attestation of the contract gives supposition of its authenticity (correctness) and accuracy,[127] i.e. it is supposed that the contract by its content is correct and true.[128]

Georgian legislation, like the German law, reinforces the presumption of reliability of public registry,[129] although, under current regime, it is not able to provide reliability and accuracy of property right. The Georgian legislation practically contradicts itself. On one hand it gives the public registry the function of origination of right, and on other hand it has only the function of recorder of statistical data. The origin of property right by law is connected to registration in public registry, but at the same time weakens importance of public registry, because the guaranty and presumption that everything is done legally, is lost. Registration, as final act of the process, legal way to aquiring of property right, stays "naked" if the process is uncontrollable, and imposing constitutional importance to it is not rational. Considering the differences of forms of notarial attestation, based on importance of transaction, the law must define obligation for execution of notarial actions on one hand and the scope of execution of notarial actions on another hand, in order to take advantage of notary functions and ensure proper reliability of registered rights.

6. Negative Results of Absence of Responsibility of Notarial Attestation

The law, as an alternative, gives opportunity of attestation of transaction[130] by means of agreement of parties, but it causes additional expenses. Notarial fees significantly differ from each

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124 *Schellhammer K.*, Zivilrecht nach Anspruchsgrundlagen. BGB Allgemeiner teil und gesamtes Schuldrecht mix Nebengesetzen, Heidelberg, "C.F. Muller Iuristischer Verlag", 1994, 698.

125 Beurkundungsgesetz, 1969, available at: <http://www.gesetze-im-internet.de/beurkg/>.

126 Ib., §39.

127 *Larenz K., Wolf M.*, Allegemeiner Teil des Burgerliechen Rechts, 8. Auflage, München, "Verlag C.H. Beck", 1997, 523.

128 *Kohle H.,* BGB AT Kompakt, München, "Verlag C.H. Beck", 2009, 81.

129 *Kurzinski-Singer E., Zarandia T.,* Reception of German Law of Property in Georgia, Journal "Bulletin of Civil Law", No 1, 2012, 253.

130 Law of Georgia on Notaries, "Georgian Law Bulletin" ("Sakartvelos Sakanonmdeblo Matsne"), No 2283, 2009, Sub-paragraph "a", Para.1, Article 38.

other during attestation of transaction and certification of authenticity of signatures. Cost of notarial actions for attestation of the transaction is defined based on total value of transaction,[131] whereas the price for certification of authenticity of signatures does not depend on transaction cost.[132] In many cases temptation of avoidance of additional expenses conditions decision of the parties to exercise the contract excluding notarial form, never think about unpredictable results, which increases the chance of mistakes or infringement of interests or rights due to unconscientious action of any of the parties.

It must be mentioned that one of the argument for cancelation of requirement of obligatory notarial attestation of transaction on acquiring of rights on immovable objects, was reimbursement for notarial actions. It is admitted that notraial fees has unduly increased expenses of exercising of transaction and cancelation of requirement of obligatory notarial attestation was necessary.[133] Also, the reinforcement of principle of absolute freedom of contract was declared as a reason for changes.[134]

By this opinion, the function of legal stability and security was practically abolished and attention has been transferred to saving of expenses, which is absolutely undue risk for the property which may have much more value than the notarial fees saved by means of conclusion of the contract without participation of notary. At the same time, if the notarial fee was not adequate, then the notary service rate could've been reviewed rather than cancelation of obligatory notarial form, which cannot justify the purpose of making changes, especially as the change is nowise connected to strengthening the principle of freedom of contract. Instead of simplifying the registration of rights originated from the transaction in public registry, danger of infringement upon stability of property rights on immovable objects has appeared. The negative results of the transactions exercised by non-notarial manner occurred in practice, as well as ensued legal disputes, which is not always the guaranty of full reinstatement of rights.

The board of civil cases of City Court of Batumi by decision made on Dec. 3, 2012 regarding the case No 2/645-09, has partially allowed the requirement of claimant about cancellation of real estate purchase contract.[135] Batumi City Court annulled the purchase contract of the director concluded on his behalf. Another, instalment sales contract, which was concluded by the same enterprise with third person, was voided as well; however appeal court has annulled this part of decision of Batumi city court and considered the contract valid as the buyer was regarded as a bona fide acquirer.[136] The above case shows that the signatory of the void contract has followed all formalities, including the decision of partners' meeting concerning the sales of

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131 Charge Rate for Execution of Notarial Actions and Fees of Chamber of Notaries of Georgia, the Rules of Payment and Service Period, approved by Government of Georgia on 29.12.2011, Decree No 507, available at: <www.matsne.gov.ge>, Para. 1 and 3, Article 3; Article 23.

132 Ib., Article 31.

133 See Explanatory Note on Draft Law of Georgia on Additions and Amendments in Civil Code of Georgia, Draft No 07-58337, submitted to Parliament on 20.10.06, 1, available at: <http://civilin.org.ge/parliament/ccodeg.php>.

134 Ib.

135 Decision of Batumi City Court, 2010, 24 (available in the archive of Batumi City Court).

136 Decision of Kutaisi Appeal Court, 2011 (available in the archive of Batumi City Court).

real estate. The mentioned decision of partners' meeting had no authority for conclusion of disputed contract with the content as it was exercised.

Regional court of Khelvachauri by the decision[137] made on may 25, 2010 regarding the case No 2-344, has annulled the real estate purchase contract, by which the property right has been transferred for significantly low price compare to the real cost, without actual transfer of property right to the owner, for pretence to third party.

The above mentioned transactions have been concluded through certifying the authenticity of signature by an authorized person of Public Registry. Most probably none of the contracts could've been concluded by the notary, in case of attestation of content of transaction. The authorized person, who certified the transaction, did not examine the contents of the decision of the partners' meeting, did not assess the will expressed by the partners and was satisfied only with formal existence of a partners' decision.

In another case, he did not paid attention to the content of contract. Second case was considered as pretended contract by the court, which is comparably difficult for assessing. Although, in first case the authorized person could easily make legal assessment of partners' meeting if he read it.

If not a rule on acquiring of ownership on real property in non-notarial manner, the enterprise director could not have made a transaction neither with himself nor conclude an instalment sales contract with the third persons. Most probably the notary could have made correct legal assessment of pretended contract. As a result, there would have been no court dispute, which obviously has huge practical importance, but the condition that this rule practically destructs the registration system, is much more important. Main purpose of registration of solid and reliable data about real estate owner and its legal value in real estate book, is not fulfilled.[138] The above rule gives the result, when nobody is responsible for the data registered in public registry, which directly contradicts the principle of reliability and trustworthy. Mentioned principle becomes exhausted and goes down only to reliability of signatures. It is important not only simple right of registration, but registration of authentic right, which may not been achieved with existing regime of registration and conclusion of transaction.

7. Conclusion

Existing Georgian system of acquiring ownership over real estate property right, by rejecting the obligation of notarial certification, in principle, stepped back and refused one of the characteristics of the real estate book system. Rejection of compulsory notarial certification negatively affected the quality of credibility of making transactions.

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[137] Decision of Khelvachauri Regional Court, 2010 (available in the archive of Khelvachauri Regional Court).

[138] *Schmidt R.,* Sachenrecht II, Immobiliarsachenrecht, Kreditsicherungsrecht, "Verlag Dr. Rolf Schmidt", 1. Aufl., 2004, 16; see *Lapachi E.,* Public Registry – Body of Registration of Real Estate Property Rights and the Reforms performed in this Field, "Law Journal", No 2, 2011, 80.

On the basis of analysis of existing judicial practice, the advantage of notarial certification of transactions on acquiring of ownership on immovable property is obvious. There are no tangible substantial reasons which necessitated cancellation of notarial certification and, hence, put credibility of the process of making transactions under risk.

Declared purpose of rule of obligatory notarial attestation, given in explanatory note on law draft, cannot justify made amendments and results undue risks and gaps in process of acquiring of ownership on immovable property, this endangers the stability of turnover of immovable property.

Recommencement of rule of obligatory notarial attestation is necessary in order to ensure security of turnover of property, stability and protection of buyer's rights, which at the same time answers the requirement of real estate book system.

Mixing up the terms of "certification", "attestation," "due attestation" in Civil Code and Notarial law, looses their meaning, and makes possible their unequal interpretation. All these needs improvement and definition of terms and their future adequate application.

Zakaria Shvelidze*

Prohibition of Employment Discrimination in Accordance with the Georgian Legislation

Introduction

The antidiscrimination principle rests on fundamental moral values that are widely shared in society. The reaction of democratic society on actions against such values was manifested in the introduction of legislation prohibiting the discrimination.[1] This field of law belongs to the area of human rights protection;[2] moreover with the consideration of problem importance the legislation covered also the norms regulating the employment relationships.[3] At present the institute prohibiting the employment discrimination is the integral component of labour law. "Employment discrimination law" is the dynamic field of law, and society generally, and business and work performer particularly, are greatly affected by developments in the law of employment discrimination.[4]

Prohibition of discrimination in employment relationships is achieved through the international acts and conventions. Moreover, national legislations in many countries prohibit employment discrimination. In 2006, following the adoption of new Labour Code in Georgia the new principle of prohibition of employment discrimination, unknown for the Georgian labour market, has become effective. This is a novelty in Georgian labour law and correct utilization of above mentioned norms has high significance for the subject of employment relationships. Prohibition of employment discrimination is characterized with the special features in labour relationships. The characteristics of institute regulations are caused by the influence of certain social or economic factors existing in specific countries. The objective of present article is to analyze the Georgian legislation prohibiting the discrimination in employment relationships and evaluate its characteristics. Following the adoption of new Labour Code it is important to clarify the forms used for regulation of employment discrimination in modern Georgian labour law. For

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* Doctoral Student of the TSU Law Faculty.

1 *Brest P*., In Defence of the Antidiscrimination Principle, in: Foundations of Employment Discrimination Law, *Donohue J*. (Editor), New York, "Oxford University Press", 1997, 17.

2 For example, see *Ontiversos M*., Employment Discrimination, in: Human Rights in Labour and Employment Relations: International and Domestic Perspectives, *Gross J*., *Compa L*. (Editors), Champaign, "Labour and Employment Relations Association", 2009, 196-198.

3 *Sural N.,* Country Studies: Turkey: Islamic Outfits in the Workplace in Turkey, A Muslim Majority Country, "Comparative Labor Law & Policy Journal", 2009, 10.

4 *Mcdonald J*., *Ravitch F., Sumners P.,* Employment Discrimination Law, Problems, Cases and Critical Perspectives, New Jersey, "Pearson Prentice Hall", 2006, Preface.

the above purposes the article tudies the origins and sources of employment discrimination law in Georgia, the scope of employment discrimination regulations and areas of its application. Moreover, as a result of categorization of discrimination grounds, the objective of the article is to determine the boundaries of discrimination grounds prohibited under the Georgian labour law and identify their characteristics. The raised issue will be discussed together with the analysis of Georgian court practices. In this context it is interesting to evaluate whether the norms prohibiting employment discrimination ensure their effective utilization in labour market.

1. Source of Employment Discrimination Regulation

1.1 Constitution of Georgia

Institutionalization of non-discrimination principle is based on the idea of human equality. Equality and discrimination are two sides of the same coin. Equality is the absence of discrimination. Human equality and non-discrimination are recognized as fundamental and universal principles by the Constitutions of democratic countries.[5] The regulatory source for non-discrimination principle is the country's supreme law. According to the article 14 of the Georgian Constitution: "Every human being is born free and is equal before the law regardless of race, colour, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence". The above norm determining the fundamental right for equality is the universal constitutional norm-principle, which implies the assurances for the equal conditions of legal protection. The idea of equality ensures the equal opportunity, in other words guarantees equal opportunities for self-realization. The main right for equality differs from other constitutional rights with the fact that it does not protect any specific area of life. The principle of equality requires equal treatment in all areas protected by the legal interests and human rights.[6] The very general constitutional concept of equality covers the employment relationships.

In addition to the fundamental principle of equality to be used for employment relationships, the Constitutions of some of the European countries contain the provisions ensuring the equal remuneration for the equal work for men and women. For example, the Constitutions of Bulgaria[7] and Hungary[8] guarantee the principle of equal remuneration of men and women

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5 *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R*. (General Editor), 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 451.

6 Case No 1/1/493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www. constcourt.ge>.

7 *Mrachkov V.*, Bulgaria, in: International Encyclopaedia for Labour Law and Industrial Relations, Vol. 4, *Blanpain R.* (Editor in Chief), Deventer/Boston, "Kluwer Law and Taxation Publishers", 1995, 162.

8 *Nagy L*., Hungary, in: International Encyclopaedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.7, The Hague/London/ Boston, "Kluwer Law International", 2000, 35-37.

performing the equal work. The same normative acts set specific criterion for determining remuneration – quantity and quality of work done. In addition of the right to receive the equal pay for the equal work, the Italian Constitution mentions that all women employees must have the same rights as men employees.[9] It is specifically noted that women have equal rights to work and right for equal working conditions.[10]

Unlike to the above mentioned countries the Georgian Constitution establishes only general principles of equality (and non-discrimination accordingly). It does not contain the provision on the equal remuneration for men and women for the work of equal value. The legislative regulation of the above idea is achieved through the international agreements[11] and special law.[12]

1.2 International Agreements

1.2.1 Conventions of International Labour Organization

The institution of non-discrimination is included in many international acts. Among the acts prohibiting the employment discrimination the conventions of International Labour Organization (ILO) should be stressed.

The principle that men and women should receive equal remuneration for work of equal value was mentioned, as from 1919, in the initial text of the ILO Constitution. Moreover, ILO Declaration of Philadelphia adopted in 1944 established the principle of non-discrimination. Finally, in 1951 No 100 Equal Remuneration Convention was adopted.[13] The above convention was ratified by the Parliament of Georgia.[14]

The notion of work of equal value which is used by the Convention has a wider meaning. The main objective of No 100 convention is that the sex of the worker should not be taken into consideration in the determination of rates of remuneration.[15] The difficulty related to the implementation of equal remuneration principle is the fact that in certain States, the government does not interfere directly in the determination of wages in private sector. The Convention

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9 *TreuT.*, Italy, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.8, The Hague/London/ Boston, "Kluwer Law International", 1998, 82.

10 *Mandruzzato P.*, Italy, in: International Labour and Employment Laws, *Keller W.*, *Darby T.* (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 6-87.

11 See Sub-chapters 1.2.1 and 1.2.2 of the present article.

12 See Sub-chapter 1.3.2.1 of the present article.

13 *Valticos N.*, *Von Potobsky G.*, International Labour Law, in: International Encyclopedia for Labour Law and Industrial Relations, Vol. 3, *Blanpain R.* (Editor in Chief), Deventer/Boston, "Kluwer Law and Taxation Publishers", 1994, 118-209.

14 See Decree of the Parliament of Georgia No 153 of 29 May, 1996.

15 *Valticos N.*, *Von Potobsky G.*, International Labour Law, in: International Encyclopedia for Labour Law and Industrial Relations, Vol. 3, *Blanpain R.* (Editor in Chief), Deventer/Boston, "Kluwer Law and Taxation Publishers", 1994, 210.

imposes on governments the obligation to ensure equal remuneration only when this is compatible with the wage-fixing methods in the country.[16] In Georgia after the adoption of the new Labour Code in 2006 the method or standards for the definition of remuneration (including the minimum wage) are not any more considered. Thus above is the subject of the agreement between the parties[17]and is regulated by the labour market.[18]

In 1958 ILO adopted No 111 Discrimination (Employment and Occupation) Convention. The Convention was ratified by the Parliament of Georgia.[19]The convention has general nature and its objective is to implement the prohibition of discrimination for various grounds in the national legislations of countries, parties to the agreement.

1.2.2 "European Social Charter"

On 1 July 2005 the Parliament of Georgia adopted the decree No1876-RS on ratification of the Strasbourg European Social Charter of 3 May 1996 (revised) and its appendix.[20] By force of the decree Georgia acknowledges as obligatory several articles of the Charter, including article 4III, whereby with a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake to recognise the right of men and women workers to equal pay for work of equal value. The ratified norms include the article 20, paragraph I, according to which - with a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognize that right and to take appropriate measures to ensure or promote its application in the following fields -access to employment, protection against dismissal and occupational reintegration.

Pursuant to the article 6, paragraph II of the Constitution of Georgia,[21] Law on Normative Acts, article 7, paragraph III[22] and Labour Code, article 1, paragraph I[23] the No 100 and No 111 conventions of International Labour Organization, as well as ratified norms of "European Social Charter" have the governing legal power in relation to the internal normative acts regulating the labour relationships.

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16 See Article 3, Paragraph II of the No 100 Equal Remuneration Convention.

17 According to Article 31, Paragraph I of Labour Code of Georgia the form and volume of work remuneration is determined by the labour agreement.

18 *Valticos N.*, *Von Potobsky G.*, International Labour Law, in: International Encyclopedia for Labour Law and Industrial Relations, Vol.3, *Blanpain R.* (Editor in Chief), Deventer/Boston, "Kluwer Law and Taxation Publishers", 1994,210.

19 See Decree of the Parliament of Georgia No 738-11, 1995.

20 Published in Legislative Magazine, No 82, 2005.

21 International agreement of Georgia or agreement which is not against the Constitution of Georgia, constitutional agreement has higher legal power compared with the inter-state normative acts.

22 The following hierarchy is valid for the legislative acts of Georgia, constitutional agreements of Georgia and international agreements and treaties of Georgia: a) The Constitution of Georgia; constitutional law of Georgia; b) constitutional agreement of Georgia; c) International agreement and treaty of Georgia; d) organic law of Georgia; e) law of Georgia, decree of President of Georgia, regulation of the Parliament of Georgia.

23 This law regulates labour and accompanying relationships on the territory of Georgia, if they are not regulated otherwise by special law or international agreement of Georgia.

1.2.3 European Union Directives

The European Union legislation has significantly contributed to the development of employment discrimination institute. At present it is not disputable that positive legal developments in the area of prohibition of employment discrimination at European level have happened because of the existence of the European Union.[24] The main provoking factors for the adoption of anti-discriminatory legislation in European Union member states were the European Union directives; therefore their influence[25] on the national legislation is evident.[26]

At the first stage the norm reflecting the equal remuneration principle for women and men[27] was included in the Treaty of Rome establishing the European Economic Community. During the first court dispute on employment discrimination under the European Union,[28] the European Court of Justice interpreted that the above article of the Treaty of Rome is directly applicable, both vertically (against the State) and horizontally (against private employers).[29] As a result, the above

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[24] *Kilpatrick C*., Emancipation Through Law or the Emasculation of Law? The Nation-State, the EU, and Gender Equality at Work, in: Labour Law in an Era of Globalization, *Conaghan J.*, *Fischl R.*, *Klare K.* (Editors), New York, "Oxford University Press", 2002, 493.

[25] According to the position of some scientists, there is certain influence from the USA labour law over the anti-discrimination law of European Union, mainly related to the regulation of discrimination based on the disability, see: *Fahlbeck R*., *Mulder B.J*., Sweden, in: International Labour and Employment Laws, *Keller W*., *Darby T*. (Editors), Volume IIA, 3rd Edition (Covering through 2007), Additional Economies (EU and Other European), Chicago, "BNA Books", 2008,19-86.

[26] *Hepple B*., *Fredman S*., *Truter G*., Great Britain, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol. 6, The Hague/London/Boston, "Kluwer Law International", 2002, 181; *Redmond M*., Ireland, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol. 8, The Hague/London/Boston, "Kluwer Law International", 1996, 135-137; *Adlercreutz A*., Sweden, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol. 13, The Hague/London/Boston, "Kluwer Law International", 1998, 123; *Loosntra C*., *Van Arkel G*., The Netherlands, International Labour and Employment Laws, *Keller W*., *Darby T*. (Editors-in-Chief), Volume IIA, 3rd Edition (Covering through 2007), Additional Economies (EU and Other European), Chicago, "BNA Books", 2008, 16-74.

[27] Article 119, article 141 in the Treaty of Amsterdam amending the Maastricht Treaty on the European Union, and now article 157 in the Lisbon Treaty amending the Maastricht Treaty on the European Union and the Treaty of Rome establishing the European Economic Community. The real motivation for inserting of the mentioned article into the Treaty of Rome was French insistence that lower gender wage differentials in key female-dominated French industries, when compared with gendered wage differentials in other EU Member States, would distort competition in the common market. It was France's concern that it would be at a competitive disadvantage in observing the principal of equal pay for equal work more thoroughly than it was observed in other Member States. See: *Kilpatrick C.,* Emancipation Through Law or the Emasculation of Law? The Nation-State, the EU, and Gender Equality at Work, in: Labour Law in an Era of Globalization, *Conaghan J*., *Fischl R*., *Klare K*. (Editors), New York, "Oxford University Press", 2002, 490.

[28] Case 43/75, *Defrenne v. Sabena* (No 2) [1976] ECR 455.

[29] *Hepple B*., *Fredman S*., *Truter G*., Great Britain, International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol. 6, The Hague/London/Boston, "Kluwer Law International", 2002, 181. *Kilpatrick C*., Emancipation Through Law or the Emasculation of Law? The Nation-State, the EU, and Gender Equality at Work, in: Labour Law in an Era of Globalization, *Conaghan J.*, *Fischl R.*, *Klare K.* (Editors), New York, "Oxford University Press", 2002, 491-492.

provision was established as the centerpiece of the European Union's drive for equality between the sexes in the workplaces.[30] According to the position of scientists, the indicated provision should be seen as specific manifestation of a more general principal of equal treatment, which represents a fundamental value of the European Union legal order.[31]

Since 1975 up to date, number of important directives regulating the employment discrimination has been adopted under the European Union framework.[32] Implementation of these directives is compulsory only for the member states of the European Union. However it has to be mentioned that according to the 2 September 1997 Resolution of the Parliament of Georgia, all laws and other normative acts adopted by the Georgian Parliament from 1 September 1998 shall be compatible with the standards and rules established by the European Union.[33] Thus, harmonization with the European Union directives and adjustment of internal legislation with the European legislation is the necessary component of country's legal development process.[34]

1.3 National Legislation

1.3.1 Labour Law Code of 1973

The Labour Code of 1973 which was effective until 2006 did not consider the issue of prohibition of discrimination. It contained some attempt to regulate the employment discrimination. According to the article 17, paragraph II of Labour Code "in the process of hiring it is not allowed to

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30 *Kenner J.*, The European Union, in: International Labour and Employment Laws, *Keller W.*, *Darby T.* (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 1-180.

31 *Dougan M.*, Free Movement: The Workseekers as Citizen, "The Cambridge Yearbook of European Legal Studies", Vol. 4, 2001, 2002, 102.

32 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Foster N.*, Blackstone's Statutes EC Legislation, 17th Edition, 2006/2007.

33 *Kereselidze D.,* National Program for Harmonization of Georgian Legislation with the European Union Legislation, "Review of Georgian Law", No 5-1, 2002, 8.

34 In the process of adjustment of Georgian legal system with the European system the important development was achieved through the treaty on "Partnership and Collaboration between the Georgia and European Union and its Members" (PCA) which became effective on 1 July, 1999. Similar to Georgia, European Union has concluded similar agreements on partnership and collaboration with two neighboring countries of Georgia – Armenia and Azerbaijan.

limit human rights directly or indirectly or to give preference based on race, colour of skin, language, gender, religion, political and other views, ethnic and social origin, origin, proprietary and title status and residential address." The mentioned norm was one fragment of prohibition of discrimination, applying only to the recruitment process while employment relationships were not covered by the scope of prohibition.

1.3.2 2006 Labour Code

The regulation of employment discrimination has been regulated at institutional level following the adoption of new Labour Code in 2006. The code ensures regulation of discrimination grounds, discriminative actions and justified actions. The normative act is discussed in detail in the present article.

1.3.3 Special Law

1.3.2.1 Law on Gender Equality

On 26 March 2010 the Parliament of Georgia adopted Law on Gender Equality.[35] Until 2010 Georgian legislation did not make systemic and special regulation of gender discrimination in employment relationships. The above area has been regulated via the No 100 convention of International Labour Organization on the "equal remuneration for women and men for the work of the same value". However the conventions of International Labour Organization are not self-executing. The ratification of them entails an obligation on the part of the State to adopt relevant legislation which is necessary for its implementation.[36] Hence the effective implementation of No 100 convention depended on the adoption of Law on Gender Equality.

According to the article 2 of the Law on Gender Equality the objective of the law is to ensure elimination of discrimination in all areas of social life (including employment relationships), creation of relevant conditions for the realization of equal rights, liberties and opportunities for men and women. The law determines the main guarantees for the provision of equal rights, freedom and opportunities for men and women, as defined under the Constitution of Georgia, determines legal mechanisms and conditions for the implementation of rights in relevant areas of social life.

1.3.3.2 Law on Trade Unions

Law on Trade Unions was adopted on 2 April 1997 by the Parliament of Georgia. The law contains only one provision on prohibition of discrimination, which according to the purpose of

[35] Law of Georgia on Gender Equality, Georgian Legislative Magazine, No 18, 2010.

[36] *Blanpain R.*, Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, 90.

the law is related only to the discrimination on the ground of trade union membership. According to article 11, paragraph VI of the law "it is not allowed to discriminate the employee by the employer due to his/her membership or not membership of trade union".

2. Prohibition of Employment Discrimination

2.1 Contents of Employment Discrimination

Discrimination is unjustified, unequal treatment of human being.[37] The word discrimination implies making distinction in a negative sense between human beings based on certain ground. Discriminative action means that person is being treated in a way that is less favourable than would be the case if it were not for some specific characteristic of that particular individual.[38]

As mentioned above, discriminatory action in its essence means the violation of equality. To be more specific – ensuring the equal treatment considers prohibition of any type of discrimination.[39] The Constitutional Court of Georgia interprets that "in the process of discussing the issue of discrimination the court shall first of all determine: 1) are the persons (groups of persons) essentially equal; it has decisive importance as these persons shall form comparative categories; they must be assigned to similar categories, analogues circumstances for some content, criteria, must be essentially equal for the specific circumstance or relationship; the same persons can be considered as equal for some relationships, conditions, but not for other conditions; 2) the different treatment of essentially equal persons should be evident (or equal treatment of essentially unequal persons) based on certain grounds, in the areas protected by rights".[40]

The Georgian Labour Code starts discussion on discrimination with the list of prohibited grounds, based on which it is only possible to determine the circle of persons protected from the discrimination. In accordance with the interpretation provided by the Supreme Court of Georgia, the article 2, paragraph III of the Labour Code specifies the certain forms of discrimination.[41]

Article 2, paragraph IV of Labour Code provides the definition of employment discrimination. According to this norm the following will be considered as discrimination – creation of conditions for the individual that directly or indirectly worsens his/her status compared with other individuals in the analogues conditions. This provision determines the general formulation for unequal, discriminative treatment and links the existence of discrimination to the violation of equality.

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37 *Blanpain R.*, Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R.* (General Editor), 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 453.

38 *Adlercreutz A.*, Sweden, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (General Editor), Vol.13, The Hague/London/Boston, "Kluwer Law International", 1998, 120.

39 *Blanpain R.*, Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (General Editor), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, 102.

40 Case No 1/1/493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www.constcourt.ge>.

41 Case No AS-549-517-2010, Constitutional Court of Georgia, 2010, available at: <http://www.constcourt.ge>.

Discrimination in itself has humiliating character, and is incompatible with human dignity.[42] Article 2, paragraph IV of Labour Code provides another form of employment discrimination – harassment.[43] Direct or indirect harassment of person will be considered as discrimination, if it is aimed or causes violation of person's dignity or creation of humiliating, hostile or offensive environment for the person.

Law on Gender Equality provides the following definition of discrimination – "Any differentiation, separation or/and limitation based on gender, which is manifested in the different acknowledgement of rights and main liberties, unequal provision, weakening or rejection of opportunities which is implemented through the direct or indirect discrimination".

The separate category of discrimination - harassment in particular, is the sexual harassment,[44] which is the form of direct discrimination on the ground of gender.[45] Georgian Labour Code does not distinguish the sexual harassment as the special form of discrimination. It is regulated by the article 6, paragraph I.b of the Law on Gender Equality - "It is prohibited in labour relationships to have any type of sexual verbal, non-verbal or physical behaviour, which is aimed at or causes violation of person's dignity or creation of humiliating, hostile or offensive environment for the person."

Prohibition of employment discrimination applies to all employers without limitation which meet the criteria determined by the Labour Code.[46] As an exception from the general rule, the US legislation shall be mentioned, where the Civil Rights Act of 1964 prohibits only those employers who employ 15 or more persons for each work day of at least 20 weeks a year.[47]

2.2 Direct Discrimination

There are two types of discrimination – direct and indirect. Direct discrimination means any difference in treatment based on expressed grounds. In case of direct discrimination the basis of the difference in treatment is the specific characteristic of the subject.[48] The example of direct

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42 *Valticos N.*, *Von Potobsky G.*, International Labour Law, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (General Editor), Vol.3, Deventer/Boston, "Kluwer Law and Taxation Publishers", 1994, 118.

43 *Harassment.*

44 Sexual harassment means any form of verbal, non-verbal or body behavior of a sexual nature whereby those, who engage in it, know or should know that this is contrary to the dignity of men and women at work, see: *Blanpain R.*, Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (General Editor), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, 102.

45 *Prangli T.*, *Liigus L.*, Estonia, in: Labor and Employment Law in the New EU Member and Candidate States, *Reitz Etgen A.*, United States of America, "American Bar Association", 2007, 149.

46 According to Article 3, Paragraph II of Labour Code of Georgia the employer is physical and legal entity, or union of such entities, for whom the certain work is implemented based on labour agreement.

47 *Goldmen A.*, United States of America, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (General Editor), Vol.13, The Hague/London/Boston, "Kluwer Law International", 1996, 178; *Mickey P.*, United States, International Labour and Employment Laws, *Keller W., Darby T.* (Editors-in-Chief), 3rd Edition, Volume IB (Covering through 2007), Major Economies (NAFTA) and International Issues, 2009, Chicago, "BNA Books", 33g-6- 33g-50.

48 *Blanpain R.*, Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol. 3, The Hague/London/Boston, "Kluwer Law International", 2001, 102.

discrimination is an advertisement for "a male teacher". This constitutes direct discrimination on the ground of gender (women are treated less favourably, than men because they will not be considered for the post).[49] It is the direct discrimination, when unequal treatment from the employer (for example rejection for promotion or hiring on the job) is conducted based on person's religious, political views or any other specific ground of a person.

2.3 Indirect Discrimination

Indirect discrimination is an action, which does not directly refers on prohibited ground, however its implementation results in discriminative consequence. During indirect discrimination the violation of equality in rights is not expressed, however it indirectly affects the person with the specific characteristic. In case of indirect discrimination neutral stipulation, measure or way of treatment affects the specific group, and the mentioned group thus is under unequal treatment due to its characteristic.[50]As a result, indirect discrimination imposes much heavier burden over the certain group of people compared with other group.[51] Fewer women or blacks may be selected for a job or for promotion, not because the employer treats them less favourably having requirement for the male persons or persons with the white colour of skin, but because other factors make it more difficult for them to comply with the criteria for selection or promotion. In this case sexually or racially neutral rules may have a disproportionate impact on women or blacks. For example, since women have greater child care obligations than men (due to their social status), fewer women than men are able to comply with job specification which include substantial overtime or mobility requirement.[52]

The establishment of the concept of indirect discrimination in labour law was articulated by the USA Supreme Court in 1971[53]; the Court addressed the legality of a requirement that all new hires have a high school degree. According to the court decision, the requirement compared with the white persons had the effect of screening out an inordinate number of African-Americans, who for social or economic reasons never had the opportunity to finish high school. According to the court position, as the requirement on a high school degree was general and was not directly related to the work performance (the announced vacancy was about the manual work), the requirement from employer was considered as indirect discrimination with the consideration of the fact that such limitation had disproportionate effect on the persons with the black colour of skin.[54]

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49 *Callaghan P*., UK, in: International Labour and Employment Laws, *Keller W., Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 8-171.

50 *Blanpain R.*, Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, 102.

51 Case No 1/1/477, Constitutional Court of Georgia, 2011, available (in Georgian) at: <http://www. constcourt.ge>.

52 *Hepple B*., *Fredman S*., *Truter G*., Great Britain, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.6, The Hague/London/Boston, "Kluwer Law International", 2002, 188.

53 *Griggs v. Duke Power Co.,* 404 US. 424, United States Supreme Court, 1971.

54 *Mickey P*., United States, in: International Labour and Employment Laws, *Keller W., Darby T*. (Editors-in-Chief), 3rd Edition, Volume IB (Covering through 2007), Major Economies (NAFTA) and International Issues, Chicago, "BNA Books", 2009, 33g-9.

After the above discussed case, the theory on disparate impacts or disparate effects, (consequences) (same as indirect discrimination) was developed. According to the theory, a facially non-discriminatory employment practice that disproportionally screens out a higher percentage of protected class members is an unlawful employment practice unless it can be demonstrated that the practice is required by business necessity or has a manifest relationship to job performance.[55]

For the better understanding of the contents of indirect discrimination it is expedient to name several examples from the foreign literature: an advertisement for "a teacher: must have a mustache" constitutes indirect discrimination based on the gender because: considerably fewer women have mustaches than men.[56] Due to the high proportion of female part-time employees, measures discriminating against part-time employees are found to be as indirect discrimination (based on gender) against female employees.[57] Prohibition of wearing the jewellery or beard for the employees (who have direct contact with the food production or transportation) is indirect discrimination for the people with the religion for whom it is compulsory to wear the specific religious jewellery-accessories or beard.[58] Similarly, limitation of certain clothing at work place causing the disproportionate influence over the people of religion, religion of which (for example Sikhs – Sikhism followers) has specific clothing requirements (for example constant wearing of hat or wearing of specific clothes).[59] The shifts' schedule determined by the employer, which requires from the employee to be at work every Sunday places under disproportionate discrimination the people who due to their religion cannot work every Sunday.[60] Work requirement for the age of candidate – 17-28 years, or defining the maximum age of 28 as work criteria, is indirect discrimination based on gender if we consider that compared with men women have difficulties to fulfill such requirements as generally in the age of 18-28 women are busy with

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55 *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, General Editor *Blanpain R.*, 2nd Revised Edition, Deventer/ Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 453.

56 *Callaghan P*., UK, in: International Labour and Employment Laws, *Keller W., Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 8-171.

57 *Bilka Kaufhaus GmbH v. Karin Weber von Hertz,* Case 170/84 [1986] ECR 1607. Employer's decision to exclude part-time employees from an occupational pension scheme was considered as indirect discrimination by the European Court of Justice based on the gender sign, see: *Weiss M.*, *Schmidt M.*, Federal Republic of Germany, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.6, The Hague/London/Boston, "Kluwer Law International", 2000, 68; *Kilpatrick C*., Emancipation Through Law or the Emasculation of Law? The Nation-State, the EU, and Gender Equality at Work, in: Labour Law in an Era of Globalization, *Conaghan J.*, *Fischl R.*, *Klare K.* (Editors), New York, "Oxford University Press", 2002, 493.

58 *Singh v Rowntree Mackintosh*, 1979; *Kaur v Butcher & Baker Foods Ltd* , 1997 (in *Bell A*., Employment Law, Nutcases, 3rd Edition, London, "Thomson, Sweets & Maxwell", 2007, 62).

59 *Hepple B*., *Fredman S*., *Truter G*., Great Britain, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol. 6, The Hague/London/Boston, "Kluwer Law International", 2002, 188;

60 *Copsey v.WWB Devon Clays Ltd.,* 2005 (in *Bell A*., Employment Law, Nutcases, 3rd Edition, London, "Thomson, Sweets & Maxwell", 2007, 71).

child care and therefore they do not have possibility to meet such criteria.[61] The requirement of employer on the minimal height of the candidate is indirect discrimination based on gender considering the fact that such criteria is causing more negative results for the women compared with the men, as the average height of women is lower compared with the average height of men.[62] Vacancy announcement including the requirement – "recent graduates". This criterion indirectly discriminated against older people, as they are less likely to be recent graduates.[63]

Georgian Labour Code does not provide the definition of indirect discrimination. The different position is selected in the Law on Gender Equality, which gives definitions for both types of discrimination.[64] It has to be also mentioned that according to the Constitutional Court interpretation article 14 of the Constitution of Georgia prohibits direct as well as indirect discrimination.[65] Problem of absence of regulations of indirect discrimination in Labour Code has been raised in 2009 year Report of the Committee of Experts on the Application of Conventions and Recommendations of International Labour Organization (session 98). In the report the committee of experts approached the government of Georgia with the question on how the indirect discrimination was regulated in Georgia.[66] The 2010 year report (session 99) mentions the answer from the government of Georgia according to which the indirect discrimination is regulated under article 142[67] of Criminal Law of

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61 *Price v Civil Service Commission,* 1978 (in *Bell A*., Employment Law, Nutcases, 3rd Edition, London, "Thomson, Sweets & Maxwell", 2007, 58); *Callaghan P*., UK, in: International Labour and Employment Laws, *Keller W., Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 8-171.

62 *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R*. (General Editor), 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 453.

63 *Callaghan P*., UK, in: International Labour and Employment Laws, *Keller W., Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 8-201.

64 According to the Law on Gender Equality the direct discrimination is "placing the person in discriminative condition for his/her gender based on legal act, program other public policy". The same law defines the indirect discrimination as "legal act, program or other public policy which does not indicate to discrimination directly, but its implementation is related to the discriminative result", see Article 3, Published in Legislative Magazine, No 18, 2010.

65 Case No 1/1/493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www. constcourt.ge>.

66 Report of the Committee of Experts on the Application of Conventions and Recommendations of International Labour Organization, 378-379 <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/ @relconf/documents/meetingdocument/wcms_103484.pdf> (last seen on 12.07.2012).

67 Violation of human beings' equality due to his/her race, skin colour, language, gender, attitude towards the religion, beliefs, confession, political or other positions, nationality, belonging to national, ethnic, social, title or society unions, origin, residential address or proprietary status, which has essentially violated human being's right, is punished by the penalty or correctional type works for the period of up to one year or imprisonment for the period of up to 2 years. The same action: a) Abusing the work authority; b) which caused the heavy results is punished by the penalty or imprisonment for the period of up to 3 years, prohibiting appointment on official position or depriving from the implementation of activities for the period of up to 3 years or without the above.

Georgia, and article 2, paragraph IV of Labour Code.[68] Thus the committee of experts based on the reply from the Government of Georgia, fixes the strict recommendation to change the anti-discrimination legislation and to give relevant definitions for the direct and indirect discrimination.[69] In 2012 report (session 101) the committee of experts once again requests to initiate the special definitions of direct and indirect discriminations in the legislation.[70]

2.4 Justified Treatment - Differentiation

The necessary element of labour discrimination is differentiation, which considers the justified unequal treatment.[71] Without differentiation the existence of discrimination prohibition institute would be Utopian and its regulation would lose the meaning. Discrimination and differentiation caused by the objective circumstances should be distinguished from each other. Differentiated treatment should not be the sole objective. There is discrimination in place if the reason for discrimination cannot be explained, lacks prudent basis. Discrimination is only intended (subjective), unjustified differentiation. Therefore, the right for equality prohibits not differentiated treatment in general, but the intended and unjustified differentiation.[72]

There are jobs in society, the essence and specifications of which require employment of persons for their specific sign –characteristic or characteristic of physical person is essentially related to the nature of works to be performed.[73]This type of work places in unequal conditions the groups of people who do not have characteristics set by the employer; however such requirement from the employer is justified with the consideration of objective, prudent and legitimate interests. According to the article 2, paragraph 5 of Georgian Labour Law "The need to

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[68] The direct or indirect oppression will be considered as discrimination, if such action was aimed at or caused creation of threatening, hostile, humiliating, dignity violating or offensive environment, or creation of such conditions for the person, which directly or indirectly worsen his/her conditions compared with other persons in similar conditions.

[69] Report of the Committee of Experts on the Application of Conventions and Recommendations of International Labour Organization, 417-418 <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf> (last seen on 12.07.2012).

[70] Report of the Committee of Experts on the Application of Conventions and Recommendations of International Labour Organization, 511<http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---elconf/ documents/ meetingdocument/wcms_174843.pdf> (seen on 12.07.2012).

[71] *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R*. (General Editor), 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 453.

[72] Case No 1/1/493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www. constcourt.ge>.

[73] For example the gender of person at the jobs, such as actor, fashion model, dancer; person's race for the jobs such as waitress at Chinese restaurant, political views for employees of political organization, religious confession for employees of religious organization and etc., see: *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R.* (General Editor), 2nd Edition, Deventer/Antwerp/London/Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 462-464.

differentiate persons will not be considered as discrimination if it is a result of work nature, specification or conditions for work implementation, contributes to the achievement of legitimate aim and is the proportionate and necessary mean ". The similar norm is envisaged under the Law on Gender Equality, according to which: "In the process of hiring and fulfilment of job tasks it is allowed to place persons in unequal conditions based on their gender or/and giving them preference, proceeding from the nature and specification of the work or conditions for its implementation and this is the proportionate and necessary mean for its achievement."

European Union directives do not consider the possibility to justify direct discrimination in contrary to the indirect discrimination.[74] Hence according to the European Union labour law the justification of direct discrimination is not allowed.[75] In case of direct discrimination the defendant is not authorised to prove that his/her actions are justified proceeding from the work interests, as it is allowed for the indirect discrimination cases.[76] Georgian Labour Code does not consider similar limitation and article 2, paragraph V covers direct as well as indirect discrimination.

3. Categorization of Grounds of Employment Discrimination

For the qualification of employer's action as discrimination it is necessary that the basis for the discriminative treatment is the ground prohibited by the legislation.[77] Therefore prohibition of discrimination grounds and its regulation by the legislation is very important. According to the article 2, paragraph III of Georgian Labour Code : "Any form of discrimination in employment relationships are prohibited based on race, colour, language, ethnic or social belonging, nationality, origin, economic condition or status, place of residence, age, gender, sexual orientation, disability, religion or membership in associations, marital status, political and other views". For better understanding of the above grounds the method for categorization of grounds of discrimination are offered according to the principles provided below.[78]

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74 *Kenner J.*, The European Union, in: International Labour and Employment Laws, *Keller W.*, *Darby T.* (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 1-238.

75 *Bamforth N.*, Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap, "The Cambridge Yearbook of European Legal Studies", Vol. 9, 2007, 11; *Blanpain R.*, Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, 102.

76 *Hepple B.*, *Fredman S.*, *Truter G.*, Great Britain, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.6, The Hague/London/Boston, "Kluwer Law International", 2002, 187.

77 *Blanpain R.*, Equality and Prohibition of Discrimination in Employment, Comparative Labour Law and Industrial Relations, *Blanpain R.* (General Editor), 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 453.

78 Similar method is used by professor Roger Blenpain, Ib.

3.1 Gender, Age

Despite the numerous legislative prohibitions at international and national levels, the problem of gender discrimination in labour law is still relevant. Gender discrimination, in majority cases, implies women discrimination, which is in most cases expressed in lower remuneration for women.[79] The jobs typically performed by women are less well paid than jobs typically performed by men.[80] Moreover, following the principle of equal remuneration for the works of the equal value by the men and women is still problematic. In this case the objective of anti discrimination is that difference in remuneration should not be caused by the gender of employee. In the process of definition of work of equal value the knowledge and qualification of the employee which are deemed necessary for the correct performance of the work should be considered. Moreover the quality, volume and quantity of carried out work shall be estimated.[81] Gender discrimination in employment relationships can be also implemented via setting less favorable (different) working conditions for the women compared with the men.

Gender discrimination is subject of special protection by the Law on Gender Equality, article 6. According to the definition provided in the law: "In employment relationships discrimination, pursuit or/and forcing of the person which is aimed at or causes violation of person's dignity or creation of humiliating, hostile or offensive environment for the person is prohibited." The law also provides the novelties for the Georgian legislative area such as regulation of equal opportunities[82] and equal treatment[83]. The law considers definition of extraordinary measure.[84]

In the process of discussion on gender discrimination issues the discrimination on the basis of pregnancy has to be stressed. The decisions of the European Court of Justice determine that discrimination against the pregnant woman is direct discrimination on grounds of sex.[85] According to

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79 Similar method is used by professor Roger Blenpain,., 460.

80 *Fahlbeck R*., *Mulder B.J*., Sweden, in: International Labour and Employment Laws, *Keller W*., *Darby T*. (Editors-in-Chief), 3rd Edition, Volume IIA (Covering through 2007), Additional Economies (EU and Other European), Chicago, "BNA Books", 2008, 19-89.

81 *Jacobsen P*., Updated by *Hasselbalch O*., Denmark, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R*. (Editor in Chief), Vol.5, The Hague/London/Boston, "Kluwer Law International", 1998, 166.

82 *Equal Opportunities.* According to Article 3 of the Law on Gender Equality the equal opportunities are defined as the system of means and conditions for achievement of equality of rights and liberties for women and men.

83 *Equal Treatment.* According to Article 3 of the Law on Gender equality the equal treatment is defined as acknowledgement of equality of rights and opportunities for persons of both gender in the process of determining the education, labour and social-political conditions in the areas of family relationships and other areas of social-political life; non-acceptance of discrimination based on gender sign.

84 The measures which aim to correct results of discrimination and directed towards the circle of persons, requiring special protection due to gender characteristics. The example of special measures envisaged by the legislation is additional vacation for women due to pregnancy, child birth and child care, prohibition of night work for women who recently have birth to child or are breast feeding the child, right for additional one hour break for mother breast feeding their children.

85 *Kenner J*., The European Union, in: International Labour and Employment Laws, *Keller W*., *Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 1-192.

the court statement, only women can be refused employment (or be dismissed from the work) because of pregnancy, such situation is considered as case of sex discrimination.[86] In USA, according to 1964 year act on civil rights[87] "because of sex" to include on the basis of pregnancy, childbirth or related medical condition.[88] It has to be also mentioned, that according to the practice of the European Court of Justice, discrimination against a transsexual is considered as sex discrimination.[89]

In terms of age discrimination the objective of legislation (as it is indicated in European Union directive) shall be to reduce the number of older workers leaving the workplace and to encourage the employment of the older unemployed workers.[90] The US labour law serves the same idea; the Age Discrimination in Employment Act of 1967 prohibits any form of employment discrimination based on age against persons 40 years or older.[91] Thus according to the US legislation only the age group over 40 is protected from discrimination.[92] In terms of discussed grounds the Georgian court practice includes only one case, when the claimant was of the view that dismissal from the job due to the pension age was the discriminative treatment.[93]

3.2 Race, Colour, Ethnicity, Nationality, Origin, Language

A common feature of grounds reviewed in this chapter is the fact that they are generally linked to the existence of different ethnic groups. The "ethnic origin" implies a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common past.[94] Georgian Labour Code prohibits discrimination on the ground of ethnicity as well as any specific sign characteristic to the ethnic group (race or colour).

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86 *Jansson O*., Labor and Employment Law in Sweden, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 315.

87 *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R*. (General Editor), 2nd Revised Edition, Deventer/ Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 460.

88 1978 year edition of amendments, Ib.

89 *Kenner J*., The European Union, in: International Labour and Employment Laws, *Keller W*., *Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009,1-218; *Hepple B*., *Fredman S*., *Truter G*., Great Britain, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R*. (Editor in Chief), Vol.6, The Hague/London/Boston, "Kluwer Law International", 2002, 186.

90 *McGlynn C*., EC Legislation Prohibiting Age Discrimination: "Towards a Europe for All Ages?", "The Cambridge Yearbook of European Legal Studies", Vol. 3, 2001, 295.

91 *Goldmen A*., United States of America, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.13, The Hague/ London/Boston, "Kluwer Law International", 1996, 191.

92 *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R*. (General Editor), 2nd Revised Edition, Deventer/Antwerp/London, Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 461.

93 Case No AS -24-24-2012, Constitutional Court of Georgia, 2012, case is available on an official web-page of the Constitutional Court of Georgia: <http://www.constcourt.ge>.

94 *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, General Editor *Blanpain R*., 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 456.

Essentially race, skin, ethnicity can be inter-related. Such connection makes it more difficult to identify which of these grounds specifically were used as a basis of discrimination. On the one hand, we have to consider the employer's action to determine the ground of expressed discrimination and on the other hand, it is decisive to know whether the discriminated subject belongs to the certain group of people (for example race or ethnicity).

There is a high risk of inter-mixing between the nationality and origin. According to the general definition the nationality may imply country of birth, ancestry, membership of national group, as well as membership of national group which never had the independent political existence.[95]

For the grounds discussed in the present sub-chapter there is only one case in Georgian court practice, when according to the employee's position the basis for discrimination against him/her was the megrelian origin. On the above case the court concluded that dismissal of claimant from the job was not based on discriminative ground including ethnicity as envisage by article 2 of Georgian Labour Code.[96]

3.3 Political and other Views, Membership of Religious or other Associations

Discrimination conducted under these grounds causes violation of equality as well as specific right or liberty of individual.[97] Prohibited ground – religion covers human beings beliefs (confession), agnosticism, atheism, membership of sect.[9899] In USA according the Civil Rights Act of 1964[100] the term religion to include all aspects of religious observance and practice as well as belief.[101] In Great Britain (as well as in Belgian legislation)[102] as a prohibited ground it is distinguished philosophic belief from religion and religious belief.[103] As for the different position, the French legislation distinguishes moral opinion of the person from the indicated prohibited grounds.[104]

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95 *Mickey P*., United States, in: International Labour and Employment Laws, *Keller W., Darby T*. (Editors-in-Chief), 3rd Edition, Volume IB (Covering through 2007), Major Economies (NAFTA) and International Issues, Chicago, "BNA Books", 2009, 33g-28.

96 Case No AS – 1803 – 1779 – 2011, Constitutional Court of Georgia 2012, available (in Georgian) at: <http://www.constcourt.ge>.

97 For example, discrimination carried out on the basis of discrimination sign – membership of trade union also covers the limitation of right to become member of the trade union. Discrimination with religion sign means limitation of religion liberty for the discriminated person.

98 *Sural N.,* Labor Law in the Eastern Mediterranean: Employment Discrimination: Anti-Discrimination Rules and Policies in Turkey, "Comparative Labor Law & Policy Journal", 2009, 2.

99 *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R*. (General Editor), 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 461.

100 Edition following the changes implemented in year 1972, Ib.

101 Ib.

102 *Beverange C*., Belgium, in: International Labour and Employment Laws, *Keller W., Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 3-98.

103 *Healy K*., Labor and Employment Law in United Kingdom, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 358.

104 *Swartz S*., Laborand Employment Law in France, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 99.

Discrimination on the ground of belonging to the association implies discrimination for the membership of a association or disassociation from such association (non-membership of association). First of all this ground considers membership of trade union, although it also covers membership of any other type of association. Georgian court practice is characterized with many cases devoted to the discrimination based on trade union membership.[105]Moreover, there are several examples, where the employee was of the view that discrimination against him/her was conducted due to his/her political opinions[106]or other (different) opinion.[107]

3.4 Social Belonging, Property and Title Status, Place of Residence, Marital Status, Sexual Orientation

Prohibited ground – marital status – implies the marital status of employee – being married, divorced, not married, widowed. It has to be mentioned that according to the definition from Canadian province Ontario the marital status also covers living with a person of the opposite sex in conjugal relationship or outside marriage.[108] According to the equal treatment act of Hungary the discrimination grounds cover marital status as well as discrimination against parenthood.[109]

Introduction of sexual orientation as discriminative ground in employment relationships is related to the Treaty of Amsterdam, effective from 1 May 1999. Since then additional two directives were adopted by the European Union, which caused indication of sexual orientation among the prohibited grounds in European Union member states.[110] In Hungary and Sweden in addition to the sexual orientation the discrimination based on sexual (gender) identity is also prohibited.[111]

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105 Case No AS-680-1010-07, Supreme Court of Georgia, 2008; case No AS-695-1025-07, Supreme Court of Georgia, 2008; case No AS-795-1010-08, Supreme Court of Georgia, 2008; case No AS-358-677-09, Supreme Court of Georgia, 2009; case No AS -343-327-2011, Supreme Court of Georgia, 2011; decisions are published and available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

106 Case 2/1107-08, Chamber of Civil Cases, Tbilisi Town Court, 2008, available only in the archive of the court. Case No AS-519-493-2011, Supreme Court of Georgia, 2011. The same dispute, repeated review at Supreme Court of Georgia - case No AS – 1803-1779-2011, Supreme Court of Georgia, 2012; decisions are published and available at the official web-page of the Supreme Court of Georgia at <http://www.supremecourt.ge/>.

107 Case No AS-549-517-2010, Supreme Court of Georgia, 2010, case is available (in Georgian) at: <http:/ /www.constcourt.ge>.

108 *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R*. (General Editor), 2nd Revised Edition, Deventer/Antwerp/ London/Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 460.

109 *Riesz T.,* Labor and Employment Law in Hungary, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 148.

110 *Kilpatrick C*., Emancipation through Law or the Emasculation of Law? The Nation-State, the EU and Gender Equality at Work, in: Labour Law in an Era of Globalization, *Conaghan J.*, *Fischl R.*, *Klare K.* (Editors), New York, "Oxford University Press", 2002, 494.

111 *Riesz T.,*Labor and Employment Law in Hungary, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America,

3.5 Disability

According to the definition provided in the Law on Social Protection of Disabled Persons,[112] "the person is disabled if due to disease, trauma, mental or physical defect his/her organism's life functions are out of order as a result of disorders in health of various degrees, which causes full or partial loss of capacity of professional work or/and causes difficulties in day-to-day living." The Americans with Disabilities Act of 1990 defines disability as including mental or physical impairments that substantially limit one or more life activities or are regarded as having such an affect.[113]

In the process of trial on the discrimination under the mentioned ground it is important to determine whether it is possible to employ the disabled person for the specific job. Labour law protects the right of disabled workers to have access to employment that is reasonably within the scope of their abilities.[114] According to the law of "Social Protection of Disabled Persons" the work conditions set in work agreements, including remuneration, regime for working hours and breaks, length of annual and additional vacations shall not worsen the condition and rights of disabled person compared with other employees. Moreover, under the same law "It is not allowed to refuse the disabled person for the conclusion of work agreement or promotion, dismissal under the initiative of administration or transfer to other job without consent from the disabled person, except for the cases when according to the medical-social expertise conclusion implementation of professional duties are harmful to the health or the health and work security of other is threatened."

In terms of scope of application of definition of disabled, the following question is relevant – whether it covers discrimination on the basis of health condition (disease) or/and physical defect. The European Court of Justice provides important concept related to this issue. Topic of one of the court trials was whether the definition of disability under the European Union directive covers the sickness of the person;[115] the court decided that definition and idea of disability must be

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"American Bar Association", 2008, 148; *Fahlbeck R.*, *Mulder B.J.*, Sweden, in: International Labour and Employment Laws, *Keller W.*, *Darby T.* (Editors-in-Chief), 3rd Edition, Volume IIA (Covering through 2007), Additional Economies (EU and Other European), Chicago, "BNA Books", 2008, 19-88.

112 The law has been adopted by the Parliament of Georgia on 14 June 1995 year (Divisions of the Parliament of Georgia, 27-30, 1994-1995, Article 633); initially the law was titled as "on Social Protection for Invalids". On 20 June 2001 year the amendments and additions were made to the law, according to which the word "invalid" in the title and the law text was replaced with the word "disabled person".

113 *Goldmen A.*, United States of America, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.13, The Hague/London/Boston, "Kluwer Law International", 1996, 190.

114 Ib.

115 Case 13/05, *Chacon Navas v. Eurest Colectividades SA* [2006] ECR I-6467. In this case the claimant was dismissed solely on account of the fact that she was absent from work because of sickness. While sickness itself was no a prohibited ground for dismissal under Spanish law, the national court recognized a connection between sickness and disability by pointing to the definition, "disability" in a generic term that includes defects, limitation of activity and restriction of participation in social life, and sickness is recognized as capable of causing defects which disable individuals. Finally the national court approached the European Court of Justice with the question to clarify whether a worker who is dismissed by her employer solely

understood as a referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. According to the court by using the term "disability" the legislature deliberately chose a term that differed from "sickness" and, therefore, the two concepts could not be given the same meaning. Accordingly, in line with court position the illness was not qualified as disability protected under the directive.[116]

Georgian Labour Code prohibits discrimination based on the current (active) disability. In the Labour Code of Slovakia this ground includes discrimination based on previous disability or discrimination against a person who, because of external symptoms, may appear to have a disability.[117] The same can be said about the Americans with Disabilities Act of 1990, which applies to the persons with a history of disability too.[118]

In addition to the inclusion in discrimination grounds, the disabled persons are subject to positive discrimination in labour law.[119] For example, in France,[120] as well as in some other countries, legislation imposes a quota of 3 per cent of the workforce shall be disabled compulsory hired in the enterprises of over 10 employees.[121]

3.6 Grounds that are not stipulated by the Georgian Labour Code

The list provided in article 2, paragraph III does not include discrimination ground characterized for the European Countries[122] - health condition. As discussed in paragraph 3.5 of

because she was sick comes within the protective scope of the directive. *Kenner J*., The European Union, in: International Labour and Employment Laws, *Keller W*., *Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 1-245-1-246.

116 Ib.

117 *Rybár T*., *Hazucha B*., Labor and Employment Law in Slovakia, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 278.

118 *Goldmen A*., United States of America, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.13, The Hague/London/Boston, "Kluwer Law International", 1996, 190.

119 This term in USA is known as "affirmative action", and Britain as –"positive discrimination".

120 *Kereselidze D., Adeishvili L.,* Draft Labour Code of Georgia and Some of the Main Principles of Labour Law of Continental European Countries, "Georgian Law Review", No 6/1, 2003, 12.

121 *Blanpain R*., Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations, *Blanpain R*. (General Editor), 2nd Revised Edition, Deventer/Antwerp/ London/Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 461.

122 *Beverange C*., Belgium, in: International Labour and Employment Laws, *Keller W., Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 17; *Örndahl J*., Labor and Employment Law in Finland, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 76; *Swartz S.*, Laborand Employment Law in France, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 99. *Riesz T.,* Labor and Employment Law in Hungary, in: International Labor and

present article, disability term does not cover illness or health condition of the person. According to the definition of the European Court of Justice, general principle of non-discrimination could not be extended by analogy beyond the other grounds of discrimination.[123] It has to be mentioned that Belgian legislation mentions future health condition among the prohibited grounds.[124]

Physical appearance, that may also include physical defect shall be considered as one of the discrimination grounds missed out in the Labour Code.[125] Discriminative action of employer due to the physical appearance, including physical defect of the person cannot be always qualified as discrimination of person on the ground of disability. In addition to the physical defect the Belgian legislation prohibits discrimination of employee for the physical or genetic traits.[126] The Portuguese legislation also contains the sign of genetic heritage.[127] It has to be mentioned that in some USA states the weight of the physical person is considered as sign separate from the physical defect.[128]

The list of discrimination grounds provided in article 2, paragraph III is comprehensive. Thus the Labour Code limits the circle of grounds which are subject to principle of prohibition of unequal treatment. In regard to the above issue the discussion provided by the Constitutional Court of Georgia on the comprehensive interpretation of article 14 (protected area) of the Constitution of Georgia is interesting; according to the position of Constitutional Court: "We shall proceed from the essence of equality against the law". The constitutional court of Georgia interprets that the list of grounds provided in article 14 of the Constitution of Georgia, "At first glance, in terms of grammar, is comprehensive; however the objective of the norm is much wider than prohibition of discrimination according to the provided limited list". According to the Constitutional Court, "Only the narrow grammatical definition would exhaust the article 14 of the

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Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T.* (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 148.

123 *Kenner J.*, The European Union, in: International Labour and Employment Laws, *Keller W.*, *Darby T.* (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 1-245.

124 *Beverange C.*, Belgium, in: International Labour and Employment Laws, *Keller W., Darby T.* (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 3-98.

125 For example compare with the French legislation; *Swartz S.*, Laborand Employment Law in France, International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T.* (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 99.

126 *Beverange C.*, Belgium, in: International Labour and Employment Laws, Editors-in-Chief *Keller W., Darby T.*, Third Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 3-98.

127 *Sá Esteves C.*, *Valente M.*, Labor and Employment Law in Portugal, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T.* (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 262.

128 *Kristen E.*, Addressing the Problem of Weight Discrimination in Employment, "California Law Review", Vol. 90:57, 2002.

Constitution of Georgia and would jeopardize its importance in constitutional-legal area".[129] "Considering the list provided in article 14 of the Constitution of Georgia as complete would itself cause confirmation of the fact by the court, that differentiation with any other ground is not discriminative, as it is not protected by the Constitution. It is natural that such approach would not be correct, as non-mentioning of each sign in the article 14 of the constitution does not exclude the unjustified nature of differentiation".[130] The interpretation provided by the Constitutional Court of Georgia cannot be considered in relation to the article 2, paragraph III of the Labour Code due to the evaluation of article 14 of the Constitution used by the Constitutional Court in constitutional-legal area. For the complete realization of any right and effective defense in the court the definition of contents and validity scale of the norm has the substantial importance.[131] In order to have adequate settlement of dispute at the court on the discriminative treatment from the employer, it is necessary to ensure the correct legal evaluation, considering relevance of determined legal facts with the composition/contents of legal norm.[132] When the legislation prohibits a specific ground, the court does not have possibility to match the legal arguments provided by the claimant and actual circumstances with the composition and contents of the article 2, paragraph III of Labour Code.[133] Thus victims of discrimination under the health condition or/and physical appearance (physical defect) grounds are limited to indicate the discrimination ground prohibited by the legislation as the legal basis of claim. Without such basis it is impossible to restore the violated right.[134] For the eradication of above gap, it is necessary, at least, to include together with the specific list of discrimination grounds the provision "and for other grounds".

4 Scope of Application of Prohibition of Employment Discrimination

4.1 Pre-contractual Relations

According to first sentence, article 2, paragraph III of Labour Code of Georgia "Any type of discrimination is prohibited in employment relationships". Proceeding from the direct formulation of the norm the prohibition covers only employment relationships; such relationships are

[129] Case No 2/1-392, Constitutional Court of Georgia, 2008, available (in Georgian) at: <http://www.constcourt.ge>.
[130] Case No 1/1-493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www.constcourt.ge>.
[131] Case No 1/1-477, Constitutional Court of Georgia, 2011, available (in Georgian) at: <http://www.constcourt.ge>.
[132] Case No-AS -700-920-08, Supreme Court of Georgia, 2009 available (in Georgian) at: <http://www.supremecourt.ge/>.
[133] There were cases in British court practice, when the subject who suffered discrimination with the sexual orientation sign; court refused to satisfy the claim based on the fact that the sexual orientation was not provided in the list of prohibited signs. The court may agree with the discriminative treatment of the person, however due to the fact that the specific sign is not covered (prohibited) by the law, satisfaction of the claim becomes impossible. *Smith v. Gardner Merchant Ltd.,* 1998, *Grant v. South-West Trains Ltd.*, 1998 (see *Bell A.*, Employment Law, Nutcases, 3rd Edition, London, "Thomson, Sweets & Maxwell", 2007, 51-52).
[134] *Bernnan F.*, The Race Directive Recycling Racial Inequality, "The Cambridge Yearbook of European Legal Studies", Vol. 5, 2004, 321.

generated through the conclusion of labour contracts[135]and/or actually commencing the work.[136] Accordingly, there is a risk that prohibition of discrimination does not apply pre-contractual relations. The significance of the problem is indicated in the International Labour Organization 2009 Report of the Committee of Experts on the Application of Conventions and Recommendations (session 98). Committee of experts indicating on article 5, paragraph VII of Labour Code[137] that discrimination prohibiting norm applying only to contractual relationships, it may effectively bar candidates from successfully bringing discrimination cases.[138] In 2010 year report (session 99) the committee of experts strongly recommends that the existing non-discrimination provisions of the Labour Code be amended to clarify that the prohibition of discrimination also applies to recruitment and selection.[139] According to 2012 year report (session 101) it is clear that Government of Georgia does not see the need for changes, as valid regulations of Labour Code cover the process of candidate hiring and selection. In 2012 year report committee of experts repeated initial recommendation on initiation of amendments to the legislation.[140]

Narrow interpretation of article 2, paragraph III of Labour Code actually gives the possibility to make such conclusion. However the issue cannot be evaluated in isolation, under validity of only one norm. It is acknowledged that labour law and standards and guarantees determined by the law cover the employee as well as candidate.[141] International Labour Organization's conventions prohibiting discrimination admit the principle of unlimited effectiveness of the rule for equal treatment that cover all human beings and all sectors of activity, public service or private employment, self-employees, independent workers as well as salaried employees.[142] The European Court of Justice established that work seekers are entitled to equal treatment as regards access to employment.[143] Seeking for job is

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135 According to the article 2, paragraph II of the Labour Code "the labour relationships are generated based on the agreement which is achieved as a result of free expression of will based on the equality of the parties."

136 According to the article 7 of the Labour Code "Labour relationships are generated at the moment of actual commencing of the work implementation by the employee, of not otherwise considered under the labour agreement."

137 According to this norm employer is not liable to justify his/her decision to refuse employment.

138 Report of the Committee of Experts on the Application of Conventions and Recommendations <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_103484.pdf>, 378-379 (last seen on 12.07.2012).

139 Report of the Committee of Experts on the Application of Conventions and Recommendations <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf>, 417-418 (last seen on12.07.2012).

140 Report of the Committee of Experts on the Application of Conventions and Recommendations <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---elconf/documents/meetingdocument/wcms_174843.pdf>, 511 (last seen on12.07.2012).

141 *Klare K.,* The Horizons of Transformative Labour and Employment Law, in: Labour Law in an Era of Globalization, *Conaghan J.*, *Fischl R.*, *Klare K.* (Editors), New York "Oxford University Press", 2002, 10.

142 *Valticos N.*, *Von Potobsky G.*, International Labour Law, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.3, Deventer/Boston, "Kluwer Law and Taxation Publishers", 1994, 123.

143 *Dougan M.*, Free Movement: The Workseekers as Citizen, "The Cambridge Yearbook of European Legal Studies", Vol. 4, 2002, 94.

enough to become a worker for the purpose of equal treatment protection.[144] Thus, it is evident that discrimination prohibition provided in article 2, paragraph III covers pre-contractual relationships. In legislative terms, some solution for the mentioned problem is offered in article 1, paragraph I – "This code regulates labour and associated relationships". "Associated relationships" consider pre-contractual relationships. Therefore general provision on the areas of effectiveness of Labour Code is sufficient basis for apllying non-discrimination principle over the pre-contractual relationships.[145]

4.2 Process of Work Performance

The scope of application of prohibition of employment discrimination is utilization of rights determined by the legislation by the employee in employment relationships.[146] Discrimination regulatory norms are provided in the Labour Code in part I "General provisions" and chapter I "Introductory provisions". The systemic place of anti discrimination provisions norms in the Labour Code ensures its application to all rights, liabilities or utilization of provisions by the subjects in employment relationships.

The regulation of non-discrimination principle covers the following areas: definition of remuneration for the employee,[147] definition of work conditions (including work and break times, conditions for allocation of paid vacations),[148] issuing instructions to the employees by the employer and delegation of work assignments,[149] promotion of employee,[150] transfer to other

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144 *Kraamwinkel M.,* Imagined European Community: Are Housewives European Citizens?, in: Labour Law in an Era of Globalization, *Conaghan J.*, *Fischl R.*, *Klare K.* (Editors), New York, "Oxford University Press", 2002, 334.

145 The same problem is identified in the Law on Gender Equality; the law with the consideration of definition for the discrimination prohibition its spreading is somehow limited over the pre-agreement relationships. However number of norms in the same law excludes at certain extent possibility of such conclusion. Article 6, paragraph II of the law acknowledges that "the state supports equal availability of the employment for the representatives of both gender." Moreover, according to the article 4, paragraph II.Z, for the protection of gender equality, the free choice of profession or type of work is ensured without discrimination.

146 *Blanpain R.*, Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, 103.

147 *Sommer U.*, Labor and Employment Law in Switzerland, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T.* (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 339; *Kenner J.*, The European Union, in: International Labour and Employment Laws, *Keller W.*, *Darby T.* (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 1-241.

148 *Örndahl J.*, Labor and Employment Law in Finland, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T.* (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 76*; Blanpain R.*, Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, 102-103*; Sommer U.*, Labor and Employment Law in Switzerland, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T.* (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 339.

149 *Berenstein A.*, *Mahon P.*, Switzerland, in: International Encyclopedia for Labour Law and Industrial Relations, *Blanpain R.* (Editor in Chief), Vol.13, The Hague/London/Boston, "Kluwer Law International", 2001, 143.

job,[151] training-re-qualification of employed,[152] establishment of trade unions by the employed and membership[153] and etc.

Georgian court practice is diverse in the direction of discrimination treatment. There was case, when the employee was relating the existence of discrimination to the lower salary compared with other employees.[154] One of the employees was proving the unequal treatment by the fact that the employer was paying bonus to other employees for overtime, but not to him/her.[155] On the same case claimant was qualifying the transfer to lower position as discrimination.[156] For one of the cases, in line with the view of the employee, the discrimination implemented by the employer was expressed in giving him/her 24-day vacation unlike the other employee.[157] In case related to the compensation of the leave the employee stated that the unequal treatment towards him, unlike the treatment of other persons, was expressed in non-payment of

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150 *Sommer U*., Labor and Employment Law in Switzerland, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 339*; Kenner J*., The European Union, in: International Labour and Employment Laws, *Keller W*., *Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 1-241.

151 *Örndahl J*., Labor and Employment Law in Finland, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 76.

152 *Sommer U*., Labor and Employment Law in Switzerland, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 339; *Örndahl J*., Labor and Employment Law in Finland, in: International Labor and Employment Law, *Berkowitz P., Reitz Etgen A., Muller-Bonanni T*. (Editors), 2nd Edition, Volume I (Europe), United States of America, "American Bar Association", 2008, 76.

153 *Kenner J*., The European Union, in: International Labour and Employment Laws, *Keller W*., *Darby T*. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 1-241.

154 Case No-AS -1112-1376-09, Supreme Court of Georgia, 2010. In the above dispute cassator was relating the existence of discrimination with the fact that his/her salary was lower compared with other employees. On the above the court defined that agreement on salary/wage based on the labour agreement does not mean that there is discrimination in place. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

155 Case No-AS -519-493-2011, Supreme Court of Georgia, 2011. According to the statement of the employee the other employees were given bonus for overtime; however he/she was not given such bonus. Despite the fact that the claimant was working overtime from 9 o'clock in the morning until 9-10 o'clock in the evening including weekends, he was not paid any overtime bonus. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

156 Case No-AS -1803-1779-2011, Supreme Court of Georgia, 2012. According to the claimant's view his/her discriminative treatment was expressed in her/his transfer to the lower position of sector assistant. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www. supremecourt.ge/>.

157 Case No-AS -832-1047-08, Supreme Court of Georgia, 2009. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>. The court considered it confirmed that the claimant was granted the vacation for the period of 24 working days, which is in accordance with the requirements envisaged by the article 21 of Labour Code of Georgia. Thus the court did not consider the actions of the employer as discriminative considered under the Labour Code. Case is available at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

compensation for unused leave.[158] There was a case, when claimant thought that he/she was a victim of discrimination, as out of 134 employees employer did not continue 1-month labour contract (renewable every month) only with him/her.[159] In the case related to the contract term employee qualified as unequal treatment the fact that employer concluded 5 year contract with the part of employees, and 1 year contract – with the remaining employees.[160] During one of the court disputes, claimant considered to be in unequal condition as compared with other employees as only his employment relationship was suspended.[161] Quite interesting case was discussed at the court trial; according to the claimant the discriminative action from the employer was expressed in using the Labour Code by the employer in the process of contract termination for certain cases, and in similar conditions employer in relationships with the other employees used the Law on Public Service.[162]

4.3 Dismissal from the Work

The principle of non-discrimination applies to the termination of employment relationships with the employer's initiative.[163] With the consideration of basis of termination envisaged under the Labour Code of Georgia the termination of employment relationships under the discriminative ground can be identified in the moment of agreement expiration as well as in the process of contract termination.

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158 Decision of the Supreme Court of Georgia dated 24 May 2010 year, on the case No-AS -326-304-2010. The claimant was declaring that the discrimination has taken place towards him/her as the employer reimbursed the disputable amount (compensation for un-used vacation) to other persons. The decision is published and available (in Georgian) at the official page of the Supreme Court of Georgia.

159 Case No 2/1107-08, Board for Civil Cases, Tbilisi Town Court, 2008. Decision is available only at the court archive.

160 Case No-AS -138-113-2010, Supreme Court of Georgia, 2010. In the discussed case the Supreme Court deemed it indisputably confirmed that the labour agreement between the parties was concluded with indefinite term. Therefore, the fact of discrimination was not confirmed. Case is available at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

161 Case No-AS -401-374-2010, Supreme Court of Georgia, 2010. The court decided that termination of labour agreements by the enterprise with the employees was caused by the difficult financial situation. The labour agreements were terminated with other employees too. Therefore the statement if the claimant that he/she was under the unequal conditions compared with other employees and there was discrimination in place was not confirmed by the case materials. Case is available at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

162 Case No-AS -702-657-2010, Supreme Court of Georgia, 2011. The claimant stated that he/she was in identical situation with the other employed person, towards who (the other employee) the different decision was made based on law on "Public services". According to the claimant the employer made different decision about the persons in the same situations and in case of claimant the employer used the norms envisaged under the Labour Code for the agreement termination; the above was the discrimination. Case is available at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

163 *Kenner J.*, The European Union, International Labour and Employment Laws, *Keller W.*, *Darby T.* (Editors-in-Chief), Third Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", IL, 2009, 1-241.

4.3.1 Termination of Employment Relationships based on the Expiration of Agreement Term

Application of prohibition of employment discrimination for the cases of termination of employment relationships due to the expiration of agreement term is a problematic issue. With the consideration of general principle of freedom of contract (same as freedom of labour) it is difficult to separate in the employer's decision discriminative treatment and his/her free will to refuse to conclude new agreement (i.e. continuation of agreement). Principle of will autonomy creates certain limiting barrier for the application of non-discrimination principle to the termination of employment relationships on the basis of expiration of agreement term. In this regard article 5, paragraph VIII of Labour Code complicates the issue, which (except for the pre-contract relationships) is also used in cases when the employer does not continue the employment agreement with ex-employee. Accordingly the employer is not liable to justify the decision on denial to continue the agreement term, thus effectiveness of discrimination prohibition for such cases practically loses the meaning.[164]

The same position is shared by the Georgian court practice for the cases when employee considers the termination of employment relationships on the basis of expiration of contract term as discrimination. With consideration of article 2, paragraph II and article 37, paragraph I.b the court is of the view that in case of expiration of employment contract term the continuation of labour relationships depends on the will of parties and the employer is always authorized not to continue employment relationship with the employee.[165] Hence, according to the court expiration of work implementation term and therefore dismissal from the job does not mean that the discrimination takes place.[166]

4.3.2 Termination of Employment Relationships Based on the Contract Termination

Application of non-discrimination principle over the termination of employment relationships based on the contract termination is undisputable. The Supreme Court of Georgia defines that expression of will of the employer on the contract termination should not violate person's main rights and general principles of law. Any civil right is limited with the lawfulness. In case of termination of employment agreement under the employer's initiative the lawfulness of right utilization considers the fact that the expression of employer's will should not violate the

[164] In this case the decisive factor is the issue of burden of proof in disputes on discrimination. If in absence of discriminative treatment the burden of proof is on the side of the employer, it is possible to apply non-discrimination principle over the cases of employment relationship termination based on the expiration of agreement term.

[165] Case No 2/1107-08, Board for Civil Cases, Tbilisi Town Court, 2008. Decision is available (in Georgian) only at the court archive.

[166] Case No-AS -250-235-2010, Supreme Court of Georgia, 2010. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

main human rights and liberties guaranteed by the Constitution of Georgia, including non-discrimination principle envisaged by the Labour Code of Georgia.[167]

The latest court practice in Georgia[168] is overloaded with the cases, where the dismissed employee (claimant) is of the view that terminating the employment agreement in line with the article 37, paragraph I.d and article 38, paragraph III of the Georgian Labour Code without indication of any reason and without issuing any warning is discrimination. For the disputes under this category, in the view of claimant the contract termination without any reason is the discriminative action. In this case "groundless" dismissal from the job without any motivation is perceived as violation of equality.[169] In response, the courts believe unjustified the view of the claimants that the termination of agreement without reasoning itself is the manifestation of discrimination.[170] For such claims of the employees the court has simple position, that the dismissed employees are not at unequal conditions compared with other employees, as the Labour Code of Georgia with its norms, envisaged in article 37 and 38, places all employees in equal conditions.[171]

For the above discussed cases it must be noted that the employee appeals to the discriminative treatment, however he/she does not indicate to the specific ground of discrimination.[172] Such position of the claimant is against the essence of discrimination, which considers violation of equality based on the characteristic ground of discrimination victim. In order to qualify the contract termination by the employer as a discrimination it is necessary that the employee presents the claim on the termination of employment agreement based on the specific ground. In such cases appealing to the termination of agreement without indication of reasons and warning cannot be considered as discriminative treatment. For the above cases the court correctly states that the discrimination is the legal evaluation of the fact for which the existence of relevant factual pre-conditions is required.[173]

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167 Case No-AS -343-327-2011, Supreme Court of Georgia, 2011. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

168 The court practice established following the enforcement of new Labour Code in 2006 is meant.

169 Case No-AS -265-250-10, Supreme Court of Georgia, 2010; case No- AS- 596-562-2011, Supreme Court of Georgia, 2011; case No – AS – 890-933-2011, Supreme Court of Georgia, 2011; case No – AS – 1265-1285-2011, Supreme Court of Georgia, 2011; case No – AS – 1597-1593-2011, Supreme Court of Georgia, 2012; case No – AS- 1605-1599-2011, Supreme Court of Georgia, 2012. Cases are available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

170 Case No-AS -265-250-10, Supreme Court of Georgia, 2010. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

171 Case No-AS -1177-1322-08, Supreme Court of Georgia, 2009. Case No – AS – 864-1150-09, Supreme Court of Georgia, 2010. Cases are available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

172 Case No-AS -115-109-10, Supreme Court of Georgia, 2010; case No – AS-510-479-2010, Supreme Court of Georgia, 2010; case No – AS – 1840-1813-2011, Supreme Court of Georgia, 2012; case No- AS – 271-262-2012, Supreme Court of Georgia, 2012; case No – AS – 339-324-2012, Supreme Court of Georgia, 2012. Cases are available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

173 Case No-AS – 864-1150-09, Supreme Court of Georgia, 2010. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

4. Conclusion

In Georgia the basis for the regulation on prohibition of employment discrimination is the Constitution of Georgia. In universal employment discrimination law data base the conventions of International Labour Organization and "European Social Charter" have important place. Employment discrimination is prohibited via special acts – Law on Gender Equality and Law of Trade Unions. Law on Social Protection of Disabled Persons also contains certain elements of prohibition of unequal treatment of disabled persons. The main legislative act regulating the employment discrimination in the country is Organic Law, Labour Code of Georgia. The Labour Code of Georgia ensures systemic as well as institutional regulation of labour discrimination. Labour Code considers contextual definition of discrimination and regulation of necessary component of the labour discrimination – justified treatment. The Labour Code of Georgia does not provide definition of indirect discrimination. The Labour Code contains list of discrimination grounds, containing all grounds, which are adequate for the Georgian labour market with the consideration of social and economic factors. However the list of grounds does not include the grounds - health condition and physical appearance (physical defect), which are widely used in Europe and is potentially significant ground for the Georgian labour market. Absence of above discussed grounds in the list of prohibited grounds makes it impossible to restore the rights violated due to the employment discrimination on the basis of health condition or physical appearance (physical defect). It has to be also considered that the list of discriminative grounds is comprehensive. Thus the Labour Code of Georgia limits (except for the listed discriminative signs) the protection of rights (at the court) of the victim of discrimination based on any other ground. Under the current circumstances it is expedient to add the provision "and for other grounds" to the list of specific grounds provided in the Labour Code of Georgia. In this case code will open the legal area of discrimination regulation and victim of the discrimination based on any other ground will be granted the opportunity to appeal the discriminative treatment.

The non-discrimination norms provided in the Georgian labour law cover the pre-contractual relationships. It is true that the literal interpretation of article 2, paragraph III of Labour Code of Georgia excludes possibility for such conclusion; however the article 1, paragraph I of the same Labour Code of Georgia (Code covering the labour and associated relationships), as well as general principle of employment discrimination law (unlimited application of discrimination principle over all human beings, including the job seekers) is the basis for eradication of such doubts. The prohibition of employment discrimination covers all stages of labour relationships, including the process of utilization of rights granted to the employee. According to the Georgian legislation the prohibition of discriminative treatment also covers the dismissal of employee from the work. Unlike the termination of labour relationships based on the contract termination, in cases of termination of labour relationships based on the expiration of agreement term, the principle of contractual freedom is the factor impeding the

effective, essential utilization of non-discrimination principle. At the moment of agreement expiration, it is difficult to draw a line between the discriminative action of the employer or expression of his free will in the negative decision of the employer to continue the agreement term or conclude new agreement.

The discussions provided in the present article confirm that the legislation regulating employment discrimination in Georgia is in place. The discriminated subjects (except for the persons discriminated for the health condition or physical appearance (physical defect) are equipped with the legislative tools to protect themselves from the illegal actions of the employer or to restore the violated rights. Moreover, it is obligatory for the employers to follow the principle of discrimination prohibition envisaged by the legislation. As a result, by the adoption of new Labour Code in 2006 the objective of the regulation of employment discrimination field in the country is partially achieved. For the further development it is necessary to harmonies the national legislation with the European Union labour anti-discriminative legislation. Moreover for the effectiveness of discriminative norms it is important that in the process of defending against the rights' violation the claimants (employees) understand well the essence of discrimination notion and use it relevantly. The court practice confirms that there are number of deficiencies in this direction. However, with the consideration of the fact that until 2006 there were no discrimination prohibition norms in the country's labour market, the active utilization of discrimination regulatory norms and their correct interpretation by the court is very important for the development of employment discrimination field in the country.

Guram Nachkebia*

The Problem of Objective Imputation in Criminal Law

1. Introduction

The article critically analyses the problem of so called "objective imputation" - its strong, weak, and controversial aspects, as well as idea of normative causality, which, in our view, with all due respect to German colleagues and their followers, represents overelaborated concept and underestimation of an idea of guilt, though the solution of the posed question requires further, more deep study.

2.Notion of Imputation

Let us start with the notion of "imputation". Prof. Gamkrelidze points out that nothing can be found in the Georgian legal literature concerning this notion. He points out that imputation is a process, "an action when the Court imputes somebody and renders him liable for his illegal action, i.e. a criminal falsehood".[1]

Therefore, the term imputation denotes making someone liable for an illegal act stipulated by Criminal Law and its results.

3. Liability as a Category of Social Philosophy

A liability can be guilty. Responsibility without guilt seems a contradictory statement, as we will see later. In fact, guilt is a form of connection of the positive and negative aspects of responsibility, when the subject acts on the one hand without responsibility, instead of acting with responsibility, i.e. in accordance with his personal appeal and purpose, and on the other hand- he establishes negative responsibility with his irresponsible action. Since "responsibility" is a category of social philosophy, a guilt, as a form of the connection of negative and positive aspects, as well as a category of social philosophy.[2] Unfortunately, as a rule, the idea of positive responsibility in legal studies is either rejected or ignored, while without understanding positive responsibility it is impossible to understand negative responsibility correctly. In particular,

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1 *Gamkrelidze O.*, The Problem of Imputation in Criminal Law and an Attempt to Prove the Normative Notion of Guilt, Problems of the Reform of Criminal Legislation and Modern Criminology, Tbilisi, 2006, 8.

2 *Nachkebia G.*, Guilt as a Category of Social Philosophy, Tbilisi, 2001.

positive responsibility is a responsible attitude of a subject in respect of standard obligation, i.e. when the subject treats this obligation with inner readiness to fulfill it. Therefore, an idea of criminal relations for avoiding crimes comes into play, according to which a subject of criminal law is obliged before a state to act lawfully and is required to fulfill this obligation responsibly, i.e. with inner readiness.

Unfortunately, German colleagues are silent on criminal relations for avoiding crimes and, therefore, are not concerned with an idea positive responsibility. Considering this the concept of a guilt as an irresponsible act of a subject before a state, is not understandable and logical for them.

3.1 Irresponsibility as a Synonym of Guilt

Unfortunately, it is not rare when a subject treats the obligation of rightful act without responsibility or as guilty. Had it not been for the positive responsibility, there would not exist its opposite term "irresponsibility", and without irresponsibility negative responsibility is impossible, since it would be impossible to impute objectively without irresponsibility as a synonym of guilt.[3]

3.2 Logical Impossibility of Responsibility without Guilt

Therefore, it is clear that the term "impute" means parallel responsibility, and no responsibility can exist without guilt. In fact, if guilt is a form a connection between the positive and negative aspects of responsibility, as a synonym of irresponsibility, then it is clear that the exclusion of guilt logically excludes responsibility in its negative and positive aspects.[4]

4. Problem of Due Understanding of Concept of "Objective Imputation"

At first sight it seems that the term "Objective imputation" should mean responsibility without guilt, but in reality, as the Doctor of Law Merab Turava states, it means objective imputation of result at the stage of objective composition of action. [5] Therefore, the term Objective Imputation, which logically should mean responsibility without guilt, seems to be more than responsibility without guilt. This is proved by a joint Manual by Johan Vessel and Vener Boilke, describing the problem of objective imputation, containing a conclusion that the idea of objective imputation gained the largest recognition in the field of imprudent delict.[6] This fact is also recognized by M. Turava. According to Turava, the theory of objective imputation deserved

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3 *Nachkebia G.*, Criminal Law, Manual, General, Tbilisi, 2011, 53-54.

4 *Nachkebia G.*, Question of Logical Impossibility of Responsibility without Guilt, in: Problems of Law, Jubelee Collection, Dedicated to the 70th Anniversary of Professor Shengelia R, *Chanturia L., Shengelia E.* (Editors), Tbilisi, 2012.

5 *Turava M.*, Criminal Law, Overview of the General Part, 8th Edition, Tbilisi, 2008, 106.

6 *Vessel J.*, *Boilke V.*, General Part of Criminal Law, Crime and its Structure, Tbilisi, 2011, 95.

broad support in case of a crime through negligence, although in case of a premeditated crime its practical importance is relatively low.[7]

It is clear that the term Objective Imputation does not mean responsibility without guilt, because in this case if the intent is not the form of guilt, it means at least negligence. We restate that we are dealing with imputation of the result of an illegal act of a subject at the stage of objective composition of action. In all, we come to a conclusion that a concrete result can be imputed to somebody if he has created such legally significant danger that developed till the relevant result of the composition of action.[8]

4.1 Final Content of the Concept "Objective Imputation"

Therefore, from a pure juridical point of view, Objective Imputation means responsibility without guilt, but it seems that from the normative point of view, it may also take place in the field of negligence. However, imputation is still objective or without guilt, since this imputation takes place at the stage of objective composition, in the form of imputing the result received to the subject. If we take into consideration the fact that in accordance with the German model of the notion of crime, a guilt is beyond the composition of action and the illegality of this action, in this case Objective Imputation already also equals to responsibility without guilt.

4.2 Traditional Argumentation of "Objective Imputation"

Therefore, on the one hand, objective imputation takes place in the delict of negligence and therefore, they do not equal to responsibility without guilt, but on the other hand, since at the stage of objective composition imputation is done to the subject before the guilt by negligence, the imputation is still without guilt. This is proven by the fact that a radical change took place in the understanding of the problems of causality. In particular, the predictability of result in the traditional notion of causality was to be done at the stage of guilt. And by today, this notion is ineffective, especially in the cases when a concrete result takes place because of uncontrollable casualty. In such case we should separate a disaster and falsehood from the objective point of view.[9]

How can this be done?

M. Turava calls the term Objective Imputation a category, i.e. we are dealing with categorical thinking. It is a known fact that there exists conceptual thinking as well. The notion is divided in accordance with general and concrete, type and kind. A category, as one of the logical forms of a thought, does not have such division. That is why a category in this or that general or most general field, represents the most general concept.

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7 *Turava M.*, 106, see fn.5.
8 *Vessel J.*, *Boilke V.*, the above-mentioned work, 96.
9 Ib., 97.

4.3 Problem of Normative Causality

Out of this methodological insert we consider M. Turava's statement to be the most interesting. He mentions that today it is not enough to have the traditional understanding of casual connection and it is due to this reason that casual connection should in all cases be replaced with the category of objective imputation.[10] Then there arises a question: which category is this? We come to a conclusion that even if objective imputation is not quite a normative category, it possesses normative aspects.[11] Moreover, the author concludes that the problem of objective imputation is solved at two stages: at the first stage causality between an act and a result should be determined. This case doesn't concern a specialist knowledge, since the casual connection is purely naturalist. And at the stage of objective imputation we are dealing with purely evaluation- a legal category, when the result caused by the behavior of the subject should be imputed to him normatively as well, like his own creation, i.e. as personal falsehood.[12]

First preliminary conclusion. Therefore, although objective imputation can be met is the field of negligence as well, due to which it does not represent a pure responsibility without guilt, but on the other hand, imputation is still objective, i.e. is without traditional forms of guilt, which is contradictory, since responsibility without guilt is logically impossible, as it was mentioned above.

Therefore, is it possible that legal causality does not exist?

5. Issue on Interrelation between Size of Responsibility and Protection Measure

It is also unclear whether a mixture of the size of responsibility and the so-called protection measure? In civil law a protection measure without guilt and responsibility, which is established only on the basis of guilt in civil law, are differentiated. Is it casual or regular, when the aim of the preservation of a norm is considered in the problematic of objective imputation? Johan Vessel and Vener Boilke expressly consider the aim of observance of a norm, when the subject creates a legally important danger when the subject goes beyond the limits of the norm protecting kindness. The authors give the following example: in Munich a car overdrove and in Nuremberg a child ran in front of the car. The child died and it was impossible to evade the death in this case. Is there any casual connection between overriding in Munich and the death of a child? Since had it not been for acceleration, the child would have survived. But in this case the aim of observance of a norm is protecting from danger within a certain sector, while in Munich the acceleration did not create any concrete danger for a child.[13]

But in the other cases the aim of observing a norm became a basis for objective imputation. For example, the Reich Court awarded an interesting judgment in connection with bicycle lamps.

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[10] *Turava M.*, Criminal Law, General Part, Doctrine of Crime, Tbilisi, 2011, 216.
[11] *Turava M.*, 217, see fn.10.
[12] Ib., 259.
[13] *Vessel J.*, *Boilke V.*, 98, see fn.6.

In particular, at night some P. and J. were cycling on dark road without lamps. P. was cycling on the right and J. was cycling after him, from behind, a little bit to the left, although both of them were cycling in the middle part. J. ran into another biker K. riding a bicycle in the opposite direction and without lamps and caused his lethal, head injury. In this case, the given result should be imputed to J. objectively, since had the bicycle been equipped with relevant lamps, it would have been possible to evade such results. It could also be that if P. had been riding a bicycle with lamps, J. would have noticed him and the collision would not have happened. But the fact is that Paragraph 222 already stipulates that it isn't mandatory for the person riding a bicycle from the opposite direction to have relevant lamps on.[14]

5.1 Notion and Importance of Responsible Attitude towards Normatively Binding Obligations

It seems from the example above, that J. has infringed his obligation to ride a bicycle with lamps and therefore, this result should be objectively imputed. If this is so, then why should not this person have had a responsible attitude in respect of his obligation and therefore, why this action should be evaluated as irresponsible or guilty? If this is not so, is not it true that the case does not concern the measure of observance but objective imputation?

There is also another example mentioned in this work, when objective imputation is impossible and, on the contrary, when it is necessary. For example, letting somebody out during the thunderstorm supposing that he will suffer a thunder strike. If this really happens, there should not take place any imputation, since in this case we are dealing with natural, uncontrollable force. But if a heir, the nephew talks his uncle into traveling by a plane with a planted time bomb, and this fact had been known to the nephew, then in case of a plane explosion because of this bomb, we should recognize objective imputation due to the information held by the nephew and the proof of the regulation of a causal process.[15]

There appears a question: Why do we get Objective Imputation here, i.e. why the contemplation is excluded, while the nephew took into consideration the possibility of his uncle's death and he even wished this result?

Second preliminary conclusion. Therefore, objective imputation artificially broadens the sphere of causality. It practically involves an element of guilt, when a subject's action is blamable. This is mostly notable when it comes to the evaluation of an action on the basis of the principle of personal responsibility. Each person is responsible solely for his own actions. It includes a case when the aggrieved or the victim is responsible for getting into danger or the damage received. In this case the third persons are not liable. The function of observation of the norm when it comes to the protection from the third persons, ends at the moment when the sphere of personal

[14] *Vessel J.*, *Boilke V.*, 98, see fn.6., 98-99.
[15] Ib., 100.

responsibility begins. For example, "a" has received injected heroin from ,"b", and in the event of a lethal effect, we will not be able to punish ,"b" in accordance with paragraph 222.[16]

The situation is different, when victim gets into danger with his/her own consent. For example, if A allowed B to inject him/her heroin and A died, then according to paragragh 222 B will be prosecuted.

Here we have also considered a question when in the sequence of events there is also involved the responsibility of a third person.

Therefore, objective imputation is not quite objective, since we are dealing with a controllable action of a person, when he can get involved in the development of events, when the negative effect is the result of his own creation, due to which he will not be able to escape his responsibility.

6. Positive Meaning of "Objective Imputation"

We believe that the above-mentioned problem of Objective Imputation points to the fact that the German colleagues are trying to go beyond the traditional dogmatic frames, which is of course their scientific merit. The more so that Objective Imputation can be a conventional notion, when before the determination of guilt there is a full determination of objective composition of action beforehand. This is the model of how imputation can be exhausted from the point of view of objective composition.

6.1 Controversial Nature of Objective Imputation

If objective imputation means responsibility without guilt, we restate that it contains logical contradiction, since imputation as a synonym of negative responsibility, can be only guilty.

Third Preliminary Conclusion. Finally, we still believe that it would be good if in accordance with the tradition existing in civil law, the measure of observation was also separated from responsibility in the criminal dogmatics as well. It may be no accident that the joint manual by Johan Vessel and Vener Boilke points out civil law, in which objective imputation seems to have been recognized from the point of view of the relation of the Purpose of Norm Protection and falsehood.[17] Unfortunately, we do not have an opportunity to deepen this question with the assistance of German civil law theory. Therefore, this question is the field of the next research.

7. Precondition of an Idea of Normative Causality

Hereby we will dare to say that the problematic of the so-called Objective Imputation, the idea of Normative Causality was created by the fact that the traditional notion of guilt as some

[16] *Vessel J.*, *Boilke V.*, 100-103.
[17] Ib.

abstract reproach or, "something to be reproached", became separated from the principle of causality, due to which illegal action and its result, is caused by the reason as something objective and therefore, the guilt has no share in objective creation. It is clear that Normative Causality is pure normativism in the problematics of causality. The same applies to the normative notion of guilt as pure evaluation. Firstly, we should differentiate a reason and a condition. A Reason is a conditional notion, since a result is not caused by any reason but it is the result of interconnection of conditions. Due to this Article 18 of the Criminal Code of Georgia stipulates that a preparation of a crime is a preliminary creation of conditions for committing a crime. Therefore, in the above-mentioned examples, when someone goes on a bike ride without lamps, and collides with another cyclist cycling from the opposite side without lamps, the collision does not take place because of one biker (the one who collided) only but because the victim was also cycling without lamps. Had the victim been cycling with lamps, the one who ran into his bicycle, would have noticed him and the collision would not have taken place. However, the result of this collision should be imputed only to the biker who ran into another biker, since in accordance with the aim of compliance of the norm, it seems that it is this colliding biker who is obliged to ride a bicycle with lamps rather than another one. Therefore, if it had happened the other way round, that is, the victim ran into the first biker and damaged him, this result would be imputed to the latter. As a result, both of them have violated the obligation to install lamps on their bicycles, but it seems that the illegal result will be imputed to the biker, who has run into another one and has cause lethal effect. It is this action that deserves disapproval from the normative point of view.

There can be put a question: if in this case the action of the subject deserves disapproval from the normative point of view, why cannot we blame him for violating the norm of caution, when he went out for a bicycle ride without lamps at night? Or: why cannot we blame a person for illegal and premeditated deprivation of life if he is certain that there is an explosive device installed on the airplane, he advises someone to travel by this very plane and the one who was advised so, was killed as a result of the explosion of this plane?

Fourth preliminary conclusion. In all, firstly, we reiterate that Objective Imputation, as responsibility without guilt, is logically contradictory, since a guilty is nothing else but a form of connection of positive and negative aspects of responsibility, and the exclusion of guilt logically excludes responsibility as a positive as well as negative aspect. Secondly, the observation measure can sometimes be also used without guilt, while there can be no responsibility (as imputation) without guilt. Thirdly, a normative evaluation of illegal results can take place if there is a guilt of a subject as well participating between these conditions, as one of the subjective reasons of an illegal act and its result. Fourthly, Normative Causality is the same normativism like, for example, Normative Will of Hans Kelzen doctrine, which is in no way connected with the psychological notion of will. Fifthly, a guilt which is purely a normative notion (the same as abstract reproach or, "something to be reproached") became separated from causality, due to which guilt is not

involved in the conditions causing a criminal act and its results. It seems that in this situation a normative evaluation has replaced guilt.

By the way, the idea of normative causality "is not new, but old." For example, T. Tsereteli critisized German Neo-Kantian criminalists for their viewpoint that philosophical understanding of causality is irrelevant for criminal law, as for normative system, and that the latter should develop its own concept of causality. T. Tsereteli cites as an authority the famous representative of doctrine of finalistic acts, Maurach. According to Maurach, criminal law isn't interested, when an act can be considered to be in causal relation with criminal consequences, but rather is interested, what nature should this causal relation have to bring a person to criminal responsibility.[18]

Prof. Tsereteli criticises Neo-Kantian ideas, according to which there is a huge abyss between *sein* and *sollen*, resulting in isolation of legal norms from real world. On this backbone guilt can't be placed within causality, since in these circumstances distinction between guilt and causality would be vanished, as exemplified by Russian criminalist N. Sergievsky.[19] According to Prof. Tsereteli, all attempts to introduce criminal law concept of causality imply abandonment of philosophical concept of cause and introduction of special legal causality.[20]

It is clear that there are two notions of causality: first – philosophical, second – legal. Since philosophical notion of causality, according to the doctrine, is useless for criminal law purposes, then the "legal causality" and philosophical causality have nothing in common. Considering this, the notion of "legal causality" represents typical normative dualism, according to which the two notions of causality are not interconnected. Hence, it might be concluded that "objective imputation", which is underpinned by the "normative causality", signifies the abandonment of an idea of guilt (shift from problem of guilt to problem of causality) and recognition of contradicting proposition of "responsibility without guilt."

8. Guilt and Problem of Causality

Things are different in the case when guilt is understood as irresponsibility of a subject in respect of a certain instance, in the criminal field- as irresponsible attitude of a subject towards the obligation of legal act, which appears in the form of an intent or negligence (sometimes their unity). If an intent is a conscious negation of the positive responsibility of the subject (a futile attempt to free himself from this responsibility), negligence is displayed through disregard of this responsibility, when the subject treats these requirements of the norms of caution without responsibility. Therefore, in the criminal field, in the form of irresponsible attitude of a subject in connection with his obligation, guilt is a subjective reason for illegal action stipulated by the

[18] *Tsereteli T.V.,* Causality in Criminal Law, Problems of Criminal Law, Vol. III, Tbilisi, 2012, 89.
[19] Ib., 336.
[20] Ib., 87.

Criminal Code. Although the reason as such is objective, but guilt is not purely subjective either. Moreover, in Georgian the term "guilt" is often used to replace the word "reason". For example, those who have a damaged liver as a result of alcohol abuse, can be told that they have got their decease for the reason of their alcohol abuse. This also implies that the subject could have abstained from alcohol abuse and since he has not done this, therefore he can be guilty for damaging his own health.

We cannot talk deeper about the problem of guilt in this work, but we shall still mention it shortly that when a subject is positively responsible for a lawful act and he is expecting from the subject a responsible attitude in connection with the obligation to act lawfully, is it difficult to understand that irresponsible attitude of a subject in respect of the obligation to act lawfully is the subjective reason of unlawful act? It seems relevant to cite the following philosophical statement: "The word "cause" has different meanings in different languages – starting with reason, impetus ending up with completed crime and guilt". The same source provides: "The reason is considered to be something active, something that gives rise to outcome and is "guilty" in producing that outcome."[21]

It seems that cause presented in role of guilt is provided in quotes, meaning that it is inadmissable to completely equalize "guilt" and "cause", but it can't be rejected either that guilt according to crime genesis precedes breach of an obligation to act lawfully, being irresponsible attitude of a subject towards that obligation, which is a subjective cause of an act. In fact, had it not been for the irresponsibility of the subject, in this case there would be no unlawful act. For example, when encouraging oneself, a subject understands that his action is unlawful but he encourages himself without any basis, i.e. without responsibility that in this case unlawful result will not take place, while this result is inevitable and the inevitability is not taken into consideration by the subject, that is why encouraging oneself is one of the types of negligence. Therefore, it is the subject's blame that in this case he is not taking into consideration the inevitability of the result of the unlawful action, while in the situation of responsible attitude towards the norm of cautiousness the subject would understand the inevitability of lawful result and therefore, would not commit a wrongful act. Therefore, the commitment of a wrongful act in the similar situation is not done without irresponsibility or without guilt of the subject, thus among the conditions causing an action and its result the guilt of the subject is of decisive importance. For example, the motive of revenge, which, let us say, is carried out by means of killing a person will be preceded by any unworthy action carried out by the victim in connection with the murderer. But the decision to murder still depends on the will of the subject, due to which this decision is evaluated as irresponsible, since the subject could not have taken this decision to take revenge on the victim of the murder. It is clear that had he not made this decision, the murder would not have taken place in this case. In this circumstance the degree of guilt, or the subjective reason of illegal action, is higher than when the decision to murder is preceded by unlawful

[21] Composite Authors, Dialectical Materialism, TSU, 1970, 354.

violence, strong abuse or any psychic trauma caused by the unlawful, often immoral action of the victim in respect of the murderer (or in respect of his close relatives) (murder in the state of sudden strong inner excitement – i.e. physiological affect, Article 111 of the Criminal Code of Georgia). In addition, in the state of a physiological affect the guilt of the subject is excluded, therefore there is no subjective reason causing this action and its result.

It is clear that if the subjective reason of this action were the psychological theory of guilt, as the psychic attitude of the subject in respect of the action as well as the results, we would have to recognize the idealistic concept of "psychic causality". But when it comes to a decision, which instead of being responsible, is irresponsible, then it is the subjective reason of unlawful act and its results, without which it would be impossible to perform such an action and its results. Therefore, guilt as irresponsible attitude of the subject to the obligation of legally lawful act, is decisive among the conditions causing the action and its results, without **which there exists no normative causality.**

9. Conclusion

We agree with Prof. O. Gamkrelidze that there is scarce information on the problem of imputation in the theory of Georgian Criminal Law. However, at present, we will be talking more confidently about the contradictory nature of Objective Imputation, and the problem mentioned above requires further and deeper consideration.

Ketevan Mchedlishvili - Hedrikh*

For a Problem of a Crime Committing Place in Criminal Law of Media

Criminal law of media is a new field of criminal proceeding. The Georgian juridical society has not paid any attention to its problematic yet. This short article is the first attempt to see one issue of a general part of criminal law from a new viewpoint.

With great respect and reverence I am dedicating this first article about the media in criminal law to my dear teacher, Professor Akaki Labartkava.

1. Introduction

A place of committing a crime is counted to be well-defined once for all and formulated exhaustively in classical criminal proceeding. Article 4 and Article 5 of the Georgian criminal code refer to a sphere of action of the criminal code of Georgia. According to the first part of Article 4 (operation of a criminal law in relation to a crime committed on the territory of Georgia) a person committing a crime on the territory of Georgia will be brought to justice according to this (Georgian)[1] code. By the "throughout" theory, given in the 2nd part of Article 4, a crime will be counted as a crime committed on the territory of Georgia, if it started, continued, ceased or finished in Georgia. If a criminal action was carried out on the territory of one state and the result was on the territory of the other state, by the principle of territoriality a place of committing a crime will be both states. According to a classical example, given in the criminal proceeding literature, if a sacrifice was made drink a poison on the territory of Georgia and he died on the territory of the other country, a crime committing place will be counted as the state where the action was done as well as the state where the result of this action took place.[2] Trial of the criminal will be carried out according to the legislation of the state which has arrested him.[3] If a change caused by a criminal action does not constitute a part of the action in the outer world, the result place will not be counted to be a crime committing place.

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1 The note is mine, *K.M.H.*

2 *Gamkrelidze O.,* Definition of Criminal Code of Georgia, Tbilisi, 2005, 63*; Satzger H.,* Internationales und Europäisches Strafrecht, Baden-Baden, "Nomos", 2010, §5/Rn. 14; *Turava M.,* Criminal Proceeding, Review of General Part, Tbilisi, 2010, 42; *Turava M.,* Crime Doctrine, Tbilisi, 2011, 104; *Tkesheliadze G.,* In a General Part of Criminal Proceeding, Tbilisi, 2007, 83-89.

3 About the preference of an action place to a result place see: *Turava M.,* Crime Doctrine, Tbilisi, 2011, 105; *Turava M.,* Criminal Proceeding, Review of General Part, Tbilisi, 2010, 42.

According to the principle of personality (citizenship) the Georgian criminal proceeding is used even when a crime is committed abroad by a Georgian citizen (or by a person permanently living in Georgia without having citizenship). Besides this action must be admitted as a crime according to the criminal code of the country where it was committed (the first part of Article 5 of Criminal Code of Georgia). If the action done by a Georgian citizen that is not admitted as a crime by the legislation of the country where it was committed, it will be under the criminal jurisdiction of Georgia only in case if it is a serious or especially a grave crime against the interests of Georgia (the 3rd part of Article 5 of Criminal Code of Georgia).

Modern informational-technical means favor not only the formation of an informational society and the globalization of economics and market, but they broaden the possibilities of committing crimes at the same time. The information revolution casts doubt on traditional opinions of the classical criminal proceeding and in order to decide guiltiness and punishable of the action it arises several questions which must be properly answered by scientists of criminal proceeding. By means of the modern media it becomes possible to make an encroachment on goodness, defended by criminal proceeding, distantly or in a global cyberspace in such a way that a person will not even cross the border of his own country. The question is: under the jurisdiction of which country will the person be, if this action in his own country is not punishable and an issue of the action result is problematic?

2. A Crime Committing Place in a Cyberspace

2. 1. A Crime Committing Place in Torts of Trans-boundary Encroachment

In German literature of criminal proceeding about **problematic of defining a crime committing place** there is given the following example: if in a boundary Polish city between Germany and Polish a Pole by means of a supersensitive camera is taking a photo of a naked woman in her bedroom in Germany, Frankfurt an der Oder, it means that he is committing an action envisaged by Article 201 of the German Criminal Code (an encroachment on a personal life).[4] By this norm it is punishable to take a photo without permission of a person, being in the flat or other protected ownership. Will this action, taking a photo by a Pole in Germany, be under the jurisdiction of Germany? To answer this question one issue must be stated: where did the result envisaged in the crime composition take place or the encroachment on the super personal living areal? Where he was acting and where he took photo of the naked woman (Poland) or where was this naked woman (Germany)? The following problem is arising: what is meant under the "super personal living areal". It can be proved that as according to this Article punishable is not only the visual observation itself (e.g. not observing the person by binoculars without permission) but photographing, the action result is the creation of the photo. The aim of this norm is to avoid taking a photo without permission (teleological

[4] Verletzung des höchstperönlicher Lebensbereichs, §201a dStGB.

definition of a norm). Hence a living areal must not be understood spatially. According to this opinion a crime committing place will be Poland. A criminal law of Germany cannot be applied to this action that leads to the non-punishability of a person's action.

In order to solve the problem in a different way we can use Tsereteli's opinion about the necessity of making the difference between a target of a crime and an object of a crime.[5] On the basis of this opinion a direct target of the crime provided for in Article 201 of the German criminal code is the right to free action in "super personal living areal".[6] Nobody must have fear that his/her action will be photographed in his/her four walls or in any other protected place, that somebody will intrude visually into his/her "super personal living areal" and will even fix this intrusion. As for the photo it is only an object of committing a crime or in other case it may be an instrument of a crime. Hence the crime committing place will be not a place of creation (i.e. Poland) of the photo (an object of a crime), but where the freedom of super personal action, protected by rules of criminal law, was violated, that is in Germany.[7] This opinion leads to spreading the German jurisdiction on this person's action and the punishability of the action.

In literature of criminal law **about the problematic of a crime committing place in torts having a result** there can be found other examples: if a Frenchman living in France writes an offensive letter to a German being in Germany, the German jurisdiction will be extended over him (insult, criminal code §185), as by number I of the second sub-paragraph of §7of criminal code of Germany the German criminal code for the action carried out abroad will be used to the German, when this action is punishable in the place of committing the action. Besides the German criminal jurisdiction must be applied to the committed action because the insult is a resultant tort and a result of the crime, i.e. the perception of the insult by the incurred person or by the third person happens in Germany. The way of committing a crime does not change the character of the crime and the action qualification will not be changed, if the Frenchman insults the German on the phone or by mail.[8] In all these cases the German legislation can be applied to the Frenchman.

Considerably more interesting will be the following variant of this example: a German being in Georgia is abusing the other German who is also in Georgia in different ways: verbally, handing him a letter, on the phone, by mail and finally loading his photo on YouTube ascribes

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5 *Tsereteli T., Tkeshelidze G.,* Crime Doctrine*,* Tbilisi 1969, 157-60.

6 *Hoyer A.,* Die Verletzung des höchstpersönlichen Lebensbereichs bei §201a StGB, "ZIS", 2006, 1(4); *Mitsch W.,* Medienstrafrecht, Berlin/Heidelberg, "Springer", 2012, §1/Rn. 6.

7 According to some scientists "super personal living areal" shoud not be imagined spatially. Hence the encroachment on the super personal areal will be considered not as photographing the woman in her bedroom but the carried out photodocumentation of the super personal (very personal) life process (sexual actions, other intimate actions, dying process and others). According to the opinions expressed in literature these are actions the photographing and making public of which can be hazardous to the person's prestige. So paragraph "a" of Article 201 in German criminal code is counted as resulting, as well as a delict of abstract danger (see: *Hoyer A.,* Die Verletzung des höchstpersönlichen Lebensbereichs bei §201a StGB, "ZIS", 2006, 2-3). This opinion is to be criticized, because dividing crimes into torts of danger and encroachment(or damaging) is based on the body of action envisaged in the criminal code and not on the results that are beyond the objective side of the action.

8 *Mitsch W.,* Medienstrafrecht, Berlin/Heidelberg, "Springer", 2012, §1/Rn. 12.

"swine". This photo with the ascription can be seen as in Georgia, where abuse is not a criminal tort, as well as in Germany, where honor and dignity protection is done by the criminal law code (§ 185 insult; §186 malicious gossip, §187 calumny, §188 spreading malicious gossips and calumnies about a public person). Abuse is a resultant tort and will be completed when it will be perceived by the incurred or the third person.

In order to decide whether the insult which is done verbally, by handing a letter, on the phone or by mail, will be or not under the German jurisdiction, German court have to use a principle of active and passive personality, as both an offender and an offended person are German citizens, the action is not taking place in Germany and the result is not either in Germany. According to the principle of both active as well as passive personality (the first subparagraph and number 1 of the second subparagraph of §7) of the German criminal law the action committed abroad by a German or in relation to the German will be under the German jurisdiction only when this action is punishable by the criminal law of the crime committing place. As the Georgian criminal code makes no provision for the punishment of an insult, according to the classical criminal law the aforesaid action will not be punished.

It is interesting to give a juridical assessment to the loading the insulting information on YouTube. What makes it different from other ways of insults, the written or mail form of insult? When insulting by means of writing or mailing a crime committing place is the place of performing the action (Georgia) and a place of the result is the place of getting the information by the incurred person (Georgia). As for loading insulting information in German it can be seen in a virtual space by an endless circle of people. The fact itself that the information is in German means that the circle of addressees (of the third party) must be found mainly in German-speaking countries. In spite of the fact that the insulting as well as the insulted person is in Georgia and the action or loading the photo is happening in Georgia, the crime committing place is Germany and not Georgia, because the result – seeing by the third party the photo loaded with insulting information is taking place in Germany. So this action will be under the jurisdiction of the result place or Germany and not the jurisdiction of the action place or Georgia.[9]

2.2. Problematic Character of a Crime Committing Place in Trans-boundary Torts of Abstract Danger

Torts of abstract danger are those which include typically dangerous actions and do not envisage the existence of a concrete danger or result.[10]

[9] *Hilgendorf E.,* Überlegungen zur strafrechtlichen Interpretation des Ubiquitätsprinzips im Zeitalter des Internets, "NJW", 1997, 1873 (1876); *Hilgendorf E.,* Die Neuen Medien und das Strafrecht, "ZStW", No. 113, 2001, 650 (669).

[10] *Ebert U.,* AT, Heidelberg, "C.F. Müller", 2001, 41.

According to the German criminal code a crime committed against public security and regulations is counted the instigating hatred for one part of population (§130 Volksverhetzung) and negation of holocaust. In German literature of criminal law a considerable diversity of views is observed concerning the following case: in Adelaide, Australia, one Australian citizen loaded anti-Semitic and holocaust rejecting texts on the Australian server. These texts could have been also read in Germany. By this action he carried out the third part of §130 of the German criminal code - rejecting of holocaust. German court was faced by the following problem – will this action be under the German jurisdiction? An action place is always a place where the action perpetrator, i.e. in this case Australia and not Germany.[11] This action, rejecting of holocaust is a tort of abstract danger and according to the opinion spread in literature of criminal law and as we have already mentioned torts of abstract danger don't include a result.

In the German criminal law in connection with the place of the action committed by the Australian there were formed several diametrically opposite opinions. According to the German Federal Court and one part of scientists the concept of result envisaged in this norm, does not coincide with the general doctrine about the action composition, which is the basis of ranking torts into two groups: torts with a result and torts without a result. In order to apply the German jurisdiction to this action the German Federal court introduced a new concept of result and pointed that the result of such an action is its suitability for making influence on the development of a public opinion.[12] The suitability of the action for encroachment on public peace is just what is meant under §9 of the German criminal code (the crime committing place).[13] The result occurs where a concrete action can create a danger to the legal goodness described in the composition of the result.[14] In this sense the content of an action result term depends not on the objective change envisaged in the action composition, but on the existed context.[15] So the mentioned tort is not abstract but it is an abstract-concrete tort with a result.

In the opinion of some criminalists torts of abstract danger do not foresee an immanent result of the action or the localization of the abstract danger. According to I subparagraph of §9 of German criminal code a result of the action is a change divisible spatially and temporally from the action appropriate to the action composition into the outer world, that is expressed in a concrete encroachment on the protected legal goodness or creation a concrete danger to it.[16] The result cannot be described by "a way that is useful for encroachment on public peace". Such wide interpretation

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11 Münchener Kommentar – Ambos, §9/Rn.29.

12 BGHSt 46, 212 (220). *Sieber U.,* Internationales Strafrecht im Internet. Das Territorialitätsprinzip des §§ 3, 9 StGB im globalen Cyberspace, "NJW", 1999, 2065 (272).

13 BGHSt 46, 212 (221).

14 Ib., 218 (221).

15 *Hecker B.,* Die Strafbarkeit grenzüberschreitender Luftverunreinigung im deutschen und europäischen Umweltstrafrecht, "ZStW", No. 115, 2003, 880 (888); *Hörnle T.,* Verbreitung der Aufschwitzlüge im Internet, "NStZ", 2001, 305 (310).

16 *Hilgendorf E.,* Überlegungen zur strafrechtlichen Interpretation des Ubiquitätsprinzips im Zeitalter des Internets, "NJW", 1997, 1873 (1876).

goes farther and according to the second subparagraph of Article 103 of the German basic law and §1 of the German criminal code it is a banned analogy. Therefore rejecting of holocaust is done in Australia and not in Germany and German criminal law cannot be extended to this case.[17]

Great debates were caused in criminal literature by another case connected with modern media that cast doubt on regulations of the classical criminal law about a crime committing place. In 1999 in appeal proceedings in Berlin there was the following case[18]: in a Polish city of Zabrze several Germen while watching the match between German and Polish football teams at the stadium expressed their emotion with a gesture of "Hitler salute".[19] The "Hitler salute" which the German population watched by television is banned according to number I of I subparagraph of §86 of the German criminal code (extending means of propaganda of unconstitutional organizations).

Criminal practice and scientists were faced with the following issue: as the punishability depends on the crime committing place, where is this action done? A person carried out bodily movement in Poland. So this action is done in Poland but such action is not foreseen by the Polish criminal code. The second subparagraph of §7of the German criminal code (operation of the criminal law on crimes committed abroad) punishes a German citizen for committing a crime abroad only when (an active personality principle) this action is banned in the crime committing place by menacing a punishment. So the Appellate Court of Berlin could not have used such an active personality principle for punishing those persons. The court solved this problem in the following way: it considered the action (extending means of propaganda of unconstitutional organizations), banned by number I of subparagraph I of §86 of German criminal code, to be an abstract tort which does not envisage a result. At the same time it pointed out that as the visual perception of this action by television was also possible in Germany, just this perception is a part of composition of the punishable action and hence the place of committing a crime should be also considered Germany. So television allowed the German court to announce a crime committed in Poland as a crime committed also in Germany and to solve the guiltiness of these persons positively. [20]

This resolution caused diversity of opinions in German criminal literature. There were formed two opinions. According to one part of experts torts of abstract danger also contain "a result belonging to the composition of the action and in Germany just such result took place."[21]

According to the opinion of the other part of experts the "Hitler salute" was carried out only in Poland, because a person committing the crime is acting only where he is physically. Hence the

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17 *Mitsch W.,* Medienstrafrecht, Berlin/Heidelberg, "Springer", 2012, §1/Rn. 9.

18 KG, Kammergericht, Court of Appeal, Zeigen des "Hitlergrüßes" bei Fußbalspiel im Ausland, "NJW", 1999, 3500.

19 <http://de.wikipedia.org/wiki/Hitlergru%C3%9F>.

20 The diversity of opinions reminds us the discussion of the Soviet period that a criminalistical result is characteristic for all the crimes, if there exist any crimes without results (see: *Tsereteli T., Tkesheliadze G.,* Crime Doctrine, Tbilisi, 1969, 195).

21 *Hecker B.,* Die Strafbarkeit grenzüberschreitender Luftverunreinigung im deutschen und europäischen Umweltstrafrecht, "ZStW", No. 115, 2003, 880 (886); *Heinric B.,* Der Erfolgsort beim abstrakten Gefährdungsdelikt, "GA", 1999, 72 ff. (in: *Mitsch W.,* Medienstrafrecht, Berlin/Heidelberg, "Springer", 2012, §1/Rn. 10).

appellate court should have rejected the guiltiness.[22] The guiltiness could not have been grounded by the place of result occurrence, because only those facts belong to the action composition, carrying out of which is necessary for objective composition of the action, in other words those signs which are given in the disposition and to which the person's intention is directed. A sign of composition "origination of abstract danger", as a result of the crime, in such a case does not exist. Torts of abstract danger are risky acts, but they only typically include a danger. The term "abstract danger" is only dogmatic, of a scientific character. A legislator does not use it in compositions envisaged in the criminal code. A crime is committed, if a person carried out this action. Torts of abstract danger do not comprise a result, they don't have a result place either and the guiltiness (by the German criminal legislation) cannot be grounded by "the result place".

Arranging games of chance without permission (without an official permission) also belong to the tort of abstract danger (Article 284 of the German criminal code). Such games can be arranged by means of the Internet. A question is: will the person being abroad and arranging such a game be punished, if participation in this game (lotto, lottery, pooling) can be possible in Germany too? Where was the crime committed? Abroad, where an arranger of these games is physically and is carrying out such action or in the country, where the participation in the games is also possible? Some scientists think that the creation of a chance of participation in the game is a result of arranging the game and not arranging a game itself. A legislator punishes arranging the game. It is tort of an abstract danger, not envisaging a result. Therefore an organizer of games of chance will not be punished according to §284 of the German criminal code.[23]

3. Conclusion Announcing abstract danger torts as the torts having results by means of modern media the national criminal law will become a sharp instrument of fighting against crimes committed in the whole world that will impair the sovereignty of other states. The necessity of national jurisdictional restriction in relation to crimes committed in cyberspace belongs to an important sphere of problems.[24]

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22 *Mitsch W.,* Medienstrafrecht, Berlin/Heidelberg , "Springer", 2012, §1/Rn. 10.

23 Ib., §1/Rn. 11.

24 *Hilgendorf E.,* Überlegungen zur strafrechtlichen Interpretation des Ubiquitätsprinzips im Zeitalter des Internets, "NJW", 1997, 1873 (1874); *Hilgendorf E.,* Die Neuen Medien und das Strafrecht, "ZStW", No. 113, 2001, 650 (660).

Irine Kherkheulidze *

Juvenile Delinquency and the Causes of Delinquency within the Institute of Juvenile Justice

1. Introduction

"Ben Lindsey, founder and judge of the Denver Juvenile Court in the early twentieth century, believed that there were "no bad kids"- only bad conditions that led to bad conduct. The purpose of his court, as he explained in a magazine article in 1927, was to save the youths who came before him, not to punish them."[1]

Almost one century ago this idea about the preference of the rehabilitation of juvenile against the punishment and about the identification of conditions supporting the crime and finding ways to overcome such conditions was still widely used. The idea was reinforced with various arguments provided by scientists and practitioner lawyers all over the world.

For the society and science to become able to better help juveniles in reduction of crimes and their avoidance, as well as help them in improvement and re-socialisation, before the planning-implementation of intervention and preventive measures, the research analysis conducted by the criminological sciences on the issues related to the essence of juvenile crimes (delinquencies), reasons causing or supporting such actions, - should be learnt and applied.

Why do so many juveniles conduct bad behaviour? What differentiates the juvenile committing bad actions from his/her peers who do not behave badly? Why the majority of juveniles who have committed anti-social behaviour before, desist from such behaviours in adulthood? Why does the part of juveniles continue displaying stubborn and un-thoughtful actions after reaching the age 19?

These questions could be partially answered based on the research results related to such important issues as: bio-psychological differences between the juveniles and adults and risk-factors related to the juvenile crime.

Only through processing and study of these data it will become possible to analyse the effectiveness of tools for intervention into the juvenile behaviour, which are developed for the reduction of juvenile crimes. Only after such study the following questions will be answered: are there means for intervention into the juvenile development which are independent from the ordinary process of growth, which can reduce the probability of crimes in juvenile as well as adult periods.[2]

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1 *Regnery A.,* Getting Away With Murder: Why the Juvenile Justice Needs an Overhaul, <http://www.hup.harvard.edu, Rethinking Juvenile Justice, Harvard University Press>, 2008, 82.

2 *Slobogin C., Fondacar M.R.,* Juveniles at Risk, A Plea for Preventive Justice, New York, "Oxford University Press", 2011, 14.

Accordingly, the problems covered in the article give us basis for further definition and development of preventive measures for the juvenile crime.

Moreover, the issue of bio-psychological difference between the juvenile and adult and risk factors related to the juvenile crime have decisive importance in making decision, how appropriate are the views that are basis for the existing retributive (punishment), individual prevention and rehabilitation models in the criminal law.[3] There is much more that we can learn from each other in our efforts to build better future for our youth and communities and much we can learn from the work going on not only in our own communities and countries, but also abroad. With the increasing globalization of world economy as well as social systems the effects of social issues such as youth violence and their potential solutions – no longer are isolated to their particular regions. These social issues affect the well-being of all nations through their impact on human capital both current and future.[4] Various countries undertake the responsibility for the prevention and reduction of juvenile violence. Using "Case study" it is possible to use cases at international scale; the above can be considered as international investment in terms of prevention, illustrating how can schools, society, countries and regions support the peaceful and healthy development of juvenile. Despite the huge difference existing between the culture, wealth and perspectives of various countries, the global citizens of the world are connected with the shared interests in the areas of juvenile, peace and development.[5]

2. Juvenile Crime (Delinquency)

Delinquency or juvenile crime is the international phenomenon which a subject of concern for all countries. However, as it is clear from the study of juvenile legal systems in various countries of the world, none of the countries managed to avoid such problem. Comparison of juvenile legal models of various countries is the best instrument to make relevant conclusions on weaknesses and strengths of specific systems, and identify the possible solutions, application of which will not be made due to the characteristics of specific countries.[6]

2.1. Conception of Juvenile Crime (Delinquency)

It is impossible to develop general and common conception for juvenile crime, as it depends on social, legal and political order of the specific country.

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3 *Slobogin C., Fondacar M.R.,* Juveniles at Risk, A Plea for Preventive Justice, New York, "Oxford University Press", 2011, 14.

4 *Hoffman J.S., Knox L., Cohen R.,* Beyond Suppression: Global Perspectives on Youth Violence, Westport, "ABC-CLIO", 2010, 9.

5 Ib., 9.

6 *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, Introduction.

According to the Code of Criminal Proceeding of Georgia the juvenile is a person, who has not attained the age of 18 year; based on Criminal Law Code juvenile is a person who became 14 but was not 18 just before committing the crime.

"At common law, children below 7 year are incapable of committing a crime, and in 1933 the age was raised to 8 by statute. It does happen that children even of this early age enter upon serious mischief, and in that event the community is not helpless against them: they can be brought before the juvenile court as in need of care or protection. In the next age-group, from the attainment of 8 until the attainment of 14, the rule is that a child cannot be convicted of crime – and must be held not to have committed a crime – unless the court is put in possession of certain evidence form which his mental state at the time of act may be deduced."[7]

It is relatively difficult to determine this issue in the countries following the above mentioned legal system in terms of effectiveness of Criminal Proceeding legislation over the illegal actions committed by the juvenile.

"In terms of spreading of jurisdiction of juvenile court in U.S. there is considerable variation across in the age of juvenile court jurisdiction. In the USA, each state sets its own age limitations. Variation across states occurs with respect to: the minimum age of juvenile court jurisdiction; the age at which transfer to the adult court is possible; the upper age of the juvenile court's original jurisdiction (the maximum age at which new cases can be heard), and the upper age of the juvenile court's continuing jurisdiction over youth who have been made wards of the court".[8]

As there is no common understanding of the juvenile crime, in the process of research we shall cover all components related to the essence of juvenile crime, adopted and implemented in juvenile legal systems of many countries.

Unlike Georgian criminal legislation many countries with Common Law system are aware of term juvenile criminal as well as juvenile delinquents and status offenders.

Violation of status was the part of American juvenile legal system from its establishment. Such violations were considered as offences in juvenile code for some periods (this is the part of definition of delinquency) and in some periods the same violation was considered as problem different from and less serious problem compared with delinquency. To clearly understand the essence of status violation, we shall provide the brief definition and review the history of role, which the status violation played for juvenile legal justice system, as well as discuss the potential legal basis for the status violation.

When the first juvenile court was created in Cook County, Illinois, in 1899, the court's jurisdiction clearly was distinct from its adult criminal court counterpart. The proceedings were confidential, informal, and non-adversarial. In terms of subject matter jurisdiction, the juvenile

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7 *Williams G.,* Criminal Law, The General Part, 2nd Edition, Florida, "Gaunt, Inc.", 1998, 814.

8 Private source: Materials of the Course on Juvenile Courts and Delinquency by Professor Birckhead at Duke University School of Law, Spring Term, 2012, reference: *Bishop D.M., Decker S.H.,* Punishment and Control: Juvenile Justice Reform in the USA.

court had responsibility for three kinds of cases: delinquency, dependency, and neglect. Dependency and neglect cases did not deal with what a child had done but with the situation in which the child was found. In reality, these types of cases were directed more at parents and guardians than at youngsters. Children were not offenders in these circumstances; they were more often viewed as victims.

This perspective did not exist for delinquency. In the broadest definition of the term, delinquency involved any offense that would be a crime (felony or misdemeanour) for an adult. However, the original juvenile court's definition of delinquency also included violations of the law that would not be offenses for adults. These are status offenses. Status offenses are defined primarily in terms of the child's age status (a person under the legal age of majority), and they are any violation of the law for a child - in the majority of states someone under the age of 18 - that would not be a crime if committed by an adult. Specific examples, along with definitions, will give further clarification.

There are various forms of status violation. The most common status offenses have almost always been truancy, running away, curfew violations, alcohol-related offenses, tobacco use, underage gambling, and virtually any form of sexual intercourse. Once again, it is essential to remember that these activities are not law violations for adults under most circumstances.

Status offense jurisdiction still is part of many juvenile codes and juvenile court systems in the United States. There seems to be virtually no way to eliminate status offenses because much of the behaviour is endemic to the teenage years. Youngsters from a variety of backgrounds and socioeconomic statuses engage in these behaviours. Many stop without detection and with no legal intervention. However, in quite a few cases, status offenses are important, not in themselves but because they are symptoms of more serious personal and family problems. Status offense jurisdiction is not likely to totally disappear from the nation's juvenile justice system anytime soon. While most people involved in the system express frustration and dissatisfaction over status offense treatment, many of them still want to retain the option of legal intervention with status offenses to provide children and their families with the services they need, but might not seek out.[9]

In summary we can conclude that it is impossible to unify the definition of juvenile due to existence of multi-aspect determining factors. However, when we deal with juvenile crime under the modern juvenile justice system, it considers criminals as well as juvenile delinquents and juveniles violating the status.

2.3. Sociological Context of Delinquency

In order to fully understand delinquency one must first understand the theory and practice of juvenile justice, and then be able to place this understanding within its proper historical and cultural context. Only taking into account the cultural and historic factors which determined the

[9] *Mays G.L.,* "Status Offenders," Encyclopedia of Juvenile Justice, Ed., Thousand Oaks, CA: SAGE, 2002, 355-59, SAGE Reference Online.

establishment of delinquency concept will make possible to understand the nature and scope of delinquency existing in the society.[10]

Public beliefs about crime and juvenile justice in U.S give the distinctive understanding and perceptions of the delinquency. Many Americans believe that crime and delinquency are serious problems. A 1995 Gallup poll found that 27% of Americans identified crime and violence as the most important problems in the U.S., and 6 % identified drugs and drug abuse.[11] Moreover, those percentages have increased considerably since the early 1980s; in 1981 only about 5% of Americans identified crime, violence, drugs or drug abuse as the most important problems in the country.[12]

Juveniles in the U.S. are especially likely to express concern about crime and delinquency. When asked to consider a list of social problems about which they might worry, 93% of a sample of 1994 high school seniors said they "often" or "sometimes" worried about crime and violence, and 77% said they worried about drug abuse.

U. S. has relatively high crime and delinquency rates compared to other industrialized nations; hence, it is scarcely surprising that many Americans fear crime. 47% of respondents in a 1994 Roper survey indicated that they were afraid to walk alone at night in their own neighbourhood. The demographic groups most likely to express fear of crime are females. Whites, upper-income people, and older people, but these groups do not necessarily have the highest victimizations rates. When asked what should be done about crime and delinquency, Americans tend to point to punishment rather than rehabilitation.[13]

In sociological terms delinquency is related to society's social organization and its culture.

A number of writers (Cohen, Ferdinand, Wilkins) contend that formal control efforts play a significant role in amplifying deviance in society. In so-called traditional societies, where formal attempts to control deviance are largely lacking, deviance has been observed to be relatively underdeveloped, spontaneous and transitory. In contrast, modern industrial societies which include Hong Kong, are characterized by highly developed and elaborate formal systems of control and treatment. In such societies crime and delinquency are inclined to become established and intransigent social problems.[14]

The conception of juvenile delinquency in Hong Kong has started its developmment since 1960. It considers several possible explanations which may account for the apparent increase in delinquent behaviour. These explanations are as follows: First – changing social and economic

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10 *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 114.

11 *Maguire K., Pastore A.L.,* Sourcebook of Criminal Justice Statistics, 1995, U.S. Department of Justice, Washington, D.C., "U.S. Government Printing Office", 140.

12 *Winterdyk J. A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 275.

13 Ib., 276.

14 Ib., 121.

conditions in Hong-Kong have helped to produce a real increase in crimes and delinquency; in this case public concerns merely reflects what is occurring in society. Second, the increase in delinquency is due to an increased willingness to report crime and delinquency. Third, there is also the possibility that criminal justice policy may shift in such way that an increasing number of people enter the criminal justice system.[15]

To summarise, we can conclude that as in case of all other social problems, the perception of delinquency by legal systems of various countries is derived from the social and cultural norms dominating in the society.

2.4 Significant Measurements Characteristic to the Juvenile Offences (Delinquencies)

Though the common definition of youth crime does not exist, it is still possible to determine those characteristics and features which are associated with youth crime and have an influence on them.

The most important point which should be indicated in this term is the attitude arguing that antisocial behaviour is such an immanence conduct for juveniles, that some authors define it as "normal", which is typical for the people of this age group.[16] According to criminological studies juvenile crime is considered to be as one of the crimes with less economic harm, which is the normal occurrence, is spread within all the classes of the community and has an episodic character. Besides juvenile offences are committed without any special advanced planning and the juveniles committing those crimes reveal the low criminal energy.[17] In accordance with the biological and physiological development of the juveniles, youth crime is considered to be as normal phenomenon of the community. Almost every juvenile even once in the childhood has violated the provision of law. The presumption that juvenile crime is being spread everywhere and always means that it exists and it is spread in every social class of the community. The episodic character of the juvenile offences implies that the youth might commit a crime in any piece of time beginning form the age of physiological changes to their final formation as an adult.[18] However, in order to analyse the issue of episodic character of the youth crime, criminological studies should be indicated regarding to the following points: the age of onset, desistance from the crime and transition to adult crimes.[19]

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15 *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 114.

16 *Moffitt T.E.,* Natural Histories of Delinquency in Cross-national Longitudinal Research on Human Development and Criminal Behavior, "Kluwer Academic Publishers", 1994, 3, 29.

17 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 17 (in Georgian).

18 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 18-19 (in Georgian).

19 *Bartollas C., Miller S.J.,* Juvenile Justice in America, 2nd Edition, "Prentice Hall, Inc.",1998, 77.

The issue whether the juvenile desists from crime or transfers to adult crime in the future is very complicated by its nature and depends on numerous factors (for instance, on the age of onset). It is considerably easier to make conclusions on the issue of escalation of offences. Official studies of escalation of offences have typically found that the incident of arrest accelerates at age 13 and peaks at about age 17, but this pattern is less evident in self-reported studies. For example, Suzanne S. Agenton and Delbert S. Elliott found that the incidence of some offenses, such as assault and robbery, increased with age, whereas that of others peaked between ages 13 and 15.[20] However, there is another attitude, that the antisocial behaviour increases between the period of 14-21 and it could be explained and justified with the stressful age of changes and socialization.[21]

The findings on escalation of offences are less consistent than those on age of onset. Several studies have found that the earlier that juvenile begins law-violating behaviours (the age of onset), the more likely they are to continue such behaviours. Marvin E. Wolfgang, Terence P. Thornberry, and Robert M. Figlio followed a 10 % sample of the Philadelphia Cohort Study to the age of 30 and found that the average number of the offenses tended to decline as nearly uniformly as their age of onset increased. Alfred Blumstein, David P. Farrington, and Soumyo Moitra also showed that one of the factors predicting those who become chronic offenders was offending at the early age. Farrington further found that those who were first convicted at the earlier age (10 to 12) offended consistently at a higher rate and for a longer period of time than did those who were first convicted at later ages.[22]

The attitude of German scientists *Beulke* claiming that "the youth crime is associated with the age of changes as it is accompanied by the problems of socialization and after the completion of the socialization process the adolescent will not commit the crime,"[23] could be criticized, because the desistance from the youth crime is not necessarily connected with the age of changes and socialization of the minor.

Had the solution been such an easy to find, the numerous criminological researches on the explanation and anticipation of this problem, would become meaningless.

In contrast with abovementioned attitude American criminologists take into account some other additional factors which possibly may cause desistance from the crime or in opposite of it - transition to adult crime. Desistance from the crime, or the age at which a juvenile ceases law-violating behaviour, seems to be strongly related to the maturation process as juveniles become aware of either the desirability of pursuing a conventional lifestyle or the undesirability of continuing with unlawful activities. Some of the stronger motivations to desist from further

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20 *Bartollas C., Miller S.J.,* Juvenile Justice in America, 2nd Edition, "Prentice Hall, Inc.",1998, 78.

21 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 19 (in Georgian).

22 *Bartollas C., Miller S.J.,* Juvenile Justice in America, 2nd Edition, "Prentice Hall, Inc.", 1998, 77.

23 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 19 (in Georgian); *Schaffstein F., Beulke W.,* Jugendstrafrecht, 14 Auflage, Stuttgart, 2005, 11.

involvement with unlawful behaviour are the following: the realization that they are going nowhere and that it is necessary to make changes in their lives if they are going to be successful as adults; a conventional lifestyle, marked by marriage service, or education, becomes more attractive than the relatively minor gains from a life of crime; the fear of jail or imprisonment if they were apprehended as adults; they had spent enough time in the justice system; they had brought enough embarrassment to their families.[24] Accordingly, only one part of the juvenile offenders continues their criminal activity after reaching adulthood.[25] For this purposes a study has been conducted my American, criminologists. "Studies have identified three groups of juveniles. The members of one group offended only during their juvenile years; the members of a second group offended only their adult years; and a third group was made up of persistent offenders both periods. There are those who argue that the best explanation of why juvenile offenders make a transition to adult crime is that they had prior participation in unlawful activities. This prior participation, according to this position, reduces the inhibitions against engaging in future unlawful behaviour. Others contend that some individuals have a higher propensity in persistent over time. This higher propensity is related to such factors as poor parental supervision, parental rejection, parental criminality, delinquent siblings, and low IQ".[26]

One of the important factors which should be underlined for comprehension the nature and dimension of the youth crime is connected with to the specialization of offences. "The cohort studies, especially, revealed little or no specialization of offending among delinquents. However, some evidence exists that specialization was much more typical of status offenders. Susan K. Datesman and Michael Aickin's examination of a sample of status offenders found that the majority of status offenders, regardless of sex and race, were referred to court within the same offence category 50 to 70 % of the time. Females, especially white females, specialized in official offence behaviour to a greater extent than did males; 35 % of the white females were referred to court for the same offenses, a sizable proportion of them for running away."[27]

We can conclude that the juvenile crime is a complex phenomenon; it is not possible to provide straightforward definition, however there are important components, which at certain level are endemic and immanent for the substance of juvenile delinquency.

3. Reasons Causing Juvenile Crimes (Delinquencies)

In the process of determination of reasons for juvenile crimes (delinquencies) the concept of risk factors is at the core point of the numerous researches on juvenile delinquency. A risk factor is any variable that is related to a juvenile becoming or not becoming a delinquent. The answer to

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24 *Bartollas C., Miller S.J.,* Juvenile Justice in America, 2nd Edition, New Jersey, "Prentice Hall, Inc.", 1998, 78.

25 *Steinberg L.,* Adolescent Development and Juvenile Justice, "Ann. Rev. Clinical Psychologies", No. 5, 2009, 459, 466.

26 *Bartollas C., Miller S.J.,* Juvenile Justice in America, 2nd Edition, "Prentice Hall, Inc.",1998,79.

27 Ib.,79.

what puts a child at risk is elusive because some research on the subject is contradictory. Often the identification of risk has focused on the trivial and simplistic: rock and roll, rap, and punk music; pornography; the Internet; television violence; violent video games; media coverage of crime; the glorification of crime and violence in movies; and so on. The simple fact is that juveniles have always been crime-prone. The reasons why a juvenile commits delinquent acts should be considered *multivariate* in nature. In other words, there is no single variable, such as television or music that causes a juvenile to commit crime. However, certain variables (risk factors) are correlated with a juvenile becoming delinquent. A risk factor is a variable that, by its presence or absence, is correlated with the youth's becoming delinquent. A juvenile who possesses several risk factors will not necessarily become a delinquent. Similarly, the absence of all risk factors does not guarantee that a juvenile will not commit delinquent acts. In addition, the concepts of protective factors (variables that correlate with not committing delinquent acts) have also been researched quite extensively. In essence, risk factors put a juvenile in greater danger of becoming delinquent while protective factors insulate a juvenile from becoming delinquent. Risk factors do not cause delinquency; protective factors do not prevent delinquency. Nonetheless, research indicates that the presence or absence of a risk or protective factor is related to delinquency. There is a cumulative effect of risk factors that tends to lead to certain risky behaviours and lifestyles, which in turn typically lead to negative outcomes and lost opportunities for the juvenile.

Efforts to design effective delinquency intervention and treatment programs have led to many research endeavours aimed at identifying the most problematic risk factors and the most important protective factors. As a result, numerous classification schemes of risk factors exist and lead to confusion regarding exactly which risk and protective factors are the most important. In addition, many identified risk factors are often beyond the youth's control (race, gender, socioeconomic status, school district) and thus do not lead to easy interventions. They may also include behaviours that children display when they are very young: hyperactivity, lying, acting out. Because these factors are relatively common in many children, intervention can be too sweeping and can identify children who really are not at risk. Another issue in the research on risk and protective factors is that the majority of youth commit some type of delinquent act, and drawing the line between "delinquent" and "non-delinquent" youth is not always clear or consistent.[28]

According to one approach in the criminological literature, definition of delinquency risk-factors is possible as a result of study of individuals, social environment and society. Despite the fact that the inter-relationship between these risk-factors should be studied better, criminological studies supported the clarification of the issue – who is under the risk and why?

The US council working on the issues related to the juvenile noted that it is possible to determine who can become a criminal with the same accuracy as the doctors can pre-determine

[28] *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice, Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

who will have the heart attack or cancer. However in both areas, awareness about the risk-factors may increase the number of preventive actions.[29]

In addition to the above mentioned three-type division of risk-factors, there are 6 main risk-factors discussed in the literature: biology and genetics; family, personality, social environment, ecological environment and educational environment. These categories cover the main world the juvenile has connection with – family, social, ecological worlds, and the school – the above factors may help us to identify the behaviour and life style developed by the juvenile. Despite the fact that these six factors are inter-related and influence on each other, the issue of the level of the above inter-influence is arguable. Inter-relationship of risk and preventive factors is different for each young person. There is no sample or number of risk-factors, which determine who will become and who will not become delinquent. We have to repeat that risk and risk-protection factors can be reviewed as tools for preliminary assumption, preliminary projection and some type of prediction and not as causal events.[30]

Existence of different schemes for reasons of juvenile delinquency makes possible conditional division of the factors, which are considered as determinants of juvenile delinquency into two types: delinquency factors determined by the bio-psychological condition of the juvenile and range of other factors which are related to the individual, social, society and other indicators.

3.1. Bio-psychological Characteristics of Juvenile

When can we say that childhood is over and maturity period has started? At which phase of mental and physiological development of human being can we consider him/her as adult? What are the bio-psychological characteristics, which differentiate juvenile from adult? Answers to these questions will help us to identify the determinants of the juvenile delinquencies, which derive from their age (biological or psychological) development.

"The starting point, where the child becomes adult, is different for various periods. In common law system the study of childhood years' history shows that in medieval centuries childhood was finished at age of 7, when child was already able to work in the field and was learning trading. Therefore in renascence epoch children of poor families were becoming adult at an age of 7, children of aristocracy were becoming adult only after passing the school which would prepare them for society management. After the industrial revolution the demand for the young people with the school education increased. Society concluded that childhood would not finish and adulthood would not start if children were deprived from school study. In other words, the issue on whether children became the adults depended on socio-economic conditions of their

[29] Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 3, available at: <http://www.nap.edu/catalog/9747.html>.

[30] *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice,Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

existence and also on how sufficient knowledge they were getting at school. The maturity age of the juvenile is defined based on similar principles today. They do not reach adulthood before completion of school or college or before starting the job appropriate to the adult. At present the confusion is still evident existing in relation to this issue, as this transformative age might be substantially different. For example, if in the theatre 12 years old person is considered as adult, state transportation bureau considers as adult person at an age of 16 years, military and election committees – 18 years, and state board for the control of alcohol drinks – 21 years. In terms of illegal action, the vague notion of responsibility is originated from the idea that the juvenile who can differentiate the right and the wrong, has developed social conscientiousness, feeling of guilty based on his/her own behaviour and has capacity to repent can be mentally developed murderer and stricter measures shall be undertaken to punish such young criminal."[31]

"In Georgian psychology, Uznadze, based on the perspective under discussion, highlights the "sexual maturity" of juveniles, so called "transitional period". According to his position, this is a period, when the concentration of attention reduces in juvenile."[32] Regarding the same issue Chkhartishvili notes that: "Requirements to leave childhood and move to adulthood gets the social contents in the transitional age and creates decisive impact in the determination of direction of juveniles' activities. This requirement, first of all, is differentiated in the form of requirements for prestige, freedom and independence and is reflected in behaviour of young person which is somehow related to connection with other persons."[33]

Transition period and socialisation of this period strictly determine the establishment of personality: during this period the human being, his/her physiological, psychological and social "processing" is established again.[34] As of today the transition period in girls cover 10-12 age, in boys – starts in age 12 -14.[35] In transitional period young person is characterised with excess energy, attempting to manifest itself without consideration of any spiritual and moral norms.[36] The processes taking place in the organism of young person during the transitional period have substantial impact on his/her psychic condition. During this period young person can characterised as follows: frequently in bad mood, unexpected (groundless) worsening (improving) of mood, variety of wishes, extreme emotionality, not serious approach to business, forgetfulness, fantasies, carelessness, difficulty to make decision and as already mentioned, excess energy. During this period young person can't control (or can manage at low level) their emotions

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31 *Bartollas C., Miller S.J.,* Juvenile Justice in America, 2nd Edition, New Jersey, "Prentice Hall, Inc.", 1998, 194-196.

32 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 560 (in Georgian).

33 Ib., 15.

34 Ib.

35 Ib.

36 Ib.

and are extremely impulsive.[37] Moreover, it is important to consider research results, which confirm that young people and adults control emotions via different area of the brain. Namely, under experiment the photos expressing different emotions (anger, aggression) were given to them; it turned out that teenagers react on such emotions with the area of brain which is distinguished with the emotional and fast decision making, as for the adults, they fulfil the same task via the brain area which is more developed and at a higher hierarchical level.[38]

The above mentioned bio-psychological condition of the juvenile during the transitional period is voluntarily or involuntarily accompanied with number of factors, which are results of biological development of teenager; however professor Godziashvili refers to such factors as reasons causing delinquencies.[39] Namely among the reasons supporting the juvenile delinquencies caused by the bio-psychological aspect, Goziashvili names the following ones: reduced interest to study; exaggerated drive towards pleasure, alcohol and narcotics, arms; encouragement of older persons in committing crime, scarceness of spiritual world, explicit individualism, increased aggressiveness, inability to compromise with peers, orientation towards rough force.[40]

3.2. Risk –factors for Juvenile Crimes (Delinquencies)

Study of risk-factors for juvenile delinquency, similarly to any other research, has to be implemented very carefully; the same careful approach is required for interpretation of results of such research. Previous researches have not provided clear answer or determined specific factors causing delinquency or preventing it. Practically it is impossible to determine inter-relationship between the risk-factors and juvenile's mind and perception. Each juvenile under risk which becomes delinquent has one factor which does not transform into delinquency. One is clear: there is no single factor causing delinquency or preventing it. According to *Huizinga, Louber and Thornberry* making projections is methodology and theoretical statements are not sufficient to determine who will be and who will not be involved in delinquency. Part of the researchers studied the risk-factors and risk preventing factors. Majority of researches contain similar general topics and similar categorical framework. However, identification of specific risk-factors and risk preventing factors is different depending on the source of data. Despite the above, there are some general risk-factors which are mainly similar and common.[41]

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37 Ib; *Schaffstein F., Beulke W.,* Jugendstrafrecht, 14 Auflage, Stuttgart, 2005, 5; *Paasch E.,* Jugendkriminalitat – ganzheitliche Ursachenanalyse und Staatliche Reaktionsmoglichkeiten in Kriminalistic, 2001, 373.

38 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 16 (in Georgian).

39 Ib., 20.

40 Ib.

41 *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice,Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

Therefore in the process of working on the present issue we shall discuss some of the most important and general factors among diverse risk-factors.

3.2.1. Individual or Personal Risk-factors

Majority of researches are at the initial stage of development in the area of identifying the relationship between the individual characteristics and creation of risk for juvenile based on the personal characteristics of individual. The biggest problem was related to the area, where such factors were defined and measured. Despite the above, there is some consecutiveness in understanding of personal features which are common for delinquents and the preventive factors common for non-delinquents.[42] Large number of individual factors and characteristics are associated with the development of juvenile delinquency. These individual factors include: factors participating in age, gender, pregnancy and child birth; impulsiveness, aggressiveness and drug abuse.[43] Another study of personal characteristics also indicates and confirms that the characteristics such as hyper-activeness, anxiety, risky attitudes and aggressiveness are preliminary, probable indicators for future delinquency and drug abuse.[44] Some of the factors work before birth or immediately after birth; some of them are demonstrated in early childhood, some of them are not detectable until the late childhood or youth. In order to fully understand the development of these individual features and their relationship with the delinquency, development of individual in relationship with his/her surrounding environment must be studied.[45]

In this regard one of the studies examines the important theory regarding the role of the family and self-control, developed by Gotfredson and Hirsch from their book: "A General Theory of Crime". The principle thesis in this book that is that a lack of self-control explains all possible types of deviant and extreme behaviour in addition to criminal behaviours, such as riving dangerously, being involved in dangerous sports and drinking heavily. Authors do not consider self-control as innate characteristics, but claim that is becomes the part of one's personality as a result of the training process activated by parents at a young age (somewhere between age 8 and 10). If that training process fails the lack of self-control will become a permanent characteristics of the child's personality, the consequences of which will be felt for his whole life.

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42 *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice,Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

43 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 67, available at: <http://www.nap.edu/catalog/9747.html>.

44 *Hawkins J., Herrenkohl T., Farrington D., Brewer D., Catalano R., Harachi T. et al.,* Predictors of Youth Violence, Washington, D.C., 2000: Office of Juvenile Justice and Delinquency Prevention.

45 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 67, available at: <http://www.nap.edu/catalog/9747.html>.

To test this theory, research used 12 items of Grasmick self-control scale including items of impulsivity, risk-seeking, self-centeredness and temper. Parallel to this scale the research measured young people's attitude towards violence as well as to what extent parents have an impact on young people's self-control and aggressive attitude.[46] In one of the researches the researchers have examined the extent to which delinquency is correlated with personal and demographic variables, such as age, gender and race.

Age. The U.S. arrest rates increase rapidly during the teenage years, pick at about age eighteen, and then decrease, although the pick age is higher for violent offences than property offences.[47] The age pattern in self-report data is similar to that in arrest data, with self-reported delinquency tending to increase through the teenage years and the peak age varying by offence.[48]

Prenatal and perinatal negative factors.

The research conducted recently indicates that early developmental factors have been shown to be related to adolescent delinquent behavior. Recent research suggests that prenatal and perinatal disadvantages (such as exposure to drugs, low birth weight, and trauma) become risks for delinquency. New studies suggest that poor language development and lack of empathy may be consequences of parental neglect. Deficiencies in language put a child at risk for school difficulties and delinquency.[49]

Intellect. Criminological researches revealed that there is certain relationship between the intellect of criminal and commitment of crime. Persons who are distinguished with low intellect due to the lack of study at school have complications in the process of integration in society; the above creates the probability for these persons to commit the crime.[50]

Impulsiveness. Impulsiveness is also one of the individual risk-factors of delinquency. High impulsiveness is reflected in riskiness of person, improvident behaviour and unconsidered decision making. The above can result in violation of law. High impulsiveness in childhood can transform into the criminal action in adulthood. "Difficult children", distinguished with excess anxiety, imbalanced mood; they can become easily angry and often express childish aggressiveness with anger; in teenage and adulthood are less avoidant to criminal behaviour.[51] Research confirmed that children who do not learn to inhibit normal early physically aggressive

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46 *Junger-Tas J.,* Many Faces of Youth Crime: Contrasting Theoretical Perspectives on Juvenile Delinquency across Countries and Cultures, New York,"Springer", 2012, 187..

47 *Jensen G.F., Rojek G.,* Delinquency and Youth Crime*,* 2nd Edition, Prospect Heights, "Waveland Press", 1992, 96.

48 *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 292.

49 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 3-4, available at: <http://www.nap.edu/catalog/9747.html>.

50 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 20 (in Georgian).

51 Ib., 20.

behavior by about 3 years of age or who are highly physically aggressive are at high risk of becoming involved in juvenile crime.[52] A big number of the criminals exposed lack of concentration and hyperactivity at the beginning of their criminal career.[53] During the late 1980s and into the 1990s, there appeared to be a return, in some circles, to the positivists/medical model involving factors such as nutrition, chemical imbalance, and neurological problems which may cause a youth to become prone to deviant and violent behaviour.[54]

Biological and genetic factors. Factors deriving from biology and genetics are also considered under individual risk-factors. Such factors include race, ethnicity and gender. This group of risk and protective factors comprises variables that are, for the most part, out of the control of the juvenile. Like the age-old debate of heredity versus environment, the basic question researchers ask regarding these factors is, Is delinquency an inherited trait based on biology and genetics, or is delinquency the result of socialization and environment? Although a great deal of controversy arises in the academic and political arenas regarding the role of biology and genetics in delinquency, several research studies have found correlations. Most problematic is the fact that the distinction between biology and socialization is not always clear. For example, low IQ has been found to be related to delinquency. Yet how we develop IQ, socially or genetically, is still not determined.[55]

Race. One volatile debate in this area involves the connection between race and crime. Some research has found that there are no differences between African American and Caucasian boys at 6 years of age, but differences gradually develop, with the prevalence of serious delinquency peaking at age 16 (Browning and Loeber, 1999). As the incidence of delinquency increases, so does the average frequency of serious offending, rising more rapidly for African American than for Caucasian boys. Regarding the onset of offending among the boys involved in serious delinquency, 51 percent of African American boys and 28 percent of Caucasian boys appear to commit serious delinquent acts by age 15.[56] Another common finding is that African Americans are more likely to be involved in violent offending than are whites. It is probably best to consider the role of race in the social rather than the biological context. If a person's race or ethnicity values behaviour that may put them in greater contact with the system, they are more likely to be delinquent than someone whose race or ethnicity does not hold that value. Certain ethnicities have cultures that greatly value family life, which can lead to juveniles being insulated. Further, in American society, some races and ethnicities are undoubtedly more isolated in deprived urban areas, which affect delinquency rates

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52 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 3-4, available at: <http://www.nap.edu/catalog/9747.html>.

53 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 20 (in Georgian).

54 *Winterdyk J. A.,* Juvenile Justice Systems, International Perspectives, published by Canadian Scholars' Press Inc., Toronto, Ontario, 1997,152.

55 *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice, Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

56 *Browning K., Loeber R.,* Highlights of Findings From the Pittsburgh Youth Study Series, Washington, D.C., 1999: Office of Juvenile Justice and Delinquency Prevention.

and further obfuscate the impact of the biology/genetics risk factor.[57] As for race, black juveniles tend to have higher arrest rates than white juveniles, particularly for violent offences.[58] However, self-reported data paint a different picture; there are much smaller black-white differences in self-reported delinquency than in arrest data.[59]

Gender. Gender is a genetic risk factor that is a clear predictor of delinquency. Boys are more involved in more serious forms of delinquency than are girls. However, according to USA data in recent years, there has been a marked increase in female involvement in delinquent acts. Despite the above, the violent crime index arrest rate for male juveniles remains substantially higher than that for female juveniles.[60] In USA males accounted for approximately 75% of all arrests of juveniles in1994; females accounted for a majority of juvenile arrests only for running away. Even for prostitution most (51%) of the arrests of juveniles in 1994 involved mails rather than females. However, the ratio of the male to female arrest rate has been decreasing since 1960.Like arrest data, self-reported delinquency is higher for males than females and the ration of male to female self-reported delinquency has been decreasing over time.[61]

Gender is a genetic risk factor that is a clear predictor of delinquency. Boys are more involved in more serious forms of delinquency than are girls. However, according to USA data in recent years, there has been a marked increase in female involvement in delinquent acts.

3.2.2. Social Risk-Factors

The subsequent, strong social risk factors include absence of parental supervision, parental rejection, child maltreatment, and lack of parental involvement or disordered, dis-organised family and neighbourhood.[62] The essential factors determining the social environment – peers and social class – are also important.[63]

If one can use Canadian textbooks and journal articles as an indicator of theoretical preference, then it would appear that the sociological/macro-perspectives are the most popular. Factors that have been studied to explain delinquent involvement include: the family and social class. Conceptualization

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57 *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice*,* Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

58 *Empey L.T., Stafford M.C.,* American Delinquency: Its Meaning and Construction*,* 3rd Edition, Belmont, "Wadsworth", 1991, 77-78.

59 *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 293.

60 *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice*,* Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

61 *Jensen G.F., Rojek G.,* Delinquency and Youth Crime*,* 2nd Edition, Prospect Heights, "Waveland Press", 1992, 96; *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 292.

62 *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice*,* Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

63 Ib.

of class and family focuses on the power relations in the workplace and the home. Hagan, Simpson and Gillis (1987) argue that delinquency rates are a function of class difference between the classes and economic conditions that in turn influence the structure of the family.[64]

Their power control theory has been reasonably effective in explaining the relative increase in family delinquency since it recognizes the effects of social changes such decline of the patriarchal family and changing sex-roles.[65]

In the process of determination of social factors, the factors such as the family and peers should be evaluated the first. Relationship of children and teenagers, relationship with family and peers impacts the development of anti-social behavior and delinquency. Inter-relationship existing in the family is the most important at early childhood, however its influence may continue for a long time. During the early teenage stage relationship with peers gains the high importance. As for the issues related to poverty, social class and neighbourhood as well as educational environment, they are discussed under society factors.[66]

Family

Despite many theories concerning the genesis or etymology of youth's criminal behaviour, family indisputably plays the central role.[67] Weak attachment to the parents is a strong predictor of delinquency.[68]

Scientific literature discusses many ways by which family influences the juvenile behaviour. First of all, we shall discuss the most influential theory devoted to the family - Hirsch's Social Control Theory.[69] According to Hirsch's theory (1969) attachment involves affectional ties between juvenile and parents. If juveniles are strongly attached to parents, (e.i. they admire their parents and care what their parents think about them) they will be less likely to commit delinquency. If attachment to parents is weak, then juveniles will not internalize conventional norms or develop respect for authority and consequently will be more likely to commit delinquency.[70] Young people, who have strong bonds with their parents would interiorize the

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64 *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc", 1997, 151.

65 Ib*.,* 152.

66 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 74, available at: <http://www.nap.edu/catalog/9747.html>.

67 *Junger-Tas J.,* Many Faces of Youth Crime: Contrasting Theoretical Perspectives on Juvenile Delinquency across Countries and Cultures, New York, "Springer", 2012,185.

68 *Loeber R., Stouthamer-Loeber M.,* Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency, in: Crime and Justice: an Annual Review of Research, Vol. 7, *Tonry M., Morris N.* (Eds.)*,* Chicago, "University of Chicago Press", 1986, 29-149; *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 292.

69 *Junger-Tas J.,* Many Faces of Youth Crime: Contrasting Theoretical Perspectives on Juvenile Delinquency across Countries and Cultures, New York, "Springer", 2012, 185.

70 *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, "Canadian Scholars' Press Inc.", Toronto/Ontario, 1997, 292.

values and norms of their parents. As a result they would behave in a norm conforming way, and since they would not want to disappoint their parents, they would try to do well at school and there would be no incentive to play truant.

Moreover in meeting the demands from their family, school, and larger society, such juveniles would rewarded by praise and privileges and a promising future. In this way they develop a stake in conformity as well as strong inhibitions against delinquency involvement that might endanger such rewards. Hirsch also claimed that such young people would select a few good friends with whom they would develop close bonds and refrain from being involved with large peer groups involved in high risk behaviour by attracting mischief "just for fun". However, this last premise turned out to be a weakness in his theory, because later research showed that Hirsch greatly underestimate both the group character of most juvenile leisure time interactions and the role of the peer groups in facilitating deviant behaviour.[71] To test this hypothesis a bonding scale is used, which is based on the questions concerning how well juvenile gets along with his parents? How often juvenile takes meal with fir parents? And whether the family spends time together they go together on outings, walks or on sport? These variables are combined in a scale labelled "Family bonding". In some researches several questions were added to the method related to such important family events, as serious illness of either parents, family disruption through alcohol or drug problems, serious parental (physical) conflict and their separation or divorce. In addition they were asked some control questions, such as whether his parents know which friends he usually goes out with. Whether his parent gave him a curfew witch he obeys?[72]

A large body of research has assessed many family characteristics and found that several family variables are risk factors. Strong risk factors include absence of parental supervision, parental rejection, child maltreatment, and lack of parental involvement; medium- and lesser-strength predictors include parental marriage status and relations, parental criminality, parental discipline, parental health, and parental absence.[73] The factors studied and used in Canada for explaining the juvenile delinquencies also include abusive treatment and negligence to juveniles.[74]

The Western culture imposes a heavy burden over the family as defines the responsibility of parents over upbringing of their children. Such cultures impose the parents the task to up-bring children in the way that they obey the behaviour rules determined by the society. We shall distinguish the **family structure** (who lives in the family) and **family functioning** (how the family members treat each other). These are two main categories which were used to check the impact of family over the delinquency.

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71 *Junger-Tas J.,* Many Faces of Youth Crime: Contrasting Theoretical Perspectives on Juvenile Delinquency across Countries and Cultures, New York, "Springer", 2012, 185.

72 Ib.

73 *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice*,* Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

74 *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 152.

Historically, one aspect of **family structure** that has received a great deal of attention as a risk factor for delinquency is growing up in a family that has experienced separation or divorce.[75] A large study of previous research on families found that a "broken home" has an impact on delinquency, but the effects appear to be minimal. The study also found that the correlation between a broken home and delinquency was greater in minor forms of delinquency.[76] Although many studies have found an association between broken homes and delinquency there is considerable debate about the meaning of the association. For example, longitudinal studies have found an increased level of conduct disorder and behavioral disturbance in children of divorcing parents before the divorce took place. Thus, it is likely that the increased risk of delinquency experienced among children of broken homes is related to the family conflict prior to the divorce or separation, rather than to family breakup itself.[77] Being born and raised in a single-parent family has also been associated with increased risk of delinquency and antisocial behavior. Research that takes into account the socioeconomic conditions of single-parent households and other risks, including disciplinary styles and problems in supervising and monitoring children, show that these other factors account for the differential outcomes in these families.[78] When breaking down certain family factors, research shows that the presence of a father reduces the chances of a son becoming delinquent, first-born children are less likely to be delinquent, and the larger the family, the more likely it is that a child in the family will be delinquent .[79] The same problem persists when the parents –the mother in particular –have alcohol-related problems.[80]

Presumably, in terms of preliminary estimation of delinquency, the important aspect is **inter-relationship in the family.** Several longitudinal studies investigating the effects of punishment on aggressive behavior have shown that physical punishments are more likely to result in defiance than compliance.[81]

Parental management had been studied by many researchers. For example, coercion theory (Patterson 1995) places a stronger emphasis on parental control than on attachment to parents while Social Control theory primarily views attachment to parents as a condition for internalizing societal values as well as self-control.

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75 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 75, available at: <http://www.nap.edu/catalog/9747.html>.

76 *Caeti T. J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice*,* Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

77 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 75, available at: <http://www.nap.edu/catalog/9747.html>.

78 Ib., 76.

79 *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice*,* Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

80 *Junger-Tas J.,* Many Faces of Youth Crime: Contrasting Theoretical Perspectives on Juvenile Delinquency across Countries and Cultures, New York, "Springer", 2012, 187.

81 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 75, available at: <http://www.nap.edu/catalog/9747.html>.

In this respect it should be observed that Loeber and Dishion (1983) found that the best predictor of delinquent behaviour was a shorter version of Glueck's measure of parental management, including the mother's discipline and supervision as well as family cohesiveness. Loeber and Stouthamer-Loeber also concluded that the strongest predictors of delinquency were parental involvement, monitoring and rejection.[82]

Consistent discipline, supervision, and affection help to create well socialized adolescents. Furthermore, reductions in delinquency between the ages of 15 and 17 years appear to be related to friendly interaction between teenagers and their parents, a situation that seems to promote school attachment and stronger family ties. In contrast, children who have suffered parental neglect have an increased risk of delinquency. *Widom* (1989) and *McCord* (1983) both found that children who had been neglected were as likely as those who had been physically abused to commit violent crimes later in life. In their review of many studies investigating relationships between socialization in families and juvenile delinquency, Loeber and Stouthamer-Loeber (1986) concluded that parental neglect had the largest impact.[83]

We can conclude - although single-parent families have been widely held responsible for juvenile crime, a considerable amount of evidence indicates that if the remaining parent provides consistent and strong guidance, children in single-parent families are no more likely to commit criminal acts than are children in two-parent families. Studies continue to show that how parents treat their children has an important impact on whether or not their children become criminal delinquents. Parental conflict and harsh, erratic discipline have been shown to contribute to juvenile crime. Abused children are also at high risk of becoming involved in crime. Households that provide safety, emotional warmth, and guidance foster the development of noncriminal young people even in neighborhoods at high risk for crime.[84] Can parent do anything to reduce the influence of the effects of delinquent peer associations? Research by Warr in 1993 shows that time spent with family, especially on weekends has such an effect. Among juveniles who spend "a great deal of time" or "quite a bit of time" with their parents on weekends, there is little or no relationship between association with delinquent peers and delinquency. For example, it may prevent attendance at weekend parties involving alcohol and drug use.[85]

Relationship with Peers

One of the strongest predictors of delinquency is association with delinquent peers. According to Sutherland's 1947 differential association theory, delinquency behaviour is learned

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82 *Junger-Tas J.,* Many Faces of Youth Crime: Contrasting Theoretical Perspectives on Juvenile Delinquency across Countries and Cultures, New York, "Springer", 2012, 186.

83 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 78, available at: <http://www.nap.edu/catalog/9747.html>.

84 Ib., 4.

85 *Winterdyk J. A.,*Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 292.

through intimate social relations, including peers relations. Juveniles who associate with delinquent peers are likely to violate the law because they learn the attitudes that condone it. Akers' 1985 social learning theory extends the differential association theory by claiming that delinquency results not only from learned attitudes but also from reinforcements (rewards and punishments) for delinquency and modelling or imitation of others' behaviour.

Consistent with the logic of both theories, Warr and Stafford (1991) have found that: "the behaviour of friends affects adolescents delinquent behaviour through their attitudes about delinquency". However, more consistent with social learning theory than differential association theory, regardless of "their own attitudes toward delinquency adolescents are strongly influenced by the behaviour of friends."[86]

Association with delinquent peers is strongly related to delinquency partially because the delinquent peers strengthen the impact on delinquent behaviour. On contrary, having peers rejecting delinquency is the preventive factor.[87] Criminology researches confirmed, that circle of friends has significant impact on commitment of crime by the juvenile.[88]

There is a dramatic increase during adolescence in the amount of time adolescents spend with their friends, and peers become increasingly important during this developmental period. Moreover, peers appear to be most important during late adolescence, with their importance peaking at about age 17 and declining thereafter (Warr, 1993). Thus the decline in delinquency after about age 18 parallels the decline in the importance of peers, including those with deviant influences. Consistent with this view, in the longitudinal research of antisocial British youth by *West and Farrington* (1977), deviant youth reported that withdrawal from delinquent peer affiliations was an important factor in desistance from offending.[89]

The intercourse of teenager with the persons, who have committed the crime, will with high probability cause commitment of crime by the teenager.[90] Alongside with the discoveries made in relation with existence of delinquent peers, the Rochester juvenile research also discovered the dependence of delinquency and involvement in delinquent behaviour in case of delinquent believes. Having delinquent believes means that the young person evaluates how acceptable or incorrect is involvement in delinquent behaviour. Delinquent views increase the probability of involvement in delinquent behaviours. Alternate involvement in delinquent behaviours has strong mutual effect, increases associations with delinquent peers and strengthens the formation of

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86 *Winterdyk J. A.,*Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 289-292.

87 *Hawkins J., Herrenkohl T., Farrington D., Brewer D., Catalano R., Harachi T. et al.,* Predictors of Youth Violence, Washington, D.C., 2000: Office of Juvenile Justice and Delinquency Prevention.

88 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 28 (in Georgian).

89 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 81, available at: <http://www.nap.edu/catalog/9747.html>.

90 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 28 (in Georgian).

delinquent attitudes.[91] In early youth **peers** start to become the important factor. Young people, associated with delinquent companions will probably conduct more incorrect behaviours if they continue to spend time with such companions.[92] In contrast with the parents and siblings the young person can him/herself select the circle of friends. Research determined that the conflict situations with family members often cause choosing by young person the circle of friends involved in criminal activities.[93] Numerous researches confirm that peer influences appear to have a particularly strong relationship to delinquency in the context of family conflict. For example, adolescents' lack of respect for their parents influenced their antisocial behavior only because it led to increases in antisocial peer affiliations.[94]

One of the longitude researches states that involvement in the circle of peers with anti-social behaviour is the only indicator which has direct and stronger impact on future delinquent behaviour of juvenile compared with the initial delinquency factors. The factors such as behaviour of delinquent peers, approval of deviant behaviour by peers, dependence on such peers or alliance, time spent with them and oppression from peers for deviance – are associated with anti-social behaviour of teenagers.[95]

3.2.3. Social Factors

Such factors include: social class, ecological environment and educational environment.

Social Class

One study conducted in USA found that "structural" position, such as social class and community of residence, had important effects on delinquency. Children from underclass backgrounds (those where there is persistent high-level poverty) were more involved in delinquency, especially serious delinquency. In this environment, economic hardship and stressful life events led to a lack of parent-child attachment and involvement and parental control over adolescents. In turn, these elements of poor parenting were significantly associated with increased delinquency.[96] However, one school of criminological thought (labelling) disputes the findings that social class is involved in delinquency, other than the fact that lower-class youths are

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91 *Browning K., Thornberry T., Porter P.,* Highlights of Findings from the Rochester Youth Development Study Series, Washington, D.C., 1999: Office of Juvenile Justice and Delinquency Prevention.

92 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 4, available at: <http://www.nap.edu/catalog/9747.html>.

93 *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 28 (in Georgian).

94 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 81, available at: <http://www.nap.edu/catalog/9747.html>.

95 Ib., 81.

96 *Hawkins J., Herrenkohl T., Farrington D., Brewer D., Catalano R., Harachi T. et al.,* Predictors of Youth Violence, Washington, D.C., 2000: Office of Juvenile Justice and Delinquency Prevention.

subjected to greater criminal justice system scrutiny.[97] In USA the view of population and explanations provided by Media often reflect the image that the delinquent actions are mostly implemented by the juveniles from low stratum of society. Report on law violations does not include data on social belonging of juveniles. However there are many researchers studying relationship between the social strata and cases of officially registered delinquencies. Evidences are different: part of researches show that there are many juveniles from low society stratum in the official arrest data; other researches state that there are no evidences for such delinquencies in above data or number is very low. The best conclusion on the above is that there is light tendency of having higher number of delinquent juveniles from lower social class in official data; however the difference between the social classes is not such big and wide, as it is between age and gender. Same conclusions can be made from the researchers studying relationship between the social class and self-reported delinquencies; however there are some evidences that more serious and repeated delinquencies are characteristic to the representatives of lower social class.[98]

Ecological Environment

Drawing on ecological concept and presuming the rationality of offenders, the routine activity theory, developed by **Cohen** and **Felson**, has attempted to link increase in delinquency to increased suitability of targets and a decline in the presence of "guardians" (e.g., friends, family and neighbours). In Canada, Kennedy and Baron in 1993 demonstrated that choices, routines and cultural environment milieu interact to affect one another to create opportunities for delinquency.[99]

It is generally accepted that the fact where families live affects the opportunities and resources available to the children of those families. Children who grow up in neighborhoods with high joblessness, poverty, and crime may see criminal behavior as an acceptable alternative when other opportunities are lacking. The negative impact of poor parenting is also stronger in disrupted neighborhoods.[100] "Delinquent behaviour sometimes is a result of totally normal process of psychological development. If little boy is brought up in a clan of pirates he will develop a super-ego that tells him never to work for something when is possible to steal it. Identifying with his father he will build an ego-ideal of bigger and better piracy. In such case the process of socialisation is accepted. The person is called a criminal by the major society, but within the minor society of the pirates he is simply growing up to be a solid and respected citizen."[101]

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97 *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice, Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

98 *Tittle C.R., Meier R.F.,* Specifying the SES/Delinquency Relationship, Criminology, 1990, 271-299.

99 *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 152.

100 Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 3-4, available at: <http://www.nap.edu/catalog/9747.html>.

101 *Williams G.,* Criminal Law, The General Part, 2nd Edition, Florida, "Gaunt, Inc.", 1998, 815.

Something of this sort is happens when a child is brought up in a delinquent family, living perhaps in a delinquent neighbourhood. Even where the parents are respectable, boys in large towns frequently spend their leisure in gangs which engage in damage and theft, partly for excitement and partly for gain. In a survey of juvenile crime in Liverpool Mr. J.B. Mays found that boys regarded it as socially necessary to join a gangs, because as it was unmanly for an adolescent to be seen out with his parent. "The gang comprises the boy's real social world and it is within the gang that he endeavours to attain prestige and status."[102]

In summary we can state that above mentioned certain characteristics of communities predict delinquency. In fact, the number of juveniles engaging in delinquency in a particular area is strongly correlated to community crime rates and vice versa. It is a relative truism that small areas within large cities typically have disproportionately high levels of violence and crime; therefore, juveniles living in those areas tend to be more involved in crime and violence. Areas in which poverty rates are high, access to drugs and firearms is easy, neighbourhood adults are involved in crime, and social relations are disorganized have all been found to be risk factors in delinquency.[103] Other aspects of the environment that have been examined as factors that may influence the risk of offending include drug markets, availability of guns, and the impact of violence in the media.[104]

Educational Environment

The school a juvenile attends can affect his or her level of delinquency—the overall level of delinquency at the school, the truancy rates, and the number of students dropping out from the school are all related to a juvenile's delinquency. Juveniles who fail academically, have low bonding to their schools, have made frequent school transitions, or have dropped out are more likely to use drugs and persist in delinquent conduct. Juveniles who are not committed to school have higher rates of street crime, and those who commit street crimes have less commitment to school. School performance, whether measured by reading achievement or teacher-rated reading performance, and retention in grade also relate to delinquency as either risk or protective factors.[105]

In criminology there are discussions on relation between the truancy and commitment of crimes.[106] "Persons who later become the criminals are characterised with frequently missing the school. Truancy is caused by lack of interest of student in materials as well as by avoiding homework. School as one of the main institutes for socialisation can develop a person as criminal

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[102] *Williams G.,* Criminal Law, The General Part, 2nd Edition, Florida, "Gaunt, Inc.", 1998, 817.

[103] *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice, Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

[104] Juvenile Crimes, Juvenile Justice, *McCord J., Spatz Widom C., Crowell N.A.* (Editors), Washington, D.C., "National Academy Press", 2001, 97, available at: <http://www.nap.edu/catalog/9747.html>.

[105] *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice, Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

[106] *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 27 (in Georgian).

or as non-criminal. Namely, if missing the school or receiving bad marks cause labelling of juvenile as incapable person, who could not fulfil teacher's assignments, it may encourage the teenager to "find shelter" in the social environment where his/her values (missing the school, bad marks) are accepted; moreover often there is only one step between the labelled person in social environment and commitment of crime."[107]

Cohen in 1955 has argued that lower-class boys are evaluated against a "middle-class measuring rod" in schools, but they are destined to fail because they lack ambition, thrift and courtesy. School failure is said to lead to a collective frustration among lower-class boys, which leads to delinquency. Many studies have found that students who do not worst in school are most likely to commit delinquent offences. However, that like hood is not limited to lower-class boys; school failure is related to delinquency among juveniles in all social classes and among girls as well as boys.[108]

Criminological research showed that the teenagers later following the criminal life style, were distinguishable at school due to their behaviour.[109] "Prominence" at school of students, who later became criminals, is demonstrated in three components: negative attitude to school, aggressive attitude to school subjects and school personnel and low marks.[110] The juveniles who drop out of school are generally more likely to be arrested even when they get older, get a job, or get married. Higher education, then, seems to be a protective factor against delinquency.[111]

4. Conclusion

Based on the review of researches provided in the present article we can derive certain conclusions. In terms of explanation of delinquent behaviour, the main differentiating characteristics between the juveniles and adults among other characteristics include the following: juvenile group with reasons caused by cognitive, neuro-biological and external factors is more inclined to risk taking and impulsive behaviour.

The juveniles starting anti-social activities at an early age, with high probability will continue such activities in adulthood. Many young people becoming law obedient at the age of 20, will presumably continue to act similarly despite the nature of reaction of justice system; however various type interventions, especially those based on society (have the social nature) may reduce the cases of

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[107] *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 26 (in Georgian).

[108] *Winterdyk J.A.,* Juvenile Justice Systems, International Perspectives, Toronto/Ontario, "Canadian Scholars' Press Inc.", 1997, 292.

[109] *Shalikashvili M., Mikanadze G.,* Characteristics of Juvenile Justice: Criminological, Criminal, Penitential and International Legal Basis of Juvenile Justice, Tbilisi, 2011, 26 (in Georgian).

[110] Ib., 26.

[111] *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice, Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

juvenile delinquencies, as well as disposition of juvenile to delinquency, which in other cases would presumably continue their anti-social actions even after achievement of adulthood.[112]

The research proved that it is impossible to preliminarily determine delinquency based on only single specific factor. One specific risk-factor or preventive factor cannot project delinquency as effectively as the cumulatively taken risk and its opposite factors, past life and attitudes. For example in 1999, *Browning and Loeber* declared that the probability of serious delinquency is increased is parallel with the increase of number of risk-factors. When the number of risk factors exceeded the number of protective factors, the juvenile's chance of having a delinquency-free adolescence was very small. The chances of a juvenile's having a successful adolescence did not become high until the number of protective factors far exceeded the number of risk factors. The best predictors of success in the *Browning* and *Loeber* study were having conventional friends, a stable family and good parental monitoring, positive expectations for the future, and non-delinquent peers.[113]

Analysis of researches provided in the article is based on ecological perspective. Postulate of ecological perspective considers that understanding of motivation and behaviour of person is possible for each specific case, when current relationship between the individual and social environment is clear for the person.[114] Numerous experimental studies show that social and contextual, as well as individual factors have drastic impact on human being's behaviour. The above ecological model is reflected in works developed in the beginning of 20th century by social psychologist Kurt Levin, psychiatrist with inter-personal orientation Harry Stuck Sullivan, behaviourist Rudolf Mun and by probably the most famous scientist Uri Bronfenbrennen who presented a theory that child's development is strongly influenced by inter-related systems, such as family members, peers, school and local society, as well as by phenomenon at macro level, such as legal system and national economy. As offered by the Bronfenbrennen work the ecological view on human behaviour is distinguished separate part related to the juvenile justice. The obvious facts confirm that children and juveniles can be more sensible, assimilating and reactive to contextual factors, especially to dynamic and variable risk-factors, compared with the adults. This fact can have significant impact on juvenile justice, in terms of understanding the juvenile delinquent behaviour as well as identification of interventions and means which may reduce the probability of juvenile delinquencies.[115]

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[112] *Slobogin C., Fondacar M.R.,* Juveniles at Risk, A Plea for Preventive Justice, New York, "Oxford University Press", 2011, 19.

[113] *Caeti T.J., Fritsch E.J.,* "At-Risk Youth," Encyclopedia of Juvenile Justice*,* Ed., Thousand Oaks, CA: SAGE, 2002, 22-28, SAGE Reference Online.

[114] *Fondacaro M.R.,* Toward an Ecological Jurisprudence Rooted in Concepts of Justice and Empirical Research, "Univ. Missouri - Kansas City, L. Rev.", No 69, 2000, 179, 185.

[115] *Slobogin C., Fondacar M.R.,* Juveniles at Risk, A Plea for Preventive Justice, New York, "Oxford University Press", 2011, 21.

Besarion Zoidze∗

Contribution by Professor Lado Chanturia into Development of Civilized Opinion

Professor at Ivane Javakhishvili Tbilisi State University Lado Chanturia turned 50 recently. For assessment of the scientific merit it is no big deal generally, but this time we encounter with the unique case. One of the chief authors of Civil Code of Georgia and "the Law on Entrepreneurs", since the Code and the Law were adopted, he has contributed significantly in development of the modern Georgian Law, towards the legislative and the scientific directions as well as judicial precedents. He is considered on merit as the recognized researcher of the Georgian Civil Law and of the modern Georgian Legal Science in general. In the small letter hereof we would like to retell several main moments from his work and wish all the new success to him again on the thorny way of constructing Georgian State.

I. Historic Right for Western Values

All the nations have their biographies just like the particular persons. The biography of the people reveals the cultural forehead as the spiritual product of its development. In the order of the cultural values character of the people being organized into the state is reflected. The backbone of this order is the law as the state is the organization being built over the law. As the weeds interfere with cultural plants, absence of the law endangers in the same way the values defining our life. That is why all that exists is presented and served by the state order. In the state of any type respect towards the state is the main natural liability of the citizen, the guaranty of the natural rights of the citizens. Therefore the question might arise with anyone regarding our legal face in the past and what it is like now, and in general what is the role of the person in this affair in general.

From historical point of view the Georgian Legal Culture was preferably of Greek and Roman nature and partially, has been developed affected by the influence of Oriental Culture. Here the Western and the Oriental Legal Values have been combined. Accordingly, the law acting among us claimed to be the synthesized product, bearing of national as well as supranational values. The proof for it is the volumes of Law by the King Vakhtang VI, in which Mose's Law, Greek and Syrian-Roman Law and the pure Georgian national law artifacts such as the books of law by Beka-Aghbugha, Giorgi Brtskinvale and the same Vakhtang VI gather and merge in harmonious way. Our ancestors have overcome in such way feudal isolation and recognized

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metaphysical nature of law. I have been assured in it by several claims, in which except for the books making part of the volumes by Vakhtang the law of those people is confirmed (Russians, French, etc.), which had no action power in Georgia. It seems our ancestors knew well non-positive state of law and its existence supranational nature.

Afterwards, when Georgia became the part of the Russian Empire, even then the work over the draft laws directed towards the western law was not ceased by the Georgian princes. Our people have gained historical right to hold the law established over the western values. In the framework of the Russian Empire our people have been deprived of this right. Only upon its decomposition the real chance has been incurred for Georgians to have their own Law. Georgia was one of the post-soviet countries, which refused the communist heritage and completely turned back to the soviet legal categories. As time passes by, Georgian legal body together with its legislation, dogmatics and precedents more and more come closer to the modern standing of the law.

II. One of the Main Authors of the Civil Code who has Introduced it into the Practice

Establishing of the Civil Code is the historical event in Georgian reality. The western styled education of the Professor Sergo Jorbenadze plaid decisive role in defining of the valued orientation of the Code. The commission established by him considered that Georgia shall restore the broken bond, which might connect it with the Europe again.

While establishing of the European type Code the right reasoning and the intellectual power of the Georgian people has been revealed. In order to succeed in that affair it was necessary to see those new (modern) trends of development of the Private Law, which was possible in cooperation with the European civil lawyers. Professors from Bremen Ralph Knipper and Helmut Heinrich have been involved into the process of establishing the Code, and after its adoption took proper care of its introduction into the real life.

The young Professor Lado Chanturia, which is the protagonist of my article, started to study Private Law at the University of Gottingen, when the Soviet Union was newly dissolved. He returned to Georgia with the best researches and starting from 1992 was involved into elaboration of the Code, and lately for several years worked hard in the commission consisting of four members established by the Professor Sergo Jorbenadze, which in the autumn of the years 1997 was completed by adoption of the Civil Code. Afterwards, total introduction of the Code into our practical life began, the heavy burden of which has been born to the date with the Professor Lado Chanturia. Introduction of the Code into the life was impossible without proper intellectual base. First of all it was decided to provide comments, which was thereto implemented and in the shortest term with the Professor Lado Chanturia as the editor of six books have been published, which are even now considered up-to-date, and soon with the editing of the same person will obtain the completely renovated different interface. All those were followed by various monographs by means of which the Private Law dogmatic basis has been established. I would not

exaggerate saying that the works by the Professor Lado Chanturia create basis for the modern science of law. Today we have quite interesting group of the researchers, the great part of which got acquainted with the Private Law by means of the indicated researches in particular. These works became the source for our judiciary precedents as well. Studying the practice persuades us that without the researches by the Professor Lado Chanturia the judiciary body would have encountered serious problems in defining and explaining in the proper way of the norms of the Civil Code and the Law on Entrepreneurs. I would like to retell in the proper sequence the significance of his main monographs for development of the modern Private Law.

III. First Researcher of the Modern Concept of the Property

Georgia was the first country in the Post-Soviet space, which upon dissolving of the Soviet Union supported the western concept of the property, and for all the proprietors the general guaranties have been verified by the Constitution. I remember the great discussions held in 80s regarding the land privatization, which had its supporters as well as the opponents. The letters published by the Professor Lado Chanturia were saturated with the western spirit and expressed the land privatization and the necessity to establish the private property in our country. Especially successful was his monograph ("Real Estate Property", Tbilisi, 1994, p. 267; second edition, 2004, p. 310), which was the significant turning point in introduction of the European concept of the Property. It totally changed our attitudes and overall reasoning towards the property. In the book hereof the property is characterized as the main right of the human being, the basis for his/her liberty. The property is reflected from the point of view of the private and the public interests, as the value moderately restricted with the social interests. The property obliges the person while using it to take into account the interests of the society also. Reflection of the property highlighted in such a way was necessary for our society, which was and I regret to tell, unfortunately still is preoccupied with the private profitability of the property. Until we realize that success of the private interests is possible only in case the societal interests are respected in cohabitation with them we will be always alienated from our state.

As the former judge of the Constitutional Court, I honestly acknowledge that the mutual alienation of the interests is so much integrated into our conscience that it is difficult sometimes even for the high ranked judge to conceive the balance. The citizen Purtskhvanidze in his/her claim declared: the property is inviolable and the lessee bears no right against the will of the lessor to prolong the term of the Agreement. According to the adjudication it is verified: the property is fundamental and inviolable right and the lessees could not restrict it. The general spirit of our current precedents is similar to the approaches of the European court, which considers that the property right might be restricted by the interests of the lessees. The book hereof, which is the best example of the analysis of Georgian and German Law, I repeat, played significant role in cognition of the modern concept of the property and the proprietary order based upon it. Then fact

of the book being published for the second time promoted the Georgian civilized reflection significantly, and it still remains for the best source of cognition of the property general right.

IV. Author of the Fundamental Guidelines of the Private Law System Concepts

The books written by the professor Lado Chanturia for the students in the Civil Law ("Introduction into the general part of the Civil Law", Tbilisi, 1997, p. 433; "General part of the Civil Law", Tbilisi, 2011, p. 476) have changed significantly our approach to the private-legal values. Civil Code, by means of which the Private law was liberated from the increased guardianship of the Public Law, was subordinated to it. Although the Civil Code introduced new values, in the real life their implementation required creation of the literature radically different from the existing soviet sources. The monographs by the Professor Lado Chanturia offered a completely different new reality to the Georgian lawyers, which were before created for the centuries by the famous authorities of the science of law (Savin, Pukhta, Ierigin, Laurence, etc.). The value of these books stands with their system body being constructed in the similar way with the guidelines widely accepted in the west. Together with several general issues, the constitutional basis of the Private Law is highlighted here. In particular, influence of the constitutional norms and values in the Private Law. This process is especially vivid in the field of the general rights. The Constitution shall be reviewed as the source of renovation and transformation of the values of the Private Law. The decision drawn by the Germans regarding the case of Lute retells a lot from this point of view.

The teaching about the persons is the great merit of these books. The human being as the subject to the law bears the personality and participates into the civil relations. The legal entities are distinguished for more novelties, which is properly preconditioned by their fictive existing. All that is created by the person completely depends upon the people. Under such correlation the legal entities fall as well. The legislator since adoption of the Civil Code to the date has several times changed the rights of the legal entities, while even the Soviet law could not ignore completely the established rights of the natural person.

From the historical point of view the legal entities completely aspired to gain the legal image of the natural person. The Civil Code provided normative ending to that and equipped them with the general authorities and capacities. In the book hereof the legal entity is underlined as the legal reality, for which the realm of the civil turnover is free. The peculiarities characteristic for the legal entity are explained with the academic attractiveness and perfection together with the legal reservation to participate into the civil turnover. Afterwards the teaching of the deals come, the normative basis of which in the Georgian Law lies upon the German Law. On basis of the rich experience accumulated in the German doctrine all the details of the deal are studied. This part introduces the brand new world of the modern concept of the deal, which verifies that the deal is the expression of the will, and such expression might be explained, and the form of the deal is free. The lack of the will is the basis for its

cancellation, etc. The most important is that the author does not avoid the sophisticated works but tries to propose their explanation to us. And at the same time does so in a simple manner that the reader has the impression as if the contents of the regulation have been always evident to him/her. As I have to tell more about other works, here I quit with the above.

V. Founder of Contemporary Georgian Corporate Law

To create legislation regulating entrepreneurship was one of the primer goals of law reform. Together with the professor from Bremen, Dr. Rolf Knipper, and Lawyer from Mine-Frankfurt, Hartmut Fromm, professor Lado Chanturia elaborated a draft law on "Entrepreneurial Society", which entered into force in 1994 with the name of "Law on Entrepreneurship" that is still in use nowadays. The interpretation and implementation of this law required the creation of the relevant literature. In a very short time professor lado Chanturia published the commentary on the abovementioned law, which was printed several times and has laid the basis for the establishment of Corporate Law in Georgia. If not this commentary, many norms from the law, which are very easy to understand for the European lawyers, would have remained unclear for us. At the same time the commentary was functioning as a textbook.

This commentary was proceeded by the fundamental monograph on corporal governance problems ("Corporate Governance and Responsibility of the Heads in Corporate Law", publication "Samartali", Tbilisi, 2006, p.527). Such kind of monograph was the first written in post-Soviet countries and it is mainly the result of comparative analysis of American and German law. The success of the corporation, as well as of any activity, depends on a management quality. In the abovementioned book the principles of the corporation governance, with positive and negative effects characterising them, is underlined in details. According to the main regulations of this book, right determination of freedom and responsibilities of the heads, is the main factor for the successful corporation.

The effect of this book is very important for our reality. It is written in a manner that the main target is Corporate Law. For anyone, interested in corporate law, this book can be very useful.

Many other researches of Professor Lado Chanturia became the basis for the formation and innovation of the corporate law in Georgian reality. None of the other branches had so much interest and depth in our current reality as the Corporate Law. We will not be mistaken if we modestly say that when talking about the Professor Lado Chanturia, we have the case of founder of the contemporary Georgian Corporate Law.

VI. Founder of Contemporary Law of Guarantees

The orientation on the completion of the obligation requires the existence of adequate law of guarantees. Civil Codes regulate in details property and obligation measures. They are

historically approved methods of such guarantees. The very first research activities in this sphere were made by Professor Lado Chanturia. He has published two volumes separately, first of which was about property measures for the demand guarantees ("Property, as a Demand Guarantee", Tbilisi), which for me was a major source of law while working on the commentaries of the Civil Code and textbook of property law. Here as well, author was very good at interpretation of some obscure norms and explanation of their true meaning. The abovementioned book was followed by an extensive guidebook in Law of Guarantees ("Credit Insurance Law", publisher "Justice", Tbilisi, 2012, p. 304). With the creation of this book, the Professor was the first scientist, who established a system of credit insurance in Georgian reality. The work includes in itself general provisions, as well as various measures of credit insurance. Firstly, the obligation-legal remedies are fully characterized, then the property-legal measures. We will only consider the property-legal means, such as lien, mortgage and conditional property. Unfortunately, in this sphere the norms of Georgian Civil Code have changed in essence and even principles were altered sometimes. This resulted in completely different interpretations of particular provisions, like the analysis of such fundamental norm, as the one relating to the transfer of the object of the mortgage to the mortgage holder's direct ownership (Article 300 of the Civil Code). Existing precedents consider both parts of the Article 300 as the one, related to each other by reason and cause. Professor Lado Chanturia made it clear that the abovementioned parts have different meanings and in first case, in order to transfer the ownership, it is required to have the pre-agreement between the owner and mortgage holder. In the second case, there is no need for the abovementioned pre-agreement; it would be enough to have parties' consent on a concession of the property if the enforcement is delayed and in order to do so, they are to be presented in Public Registry together. The first case is strictly imperative and represents an element of the mortgage treaty; the second one is its surrogate. Professor Lado Chanturia's opinion is well evidenced by contradictory nature of two parts of the Article 300 of the Civil Code. In this case, I would objectively say, that the author of the book should be regarded as the founder of the law of guarantees in Georgian reality.

VII. Disseminator of Georgian Legal Opinion in European and Post-Soviet Countries.

Harmonization process to the European Law means to export Georgian Law in the West. In ancient time this was made by the European researchers (Holdack, Karst and others). Since the day of entering into force of the Civil Code, Georgian researchers took their role as well, as evidenced by their Ph.D. theses defended abroad. Professor Lado Chanturia publishes monographs and scientific articles in German, English and Russian languages, by which foreigners are introduced to the Georgian Law spirit. Scientific honesty and objectivity are rooted in these books together with the love of Georgians towards their country. I would only consider two of them. Much of the monograph, written by the Professor Rolf Knipper and Hans-Joachim Schramm, published in Berlin ("Private Law in Caucasus and Central Asia", 2010, p. 636)

belongs to Professor Lado Chanturia. In this book, the European Law is seen as a background of post-Soviet Law, from which the Georgian Civil Code can be clearly seen. Its main merit is that it is entirely secular from the Soviet legal categories. It could not be fully achieved in other countries. For instance, many of post-Soviet countries still remain devoted to the legal forms of ownership, operational management, categories of the full economic governance, etc.

"Introduction to the Civil Law", which was discussed above, was published on Russian by well-known publishing house. In Russian universities, students are advised to investigate civil law from the book of Professor Lado Chanturia, together with the textbooks of famous Russian civil law professors. This is due to the European dogmatic spirit of this manual.

VIII. Judicial Law Assistant and Students' Beloved Professor

Civil Code implementation in practice would be impossible if the judges were limited to have a right to freedom of interpretation of the Code. The main point here was that judges had the possibility to overcome the fear of erroneous interpretation of the law, which was making them as captives of the positive law. This we have seen, when there was a constitutional submission in constitutional court, all the judges in fact were asking to interpret those norms, which they had to do. Professor Lado Chanturia initially supported the judges' activities in this direction and with the help of numerous international organizations he supported the development of judicial law in Georgia. The Professor also published outstanding works in the abovementioned direction. Judges in the West are considered as the primary assistants of the legislation and we also have to move in this direction.

Many times I offered to Professor Lado Chanturia to make an exhibition and presentation of his books, but he always refused. In his opinion, the most adequate and proper judge of his works is a student. He is considered as students' beloved professor, which is due to the fact that his works are written in such a manner that academic style and clarity is combined perfectly, which makes easy to understand the material. In short, his language is Georgian and after the professor Sergo Jorbenadze, writing manner of this style, has not been ever repeated.

I would have rather a lot to say about the professor, but I will stop here and keep the rest that I have to say for the next time. For now, though, I wish a lot of new success to my colleague and friend of mine, who serves generously, as did the Georgian public figures in previous centuries, to the idea of establishment of state-oriented thinking of Georgian people.

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